Martin O'Malley
Governor

Anthony G. Brown
Lt. Governor

Margaret G. McHale
Chair

Ren Serey
Executive Director

STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

August 9, 2010

Ms. Pam Cotter
Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, MS 6301
Annapolis, Maryland 21401

Re: Ronan, Timothy- 2010-0140-V

Dear Ms. Cotter:

This office has received information regarding the above-referenced variance request. The applicant has requested a variance to allow a dwelling with less setbacks and Buffer than required. The majority of the 10.99 acre property is within the Critical Area with 10.39 acres designated as a Resource Conservation Area (RCA) and 0.59 acres designated as a Limited Development Area (LDA). The property is currently undeveloped with the exception of a shed, and is mostly forested with the exception of a small cleared area along Mimosa Cove Road in the RCA. The applicant proposes to construct a new dwelling and driveway in this cleared area.

Because the majority of the Parcel is designated as an RCA, and because the entire property in the Critical Area is mapped as expanded Buffer to the intermittent stream and its contiguous hydric soils, this office does not oppose the granting of some degree of variance from the County's prohibition on development within the Buffer for development of the property. However, we note that the footprint of the proposed dwelling appears to be as close as three feet from the 25-foot nontidal wetland buffer on the property, and typically, an area of at least ten feet in width is necessary between proposed structures and the edge of the limit of disturbance to allow adequate space for construction activities. Accordingly, we recommend that the proposed development, particularly with reference to the proposed deck at its closest point to the nontidal wetland buffer, be reduced or reconfigured such that at least a 10-foot area surrounding the proposed construction is included within the proposed limit of disturbance. Additionally, we recommend that the applicant provide some type of signage or fencing permanently marking the edge of the nontidal wetland buffer on site to prevent future encroachment into this area by mowing or other residential activities.

We recommend that the existing shed located alongside the stream on the property be required to be removed or relocated within the proposed development envelope in conjunction with this variance request.

Also, it appears that the existing forested area on the property is considered Forest Interior Dwelling Species (FIDS) habitat. Further, the Maryland Department of Natural Resources' GIS data indicates that a federally protected species is located in close proximity to the property. Because the applicant will use the only existing development right associated with the property's RCA with this development proposal, and because of the presence of several sensitive environmental features on the property, we suggest that the applicant place the remaining portion of the property outside of the project's limits of disturbance in a forest conservation easement to ensure that there will be no future clearing or disturbance within the forested area on the property.

We note that the Critical Area Buffer regulations located in COMAR 27.01.09.01 require the applicant to provide a Buffer Management Plan showing that mitigation plantings will be provided, on the site if feasible, for the area within the limit of disturbance in the expanded Buffer at a 3:1 ratio. This requirement must be addressed prior to the applicant's receipt of any necessary permits.

Thank you for the opportunity to provide comments. Please include this letter in your file and submit it as part of the record for this variance. Also, please notify the Commission in writing of the decision made in this case.

Sincerely,

Amber Widmayer
Natural Resources Planner

cc: AA 242-10
AA 333-08

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June 25, 2008

Ms. Pam Cotter
Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, MS 6301
Annapolis, Maryland 21401

Re: Emert Property Mapping Mistake Application
2008-0148-C

Dear Ms. Cotter:

Thank you for providing notice of the above-referenced Critical Area reclassification request. The applicant proposes to reclassify the Critical Area designations within two existing parcels with a total of 13.39 acres. Currently, 11.09 acres are designated as a Resource Conservation Area (RCA), and it is unclear how much of the property is designated as a Limited Development Area (LDA). It is also unclear how much of the property is outside of the Critical Area. The applicant proposes to reclassify the property on the basis that Anne Arundel County mistakenly mapped the property as described above at the time of the original Critical Area mapping. It appears that the applicant is requesting to have the 11.09 acres of RCA remapped to LDA.

If the property's Critical Area designations are changed as proposed by the applicant, the entire portion of the property that is in the Critical Area would be designated as LDA, though it is unclear from the submitted materials what this acreage is.

In evaluating map amendments that involve the correction of mistakes made during the original Critical Area mapping, local governments are guided by the Court of Special Appeals decision in August Bellanca v. County Commissioners of Kent County. See Enclosure (1). The Commission's role in reviewing these amendments is to ensure that when a local government finds that a mistake was made at the time of the original mapping, that the subject properties met the required mapping standards at that time.

