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Lt. Governor



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**STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS**

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December 29, 2010

Richard B. Ladd, Chair
Anne Arundel County Council
Arundel Center
44 Calvert Street
Annapolis, Maryland 21404 - 2700

RE: Experience of the Critical Area Commission (CAC) with the Anne Arundel County Board of Appeals (AA BOA, BOA or Board)

Dear Mr. Chairman:

Congratulations on both your recent election to the County Council and your election as Chairman. As you begin your term of service to the citizens of Anne Arundel County, I wish you great success in all your endeavors.

I recently had the opportunity to review a tape of the County Council proceedings on December 20, 2010 in which prospective members of the AA BOA appeared as a part of the Board selection process. You very graciously allowed additional time for the submission of further comment, and I am writing in response to the information provided that evening regarding the experience of the CAC when appearing before your BOA.

Of great concern is the misimpression that the CAC withdrew from participation in BOA proceedings last year simply because of one adverse ruling on the expertise of one of our staff members. Please be assured that the CAC does not operate that way. Rather, as more fully set forth below, in 2008 a careful review of longstanding patterns of Board members' behavior brought us to the conclusion that staff time would be more effectively spent elsewhere.

However, in light of a new County Council and an upcoming newly constituted BOA, it is my hope that we can all work together to fashion a more equitable Board process that is based on professional and personal respect, constructive conflict resolution, and resource preservation goals.

Background

I regret to inform you that, unfortunately, over our many years of testifying before the BOA there have been multiple instances of certain BOA members' disrespectful treatment of our staff members as well as a general disregard of the Critical Area Program. After a particularly unsettling experience in May of 2008 at the *Hagberg* hearing, our office determined that we would no longer subject our staff to the taunts that had become the norm. We also determined that, given our already stretched staff resources, our time and effort would be better spent working on issues where we would have a more meaningful impact, rather than testifying over and over to no avail before a board whose members openly expressed disdain for our testimony. This decision regarding staffing priorities did not result from just that one hearing; the *Hagberg* hearing was "the last straw." Since then, our practice has been to submit written testimony only and, in the event of an adverse BOA decision, we then evaluate an appeal on a case-by-case basis.

In May of 2009, one of our natural resource planners received a subpoena to testify regarding our position in the *Rabena* case, which was the case cited last Monday evening. In response to the comments made at that time, I have reviewed the *Hagberg* hearing transcript, I have listened to the recorded *Rabena* proceedings¹, and I have reviewed staff and counsel notes on these proceedings. Based on that documentation, I would like to set out some additional aspects of those hearings in order to apprise you and other members of the County Council more fully of the CAC experience before the BOA². Please note that all of my attempts to resolve these differences³ have proven unsuccessful⁴.

¹ These are but two of the cases heard each year by the AA BOA, but, given the level of dysfunction apparent in these cases, one cannot help but inquire as to what other abuses occur on a regular basis. In fact, the attorney for the BOA told me (via a phone conversation in November of 2009) that CAC witnesses are treated better than most other witnesses before the Board. Given the consistently disappointing level of our experience, it certainly does not bode well for those other hearings.

² Not all members of the BOA have expressed contempt for the CA Program. In our experience, the conduct of three members has consistently been the most troublesome – Chairman William Knight, John Boring, and Arnold McKechnie.

³ After the BOA issued its *Rabena* decision in September of 2009, I attempted to meet – first with Chairman Knight and then with the entire Board, not with individual Board members one at a time -- to resolve some apparent misunderstandings of our Program and its functions and to request behavior changes so that our two government agencies could work together more productively. All my efforts, which continued through November of 2009, were rebuffed. At their public meeting on December 4, 2009, without notice to me before or after that meeting that my request would be or had been a part of their agenda, the BOA vehemently refused to meet to discuss any of the matters I had raised via phone, first with the Chairman and then with the Board's attorney. Also, in the Spring of 2010, I met with then-Chairman Ed Middlebrooks of the AA County Council, but nothing came of that meeting.

