

1000 FRIENDS *of* MARYLAND

GUIDE *to* STOPPING

BAD

DEVELOPMENT

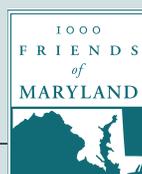


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Written for 1000 Friends of Maryland
by Ann MacNeille,
with generous support from
the Abell Foundation.

1000 Friends of Maryland
is a statewide nonprofit organization working to make smart growth happen.
Our mission is threefold: to end wasteful, poorly planned development;
to revitalize older neighborhoods; and to link all of our communities together
with a range of transportation options.

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INTRODUCTION

If you were to do a web search for “suburban sprawl,” you would quickly turn up information on why you should care about it and how the problem should be addressed by our legislators. You would find articles on the acreage of open space developed in the last decade; the effect of sprawl on taxpayers, residents, and the environment; model anti-sprawl legislation; sound planning techniques; and the effect of highways on land use. But nowhere would you find a guide that outlines for the Maryland citizen activist the various legal routes for opposing and containing development in Maryland.

In publishing this guide, we are not suggesting that litigation is the only, or even the best, way to resist sprawl. However, when the citizens ignore the legal aspects of a land use issue, the developer has a chance of locking in the proposed use for good. Lawyers usually represent developers at the earliest phases of their projects. Developers are also organized political donors and lobby in the legislature. Their success in acquiring and developing the open space in Maryland is directly attributable to their ability to navigate the legal system.

This guide is intended to accomplish three goals. First, we hope to provide citizen activists with a fundamental understanding of the basic legal issues that arise in many land use changes, in the hopes that you will recognize them in time to preserve your legal rights. We have tried here to direct you to some of the legal steps you should consider if your local zoning authority seems bent on approving a rubblefill, mall, or other intrusive project in your community, or if the state is permitting roads or

industrial uses that may change your landscape and pollute your air and water. Second, we have tried to give you an overview of what is involved in land use litigation, and how it is best used as an adjunct to other methods of opposing a project. Third, we hope that this guide will equip citizens to evaluate the laws on which their elected representatives vote. We hope that you will become involved in the political process, so that legal action becomes less necessary in the future.

This manual does not contain legal advice. Nor does it pretend to be comprehensive: volumes have been written about each legal topic outlined here, and each locality’s zoning code is several inches thick. A visit to some of the web sites listed in Appendix I may give you a sense of the intricacy of these laws. Whether your community will prevail under a certain law will depend on the facts of your case and many other variables, including your community’s ability to obtain legal representation and scientific advice. Because the statutory remedies have been invoked too rarely in Maryland, your ability to prevail may also depend on your group’s ability to educate the decision making authorities on laws they might never have applied. Progress in this field can be incremental.

The manual is divided into three parts: Prevention, Containment and Mitigation, and Logistics. Each section addresses the Maryland and federal law most often applicable to efforts to preserve open space. But because laws change, this manual is best used as an alert to the legal issues you or your lawyer should investigate. We hope it will be useful to you.

PART I: PREVENTION

CHAPTER 1
PUBLIC PARTICIPATION

Early participation by citizens is key to preserving open space. This chapter describes your rights to participate in proceedings involving land use changes, the local zoning and land use laws involved in those changes, and the most useful federal statutes.

RECOGNIZING THE PROBLEM

The first rule of prevention is to know what's coming in time to do something about it. Every major land use change in Maryland requires some sort of permit or approval preceded by public disclosure, such as the posting of signs on the property or notices in the newspaper. Many community associations have committees dedicated to monitoring permit applications, zoning changes, and water and transportation planning issues.

EXERCISING YOUR RIGHT TO ACQUIRE INFORMATION

The Maryland Public Information Act (PIA) declares "All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees."¹ (When a federal agency is involved, the Freedom of Information Act (FOIA) grants similar rights.)

The Public Information Act applies to the state and the political subdivisions, including counties, municipal corporations, unincorporated towns, school districts, and their entities' "units," or agencies. You can use the Public Information Act to get access to an agency's permitting file, which should contain detailed information on exactly what is being proposed. The information to which you are entitled includes documents, photographs, computerized records, films, maps, and other records. An agency's file should also contain records of the agency's contacts with the public.

The mechanics of the Public Information Act are simple. First, you must submit a request letter to the agency in question. A sample appears at Appendix 2. The Maryland Department of the Environment (MDE) accepts requests through its web page. The agency must either deny your request within *ten days* or produce the documents *within thirty*. Often, the agency will ask you to make an appointment to review the documents at its office. In that case, you will usually be given a desk, the files, and a box of paperclips so you can clip the pages you want copied. Be careful not to change the order of the files or dislodge stick-on notes. Ask about the copying charge before you begin. You can also take notes, but if there is any chance

How to Stay Informed

- Read the small-print legal notices in the newspaper.
- Check your locality's home page for the list of projects coming up for approval, but be aware that it might not be updated frequently.
- Check the web site of the Maryland Department of the Environment for water, wetlands, and air permitting actions (useful web sites are listed at Appendix 1).
- Check with your local councilperson and ask to be notified of projects in your neighborhood.
- Read the notices posted on the properties in your neighborhood.
- Read the local and business sections of your newspaper so you will know about businesses' plans to expand in or come to your community.
- Read the real estate advertisements and the notices to bid.
- If you see construction or grading going on, ask the workers what the project is.
- Notice "For Sale" signs on undeveloped property.
- Keep an eye on the political agenda: for what projects is the legislature considering approving a bond issuance? What corporation is seeking local tax breaks to construct facilities, or suddenly contributing to the campaigns of local politicians?
- Look at the bulletin board at your local public library for zoning notices.
- In every event involving a permit, go to the public meeting listed in the notice, listen to the owner explain the project, and ask questions.
- If you and your neighbors don't already have a committee to share these tasks, start one.
- Look at satellite maps of your neighborhood that may be available online, to check for site clearing or other changes.

that the papers will be used in litigation, it is probably more cost-effective to pay for copies. Sometimes the agency will make the copies while you wait; sometimes it will mail them to you. The Department of the Environment's web page (www.mde.state.md.us) contains a good explanation of that agency's procedures.

¹ Maryland Code, State Government Article, § 10-612.

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How to Make Effective Use of the Public Information Act

- Submit your Public Information Act requests as soon as you learn of a proposed or impending land use change.
- Submit Public Information Act requests to every conceivably involved state and local agency, and review the documents you get to see if others are involved.
- Renew your requests from time to time; the agencies will not inform you of subsequent additions to the file.
- Be aware that not all government employees understand the Public Information Act, and may accidentally make inappropriate refusals. At the least, request that any refusal be accompanied by an identification of the type of document, and a description of the Public Information Act exception that the agency is claiming.
- Remember that you do not need to explain to anyone your reasons for requesting information.
- Look at the file page-by-page and as a whole: some permitting files are most interesting for what they do not contain, or for the dates on which information first appears.

How to Make Effective Use of the Open Meetings Law

- Read the legal notices in your local newspaper and go to the meetings published there.
- Ask your local government how and where its agencies and commissions publish notice of their meetings, and whether any have mailing lists or web sites.
- If you learn that a meeting has occurred or a public body has taken an action, find out whether the meeting was properly published. Inform the agency and the executive that actions taken at the meeting are void, and consider legal action.

remedies.

In addition, whether you are before a zoning board, state agency, or court, you must have “*standing*” to challenge the action. For state and local actions, the Maryland Environmental Standing Act declares the right of Maryland citizens to appear in court to request enforcement of the environmental laws.⁴ (Citizens have seldom invoked the Act, and Maryland courts have seldom interpreted it.) As the law stands in Maryland, you should be able to meet the standing requirements for both court and agency challenges if you own or use and enjoy property affected by the land use decision. If you own property downstream of an applicant for a permit to discharge pollutants into the stream, or use a public park downstream of that discharge, you can probably establish standing; an upstream owner or hiker could have difficulty.

The standing rules for citizens’ associations vary with the type of action involved. The Maryland Department of the Environment has specifically been known to challenge the standing of community groups. Therefore, you should also bring your action in the name of an individual with standing. If an agency attempts to bar your group from participating in agency proceedings, you should protest vociferously to your elected representatives.

Next, although the procedures by which citizens may challenge a government land use decision vary by decision and decision maker, all have *deadlines* that you must not miss. The counties and Baltimore City each have separate procedures for appealing zoning decisions, which you must learn. The state has “contested case” procedures for agency actions, such as the issuance of a Clean Water Act permit by the Maryland Department of the Environment. Those procedures are described generally in Chapter 1. The federal government has analogous provisions. In some cases, the decision itself will tell you when you must appeal, but the method of appeal and the issues to be raised are legal matters best referred to a lawyer.

EXERCISING YOUR RIGHT TO OBSERVE MEETINGS

Maryland’s Open Meetings Law requires that “public business be performed in an open and public manner.”² The law requires that “public bodies” (which means any entity consisting of more than one person and created by law, rule, ordinance or executive order) give public notice of meetings at which they perform legislative types of functions. The law contains many exceptions, but it expressly applies to public bodies when they are meeting to consider licenses, permits, and zoning matters.³

This law can be important. If a county commission has met to approve a project without proper public notice, and you have missed the deadline for challenging the action, you can seek to have the action voided so you can file a timely challenge. The law is also a useful way for citizens to convey their interest in land use issues: your representatives will notice an audience of voters.

EXERCISING YOUR RIGHT TO CHALLENGE AN ACTION

Most challenges to land use decisions must be presented to the agency that made the decision and pass through that agency’s administrative process before being heard in court. This requirement is called *exhausting administrative*

² Maryland Code, State Government Article, § 10-501.

³ Maryland Code, State Government Article, § 10-503.

⁴ Maryland Code, National Resources Article, § 1-503.

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UNDERSTANDING THE GENERAL PRINCIPLES

You should also be aware of some general principles that apply to all land use decisions. *First*, the agency must have a basis for its action. The Department of the Environment has argued, for instance, that it may issue a discharge permit without researching any harm to water quality unless citizens can prove harm to the environment. That proposition is wrong: if an agency has a factual basis for its action, the court will avoid second-guessing it, but an agency may not issue a permit without facts to show that there will be no harm.

Second, agencies have extensive fact finding powers in land use cases. As the law is structured, citizens are in the position of proving to the agency that made the decision that it was incorrect. In state permitting proceedings, this procedure often leads the agency that has decided to grant a permit to align itself with the developer against the citizens. The Department of the Environment, for instance, has argued that the citizens could not meet with state employees to whom it gave the project owner access. It has also maintained that its lawyer's communications with the project owner's lawyers were privileged. If an agency's practices appear to you to unduly burden your group's participation in the process, your group should contact your representatives. Maryland has no ombudsman (an official person who can assist you with delay, injustice or impersonal delivery of services) for citizens seeking the enforcement of its environmental laws.

