



*Queen  
Anne's  
County*

**DEPARTMENT OF PLANNING & ZONING**

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**BACKGROUND MEMORANDUM**

DATE: APRIL 12, 2022

TO: QUEEN ANNE'S COUNTY COMMISSIONERS

FROM: ALAN QUIMBY, DIRECTOR, DEPARTMENT OF PUBLIC WORKS  
AMY G. MOREDOCK, DIRECTOR, PLANNING AND ZONING  
STEPHANIE JONES, PRINCIPAL PLANNER

SUBJECT: GROWTH AREA DECISIONS  
2022 QUEEN ANNE'S COUNTY COMPREHENSIVE PLAN AND  
KENT NARROWS COMMUNITY PLAN

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**Introduction:** The 2022 Queen Anne's County Comprehensive Plan and Kent Narrows Community Plan were introduced on January 25, 2022, opening the public record for comments. We would like to offer the following details in regard to the two Plans before you.

Overall, the lack of sewer capacity at the Kent Narrows/Stevensville/Grasonville Wastewater Treatment Plant (KNSG WWTP) has constrained the Comprehensive Plan and the Kent Narrows Community Plan. The existing 3 MGD capacity at KNSG is now nearly fully obligated. The resulting estimates conclude that there is an insufficient amount of capacity available to meet the goals of the current Comp Plan and desires of local landowners. Details of explorable short-term and long-term options to potentially resolve this issue are outlined in the [Water Resources Element and Chapter 4: Land Use](#).

The County requested a legal opinion in order to reconcile the lack of sewer capacity against the citizen requested expansion of the current Growth Area and possibly even a reduction of the current Growth Area. It was essential that County receive legal guidance in light of comprehensive rezoning requests to increase the County's Growth Areas, as well as requests to increase residential density. **The bottom line of that legal opinion articulated that the County is compelled consider these land use decisions in light of a sound assurance that adequate public services can be provided within a reasonable timeframe.** This legal guidance is attached for your reference.

**Rezoning Requests:** The Technical Advisory Committee, comprised of staff, offered guidance and recommendations for each of the 48 comprehensive rezoning requests to the Planning Commission for consideration at its 8 July 2021 meeting. While the Planning Commission and staff agreed on most of the requests, the Planning Commission disagreed with the Technical Committee recommendations and opted to expand the Growth Area. (It should be noted that the legal opinion received regarding this matter was received *after* the Planning Commission review.) Having updated the Planning Commission with the results of that legal opinion and providing a thorough public explanation of the federal and state requirements which constrains the ability of local sewage treatment plants to expand capacity (i.e.: TMDLs), there is now

a better understanding of the impacts of that treatment capacity constraint on the current comprehensive planning exercise.

The issues before the County Commissioners now include your consideration and final votes on the 48 Comprehensive Rezoning Requests (which are characterized in the Wallace Montgomery Status Briefing Memo #18). As noted above, in general, the Planning Commission and the Technical Committee were in agreement on all requests but three – all three of which were requests for Growth Area expansion.

**Growth Area Expansion Requests:** In total there were four Growth Area expansion requests presented.

One of those four appropriately recognizes the results of past litigation and the Planning Commission's favorable recommendation should be supported.

1. CRR 45: Kent Island, LLC – Bay Bridge Cove, Stevensville
  - The Technical Advisory Committee supported the Growth Area expansion for this parcel as it is in fact almost already fully developed to Growth Area standards pursuant to a November 5, 2007 order of the Circuit Court to immediately provide water and sewer service.

Regarding the other 3 applications, and the legal opinion following the Planning Commission's recommendations, the County is in a position to consider rejecting the Planning Commission recommendations. To do otherwise, in accordance with the legal opinion, places the County at risk of liability in 'promising' to provide an essential service which it cannot readily provide within the time horizon of this Plan. In addition, the Commissioners should consider even shrinking the Growth Area in Chester which is a location at which a project has consistently received well-documented confirmation that public sewer (public infrastructure) is insufficient. See below for thorough explanations of these three requests.