⁴ A single variance case is not the forum to ask questions or state complaints, let alone belligerent questions or complaints, regarding how the CA Program operates, what its priorities are, why past cases called for certain mitigation, or why other cases the BOA decided were overturned on appeal. These are the sort of policy issues that could be discussed in a more productive forum, such as an inter-agency meeting between the CAC and the AA BOA or perhaps an education session, but the BOA refuses to participate in this sort of meeting. Please note that the CAC has frequently met with BOAs in many other jurisdictions to discuss similar policy issues.

As a preliminary matter, some members of the BOA do not appear to understand how various government agencies interact. Likewise, they seem to reject the statutory obligation of the CAC to oversee the implementation and enforcement processes of each local program. Rather than the perspective of state and local partner agencies, each with its own role in implementation of the Critical Area Law, as is the case in most of the other jurisdictions with an approved local Critical Area program, some members of this Board have taken on an adversarial stance with the CAC, and an atmosphere of contempt has permeated the proceedings in which we have appeared. The following instances occurred during the *Rabena* hearing:

- Question taunting CAC staff regarding how many permits the CAC issues. (Answer: None. Permit issuance is a function of the local government's program, not the state agency.)
- In an argumentative tone to the CAC staffer: "Your Program has no teeth and there is nothing you can do....."
- "We don't care what you have to say."

Specific Instances of Concern

With respect to specific BOA members, as you well know, the chairman of a government body is the linchpin of that body; it is the chairman's responsibility to conduct fair and impartial hearings. Yes, boards of appeal are authorized to establish their own rules of evidence and to develop flexible standards for framing a record, but under Mr. Knight's leadership this BOA provides broad latitude to some parties but not to others.

- For example, in *Rabena*, one party advocating for the development project that the CAC opposed was allowed to conduct an extremely hostile, sometimes even demeaning, cross-examination of the CAC witness on issues that were irrelevant to the case at hand (such as her knowledge and opinion of a certain Court of Appeals decision). The Chairman did not restrain him in any way. It is significant to note two conversations that occurred subsequent to the *Rabena* hearing: first, one BOA member advised the CAC staffer that she could file a complaint because of how badly she had been treated; and second, the attorney himself later apologized to the CAC staff person and admitted that he had "lost control."
- Also in *Rabena*, the BOA Chairman literally stood up and screamed at the attorney for Rabena's neighbors (who opposed the requested variance) when that attorney asked for a five-minute recess: "Sit down. You have worn my patience thin. Three days of nothing... I am getting tired of this nonsense!" when that attorney asked for a five-minute recess. The BOA Chairman told the neighbors' attorney that he was through listening to him, and as a result he would make him sit there until the entire hearing was over, without any break. Note that the hearing that evening had gone much later than planned, and the attorney wanted to make a phone call to arrange for child care. Mr. Knight himself later admitted getting "a little excited" with him, but the case "had gone on long enough." However, the length of the hearing at that point was due to the applicants' case taking three evenings; the neighbors were just getting started with their case in opposition to the variance.

- In addition to the instances set out above, these are some additional comments by Mr. Knight during the *Rabena* hearing:
 - “We see this all the time – minimum necessary, minimum necessary (in a derisive tone)... That’s the answer I expected.” (The CAC witness was trying to explain a statement in her letter regarding the size and location of the house and the septic reserve area on the property – that is, her analysis in the context of one of the legal requirements related to the granting of a variance for unwarranted hardship.)
 - In a dismissive tone, “Her letters are just comments. She has no basis for knowing if the CAC objects to this variance.” (This was in the context of whether he would accept the CAC witness’ capacity as an agent to represent the position of the CAC in that case.)

As for Mr. Boring, both his behavior and his verbal exchanges with our witnesses signal a general lack of respect for the matters before the Board, in particular Critical Area cases, and the individuals presenting those cases.