MAKING THE LEGAL CHALLENGE

When you challenge a land use decision, you will need to prove the basis of your challenge to a decision maker in a hearing. The hearings are like trials, in that the parties

Overriding Principles for Challenging the Legality of an Action

- Ascertain the deadline for filing the challenge.
- Line up a lawyer to confirm the deadline and prepare or at least review your filing.
- Gather the facts to establish standing.
- Use the free manual available from Community and Environmental Defense Services (see Appendix I for contact information) or another citizens' environmental guide to help you spot the laws relevant to this land use change.
- Ascertain the impact of the proposed use on the neighborhood (refer to the Community and Environmental Defense Services manual, and see Chapter 2 on zoning).
- Don't let up on other methods of opposing the use, such as land purchase, political pressure, and negotiation.

introduce evidence and witnesses, but different because you are not entitled to discover the other side's facts beforehand, unless you can persuade the hearing officer otherwise. There is no jury. You will often need to introduce scientific or other expert testimony. In local zoning cases, an employee of the locality hears the case; in state permitting cases, an Administrative Law Judge, a state employee, will hear the case initially. The contested case procedures and various zoning procedures are described generally in Chapter 1.

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CHAPTER 2
ZONING LAWS

Your first inquiry when you learn of a land use change should be whether the applicable zoning allows that use. In Maryland, zoning is done at a local, rather than statewide, level. Each County and municipality (including Baltimore City) has its own zoning process, ordinance or code, and appeals procedures, so you will need to check your locality's code.

CHECKING YOUR ZONING

You should check your locality's zoning ordinance and map to ascertain the uses for which your neighborhood is zoned.

Where to Find Your Zoning Ordinance

- Your local library; ask if it is updated.
- The law libraries for the circuit court in each county seat, for the appellate courts in Annapolis, and for the two law schools in Baltimore. They are generally open to the public.
- Online, at your government web site.⁵
- Your locality's planning office: ask to see the zoning map and code.

UNDERSTANDING THE VOCABULARY AND PROCESS

The general process and vocabulary in the various zoning codes are sufficiently similar to be explained generally. Zoning codes generally have a definitions section, though additional definitions may appear throughout; a table of uses; provisions setting forth the various zoning categories, application and appeals procedures, and technical requirements, such as setbacks, building heights, and road widths. **Check for updates at the beginning or end of the binder.**

Widely Used Terms and Concepts

Cluster Zoning. Cluster zoning enables the same number of homes to be built as with conventional zoning, but saves much more land. Clustering protects open space, creates more walkable neighborhoods, and can reduce dependence on cars.

Comprehensive Plans. A comprehensive plan is a general guide that outlines a vision of the future, and includes goals for land use and development. Maryland

requires all local governments to have comprehensive plans. These documents must be updated every six years and are approved by the local council or other governing body. They are not zoning codes and often contain vague language. Nonetheless, when you see that your county is revising its comprehensive plan, you should participate, because much of what is set forth in the Comprehensive Plan will affect zoning decisions for years to come.

Conditional Uses. Conditional uses are only permitted if the owner demonstrates that the use will comply with specific conditions set forth in the zoning code.

Covenant. A covenant is similar to an easement, in that it is a written agreement between two or more parties regarding how land can be used. Covenants can be used to restrict how a property can be used in the future.

Critical Areas. The Maryland Critical Area Protection Program⁶ law requires the localities to adopt special rules to protect the Chesapeake Bay, its tributaries to head of tide, its tidal marshes, and a 1,000-foot buffer of land around the perimeter of these waters. This protection was expanded in 2002 to include the coastal bays along the Atlantic seaboard. If your locality includes such areas, your local planning office has a map of the critical areas. To develop such areas, the owner must prove that the project will not adversely affect the bay and the habitats of fish, wildlife, and plants in need of conservation. The owner may also have to apply for a "Growth Allocation," where the jurisdiction gives the developer the right to build in the critical area.

Districts, or Zones. Most codes designate the uses allowed in particular districts, often by initials. For instance, the "OS" zone in Prince George's County is the Open Space zone. The Prince George's code outlines the general purposes of this zone, explaining that it is "devoted to uses which preserve the County's ecological balance." The uses permitted in that zone appear in the code's Table of Uses.

Easement. An easement is the right of one person to use another person's property. For example, if your town wants to build a new trail, you can grant the town an easement over your property, thereby giving

⁵ For a list of local government web sites, go to www.mdarchives.state.md.us/msa/mdmanual/01glance/html/locgov.html.

⁶ Maryland Code, National Resources Article, §§ 8-1801 – 8-1817.

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the town permission to use your land even though you still own it. A Conservation Easement is a specific kind of easement where the owner transfers the right to develop his or her property to a third party, such as a non-profit land trust or a government agency. The owner still owns the land; however, he or she cannot develop it. There are several advantages to conservation easements, including relief from property and estate taxes, a charitable gift tax deduction, and the permanent classification as open space.

Eminent Domain (Condemnation). The federal, state and local governments all have power to take private property for public use, although they must pay the property owner just compensation.

Forest Conservation Areas. Maryland's Forest Conservation Act requires the protection of areas containing endangered trees, shrubs, or plants. You should also check for local ordinances that may have a similar effect.

Growth Allocation. See Critical Areas.

Historic Districts/Places. Most zoning codes require the preservation of historic resources. You should check your code for its definition; some codes mandate the protection of the "historic setting" as well as the structures themselves.

Nonconforming Uses. Sometimes an owner's existing use is made impermissible by a change in the zoning law. The owner must then prove that the property had been used legally for the desired use before the law changed, and that the use had not been abandoned. If those things are proven, then the use is deemed "vested" and can continue. An owner may "intensify" a vested use (for example, a marina was entitled to add to its rental rowboat fleet), but not "extend" it to a new and different use (the same marina could not construct extensive new dockage). If your corner grocery store wants to add gas pumps, even though a gas station is not allowed, the owner may argue that the use is vested because the property was once a gas station in the past. The relevant zoning questions are (1) whether the use lapsed for the period specified in your locality's code, and (2) whether the use is "new and different" from the old use or the current grocery store use.

Overlay Zones. Sometimes an area can have more than one zoning classification. For example, residential units may also be part of a historic district zone that "overlays" the basic residential zoning. The critical area buffer around the Chesapeake Bay and the Atlantic coastline is another example.

Plat. A plat is a property map, indicating the location and boundaries of individual properties. It is primarily used when a property is subdivided, to show where the new lots will be. You should verify the accuracy of plats submitted with subdivision requests; streams and steep slopes, which bring additional regulations into play, are sometimes omitted.

Sensitive Areas. The Maryland Economic Growth, Resource Protection and Planning Act requires localities to adopt seven goals in their Comprehensive Plans. One goal is to protect "sensitive areas." Those areas include habitats for rare and endangered species.

Site Plans. An owner seeking to build must usually submit a site plan. The procedure is usually a simpler version of that used for subdivision plans. Check to make sure that the plan accurately reflects the property's topography.

Special Exception Uses. If a proposed use is only allowed by special exception, then the owner must show, among other things, that the use would not have an unusually adverse impact on the neighborhood. Special Exception cases are often litigated and are discussed further below.

Subdivision Plans. An owner seeking to subdivide a property must submit a plat that shows how the property will be carved up. The local code usually sets forth the various agencies, such as the traffic and health departments, which must review the plat before it is approved. The plat must comply with the local subdivision regulations, which usually control street width, runoff control, access, and lot size. It must also comply with the property's zoning. You may go to your local planning office and ask to see the owner's plat and any accompanying documents. Make sure the map accurately represents the property; pay special attention to stream placement and steep slopes.

Uses. Zoning codes govern which "uses," or activities, are allowed in different areas. The codes usually say that anything that is not specifically permitted in a particular zone is forbidden. Heavy industry might be listed as a permissible use in one place, but not in another. Likewise, single-family detached houses might be permissible in a zone, but townhouses might not be. You need to read your County Code to learn how your neighborhood is zoned, and then to see what uses are permitted in that zone. The uses usually appear in chart form, and each is usually defined in a "Definitions" section near the front.

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Uses As of Right (or Unconditional Uses). When the ordinance specifies a use “as of right” or “unconditionally,” the owner does not need approval of the zoning board in order to begin the use. The owner might need other permits, however.

Variations. An owner who wants to use his or her property in a way not allowed by the zoning must first acquire a variance. Thus, if you wanted to build a garage impermissibly close to your property line, or an impermissibly narrow access road, you would need to apply for a variance. Generally, a locality may only grant a variance if the owner proves an unreasonable hardship created by some inherent trait of the property, (in the access road example, a large and immovable rock outcropping might suffice), harmony with the zoning regulations, and lack of harm to the public. In one case, an owner’s wish to build a gazebo too close to a river did not satisfy those standards. Variations can have major consequences. For instance, an owner planning a subdivision might apply for a variance to build an access road two feet narrower than that required by the code. A two foot variance might seem inconsequential, unless you learn that the developer does not own enough land to build the full width, and therefore needs the variance to develop the property. If that is the case, then preventing the variance may prevent the whole project.

Zoning Changes. Property owners can apply to have their land rezoned. Such “spot” rezonings are not favored. To succeed, an owner must prove either that the character of the neighborhood has substantially changed (thus, the owner must prove its definition of the neighborhood, the character of the neighborhood at the time of zoning, and the character now), or that the original zoning was a mistake. You should oppose rezoning efforts, even if the owner’s plans seem innocuous, for two reasons: first, the “office use” proposed by this owner might be acceptable, but the category may well permit an intensity of use which is not, and, second, one owner’s success will make it easier for others nearby to claim that the neighborhood has changed, so their properties should be rezoned, too.

Zoning Maps/Redistricting/Comprehensive Rezoning. As with the Comprehensive Plan, the adoption of zoning maps, which spell out the permissible uses in each district of the county, occurs through the political process. Many localities address zoning on a wholesale basis every several years. Developers participate in the process by supporting politicians for office and by lobbying. Citizens should, too.