The County needs to determine that a mistake occurred at the time of original mapping based on compelling evidence provided by the applicant. This evidence would not only

include aerial photography as documentation of the land use at the time, but also a showing that these types of uses were similarly mapped as LDA on similar properties. The County must also find the parcel met the LDA mapping standards that are provided below.

If the County finds the reclassification request can be approved, the role of the Critical Area Commission would then be to determine whether at the time of original mapping, the parcel met the mapping standards for LDA. At that time, the property would have had to have at least one of the following features:

1. Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre;
2. Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space;
3. Areas meeting the conditions of Regulation .03A, but not .03B, of this regulation;
4. Areas having public sewer or public water, or both.

If the County approves this request, it must be submitted to the Critical Area Commission as a proposed change to the County's local Critical Area program.

Sincerely,

Amber Widmayer
Natural Resources Planner
cc: AA 333-08

333-08

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2008-0148-C

GEORGE EMERT AND GRACE EMERT

SEVENTH ASSESSMENT DISTRICT

DATE HEARD: MARCH 5, 2009

ORDERED BY:
DOUGLAS CLARK HOLLMANN, ADMINISTRATIVE HEARING OFFICER

PLANNER: JOHN R. FURY

DATE FILED: **MARCH 31, 2009**

PLEADINGS

George Emert and Grace Emert, the applicants, seek critical area reclassifications (2008-0148-C) from resource conservation area (RCA) to limited development area (LDA) on two parcels located on the east and west sides of Mimosa Cove Road, north of Reilly Road, Deale.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's web site in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175 feet of the property was notified by mail, sent to the address furnished with the application. Ian Freedman, Esquire, one of applicants' attorneys, submitted his affidavit and testified that the property was posted for more than 30 days prior to the hearing. He also testified, and affirmed in his affidavit, that the Critical Area Commission had been timely notified of the application for this critical area reclassification pursuant to § 18-16-302(b)(5). I find and conclude that the requirements of public notice have been satisfied and that the Critical Area Commission has been properly notified of this application.

FINDINGS

The Property

This case concerns two parcels located on the east and west sides of Mimosa Cove Road, north of Reilly Road, in Deale, Maryland 20751, collectively referred to herein as "the Property." The first parcel, located on the south side of Mimosa Cove Road, is identified as Parcel 3, Tax Map 78, Block 02 on Applicants' Exhibit 1 admitted into evidence at the hearing, and shall be referred to in this decision as "Parcel 3." Parcel 3 is approximately 2.423 acres and is zoned R5 Residential District. It is partly in the LDA and partly in the RCA. The applicants seek to change the critical area classification of Parcel 3 to LDA in its entirety.

The second and larger parcel, located on the north side of Mimosa Cove Road, is identified as Parcel 77, Tax Map 78, Block 02 on Applicants' Exhibit 1, and shall be referred to in this decision as "Parcel 77." Parcel 77 is approximately 10.977 acres and is split-zoned R2 and R5 Residential District.[1] A portion of Parcel 77 is in the LDA, with the remainder being classified as RCA. The applicants seek to change the critical area classification of Parcel 77 to LDA but, unlike Parcel 3 immediately across Mimosa Cove Road, they are only seeking reclassification of three areas identified as Area A, Area B, and Area C on

[1] The R2 portion of Parcel 77, in the northwest corner of the Property, is not the subject of this application. Consequently, the underlying zoning for the four areas of Parcel 3 and Parcel 77 that are the subject of this application is R5 only.

Applicants' Exhibit 1. The remainder of Parcel 77 contains wetlands and is not the subject of this application.

The Anne Arundel County Code

Anne Arundel County Code, Article 18, §18-16-302(b) provides that a critical area reclassification shall be granted or denied in accordance with compatibility with the underlying zoning district, but may only be granted on the affirmative findings that:

(1) There was a mistake in the approved critical area map based on land uses or natural features in existence on December 1, 1985;

(2) The proposed critical area classification conforms to the State and County critical area mapping criteria;

(3) The proposed critical area classification conforms to the environmental goals and standards of the General Development Plan (GDP);

(4) There is compatibility between the uses of the property as reclassified and surrounding land uses, so as to promote the health, safety, and welfare of present and future residents of the County and effective environmental land use management; and

(5) The applicants have provided to the Critical Area Commission a copy of the Administrative Hearing Officer's notice and a copy of the application at least 30 days before the date of the hearing.

