PETITION FOR ZONING RE-CLASSIFICATION
SPECIAL EXCEPTION AND/OR VARIANCE

TO THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition (1) that the zoning status of the herein described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an RC-5 zone to an BR zone, for the reasons given in the attached statement; and (2) for a Special Exception, under the said Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property, for

and (3) for the reasons given in the attached statement, a variance from the following sections of the Zoning Law and Zoning Regulations of Baltimore County:

RECEIVED
COUNTY BOARD OF APPEALS
'86 MAR -1 P 2 48

#R-86-109
NELSON L. BOND, JR., ET AL
N/S Hanover Rd. 1996' +/- E/C
N. from center of Butler Rd.
4th Dist.
17A M #3

Property is to be posted and advertised as prescribed by The Baltimore County Code.

I, or we, agree to pay expenses of above Re-classification, Special Exception and/or Variance, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

Contract Purchaser:	Legal Owner(s):
(Type or Print Name)	Nelson L. Bond, Jr. (Type or Print Name)
Signature	Signature
Address	13019 Old Hanover Road Reisterstown, Maryland 21136 (Type or Print Name) Address
City and State	Calvin O. McElhattan, Jr. Signature Name
Attorney for Petitioner:	Signature
John B. Howard (Type or Print Name)	13015 Old Hanover Road Reisterstown, Maryland 21136 Address Phone No.
Signature	Calvin O. McElhattan, Sr.
210 Allegheny Avenue Address	City and State
Towson, Maryland 21204 City and State	13011 Old Hanover Rd. Reisterstown, MD Name, address and phone number of legal owner, contract purchaser or representative to be contacted
Attorney's Telephone No.: 823-4111	John B. Howard Name 210 Allegheny Avenue Towson, Maryland 21204 823-4111 Address Phone No.

BABC—Form 1

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

February 12, 1986

John B. Howard, Esq.
210 Allegheny Ave.
Towson, Md. 21204

Re: Case No. R-86-109
Nelson L. Bond, Jr., et al

Dear Mr. Howard:

Enclosed herewith is a copy of the Opinion and Order passed today by the County Board of Appeals in the above entitled case.

Very truly yours,

June Holmen

June Holmen, Secretary

Encl.
cc: Nelson L. Bond, Jr.
Calvin O. McElhattan, Jr.
Calvin O. McElhattan, Sr.
Phyllis C. Friedman
Arnold Jablon
James Dyer
Jean Jung
Norman Gerber
James Hoswell
James E. Kraft

IN THE MATTER OF THE APPLICATION OF NELSON L. BOND, JR., ET AL RE: PETITION FOR RECLASSIFICATION - 3 PARCELS SITUATED ON THE EAST SIDE OF OLD HANOVER RD., CONTAINING 1.4, .96 and 3.3 ACRES RESPECTIVELY, AND BEING SITUATED 1720', 995' and 2121' RESPECTIVELY NORTH BUTLER RD. 4th DISTRICT : BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY No. R-86-109

CONCURRING OPINION

Although I concur with the result reached by the majority, I arrive at that finding differently.

The majority does not consider the impact of Baltimore County Zoning Regulation (BCZR) Section 1 A00.3.A.1 in its Opinion. Rather, the majority holds that "Section 2-58.1 of the Baltimore County Code must be considered prior to consideration of the BCZR, Section 1 A00.3.A.1". After reaching the conclusion that this property was improperly classified, the majority finds it unnecessary to address BCZR 1 A00.3.A.1 as the property's proper classification is B.L.

I believe that BCZR 1 A00.3.A.1 must be addressed prior to consideration of the classification. This Section provides in essence, that a petition to reclassify an R.C. zone cannot be filed unless the property under petition is to be served by public water and sewer within two (2) years from the date of the petition.

People's Counsel argues that this regulation is constitutional as a lawful extension of the County's police power. Conversely, the Petitioner asserts that the regulation is unconstitutional as a violation of procedural due process, substantive due process and equal protection.

Nelson L. Bond, Jr., et al
Case No. R-86-109 2.

Consideration of the interpretation of 1 A00.3.A.1 is a case of first impression before this Board. Although the matter was considered in D & R Joint Venture & Isaac Jones (R-83-189), a reconsideration of the Board's Memorandum of Opinion was granted. Thereafter, that case was never resolved on its merits.

In evaluating the constitutionality of 1 A00.3.A.1, I note particularly the holding of Hope vs. Baltimore Co. 288 MD 656, 41 A2d 576, (1980). This case held that the Board of Appeals is the exclusive remedy in the appellate process from an appeal from the approval or disapproval of a subdivision plat. The Court also noted that when a section of the Code is contrary to the provisions of the County Charter, that section is a nullity.

Based upon the holding in Hope, in addition to Petitioner's other arguments, I believe 1 A00.3.A.1 is unconstitutional. If this regulation were valid, its effect would be to deny relief to any property owner who alleged error in zoning the property R.C., if sewer and water facilities were not available within two (2) years. This prohibition would conflict with the Board's authority, under Section 602 of the Charter, of "original and exclusive jurisdiction over all petitions for reclassification", Baltimore Co. Charter, Section 602, (e).

Therefore, I would hold that BCZR 1 A00.3.A.1 is unconstitutional.

Turning to the reclassification itself, I agree with the majority's rationale and their result of zoning for this property of B.L. Thus, I join in the reclassification of this property from R.C. 5 to B.L.

Lawrence E. Schmidt

Lawrence E. Schmidt

Date: February 12, 1986

IN THE MATTER OF THE APPLICATION OF NELSON L. BOND, JR., ET AL RE: PETITION FOR RECLASSIFICATION - 3 PARCELS SITUATED ON THE EAST SIDE OF OLD HANOVER RD., CONTAINING 1.4, .96 and 3.3 ACRES RESPECTIVELY, AND BEING SITUATED 1720', 995' and 2121' RESPECTIVELY NORTH BUTLER RD. 4th DISTRICT : BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY No. R-86-109

OPINION

This case comes before this Board on Petition for a Reclassification of property from R.C. 5 to B.R. There are three parcels containing 3.3 acres, 1.4 acres and .96 acres, for a total of 5.66 acres covered under proper petition.

Petitioner presented two witnesses in this case, Mr. Nelson L. Bond, Jr., property owner, testifying for the entire 5.66 acre parcel and William Kirwin, Professional Land Planner. People's Counsel representing Baltimore County, presented one witness, Mr. James Hoswell, Planner for Baltimore County. Mr. Bond testified as to the local changes in the character of the area since his purchase in 1977 and described these changes in detail. He also testified that he requested a change in zoning before the Baltimore County Council following the requested change to B.R. by the Reisterstown Lumber Company. He especially noted the fact that these subject properties are bordered on the south and east by a 400 ft. wide (B.G.&E.) right-of-way for power transmission towers and power line. Mr. William Kirwin testified as to the abutting and surrounding commercial zones and uses. He also testified that the sewer and water lines end approximately 2000 feet south of these properties and that while no plans exist to extend these services, the properties are located within the Metropolitan District and that this area is designated as a fringe development area. He also noted that one of the individual properties is less than the minimum lot size required under the R.C. 5 zoning classification.

Nelson L. Bond, Jr., et al
Case No. R-86-109 2.

Mr. James Hoswell testified that all three individual properties were issues in the Comprehensive Map Process and since there was no plan to extend water and sewer services, the R.C. 5 was the most appropriate classification. On cross examination, he testified that in the 1984 map process on the Reisterstown Lumber Company's property, the B.R. zoning was increased by some 11 acres, this property directly abutting the subject site to the north. This concluded the direct testimony in this case and this very brief synopsis of the testimony in no way purports to be complete, but the record produced during this hearing will speak for itself.

Memorandums in this case were received from both parties and were carefully considered. Mr. Zimmerman's memo leans heavily upon the wording in the Baltimore County Zoning Regulations (BCZR) Section 1A00.3.A.1, which clearly states that no petition may be accepted to reclassify any R.C. zone to other than some other R.C. zone unless water and sewer are planned within two years as are not planned in this case. Section 2-58.1.J(1) states that before any property is reclassified, the Board must find that the last classification of the property was established in error. It is the opinion of this Board, that Section 2-58.1 of the Baltimore County Code must be considered prior to consideration of the BCZR, Section 1A00.3.A.1. The Board notes that this R.C. classification of the subject site is not one of long standing but a classification awarded during the 1984 map process. During this same process, 11 acres were reclassified to B.R. directly abutting the subject site. In the consideration of this 11 acres, it would seem impossible not to note the B.L. zoning directly across Hanover Pike, the existence of the 400' wide transmission line and the proximity of the large business of Reisterstown Lumber Company.

Nelson L. Bond, Jr., et al
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To reclassify this small parcel, well defined by this transmission line, in the midst of all this business zoning as R.C. 5 would be arbitrary and thus in error. Having established that the R.C. 5 zoning, in this Board's opinion, is in error, Section 602 of the Baltimore County Charter grants this Board jurisdiction over all petitions for reclassification. Section 2-58-1J(2) states that the prospective reclassification of the property is warranted by that change or error. The Board finds in this case that such reclassification is warranted by that error. To confine forever the use of this 5.66 acres as strictly residential in the center of all the business zoning is unreasonable. Section 2-58.1J(2) further states that any finding of such change or error and any finding that the prospective reclassification is warranted may be made only upon consideration of factors relating to the purposes of the zoning regulations and maps including but not limited to all of the following, one of which is compatability of uses generally allowable under the prospective classification with the present and projected development or character of the surrounding area. Residential use is, in the opinion of this Board, not compatible with the business use already afforded adjacent properties, but the request for B.R. classification is somewhat suspect. Ample B.R. zoning with the addition of the 11 acres granted Reisterstown Lumber appears provided. A more logical classification for the subject site would be B.L. allowing for less extensive business use. It is the opinion of this Board that the County Council erred in assigning the R.C. 5 designation to this property, so therefore, Section 1A003.A.1 does not prevail. Section 602 of the Baltimore County Charter and Baltimore County Code Section 2-58.1 authorize the Baltimore County Board of Appeals the right to reclassify property under the petition process. It is the opinion of this Board that the R.C. 5 classification is in error and that the proper classification for the subject petitions should be B.L. and will so Order.

Nelson L. Bond, Jr., et al
Case No. R-86-109 4.

ORDER

For the reasons set forth in the aforegoing Opinion, it is this 12th day of February, 1986, by the County Board of Appeals, ORDERED that the requested petitions for reclassification of the subject sites from R.C. 5 to B.R., be DENIED, but that reclassification from R.C. 5 to B.L. be and the same is GRANTED.

Any appeal from this decision must be in accordance with Rules B-1 thru B-13 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

William T. Hackett

William T. Hackett, Chairman

LeRoy B. Spurrier

LeRoy B. Spurrier

GERHOLD, CROSS & ETZEL
Registered Professional Land Surveyors
412 DELAWARE AVENUE
TOWSON, MARYLAND 21204
823-4470

CARL L. GERHOLD
PHILIP K. CROSS
JOHN F. ETZEL
WILLIAM S. ULRICH
GORDON T. LANGDON

EMERITUS
PAUL G. DOLLENBERG
FRED H. DOLLENBERG

February 28, 1985

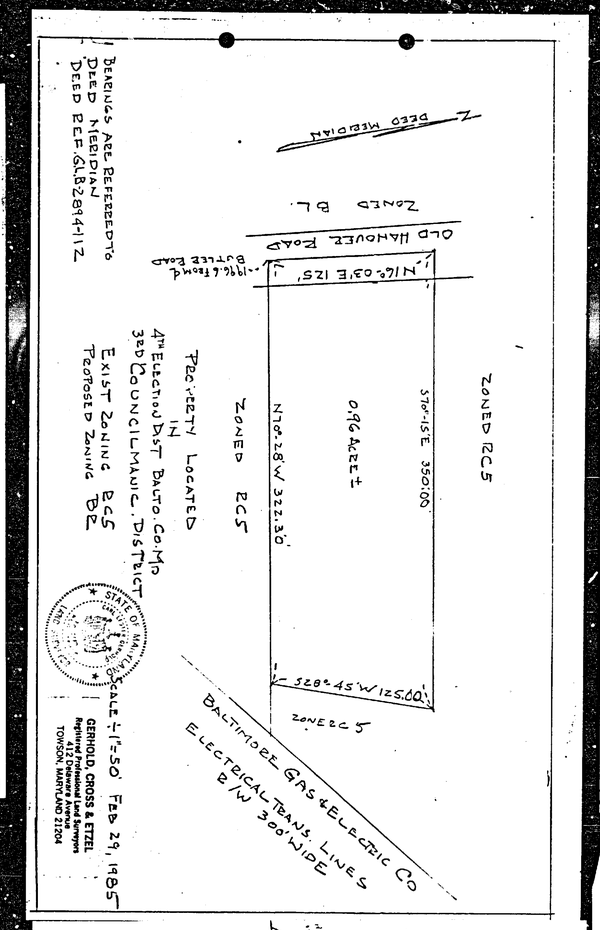
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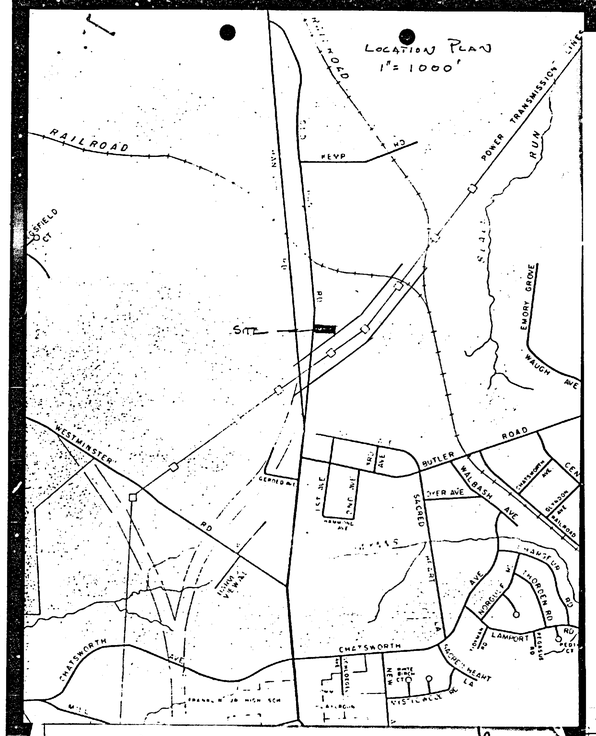
All that piece or parcel of land situate, lying and being in the Fourth Election District of Baltimore County, State of Maryland and described as follows to wit:

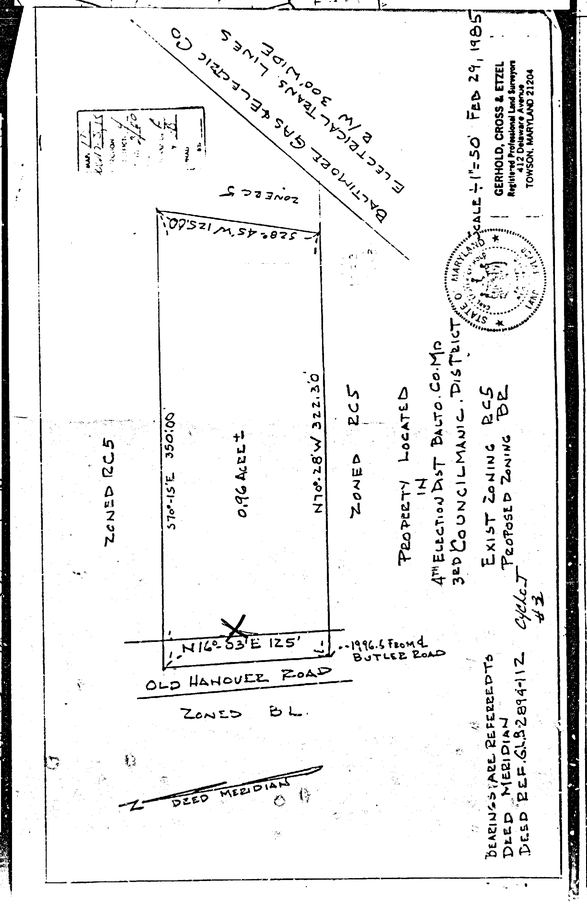
Beginning for the same in the center of Old Hanover Road at the distance of 1996.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, North 16 degrees 03 minutes East 125 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: South 70 degrees 15 minutes East 350.00 feet, South 28 degrees 45 minutes West 125.00 feet and North 70 degrees 28 minutes West 322.30 feet to the place of beginning.

Containing 0.96 of an Acre of land more or less.

STATE OF MARYLAND — CARL L. GERHOLD — REGISTERED LAND SURVEYOR







GERHOLD, CROSS & ETZEL
Registered Professional Land Surveyors
412 DELAWARE AVENUE
TOWSON, MARYLAND 21204
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February 28, 1985

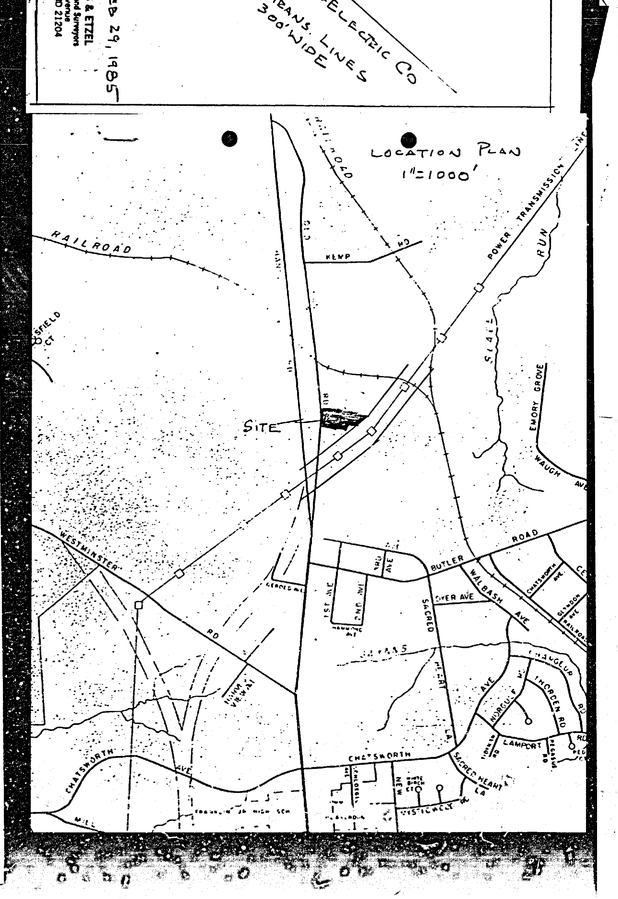
Zoning Description

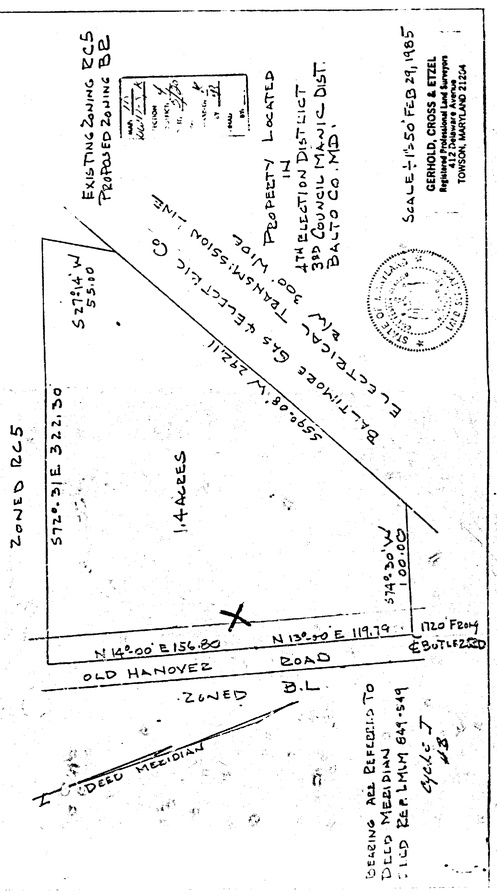
All that piece or parcel of land situate, lying and being in the Fourth Election District of Baltimore County, State of Maryland and described as follows to wit:

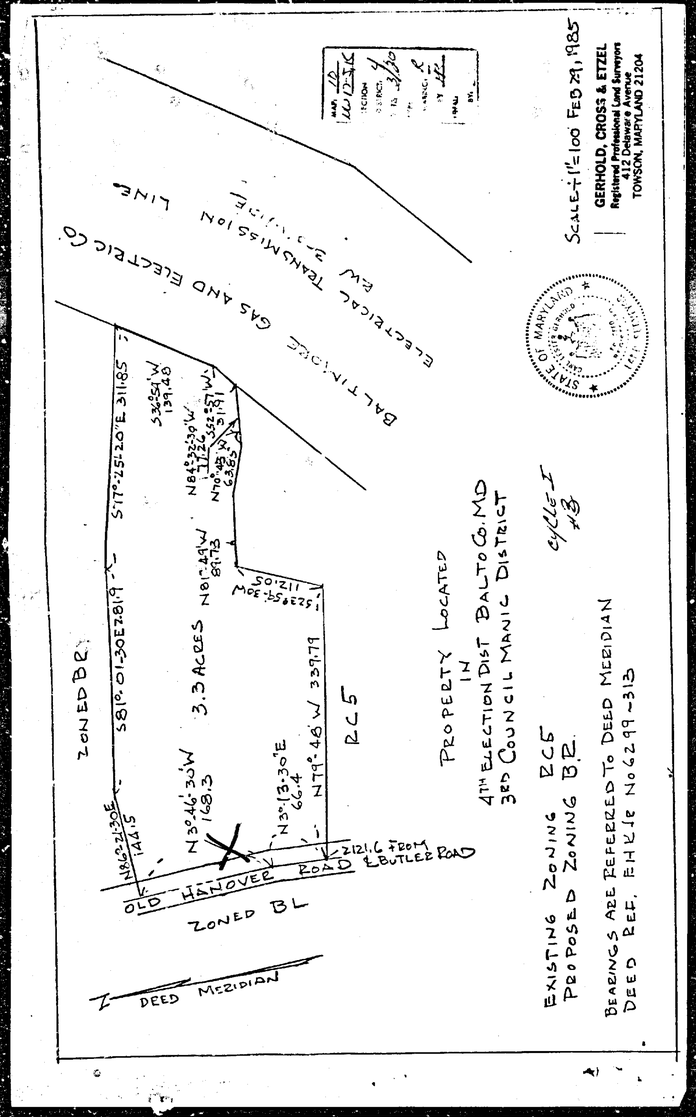
Beginning for the same in the center of Old Hanover Road at the distance of 2121.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 3 degrees 13 minutes 30 seconds East 66.4 feet, North 3 degrees 46 minutes 30 seconds West 168.3 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: North 86 degrees 21 minutes 30 seconds East 144.5 feet, South 81 degrees 01 minute 30 seconds East 281.9 feet and South 77 degrees 25 minutes 20 seconds East 311.85 feet to the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, thence binding on said right of way lines, the two following courses and distances viz: South 36 degrees 54 minutes West 139.48 feet and South 52 degrees 57 minutes West 31.91 feet and thence leaving said right of way and continuing to bind on the outlines of the land of the petitioners herein, the five following courses and distances viz: North 84 degrees 32 minutes 30 seconds West 77.26 feet, North 70 degrees 43 minutes West 63.85 feet, North 81 degrees 49 minutes West 89.73 feet, South 23 degrees 59 minutes 30 seconds West 112.05 feet and North 79 degrees 48 minutes West 339.79 feet to the place of beginning.

Containing 3.3 Acres of land more or less.

STATE OF MARYLAND — CARL L. GERHOLD — REGISTERED LAND SURVEYOR







PETITION FOR RECLASSIFICATION
4th Election District

LOCATION: 3 parcels situated on the west side of Old Hanover Road, containing 1.4, .96 and 3.3 acres respectively, and being situated 1720', 1996' and 2121' respectively North of Butler Road.

PUBLIC HEARING: Tuesday, September 17, 1985 at 10:00 a.m.

The County Board of Appeals for Baltimore County, by authority of the Baltimore County Charter, will hold a public hearing:

Present Zoning: R.C.5
Proposed Zoning: B.R.

All that parcel of land in the 4th Election District of Baltimore County, Maryland

(1) Beginning for the same in the center of Old Hanover Road at the distance of 1720 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 15 degrees 00 minutes East 119.79 feet and North 14 degrees 00 minutes East 156.80 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the four following courses and distances viz: South 72 degrees 31 minutes East 322.50 feet, South 27 degrees 14 minutes West 55 feet, South 59 degrees 08 minutes West, binding on the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, 292.11 feet and North 74 degrees 30 minutes West 100 feet to the place of beginning.

Containing 1.4 Acres of land more or less.

(2) Beginning for the same in the center of Old Hanover Road at the distance of 1996.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, North 18 degrees 05 minutes East 125 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: South 70 degrees 15 minutes East 350.00 feet, South 28 degrees 45 minutes West 125.00 feet and North 70 degrees 28 minutes West 332.50 feet to the place of beginning.

Containing 0.96 of an Acre of land more or less.

(3) Beginning for the same in the center of Old Hanover Road at the distance of 2121.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 3 degrees 13 minutes 30 seconds East 66.4 feet, North 3 degrees 46 minutes 30 seconds West 168.3 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: North 86 degrees 21 minutes 30 seconds East 144.5 feet, South 81 degrees 01 minutes 30 seconds East 281.9 feet and South 77 degrees 25 minutes 20 seconds East 311.85 feet to the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission Lines, thence binding on said right of way lines, the two following courses and distances viz: South 36 degrees 54 minutes West 199.48 feet and South 52 degrees 57 minutes West 31.91 feet and thence leaving said right of way and continuing to bind on the outlines of the land of the petitioners herein, the five following courses and distances viz: North 84 degrees 32 minutes 30 seconds West 77.36 feet, North 70 degrees 45 minutes West 63.85 feet, North 81 degrees 49 minutes West 89.73 feet, South 23 degrees 59 minutes 30 seconds West 112.05 feet and North 79 degrees 48 minutes West 399.79 feet to the place of beginning.

Containing 3.3 Acres of land more or less.

Being the property of Nelson L. Bond, Jr., et al, as shown on the plat plan filed with the Zoning Department.

BY ORDER OF
WILLIAM T. HACKETT,
CHAIRMAN
COUNTY BOARD OF APPEALS
BALTIMORE COUNTY

Aug. 29.

R-86-109

CERTIFICATE OF PUBLICATION

TOWSON, MD., August 29, 19 85

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., appearing on August 29, 19 85

THE JEFFERSONIAN,

T. B. Venetoulis
Publisher

63.25

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 005267

DATE 3/16/85 ACCOUNT R01-615-000

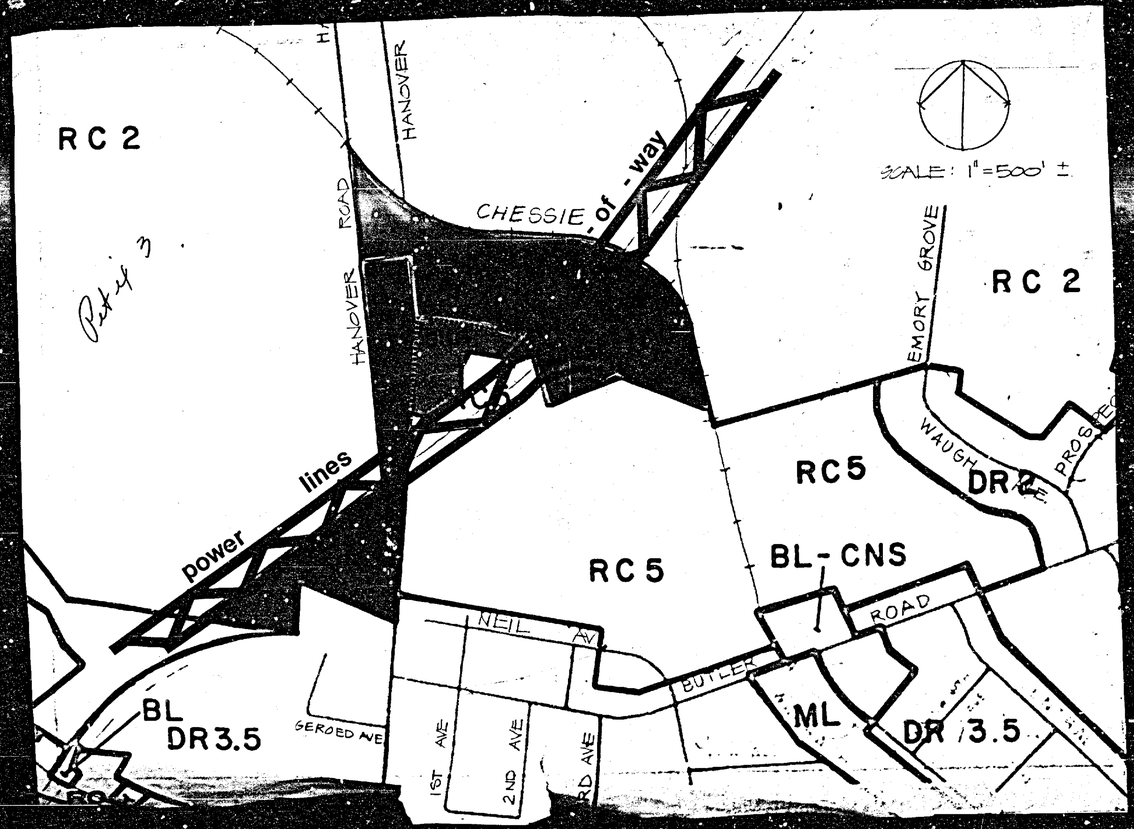
AMOUNT $ 100.00

RECEIVED FROM: Cook, Howard, Downes & Tracy

FOR: filing fee for reclassification

B B004*****10000:a 616F

VALIDATION OR SIGNATURE OF CASHIER



CERTIFICATE OF POSTING

ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

R-86-109

District 4th Date of Posting August 21-85

Posted for: Reclassification

Petitioner: Nelson Bond Jr. et al

Location of property: 3 parcels on E/S of Old Hanover Road, situated 1720', 1996' and 2121' North of Butler Rd.

Location of Signs: 1 sign in front of 13011 Old Hanover Road - 1 sign in front of 13015 Old Hanover Road and 1 sign in front of 13019 Old Hanover Road

Remarks:

Posted by A. J. Ansta (Signature) Date of return: Aug 23-85

Number of Signs: 7

LAW OFFICES
COOK, HOWARD, DOWNES & TRACY
210 ALLEGHENY AVENUE
P.O. BOX 5517
TOWSON, MARYLAND 21204

JAMES H. COOK
JOHN B. HOWARD
DAVID D. DOWNES
DANIEL O'C. TRACY, JR.
JOHN H. DINK, III
JOSEPH C. WICH, JR.
HENRY B. PECK, JR.
HERBERT R. O'CONOR, III
THOMAS L. HUDSON
C. CAREY DEELEY, JR.
GEORGE K. REYNOLDS, III
LAWRENCE L. HOOPER, JR.
H. KING HILL, III
ROBERT A. HOI FMAN
DEBORAH C. DOPKIN
CYNTHIA M. HAHN
ANGUS E. FINNEY
KEVIN W. SMITH*
H. BARRITT PETERSON, JR.
* ADM. TTED IN IOWA ONLY

JAMES O. C. DOWNES
(1906-1979)

TELEPHONE
(301) 823-4111

TELECOPIER
(301) 821-0147

March 1, 1985

The County Board of Appeals
of Baltimore County
Old Court House
Towson, Maryland 21204

Re: Petition for Reclassification
Nelson L. Bond, Jr.; Calvin O. McElhattan, Sr.
and Calvin O. McElhattan, Jr., Petitioners

Dear Sir or Madam:

This firm represents the above-referenced Petitioners in their request for a zoning reclassification of property located on Old Hanover Road in Reisterstown from RC5 to BR.

Petitioners' properties, 13011, 13015 and 13019 Old Hanover Road were rezoned in 1984 by the County Council from DR2 to RC5 and form an island of RC zoned property surrounded by commercial zoning. Immediately adjacent to the subject property and to the north, Reisterstown Lumber Company obtained a reclassification to BR on the 1984 Comprehensive Maps of two separate parcels. One has been owned by Reisterstown Lumber since prior to the adoption of the zoning regulations in 1955, and until the 1984 Comprehensive Map, was a nonconforming use. The second parcel, 13021 and 13023 Old Hanover Road was purchased by Reisterstown Lumber Company within the last several years.

A review of the attached plats and zoning maps show that Petitioners' properties are bordered to the north by BR, to the south and east by a 400 foot BG&E right-of-way for

The County Board of Appeals
of Baltimore County
March 1, 1985
Page 2

overhead transmission lines and to the west by a BL zone. It is apparent that there has been a mistake and/or error in rezoning these properties from DR-2 to RC5. It is respectively submitted that the RC5 zoning classification is not appropriate for property in the heart of a commercial zone and should be reclassified BR.

Petitioners realize that one of the issues relates to an interpretation of Section 1A00.3.A.1 (B.C.Z.R.) regarding acceptance for filing. This will be addressed by legal memorandum at the appropriate time.

For these reasons, Petitioners respectfully request that this petition for reclassification be granted.

Yours truly,

John B. Howard
Attorney for Petitioners

JBH:kam

IN THE MATTER OF THE PETITION : BEFORE THE COUNTY BOARD OF APPEALS
FOR RECLASSIFICATION FROM R.C. 5
TO B.L. ZONE : OF BALTIMORE COUNTY
E/S of Old Hanover Rd., 1720'
N of Butler Rd., Fourth District :

NELSON L. BOND, et al., : Zoning Case No. R-86-109
Petitioners

: : : : : : :

PEOPLE'S COUNSEL'S MEMORANDUM

The present petition for reclassification is remarkable because it involves a request for commercial zoning of property zoned R.C. 5 (rural residential) in an area with no planned water or sewer service. Therefore, in addition to the usual questions of error and the appropriateness of the requested zoning designation, there comes into play the crucial issue of the determinative issue of the county zoning law which prohibits administrative reclassification of property zoned R.C. to anything but another R.C. classification.

The bottom line is that whatever the finding as to error, the present zoning law pertinent to resource zoning classifications and the water and sewer plan precludes a finding that the requested commercial zoning is warranted under Section 2-59.1(j) of the County Code. It is necessary to keep in mind at all times that the matter of "error" is but one-half of the statutory test. The other half, which is equally important, requires a finding that the requested classification is warranted or appropriate.

Because of the unusual nature of this case, and because the Petitioner has challenged the validity of the statute which prohibits this reclassification, we will deal with that question first. In this context, we will also address the capacity of an administrative board to rule upon the validity of a legislative act. Then, we will turn to the question of error, and finally, we will address the appropriateness of the requested

B. R. zoning, assuming arguendo it were otherwise permitted.

I.

The pertinent statute, BCZR 1.A00.3.A.1, integrates the rezoning process with the master water and sewer planning process. It is a crucial element of the county's legislative program to protect rural areas and to limit inappropriate and piecemeal grants of intensive zoning in areas for which there is no planned water or sewer.

The validity of this statute was thoroughly briefed and argued in D & R Joint Venture, CBA No. R-83-189, and its validity established by this Board's Opinion dated June 8, 1983. Reconsideration was granted on June 17, 1983, but the Board never reversed its position. Since that time, the legislation has remained intact. On this basis alone, the Board must uphold the law. There is absolutely no change in circumstance which would warrant a different finding. The reversal of position which Petitioner here requests would indeed be arbitrary and capricious.[1]

* * *

Even had this question not so recently been addressed by the Board, the validity of the statute as a police power measure directed toward protection of the environment and rural areas easily satisfies the constitional requirements of due process and equal protection clauses. As background, it is important to understand the function of master water and sewer planning, the actual effect of the statute, and the relationship of zoning to the master water and sewer plan process. Upon review, it will be seen that both the water and sewer planning process and the

[1] We enclose herewith as Exhibit 1 copies of the CBA Memorandum Opinion, Answer to Motion for Reconsideration, and People's Counsel's Hearing Memorandum in Case No. R-83-189.

comprehensive zoning process provide avenues for property owners to request changes, and that even under the existing water and sewer plan and zoning classifications, the property owner has various options for property use listed as of right and by special exception in any of the resource conservation categories. Upon review, it will also be seen that the police power of local government is exceedingly broad, and that the legislative judgment in enacting a statute cannot be overturned even by a court so long as fairly debatable. In this connection, the courts have given the legislature wide latitude in the sphere of land use legislation.

The master water and sewer plan is not a casual enterprise. Maryland State Law governs and defines the process in detail. Maryland Annotated Code Health-Environmental Article Section 9-501 to 9-521.[2]

Concisely stated, the law requires the preparation and adoption by each local legislative body of master water and sewer, as well as solid waste management, plans. Following adoption by the local legislative body, each plan must be reviewed by the State Health Department. Moreover, the plans are amended annually. Any property owner dissatisfied with the designation of his property may challenge the action of the local legislative body and ultimately obtain judicial review. Carusillo v. Prince George's County, 289 Md. 436 (1981).

Otherwise stated, Maryland water and sewer planning law plays a major role in Maryland environmental law. Decisions affecting the placement of public and private water and sewer supplies are the subject of both local

[2] The extensiveness of the state law is best understood by a review of the entire subtitle which is attached as Exhibit 2.

and state scrutiny after time-consuming and painstaking study by various agencies. Once adopted, a local government is not free to make any decision inconsistent with the plan.

In Baltimore County, the process is given the dignity which it deserves. Pursuant to Resolution 71-79, the Master Water and Sewer Plan is designated as an element of the Baltimore County Master Plan. Under Section 523 of the Baltimore County Charter, zoning must be consistent with the Master Plan. See Board of County Commissioners v. Gaster, 285 Md. 233 (1979); Coffey v. Maryland-National Capital Parking and Planning Commission, 293 Md. 24 (1982).

* * *

In order for the Master Water and Sewer Plan to function and to work, zoning must bear a reasonable relationship to designated water and sewer classifications of property. Areas without planned water or sewer service should generally be protected from the more intense land uses and zoning classifications. It is, therefore, logical that the county would seek to place limits on rezoning of properties lacking planned water or sewer service. This reduces the potential for zoning maps which would disrupt the entire water and sewer planning process. It needs to be stressed that the physical possibility of extending public water and sewer is irrelevant. There will always be some properties outside the planned service area to which extensions could feasibly be accomplished at varying levels of expense. The line is drawn, however, at the limits of the plan established under law.

The beneficial purpose and effect of BCZR 1.A00.3.A.1 can readily be discerned. Properties classified in one of the resource conservation zoning categories are by definition and application rural areas and not suitable for public water or sewer. There may be reasons, in particular rural locations, for more intense zoning, such as commercial or industrial, as in the case of rural villages or historically established businesses. As a prevailing rule, however, the R.C. zoning classifications fit the no planned service areas and should not be disturbed.

If a property zoned resource conservation and lacking in planned water or sewer service ought to be substantially reclassified, it should not occur without comprehensive consideration. The statute at issue here accomplishes precisely that. It forbids piecemeal zoning reclassification of properties so designated so that if these were permitted, they gradually could erode and eventually destroy both the water and sewer planning and comprehensive zoning process, leading to sprawl one step at a time.

This is not to say that growth is impossible or that classification boundaries are immutable forever. There are two avenues open to the county and to property owners to consider changes. The water and sewer planning process itself provides for annual amendment after hearings, with notice and opportunity to be heard. The comprehensive zoning process occurs every four years, again with hearings, notice, and opportunity to be heard.

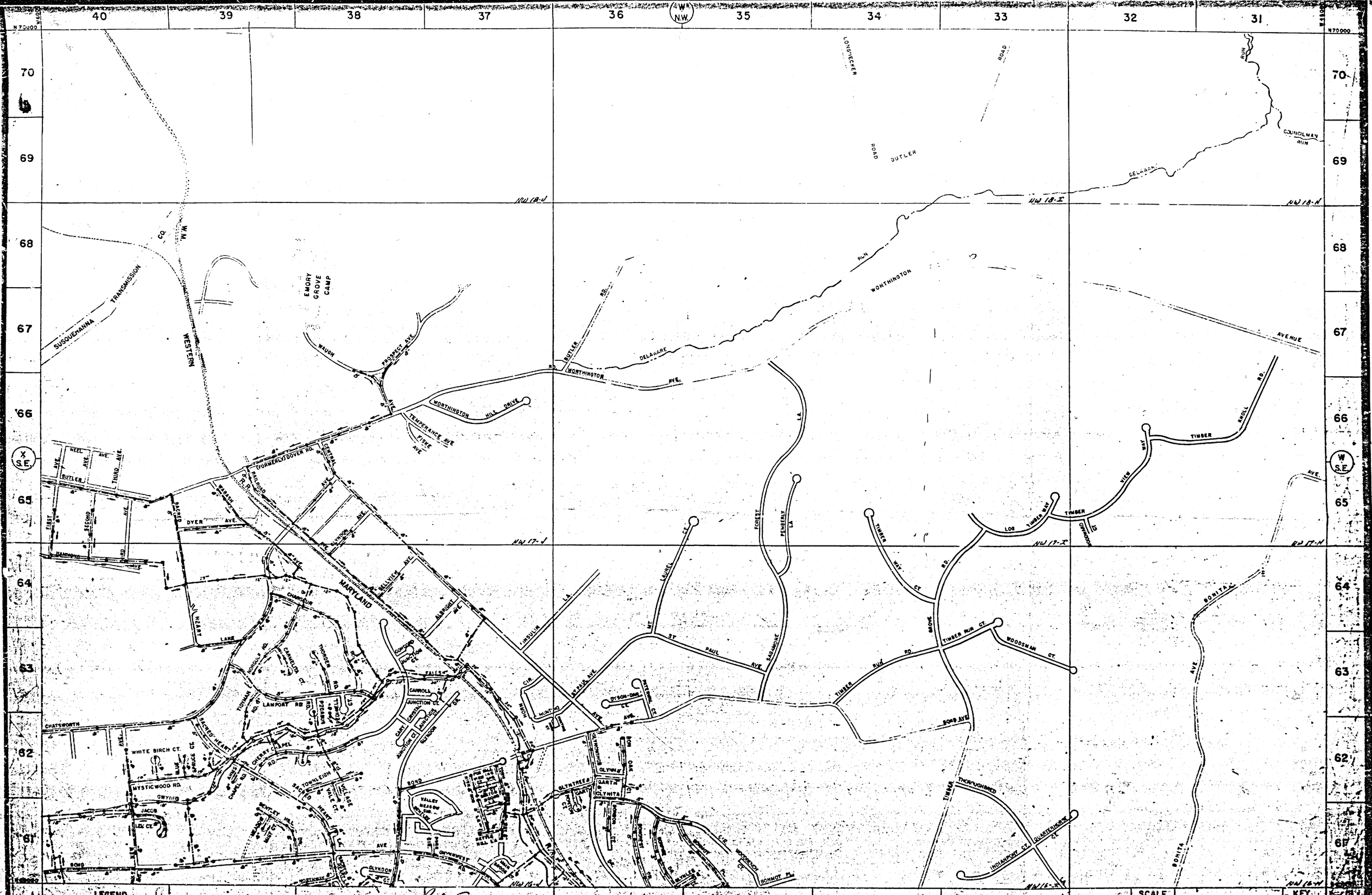
The function of BCZR 1.A00.3.A.1 is simply to cut off a third avenue of change or reclassification, the piecemeal rezoning process, and even here, only from requests involving other than resource conservation zoning. This legislative judgment not only is well within the authority of the county as a valid police power measure, but also may be considered as a logical extension of state and county water and sewer planning law.

Of course, there will always be contentions that some properties have been designated for public water or sewer, which should have been left out, and reciprocal claims for inclusion by those not so designated. There will inevitably be claims of differential treatment to similar properties, particularly at the legally established limits of the planned service areas. At any particular time, arguments may be made on behalf of one or another property owner for modification of the boundaries. But, so long as the lines drawn are the subject of judgment, they will not be disturbed.

In this connection, the statute in question is no different from so many land use enactments over the years applying restrictive land use measures. Since the early days of planning and zoning, property owners have mounted challenges against such statutes and have made arguments similar to those of Petitioner here. And since the early days of zoning, beginning with the Supreme Court and the Courts of Appeals of states around the country, such challenges have been rejected because of the understanding of the importance of legislative discretion to protect the public safety, health, and welfare under the police power.

Indeed, the legislation here is far less restrictive than many land use measures approved by the courts over the years. BCZR 1A00.3.A.1 in no way denies to the property owner a reasonable use of property. Nor does it deny that property owner the opportunity to petition each and every year in the water and sewer planning process and every fourth year in the comprehensive zoning process, for a more intense classification. The statute simply recognizes that special concern is due to rural areas without planned water and sewer service, and that changes should not be made in these sensitive areas without comprehensive consideration and

sion making.



LEGEND

☐ PUMPING STATIONS

Ref. Ex # 6-D

BALTIMORE COUNTY METROPOLITAN DISTRICT
KEY MAP
SANITARY SEWERS

SCALE
1IN=500FT

TOPO & PLAN SHEETS		KEY SHEET
N.W. 16-H	18-I	
17-H	16-J	
18-H	17-J	
16-I	18-J	
17-I		

3/14/85

MICROFILMED

50 49 48 47 46 45 44 43 42 41

N 70000 E 75000 E 80000 N 70000

70 69 68 67 66 65 64 63 62 61

CARROLL CO.

BALTIMORE CO.

WESTMINSTER

WESTERN MARYLAND R.R.

PIKE

CO.

QUEENSDALE RD

EARLTON RD

EARLTON CT

HILL CT

HILL WAY

ARMY

BRENT

HANOVER

NEW

OLD

PUTTY HILL RD

GLENCOE AVE

GREEN HILL FARM RD

GORES MILL RD

IVY MILL

KEYSER RUN

COCKEYS MILL ROAD

OLD GORES MILL ROAD

CHATSWORTH AVE

SUSQUEHANNA TRANSMISSION NORTHWEST EXPRESSWAY

PARIS

NW 16-K NW 16-M NW 17-K NW 17-M NW 16-L NW 16-C NW 17-L NW 17-C

X NE X SW W S.W.

-LEGEND-

PUMPING STATIONS

Ref. Ex #

6-C

BALTIMORE COUNTY METROPOLITAN DISTRICT

KEY MAP

SANITARY SEWERS

SCALE	TOPO & PLAN SHEETS		KEY SHEET
1 IN=500	N.W. 16-K	18-L	
	17-K	16-M	
	18-K	17-M	
	16-L	18-M	
	17-L		S.E.

Pet Ex #9

R.C.2

GLEN MORRIS

30

BR

R.C.4

R.C.2

R.C.2

BR

82-26-A
N67,720
W 68,920

R.C.4

140

R.C.4

R.C.2

BL

RC 4

83-182-X
N64450
W62790

81-117 SPH
N64810
W63415

D.R.16

DR 3.5

84-318 XA
N64200
W63180

REISTERSTOWN

30

D.R.16

140

BL

D.R.16

R.C.3

BM

D.R.2

D.R.3.5

1980 COMPREHENSIVE ZONING MAP
ADOPTED BY THE
BALTIMORE COUNTY COUNCIL
OCT. 14, 1980
BILL NOS. 184-80, 185-80, 186-80
187-80, 188-80, 189-80 AND 190-80

CHAIRMAN, COUNTY COUNCIL

PHOTOGRAMMETRIC MAP OF
BALTIMORE COUNTY METROPOLITAN AREA
OFFICIAL ZONING MAP

REVISIONS | SCALE 1" = 200' | LOCATION | SHEET

REISTERSTOWN
GLEN MORRIS

Pet. Ex #9

R.C.2

GLEN MORRIS

30

BR

R.C.2

BL

D.R.2

R.C.2

BR

R.C.2

Pet

Tram Inc

D.R.2

BM

R.C.2

84-332 A
N 66170
W 55820

D.R.2

R.C.2

R.C.2

BL

D.R.2

BL-CNS

M.L.

D.R.3.5

D.R.3.5

D.R.2

R.C.5

DR 3.5

REISTERSTOWN

30

1980 COMPREHENSIVE ZONING MAP
ADOPTED BY THE
BALTIMORE COUNTY COUNCIL
OCT. 14, 1980
BILL NOS. 184-80, 185-80, 186-80,
187-80, 188-80, 189-80, AND 190-80

CHAIRMAN, COUNTY COUNCIL

REVISIONS | SCALE | LOCATION | SHEET

REISTERSTOWN
GLEN MORRIS

BALTIMORE COUNTY METROPOLITAN AREA
OFFICIAL ZONING MAP

40 39 38 37 36 W N.W. 35 34 33 32 31

N 70000 W 600 W 450 N 70000

70 69 68 67 66 65 64 63 62 61

NW 18-J NW 18-I NW 18-H

NW 17-J NW 17-I NW 17-H

NW 16-I NW 16-H

W 55988 N 67775

W 53894 N 66003

N 65438 W 51450

N 63339 W 50525

W 47294 N 61203

W 46347 N 60824

SUSQUEHANNA TRANSMISSION CO.

W.M. WESTERN

EMORY GROVE CAMP

WAUGH

PROSPECT AVE.

BUTLER RD.

WORTHINGTON AVE.

DELAMERE RUN

WORTHINGTON AVE.

LONGIECKER ROAD

BUTLER ROAD

GELAGAD RUN

COLNOLMAN RUN

TRIGHTON CT.

WORTHINGTON HILL DRIVE

TEMPERANCE AVE

FISKE AVE

NEEL AVE.

BUTLER AVE.

FIRST AVE.

SECOND AVE.

THIRD AVE.

HAMMOND AVE.

(FORMERLY) DOVER RD.

RAILROAD AVE.

CENTRAL AVE.

DYER AVE.

GLYNDON AVE.

BELVIEW AVE.

ALBRIGHT AVE.

MARYLAND AVE.

INSULIN LA.

CHARGOUR

SACRED HEART LANE

DOLLY RD.

CARMELITA CT.

THORDEN RD.

TIDYMAN RD.

LAMPORT RD.

PERSHELL CT.

PERSHELL RD.

CONCORD JUNCTION CT.

FALLS

CARROLL JUNCTION CT.

CHATSWORTH AVE.

WHITE BIRCH CT.

MYSTIC WOOD RD.

GWYNN

JACOB LEE CT.

SACRED HEART CHAPEL RD.

ARMS CHAPEL RD.

TOWNLEIGH RD.

VILLAGE VALE CT.

HEART CT.

BENTLEY HILL DR.

MOSQUE MOSQUE CT.

BOND

NORTHWAY

GWYNNEST RD.

GLYNDON CT.

VALLEY MEADOW CIR.

BOND

RETTIE HILL LA.

GLYNDON

GLYNTREE CT.

GLYNTREE MANOR CT.

GLYNDON MANOR

GLYNDON

GLYNDON CT.

HUNTING RIDGE CT.

HUNTING RIDGE AVE.

ST. PAUL AVE.

CIR

OYSON DAN CT.

PATTERN CT.

AVE.

ST. PAUL AVE.

BACKMORE

LAUREL CT.

FOREST

PENBERLY LA

TIMBER RUN CT.

TIMBER RUN RD.

WOODSMEN CT.

TIMBER WAY CT.

TIMBER GROVE RD.

LOG TIMBER DR.

TIMBER VIEW

TIMBER RIDGE CT.

BOND AVE.

THOROUGHBRED

QUARTERHORSE CT.

INDIANPONY CT.

BONITA AVE.

BONITA

RUN

TIMBER

ENGLE RD.

AVE.

WOODSIDE

BONNOT PL.

BONNOT

CIR.

LEGEND

B.C.M.D. MAINS SHOWN

BALTIMORE CITY MAINS SHOWN

FIRE HYDRANTS SHOWN

VALVES SHOWN

METROPOLITAN DISTRICT LINK

Rel. Eq #94

6-B

BALTIMORE COUNTY METROPOLITAN DISTRICT
KEY MAP
WATER MAINS

SCALE 1 IN = 500 FT

TOPO & PLAN SHEETS			
N.W.	16-H	18-I	
	17-H	18-J	
	18-H	17-J	
	16-I	18-J	
	17-I		

KEY SHEET

MIBR

50 49 48 47 46 45 44 43 42 41

70 69 68 67 66 65 64 63 62 61

CARROLL CO.

BALTIMORE CO.

WESTMINSTER

WESTERN MARYLAND R.R.

PIKE

GREEN HILL FARM RD.

GORE'S MILL RD.

IVY MILL

KEYSER RUN

COCKEYS MILL ROAD

OLD GORES MILL ROAD

TRANSMISSION

SUSQUEHANNA NORTHWEST EXPRESSWAY

NW 17-M NW 17-L NW 17-K

NW 16-M NW 16-L NW 16-K

-LEGEND-

BCMD MAINS SHOWN

BALTIMORE CITY MAINS SHOWN

FIRE HYDRANTS SHOWN

VALVES SHOWN

METROPOLITAN DISTRICT LINE

Ref. Eq # 6-A

BALTIMORE COUNTY METROPOLITAN DISTRICT
KEY MAP
WATER MAINS

SCALE 1 IN. = 500

TOPO & PLAN SHEETS

N.W.	16-K	18-L	
	17-K	18-M	
	18-K	17-M	
	16-L	18-M	
	17-L		

KEY SHEET

S.E.

Petitioner's Ex #4.

HANOVER ROAD

HANOVER ROAD

OLD

(30)

(1) (2) (3) (5) (6) (7) (8) (9) (10) (11) (12) (14)

Camp. #9A

BALTIMORE GAS & ELECTRIC CO.

POWER TRANSMISSION LINES

3

4

SCALE 1" = 50'

sion continued to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, however, and reapproved the preliminary plat in 1978. In August 1979, the Commission reversed its position and decided that plats submitted for renewal should be evaluated under the zoning ordinance and subdivision regulations in effect when the renewal was sought. App. 279–282. The Commission then renewed the Temple Hills plat under the ordinances and regulations in effect at that time. *Id.*, at 283–284.

In January 1980, the Commission asked the developer to submit a revised preliminary plat before it sought final approval for the remaining sections of the subdivision. The Commission reasoned that this was necessary because the original preliminary plat contained a number of surveying errors, the land available in the subdivision had been decreased inasmuch as the State had condemned part of the land for a parkway, and the areas marked "reserved for future development" had never been platted. Plaintiff's Exs. 1078 and 1079; Tr. 164–168. A special committee (Temple Hills Committee) was appointed to work with the developer on the revision of the preliminary plat. Plaintiff's Ex. 1081; Tr. 169–170.