How to Use Your Zoning Code

- Determine the applicable deadlines for opposing a project or appealing a decision.
- Determine the features—environmental, topographical, and historical—of the property and of the neighborhood. Community and Environmental Defense Services (CEDS) has a manual available free online, that provides detailed advice on this step, from the identification of habitat to the determination of traffic impacts, and on how to find help in doing it. (See Appendix 1 for contact information.)
- Read the zoning code with these features of the land in mind, and make a checklist of all the uses permitted in your zone and the types of approval required for this project. If the code makes other features significant, such as an archaeological site or endangered plant, go back and look for these features.
- Be particularly aware of the possibility that the property might be designated as a “Critical Area” if it is within 1,000 feet of the Chesapeake Bay, its tidal tributary or any coastal bays.⁷

OPPOSING ZONING AND PERMIT APPLICATIONS

Your locality’s code provides citizens with mechanisms by which to oppose and appeal zoning and permitting decisions. The mechanisms, nomenclature, and deadlines vary by locality and type of decisions, and, particularly regarding appeals, you should consider seeking legal advice. But, very generally, a properly noted appeal follows these steps: a zoning examiner (called “officer” or “commissioner” in some places) will hear evidence and decide the case. The losing party may then appeal to a board consisting of County Commissioners in some places (Prince George’s County, for instance) or to a publicly appointed Board of Appeals in others (Baltimore County, for instance). Also, some zoning applications are subject to approval by the zoning commissioner. In those cases, your first appeal would occur upon an adverse decision by the zoning commissioner.

It is important to know whether the second round of your challenge will be “on the record,” which means that the case is reviewed on the transcript and documents introduced in the first hearing. The other possibility is that the appeal is heard “de novo,” which means that the parties present their evidence, witnesses and all, over again. How citizens allocate their financial resources depends heavily on whether the first hearing has any effect on the second and on strategic questions, such as the need to publicly demonstrate the strength of the evidence.

The losing party from the second round may appeal in

⁷ Maryland Code, National Resources Article, §§ 8-1801 – 8-1817.

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the circuit court for that locality. The circuit court will not hear new evidence, and it will accord “deference” to the lower body’s reasonable findings of fact and, often, to its interpretation of the local law.

How to Appeal a Decision

- Meet the deadline for filing an appeal, and file it with the right entity. This is best done by a lawyer, but if your deadline is too soon to contact one, walk into the planning office, ask whether they have a form or can show you a file in which someone else filed an appeal, write it out with the file number and property address on it, make a copy, ask where it must be filed, take it there, and get your copy stamped as received. This approach is not perfect, but it is preferable to losing your right to appeal. A sample is attached in Appendix 3; it worked in that locality, but you should only use it to get the general idea of how one should look.
- Unless you are very confident of your ability to represent yourself in legal proceedings, hire a lawyer to prepare and present your case.
- Address whether the procedure by which the locality made the decision was correct:
 - Was publication proper?
 - Were zoning decisions made in accordance with the Open Meetings Law?
- If the Code required that the planning office approve a proposal only after review and approval by other county agencies, does the file contain a record that each of those agencies received and reviewed the plan?
- If the Code conditions approval on the owner’s demonstration of certain facts, does the planning office’s file contain a record of each of those facts?
- Did the planning office apply all of the relevant code provisions?
- Did the owner change the proposal or map during the process, so that some agency’s approval was no longer valid when the decision was made?
- Address whether the substance of the decision was correct:
 - Is the owner’s map accurate?
 - Is the use permissible in that place?
 - Is the locality’s interpretation of the Code correct?
 - Did the locality decide issues such as environmental, schools, and traffic impacts correctly, and did its factual assumptions reflect existing conditions?

OPPOSING A SPECIAL EXCEPTION

If a developer has applied for a special exception—for instance, an application to build a rubblefill in a rural zone in which rubblefills may be built by special exception—you must gather facts to prove that the use would have a more adverse impact as sited than on other areas in that rural zone. The decision maker must find some impact “unique” to your neighborhood. You therefore should concentrate on features of the neighborhood that are not shared by other areas in the zone: a unique configuration of roads, so that the additional traffic generated by the project would have a uniquely adverse effect; unique topography, so that an unsightly project would have a particularly deleterious effect on this neighborhood; a

How to Oppose a Special Exception

- Make sure you know the appeals deadline.
- Gather facts about your neighborhood.
- Depending on the type of impact expected, contact a traffic engineer, a landscape architect, land use planner, noise expert, and/or biologist, or hire an environmental consultant to identify the issues and coordinate the evidence for you.
- Hire a lawyer to present your case.

unique proximity to waters, historic sites, streams, livestock, or houses that would be impacted by the use; a unique lack of nearby fire departments. You should also gather facts to prove that the use will not comply with other requirements in the ordinance, such as the protection of sensitive areas or critical habitat. A free guide, published by Community and Environmental Defense Services, (see Appendix 1) has good information on how to do these tasks.

PARTICIPATING IN LEGISLATIVE LAND USE DECISIONS

Sometimes the laws on the books are simply inadequate to ensure sound land use planning. Inadequate laws create unnecessary conflicts between developers and nearby citizens, sometimes doing more harm than good. Citizens should participate in long term zoning decisions, which are most often made when local governments enact statutes and adopt master plans. To implement sound planning practices, it is vital to enact clearly written statutes that limit the discretion of administrative agencies to relax important environmental or land use standards.

Good land use policy, or “smart growth,” recognizes the importance of ensuring access to jobs, providing open space, and preserving established neighborhoods. Consider whether your locality is implementing the principles of smart growth, particularly with regard to these methods:

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Planning Terms

In-fill. To take advantage of existing infrastructure, developers often build new structures on vacant parcels between existing buildings. This in-fill development combats sprawl by efficiently using land in already developed areas, and it can also improve neighborhood appearances by filling in ugly gaps, vacant lots, and oversized parking lots.

Infrastructure. Every new building has a hidden cost, which is the money it takes to build the roads, schools, sewer and water lines, and other services on which the building relies. Most often, local government—and therefore the taxpayer—pays these costs. Sprawl development forces us to constantly build new infrastructure, while existing schools, roads and services are underused. Because it is so spread out, sprawl actually costs taxpayers more than walkable and compact neighborhoods do.

Planned Unit Development (PUD). A planned unit development is a large project that combines a range of uses, including residential uses, commercial uses and sometimes even light industrial uses. PUDs are used to promote the coherent planning of large areas, rather than have them be developed in a piecemeal manner.

Priority Funding Areas (PFAs). These are areas where the state and local governments have decided that they want to support new growth. Although local governments can still allow development outside of Priority Funding Areas, the state of Maryland will no longer subsidize infrastructure outside of their boundaries. The jurisdiction or the developer will have to pay for it itself. The areas that qualify as Priority Funding Areas include every municipality; areas inside either the Baltimore Beltway or the Washington Beltway; areas already designated as enterprise zones; neighborhood revitalization areas; heritage areas; existing industrial land; and other areas designated by local governments.

Rural Legacy Areas. Maryland's Rural Legacy grant program uses state funds to buy conservation easements over large stretches of farmland, forest, and natural areas. Local governments and private land trusts are in charge of identifying the areas they want to preserve, and applying to the State for funds to purchase the easements.

Transfer of Development Rights (TDR). Some counties designate certain areas as “sending zones” for development rights, and others as “receiving zones.” A developer who wishes to add more residential units to a receiving parcel can purchase unused development

rights from a landowner in a sending zone. The sending property will stay undeveloped, but the owner can still make money off it. With a well-designed TDR program, growth is directed into the receiving zones, and away from rural areas.

Transit-Oriented Development (TOD). The intent of a transit-oriented development is to cluster growth within a short walk of a transit stop. The development produced is easily walkable, attractive and convenient, and allows most trips to be made without cars.

MONITORING LAND USE LEGISLATION

The state and most local governments have web pages describing their various legislative processes, and some of these sites list pending legislation. You can also find out what bills have been introduced by reading the newsletters of citizen organizations during the legislative sessions. Bear in mind, though, that few newsletters cover legislation at the local level, and most list only the legislation relevant to their own goals. Thus, when you read a list of “environmental” bills introduced during the state session, that list might not include land use issues such as transportation or funding for neighborhood revitalization.

Never hesitate to contact your state or local representative, either to ask about his or her position on pending legislation, or to request that he or she introduce new legislation. If you get a canned or vague response on an issue that is important to you, make an appointment and go see your representative in person. Legislators who are only visited by lobbyists are not always voting on the basis of a complete set of facts.

PART I: PREVENTION

CHAPTER 3
WETLAND LAWS

The presence of tidal or nontidal wetlands on the site might provide a basis for challenging or limiting the development and preserving open space. Developers may want to maximize their useable space by urging a finding that no wetlands are present, by seeking to minimize the required buffers, and/or by seeking permits to dredge and fill wetlands.

The Critical Areas laws that protect the tidal wetlands are well known. Less often enforced are the laws protecting the nontidal wetlands. The Maryland legislature has found that “nontidal wetlands play important roles in the preservation of the Chesapeake Bay and other waters of the State... Many nontidal wetlands have already been lost or degraded due to the combined effects of population growth and land use.”⁸

IDENTIFYING WETLANDS

Determine whether your local planning office, Maryland Department of Natural Resources (DNR) and/or the Department of the Environment regard any part of the property as wetlands. The Army Corps of Engineers has listed techniques for identifying wetlands in its Federal Manual for Identifying and Delineating Jurisdictional Wetlands. They are also defined by the State of Maryland:

“Nontidal wetland” means an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation.⁹

DNR’s web site on wetlands may also be useful.

UNDERSTANDING THE WETLANDS REQUIREMENTS

Under the wetlands laws no one may perform a “regulated activity” in a nontidal wetland without a permit.¹⁰ “Regulated activities” include changing the flow pattern of a stream, placing material into a nontidal wetland, or grading the topography of the stream bank within a 25 foot buffer of the nontidal wetland.¹¹ For instance, a developer would need a wetlands permit to construct a road crossing over a stream or wetland. To obtain a permit, the developer must prove that it has no practicable

alternative, that the developer will minimize impairment of the wetland, and that the activity will not contribute to the degradation of ground or surface water.¹²

MONITORING A WETLANDS PERMIT APPLICATION

The Department of the Environment’s Water Management Administration must provide public notice of any application for a wetlands permit. The Department of Natural Resources posts these applications at its “Water and Wetlands” section on its web page (see Appendix 1). The notice must describe the proposed work and provide a date by which any citizen may request a public informational hearing. You should file such a request and begin to analyze the scientific issues, preferably with an environmental consultant.

How to Monitor a Wetlands Permit Application

- What is the deadline for filing a request for an informational hearing? (If it has passed, contact the Maryland Department of the Environment to submit comments and request to be added to the list of people to be notified of its action).
- Did the developer demonstrate a need to disturb the wetlands (or merely an economic preference)?
- Are there any alternatives to disturbing the wetlands?
- Will the developer minimize impacts to the wetlands, and are the proposed methods likely to work?
- Is the project consistent with the water quality standards?
- Did the Department of the Environment give proper notice?
- Should you request that the Department of the Environment stay all work on the project pending the outcome of your appeal?