2. CRR 02: Dream Farm, LLC c/o Tracy T. Schulz – Map 57, Parcel 68, 200 Dream Farm Lane, Chester
  - The Technical Advisory Committee opposed expansion of the Growth Area due to nearing limits of adequate public facilities including transportation infrastructure, school capacity, and sewage capacity permit restrictions at the KNSG WWTP.
  - Development meeting Growth Area densities would require considerable Critical Area Growth Allocation.
3. CRR 05: Chesterhaven Beach Partnership, LLP – Map 57, Parcel 25, 2501 Piney Creek Road, Chester
  - The Technical Advisory Committee opposed expansion of the Growth Area due to the fact that nothing has materially changed since the original removal from the Growth Area in 2007. Note: transportation and infrastructure (sewer capacity) have become worse.
  - There are already 180 legal lots of record on this parcel.
  - Sewer allocation has been granted for the 180 lots, and a nonrefundable deposit to DPW has been submitted.
  - Including the parcel in the Growth Area makes it eligible for County water and the potential of an intensification of the property beyond what the sewer allocation envisioned at its granting.
4. CRR 07: Cliff and Danielle Lowe – Map 48, Parcel 11, Walker Road, Stevensville
  - The Technical Advisory Committee opposed expansion of the Growth Area due to nearing limits of adequate public facilities including transportation infrastructure, school capacity, and sewage capacity permit restrictions at the KNSG Wastewater Treatment Plan. This parcel is also included in the Priority Preservation Area.

**Growth Area Reduction Considerations:** There is, likewise, potential for shrinking the Growth Area. The attached legal decision addresses the need to consider this action as well. The following parcels should be considered for removal/alteration from the Stevensville/Chester Growth Area. These parcels, and only these parcels, are zoned Neighborhood Village Center District, NVC.

5. Dream Farm LLC. - Map 27, Parcel 68 (roughly 16 ac): The northwest portion of this parcel is included within the Stevensville/Chester Growth Area. CRR 02 has requested that the remaining portion of the parcel (138 ac) be included within the Growth Area.
6. Lowery, John Claude Jr. & JoAnn – Map 57, Parcel 43, Lot 1 (17.216 ac)
7. Lowery, John Claude Jr. & JoAnn – Map 57, Parcel 43, Lot 2 (52.0 ac)
8. Gardner's Purchase Inc., - Map 57, Parcel 39 (10.602 ac): Should this parcel remain within the Growth Area to serve mixed use infill opportunities, the zoning should be changed to NC-8 during the Comprehensive Zoning Update to remove the NVC District.



There are several options for consideration of the removal of these parcels from the Growth Area:

9. Completely remove all four parcels from the Growth Area in their entirety and rezone them Countryside.
10. Remove 3 parcels (43 (lot 1), 43 (lot 2), and 68) from the Growth Area and rezone them Countryside. Retain parcel 39 and rezone it NC-8.
11. Allow the portion of the parcels which are directly adjacent to Route 18 to be rezoned Town Center in line with the existing parcels that are zoned Town Center (see red outline) to be Commercial & Mixed Use and eventually zoned Town Center. This would be consistent with previous zoning history.

**Kent Narrows Community Plan:** The Kent Narrows Development Foundation has requested that stand-alone apartment use (not affiliated with a mixed use development as is currently allowed) be added to the Kent Narrows Community Plan for the intent to have the permitted use added to the Waterfront Village Center, WVC District, as a conditional use. This would not be consistent with the Queen Anne’s County Comprehensive Plan or the Kent Narrows Community Plan and would require the purpose of the WVC District to be altered for a single property. The Technical Advisory Committee did not support the proposal for the following reasons.

#### Queen Anne’s County Comprehensive Plan

- As noted above the County is very limited to how it is going to utilize sewer capacity in the near future.
- The Comp Plan directs the County to manage the KNSG capacity limit by reserving sewerage capacity for commercial development projects, in fill projects, and redevelopment projects—to include focusing redevelopment efforts on abandoned, derelict sites.

#### The Kent Narrows Community Plan

- Water and Sewer section outlines the KNSG capacity constraint as noted above.
- The support for mixed use development is called out throughout the KNCP.

#### Article IV Special Kent Narrows Tax District (SKNTD)

- The WVC zoning district is inextricably linked to the SKNTD and has been enacted in accordance with MD Annotated Code. All properties located within the WVC are subject to the special tax assessment unless they are identified as exempt under § 5-12 (Definitions). Exempt properties include 1) property owned by federal, state, County, or local governments or their agencies; and **2) property used solely for residential purposes.** If sole residential properties are included as a permitted use, they will not be subject to the tax, not meeting the overall intent to generate revenue, and yet will benefit from the taxing proceeds.

