Camilla Carroll and Philip Carroll,	*	BEFORE THE ZONING BOARD
Petitioners	*	OF HOWARD COUNTY, MARYLAND
		Zoning Board Case 1087M

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DECISION AND ORDER

On April 14, May 12, June 9 and 23, and July 12 and 23, 2010 the Zoning Board of Howard County, Maryland considered the petition of Petitioners, Camilla Carroll and Philip Carroll, for an amendment to the Zoning Map of Howard County, Maryland so as to reclassify 221.1 acres of land from the RC-DEO (Rural Conservation-Density Exchange Option) to the R-ED (Residential-Environmental Development) Zoning District. The subject property is located on the south side of MD 144 approximately 1,300 feet west of US 40.

The notice of the hearing was advertised, the subject property was posted and adjoining property owners were notified by mail of the hearing date as evidenced by the certificates of advertising, posting and mailing to adjoining property owners, all of which were made part of the record. All of the official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning, the reports of the responding reviewing agencies, the Planning Board Recommendation, the Howard County Code and Zoning Regulations and the Howard County General Plan were incorporated into the record of the hearing. Both the Department of Planning and Zoning and the Planning Board recommended approval of the petition. An Exhibit List showing the exhibits introduced into the record at the hearings is attached to the decision.

The Petitioners were represented by Sang Oh, Esquire. The Zoning Counsel, Eileen Powers, Esquire, appeared to defend the 2004 Comprehensive Zoning of the subject property in

the RC-DEO Zoning District. The Chateau Ridge Lake Community Association appeared in opposition to the petition and was represented by Katherine Taylor, Esquire and Andrea LeWinter, Esquire. Several other individuals appeared in opposition to the petition and represented themselves.

After careful evaluation of all the information presented, the Zoning Board makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Petitioners are seeking rezoning from the RC-DEO to the R-ED District for the 221.1 acre subject property. The subject property is a portion of a much larger property, Parcel 71, which is approximately 892 acres and is commonly referred to as Doughoregan Manor ("DM"). This larger property extends to the west along its frontage on MD 144 and also has frontage on Folly Quarter Road. The subject property is the same property which was placed in the Planned Service Area ("PSA") by Council Bill (CB) 9-2010, which was adopted on April 5, 2010 and became effective on June 8, 2010 (Applicants' Exhibit 3A). The subject property has frontage on MD 144 as well.

2. The subject property and the larger DM property of which it is a part, were zoned RC-DEO in the 1992-93 Comprehensive Zoning and were retained in RC-DEO District in the 2004 Comprehensive Zoning.

3. The properties to the north of the subject property across MD 144 were generally zoned R-20 in the 1993 Comprehensive Zoning and retained in the R-20 District in the 2004 Comprehensive Zoning except for one property rezoned to R-SA-8 and another property rezoned to B-1. Most of these properties are developed with single-family detached homes except for the B-1 property which remains undeveloped. The property to the northeast of the subject property is

the Kiwanis-Wallis Park, a recreational facility owned by Howard County that was zoned R-20 in the 1993 and 2004 Comprehensive Zonings. To the east and southeast of the subject property along its eastern boundary, south of the Kiwanis-Wallis Park property, are a series of R-20-zoned single-family detached residential homes in the developments of Pine Orchard Meadow, Centennial Manor, Ridge Lake, Chateau Ridge and Burleigh Manor. To the south and west of the subject property are the remaining portions of the DM property, all of which, like the subject property, were zoned RC-DEO at the 1992-93 and 2004 Comprehensive Zonings.

4. The proposed General Plan Amendment to include the subject property in the PSA, and the companion request to rezone the subject property R-ED were undertaken, according to the Petitioners, to implement the General Plan goal of preserving "contiguous blocks of agricultural land and protect the rural character of the Near West". *See October 28, 2009 Letter from Sang Oh, Petitioners' legal counsel, to the County Council Regarding the Proposed General Plan Amendment , page 2* (this letter was both an attachment to the petition and part of Zoning Counsel Exhibit 1). The "near West" is defined in the Howard County General Plan as the area of the Rural West that is zoned Rural Conservation (RC) and is adjacent to the Planned Service Area. (*p. 44 of the Howard County General Plan*).

The Howard County General Plan clearly recognizes the problem of the pressures to develop Rural West land and discusses possible responses to that problem. In the General Plan's Chapter 3: Preservation of the Rural West, pages 39-50, the Plan indicates that downzoning the Rural West was rejected as a response to development pressures but that the County's preservation of agricultural land through purchasing development rights and the subdivision of land with relatively smaller clustered lots and large undeveloped preservation parcels were alternative responses to dealing with those development pressures.

