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# COMMONWEALTH of VIRGINIA

**K. Marshall Cook**

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## Office of the Attorney General

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August 10, 1990

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My detlr Ms. Pandak:

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You ask certain questions requiring an Interpretation of SS 4.2(7)(b) and 4.3(B)(2) of Part IV of the Chesapeajce Bay Preservation A-re& Designation and Mannement Regula- tions, VR 173-02-01 (the "Regulations"). 6:1 Va. Reg3. Reg. 11, 16, 17-18 (1989) ("6tl Va. Regs.').

### 1. Applicable statute and Regulations

Section 10.1-2115 of the Code of Virginia, a portion, of the Chesapedke Etay Presm- Ar')ation Act, SS 10.1-2100 through 10.1-2115, provides that the Act "shan not dffect :7 eated rights of any landowner under existing law.'

The Chesapeake Bay Local A-ssistance B@oard has promulgated the Regulations pur- suant to S 10.1-2107(A) to 'establish criteria for use by local governments In -granting, denying, or modifying requests to rezone, subdivide, or to use'and develop land In' Ches- apeake Bay Preservation Areas designated by the locality.

Section 4.1(A) of the Regulations provides that the land use and development per- formance criteria 'become mandatory upon the local program adoption date.' 6il Va. Re .ga., *Supra*, at 15-16. The local prog7rarn adoption date Is the date a local government meets the requirements of having (1) a map delineating Chesap-eake Bay Preservation Areas In the locality, and (2) performance criteria applying In Chesapeake Etay Preserva- tion Areas In that locality that employ the requirements of Part IV of the Regulations. *Sao* 6il Va. Reg@s., *supm* PL 4 S 1.4, at 12; Pt. 11, S 2.2(A)-(B), at 14.

S-ection 4.2(7)(b) of the Regulations requires that any new comtruction must

provide a reserve sewage disposal site with a capacity at least equal to that of the primau sewage disposal site. This reserve sewage disposal site requirement sh&U not apply to any lot or parcel recorded prior to the effe,-,- tive date of these regulations, and which lot or parcel Is not sufficient In capacity to accommodate a reserve sewage disposal site, as determined by the local health department.

6:1 Va. Regs.,supra, at 16.

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Section 4.3(B) of the Regulations provides that when the application of the required buffer area in a Resource Protection Area

would result in the loss of a buildable area on a lot or parcel recorded prior to the effective date of these regulations, modifications to the width of the buffer may be allowed in accordance with the following criteria

- a. Modifications to the buffer area shall meet the minimum necessity to achieve a reasonable buildable area for a principal structure and necessary utilities.
- b. Where possible, an area equal to the area encroaching the buffer area shall be established elsewhere on the lot or parcel in a way to maximize water quality protection.
- c. In no case shall the reduced portion of the **buffer area be less than 50 feet in width.**

6:1 Va. Regs., supra, at 18.

Section 6.5 sets October 1, 1989, as the effective date of the Regulations. 6:1 Va. Regs., supra Pt. VI, at 24.

## II. Adoption of Local Ordinance Tringlers Drainfield and Buffer Requirements

Your first question is whether the reserve sewage drainfield and full buffer area criteria should be applied to lots that were recorded after October 1, 1989, but before the adoption of an ordinance implementing the requirements of the Regulations.

Until a locality adopts an implementing ordinance, there are no Chesapeake Bay Preservation Area criteria to apply to lots in that locality. The Regulations are not self-executing on landowners. Section 4.1(A) provides that the criteria become mandatory upon the local government's adoption date. 6:1 Va. Regs., supra, at 15-18. It is my opinion, therefore, that the criteria only affect a landowner after they are adopted by local ordinance.

Upon adoption of an ordinance, reserve drainfield and full buffer area requirements apply to all lots except lots recorded prior to the effective date of the Regulations that either (1) already are vested under a traditional vesting analysis, or (2) fall within the exception in S 4.2(7)(b) or S 4.3(B)(2), quoted above.