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September 14, 2021

Todd R. Mohn, PE  
County Administrator  
Queen Anne's County  
107 N. Liberty Street  
Centreville, MD 21617

Re: Sewer capacity limitations  
in light of recent  
Federal and State regulations

Dear Mr. Mohn,

I am writing in response to four questions you have raised in connection with the impact upon the Queen Anne's County comprehensive planning and land use approval process as a result of limitations on the sewer capacity of the Kent Island sewage treatment facility due to regulations adopted by the EPA and the State of Maryland. For purposes of this letter, the primary impact of those regulations is that, due to strict nitrogen discharge limitations, the Kent Island facility's remaining capacity to serve new development is limited, and the County's ability to expand the capacity has been severely circumscribed. Currently, there is no known technology to substantially increase capacity that would not run afoul of the new regulations.

I will begin the analysis by stating the constitutional principles that govern the ability of local government to limit or control the use of land by zoning and other land use regulations. Under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, private property shall not be taken without due process of law, nor shall it be taken without just compensation. (*Tahoe-Sierra v. Tahoe Regional Planning*, 535 U.S. 302, 2002) The taking of property by a government has been interpreted over the years to be in various forms. Traditionally, the act of physically acquiring a private property for a public use, such as a municipal building, a school, or a road would be considered in the application of the constitutional requirements. The evolution of takings law has further expanded to include land use regulation by government that impacts the use to which a property owner can put his or her property. (*Lingle v. Chevron, USA*, 544 U.S. 528, 2005) The baseline constitutional rule is that government ordinarily cannot through land use regulation deprive an owner of all substantial, beneficial use of property. (*Q.C. Construction v. Gallo*, 649 F. Supp 1331, 1986).

You have posed four questions necessary to guide the County in the land use decisions it must make in response to the new environmental regulations. I will address each of your questions in turn.

Does the County's Adequate Public Facilities Ordinance give us the ability to stop forever or until such time that we expand the plant?

No. Federal and state case law is settled that, while a government may halt specific development because of an absence of public infrastructure for some measure of time (and the different cases in different jurisdictions vary widely on what that amount of time is), the government can do so only if it has a plan in place to deal with the situation giving rise to the delay, and the halt must be limited in duration and must be reasonable in its response to the situation. Where the government does not have a plan in place, and/or there is no expectation that the delay will be limited to some quantifiable duration, the courts are likely to find that a taking has occurred. (*First Evangelical Church v. Los Angeles*, 482 U.S. 304, 1987; *Smoke Rise v. WSSC*, 400 F. Supp. 1369, 1975).

The practical problem facing the County is that, under current technology, there is no definitive event horizon to which the County can point to say that development will no longer be hampered by sewer restrictions. As a result of the federal and state regulations, the County cannot at this time take the position that it has a plan in place to address the sewer capacity limitations. Nonetheless, it is a reality with which the County must now deal. The County must establish land use regulations that afford each property owner substantial, beneficial use of his or her property. A property cannot be placed in a Growth Area where development is permitted only when public sewer is available, if there is no reasonable expectation that public sewer can be provided in the reasonably near future, and there is no plan to finance and construct sewer capacity in the reasonably near future. In this circumstance, the property must be placed in a land use designation and zoning classification in which the owner has an opportunity to make substantial, beneficial use of the property. It should be noted that, there is no requirement that the permitted uses be the most valuable or productive potential uses of the land. (*Pulte Homes v. Montgomery County*, 271 F. Supp 3d 762, 2017) There is no reasonable timetable that the County can place on the halt of development because there are no metrics available to indicate when technology might improve to accommodate increased capacity at the Kent Island facility.

Discussion of removal of properties from the Growth Area (that don't have sewer)

I believe that the practical way to deal with the new restrictions is to amend the Growth Area plan to reflect the new reality. Under Maryland law, the Queen Anne's County Commissioners have the ability to "adopt, modify, remand, or disapprove" the Growth Area plan as it currently exists, as promulgated by the Planning Commission. (MD Land Use Code §3-204). Obviously, this must be done at a public hearing held after the appropriate notice has been given.