The applicants have the burden of proof, including of burden of going forward with the production of evidence and the burden of persuasion, on all questions of fact. Section 18-16-301(c).

The Evidence Presented At The Hearing

John R. Fury, a planner with the Office of Planning and Zoning (OPZ), testified that the RCA designation for the areas that are subject to this reclassification application is described by the critical area program documents as those areas that are characterized by naturally dominated environments (e.g., wetlands, forest and abandoned fields) and resource utilization activities (e.g., agricultural, forestry, fisheries, or agricultural), and must have at least one of the following features (1) the density is less than one dwelling unit per five acres, or (2) the dominate land use is in agricultural, wetland, forest, barren land, surface water, or open space.

The LDA designations are described in the critical area program documents as those areas that are currently developed in low or moderate intensity uses and also contain areas of natural plant and animal habitats, and the quality of runoff from those areas has not been substantially altered or impaired. These areas shall have at least one of the following features: (1) housing density ranging from one dwelling unit per 5 acres up to 4 dwelling units per acre, or (2) areas not dominated by agricultural, wetland, forest, barren land, surface water or open space, or (3) areas having public sewer or public water, or both.

Mr. Fury discussed the criteria that were used to determine classification of land in the different categories as of December 1, 1985. One of those criteria talks about land being served by sewer on that date, or undeveloped land lying within 2,000 feet of an existing water or sewer line, as showed on the County's Water and Sewer Maps. At the time, properties within 2,000 feet of an existing water or sewer line or that were in the corresponding timing areas for sewer service in the future were considered to have water or sewer service within the context of the definition of the LDA classification. However, Anne Arundel County Bill 67-08, amended Code § 18-16-302 to provide that a property located within 2,000 feet of public water or sewer may not be considered to have public water or sewer for proposes of reclassification and may not be considered to be a mapping mistake. Therefore, Mr. Fury testified that OPZ concluded that the presence of a sewer line (discussed below) that crosses the property was not to be considered as a mapping mistake.[2]

Mr. Fury testified that the determination of what to place in the different classifications was based upon the use of the Property in 1985, not the intended use. Aerial photographs from 1984 and 1995 show the Property as forested and unimproved. The official sewer map adopted by the County Council on April 16, 1984 designates the Property as being in an immediate priority area. The 1984 sewer map also indicates that the Property is located within approximately 700

[2] The applicants disagreed that the amendment to the Code applied to this application. See discussion below.

feet of an existing sewer line.[3] The 1984 sewer map also indicates that the site is located within 700 feet of an existing sewer line.[4]

The evidence as to the use of the property at the time of the classification in 1985 shows that the Property would meet the RCA mapping criteria given the various sensitive environmental features present including a perennial stream and non-tidal wetlands on Parcel 77. In addition, the Property is undeveloped and forested overall. Accordingly, the dominant land use was passive and consisted of natural features such as forest and wetlands, which corresponds to properties that are mapped as RCA. For all of the above reasons, OPZ concludes that the subject property was correctly mapped as a RCA at the time of the adoption of the critical area maps.

The applicants cite two recent critical area reclassifications granted in the vicinity of the Property. (Case No. 2004-0272-C and 2006-0014-C). These two cases are discussed below. Mr. Fury pointed out that there was existing development on both those parcels, consisting of principal and accessory structures, and that the dominate land uses and housing densities for both sites would conform to the requirements for mapping in LDA. This is in contrast to the situation involving the Property.

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[3] Whether or not the sewer line shown on Applicants' Exhibit 1 was in the ground at the time of the classification of the Property in 1985 is discussed below.

[4] Again, whether the sewer line had been built and in the ground at the time of the classification of the property is a fact that must be determined.

The Chesapeake Bay Critical Area Commission indicated that any reclassification must be submitted to the Commission as a change to the County's local program.

