

September 28, 2021

**By First Class Mail**

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**Re: Talbot County Council Resolutions 281 and 308**

Dear Messrs. Briggs, McConnel & Smith:

You have asked us to consider three matters relating to Talbot County Council Resolution 281. We have reviewed the Talbot County Council's potential rescission of Resolution 281 through Resolution 308 and the Planning Commission's potential rescission of its certification of Resolution 281 for consistency with the County's Comprehensive Plan. Based on our review of facts available to us and applicable law, we conclude as follows:

Does the Talbot County Council have the authority to rescind Resolution 281, and, if so, would Resolution 308 accomplish this?

**Yes and yes. The County Council unquestionably is authorized to rescind Resolution 281. Particularly in a case where new facts have come to light or a resolution was based on material assertions of fact that have turned out to be inaccurate or incomplete, the Council not only has the authority to rescind the resolution under Maryland common law, but a responsibility to do so. Resolution 308 would rescind Resolution 281.**

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Does the Talbot County Planning Commission have the authority to reverse or rescind its certification that was necessary for the adoption of Resolution 281?

**Yes. The Planning Commission has authority to reverse or rescind its certification. This is particularly so when new information has been revealed or the initial certification was based on assertions of material fact that were inaccurate or incomplete.**

Does the adoption of Resolution 308 effectively rescind Resolution 281's amendments to the County's Comprehensive Water and Sewer Plan, and therefore restore the *status quo* as it existed before Resolution 281?

**Yes. Resolution 308 would rescind Resolution 281's amendments and would restore the parties to the *status quo* as it existed before the adoption of Resolution 281. Resolution 281's amendments would have no legal effect after Resolution 308's enactment, so any administrative approval of those amendments by the Maryland Department of Environment would be a nullity and rendered ineffective.**

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## I. Background

In 2019 the Talbot County Council introduced Resolution 281, which proposed significant changes to the County's Comprehensive Water and Sewer Plan to accommodate the Lakeside development in Trappe. The Town of Trappe and the developer of Lakeside requested Resolution 281's amendments to the Water and Sewer Plan. If constructed, Lakeside would significantly increase Trappe's population, adding 2,500 households and a shopping center. The corresponding additional burden on the County's water and sewer infrastructure would be substantial.

Following consideration of many factors—including wastewater service to be provided in part by a new system described in a draft groundwater discharge permit submitted by Lakeside's developer and in part by an existing wastewater plant—the Planning Commission certified that Resolution 281 was consistent with the 2016

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County Comprehensive Plan. This certification was required to enable the County Council to exercise its statutorily-granted control of County water and sewer management by enacting Resolution 281. In November 2020, the Maryland Department of the Environment approved the Resolution's amendments to the County Water and Sewer Plan.

## II. Analysis

We respectfully disagree with the Acting County Attorney, who has advised the County Council that Resolution 308 would be ineffective, and that "the only way to theoretically undo Resolution 281 would now be to do another comprehensive water and sewer plan amendment." The applicable State and local law we have reviewed does not support this conclusion.

### A. The County Council is authorized to rescind Resolution 281.

Maryland law grants the County Council broad rescission authority. Maryland's highest court, the Court of Appeals, recognizes that, "As a general rule, the governing body of a local government 'has the right to reconsider its actions and ordinances, and ... rescind [an action] that has been previously adopted before the rights of third parties have vested.'"<sup>1</sup> Maryland courts afford local governing bodies great deference in determining whether rescission is appropriate.

The authority to rescind is necessary and sound public policy. Absent a County Council's authority to rescind, the Court of Appeals recognizes that legislative actions like Resolution 281 "would be frozen in time with local officials unable to react to changed circumstances or to pursue policies presently preferred over those previously adopted."<sup>2</sup> The Council's power to rescind Resolution 281 is unconditional. Changes in factual circumstances are not necessary for rescission. Legislative bodies regularly rely, though, on changes in factual circumstances or

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<sup>1</sup> *Waterman Family Limited Partnership v. Boomer*, 456 Md. 330, 344 (2017) (citation omitted); *see also Dabbs v. Anne Arundel County*, 458 Md. 331, 364 (2018); *Petrus v. Mayor & City Council of Baltimore*, No. 2368, Sept. Term, 2019, 2021 WL 689726, at \*4-5 (Md. Ct. Spec. App. Feb. 21, 2021).