The developer submitted a revised preliminary plat for approval in October 1980.[3] Upon review, the Commission's staff and the Temple Hills Committee noted several problems with the revised plat. App. 304–305. First, the allowable density under the zoning ordinance and subdivision regulations then in effect was 548 units, rather than the 736 units claimed under the preliminary plat approved in 1973. The difference reflected a decrease in 18.5 acres for the parkway, a decrease of 56 acres for the 10% deduction for roads, and an

[3]The developer also submitted the preliminary plat that had been approved in 1973 and reapproved on several subsequent occasions, contending that it had the right to develop the property according to that plat. As we have noted, that plat did not indicate how all of the parcels would be developed. App. 84–85.

exclusion of 44 acres for 50% of the land lying on slopes exceeding a 25% grade. Second, two cul-de-sac roads that had become necessary because of the land taken for the parkway exceeded the maximum length allowed for such roads under the subdivision regulations in effect in both 1980 and 1973. Third, approximately 2000 feet of road would have grades in excess of the maximum allowed by county road regulations. Fourth, the preliminary plat placed units on land that had grades in excess of 25% and thus was considered undevelopable under the zoning ordinance and subdivision regulations. Fifth, the developer had not fulfilled its obligations regarding the construction and maintenance of the main access road. Sixth, there were inadequate fire protection services for the area, as well as inadequate open space for children's recreational activities. Finally, the lots proposed in the preliminary plat had a road frontage that was below the minimum required by the subdivision regulations in effect in 1980.

The Temple Hills Committee recommended that the Commission grant a waiver of the regulations regarding the length of the cul-de-sacs, the maximum grade of the roads, and the minimum frontage requirement. *Id.*, at 297, 304–306. Without addressing the suggestion that those three requirements be waived, the Commission disapproved the plat on two other grounds: first, the plat did not comply with the density requirements of the zoning ordinance or subdivision regulations, because no deduction had been made for the land taken for the parkway, and because there had been no deduction for 10% of the acreage attributable to roads or for 50% of the land having a slope of more than 25%; and second, lots were placed on slopes with a grade greater than 25%. Plaintiff's Ex. 9112.

The developer then appealed to the County Board of Zoning Appeals for an "interpretation of the Residential Cluster zoning [ordinance] as it relates to Temple Hills."[4] App. 314.

[4]The Board of Zoning Appeals was empowered:

On November 11, 1980, the Board determined that the Commission should apply the zoning ordinance and subdivision regulations that were in effect in 1973 in evaluating the density of Temple Hills. *Id.*, at 328. It also decided that in measuring which lots had excessive grades, the Commission should define the slope in a manner more favorable to the developer. *Id.*, at 329.

On November 26, respondent, Hamilton Bank of Johnson City, acquired through foreclosure the property in the Temple Hills subdivision that had not yet been developed, a total of 257.65 acres. *Id.*, at 189–190. This included many of the parcels that had been left blank in the preliminary plat approved in 1973. In June 1981, respondent submitted two preliminary plats to the Commission—the plat that had been approved in 1973 and subsequently reapproved several times, and a plat indicating respondent's plans for the undeveloped areas, which was similar to the plat submitted by the developer in 1980. *Id.*, at 8a. The new plat proposed the development of 688 units; the reduction from 736 units represented respondent's concession that 18.5 acres should be removed from the acreage because that land had been taken for the parkway. *Id.*, at 424, 425.

"a. To hear and decide appeals on any permit, decision, determination, or refusal made by the [County] Building Commissioner or other administrative official in the carrying out or enforcement of any provision of this Resolution; and to interpret the Zoning map and this Resolution.

"c. To hear and decide applications for variances from the terms of this Resolution. Such variances shall be granted only where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property which at the time of adoption of this Resolution was a lot of record, or where by reason of exceptional topographic situations or conditions of a piece of property the strict application of the provisions of this Resolution would result in practical difficulties to or undue hardship upon the owner of such property." Plaintiff's Ex. 9112. See also Tenn. Code. Ann. §§ 13–7–106 to 13–7–109 (1980).

On June 18, the Commission disapproved the plat for eight reasons, including the density and grade problems cited in the October 1980 denial, as well as the objections the Temple Hills Committee had raised in 1980 to the length of two cul-de-sacs, the grade of various roads, the lack of fire protection, the disrepair of the main-access road, and the minimum frontage. *Id.*, at 270. The Commission declined to follow the decision of the Board of Zoning Appeals that the plat should be evaluated by the 1973 zoning ordinance and subdivision regulations, stating that the Board lacked jurisdiction to hear appeals from the Commission. *Id.*, at 187–188, 360–361.

B

Respondent then filed this suit in the United States District Court for the Middle District of Tennessee, pursuant to 42 U. S. C. §1983, alleging that the Commission had taken its property without just compensation and asserting that the Commission should be estopped under state law from denying approval of the project.[5] Respondent's expert witnesses testified that the design that would meet each of the Commission's eight objections would allow respondent to build only 67 units, 409 fewer than respondent claims it is entitled to build,[6] and that the development of only 67 sites would result in a net loss of over $1 million. App. 377. Petitioners' expert witness, on the other hand, testified that the Commission's eight objections could be overcome by a design that

[5]Respondent also alleged that the Commission's refusal to approve the plat violated respondent's rights to substantive and procedural due process and denied it equal protection. The District Court granted a directed verdict to petitioners on the substantive due process and equal protection claims, and the jury found that respondent had not been denied procedural due process. App. 32. Those issues are not before us.

[6]*Id.*, at 277; Tr. 238–243. Respondent claimed it was entitled to build 676 units: the 736 units allegedly approved in 1973 minus the 212 units already built or given final approval and minus 48 units that were no longer available because land had been taken from the subdivision for the parkway.

would allow development of approximately 300 units. Tr. 1467–1468.

After a three-week trial, the jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause, and that the Commission was estopped under state law from requiring respondent to comply with the current zoning ordinance and subdivision regulations rather than those in effect in 1973. App. 32–35. The jury awarded damages of $350,000 for the temporary taking of respondent's property. *Id.*, at 33–34.[7] The court entered a permanent injunction requiring the Commission to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, and to approve the plat submitted in 1981. *Id.*, at 34.

The court then granted judgment notwithstanding the verdict in favor of the Commission on the taking claim, reasoning in part that respondent was unable to derive economic benefit from its property on a temporary basis only, and that such a temporary deprivation, as a matter of law, cannot constitute a taking. *Id.*, at 36, 41. In addition, the court modified its permanent injunction to require the Commission merely to apply the zoning ordinance and subdivision regulations in effect in 1973 to the project, rather than requiring approval of the plat, in order to allow the parties to resolve "legitimate technical questions of whether plaintiff meets the requirements of the 1973 regulations," *id.*, at 42, through the appli-

[7]Although the record is less than clear, it appears that the jury calculated the $350,000 award by determining a fair rate of return on the value of the property for the time between the Commission's rejection of the preliminary plat in 1980 and the jury's verdict in March 1982. See Tr. 300–305; Tr. of Ors' Arg. 25, 32–33. In light of our disposition of the case, we need not reach the question whether that measure of damages would provide just compensation, or whether it would be appropriate if respondent's claims of action were viewed as stating a claim under the Due Process Clause.

cable state and local appeals procedures.[8]

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed. 729 F. 2d 402 (1984). The court held that application of government regulations affecting an owner's use of property may constitute a taking if the regulation denies the owner all "economically viable" use of the land, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the preliminary plat and the jury's verdict. *Id.*, at 405–406. Rejecting petitioners' argument that respondent never had submitted a plat that complied with the 1973 regulations, and thus never had acquired rights that could be taken, the court held that the jury's estoppel verdict indicates that the jury must have found that respondent had acquired a "vested right" under state law to develop the subdivision according to the plat submitted in 1973. *Id.*, at 407. Even if respondent had no vested right under state law to finish the development, the jury was entitled to find that respondent had a reasonable investment-backed expectation that the development could be completed, and that the actions of the Commission interfered with that expectation. *Ibid.*

The court rejected the District Court's holding that the taking verdict could not stand as a matter of law. A temporary denial of property could be a taking, and was to be analyzed in the same manner as a permanent taking. Finally, relying upon the dissent in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 636 (1981), the court determined

[8]While respondent's appeal was pending before the Court of Appeals, the parties reached an agreement whereby the Commission granted a variance from its cul-de-sac and road grade regulations and approved the development of 676 units, and respondent agreed, among other things, to rebuild existing roads, and build all new roads, according to current regulations. App. to Brief for Petitioners 3a.

that damages are required to compensate for a temporary taking.[9]

II

We granted certiorari to address the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations. —— U. S. —— (1984). Petitioners and their *amici* contend that we should answer the question in the negative by ruling that government regulation can never effect a "taking" within the meaning of the Fifth Amendment. They recognize that government regulation may be so restrictive that it deprives a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use, which concededly would be a taking under the Fifth Amendment. According to petitioners, however, regulation that has such an effect should not be viewed as a taking. Instead, such regulation should be viewed as a violation of the Fourteenth Amendment's Due Process Clause, because it is an attempt by government to use its police power to effect a result that is so unduly oppressive to the property owner that it constitutionally can be effected only through the power of eminent domain. Viola-

[9]Judge Wellford dissented. 729 F. 2d, at 409. He did not agree that the evidence supported a finding that respondent's property had been taken, in part because there was no evidence that respondent had formally requested a variance from the regulations. Even if there was a temporary denial of the "economically viable" use of the property, Judge Wellford would have held that mere fluctuations in value during the process of governmental decision-making are "incidents of ownership" and cannot be considered a "taking." *Id.*, at 410, quoting *Agins* v. *Tiburon*, 447 U. S. 255, 263, n. 9 (1980). He also did not agree that damages could be awarded to remedy any taking, reasoning that the *San Diego Gas* dissent does not reflect the views of the majority of this Court, and that this Court never has awarded damages for a temporary taking where there was no invasion, physical occupation, or "seizure and direction" by the State of the landowner's property. 729 F. 2d, at 411.

tions of the Due Process Clause, petitioners' argument concludes, need not be remedied by "just compensation."

The Court twice has left this issue undecided. *San Diego Gas & Electric Co.* v. *San Diego*, *supra*; *Agins* v. *Tiburon*, 447 U. S. 255, 263 (1980). Once again, we find that the question is not properly presented, and must be left for another day. For whether we examine the Planning Commission's application of its regulations under Fifth Amendment "taking" jurisprudence, or under the precept of due process, we conclude that respondent's claim is premature.

III

We examine the posture of respondent's cause of action first by viewing it as stating a claim under the Just Compensation Clause. This Court often has referred to regulation that "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), as a "taking." See, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, —— U. S. ——, (1984) (slip op. 16–17); *Agins* v. *Tiburon*, 447 U. S., at 260; *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962); *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958). Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation, see *San Diego*, 450 U. S., at 647–653 (dissenting opinion), and even assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld. Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee

This legislative judgment recognizes and understands that some properties which potentially might be reclassified to other than resource conservation zoning by the County Board of Appeals should not and are not now eligible for such reclassification. Indeed, the statute would otherwise be useless and of no effect. The point is that the County Council decided to reserve for itself the judgment concerning such matters, and there is absolutely no constitutional provision which guarantees to every property owner the right to have its case heard not only before the local legislative body on a frequent basis, but also by an additional forum created by the legislative body.

Indeed, there is no constitutional right to any property owner to have the opportunity for piecemeal administrative rezoning. It should be remembered that the County Board of Appeals, as an administrative body, is subordinate to the legislature. Its power is limited to that defined by the legislative body.

* * *

Since Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court has given broad latitude to local land use legislation under the police power. There, in sustaining a law which established land use districts excluding all industrial establishments, the Court recognized that some industries might well be innocuous in particular cases. But, as the Court noted,

> "The inclusion of a reasonable margin, to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." 272 U.S. at 388-89.

Similarly, in Kadacheck v. Sebastian, 239 U.S. 394 (1915), the Court upheld a local law excluding brickyards from a particular district. In its

discussion of the police power, the Court said,

> "It is to be remembered that we are dealing with one of the most essential powers of government,--one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." 239 U.S. at 410.

Mr. Justice Douglas delivered the more recent Opinion of the Court in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), approving yet another controversial zoning law, this time restricting the occupancy of single family dwellings to traditional families. He underlined,

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be '"reasonable, not arbitrary"'" 416 U.S. at 8.

Moreover, in countering the suggestion that the legislative judgment was arbitrary, he quoted Mr. Justice Holmes who observed over a half century ago,

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Ibid.

* * *

Indeed, in reference to these constitutional issues, the opportunity for Petitioner to seek the accomplishment of its objectives through, in particular, the water and sewer planning process, as well as the next comprehensive zoning process, raises the important points of exhaustion of statutory remedies and the finality of the County decision. The Supreme Court has consistently refused constitutional challenges to zoning statutes where it appeared either that the Petitioner neglected to utilize appropriate and available local process or that the local governmental decision was not complete.

In Williamson County Regional Planning Comm. v. Hamilton Bank, ___ U.S. ___ (1985), Slip Opinion attached as Exhibit 3, the Court followed this approach in turning back allegations that the application of various zoning laws and regulations in Williamson County, Tennessee, amounted to a "taking" of the Petitioner's property. The judgment of the Court was in no way novel or surprising. As Mr. Justice Blackmun explained, the Court had consistently articulated this position in such other recent cases as Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978); Agins v. Tiburon, 447 U.S. 255, 263 (1980); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); and Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981).

In each of the above Supreme Court cases, property owners fought against local legislation of greater impact and far more severe consequences to property values than the statute in question. But, in each case, the Supreme Court had no difficulty sustaining the facial constitutionality of the statute and/or referring the property owner to additional available local decision making procedures.

This is easily understood. Ever since the Euclid case, supra, the Supreme Court has been following this road because of its great understanding and respect for the importance of local legislative judgment in land use controversies.

It is apparent that BCZR 1A00.3.A.1 fits within the tradition of local zoning legislation reasonably designed to advance the public welfare. As in the case with any ordinance of strength and impact, it inevitably runs up against the interests of one property owner or another. This is in the nature of land use legislation. Here, related regulation through zoning and water and sewer planning work together to protect the important rural areas of the county from urban sprawl.

Moreover, there is no question that the county-wide zoning maps generally provide for a variety of uses and levels of development. In other words, we are not dealing here with legislation aimed at stopping all growth. Rather, the undertaking is to moderate and direct the development of the county within proper boundaries.

Thus, BCZR 1A00.3.A.1 must be sustained consistent with the constitutional doctrine of the police power developed by the Supreme Court. It clearly is facially constitutional.

II.

While the validity of the zoning statute in question is clear, it is noteworthy that this very issue brings with it a crucial jurisdictional question. The authority of the County Board of Appeals to invalidate zoning legislation is extremely doubtful.

A review of Baltimore County Charter Section 602 demonstrates that the Board exercises in zoning "such functions and powers (as) may be prescribed by legislative act of the County Council." Section 602(a), Bill No. 85-78. Neither this section nor any implementing legislation confers

upon the Board the responsibility to decide the validity of County Council action.

Research has revealed no Maryland case on point, but the prevailing rule excludes this power. As it is said in Anderson, American Law of Zoning, Section 20.09,

> "§20.09. Authority to rule on validity of ordinance.
>
> The jurisdiction of the board of adjustment to review administrative decisions, and in the course of such review to construe the zoning regulations, does not include the power to determine whether the zoning ordinance is valid. Although some courts have apparently taken the position that validity is in issue when a landowner applies for administrative relief, a board of adjustment exercises a delegated power which neither expressly nor impliedly includes the power to review the process of enactment, or the constitutionality of the ordinance."

Otherwise stated, the essential constitutional question must be answered in a judicial forum. It is an issue which may well be addressed by the Circuit Court upon review of this administrative decision. See Cardon Investments v. Town of New Market, 302 Md. 77 (1984).

III.

To be sure, the conclusion that BCZR 1A00.3.A.1 is valid does not in theory moot the question of error. The Board of Appeals may consider the case and reclassify the property to another resource conservation classification if the evidence calls for it. In this case, however, no amount of argument regarding the wisdom or equity of the Council action can obscure the point that there was no error as a matter of law.

The definitions and standards relating to the issue of zoning "error" sufficient to sustain a piecemeal reclassification are so well established as to bear little repetition here. See Boyce v. Sambly, 25 Md. App. 43 (1975) and Coppolino v. County Board of Appeals of Baltimore County, 23 Md. App. 358 (1974). Simply put, the inquiry is whether the Council was

familiar with the area and had the opportunity to consider the pertinent facts. So long as this is the case, the wisdom or quality of the decision from a planning point of view is irrelevant.

In the present case, both the subject property and the neighboring property of the Reisterstown Lumber Company were specific issues in the 1984 process. The County Council and the Planning Board records submitted as specific exhibits demonstrate that the parties not only identified the properties but gave testimony to the County Council during the hearing process. The legislative action taken came after the Petitioner had the opportunity to provide full information. The bottom line is that the Council apparently did not agree with the request to rezone to commercial. The rural character of the area and the lack of planned water or sewer service easily support this judgment.

Moreover, there is no sustainable claim to unreasonable discrimination or denial of equal protection. It is inevitable that lines must be drawn, often between properties sharing some similar characteristics. In County Commissioners of Queen Anne's County v. Miles, 246 Md. 355 (1967), the Court sustained a far more restrictive zoning ordinance, establishing a five acre minimum lot size in rural waterfront areas. In addressing the contention that properties similar to those of the challengers received more favorable zoning, the Court acknowledged that the judgments might well have been different and that the wisdom of the lines drawn might well be doubtful. But, so long as the classifications were fairly debatable, they would necessarily be sustained.

In the present case, there is no question that the subject property remains part of a rural residential area and that both planned water and

sewer service are absent. Rather, the core of the argument for "error" is in the rezoning of the adjacent Reisterstown Lumber Company property to B.R. (business roadside). The lumber company property, of course, adjoins the subject property and is alleged to be similar in character, but there are important distinguishing features. The most important is historical, there being no dispute that the neighboring Reisterstown Lumber Company has existed as far back as memory can go and prior to comprehensive zoning and the establishment of resource conservation zones. Other commercial zoning on the west side of Old Hanover Road, across from the subject property, remains vacant. While the most recent addition of commercial zoning of Reisterstown Lumber Company property has reached further to the east, this judgment is explainable as an extension of an existing business. It does not constitute a zoning action which authorizes the intrusion of new development into a rural area.

Again, as it was said in Miles, whatever doubt there may be as to the wisdom of the County Council's decision, the zoning classification must be sustained as fairly debatable. To be sure, the County Council might legitimately have chosen not to extend commercial zoning to the lumber company property eastward, or the Council might have chosen to include the subject property among the land so reclassified. But these are matters for the legislature and beyond the scope of the County Board of Appeals in this proceeding.

IV.

Even if there were an error, the request for B.R. zoning would have to be rejected because it is not warranted on this record. The Petitioner presented opinion testimony that local shopping, or a "7-11" store would be appropriate. This implies not B.R. zoning, but rather B.L. (Business-Local). This opinion was itself totally unsupported by cogent facts,

and was contradicted by the undisputed evidence that the property zoned B.L. on the west side of the road is vacant.

The bottom line is that there was no affirmative evidence to support any of the commercial zoning classifications. The case reduces to nothing more than a visceral reaction to the legislative choice to extend the Lumber Company zoning without carrying these properties along the way. Perhaps there is the hope that sometime in the future the Lumber Company may desire to purchase the subject property.

However understandable the reasons for the disappointment which generated this Petition, they do not amount to a legal basis to make the requisite affirmative finding that any particular commercial zoning classification is appropriate, much less the request for B.R.

V.

The significant points may be summarized in this way:

1. BCZR 1A00.3.A.1 is constitutional, so that the jurisdiction of the County Board of Appeals is limited to consideration of rezoning to another classification within the resource conservation category.

2. Moreover, it does not appear that the County Board of Appeals has jurisdiction to invalidate the county statute.

3. In any event, there is no error on this record.

4. Finally, there is no affirmative evidence to support reclassification to B.R. zoning or even the B.L. classification suggested by Petitioner in the testimony.

For all of these reasons, this petition should be denied.

Phyllis Cole Friedman
Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel
Room 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 14th day of October, 1985, a copy of the foregoing People's Counsel's Memorandum was mailed to John B. Howard, Esquire, and Robert A. Hoffman, Esquire, 210 Allegheny Ave., Towson, MD 21204; Malcolm F. Spicer, Jr., County Attorney, Office of Law, Mezzanine, Court House, Towson, MD 21204; and Norman E. Gerber, Director of the Office of Planning and Zoning, Courts Building, Towson, MD 21204.

Peter Max Zimmerman
Peter Max Zimmerman

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PETITION FOR RECLASSIFICATION 3 Parcels, E/S Old Hanover Road; 1.4, .96 and 3.3 acres, respectively Situated 1720 Feet and 2121 Feet, respectively N/Butler Road FOURTH ELECTION DISTRICT NELSON L. BOND, JR., et al.	*	BEFORE THE
	*	COUNTY BOARD OF APPEALS
	*	OF BALTIMORE COUNTY
	*	
	*	Case No. R-86-109 Cycle 1 - Item 3
	*	
Petitioners	*	

* * * * * * *

MEMORANDUM IN SUPPORT OF
PETITION FOR RECLASSIFICATION

Petitioners Nelson L. Bond, Jr., et al., by their attorneys, John B. Howard, Robert A. Hoffman and Cook, Howard, Downes & Tracy in support of their Petition for Reclassification state the following:

Petitioners' properties, located at 13011, 13015 and 13019 Old Hanover Road were rezoned during the 1984 comprehensive map process from DR2 to RC5. However, immediately adjacent to the subject properties and to the north, the Reisterstown Lumber Company obtained a reclassification to BR of two separate parcels, consisting of 13021 and 13023 Old Hanover Road which were purchased by Reisterstown Lumber in 1980. Although both Petitioners' and Reisterstown Lumber's properties do not currently have public water and sewer, they are within the

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Metropolitan District with existing public facilities approximately .4 miles south on Old Hanover Road.

I. SECTION 1A00.3.A.1

First, Petitioners will address Section 1AOO.3.A.1 of the Baltimore County Zoning Regulations, (B.C.Z.R.) and the issue of whether petitions for reclassification of properties located in the resource conversation zones can be filed. That provision reads as follows:

> 1AOO.3-Rezoning.
> A. Filing of rezoning petitions. (Bill No. 98-75)
> 1. No petition to reclassify an R.C. zone or part thereof as other than an R.C. zone may be accepted for filing by the Zoning Commissioner unless - (Bill No. 98-75).
> a. The Capital Program, duly adopted Baltimore County master or comprehensive plan, and the "county plan", required under Article 43 Section 387 C of the Annotated Code of Maryland 1957, with ammendments as codified in the 1971 Replacement Volume and 1974 Cummulative Supplement, show that the property under petition is to be serviced by public sewerage and water-supply systems within TWO years after the date the petition is submitted. (Bill No. 98-75)

For the following reasons, Petitioners submit that the blanket denial of a right to be heard on the petition for reclassification is a violation of their rights under the United States and Maryland State Constitutions.

A. STANDING.

As a threshold matter, Petitioners have standing to raise the Constitutional issues cited herein where the ability to rezone their properties have been curtailed by this regulation. Simpson v. Board of Appeals, 218 Md. 222 (1958).

D. INTERPRETING SECTION 1A00.3.A.1 ALONE WILL BE A CASE OF FIRST IMPRESSION BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY.

In the Spring of 1983, the Baltimore County Board of Appeals heard testimony and accepted legal memoranda in an application for reclassification of RC4 and RC5 property to DR3.5 in Case No. R-83-189. Petitioners in that case, D & R Joint Venture and Isaac Jones argued that both sections 1AOO.3.A.1 and 1AO3.2 of the Baltimore County Zoning Regulations did not preclude the Board from granting Petitioners requested relief. Section 1AO3.2 reads in pertinent part as follows:

> 1AO3.2 - Rezoning by petition (Bill nos. 98-75; 178-79)
> No petition for reclassification of property in an RC4 zone may be granted unless a registered professional engineer, architect, landscape architect, or land surveyor first certifies: (Bill nos. 98-75; 178-79)
> 1. That the parcel of land under petition lies at least 200 feet from the property line of any public water reservoir; (Bill no. 178-79)
> 2. That the parcel lies at least 300 feet from any first-or second order or greater

> stream that flows directly into a public water reservoir; (Bill no. 178-79)
> 3. That the parcel lies at least 300 feet from any third-order or greater stream that flows directly or indirectly into a public water reservoir; (Bill no. 178-79)

Following a decision by the Circuit Court that the Baltimore County Board of Appeals hear the case and decide the issue of application of the above referenced regulations, the Board found that both sections read together precluded the Board from ultimately granting Petitioner's request for relief.

This decision on June 8, 1983 was subsequently, on June 17, suspended pursuant to a Motion for Reconsideration of the validity of the regulations in question. No subsequent decision was ever rendered by the County Board of Appeals, and on March 28, 1985, an Order of Dismissal of the petitions was signed by the Board.

It may be argued that since the above referenced order dated June 8, 1983 was suspended pursuant to a Motion for Reconsideration, that decision would not be binding on the Board or Petitioners in this case. However, Petitioners submit that, notwithstanding the June 8 Order, Section 1A00.3A.1. should not be applied to dismiss the Petition in this case.

Petitioners in this case are not challenging the validity of the restrictions found in filing petitions under the the RC4 zoning classification. Distinguishing

the D & R Joint Venture and Isaac Jones case from the case at hand, the D & R Joint Venture case discussed the validity of the two statutory restrictions on filing reclassification Petitions found in the RC zones, while the case at hand deals only with the blanket denial of a hearing under any petition for reclassification of an RC zoned property. For reasons to follow, Petitioners believe that section 1AOO.3.A.1 is not a valid exercise of Baltimore County's police power.

C. SECTION 1AOO.3.A.1 VIOLATES PROCEDURAL DUE PROCESS.

Where a regulation deprives an individual of a property right, and no hearing to address such deprivation is permitted, the regulation is an invalid exercise of the state's police power and a violation of the due process clause of the Fourteenth Ammendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights. (The Maryland Court of Appeals has long equated Article 23 with the due process clause of the Fourteenth Amendment. See e.g.; Bowie Inn v. City of Bowie, 274 Md. 230 (1975). In Re: Easton, 214 Md. 176 (1957).)

In determining in what instances a due process hearing would be required, the Court of Appeals in Albert v. Public Service Commission 209 Md. 27 (1956), stated the following:

> ...where a public administrative body acts in a judicial or quasi-judicial manner, and its acts are particular and immediate rather than general and prospective, the person whose rights or property may be affected by the action is entitled to notice and hearing. (emphasis added)

Id. 37-38.

In enforcing this regulation, Petitioners' property is being locked into an RC Zoning classification, while Petitioners are being denied their constitutional right to notice and a hearing.

Further, it is stated in 1 Rathkopf, The Law of Zoning and Planning, (4th ed. 1985) that an ordinance or amendment which is inconsistent with the enabling statute constitutes a denial of procedural due process.

The enabling statute which permits Baltimore County to enact its zoning regulations can be found in Article 25A, Section 5, Annotated Code of Maryland, (1957). Pursuant to Section 5(x), thereof Baltimore County is permitted:

> to enact local laws for the protection and promotion of public safety, health, morals and welfare relating to zoning and planning including the power to provide for the right of appeal of any matter arising under such planning and zoning laws to the circuit court except as is provided for under appeals to the county board of appeals.

In Section 5(u) the enabling statute provides for "a decision by the board of appeals on petition by any

interested person and after notice and opportunity for hearing." (emphasis added)

The denial of a hearing which is a fundamental right under the due process clause is not only in violation of the enabling statute under the Annotated Code of Maryland, but also is a deprivation of a procedural right under the Fourteenth Amendment of the United States Constitution and the Constitution of Maryland.

In this case, Petitioners have had their property rezoned to an R.C. classification under the comprehensive map process, and although rezoning under the comprehensive map process is a valid exercise of the police power, Petitioner is denied the right to be heard upon a petition for reclassification to contest the rezoning. The regulation therefore violates due process.

D. SECTION 1AOO.3.A.1. VIOLATES SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Supreme Court of the United States in Euclid v. Amber Realty Company 272 U.S. 365 (1926), found that zoning laws are a form of land use control and are justified on the grounds of proper exercise of the police power of a political subdivision as delegated to it by the state. The power of a subdivision of a state to rezone comes from an enabling act passed pursuant to the state's

constitutional provisions. Tome v. Norwood Realty Company, 211 Ga. 814, 89 S.E.2d 265 (1955).

However, the general rule that a county or municipality may control land is limited by constitutional considerations; a county or municipal corporation must not exercise this police power in an arbitrary, unreasonable or capricious manner. Any exercise of that power must be substantially related to the public welfare. See, Moore v. East Cleveland, 431 U.S. 494 (1977); Euclid v. Amber Realty Company 272 U.S. 365 (1926); Wincamp Partnership v. Anne Arundel County, 458 F.Supp. 1009 (1978).

In 1 Rathkopf, The Law of Zoning and Planning, Section 402 (4th ed. 1985) it is stated that a denial of substantive due process may be found when a restriction in an ordinance constitutes an unauthoried exercise of the police power, in that the restriction is arbitrary and fails to achieve the purpose for which was intended.

The subject regulation requires that if ones property is zoned R.C. by the County Council during the comprehensive map process, a rezoning petition cannot be accepted for filing unless that property is on the "Capital Program" and is due to be serviced by public sewerage and water-supply systems within two years after the date the petition is submitted.

In Petitioners case, the subject property falls within the "metropolitan district" and public sewer and water facilities could be available if extended privately. Where the intent of the legislature was obviously to restrict development in those areas that will not have public sewer and water under any circumstances, a regulation which distinguishes between property owners that have public sewer and water extended with public funds, (i.e. under the Capital Program) as opposed to property owners who may extend public sewer and water privately is arbitrary, capricious and discriminitory on its face.

In furtherance of that conclusion is the rezoning of the Reisterstown Lumber Yard, from DR 2 to BR on property located further from exisiting public water and sewer supplies on the comprehensive maps. That property owner's right to file a rezoning petition has not been denied despite the property not being included on the Capital Program for extension of public sewer and water. On the one hand the County Council is permitted to rezone notwithstanding the Capital Program, while on the hand extended to Petitioners, the Board is asked to dismiss a Petition to rezone property nearly identical based on the Capital Program. There is no rational basis for such a distinction.

E. SECTION 1.A.00.3.A.1. VIOLATES EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

Under the equal protection clause of the Fourteenth Amendment, where the county has unlawfully discriminated amongst land owners, and there is no fundamental right or suspect classification involved, such discrimination will be subject to the "rational basis" type of scrutiny essentially equivalent to the substantive due process test above. See: Construction Industry Association v. City of Petaluma 522 F2d.897 (9th circuit 1975). See also: McLaughlin v. Florida, 379 U.S. 184 (1964).

That is, where land owners similarly situated are treated differently there must be a reason why and the difference in treatment must not be arbitrary, unreasonable or capricious.

In the case at hand, RC property owners who are not slated for public water and sewer are denied the right to be heard on a reclassification petition where the rezoning to RC may have been in error. There is no rational basis for denying a hearing to these property owners where other property owners with property similarly situated, also without public water or sewer, have the right to petition for rezoning.

Clearly, the regulation violated Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment.

II. THE RC-5 ZONING CLASSIFICATION CONSTITUTES MISTAKE AND/OR ERROR.

Assuming the Board agrees that Section 1A00.3.A.1 should not apply in this case, testimony presented at the hearing before the Board on September 17, 1985, clearly indicates that a mistake or error was committed in not rezoning Petitioner's properties to BR on the 1984 comprehensive map. A brief summary of Petitioners' and People's Councel's witnesses' testimony below demonstrates that the request for reclassification should be granted.

The first witness presented by Petitioners was Nelson L. Bond, Jr. Mr. Bond is the owner of 13019 Old Hanover Road and was speaking on behalf of the other Petitioners and owners Calvin O. McElhattan, Sr. and Calvin O. McElhattan, Jr., owners of 13011 and 13015 Old Hanover Road, respectively.

Mr. Bond testified that there had been certain changes since the purchase of his house in 1977. First, Reisterstown Lumber Company, immediately adjacent to the north of Mr. Bond's property uses flood lights on their property all night. Second, the BL zoned property on the west side of Old Hanover Road is being "filled" and has two shed like structures, each with three bays, on the northern portion of the BL property.

Mr. Bond further testified that he had requested a change in zoning to BR before the County Council on the

1984 comprehensive maps following the requested change to BR by Reisterstown Lumber.

Also, Mr. Bond testified that these properties are bordered to the south and east by a 400 foot Baltimore Gas & Electric ("BG&E") right-of-way used for the power transmission towers and lines.

Petitioners' properties, surrounded on two sides by commercial zoning, and on one side by a 400 foot BG & E right-of-way indicates that a mistake and/or error was made in not rezoning this island of property to BR on the 1984 comprehensive maps.

The next witness called by Petitioners was William F. Kirwin, who was acknowledged by the Board to be an expert land planner.

Mr. Kirwin prepared and presented several exhibits and photographs in support of Petitioners proposed reclassification. Mr. Kirwin first pointed out the location of the transmission lines on a 500 foot scale drawing which was submitted as Petitioners Exhibit 3. Mr. Kirwin further indicated on this exhibit the heavy truck traffic flow north on Hanover Pike and the MTA "turn around" point just south of Petitioner's property.

Mr. Kirwin then described Petitioner's Exhibit 4, a 50 foot scale drawing with "numbers" making the location of photographs which were submitted as

Petitioner's Exhibits 5-1 through 5-12. The importance of this exhibit and the photographs was to illustrate the surrounding commercial zones and uses, and the dimensions of the power lines and substation that borders on the east side of Petitioner's property.

Mr. Kirwin next testified that according to County sewer and water maps, sanitary sewer and public water is available at Butler Road and Hanover Pike, approximately 2,000 feet south of the Petitioners' properties. Because of the availability of sewer and water, it was Mr. Kirwin's opinion that the RC5 zoning classification was not the proper classification to be placed on Petitioners' properties. The RC5 zoning classification's purpose according to Mr. Kirwin, is to prevent "leapfrog zoning and development" in a rural area. Here, however, public facilities are available and these properties do lie within the Metropolitan District. The rezoning of this property to RC5 was therefore in error and should be reclassified BR.

Mr. Kirwin continued and discussed the master plan for Baltimore County, land use element, page 15 on which Petitioners' properties were designated to be within the "fringe development area". The fringe development areas are those areas within the county that are presently sewered, or planned to be sewered within ten years, that

are not developed at present and are not included within the boundaries of any new developement area or town or community center.

Clearly, the reclassification of the Petitioners' properties to RC5, in light of the conflict with the master plan for Baltimore County was error and/or mistake.

It was further Mr. Kirwin's opinion that given the lack of provisions for neighborhood shopping areas outside of the Owings Mill's town center, and the fact that Petitioners' properties are nestled between commercial zoning and the transmission lines, it was a mistake not to rezone these properties to BR.

Testimony also indicated a further example of error. One of Petitioner's properties is less than one acre (.96 acres owned by Mr. McElhattan, Jr.), the minimum lot area required under the RC5 zoning classification. The rezoning therefore created a non-conforming use. Clearly the Council must have erred in rezoning this property, where Mr. McElhattan's home could not be rebuilt if destroyed by fire or other calamity. Petitioners submit that the Council, had it been aware of the result of this rezoning, would not have placed one of its citizens in such serious financial jeopardy.

Finally, Mr. Kirwin testified that future traffic patterns, specifically the construction of an exit off the northwest expressway and Butler Road, would require a need for more neighborhood commercial zoning.

For all of the above cited reasons, it was Mr. Kirwin's opinion that this property should more appropriately be zoned BR.

That concluded Petitioner's case and People's Counsel called Mr. James Hoswell of the Office of Planning as its sole witness.

In recounting a history of the zoning on Petitioners' property, Mr. Hoswell testified that certain urban zones had been "unwisely placed" on the 1971 comprehensive maps. Petitioners' properties were properties that were included in those which according Mr. Hoswell were unwisely placed and therefore received the down-zoning to RC5 on the 1984 comprehensive map.

Most significant to Petitioner's case was a statement by Mr. Hoswell in accord with Petitioner's expert, Mr. Kirwin. Mr. Hoswell testified that given the 400 foot right-of-way that borders the east side of Petitioner's property, as well as Reisterstown Lumber Company, it did not make good planning sense to rezone a portion of Reisterstown Lumber's property which lies to the east of the power transmission lines. It was Mr.

Hoswell's opinion that it would have been better, from a planning perspective, to rezone property which abuts the existing commercial (i.e. Petitioners' properties).

The basic test considered in a contention of error or mistake is whether the County Council made a besic and actual mistake, as that term is used in zoning law, when it adopted a comprehensive zoning map placing the subject property in the present classification, or error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proved that the Council's initial premises were incorrect. See Coppolino v. County Board of Appeals of Baltimore County, 23 Md. App.358 (1974); Boyce v. Asembly, 25 Md. App.43 (1975)

The testimony presented clearly indicates that a besic mistake was made in allowing an island of RC5 zoned properties to remain, while surrounded on two sides by commercial zoning and on the third by a 400 foot BG & E right-of-way. Further, the rezoning of property to the east of the power lines, beyond an obvious buffer from RC-5 zoned property, where property which currently abuts the commercial property is zoned RC5, demonstrates mistake and error.

Finally, the County Council erred in not providing sufficient neighborhood shopping to accomodate

the fifty thousand density units placed upon the 1984 comprehensive map in the Owings Mills area, and in not following the guidance of its own master plan showing these properties as being in the fringe development area.

For the reasons stated above Petitioner respectively requests this Honorable Board take notice of the proper filing of this rezoning petition and requests to re- ne the properties from RC5 to BR.

Respectively submitted,

JOHN B. HOWARD

ROBERT A. HOFFMAN
Cook, Howard, Downes & Tracy
210 Allegheny Avenue
P.O. Box 5517
Towson, Maryland 21204
301-823-4111
Attorney for the Petitioners

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this day of 1985, a copy of the foregoing Memorandum in Support of Petition for Reclassification was mailed to Phyllis Cole Friedman, People's Counsel and Peter Max Zimmerman, Deputy People's Counsel, Old Court House, 2nd Floor, Towson, Maryland 21204

JOHN B. HOWARD

Maryland Department of Transportation
State Highway Administration

William K. Hellmann
Secretary
Hal Kassoff
Administrator

March 15, 1985

Mr. William Hackett, Chairman
Board of Appeals
County Office Building
Towson, Maryland 21204

Attn: Mr. N. Commodari

Re: Reclassification Petitions
Cycle I - 1985
Meeting of March 6, 1985
Property Owner: Nelson L. Bond, Jr., et al
Location: E/S Old Hanover Road, Route 668, 1720', 1996' and 2121' N. from c/l Butler Road
Existing Zoning: R.C. 5
Proposed Zoning: B.R.
Acres: 5.66
District: 4th

Dear Mr. Hackett:

On review of the submittal of 2-29-85 of the 3.3 acre site on the east side of Old Hanover Road (Route 668), the State Highway Administration offers the following comments.

All commercial access to Old Hanover Road must be through S.H.A. access permit.

On review of a detail site plan showing building location, entrance and park location, the State Highway Administration will provide additional comments.

Very truly yours,

Charles Lee, Chief
Bureau of Engineering
Access Permits

By: George Wittman

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cc: Mr. J. Ogle

My telephone number is (301) 659-1350
Teletypewriter for Impaired Hearing or Speech
383-7555 Baltimore Metro — 565-0451 D.C. Metro — 1-800-492-5062 Statewide Toll Free
P.O. Box 717 / 707 North Calvert St., Baltimore, Maryland 21203 - 0717

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO Mr. William Hackett, Chairman, Board of Appeals Date March 20, 1985

FROM Ian J. Forrest

SUBJECT Reclassification Petitions
CYCLE I - 1985
Meeting of March 6, 1985

The Baltimore County Department of Health has reviewed the following Reclassification Petitions and does not anticipate any health hazards at this time regarding these Petitions.

Item #1 - Helena D. Gibbons

Item #2 - Paul Gambrill, et al

Item #3 - Nelson L. Bond, Jr., et al

Item #4 - Conservation Associates

Item #5 - Greater Baltimore Medical Center

Item #6 - Josef of Vienna, Inc.

Item #7 - John W. Ruppert, et al

Ian J. Forrest, Director
BUREAU OF ENVIRONMENTAL SERVICES

IJF/fth

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IN THE MATTER OF THE PETITION FOR RECLASSIFICATION FROM R.C. 5 TO B.R. ZONE E/S Old Hanover Rd., 1720', 1996' & 2121' N from Centerline of Butler Rd., 4th District

NELSON L. BOND, JR., et al., Petitioners

: BEFORE THE COUNTY BOARD OF APPEALS
: OF BALTIMORE COUNTY
:
: Case No. R-86-109
:

ENTRY OF APPEARANCE

Please enter the appearance of the People's Counsel in the above-captioned matter. Notices should be sent of any hearing dates or other proceedings in this matter and of the passage of any preliminary or final Order.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, MD 21204
494-2188

RECEIVED
COUNTY BOARD OF APPEALS
AUG -7 A 9:58

I HEREBY CERTIFY that on this 7th day of August, 1985, a copy of the foregoing Entry of Appearance was mailed to John B. Howard, Esquire, 210 Allegheny Ave., Towson, MD 21204, Attorney for Petitioners.

Peter Max Zimmerman

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210 ALLEGHENY AVENUE
P.O. BOX 5517
TOWSON, MARYLAND 21204

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March 1, 1985

The County Board of Appeals
of Baltimore County
Old Court House
Towson, Maryland 21204

Re: Petition for Reclassification
Nelson L. Bond, Jr.; Calvin O. McElhattan, Sr.
and Calvin O. McElhattan, Jr., Petitioners

Dear Sir or Madam:

This firm represents the above-referenced Petitioners in their request for a zoning reclassification of property located on Old Hanover Road in Reisterstown from RC5 to BR.

Petitioners' properties, 13011, 13015 and 13019 Old Hanover Road were rezoned in 1984 by the County Council from DR2 to RC5 and form an island of RC zoned property surrounded by commercial zoning. Immediately adjacent to the subject property and to the north Reisterstown Lumber Company obtained a reclassification to BR on the 1984 Comprehensive Maps of two separate parcels. One has been owned by Reisterstown Lumber since prior to the adoption of the zoning regulations in 1955, and until the 1984 Comprehensive Map, was a nonconforming use. The second parcel, 13021 and 13023 Old Hanover Road was purchased by Reisterstown Lumber Company within the last several years.

A review of the attached plats and zoning maps show that Petitioners' properties are bordered to the north by ER, to the south and east by a 400 foot BG&E right-of-way for

The County Board of Appeals
of Baltimore County
March 1, 1985
Page 2

overhead transmission lines and to the west by a BL zone. It is apparent that there has been a mistake and/or error in rezoning these properties from DR-2 to RC5. It is respectively submitted that the RC5 zoning classification is not appropriate for property in the heart of a commercial zone and should be reclassified BR.

Petitioners realize that one of the issues relates to an interpretation of Section 1A00.3.A.1 (B.C.Z.R.) regarding acceptance for filing. This will be addressed by legal memorandum at the appropriate time.

For these reasons, Petitioners respectfully request that this petition for reclassification be granted.

Yours truly,

John B. Howard
Attorney for Petitioners

JBH:kam

3180

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

September 12, 1985

John B. Howard, Esquire
210 Allegheny Avenue
Towson, Maryland 21204

RE; Petition for Reclassification
3 parcels situated on the E/S of Old Hanover Rd., containing 1.4, .96 & 3.3 acres respectively, & being 996' & 2121' respectively N/Butler Road
4th Election District
Nelson L. Bond, Jr., etal, Petitioners
Case No. R-86-109 Cycle I - Item # 3

This is to advise you that $ 739.30 is due for advertising and posting of the above property. This fee must be paid before an Order is issued.

Please make the check payable to Baltimore County, Maryland, and remit to Mrs. Barbara Gaillard, Zoning Office, Room 109, County Office Building, Towson, Maryland 21204, before the hearing.

Sincerely,

ARNOLD JABLON
Zoning Commissioner

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 012522

DATE 9/19/85 ACCOUNT R-01-615-000

AMOUNT $ 739.30

RECEIVED FROM: Nelson L. Bond, Jr.

FOR: Advertising and Posting R-86-109

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VALIDATION OR SIGNATURE OF CASHIER

COUNTY BOARD OF APPEALS
RECEIVED
SEP 20 P 1:06

John B. Howard, Esquire
210 Allethery Avenue
Towson, Maryland 21204

August 16, 1985

NOTICE OF HEARING

RE: Petition for Reclassification
3 parcels situated on the E/S of Old Hanover Rd., containing 1.4, .96 & 3.3 acres respectively, & being situated 1720', 996' & 2121' respectively N/Butler Road
4th Election District
Nelson L. Bond, Jr., et al, Petitioners
Case No. R-86-109 Cycle I - Item #3

TIME: 10:00 a.m.

DATE: Tuesday, September 17, 1985

PLACE: Room 218, Courthouse, Towson, Maryland

William T. Hackett
William T. Hackett, Chairman
County Board of Appeals

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

September 12, 1985

John B. Howard, Esquire
210 Allegheny Avenue
Towson, Maryland 21204

RE; Petition for Reclassification
3 parcels situated on the E/S of Old Hanover Rd., containing 1.4, .96 & 3.3 acres respectively, & being 996' & 2121' respectively N/Butler Road
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Sincerely,

ARNOLD JABLON
Zoning Commissioner

AJ:bg

t of all eligible costs; and

— (1) In addition to cost sharing f of the Agriculture Article, grants ma best management practices to preven point sources of water pollution on a other areas in which the potential f substantial. When cost sharing funds u f the Agriculture Article, the procedur than § 9-345 apply.

ubsection to governmental entities of or up to 100 percent of the total cost a grants, the applicant's financial capabili economic benefit shall be considered ed matching dollar amount.

his subsection shall be made after pri griculture. (1984, ch. 795.)

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ary shall report on or before January eral Assembly on the status of the Wate

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maining;
ch funds have been expended or are

constructed in the near future for which be made;
's effectiveness; and
g requirements. (1984, ch. 795.)

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EXHIBIT 2

Subtitle 5. County Water and Sewerage Plans.

§ 9-501. Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

REVISOR'S NOTE

This subsection formerly appeared as HE § 9-501 (a).
No changes are made.

(b) *Community sewerage system.* — "Community sewerage system" means a publicly or privately owned sewerage system that serves at least 2 lots.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (c).
The former language "for the collection and disposal of sewage or industrial waste of a liquid nature, including various devices for the treatment of that sewage and industrial waste" is deleted for clarity and is included in a combined reading of the defined terms "sewage" and "sewerage system."

(c) *Community water supply system.* — "Community water supply system" means a water supply system that serves at least 2 lots.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (d).
The former language "a source of water and a distribution system, including treatment facilities and storage facilities, whether publicly or privately owned" is deleted as included in the defined term "water supply system".

(d) *County plan.* — (1) "County plan" means a comprehensive plan for adequately providing throughout the county, including all towns, municipal corporations, and sanitary districts in the county, the following facilities and services by public or private ownership:
(i) Water supply systems;
(ii) Sewerage systems;
(iii) Solid waste disposal systems;
(iv) Solid waste acceptance facilities; and
(v) Systematic collection and disposal of solid waste, including litter.
(2) "County plan" includes a revised or amended county plan.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (e) and, as it related to the contents of a county plan, the first sentence of § 9-502 (a).

(e) *Individual sewerage system.* — "Individual sewerage system" means a sewerage system that serves only 1 lot.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (f).
The former references to a "single system of sewers and pipes, treatment tanks, or other facilities" and "disposing of sewage or industrial waste" are deleted as included in the defined terms "sewage" and "sewerage system".

(f) *Individual water supply system.* — "Individual water supply system" means a water supply system that supplies water to only 1 lot.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (g).
The former clause "a single system of pipes, ... included in the defined term "water supply system".

(g) *Litter.* — "Litter" means any:
(1) Waste materials;
(2) Garbage;
(3) Refuse;
(4) Trash;
(5) Debris;
(6) Dead animals; or
(7) Other discarded material.

REVISOR'S NOTE

This subsection formerly appeared as HE § 9-501 (h).
The former term "rubbish" is deleted as conform to the editorial interpretation of "litter".
The only other changes are in style.

(h) *Lot.* — "Lot" means a parcel of land, including a part of a subdivision, that:
(1) Is used or is intended to be used as a building site; and
(2) Is not intended to be further subdivided.

REVISOR'S NOTE

This subsection formerly appeared as HE § 9-501 (i).
In item (1) of this subsection, "building site" is substituted for the former clause "intended to be used for building purposes", for clarity.
The only other changes are in style.

(i) *Multiuse sewerage system.* — "Multiuse sewerage system" means a sewerage system that:
(1) Serves only 1 lot;
(2) Serves a number of individuals;
(3) Has a treatment capacity of more than 5,000 gallons a day; and
(4) Is not publicly owned or operated.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (j).
The definition and element of "sewage or industrial waste of a liquid nature, including various devices for the treatment of that sewage and industrial waste" is deleted as included in the defined terms "sewage" and "sewerage system" and "treating of that sewage and industrial waste" is deleted as included in the defined term "operation".
Item (4) of this subsection is substituted for the former phrase "which is not publicly owned or operated" to avoid the implication that a system operated by an individual or group of individuals is a "multiuse sewerage system".

(j) *Multiuse water supply system.* — "Multiuse water supply system" means an individual water supply system that:
(1) Has the capacity to supply more than 5,000 gallons of water a day; and
(2) Serves a number of individuals.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (k).
The former clause "a single system of pipes, ... included in the defined term "water supply system".
The only other changes are in style.

(k) *Water supply system.* — (1) "Water supply system" means a publicly or privately owned or operated:
(i) Source and the surrounding area from which water is supplied for drinking or domestic purposes; and
(ii) Structure, channel, or appurtenance used or intended to be used to transport water to a consumer.
(2) "Water supply system" includes the plumbing system inside any building that is served by the water supply system.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (l).
The former language "any ... system" is deleted as included in the defined term "water supply system".
In paragraph (1) of this subsection, "publicly or privately owned or operated" is substituted for the former phrase "which required each county water authority to adopt its own county plan, the Department of Natural Resources, and each county water authority" to avoid the implication that the Department of Natural Resources is a water authority.
In paragraph (1) of this subsection, "public water supply system" is deleted as included in the defined term "water supply system".
In paragraph (2) of this subsection, "plumbing system" is substituted for the former phrase "pipes, ... that are connected to the water supply system" for clarity.
Also in paragraph (2) of this subsection, the reference to "piping or fixtures" is deleted as included in the definition of "plumbing system".

(ii) Otherwise for safe and sanitary treatment of sewage and other liquid wastes in a manner that is consistent with the laws of this State that relate to air pollution, water pollution, and land use;
(3) Provide for facilities that are adequate to treat, recover, or dispose of solid waste in a manner that is consistent with the laws of this State that relate to air pollution, water pollution, and land use;
(4) Contain adequate information about:
(i) The present sewage treatment capacity in each drainage basin; and
(ii) The present level of use of sewage treatment plants in each drainage basin;
(5) Projections for use of sewage treatment capacity based on:
1. Zoning commitments if the county does not have subdivision authority; or
2. Zoning commitments taking into account all relevant planning, zoning, population, engineering, and economic factors if each county governing body shall adopt and local plans, describe, with all practical precision, those parts of the land that reasonably may be expected to be served in the next 10 years by any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system;
(vi) Solid waste acceptance facility;
(6) Set forth the estimated cost of constructing each existing or proposed water supply system, sewerage system, solid waste disposal system, solid waste acceptance facility, or plant where primary purpose is to dispose of, treat, or process solid waste;
(7) Take into account all relevant, planning, zoning, population, engineering, and economic factors in each county governing body shall adopt and local plans, describe, with all practical precision, those parts of the land that reasonably may be expected to be served in the next 10 years by any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system;
(vi) Solid waste acceptance facility;
(8) Set forth a time schedule that conforms to the time requirements in paragraph (7) of this subsection, any right-of-way or easements that are necessary for any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system; and
(vi) Solid waste acceptance facility;
(9) Take into account existing, on a time schedule that conforms to the time requirements in paragraph (7) of this subsection, any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system; and
(vi) Solid waste acceptance facility;
(10) Set a time schedule that conforms to the time requirements in paragraph (7) of this subsection, any proposed method for financing the construction and operation of each planned:
(i) Community water supply system;

(b) *Review by governing body of county.* — Except as provided in § 9-515 of this subtitle, each county governing body shall review its county plan at least every 2 years in accordance with a schedule set by the Department, and submit to the Department a revised county plan, if appropriate.
(2) The Department requires a revision or amendment necessary, or adopts any revision or amendment to its county plan or adopts a new county plan.

(c) *Public hearing prior to adoption.* — (1) Before a county governing body adopts a new county plan, revision, or amendment that may be conducted jointly with other public hearings or meetings:
(i) Conduct a public hearing on the county plan, revision, or amendment;
(ii) Give the principal elected official of each municipal corporation that is affected notice of the time and place of the public hearing, together with a summary of the plan, revision, or amendment, at least 14 days before the hearing;
(iii) Publish notice of the public hearing at least 1 time in a newspaper of general circulation in the county once each week for 2 successive weeks, with the first publication of notice appearing at least 14 days before the hearing; and
(iv) Make a record of all public hearing testimony.
(2) Notice of the public hearing may be a part of the general notice requirement that is considered during the public hearing or meeting.

REVISOR'S NOTE

This section is new language derived with substantive change from former HE § 9-501 (b).
Subsection (a) (1) of this section is new language added to make expressly the intent implicit in former § 9-501 (b) that each county governing body adopt its own county plan, the Department of Natural Resources, and each county water authority adopt its own county plan.
Subsection (a) (2) of this section is new language added for clarity. This reference to "any revision or amendment necessary" is necessary because there may not exist in fact, even though it may be required by law, any revision or amendment to a county plan that is necessary.
Subsection (b) of this section is new language added for clarity and to require each county governing body to review its county plan at least every 2 years.
Subsection (c) (1) of this section is new language added to require that a public hearing be held on the adoption of a county plan, revision, or amendment. Former § 9-501 (b) (2) (ii) required the Department to hold a public hearing before it approved a county plan, revision, or amendment. Subsection (c) (1) of this section, however, requires that a public hearing be held before the county governing body adopts a county plan, revision, or amendment. The Department is required to approve or disapprove a county plan, revision, or amendment within 60 days after it is submitted to the Department. Therefore, the General Assembly may not have intended that a public hearing be held before the Department approves a county plan, revision, or amendment. Subsection (c) (1) of this section, however, requires that a public hearing be held before the county governing body adopts a county plan, revision, or amendment.
Subsection (c) (1) (ii) of this section is new language added to require that the principal elected official of each municipal corporation that is affected be given notice of the time and place of the public hearing, together with a summary of the plan, revision, or amendment, at least 14 days before the hearing.
Subsection (c) (1) (iii) of this section is new language added to require that a public hearing be advertised in a newspaper of general circulation in the county once each week for 2 successive weeks, with the first publication of notice appearing at least 14 days before the hearing.
Subsection (c) (1) (iv) of this section is new language added to require that a record be made of all public hearing testimony.
Subsection (c) (2) of this section is new language added to clarify that the notice of the public hearing may be a part of the general notice requirement that is considered during the public hearing or meeting.
Chapter 542, Acts 1983, effective July 1, 1984, repealed subsection (b) (2) (ii) of former § 9-501, which required each county governing body to submit its county plan to the Department for approval. Chapter 542 also repealed former § 9-501 (b) (2) (iii), which required each county governing body to submit its county plan to the Department for approval if the Department requested it. Chapter 542 also repealed former § 9-501 (b) (3), which required the Department to approve or disapprove a county plan within 60 days after it was submitted to the Department. Chapter 542 also repealed former § 9-501 (b) (4), which required the Department to hold a public hearing on a county plan before it approved the plan. Chapter 542 also repealed former § 9-501 (b) (5), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (6), which required the Department to disapprove a county plan if it was inconsistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (7), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (8), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (9), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (10), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (11), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (12), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (13), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (14), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (15), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (16), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (17), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (18), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (19), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (20), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (21), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (22), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (23), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (24), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (25), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (26), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (27), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (28), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (29), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (30), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (31), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (32), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (33), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (34), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (35), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (36), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (37), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (38), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (39), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (40), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (41), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (42), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (43), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (44), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (45), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (46), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (47), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (48), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (49), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (50), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (51), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (52), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (53), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (102), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (103), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (104), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (105), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (110), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (111), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (112), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (113), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (114), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (115), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (116), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (117), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (122), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (123), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (124), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (125), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (126), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (127), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (128), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (129), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (142), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (143), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (144), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (145), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (150), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (151), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (152), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (153), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (154), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air

A. Posting a bond to secure actual construction and installation of the systems with satisfactory surety for the benefit of the county governing body; or

B. Making any other arrangement that the Department considers necessary and adequate to carry out the provisions of this subtitle; and

(7) If a solid waste disposal system is not available or required to be installed in any area as provided in item (4) of this subsection, to allow a person to provide a solid waste acceptance facility in the area without a systematic collection and transportation system.