The Development Division of OPZ pointed out that the first step in the critical area mapping process was to map all wetlands as RCA. The process determined an approximate 300-foot buffer established along streams and environmentally sensitive features such as wetlands. Based on this information alone, it is clear that no mapping error occurred and the Property should have been mapped as RCA because of the extensive presence of wetlands on the Property. Further, LDA criteria state that LDAs are those areas that are currently developed in low or moderate density uses. Because there is no development in 1985 on the Property, the RCA classification was not a mistake.

The Development Division acknowledge that the critical area program document permitted land that was within 2,000 feet of an existing sewer line, but which had not been developed, to be classified as LDA. However, the reclassification would have been denied because of the extensive wetlands on Parcel 77. (Apparently the Development Division did not comment on Parcel 3.) For the reasons stated above, specifically, the wetlands, the stream complex, the forested condition and the lack of any on-site development, Parcel 77 was correctly mapped and should remain RCA.

The County Department of Health offered no object to the reclassification provided a plan was submitted and approved by the Department.

By way of ultimate conclusion, Mr. Fury opposed the application because, among other grounds, the Property meets the standards for mapping in the RCA. OPZ also concluded that the existence of sewer was no longer allowed as a basis for finding mistake. Accordingly, the request should be denied.

The applicants' attorneys, Marc K. Cohen and Ian I. Friedman, cross-examined Mr. Fury. Mr. Fury admitted on cross-examination that there did not appear to be any endangered species or environmental concerns, aside from the wetlands, on the two parcels. (However, Mr. Richard Johnson testified for the Protestants that he moved into the area in 1955 and that there are some endangered species on the Property, such as crow's foot, evergreen cedars, and lady slipper orchids. No significant evidence was submitted to support this contention.)

Robert Boyd, who works for A.B. Consultants, Inc., testified as the landscape architect and land planner for the applicant. Mr. Boyd related the history and the environmental conditions of the Property. Mr. Boyd testified that the 1952 photograph admitted into evidence as Applicants' Exhibit 3 showed clearing on Parcel 77, which indicated that it was being prepared for further development. Therefore, it was his opinion that Parcel 77 at least had exhibited some development prior to the classification in 1985 and therefore supported the argument that classifying the Property, as RCA was a mistake.

Mr. Boyd testified about the sewer line that apparently runs along Rielly Road, Inscoe Road, and then across Mimosa Cove Road and Parcel 3. Mr. Boyd cited the As-Built plans admitted into evidence as Applicants' Exhibit 6 as

showing a sewer line on the Property, and that the plans for this line were approved in 1968. Therefore, Mr. Boyd testified that sewer was available within 2,000 feet of the Property in 1985 and Parcel 3 and Parcel 77 should have been classified as LDA. Mr. Boyd testified that the applicants have been paying front foot assessment charges on both Parcel 3 and Parcel 77 because the sewer runs alongside the southerly or southeasterly portions of Parcel 77 and crosses Parcel 3.

Mr. Boyd clarified the three areas labeled A, B and C on Applicants' Exhibit 1 as the only areas on Parcel 77 being asked to be reclassified. Apparently, the remainder of Parcel 77 consists of wetlands and cannot be developed.

County Exhibit 1-O, referred to throughout the testimony as Critical Area Program Document, pages 13 – 16, was referred to throughout the hearing by Counsel for the applicants in questioning Mr. Fury, and in Mr. Boyd's testimony. The Program document is dated August 22, 1988 and was apparently used in classifying properties as IDA, LDA or RCA. However, Mr. Boyd testified that he believed that the Property met the requirements for LDA, as expressed in the program document, and in the other criteria discussed above.

Finally, Mr. Boyd testified that the Small Area Plan (SAP) for this part of the County equals R5 zoning because the SAP calls for residential low/medium density use which is consistent with the intentions of the applicants to develop the property with approximately nine buildable sites of about a quarter acre each, as shown on Applicants' Exhibit 10. Mr. Boyd testified that these proposed building

lots would be consistent in size with the existing lots in the Mimosa Cove development. Therefore, the variances would not alter the nature or character of the neighboring community.

The applicants submitted 16 exhibits, which were received into evidence. Exhibits 13 – 16 are copies of decisions by this office granting reclassifications for nearby properties on the ground that mistakes had been made in the original classification process. (These cases will be discussed below).

In conclusion, Mr. Boyd testified that he thought that the classifications of the areas of Parcel 3 and Parcel 77 had been a mistake and that they should have been classified as LDA in 1985.