At the informational meeting, the developer will describe the project, and you may ask questions. You may also submit written comments to the Department of the Environment. The Department of the Environment’s decision on the permit should specify its response to your comments. As with a Clean Water Act permit, your appeal of any permitting action will follow the contested case procedures (see Chapter 1).

⁸ Maryland Code, Environment Article § 5-902(a).

⁹ Maryland Code, Environment Article § 5-901(h)(l).

¹⁰ Code of Maryland Regulations, 26.23.02.01.

¹¹ Maryland Code, Environment Article, § 5-901(i).

¹² Maryland Code, Environment Article, § 5-907(a).

PART I: PREVENTION

— CHAPTER 4 —
THE FEDERAL CLEAN WATER ACT

An effective way to prevent the inappropriate development of open space is to keep the owner from acquiring the discharge permits needed to operate the project. The Clean Water Act (CWA) is a powerful but still underutilized tool for containing sprawl.

Although it is a federal act, the EPA has delegated many of its Clean Water Act administration and enforcement duties to the Maryland Department of the Environment. Therefore, the laws and regulations governing Clean Water Act questions appear in four places: the U.S. Code, the U.S. Code of Federal Regulations (CFR), the Maryland Code, and the Code of Maryland Regulations (COMAR).

IDENTIFYING THE ACTIVITIES THAT ARE SUBJECT TO THE ACT

If the business or other entity will discharge anything into a stream or other waters through a pipe, ditch, or other “point,” it will need a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act. Examples of businesses needing permits include auto body shops, gas stations, truck terminals, manufacturers, laboratories, wastewater treatment plants, and power plants. As explained above, permit applications are publicly noticed.

You should also watch for the absence of a discharge permit. The fact that no one has issued a permit does not mean that none is required. You may not trespass onto someone else’s property, but you can talk to people who know the land, look at the contiguous properties and downstream waters, read the deed, look at the

Department of Natural Resources and county or city maps, and order a USGS map.¹³

APPLYING THE CLEAN WATER ACT

The Act has two interconnected mechanisms for preventing and eliminating water pollution. **First**, as EPA’s delegate, the Department of the Environment must designate uses for the various waters in Maryland and determine for each the “water quality standards” that will protect it for its designated use. For instance, a stream that has been designated for protection as a trout stream has specific limits for dissolved oxygen, chlorine and temperature that differ from the standards for waters protected for swimming. The Department of the Environment’s Surface Water Quality Standards Fact Sheet, available online (www.mde.state.md.us), explains the seven types of uses and the purpose of the standards.

Second, project owners must get discharge permits from the Maryland Department of the Environment for any discharges from “point sources,” such as pipes, channels, or ditches, into “navigable waters,” which the Department of the Environment construes as any size stream. The Maryland Department of the Environment may not issue a permit that does not assure the protection of the receiving water for its designated use. For instance, if the discharge would cause the dissolved oxygen level to exceed the limit stated in the water quality standard, the Department of the Environment may not permit it. If another permit holder is discharging a pollutant into the stream, the Maryland Department of the Environment must allocate the discharges among all permit holders so that the cumulative discharges do not exceed the stream’s standard for that pollutant.

Permits may only last five years, so the Maryland Department of the Environment is supposed to revisit the health of the receiving stream that often. The Department of the Environment may not renew permits in such a way as to increase pollution; the Clean Water Act contains an “anti-backsliding” provision. Finally, permits require the discharger to file with the Department of the Environment monthly discharge monitoring reports (DMRs) of the contents of their discharges, so that the Department of the Environment can determine whether they are complying with their permits. Discharge monitoring reports are public information. A discharger’s failure to submit them is a violation of the Act.

Very few enforcement cases have reached the courts since 1970; the Department of the Environment routinely enters into consent orders by which it gives the discharger

Ways to be Alert About Projects That Need Permits

- Are you aware of similar projects that have permits? Look at the EPA web site (see Appendix 1) and determine whether other owners of this type of project have obtained permits.
- Will the project discharge water or anything else into a stream or other waters?
- Does the property contain wetlands or a stream?
- Will the owner be dredging?
- Does the project involve federal funds or federal approval?

¹³ <http://mapping.usgs.gov>.

PART I: PREVENTION
CHAPTER 4: THE FEDERAL CLEAN WATER ACT

an extension of time in which to stop violating the Act. The Act entitles citizens to sue polluters when the Department of the Environment, after notice, refuses to sue. The Act also entitles citizens to sue the Department of the Environment for failing to perform nondiscretionary acts required by the statute. No one has ever enforced the Department of the Environment's duty to apply the anti-backsliding provision, adhere to the renewal requirement, or amend permits when cumulative discharges exceed the water quality standards.

Citizen participation *before* a discharge permit is issued is crucial.

What to Do *Before* a Discharge Permit is Issued

- Learn the uses for which the Maryland Department of the Environment has designated the waters in which you are interested. To do so, look in the Code of Maryland Regulations (COMAR) in Title 26.
- Make a list of the water quality standards applicable to your waters. The standards are in COMAR; there are standards applicable to all waters, and also use-specific standards. You need to check both.
- Obtain an evaluation of the waters and determine whether it meets their standards. The Community and Environmental Defense Services manual has good advice on how to do this.
- Ascertain whether the Department of the Environment has listed your waters as impaired; submit a Public Information Act request to the Department of the Environment and the Department of Natural Resources and ask for their documents on the stream.
- Ask the Department of the Environment and/or the Department of Natural Resources to evaluate the waters and its aquatic life.
- Observe the waters over the various seasons. Document any algae, foam, a sheen, turbidity (cloudiness), dead fish, lack of fish, and flood events. Local environmental groups offer courses for people wanting to know how to evaluate streams, and Community and Environmental Defense Services has an online fact sheet that can help (www.watercare.net/factsheets). Consider asking a local college or high school with an environmental technology program if it is interested in monitoring your stream. If you have the resources, hire a professional.

MONITORING A DISCHARGE PERMIT APPLICATION

The application process proceeds generally in the following order:

1. The owner applies for a discharge permit. The Maryland Department of the Environment then publishes notice of the application and provides an opportunity for an informational meeting. The Department of the Environment estimates that its standard turnaround time, depending on the size of the facility, varies from nine to sixteen months.

Owner applies for a discharge permit. You or your attorney should:

- A. Write the Department of the Environment and request that you be added to the list of interested parties who will receive notice of all actions relating to the permit application.
- B. Submit a Public Information Act request to the Department of the Environment immediately. (Appendix 2). Ask for two sets of information: the Department of the Environment's file on this project, and the Department of the Environment's file on other permits held by this applicant at other locations.
- C. Submit another Public Information Act request to Maryland's Department of Natural Resources, which may have done biological studies of the waters.
- D. Go to the meeting, sign in, ask questions, and articulate your concerns. At this stage, the Department of the Environment's mind is officially still open.
- E. Consider hiring an environmental consultant to analyze whether the waterbody will still be healthy if the discharge is permitted. To answer this question, the consultant needs to know more about the stream than might be contained in the Department of the Environment's file: what its flow is (the Department of the Environment often extrapolates flow from its data on other streams which, in reality, might not be comparable); how its flow varies (in one case, Department of the Environment inspectors usually visited the stream after heavy rainfalls and based their conclusions on those conditions); and to what other "loads," or other pollution sources, the waters are already subjected (in another case, the Department of the Environment counsel argued that it had no duty to make this analysis).
- F. Gather your own information about the stream. Walk the stream or the shore of the waters; run a zip code search to see whether other entities have discharge permits upstream or nearby; be alert to the physical condition of the water, the flora, and the fauna. A free guide published by Community and Environmental Defense Services contains a good checklist of how to evaluate your stream (see Appendix 1).
- G. Examine the basis of every conclusion reached by the Department of the Environment:

PART I: PREVENTION (STOP IT BEFORE IT STARTS)
CHAPTER 4: THE FEDERAL CLEAN WATER ACT

- a. Did the Department of the Environment address your issue at all?
 - b. Did the Department of the Environment use accurate data, and were the resources typical of the conditions in all seasons and in both drought and rainy years?
 - c. Did it use the right computer model when it ran calculations from those data?
 - d. Did the Department of the Environment assess its conclusions in light of all the governing regulations?
 - e. If you have the resources, consider hiring a lawyer at this stage; if your resources are limited, save them for the next.
- 2. The Department of the Environment publishes a notice of tentative determination.** You may request a public hearing. If no adverse comments are received, the Department of the Environment issues the permit. If adverse comments are received, the Department of the Environment prepares a final determination.
- 3. The Department of the Environment determines to issue the permit.** The Department of the Environment very seldom denies a permit application. The notice will inform you of the date by which you must file a request for a “contested case hearing” if you wish to contest the permit. You usually have **15 days**.
- The Department of the Environment issues the permit. You or your attorney should:*
- A. Obtain legal advice. The request you send will limit the legal and factual issues that can be raised to those you have specified.
 - B. Gather the evidence to demonstrate that an interested person has a connection with the waters sufficient to establish his/her standing to request a hearing. That evidence can include ownership or use of the affected waters.
 - C. If your choice is between representing yourself and not challenging the permit, see the Code of Maryland Regulations (COMAR)¹⁴ for what you must include in your request. A sample is attached at Appendix 3.
- 4. The Department of the Environment refers issues to the Office of Administrative Hearings for a hearing.** The Department of the Environment must refer your request for a contested case hearing to a state employee known as an administrative law judge (ALJ) within **five business days**.
- The Department of the Environment refers issues for a hearing. You or your attorney should:*
- A. Prepare to try the case. You will need expert testimony on how the applicant’s proposed discharge will cause a violation of the water quality standard. You will only be allowed limited discovery into the Maryland Department of the Environment’s and the applicant’s information. Administrative law judges have, for instance, denied citizens the opportunity to make site visits, and the Department of the Environment, which has the right to visit the site, has refused to allow citizens to accompany its employees.
 - B. File new Public Information Act requests, and add the Office of the Attorney General to your list. It has been the Maryland Department of the Environment’s practice to treat the citizens, not the applicant, as its adversary in contested case proceedings. You should therefore be alert to the possibility that, when you request documents under the Public Information Act, the Department of the Environment will withhold its counsel’s communications with the applicant. The Department of the Environment’s counsel may also try to prevent you from speaking with other government officials about the case. It is important that you refuse to be intimidated, and that you insist that the Department of the Environment treat the citizens as it treats the applicant.
- 5. The administrative law judge hears the case.** The hearing itself resembles a trial: a judge hears witnesses testify in response to counsel’s questions and receives other evidence, such as maps, test results, and other documents. A lawyer from the Office of the Attorney General will represent the Department of the Environment. The applicant often also appears and participates with counsel, but sometimes just relies on the state lawyer to advocate the permit.
- The Department of the Environment **bears the burden** of establishing that it has a factual and legal basis for its permitting decision. The Department of the Environment and the applicant therefore should go first, as plaintiffs would in ordinary lawsuits. However, the Department of the Environment has argued in the past that the citizens must go first.
- The administrative law judge hears the case. You or your attorney should:*
- A. Insist on the appropriate order of proof.
 - B. Be alert to whether the issues framed by the Department of the Environment in its opening statement include those that you have raised.
 - C. Ask as many people as possible to attend.
 - D. Ask to submit a written summation.
- 6. The administrative law judge proposes findings of fact and law and a result.** After the hearing—sometimes three months after the hearing—the administrative law judge will propose his or her findings to the Department of the Environment. When you and/or your lawyer receive the administrative law judge’s decision,

¹⁴ Code of Maryland Regulations: 26.08.04.01-3C.

