

# COMMONWEALTH of VIRGINIA

## CHESAPEAKE BAY LOCAL ASSISTANCE DEPARTMENT

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June 2, 2004

Mr. Uwe H. Kirste, Environmental Services Division Chief  
Department of Public Works  
4361 Ridgewood Center Drive  
Prince William, Virginia 22192-5308

Dear Mr. Kirste:

As I am sure you are aware, over the past several months I have been working closely with members of your staff on a compliance evaluation of the Prince William County Chesapeake Bay program. In the midst of the evaluation, I received an official complaint from a citizen regarding the South Market project on Thoroughfare Road. The project involved a Preservation Area Site Assessment (PASA) that was approved in 2001 for a proposed rezoning that was denied in 2003. The developer then applied for a by-right subdivision project that was reviewed and approved by the Planning Commission in March 2004. The citizens' concerns stemmed from the County's vesting of the 2001 RPA delineation as shown on the approved PASA. Further investigation resulting both from this complaint and the compliance evaluation has led to a number of concerns regarding the County's vesting policy. We have discussed these concerns with our counsel at the Attorney General's office, and he concurs with our recommendations.

In January 2004, CBLAD Director Scott Crafton sent a letter to Tidewater localities in an attempt to clarify the issue of vesting in light of amended ordinances being adopted in response to the Board's revised Bay Act Regulations. All jurisdictions had development applications in the plan review process when their amended ordinances were adopted, and our Department was receiving phone calls on a regular basis on the issue of vested rights. In his January letter, Mr. Crafton made it clear that specific vesting decisions are the purview of individual local governments, but that according to various Attorney General opinions (attached to that letter), applicants are required to comply with the Regulations to the maximum extent practicable.

Section 15.2-2307 of the Code of Virginia addresses vested rights in Virginia, and deems a landowner's right to be vested when the "landowner 1) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect

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allowing development of a specific project; 2) relies in good faith on the significant affirmative governmental act; and 3) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act."

Significant affirmative governmental acts that allow development of a specific project and are identified in the law include the following: 1) acceptance of proffers or proffered conditions which specify use related to a zoning amendment; 2) approval of an application for a rezoning or a specific use or density; 3) granting of a special exception or use permit with conditions by a governing body or Board of Zoning Appeals (BZA); 4) approval of a variance by a BZA; 5) approval of a preliminary subdivision plat, site plan or plan of development for the landowner's property, provided that the applicant "diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances;" or 6) approval of a final subdivision plat, site plan or plan of development for the landowner's property.

Section 15.2-2261.E of the Virginia Code indicates that an approved final subdivision or site plan is valid for a period of 5 years except that "nothing contained in this section shall be construed to affect ... (iii) the application to individual lots on recorded plats or parcels of land subject to final site plans, to the greatest extent possible, of the provisions of any local ordinance adopted pursuant to the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.)". In addition, §15.2-2261.C of the Virginia Code states that: "[F]or so long as the final site plan remains valid in accordance with the provisions of this section, or in the case of a recorded plat for five years after approval, no change or amendment to any local ordinance, map, resolution, rule, regulation, policy or plan adopted subsequent to the date of approval of the recorded plat or final site plan shall adversely affect the right of the subdivider or developer or his successor in interest to commence and complete an approved development in accordance with the lawful terms of the recorded plat or site plan unless the change or amendment is required to comply with state law or there has been a mistake, fraud or a change in circumstances substantially affecting the public health, safety or welfare."

It is clear from the Virginia Code language cited above that vesting of a plan 1) requires a significant affirmative governmental act as outlined above; 2) is tied directly to the specific project for which it was produced; 3) remains in effect only if development is being diligently pursued; and 4) the 5-year validity for final site plans and recorded plats does not apply to the provisions of any local ordinance adopted pursuant to the Chesapeake Bay Preservation Act (§15.2-2261.E(iii)). It is also clear in the Attorney General opinions enclosed with Mr. Crafton's January 2004 letter, that all projects must meet the Regulations to the maximum extent possible, including buffer requirements and site-specific RPA delineations. Finally, because the December 2002 amendments to the Prince William County ordinance and Design Construction Standards Manual (DCSM) were required to comply with the amended Chesapeake Bay Preservation Area Designation and Management Regulations (§15.2-2261.C), the Department is of the view that an applicant is required to comply with the provisions, to the greatest extent possible.

