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BY ELECTRONIC MAIL

February 5, 2019

**MEMORANDUM**

**TO:** Gerald Winegrad  
**FROM:** Thomas A. Deming  
**SUBJECT:** Preliminary Forest Conservation Plan and Worksheet submitted to the City of Annapolis on behalf of National Lutheran Communities and Services (NLCS) on January 22, 2019

Per your request, I reviewed the Preliminary Forest Conservation Plan and Worksheet submitted to the City on behalf of National Lutheran Communities and Services (NLCS) on January 22, 2019 as part of their filings for the approval of The Village at Providence Point ("the project"). You have asked that I write up my analysis and conclusions on certain issues posed by this filing so that you may share them with others.<sup>1</sup>

The issues addressed herein arise from the enactment of Annapolis City Ordinance O-27-18, an ordinance concerning Forest Conservation - No Net Loss, effective November 29, 2018. During the pendency of this ordinance before the City Council, Planning and Zoning Director Pete Gutwald had advised the Planning Commission in a September 8, 2018 memorandum that the ordinance would *increase* the required amount of reforestation on the project site from 16.45 acres to 39.5 acres, an increase of 23.05 acres or 100% reforestation of forest acres cleared. These figures on proposed forest clearing and replanting for the project came from a July 14, 2017 version of a preliminary forest conservation plan (PFCP) filed with the City on July 25, 2017. Mr. Gutwald's comparison for the increase of 23.05 more acres was due to the proposed

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<sup>1</sup> You have also asked that, for the information of those reading this memorandum, I summarize my knowledge of and experience with the Forest Conservation Act. From 1979 through 1995, I served as an Assistant Attorney General of Maryland and Principal Counsel to the Department of Natural Resources. Among my responsibilities were representation of the department before the Maryland General Assembly on pending legislation of interest to DNR and review of all regulations developed by the Department for form and legal sufficiency. Thus I was closely involved in development of the Forest Conservation Act of 1991, and in the subsequent drafting of the regulations and technical manual that implemented the Act. Following my retirement from the Attorney General's Office in 1996, my primary clientele in private practice have been neighborhood and environmental groups. A number of my cases have involved issues under the State Forest Conservation Act generally and the City's forest conservation ordinance and program in particular.

elimination of the credits in O-28-18 allowed under then current law. The PFCP was prepared for the project by Perkins Eastman, the consultants retained by developer National Lutheran Communities & Services.<sup>2</sup> This PFCP was filed along with the full plans for the project. Mr. Gutwald chose to use the PFCP filed on July 25, 2017 to illustrate to the Planning Commission the differences in existing requirements for replanting as compared to the proposed requirements under O-27-18. It should be noted that a later iteration of a PFCP for the project was filed with the City on December 15, 2017 and again was prepared by Perkins Eastman. The PFCP, dated December 14, 2017 was filed with other revised materials with Planning and Zoning to gain approval of the project.

This PFCP of December 14, 2017 proposed to clear 38.8 acres of forest and contained a planting requirement of 15.05 acres even after taking the credit which has been eliminated by O-27-18.

The estimate of required reforestation presented by Perkins Eastman in their latest PFCP for the project dated January 22, 2019 is 0 acres. To say the least, you and I are flabbergasted by the proposition that *after* passage of Ordinance O-27-18, an ordinance intended to make reforestation requirements stricter and termed the no net loss ordinance, the amount of reforestation required for the project would decrease from 16.45 acres (or 15.05 acres) to 0 acres.

From your initial discussion with Mr. Michael Klebasko, the forestry consultant for the project, two justifications for this startling result are being offered. First, using a worksheet from the State Forest Conservation Technical Manual compels this result when using the break even point calculation. You also advised me that Mr. Gutwald advised you on February 1 that he concurred in the conclusion that zero replanting was required using this break even point from the State Forest Conservation Technical Manual worksheet. Second, Ordinance O-27-18 is inapplicable at this time because it has not been approved by the State Department of Natural Resources as an amendment of the City's local forest conservation program. In my opinion, neither of these justifications is correct.

Each iteration of the PFCP for the project prepared by Perkins Eastman has included a completed version of the Forest Conservation Technical Manual worksheet using a break even point. Comparing the worksheets submitted on July 25 and December 15, 2017 with the one submitted on January 22 of this year, one can readily discern how the numbers have been changed to support the startling conclusion that the amount of required reforestation has dropped from 16.45 acres (or 15.05 acres) to 0 acres. Both the previous PFCP worksheets submitted to the City contained the same break even point of 90.5 acres. In the latest PFCP filing this was inexplicably reduced to 40.46 acres.

I submit that such a detailed dive into the numbers is beside the point. Rather, the critical legal question is whether, on the specific matter of the amount of forest retention and

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<sup>2</sup> The discussion herein of the acreage numbers stated in the preliminary forest conservation plans prepared for NLCS in no way constitutes any endorsement or conclusion on my part or your part that those numbers are correct estimates of the various categories of forest acreage that should be used in forest conservation planning for the Village at Providence Point project site.

reforestation required by the City's program standards, which are stricter than the State standards addressed in the Technical Manual, the Manual's worksheet use of the break even point should be used at all.

The State Forest Conservation Act, the regulations under it, and the technical manual established varying conservation "threshold" amounts of forested acreage for various types of development (e.g. 20% of the site area for high density residential areas as in this case). As the State Forest Conservation Technical Manual explains, in Section 3.1.3, "The forest conservation thresholds are not established minimum limits for forest retention, but are instead points at which the penalty for clearing increases eight-fold. Conversely, any forest retained above the threshold is credited at a higher rate."