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CHAPTER 4: THE FEDERAL CLEAN WATER ACT

you must promptly file exceptions with the Department of the Environment regarding anything to which you wish to object. You might want to file exceptions even if you like the overall result. If, for instance, the administrative law judge recommended against granting the permit, but disagreed with one of your arguments or witnesses, and the Department of the Environment or the applicant excepts to the result, you would need to also file exceptions in case the decision maker rejects the findings that went your way. You should consider requesting oral argument.

7. **The Department of the Environment's Final Decision Maker issues a decision.** A Maryland Department of the Environment employee selected to be its "Final Decision Maker" will decide whether to reject or accept all or parts of the administrative law judge's decision.
8. **The losing side appeals to state circuit court.** If the Department of the Environment's Final Decision Maker affirms its decision to grant the permit, you may then appeal to the state circuit court, usually in your county. That court will hear oral arguments, read the parties' briefs, and issue an opinion. You do not have the opportunity to introduce new evidence or arguments.

9. **The circuit court issues its decision.** The circuit court judge may or may not issue an opinion on the day of the oral argument; usually, he or she will issue an opinion months later. You may then appeal to the Maryland Court of Special Appeals, and, if that court decides against you, you may ask the Court of Appeals if it will hear your case.

POSSIBLE RESULTS

The best result is the denial of the permit entirely. The courts have also vacated permits and remanded the case to the Department of the Environment to supply the facts that they failed to gather during the permitting process. That result gives the Department of the Environment a second chance and is problematic because it puts the citizens to the expense of another round of proceedings. However, it is equally problematic for the applicant, whose financing might be contingent on the acquisition of permits. A third possible result is that the Department of the Environment revises the permit to account for the citizens' objections, and it is issued. In that event, you might not have succeeded in stopping the project, but you have succeeded in reducing its impact. The fourth result is that the permit is issued as written. That result may appear to be a total loss, but your effort will have had two important ramifications: other potential developers may avoid your community, and this applicant will know that its compliance with its permit will be subject to scrutiny.

PART I: PREVENTION

— CHAPTER 5 —
THE FEDERAL CLEAN AIR ACT

The Clean Air Act is seldom implicated in residential development. It most often affects major highway projects and development for manufacturing purposes. Because better enforcement of the Act in urban areas would strengthen existing communities, it has an indirect effect on sprawl. As of this writing, the Maryland Department of the Environment is administering the Act in Maryland.

APPLYING THE CLEAN AIR ACT

If an entity discharges anything that is not pure steam into the air, it needs a Clean Air Act permit. Those businesses might include dry cleaners, automotive businesses, hospitals, and manufacturers. Because the Clean Air Act, like the Clean Water Act, applies only to discharges from “point sources,” its application to residential and most commercial uses is limited. For instance, an owner does not need a Clean Air Act permit for the pollution caused

by increased traffic. The Clean Air Act does apply to transportation projects: to add lanes to a highway, for example, a state government must meet certain requirements.

MONITORING A CLEAN AIR ACT PERMIT

The Clean Air Act is structured in the same way as the Clean Water Act: owners wishing to discharge pollutants into the air must acquire a permit, and the Maryland Department of the Environment may not issue a permit that will cause the air to exceed the standard designated for it. The progress of a Clean Air Act permit through the administrative process is the same as that of a Clean Water Act permit. You will need an expert to ascertain whether the proposed and likely actual discharge will be dispersed in the air in such a way as to preserve the air quality. The air in many areas of Maryland is already so impaired that the Maryland Department of the Environment should not be issuing many permits. An important question to be addressed is whether the agency’s assumptions about the air quality reflect current conditions.

— CHAPTER 6 —
TOXIC SUBSTANCES PERMITS

Many small businesses, such as gas stations, auto body repair shops, and cleaners, must obtain toxic substances permits to handle the materials they use in their operations.

These permits require off-site disposal, so you might have difficulty arguing that the permit will have an adverse effect on the neighborhood. The owner’s application might educate you on other issues, though, such as the likely composition of runoff, or the type and frequency of traffic visiting the site. (See Chapter 2 on Zoning).

PART I: PREVENTION

— CHAPTER 7 —
ENDANGERED SPECIES LAWS

The federal Endangered Species Act prohibits the “taking” of species listed as endangered. “Taking” can include the destruction of the habitat that endangered species need to survive.

The Maryland Forest Conservation Law protects the “critical habitats” of endangered species and “trees, shrubs, or plants.” The names of these species are on the rare, threatened and endangered list maintained by the U.S. Fish and Wildlife Service and the Maryland Department of Natural Resources¹⁵. A free guide published by

Community and Environmental Defense Services (see Appendix 1) also gives good advice on identifying the relevant flora and fauna.

As of today, the critical habitat laws have been underutilized by citizens challenging projects in Maryland.

Note that the term “Critical Area” under Maryland’s Critical Areas Law differs from the term “critical habitat” under the Endangered Species Act or the Forest Conservation Law. A Critical Area, which is defined by its coastal location, may or may not also be a “critical habitat,” as defined by its flora and fauna.

— CHAPTER 8 —
ENVIRONMENTAL IMPACT STATEMENTS

The federal National Environmental Protection Act (NEPA) requires federal agencies to consider the environmental impacts of their actions.

Under NEPA, agencies must prepare an Environmental Impact Statement (EIS) for any “major federal action,” such as projects involving federal funds or approval. For instance, any federal funding of dredging of the Chesapeake Bay shipping channels must be preceded by the preparation of an Environmental Impact Statement. Similarly, the construction of highways, bridges, or additional airport runways may trigger the requirement.

The agency involved must discuss in its Environmental Impact Statement the alternatives to the project in question (for instance, whether a highway must bisect a forest) and issue a record of its decision before it may take any action which would harm the environment or limit the alternatives.

Citizens may sue an agency to require it to perform an Environmental Impact Statement, or to challenge its sufficiency. The Supreme Court has greatly limited people’s ability to challenge an agency’s decision on the merits. You therefore need to examine whether the agency considered all possible alternatives.

¹⁵ www.dnr.state.md.us/wildlife/espaa.html.

PART II: CONTAINMENT *and* MITIGATION of EXISTING USES

CHAPTER 9

PRIVATE LAWSUITS UNDER MARYLAND'S COMMON LAW

Because there are now so many environmental laws on the books, people have come to depend on government agencies to enforce their environmental rights. However, governmental involvement is subject to political and funding vicissitudes, and you may need to resort to private remedies.

Maryland courts have long enforced in private lawsuits the rights of people to use and enjoy their land without interference by the uses to which other land is put. Well before the Clean Water Act was enacted, people in Baltimore sued people for polluting waters. A contractor whose dredge material washed into a creek was found liable to a landowner in 1939; a slaughterhouse's discharge of animal blood into a stream was found to be a nuisance in 1881. This body of common law still controls.

Private citizens may also sue under the major federal environmental statutes.

UNDERSTANDING THE LEGAL THEORIES

Several causes of action, or legal theories, are relevant to the containment of sprawl: nuisance, trespass, strict liability, negligence, and riparian rights. Two forms of relief are possible: an injunction, by which the court orders the owner to stop the harmful activity; and a damage award, by which a jury decides whether and the amount in which you have incurred losses, such as diminished property value.

When You Should Consider a Lawsuit

- an upstream owner has proposed a development in which the stormwater will be collected and discharged into your stream;
- such a development already exists, and you can establish that the stormwater discharges and runoff are causing material damage to your land, such as flooding, erosion, and/or impaired water quality;
- a nearby use is interfering with your use of your property, whether by noise, air, or water pollution;
- other methods of resolving the problem, such as complaints to your state or local government, are proving ineffective.

CLAIMING UNDER NUISANCE LAW

The law of nuisance applies when one person uses his/her land in such a way as to interfere with another person's use and enjoyment of that person's land. If you sue a defendant for maintaining a nuisance, you must prove four things: 1) that you own or have some other property interest in the affected property; 2) that the defendant's activity is interfering with your use and enjoyment of your property; 3) that the defendant's activity is either negligent (the failure to test underground tanks for leaks, for instance) or so inherently hazardous that he/she will be deemed strictly liable for any harm it causes (the storage of hazardous chemicals, for instance); 4) that the defendant's activity caused the damages you claim. Examples of successfully proven nuisances include dust, noise and groundwater contamination.

CLAIMING UNDER TRESPASS LAW

This cause of action applies only when something owned or discharged by the defendant comes onto your property. You must prove: 1) that you own or have some other property interest in the affected property; 2) that the pollution or other thing which came onto your property was created by or in the control of the defendant; 3) that the trespass was not permitted by you. An example would be the contamination of your soil by gasoline leaking from your neighbor's tank.

CLAIMING UNDER STRICT LIABILITY AND/OR NEGLIGENCE LAW

These causes of action differ in what you must prove, but an activity can result in liability under both. The placement of an underground gasoline tank, for example, in close proximity to a neighbor's drinking water well exposes the owner of the tank to strict liability for harm caused by any leak. In those cases, whether the defendant did something negligently is *not material*. The defendant may also have done something negligently, such as building an insufficient stormwater pond bank, or designing a subdivision without adequate runoff control. In either case, you have to prove that the activity caused your damages.

CLAIMING YOUR RIPARIAN RIGHTS

"Riparian" means "relating to the bank of a stream," so riparian owners of a stream are those who own the land along it. Maryland's highest court, the Court of Appeals, has stated this rule: "The higher landowner cannot artificially collect surface water and discharge it at one point over the lower land, so as to injure it, nor can he precipi-

PART II: CONTAINMENT *and* MITIGATION of EXISTING USES
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tate it in greatly increased or unnatural quantities upon his neighbor below to the substantial injury to the latter.”