Six people testified in opposition to the application to reclassify the Property. Many more signed up and/or were present in the hearing room to listen to the presentation of evidence. The protestants expressed concerns about the inadequate roads, the impact that the proposed development would have on the neighborhood, the inadequacy of the existing sewer to serve the proposed development, the increase in lot coverage that would increase runoff and impact nearby tidal waters, the installation of wells that will further deplete the water table that apparently is in crisis in South County, and that the proposed development did not comport with the GDP which has the expressed purpose of keeping South County rural.

Ms. Peggy Traband, for the Parker Creek View Civic Association, presented evidence concerning the two reclassifications granted by this Office

referred to by the applicants. She pointed out that in one case there was a residence already on the property and no wetlands, and in the second case, the property had been partially cleared and developed, and that these reclassifications were in contrast to the undeveloped status of the Property and the wetlands that existed on Parcel 77.[5]

CONCLUSIONS

1. Mistake

The first step in the classification process was to map wetlands as RCA.[6] Thereafter, all lands were placed in one of three categories. The IDA was assigned for land with industrial or commercial facilities. Land that did not meet either IDA or LDA was mapped as RCA. The classification relied on aerial photographs from April, 1984 (black and white) and July and September, 1985 (color). Finally, the primary criterion for placing property within one of the three classifications was land use in existence on December 1, 1985.

The evidence shows that there had been no development of either Parcel 3 or Parcel 77 as of the time of classification. The aerial photographs over the years show the same picture of forested, undeveloped land. The claim by Mr. Boyd that he can see some indication of clearing to put roads into the Property for

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[5] It was unclear from the evidence that there were wetlands to any significant extent on Parcel 3. There was also some concern about endangered species, as noted above, but no scientific evidence was presented to support this concern.

[6] This automatically rules out any mistake as to that portion of Parcel 77 that contains wetlands. The RCA designation was correct for that portion of Parcel 77. I recognize that the applicants are not seeking reclassification for the wetland areas of Parcel 77, but this makes clear that no mistake was made as to those areas.

development is insufficient to support a claim of mistake. The claim is based on the 1952 aerials. The snapshot for classification purposes was made as of 1985, when there is no evidence of development. Furthermore, such scant activity, even if in existence as of 1985, is not sufficient to overcome the presumption that the RCA designation was correct. Based on the evidence before me, the classification was correct.

However, the applicants argue that the existence of the sewer line provides them with the key to unlock the door to LDA reclassification. I find that it does not.

First, the language in the Code as to "mistake" must be examined to evaluate the facts presented at the hearing. § 18-16-302(b) reads as follows:

> (1) There was a mistake in the approved critical area map based on land uses or natural features in existence on December 1, 1985.

Apparently, at the time of classification, the County considered the presence of sewer line within 2,000 feet of a property to be a factor that pushed the classification of that property toward LDA, although it is not clear that the presence of sewer was the only factor in reaching that decision. A document entitled "Critical Area Program - Final - 8/22/88" was entered into evidence as County Exhibit 1-0 and referred to by all parties at the hearing. The pertinent language reads as follows:

> Land within 2,000 feet of an existing water or sewer line, as shown on the water and sewer maps, without any development, was also

classified as an LDA (unless it was a wetland or public property); if sewer service was scheduled within the 6-10 years period (or earlier) in the County water and sewer plan, or water service was scheduled in the 11-20 year period (or earlier) in the County water and sewer plan. This land was determined to have water or sewer service, or both, since the developer would be required to connect and extend service from the existing line as a condition of development under existing County subdivision regulations (Article 26, § 3-305 and d-312). Land that was developed at less than one dwelling unit per five acres and did not meet any of the above conditions was classified as Resource Conservation.

It seems that this Program Document was first used to classify property, and then, second, now, to show that property classified RCA should have been classified as LDA. At least, prior decisions of this Office, as discussed below, appear to have used this document, coupled with evidence of sewer lines being within 2,000 feet of a property, to find mistake.