(8) To require that, before issuance of a permit for construction of a community or multiuse sewerage system, a financial management plan sufficient to insure the dependable and safe operation of the system has been adopted within the county plan and approved by the Department. (1983, ch. 542, § 2; 1984, chs. 255, 798.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE §§ 9-506 (1), (2), (4), (5), (6), and (7), 9-508, and 9-510.

In subsection (a) (1) of this section, the former reference to "studies", "investigations", and "analyses" are deleted as unnecessary in light of the broader reference to "surveys and reports".

Subsection (b) (1) of this section is substituted for the former reference to the power of the Department to "[e]xercise any other functions that are necessary and appropriate to the administration of this subtitle" in light of the broad, general power of the Department to adopt rules and regulations to carry out the provisions of the subtitle.

Subsection (b) (2) (i) and (ii) of this section is substituted for the former references to "individual or community water supply or sewerage systems", to reflect the apparent intent of former HE § 9-506 (1) and to the current practice of the Department, also to control, limit, or prohibit the installation and use of multiuse water supply systems and multiuse sewerage systems. See the definitions of "water supply system" and "sewerage system" in § 9-501 of this subtitle.

Subsection (b) (3) of this section combines former HE § 9-506 (4) and (5), for clarity. Since former HE § 9-506 (4) required the Department to consider certain factors but did not state in what manner these factors were to be considered, this subsection incorporates certain provisions from former HE § 9-506 (5), which required the installation of community water supply, sewerage, or solid waste disposal systems if the systems were reasonably necessary giving due consideration to the factors set forth in subsection (b) (3) and (4) of this section. No change of substance is intended.

Also in subsection (b) (3) of this section, the reference to "individual water supply systems or individual sewerage systems" is added to conform to the overall scheme of administrative regulation and to the administrative practice of the Department.

Effect of amendments. — Chapter 255, Acts 1984, approved May 8, 1984, and effective from date of passage, in subparagraph (ii) of paragraph (6) of subsection (b), redesignated former sub-subparagraphs A. and B. as present sub-subparagraphs 1. and 2. and redesignated former sub-sub-subparagraphs 1. and 2. as present sub-sub-subparagraphs A. and B.

Chapter 798, Acts 1984, added paragraph (8) in subsection (b).

Editor's note. — Section 2, ch. 255, Acts 1984, provides that "the provisions of this act are intended solely to correct technical errors in the law and that there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this act."

§ 9-511. Conformance to county plans required — In general.

Unless they conform to the county plan or revision or amendment of the county plan, the following systems and facilities may not be installed or extended:

(1) A water supply system;

(2) A sewerage system;

(3) A solid waste disposal system; or

(4) A solid waste acceptance facility. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive changes from the second and third clauses of the first sentence of former HE § 9-511 (b).

In item (1) of this section, the defined term "water supply system" is substituted for the former references to "community water supply . . . system", "multiuse water supply . . . system", and "individual water supply . . . system".

In item (2) of this section, the defined term "sewerage system" is substituted for the former references to "community . . . sewerage . . . system", "multiuse . . . sewerage disposal system", and "individual sewerage system".

§ 9-512. Same — Building permits; subdivision plats.

(a) *"Building permit" defined.* — In this section, "building permit" means any permit that allows any building construction and is issued by any State or local authority.

(b) *Building permits — Conformity with county plan; issuance of building permits.* — (1) A State or local authority may not issue a building permit unless:

(i) The water supply system, sewerage system, or solid waste acceptance facility is adequate to serve the proposed construction, taking into account all existing and approved developments in the service area; and

(ii) Any water supply system, sewerage system, or solid waste acceptance facility described in the application will not overload any present facility for conveying, pumping, storing, or treating water, sewage, or solid waste.

(2) A water supply system, sewerage system, or solid waste acceptance facility referenced in a subdivision plat shall conform to the applicable county plan.

(3) If an allocation of water or wastewater is needed, and before a State or local authority may issue a building permit, the State shall:

(i) Have an allocation of water and wastewater from the county whose facilities are affected by the proposed building construction; or

(ii) Show evidence of being able to provide an acceptable on-site sewage disposal system or well system until an allocation becomes available, or on a permanent basis if the State elects.

(3) "Health officer" means the health officer for:

(i) Montgomery County; or

(ii) Prince George's County.

(4) "Issuing authority" means any 1 of the following authorities that is authorized to issue or approve a permit:

(i) The Department;

(ii) The health officer;

(iii) The Montgomery County Health Department; or

(iv) The Prince George's County Health Department.

(5) "Permit" means a permit issued or approved by the issuing authority for Montgomery County or Prince George's County to install, connect to, or use an individual septic system.

(b) *Scope of section.* — This section applies only in Montgomery County and Prince George's County.

(c) *Permit required.* — In each county, a person shall have a permit from an issuing authority before the person may install, connect to, or use an individual septic system.

(d) *Applications for permits — In general.* — An applicant for a permit shall submit an application to the issuing authority on the form that the issuing authority requires.

(e) *Same — Submission to Commission required; exceptions; multiple applications in area or subdivision.* — (1) The health officer shall:

(i) Submit each application for a permit to the Commission; and

(ii) Notify the Commission if there is more than 1 application for a permit in an area or subdivision of each county when:

1. The original permit application is submitted to the Commission; or

2. This fact reasonably becomes known to the health officer.

(2) This subsection does not apply to an area of each county in which a community sewerage system is not planned within 10 years under the county's comprehensive plan for sewerage systems.

(f) *Same — Review and comment on applications; combining applications for review and comment.* — (1) Within 30 days after the Commission receives an application under subsection (e) (1) of this section, the Commission shall review the application and comment to the health officer, in writing, on the application.

(2) If there is more than 1 application for a permit in an area or subdivision of each county, the Commission may group these applications together for purposes of review and comment.

(3) In its review and comments under this subsection, the Commission shall include:

(i) A determination of the location of the nearest collection line of a community sewerage system;

(ii) The capacity, feasibility, cost, and engineering conditions or requirements for an extension of this collection line; and

(iii) If available, an estimate of the time required for this extension.

(g) *Issuance of permit; failure of Commission to act within review period.* — (1) The issuing authority shall issue a permit to any applicant who meets the requirements of this subtitle.

(2) If the Commission does not respond as required by subsection (f) of this section, and if the permit otherwise complies with this section, the local health officer may issue the permit.

(h) *Contents of permit; rules and regulations of issuing authority.* — (1) The issuing authority shall include on each permit that the issuing authority issues a requirement that the holder of a permit shall notify, in writing, any buyer or lessee of the permitted property:

(i) That the permitted property is served by an individual septic system;

(ii) Of the conditions, estimate of time, and other factors that concern the subsequent extension of a community sewerage system to the permitted property; and

(iii) If applicable, that the Commission did not review and comment on the application for a permit because the permitted property was in an area of the county in which at the time of the application a community sewerage system was not planned within 10 years under the county's comprehensive plan for sewerage systems.

(2) The health officer:

(i) Shall adopt rules and regulations to carry out the provisions of this subsection; and

(ii) May require the holder of a permit to record the information required by paragraph (1) of this subsection in the land records of the county in which the permitted property is located. (1983, ch. 542, § 2; 1984, ch. 255.)

REVISOR'S NOTE

Subsection (a) of this section is new language added to avoid repetition of several lengthy phrases.

Subsection (b) of this section is new language added to state expressly that this section applies only in Montgomery County and Prince George's County.

Subsections (c) through (h) of this section are new language derived without substantive change from former HE § 9-517.

Throughout this section, "community sewerage system" is substituted for the former, various references to "public sewerage system", "public sanitary sewerage service", "public sewer", and "public sewerage service", for clarity and in light of the definition of "community sewerage system".

Also throughout this section, "private septic tank system" is deleted as included in the term "individual septic system", and to conform to the interpretation of the Department.

In subsections (a) (5) and (6) of this section, the references to "connect to . . . an individual septic system" are derived from the third sentence of former HE § 9-517 (a) and are applied throughout this section to state expressly that a permit can be issued or approved to allow a connection to an individual septic system.

In subsection (e) (2) of this section, "planned" is substituted for the former term "contemplated", for clarity.

In subsections (e) (2) and (h) (1) (iii) of this section, the references to "within 10 years under the . . . comprehensive . . . sewer system" is substituted for "planned . . . sewerage plan", for clarity.

Subsection (g) (1) of this section is new language added to state expressly the formerly only implied duty of the issuing authority to issue a permit to a qualified applicant.

In subsection (g) (2) of this section, the

former language "or because of extenuating circumstances" is deleted as unnecessary since "extenuating circumstances" also would be "good cause".

Subsection (e) of this section is derived from a combined reading of the last sentence of former HE § 9-511 (a) and from the first clause of the first sentence of (b). Even though a proposed county plan is not final until the Department approves it, subsection (e) (1) of this section allows a county to use its proposed county plan at the county's own risk under certain conditions. Subsection (e) (2) of this section clarifies that, in the interim period between adoption by the county governing body and approval by the Department, the proposed county plan is presumptively valid. No substantive change is intended by these revisions.

§ 9-508. Same — Notice of Departmental disapproval; reconsideration of disapproval.

(a) *Notice of Departmental disapproval.* — If the Department disapproves, in whole or in part, a proposed county plan or a proposed revision or amendment of a county plan, the Department shall give the county a written notice of disapproval that states the reasons for disapproval.

(b) *Reconsideration of disapproval of proposed county plan.* — At any time up to 6 months after a county receives the notice of disapproval, the county governing body may ask the Secretary to reconsider the disapproval in accordance with the rules and regulations of the Department. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-507 and the last clause of § 9-506 (9). As to the derivation of subsection (a) of this section from the last clause of former HE § 9-506 (9), see the revisor's note to § 9-506 of this subtitle.

(2) Specify the location for any sewage treatment facility discharge point that is included in any county plan.

(b) *Duties.* — In addition to the duties set forth elsewhere in this subtitle, the Department shall adopt rules and regulations:

(1) To carry out the provisions of this subtitle;

(2) To control, limit, or prohibit the installation and use of:

(i) Water supply systems; and

(ii) Sewerage systems;

(3) To require that, before installation of individual water supply systems or individual sewerage systems, consideration be given to:

(i) Present and future population density;

(ii) Size of parcels;

(iii) Contour of the land;

(iv) Porosity and absorbency of the soil;

(v) Ground water conditions;

(vi) Availability of water from unpolluted aquifers;

(vii) Type of construction of community water supply systems;

(viii) Type of construction of community sewerage systems;

(ix) Size of the proposed development; and

(x) Any other pertinent factors;

(4) To require that, giving consideration to the factors in item (3) of this subsection, areas be served by community facilities if the Department finds them to be reasonably necessary:

(i) By installation of the community water supply system, community sewerage system, or solid waste disposal system; and

(ii) By connection of all premises to or service to all premises by the community water supply system, community sewerage system, or solid waste disposal system;

(5) To require that community water supply systems, community sewerage systems, and solid waste disposal systems be constructed to allow the connection of those systems to a larger system, if that larger system becomes available;

(6) To allow a person to install an individual water supply system or an individual sewerage system in any area where a community water supply system or a community sewerage system is not available or required to be installed in the area if:

(i) The Department finds that the individual system is adequate and safe for use before a community system is scheduled to be available in the area; and

(ii) The individual system is constructed in the most economical and convenient way to permit connection to a community system in the area, and the person guarantees the connection to a community system:

1. When the county governing body where the area is located sets a time; and

2. In accordance with this subtitle, any rules and regulations adopted under this subtitle, and any other State law or county requirement by:

(1) The county plan; or

(2) Any revision or amendment to the county plan. (1983, ch. 542, § 2.)

REVISOR'S NOTE

Subsection (a) of this section is new language added to state expressly that the provisions of this section apply only in Montgomery County and Prince George's County.

Subsections (b) through (h) of this section are new language derived without substantive change from the first through fourth and the sixth through fourteenth sentences of former HE § 9-502 (b) and (c), respectively, and the second clause of § 9-505 (a) (9), and the second clause of the first sentence of § 9-513.

In subsections (b) and (c) of this section, the references to the annual review of the statement of objectives and policies by the county councils and the annual review of the county plans by the county executives are substituted for the annual review of the county plans "by the governing body of the county", for clarity. No change of substance is intended by these substitutions.

In subsection (c) (2) of this section, the reference to "any revision or amendment" to the county plan be submitted to the county council is added to conform to the intent of former HE § 9-502 (b) and (c) and to administrative practice in this regard. No change of substance is intended.

(3) Present and future capacities;

(4) Available service projection;

(5) Fiscal elements; and

(6) Annual revisions of this information.

(c) *What the Maryland-National Capital Park and Planning Commission shall provide.* — The Maryland-National Capital Park and Planning Commission shall provide any requested information to each county as to:

(1) Population;

(2) Growth projections;

(3) Planning factors; and

(4) Other developmental standards. (1983, ch. 542, § 2.)

REVISOR'S NOTE

Subsection (a) of this section is new language added to state expressly that this section applies only in Montgomery County and Prince George's County.

Subsections (b) through (c) of this section are new language derived without substantive change from former HE § 9-503 (a) and (b) (1) and (2).

§ 9-517. Same — Individual sewerage systems.

In Montgomery County or Prince George's County, the comprehensive plan for water supply systems and sewerage systems may allow the installation and use of an individual sewerage system for an interim period until the necessary sewerage transmission and treatment capacity in the area is available to provide adequate community sewerage service if:

(1) A community sewerage system otherwise is required in the area; but

(2) Access to a community sewerage system is prohibited by an order of:

(i) The Department;

(ii) Montgomery County;

(iii) Prince George's County; or

(iv) The Washington Suburban Sanitary Commission. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-504 (7), as that item related to Montgomery and Prince George's counties.

(i) May not issue any permit to install or alter a water supply system, sewerage system, or solid waste disposal system in that county under § 9-210 of this title;

(ii) Shall give the county notice of its right to administrative review by the Secretary under this subsection; and

(iii) Shall give the county notice of its right to appeal the Secretary's decision to the Board of Review. (1983, ch. 542, § 2; 1985, ch. 224.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-505 (a) (8), (9), (10), the first clause of (11), the first clause of (14), the first clause of (17), and the first clause of (18) and § 9-505 (b) and (c) (1), (2), (3), (4), (5), (6), (7), (10), (11), and the first clause of (12).

In subsection (a) (1) (iii) of this section, "solid waste acceptance facilities" is new language added for clarity.

In subsection (a) (7), (8), (9), (10), and (11) of this section, "solid waste disposal system" is substituted for the former references to "community solid waste disposal system" and "community solid waste disposal systems", for clarity.

In subsection (a) (7) and (9) of this section, the references to "solid waste acceptance facility" are new language added to conform to a combination of former HE § 9-505 (a) (6), which required the Department to describe certain areas that would or would not be served by, inter alia, a solid waste disposal system, and former HE § 9-505 (a) (6), which required the Department to acquire certain rights-of-way for, inter alia, solid waste disposal systems and solid waste acceptance facilities under a time schedule required by item (5)". This addition clarifies that the Department must describe which areas would or would not be served by solid waste acceptance facilities and, also, conforms to administrative practice. No substantive change is intended.

In subsection (a) (8), (10), and (11) of this section, the references to "multiuse water supply system" are new language added to state expressly that county plans must describe where multiuse water supply systems are to be constructed to identify and acquire rights-of-way and easements and to set out a schedule and a proposed method of financing and the estimated cost of construction and operation. These additions conform to the administrative practice of the Department. No substantive change is intended. Conversely, "multiuse sewerage system" is not added to subsection (a) (8), (10), and (11) of this section since, by definition, a multiuse sewerage system cannot be publicly owned and subsection (a) (8), (10), and (11) of this section relates to components of a county plan that may be publicly financed. See also the revisor's note to § 9-501 (i) of this subtitle.

In subsection (a) (10) and (13) of this section, "planned" is substituted for the former term "programmed", for clarity. No substantive change is intended.

In subsection (a) (12) of this section, the former reference to "applicable rules or regulations adopted by the Department" under former HE § 9-506 is deleted as unnecessary and to conform to the revision of parts of former HE § 9-506, which now appears in §§ 9-508 (b), 9-507 (a), (b) (1), and (c), and 9-508 (a) of this subtitle, as statutory powers and duties. See the revisor's note to §§ 9-506 and 9-507 of this subtitle.

In subsection (a) (13) (ii) and (vi) of this section, reference to use in addition to installation of a system is added to conform to other items in this paragraph.

Also in subsection (a) (13) (x) of this section, "described area" is substituted for the former reference to "community", for clarity.

In subsection (a) (15) of this section, the former reference to "trash" is deleted as included in the defined term "litter".

(1) To the Department of Natural Resources for advice on natural resources matters;

(2) To the Department of State Planning for advice on the consistency of the proposal with the local master plan and other appropriate matters; and

(3) To the Department of Agriculture for advice on the impact of water and sewerage service and solid waste facilities on productive or potentially productive agricultural land.

(c) *Review period.* — (1) Except as otherwise provided in this subsection, the Department shall approve, disapprove, or partially approve and partially disapprove each proposed county plan or proposed revision or amendment to a county plan within 90 days after the proposal is submitted to the Department.

(2) For good cause and after notice to the county involved, the Department may extend the 90-day review period of paragraph (1) of this subsection for an additional 90 days.

(d) *Failure of Department to act within review period.* — If the Department does not disapprove, in whole or in part, a proposed county plan or a proposed revision or amendment of a county plan within the review period provided in subsection (c) of this section, the proposal is approved.

(e) *Effect of county plans after adoption by county governing body.* — (1) Before the Department takes any action under subsection (a) of this section, a county may use its proposed county plan or proposed revision or amendment of its county plan at the county's own risk, if the county governing body has adopted the proposed county plan, revision, or amendment.

(2) After the county governing body adopts the proposed county plan, a person shall follow the provisions of that plan except to the extent that the Department modifies or disapproves that plan. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-506 (8) and the first and second clauses of (9) and § 9-511 (a) and the first clause of the first sentence of (b).

As to subsection (a) of this section, the term "county governing body" is substituted for "approving authority", since a county governing body must approve the proposed county plan before it is submitted to the Department. No substantive change is intended by this substitution.

As to the derivation of subsections (a) and (b) of this section from former HE § 9-506 (8) and the first and second clauses of (9), see the revisor's note to § 9-506 of this subtitle.

In subsection (b) of this section, the former references to "comments" from the Department of State Planning and "comment" from the Department of Agriculture are revised to require those departments to advise the Department of Health and Mental Hygiene as to the matters specified. This substitution parallels the language of former HE § 9-506 (8) (i) — now subsection (b) (1) of this section — and clarifies the apparent legislative intent that each of the departments to which the Department of Health and Mental Hygiene is required by this section to refer a proposal for advice has the duty to respond with that advice.

As to subsection (b) (2) of this section, former HE § 9-506 (8) (ii) stated that the Department of State Planning is to make "comments including those concerning consistency with the local master plan". Therefore, the revision of that language in subsection (b) (2) of this section is intended to clarify that the advice of that department must address consistency with the local master plan, but also may address other appropriate matters.

In subsection (c) (2) of this section, the

(b) *Prerequisites to issuance of building permits and zoning permits.* — In Harford County, a building permit or a zoning permit may not be issued for a new subdivision in an area where a community water supply system or a community sewerage system is scheduled to be built within 10 years under the county plan, unless there is a county approved water supply system and a county approved sewerage system for the subdivision.

(c) *Consideration of population density estimates.* — In the planning for water supply systems, sewerage systems, and solid waste disposal systems in its county plan, the Harford County governing body shall consider estimates of population density for Harford County. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section a new language derived without substantive change from former HE § 9-503 (b), § 9-516, and the second clause of (d), the second clause of (4), the second clause of (7), and the second clause of (8).

In subsection (b) of this section, the former references to "within 10 years . . . after June 1, 1972" are deleted as obsolete.

§ 9-515. Special provisions for county plan in Montgomery County and Prince George's County — Preparation; revision or amendment; approval; submission to Department; annual review.

(a) *Scope of section.* — This section applies only in Montgomery County and Prince George's County.

(b) *Objectives and policies of county plan.* — The county council of each county shall:

(1) Annually prepare a county plan;

(2) Prepare and review and annually revise, as the county council considers necessary, a separate statement of objectives and policies to be achieved and implemented by the county plan in the county; and

(3) Consider the following in the statements of objectives and policies of the county plans:

(i) Planning;

(ii) Zoning;

(iii) Population estimates;

(iv) Engineering;

(v) Economics; and

(vi) State, regional, municipal, local, and area plans.

(c) *Drafts and annual revisions or amendments of county plans.* — To achieve the objectives and policies set by the county council, the county executive of each county shall:

(1) Prepare a preliminary draft of the county plan;

(2) Review and prepare preliminary revisions or amendments annually to the county plan; and

(3) Submit to the county council for the county council's consideration, revision, modification, comment, and approval:

(i) The draft; and

(ii) Any revision or amendment to the draft.

(d) *Proposed county plans — Preparation and submission by county executive.* — The county executive of each county shall prepare and submit to the county council:

(1) A final draft of the county plan to conform to the action of the county council in approving the draft; and

(2) An annual, final revision or amendment to the county plan that takes into consideration any significant change in the intervening planning or development in the county.

(e) *Same — Submission to Washington Suburban Sanitary Commission and Maryland-National Capital Park and Planning Commission.* — At least 30 days before the date set for a public hearing under subsection (f) of this section, the county council of each county shall submit its final draft or the final draft of any revision or amendment of the county plan for recommendation to:

(1) The Washington Suburban Sanitary Commission; and

(2) The Maryland-National Capital Park and Planning Commission.

(f) *Same — Public hearing; notice.* — The county council of each county shall:

(1) Hold a public hearing on:

(i) Its final draft of the county plan; and

(ii) The final draft of any revision or amendment to the county plan; and

(2) Publish a notice of the time and place of the public hearing at least 10 days before the hearing in a newspaper of general circulation in the county.

(g) *Same — Actions by the county councils when action is final; review and recommendations by county executives.* — (1) After the public hearing in each county, the county council shall review, may amend as the county council considers necessary, and shall adopt the county plan or the revision or amendment to the county plan.

(2) The adoption of the county plan or a revision or amendment of the county plan by the county council of the county is not final until 10 days after the action adopting it.

(3) During the 10-day period provided by paragraph (2) of this subsection, the county executive may:

(i) Review the county plan or any revision or amendment to the county plan; and

(ii) Recommend for the consideration of the county council whatever change to the county plan or any revision or amendment to the county plan that the county executive considers necessary or desirable.

(h) *Submission of county plan to Department.* — After the time periods required for adoption under this section, the county council of each county shall submit to the Department, as required by § 9-506 (b) and (c) of this subtitle:

(16) By July 1, 1987, treat each publicly owned community sewerage system as a separate entity for fiscal purposes within the local operating agency.

(17) Document compliance with and report on actions taken and plans to enforce the Maryland Water Conservation Plumbing Fixtures Law under Article 56, of the Code.

(b) *Use of prisoners.* — A plan created under subsection (a) (15) of this section may include the use of prisoners from the State correctional system or from county jails or detention centers. (1983, ch. 542, § 2; 1984, cha. 255, 798; 1985, ch. 10, § 3.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-504 (1), (2), (5), (6), (9), (10), the first clause of (3), the first clause of (4), the first clause of (7), and the first clause of (8) and § 9-505 (b) and (a) (1), (2), (3), (4), (5), (6), (7), (10), (11), and the first clause of (9).

In subsection (a) (1) (iii) of this section, "solid waste acceptance facilities" is new language added for clarity.

In subsection (a) (7), (8), (9), (10), and (11) of this section, "solid waste disposal system" is substituted for the former references to "community solid waste disposal system" and "community solid waste disposal systems", for clarity.

In subsection (a) (7) and (9) of this section, the references to "solid waste acceptance facility" are new language added to conform to a combination of former HE § 9-505 (a) (6), which required the Department to describe certain areas that would or would not be served by, inter alia, a solid waste disposal system, and former HE § 9-505 (a) (6), which required the Department to acquire certain rights-of-way for, inter alia, solid waste disposal systems and solid waste acceptance facilities under a time schedule required by "item (5)". This addition clarifies that the Department must describe which areas would or would not be served by solid waste acceptance facilities and, also, conforms to administrative practice. No substantive change is intended.

In subsection (a) (8), (10), and (11) of this section, the references to "multiuse water supply system" are new language added to state expressly that county plans must describe where multiuse water supply systems are to be constructed to identify and acquire

Effect of amendments. — Chapter 255, Acts 1984, approved May 8, 1984, and effective from date of passage, in subsection (a), substituted "paragraphs" for "items" in paragraph (3), redesignated former sub-subparagraphs A. and B. as present sub-subparagraphs 1. and 2. in subparagraph (iii) of paragraph (6), and substituted "paragraph" for "item" in paragraph (8).

Chapter 798, Acts 1984, rewrote the introductory language of paragraph (1) of subsection (a) and added paragraphs (16) and (17) in that subsection.

The 1985 amendment, effective July 1, 1985, substituted "§ 3.05 of Article 66B, § 5 (X) of Article 25A, § 13 of Article 25B, and § 7-108 of Article 28" for "Articles 66B § 3.05, 25A § 5 (X), 25B § 13, and 28 § 7-108" in the introductory language of paragraph (1) of subsection (a).

Editor's note. — Section 2, ch. 255, Acts 1984, provides that "the provisions of this act are intended solely to correct technical errors in the law and that there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this act."

§ 9-506. Same — Review by official planning agencies; progress reports; submitting reports to Department.

(a) *Review by official planning agencies.* — (1) Except as provided in paragraph (2) of this subsection, before a county governing body may adopt a county plan or a revision or amendment to the county plan:

(i) The county governing body shall submit the county plan, revision, or amendment to each official planning agency that has jurisdiction in the county, including any comprehensive planning agency with areawide jurisdiction, for review and comment within a 30-day period for consistency with planning programs for the area; and

(ii) The county planning agency shall certify that the plan, revision, or amendment is consistent with the county comprehensive plan prepared under Article 66B, § 3.05; Article 25A, § 5 (X); or Article 25B, § 13 of the Code.

(2) In Montgomery County and Prince George's County, the review and comments of the Maryland-National Capital Park and Planning Commission in accordance with § 9-516 of this subtitle constitute full compliance with the requirement for review by an official planning agency under this subsection.

(b) *Submitting reports to Department — In general.* — Each county governing body shall submit to the Department:

(1) Progress reports on the development of its county plan; and

(2) A report of its review conducted at least every 2 years, including any revision or amendment of the county plan that has been adopted.

(c) *Same — Notice and other administrative actions for failure to submit certain reports.* — (1) If the Secretary determines that a county governing body has failed to submit a timely and adequate report of its review of its county plan or any required revision or amendment of its county plan to the Department, the Secretary shall give the county governing body a written notice of:

(i) The county's failure to submit a report; or

(ii) Any specific inadequacy in the county's plan.

(2) If within 90 days of this notice a county does not submit its report or an adequate revision or amendment of its plan to the Department, the Secretary:

(4) The county shall timely review any State request for an allocation of water or wastewater, and report its findings to the State within 45 days from the date of such request.

(c) *Same — Applications.* — To apply for a building permit, an applicant shall:

(1) Submit an application to a State or local authority on the form that the authority requires; and

(2) Provide any information that the authority reasonably requires to comply with subsection (b) of this section.

(d) *Subdivision plats — Conformity with county plan; recording or approving subdivision plats.* — (1) A State or local authority may not record or approve a subdivision plat unless any approved facility for conveying, pumping, storing, or treating water, sewage, or solid waste to serve the proposed development would be:

(i) Completed in time to serve the proposed development; and

(ii) Adequate to serve the proposed development, once completed, without overloading any water supply system, sewerage system, or solid waste acceptance facility.

(2) Each water supply system, sewerage system, and solid waste acceptance facility in a subdivision shall:

(i) Conform to the applicable county plan; and

(ii) Take into consideration all present and approved subdivision plats and building permits in the service area.

(3) If an allocation of water or wastewater is needed, and before a State or local authority may record or approve a subdivision plat, the State shall:

(i) Have an allocation of water and wastewater from the county whose facilities are affected by the proposed development; or

(ii) Show evidence of being able to provide an acceptable on-site sewage disposal system or well system until an allocation becomes available, or on a permanent basis if the State elects.

(4) The county shall timely review any State request for an allocation of water or wastewater, and report its findings to the State within 45 days from the date of such request.

(e) *Same — Applications.* — To apply for approval of a subdivision plat, an applicant shall:

(1) Submit an application to the appropriate State or local authority on the form that the authority requires; and

(2) Provide any information that the authority reasonably requires to comply with subsection (d) of this section. (1983, ch. 542, § 2; 1984, ch. 762.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-512 (a) and (b).

Throughout this section, "water supply system" and "sewerage system" are substituted for the former phrase "individual or community water supply or sewerage systems" to conform to § 9-501 (b) (2) of this subtitle. This substitution conforms to the administrative practice of the Department, which specifically includes multiuse water supply systems and multiuse sewerage systems under the provisions of this section. No change of substance is intended. This substitution is brought to the attention of the General Assembly.

Effect of amendment. — The 1984 amendment, effective July 1, 1984, in subsection (b), deleted "present" preceding "water supply system" in subparagraph (i) of paragraph (1), added paragraphs (3) and (4) in that subsection and added paragraphs (3) and (4) in subsection (d).

§ 9-513. Exceptions to county plan in Baltimore County and Carroll County.

In Baltimore County or Carroll County, the county approving authority may grant an exception to the county plan that allows a person to install an individual water supply system or an individual sewerage system for an individual residence if the Secretary or a designee of the Secretary:

(1) Finds that this exception to the county plan is justified and necessary to alleviate extreme hardship; and

(2) Approves the exception to the county plan. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from the second sentence of former HE § 9-511 (b).

The term "county governing body" is substituted for "approving authority" since a county governing body must approve the proposed county plan before it is submitted to the Department. No substantive change is intended by this substitution.

§ 9-514. Exceptions to county plan in Harford County.

(a) *Incorporation of subsidiary plans.* — (1) If the Harford County governing body does not approve and incorporate in its county plan all or part of the subsidiary plans of each town, municipal corporation, and sanitary district in Harford County, the Harford County governing body shall send to the Department a written notice of:

(i) This action; and

(ii) The specific reasons for this action.

(2) If the Harford County governing body or the governing body of a town, municipal corporation, or sanitary district in Harford County requests, the Department may:

(i) Arbitrate the dispute; and

(ii) Decide whether to approve and incorporate all or part of this subsidiary plan in the Harford County plan

§ 9-519 HEALTH-ENVIRONMENTAL

former reference to allowing the health officer to "proceed to process" the application is deleted as unnecessary in light of the authority of the health officer to issue the permit.

Also in subsection (g) (3) of this section, the reference to "if the permit otherwise complies with this section" is substituted for the former phrase "if otherwise appropriate" to state expressly the formerly only implied power to issue a permit if the requirements of this section are met.

In subsection (h) (1) of this section, "holder of a permit" is substituted for the former phrase "person, firm, or corporation to whom the permit is issued", in light of the definition of "person".

Effect of amendment. -- The 1984 amendment, approved May 8, 1984, and effective from date of passage, redesignated former sub-subparagraphs A and B as present sub-subparagraphs 1. and 2. in subparagraph (iii) of paragraph (1) of subsection (e).

Editor's note. -- Section 2, ch. 255, Acts 1984, provides that "the provisions of this act are intended solely to correct technical errors in the law and that there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this act."

§§ 9-519, 9-520.

Reserved.

§ 9-521. Penalties.

(a) *In general.* — A State or local authority that violates any provisions of § 9-512 (b) or (d) of this subtitle is liable to a civil penalty not exceeding $100 to be collected in a civil action brought by the Department in the circuit court for any county. Each day a violation continues is a separate violation under this section.

(b) *No bar to other relief or penalty.* — A civil penalty imposed under this section does not bar any other applicable relief or penalty. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-512 (c).

Former HE § 9-512 (c) made any violation of former [illegible] § 9-512 (a) subject to the penalties stated in subsection (a) of this section. Since a State or local authority is the only entity that can violate that provision, it would be possible, for example, for this State to fine itself under this provision. The Commission to Revise the Annotated Code brings this unclear situation to the attention of the General Assembly and suggests the following alternative solutions to this problem: (1) amend subsection (a) of this section to make it apply only to employees or officials of a State or local authority; (2) amend subsection (a) of this section to be a civil penalty only; or (3) repeal subsection (a) of this section as nonsensical and amend subsection (b) of this section to delete all references to conviction and fine.

WATER, ICE, A

Cross reference. — See Editor's not § 9-501 of this article.

Subtitle 6. S

Part III. Sa

§ 9-624. Officers.

(a) *Chairman.* — From among commission shall elect a chairma district.

(b) *Vice chairman in Somerset C* the sanitary commissioners, the cor

(c) *Secretary-treasurer.* — Eac secretary-treasurer.

(d) *Other offices.* — In a single may not hold any other office of t 1982, ch. 240, § 2; 1985, ch. 69.)

Effect of amendment. — The 1985 amen present, effective July 1, 1985, redesignat former subsections (b) and (c) as present su

Part IV. Powers

§ 9-633. Eminent domain.

Characterization of "taking" prerequ site to implication of contractual oblig tion of government. — It is only when the e a "taking" in the constitutional sense, th an obligation on the part of a government body to pay compensation arises, and that contract can be implied; thus, a determinatio that a taking in the constitutional sense ha occurred is a prerequisite to implying a cor tractual obligation on the part of a governmen tal body. Public Serv. Comm'n v. Highfiel Water Co., 293 Md. 1, 441 A.2d 1031 (1982

§ 9-635. Contracts to buy an

(a) *Definitions.* — (1) In this sectio indicated.

(2) (i) "Contracting party" mean district under this section.

(ii) "Contracting party" includ

1. A person;

2. A county of this State or a

EXHIBIT 3

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. v. HAMILTON BANK OF JOHNSON CITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-4. Argued February 19, 1985—Decided June 28, 1985

As required under Tennessee law, in 1973 respondent's predecessor in interest, a land developer, obtained petitioner Planning Commission's approval of a preliminary plat for development of a tract. The tract was to be developed in accord with the requirements of a county zoning ordinance for "cluster" development of residential areas and the Commission's implementing regulations. In 1977, the county zoning ordinance was changed so as to reduce the allowable density of dwelling units, but the Commission continued to apply the 1973 ordinance and regulations to the developer's tract. In 1979, however, the Commission decided that further development of the tract should be governed by the ordinance and regulations then in effect. The Commission thereafter disapproved plans proposing further development of the remainder of the tract on various grounds, including failure to comply with current density requirements. Respondent filed suit against the Commission and its members and staff (also petitioners) in Federal District Court pursuant to 42 U. S. C. § 1983, alleging that the Commission had taken its property without just compensation by refusing to approve the proposed development. The jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause of the Fifth Amendment, and awarded damages for the temporary taking of respondent's property. The District Court entered an injunction requiring the Commission to apply the 1973 ordinance and regulations to the project, but granted judgment notwithstanding the jury's verdict for the Commission on the taking claim, concluding that the temporary deprivation of economic benefit from respondent's property, as a matter of law, could not constitute a taking. The Court of

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Appeals reversed, holding that application of government regulations affecting an owner's use of property may constitute a taking, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the plat and the jury's verdict.

Held:

1. Even assuming, *arguendo*, that government regulation may effect a taking for which the Fifth Amendment requires just compensation, and assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld because respondent's claim is premature. Respondent has not yet obtained a final decision regarding the application of the ordinance and regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, and its claim therefore is not ripe. Pp. 12–23.

(a) Although respondent's plan for developing its property was rejected, it did not then seek variances that would have allowed it to develop the property according to its proposed plat. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U. S. 264. The record does not support respondent's claim that the Commission's denial of approval for respondent's plat was equivalent to a denial of variances. Thus, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Respondent's contention that it should not be required to seek variances because its suit is predicated upon 42 U. S. C. § 1983 is without merit. While there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action, the question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable. Pp. 12–20.

(b) The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking. If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature. Pp. 20–23.

2. Respondent's claim also is premature if viewed under the theory that government regulation that goes so far that it has the same effect as a physical taking, must be viewed not as a Fifth Amendment "taking,"

WILLIAMSON PLANNING COMM'N v. HAMILTON BANK III

Syllabus

but as an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Resolution of the due process question depends, in significant part, upon an analysis of the effect the Commission's application of the ordinance and regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply for variances from the regulations. Pp. 23–26.

729 F. 2d 402, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined. STEVENS, J., filed an opinion concurring in the judgment. WHITE, J., filed a dissenting statement. POWELL, J., took no part in the decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-4

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., PETITIONERS v. HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 28, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent, the owner of a tract of land it was developing as a residential subdivision, sued petitioners, the Williamson County [Tennessee] Regional Planning Commission and its members and staff, in United States District Court, alleging that petitioners' application of various zoning laws and regulations to respondent's property amounted to a "taking" of that property. At trial, the jury agreed and awarded respondent $350,000 as just compensation for the "taking." Although the jury's verdict was rejected by the District Court, which granted a judgment notwithstanding the verdict to petitioners, the verdict was reinstated on appeal. Petitioners and their *amici* urge this Court to overturn the jury's award on the ground that a temporary regulatory interference with an investor's profit expectation does not constitute a "taking" within the meaning of the Just Compensation Clause of the Fifth Amendment,[1] or, alternatively, on the ground that even if such interference does constitute

[1] "[N]or shall private property be taken for public use, without just compensation."

The Fifth Amendment's prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241 (1897); see also *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 623 n. 1 (1981).

a taking, the Just Compensation Clause does not require money damages as recompense. Before we reach those contentions, we examine the procedural posture of respondent's claim.

I

A

Under Tennessee law, responsibility for land-use planning is divided between the legislative body of each of the State's counties and regional and municipal "planning commissions." The county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings. Tenn. Code Ann. § 13–7–101 (1980). The planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development. §§ 13–3–403, 13–4–303. Enforcement of both the zoning ordinances and the subdivision regulations is accomplished in part through a requirement that the planning commission approve the plat of a subdivision before the plat may be recorded. §§ 13–3–402, 13–4–302 (1980 & Supp. 1984).

Pursuant to § 13–7–101, the Williamson County "Quarterly Court," which is the county's legislative body, in 1973 adopted a zoning ordinance that allowed "cluster" development of residential areas. Under "cluster" zoning,

"both the size and the width of individual residential lots in . . . [a] development may be reduced, provided . . . that the overall density of the entire tract remains constant—provided, that is, that an area equivalent to the total of the areas thus 'saved' from each individual lot is pooled and retained as common open space." 2 N. Williams, American Land Planning Law § 47.01, pp. 212–213 (1974).

Cluster zoning thus allows housing units to be grouped, or "clustered" together, rather than being evenly spaced on uniform lots.

As required by § 13–3–402, respondent's predecessor-in-interest (developer) in 1973 submitted a preliminary plat for the cluster development of its tract, the Temple Hills Country Club Estates (Temple Hills), to the Williamson County Regional Planning Commission for approval. At that time, the county's zoning ordinance and the Commission's subdivision regulations required developers to seek review and approval of subdivision plats in two steps. The developer first was to submit for approval a preliminary plat, or "initial sketch plan," indicating, among other things, the boundaries and acreage of the site, the number of dwelling units and their basic design, the location of existing and proposed roads, structures, lots, utility layouts, and open space, and the contour of the land. App. in case No. 82–5388 (CA6), pp. 857, 871 (CA App.). Once approved, the preliminary plat served as a basis for the preparation of a final plat. Under the Commission's regulations, however, approval of a preliminary plat "will not constitute acceptance of the final plat." *Id.*, at 872. Approval of a preliminary plat lapsed if a final plat was not submitted within one year of the date of the approval, unless the Commission granted an extension of time, or unless the approval of the preliminary plat was renewed. *Ibid.* The final plat, which is the official authenticated document that is recorded, was required to conform substantially to the preliminary plat, and, in addition, to include such details as the lines of all streets, lots, boundaries, and building setbacks. *Id.*, at 875.

On May 3, 1973, the Commission approved the developer's preliminary plat for Temple Hills. App. 245–247. The plat indicated that the development was to include 676 acres, of which 260 acres would be open space, primarily in the form of a golf course. *Id.*, at 422. A notation on the plat indicated that the number of "allowable dwelling units for total development" was 736, but lot lines were drawn in for only 469 units. The areas in which the remaining 276 units were to be placed were left blank and bore the notation "this parcel not to be developed until approved by the planning commission." The plat also contained a disclaimer that "parcels with note 'this parcel not to be developed until approved by the planning commission' not a part of this plat and not included in gross areas." *Ibid.* The density of 736 allowable dwelling units was calculated by multiplying the number of acres (676) by the number of units allowed per acre (1.089). *Id.*, at 861. Although the zoning regulations in effect in 1973 required that density be calculated "on the basis of total acreage less fifty percent (50%) of the land lying in the flood plain . . . and less fifty percent (50%) of all land lying on a slope with a grade in excess of twenty-five percent (25%)," CA App. 850, no deduction was made from the 676 acres for such land. Tr. 369.

Upon approval of the preliminary plat, the developer conveyed to the county a permanent open space easement for the golf course, and began building roads and installing utility lines for the project. App. 259–260. The developer spent approximately $3 million building the golf course, and another $500,000 installing sewer and water facilities. Defendant's Ex. 96. Before horizontal construction was to begin on a particular section, a final plat of that section was submitted for approval. Several sections, containing a total of 212 units, were given final approval by 1979. App. 250, 270, 278, 423. The preliminary plat, as well, was reapproved four times during that period. *Id.*, at 270, 274, 362, 423.

In 1977, the county changed its zoning ordinance to require that calculations of allowable density exclude 10% of the total acreage to account for roads and utilities. *Id.*, at 363; CA App. 962. In addition, the number of allowable units was changed to one per acre from the 1.089 per acre allowed in 1973. *Id.*, at 858, 862; Tr. 1169–1170, 1182. The Commis-

PETITION FOR ZONING RE-CLASSIFICATION
SPECIAL EXCEPTION AND/OR VARIANCE

TO THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition (1) that the zoning status of the herein described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an RC-5 zone to an BR zone, for the reasons given in the attached statement; and (2) for a Special Exception, under the said Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property, for

and (3) for the reasons given in the attached statement, a variance from the following sections of the Zoning Law and Zoning Regulations of Baltimore County:

RECEIVED
COUNTY BOARD OF APPEALS
'86 MAR -1 P 2 48

#R-86-109
NELSON L. BOND, JR., ET AL
N/S Hanover Rd. 1996' +/- E/C
N. from center of Butler Rd.
4th Dist.
17A M #3

Property is to be posted and advertised as prescribed by The Baltimore County Code.

I, or we, agree to pay expenses of above Re-classification, Special Exception and/or Variance, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

Contract Purchaser:	Legal Owner(s):
(Type or Print Name)	Nelson L. Bond, Jr. (Type or Print Name)
Signature	Signature
Address	13019 Old Hanover Road Reisterstown, Maryland 21136 (Type or Print Name) Address
City and State	Calvin O. McElhattan, Jr. Signature Name
Attorney for Petitioner:	Signature
John B. Howard (Type or Print Name)	13015 Old Hanover Road Reisterstown, Maryland 21136 Address Phone No.
Signature	Calvin O. McElhattan, Sr.
210 Allegheny Avenue Address	City and State
Towson, Maryland 21204 City and State	13011 Old Hanover Rd. Reisterstown, MD Name, address and phone number of legal owner, contract purchaser or representative to be contacted
Attorney's Telephone No.: 823-4111	John B. Howard Name 210 Allegheny Avenue Towson, Maryland 21204 823-4111 Address Phone No.

BABC—Form 1

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

February 12, 1986

John B. Howard, Esq.
210 Allegheny Ave.
Towson, Md. 21204

Re: Case No. R-86-109
Nelson L. Bond, Jr., et al

Dear Mr. Howard:

Enclosed herewith is a copy of the Opinion and Order passed today by the County Board of Appeals in the above entitled case.

Very truly yours,

June Holmen

June Holmen, Secretary

Encl.
cc: Nelson L. Bond, Jr.
Calvin O. McElhattan, Jr.
Calvin O. McElhattan, Sr.
Phyllis C. Friedman
Arnold Jablon
James Dyer
Jean Jung
Norman Gerber
James Hoswell
James E. Kraft

IN THE MATTER OF THE APPLICATION OF NELSON L. BOND, JR., ET AL RE: PETITION FOR RECLASSIFICATION - 3 PARCELS SITUATED ON THE EAST SIDE OF OLD HANOVER RD., CONTAINING 1.4, .96 and 3.3 ACRES RESPECTIVELY, AND BEING SITUATED 1720', 995' and 2121' RESPECTIVELY NORTH BUTLER RD. 4th DISTRICT : BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY No. R-86-109

CONCURRING OPINION

Although I concur with the result reached by the majority, I arrive at that finding differently.

The majority does not consider the impact of Baltimore County Zoning Regulation (BCZR) Section 1 A00.3.A.1 in its Opinion. Rather, the majority holds that "Section 2-58.1 of the Baltimore County Code must be considered prior to consideration of the BCZR, Section 1 A00.3.A.1". After reaching the conclusion that this property was improperly classified, the majority finds it unnecessary to address BCZR 1 A00.3.A.1 as the property's proper classification is B.L.

I believe that BCZR 1 A00.3.A.1 must be addressed prior to consideration of the classification. This Section provides in essence, that a petition to reclassify an R.C. zone cannot be filed unless the property under petition is to be served by public water and sewer within two (2) years from the date of the petition.

People's Counsel argues that this regulation is constitutional as a lawful extension of the County's police power. Conversely, the Petitioner asserts that the regulation is unconstitutional as a violation of procedural due process, substantive due process and equal protection.

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Consideration of the interpretation of 1 A00.3.A.1 is a case of first impression before this Board. Although the matter was considered in D & R Joint Venture & Isaac Jones (R-83-189), a reconsideration of the Board's Memorandum of Opinion was granted. Thereafter, that case was never resolved on its merits.

In evaluating the constitutionality of 1 A00.3.A.1, I note particularly the holding of Hope vs. Baltimore Co. 288 MD 656, 41 A2d 576, (1980). This case held that the Board of Appeals is the exclusive remedy in the appellate process from an appeal from the approval or disapproval of a subdivision plat. The Court also noted that when a section of the Code is contrary to the provisions of the County Charter, that section is a nullity.

Based upon the holding in Hope, in addition to Petitioner's other arguments, I believe 1 A00.3.A.1 is unconstitutional. If this regulation were valid, its effect would be to deny relief to any property owner who alleged error in zoning the property R.C., if sewer and water facilities were not available within two (2) years. This prohibition would conflict with the Board's authority, under Section 602 of the Charter, of "original and exclusive jurisdiction over all petitions for reclassification", Baltimore Co. Charter, Section 602, (e).

Therefore, I would hold that BCZR 1 A00.3.A.1 is unconstitutional.

Turning to the reclassification itself, I agree with the majority's rationale and their result of zoning for this property of B.L. Thus, I join in the reclassification of this property from R.C. 5 to B.L.

Lawrence E. Schmidt

Lawrence E. Schmidt

Date: February 12, 1986

IN THE MATTER OF THE APPLICATION OF NELSON L. BOND, JR., ET AL RE: PETITION FOR RECLASSIFICATION - 3 PARCELS SITUATED ON THE EAST SIDE OF OLD HANOVER RD., CONTAINING 1.4, .96 and 3.3 ACRES RESPECTIVELY, AND BEING SITUATED 1720', 995' and 2121' RESPECTIVELY NORTH BUTLER RD. 4th DISTRICT : BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY No. R-86-109

OPINION

This case comes before this Board on Petition for a Reclassification of property from R.C. 5 to B.R. There are three parcels containing 3.3 acres, 1.4 acres and .96 acres, for a total of 5.66 acres covered under proper petition.

Petitioner presented two witnesses in this case, Mr. Nelson L. Bond, Jr., property owner, testifying for the entire 5.66 acre parcel and William Kirwin, Professional Land Planner. People's Counsel representing Baltimore County, presented one witness, Mr. James Hoswell, Planner for Baltimore County. Mr. Bond testified as to the local changes in the character of the area since his purchase in 1977 and described these changes in detail. He also testified that he requested a change in zoning before the Baltimore County Council following the requested change to B.R. by the Reisterstown Lumber Company. He especially noted the fact that these subject properties are bordered on the south and east by a 400 ft. wide (B.G.&E.) right-of-way for power transmission towers and power line. Mr. William Kirwin testified as to the abutting and surrounding commercial zones and uses. He also testified that the sewer and water lines end approximately 2000 feet south of these properties and that while no plans exist to extend these services, the properties are located within the Metropolitan District and that this area is designated as a fringe development area. He also noted that one of the individual properties is less than the minimum lot size required under the R.C. 5 zoning classification.

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Mr. James Hoswell testified that all three individual properties were issues in the Comprehensive Map Process and since there was no plan to extend water and sewer services, the R.C. 5 was the most appropriate classification. On cross examination, he testified that in the 1984 map process on the Reisterstown Lumber Company's property, the B.R. zoning was increased by some 11 acres, this property directly abutting the subject site to the north. This concluded the direct testimony in this case and this very brief synopsis of the testimony in no way purports to be complete, but the record produced during this hearing will speak for itself.

Memorandums in this case were received from both parties and were carefully considered. Mr. Zimmerman's memo leans heavily upon the wording in the Baltimore County Zoning Regulations (BCZR) Section 1A00.3.A.1, which clearly states that no petition may be accepted to reclassify any R.C. zone to other than some other R.C. zone unless water and sewer are planned within two years as are not planned in this case. Section 2-58.1.J(1) states that before any property is reclassified, the Board must find that the last classification of the property was established in error. It is the opinion of this Board, that Section 2-58.1 of the Baltimore County Code must be considered prior to consideration of the BCZR, Section 1A00.3.A.1. The Board notes that this R.C. classification of the subject site is not one of long standing but a classification awarded during the 1984 map process. During this same process, 11 acres were reclassified to B.R. directly abutting the subject site. In the consideration of this 11 acres, it would seem impossible not to note the B.L. zoning directly across Hanover Pike, the existence of the 400' wide transmission line and the proximity of the large business of Reisterstown Lumber Company.

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To reclassify this small parcel, well defined by this transmission line, in the midst of all this business zoning as R.C. 5 would be arbitrary and thus in error. Having established that the R.C. 5 zoning, in this Board's opinion, is in error, Section 602 of the Baltimore County Charter grants this Board jurisdiction over all petitions for reclassification. Section 2-58-1J(2) states that the prospective reclassification of the property is warranted by that change or error. The Board finds in this case that such reclassification is warranted by that error. To confine forever the use of this 5.66 acres as strictly residential in the center of all the business zoning is unreasonable. Section 2-58.1J(2) further states that any finding of such change or error and any finding that the prospective reclassification is warranted may be made only upon consideration of factors relating to the purposes of the zoning regulations and maps including but not limited to all of the following, one of which is compatability of uses generally allowable under the prospective classification with the present and projected development or character of the surrounding area. Residential use is, in the opinion of this Board, not compatible with the business use already afforded adjacent properties, but the request for B.R. classification is somewhat suspect. Ample B.R. zoning with the addition of the 11 acres granted Reisterstown Lumber appears provided. A more logical classification for the subject site would be B.L. allowing for less extensive business use. It is the opinion of this Board that the County Council erred in assigning the R.C. 5 designation to this property, so therefore, Section 1A003.A.1 does not prevail. Section 602 of the Baltimore County Charter and Baltimore County Code Section 2-58.1 authorize the Baltimore County Board of Appeals the right to reclassify property under the petition process. It is the opinion of this Board that the R.C. 5 classification is in error and that the proper classification for the subject petitions should be B.L. and will so Order.

Nelson L. Bond, Jr., et al
Case No. R-86-109 4.

ORDER

For the reasons set forth in the aforegoing Opinion, it is this 12th day of February, 1986, by the County Board of Appeals, ORDERED that the requested petitions for reclassification of the subject sites from R.C. 5 to B.R., be DENIED, but that reclassification from R.C. 5 to B.L. be and the same is GRANTED.

Any appeal from this decision must be in accordance with Rules B-1 thru B-13 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

William T. Hackett

William T. Hackett, Chairman

LeRoy B. Spurrier

LeRoy B. Spurrier

sion continued to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, however, and reapproved the preliminary plat in 1978. In August 1979, the Commission reversed its position and decided that plats submitted for renewal should be evaluated under the zoning ordinance and subdivision regulations in effect when the renewal was sought. App. 279–282. The Commission then renewed the Temple Hills plat under the ordinances and regulations in effect at that time. *Id.*, at 283–284.

In January 1980, the Commission asked the developer to submit a revised preliminary plat before it sought final approval for the remaining sections of the subdivision. The Commission reasoned that this was necessary because the original preliminary plat contained a number of surveying errors, the land available in the subdivision had been decreased inasmuch as the State had condemned part of the land for a parkway, and the areas marked "reserved for future development" had never been platted. Plaintiff's Exs. 1078 and 1079; Tr. 164–168. A special committee (Temple Hills Committee) was appointed to work with the developer on the revision of the preliminary plat. Plaintiff's Ex. 1081; Tr. 169–170.