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Given the requirements of the amended Regulations and the Code of Virginia sections cited above, the Department is concerned about the Preservation Area Site Assessment section of Prince William's vesting policy as stated in the Vesting/Grandfathering Guidelines for the Applicability of the Amended Chesapeake Bay Regulations on Development Plans, provided to me by your staff on March 3, 2004. According to this policy, an approved PASA where no development has yet occurred will remain valid for 5 years from the date of its approval. In addition, a PASA under review but not yet approved will be valid for 5 years from the date of its approval, or as long as the corresponding final site/subdivision plans remain valid. And finally, an approved PASA vests a project with respect to further identification of RPA on site.

The first area of concern centers on the definition of Resource Protection Area (RPA). As part of the revisions to the Regulations approved by the Chesapeake Bay Local Assistance Board (Board) in December 2001, the definition of an RPA was amended to refer to the identification and protection of water bodies with perennial flow, rather than tributary streams (9 VAC 10-20-80). The Regulations also require that site-specific refinement of Chesapeake Bay Preservation Area boundaries be made or confirmed by the local government (9 VAC 10-20-105). According to your staff, PASAs performed prior to February 2003 (effective date of the December 2002 amendments) were completed using the USGS quadrangle maps to identify tributary streams rather than a scientific protocol for the determination of perenniality. These PASAs, therefore, are not assumed to be automatic indicators of the presence or absence of water bodies with perennial flow, and as a result do not meet the requirements of the Regulations to the maximum extent possible with respect to site-specific RPA delineations.

The second issue is the statement in the vesting policy that an approved PASA vests a project with respect to further identification of RPA on site. According to your staff, a PASA was only required if a site had mapped RPA located on it. After February 2003, the revised Prince William County ordinances required submission of a Perennial Flow Determination (PFD) study where un-mapped streams were identified. However, because the County's vesting policy precludes additional RPA identification on sites that have approved PASAs, it appears that the County may not request a PFD on sites with an approved PASA, even if additional, un-mapped streams are identified. The existence of an approved PASA should not preclude the identification of additional RPA on site when a PFD would be required under normal circumstances. This policy has the potential to result in some perennial streams remaining unprotected, again with the result that the requirements of the Regulations are not being met to the maximum extent possible.

Based on the concerns expressed above and for the reasons discussed, the Department recommends the County revise its vesting policy pertaining to PASAs as soon as possible to reflect the parameters of the Code of Virginia regarding vesting and 5-year validity of site plans and plats in the following areas:

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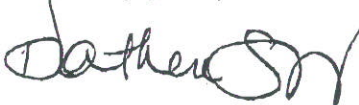
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- Revise the time of validity for approved PASAs where development has begun and is being diligently pursued from 5 years to some shorter, more reasonable time frame. Other localities have used 6 or 12 months from the date of local government approval.
- Revise the vesting policy to state that the validity of an approved PASA only remains in effect while development (or pursuit of final plans) is being diligently pursued.
- Revise the vesting policy to only pertain to approved PASAs, deleting the sentence that provides vesting for PASAs that are under review but not yet approved.
- Revise the vesting policy to state that the validity of an approved PASA only remains in effect for the specific project for which it was submitted.
- Revise the vesting policy to require the submission of a Perennial Flow Determination where unmapped streams are identified, allowing for the possibility of further identification of RPA on site.

A revised vesting policy would prevent further confusion on the part of landowners, public review bodies and County staff, and the potential for inequitable application of the Chesapeake Bay Preservation requirements. If you have any questions or would like to discuss this further, please feel free to contact either Martha Little or myself at 1-800-CHESBAY.

Very truly yours,



Heather C.A. Mackey  
Principal Environmental Planner, CBLAD

C: C. Scott Crafton, Executive Director, CBLAD  
Roger L. Chaffe, Office of the Attorney General  
Martha Little, Chief Environmental Planning Division, CBLAD