As of this writing, the County has a list of several dozen applicants, covering nearly 50 properties, seeking to be included in the Growth Area as currently contemplated. One of the many responsibilities of the Planning Commission and the County Commissioners in the comprehensive planning process is to provide appropriate land use designations. As it seems impossible at this time to approve all of the applications, it is appropriate for the Planning Commission and the Commissioners to provide land use designations based on empirical data that allow each property owner to make substantial, beneficial use of his or her property. This means that a property should not be given a land use designation in the Growth Area which would require the existence of public sewer if there is no logical, reasonable plan in place for the provision of public sewer in the reasonable and foreseeable future. I believe that it is not only within the authority of the Planning Commission and Commissioners to remove properties where there is no reasonable expectation of providing public sewer, but that they are compelled to do so, in order to ensure that property owners can make substantial, beneficial use of their property.

Our discussion of removal of properties eligible for development must include, however, consideration of the existence of vested rights. Under Maryland law, a property owner can obtain vested rights in a certain improvement or use of a property in two distinct ways: vested zoning rights and vested contract rights. Vested zoning rights are obtained by beginning substantial construction on an improvement pursuant to a valid building permit. (*Prince George's Co. v. Sunrise Dev.*, 330 Md. 297, 1993). Vested contract rights, on the other hand, can be obtained when (1) a law authorizes the government to enter into a contract to establish or freeze a specific zoning or land use, and (2) the government validly enters into the contract by complying with all applicable procedures and formalities. (*Mayor and City Council of Balto. v. Crane*, 277 Md. 198, 1976). Depending on the situation specific to each property, it may be the case that an owner has the right to proceed with development under the current Growth Area and zoning, either in light of where they are at in the construction process, or in light of contractual agreements made between them and the County. The existence of vested rights must be carefully analyzed in establishing land use designations, including the Growth Area.

#### Discussion of adding properties to the Growth Area

My understanding of the current sewer capacity, relative to the federal and state guidelines, is that there exists some capacity – just not enough to accommodate the magnitude of development otherwise contemplated in the Growth Area. It is my belief that the County certainly may allocate the limited resources of the sewage treatment facility in a manner that most effectively maximizes that capacity. Even given the physical limitations of the facility, it appears that there is the possibility of limited development. Allocation of that capacity must be made, however, in a reasonable manner consistent with the County's goals for growth. For example, the consideration of this allocation can include factors such as which properties fall in Priority Funding Areas, since this might include substantial State contribution of funds. Furthermore, a property owner can obtain a vested contract right in sewer capacity allocations where a lawful contract has been executed by the property owner and the government. (*Farmer v. Jamieson*, 31 Md. App 37, 1976; distinguished in *Calvert County v. East Prince Frederick Corp.*, 80 Md. App 78,

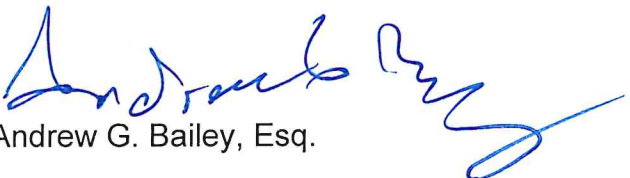
1989; *cf Crane, op cit*; 6 MLE, Counties §61). A contractual vested right in sewer allocations supported by existing capacity may militate in favor of including a property in the growth area because the capacity to support development already exists.

Can the Comprehensive Plan include "planning areas" that are sort of in the Growth Area, just not eligible for sewer until we figure out the expansion question

Similar to the discussion in the first and second sections above, the County should be wary of creating expectations in the absence of a logical plan to meet those expectations. Without a tangible plan in place to deal with the sewage capacity issue, including properties in the Growth Area (or a deferred growth area) that cannot be served by sewer invites takings claims in the future by owners seeking compensation. Land use designations requiring public sewer infrastructure before development can occur must be carefully planned and based on empirical data and analysis. I am aware that municipal corporations are specifically authorized to establish growth areas and deferred growth areas. County Commissioner counties do not have a similar express authorization. I believe that the legislature concluded that the establishment of deferred growth areas is appropriate in the context of municipal corporations where the provision of public sewer and water is typical and into which properties are routinely annexed to obtain public sewer and water. (Md. Code, Land Use Article, §3-112).

Thank you for the opportunity to have assisted in this matter. Please feel free to follow up with any additional questions or concerns.

Best wishes,

  
Andrew G. Bailey, Esq.