The developer submitted a revised preliminary plat for approval in October 1980.[3] Upon review, the Commission's staff and the Temple Hills Committee noted several problems with the revised plat. App. 304–305. First, the allowable density under the zoning ordinance and subdivision regulations then in effect was 548 units, rather than the 736 units claimed under the preliminary plat approved in 1973. The difference reflected a decrease in 18.5 acres for the parkway, a decrease of 56 acres for the 10% deduction for roads, and an

[3]The developer also submitted the preliminary plat that had been approved in 1973 and reapproved on several subsequent occasions, contending that it had the right to develop the property according to that plat. As we have noted, that plat did not indicate how all of the parcels would be developed. App. 84–85.

exclusion of 44 acres for 50% of the land lying on slopes exceeding a 25% grade. Second, two cul-de-sac roads that had become necessary because of the land taken for the parkway exceeded the maximum length allowed for such roads under the subdivision regulations in effect in both 1980 and 1973. Third, approximately 2000 feet of road would have grades in excess of the maximum allowed by county road regulations. Fourth, the preliminary plat placed units on land that had grades in excess of 25% and thus was considered undevelopable under the zoning ordinance and subdivision regulations. Fifth, the developer had not fulfilled its obligations regarding the construction and maintenance of the main access road. Sixth, there were inadequate fire protection services for the area, as well as inadequate open space for children's recreational activities. Finally, the lots proposed in the preliminary plat had a road frontage that was below the minimum required by the subdivision regulations in effect in 1980.

The Temple Hills Committee recommended that the Commission grant a waiver of the regulations regarding the length of the cul-de-sacs, the maximum grade of the roads, and the minimum frontage requirement. *Id.*, at 297, 304–306. Without addressing the suggestion that those three requirements be waived, the Commission disapproved the plat on two other grounds: first, the plat did not comply with the density requirements of the zoning ordinance or subdivision regulations, because no deduction had been made for the land taken for the parkway, and because there had been no deduction for 10% of the acreage attributable to roads or for 50% of the land having a slope of more than 25%; and second, lots were placed on slopes with a grade greater than 25%. Plaintiff's Ex. 9112.

The developer then appealed to the County Board of Zoning Appeals for an "interpretation of the Residential Cluster zoning [ordinance] as it relates to Temple Hills."[4] App. 314.

[4]The Board of Zoning Appeals was empowered:

On November 11, 1980, the Board determined that the Commission should apply the zoning ordinance and subdivision regulations that were in effect in 1973 in evaluating the density of Temple Hills. *Id.*, at 328. It also decided that in measuring which lots had excessive grades, the Commission should define the slope in a manner more favorable to the developer. *Id.*, at 329.

On November 26, respondent, Hamilton Bank of Johnson City, acquired through foreclosure the property in the Temple Hills subdivision that had not yet been developed, a total of 257.65 acres. *Id.*, at 189–190. This included many of the parcels that had been left blank in the preliminary plat approved in 1973. In June 1981, respondent submitted two preliminary plats to the Commission—the plat that had been approved in 1973 and subsequently reapproved several times, and a plat indicating respondent's plans for the undeveloped areas, which was similar to the plat submitted by the developer in 1980. *Id.*, at 8a. The new plat proposed the development of 688 units; the reduction from 736 units represented respondent's concession that 18.5 acres should be removed from the acreage because that land had been taken for the parkway. *Id.*, at 424, 425.

"a. To hear and decide appeals on any permit, decision, determination, or refusal made by the [County] Building Commissioner or other administrative official in the carrying out or enforcement of any provision of this Resolution; and to interpret the Zoning map and this Resolution.

"c. To hear and decide applications for variances from the terms of this Resolution. Such variances shall be granted only where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property which at the time of adoption of this Resolution was a lot of record, or where by reason of exceptional topographic situations or conditions of a piece of property the strict application of the provisions of this Resolution would result in practical difficulties to or undue hardship upon the owner of such property." Plaintiff's Ex. 9112. See also Tenn. Code. Ann. §§ 13–7–106 to 13–7–109 (1980).

On June 18, the Commission disapproved the plat for eight reasons, including the density and grade problems cited in the October 1980 denial, as well as the objections the Temple Hills Committee had raised in 1980 to the length of two cul-de-sacs, the grade of various roads, the lack of fire protection, the disrepair of the main-access road, and the minimum frontage. *Id.*, at 270. The Commission declined to follow the decision of the Board of Zoning Appeals that the plat should be evaluated by the 1973 zoning ordinance and subdivision regulations, stating that the Board lacked jurisdiction to hear appeals from the Commission. *Id.*, at 187–188, 360–361.

B

Respondent then filed this suit in the United States District Court for the Middle District of Tennessee, pursuant to 42 U. S. C. §1983, alleging that the Commission had taken its property without just compensation and asserting that the Commission should be estopped under state law from denying approval of the project.[5] Respondent's expert witnesses testified that the design that would meet each of the Commission's eight objections would allow respondent to build only 67 units, 409 fewer than respondent claims it is entitled to build,[6] and that the development of only 67 sites would result in a net loss of over $1 million. App. 377. Petitioners' expert witness, on the other hand, testified that the Commission's eight objections could be overcome by a design that

[5]Respondent also alleged that the Commission's refusal to approve the plat violated respondent's rights to substantive and procedural due process and denied it equal protection. The District Court granted a directed verdict to petitioners on the substantive due process and equal protection claims, and the jury found that respondent had not been denied procedural due process. App. 32. Those issues are not before us.

[6]*Id.*, at 277; Tr. 238–243. Respondent claimed it was entitled to build 676 units: the 736 units allegedly approved in 1973 minus the 212 units already built or given final approval and minus 48 units that were no longer available because land had been taken from the subdivision for the parkway.

would allow development of approximately 300 units. Tr. 1467–1468.

After a three-week trial, the jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause, and that the Commission was estopped under state law from requiring respondent to comply with the current zoning ordinance and subdivision regulations rather than those in effect in 1973. App. 32–35. The jury awarded damages of $350,000 for the temporary taking of respondent's property. *Id.*, at 33–34.[7] The court entered a permanent injunction requiring the Commission to apply the zoning ordinance and subdivision regulations in effect in 1973 to Temple Hills, and to approve the plat submitted in 1981. *Id.*, at 34.

The court then granted judgment notwithstanding the verdict in favor of the Commission on the taking claim, reasoning in part that respondent was unable to derive economic benefit from its property on a temporary basis only, and that such a temporary deprivation, as a matter of law, cannot constitute a taking. *Id.*, at 36, 41. In addition, the court modified its permanent injunction to require the Commission merely to apply the zoning ordinance and subdivision regulations in effect in 1973 to the project, rather than requiring approval of the plat, in order to allow the parties to resolve "legitimate technical questions of whether plaintiff meets the requirements of the 1973 regulations," *id.*, at 42, through the appli-

[7]Although the record is less than clear, it appears that the jury calculated the $350,000 award by determining a fair rate of return on the value of the property for the time between the Commission's rejection of the preliminary plat in 1980 and the jury's verdict in March 1982. See Tr. 300–305; Tr. of Ors' Arg. 25, 32–33. In light of our disposition of the case, we need not reach the question whether that measure of damages would provide just compensation, or whether it would be appropriate if respondent's claims of action were viewed as stating a claim under the Due Process Clause.

cable state and local appeals procedures.[8]

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed. 729 F. 2d 402 (1984). The court held that application of government regulations affecting an owner's use of property may constitute a taking if the regulation denies the owner all "economically viable" use of the land, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the preliminary plat and the jury's verdict. *Id.*, at 405–406. Rejecting petitioners' argument that respondent never had submitted a plat that complied with the 1973 regulations, and thus never had acquired rights that could be taken, the court held that the jury's estoppel verdict indicates that the jury must have found that respondent had acquired a "vested right" under state law to develop the subdivision according to the plat submitted in 1973. *Id.*, at 407. Even if respondent had no vested right under state law to finish the development, the jury was entitled to find that respondent had a reasonable investment-backed expectation that the development could be completed, and that the actions of the Commission interfered with that expectation. *Ibid.*

The court rejected the District Court's holding that the taking verdict could not stand as a matter of law. A temporary denial of property could be a taking, and was to be analyzed in the same manner as a permanent taking. Finally, relying upon the dissent in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 636 (1981), the court determined

[8]While respondent's appeal was pending before the Court of Appeals, the parties reached an agreement whereby the Commission granted a variance from its cul-de-sac and road grade regulations and approved the development of 676 units, and respondent agreed, among other things, to rebuild existing roads, and build all new roads, according to current regulations. App. to Brief for Petitioners 3a.

that damages are required to compensate for a temporary taking.[9]

II

We granted certiorari to address the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations. —— U. S. —— (1984). Petitioners and their *amici* contend that we should answer the question in the negative by ruling that government regulation can never effect a "taking" within the meaning of the Fifth Amendment. They recognize that government regulation may be so restrictive that it deprives a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use, which concededly would be a taking under the Fifth Amendment. According to petitioners, however, regulation that has such an effect should not be viewed as a taking. Instead, such regulation should be viewed as a violation of the Fourteenth Amendment's Due Process Clause, because it is an attempt by government to use its police power to effect a result that is so unduly oppressive to the property owner that it constitutionally can be effected only through the power of eminent domain. Viola-

[9]Judge Wellford dissented. 729 F. 2d, at 409. He did not agree that the evidence supported a finding that respondent's property had been taken, in part because there was no evidence that respondent had formally requested a variance from the regulations. Even if there was a temporary denial of the "economically viable" use of the property, Judge Wellford would have held that mere fluctuations in value during the process of governmental decision-making are "incidents of ownership" and cannot be considered a "taking." *Id.*, at 410, quoting *Agins* v. *Tiburon*, 447 U. S. 255, 263, n. 9 (1980). He also did not agree that damages could be awarded to remedy any taking, reasoning that the *San Diego Gas* dissent does not reflect the views of the majority of this Court, and that this Court never has awarded damages for a temporary taking where there was no invasion, physical occupation, or "seizure and direction" by the State of the landowner's property. 729 F. 2d, at 411.

tions of the Due Process Clause, petitioners' argument concludes, need not be remedied by "just compensation."

The Court twice has left this issue undecided. *San Diego Gas & Electric Co.* v. *San Diego*, *supra*; *Agins* v. *Tiburon*, 447 U. S. 255, 263 (1980). Once again, we find that the question is not properly presented, and must be left for another day. For whether we examine the Planning Commission's application of its regulations under Fifth Amendment "taking" jurisprudence, or under the precept of due process, we conclude that respondent's claim is premature.

III

We examine the posture of respondent's cause of action first by viewing it as stating a claim under the Just Compensation Clause. This Court often has referred to regulation that "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922), as a "taking." See, *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, —— U. S. ——, (1984) (slip op. 16–17); *Agins* v. *Tiburon*, 447 U. S., at 260; *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980); *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962); *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958). Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation, see *San Diego*, 450 U. S., at 647–653 (dissenting opinion), and even assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld. Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee

provides for obtaining just compensation, respondent's claim is not ripe.

A

As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. In *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981), for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. § 1201 *et seq.*, effected a taking because:

> "There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." 452 U. S., at 297 (footnote omitted).

Similarly, in *Agins* v. *Tiburon*, *supra*, the Court held that a challenge to the application of a zoning ordinance was not *ripe* because the property owners had not yet submitted a plan for development of their property. 447 U. S., at 260. In *Penn Central Transp. Co.* v. *New York City*, *supra*, the Court declined to find that the application of New York City's Landmarks Preservation Law to Grand Central Terminal effected a taking because, although the Landmarks Preserva-

tion Commission had disapproved a plan for a 50-story office building above the terminal, the property owners had not sought approval for any other plan, and it therefore was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property. 438 U. S., at 136–137.

Respondent's claim is in a posture similar to the claims the Court held premature in *Hodel*. Respondent has submitted a plan for developing its property, and thus has passed beyond the *Agins* threshhold. But, like the *Hodel* plaintiffs, respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%. Tr. 1204–1205, see n. 3, *supra*. The Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road grade, and frontage requirements.[1] Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations. App. 304–306. Nevertheless, re-

[1]The subdivision regulations in effect in 1980 and 1981 provided:

"Variances may be granted under the following conditions:

"Where the subdivider can show that strict adherence to these regulations would cause unnecessary hardship, due to conditions beyond the control of the subdivider. If the subdivider creates the hardship due to his design or in an effort to increase the yield of lots in his subdivision, the variance will not be granted.

"Where the Planning Commission decides that there are topographical or other conditions peculiar to the site, and a departure from their regulations will not destroy their intent." CA App. 822.

spondent did not seek variances from either the Board or the Commission.

Respondent argues that it "did everything possible to resolve the conflict with the commission," Brief for Respondent 42, and that the Commission's denial of approval for respondent's plat was equivalent to a denial of variances. The record does not support respondent's claim, however. There is no evidence that respondent applied to the Board of Zoning Appeals for variances from the zoning ordinance. As noted, the developer sought a ruling that the ordinance in effect in 1973 should be applied, but neither respondent nor the developer sought a variance from the requirements of either the 1973 or 1980 ordinances. Further, although the subdivision regulations in effect in 1981 required that applications to the Commission for variances be in writing, and that notice of the application be given to owners of adjacent property,[2] the record contains no evidence that respondent ever filed a written request for variances from the cul-de-sac, road grade, or frontage requirements of the subdivision regulations, or that respondent ever gave the required notice.[3] App. 212–213; see also Tr. 1255–1257.

[2]The Commission's regulations required that

"Each applicant must file with the Planning Commission a written request for variance stating at least the following:

"a. The variance requested;

"b. Reason or circumstances requiring the variance;

"c. Notice to the adjacent property owners that a variance is being requested.

"Without the application any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." *Id.*, at 833.

[3]Respondent's predecessor-in-interest requested, and apparently was granted, a waiver of the 10% road grade regulation for section VI of the subdivision. See Plaintiff's Exs. 107S, 109d. The predecessor-in-interest wrote a letter on January 3, 1980, that respondent contends must be construed as a request for a waiver of the road-grade regulation for the entire subdivision:

Indeed, in a letter to the Commission written shortly before its June 18, 1981, meeting to consider the preliminary sketch, respondent took the position that it would not request variances from the Commission until *after* the Commission approved its proposed plat:

> "[Respondent] stands ready to work with the Planning Commission concerning the necessary variances. Until the initial sketch is renewed, however, and the developer has an opportunity to do detailed engineering work it is impossible to determine the exact nature of any variances that may be needed." Plaintiff's Ex. 902S, p. 6.

The Commission's regulations clearly indicated that unless a developer applied for a variance in writing and upon notice to other property owners, "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." CA App. 833. Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about

"I contend that the road grade and slope question . . . is adequately provided for by both the [subdivision] Regulations and the Zoning Ordinance. In both, the Planning Commission is given the authority to approve roads that have grades in excess of 10%.

"In our particular case, it was common knowledge from the beginning that due to the character of the land involved that there would be roads that exceeded the 10% slope. In fact in our first Section there is a stretch of road that exceeds the 10%; therefore I respectfully request that this letter be made an official part of the Planning Commission Minutes of January 8, 1980 and further the Zoning Approval which has been granted be allowed to stand without any changes." Defendants' Ex. 9S.

Even assuming *arguendo* that the letter constituted a request for a variance, respondent's taking claim nevertheless is not ripe. There is no evidence that respondent requested variances from the regulations that formed the basis of the other objections raised by the Commission, such as those regulating the length of cul-de-sacs. Absent a final decision regarding the application of all eight of the Commission's objections, it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed.

the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.

As in *Hodel*, *Agins*, and *Penn Central*, then, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine takings claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for the purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co.* v. *New York City*, 438 U. S., at 123, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Id.*, at 124. See also *Ruckelshaus* v. *Monsanto Co.*, —— U. S., at —— (slip op. 17); *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 83; *Kaiser Aetna* v. *United States*, 444 U. S., at 175. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Here, for example, the jury's verdict indicates only that it found that respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the Commission's eight objections. It is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance. Indeed, the expert witness who testified regarding the economic impact of the Commission's actions did not itemize the effect of each of the eight objections, so the jury would have been unable to discern how a grant of a variance from any one of the regula-

tions at issue would have affected the profitability of the development. App. 377; see also *id.*, at 102–104. Accordingly, until the Commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondents "will be unable to derive economic benefit" from the land.[4]

Respondent asserts that it should not be required to seek variances from the regulations because its suit is predicated upon 42 U. S. C. § 1983, and there is no requirement that a

[4]The District Court's instructions allowed the jury to find a taking if it ascertained "that the regulations in question as applied to [respondent's] property denied [respondent] economically viable use of its property." Tr. 2016. That instruction seems to assume that respondent's taking theory was simply that its property was rendered valueless by the application of new zoning laws and subdivision regulations in 1980. The record indicates, however, that respondent's claim was based upon a state law theory of "vested rights," and that the alleged "taking" was the Commission's interference with respondent's "expectation interest" in completing the development according to its original plans. The evidence that it was not economically feasible to develop just the 67 units respondent claims the Commission's actions would limit it to developing was based upon the cost of building the development according to the original plan. The expected income from the sale of the 67 units apparently was measured against the cost of the 27-hole golf course and the cost of installing water and sewer connections for a large development that would not have had to have been installed for a development of only 67 units. App. 191–197; Tr. 690; see also *id.*, at 2154–2155. Thus, the evidence appears to indicate that it would not be profitable to develop 67 units because respondent had made various expenditures in the expectation that the development would contain far more units; the evidence does not appear to support the proposition that, aside from those "reliance" expenditures, development of 67 units on the property would not be economically feasible.

We express no view of the propriety of applying the "economic viability" test when the taking claim is based upon such a theory of "vested rights" or "expectation interest." Cf. *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979) (analyzing a claim that government regulations effected a taking by reducing expected profits). It is sufficient for our purposes to note that whether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, it is impossible to determine the extent of the loss or interference until the Commission has de-

plaintiff exhaust administrative remedies before bringing a § 1983 action. *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. See *FTC* v. *Standard Oil Co.*, 449 U. S. 232, 243 (1980); *Bethlehem Steel Corp.* v. *EPA*, 669 F. 2d 903, 908 (CA2 1982). See generally, C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3532.6 (1984). While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.

The difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy*, respondent would not be required to exhaust. While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, see *Fallin* v. *Knox County Bd. of Comm'rs*, 656 S. W. 2d 338 (Tenn. 1983); Tenn. Code Ann. §§ 27–8–101, 27–9–101 to 27–9–113, and 29–14–101 to 29–14–113 (1980 and Supp. 1984), respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board

cided whether it will grant a variance from the application of the regulations.

of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decision-making.

Resort to those procedures would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

B

A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.[5] The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 297, n. 40. Nor does

[5]Again, it is necessary to contrast the procedures provided for review of the Commission's actions, such as those for obtaining a declaratory judgment, see Tenn. Code Ann. §§ 29–14–101 to 29–14–113 (1980), with procedures that allow a property owner to obtain compensation for a taking. Exhaustion of review procedures is not required. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). As we have explained, however, because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

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Respondent's claim is in a posture similar to the claims the Court held premature in *Hodel*. Respondent has submitted a plan for developing its property, and thus has passed beyond the *Agins* threshhold. But, like the *Hodel* plaintiffs, respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%. Tr. 1204–1205, see n. 3, *supra*. The Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road grade, and frontage requirements.[1] Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations. App. 304–306. Nevertheless, re-

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Here, for example, the jury's verdict indicates only that it found that respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the Commission's eight objections. It is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance. Indeed, the expert witness who testified regarding the economic impact of the Commission's actions did not itemize the effect of each of the eight objections, so the jury would have been unable to discern how a grant of a variance from any one of the regula-

tions at issue would have affected the profitability of the development. App. 377; see also *id.*, at 102–104. Accordingly, until the Commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondents "will be unable to derive economic benefit" from the land.[4]

Respondent asserts that it should not be required to seek variances from the regulations because its suit is predicated upon 42 U. S. C. § 1983, and there is no requirement that a

[4]The District Court's instructions allowed the jury to find a taking if it ascertained "that the regulations in question as applied to [respondent's] property denied [respondent] economically viable use of its property." Tr. 2016. That instruction seems to assume that respondent's taking theory was simply that its property was rendered valueless by the application of new zoning laws and subdivision regulations in 1980. The record indicates, however, that respondent's claim was based upon a state law theory of "vested rights," and that the alleged "taking" was the Commission's interference with respondent's "expectation interest" in completing the development according to its original plans. The evidence that it was not economically feasible to develop just the 67 units respondent claims the Commission's actions would limit it to developing was based upon the cost of building the development according to the original plan. The expected income from the sale of the 67 units apparently was measured against the cost of the 27-hole golf course and the cost of installing water and sewer connections for a large development that would not have had to have been installed for a development of only 67 units. App. 191–197; Tr. 690; see also *id.*, at 2154–2155. Thus, the evidence appears to indicate that it would not be profitable to develop 67 units because respondent had made various expenditures in the expectation that the development would contain far more units; the evidence does not appear to support the proposition that, aside from those "reliance" expenditures, development of 67 units on the property would not be economically feasible.

We express no view of the propriety of applying the "economic viability" test when the taking claim is based upon such a theory of "vested rights" or "expectation interest." Cf. *Andrus* v. *Allard*, 444 U. S. 51, 66 (1979) (analyzing a claim that government regulations effected a taking by reducing expected profits). It is sufficient for our purposes to note that whether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, it is impossible to determine the extent of the loss or interference until the Commission has de-

plaintiff exhaust administrative remedies before bringing a § 1983 action. *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. See *FTC* v. *Standard Oil Co.*, 449 U. S. 232, 243 (1980); *Bethlehem Steel Corp.* v. *EPA*, 669 F. 2d 903, 908 (CA2 1982). See generally, C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3532.6 (1984). While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.

The difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy*, respondent would not be required to exhaust. While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, see *Fallin* v. *Knox County Bd. of Comm'rs*, 656 S. W. 2d 338 (Tenn. 1983); Tenn. Code Ann. §§ 27–8–101, 27–9–101 to 27–9–113, and 29–14–101 to 29–14–113 (1980 and Supp. 1984), respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board

cided whether it will grant a variance from the application of the regulations.

of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decision-making.

Resort to those procedures would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

B

A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.[5] The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel* v. *Virginia Surface Mining & Recl. Assn., Inc.*, 452 U. S., at 297, n. 40. Nor does

[5]Again, it is necessary to contrast the procedures provided for review of the Commission's actions, such as those for obtaining a declaratory judgment, see Tenn. Code Ann. §§ 29–14–101 to 29–14–113 (1980), with procedures that allow a property owner to obtain compensation for a taking. Exhaustion of review procedures is not required. See *Patsy* v. *Florida Board of Regents*, 457 U. S. 496 (1982). As we have explained, however, because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 124–125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890)). See also *Ruckelshaus* v. *Monsanto Co.*, —— U. S., at —— (slip op. 28); *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932). If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government for a taking." *Monsanto*, —— U. S., at ——, and n. 21 (slip op. 24, and 30, n. 21). Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U. S. C. §1491. *Monsanto*, at —— – —— (slip op. 27–31). Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt* v. *Taylor*, 451 U. S. 527 (1981). There, the Court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson* v. *Palmer*, —— U. S. ——, —— n. 12 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.[*]

Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn. Code Ann. §29–16–123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain. §§29–16–101 to 29–16–121. The State is prohibited from "entor[ing] upon [condemned] land" until these procedures have been utilized and compensation has been paid the owner, §29–16–122, but if a government entity does take possession of the land without following the required procedures,

> "the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way . . . ." §29–16–123.

The Tennessee state courts have interpreted §29–16–123 to allow recovery through inverse condemnation where the "taking" is effected by restrictive zoning laws or development regulations. See *Davis* v. *Metropolitan Gov't of Nashville*, 620 S. W. 2d 532, 533–534 (Tenn. App. 1981); *Speight* v. *Lockhart*, 524 S. W. 2d 249 (Tenn. App. 1975). Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

IV

We turn to an analysis of respondent's claim under the due process theory that petitioners espouse. As noted, under that theory government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Should the Government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken. The remedy *for* a regulation that goes too far, under the due process theory, is not "just compensation," but invalidation of the regulation, and if authorized and appropriate, actual damages.[*]

The notion that excessive regulation can constitute a "taking" under the Just Compensation Clause stems from language in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922). See *San Diego*, 450 U. S., at 649 (dissenting opinion). Writing for the *Pennsylvania Coal* Court, Justice Holmes stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S., at 415. Those who argue that excessive regulation should be considered a violation of the Due Process Clause rather than a "taking" assert that *Pennsylvania Coal* used the word "taking" not in the literal Fifth Amendment sense, but as a metaphor for actions having the same effect as a taking by eminent domain. See, *e. g.*, *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 274, 598 P. 2d 25, 29 (1979), aff'd, 447 U. S. 255 (1980); *Fred F. French Investing Co.* v. *City of New York*, 39 N. Y. 2d 587, 594, 350 N. E. 2d 381, 385 (1976). Because no issue was presented in *Pennsylvania Coal* regarding compensation, it is argued, the Court was free to use the term loosely.[*]

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[*] The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations such as those involved in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982), in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process. Unlike the Due Process Clause, however, the Just Compensation Clause has never been held to require pretaking process or compensation. *Ruckelshaus* v. *Monsanto Co.*, —— U. S. ——, —— (1984) (slip op. 29). Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by posttaking compensation. Under the Due Process Clause, on the other hand, the Court has recognized that predeprivation process is of "obvious value in reaching an accurate decision," that the "only meaningful opportunity to invoke the discretion of a decisionmaker is likely to be before the [deprivation] takes place," *Cleveland Board of Education* v. *Loudermill*, —— U. S. —— (1985) (slip op. 9–10), and that predeprivation process may serve the purpose of making an individual feel that the Government has dealt with him fairly. See *Carey* v. *Piphus*, 435 U. S. 247, 262 (1978). Thus, despite the Court's holding in *Logan*, *Parratt*'s reasoning applies here by analogy because of the special nature of the Just Compensation Clause.

[*] See generally F. Bosselman, D. Callies, J. Banta, The Taking Issue 238–255 (1973); Stark, Government Liability for Unconstitutional Land Use Regulation, —— Ind. L. J. —— (1985); Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981); Stoebuck, Police Power, Takings, and Due Process, 37 Wash. & Lee L. Rev. 1057 (1980); Comment, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, 57 Wash. L. Rev. 715 (1982); Comment, Just Compensation or Just Invalidation: The Availability of a Damage Remedy in Challenging Land Use Regulations, 29 UCLA L. Rev. 711 (1982); cf. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 102 (1975) (proposing that regulation be viewed as neither an exercise of the police power, nor as a taking, but as an exercise of an "accommodation" power, which would require government to offer "fair compensation" for regulation that "goes too far").

[*] In *Pennsylvania Coal*, homeowners sought to enjoin a coal company from mining coal under their house in violation of Pennsylvania's Kohler Act, which prohibited the mining of coal that would cause the subsidence of any home or industrial or mercantile establishment. In defense, the coal company argued not that the regulation itself was a "taking" for which just compensation was required, but that "[i]f surface support in the anthracite district is necessary for public use, it can constitutionally be acquired only by condemnation with just compensation to the parties affected." 260 U. S., at 400.

The due process argument finds support, we are told, in the fact that *Pennsylvania Coal* framed the question presented as "whether the police power can be stretched so far" as to destroy property rights, 260 U. S., at 413, and by the Court's emphasis upon the need to proceed by eminent domain rather than by regulation when the effect of the regulation would be to destroy property interests:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases *there must be an exercise of eminent domain and compensation to sustain the act.*" *Ibid.* (Emphasis added.)

Further, in earlier cases involving the constitutional limitations on the exercise of police power, Justice Holmes' opinions for the Court made clear that the Court did not view overly restrictive regulation as triggering an award of compensation, but as an invalid means of accomplishing what constitutionally can be accomplished only through the exercise of eminent domain. See, *e. g.*, *Block* v. *Hirsch*, 256 U. S. 135, 156 (1921); *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908); *Martin* v. *District of Columbia*, 205 U. S. 135, 139 (1907).

We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.[*] As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its §1983 action, because respondent failed to apply for variances from the regulations.

V

In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.[*] We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE dissents from the holding that the issues in this case are not ripe for decision at this time.

JUSTICE POWELL took no part in the decision of this case.

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[*] "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a "taking" has been called the "lawyer's equivalent of the physicist's hunt for the quark." C. Haar, Land-Use Planning 756 (3d ed. 1976). See generally, Bauman, The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, 16 Rutgers L. J. 15, 20–32 (1985); Stoebuck, *supra*, at 1058–1079; Berger, A Policy Analysis of the Taking Problem, 49 N. Y. U. L. Rev. 165 (1974); Sax, Taking, Private Property and Public Rights, 81 Yale L. J. 149 (1971); Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. Cal. L. Rev. 1 (1971); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

[*] In light of this disposition, we need not reach the question whether the jury's verdict that respondent's expectation interest had been "taken," see n. 12, *supra*, can stand in light of the absence of any discussion in the jury instructions about the reasonableness of the alleged expectation interest. See *Ruckelshaus* v. *Monsanto Co.*, —— U. S. ——, —— (1984) (slip op. 17); *Andrus* v. *Allard*, 444 U. S., at 66. Nor do we need to reach the question whether the jury was properly allowed to determine the economic feasibility of the property, or the extent of interference with respondent's expectation interests, by reference to only that portion of the development purchased by respondent, rather than by reference to the development as a whole. Cf. *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 130 (1978).

SUPREME COURT OF THE UNITED STATES

No. 84–4

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., PETITIONERS v. HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 28, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

The Court today discusses two methods for analyzing the constitutional injury that may result from the temporary application of government regulations denying property any economically viable use. The Court concludes that, under either approach, the respondent's claim is premature because the petitioner Williamson County Regional Planning Commission's 1981 disapproval of the respondent's preliminary plat did not constitute a final reviewable decision given the availability of a variance procedure that the respondent did not pursue. *Ante*, at 11–12, 26.

I join the Court's opinion without, however, departing from my views set forth in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 636 (1981) (BRENNAN, J., dissenting). Because "[i]nvalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken," I believe that "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government chooses to rescind or otherwise amend the regulation." *Id.*, at 653, 655. As the

Court demonstrates in this case, however, "the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision." *Ante*, at 20. In addition, "[r]espondent has not shown that [Tennessee's] inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature." *Ante*, at 23. Accordingly, I join the Court's opinion reversing the judgment of the Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

No. 84-4

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., PETITIONERS v. HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 28, 1985]

JUSTICE STEVENS, concurring in the judgment.

Zoning restrictions are a species of governmental regulation that may impair the value of private property. The impairment may occur in one of two ways. The substance of a restriction may permanently curtail the economic value of the property. Or the procedures that must be employed, either to obtain permission to use property in a particular way or to remove an unlawful restriction on its use, may temporarily deprive the owner of a fair return on his investment. For convenience, I will refer to the former category as "permanent harms" and the latter as "temporary harms."

Permanent harms fall into three subcategories. They may be impermissible even if the Government is willing to pay for them.[1] They may be permissible provided that the property owner is compensated for his loss.[2] Or they may be permissible even if no compensation at all is paid.[3] The permanent harm inflicted by the zoning regulations at issue in this case is

[1] For example, even if the State is willing to compensate me, it has no right to appropriate my property because it does not agree with my political or religious views.

[2] See *e. g., United States v. 50 Acres of Land*, 469 U. S. ——, —— (1984).

[3] See *e. g., Penn Central Transportation Co. v. New York City*, 438 U. S. 104 (1978).

either in the second or the third subcategory. As the Court demonstrates, until all available remedies have been exhausted, all we can say with any certainty is that petitioners may be required to abandon some of their restrictions upon respondent unless they are prepared to compensate respondent for whatever permanent harm they may cause.

In most litigation involving a challenge to a governmental regulation—and this case is no exception—the Government contends that the public interest justifies the harm to the property owner and that no compensation need be paid. If the Government fails to convince the court that such is the case—that is, if it is not entitled to impose an uncompensated permanent harm on the property owner—the court can express its ruling on the merits by stating that the regulation is invalid, or by characterizing it as a "taking." In either event, the essence of the holding is a conclusion that the harm caused by the regulation is one that the Government may not impose unless it is prepared to pay for it. In my opinion, when such a situation develops, there is nothing in the Constitution that prevents the Government from electing to abandon the permanent-harm-causing regulation. The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that "goes too far" as a "taking" does not mean that such a regulation may never be cancelled and must always give rise to a right to compensation.[1]

To the extent that this case involves a claim that the respondent has suffered an unlawful permanent harm—whether it is called a "taking" or merely an invalid attempt to

[1] In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922), Justice Holmes' opinion for the Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." As he explained earlier in the opinion, however, all this implies is that when regulation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.*, at 413. For a complete discussion of this point see Siemon, Of Regulatory Takings and Other Myths, 1 J. Land Use & Env. L. 105, 110–117 (1985).

regulate—the Court correctly explains that the issue is not yet ripe for decision. We do not yet know whether the harm inflicted by the zoning regulations is severe enough to lead to the conclusion that the zoning regulations "go too far." We do know, however, that the process of determining how far the regulations do apply to respondent has already caused it a fairly serious harm—one that the jury calculated as worth $350,000. But that harm is in my second major category—it was a "temporary harm."

Temporary harms resulting from a regulatory decision fall into two broad subcategories: (1) those that result from a deliberate decision to appropriate certain property for public use for a limited period of time; and (2) those that are a by-product of governmental decisionmaking. The first subcategory includes, for example, the condemnation of a laundry to be used by the military for the duration of World War II, *Kimball Laundry Co. v. United States*, 338 U. S. 1 (1949), or the condemnation of the unexpired term of a lease, *United States v. General Motors Corp.*, 323 U. S. 373 (1945)—that type of appropriation is correctly characterized as a "temporary taking." The second subcategory is fairly characterized as an inevitable cost of doing business in a highly regulated society.

Temporary harms in the second subcategory are an unfortunate but necessary by-product of disputes over the extent of the Government's power to inflict permanent harms without paying for them. Every time a property owner is successful, in whole or in part, in a challenge to a governmental regulation—whether it be a zoning ordinance, a health regulation,[2] or a traffic law[3]—he is almost certain to suffer some temporary harm in the process. At the least, he will usually incur significant litigation expenses and frequently he will ir

[2] See *e. g., Industrial Union Department v. American Petroleum Institute*, 448 U. S. 607 (1980).

[3] See *e. g., Raymond Motor Transportation, Inc. v. Rice*, 434 U. S. 429 (1978).

cur substantial revenue losses because the use of his property has been temporarily curtailed while the dispute is being resolved.

In some situations these temporary harms are compensable. Statutes authorize the recovery of some costs of litigation, including attorneys' fees. Sometimes the cost of obtaining regulatory approval is budgeted in an initial development plan and ultimately recovered from consumers. But in many cases—and apparently this is one—the property owner has no effective remedy for such a temporary harm except a possible claim that his constitutional rights have been violated. If his property is harmed—even temporarily—without due process of law, he may have a claim for damages based on the denial of his procedural rights.[1] But if the procedure that has been employed to determine whether a particular regulation "goes too far" is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm.

The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the Government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable byproduct of every such dispute as a "taking" of private property.

[1] Cf. *Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1 (1978).

In this case there was a substantial dispute not only about the permissibility of the permanent harm, but also over the fairness of the procedures employed by the petitioners. Respondent made a claim this its constitutional right to due process of law had been violated. Conceivably it might have prevailed on that theory if it could have proved that an unconstitutional procedure had resulted in an unnecessary delay in obtaining approval of its development plan. See *ante*, at 9, n. 6. But its proof failed on that issue. The jury found "that respondent had not been denied procedural due process." *Ante*, at 8, n. 4. In my opinion, that finding completely disposes of respondent's claim for damages based on the temporary harm resulting from the controversy between respondent and petitioners over the applicability and enforceability of the various zoning restrictions involved in this case.

There is nothing in the record to suggest that petitioners have tried to condemn any part of respondent's property, either permanently or for a limited period of time. There was no "temporary taking" of the kind involved in *Kimball Laundry Co., supra*, or *General Motors Corp., supra*. There has been a finding that there was no violation of procedural due process. Accordingly, the award of damages cannot stand and the judgment below must be reversed.

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

COUNTY OFFICE BLDG.
111 W. Chesapeake Ave.
Towson, Maryland 21204

000

Nicholas B. Commodari
Chairman

MEMBERS

Bureau of Engineering
Department of Traffic Engineering
State Roads Commission
Bureau of Fire Prevention
Health Department
Project Planning
Building Department
Board of Education
Zoning Administration
Industrial Development

April 12, 1985

John B. Howard, Esquire
210 Allegheny Avenue
Towson, Maryland 21204

RE: Item No. 3 - Cycle I
Petitioner - Nelson Bond, et al
Reclassification Petition

Dear Mr. Howard:

This reclassification petition has been filed with the Board of Appeals for a public hearing within the April-October reclassification cycle (Cycle I). It has been reviewed by the zoning office as to form and content and has also been reviewed by the Zoning Plans Advisory Committee. The review and enclosed comments from the Committee are intended to provide you and the Board of Appeals with an insight as to possible conflicts or problems that could arise from the requested reclassification or uses and improvements that may be specified as part of the request. They are not intended to indicate the appropriateness of the zoning action requested.

If it has been suggested that the petition forms, descriptions, briefs, and/or the site plans be amended so as to reflect better compliance with the zoning regulations and/or commenting agencies' standards and policies, you are requested to review these comments, make your own judgement as to their accuracy and submit the necessary amendments to this office before Tuesday, April 30, 1985. In the event that any requested amendments are not received prior to this date, the petition will be advertised as originally submitted.

In view of your clients' proposal to reclassify the subject property, consisting of three separate parcels of land, from an R.C. 5 to a B.R. zone, this hearing is required.

As indicated in your brief that accompanied this petition, it appears that said petition is in conflict with Section 1 A00.3.A.1 of the zoning regulations; i.e., no planned water or sewer service for this area. This was verified with Oscar Keyes, Department of Public Works. However, it was your position that you wanted the petition processed, and this matter would be discussed at a future time.

Item No. 3 - Cycle No. I
Petitioner - Nelson Bond, et al
Reclassification Petition
April 12, 1985

In view of the fact that the submitted site plan does not indicate a proposed development, the enclosed comments from this Committee are general in nature. If the requested reclassification is granted, more detailed comments from County agencies and the Committee (if a hearing is required) will be written when a proposed development is indicated.

If you have any questions concerning the enclosed comments, please feel free to contact me at 494-3391. Notice of the specific hearing date which will be between September 1 and December 31, 1985, will be forwarded to you in the future.

Very truly yours,

Nicholas B. Commodari /sc

NICHOLAS B. COMMODARI
Chairman
Zoning Plans Advisory Committee

NBC:bsc

Enclosures

cc: Gerhold, Cross and Etzel
412 Delaware Avenue
Towson, Maryland 21204

BALTIMORE COUNTY
DEPARTMENT OF PUBLIC WORKS
TOWSON, MARYLAND 21204

HARRY J. PISTEL, P. E.
DIRECTOR

March 15, 1985

Mr. Arnold Jablon
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Re: Item #3 - Cycle I - 1985
Property Owner: Nelson L. Bond, Jr., et al
E/S Old Hanover Road 1720', 1996' and 2121' N. from centerline Butler Road
Existing Zoning: R.C. 5
Proposed Zoning: B.R.
Acres: 5.66 District: 4th

Dear Mr. Jablon:

The following comments are furnished in regard to the plat submitted to this office for review by the Zoning Advisory Committee in connection with the subject item.

General Comments:

All improvements, intersections, entrances, drainage requirements and construction affecting a State Road right-of-way are subject to the standards, specifications and approval of the Maryland State Highway Administration in addition to those of Baltimore County.

As no public facilities are involved, this office has no comment.

The Petitioner must provide necessary drainage facilities (temporary or permanent) to prevent creating any nuisances or damages to adjacent properties, especially by the concentration of surface waters. Correction of any problem which may result, due to improper grading or improper installation of drainage facilities, would be the full responsibility of the Petitioner.

Development of this property through stripping, grading and stabilization could result in a sediment pollution problem, damaging private and public holdings downstream of the property. A grading permit is, therefore, necessary for all grading, including the stripping of top soil.

Very truly yours,
James A. Markle
JAMES A. MARKLE, P.E., Chief
Bureau of Public Services

JAM:EAM:ROP:ss

cc: File

2

Maryland Department of Transportation
State Highway Administration

William K. Hellmann
Secretary
Hal Kassoff
Administrator

March 15, 1985

Mr. William Hackett, Chairman
Board of Appeals
County Office Building
Towson, Maryland 21204

Attn: Mr. N. Commodari

Re: Reclassification Petitions
Cycle I - 1985
Meeting of March 6, 1985
Property Owner: Nelson L. Bond, Jr., et al
Location: E/S Old Hanover Road, Route 668, 1720', 1996' and 2121' N. from c/l Butler Road
Existing Zoning: R.C. 5
Proposed Zoning: B.R.
Acres: 5.66
District: 4th

Dear Mr. Hackett:

On review of the submittal of 2-29-85 of the 3.3 acre site on the east side of Old Hanover Road (Route 668), the State Highway Administration offers the following comments.

All commercial access to Old Hanover Road must be through S.H.A. access permit.

On review of a detail site plan showing building location, entrance and park location, the State Highway Administration will provide additional comments.

Very truly yours,
Charles Lee, Chief
Bureau of Engineering
Access Permits

By: George Wittman

CL:GW:maw

cc: Mr. J. Ogle

RECEIVED
COUNTY BOARD OF APPEALS
MAR 19 AM 10 23

My telephone number is (301) 659-1350
Teletypewriter for impaired Hearing or Speech
383-7555 Baltimore Metro — 565-0451 D.C. Metro — 1-800-492-5062 Statewide Toll Free
P.O. Box 717 / 707 North Calvert St., Baltimore, Maryland 21203 - 0717

BALTIMORE COUNTY
OFFICE OF PLANNING AND ZONING
TOWSON, MARYLAND 21204
494-3211

NORMAN E. GERBER
DIRECTOR

Mr. Arnold Jablon
Zoning Commissioner
County Office Building
Towson, Maryland 21204

3/25/85

Re: Zoning Advisory Meeting of 3/6/85
Item # 3
Property Owner: Nelson L. Bond, Jr. et al
Location: E/S Old Hanover Rd. N of Butler Rd.

Dear Mr. Jablon:

The Division of Current Planning and Development has reviewed the subject petition and offers the following comments. The items checked below are applicable.

(X) There are no site planning factors requiring comment, at this time.
( ) A County Review Group Meeting is required.
( ) A County Review Group meeting was held and the minutes will be forward by the Bureau of Public Services.
( ) This site is part of a larger tract; therfore it is defined as a subdivision. The plan must show the entire tract.
( ) A record plat will be required and must be recorded prior to issuance of a building permit.
( ) The access is not satisfactory.
( ) The circulation on this site is not satisfactory.
( ) The parking arrangement is not satisfactory.
( ) Parking calculations must be shown on the plan.
( ) This property contains soils which are defined as wetlands, and development on these soils is prohibited.
( ) Construction in or alteration of the Floodplain is prohibited under the provisions of Section 22-98 of the Development Regulations.
( ) Development of this site may constitute a potential conflict with the Baltimore County Master Plan.
( ) The amended Development Plan was approved by the Planning Board on _____.
( ) Landscaping: Must comply with Baltimore County Landscape Manual.
( ) The property is located in a deficient service area as defined by Bill 178-79. No building permit may be issued until a Reserve Capacity Use Certificate has been issued. The deficient service is _____.
( ) The property is located in a traffic area controlled by a "D" level intersection as defined by Bill 178-79, and as conditions change traffic capacity may become more limited. The Basic Services Areas are re-evaluated annually by the County Council.
(X) Additional comments:
Any Future Development on the site must comply with the requirements of Bill 226-80, the Development Regulations.

Eugene A. Bober
Chief, Current Planning and Development

cc: James Hoswell

BALTIMORE COUNTY
DEPARTMENT OF TRAFFIC ENGINEERING
TOWSON, MARYLAND 21204
494-3550

STEPHEN E. COLLINS
DIRECTOR

March 27, 1985

Mr. William Hackett
Chairman, Board of Appeals
Office of Law, Courthouse
Towson, Maryland 21204

Cycle I
Item No. - 3 - Meeting of March 6, 1985
Property Owner: Nelson L. Bond, Jr., et al

Location: E/S Old Hanover Road 1720', 1966', and 2121'

Existing Zoning: R.C.5
Proposed Zoning: 4th

Acres: 5.66
District: 4th

Dear Mr. Hackett:

The proposed zoning can be expected to generate approximately 2800 additional trips per day.

Michael S. Flanigan
Traffic Engineering Assoc. II

MSF/ccm

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

MAR 27 AM

TO: Mr. William Hackett
Chairman, Board of Appeals
Date: March 20, 1985

FROM: Ian J. Forrest

SUBJECT: Reclassification Petitions
CYCLE I - 1985
Meeting of March 6, 1985

ZONING DEPARTMENT
By

The Baltimore County Department of Health has reviewed the following Reclassification Petitions and does not anticipate any health hazards at this time regarding these Petitions.

Item #1 - Helena D. Gibbons
Item #2 - Paul Gambrill, et al
Item #3 - Nelson L. Bond, Jr., et al
Item #4 - Conservation Associates
Item #5 - Greater Baltimore Medical Center
Item #6 - Josef of Vienna, Inc.
Item #7 - John W. Ruppert, et al

Ian J. Forrest, Director
BUREAU OF ENVIRONMENTAL SERVICES

IJF/fth

RECEIVED
COUNTY BOARD OF APPEALS
MAR 25 P 1:02

BALTIMORE COUNTY
FIRE DEPARTMENT
TOWSON, MARYLAND 21204-2586
494-4500

PAUL H. REINCKE
CHIEF

March 11, 1985

William Hackett
Chairman, Board of Appeals
Office of Planning and Zoning
Baltimore County Office Building
Towson, MD 21204

Attention: Nick Commodari, Chairman
Zoning Plans Advisory Committee

RE: Property Owner: Nelson L. Bond, Jr., et al.

Location: E/S Old Hanover Road 1720', 1996', and 2121' N. from c/l Butler Road
Item No.: 3
Zoning Agenda: 3/6/85, Cycle -1

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below marked with an "X" are applicable and required to be corrected or incorporated into the final plans for the property.

( ) 1. Fire hydrants for the referenced property are required and shall be located at intervals or _____ feet along an approved road in accordance with Baltimore County Standards as published by the Department of Public Works.

( ) 2. A second means of vehicle access is required for the site.

( ) 3. The vehicle dead end condition shown at _____
EXCEEDS the maximum allowed by the Fire Department.

( ) 4. The site shall be made to comply with all applicable parts of the Fire Prevention Code prior to occupancy or beginning of operation.

(x) 5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1976 Edition prior to occupancy.

( ) 6. Site plans are approved, as drawn.

( ) 7. The Fire Prevention Bureau has no comments, at this time.

REVIEWER: Lt. Joseph Kelly 3-11-85
Planning Group
Special Inspection Division

Noted and Approved: Roy W. Kemmer
Fire Prevention Bureau

/mb

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Mr. William T. Hackett, Chairman, Appeals Board
C/O Nicholas Commodari, Zoning Department
Date: March 12, 1985

FROM: Charles E. Burnham, Chief, Building Plans Review C.E.B

SUBJECT: Cycle I - 1985, Meeting Scheduled 3/6/85
ITEM #3) Owner - Nelson L. Bond, Jr., et al, E/S Old Hanover Road 1720', 1996' and 2121' N. from c/l Butler Road

Conversion of property from one use to another use requires the structures involved to comply with the Building Code in force at the time a permit is applied for and before the structure can be used. Existing structures will require a Change of Use/Occupancy permit as well as alteration permits to upgrade the structure to meet the Code requirements for the new proposed use.

New structures shall be designed from the footings up to comply with the correct Use Group as provided for in Article 3 of the current 1981 Code.

Compliance with the State Handicapped Code is required for the buildings and the site.

Set backs from interior lot lines, other buildings on the same lot, and street lot lines for fire separations shall also comply to the Building Code in force at the time an application is made for the permit. This currently involves Table 401, Table 507 and Section 506, of the current 1981 B.O.C.A. Code known as the Baltimore County Building Code as adopted by Bill 4-82. The 1984 Edition of B.O.C.A. has been approved by the County Council and will become effective on permits filed 45 days after it's enactment.

No further comments at this time.

CEB/vw

BALTIMORE COUNTY PUBLIC SCHOOLS

Robert Y. Dubel, Superintendent

Towson, Maryland — 21204

Date: March 19, 1985

Mr. William Hackett
Chairman, Board of Appeals
Baltimore County Office Building
1111 West Chesapeake Avenue
Towson, Maryland 21204

Zoning Cycle #I

RE: Item No: 3
Property Owner: Nelson L. Bond, Jr., et al
Location: E/S Old Hanover Road 1720', 1996' and 2121' N. from C/i Butler R
Present Zoning: R.C. 5
Proposed Zoning: B.R.

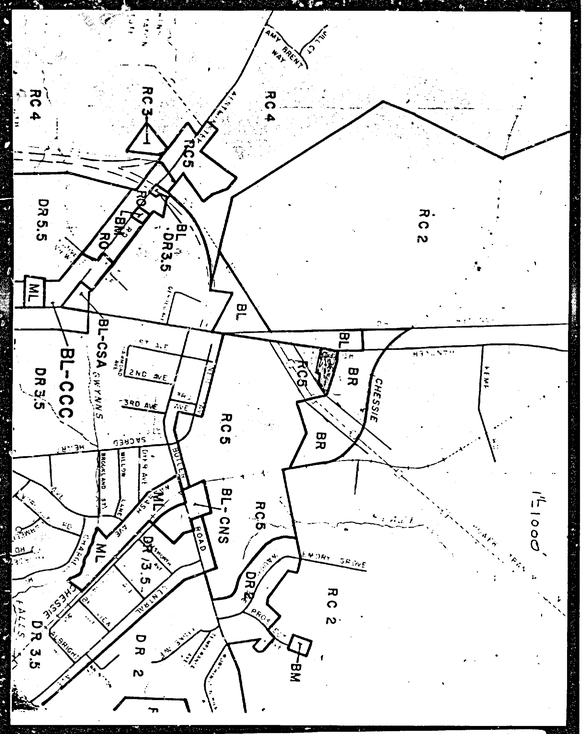
School Situation September 1984

School	Enrollment	Capacity	Over/Under
Franklin Elementary	538	500	+ 38
Franklin Middle	861	1127	-266
Franklin High	1306	1310	- 4

Student Yield With: Existing Zoning And Proposed Zoning

Elementary, Middle, High: Acreage too small to affect student population.

Very truly yours,
John Demron
John Demron, Field Representative
Department of Planning



2.

CITED LEGAL SECTIONS

a. The Capital Program, duly adopted Baltimore County master or comprehensive plans, and the "county plan" required under Article 43, Section 387C of the Annotated Code of Maryland 1957, with amendments as codified in the 1971 Replacement Volume and 1974 Cumulative Supplement, show that the property under petition is to be serviced by public sewerage and water-supply systems within TWO years after the date the petition is submitted; (Bill No. 98-75)

1AC3.2 - Rezoning by petition. (Bill Nos. 98-75; 178-79)

No petition for reclassification of property in an R.C. 4 zone may be granted unless a registered professional engineer, architect, landscape architect, or land surveyor first certifies: (Bill Nos. 98-75; 178-79)

1. That the parcel of land under petition lies at least 200 feet from the property line of any public water reservoir; (Bill No. 178-79)

2. That the parcel lies at least 300 feet from any 1st - or 2nd order or greater stream that flows directly into a public water reservoir; (Bill No. 178-79)

3. That the parcel lies at least 300 feet from any 3rd - order or greater stream that flows directly or indirectly into a public water reservoir; (Bill No. 178-79)

EXHIBIT 1

IN THE MATTER OF THE APPLICATION OF D & R JOINT VENTURE and ISAAC JONES FOR RECLASSIFICATION FROM RC 4 and RC 5 and DR 1 to DR 3.5 ON PROPERTY LOCATED ON OLD BOSLEY RD. AND POT SPRING RD. 8th District

BEFORE

COUNTY BOARD OF APPEALS

OF

BALTIMORE COUNTY

No. R-83-189

RECEIVED JUN 08 1983 PEOPLE'S COUNSEL BALTIMORE COUNTY, MARYLAND

MEMORANDUM OF OPINION

On March 15, 1983, a hearing was held before the Baltimore County Board of Appeals on petitioners' request for a reclassification. The purpose of this hearing was to decide whether or not this case should be heard on its merits. People's Counsel submitted that the case should not be heard on its merits because Sections 1A00.3.A.1.a and 1A03.2 of the Baltimore County Zoning Regulations preclude the Board from granting petitioners' requested relief. Petitioner maintained that the above referred to Sections, when considered in combination with Baltimore County Code Section 2.58.1 and Charter Section 602.a, do not preclude the Board from granting the relief requested pursuant to his petition for reclassification. Copies of the above noted Sections are attached hereto.

At that time, it was agreed between parties that legal memoranda would be submitted on the sole issue as to whether or not the above noted Sections would ultimately bar the Board from reclassifying the subject property. After careful consideration of the memos submitted by both parties and the above noted Sections, the Board regrets that it has no choice but to advise petitioner that it finds that under these statutes his requested reclassification must be denied.

Property in question is currently zoned RC 4 and RC 5. Prior to October, 1980, the entire parcel was zoned DR 1 and the then existing water and sewer plan indicated these services projected to this site within a 3 to 5 year span. During the comprehensive map process of 1980, the Baltimore County Council rezoned the parcel to RC 4 and RC 5. The Baltimore County Zoning Regulations 1A00.3.A.1.a prohibited him

IN THE MATTER OF THE APPLICATION OF D & R JOINT VENTURE and ISAAC JONES FOR RECLASSIFICATION FROM RC-4 and RC-5 and DR-1 to DR 3.5 ON PROPERTY LOCATED ON OLD BOSLEY RD. AND POTSPRING RD. 8th DISTRICT

BEFORE

COUNTY BOARD OF APPEALS

OF

BALTIMORE COUNTY

No. R-83-189

RECEIVED JUN 17 1983 PEOPLE'S COUNSEL

ANSWER TO MOTION FOR RECONSIDERATION OF MEMORANDUM OF OPINION

Pursuant to Petitioner's Motion for Reconsideration of Memorandum of Opinion, hand delivered to this office on June 14, 1983, and People's Counsel having indicated no objection, it is this 17th day of June, 1983, ORDERED that the Motion be and is hereby GRANTED for the purpose of determining the question concerning the validity of the statutes in question cited in said Motion. [Emphasis added]

After a decision by the Board concerning the validity of the two statutes in question has been reached, the case may then proceed on its merits if the Petitioner elects said option.

IT IS FURTHER ORDERED by the County Board of Appeals, this 17th day of June, 1983, that its Order of June 8, 1983, be and it is hereby suspended pending reconsideration pursuant to said Motion.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

William T. Hackett, Chairman

Lakay B. Spurrier

Joanne L. Suder

D. & R. Joint Venture and
Isaac Janes
Case No. R-83-189

2.

from filing a petition for a reclassification of the site, since he did not meet the two year requirement for water and sewer service, so in March 1981 suit was filed in the Baltimore County Circuit Court seeking relief. In January, 1982, the Baltimore County Council removed the 3 to 5 year plan for projected water and sewer service to this parcel and placed it into the "no plan" category. In June, 1982, as a result of the suit filed in the Circuit Court in March 1981, The Honorable Paul Alpert ruled that a petition for reclassification must be filed with the Baltimore County Board of Appeals and the petition that now exists was so filed. In November, 1982, The Honorable James Langrell heard legal arguments regarding this petition and ordered that the Baltimore County Board of Appeals must hear the case.