CHOOSING DEFENDANTS

You do not want to waste resources in suing people whose involvement was minimal. You do wish to sue those whose acts substantially caused your problem. If the source of the erosion, flooding, and/or pollution of your stream is a factory, its owner is the logical defendant. If the upstream source is a subdivision, the question gets more complicat-

ed. The developer, a homeowner association, and/or the local government might own the stormwater system. They might bring in as an additional defendant the landscape architect and engineering firms that configured the subdivision. If the upstream source is a sewage treatment plant, its operator and owner, who may be different entities or people, are logical defendants. If you are suing a governmental entity, you usually must first send written notice of your claim.

CHAPTER 10

PRIVATE CITIZENS' SUITS UNDER THE CLEAN WATER ACT (CWA)

The federal pollution statutes entitle citizens to sue polluters on behalf of the government when the government refuses to do so. Any fines awarded in such cases go to the U.S. Treasury; the court can also impose an injunction.

IDENTIFYING CLEAN WATER ACT VIOLATIONS

A permit holder violates its permit whenever it fails to submit Discharge Monitoring Reports (DMRs) to the Maryland Department of the Environment; discharges pollutants neither permitted nor properly disclosed to the Department of the Environment during the application process; or fails to perform any provision of its National Pollutant Discharge Elimination System permit. You should submit a Public Information Act request to the Department of the Environment and read the permit. You should then read the discharge monitoring reports to see what the discharger has disclosed. If you suspect the discharge of non-disclosed substances, you should ask the Department of the Environment to investigate and also seek the assistance of an environmental consultant or testing laboratory to test the downstream water. In one case, citizens requested the National Pollutant Discharge Elimination System file and discovered that the discharger had not filed discharge monitoring reports; in another, the discharge monitoring reports showed violations not pursued by the agency. Do not assume either that the state

has the staff to review every discharge monitoring report and prosecute violations or that it is eager to prosecute large employers or counties.

ENFORCING CLEAN WATER ACT VIOLATIONS AS A PRIVATE CITIZEN

The Clean Water Act has a “citizen suit” provision by which citizens with standing may sue a discharger that is violating a discharge permit. First, you must send the discharger, the Environmental Protection Agency, and the Maryland Department of the Environment a “sixty-day letter,” in which you specify the violations that you will allege and notify them that you intend to file suit under the Clean Water Act. If either Maryland or the United States responds to your letter within **60 days** by “diligently prosecuting” the discharger for those violations, you have no right to sue. If the discharger comes into compliance in those 60 days, you have no right to sue. If the governments ignore your letter and the discharger keeps violating its permit, you may then file suit in the United States District Court for the District of Maryland. If the court rules in your favor, it may fine the discharger up to \$27,500 per violation, payable to the U.S. Treasury, and order the discharger to stop. Because a violation can be charged for every day the discharger violates its permit, Clean Water Act citizen suits can have substantial deterrent effects.

PART III: LOGISTICS

PRIVATE LAWSUITS UNDER MARYLAND'S COMMON LAW

In this section, we hope to give you an idea of how to proceed when you think you need to assert a legal challenge, and how legal challenges complement other methods of resisting sprawl-conducive land use changes. A free guide published by the Community and Environmental Defense Services (see Appendix 1) contains good advice on how to organize community resistance, deal with decision makers and developers in the early stages of a project, find scientific help, and identify lawyers. That advice is not repeated here.

IDENTIFYING ENVIRONMENTAL LAWYERS LICENSED TO PRACTICE IN MARYLAND

As the Community and Environmental Defense Services manual advises, a good way to find like-minded lawyers with experience in environmental matters is to call other activists and environmental groups. Your group might want to start gathering names and contacting lawyers before a problem arises, so you don't have to find one at the last minute.

CHOOSING A LAWYER

If you have the luxury of time and have a few names, ask each lawyer some questions:

- What other environmental and/or zoning matters have you handled? Which side did you represent, and what happened? (The results in other cases have no bearing on how a case will turn out, but the course of those proceedings is instructive on the lawyer's experience with the various stages of land use proceedings).
- Do you have clients who are in the real estate or construction industries or who regularly seek permits from the agencies involved here? (Would this lawyer feel constrained in urging a systematic enforcement of a certain law or in challenging the action of the political subdivision or agency involved? In the smaller counties, people have sometimes had to hire out-of-county lawyers).
- What is your hourly rate? Do you bill in increments of 6 minutes or 15? (a 4-minute task will cost one-fourth of the hourly rate if billed in 15-minute increments, but only one-tenth in the more usual 6-minute increments). Do you have a rate for citizens' groups?
- What expenses do you bill to clients? Copying, postage, and telephone costs, and if so, at what rate? Travel time and mileage to court and to meetings with clients?

(Merely comparing hourly rates does not provide the information needed to intelligently compare how much different lawyers will charge).

- Will you consider setting a fixed fee or maximum for defined tasks? (It is easier for citizens' groups to raise funds for definite goals. Recognize, though, that estimating the costs of legal proceedings is an inexact science).
- How often do you bill, and what retainer will you require?

REDUCING LEGAL COSTS

Remember that lawyers and experts earn their money by charging for their time and that the time they can devote to your case is not infinite. You want to ensure that their time is spent on moving your case forward. You can do that in two basic ways: not wasting their time and energy on less productive tasks, and assuming non-legal tasks when the lawyer is comfortable delegating them to you. Here are some suggestions:

- If the client is a community group, designate one person to be the lawyer's contact. If the lawyer charges when he/she has to call four members to explain the same event, you are wasting resources; if he/she is not charging, you are not using his/her good will productively. Groups particularly wish to avoid situations in which the lawyer spends time addressing conflicting concerns. Resolve your differences, and then talk to the lawyer.
- If the client is a community group, make sure before the group hires the lawyer that the group's by-laws have been observed and that the action is properly authorized. Avoid situations in which lawyers must give presentations to new board members or prove to treasurers that he/she actually was retained.
- When the lawyer hires experts on your behalf, review their bills early, ask your lawyer any questions, and complete the transaction promptly, so that the expert will continue to work for you with enthusiasm and will not raise his/her rates to account for delay.
- Involve your lawyer in fundraising activities only when his/her presence and knowledge will forward the effort. You want your lawyer to think about the case.
- Educate yourself about your case as much as possible before you talk to your lawyer, for two reasons. First, the less that has to be explained to you, the better. Second,

PART III: LOGISTICS
PRIVATE LAWSUITS UNDER MARYLAND'S COMMON LAW

you may be able to shortcut your lawyer's time by providing him/her with your town's master plan, identifying the issues you think might be productive, or giving him/her a chronology of the events to date and copies of the documents you have reviewed.

- Discuss with your lawyer the tasks that you, your group, and/or an environmental consultant might be able to perform. If an expert needs to visit the site, a lawyer ideally will go to point out specific features and ask about specific issues, but if your resources are limited, it may be that you can go with a list. If an agency has Public Information Act documents ready to be reviewed, perhaps the lawyer can define the documents needed, and you can do the review, especially for updated requests. If one of you is a photographer, surveyor, or engineer, offer to do those tasks.
- Pick your battles, and match your expectations to your resources. This guide and the Community and Environmental Defense Services guide (see Appendix 1) describe many issues, and several might apply to your case. Do not expect to afford either to raise them all or to litigate them all to the maximum extent, unless you have unlimited resources. Focus with your lawyer on the most productive issues so that your money will be spent most productively.

- **Avoid emergencies.** When a lawyer is asked to prepare documents at the last minute, he/she has no time in which to delegate tasks to less expensive personnel. You want to avoid the situation in which you reach a lawyer at 5 p.m. and present circumstances calling for an immediate filing in court.

COORDINATING TYPES OF EFFORTS

The best efforts are *multi-pronged*. A legal challenge to a zoning decision might show the developer that the project carries risks and that the best business move is to donate a preservation easement for a tax deduction and sell the land to the neighbors. Publicity about the neighbors' opposition to a proposal might cause elected officials to apply some oversight to the agency addressing it. Repeated contacts with your representatives might have a similar effect. As the free manual from Community and Environmental Defense Services explains (see Appendix 1), these are productive non-legal ways in which to oppose sprawl. They are most powerful when *coordinated* with your legal effort. Therefore, tell your lawyer what else is going on, so he/she can decide with you whether, for instance, disclosing your evidence earlier than required might further efforts to buy the land.

CONCLUSION

Protecting Maryland's quality of life depends largely on the vigilance and involvement of its citizens. 1000 Friends of Maryland is committed to bringing together a diverse group of people to learn, discuss and

plan how citizens can make a difference as we continue to face the challenges of wasteful, poorly planned, and costly sprawl development.

APPENDIX 1

USEFUL CONTACT INFORMATION

NATIONAL RESOURCES

- 1. Community and Environmental Defense Services.** A resource center that helps people defend their community and environment from poorly planned land development. For CEDS' free manual with advice on challenging land use actions, visit www.ceds.org.
8100 Greenspring Valley Road
Owings Mills, MD 21117
Phone: 800-773-4571; 410-654-3021
www.ceds.org
- 2. Smart Growth Network.** A collaborative venture by many different smart growth groups.
www.smartgrowth.org
- 3. Smart Growth America.** A nationwide coalition promoting a better way to grow.
1100 17th Street NW, 10th Floor
Washington, DC 20036
Phone: 202-715-2035
www.smartgrowthamerica.com
- 4. Sierra Club.** Anti-sprawl website.
www.sierraclub.org/sprawl
- 5. Sprawl Guide.** An online resource that can give you information about poorly planned development and links to other information.
www.plannersweb.com/sprawl/home.html
- 6. U.S. Environmental Protection Agency**
www.epa.gov
- 7. Congress for the New Urbanism.** An organization that promotes traditional, walkable development patterns.
The Hearst Building
5 Third Street, Suite 725
San Francisco, CA 94103
Phone: 415-495-2255
www.cnu.org
- 8. Trust for Public Land.** A national land trust that helps acquire land for people to use as open space.
TPL National Office
116 New Montgomery St., 4th Floor
San Francisco, CA 94105
Phone: 415-495-4014
www.tpl.org
- 9. National Trust for Historic Preservation**
1785 Massachusetts Ave., NW
Washington, DC 20036
Phone: 202-588-6000
www.nthp.org
- 10. American Farmland Trust.** A national advocacy organization that works to preserve farmland.
1200 18th Street, NW, Suite 800
Washington, DC 20036
Phone: 202-331-7300
www.farmland.org
- 11. Surface Transportation Policy Project.** A national organization that works to build a diversified transportation system.
1100 17th Street, NW, 10th Floor
Washington, DC 20036
Phone: 202-466-2636
www.transact.org
- 12. Center for Watershed Protection.** The center provides local governments, activists, and watershed organizations around the country with the technical tools for protecting our streams, lakes and rivers.
8391 Main Street
Ellicott City, MD 21043-4605
Phone: 410-461-8323
www.cwp.org