The applicants submitted evidence that a sewer line was within 2,000 feet of the Parcel 3 and Parcel 77 in 1985. However, the evidence presented was not clear. The applicants submitted Exhibit 6, which is confusing, to say the least. It is titled "Anne Arundel County As-Built June 1, 1988." I interpret this to mean that the sewer indicated on Exhibit 6 was in existence as of June 1, 1988. This is after December 1, 1985. The bottom left-hand corner indicates that Exhibit 6 was

"reviewed and approved" as of June 6, 1985. This is before December 1, 1985. No one explained how information as of June 1, 1988 could have been reviewed and approved on June 6, 1985, almost three years earlier. The information on Exhibit 6 is also not clear as to whether some portions of the sewer lines shown were actually in existence as of June 1, 1988. This evidence does not persuade me that the sewer line depicted on Exhibit 6 actually existed on December 1, 1985.

Other evidence indicates that sewer was available, or was planned within the requisite time period.[7] See Exhibit 9 - Anne Arundel County As-Built Plans dated June 16, 1980. Furthermore, a number of decisions from this office have granted reclassifications based on mistake for failure to consider the availability of sewer: *In re Byron and Viola Sorrell* (Case No. 2004-0272-C); *In re Michael and Laura Daras* (Case No. 2004-0464-C); *In re James and Victoria Parkin* (Case No. 2006-0121-C); and *In re JWL Associates and William and Mary Magenau* (Case Nos. 1999-0270-C and 2006-0014-C). All of these decisions related to properties in the near vicinity of the Property that is the subject of this application and were apparently referring to the sewer line the applicants are claiming was in the ground in 1985. All of these decisions recognized that a mistake had been made in not classifying those properties LDA on the ground that the availability of sewer was overlooked in the process. It is not clear whether the availability of sewer was the only factor in those decisions.

[7] There was testimony that the applicants have been paying front foot assessment charges on both properties that are the subject of this application. When that began was not clear.

However, whether sewer was in the ground within 2,000 feet of the Property in 1985 is not a factor in deciding this application. The Code was changed in 2008 to specifically eliminate the proximity of sewer at the time of classification as evidence of mistake. Bill No. 67-08 amended § 18-16-302(b), which now reads as follows (language added by the 2008 amendment shown in italics):

> (2) There was a mistake in the approved critical area map based on land uses or natural features in existence on December 1, 1985, *provided that a property located within 2,000 feet of public water or sewer may not be considered to have public water or sewer for purposes of reclassification and may not be considered to be a mapping mistake.*

If this amendment applies to this proceeding, the presence of sewer is not a factor in deciding whether mistake occurred in 1985 when the Property was classified RCA.

The rule is that a legislated change which occurs during an on-going litigation of a zoning or land use case, absent intervening vested rights, is applied retroactively. *Powell v. Calvert County*, 368 Md. 400, 795 A.2d 96 (2002); *Antwerpen v. Baltimore County*, 163 Md. App. 194, 877 A.2d 1166 (2005). If the 2008 amendment took effect prior to the March 5, 2009 hearing, the amendment applies. If so, the recent change took away from the applicants whatever right

they may have had to argue that the presence of sewer entitled them to reclassification of the parcels that are the subject of this application.

Section 3 of the 2008 amendment provides that it would become effective "45 days from the date of enactment or upon approval by the State Critical Area Commission, *whichever is later.*" 45 days would be November 5, 2008. The State Critical Area approved the text of Bill No. 67-08 on November 5, 2008. *See*, letter dated November 19, 2008, from Margaret McHale, Chair, Critical Area Commission, to Mr. Larry Tom, Planning and Zoning Officer, indicating that the Commission and the Chairperson had approved the change proposed by Bill No. 67-08 on November 5, 2008. Therefore, the presence of sewer is no longer evidence of mistake within the meaning of § 18-16-302(b).

The focus, therefore, returns to the phrase "based on land uses or natural features in existence on December 1, 1985." The evidence shows that the Property in its entirety (both Parcel 77 and Parcel 3) was undeveloped and in a natural state. Given the presence of extensive wetlands on Parcel 77, and the proximity of Parcel 3 across Mimosa Cove Lane, the applicants have failed to carry their burden of showing that the original RCA classification was a mistake. The applicants have not met the requirements of the first prong of § 18-16-302(b) for reclassifying those areas of the Property for which they seek LDA classification.