After careful consideration of all these facts and all applicable regulations, the Board has no choice but to determine that Sections 1A00.3.A.1.a and 1A03.2 preclude the Board from ultimately granting the requested relief. Thus, even if petitioner was able to prove change or error as would be required in Section 2.58.1, this Board would still be precluded from granting petitioner's request by reason of the existence of these two sections.

Any appeal from this decision must be in accordance with Rules B-1 thru B-13 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

William T. Hackett, Chairman

Date: June 8, 1983

Joanne L. Suder

Leroy B. Spurrier

RE: PETITION FOR RECLASSIFICATION FROM R.C. 4 AND R.C. 5 TO D.R. 3.5 ZONE, SE Corner Pot Spring Rd. and Old Bosley Rd., 8th District

BEFORE THE COUNTY BOARD OF APPEALS

OF BALTIMORE COUNTY

D & R JOINT VENTURE, et al, Petitioners

Case No. R-83-189 (Item 12, Cycle IV)

HEARING MEMORANDUM

At the request of the County Board of Appeals, People's Counsel for Baltimore County files this Memorandum.

I. An Enacted Master Plan

Prior to 1978, there was no legal provision in Baltimore County for a Master Plan adopted by the legislature. In this context, the "comprehensive plan" then existing, was approved by the Baltimore County Planning Board and was a guide in the comprehensive zoning process. Nottingham v. Baltimore County, 266 Md. 339 (1972); Chapman v. Montgomery County, 259 Md. 641 (1970); and Pattey v. Board of Commissioners for Worcester County, 271 Md. 352 (1974).

In 1978, following recommendation of a duly constituted charter revision commission, the County Council approved, and the electorate adopted new Section 523 of the Baltimore County Charter. This provided for the first time that the County Council would adopt a written Master Plan, and that the zoning maps should be "consistent with the master plan." (Bill No. 83-78)

A new attitude toward the legal significance of the Master Plan developed also through a series of court decisions. Goster v. Board of County Commissioners of Cecil County, 285 Md. 233 (1979); Coffey v. Md. Nat'l Cap. P. & P. Comm., 293 Md. 24 (1982); and Md. Nat'l Cap. P. & P. Comm. v. Washington Business Park Assoc., 294 Md. 302 (1982). All acknowledged the position of priority of master plans bearing the legislative imprimatur.

CITED LEGAL SECTIONS

Baltimore County Code
1981 Cumulative Supplement

Sec. 2-58.1. Delegation to board of appeals of interim power to change zoning classification of property; method of interim zoning reclassification; method for early action on reclassification due to public interest or emergency.

(i) Before any property is reclassified pursuant to this section, the board of appeals must find:

(1) That there has occurred a substantial change in the character of the neighborhood in which the property is located since the property was last classified, or that the last classification of the property was established in error; and

(2) That the prospective reclassification of the property is warranted by that change or error. Any finding of such a change or error and any finding that the prospective reclassification is warranted may be made only upon consideration of factors relating to the purposes of the zoning regulations and maps, including, but not limited to, all of the following: Population trends; availability and adequacy of present and proposed transportation facilities, water-supply facilities, sewerage, solid waste-disposal facilities, schools, recreational facilities, and other public facilities, compatibility of uses generally allowable under the prospective classification with the present and projected development or character of the surrounding area; any pertinent recommendation of the planning board or office of planning and zoning; and consistency of the current and prospective classifications with the master plan, the county plan for sewerage and water-supply facilities, and the capital program.

Sec. 602. Powers and functions of county board of appeals.

The county board of appeals shall have and may exercise the following functions and powers:

(a) The county board of appeals shall have original and exclusive jurisdiction over all petitions for reclassification.

Baltimore County Zoning Regulations

Section 1A00 - General Provisions: All R.C. Classifications (Bill No. 98-75)

1A00.3 - Rezoning.

A. Filing of rezoning petitions. (Bill No. 98-75)

1. No petition to reclassify an R.C. zone or part thereof as other than an R.C. zone may be accepted for filing by the Zoning Commissioner unless - (Bill No. 98-75)

To be sure, these cases all presented questions going to the consistency of subdivision plans with the master plan rather than a direct confrontation with the zoning map. In this context, Judge Smith suggested that such a confrontation might be treated differently:

> "Given those facts we believe the Commission should have an opportunity to address the issue here with knowledge of the fact that in Coffey we have held that when the Prince George's County subdivision regulations require that a subdivision plan comply with a master plan, that plan is not considered a mere guidepost or set of recommendations as in zoning matters." Washington Business Park, supra, 294 Md., at 316.

This dictum does not, however, lead to the conclusion that the Master Plan in Baltimore County remains as a mere guide in zoning matters. Judge Smith was not faced with a provision similar to Section 523(a) of the Baltimore County Charter.

Accordingly, it is submitted that the plain language of the Baltimore County Charter, together with the reasoning of the Court of Appeals in the recent master plan cases, calls for a new interpretation of the legal significance of the Master Plan in Baltimore County. The key to this interpretation is the requirement of consistency. Courts generally have held the word "consistent" to mean "not contradictory, compliable, accordant, harmonious, congruous, and compatible." Ryan v. Roach Drug Co., 239 P. 912; Baldwin-Heckes Co. v. Kammerlohr, 242 N.W. 661. The New York court in Vitscher v. Hudson River R. Co., N.Y., 15 Barb. 37, formulated this test:

> "Can the requirements of both the charter and the general act be followed out and complied with in one case?"

In other cases involving charter and constitutional provisions and consistency requirements, such definitions as "subject to, restrained by, and not hostile to" have been implied. City of Wewoka v. Rodman, 46 P.2d 334; State v. Superior Court for Spokane County, 126 P. 920. The only pertinent Maryland case which our research has disclosed is Snyder v. Greenbaum and Assoc., 38 Md. App. 144 (1977). There, the word "inconsistency" as [illegible] in the Uniform Commercial Code was held to mean "absence of reasonable harmony."

DEC 29 1983

II. The Master Water and Sewerage Plan - A Part of the Master Plan

The Baltimore County Master Plan 1979-90 was adopted in Resolution No. 71-79 on November 19, 1979 (copy attached). The resolution provided for an ongoing process including water and sewer planning supplementary to and in conformity with the Master Plan, with the intention that such plans as amended from time to time shall be incorporated in the Master Plan by reference. Chapter II of the Baltimore County Water and Sewerage Plan confirms its integral relationship to the Master Plan. Accordingly, zoning must be consistent with the Water and Sewerage Plan.

In the zoning regulations process, the County Council has further provided for consideration of "consistency of the current and prospective classifications with the master plan, the county plan for sewerage and water-supply facilities, and the capital program." Baltimore County Code Section 2-58.1(j). In this respect, the Code parallels the Charter. The County Board of Appeals is compelled by law, therefore, to render a decision which is in reasonable harmony with and not hostile to the intent of the provisions of the Water and Sewerage Plan.

III. An Apparent Inconsistency between Zoning Proposed by Petitioners and the Water and Sewerage Plan

It is undisputed that the County Water and Sewerage Plan places Petitioners' property in a "no planned service" (NPS) category. The Water and Sewerage Plan designations for no planned service, W-7 and S-7, are defined as appertinent to:

> "Areas of planned low-density growth (Resources Conservation Zoning) for which Metropolitan facilities extensions are not planned or intended."

(See copy attached.) The County Council has reinforced these designations by providing that the reclassification of an R.C. zone to other than an R.C. zone involves a showing that the property is to be serviced by public water and sewer within two years. BCZR Section 1A00.3A1.a. The apparent result is that a reclassification of the Petitioners' property to other than an R.C. zone would be inconsistent with the Master Plan.

IV. Discussion

The Petitioners acknowledged the problem, and have sought a preliminary ruling. As outlined at a pre-hearing conference February 8, 1983, and followed by additional discussion at a public hearing March 15, 1983, the purpose of such a ruling would be to determine whether or not a full hearing on the merits should be undertaken and if so, under what legal understanding as to the impact of the Master Water and Sewerage Plan.

In this connection, the People's Counsel has undertaken a preliminary investigation to discover any factor which the Petitioners could conceivably benefit from in their effort to overcome the inconsistency between their proposal and the NPS planning designation. This included consideration of the Petitioners' suggestion that the Master Plan is but one of a number of competing factors which enter into a balancing process under Code Section 2-58.1(j). As a result of the legal analysis set forth in Sections I and II of this Memorandum, we were forced to reject this claim. The investigation then turned to a review of the possibility that the County Council, in the course of the 1980 Comprehensive Rezoning, might have classified any properties with NPS designation in a residential zoning category. It appears, in fact, that a couple of areas were so classified, but the Office of Planning and Zoning further stated that these areas were overlooked and would be earmarked for rezoning to R.C. consistent with the Master Water and Sewerage Plan in 1984.

Accordingly, we have found no basis upon which the Petitioners may effectively rely in the zoning petition process to satisfy and/or overcome the plain requirement of Master Plan consistency. In this context, we must also reject a suggestion of the Petitioners that centers on the idea that there is a primacy of zoning over planning, and that a strong Master Plan consistency requirement somehow usurps the prerogative of the County Board of Appeals to review a zoning petition. Here, the Petitioners also appear to refer to the provisions of state law requiring master water and sewerage plans as recognizing county zoning requirements. This is a bootstrap argument.

Pursuant to the Maryland Constitution and Public General Law, the citizens of Baltimore County have adopted a charter and provided for home rule. Maryland Constitution Article VI-A. The Express Powers Act, enacted by the legislature to define home rule powers, provides for authority generally to maintain the peace, good government, health and welfare of the county, and specifically for zoning and planning. Maryland Annotated Code Article 25A, Sections 5(S), (X). The people of Baltimore County have now also voted that zoning shall be consistent with the Master Plan. Charter Section 523. It has not been contended that the people lack the power to have adopted such a provision, nor do we know of any logical argument to that effect.

There are any number of provisions under State law, generally in the area of health and the environment, which give some recognition to local zoning as evidence of the usual legislative intent not to preempt local control over land use. Such laws do not govern the precise relationship between planning and zoning in each political subdivision. That is a matter left to local government. In Baltimore County, the State recognition of zoning necessarily involves consistency with the Master Plan. The result otherwise would be to destroy the County's home rule power over planning and zoning.

V. Options

If, as appears to be the case, the Petitioners are not in a position to reclassify their property to other than an R.C. zone, several options are open. First of all, the Petitioners may still pursue a zoning reclassification to another R.C. zone, such as R.C. 5 (rural residential) at the Board of Appeals. Thus, in the event that Petitioners were able to show error or change in the character of the neighborhood, there is some remedy available here.

Secondly, as Petitioners are already doing, they may request an amendment to the Master Water and Sewerage Plan, a procedure which occurs annually. An appeal from

the decision of the County Council there may be taken to the Circuit Court for Baltimore County. Carusillo v. Prince George's Co., 289 Md. 436 (1981).

We are aware that the Petitioners have previously filed a law suit in the Circuit Court for Baltimore County, and that this petition for reclassification is proceeding following the Order of the Court dated November 23, 1982 effecting a stay of proceedings. The Court properly refused to continue with those proceedings because they involved a broadly based direct attack on the comprehensive zoning classification. The lawsuit was not narrowly framed as a request for judicial review of the Master Water and Sewerage Plan designation. (A copy of the Amended Bill of Complaint and Amendment to Amended Bill of Complaint in Isaac A. Jones and D. & R. Joint Venture v. Baltimore County, Md., Case No. 108029 in Equity are attached.)

Upon review of the Petitioners' request for reclassification, now duly accepted and processed, it appears that there are four options pertinent to the Master Water and Sewerage Plan inconsistency which the Board may exercise:

1. The Board of Appeals may continue these proceedings, pending an opportunity for the Petitioners to pursue their requested amendment to the Master Water and Sewerage Plan.

2. The Board of Appeals may conduct a hearing on the merits, with the limitation that the property may not be reclassified to other than an R.C. zone.

3. The Board of Appeals may go ahead with an open-ended hearing, with the idea that some new factor or basis may appear which might overcome the apparent Master Plan inconsistency.

4. The Board of Appeals may deny the Petitioners' request for other than an R.C. zone at this time on the merits, thereby affording Petitioners the opportunity to pursue their legal argument promptly by appeal on narrow legal grounds and without the cost in time and resources of a full-blown evidentiary hearing.

CONCLUSION

The question of Master Plan consistency under Charter Section 523 has been raised with increasing frequency and importance in this and other Baltimore County land use controversies. We appreciate, therefore, this opportunity to articulate a reasonable and workable interpretation and, at the same time, to facilitate the process of administrative review.

Our research and analysis has led to the inescapable conclusion that the enacted Master Plan is a new force in the land use arena, and that the duly established government agencies must find unacceptable any zoning proposal which cannot coexist in reasonable harmony with the Plan.

The substantive review of Petitioners' proposal disclosed in turn the obvious inconsistency between the proposal for residential zoning and the "no planned service" Water and Sewerage Plan designation. We considered several potential approaches which Petitioners might utilize to overcome the Master Plan consistency problem, but these were unsatisfactory.

The preliminary finding of inconsistency gives the Board several procedural options which we have enumerated. It is for the Board to consider, in the exercise of its discretion, which comports best with the administration of justice.

Respectfully submitted,

John W. Hessian, III
John W. Hessian, III
People's Counsel for Baltimore County

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 13th day of April, 1983, a copy of the foregoing Hearing Memorandum was mailed to Charles F. Obrecht, Jr., Esquire, 906 Munsey Building, Baltimore, MD 21202; and David J. Preller, Jr., Esquire, Preller and Preller, Suite 200, 15 Charles Street, Baltimore, MD 21201.

Peter Max Zimmerman
Peter Max Zimmerman

COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND

Legislative Session 1979, Legislative Day No. 22

RESOLUTION NO. 71-79

Mr. Norman W. Lauenstein, Councilman

By the County Council, November 19, 1979

WHEREAS, by Article XI-A of the Maryland Constitution, the General Assembly is authorized to provide a grant of "express powers" to counties that form a charter government; and

WHEREAS, by Article 25A, Section 5 of the Annotated Code of Maryland, the General Assembly has designated the "express powers" to be granted to charter counties, which powers include the power to enact local laws for the protection and promotion of public health, safety and welfare, relating to planning, zoning and subdivision, and to pass all ordinances, resolutions or bylaws that may be necessary and proper to execute and enforce any of the powers expressly enumerated; and

WHEREAS, the people of Baltimore County in accordance with the Constitution and Laws of the State of Maryland have adopted, ordained and established the Baltimore County Charter; and

WHEREAS, pursuant to provisions of the Charter and of the County Code, the County is responsible for planning for the future growth and development of the County, including the preparation of a Master Plan; and

WHEREAS, pursuant to Section 523 of the Baltimore County Charter, the Master Plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards to serve as a guide for the development of the County; and

WHEREAS, the Charter provides that the Office of Planning and Zoning prepare and revise a Master Plan at least every ten years, the previous such revision being accomplished in 1975; and

WHEREAS, pursuant to Section 523 of the Baltimore County Charter, the County Council has the responsibility to accept or modify, and then adopt by resolution, a Master Plan which it receives from the Office of Planning and Zoning; and

WHEREAS, the County Council has caused to be prepared by consultants and staff, at great expense to the taxpayers of Baltimore County, a comprehensive growth management planning study which has been accomplished over the past three years; and

WHEREAS, the elements of said planning study together comprise a Master Plan, containing objectives, policies and standards, and a composite of mapped and written proposals serving as a guide for the physical development of the County; and

WHEREAS, the Planning Board of Baltimore County has held public hearings on the Master Plan and on the elements thereof and has recommended the adoption of certain elements of that Plan; and

WHEREAS, the Office of Planning and Zoning has submitted to the County Council a Master Plan, entitled "Recommended Baltimore County Master Plan 1979-1995", with accompanying map entitled "Baltimore County Master Plan Land Use Plan"; and

WHEREAS, the County Council has held a public hearing on the Master Plan on September 11, 1979.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND, that the Master Plan submitted by the Office of Planning and Zoning and adopted by the Baltimore County Planning Board, including mapped and written proposals, are hereby amended and modified, and as so amended or modified, are hereby adopted and declared to incorporate and be comprised of the following written and mapped components, which will serve as a guide for the development of the County, and which may be subject to such further modifications as deemed advisable by the Baltimore County Council:

"Baltimore County Master Plan 1979-1990" Written Components, maps, errata and addendum thereto, as follows:

SECTION I
Baltimore County Growth Management Program Physical Development Plan, Part I, Land Use Elements.

SECTION II
Baltimore County Growth Management Program Physical Development Plan, Part II, Transportation Element.

SECTION III
Baltimore County Growth Management Program Housing and Community Preservation Plan.

SECTION IV
Baltimore County Growth Management Program Open Space and Recreation Plan.

SECTION V
Baltimore County Growth Management Program Public Facilities Plan, Part I, Community Services.

SECTION VI
Baltimore County Growth Management Program Public Facilities Plan, Part II, Utilities.

BE IT FURTHER RESOLVED, that, using the Baltimore County Master Plan 1979-1990 herein adopted as a guide, the County Council intends to proceed with development of an overall growth management program for the implementation of the Master Plan, said program to include revised zoning maps, zoning rules and regulations, subdivision rules and regulations, a capital improvements program, community plans, including but not limited to, Owings Mills and Whitemarsh, and such other legislation, regulations, policies and programs as may be necessary; and

BE IT FURTHER RESOLVED, that until said overall growth management program and implementation measures can be adopted, the Office of Planning and Zoning, the Baltimore County Council and all other departments, agencies and officials of the County, in the exercise of any powers, authority, duties or responsibilities related to actions impacting on land use, growth or development, including planning, zoning and subdivision activities, in the County, shall consider the objectives, policies and standards of the Master Plan.

BE IT FURTHER RESOLVED, that all programs and construction projects initiated by the County be in concert with or further the goals and objectives stated in the Master Plan adopted in this resolution, and further that the Director of the Office of Planning and Zoning make such ~~a determination~~ AN EVALUATION of each and every such project and program and forward said ~~determination~~ EVALUATION to the County Executive and the County Council for their ~~approval~~ CONSIDERATION.

BE IT FURTHER RESOLVED, that supplementary to and in conformity with the Master Plan, the agencies of Baltimore County engage in an ongoing process which includes water, sewer, and solid waste management planning, management of the coastal zone of Baltimore County, designation of areas of critical state concern, specific area plans, and plans devoted to capital improvements and other facilities. It is intended that such plans, upon enactment by the County Council and as amended from time to time shall be incorporated in the Master Plan by reference.

BE IT FURTHER RESOLVED, that the County Council intends to approve a land use map to be part of the Master Plan concurrently with the adoption of the 1980 Comprehensive Zoning maps.

BE IT FURTHER RESOLVED, that the Planning Board forward to the Council, upon completion of the elements governing growth in each of the Growth Areas, a recommendation on the method of ensuring that all development actions made by the public and private sectors are in conformance with the master plan goals, objectives and elements as adopted by the County Council.

AND BE IT FURTHER RESOLVED, that previous Master Plans adopted by the Planning Board and/or the County Council are rescinded to the extent that they are inconsistent with the Baltimore County Master Plan 1979-1990.

WATER SUPPLY PLAN DESIGNATIONS

Areal Designation

W-1 EXISTING SERVICE AREA

Metropolitan facilities are available to 90% or more of the properties in these areas.

W-3 CAPITAL FACILITIES AREA (1-6 years)

Capital facilities are required and are possible within the framework of the 6-year Capital Program; subject to annual budgeting, neighborhood petitions, determination of health hazards, and the negotiation of Public Works Agreements.

W-5 MASTER PLAN AREA (7-10 years)

Capital facilities are required and are intended within the framework of the Baltimore County Master Plan.

W-6 AREAS OF FUTURE CONSIDERATION

Areas to be considered in the design of major facilities for growth and development beyond 1990.

W-7 NO PLANNED SERVICE (NPS)

Areas of planned low-density growth (Resources Conservation Zoning) for which Metropolitan facilities extensions are not planned or intended.

EXHIBIT B

SEWERAGE PLAN DESIGNATIONS

Areal Designation

S-1 EXISTING SERVICE AREA

Metropolitan facilities are available to 90% or more of the properties in these areas.

S-3 CAPITAL FACILITIES AREA (1-6 years)

Capital facilities are required and are possible within the framework of the 6-year capital program; subject to annual budgeting, neighborhood petitions, determination of health hazards and the negotiation of Public Works Agreements.

S-5 MASTER PLAN AREA (7-10 years)

Capital facilities are required and are intended within the framework of the Baltimore County Master Plan.

S-6 AREAS OF FUTURE CONSIDERATION

Areas to be considered in the design of major facilities for growth and development beyond 1990.

S-7 NO PLANNED SERVICE (NPS)

Areas of planned low-density growth (Resources Conservation Zoning) for which Metropolitan facilities extensions are not planned or intended.

PETITION FOR RECLASSIFICATION
4th Election District

LOCATION: 3 parcels situated on the east side of Old Hanover Road, containing 1.4, .96 and 3.3 acres respectively, and being situated 1720', 996' and 2121' respectively North of Butler Road.

PUBLIC HEARING: Tuesday, September 17, 1985 at 10:00 a.m.

The County Board of Appeals for Baltimore County, by authority of the Baltimore County Charter, will hold a public hearing:

Present Zoning: R.C. 5
Proposed Zoning: B.R.

All that parcel of land in the 4th Election District of Baltimore County, Maryland

(1) Beginning for the same in the center of Old Hanover Road at the distance of 1720 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 13 degrees 00 minutes East 119.79 feet and North 14 degrees 00 minutes East 156.80 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the four following courses and distances viz: South 72 degrees 31 minutes East 322.30 feet, South 27 degrees 14 minutes West 55 feet, South 59 degrees 08 minutes West, binding on the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, 292.11 feet and North 74 degrees 30 minutes West 100 feet to the place of beginning.

Containing 1.4 Acres of land more or less.

(2) Beginning for the same in the center of Old Hanover Road at the distance of 1996.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, North 16 degrees 03 minutes East 125 feet, thence leaving said road and binding on the outlines of the land of the petitioners hersin, the three following courses and distances viz: South 70 degrees 15 minutes East 350.00 feet, South 28 degrees 45 minutes West 125.00 feet and North 70 degrees 28 minutes West 322.30 feet to the place of beginning.

Containing 0.96 of an Acre of land more or less.

(3) Beginning for the same in the center of Old Hanover Road at the distance of 2121.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 3 degrees 13 minutes 30 seconds East 66.4 feet, North 3 degrees 46 minutes 30 seconds West 168.3 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: North 86 degrees 21 minutes 30 seconds East 144.5 feet, South 81 degrees 01 minute 30 seconds East 281.9 feet and South 77 degrees 25 minutes 20 seconds East 311.85 feet to the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, thence binding on said right of way lines, the two following courses and distances viz: South 36 degrees 54 minutes West 139.48 feet and South 52 degrees 57 minutes West 31.91 feet and thence leaving said right of way and continuing to bind on the outlines of the land of the petitioners herein, the five following courses and distances viz: North 84 degrees 32 minutes 30 seconds West 77.26 feet, North 70 degrees 43 minutes West 63.85 feet, North 81 degrees 49 minutes West 89.73 feet, South 23 degrees 59 minutes 30 seconds West 112.05 feet and North 79 degrees 48 minutes West 339.79 feet to the place of beginning.

Containing 3.3 Acres of land more or less.

Being the property of Nelson L. Bond, Jr., et al, as shown on the plan plan filed with the Zoning Department.

BY ORDER OF
WILLIAM T. HACKETT, CHAIRMAN
COUNTY BOARD OF APPEALS
BALTIMORE COUNTY

CARL L. GERHOLD
PHILIP E. CROSS
JOHN P. ETZEL
WILLIAM B. ULRICH
GORDON T. LANGDON

GERHOLD, CROSS & ETZEL
Registered Professional Land Surveyors
412 DELAWARE AVENUE
TOWSON, MARYLAND 21204
823-4470

EMERITUS
PAUL D. GOLLEHON
FRED H. GOLLEHON

February 28, 1985

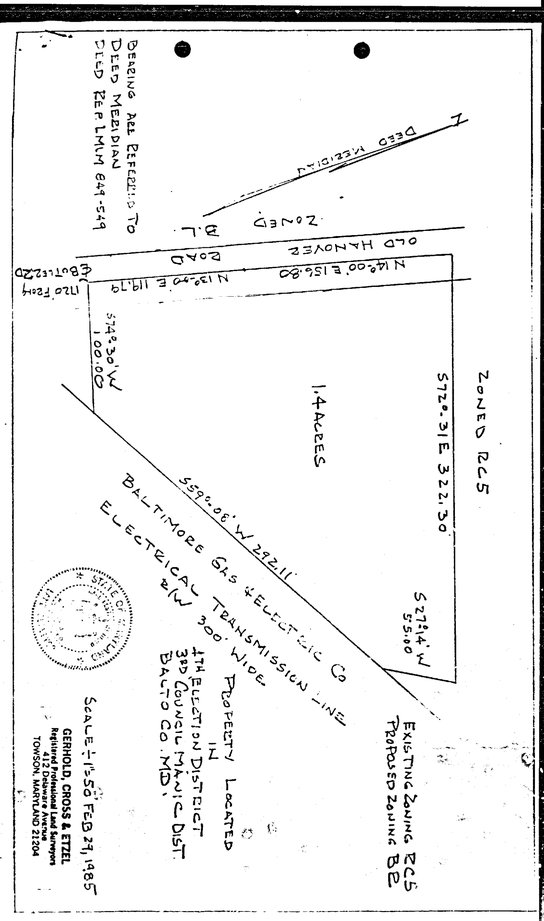
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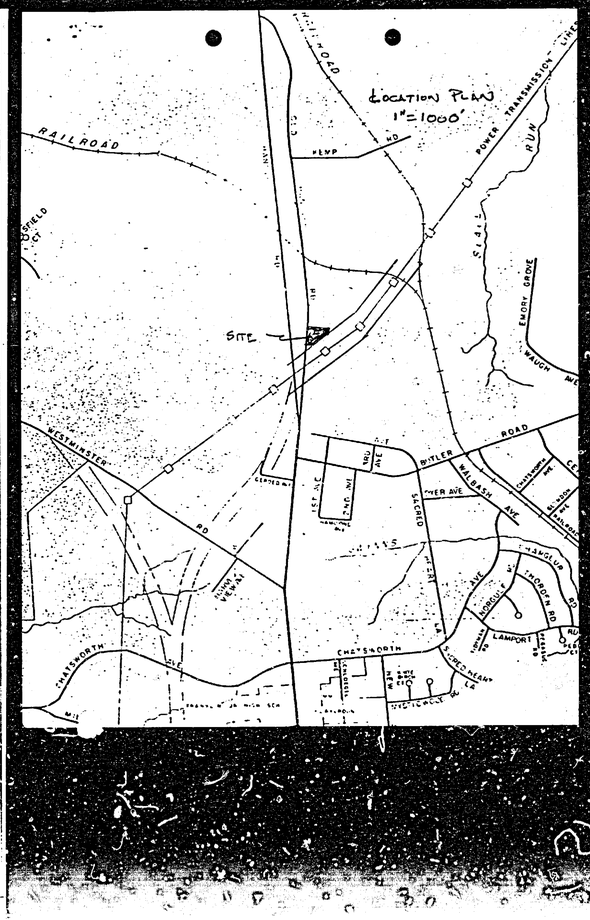
All that piece or parcel of land situate, lying and being in the Fourth Election District of Baltimore County, State of Maryland and described as follows to wit:

Beginning for the same in the center of Old Hanover Road at the distance of 1720 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 13 degrees 00 minutes East 119.79 feet and North 14 degrees 00 minutes East 156.80 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the four following courses and distances viz: South 72 degrees 31 minutes East 322.30 feet, South 27 degrees 15 minutes East 55 feet, South 59 degrees 08 minutes West, binding on the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, 292.12 feet and North 74 degrees 30 minutes West 100 feet to the place of beginning.

Containing 1.4 Acres of land more or less.

STATE OF MARYLAND — PAUL EUGENE GERHOLD — No. 6749 — REGISTERED LAND SURVEYOR





GERHOLD, CROSS & ETZEL
Registered Professional Land Surveyors
412 DELAWARE AVENUE
TOWSON, MARYLAND 21204
823-4470

CARL L. GERHOLD
PHILIP K. CROSS
JOHN F. ETZEL
WILLIAM S. ULRICH
GORDON T. LANGDON

EMERITUS
PAUL G. DOLLENBERG
FRED H. DOLLENBERG

February 28, 1985

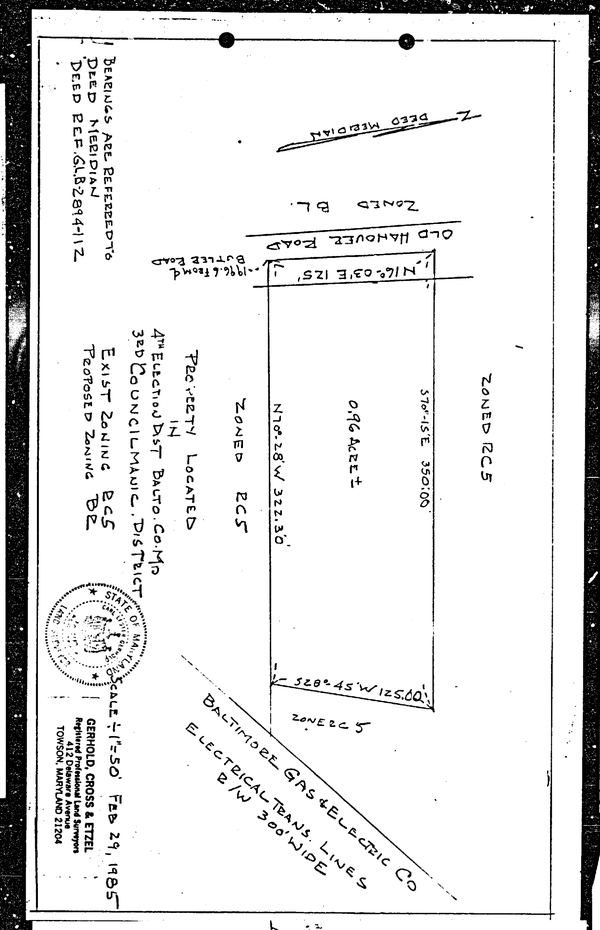
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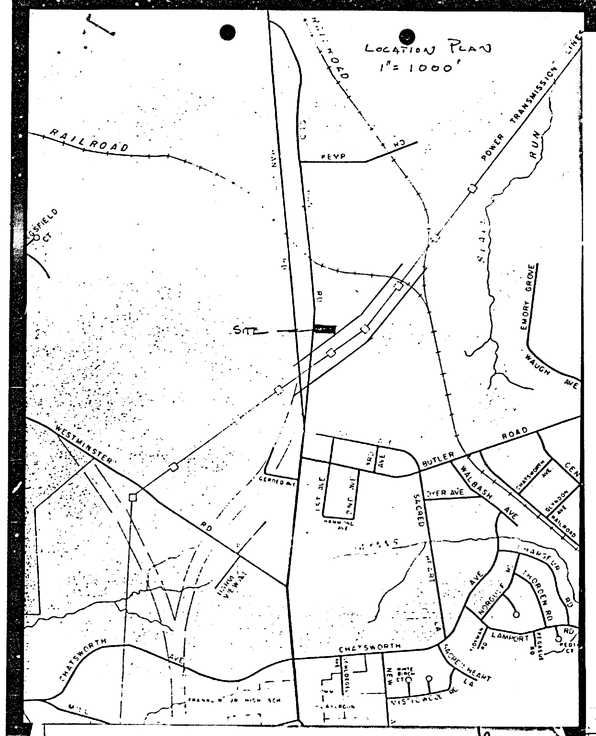
All that piece or parcel of land situate, lying and being in the Fourth Election District of Baltimore County, State of Maryland and described as follows to wit:

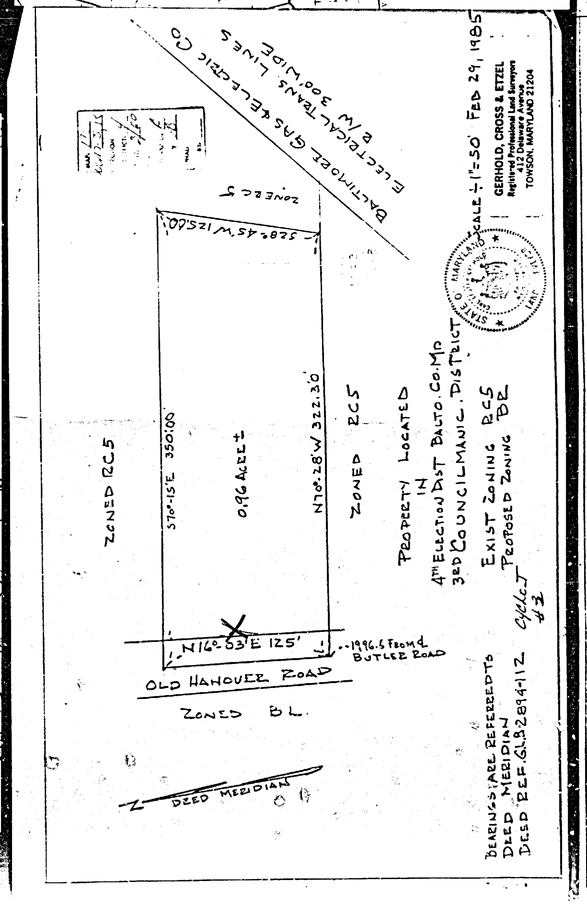
Beginning for the same in the center of Old Hanover Road at the distance of 1996.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, North 16 degrees 03 minutes East 125 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: South 70 degrees 15 minutes East 350.00 feet, South 28 degrees 45 minutes West 125.00 feet and North 70 degrees 28 minutes West 322.30 feet to the place of beginning.

Containing 0.96 of an Acre of land more or less.

STATE OF MARYLAND — CARL L. GERHOLD — REGISTERED LAND SURVEYOR







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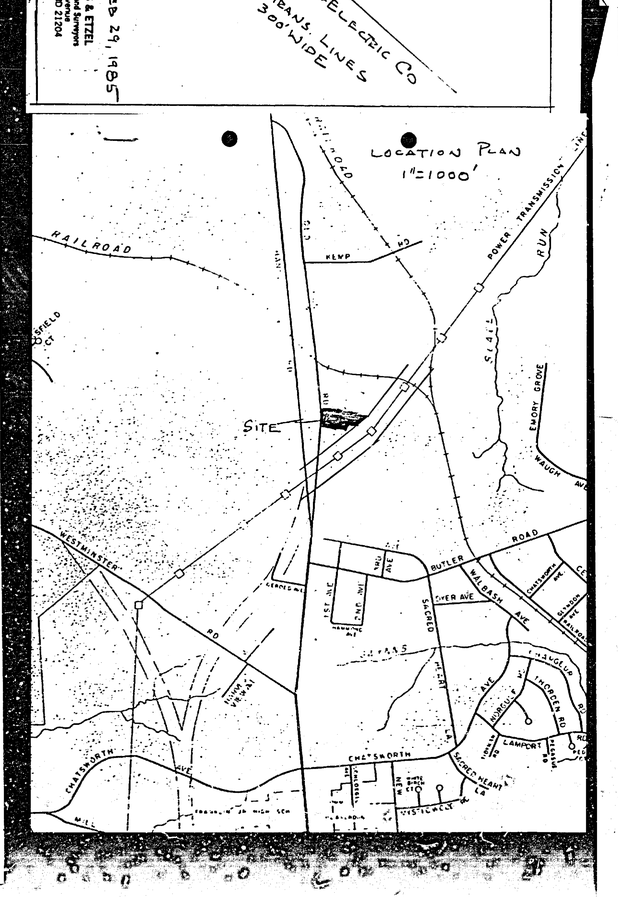
Zoning Description

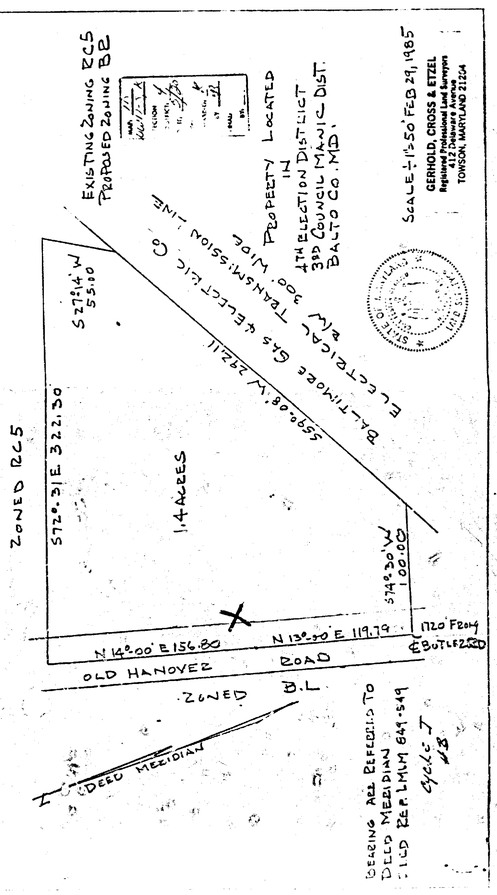
All that piece or parcel of land situate, lying and being in the Fourth Election District of Baltimore County, State of Maryland and described as follows to wit:

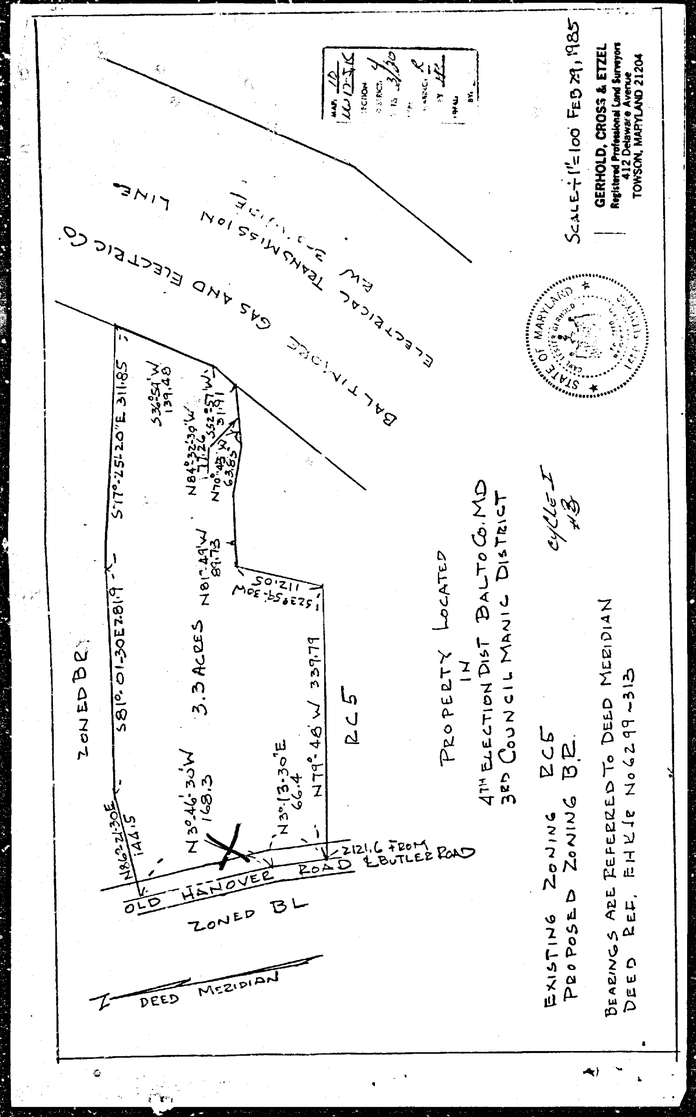
Beginning for the same in the center of Old Hanover Road at the distance of 2121.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 3 degrees 13 minutes 30 seconds East 66.4 feet, North 3 degrees 46 minutes 30 seconds West 168.3 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: North 86 degrees 21 minutes 30 seconds East 144.5 feet, South 81 degrees 01 minute 30 seconds East 281.9 feet and South 77 degrees 25 minutes 20 seconds East 311.85 feet to the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, thence binding on said right of way lines, the two following courses and distances viz: South 36 degrees 54 minutes West 139.48 feet and South 52 degrees 57 minutes West 31.91 feet and thence leaving said right of way and continuing to bind on the outlines of the land of the petitioners herein, the five following courses and distances viz: North 84 degrees 32 minutes 30 seconds West 77.26 feet, North 70 degrees 43 minutes West 63.85 feet, North 81 degrees 49 minutes West 89.73 feet, South 23 degrees 59 minutes 30 seconds West 112.05 feet and North 79 degrees 48 minutes West 339.79 feet to the place of beginning.

Containing 3.3 Acres of land more or less.

STATE OF MARYLAND — CARL L. GERHOLD — REGISTERED LAND SURVEYOR







PETITION FOR RECLASSIFICATION
4th Election District

LOCATION: 3 parcels situated on the west side of Old Hanover Road, containing 1.4, .96 and 3.3 acres respectively, and being situated 1720', 1996' and 2121' respectively North of Butler Road.

PUBLIC HEARING: Tuesday, September 17, 1985 at 10:00 a.m.

The County Board of Appeals for Baltimore County, by authority of the Baltimore County Charter, will hold a public hearing:

Present Zoning: R.C.5
Proposed Zoning: B.R.

All that parcel of land in the 4th Election District of Baltimore County, Maryland

(1) Beginning for the same in the center of Old Hanover Road at the distance of 1720 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 15 degrees 00 minutes East 119.79 feet and North 14 degrees 00 minutes East 156.80 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the four following courses and distances viz: South 72 degrees 31 minutes East 322.50 feet, South 27 degrees 14 minutes West 55 feet, South 59 degrees 08 minutes West, binding on the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, 292.11 feet and North 74 degrees 30 minutes West 100 feet to the place of beginning.

Containing 1.4 Acres of land more or less.

(2) Beginning for the same in the center of Old Hanover Road at the distance of 1996.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, North 18 degrees 05 minutes East 125 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: South 70 degrees 15 minutes East 350.00 feet, South 28 degrees 45 minutes West 125.00 feet and North 70 degrees 28 minutes West 332.50 feet to the place of beginning.

Containing 0.96 of an Acre of land more or less.

(3) Beginning for the same in the center of Old Hanover Road at the distance of 2121.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 3 degrees 13 minutes 30 seconds East 66.4 feet, North 3 degrees 46 minutes 30 seconds West 168.3 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: North 86 degrees 21 minutes 30 seconds East 144.5 feet, South 81 degrees 01 minutes 30 seconds East 281.9 feet and South 77 degrees 25 minutes 20 seconds East 311.85 feet to the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission Lines, thence binding on said right of way lines, the two following courses and distances viz: South 36 degrees 54 minutes West 199.48 feet and South 52 degrees 57 minutes West 31.91 feet and thence leaving said right of way and continuing to bind on the outlines of the land of the petitioners herein, the five following courses and distances viz: North 84 degrees 32 minutes 30 seconds West 77.36 feet, North 70 degrees 45 minutes West 63.85 feet, North 81 degrees 49 minutes West 89.73 feet, South 23 degrees 59 minutes 30 seconds West 112.05 feet and North 79 degrees 48 minutes West 399.79 feet to the place of beginning.

Containing 3.3 Acres of land more or less.

Being the property of Nelson L. Bond, Jr., et al, as shown on the plat plan filed with the Zoning Department.

BY ORDER OF
WILLIAM T. HACKETT,
CHAIRMAN
COUNTY BOARD OF APPEALS
BALTIMORE COUNTY

Aug. 29.

R-86-109

CERTIFICATE OF PUBLICATION

TOWSON, MD., August 29, 19 85

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., appearing on August 29, 19 85

THE JEFFERSONIAN,

T. B. Venetoulis
Publisher

63.25

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 005267

DATE 3/16/85 ACCOUNT R01-615-000

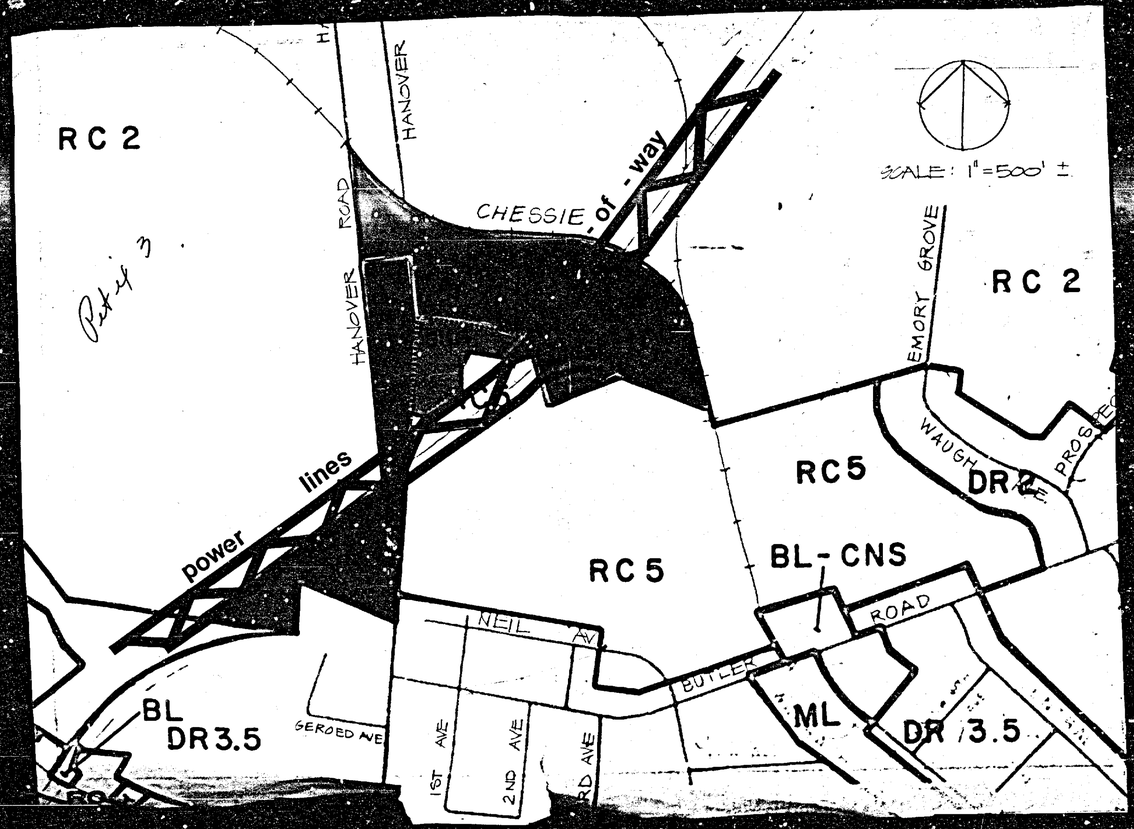
AMOUNT $ 100.00

RECEIVED FROM: Cook, Howard, Downes & Tracy

FOR: filing fee for reclassification

B B004*****10000:a 616F

VALIDATION OR SIGNATURE OF CASHIER



CERTIFICATE OF POSTING

ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

R-86-109

District 4th Date of Posting August 21-85

Posted for: Reclassification

Petitioner: Nelson Bond Jr. et al

Location of property: 3 parcels on E/S of Old Hanover Road, situated 1720', 1996' and 2121' North of Butler Rd.

Location of Signs: 1 sign in front of 13011 Old Hanover Road - 1 sign in front of 13015 Old Hanover Road and 1 sign in front of 13019 Old Hanover Road

Remarks:

Posted by A. J. Ansta (Signature) Date of return: Aug 23-85

Number of Signs: 7

LAW OFFICES
COOK, HOWARD, DOWNES & TRACY
210 ALLEGHENY AVENUE
P.O. BOX 5517
TOWSON, MARYLAND 21204

JAMES H. COOK
JOHN B. HOWARD
DAVID D. DOWNES
DANIEL O'C. TRACY, JR.
JOHN H. DINK, III
JOSEPH C. WICH, JR.
HENRY B. PECK, JR.
HERBERT R. O'CONOR, III
THOMAS L. HUDSON
C. CAREY DEELEY, JR.
GEORGE K. REYNOLDS, III
LAWRENCE L. HOOPER, JR.
H. KING HILL, III
ROBERT A. HOI FMAN
DEBORAH C. DOPKIN
CYNTHIA M. HAHN
ANGUS E. FINNEY
KEVIN W. SMITH*
H. BARRITT PETERSON, JR.
* ADM. TTED IN IOWA ONLY

JAMES O. C. DOWNES
(1906-1979)

TELEPHONE
(301) 823-4111

TELECOPIER
(301) 821-0147

March 1, 1985

The County Board of Appeals
of Baltimore County
Old Court House
Towson, Maryland 21204

Re: Petition for Reclassification
Nelson L. Bond, Jr.; Calvin O. McElhattan, Sr.
and Calvin O. McElhattan, Jr., Petitioners

Dear Sir or Madam:

This firm represents the above-referenced Petitioners in their request for a zoning reclassification of property located on Old Hanover Road in Reisterstown from RC5 to BR.

Petitioners' properties, 13011, 13015 and 13019 Old Hanover Road were rezoned in 1984 by the County Council from DR2 to RC5 and form an island of RC zoned property surrounded by commercial zoning. Immediately adjacent to the subject property and to the north, Reisterstown Lumber Company obtained a reclassification to BR on the 1984 Comprehensive Maps of two separate parcels. One has been owned by Reisterstown Lumber since prior to the adoption of the zoning regulations in 1955, and until the 1984 Comprehensive Map, was a nonconforming use. The second parcel, 13021 and 13023 Old Hanover Road was purchased by Reisterstown Lumber Company within the last several years.

A review of the attached plats and zoning maps show that Petitioners' properties are bordered to the north by BR, to the south and east by a 400 foot BG&E right-of-way for

The County Board of Appeals
of Baltimore County
March 1, 1985
Page 2

overhead transmission lines and to the west by a BL zone. It is apparent that there has been a mistake and/or error in rezoning these properties from DR-2 to RC5. It is respectively submitted that the RC5 zoning classification is not appropriate for property in the heart of a commercial zone and should be reclassified BR.

Petitioners realize that one of the issues relates to an interpretation of Section 1A00.3.A.1 (B.C.Z.R.) regarding acceptance for filing. This will be addressed by legal memorandum at the appropriate time.

For these reasons, Petitioners respectfully request that this petition for reclassification be granted.

Yours truly,

John B. Howard
Attorney for Petitioners

JBH:kam

IN THE MATTER OF THE PETITION : BEFORE THE COUNTY BOARD OF APPEALS
FOR RECLASSIFICATION FROM R.C. 5
TO B.L. ZONE : OF BALTIMORE COUNTY
E/S of Old Hanover Rd., 1720'
N of Butler Rd., Fourth District :

NELSON L. BOND, et al., : Zoning Case No. R-86-109
Petitioners

: : : : : : :

PEOPLE'S COUNSEL'S MEMORANDUM

The present petition for reclassification is remarkable because it involves a request for commercial zoning of property zoned R.C. 5 (rural residential) in an area with no planned water or sewer service. Therefore, in addition to the usual questions of error and the appropriateness of the requested zoning designation, there comes into play the crucial issue of the determinative issue of the county zoning law which prohibits administrative reclassification of property zoned R.C. to anything but another R.C. classification.

The bottom line is that whatever the finding as to error, the present zoning law pertinent to resource zoning classifications and the water and sewer plan precludes a finding that the requested commercial zoning is warranted under Section 2-59.1(j) of the County Code. It is necessary to keep in mind at all times that the matter of "error" is but one-half of the statutory test. The other half, which is equally important, requires a finding that the requested classification is warranted or appropriate.

Because of the unusual nature of this case, and because the Petitioner has challenged the validity of the statute which prohibits this reclassification, we will deal with that question first. In this context, we will also address the capacity of an administrative board to rule upon the validity of a legislative act. Then, we will turn to the question of error, and finally, we will address the appropriateness of the requested

B. R. zoning, assuming arguendo it were otherwise permitted.

I.

The pertinent statute, BCZR 1.A00.3.A.1, integrates the rezoning process with the master water and sewer planning process. It is a crucial element of the county's legislative program to protect rural areas and to limit inappropriate and piecemeal grants of intensive zoning in areas for which there is no planned water or sewer.

The validity of this statute was thoroughly briefed and argued in D & R Joint Venture, CBA No. R-83-189, and its validity established by this Board's Opinion dated June 8, 1983. Reconsideration was granted on June 17, 1983, but the Board never reversed its position. Since that time, the legislation has remained intact. On this basis alone, the Board must uphold the law. There is absolutely no change in circumstance which would warrant a different finding. The reversal of position which Petitioner here requests would indeed be arbitrary and capricious.[1]

* * *

Even had this question not so recently been addressed by the Board, the validity of the statute as a police power measure directed toward protection of the environment and rural areas easily satisfies the constitional requirements of due process and equal protection clauses. As background, it is important to understand the function of master water and sewer planning, the actual effect of the statute, and the relationship of zoning to the master water and sewer plan process. Upon review, it will be seen that both the water and sewer planning process and the

[1] We enclose herewith as Exhibit 1 copies of the CBA Memorandum Opinion, Answer to Motion for Reconsideration, and People's Counsel's Hearing Memorandum in Case No. R-83-189.

comprehensive zoning process provide avenues for property owners to request changes, and that even under the existing water and sewer plan and zoning classifications, the property owner has various options for property use listed as of right and by special exception in any of the resource conservation categories. Upon review, it will also be seen that the police power of local government is exceedingly broad, and that the legislative judgment in enacting a statute cannot be overturned even by a court so long as fairly debatable. In this connection, the courts have given the legislature wide latitude in the sphere of land use legislation.

The master water and sewer plan is not a casual enterprise. Maryland State Law governs and defines the process in detail. Maryland Annotated Code Health-Environmental Article Section 9-501 to 9-521.[2]

Concisely stated, the law requires the preparation and adoption by each local legislative body of master water and sewer, as well as solid waste management, plans. Following adoption by the local legislative body, each plan must be reviewed by the State Health Department. Moreover, the plans are amended annually. Any property owner dissatisfied with the designation of his property may challenge the action of the local legislative body and ultimately obtain judicial review. Carusillo v. Prince George's County, 289 Md. 436 (1981).

Otherwise stated, Maryland water and sewer planning law plays a major role in Maryland environmental law. Decisions affecting the placement of public and private water and sewer supplies are the subject of both local

[2] The extensiveness of the state law is best understood by a review of the entire subtitle which is attached as Exhibit 2.

and state scrutiny after time-consuming and painstaking study by various agencies. Once adopted, a local government is not free to make any decision inconsistent with the plan.

