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# MEMORANDUM

**Date: June 17, 2014**
**To: Jay Falstad, Executive Director, Queen Anne's Conservation Association**
**Re: SKI Sanitary Project**

You have asked me for a brief, non-technical summary of the legal research and analysis that our firm has been conducting over the past several weeks with respect to the constitutionality of the recently-enacted QAC Lot Consolidation Ordinance. Our research has uncovered multiple possible avenues of attack on the Ordinance by the SKI lot owners who have announced that they will, at a suitable time, challenge the Ordinance in court. (I have kept the legal detail out of this memo, instead putting a small part of it in an Appendix.)

For purposes of a brief summary, I start with the rule laid out by the Supreme Court that a taking occurs in violation of the Fifth Amendment (when uncompensated) where a land-use regulation either "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." It can be plausibly argued that the Ordinance does **both** of these things.

First, many courts -- including those in Maryland --have recognized that a law or regulation (like the Ordinance) enacted simply and avowedly in an attempt to thwart growth is, as a general matter, impermissible. Second, there is ample authority that a no-construction provision (*i.e.*, a law or regulation that a property must be left in essentially its natural state) constitutes a restriction that eliminates all economically viable use of the land.

Proponents of the constitutionality of the Ordinance have cited no Maryland decision upholding a mandatory lot consolidation (or "merger"), and we have found none. Notably, the Maryland courts repeatedly acknowledge that in order for merger to occur, there must be some evidence that the owner of two (or more) contiguous lots **actually intends** (or intended) to merge the properties. Examples in the Maryland decisions include, *inter alia*, building a home across lot lines, building a circular driveway that crosses the undeveloped parcel, or building a swimming pool on an adjacent parcel(s).

In Maryland, such an inquiry is highly fact-specific, and whether merger has occurred must be evaluated on a case-by-case basis. There is simply no way for anyone to conclude with any confidence that the mandatory merger of all the commonly-owned lots at issue on SKI, as provided in the Ordinance, would be consistent with the merger doctrine as applied in Maryland. To repeat, there are no Maryland authorities upholding a mandatory lot merger imposed without regard to the actual intent of the owner of the lots.

Faced with the foregoing, proponents of the Ordinance may seek to avoid the constitutional claim of an uncompensated taking by falling back on the argument that the lots are unbuildable, and thus valueless for takings purposes, because they don't perc. This argument, however, can be met by reference to the cases involving the denial of services and the availability of alternative septic systems. The County cannot both refuse to connect properties to the sewer line **and** prohibit the use of viable alternatives, so long as the systems do not pose a risk to the community (under settled principles of nuisance law that would prohibit use in any event).

If the County tries both to deny sewer service to unmerged lots and refuse to allow their development on septic, courts will likely hold (1) that such denial of service and/or prohibition is unreasonable, and (2) the County has engaged in a taking, requiring compensation under the US and Maryland Constitutions.

Accordingly, for the reasons briefly (and only partially) stated above, Queen Anne's Conservation Association cannot safely assume that the SKI Sanitary Project will not result in the owners of many more than 658 lots being entitled either to develop their lots or to receive compensation for being prohibited from doing so.

**APPENDIX**

At present, there are no Maryland cases specifically addressing the constitutionality of forced lot merger ordinances. Nonetheless, the Court of Appeals in *Stansbury v. Jones*, 372 Md. 172, 191 n. 8 (2002), expressly noted that there may, indeed, be colorable challenges to the legality or constitutionality of such provisions.

A party seeking to challenge County Ordinance 13-24 could do so pursuant to a number of legal theories, any one of which has the potential to cast serious doubt upon the ordinance's legal validity. As a general matter, it is necessary to recognize that forced merger provisions are not universally accepted. *See, e.g., Schreiner v. Russell Township Bd. of Trustees*, 60 Ohio App. 3d 152 (mandatory lot consolidation ordinance held to be unconstitutional taking).

Moreover, courts have repeatedly declined to adopt bright line rules in regulatory takings cases, instead preferring highly fact-specific, case-by-case analysis, thus limiting anyone's ability to predict with substantial confidence whether a particular regulation results in an unconstitutional taking under a particular set of circumstances. *See Penn Central Transportation*

*Co. v. City of New York*, 438 U.S. 104, 124 (1978) (characterizing takings analyses as "essentially ad hoc, factual inquiries"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (a regulation may require compensation under the Takings Clause where either all economically beneficial use is eliminated, or, where certain factors are present, including, *inter alia*, significant interference with reasonable investment-backed expectations of property owner).

In the present situation, a challenger could almost certainly counter those arguments likely to be relied upon by the County, namely, that merger has already occurred pursuant to the "merger doctrine," *see Mueller v. People's Counsel for Baltimore County*, 177 Md. App. 43 (2007) (identifying circumstances that may preclude applicability of merger doctrine, despite fact that contiguous parcels are under same ownership at relevant time); that lots are "unbuildable" and thus valueless, *see Erb v. Md. Dept. of Environment*, 110 Md. App. 246 (1996) (where landowner's request to install traditional septic system on property was denied, no taking has occurred so long as landowner may explore and pursue alternative septic technologies); or that the merger provision does not result in the denial of all economically beneficial/productive use of the land, *see generally, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *see also Palazzolo*, 533 U.S. at 631 ("State may not evade the duty to compensate on the premise that the landowner is left with token interest").

There is also a potentially cognizable claim in this case that the QAC ordinance constitutes an arbitrary, unreasonable, and unauthorized exercise of the police power. As a rule, a municipal corporation may not, in the exercise of police power, impose restrictions on the free, full, and lawful use of private property, unless the imposition of such restrictions serves a permissible purpose. Notably, a municipality cannot, under the guise of exercising the police power, impose restrictions on land use that serve an impermissible purpose, such as, for example, limitations meant to "effectively restrict population to near present levels," *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369, 1384 (D. Md. 1975) (quoting *Concord Township Appeal*, 439 Pa. 466, 474 (1970)); *accord, Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653 (1959). Perhaps more importantly, it has been recognized in Maryland that "[z]oning [which is an exercise of the state's police power] cannot be used as a substitute for eminent domain proceedings so as to defeat the constitutional requirements for the payment of just compensation," 23 M.L.E. Zoning and Planning § 4.

The County's purported "notice requirement" will not necessarily preclude future purchasers from asserting constitutional claims. Noting that there is no "expiration date on the Takings Clause," the Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001) expressly rejected the notion that buyers or successors in title are barred from claims disputing the constitutionality of a zoning regulation simply because they purchased or took title with knowledge of the regulation's existence. *Id.* at 626.

In conclusion, it is likely that all of the above arguments (and perhaps others) against the QAC lot merger ordinance will eventually be asserted in legal proceedings. If any of these claims succeed, the County may amend or withdraw the regulation, which could certainly lead to

a surge in development, or, in the alternative, exercise its power of eminent domain, which will require the payment of just compensation to affected landowners. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 321 (1987).