2. Conformity to State and County Critical Area Mapping Criteria[8]

Code of Maryland Regulations (COMAR) § 27.01.02.04(A) sets forth the criteria for classifying land as LDA:

> A. Limited development areas are those areas, which are currently developed in low or moderate intensity uses. They also contain areas of natural plant and animal habitats, and the quality of runoff from these areas has not been substantially altered or impaired. These areas shall have at least one of the following features:
>
> (1) Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre;
>
> (2) Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space;
>
> (3) Areas meeting the conditions of Regulation .03A, but not .03B, of this regulation;
>
> (4) Areas having public sewer or public water, or both.
>
> (Emphasis added.)

The applicants point out that the underlying zoning (R5) appears to support their application. However, whether the areas the applicants seek to reclassify to LDA comply with State and County Critical Area Mapping Criteria does not turn on the underlying zoning only. First and foremost, the property that is the subject of reclassification must be lands "which are currently [as of December 1, 1985] developed in low or moderate intensity uses." The evidence shows that the Property was and is undeveloped. The sentence that follows, which reads, "[t]hey also contain areas of natural plant and animal habitats, and the quality of runoff

[8] Since I have found that there was no mistake made at the time of reclassification, it may not be necessary to examine the remaining four factors. However, because my decision is not based solely on the change in the Code brought about by the 2008 amendment, I will set forth my findings on those factors as well.

from these areas has not been substantially altered or impaired[.]" does not supersede the first sentence, otherwise every natural area that has not been altered or impaired could be classified as LDA. Lands that "are currently developed in low or moderate intensity uses" can have "areas of natural plant and animal habitats," but they still must be developed to some extent as of December 1, 1985 in order to qualify for LDA classification. The areas of the Property that the applicants seek to reclassify were not developed at that time. Therefore, no mistake has been made.[9] The applicants have not carried their burden under this prong of § 18-16-302(b).

3. Conformity to Environmental Goals and Standards of the General Development Plan (GDP)

Evidence was presented by the applicants through the testimony of Mr. Robert Boyd, a land planner and landscape architect, that LDA classification for the areas of the Property that are the subject of this application would conform to the environmental goals of the GDP, and that there is compatibility between the uses of the property as reclassified and the surrounding land uses. I cannot accept this conclusion. The land sought to be reclassified is part of sensitive areas containing non-tidal wetlands, a running stream, and forest cover. The dominant land use is passive, with little or no agricultural use. I find that the applicants have not carried their burden of showing that the proposed change would conform to the environmental goals of the GDP. Developing sensitive land next to even more

[9] This analysis comports with the earlier decisions of this office because in those cases there appears to have been some development as of 1985, in contrast to the situation presented in this application.

sensitive land is not conforming to the environmental goals of the GDP. Houses on the lots as proposed by the applicants would be compatible with the houses that exist in the Mimosa Cove community, but not with the RCA areas to the north. The applicants have not carried their burden under this prong of § 18-16-302(b).

4. Health, Safety, and Welfare

Mr. Boyd testified that there is compatibility between the uses of the property as reclassified and surrounding land uses, so as to promote the health, safety, and welfare of present and future residents of the County and effective environmental land use management. I cannot find that the applicants carried their burden on this factor. The testimony showed that the effects of development that has already occurred are overwhelming the Mimosa Cove area. The water table is sinking; more wells would pull it down further. The tidal areas are experiencing increased pollution; no one yet has developed a parcel in close proximity to non-tidal and tidal waters that has not increased the pollution load borne by those waters. Traffic appears to be another problem for Mimosa Cove, particularly along the narrow road that separates Parcel 3 from Parcel 77; development of the lots proposed by the applicants would only exacerbate that situation. The reclassification of the subject areas would have a negative impact on the environment and the people who live in this area. Classifying the Property as RCA was not a mistake. The applicants have not carried their burden under this prong of § 18-16-302(b).

5. Notice to the Critical Area Commission

As noted on page 1 of this decision, the applicants have complied with the requirement that notice of their application be served on the Critical Area Commission at least 30 days before the hearing held on March 5, 2009.

Conclusion

For the reasons stated above, I cannot find that the classification of the Property as RCA was a mistake and will deny the application.