In Baltimore County, the process is given the dignity which it deserves. Pursuant to Resolution 71-79, the Master Water and Sewer Plan is designated as an element of the Baltimore County Master Plan. Under Section 523 of the Baltimore County Charter, zoning must be consistent with the Master Plan. See Board of County Commissioners v. Gaster, 285 Md. 233 (1979); Coffey v. Maryland-National Capital Parking and Planning Commission, 293 Md. 24 (1982).

* * *

In order for the Master Water and Sewer Plan to function and to work, zoning must bear a reasonable relationship to designated water and sewer classifications of property. Areas without planned water or sewer service should generally be protected from the more intense land uses and zoning classifications. It is, therefore, logical that the county would seek to place limits on rezoning of properties lacking planned water or sewer service. This reduces the potential for zoning maps which would disrupt the entire water and sewer planning process. It needs to be stressed that the physical possibility of extending public water and sewer is irrelevant. There will always be some properties outside the planned service area to which extensions could feasibly be accomplished at varying levels of expense. The line is drawn, however, at the limits of the plan established under law.

The beneficial purpose and effect of BCZR 1.A00.3.A.1 can readily be discerned. Properties classified in one of the resource conservation zoning categories are by definition and application rural areas and not suitable for public water or sewer. There may be reasons, in particular rural locations, for more intense zoning, such as commercial or industrial, as in the case of rural villages or historically established businesses. As a prevailing rule, however, the R.C. zoning classifications fit the no planned service areas and should not be disturbed.

If a property zoned resource conservation and lacking in planned water or sewer service ought to be substantially reclassified, it should not occur without comprehensive consideration. The statute at issue here accomplishes precisely that. It forbids piecemeal zoning reclassification of properties so designated so that if these were permitted, they gradually could erode and eventually destroy both the water and sewer planning and comprehensive zoning process, leading to sprawl one step at a time.

This is not to say that growth is impossible or that classification boundaries are immutable forever. There are two avenues open to the county and to property owners to consider changes. The water and sewer planning process itself provides for annual amendment after hearings, with notice and opportunity to be heard. The comprehensive zoning process occurs every four years, again with hearings, notice, and opportunity to be heard.

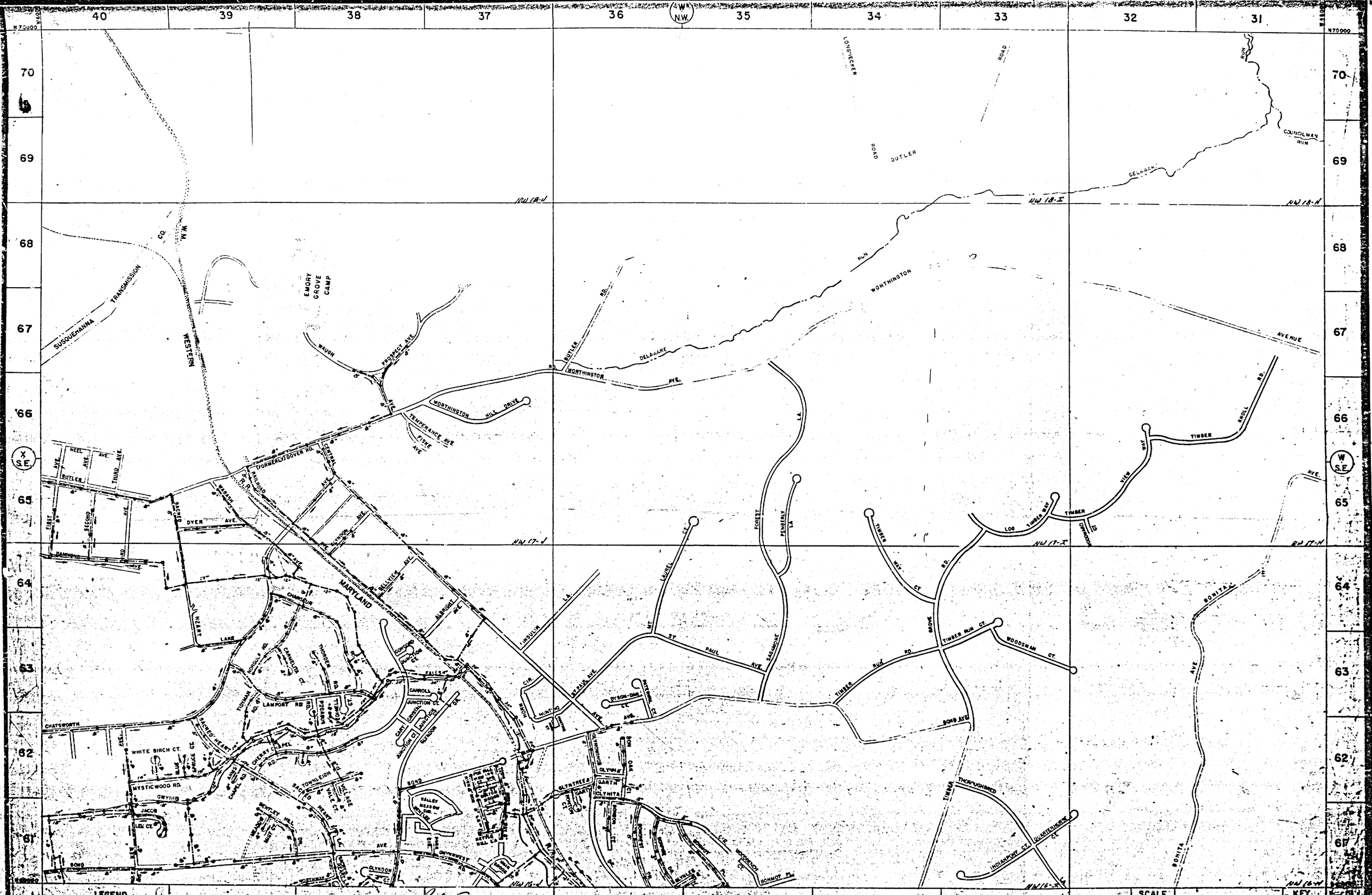
The function of BCZR 1.A00.3.A.1 is simply to cut off a third avenue of change or reclassification, the piecemeal rezoning process, and even here, only from requests involving other than resource conservation zoning. This legislative judgment not only is well within the authority of the county as a valid police power measure, but also may be considered as a logical extension of state and county water and sewer planning law.

Of course, there will always be contentions that some properties have been designated for public water or sewer, which should have been left out, and reciprocal claims for inclusion by those not so designated. There will inevitably be claims of differential treatment to similar properties, particularly at the legally established limits of the planned service areas. At any particular time, arguments may be made on behalf of one or another property owner for modification of the boundaries. But, so long as the lines drawn are the subject of judgment, they will not be disturbed.

In this connection, the statute in question is no different from so many land use enactments over the years applying restrictive land use measures. Since the early days of planning and zoning, property owners have mounted challenges against such statutes and have made arguments similar to those of Petitioner here. And since the early days of zoning, beginning with the Supreme Court and the Courts of Appeals of states around the country, such challenges have been rejected because of the understanding of the importance of legislative discretion to protect the public safety, health, and welfare under the police power.

Indeed, the legislation here is far less restrictive than many land use measures approved by the courts over the years. BCZR 1A00.3.A.1 in no way denies to the property owner a reasonable use of property. Nor does it deny that property owner the opportunity to petition each and every year in the water and sewer planning process and every fourth year in the comprehensive zoning process, for a more intense classification. The statute simply recognizes that special concern is due to rural areas without planned water and sewer service, and that changes should not be made in these sensitive areas without comprehensive consideration and

sion making.



LEGEND

☐ PUMPING STATIONS

Ref. Ex # 6-D

BALTIMORE COUNTY METROPOLITAN DISTRICT
KEY MAP
SANITARY SEWERS

SCALE
1IN=500FT

TOPO & PLAN SHEETS		KEY SHEET
N.W. 16-H	18-I	
17-H	16-J	
18-H	17-J	
16-I	18-J	
17-I		

3/14/85

MICROFILMED

the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 124–125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890)). See also *Ruckelshaus* v. *Monsanto Co.*, —— U. S., at —— (slip op. 28); *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21 (1940); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932). If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government for a taking." *Monsanto*, —— U. S., at ——, and n. 21 (slip op. 24, and 30, n. 21). Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U. S. C. §1491. *Monsanto*, at —— – —— (slip op. 27–31). Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt* v. *Taylor*, 451 U. S. 527 (1981). There, the Court ruled that a person deprived of property through a random and unauthorized act by a state employee does not state a claim under the Due Process Clause merely by alleging the deprivation of property. In such a situation, the Constitution does not require predeprivation process because it would be impossible or impracticable to provide a meaningful hearing before the deprivation. Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson* v. *Palmer*, —— U. S. ——, —— n. 12 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.[*]

Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn. Code Ann. §29–16–123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain. §§29–16–101 to 29–16–121. The State is prohibited from "entor[ing] upon [condemned] land" until these procedures have been utilized and compensation has been paid the owner, §29–16–122, but if a government entity does take possession of the land without following the required procedures,

> "the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way . . . ." §29–16–123.

The Tennessee state courts have interpreted §29–16–123 to allow recovery through inverse condemnation where the "taking" is effected by restrictive zoning laws or development regulations. See *Davis* v. *Metropolitan Gov't of Nashville*, 620 S. W. 2d 532, 533–534 (Tenn. App. 1981); *Speight* v. *Lockhart*, 524 S. W. 2d 249 (Tenn. App. 1975). Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

IV

We turn to an analysis of respondent's claim under the due process theory that petitioners espouse. As noted, under that theory government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Should the Government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken. The remedy *for* a regulation that goes too far, under the due process theory, is not "just compensation," but invalidation of the regulation, and if authorized and appropriate, actual damages.[*]

The notion that excessive regulation can constitute a "taking" under the Just Compensation Clause stems from language in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922). See *San Diego*, 450 U. S., at 649 (dissenting opinion). Writing for the *Pennsylvania Coal* Court, Justice Holmes stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S., at 415. Those who argue that excessive regulation should be considered a violation of the Due Process Clause rather than a "taking" assert that *Pennsylvania Coal* used the word "taking" not in the literal Fifth Amendment sense, but as a metaphor for actions having the same effect as a taking by eminent domain. See, *e. g.*, *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 274, 598 P. 2d 25, 29 (1979), aff'd, 447 U. S. 255 (1980); *Fred F. French Investing Co.* v. *City of New York*, 39 N. Y. 2d 587, 594, 350 N. E. 2d 381, 385 (1976). Because no issue was presented in *Pennsylvania Coal* regarding compensation, it is argued, the Court was free to use the term loosely.[*]

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[*] The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations such as those involved in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982), in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process. Unlike the Due Process Clause, however, the Just Compensation Clause has never been held to require pretaking process or compensation. *Ruckelshaus* v. *Monsanto Co.*, —— U. S. ——, —— (1984) (slip op. 29). Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by posttaking compensation. Under the Due Process Clause, on the other hand, the Court has recognized that predeprivation process is of "obvious value in reaching an accurate decision," that the "only meaningful opportunity to invoke the discretion of a decisionmaker is likely to be before the [deprivation] takes place," *Cleveland Board of Education* v. *Loudermill*, —— U. S. —— (1985) (slip op. 9–10), and that predeprivation process may serve the purpose of making an individual feel that the Government has dealt with him fairly. See *Carey* v. *Piphus*, 435 U. S. 247, 262 (1978). Thus, despite the Court's holding in *Logan*, *Parratt*'s reasoning applies here by analogy because of the special nature of the Just Compensation Clause.

[*] See generally F. Bosselman, D. Callies, J. Banta, The Taking Issue 238–255 (1973); Stark, Government Liability for Unconstitutional Land Use Regulation, —— Ind. L. J. —— (1985); Oakes, "Property Rights" in Constitutional Analysis Today, 56 Wash. L. Rev. 583 (1981); Stoebuck, Police Power, Takings, and Due Process, 37 Wash. & Lee L. Rev. 1057 (1980); Comment, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis, 57 Wash. L. Rev. 715 (1982); Comment, Just Compensation or Just Invalidation: The Availability of a Damage Remedy in Challenging Land Use Regulations, 29 UCLA L. Rev. 711 (1982); cf. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 102 (1975) (proposing that regulation be viewed as neither an exercise of the police power, nor as a taking, but as an exercise of an "accommodation" power, which would require government to offer "fair compensation" for regulation that "goes too far").

[*] In *Pennsylvania Coal*, homeowners sought to enjoin a coal company from mining coal under their house in violation of Pennsylvania's Kohler Act, which prohibited the mining of coal that would cause the subsidence of any home or industrial or mercantile establishment. In defense, the coal company argued not that the regulation itself was a "taking" for which just compensation was required, but that "[i]f surface support in the anthracite district is necessary for public use, it can constitutionally be acquired only by condemnation with just compensation to the parties affected." 260 U. S., at 400.

The due process argument finds support, we are told, in the fact that *Pennsylvania Coal* framed the question presented as "whether the police power can be stretched so far" as to destroy property rights, 260 U. S., at 413, and by the Court's emphasis upon the need to proceed by eminent domain rather than by regulation when the effect of the regulation would be to destroy property interests:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases *there must be an exercise of eminent domain and compensation to sustain the act.*" *Ibid.* (Emphasis added.)

Further, in earlier cases involving the constitutional limitations on the exercise of police power, Justice Holmes' opinions for the Court made clear that the Court did not view overly restrictive regulation as triggering an award of compensation, but as an invalid means of accomplishing what constitutionally can be accomplished only through the exercise of eminent domain. See, *e. g.*, *Block* v. *Hirsch*, 256 U. S. 135, 156 (1921); *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908); *Martin* v. *District of Columbia*, 205 U. S. 135, 139 (1907).

We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.[*] As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its §1983 action, because respondent failed to apply for variances from the regulations.

V

In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment.[*] We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE dissents from the holding that the issues in this case are not ripe for decision at this time.

JUSTICE POWELL took no part in the decision of this case.

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[*] "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a "taking" has been called the "lawyer's equivalent of the physicist's hunt for the quark." C. Haar, Land-Use Planning 756 (3d ed. 1976). See generally, Bauman, The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, 16 Rutgers L. J. 15, 20–32 (1985); Stoebuck, *supra*, at 1058–1079; Berger, A Policy Analysis of the Taking Problem, 49 N. Y. U. L. Rev. 165 (1974); Sax, Taking, Private Property and Public Rights, 81 Yale L. J. 149 (1971); Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. Cal. L. Rev. 1 (1971); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

[*] In light of this disposition, we need not reach the question whether the jury's verdict that respondent's expectation interest had been "taken," see n. 12, *supra*, can stand in light of the absence of any discussion in the jury instructions about the reasonableness of the alleged expectation interest. See *Ruckelshaus* v. *Monsanto Co.*, —— U. S. ——, —— (1984) (slip op. 17); *Andrus* v. *Allard*, 444 U. S., at 66. Nor do we need to reach the question whether the jury was properly allowed to determine the economic feasibility of the property, or the extent of interference with respondent's expectation interests, by reference to only that portion of the development purchased by respondent, rather than by reference to the development as a whole. Cf. *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 130 (1978).

SUPREME COURT OF THE UNITED STATES

No. 84–4

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., PETITIONERS v. HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 28, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

The Court today discusses two methods for analyzing the constitutional injury that may result from the temporary application of government regulations denying property any economically viable use. The Court concludes that, under either approach, the respondent's claim is premature because the petitioner Williamson County Regional Planning Commission's 1981 disapproval of the respondent's preliminary plat did not constitute a final reviewable decision given the availability of a variance procedure that the respondent did not pursue. *Ante*, at 11–12, 26.

I join the Court's opinion without, however, departing from my views set forth in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 636 (1981) (BRENNAN, J., dissenting). Because "[i]nvalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken," I believe that "once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government chooses to rescind or otherwise amend the regulation." *Id.*, at 653, 655. As the

50 49 48 47 46 45 44 43 42 41

N 70000 E 75000 E 80000 N 70000

70 69 68 67 66 65 64 63 62 61

CARROLL CO.

BALTIMORE CO.

WESTMINSTER

WESTERN MARYLAND R.R.

PIKE

CO.

QUEENSDALE RD

EARLTON RD

EARLTON CT

HILL CT

HILL WAY

ARMY

BRENT

HANOVER

NEW

OLD

PUTTY HILL RD

GLENCOE AVE

GREEN HILL FARM RD

GORES MILL RD

IVY MILL

KEYSER RUN

COCKEYS MILL ROAD

OLD GORES MILL ROAD

CHATSWORTH AVE

SUSQUEHANNA TRANSMISSION NORTHWEST EXPRESSWAY

PARIS

NW 16-K NW 16-M NW 17-K NW 17-M NW 16-L NW 16-C NW 17-L NW 17-C

X NE X SW W S.W.

-LEGEND-

PUMPING STATIONS

Ref. Ex #

6-C

BALTIMORE COUNTY METROPOLITAN DISTRICT

KEY MAP

SANITARY SEWERS

SCALE	TOPO & PLAN SHEETS		KEY SHEET
1 IN=500	N.W. 16-K	18-L	
	17-K	16-M	
	18-K	17-M	
	16-L	18-M	
	17-L		S.E.

Pet Ex #9

R.C.2

GLEN MORRIS

30

BR

R.C.4

R.C.2

R.C.2

BR

82-26-A
N67,720
W 68,920

R.C.4

140

R.C.4

R.C.2

BL

RC 4

83-182-X
N64450
W62790

81-117 SPH
N64810
W63415

D.R.16

DR 3.5

84-318 XA
N64200
W63180

REISTERSTOWN

30

D.R.16

140

BL

D.R.16

R.C.3

BM

D.R.2

D.R.3.5

1980 COMPREHENSIVE ZONING MAP
ADOPTED BY THE
BALTIMORE COUNTY COUNCIL
OCT. 14, 1980
BILL NOS. 184-80, 185-80, 186-80
187-80, 188-80, 189-80 AND 190-80

CHAIRMAN, COUNTY COUNCIL

PHOTOGRAMMETRIC MAP OF
BALTIMORE COUNTY METROPOLITAN AREA
OFFICIAL ZONING MAP

REVISIONS | SCALE 1" = 200' | LOCATION | SHEET

REISTERSTOWN
GLEN MORRIS

Pet. Ex #9

R.C.2

GLEN MORRIS

30

BR

R.C.2

BL

D.R.2

R.C.2

BR

R.C.2

Pet

Tram Inc

D.R.2

BM

R.C.2

84-332 A
N 66170
W 55820

D.R.2

R.C.2

R.C.2

BL

D.R.2

BL-CNS

M.L.

D.R.3.5

D.R.3.5

D.R.2

R.C.5

DR 3.5

REISTERSTOWN

30

1980 COMPREHENSIVE ZONING MAP
ADOPTED BY THE
BALTIMORE COUNTY COUNCIL
OCT. 14, 1980
BILL NOS. 184-80, 185-80, 186-80,
187-80, 188-80, 189-80, AND 190-80

CHAIRMAN, COUNTY COUNCIL

REVISIONS | SCALE | LOCATION | SHEET

REISTERSTOWN
GLEN MORRIS

BALTIMORE COUNTY METROPOLITAN AREA
OFFICIAL ZONING MAP

40 39 38 37 36 W N.W. 35 34 33 32 31

N 70000 W 600 W 450 N 70000

70 69 68 67 66 65 64 63 62 61

NW 18-J NW 18-I NW 18-H

NW 17-J NW 17-I NW 17-H

NW 16-I NW 16-H

W 55988 N 67775

W 53894 N 66003

N 65438 W 51450

N 63339 W 50525

W 47294 N 61203

W 46347 N 60824

SUSQUEHANNA TRANSMISSION CO.

W.M. WESTERN

EMORY GROVE CAMP

WAUGH

PROSPECT AVE.

BUTLER RD.

WORTHINGTON AVE.

DELAMERE RUN

WORTHINGTON AVE.

LONGIECKER ROAD

BUTLER ROAD

GELAGAD RUN

COLNOLMAN RUN

TRIGHTON CT.

WORTHINGTON HILL DRIVE

TEMPERANCE AVE

FISKE AVE

NEEL AVE.

BUTLER AVE.

FIRST AVE.

SECOND AVE.

THIRD AVE.

HAMMOND AVE.

(FORMERLY) DOVER RD.

RAILROAD AVE.

CENTRAL AVE.

DYER AVE.

GLYNDON AVE.

BELVIEW AVE.

ALBRIGHT AVE.

MARYLAND AVE.

INSULIN LA.

CHARGOUR

SACRED HEART LANE

DOLLY RD.

CARMELITA CT.

THORDEN RD.

TIDYMAN RD.

LAMPORT RD.

PERSHELL CT.

PERSHELL RD.

CONCORD JUNCTION CT.

FALLS

CARROLL JUNCTION CT.

CHATSWORTH AVE.

WHITE BIRCH CT.

MYSTIC WOOD RD.

GWYNN

JACOB LEE CT.

SACRED HEART CHAPEL RD.

ARMS CHAPEL RD.

TOWNLEIGH RD.

VILLAGE VALE CT.

HEART CT.

BENTLEY HILL DR.

MOSQUE MOSQUE CT.

BOND

NORTHWAY

GWYNNEST RD.

GLYNDON CT.

VALLEY MEADOW CIR.

BOND

RETTIE HILL LA.

GLYNDON

GLYNTREE CT.

GLYNTREE MANOR CT.

GLYNDON MANOR

GLYNDON

GLYNDON CT.

HUNTING RIDGE CT.

HUNTING RIDGE AVE.

ST. PAUL AVE.

CIR

OYSON DAN CT.

PATTERN CT.

AVE.

ST. PAUL AVE.

BACKMORE

LAUREL CT.

FOREST

PENBERLY LA

TIMBER RUN CT.

TIMBER RUN RD.

WOODSMEN CT.

TIMBER WAY CT.

TIMBER GROVE RD.

LOG TIMBER DR.

TIMBER VIEW

TIMBER RIDGE CT.

BOND AVE.

THOROUGHBRED

QUARTERHORSE CT.

INDIANPONY CT.

BONITA AVE.

BONITA

RUN

TIMBER

ENGLE RD.

AVE.

WOODSIDE

BONNOT PL.

BONNOT

CIR.

LEGEND

B.C.M.D. MAINS SHOWN

BALTIMORE CITY MAINS SHOWN

FIRE HYDRANTS SHOWN

VALVES SHOWN

METROPOLITAN DISTRICT LINK

Rel. Eq #94

6-B

BALTIMORE COUNTY METROPOLITAN DISTRICT
KEY MAP
WATER MAINS

SCALE 1 IN = 500 FT

TOPO & PLAN SHEETS			
N.W.	16-H	18-I	
	17-H	18-J	
	18-H	17-J	
	16-I	18-J	
	17-I		

KEY SHEET

MIBR

50 49 48 47 46 45 44 43 42 41

70 69 68 67 66 65 64 63 62 61

CARROLL CO.

BALTIMORE CO.

WESTMINSTER

WESTERN MARYLAND R.R.

PIKE

GREEN HILL FARM RD.

GORE'S MILL RD.

IVY MILL

KEYSER RUN

COCKEYS MILL ROAD

OLD GORES MILL ROAD

TRANSMISSION

SUSQUEHANNA NORTHWEST EXPRESSWAY

NW 17-M NW 17-L NW 17-K

NW 16-M NW 16-L NW 16-K

-LEGEND-

BCMD MAINS SHOWN

BALTIMORE CITY MAINS SHOWN

FIRE HYDRANTS SHOWN

VALVES SHOWN

METROPOLITAN DISTRICT LINE

Ref. Eq # 6-A

BALTIMORE COUNTY METROPOLITAN DISTRICT
KEY MAP
WATER MAINS

SCALE 1 IN. = 500

TOPO & PLAN SHEETS

N.W.	16-K	18-L	
	17-K	18-M	
	18-K	17-M	
	16-L	18-M	
	17-L		

KEY SHEET

S.E.

Petitioner's Ex #4.

HANOVER ROAD

HANOVER ROAD

OLD

(30)

(1) (2) (3) (5) (6) (7) (8) (9) (10) (11) (12) (14)

Camp. #9A

BALTIMORE GAS & ELECTRIC CO.

POWER TRANSMISSION LINES

3

4

SCALE 1" = 50'

This legislative judgment recognizes and understands that some properties which potentially might be reclassified to other than resource conservation zoning by the County Board of Appeals should not and are not now eligible for such reclassification. Indeed, the statute would otherwise be useless and of no effect. The point is that the County Council decided to reserve for itself the judgment concerning such matters, and there is absolutely no constitutional provision which guarantees to every property owner the right to have its case heard not only before the local legislative body on a frequent basis, but also by an additional forum created by the legislative body.

Indeed, there is no constitutional right to any property owner to have the opportunity for piecemeal administrative rezoning. It should be remembered that the County Board of Appeals, as an administrative body, is subordinate to the legislature. Its power is limited to that defined by the legislative body.

* * *

Since Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Supreme Court has given broad latitude to local land use legislation under the police power. There, in sustaining a law which established land use districts excluding all industrial establishments, the Court recognized that some industries might well be innocuous in particular cases. But, as the Court noted,

> "The inclusion of a reasonable margin, to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." 272 U.S. at 388-89.

Similarly, in Kadacheck v. Sebastian, 239 U.S. 394 (1915), the Court upheld a local law excluding brickyards from a particular district. In its

discussion of the police power, the Court said,

> "It is to be remembered that we are dealing with one of the most essential powers of government,--one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." 239 U.S. at 410.

Mr. Justice Douglas delivered the more recent Opinion of the Court in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), approving yet another controversial zoning law, this time restricting the occupancy of single family dwellings to traditional families. He underlined,

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be '"reasonable, not arbitrary"'" 416 U.S. at 8.

Moreover, in countering the suggestion that the legislative judgment was arbitrary, he quoted Mr. Justice Holmes who observed over a half century ago,

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Ibid.

* * *

Indeed, in reference to these constitutional issues, the opportunity for Petitioner to seek the accomplishment of its objectives through, in particular, the water and sewer planning process, as well as the next comprehensive zoning process, raises the important points of exhaustion of statutory remedies and the finality of the County decision. The Supreme Court has consistently refused constitutional challenges to zoning statutes where it appeared either that the Petitioner neglected to utilize appropriate and available local process or that the local governmental decision was not complete.

In Williamson County Regional Planning Comm. v. Hamilton Bank, ___ U.S. ___ (1985), Slip Opinion attached as Exhibit 3, the Court followed this approach in turning back allegations that the application of various zoning laws and regulations in Williamson County, Tennessee, amounted to a "taking" of the Petitioner's property. The judgment of the Court was in no way novel or surprising. As Mr. Justice Blackmun explained, the Court had consistently articulated this position in such other recent cases as Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-37 (1978); Agins v. Tiburon, 447 U.S. 255, 263 (1980); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981); and Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981).

In each of the above Supreme Court cases, property owners fought against local legislation of greater impact and far more severe consequences to property values than the statute in question. But, in each case, the Supreme Court had no difficulty sustaining the facial constitutionality of the statute and/or referring the property owner to additional available local decision making procedures.

This is easily understood. Ever since the Euclid case, supra, the Supreme Court has been following this road because of its great understanding and respect for the importance of local legislative judgment in land use controversies.

It is apparent that BCZR 1A00.3.A.1 fits within the tradition of local zoning legislation reasonably designed to advance the public welfare. As in the case with any ordinance of strength and impact, it inevitably runs up against the interests of one property owner or another. This is in the nature of land use legislation. Here, related regulation through zoning and water and sewer planning work together to protect the important rural areas of the county from urban sprawl.

Moreover, there is no question that the county-wide zoning maps generally provide for a variety of uses and levels of development. In other words, we are not dealing here with legislation aimed at stopping all growth. Rather, the undertaking is to moderate and direct the development of the county within proper boundaries.

Thus, BCZR 1A00.3.A.1 must be sustained consistent with the constitutional doctrine of the police power developed by the Supreme Court. It clearly is facially constitutional.

II.

While the validity of the zoning statute in question is clear, it is noteworthy that this very issue brings with it a crucial jurisdictional question. The authority of the County Board of Appeals to invalidate zoning legislation is extremely doubtful.

A review of Baltimore County Charter Section 602 demonstrates that the Board exercises in zoning "such functions and powers (as) may be prescribed by legislative act of the County Council." Section 602(a), Bill No. 85-78. Neither this section nor any implementing legislation confers

upon the Board the responsibility to decide the validity of County Council action.

Research has revealed no Maryland case on point, but the prevailing rule excludes this power. As it is said in Anderson, American Law of Zoning, Section 20.09,

> "§20.09. Authority to rule on validity of ordinance.
>
> The jurisdiction of the board of adjustment to review administrative decisions, and in the course of such review to construe the zoning regulations, does not include the power to determine whether the zoning ordinance is valid. Although some courts have apparently taken the position that validity is in issue when a landowner applies for administrative relief, a board of adjustment exercises a delegated power which neither expressly nor impliedly includes the power to review the process of enactment, or the constitutionality of the ordinance."

Otherwise stated, the essential constitutional question must be answered in a judicial forum. It is an issue which may well be addressed by the Circuit Court upon review of this administrative decision. See Cardon Investments v. Town of New Market, 302 Md. 77 (1984).

III.

To be sure, the conclusion that BCZR 1A00.3.A.1 is valid does not in theory moot the question of error. The Board of Appeals may consider the case and reclassify the property to another resource conservation classification if the evidence calls for it. In this case, however, no amount of argument regarding the wisdom or equity of the Council action can obscure the point that there was no error as a matter of law.

The definitions and standards relating to the issue of zoning "error" sufficient to sustain a piecemeal reclassification are so well established as to bear little repetition here. See Boyce v. Sambly, 25 Md. App. 43 (1975) and Coppolino v. County Board of Appeals of Baltimore County, 23 Md. App. 358 (1974). Simply put, the inquiry is whether the Council was

familiar with the area and had the opportunity to consider the pertinent facts. So long as this is the case, the wisdom or quality of the decision from a planning point of view is irrelevant.

In the present case, both the subject property and the neighboring property of the Reisterstown Lumber Company were specific issues in the 1984 process. The County Council and the Planning Board records submitted as specific exhibits demonstrate that the parties not only identified the properties but gave testimony to the County Council during the hearing process. The legislative action taken came after the Petitioner had the opportunity to provide full information. The bottom line is that the Council apparently did not agree with the request to rezone to commercial. The rural character of the area and the lack of planned water or sewer service easily support this judgment.

Moreover, there is no sustainable claim to unreasonable discrimination or denial of equal protection. It is inevitable that lines must be drawn, often between properties sharing some similar characteristics. In County Commissioners of Queen Anne's County v. Miles, 246 Md. 355 (1967), the Court sustained a far more restrictive zoning ordinance, establishing a five acre minimum lot size in rural waterfront areas. In addressing the contention that properties similar to those of the challengers received more favorable zoning, the Court acknowledged that the judgments might well have been different and that the wisdom of the lines drawn might well be doubtful. But, so long as the classifications were fairly debatable, they would necessarily be sustained.

In the present case, there is no question that the subject property remains part of a rural residential area and that both planned water and

sewer service are absent. Rather, the core of the argument for "error" is in the rezoning of the adjacent Reisterstown Lumber Company property to B.R. (business roadside). The lumber company property, of course, adjoins the subject property and is alleged to be similar in character, but there are important distinguishing features. The most important is historical, there being no dispute that the neighboring Reisterstown Lumber Company has existed as far back as memory can go and prior to comprehensive zoning and the establishment of resource conservation zones. Other commercial zoning on the west side of Old Hanover Road, across from the subject property, remains vacant. While the most recent addition of commercial zoning of Reisterstown Lumber Company property has reached further to the east, this judgment is explainable as an extension of an existing business. It does not constitute a zoning action which authorizes the intrusion of new development into a rural area.

Again, as it was said in Miles, whatever doubt there may be as to the wisdom of the County Council's decision, the zoning classification must be sustained as fairly debatable. To be sure, the County Council might legitimately have chosen not to extend commercial zoning to the lumber company property eastward, or the Council might have chosen to include the subject property among the land so reclassified. But these are matters for the legislature and beyond the scope of the County Board of Appeals in this proceeding.

IV.

Even if there were an error, the request for B.R. zoning would have to be rejected because it is not warranted on this record. The Petitioner presented opinion testimony that local shopping, or a "7-11" store would be appropriate. This implies not B.R. zoning, but rather B.L. (Business-Local). This opinion was itself totally unsupported by cogent facts,

and was contradicted by the undisputed evidence that the property zoned B.L. on the west side of the road is vacant.

The bottom line is that there was no affirmative evidence to support any of the commercial zoning classifications. The case reduces to nothing more than a visceral reaction to the legislative choice to extend the Lumber Company zoning without carrying these properties along the way. Perhaps there is the hope that sometime in the future the Lumber Company may desire to purchase the subject property.

However understandable the reasons for the disappointment which generated this Petition, they do not amount to a legal basis to make the requisite affirmative finding that any particular commercial zoning classification is appropriate, much less the request for B.R.

V.

The significant points may be summarized in this way:

1. BCZR 1A00.3.A.1 is constitutional, so that the jurisdiction of the County Board of Appeals is limited to consideration of rezoning to another classification within the resource conservation category.

2. Moreover, it does not appear that the County Board of Appeals has jurisdiction to invalidate the county statute.

3. In any event, there is no error on this record.

4. Finally, there is no affirmative evidence to support reclassification to B.R. zoning or even the B.L. classification suggested by Petitioner in the testimony.

For all of these reasons, this petition should be denied.

Phyllis Cole Friedman
Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel
Room 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 14th day of October, 1985, a copy of the foregoing People's Counsel's Memorandum was mailed to John B. Howard, Esquire, and Robert A. Hoffman, Esquire, 210 Allegheny Ave., Towson, MD 21204; Malcolm F. Spicer, Jr., County Attorney, Office of Law, Mezzanine, Court House, Towson, MD 21204; and Norman E. Gerber, Director of the Office of Planning and Zoning, Courts Building, Towson, MD 21204.

Peter Max Zimmerman
Peter Max Zimmerman

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PETITION FOR RECLASSIFICATION 3 Parcels, E/S Old Hanover Road; 1.4, .96 and 3.3 acres, respectively Situated 1720 Feet and 2121 Feet, respectively N/Butler Road FOURTH ELECTION DISTRICT NELSON L. BOND, JR., et al.	*	BEFORE THE
	*	COUNTY BOARD OF APPEALS
	*	OF BALTIMORE COUNTY
	*	
	*	Case No. R-86-109 Cycle 1 - Item 3
	*	
Petitioners	*	

* * * * * * *

MEMORANDUM IN SUPPORT OF
PETITION FOR RECLASSIFICATION

Petitioners Nelson L. Bond, Jr., et al., by their attorneys, John B. Howard, Robert A. Hoffman and Cook, Howard, Downes & Tracy in support of their Petition for Reclassification state the following:

Petitioners' properties, located at 13011, 13015 and 13019 Old Hanover Road were rezoned during the 1984 comprehensive map process from DR2 to RC5. However, immediately adjacent to the subject properties and to the north, the Reisterstown Lumber Company obtained a reclassification to BR of two separate parcels, consisting of 13021 and 13023 Old Hanover Road which were purchased by Reisterstown Lumber in 1980. Although both Petitioners' and Reisterstown Lumber's properties do not currently have public water and sewer, they are within the

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Metropolitan District with existing public facilities approximately .4 miles south on Old Hanover Road.

I. SECTION 1A00.3.A.1

First, Petitioners will address Section 1AOO.3.A.1 of the Baltimore County Zoning Regulations, (B.C.Z.R.) and the issue of whether petitions for reclassification of properties located in the resource conversation zones can be filed. That provision reads as follows:

> 1AOO.3-Rezoning.
> A. Filing of rezoning petitions. (Bill No. 98-75)
> 1. No petition to reclassify an R.C. zone or part thereof as other than an R.C. zone may be accepted for filing by the Zoning Commissioner unless - (Bill No. 98-75).
> a. The Capital Program, duly adopted Baltimore County master or comprehensive plan, and the "county plan", required under Article 43 Section 387 C of the Annotated Code of Maryland 1957, with ammendments as codified in the 1971 Replacement Volume and 1974 Cummulative Supplement, show that the property under petition is to be serviced by public sewerage and water-supply systems within TWO years after the date the petition is submitted. (Bill No. 98-75)

For the following reasons, Petitioners submit that the blanket denial of a right to be heard on the petition for reclassification is a violation of their rights under the United States and Maryland State Constitutions.

A. STANDING.

As a threshold matter, Petitioners have standing to raise the Constitutional issues cited herein where the ability to rezone their properties have been curtailed by this regulation. Simpson v. Board of Appeals, 218 Md. 222 (1958).

D. INTERPRETING SECTION 1A00.3.A.1 ALONE WILL BE A CASE OF FIRST IMPRESSION BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY.

In the Spring of 1983, the Baltimore County Board of Appeals heard testimony and accepted legal memoranda in an application for reclassification of RC4 and RC5 property to DR3.5 in Case No. R-83-189. Petitioners in that case, D & R Joint Venture and Isaac Jones argued that both sections 1AOO.3.A.1 and 1AO3.2 of the Baltimore County Zoning Regulations did not preclude the Board from granting Petitioners requested relief. Section 1AO3.2 reads in pertinent part as follows:

> 1AO3.2 - Rezoning by petition (Bill nos. 98-75; 178-79)
> No petition for reclassification of property in an RC4 zone may be granted unless a registered professional engineer, architect, landscape architect, or land surveyor first certifies: (Bill nos. 98-75; 178-79)
> 1. That the parcel of land under petition lies at least 200 feet from the property line of any public water reservoir; (Bill no. 178-79)
> 2. That the parcel lies at least 300 feet from any first-or second order or greater

> stream that flows directly into a public water reservoir; (Bill no. 178-79)
> 3. That the parcel lies at least 300 feet from any third-order or greater stream that flows directly or indirectly into a public water reservoir; (Bill no. 178-79)

Following a decision by the Circuit Court that the Baltimore County Board of Appeals hear the case and decide the issue of application of the above referenced regulations, the Board found that both sections read together precluded the Board from ultimately granting Petitioner's request for relief.

This decision on June 8, 1983 was subsequently, on June 17, suspended pursuant to a Motion for Reconsideration of the validity of the regulations in question. No subsequent decision was ever rendered by the County Board of Appeals, and on March 28, 1985, an Order of Dismissal of the petitions was signed by the Board.

It may be argued that since the above referenced order dated June 8, 1983 was suspended pursuant to a Motion for Reconsideration, that decision would not be binding on the Board or Petitioners in this case. However, Petitioners submit that, notwithstanding the June 8 Order, Section 1A00.3A.1. should not be applied to dismiss the Petition in this case.

Petitioners in this case are not challenging the validity of the restrictions found in filing petitions under the the RC4 zoning classification. Distinguishing

the D & R Joint Venture and Isaac Jones case from the case at hand, the D & R Joint Venture case discussed the validity of the two statutory restrictions on filing reclassification Petitions found in the RC zones, while the case at hand deals only with the blanket denial of a hearing under any petition for reclassification of an RC zoned property. For reasons to follow, Petitioners believe that section 1AOO.3.A.1 is not a valid exercise of Baltimore County's police power.

C. SECTION 1AOO.3.A.1 VIOLATES PROCEDURAL DUE PROCESS.

Where a regulation deprives an individual of a property right, and no hearing to address such deprivation is permitted, the regulation is an invalid exercise of the state's police power and a violation of the due process clause of the Fourteenth Ammendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights. (The Maryland Court of Appeals has long equated Article 23 with the due process clause of the Fourteenth Amendment. See e.g.; Bowie Inn v. City of Bowie, 274 Md. 230 (1975). In Re: Easton, 214 Md. 176 (1957).)

In determining in what instances a due process hearing would be required, the Court of Appeals in Albert v. Public Service Commission 209 Md. 27 (1956), stated the following:

> ...where a public administrative body acts in a judicial or quasi-judicial manner, and its acts are particular and immediate rather than general and prospective, the person whose rights or property may be affected by the action is entitled to notice and hearing. (emphasis added)

Id. 37-38.

In enforcing this regulation, Petitioners' property is being locked into an RC Zoning classification, while Petitioners are being denied their constitutional right to notice and a hearing.

Further, it is stated in 1 Rathkopf, The Law of Zoning and Planning, (4th ed. 1985) that an ordinance or amendment which is inconsistent with the enabling statute constitutes a denial of procedural due process.

The enabling statute which permits Baltimore County to enact its zoning regulations can be found in Article 25A, Section 5, Annotated Code of Maryland, (1957). Pursuant to Section 5(x), thereof Baltimore County is permitted:

> to enact local laws for the protection and promotion of public safety, health, morals and welfare relating to zoning and planning including the power to provide for the right of appeal of any matter arising under such planning and zoning laws to the circuit court except as is provided for under appeals to the county board of appeals.

In Section 5(u) the enabling statute provides for "a decision by the board of appeals on petition by any

interested person and after notice and opportunity for hearing." (emphasis added)

The denial of a hearing which is a fundamental right under the due process clause is not only in violation of the enabling statute under the Annotated Code of Maryland, but also is a deprivation of a procedural right under the Fourteenth Amendment of the United States Constitution and the Constitution of Maryland.

In this case, Petitioners have had their property rezoned to an R.C. classification under the comprehensive map process, and although rezoning under the comprehensive map process is a valid exercise of the police power, Petitioner is denied the right to be heard upon a petition for reclassification to contest the rezoning. The regulation therefore violates due process.

D. SECTION 1AOO.3.A.1. VIOLATES SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Supreme Court of the United States in Euclid v. Amber Realty Company 272 U.S. 365 (1926), found that zoning laws are a form of land use control and are justified on the grounds of proper exercise of the police power of a political subdivision as delegated to it by the state. The power of a subdivision of a state to rezone comes from an enabling act passed pursuant to the state's

constitutional provisions. Tome v. Norwood Realty Company, 211 Ga. 814, 89 S.E.2d 265 (1955).

However, the general rule that a county or municipality may control land is limited by constitutional considerations; a county or municipal corporation must not exercise this police power in an arbitrary, unreasonable or capricious manner. Any exercise of that power must be substantially related to the public welfare. See, Moore v. East Cleveland, 431 U.S. 494 (1977); Euclid v. Amber Realty Company 272 U.S. 365 (1926); Wincamp Partnership v. Anne Arundel County, 458 F.Supp. 1009 (1978).

In 1 Rathkopf, The Law of Zoning and Planning, Section 402 (4th ed. 1985) it is stated that a denial of substantive due process may be found when a restriction in an ordinance constitutes an unauthoried exercise of the police power, in that the restriction is arbitrary and fails to achieve the purpose for which was intended.

The subject regulation requires that if ones property is zoned R.C. by the County Council during the comprehensive map process, a rezoning petition cannot be accepted for filing unless that property is on the "Capital Program" and is due to be serviced by public sewerage and water-supply systems within two years after the date the petition is submitted.

In Petitioners case, the subject property falls within the "metropolitan district" and public sewer and water facilities could be available if extended privately. Where the intent of the legislature was obviously to restrict development in those areas that will not have public sewer and water under any circumstances, a regulation which distinguishes between property owners that have public sewer and water extended with public funds, (i.e. under the Capital Program) as opposed to property owners who may extend public sewer and water privately is arbitrary, capricious and discriminitory on its face.

In furtherance of that conclusion is the rezoning of the Reisterstown Lumber Yard, from DR 2 to BR on property located further from exisiting public water and sewer supplies on the comprehensive maps. That property owner's right to file a rezoning petition has not been denied despite the property not being included on the Capital Program for extension of public sewer and water. On the one hand the County Council is permitted to rezone notwithstanding the Capital Program, while on the hand extended to Petitioners, the Board is asked to dismiss a Petition to rezone property nearly identical based on the Capital Program. There is no rational basis for such a distinction.

E. SECTION 1.A.00.3.A.1. VIOLATES EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

Under the equal protection clause of the Fourteenth Amendment, where the county has unlawfully discriminated amongst land owners, and there is no fundamental right or suspect classification involved, such discrimination will be subject to the "rational basis" type of scrutiny essentially equivalent to the substantive due process test above. See: Construction Industry Association v. City of Petaluma 522 F2d.897 (9th circuit 1975). See also: McLaughlin v. Florida, 379 U.S. 184 (1964).

That is, where land owners similarly situated are treated differently there must be a reason why and the difference in treatment must not be arbitrary, unreasonable or capricious.

In the case at hand, RC property owners who are not slated for public water and sewer are denied the right to be heard on a reclassification petition where the rezoning to RC may have been in error. There is no rational basis for denying a hearing to these property owners where other property owners with property similarly situated, also without public water or sewer, have the right to petition for rezoning.

Clearly, the regulation violated Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment.

II. THE RC-5 ZONING CLASSIFICATION CONSTITUTES MISTAKE AND/OR ERROR.

Assuming the Board agrees that Section 1A00.3.A.1 should not apply in this case, testimony presented at the hearing before the Board on September 17, 1985, clearly indicates that a mistake or error was committed in not rezoning Petitioner's properties to BR on the 1984 comprehensive map. A brief summary of Petitioners' and People's Councel's witnesses' testimony below demonstrates that the request for reclassification should be granted.

The first witness presented by Petitioners was Nelson L. Bond, Jr. Mr. Bond is the owner of 13019 Old Hanover Road and was speaking on behalf of the other Petitioners and owners Calvin O. McElhattan, Sr. and Calvin O. McElhattan, Jr., owners of 13011 and 13015 Old Hanover Road, respectively.

Mr. Bond testified that there had been certain changes since the purchase of his house in 1977. First, Reisterstown Lumber Company, immediately adjacent to the north of Mr. Bond's property uses flood lights on their property all night. Second, the BL zoned property on the west side of Old Hanover Road is being "filled" and has two shed like structures, each with three bays, on the northern portion of the BL property.

Mr. Bond further testified that he had requested a change in zoning to BR before the County Council on the

1984 comprehensive maps following the requested change to BR by Reisterstown Lumber.

Also, Mr. Bond testified that these properties are bordered to the south and east by a 400 foot Baltimore Gas & Electric ("BG&E") right-of-way used for the power transmission towers and lines.

Petitioners' properties, surrounded on two sides by commercial zoning, and on one side by a 400 foot BG & E right-of-way indicates that a mistake and/or error was made in not rezoning this island of property to BR on the 1984 comprehensive maps.

The next witness called by Petitioners was William F. Kirwin, who was acknowledged by the Board to be an expert land planner.

Mr. Kirwin prepared and presented several exhibits and photographs in support of Petitioners proposed reclassification. Mr. Kirwin first pointed out the location of the transmission lines on a 500 foot scale drawing which was submitted as Petitioners Exhibit 3. Mr. Kirwin further indicated on this exhibit the heavy truck traffic flow north on Hanover Pike and the MTA "turn around" point just south of Petitioner's property.

Mr. Kirwin then described Petitioner's Exhibit 4, a 50 foot scale drawing with "numbers" making the location of photographs which were submitted as

Petitioner's Exhibits 5-1 through 5-12. The importance of this exhibit and the photographs was to illustrate the surrounding commercial zones and uses, and the dimensions of the power lines and substation that borders on the east side of Petitioner's property.

Mr. Kirwin next testified that according to County sewer and water maps, sanitary sewer and public water is available at Butler Road and Hanover Pike, approximately 2,000 feet south of the Petitioners' properties. Because of the availability of sewer and water, it was Mr. Kirwin's opinion that the RC5 zoning classification was not the proper classification to be placed on Petitioners' properties. The RC5 zoning classification's purpose according to Mr. Kirwin, is to prevent "leapfrog zoning and development" in a rural area. Here, however, public facilities are available and these properties do lie within the Metropolitan District. The rezoning of this property to RC5 was therefore in error and should be reclassified BR.

Mr. Kirwin continued and discussed the master plan for Baltimore County, land use element, page 15 on which Petitioners' properties were designated to be within the "fringe development area". The fringe development areas are those areas within the county that are presently sewered, or planned to be sewered within ten years, that

are not developed at present and are not included within the boundaries of any new developement area or town or community center.

Clearly, the reclassification of the Petitioners' properties to RC5, in light of the conflict with the master plan for Baltimore County was error and/or mistake.

It was further Mr. Kirwin's opinion that given the lack of provisions for neighborhood shopping areas outside of the Owings Mill's town center, and the fact that Petitioners' properties are nestled between commercial zoning and the transmission lines, it was a mistake not to rezone these properties to BR.

Testimony also indicated a further example of error. One of Petitioner's properties is less than one acre (.96 acres owned by Mr. McElhattan, Jr.), the minimum lot area required under the RC5 zoning classification. The rezoning therefore created a non-conforming use. Clearly the Council must have erred in rezoning this property, where Mr. McElhattan's home could not be rebuilt if destroyed by fire or other calamity. Petitioners submit that the Council, had it been aware of the result of this rezoning, would not have placed one of its citizens in such serious financial jeopardy.

Finally, Mr. Kirwin testified that future traffic patterns, specifically the construction of an exit off the northwest expressway and Butler Road, would require a need for more neighborhood commercial zoning.

For all of the above cited reasons, it was Mr. Kirwin's opinion that this property should more appropriately be zoned BR.

That concluded Petitioner's case and People's Counsel called Mr. James Hoswell of the Office of Planning as its sole witness.

In recounting a history of the zoning on Petitioners' property, Mr. Hoswell testified that certain urban zones had been "unwisely placed" on the 1971 comprehensive maps. Petitioners' properties were properties that were included in those which according Mr. Hoswell were unwisely placed and therefore received the down-zoning to RC5 on the 1984 comprehensive map.

Most significant to Petitioner's case was a statement by Mr. Hoswell in accord with Petitioner's expert, Mr. Kirwin. Mr. Hoswell testified that given the 400 foot right-of-way that borders the east side of Petitioner's property, as well as Reisterstown Lumber Company, it did not make good planning sense to rezone a portion of Reisterstown Lumber's property which lies to the east of the power transmission lines. It was Mr.

Hoswell's opinion that it would have been better, from a planning perspective, to rezone property which abuts the existing commercial (i.e. Petitioners' properties).

The basic test considered in a contention of error or mistake is whether the County Council made a besic and actual mistake, as that term is used in zoning law, when it adopted a comprehensive zoning map placing the subject property in the present classification, or error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proved that the Council's initial premises were incorrect. See Coppolino v. County Board of Appeals of Baltimore County, 23 Md. App.358 (1974); Boyce v. Asembly, 25 Md. App.43 (1975)

The testimony presented clearly indicates that a besic mistake was made in allowing an island of RC5 zoned properties to remain, while surrounded on two sides by commercial zoning and on the third by a 400 foot BG & E right-of-way. Further, the rezoning of property to the east of the power lines, beyond an obvious buffer from RC-5 zoned property, where property which currently abuts the commercial property is zoned RC5, demonstrates mistake and error.

Finally, the County Council erred in not providing sufficient neighborhood shopping to accomodate

the fifty thousand density units placed upon the 1984 comprehensive map in the Owings Mills area, and in not following the guidance of its own master plan showing these properties as being in the fringe development area.

For the reasons stated above Petitioner respectively requests this Honorable Board take notice of the proper filing of this rezoning petition and requests to re- ne the properties from RC5 to BR.

Respectively submitted,

JOHN B. HOWARD

ROBERT A. HOFFMAN
Cook, Howard, Downes & Tracy
210 Allegheny Avenue
P.O. Box 5517
Towson, Maryland 21204
301-823-4111
Attorney for the Petitioners

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this day of 1985, a copy of the foregoing Memorandum in Support of Petition for Reclassification was mailed to Phyllis Cole Friedman, People's Counsel and Peter Max Zimmerman, Deputy People's Counsel, Old Court House, 2nd Floor, Towson, Maryland 21204

JOHN B. HOWARD

Maryland Department of Transportation
State Highway Administration

William K. Hellmann
Secretary
Hal Kassoff
Administrator

March 15, 1985

Mr. William Hackett, Chairman
Board of Appeals
County Office Building
Towson, Maryland 21204

Attn: Mr. N. Commodari

Re: Reclassification Petitions
Cycle I - 1985
Meeting of March 6, 1985
Property Owner: Nelson L. Bond, Jr., et al
Location: E/S Old Hanover Road, Route 668, 1720', 1996' and 2121' N. from c/l Butler Road
Existing Zoning: R.C. 5
Proposed Zoning: B.R.
Acres: 5.66
District: 4th

Dear Mr. Hackett:

On review of the submittal of 2-29-85 of the 3.3 acre site on the east side of Old Hanover Road (Route 668), the State Highway Administration offers the following comments.

All commercial access to Old Hanover Road must be through S.H.A. access permit.

On review of a detail site plan showing building location, entrance and park location, the State Highway Administration will provide additional comments.

Very truly yours,

Charles Lee, Chief
Bureau of Engineering
Access Permits

By: George Wittman

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COUNTY BOARD OF APPEALS
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CL:GW:maw

cc: Mr. J. Ogle

My telephone number is (301) 659-1350
Teletypewriter for Impaired Hearing or Speech
383-7555 Baltimore Metro — 565-0451 D.C. Metro — 1-800-492-5062 Statewide Toll Free
P.O. Box 717 / 707 North Calvert St., Baltimore, Maryland 21203 - 0717

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO Mr. William Hackett, Chairman, Board of Appeals Date March 20, 1985

FROM Ian J. Forrest

SUBJECT Reclassification Petitions
CYCLE I - 1985
Meeting of March 6, 1985

The Baltimore County Department of Health has reviewed the following Reclassification Petitions and does not anticipate any health hazards at this time regarding these Petitions.

Item #1 - Helena D. Gibbons

Item #2 - Paul Gambrill, et al

Item #3 - Nelson L. Bond, Jr., et al

Item #4 - Conservation Associates

Item #5 - Greater Baltimore Medical Center

Item #6 - Josef of Vienna, Inc.

Item #7 - John W. Ruppert, et al

Ian J. Forrest, Director
BUREAU OF ENVIRONMENTAL SERVICES

IJF/fth

RECEIVED
COUNTY BOARD OF APPEALS
MAR 25 P 1:00

IN THE MATTER OF THE PETITION FOR RECLASSIFICATION FROM R.C. 5 TO B.R. ZONE E/S Old Hanover Rd., 1720', 1996' & 2121' N from Centerline of Butler Rd., 4th District

NELSON L. BOND, JR., et al., Petitioners

: BEFORE THE COUNTY BOARD OF APPEALS
: OF BALTIMORE COUNTY
:
: Case No. R-86-109
:

ENTRY OF APPEARANCE

Please enter the appearance of the People's Counsel in the above-captioned matter. Notices should be sent of any hearing dates or other proceedings in this matter and of the passage of any preliminary or final Order.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, MD 21204
494-2188

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COUNTY BOARD OF APPEALS
AUG -7 A 9:58

I HEREBY CERTIFY that on this 7th day of August, 1985, a copy of the foregoing Entry of Appearance was mailed to John B. Howard, Esquire, 210 Allegheny Ave., Towson, MD 21204, Attorney for Petitioners.