<sup>2</sup> *Waterman*, 456 Md. at 344.

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material new information as a basis for rescission. Particularly if public health concerns are implicated, the Council may have a duty to rescind a previous decision given its responsibilities to the public.

The County Council's rescission authority would be constrained only if a third party had acquired vested rights based on good faith reliance on Resolution 281's enactment. We are not aware of any vested rights that have been obtained in good faith that would bar rescission. In any event, the potential existence of vested rights is a determination that must be made by a court, not the Council.

**B. The Planning Commission is authorized to reverse its certification of Resolution 281's amendments.**

While certification was a precondition to Resolution 281's enactment, Maryland law grants a "planning commission, not otherwise constrained," inherent authority to reverse a decision or recommendation based on "a showing that the original action was the product of fraud, surprise, mistake, or inadvertence, or that some new or different factual situation . . . justifies the different conclusion."<sup>3</sup> We understand that such circumstances may very well exist here. A decision to rescind the Planning Commission's certification is not necessary, of course, for the County Council to rescind Resolution 281, as the Council's power in this regard is unconditional.

**C. Rescission of Resolution 281 would return the County to the *status quo* before the Resolution's enactment.**

Enactment of Resolution 308 would operate to rescind Resolution 281's amendments and restore the *status quo* as it existed prior to Resolution 281. By eliminating the legal effect of Resolution 281's amendments, any administrative approval of those amendments would be nullified and rendered ineffective. Moreover, because the Maryland Code requires that the County submit proposed amendments to MDE before the agency considers them, the County's rescission of

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<sup>3</sup> *Calvert County Planning Commission v. Howlin Realty Management, Inc.*, 364 Md. 301, 325 (2001); *see also Cinque v. Montgomery County Planning Board*, 173 Md. App. 349, 361 (2007).

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the proposed amendments would retroactively eliminate a necessary precondition to any request for MDE approval.<sup>4</sup>

Passing another amendment is not the only way to reverse Resolution 281's amendments to the Water and Sewer Plan. Under the Maryland Code, counties—not MDE—control new development in their jurisdictions. Here, the Code delegated to the County Council decisions to amend the Water and Sewer Plan to accommodate development. This is exactly the process the Council followed in considering the request to change the Plan to accommodate Lakeside. MDE's role with respect to a county's proposed amendment to its water and sewer plan is limited to considering the county's proposal and approving, disapproving, or modifying it based on specified criteria.<sup>5</sup> Thus, if a county exercises its broad common law authority to rescind an amendment based on changed circumstances or other local factors, the Code's requirement that MDE approve or deny the amendment does not and will not stand in the way of the county's control over development. To require otherwise would entail forcing counties to move forward with development they no longer want or believe they can safely handle while protecting their environment and citizens.<sup>6</sup>

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<sup>4</sup> Maryland Code, Environment § 9-507(a).

<sup>5</sup> Maryland Code, Environment § 9-507(b).

<sup>6</sup> The lack of logic in passing a new amendment to “undo” Resolution 281 underscores that rescission—not another amendment—is the appropriate procedural mechanism to nullify Resolution 281's amendments. The administrative process that would follow any proposed amendment would have no logical application to an amendment that does nothing more than reinstate the *status quo* by reversing another amendment. Among other factors, it is unclear who, if anyone, would file the application for such an amendment; what the Planning Commission would be asked to certify; and what analysis, if any, MDE would or could conduct. Each of these mandatory steps would be a time-consuming, expensive, and ultimately futile endeavor, as the County would simply be returning to the *status quo ante*.

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For these reasons, we conclude as follows:

The County Council is authorized to rescind Resolution 281 and would do so by enacting Resolution 308.

The Planning Commission has authority to reverse or rescind its certification of Resolution 281.

Resolution 308 would rescind Resolution 281's amendments and would restore the *status quo* as it existed before the adoption of Resolution 281 and its approval by MDE.

This opinion letter is furnished to you solely for your benefit. This opinion letter may not be relied upon by any other person without our prior written consent. We very much appreciate the opportunity to provide our views on these important matters.

Very truly yours,



Mark S. Saudek  
Sam Cowin  
Ward B. Coe