The City's program has stricter standards than those addressed in the State FCA and Technical Manual, in two respects. First, where the State standard calls for reforestation at a rate of 1/4 acre for each acre of existing forest removed above the threshold, the City of Annapolis in 2016 enacted a corresponding reforestation standard of 1 acre of reforestation for each acre removed. See O-22-16. And second, with the passage of Ordinance O-28-17, the City eliminated any credit for forest retained above the threshold.<sup>3</sup>

The worksheet from the State Manual contains at Step H directions for determining a "Break Even Point (Amount of Forest that must be retained so that no mitigation is required)." The State Manual explains, at Section 3.1.3 that "any forest retained above the threshold is credited at a higher rate. This results in a clearing break-even point at which no reforestation will be required for forest clearing resulting from proposed development." The determination of this "break-even point" is a step in the mathematical application of the State standards that results in a credit against reforestation requirements based upon the amount of existing forest retained.

As you know, the concept of a credit for forest retained above the threshold was part of the original State Forest Conservation Act, at Natural Resources Article, Sec. 5-1606(d)(2): "Each acre of forest retained on the net tract area above the applicable forest conservation threshold shall be credited against the total number of acres required to be reforested under paragraph (1) of this subsection."

Prior to the enactment of City Ordinance O-27-18 effective on November 29, 2018, an ordinance concerning "Forest Conservation - No Net Loss", the forest conservation provisions of the City Code, at Sec. 21.71.090 A.3.ii. provided: "Each acre of forest retained on the net tract area above the applicable forest conservation threshold shall be credited against the total number

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<sup>3</sup> The City (and all other local jurisdictions) were explicitly authorized to make the reforestation requirements of their forest conservation programs more stringent than state law and regulations. In 2017, by Chapter 794 of the laws of Maryland, the General Assembly expressly authorized local governments to adopt more stringent requirements for reforestation: "A unit of local government with planning and zoning authority may adopt forest conservation thresholds and afforestation and reforestation requirements as part of its local forest conservation program that are more stringent than the forest conservation thresholds and afforestation and reforestation requirements in this section." Natural Resources Article, Sec. 5-1606(g). That is precisely what Ordinance O-27-18 accomplished, with its elimination of any credit for forest remaining above the threshold and its no net loss provisions for 100% replacement of forest cleared no matter how much forest remained.

of acres required to be reforested under 3.1 of this subsection. The calculation of the credit shall be according to the criteria provided in the Forest Conservation Technical Manual."

Towards the goal of no net loss of forest from development projects, Ordinance O-27-18 repealed subsection A.3.ii in its entirety so that the City's forest conservation program no longer provides any credit for retention of forest above the conservation threshold and requires at least a one-for-one replacement of all forest cleared. Mr. Gutwald's submittal to the Planning Commission on how O-27-18 would affect this project and others in the City's pipeline clearly indicates that 100% of forest cleared on this project's site must be replanted. There was no equivocation or mention of a break even point allowing for any credit for forest remaining on the site. Nor did Mr. Gutwald or anyone else at Planning and Zoning ever mention any problems with the previous break even points used in the July 25 and December 15 filings indicating that even before enactment of the no net loss ordinance (O-27-18), respectively 16.45 acres and 15.05 acres of cleared forest would have to be planted.

With the elimination of the credit under O-27-18, forest conservation plans developed to meet the City's forest conservation law and program should no longer reflect "a clearing break-even point at which no reforestation will be required for forest clearing resulting from proposed development." Thus, the worksheet provision for calculation of a break even point should no longer be used in Annapolis. This conclusion is bolstered by the express repeal, in Ordinance O-27-18, of the direction that "The calculation of the credit shall be according to the criteria provided in the Forest Conservation Technical Manual." How else could the intent of the ordinance to achieve a no net loss of forest from development be achieved?

I would also point out that the City Forest Conservation law contains no definition of or other reference to a "break even point". Nor does the State Forest Conservation Act itself.

Thus, the January 22, 2019 PFCP filed with the City erroneously uses a break even point calculation. This calculation effectively relieves the developer of any responsibility for replanting any of the 30 acres of priority forest to be cleared, even while the PFCP appears to acknowledge the repeal of any credit for leaving forest above the threshold by O-27-18. This erroneous calculation renders the PFCP invalid and it should be rejected by Planning and Zoning.

Turning to the second issue, the proposition that Ordinance O-27-18 must be approved by the Department of Natural Resources in order to be legally effective is groundless. The State Forest Conservation Act at NR § 5-1603 provides only for state review and approval of a local government's initial forest conservation ordinance. If the General Assembly intends to condition amendments to a local regulatory program upon approval by a State agency, it must expressly legislate such a restriction on local legislative prerogatives. Thus for example, the State Critical Area Law requires, at Natural Resources Article, Section 8-1809(i) that, "A [local critical area protection] program may not be amended except with the approval of the Commission." The State Forest Conservation Act contains no such requirement.

Ordinance O-27-18 explicitly made the law applicable to projects "in the pipeline" such as The Village at Providence Point, providing that as of November 29, 2017, its provisions

applied to all projects that had not received approval of preliminary and final forest conservation plans. The provisions of Ordinance O-27-18 must be met by any preliminary and final conservation plans for the project that have not received approval by the City.

In conclusion, it is my opinion that the clear intent of Ordinance O-27-18 was to require 100% reforestation of the amount of existing forest acreage cleared on a site. The convoluted mash of State and City program requirements inherent in the PFCP filed by NLCS on January 22, 2019 avoids the requirement of 100% reforestation. Therefore this plan must be rejected.