Buffer requirements provide that a 100 foot buffer area shall be retained if present and established where it does not exist. However, "a combination of a buffer area not less than 50 feet in width and appropriate best management practices [to achieve the purposes of the Resource Protection Areas] at least the equivalent of the 100 foot buffer area may be employed in lieu of the 100 foot buffer." 6:1 Va. Regs., supra S 4.3(B), at 18.

Under a traditional vesting analysis, vesting occurs when a building permit has been issued, or if no building permit has been issued, when an owner has incurred substantial good-faith expenditures based on local approval of his plans for development. See *Fairfax County v. Adedical Structures*, 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972) (where special use permit was granted under existing zoning, bona fide site plan was filed and diligently pursued, and substantial expense was incurred in good faith before change in zoning requirements, permittee had vested right to land use described in use permit). See also 1989 Att'y Gen. Ann. Rep. 32. A vested project may be completed as permitted, even though it cannot comply with current requirements.

### III. Lot 5 Recorded Prior to October 1, 1989 - Have Limited Vested Rights

Your second question is whether a landowner's rights to use of a lot have vested with respect to the reserve drainfield and buffer requirements where (1) the lot was subdivided before the effective date of the Regulations, but (2) the lot was not developed before the adoption of the local ordinance, and (3) no plans for development of the lot had been submitted to the locality for approval prior to the time of local ordinance adoption.

As provided in §§ 4.2(7)(b) and 4.3(13)(2), a lot that was recorded prior to October 1, 1989 but was not developed before adoption of the local ordinance, and cannot meet the reserve drainfield and full buffer requirements of the local ordinance and still retain a usable building site, does not have to meet those requirements, or in other words, is vested as to those requirements. If the lot can be built upon and still meet the reserve drainfield and full buffer requirements, however, the exceptions and modifications in §§ 4.2(7)(b) and 4.3(B)(2) do not apply. 6:1 Va. Regs., -vimp, at 16, 18.

You also ask whether an owner who, before October 1, 1989, recorded a lot on which it is feasible to establish a reserve drainfield and buffer, and who has submitted plans for development of the lot that have advanced far enough in the development process to be vested under a traditional vesting analysis, is required to comply with the Regulations. A prior opinion of this Office concludes:

[T]he owner has established a vested right to use the land for the purpose approved by the county, subject to the requirement that he comply with the new requirements to the greatest extent possible. Because nonconforming uses are contrary to public policy, they are protected only to avoid injustice and that is the limit of their protection against conformity. A lot large enough to contain a vegetated buffer, therefore, must have such a buffer reserved, even though the owner has a vested right to use the parcel if the buffer requirements could not have been met.

<sup>2</sup>Note that § 4.3(B)(2) authorizes a reduced buffer area, not the elimination of all but - See supra note 1.

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1989 Attly Gen. Ann. Rep., 3upra, at 36 citations omitted). Based on similar reasoning, I am of the opinion that an owner must comply with the reserve drainfield and buffer requirements on lots on which It Is feasible to meet those requirements, even If the own- er's rights to use of the property might otherwise be vested under a traditional vesting analysis.

IV. Date of Common Law Vesting Is Date of Lo@cal OrdinaLnce Adoption

Your final question Is what date the locality should use to determine vesting Issues. 13ecause, as discussed In Part I above, the Regulations take eff act only updh the adoption of a local ordinance, It is my opinion that the date of adoption of the local ordin&nce is the determinative date for analyzing a particular owner's common law vested rights. October 1, 1989 is the relevant date only for determining whether lots that were re- corded before that date, but that cannot meet the reserve drainficid and full buffer requirements, are elloble for the exceptions and m"fications discussed In PartIU above.

With kindest regards, I am

Sincerely,

Mary Sue Terry  
Attorney Gen4@ral

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