APPENDIX 1
USEFUL CONTACT INFORMATION

MARYLAND RESOURCES

1. **Governor's Office of Smart Growth.** The office that coordinates state Smart Growth activities across Maryland.
6 St. Paul Street, Suite 2204
Baltimore, MD 21201
Phone: 410-767-8710
www.smartgrowth.state.md.us
2. **Maryland Department of Planning**
Room 1101
301 W. Preston Street
Baltimore, MD 21201-2365
Phone: 410-767-4500
www.mdp.state.md.us
3. **State Highway Administration**
707 North Calvert Street
Baltimore, MD 21202
Phone: 800-206-0770
www.sha.state.md.us
4. **Maryland Department of Natural Resources**
580 Taylor Avenue
Tawes State Office Building
Annapolis, MD 21401
Phone: 877-620-8DNR
www.dnr.state.md.us
5. **Maryland Department of the Environment**
2500 Broening Highway
Baltimore, MD 21224
Phone: 410-631-3000
www.mde.state.md.us
6. **National Center for Smart Growth Research and Education at the University of Maryland in College Park**
1117 Architecture Building
College Park, MD 20742
Phone: 301-405-6788
www.smartgrowth.umd.edu
7. **Preservation Maryland.** A statewide organization dedicated to protecting Maryland's historic sites and unique culture.
24 West Saratoga Street
Baltimore, MD 21201
Phone: 410-685-2886
www.preservemd.org
8. **Chesapeake Bay Foundation**
Philip Merrill Environmental Center
6 Herndon Avenue
Annapolis, MD 21403
Phone: 410-268-8816
www.savethebay.cbf.org
9. **Baltimore Regional Partnership.** A collaboration between 1000 Friends of Maryland, Chesapeake Bay Foundation, Citizens Planning and Housing Association, Baltimore Urban League, and Environmental Defense. The Partnership works to promote people-oriented land use and transportation in the Baltimore region.
1209 North Calvert Street
Baltimore, MD 21202
Phone: 410-385-2910
www.balto-region-partners.org
10. **Citizens Planning and Housing Association.** CPHA envisions a well-planned Baltimore region with equity among jurisdictions, where citizens respect diversity and have access to responsive government and quality housing in vibrant neighborhoods.
218 W. Saratoga Street, 5th Floor
Baltimore, MD 21201
Phone: 410-539-1369
www.cphabaltimore.org
11. **Valleys Planning Council.** The council works to protect the scenic valleys of Baltimore County.
PO Box 5402
Towson, MD 21285
Phone: 410-337-6877
www.thevpc.org
12. **Coalition for Smarter Growth.** A coalition that works to create better communities and less traffic in the Washington, DC region.
1777 Church Street, NW
Washington, DC 20036
Phone: 202-588-5570
www.smartergrowth.net
13. **Washington Regional Network for Livable Communities.**
1777 Church Street, NW
Washington, DC 20036
Phone: 202-667-5445
www.washingtonregion.net
14. **Eastern Shore Land Conservancy.** The conservancy works to protect the Eastern Shore through conservation easements and policy expertise.
P.O. Box 169
Queenstown, MD 21658
Phone: 410-827-9756
www.eslc.org

APPENDIX 2

SAMPLE PUBLIC INFORMATION ACT REQUEST

SAMPLE COVER LETTER

[DATE]

[CHECK YOUR RECIPIENT'S CORRECT NAME,
TITLE, AND ADDRESS]

Louise Connelly, PIA Liaison
Water Management Administration
Maryland Department of the Environment
2500 Broening Highway
Baltimore, Maryland 21224

Re: _____ Wastewater Treatment Plant
State Permit No.: _____
NPDES No.: _____

Dear Ms. Connelly:

I write now to request a copy of certain documents related to the _____ Wastewater Treatment Plant located in _____ County. Please provide copies of the following documents to me [or, for my inspection]:

1. All documents that describe in any way the flow of the _____ Stream upstream of the discharge point at the _____ Wastewater Treatment Plant;
2. All documents related in any way to the flow of the _____ Stream downstream of the _____ Wastewater Treatment Plant;
3. All documents related in any way to the absence or the presence of any flow gauge station anywhere on the _____ Stream; and
4. All documents related in any way to any data generated by any flow gauging station anywhere on the _____ Stream.

Very truly yours,

APPENDIX 3

SAMPLE REQUEST FOR A CONTESTED CASE HEARING
ON A PERMIT DECISION

SAMPLE COVER LETTER

[DATE]

HAND DELIVERY

[CHECK YOUR RECIPIENT'S CORRECT NAME,
TITLE, AND ADDRESS]

Robert M. Summers, Director
Water Management Administration
Maryland Department of the Environment
2500 Broening Highway
Baltimore, Maryland 21224

Re: Notice of Permit Decision For: Regulated activities necessary for the construction of a road crossing of a waterway and adjacent nontidal wetlands, a stormwater discharge outfall, and two utility crossings associated with the _____ subdivision, in _____ County. The authorized activities will result in (1) the loss of _____ square feet of forested nontidal wetlands and _____ square feet of nontidal wetlands buffer; (2) temporary impacts to _____ square feet of nontidal wetlands and _____ square feet of nontidal wetlands buffer; and (3) impacts to _____ linear feet of an unnamed tributary to _____ Run. The project site is located at the end of _____, approximately _____ feet southeast of the intersection of _____ and _____.

Permit No.: _____
Effective Date: _____
Expiration Date: _____
Permitee: [Name and Address]

Dear Mr. Summers:

I am writing to request a contested case hearing and a temporary stay of activity pending final decision in the matter captioned above. Set forth below is the information required by MDE for this request. The categories below correspond to those set forth in the _____ letter issued by the Non-Tidal Wetlands and Waterways Division regarding its Notice of Permit decision.

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APPENDIX 3
SAMPLE REQUEST FOR A CONTESTED CASE HEARING ON A PERMIT DECISION

1. [Names of citizens] request the hearing and stay; they reside at [address]. [Citizens'] business phone number is _____.

2. (The requesters' interests). The [citizens' names] will be adversely affected by this permit decision, and in ways not common to the general public. The [names of citizens'] house is located on a _____-acre lot which they purchased in _____ for \$_____. Their property includes an unnamed tributary to _____ Run, a [applicable classification, e.g., Class III Natural Trout Water (COMAR 26.08.02.08H(3))]. They purchased their home in part because it was located on this high-quality stream. After entering onto the [citizens' names'] property, the tributary flows through a corrugated pipe culvert. The culvert carries the stream beneath the common driveway to the [names of citizens'] house and that of their neighbors.

The proposed stormwater pond will discharge into the tributary _____ feet upstream of the [names of citizens'] property. MDE's decision to allow the Applicant to discharge stormwater into the tributary harms the [names of citizens] in several ways. First, the stormwater discharge will thermally pollute and otherwise degrade their Class III stream. Second, the wetland permit will cause accelerated erosion of the [names of citizens'] property. Third, the failure of the proposed stormwater pond would release so much floodwater into the tributary that it would exceed the capacity of the culvert and cause floodwaters to overtop and erode the common driveway, thus denying vehicle access (including emergency vehicles) to the [names of citizens'] home and that of their neighbors. Furthermore, the erosion caused by the overtopping floodwaters would threaten utility lines serving the properties. These effects will diminish the names of citizens' use and enjoyment of their property and lower its value.

The grounds for the requested hearing and stay are set forth below:

I. The permit improperly allows the thermal pollution of a Class III natural trout water in violation of the applicable laws and regulations.

The permit improperly allows the discharge of collected and channelized stormwater to a tributary to _____ Run, a Class III Natural Trout Waters. COMAR 26.08.02.08H(3). The collected stormwater discharge violates the Criteria for Review of Nontidal Wetland Permit Applications (COMAR 26.23.02.04) because the stormwater discharge will violate the applicable water quality standards. COMAR 26.23.02.06A(2) of the Nontidal Wetland regulations requires compliance with the water quality standards.

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COMAR 28.08.02.02-3D-3 establishes the water quality standard for temperature in Class III waters. It provides:

(a) the maximum temperature outside the mixing zone determined in accordance with regulation .05 of this chapter or COMAR 26.08.03.03-.05 may not exceed 68(F (20(C) or the ambient temperature of the surface waters, whichever is greater.

(b) a thermal barrier that adversely affects aquatic life may not be established.

Furthermore, COMAR 26.08.02.03 provides that: “Waters of this state may not be polluted by... (3) [h]igh temperatures... which are harmful to aquatic life.” That regulation also prohibits the addition of substances which will cause a nuisance.

The proposed discharge will violate both requirements of COMAR 28.08.02.02-3D-3: it will exceed the higher of 68(F or the ambient temperature, and it will create a thermal barrier. Various studies have shown that similarly-designed ponds release stormwater at a temperature of up to 100° F. The volume of discharge from the proposed pond will greatly exceed the base flow in this small receiving stream. Therefore, the proposed activity will cause a violation of the water quality standard for temperature. The permit file discloses no analysis by MDE of whether the proposed discharge will exceed 68(F, will exceed the stream’s ambient temperature, will be detrimental to the life in the stream, or will create a thermal barrier. The issuance of a permit in the absence of a factual basis for the determination required by law is impermissible.

MDE’s own studies establish that the 12-hour detention time proposed for this facility will not ensure compliance with the thermal regulations. MDE has studied discharges from three extended detention/wetland stormwater management basins along Route 32 in Anne Arundel County. Each pond was designed for a different detention time: 6-, 12-, and 24-hours. That study reveals that stormwater ponds discharge water at temperatures that will violate the water quality standards for a Class III water. MDE found that 100% of the discharge from all three ponds violated the Class III temperature standard of 68° F. MDE also found that 67% of the discharge from the ponds with a 6- and 24-hour detention time exceeded the Class IV standard (75° F), while 64% of the discharge from the pond with a 12-hour detention exceeded the Class IV standard. Thus, _____ Run – a Class III stream – will exceed the Class IV standard 64% of the time instead 67% of the time. MDE’s enabling statutes authorize the issuance of permits

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only upon a finding that the discharge will meet all applicable water quality standards. The decision to issue this permit does not meet that condition.

II. The Maryland Department of the Environment should not issue the nontidal wetlands and waterways permit because it will impermissibly allow the erosion on the [names of citizens'] property.