Peter Max Zimmerman

LAW OFFICES
COOK, HOWARD, DOWNES & TRACY
210 ALLEGHENY AVENUE
P.O. BOX 5517
TOWSON, MARYLAND 21204

JAMES H. COOK
JOHN B. HOWARD
DAVID D. DOWNES
DANIEL D'C. TRACY, JR.
JOHN H. ZINK, III
JOSEPH C. WICH, JR.
HENRY B. PECK, JR.
HERBERT R. O'CONOR, III
THOMAS L. NUDSON
C. CAREY DEELEY, JR.
GEORGE K. REYNOLDS, III
LAWRENCE L. HOOPER, JR.
H. KING HILL, III
ROBERT A. HOFFMAN
DEBORAH C. DOPKIN
CYNTHIA M. HANN
ANGUS E. FINNEY
KEVIN W. SMITH*
H. BARRITT PETERSON, JR.

* ADMITTED IN KENTUCKY ONLY

JAMES D.C. DOWNES
(1908-1979)

TELEPHONE
(301) 823-4111

TELECOPIER
(301) 821-0147

March 1, 1985

The County Board of Appeals
of Baltimore County
Old Court House
Towson, Maryland 21204

Re: Petition for Reclassification
Nelson L. Bond, Jr.; Calvin O. McElhattan, Sr.
and Calvin O. McElhattan, Jr., Petitioners

Dear Sir or Madam:

This firm represents the above-referenced Petitioners in their request for a zoning reclassification of property located on Old Hanover Road in Reisterstown from RC5 to BR.

Petitioners' properties, 13011, 13015 and 13019 Old Hanover Road were rezoned in 1984 by the County Council from DR2 to RC5 and form an island of RC zoned property surrounded by commercial zoning. Immediately adjacent to the subject property and to the north Reisterstown Lumber Company obtained a reclassification to BR on the 1984 Comprehensive Maps of two separate parcels. One has been owned by Reisterstown Lumber since prior to the adoption of the zoning regulations in 1955, and until the 1984 Comprehensive Map, was a nonconforming use. The second parcel, 13021 and 13023 Old Hanover Road was purchased by Reisterstown Lumber Company within the last several years.

A review of the attached plats and zoning maps show that Petitioners' properties are bordered to the north by ER, to the south and east by a 400 foot BG&E right-of-way for

The County Board of Appeals
of Baltimore County
March 1, 1985
Page 2

overhead transmission lines and to the west by a BL zone. It is apparent that there has been a mistake and/or error in rezoning these properties from DR-2 to RC5. It is respectively submitted that the RC5 zoning classification is not appropriate for property in the heart of a commercial zone and should be reclassified BR.

Petitioners realize that one of the issues relates to an interpretation of Section 1A00.3.A.1 (B.C.Z.R.) regarding acceptance for filing. This will be addressed by legal memorandum at the appropriate time.

For these reasons, Petitioners respectfully request that this petition for reclassification be granted.

Yours truly,

John B. Howard
Attorney for Petitioners

JBH:kam

3180

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

September 12, 1985

John B. Howard, Esquire
210 Allegheny Avenue
Towson, Maryland 21204

RE; Petition for Reclassification
3 parcels situated on the E/S of Old Hanover Rd., containing 1.4, .96 & 3.3 acres respectively, & being 996' & 2121' respectively N/Butler Road
4th Election District
Nelson L. Bond, Jr., etal, Petitioners
Case No. R-86-109 Cycle I - Item # 3

This is to advise you that $ 739.30 is due for advertising and posting of the above property. This fee must be paid before an Order is issued.

Please make the check payable to Baltimore County, Maryland, and remit to Mrs. Barbara Gaillard, Zoning Office, Room 109, County Office Building, Towson, Maryland 21204, before the hearing.

Sincerely,

ARNOLD JABLON
Zoning Commissioner

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 012522

DATE 9/19/85 ACCOUNT R-01-615-000

AMOUNT $ 739.30

RECEIVED FROM: Nelson L. Bond, Jr.

FOR: Advertising and Posting R-86-109

B660*****7393Cta 8048F

VALIDATION OR SIGNATURE OF CASHIER

COUNTY BOARD OF APPEALS
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Court demonstrates in this case, however, "the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision." *Ante*, at 20. In addition, "[r]espondent has not shown that [Tennessee's] inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature." *Ante*, at 23. Accordingly, I join the Court's opinion reversing the judgment of the Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

No. 84-4

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., PETITIONERS v. HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 28, 1985]

JUSTICE STEVENS, concurring in the judgment.

Zoning restrictions are a species of governmental regulation that may impair the value of private property. The impairment may occur in one of two ways. The substance of a restriction may permanently curtail the economic value of the property. Or the procedures that must be employed, either to obtain permission to use property in a particular way or to remove an unlawful restriction on its use, may temporarily deprive the owner of a fair return on his investment. For convenience, I will refer to the former category as "permanent harms" and the latter as "temporary harms."

Permanent harms fall into three subcategories. They may be impermissible even if the Government is willing to pay for them.[1] They may be permissible provided that the property owner is compensated for his loss.[2] Or they may be permissible even if no compensation at all is paid.[3] The permanent harm inflicted by the zoning regulations at issue in this case is

[1] For example, even if the State is willing to compensate me, it has no right to appropriate my property because it does not agree with my political or religious views.

[2] See *e. g., United States v. 50 Acres of Land*, 469 U. S. ——, —— (1984).

[3] See *e. g., Penn Central Transportation Co. v. New York City*, 438 U. S. 104 (1978).

either in the second or the third subcategory. As the Court demonstrates, until all available remedies have been exhausted, all we can say with any certainty is that petitioners may be required to abandon some of their restrictions upon respondent unless they are prepared to compensate respondent for whatever permanent harm they may cause.

In most litigation involving a challenge to a governmental regulation—and this case is no exception—the Government contends that the public interest justifies the harm to the property owner and that no compensation need be paid. If the Government fails to convince the court that such is the case—that is, if it is not entitled to impose an uncompensated permanent harm on the property owner—the court can express its ruling on the merits by stating that the regulation is invalid, or by characterizing it as a "taking." In either event, the essence of the holding is a conclusion that the harm caused by the regulation is one that the Government may not impose unless it is prepared to pay for it. In my opinion, when such a situation develops, there is nothing in the Constitution that prevents the Government from electing to abandon the permanent-harm-causing regulation. The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that "goes too far" as a "taking" does not mean that such a regulation may never be cancelled and must always give rise to a right to compensation.[1]

To the extent that this case involves a claim that the respondent has suffered an unlawful permanent harm—whether it is called a "taking" or merely an invalid attempt to

[1] In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922), Justice Holmes' opinion for the Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." As he explained earlier in the opinion, however, all this implies is that when regulation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.*, at 413. For a complete discussion of this point see Siemon, Of Regulatory Takings and Other Myths, 1 J. Land Use & Env. L. 105, 110–117 (1985).

regulate—the Court correctly explains that the issue is not yet ripe for decision. We do not yet know whether the harm inflicted by the zoning regulations is severe enough to lead to the conclusion that the zoning regulations "go too far." We do know, however, that the process of determining how far the regulations do apply to respondent has already caused it a fairly serious harm—one that the jury calculated as worth $350,000. But that harm is in my second major category—it was a "temporary harm."

Temporary harms resulting from a regulatory decision fall into two broad subcategories: (1) those that result from a deliberate decision to appropriate certain property for public use for a limited period of time; and (2) those that are a by-product of governmental decisionmaking. The first subcategory includes, for example, the condemnation of a laundry to be used by the military for the duration of World War II, *Kimball Laundry Co. v. United States*, 338 U. S. 1 (1949), or the condemnation of the unexpired term of a lease, *United States v. General Motors Corp.*, 323 U. S. 373 (1945)—that type of appropriation is correctly characterized as a "temporary taking." The second subcategory is fairly characterized as an inevitable cost of doing business in a highly regulated society.

Temporary harms in the second subcategory are an unfortunate but necessary by-product of disputes over the extent of the Government's power to inflict permanent harms without paying for them. Every time a property owner is successful, in whole or in part, in a challenge to a governmental regulation—whether it be a zoning ordinance, a health regulation,[2] or a traffic law[3]—he is almost certain to suffer some temporary harm in the process. At the least, he will usually incur significant litigation expenses and frequently he will ir

[2] See *e. g., Industrial Union Department v. American Petroleum Institute*, 448 U. S. 607 (1980).

[3] See *e. g., Raymond Motor Transportation, Inc. v. Rice*, 434 U. S. 429 (1978).

cur substantial revenue losses because the use of his property has been temporarily curtailed while the dispute is being resolved.

In some situations these temporary harms are compensable. Statutes authorize the recovery of some costs of litigation, including attorneys' fees. Sometimes the cost of obtaining regulatory approval is budgeted in an initial development plan and ultimately recovered from consumers. But in many cases—and apparently this is one—the property owner has no effective remedy for such a temporary harm except a possible claim that his constitutional rights have been violated. If his property is harmed—even temporarily—without due process of law, he may have a claim for damages based on the denial of his procedural rights.[1] But if the procedure that has been employed to determine whether a particular regulation "goes too far" is fair, I know of nothing in the Constitution that entitles him to recover for this type of temporary harm.

The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the Government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make a good-faith effort to advance the public interest when they are performing their official duties, but we must also recognize that they will often become involved in controversies that they will ultimately lose. Even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable byproduct of every such dispute as a "taking" of private property.

[1] Cf. *Memphis Light, Gas & Water Div. v. Craft*, 436 U. S. 1 (1978).

In this case there was a substantial dispute not only about the permissibility of the permanent harm, but also over the fairness of the procedures employed by the petitioners. Respondent made a claim this its constitutional right to due process of law had been violated. Conceivably it might have prevailed on that theory if it could have proved that an unconstitutional procedure had resulted in an unnecessary delay in obtaining approval of its development plan. See *ante*, at 9, n. 6. But its proof failed on that issue. The jury found "that respondent had not been denied procedural due process." *Ante*, at 8, n. 4. In my opinion, that finding completely disposes of respondent's claim for damages based on the temporary harm resulting from the controversy between respondent and petitioners over the applicability and enforceability of the various zoning restrictions involved in this case.

There is nothing in the record to suggest that petitioners have tried to condemn any part of respondent's property, either permanently or for a limited period of time. There was no "temporary taking" of the kind involved in *Kimball Laundry Co., supra*, or *General Motors Corp., supra*. There has been a finding that there was no violation of procedural due process. Accordingly, the award of damages cannot stand and the judgment below must be reversed.

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

COUNTY OFFICE BLDG.
111 W. Chesapeake Ave.
Towson, Maryland 21204

000

Nicholas B. Commodari
Chairman

MEMBERS

Bureau of Engineering
Department of Traffic Engineering
State Roads Commission
Bureau of Fire Prevention
Health Department
Project Planning
Building Department
Board of Education
Zoning Administration
Industrial Development

April 12, 1985

John B. Howard, Esquire
210 Allegheny Avenue
Towson, Maryland 21204

RE: Item No. 3 - Cycle I
Petitioner - Nelson Bond, et al
Reclassification Petition

Dear Mr. Howard:

This reclassification petition has been filed with the Board of Appeals for a public hearing within the April-October reclassification cycle (Cycle I). It has been reviewed by the zoning office as to form and content and has also been reviewed by the Zoning Plans Advisory Committee. The review and enclosed comments from the Committee are intended to provide you and the Board of Appeals with an insight as to possible conflicts or problems that could arise from the requested reclassification or uses and improvements that may be specified as part of the request. They are not intended to indicate the appropriateness of the zoning action requested.

If it has been suggested that the petition forms, descriptions, briefs, and/or the site plans be amended so as to reflect better compliance with the zoning regulations and/or commenting agencies' standards and policies, you are requested to review these comments, make your own judgement as to their accuracy and submit the necessary amendments to this office before Tuesday, April 30, 1985. In the event that any requested amendments are not received prior to this date, the petition will be advertised as originally submitted.

In view of your clients' proposal to reclassify the subject property, consisting of three separate parcels of land, from an R.C. 5 to a B.R. zone, this hearing is required.

As indicated in your brief that accompanied this petition, it appears that said petition is in conflict with Section 1 A00.3.A.1 of the zoning regulations; i.e., no planned water or sewer service for this area. This was verified with Oscar Keyes, Department of Public Works. However, it was your position that you wanted the petition processed, and this matter would be discussed at a future time.

Item No. 3 - Cycle No. I
Petitioner - Nelson Bond, et al
Reclassification Petition
April 12, 1985

In view of the fact that the submitted site plan does not indicate a proposed development, the enclosed comments from this Committee are general in nature. If the requested reclassification is granted, more detailed comments from County agencies and the Committee (if a hearing is required) will be written when a proposed development is indicated.

If you have any questions concerning the enclosed comments, please feel free to contact me at 494-3391. Notice of the specific hearing date which will be between September 1 and December 31, 1985, will be forwarded to you in the future.

Very truly yours,

Nicholas B. Commodari /sc

NICHOLAS B. COMMODARI
Chairman
Zoning Plans Advisory Committee

NBC:bsc

Enclosures

cc: Gerhold, Cross and Etzel
412 Delaware Avenue
Towson, Maryland 21204

John B. Howard, Esquire
210 Allethery Avenue
Towson, Maryland 21204

August 16, 1985

NOTICE OF HEARING

RE: Petition for Reclassification
3 parcels situated on the E/S of Old Hanover Rd., containing 1.4, .96 & 3.3 acres respectively, & being situated 1720', 996' & 2121' respectively N/Butler Road
4th Election District
Nelson L. Bond, Jr., et al, Petitioners
Case No. R-86-109 Cycle I - Item #3

TIME: 10:00 a.m.

DATE: Tuesday, September 17, 1985

PLACE: Room 218, Courthouse, Towson, Maryland

William T. Hackett
William T. Hackett, Chairman
County Board of Appeals

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

September 12, 1985

John B. Howard, Esquire
210 Allegheny Avenue
Towson, Maryland 21204

RE; Petition for Reclassification
3 parcels situated on the E/S of Old Hanover Rd., containing 1.4, .96 & 3.3 acres respectively, & being 996' & 2121' respectively N/Butler Road
4th Election District
Nelson L. Bond, Jr., etal, Petitioners
Case No. R-86-109 Cycle I - Item # 3

This is to advise you that $ 739.30 is due for advertising and posting of the above property. This fee must be paid before an Order is issued.

Please make the check payable to Baltimore County, Maryland, and remit to Mrs. Barbara Galliard, Zoning Office, Room 109, County Office Building, Towson, Maryland 21204, before the hearing.

Sincerely,

ARNOLD JABLON
Zoning Commissioner

AJ:bg

t of all eligible costs; and

— (1) In addition to cost sharing f of the Agriculture Article, grants ma best management practices to preven point sources of water pollution on a other areas in which the potential f substantial. When cost sharing funds u f the Agriculture Article, the procedur than § 9-345 apply.

ubsection to governmental entities of or up to 100 percent of the total cost a grants, the applicant's financial capabili economic benefit shall be considered ed matching dollar amount.

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06

EXHIBIT 2

Subtitle 5. County Water and Sewerage Plans.

§ 9-501. Definitions.

(a) *In general.* — In this subtitle the following words have the meanings indicated.

REVISOR'S NOTE

This subsection formerly appeared as HE § 9-501 (a).
No changes are made.

(b) *Community sewerage system.* — "Community sewerage system" means a publicly or privately owned sewerage system that serves at least 2 lots.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (c).
The former language "for the collection and disposal of sewage or industrial waste of a liquid nature, including various devices for the treatment of that sewage and industrial waste" is deleted for clarity and is included in a combined reading of the defined terms "sewage" and "sewerage system."

(c) *Community water supply system.* — "Community water supply system" means a water supply system that serves at least 2 lots.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (d).
The former language "a source of water and a distribution system, including treatment facilities and storage facilities, whether publicly or privately owned" is deleted as included in the defined term "water supply system".

(d) *County plan.* — (1) "County plan" means a comprehensive plan for adequately providing throughout the county, including all towns, municipal corporations, and sanitary districts in the county, the following facilities and services by public or private ownership:
(i) Water supply systems;
(ii) Sewerage systems;
(iii) Solid waste disposal systems;
(iv) Solid waste acceptance facilities; and
(v) Systematic collection and disposal of solid waste, including litter.
(2) "County plan" includes a revised or amended county plan.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (e) and, as it related to the contents of a county plan, the first sentence of § 9-502 (a).

(e) *Individual sewerage system.* — "Individual sewerage system" means a sewerage system that serves only 1 lot.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (f).
The former references to a "single system of sewers and pipes, treatment tanks, or other facilities" and "disposing of sewage or industrial waste" are deleted as included in the defined terms "sewage" and "sewerage system".

(f) *Individual water supply system.* — "Individual water supply system" means a water supply system that supplies water to only 1 lot.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (g).
The former clause "a single system of pipes, ... included in the defined term "water supply system".

(g) *Litter.* — "Litter" means any:
(1) Waste materials;
(2) Garbage;
(3) Refuse;
(4) Trash;
(5) Debris;
(6) Dead animals; or
(7) Other discarded material.

REVISOR'S NOTE

This subsection formerly appeared as HE § 9-501 (h).
The former term "rubbish" is deleted as conform to the editorial interpretation of "litter".
The only other changes are in style.

(h) *Lot.* — "Lot" means a parcel of land, including a part of a subdivision, that:
(1) Is used or is intended to be used as a building site; and
(2) Is not intended to be further subdivided.

REVISOR'S NOTE

This subsection formerly appeared as HE § 9-501 (i).
In item (1) of this subsection, "building site" is substituted for the former clause "intended to be used for building purposes", for clarity.
The only other changes are in style.

(i) *Multiuse sewerage system.* — "Multiuse sewerage system" means a sewerage system that:
(1) Serves only 1 lot;
(2) Serves a number of individuals;
(3) Has a treatment capacity of more than 5,000 gallons a day; and
(4) Is not publicly owned or operated.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (j).
The definition and element of "sewage or industrial waste of a liquid nature, including various devices for the treatment of that sewage and industrial waste" is deleted as included in the defined terms "sewage" and "sewerage system" and "treating of that sewage and industrial waste" is deleted as included in the defined term "operation".
Item (4) of this subsection is substituted for the former phrase "which is not publicly owned or operated" to avoid the implication that a system operated by an individual or group of individuals is a "multiuse sewerage system".

(j) *Multiuse water supply system.* — "Multiuse water supply system" means an individual water supply system that:
(1) Has the capacity to supply more than 5,000 gallons of water a day; and
(2) Serves a number of individuals.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (k).
The former clause "a single system of pipes, ... included in the defined term "water supply system".
The only other changes are in style.

(k) *Water supply system.* — (1) "Water supply system" means a publicly or privately owned or operated:
(i) Source and the surrounding area from which water is supplied for drinking or domestic purposes; and
(ii) Structure, channel, or appurtenance used or intended to be used to transport water to a consumer.
(2) "Water supply system" includes the plumbing system inside any building that is served by the water supply system.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former HE § 9-501 (l).
The former language "any ... system" is deleted as included in the defined term "water supply system".
In paragraph (1) of this subsection, "publicly or privately owned or operated" is substituted for the former phrase "which required each county water authority to adopt its own county plan, the Department of Natural Resources, and each county water authority" to avoid the implication that the Department of Natural Resources is a water authority.
In paragraph (1) of this subsection, "public water supply system" is deleted as included in the defined term "water supply system".
In paragraph (2) of this subsection, "plumbing system" is substituted for the former phrase "pipes, ... that are connected to the water supply system" for clarity.
Also in paragraph (2) of this subsection, the reference to "piping or fixtures" is deleted as included in the definition of "plumbing system".

(ii) Otherwise for safe and sanitary treatment of sewage and other liquid wastes in a manner that is consistent with the laws of this State that relate to air pollution, water pollution, and land use;
(3) Provide for facilities that are adequate to treat, recover, or dispose of solid waste in a manner that is consistent with the laws of this State that relate to air pollution, water pollution, and land use;
(4) Contain adequate information about:
(i) The present sewage treatment capacity in each drainage basin; and
(ii) The present level of use of sewage treatment plants in each drainage basin;
(5) Projections for use of sewage treatment capacity based on:
1. Zoning commitments if the county does not have subdivision authority; or
2. Zoning commitments taking into account all relevant planning, zoning, population, engineering, and economic factors if each county governing body shall adopt and local plans, describe, with all practical precision, those parts of the land that reasonably may be expected to be served in the next 10 years by any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system;
(vi) Solid waste acceptance facility;
(6) Set forth the estimated cost of constructing each existing or proposed water supply system, sewerage system, solid waste disposal system, solid waste acceptance facility, or plant where primary purpose is to dispose of, treat, or process solid waste;
(7) Take into account all relevant, planning, zoning, population, engineering, and economic factors in each county governing body shall adopt and local plans, describe, with all practical precision, those parts of the land that reasonably may be expected to be served in the next 10 years by any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system;
(vi) Solid waste acceptance facility;
(8) Set forth a time schedule that conforms to the time requirements in paragraph (7) of this subsection, any right-of-way or easements that are necessary for any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system; and
(vi) Solid waste acceptance facility;
(9) Take into account existing, on a time schedule that conforms to the time requirements in paragraph (7) of this subsection, any:
(i) Community water supply system;
(ii) Community sewerage system;
(iii) Community water supply system;
(iv) Multiuse sewerage system;
(v) Solid waste disposal system; and
(vi) Solid waste acceptance facility;
(10) Set a time schedule that conforms to the time requirements in paragraph (7) of this subsection, any proposed method for financing the construction and operation of each planned:
(i) Community water supply system;

(b) *Review by governing body of county.* — Except as provided in § 9-515 of this subtitle, each county governing body shall review its county plan at least every 2 years in accordance with a schedule set by the Department, and submit to the Department a revised county plan, if appropriate.
(2) The Department requires a revision or amendment necessary, or adopts any revision or amendment to its county plan or adopts a new county plan.

(c) *Public hearing prior to adoption.* — (1) Before a county governing body adopts a new county plan, revision, or amendment that may be conducted jointly with other public hearings or meetings:
(i) Conduct a public hearing on the county plan, revision, or amendment;
(ii) Give the principal elected official of each municipal corporation that is affected notice of the time and place of the public hearing, together with a summary of the plan, revision, or amendment, at least 14 days before the hearing;
(iii) Publish notice of the public hearing at least 1 time in a newspaper of general circulation in the county once each week for 2 successive weeks, with the first publication of notice appearing at least 14 days before the hearing; and
(iv) Make a record of all public hearing testimony.
(2) Notice of the public hearing may be a part of the general notice requirement that is considered during the public hearing or meeting.

REVISOR'S NOTE

This section is new language derived with substantive change from former HE § 9-501 (b).
Subsection (a) (1) of this section is new language added to make expressly the intent implicit in former § 9-501 (b) that each county governing body adopt its own county plan, the Department of Natural Resources, and each county water authority adopt its own county plan.
Subsection (a) (2) of this section is new language added for clarity. This reference to "any revision or amendment necessary" is necessary because there may not exist in fact, even though it may be required by law, any revision or amendment to a county plan that is necessary.
Subsection (b) of this section is new language added for clarity and to require each county governing body to review its county plan at least every 2 years.
Subsection (c) (1) of this section is new language added to require that a public hearing be held on the adoption of a county plan, revision, or amendment. Former § 9-501 (b) (2) (ii) required the Department to hold a public hearing before it approved a county plan, revision, or amendment. Subsection (c) (1) of this section, however, requires that a public hearing be held before the county governing body adopts a county plan, revision, or amendment. The Department is required to approve or disapprove a county plan, revision, or amendment within 60 days after it is submitted to the Department. Therefore, the General Assembly may not have intended that a public hearing be held before the Department approves a county plan, revision, or amendment. Subsection (c) (1) of this section, however, requires that a public hearing be held before the county governing body adopts a county plan, revision, or amendment.
Subsection (c) (1) (ii) of this section is new language added to require that the principal elected official of each municipal corporation that is affected be given notice of the time and place of the public hearing, together with a summary of the plan, revision, or amendment, at least 14 days before the hearing.
Subsection (c) (1) (iii) of this section is new language added to require that a public hearing be advertised in a newspaper of general circulation in the county once each week for 2 successive weeks, with the first publication of notice appearing at least 14 days before the hearing.
Subsection (c) (1) (iv) of this section is new language added to require that a record be made of all public hearing testimony.
Subsection (c) (2) of this section is new language added to clarify that the notice of the public hearing may be a part of the general notice requirement that is considered during the public hearing or meeting.
Chapter 542, Acts 1983, effective July 1, 1984, repealed subsection (b) (2) (ii) of former § 9-501, which required each county governing body to submit its county plan to the Department for approval. Chapter 542 also repealed former § 9-501 (b) (2) (iii), which required each county governing body to submit its county plan to the Department for approval if the Department requested it. Chapter 542 also repealed former § 9-501 (b) (3), which required the Department to approve or disapprove a county plan within 60 days after it was submitted to the Department. Chapter 542 also repealed former § 9-501 (b) (4), which required the Department to hold a public hearing on a county plan before it approved the plan. Chapter 542 also repealed former § 9-501 (b) (5), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (6), which required the Department to disapprove a county plan if it was inconsistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (7), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (8), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (9), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (10), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (11), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (12), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (13), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (14), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (15), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (16), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (17), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (18), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (19), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (20), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (21), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (22), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (23), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (24), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (25), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (26), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (27), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (28), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (29), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (30), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (31), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (32), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (33), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (34), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (35), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (36), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (37), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (102), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (103), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (104), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (105), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (110), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (111), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (112), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (113), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (114), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (115), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (116), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (117), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (122), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (123), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (124), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (125), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (126), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (127), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (128), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (129), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (146), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (147), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (148), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. Chapter 542 also repealed former § 9-501 (b) (149), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air pollution, water pollution, and land use. 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Chapter 542 also repealed former § 9-501 (b) (154), which required the Department to approve a county plan if it was consistent with the laws of this State that relate to air

A. Posting a bond to secure actual construction and installation of the systems with satisfactory surety for the benefit of the county governing body; or

B. Making any other arrangement that the Department considers necessary and adequate to carry out the provisions of this subtitle; and

(7) If a solid waste disposal system is not available or required to be installed in any area as provided in item (4) of this subsection, to allow a person to provide a solid waste acceptance facility in the area without a systematic collection and transportation system.

(8) To require that, before issuance of a permit for construction of a community or multiuse sewerage system, a financial management plan sufficient to insure the dependable and safe operation of the system has been adopted within the county plan and approved by the Department. (1983, ch. 542, § 2; 1984, chs. 255, 798.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE §§ 9-506 (1), (2), (4), (5), (6), and (7), 9-508, and 9-510.

In subsection (a) (1) of this section, the former reference to "studies", "investigations", and "analyses" are deleted as unnecessary in light of the broader reference to "surveys and reports".

Subsection (b) (1) of this section is substituted for the former reference to the power of the Department to "[e]xercise any other functions that are necessary and appropriate to the administration of this subtitle" in light of the broad, general power of the Department to adopt rules and regulations to carry out the provisions of the subtitle.

Subsection (b) (2) (i) and (ii) of this section is substituted for the former references to "individual or community water supply or sewerage systems", to reflect the apparent intent of former HE § 9-506 (1) and to the current practice of the Department, also to control, limit, or prohibit the installation and use of multiuse water supply systems and multiuse sewerage systems. See the definitions of "water supply system" and "sewerage system" in § 9-501 of this subtitle.

Subsection (b) (3) of this section combines former HE § 9-506 (4) and (5), for clarity. Since former HE § 9-506 (4) required the Department to consider certain factors but did not state in what manner these factors were to be considered, this subsection incorporates certain provisions from former HE § 9-506 (5), which required the installation of community water supply, sewerage, or solid waste disposal systems if the systems were reasonably necessary giving due consideration to the factors set forth in subsection (b) (3) and (4) of this section. No change of substance is intended.

Also in subsection (b) (3) of this section, the reference to "individual water supply systems or individual sewerage systems" is added to conform to the overall scheme of administrative regulation and to the administrative practice of the Department.

Effect of amendments. — Chapter 255, Acts 1984, approved May 8, 1984, and effective from date of passage, in subparagraph (ii) of paragraph (6) of subsection (b), redesignated former sub-subparagraphs A. and B. as present sub-subparagraphs 1. and 2. and redesignated former sub-sub-subparagraphs 1. and 2. as present sub-sub-subparagraphs A. and B.

Chapter 798, Acts 1984, added paragraph (8) in subsection (b).

Editor's note. — Section 2, ch. 255, Acts 1984, provides that "the provisions of this act are intended solely to correct technical errors in the law and that there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this act."

§ 9-511. Conformance to county plans required — In general.

Unless they conform to the county plan or revision or amendment of the county plan, the following systems and facilities may not be installed or extended:

(1) A water supply system;

(2) A sewerage system;

(3) A solid waste disposal system; or

(4) A solid waste acceptance facility. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive changes from the second and third clauses of the first sentence of former HE § 9-511 (b).

In item (1) of this section, the defined term "water supply system" is substituted for the former references to "community water supply . . . system", "multiuse water supply . . . system", and "individual water supply . . . system".

In item (2) of this section, the defined term "sewerage system" is substituted for the former references to "community . . . sewerage . . . system", "multiuse . . . sewerage disposal system", and "individual sewerage system".

§ 9-512. Same — Building permits; subdivision plats.

(a) *"Building permit" defined.* — In this section, "building permit" means any permit that allows any building construction and is issued by any State or local authority.

(b) *Building permits — Conformity with county plan; issuance of building permits.* — (1) A State or local authority may not issue a building permit unless:

(i) The water supply system, sewerage system, or solid waste acceptance facility is adequate to serve the proposed construction, taking into account all existing and approved developments in the service area; and

(ii) Any water supply system, sewerage system, or solid waste acceptance facility described in the application will not overload any present facility for conveying, pumping, storing, or treating water, sewage, or solid waste.

(2) A water supply system, sewerage system, or solid waste acceptance facility referenced in a subdivision plat shall conform to the applicable county plan.

(3) If an allocation of water or wastewater is needed, and before a State or local authority may issue a building permit, the State shall:

(i) Have an allocation of water and wastewater from the county whose facilities are affected by the proposed building construction; or

(ii) Show evidence of being able to provide an acceptable on-site sewage disposal system or well system until an allocation becomes available, or on a permanent basis if the State elects.

(3) "Health officer" means the health officer for:

(i) Montgomery County; or

(ii) Prince George's County.

(4) "Issuing authority" means any 1 of the following authorities that is authorized to issue or approve a permit:

(i) The Department;

(ii) The health officer;

(iii) The Montgomery County Health Department; or

(iv) The Prince George's County Health Department.

(5) "Permit" means a permit issued or approved by the issuing authority for Montgomery County or Prince George's County to install, connect to, or use an individual septic system.

(b) *Scope of section.* — This section applies only in Montgomery County and Prince George's County.

(c) *Permit required.* — In each county, a person shall have a permit from an issuing authority before the person may install, connect to, or use an individual septic system.

(d) *Applications for permits — In general.* — An applicant for a permit shall submit an application to the issuing authority on the form that the issuing authority requires.

(e) *Same — Submission to Commission required; exceptions; multiple applications in area or subdivision.* — (1) The health officer shall:

(i) Submit each application for a permit to the Commission; and

(ii) Notify the Commission if there is more than 1 application for a permit in an area or subdivision of each county when:

1. The original permit application is submitted to the Commission; or

2. This fact reasonably becomes known to the health officer.

(2) This subsection does not apply to an area of each county in which a community sewerage system is not planned within 10 years under the county's comprehensive plan for sewerage systems.

(f) *Same — Review and comment on applications; combining applications for review and comment.* — (1) Within 30 days after the Commission receives an application under subsection (e) (1) of this section, the Commission shall review the application and comment to the health officer, in writing, on the application.

(2) If there is more than 1 application for a permit in an area or subdivision of each county, the Commission may group these applications together for purposes of review and comment.

(3) In its review and comments under this subsection, the Commission shall include:

(i) A determination of the location of the nearest collection line of a community sewerage system;

(ii) The capacity, feasibility, cost, and engineering conditions or requirements for an extension of this collection line; and

(iii) If available, an estimate of the time required for this extension.

(g) *Issuance of permit; failure of Commission to act within review period.* — (1) The issuing authority shall issue a permit to any applicant who meets the requirements of this subtitle.

(2) If the Commission does not respond as required by subsection (f) of this section, and if the permit otherwise complies with this section, the local health officer may issue the permit.

(h) *Contents of permit; rules and regulations of issuing authority.* — (1) The issuing authority shall include on each permit that the issuing authority issues a requirement that the holder of a permit shall notify, in writing, any buyer or lessee of the permitted property:

(i) That the permitted property is served by an individual septic system;

(ii) Of the conditions, estimate of time, and other factors that concern the subsequent extension of a community sewerage system to the permitted property; and

(iii) If applicable, that the Commission did not review and comment on the application for a permit because the permitted property was in an area of the county in which at the time of the application a community sewerage system was not planned within 10 years under the county's comprehensive plan for sewerage systems.

(2) The health officer:

(i) Shall adopt rules and regulations to carry out the provisions of this subsection; and

(ii) May require the holder of a permit to record the information required by paragraph (1) of this subsection in the land records of the county in which the permitted property is located. (1983, ch. 542, § 2; 1984, ch. 255.)

REVISOR'S NOTE

Subsection (a) of this section is new language added to avoid repetition of several lengthy phrases.

Subsection (b) of this section is new language added to state expressly that this section applies only in Montgomery County and Prince George's County.

Subsections (c) through (h) of this section are new language derived without substantive change from former HE § 9-517.

Throughout this section, "community sewerage system" is substituted for the former, various references to "public sewerage system", "public sanitary sewerage service", "public sewer", and "public sewerage service", for clarity and in light of the definition of "community sewerage system".

Also throughout this section, "private septic tank system" is deleted as included in the term "individual septic system", and to conform to the interpretation of the Department.

In subsections (a) (5) and (6) of this section, the references to "connect to . . . an individual septic system" are derived from the third sentence of former HE § 9-517 (a) and are applied throughout this section to state expressly that a permit can be issued or approved to allow a connection to an individual septic system.

In subsection (e) (2) of this section, "planned" is substituted for the former term "contemplated", for clarity.

In subsections (e) (2) and (h) (1) (iii) of this section, the references to "within 10 years under the . . . comprehensive . . . sewer system" is substituted for "planned . . . sewerage plan", for clarity.

Subsection (g) (1) of this section is new language added to state expressly the formerly only implied duty of the issuing authority to issue a permit to a qualified applicant.

In subsection (g) (2) of this section, the

former language "or because of extenuating circumstances" is deleted as unnecessary since "extenuating circumstances" also would be "good cause".

Subsection (e) of this section is derived from a combined reading of the last sentence of former HE § 9-511 (a) and from the first clause of the first sentence of (b). Even though a proposed county plan is not final until the Department approves it, subsection (e) (1) of this section allows a county to use its proposed county plan at the county's own risk under certain conditions. Subsection (e) (2) of this section clarifies that, in the interim period between adoption by the county governing body and approval by the Department, the proposed county plan is presumptively valid. No substantive change is intended by these revisions.

§ 9-508. Same — Notice of Departmental disapproval; reconsideration of disapproval.

(a) *Notice of Departmental disapproval.* — If the Department disapproves, in whole or in part, a proposed county plan or a proposed revision or amendment of a county plan, the Department shall give the county a written notice of disapproval that states the reasons for disapproval.

(b) *Reconsideration of disapproval of proposed county plan.* — At any time up to 6 months after a county receives the notice of disapproval, the county governing body may ask the Secretary to reconsider the disapproval in accordance with the rules and regulations of the Department. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-507 and the last clause of § 9-506 (9). As to the derivation of subsection (a) of this section from the last clause of former HE § 9-506 (9), see the revisor's note to § 9-506 of this subtitle.

(2) Specify the location for any sewage treatment facility discharge point that is included in any county plan.

(b) *Duties.* — In addition to the duties set forth elsewhere in this subtitle, the Department shall adopt rules and regulations:

(1) To carry out the provisions of this subtitle;

(2) To control, limit, or prohibit the installation and use of:

(i) Water supply systems; and

(ii) Sewerage systems;

(3) To require that, before installation of individual water supply systems or individual sewerage systems, consideration be given to:

(i) Present and future population density;

(ii) Size of parcels;

(iii) Contour of the land;

(iv) Porosity and absorbency of the soil;

(v) Ground water conditions;

(vi) Availability of water from unpolluted aquifers;

(vii) Type of construction of community water supply systems;

(viii) Type of construction of community sewerage systems;

(ix) Size of the proposed development; and

(x) Any other pertinent factors;

(4) To require that, giving consideration to the factors in item (3) of this subsection, areas be served by community facilities if the Department finds them to be reasonably necessary:

(i) By installation of the community water supply system, community sewerage system, or solid waste disposal system; and

(ii) By connection of all premises to or service to all premises by the community water supply system, community sewerage system, or solid waste disposal system;

(5) To require that community water supply systems, community sewerage systems, and solid waste disposal systems be constructed to allow the connection of those systems to a larger system, if that larger system becomes available;

(6) To allow a person to install an individual water supply system or an individual sewerage system in any area where a community water supply system or a community sewerage system is not available or required to be installed in the area if:

(i) The Department finds that the individual system is adequate and safe for use before a community system is scheduled to be available in the area; and

(ii) The individual system is constructed in the most economical and convenient way to permit connection to a community system in the area, and the person guarantees the connection to a community system:

1. When the county governing body where the area is located sets a time; and

2. In accordance with this subtitle, any rules and regulations adopted under this subtitle, and any other State law or county requirement by:

(1) The county plan; or

(2) Any revision or amendment to the county plan. (1983, ch. 542, § 2.)

REVISOR'S NOTE

Subsection (a) of this section is new language added to state expressly that the provisions of this section apply only in Montgomery County and Prince George's County.

Subsections (b) through (h) of this section are new language derived without substantive change from the first through fourth and the sixth through fourteenth sentences of former HE § 9-502 (b) and (c), respectively, and the second clause of § 9-505 (a) (9), and the second clause of the first sentence of § 9-513.

In subsections (b) and (c) of this section, the references to the annual review of the statement of objectives and policies by the county councils and the annual review of the county plans by the county executives are substituted for the annual review of the county plans "by the governing body of the county", for clarity. No change of substance is intended by these substitutions.

In subsection (c) (2) of this section, the reference to "any revision or amendment" to the county plan be submitted to the county council is added to conform to the intent of former HE § 9-502 (b) and (c) and to administrative practice in this regard. No change of substance is intended.

(3) Present and future capacities;

(4) Available service projection;

(5) Fiscal elements; and

(6) Annual revisions of this information.

(c) *What the Maryland-National Capital Park and Planning Commission shall provide.* — The Maryland-National Capital Park and Planning Commission shall provide any requested information to each county as to:

(1) Population;

(2) Growth projections;

(3) Planning factors; and

(4) Other developmental standards. (1983, ch. 542, § 2.)

REVISOR'S NOTE

Subsection (a) of this section is new language added to state expressly that this section applies only in Montgomery County and Prince George's County.

Subsections (b) through (c) of this section are new language derived without substantive change from former HE § 9-503 (a) and (b) (1) and (2).

§ 9-517. Same — Individual sewerage systems.

In Montgomery County or Prince George's County, the comprehensive plan for water supply systems and sewerage systems may allow the installation and use of an individual sewerage system for an interim period until the necessary sewerage transmission and treatment capacity in the area is available to provide adequate community sewerage service if:

(1) A community sewerage system otherwise is required in the area; but

(2) Access to a community sewerage system is prohibited by an order of:

(i) The Department;

(ii) Montgomery County;

(iii) Prince George's County; or

(iv) The Washington Suburban Sanitary Commission. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-504 (7), as that item related to Montgomery and Prince George's counties.

(i) May not issue any permit to install or alter a water supply system, sewerage system, or solid waste disposal system in that county under § 9-210 of this title;

(ii) Shall give the county notice of its right to administrative review by the Secretary under this subsection; and

(iii) Shall give the county notice of its right to appeal the Secretary's decision to the Board of Review. (1983, ch. 542, § 2; 1985, ch. 224.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-505 (a) (8), (9), (10), the first clause of (11), the first clause of (14), the first clause of (17), and the first clause of (18) and § 9-505 (b) and (c) (1), (2), (3), (4), (5), (6), (7), (10), (11), and the first clause of (12).

In subsection (a) (1) (iii) of this section, "solid waste acceptance facilities" is new language added for clarity.

In subsection (a) (7), (8), (9), (10), and (11) of this section, "solid waste disposal system" is substituted for the former references to "community solid waste disposal system" and "community solid waste disposal systems", for clarity.

In subsection (a) (7) and (9) of this section, the references to "solid waste acceptance facility" are new language added to conform to a combination of former HE § 9-505 (a) (6), which required the Department to describe certain areas that would or would not be served by, inter alia, a solid waste disposal system, and former HE § 9-505 (a) (6), which required the Department to acquire certain rights-of-way for, inter alia, solid waste disposal systems and solid waste acceptance facilities under a time schedule required by item (5)". This addition clarifies that the Department must describe which areas would or would not be served by solid waste acceptance facilities and, also, conforms to administrative practice. No substantive change is intended.

In subsection (a) (8), (10), and (11) of this section, the references to "multiuse water supply system" are new language added to state expressly that county plans must describe where multiuse water supply systems are to be constructed to identify and acquire rights-of-way and easements and to set out a schedule and a proposed method of financing and the estimated cost of construction and operation. These additions conform to the administrative practice of the Department. No substantive change is intended. Conversely, "multiuse sewerage system" is not added to subsection (a) (8), (10), and (11) of this section since, by definition, a multiuse sewerage system cannot be publicly owned and subsection (a) (8), (10), and (11) of this section relates to components of a county plan that may be publicly financed. See also the revisor's note to § 9-501 (i) of this subtitle.

In subsection (a) (10) and (13) of this section, "planned" is substituted for the former term "programmed", for clarity. No substantive change is intended.

In subsection (a) (12) of this section, the former reference to "applicable rules or regulations adopted by the Department" under former HE § 9-506 is deleted as unnecessary and to conform to the revision of parts of former HE § 9-506, which now appears in §§ 9-508 (b), 9-507 (a), (b) (1), and (c), and 9-508 (a) of this subtitle, as statutory powers and duties. See the revisor's note to §§ 9-506 and 9-507 of this subtitle.

In subsection (a) (13) (ii) and (vi) of this section, reference to use in addition to installation of a system is added to conform to other items in this paragraph.

Also in subsection (a) (13) (x) of this section, "described area" is substituted for the former reference to "community", for clarity.

In subsection (a) (15) of this section, the former reference to "trash" is deleted as included in the defined term "litter".

(1) To the Department of Natural Resources for advice on natural resources matters;

(2) To the Department of State Planning for advice on the consistency of the proposal with the local master plan and other appropriate matters; and

(3) To the Department of Agriculture for advice on the impact of water and sewerage service and solid waste facilities on productive or potentially productive agricultural land.

(c) *Review period.* — (1) Except as otherwise provided in this subsection, the Department shall approve, disapprove, or partially approve and partially disapprove each proposed county plan or proposed revision or amendment to a county plan within 90 days after the proposal is submitted to the Department.

(2) For good cause and after notice to the county involved, the Department may extend the 90-day review period of paragraph (1) of this subsection for an additional 90 days.

(d) *Failure of Department to act within review period.* — If the Department does not disapprove, in whole or in part, a proposed county plan or a proposed revision or amendment of a county plan within the review period provided in subsection (c) of this section, the proposal is approved.

(e) *Effect of county plans after adoption by county governing body.* — (1) Before the Department takes any action under subsection (a) of this section, a county may use its proposed county plan or proposed revision or amendment of its county plan at the county's own risk, if the county governing body has adopted the proposed county plan, revision, or amendment.

(2) After the county governing body adopts the proposed county plan, a person shall follow the provisions of that plan except to the extent that the Department modifies or disapproves that plan. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-506 (8) and the first and second clauses of (9) and § 9-511 (a) and the first clause of the first sentence of (b).

As to subsection (a) of this section, the term "county governing body" is substituted for "approving authority", since a county governing body must approve the proposed county plan before it is submitted to the Department. No substantive change is intended by this substitution.

As to the derivation of subsections (a) and (b) of this section from former HE § 9-506 (8) and the first and second clauses of (9), see the revisor's note to § 9-506 of this subtitle.

In subsection (b) of this section, the former references to "comments" from the Department of State Planning and "comment" from the Department of Agriculture are revised to require those departments to advise the Department of Health and Mental Hygiene as to the matters specified. This substitution parallels the language of former HE § 9-506 (8) (i) — now subsection (b) (1) of this section — and clarifies the apparent legislative intent that each of the departments to which the Department of Health and Mental Hygiene is required by this section to refer a proposal for advice has the duty to respond with that advice.

As to subsection (b) (2) of this section, former HE § 9-506 (8) (ii) stated that the Department of State Planning is to make "comments including those concerning consistency with the local master plan". Therefore, the revision of that language in subsection (b) (2) of this section is intended to clarify that the advice of that department must address consistency with the local master plan, but also may address other appropriate matters.

In subsection (c) (2) of this section, the

(b) *Prerequisites to issuance of building permits and zoning permits.* — In Harford County, a building permit or a zoning permit may not be issued for a new subdivision in an area where a community water supply system or a community sewerage system is scheduled to be built within 10 years under the county plan, unless there is a county approved water supply system and a county approved sewerage system for the subdivision.

(c) *Consideration of population density estimates.* — In the planning for water supply systems, sewerage systems, and solid waste disposal systems in its county plan, the Harford County governing body shall consider estimates of population density for Harford County. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section a new language derived without substantive change from former HE § 9-503 (b), § 9-516, and the second clause of (d), the second clause of (4), the second clause of (7), and the second clause of (8).

In subsection (b) of this section, the former references to "within 10 years . . . after June 1, 1972" are deleted as obsolete.

§ 9-515. Special provisions for county plan in Montgomery County and Prince George's County — Preparation; revision or amendment; approval; submission to Department; annual review.

(a) *Scope of section.* — This section applies only in Montgomery County and Prince George's County.

(b) *Objectives and policies of county plan.* — The county council of each county shall:

(1) Annually prepare a county plan;

(2) Prepare and review and annually revise, as the county council considers necessary, a separate statement of objectives and policies to be achieved and implemented by the county plan in the county; and

(3) Consider the following in the statements of objectives and policies of the county plans:

(i) Planning;

(ii) Zoning;

(iii) Population estimates;

(iv) Engineering;

(v) Economics; and

(vi) State, regional, municipal, local, and area plans.

(c) *Drafts and annual revisions or amendments of county plans.* — To achieve the objectives and policies set by the county council, the county executive of each county shall:

(1) Prepare a preliminary draft of the county plan;

(2) Review and prepare preliminary revisions or amendments annually to the county plan; and

(3) Submit to the county council for the county council's consideration, revision, modification, comment, and approval:

(i) The draft; and

(ii) Any revision or amendment to the draft.

(d) *Proposed county plans — Preparation and submission by county executive.* — The county executive of each county shall prepare and submit to the county council:

(1) A final draft of the county plan to conform to the action of the county council in approving the draft; and

(2) An annual, final revision or amendment to the county plan that takes into consideration any significant change in the intervening planning or development in the county.

(e) *Same — Submission to Washington Suburban Sanitary Commission and Maryland-National Capital Park and Planning Commission.* — At least 30 days before the date set for a public hearing under subsection (f) of this section, the county council of each county shall submit its final draft or the final draft of any revision or amendment of the county plan for recommendation to:

(1) The Washington Suburban Sanitary Commission; and

(2) The Maryland-National Capital Park and Planning Commission.

(f) *Same — Public hearing; notice.* — The county council of each county shall:

(1) Hold a public hearing on:

(i) Its final draft of the county plan; and

(ii) The final draft of any revision or amendment to the county plan; and

(2) Publish a notice of the time and place of the public hearing at least 10 days before the hearing in a newspaper of general circulation in the county.

(g) *Same — Actions by the county councils when action is final; review and recommendations by county executives.* — (1) After the public hearing in each county, the county council shall review, may amend as the county council considers necessary, and shall adopt the county plan or the revision or amendment to the county plan.

(2) The adoption of the county plan or a revision or amendment of the county plan by the county council of the county is not final until 10 days after the action adopting it.

(3) During the 10-day period provided by paragraph (2) of this subsection, the county executive may:

(i) Review the county plan or any revision or amendment to the county plan; and

(ii) Recommend for the consideration of the county council whatever change to the county plan or any revision or amendment to the county plan that the county executive considers necessary or desirable.

(h) *Submission of county plan to Department.* — After the time periods required for adoption under this section, the county council of each county shall submit to the Department, as required by § 9-506 (b) and (c) of this subtitle:

(16) By July 1, 1987, treat each publicly owned community sewerage system as a separate entity for fiscal purposes within the local operating agency.

(17) Document compliance with and report on actions taken and plans to enforce the Maryland Water Conservation Plumbing Fixtures Law under Article 56, of the Code.

(b) *Use of prisoners.* — A plan created under subsection (a) (15) of this section may include the use of prisoners from the State correctional system or from county jails or detention centers. (1983, ch. 542, § 2; 1984, cha. 255, 798; 1985, ch. 10, § 3.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-504 (1), (2), (5), (6), (9), (10), the first clause of (3), the first clause of (4), the first clause of (7), and the first clause of (8) and § 9-505 (b) and (a) (1), (2), (3), (4), (5), (6), (7), (10), (11), and the first clause of (9).

In subsection (a) (1) (iii) of this section, "solid waste acceptance facilities" is new language added for clarity.

In subsection (a) (7), (8), (9), (10), and (11) of this section, "solid waste disposal system" is substituted for the former references to "community solid waste disposal system" and "community solid waste disposal systems", for clarity.

In subsection (a) (7) and (9) of this section, the references to "solid waste acceptance facility" are new language added to conform to a combination of former HE § 9-505 (a) (6), which required the Department to describe certain areas that would or would not be served by, inter alia, a solid waste disposal system, and former HE § 9-505 (a) (6), which required the Department to acquire certain rights-of-way for, inter alia, solid waste disposal systems and solid waste acceptance facilities under a time schedule required by "item (5)". This addition clarifies that the Department must describe which areas would or would not be served by solid waste acceptance facilities and, also, conforms to administrative practice. No substantive change is intended.

In subsection (a) (8), (10), and (11) of this section, the references to "multiuse water supply system" are new language added to state expressly that county plans must describe where multiuse water supply systems are to be constructed to identify and acquire

Effect of amendments. — Chapter 255, Acts 1984, approved May 8, 1984, and effective from date of passage, in subsection (a), substituted "paragraphs" for "items" in paragraph (3), redesignated former sub-subparagraphs A. and B. as present sub-subparagraphs 1. and 2. in subparagraph (iii) of paragraph (6), and substituted "paragraph" for "item" in paragraph (8).

Chapter 798, Acts 1984, rewrote the introductory language of paragraph (1) of subsection (a) and added paragraphs (16) and (17) in that subsection.

The 1985 amendment, effective July 1, 1985, substituted "§ 3.05 of Article 66B, § 5 (X) of Article 25A, § 13 of Article 25B, and § 7-108 of Article 28" for "Articles 66B § 3.05, 25A § 5 (X), 25B § 13, and 28 § 7-108" in the introductory language of paragraph (1) of subsection (a).

Editor's note. — Section 2, ch. 255, Acts 1984, provides that "the provisions of this act are intended solely to correct technical errors in the law and that there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this act."

§ 9-506. Same — Review by official planning agencies; progress reports; submitting reports to Department.

(a) *Review by official planning agencies.* — (1) Except as provided in paragraph (2) of this subsection, before a county governing body may adopt a county plan or a revision or amendment to the county plan:

(i) The county governing body shall submit the county plan, revision, or amendment to each official planning agency that has jurisdiction in the county, including any comprehensive planning agency with areawide jurisdiction, for review and comment within a 30-day period for consistency with planning programs for the area; and

(ii) The county planning agency shall certify that the plan, revision, or amendment is consistent with the county comprehensive plan prepared under Article 66B, § 3.05; Article 25A, § 5 (X); or Article 25B, § 13 of the Code.

(2) In Montgomery County and Prince George's County, the review and comments of the Maryland-National Capital Park and Planning Commission in accordance with § 9-516 of this subtitle constitute full compliance with the requirement for review by an official planning agency under this subsection.

(b) *Submitting reports to Department — In general.* — Each county governing body shall submit to the Department:

(1) Progress reports on the development of its county plan; and

(2) A report of its review conducted at least every 2 years, including any revision or amendment of the county plan that has been adopted.

(c) *Same — Notice and other administrative actions for failure to submit certain reports.* — (1) If the Secretary determines that a county governing body has failed to submit a timely and adequate report of its review of its county plan or any required revision or amendment of its county plan to the Department, the Secretary shall give the county governing body a written notice of:

(i) The county's failure to submit a report; or

(ii) Any specific inadequacy in the county's plan.

(2) If within 90 days of this notice a county does not submit its report or an adequate revision or amendment of its plan to the Department, the Secretary:

(4) The county shall timely review any State request for an allocation of water or wastewater, and report its findings to the State within 45 days from the date of such request.

(c) *Same — Applications.* — To apply for a building permit, an applicant shall:

(1) Submit an application to a State or local authority on the form that the authority requires; and

(2) Provide any information that the authority reasonably requires to comply with subsection (b) of this section.

(d) *Subdivision plats — Conformity with county plan; recording or approving subdivision plats.* — (1) A State or local authority may not record or approve a subdivision plat unless any approved facility for conveying, pumping, storing, or treating water, sewage, or solid waste to serve the proposed development would be:

(i) Completed in time to serve the proposed development; and

(ii) Adequate to serve the proposed development, once completed, without overloading any water supply system, sewerage system, or solid waste acceptance facility.

(2) Each water supply system, sewerage system, and solid waste acceptance facility in a subdivision shall:

(i) Conform to the applicable county plan; and

(ii) Take into consideration all present and approved subdivision plats and building permits in the service area.

(3) If an allocation of water or wastewater is needed, and before a State or local authority may record or approve a subdivision plat, the State shall:

(i) Have an allocation of water and wastewater from the county whose facilities are affected by the proposed development; or

(ii) Show evidence of being able to provide an acceptable on-site sewage disposal system or well system until an allocation becomes available, or on a permanent basis if the State elects.

(4) The county shall timely review any State request for an allocation of water or wastewater, and report its findings to the State within 45 days from the date of such request.

(e) *Same — Applications.* — To apply for approval of a subdivision plat, an applicant shall:

(1) Submit an application to the appropriate State or local authority on the form that the authority requires; and

(2) Provide any information that the authority reasonably requires to comply with subsection (d) of this section. (1983, ch. 542, § 2; 1984, ch. 762.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-512 (a) and (b).

Throughout this section, "water supply system" and "sewerage system" are substituted for the former phrase "individual or community water supply or sewerage systems" to conform to § 9-501 (b) (2) of this subtitle. This substitution conforms to the administrative practice of the Department, which specifically includes multiuse water supply systems and multiuse sewerage systems under the provisions of this section. No change of substance is intended. This substitution is brought to the attention of the General Assembly.

Effect of amendment. — The 1984 amendment, effective July 1, 1984, in subsection (b), deleted "present" preceding "water supply system" in subparagraph (i) of paragraph (1), added paragraphs (3) and (4) in that subsection and added paragraphs (3) and (4) in subsection (d).