ORDER

PURSUANT to the application of George Emert and Grace Emert, petitioning for critical area reclassifications from RCA to LDA on two parcels; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 31st day of March, 2009,

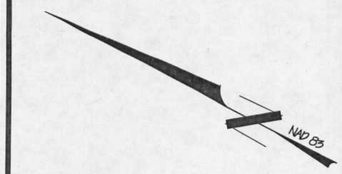
ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicants are hereby **denied** critical area reclassifications from RCA to LDA for Parcel 3 and for those three portions of Parcel 77 (Area A, Area B, and Area C on Applicants' Exhibit 1).

Douglas Clark Hollmann
Administrative Hearing Officer

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise they will be discarded.



478,178.25 S.F. +/-
OR
10.977 Ac. +/-
TAX MAP: 78, BLOCK: 02, PARCELS: 77

105,563.41 S.F. +/-
OR
2.423 Ac. +/-
TAX MAP: 78, BLOCK: 02, PARCELS: 3

M.F. (HELD)
514.24
N43°02'16"W
873.01
N56°10'03"W
P.F. (HELD)
S33°51'08"W
143.68
P.F. (HELD)
C1
C3
N24°52'12"W
685.90
822.55
MIMOSA COVE ROAD
S84°02'07"W
35.66
N26°06'53"W
P.F. (HELD)
P.F. (HELD)
P.F. (HELD)
709.14'
P.F. (HELD)
P.F. (HELD)
21.48'
N26°49'44"W
192.60
N71°25'43"W
61.99
N79°57'20"W
110.87
C2
S63°15'29"W
26.53
S.S.M.H.
S26°44'31"E
176.38
RIELLY ROAD
RIELLY ROAD
MILTON AVENUE
MILTON AVENUE
174.27'
MIMOSA COVE SIGN
C/O
101.74
N65°21'43"E
CENTER LINE 20' UTILITY EASEMENT SEE LIBER 3085 FOLIO 455
RCA
LDA
RCA
LDA
RCA
LDA
M.F. (HELD)
27.86'
N04°10'06"W
231.41
P.F. (HELD)
CENTER LINE 20' UTILITY EASEMENT SEE LIBER 3085 FOLIO 455
RCA
LDA
S63°13'
N43°02'31"W
154.75
MILTON AVENUE
N02°18'19"W
98.87
CENTER LINE DRAINAGE DITCH SEE LIBER 1336 FOLIO 514
N07°58'29"E
51.37
N68°08'31"W
85.50
P.F. (HELD)
N43°02'29"E
INSCOE ROAD
346.93

NOTES

1) PROPERTY SUBJECT TO A EASEMENT FOR A DRAINAGE DITCH SEE LIBER 1336 FOLIO 514
2) NO TITLE REPORT FURNISHED
3) P.F.- PIPE FOUND
4) M.F.- MONUMENT FOUND
5) S.S.M.H.- SANITARY SEWER MANHOLE

CURVE TABLE			
CURVE	CHORD	LENGTH	RADIUS
C1	N 39° 45' 56" W 138.09'	139.66'	268.59'
C2	N 68° 19' 27" W 98.59'	99.27'	244.50'
C3	N 60° 25' 23" W 157.00'	167.55'	135.00'

AZIMUTH AND ROOD, LLC
115 CATHEDRAL STREET
ANNAPOLIS, MARYLAND 21401
410-269-1053 FAX 410-269-5260

STATE OF MARYLAND
JOHN J. DOWLING
PROFESSIONAL LAND SURVEYOR

DEED REFERANCE: LIBER 5424 FOLIO 364
TAX ACCOUNT: 7-000-05038000
TAX MAP: 78, BLOCK: 02, PARCELS: 3

DEED REFERANCE: LIBER 5424 FOLIO 364
TAX ACCOUNT: 7-000-90101172
TAX MAP: 78, BLOCK: 02, PARCELS: 77

LOT PARCEL B-R BLOCK SECTION PLAT
PLAT ENTITLED MIMOSA COVE AND PART OF THE EWERT PROPERTY
RECORDED IN ANNE ARUNDEL COUNTY
PLAT BOOK 202 FOLIO 8
SCALE: 1" = 50' JOB NO: M507011 DATE: 7/16/07

BOUNDARY SURVEY

MIMOSA COVE ROAD

SITE ZIP CODE 20759
SEVENTH DISTRICT, ANNE ARUNDEL COUNTY, MARYLAND

REVISED: 9/27/08
TO SHOW CRITICAL AREA LINE