- Over the years he has frequently turned his chair around with his back facing a witness to indicate his disdain for that testimony.
- The BOA attorney and Mr. Boring laughed when the BOA attorney mockingly imitated the CAC staffer during a short break in the *Rabena* hearing.
- After lots of questions regarding the CAC process of deciding which cases to get involved in, the role of the staff, the role of the CAC Chair, and the role of the Office of the Attorney General, Mr. Boring, in a jeering remark addressed to our then-Assistant Attorney General, dared Attorney General Gansler to come and explain how and why certain cases “get picked.” “... every time we turn around we’re...getting spanked by the Court.” *Hagberg*

Likewise, there are several instances of questionable conduct by Mr. McKechnie.

- In *Rabena*, “You just take this application and ‘hm, ho’ you don’t check the state law, you don’t check What DO you check??? You don’t look at ANYTHING, you don’t bounce it against any kind of laws or codes, do you?” These questions, spoken in a mocking tone, were in the context of septic requirements, which are not within the oversight of the CAC but rather the local health department, upon whom the CAC witness relied in her evaluation of where the septic system could be placed.
- Note that the CAC does not approve plans or grant permits because the CA Program was not set up that way. But Mr. McKechnie badgered the CAC witness, “What percent of plans are approved?” (There is no way that the CAC witness would have access to that information since permits are issued by the County.) “Does a taking have any bearing on what the Commission approves? A house was approved in total wetlands in Shadyside, what about that?” (Wetlands were irrelevant to this case; furthermore, the Maryland Department of the Environment grants wetland permits, not the CAC.) “How do you go ahead and make suggested changes to plans if you are not aware of health department regulations?” (The CAC relies on the expertise of the health department to interpret its own regulations.) All of these questions were asked rapid fire, with no time for any response.
- Out in the hallway, in commenting to another BOA member regarding the CAC staff: “They don’t do their job and then they come in here and they just sit there....”

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Conclusion

Certainly there are many possible avenues to arrive at an improved resolution of these matters, and I trust that you and the other County Council members will ascertain the best way to proceed. In that light, I offer a few options for your consideration, most of which pertain to both the BOA members and their attorney. First, the most pressing matter – before County Council appointments are made, I request a thorough and objective evaluation of the current BOA candidates. In the longer run, I would suggest that you institute specific safeguards to ensure greater accountability throughout the course of public service, including specific objective criteria by which to make appointments, evaluate job performance, and consider discharge. Second, although state law requires certain training for boards of appeal, the existing course does not provide in-depth coverage of variances, let alone the specific criteria underlying a Critical Area variance. Moreover, of particular benefit would be regular ongoing education regarding the legal role and function of a board of appeals, appropriate conduct for a board, and all the substantive areas of the law in which the BOA decides cases.

This has been a difficult letter to write. The significant and longstanding “disconnect” between the CAC and the AA BOA has long been a matter of grave concern, and it will not be easily resolved. However, as we stand at the beginning of your County Council term, as well as at the beginning of the BOA term, I do have hope that the County will “turn a corner” and take a new approach. As you know, so much is at stake: every day newspaper headlines remind us of the rapid decline of our state’s precious water resources, and, given Anne Arundel County’s extensive coastline combined with intense development pressure, a large number of Critical Area cases originate here. For the sake of the Chesapeake Bay, there is no time to lose!

History has shown that, as a state-local partnership, the resource preservation goals of the Critical Area Program are best achieved when all parties openly communicate and work together toward those same goals. Civility is where this must begin.

Please feel free to contact me if I may be of any further assistance in this regard.

Sincerely,



Margaret McHale
Chair

cc: Derek J. Fink, Vice-Chair
Daryl D. Jones
John J. Grasso
G. James (Jamie) Benoit, Jr.
Christopher J. Trumbauer
M. Geral (Jerry) Walker