§ 9-513. Exceptions to county plan in Baltimore County and Carroll County.

In Baltimore County or Carroll County, the county approving authority may grant an exception to the county plan that allows a person to install an individual water supply system or an individual sewerage system for an individual residence if the Secretary or a designee of the Secretary:

(1) Finds that this exception to the county plan is justified and necessary to alleviate extreme hardship; and

(2) Approves the exception to the county plan. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from the second sentence of former HE § 9-511 (b).

The term "county governing body" is substituted for "approving authority" since a county governing body must approve the proposed county plan before it is submitted to the Department. No substantive change is intended by this substitution.

§ 9-514. Exceptions to county plan in Harford County.

(a) *Incorporation of subsidiary plans.* — (1) If the Harford County governing body does not approve and incorporate in its county plan all or part of the subsidiary plans of each town, municipal corporation, and sanitary district in Harford County, the Harford County governing body shall send to the Department a written notice of:

(i) This action; and

(ii) The specific reasons for this action.

(2) If the Harford County governing body or the governing body of a town, municipal corporation, or sanitary district in Harford County requests, the Department may:

(i) Arbitrate the dispute; and

(ii) Decide whether to approve and incorporate all or part of this subsidiary plan in the Harford County plan

§ 9-519 HEALTH-ENVIRONMENTAL

former reference to allowing the health officer to "proceed to process" the application is deleted as unnecessary in light of the authority of the health officer to issue the permit.

Also in subsection (g) (3) of this section, the reference to "if the permit otherwise complies with this section" is substituted for the former phrase "if otherwise appropriate" to state expressly the formerly only implied power to issue a permit if the requirements of this section are met.

In subsection (h) (1) of this section, "holder of a permit" is substituted for the former phrase "person, firm, or corporation to whom the permit is issued", in light of the definition of "person".

Effect of amendment. -- The 1984 amendment, approved May 8, 1984, and effective from date of passage, redesignated former sub-subparagraphs A and B as present sub-subparagraphs 1. and 2. in subparagraph (iii) of paragraph (1) of subsection (e).

Editor's note. -- Section 2, ch. 255, Acts 1984, provides that "the provisions of this act are intended solely to correct technical errors in the law and that there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this act."

§§ 9-519, 9-520.

Reserved.

§ 9-521. Penalties.

(a) *In general.* — A State or local authority that violates any provisions of § 9-512 (b) or (d) of this subtitle is liable to a civil penalty not exceeding $100 to be collected in a civil action brought by the Department in the circuit court for any county. Each day a violation continues is a separate violation under this section.

(b) *No bar to other relief or penalty.* — A civil penalty imposed under this section does not bar any other applicable relief or penalty. (1983, ch. 542, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former HE § 9-512 (c).

Former HE § 9-512 (c) made any violation of former [illegible] § 9-512 (a) subject to the penalties stated in subsection (a) of this section. Since a State or local authority is the only entity that can violate that provision, it would be possible, for example, for this State to fine itself under this provision. The Commission to Revise the Annotated Code brings this unclear situation to the attention of the General Assembly and suggests the following alternative solutions to this problem: (1) amend subsection (a) of this section to make it apply only to employees or officials of a State or local authority; (2) amend subsection (a) of this section to be a civil penalty only; or (3) repeal subsection (a) of this section as nonsensical and amend subsection (b) of this section to delete all references to conviction and fine.

WATER, ICE, A

Cross reference. — See Editor's not § 9-501 of this article.

Subtitle 6. S

Part III. Sa

§ 9-624. Officers.

(a) *Chairman.* — From among commission shall elect a chairma district.

(b) *Vice chairman in Somerset C* the sanitary commissioners, the cor

(c) *Secretary-treasurer.* — Eac secretary-treasurer.

(d) *Other offices.* — In a single may not hold any other office of t 1982, ch. 240, § 2; 1985, ch. 69.)

Effect of amendment. — The 1985 amen present, effective July 1, 1985, redesignat former subsections (b) and (c) as present su

Part IV. Powers

§ 9-633. Eminent domain.

Characterization of "taking" prerequ site to implication of contractual oblig tion of government. — It is only when the e a "taking" in the constitutional sense, th an obligation on the part of a government body to pay compensation arises, and that contract can be implied; thus, a determinatio that a taking in the constitutional sense ha occurred is a prerequisite to implying a cor tractual obligation on the part of a governmen tal body. Public Serv. Comm'n v. Highfiel Water Co., 293 Md. 1, 441 A.2d 1031 (1982

§ 9-635. Contracts to buy an

(a) *Definitions.* — (1) In this sectio indicated.

(2) (i) "Contracting party" mean district under this section.

(ii) "Contracting party" includ

1. A person;

2. A county of this State or a

EXHIBIT 3

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. v. HAMILTON BANK OF JOHNSON CITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-4. Argued February 19, 1985—Decided June 28, 1985

As required under Tennessee law, in 1973 respondent's predecessor in interest, a land developer, obtained petitioner Planning Commission's approval of a preliminary plat for development of a tract. The tract was to be developed in accord with the requirements of a county zoning ordinance for "cluster" development of residential areas and the Commission's implementing regulations. In 1977, the county zoning ordinance was changed so as to reduce the allowable density of dwelling units, but the Commission continued to apply the 1973 ordinance and regulations to the developer's tract. In 1979, however, the Commission decided that further development of the tract should be governed by the ordinance and regulations then in effect. The Commission thereafter disapproved plans proposing further development of the remainder of the tract on various grounds, including failure to comply with current density requirements. Respondent filed suit against the Commission and its members and staff (also petitioners) in Federal District Court pursuant to 42 U. S. C. § 1983, alleging that the Commission had taken its property without just compensation by refusing to approve the proposed development. The jury found that respondent had been denied the "economically viable" use of its property in violation of the Just Compensation Clause of the Fifth Amendment, and awarded damages for the temporary taking of respondent's property. The District Court entered an injunction requiring the Commission to apply the 1973 ordinance and regulations to the project, but granted judgment notwithstanding the jury's verdict for the Commission on the taking claim, concluding that the temporary deprivation of economic benefit from respondent's property, as a matter of law, could not constitute a taking. The Court of

II WILLIAMSON PLANNING COMM'N v. HAMILTON BANK

Syllabus

Appeals reversed, holding that application of government regulations affecting an owner's use of property may constitute a taking, and that the evidence supported the jury's finding that the property had no economically feasible use during the time between the Commission's refusal to approve the plat and the jury's verdict.

Held:

1. Even assuming, *arguendo*, that government regulation may effect a taking for which the Fifth Amendment requires just compensation, and assuming further that the Fifth Amendment requires the payment of money damages to compensate for such a taking, the jury verdict in this case cannot be upheld because respondent's claim is premature. Respondent has not yet obtained a final decision regarding the application of the ordinance and regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensation, and its claim therefore is not ripe. Pp. 12–23.

(a) Although respondent's plan for developing its property was rejected, it did not then seek variances that would have allowed it to develop the property according to its proposed plat. Cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U. S. 264. The record does not support respondent's claim that the Commission's denial of approval for respondent's plat was equivalent to a denial of variances. Thus, respondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Respondent's contention that it should not be required to seek variances because its suit is predicated upon 42 U. S. C. § 1983 is without merit. While there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action, the question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable. Pp. 12–20.

(b) The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking. If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature. Pp. 20–23.

2. Respondent's claim also is premature if viewed under the theory that government regulation that goes so far that it has the same effect as a physical taking, must be viewed not as a Fifth Amendment "taking,"

WILLIAMSON PLANNING COMM'N v. HAMILTON BANK III

Syllabus

but as an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment. Resolution of the due process question depends, in significant part, upon an analysis of the effect the Commission's application of the ordinance and regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply for variances from the regulations. Pp. 23–26.

729 F. 2d 402, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined. STEVENS, J., filed an opinion concurring in the judgment. WHITE, J., filed a dissenting statement. POWELL, J., took no part in the decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-4

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., PETITIONERS v. HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 28, 1985]

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent, the owner of a tract of land it was developing as a residential subdivision, sued petitioners, the Williamson County [Tennessee] Regional Planning Commission and its members and staff, in United States District Court, alleging that petitioners' application of various zoning laws and regulations to respondent's property amounted to a "taking" of that property. At trial, the jury agreed and awarded respondent $350,000 as just compensation for the "taking." Although the jury's verdict was rejected by the District Court, which granted a judgment notwithstanding the verdict to petitioners, the verdict was reinstated on appeal. Petitioners and their *amici* urge this Court to overturn the jury's award on the ground that a temporary regulatory interference with an investor's profit expectation does not constitute a "taking" within the meaning of the Just Compensation Clause of the Fifth Amendment,[1] or, alternatively, on the ground that even if such interference does constitute

[1] "[N]or shall private property be taken for public use, without just compensation."

The Fifth Amendment's prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241 (1897); see also *San Diego Gas & Electric Co.* v. *San Diego*, 450 U. S. 621, 623 n. 1 (1981).

a taking, the Just Compensation Clause does not require money damages as recompense. Before we reach those contentions, we examine the procedural posture of respondent's claim.

I

A

Under Tennessee law, responsibility for land-use planning is divided between the legislative body of each of the State's counties and regional and municipal "planning commissions." The county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings. Tenn. Code Ann. § 13–7–101 (1980). The planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development. §§ 13–3–403, 13–4–303. Enforcement of both the zoning ordinances and the subdivision regulations is accomplished in part through a requirement that the planning commission approve the plat of a subdivision before the plat may be recorded. §§ 13–3–402, 13–4–302 (1980 & Supp. 1984).

Pursuant to § 13–7–101, the Williamson County "Quarterly Court," which is the county's legislative body, in 1973 adopted a zoning ordinance that allowed "cluster" development of residential areas. Under "cluster" zoning,

"both the size and the width of individual residential lots in . . . [a] development may be reduced, provided . . . that the overall density of the entire tract remains constant—provided, that is, that an area equivalent to the total of the areas thus 'saved' from each individual lot is pooled and retained as common open space." 2 N. Williams, American Land Planning Law § 47.01, pp. 212–213 (1974).

Cluster zoning thus allows housing units to be grouped, or "clustered" together, rather than being evenly spaced on uniform lots.

As required by § 13–3–402, respondent's predecessor-in-interest (developer) in 1973 submitted a preliminary plat for the cluster development of its tract, the Temple Hills Country Club Estates (Temple Hills), to the Williamson County Regional Planning Commission for approval. At that time, the county's zoning ordinance and the Commission's subdivision regulations required developers to seek review and approval of subdivision plats in two steps. The developer first was to submit for approval a preliminary plat, or "initial sketch plan," indicating, among other things, the boundaries and acreage of the site, the number of dwelling units and their basic design, the location of existing and proposed roads, structures, lots, utility layouts, and open space, and the contour of the land. App. in case No. 82–5388 (CA6), pp. 857, 871 (CA App.). Once approved, the preliminary plat served as a basis for the preparation of a final plat. Under the Commission's regulations, however, approval of a preliminary plat "will not constitute acceptance of the final plat." *Id.*, at 872. Approval of a preliminary plat lapsed if a final plat was not submitted within one year of the date of the approval, unless the Commission granted an extension of time, or unless the approval of the preliminary plat was renewed. *Ibid.* The final plat, which is the official authenticated document that is recorded, was required to conform substantially to the preliminary plat, and, in addition, to include such details as the lines of all streets, lots, boundaries, and building setbacks. *Id.*, at 875.

On May 3, 1973, the Commission approved the developer's preliminary plat for Temple Hills. App. 245–247. The plat indicated that the development was to include 676 acres, of which 260 acres would be open space, primarily in the form of a golf course. *Id.*, at 422. A notation on the plat indicated that the number of "allowable dwelling units for total development" was 736, but lot lines were drawn in for only 469 units. The areas in which the remaining 276 units were to be placed were left blank and bore the notation "this parcel not to be developed until approved by the planning commission." The plat also contained a disclaimer that "parcels with note 'this parcel not to be developed until approved by the planning commission' not a part of this plat and not included in gross areas." *Ibid.* The density of 736 allowable dwelling units was calculated by multiplying the number of acres (676) by the number of units allowed per acre (1.089). *Id.*, at 861. Although the zoning regulations in effect in 1973 required that density be calculated "on the basis of total acreage less fifty percent (50%) of the land lying in the flood plain . . . and less fifty percent (50%) of all land lying on a slope with a grade in excess of twenty-five percent (25%)," CA App. 850, no deduction was made from the 676 acres for such land. Tr. 369.

Upon approval of the preliminary plat, the developer conveyed to the county a permanent open space easement for the golf course, and began building roads and installing utility lines for the project. App. 259–260. The developer spent approximately $3 million building the golf course, and another $500,000 installing sewer and water facilities. Defendant's Ex. 96. Before horizontal construction was to begin on a particular section, a final plat of that section was submitted for approval. Several sections, containing a total of 212 units, were given final approval by 1979. App. 250, 270, 278, 423. The preliminary plat, as well, was reapproved four times during that period. *Id.*, at 270, 274, 362, 423.

In 1977, the county changed its zoning ordinance to require that calculations of allowable density exclude 10% of the total acreage to account for roads and utilities. *Id.*, at 363; CA App. 962. In addition, the number of allowable units was changed to one per acre from the 1.089 per acre allowed in 1973. *Id.*, at 858, 862; Tr. 1169–1170, 1182. The Commis-

BALTIMORE COUNTY
DEPARTMENT OF PUBLIC WORKS
TOWSON, MARYLAND 21204

HARRY J. PISTEL, P. E.
DIRECTOR

March 15, 1985

Mr. Arnold Jablon
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Re: Item #3 - Cycle I - 1985
Property Owner: Nelson L. Bond, Jr., et al
E/S Old Hanover Road 1720', 1996' and 2121' N. from centerline Butler Road
Existing Zoning: R.C. 5
Proposed Zoning: B.R.
Acres: 5.66 District: 4th

Dear Mr. Jablon:

The following comments are furnished in regard to the plat submitted to this office for review by the Zoning Advisory Committee in connection with the subject item.

General Comments:

All improvements, intersections, entrances, drainage requirements and construction affecting a State Road right-of-way are subject to the standards, specifications and approval of the Maryland State Highway Administration in addition to those of Baltimore County.

As no public facilities are involved, this office has no comment.

The Petitioner must provide necessary drainage facilities (temporary or permanent) to prevent creating any nuisances or damages to adjacent properties, especially by the concentration of surface waters. Correction of any problem which may result, due to improper grading or improper installation of drainage facilities, would be the full responsibility of the Petitioner.

Development of this property through stripping, grading and stabilization could result in a sediment pollution problem, damaging private and public holdings downstream of the property. A grading permit is, therefore, necessary for all grading, including the stripping of top soil.

Very truly yours,
James A. Markle
JAMES A. MARKLE, P.E., Chief
Bureau of Public Services

JAM:EAM:ROP:ss

cc: File

2

Maryland Department of Transportation
State Highway Administration

William K. Hellmann
Secretary
Hal Kassoff
Administrator

March 15, 1985

Mr. William Hackett, Chairman
Board of Appeals
County Office Building
Towson, Maryland 21204

Attn: Mr. N. Commodari

Re: Reclassification Petitions
Cycle I - 1985
Meeting of March 6, 1985
Property Owner: Nelson L. Bond, Jr., et al
Location: E/S Old Hanover Road, Route 668, 1720', 1996' and 2121' N. from c/l Butler Road
Existing Zoning: R.C. 5
Proposed Zoning: B.R.
Acres: 5.66
District: 4th

Dear Mr. Hackett:

On review of the submittal of 2-29-85 of the 3.3 acre site on the east side of Old Hanover Road (Route 668), the State Highway Administration offers the following comments.

All commercial access to Old Hanover Road must be through S.H.A. access permit.

On review of a detail site plan showing building location, entrance and park location, the State Highway Administration will provide additional comments.

Very truly yours,
Charles Lee, Chief
Bureau of Engineering
Access Permits

By: George Wittman

CL:GW:maw

cc: Mr. J. Ogle

RECEIVED
COUNTY BOARD OF APPEALS
MAR 19 AM 10 23

My telephone number is (301) 659-1350
Teletypewriter for impaired Hearing or Speech
383-7555 Baltimore Metro — 565-0451 D.C. Metro — 1-800-492-5062 Statewide Toll Free
P.O. Box 717 / 707 North Calvert St., Baltimore, Maryland 21203 - 0717

BALTIMORE COUNTY
OFFICE OF PLANNING AND ZONING
TOWSON, MARYLAND 21204
494-3211

NORMAN E. GERBER
DIRECTOR

Mr. Arnold Jablon
Zoning Commissioner
County Office Building
Towson, Maryland 21204

3/25/85

Re: Zoning Advisory Meeting of 3/6/85
Item # 3
Property Owner: Nelson L. Bond, Jr. et al
Location: E/S Old Hanover Rd. N of Butler Rd.

Dear Mr. Jablon:

The Division of Current Planning and Development has reviewed the subject petition and offers the following comments. The items checked below are applicable.

(X) There are no site planning factors requiring comment, at this time.
( ) A County Review Group Meeting is required.
( ) A County Review Group meeting was held and the minutes will be forward by the Bureau of Public Services.
( ) This site is part of a larger tract; therfore it is defined as a subdivision. The plan must show the entire tract.
( ) A record plat will be required and must be recorded prior to issuance of a building permit.
( ) The access is not satisfactory.
( ) The circulation on this site is not satisfactory.
( ) The parking arrangement is not satisfactory.
( ) Parking calculations must be shown on the plan.
( ) This property contains soils which are defined as wetlands, and development on these soils is prohibited.
( ) Construction in or alteration of the Floodplain is prohibited under the provisions of Section 22-98 of the Development Regulations.
( ) Development of this site may constitute a potential conflict with the Baltimore County Master Plan.
( ) The amended Development Plan was approved by the Planning Board on _____.
( ) Landscaping: Must comply with Baltimore County Landscape Manual.
( ) The property is located in a deficient service area as defined by Bill 178-79. No building permit may be issued until a Reserve Capacity Use Certificate has been issued. The deficient service is _____.
( ) The property is located in a traffic area controlled by a "D" level intersection as defined by Bill 178-79, and as conditions change traffic capacity may become more limited. The Basic Services Areas are re-evaluated annually by the County Council.
(X) Additional comments:
Any Future Development on the site must comply with the requirements of Bill 226-80, the Development Regulations.

Eugene A. Bober
Chief, Current Planning and Development

cc: James Hoswell

BALTIMORE COUNTY
DEPARTMENT OF TRAFFIC ENGINEERING
TOWSON, MARYLAND 21204
494-3550

STEPHEN E. COLLINS
DIRECTOR

March 27, 1985

Mr. William Hackett
Chairman, Board of Appeals
Office of Law, Courthouse
Towson, Maryland 21204

Cycle I
Item No. - 3 - Meeting of March 6, 1985
Property Owner: Nelson L. Bond, Jr., et al

Location: E/S Old Hanover Road 1720', 1966', and 2121'

Existing Zoning: R.C.5
Proposed Zoning: 4th

Acres: 5.66
District: 4th

Dear Mr. Hackett:

The proposed zoning can be expected to generate approximately 2800 additional trips per day.

Michael S. Flanigan
Traffic Engineering Assoc. II

MSF/ccm

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

MAR 27 AM

TO: Mr. William Hackett
Chairman, Board of Appeals
Date: March 20, 1985

FROM: Ian J. Forrest

SUBJECT: Reclassification Petitions
CYCLE I - 1985
Meeting of March 6, 1985

ZONING DEPARTMENT
By

The Baltimore County Department of Health has reviewed the following Reclassification Petitions and does not anticipate any health hazards at this time regarding these Petitions.

Item #1 - Helena D. Gibbons
Item #2 - Paul Gambrill, et al
Item #3 - Nelson L. Bond, Jr., et al
Item #4 - Conservation Associates
Item #5 - Greater Baltimore Medical Center
Item #6 - Josef of Vienna, Inc.
Item #7 - John W. Ruppert, et al

Ian J. Forrest, Director
BUREAU OF ENVIRONMENTAL SERVICES

IJF/fth

RECEIVED
COUNTY BOARD OF APPEALS
MAR 25 P 1:02

BALTIMORE COUNTY
FIRE DEPARTMENT
TOWSON, MARYLAND 21204-2586
494-4500

PAUL H. REINCKE
CHIEF

March 11, 1985

William Hackett
Chairman, Board of Appeals
Office of Planning and Zoning
Baltimore County Office Building
Towson, MD 21204

Attention: Nick Commodari, Chairman
Zoning Plans Advisory Committee

RE: Property Owner: Nelson L. Bond, Jr., et al.

Location: E/S Old Hanover Road 1720', 1996', and 2121' N. from c/l Butler Road
Item No.: 3
Zoning Agenda: 3/6/85, Cycle -1

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below marked with an "X" are applicable and required to be corrected or incorporated into the final plans for the property.

( ) 1. Fire hydrants for the referenced property are required and shall be located at intervals or _____ feet along an approved road in accordance with Baltimore County Standards as published by the Department of Public Works.

( ) 2. A second means of vehicle access is required for the site.

( ) 3. The vehicle dead end condition shown at _____
EXCEEDS the maximum allowed by the Fire Department.

( ) 4. The site shall be made to comply with all applicable parts of the Fire Prevention Code prior to occupancy or beginning of operation.

(x) 5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1976 Edition prior to occupancy.

( ) 6. Site plans are approved, as drawn.

( ) 7. The Fire Prevention Bureau has no comments, at this time.

REVIEWER: Lt. Joseph Kelly 3-11-85
Planning Group
Special Inspection Division

Noted and Approved: Roy W. Kemmer
Fire Prevention Bureau

/mb

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Mr. William T. Hackett, Chairman, Appeals Board
C/O Nicholas Commodari, Zoning Department
Date: March 12, 1985

FROM: Charles E. Burnham, Chief, Building Plans Review C.E.B

SUBJECT: Cycle I - 1985, Meeting Scheduled 3/6/85
ITEM #3) Owner - Nelson L. Bond, Jr., et al, E/S Old Hanover Road 1720', 1996' and 2121' N. from c/l Butler Road

Conversion of property from one use to another use requires the structures involved to comply with the Building Code in force at the time a permit is applied for and before the structure can be used. Existing structures will require a Change of Use/Occupancy permit as well as alteration permits to upgrade the structure to meet the Code requirements for the new proposed use.

New structures shall be designed from the footings up to comply with the correct Use Group as provided for in Article 3 of the current 1981 Code.

Compliance with the State Handicapped Code is required for the buildings and the site.

Set backs from interior lot lines, other buildings on the same lot, and street lot lines for fire separations shall also comply to the Building Code in force at the time an application is made for the permit. This currently involves Table 401, Table 507 and Section 506, of the current 1981 B.O.C.A. Code known as the Baltimore County Building Code as adopted by Bill 4-82. The 1984 Edition of B.O.C.A. has been approved by the County Council and will become effective on permits filed 45 days after it's enactment.

No further comments at this time.

CEB/vw

BALTIMORE COUNTY PUBLIC SCHOOLS

Robert Y. Dubel, Superintendent

Towson, Maryland — 21204

Date: March 19, 1985

Mr. William Hackett
Chairman, Board of Appeals
Baltimore County Office Building
1111 West Chesapeake Avenue
Towson, Maryland 21204

Zoning Cycle #I

RE: Item No: 3
Property Owner: Nelson L. Bond, Jr., et al
Location: E/S Old Hanover Road 1720', 1996' and 2121' N. from C/i Butler R
Present Zoning: R.C. 5
Proposed Zoning: B.R.

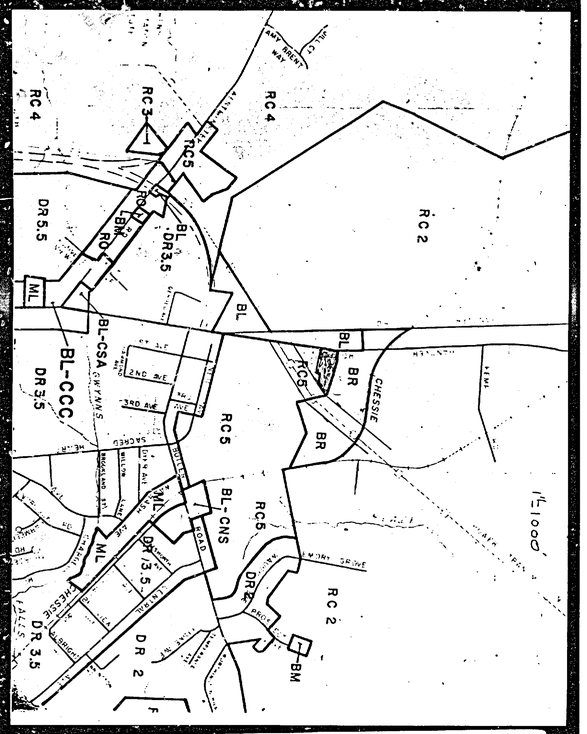
School Situation September 1984

School	Enrollment	Capacity	Over/Under
Franklin Elementary	538	500	+ 38
Franklin Middle	861	1127	-266
Franklin High	1306	1310	- 4

Student Yield With: Existing Zoning And Proposed Zoning

Elementary, Middle, High: Acreage too small to affect student population.

Very truly yours,
John Demron
John Demron, Field Representative
Department of Planning



2.

CITED LEGAL SECTIONS

a. The Capital Program, duly adopted Baltimore County master or comprehensive plans, and the "county plan" required under Article 43, Section 387C of the Annotated Code of Maryland 1957, with amendments as codified in the 1971 Replacement Volume and 1974 Cumulative Supplement, show that the property under petition is to be serviced by public sewerage and water-supply systems within TWO years after the date the petition is submitted; (Bill No. 98-75)

1AC3.2 - Rezoning by petition. (Bill Nos. 98-75; 178-79)

No petition for reclassification of property in an R.C. 4 zone may be granted unless a registered professional engineer, architect, landscape architect, or land surveyor first certifies: (Bill Nos. 98-75; 178-79)

1. That the parcel of land under petition lies at least 200 feet from the property line of any public water reservoir; (Bill No. 178-79)

2. That the parcel lies at least 300 feet from any 1st - or 2nd order or greater stream that flows directly into a public water reservoir; (Bill No. 178-79)

3. That the parcel lies at least 300 feet from any 3rd - order or greater stream that flows directly or indirectly into a public water reservoir; (Bill No. 178-79)

EXHIBIT 1

IN THE MATTER OF THE APPLICATION OF D & R JOINT VENTURE and ISAAC JONES FOR RECLASSIFICATION FROM RC 4 and RC 5 and DR 1 to DR 3.5 ON PROPERTY LOCATED ON OLD BOSLEY RD. AND POT SPRING RD. 8th District

BEFORE

COUNTY BOARD OF APPEALS

OF

BALTIMORE COUNTY

No. R-83-189

RECEIVED JUN 08 1983 PEOPLE'S COUNSEL BALTIMORE COUNTY, MARYLAND

MEMORANDUM OF OPINION

On March 15, 1983, a hearing was held before the Baltimore County Board of Appeals on petitioners' request for a reclassification. The purpose of this hearing was to decide whether or not this case should be heard on its merits. People's Counsel submitted that the case should not be heard on its merits because Sections 1A00.3.A.1.a and 1A03.2 of the Baltimore County Zoning Regulations preclude the Board from granting petitioners' requested relief. Petitioner maintained that the above referred to Sections, when considered in combination with Baltimore County Code Section 2.58.1 and Charter Section 602.a, do not preclude the Board from granting the relief requested pursuant to his petition for reclassification. Copies of the above noted Sections are attached hereto.

At that time, it was agreed between parties that legal memoranda would be submitted on the sole issue as to whether or not the above noted Sections would ultimately bar the Board from reclassifying the subject property. After careful consideration of the memos submitted by both parties and the above noted Sections, the Board regrets that it has no choice but to advise petitioner that it finds that under these statutes his requested reclassification must be denied.

Property in question is currently zoned RC 4 and RC 5. Prior to October, 1980, the entire parcel was zoned DR 1 and the then existing water and sewer plan indicated these services projected to this site within a 3 to 5 year span. During the comprehensive map process of 1980, the Baltimore County Council rezoned the parcel to RC 4 and RC 5. The Baltimore County Zoning Regulations 1A00.3.A.1.a prohibited him

IN THE MATTER OF THE APPLICATION OF D & R JOINT VENTURE and ISAAC JONES FOR RECLASSIFICATION FROM RC-4 and RC-5 and DR-1 to DR 3.5 ON PROPERTY LOCATED ON OLD BOSLEY RD. AND POTSPRING RD. 8th DISTRICT

BEFORE

COUNTY BOARD OF APPEALS

OF

BALTIMORE COUNTY

No. R-83-189

RECEIVED JUN 17 1983 PEOPLE'S COUNSEL

ANSWER TO MOTION FOR RECONSIDERATION OF MEMORANDUM OF OPINION

Pursuant to Petitioner's Motion for Reconsideration of Memorandum of Opinion, hand delivered to this office on June 14, 1983, and People's Counsel having indicated no objection, it is this 17th day of June, 1983, ORDERED that the Motion be and is hereby GRANTED for the purpose of determining the question concerning the validity of the statutes in question cited in said Motion. [Emphasis added]

After a decision by the Board concerning the validity of the two statutes in question has been reached, the case may then proceed on its merits if the Petitioner elects said option.

IT IS FURTHER ORDERED by the County Board of Appeals, this 17th day of June, 1983, that its Order of June 8, 1983, be and it is hereby suspended pending reconsideration pursuant to said Motion.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

William T. Hackett, Chairman

Lakay B. Spurrier

Joanne L. Suder

D. & R. Joint Venture and
Isaac Janes
Case No. R-83-189

2.

from filing a petition for a reclassification of the site, since he did not meet the two year requirement for water and sewer service, so in March 1981 suit was filed in the Baltimore County Circuit Court seeking relief. In January, 1982, the Baltimore County Council removed the 3 to 5 year plan for projected water and sewer service to this parcel and placed it into the "no plan" category. In June, 1982, as a result of the suit filed in the Circuit Court in March 1981, The Honorable Paul Alpert ruled that a petition for reclassification must be filed with the Baltimore County Board of Appeals and the petition that now exists was so filed. In November, 1982, The Honorable James Langrell heard legal arguments regarding this petition and ordered that the Baltimore County Board of Appeals must hear the case.

After careful consideration of all these facts and all applicable regulations, the Board has no choice but to determine that Sections 1A00.3.A.1.a and 1A03.2 preclude the Board from ultimately granting the requested relief. Thus, even if petitioner was able to prove change or error as would be required in Section 2.58.1, this Board would still be precluded from granting petitioner's request by reason of the existence of these two sections.

Any appeal from this decision must be in accordance with Rules B-1 thru B-13 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

William T. Hackett, Chairman

Date: June 8, 1983

Joanne L. Suder

Leroy B. Spurrier

RE: PETITION FOR RECLASSIFICATION FROM R.C. 4 AND R.C. 5 TO D.R. 3.5 ZONE, SE Corner Pot Spring Rd. and Old Bosley Rd., 8th District

BEFORE THE COUNTY BOARD OF APPEALS

OF BALTIMORE COUNTY

D & R JOINT VENTURE, et al, Petitioners

Case No. R-83-189 (Item 12, Cycle IV)

HEARING MEMORANDUM

At the request of the County Board of Appeals, People's Counsel for Baltimore County files this Memorandum.

I. An Enacted Master Plan

Prior to 1978, there was no legal provision in Baltimore County for a Master Plan adopted by the legislature. In this context, the "comprehensive plan" then existing, was approved by the Baltimore County Planning Board and was a guide in the comprehensive zoning process. Nottingham v. Baltimore County, 266 Md. 339 (1972); Chapman v. Montgomery County, 259 Md. 641 (1970); and Pattey v. Board of Commissioners for Worcester County, 271 Md. 352 (1974).

In 1978, following recommendation of a duly constituted charter revision commission, the County Council approved, and the electorate adopted new Section 523 of the Baltimore County Charter. This provided for the first time that the County Council would adopt a written Master Plan, and that the zoning maps should be "consistent with the master plan." (Bill No. 83-78)

A new attitude toward the legal significance of the Master Plan developed also through a series of court decisions. Goster v. Board of County Commissioners of Cecil County, 285 Md. 233 (1979); Coffey v. Md. Nat'l Cap. P. & P. Comm., 293 Md. 24 (1982); and Md. Nat'l Cap. P. & P. Comm. v. Washington Business Park Assoc., 294 Md. 302 (1982). All acknowledged the position of priority of master plans bearing the legislative imprimatur.

CITED LEGAL SECTIONS

Baltimore County Code
1981 Cumulative Supplement

Sec. 2-58.1. Delegation to board of appeals of interim power to change zoning classification of property; method of interim zoning reclassification; method for early action on reclassification due to public interest or emergency.

(i) Before any property is reclassified pursuant to this section, the board of appeals must find:

(1) That there has occurred a substantial change in the character of the neighborhood in which the property is located since the property was last classified, or that the last classification of the property was established in error; and

(2) That the prospective reclassification of the property is warranted by that change or error. Any finding of such a change or error and any finding that the prospective reclassification is warranted may be made only upon consideration of factors relating to the purposes of the zoning regulations and maps, including, but not limited to, all of the following: Population trends; availability and adequacy of present and proposed transportation facilities, water-supply facilities, sewerage, solid waste-disposal facilities, schools, recreational facilities, and other public facilities, compatibility of uses generally allowable under the prospective classification with the present and projected development or character of the surrounding area; any pertinent recommendation of the planning board or office of planning and zoning; and consistency of the current and prospective classifications with the master plan, the county plan for sewerage and water-supply facilities, and the capital program.

Sec. 602. Powers and functions of county board of appeals.

The county board of appeals shall have and may exercise the following functions and powers:

(a) The county board of appeals shall have original and exclusive jurisdiction over all petitions for reclassification.

Baltimore County Zoning Regulations

Section 1A00 - General Provisions: All R.C. Classifications (Bill No. 98-75)

1A00.3 - Rezoning.

A. Filing of rezoning petitions. (Bill No. 98-75)

1. No petition to reclassify an R.C. zone or part thereof as other than an R.C. zone may be accepted for filing by the Zoning Commissioner unless - (Bill No. 98-75)

To be sure, these cases all presented questions going to the consistency of subdivision plans with the master plan rather than a direct confrontation with the zoning map. In this context, Judge Smith suggested that such a confrontation might be treated differently:

> "Given those facts we believe the Commission should have an opportunity to address the issue here with knowledge of the fact that in Coffey we have held that when the Prince George's County subdivision regulations require that a subdivision plan comply with a master plan, that plan is not considered a mere guidepost or set of recommendations as in zoning matters." Washington Business Park, supra, 294 Md., at 316.

This dictum does not, however, lead to the conclusion that the Master Plan in Baltimore County remains as a mere guide in zoning matters. Judge Smith was not faced with a provision similar to Section 523(a) of the Baltimore County Charter.

Accordingly, it is submitted that the plain language of the Baltimore County Charter, together with the reasoning of the Court of Appeals in the recent master plan cases, calls for a new interpretation of the legal significance of the Master Plan in Baltimore County. The key to this interpretation is the requirement of consistency. Courts generally have held the word "consistent" to mean "not contradictory, compliable, accordant, harmonious, congruous, and compatible." Ryan v. Roach Drug Co., 239 P. 912; Baldwin-Heckes Co. v. Kammerlohr, 242 N.W. 661. The New York court in Vitscher v. Hudson River R. Co., N.Y., 15 Barb. 37, formulated this test:

> "Can the requirements of both the charter and the general act be followed out and complied with in one case?"

In other cases involving charter and constitutional provisions and consistency requirements, such definitions as "subject to, restrained by, and not hostile to" have been implied. City of Wewoka v. Rodman, 46 P.2d 334; State v. Superior Court for Spokane County, 126 P. 920. The only pertinent Maryland case which our research has disclosed is Snyder v. Greenbaum and Assoc., 38 Md. App. 144 (1977). There, the word "inconsistency" as [illegible] in the Uniform Commercial Code was held to mean "absence of reasonable harmony."

DEC 29 1983

II. The Master Water and Sewerage Plan - A Part of the Master Plan

The Baltimore County Master Plan 1979-90 was adopted in Resolution No. 71-79 on November 19, 1979 (copy attached). The resolution provided for an ongoing process including water and sewer planning supplementary to and in conformity with the Master Plan, with the intention that such plans as amended from time to time shall be incorporated in the Master Plan by reference. Chapter II of the Baltimore County Water and Sewerage Plan confirms its integral relationship to the Master Plan. Accordingly, zoning must be consistent with the Water and Sewerage Plan.

In the zoning regulations process, the County Council has further provided for consideration of "consistency of the current and prospective classifications with the master plan, the county plan for sewerage and water-supply facilities, and the capital program." Baltimore County Code Section 2-58.1(j). In this respect, the Code parallels the Charter. The County Board of Appeals is compelled by law, therefore, to render a decision which is in reasonable harmony with and not hostile to the intent of the provisions of the Water and Sewerage Plan.

III. An Apparent Inconsistency between Zoning Proposed by Petitioners and the Water and Sewerage Plan

It is undisputed that the County Water and Sewerage Plan places Petitioners' property in a "no planned service" (NPS) category. The Water and Sewerage Plan designations for no planned service, W-7 and S-7, are defined as appertinent to:

> "Areas of planned low-density growth (Resources Conservation Zoning) for which Metropolitan facilities extensions are not planned or intended."

(See copy attached.) The County Council has reinforced these designations by providing that the reclassification of an R.C. zone to other than an R.C. zone involves a showing that the property is to be serviced by public water and sewer within two years. BCZR Section 1A00.3A1.a. The apparent result is that a reclassification of the Petitioners' property to other than an R.C. zone would be inconsistent with the Master Plan.

IV. Discussion

The Petitioners acknowledged the problem, and have sought a preliminary ruling. As outlined at a pre-hearing conference February 8, 1983, and followed by additional discussion at a public hearing March 15, 1983, the purpose of such a ruling would be to determine whether or not a full hearing on the merits should be undertaken and if so, under what legal understanding as to the impact of the Master Water and Sewerage Plan.

In this connection, the People's Counsel has undertaken a preliminary investigation to discover any factor which the Petitioners could conceivably benefit from in their effort to overcome the inconsistency between their proposal and the NPS planning designation. This included consideration of the Petitioners' suggestion that the Master Plan is but one of a number of competing factors which enter into a balancing process under Code Section 2-58.1(j). As a result of the legal analysis set forth in Sections I and II of this Memorandum, we were forced to reject this claim. The investigation then turned to a review of the possibility that the County Council, in the course of the 1980 Comprehensive Rezoning, might have classified any properties with NPS designation in a residential zoning category. It appears, in fact, that a couple of areas were so classified, but the Office of Planning and Zoning further stated that these areas were overlooked and would be earmarked for rezoning to R.C. consistent with the Master Water and Sewerage Plan in 1984.

Accordingly, we have found no basis upon which the Petitioners may effectively rely in the zoning petition process to satisfy and/or overcome the plain requirement of Master Plan consistency. In this context, we must also reject a suggestion of the Petitioners that centers on the idea that there is a primacy of zoning over planning, and that a strong Master Plan consistency requirement somehow usurps the prerogative of the County Board of Appeals to review a zoning petition. Here, the Petitioners also appear to refer to the provisions of state law requiring master water and sewerage plans as recognizing county zoning requirements. This is a bootstrap argument.

Pursuant to the Maryland Constitution and Public General Law, the citizens of Baltimore County have adopted a charter and provided for home rule. Maryland Constitution Article VI-A. The Express Powers Act, enacted by the legislature to define home rule powers, provides for authority generally to maintain the peace, good government, health and welfare of the county, and specifically for zoning and planning. Maryland Annotated Code Article 25A, Sections 5(S), (X). The people of Baltimore County have now also voted that zoning shall be consistent with the Master Plan. Charter Section 523. It has not been contended that the people lack the power to have adopted such a provision, nor do we know of any logical argument to that effect.

There are any number of provisions under State law, generally in the area of health and the environment, which give some recognition to local zoning as evidence of the usual legislative intent not to preempt local control over land use. Such laws do not govern the precise relationship between planning and zoning in each political subdivision. That is a matter left to local government. In Baltimore County, the State recognition of zoning necessarily involves consistency with the Master Plan. The result otherwise would be to destroy the County's home rule power over planning and zoning.

V. Options

If, as appears to be the case, the Petitioners are not in a position to reclassify their property to other than an R.C. zone, several options are open. First of all, the Petitioners may still pursue a zoning reclassification to another R.C. zone, such as R.C. 5 (rural residential) at the Board of Appeals. Thus, in the event that Petitioners were able to show error or change in the character of the neighborhood, there is some remedy available here.

Secondly, as Petitioners are already doing, they may request an amendment to the Master Water and Sewerage Plan, a procedure which occurs annually. An appeal from

the decision of the County Council there may be taken to the Circuit Court for Baltimore County. Carusillo v. Prince George's Co., 289 Md. 436 (1981).

We are aware that the Petitioners have previously filed a law suit in the Circuit Court for Baltimore County, and that this petition for reclassification is proceeding following the Order of the Court dated November 23, 1982 effecting a stay of proceedings. The Court properly refused to continue with those proceedings because they involved a broadly based direct attack on the comprehensive zoning classification. The lawsuit was not narrowly framed as a request for judicial review of the Master Water and Sewerage Plan designation. (A copy of the Amended Bill of Complaint and Amendment to Amended Bill of Complaint in Isaac A. Jones and D. & R. Joint Venture v. Baltimore County, Md., Case No. 108029 in Equity are attached.)

Upon review of the Petitioners' request for reclassification, now duly accepted and processed, it appears that there are four options pertinent to the Master Water and Sewerage Plan inconsistency which the Board may exercise:

1. The Board of Appeals may continue these proceedings, pending an opportunity for the Petitioners to pursue their requested amendment to the Master Water and Sewerage Plan.

2. The Board of Appeals may conduct a hearing on the merits, with the limitation that the property may not be reclassified to other than an R.C. zone.

3. The Board of Appeals may go ahead with an open-ended hearing, with the idea that some new factor or basis may appear which might overcome the apparent Master Plan inconsistency.

4. The Board of Appeals may deny the Petitioners' request for other than an R.C. zone at this time on the merits, thereby affording Petitioners the opportunity to pursue their legal argument promptly by appeal on narrow legal grounds and without the cost in time and resources of a full-blown evidentiary hearing.

CONCLUSION

The question of Master Plan consistency under Charter Section 523 has been raised with increasing frequency and importance in this and other Baltimore County land use controversies. We appreciate, therefore, this opportunity to articulate a reasonable and workable interpretation and, at the same time, to facilitate the process of administrative review.

Our research and analysis has led to the inescapable conclusion that the enacted Master Plan is a new force in the land use arena, and that the duly established government agencies must find unacceptable any zoning proposal which cannot coexist in reasonable harmony with the Plan.

The substantive review of Petitioners' proposal disclosed in turn the obvious inconsistency between the proposal for residential zoning and the "no planned service" Water and Sewerage Plan designation. We considered several potential approaches which Petitioners might utilize to overcome the Master Plan consistency problem, but these were unsatisfactory.

The preliminary finding of inconsistency gives the Board several procedural options which we have enumerated. It is for the Board to consider, in the exercise of its discretion, which comports best with the administration of justice.

Respectfully submitted,

John W. Hessian, III
John W. Hessian, III
People's Counsel for Baltimore County

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 13th day of April, 1983, a copy of the foregoing Hearing Memorandum was mailed to Charles F. Obrecht, Jr., Esquire, 906 Munsey Building, Baltimore, MD 21202; and David J. Preller, Jr., Esquire, Preller and Preller, Suite 200, 15 Charles Street, Baltimore, MD 21201.

Peter Max Zimmerman
Peter Max Zimmerman

COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND

Legislative Session 1979, Legislative Day No. 22

RESOLUTION NO. 71-79

Mr. Norman W. Lauenstein, Councilman

By the County Council, November 19, 1979

WHEREAS, by Article XI-A of the Maryland Constitution, the General Assembly is authorized to provide a grant of "express powers" to counties that form a charter government; and

WHEREAS, by Article 25A, Section 5 of the Annotated Code of Maryland, the General Assembly has designated the "express powers" to be granted to charter counties, which powers include the power to enact local laws for the protection and promotion of public health, safety and welfare, relating to planning, zoning and subdivision, and to pass all ordinances, resolutions or bylaws that may be necessary and proper to execute and enforce any of the powers expressly enumerated; and

WHEREAS, the people of Baltimore County in accordance with the Constitution and Laws of the State of Maryland have adopted, ordained and established the Baltimore County Charter; and

WHEREAS, pursuant to provisions of the Charter and of the County Code, the County is responsible for planning for the future growth and development of the County, including the preparation of a Master Plan; and

WHEREAS, pursuant to Section 523 of the Baltimore County Charter, the Master Plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards to serve as a guide for the development of the County; and

WHEREAS, the Charter provides that the Office of Planning and Zoning prepare and revise a Master Plan at least every ten years, the previous such revision being accomplished in 1975; and

WHEREAS, pursuant to Section 523 of the Baltimore County Charter, the County Council has the responsibility to accept or modify, and then adopt by resolution, a Master Plan which it receives from the Office of Planning and Zoning; and

WHEREAS, the County Council has caused to be prepared by consultants and staff, at great expense to the taxpayers of Baltimore County, a comprehensive growth management planning study which has been accomplished over the past three years; and

WHEREAS, the elements of said planning study together comprise a Master Plan, containing objectives, policies and standards, and a composite of mapped and written proposals serving as a guide for the physical development of the County; and

WHEREAS, the Planning Board of Baltimore County has held public hearings on the Master Plan and on the elements thereof and has recommended the adoption of certain elements of that Plan; and

WHEREAS, the Office of Planning and Zoning has submitted to the County Council a Master Plan, entitled "Recommended Baltimore County Master Plan 1979-1995", with accompanying map entitled "Baltimore County Master Plan Land Use Plan"; and

WHEREAS, the County Council has held a public hearing on the Master Plan on September 11, 1979.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND, that the Master Plan submitted by the Office of Planning and Zoning and adopted by the Baltimore County Planning Board, including mapped and written proposals, are hereby amended and modified, and as so amended or modified, are hereby adopted and declared to incorporate and be comprised of the following written and mapped components, which will serve as a guide for the development of the County, and which may be subject to such further modifications as deemed advisable by the Baltimore County Council:

"Baltimore County Master Plan 1979-1990" Written Components, maps, errata and addendum thereto, as follows:

SECTION I
Baltimore County Growth Management Program Physical Development Plan, Part I, Land Use Elements.

SECTION II
Baltimore County Growth Management Program Physical Development Plan, Part II, Transportation Element.

SECTION III
Baltimore County Growth Management Program Housing and Community Preservation Plan.

SECTION IV
Baltimore County Growth Management Program Open Space and Recreation Plan.

SECTION V
Baltimore County Growth Management Program Public Facilities Plan, Part I, Community Services.

SECTION VI
Baltimore County Growth Management Program Public Facilities Plan, Part II, Utilities.

BE IT FURTHER RESOLVED, that, using the Baltimore County Master Plan 1979-1990 herein adopted as a guide, the County Council intends to proceed with development of an overall growth management program for the implementation of the Master Plan, said program to include revised zoning maps, zoning rules and regulations, subdivision rules and regulations, a capital improvements program, community plans, including but not limited to, Owings Mills and Whitemarsh, and such other legislation, regulations, policies and programs as may be necessary; and

BE IT FURTHER RESOLVED, that until said overall growth management program and implementation measures can be adopted, the Office of Planning and Zoning, the Baltimore County Council and all other departments, agencies and officials of the County, in the exercise of any powers, authority, duties or responsibilities related to actions impacting on land use, growth or development, including planning, zoning and subdivision activities, in the County, shall consider the objectives, policies and standards of the Master Plan.

BE IT FURTHER RESOLVED, that all programs and construction projects initiated by the County be in concert with or further the goals and objectives stated in the Master Plan adopted in this resolution, and further that the Director of the Office of Planning and Zoning make such ~~a determination~~ AN EVALUATION of each and every such project and program and forward said ~~determination~~ EVALUATION to the County Executive and the County Council for their ~~approval~~ CONSIDERATION.

BE IT FURTHER RESOLVED, that supplementary to and in conformity with the Master Plan, the agencies of Baltimore County engage in an ongoing process which includes water, sewer, and solid waste management planning, management of the coastal zone of Baltimore County, designation of areas of critical state concern, specific area plans, and plans devoted to capital improvements and other facilities. It is intended that such plans, upon enactment by the County Council and as amended from time to time shall be incorporated in the Master Plan by reference.

BE IT FURTHER RESOLVED, that the County Council intends to approve a land use map to be part of the Master Plan concurrently with the adoption of the 1980 Comprehensive Zoning maps.

BE IT FURTHER RESOLVED, that the Planning Board forward to the Council, upon completion of the elements governing growth in each of the Growth Areas, a recommendation on the method of ensuring that all development actions made by the public and private sectors are in conformance with the master plan goals, objectives and elements as adopted by the County Council.

AND BE IT FURTHER RESOLVED, that previous Master Plans adopted by the Planning Board and/or the County Council are rescinded to the extent that they are inconsistent with the Baltimore County Master Plan 1979-1990.

WATER SUPPLY PLAN DESIGNATIONS

Areal Designation

W-1 EXISTING SERVICE AREA

Metropolitan facilities are available to 90% or more of the properties in these areas.

W-3 CAPITAL FACILITIES AREA (1-6 years)

Capital facilities are required and are possible within the framework of the 6-year Capital Program; subject to annual budgeting, neighborhood petitions, determination of health hazards, and the negotiation of Public Works Agreements.

W-5 MASTER PLAN AREA (7-10 years)

Capital facilities are required and are intended within the framework of the Baltimore County Master Plan.

W-6 AREAS OF FUTURE CONSIDERATION

Areas to be considered in the design of major facilities for growth and development beyond 1990.

W-7 NO PLANNED SERVICE (NPS)

Areas of planned low-density growth (Resources Conservation Zoning) for which Metropolitan facilities extensions are not planned or intended.

EXHIBIT B

SEWERAGE PLAN DESIGNATIONS

Areal Designation

S-1 EXISTING SERVICE AREA

Metropolitan facilities are available to 90% or more of the properties in these areas.

S-3 CAPITAL FACILITIES AREA (1-6 years)

Capital facilities are required and are possible within the framework of the 6-year capital program; subject to annual budgeting, neighborhood petitions, determination of health hazards and the negotiation of Public Works Agreements.

S-5 MASTER PLAN AREA (7-10 years)

Capital facilities are required and are intended within the framework of the Baltimore County Master Plan.

S-6 AREAS OF FUTURE CONSIDERATION

Areas to be considered in the design of major facilities for growth and development beyond 1990.

S-7 NO PLANNED SERVICE (NPS)

Areas of planned low-density growth (Resources Conservation Zoning) for which Metropolitan facilities extensions are not planned or intended.

PETITION FOR RECLASSIFICATION
4th Election District

LOCATION: 3 parcels situated on the east side of Old Hanover Road, containing 1.4, .96 and 3.3 acres respectively, and being situated 1720', 996' and 2121' respectively North of Butler Road.

PUBLIC HEARING: Tuesday, September 17, 1985 at 10:00 a.m.

The County Board of Appeals for Baltimore County, by authority of the Baltimore County Charter, will hold a public hearing:

Present Zoning: R.C. 5
Proposed Zoning: B.R.

All that parcel of land in the 4th Election District of Baltimore County, Maryland

(1) Beginning for the same in the center of Old Hanover Road at the distance of 1720 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 13 degrees 00 minutes East 119.79 feet and North 14 degrees 00 minutes East 156.80 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the four following courses and distances viz: South 72 degrees 31 minutes East 322.30 feet, South 27 degrees 14 minutes West 55 feet, South 59 degrees 08 minutes West, binding on the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, 292.11 feet and North 74 degrees 30 minutes West 100 feet to the place of beginning.

Containing 1.4 Acres of land more or less.

(2) Beginning for the same in the center of Old Hanover Road at the distance of 1996.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, North 16 degrees 03 minutes East 125 feet, thence leaving said road and binding on the outlines of the land of the petitioners hersin, the three following courses and distances viz: South 70 degrees 15 minutes East 350.00 feet, South 28 degrees 45 minutes West 125.00 feet and North 70 degrees 28 minutes West 322.30 feet to the place of beginning.

Containing 0.96 of an Acre of land more or less.

(3) Beginning for the same in the center of Old Hanover Road at the distance of 2121.6 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 3 degrees 13 minutes 30 seconds East 66.4 feet, North 3 degrees 46 minutes 30 seconds West 168.3 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the three following courses and distances viz: North 86 degrees 21 minutes 30 seconds East 144.5 feet, South 81 degrees 01 minute 30 seconds East 281.9 feet and South 77 degrees 25 minutes 20 seconds East 311.85 feet to the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, thence binding on said right of way lines, the two following courses and distances viz: South 36 degrees 54 minutes West 139.48 feet and South 52 degrees 57 minutes West 31.91 feet and thence leaving said right of way and continuing to bind on the outlines of the land of the petitioners herein, the five following courses and distances viz: North 84 degrees 32 minutes 30 seconds West 77.26 feet, North 70 degrees 43 minutes West 63.85 feet, North 81 degrees 49 minutes West 89.73 feet, South 23 degrees 59 minutes 30 seconds West 112.05 feet and North 79 degrees 48 minutes West 339.79 feet to the place of beginning.

Containing 3.3 Acres of land more or less.

Being the property of Nelson L. Bond, Jr., et al, as shown on the plan plan filed with the Zoning Department.

BY ORDER OF
WILLIAM T. HACKETT, CHAIRMAN
COUNTY BOARD OF APPEALS
BALTIMORE COUNTY

CARL L. GERHOLD
PHILIP E. CROSS
JOHN P. ETZEL
WILLIAM B. ULRICH
GORDON T. LANGDON

GERHOLD, CROSS & ETZEL
Registered Professional Land Surveyors
412 DELAWARE AVENUE
TOWSON, MARYLAND 21204
823-4470

EMERITUS
PAUL D. GOLLEHON
FRED H. GOLLEHON

February 28, 1985

Zoning Description

All that piece or parcel of land situate, lying and being in the Fourth Election District of Baltimore County, State of Maryland and described as follows to wit:

Beginning for the same in the center of Old Hanover Road at the distance of 1720 feet northerly from the center of Butler Road and running thence and binding in the center of Old Hanover Road, the two following courses and distances viz: North 13 degrees 00 minutes East 119.79 feet and North 14 degrees 00 minutes East 156.80 feet, thence leaving said road and binding on the outlines of the land of the petitioners herein, the four following courses and distances viz: South 72 degrees 31 minutes East 322.30 feet, South 27 degrees 15 minutes East 55 feet, South 59 degrees 08 minutes West, binding on the northwest right of way line of the Baltimore Gas and Electric Company Electrical Transmission lines, 292.12 feet and North 74 degrees 30 minutes West 100 feet to the place of beginning.

Containing 1.4 Acres of land more or less.

STATE OF MARYLAND — PAUL EUGENE GERHOLD — No. 6749 — REGISTERED LAND SURVEYOR