The discharge from the proposed stormwater outfall will contribute to erosion on the [names of citizens'] property. The outfall and the discharge it will convey were designed according to the old Maryland stormwater management regulations. The Applicant and MDE failed to comply with those stormwater regulations because they inadequately considered the viable option of using an infiltration system.

Furthermore, new regulations went into effect on July 1, 2001. They require additional measures to prevent stream channel erosion. By incorporating these new design requirements into its regulations, the Department has recognized that the old design procedures were inadequate to prevent accelerated stream channel erosion. The collected stormwater discharged from the Applicant's proposed outfall will cause accelerated erosion of the [names of citizens'] property, create a nuisance, and degrade the quality of habitat within the receiving waters. That result is prohibited by Nontidal Wetland regulation 26.23.02.06A(1) and the general water quality regulations.

III. The Maryland Department of the Environment should not issue the nontidal wetlands and waterways permit because the stormwater management pond does not comply with COMAR 26.17.04.05B(1).

The [names of citizens] share a common driveway with several of their neighbors. The driveway crosses the stream channel which will receive the Applicant's stormwater. The stream flows beneath the driveway through a corrugated metal pipe.

COMAR 26.17.04.05B(1) requires the Applicant to perform an accurate breach analysis. The [names of citizens'] proper breach analysis determined that the failure of the proposed stormwater pond would release a volume of flow 44 times greater than the 100-year discharge. The flow released by a breach would damage the [names of citizens'] driveway and aquatic habitat of their stream and cause a nuisance. Therefore, the proposed stormwater pond violates Nontidal Wetland regulation 26.23.02.05B(3)(e) and COMAR 26.08.02.03(B). The Applicant in a May 10, 2001 letter to MDE confirms that a breach will

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APPENDIX 3
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result in flow overtopping the driveway. That same evaluation includes the following:

A statement that a breach is more likely to occur on the higher embankment on the north side. The Applicant, thereby, confirms that siting the pond on the steeply sloping ridge where higher embankments are required in the design represents a greater risk of failure than siting the pond on an area of the property topographically more suitable to pond design. Such an alternative was not evaluated.

The Applicant compares the flow attributing to breach of the pond to a 100 year flood calculation for a property, which is of questionable relevance and does not take into consideration any upstream flow from the stream itself in evaluating the impact of a breach.

The hazard classification applied to the pond does not accurately reflect downstream land use.

MDE improperly concluded that “information provided by _____ County indicates the analysis done by the applicant’s consultant determined that the facility is a low hazard structure that will not result in flooding of downstream properties.” The analysis performed by the Applicant’s consultant did not accurately assess the potential hazard posed by the stormwater facility. Therefore, the Department erred in its finding that this issue had been resolved.

IV. The Maryland Department of the Environment should not issue the nontidal wetlands and waterways permit because it impermissibly allows a 25-foot buffer when a 100-foot buffer is required by state law and regulations

Nontidal Wetland Regulation 26.23.01.04A requires expanding the normal 25-foot wetland buffer to 100 feet when either a steep slope (>15%) or highly-erodible soils ($k > 0.35$) adjoin a wetland. Both conditions exist at the proposed storm drain outfall location. However, only a 25-foot buffer is proposed. MDE must require a minimum 100-foot buffer along with the greater amount of mitigation necessitated by the increased wetland buffer impact. The fact that MDE has not performed the designations required by COMAR 26.03.01.04 (C)(2) (Summary basis, p. 7) is not grounds for exempting this project from the buffer regulations.

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V. The Maryland Department of the Environment should not issue the nontidal wetlands and waterways permit because the Applicant performed an inaccurate and incomplete alternatives analysis.

Nontidal Wetland Regulation 26.23.02.05 requires an applicant to consider all reasonable alternatives for first avoiding, then minimizing, adverse impacts. MDE never considered the alternative of using _____ Road for a road and sewer crossing. This alternative would eliminate the need for the proposed road and sewer crossing.

The use of _____ is a viable alternative. The Applicant's deed for the site in question specifically states that the access to _____ is retained. Furthermore, the Applicant's 1996 Preliminary Plan for this project showed that both water and sewer service would be provided by extending lines from the end of _____. I have attached portions of three plans showing that the Applicant's property connects to _____.

MDE also failed to consider any alternatives to minimize adverse impacts caused by the proposed stormwater pond outfall. For example, MDE did not require the Applicant to fully evaluate the option of using an infiltration system. Such a system would reduce the environmental impacts.

The Applicant failed to adequately consider an infiltration system. It performed infiltration suitability testing in only one small area of the site where the soils would likely be least suitable for infiltration. Nevertheless, one of the test holes revealed conditions suitable for the use of an infiltration system. The Applicant should have continued testing back up the ridge where a satisfactory location for an infiltration facility would likely have been found. By failing to pursue this option the applicant failed to pursue an extremely important alternative.

MDE should also have required the Applicant to

- reduce the proposed impervious area within the watershed to eliminate the need for a stormwater pond outfall;
- use low-impact development techniques to create stormwater storage in a diffuse manner throughout the project site so the size of the stormwater pond could be reduced or eliminated; and
- relocate the pond to a portion of the site suitable to infiltration; and/or discharging the stormwater to the stream located immediately to the northwest, which would eliminate the impact to the driveway culvert

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- relocate the pond to a topographically more suitable portion of the site to reduce the risk of breach and minimize environmental impact associated with the enlarged footprint necessary to compensate to the steeply sloping ridgeline natural topography.

MDE incorrectly concluded that the Applicant had sufficiently sought to minimize environmental impacts when MDE accepted a proposition that the “subdivision had been redesigned several times.” (Summary Basis, p.5). In fact, the Applicant’s earlier concept plan shows the same number of lots and the same road configuration as shown on the most recent plans. Therefore, the statement that the “subdivision has been redesigned several times” is without foundation.

MDE’s Summary Basis assumes that the project meets “a demonstrated public need.” The Summary does not set forth any factual basis to support that assumption. Similarly, the Summary states that “it was determined” that a bridge crossing was not “an economically feasible alternative.” MDE’s enabling statutes do not authorize it to determine feasibility by reference to the developer’s economic preferences. Furthermore, the Summary contains no information establishing the Applicant’s financial inability to construct a bridge.

VI. MDE failed to require a NPDES permit for the stormwater discharge.

The Clean Water Act prohibits the discharge of any pollutant into a receiving water without a permit to do so. Under 40 CFR Section 122.2, the “discharge of a pollutant” includes additions from “surface runoff which is collected or channeled by man.” The Applicant proposes to collect stormwater in a facility which will thermally pollute it, channel it, and discharge it into a Class III stream. The discharge will contain heat and add flow to the stream. Heat is a statutory pollutant, 33 U.S.C § 1362(6), and the addition of flow also requires an NPDES permit. An individual permit is required when the discharge is expected to contribute to a violation of the applicable water quality standards. The Applicant’s project exceeds 5 acres, and the stormwater pond’s discharge of collected stormwater is an industrial discharge. The Summary Basis contains no discussion of this issue.

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VII. The Permit does not comply with the USACE General Requirement #3 to minimize adverse environmental impact.

In addition to the impacts described above, the location of the detention basin on the ridgeline requires the maximum footprint and therefore, does not minimize impact to sensitive environmental resources including mature forest, steep slopes and erosive soils.

4. (Relief Requested). The [names of citizens] request a contested case hearing on this matter. The relief they will seek is that MDE rescind the Nontidal Wetlands and Waterways Permit because it fails to comply with the applicable law. They further request a temporary stay of the activities proposed by the Applicant. A stay of these activities will further MDE's ability to study the effects of this activity on this stream and will not result in any injury to the environment. The grounds set forth above establish a substantial likelihood that the [names of citizens] will prevail on the merits of the final determination of the contested case proceeding.

5. (Witnesses). [NAMES OF WITNESSES].

Thank you for your consideration in this matter.

Very truly yours,

Enclosure
cc: [APPLICANT]

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APPENDIX 4

SAMPLE DOCUMENTS FOR AN APPEAL OF A ZONING DECISION

SAMPLE COVER LETTER

[DATE]

[CHECK YOUR JURISDICTION'S CORRECT ADDRESS]

Clerk of the Circuit Court
Attn: Civil Department
Circuit Court for Baltimore County
401 Bosley Avenue
Towson, Maryland 21285-6755

Re: In the Matter of _____
Case No.: _____

Dear Sir/Madam:

Enclosed please find an original and one copy of the Appellants' Notice of Appeal for filing in the above-referenced matter. Please date stamp the copy and return the copy to the courier.

Should you have any questions or need any additional information, please contact me. Thank you for your cooperation in this matter.

Very truly yours,

[NAME OF ATTORNEY(S)]

Enclosures

APPENDIX 4
SAMPLE DOCUMENTS FOR AN APPEAL OF A ZONING DECISION

SAMPLE NOTICE

[CHECK YOUR JURISDICTION'S CORRECT RULES
FOR THE APPLICABLE FORUM, FORMAT AND DEADLINES]

PETITION OF _____ IN THE
_____ CIRCUIT COURT

FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY FOR
IN THE CASE OF: IN THE MATTER OF _____ Case No. _____

NOTICE OF APPEAL

Appellants, _____, by and through their attorney, _____, pursuant to Maryland Rules 7-202, et seq., hereby note an appeal from the Memorandum Opinion of the Circuit Court for Baltimore County, entered _____.

[NAME, ADDRESS, AND PHONE
NUMBER OF ATTORNEY(S) OR
CITIZEN REPRESENTATIVE OR
SELF]

APPENDIX 4
SAMPLE DOCUMENTS FOR AN APPEAL OF A ZONING DECISION

**SAMPLE CERTIFICATE OF
SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, _____, a copy of the foregoing Notice of Appeal was mailed first-class, postage prepaid, to:

[LIST NAMES AND ADDRESSES
OF ALL PARTIES TO RECEIVE COPIES]

[NAME OF ATTORNEY(S) OR
CITIZEN REPRESENTATIVE OR
SELF]

AUTHOR'S ACKNOWLEDGMENTS

Acknowledged here with gratitude are the Abell Foundation, for its support of this project; Macy Nelson, for sharing the knowledge and experiences gained in his work on behalf of citizens, and for his other contributions; Richard Klein, to whose work this guide refers often; Victoria Woodward, for her input and wonderful perseverance; and my parents, Merrall and Margie MacNeille, who, with my aunts and uncles and their other neighbors have worked for the last thirty-five years to preserve open spaces and clean waters in their part of Baltimore County.



1000 FRIENDS *of* MARYLAND

1209 N. Calvert Street

Baltimore, Maryland 21202

tel: 410.385.2910

fax: 410.385.2913

www.friendsofmd.org