On page 41 of the General Plan, it is stated that "continuing development pressure on a diminishing supply of available land results in increasing land prices and competes with agricultural preservation objectives for the western Howard County land base. . . As build out [in eastern Howard County] approaches, pressure will increase to extend water and sewer service into the Rural West via piecemeal requests. Chapter 4, *Balanced and Phased Growth*, defines the very limited conditions under which a rezoning might be considered (see Expansion of the Planned Service Area) (*Emphasis supplied*)".

Petitioners, as indicated in Mr. Oh's previously referred to October 28, 2009 letter, noted that the larger 892 acre DM property, of which the subject property is the easternmost 221 acre portion, could be developed by the property owner with "over 400 single-family detached units" (*p. 2 of Oh letter*). Petitioners continued in the letter by pointing out that "locating these lots on the portions of Doughoregan with the soils most suitable for septic systems presents the undesirable option of sprawling the development across the Property and in locations that would adversely affect the agricultural character of this area". *(p.2 of Oh letter).*

Petitioners further contended that "development that is permitted by right would not best serve the interests of our County" and further suggested that "the goals of the 2000 General Plan and Smart Growth policies would be better served by a proposal of concentrating the residential development to the eastern-most section of the Property in the area of the Site [the subject property]. . ." (*p.2 of Oh letter*).

The Department of Planning and Zoning recognized the reality of these development pressures on the DM property in its Technical Staff Report when it noted that the 2007 expiration of the property's Maryland Historical Trust Easement was not addressed in the 2000 General

Plan and 2004 Comprehensive Zoning, and that "some development of the Property [DM property] would be necessary in order to make a preservation plan practical" (*TSR, p. 10*).

5. The Petitioners had two different bases for their requested rezoning, both based on alleged mistake in the 2004 Comprehensive Zoning of the subject property in the RC-DEO District. Petitioners did not allege change in the character of the neighborhood as a basis for rezoning. Petitioners also acknowledged that the subject property/DM property could continue to be used for the existing uses of a single-family residential home and farming if RC-DEO zoning was continued on the subject property.

The first basis of alleged mistake is tied to the subject property's inclusion in the PSA by the County Council's adoption of CB 9-2010. Petitioner presented testimony that this change to the PSA boundary to include the subject property was a fact occurring subsequent to the 2004 Comprehensive Zoning, and therefore could not have been considered by the County Council at that time. Petitioners contended that the property's inclusion in the PSA meant the subject property was no longer part of the County's Rural West, and that it could no longer be subdivided for development with well and septic systems but was required to develop with public water and sewer. In support of this contention, Petitioners presented excerpts of pages 36 and 40 of the 2000 Howard General Plan (Applicants' Exhibit 4A), Section 104E.1.b. of the Howard County Zoning Regulations (Applicants' Exhibit 4B) and Section 16.131 of the Howard County Subdivision and Land Development Regulations (Applicants' Exhibit 4C).

The Page 36 excerpt of the 2000 Howard County General Plan is part of Chapter 3 of that document, entitled "Preservation of the Rural West". It indicates that "the Rural West [is] defined as the area zoned Rural Conservation (RC) or Rural Residential (RR) and not served by public sewer" (*p. 36 of the Howard County General Plan)*. The page 40 excerpt of the General

Plan, in Box 3-2, indicates that "except for the small commercial and industrial areas, all land in the Rural West is zoned either Rural Conservation (RC) or Rural Residential (RR)" (*p. 40 of the Howard County General Plan).*

Section 104E.1.b. of the Howard County Zoning Regulations indicates that the minimum lot size requirements for buildable lots in the RC District only relate to shared or individual septic systems.

Section 16.131 of the Howard County Subdivision and Land Development Regulations provides that proposed subdivisions of land in the planned service area shall be approved only for development with public water and sewer systems.

6. The Board notes that there are several other references to the PSA in the 2000 Howard County General Plan, including the following:

> These State mandates have not required major changes in Howard County's land use policies and plans. The 1990 General Plan incorporated key goals of the 2020 Report, so the County was the first in Maryland to have a General Plan in compliance with the 1992 Planning Act. However, the visions of the 1992 Planning Act and the Smart Growth programs have strongly reinforced the County's policies of directing most growth and related services to the Planned Service Area in the East and preserving farmland and rural character in western Howard County.
> Howard County General Plan.
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> Id., p. 2.

> **Manage growth and preserve rural lands**. Howard County's Planned Service Area boundary for public water and sewer is also the County's growth boundary. By maintaining the current planned growth boundary, Howard County will reinforce State-wide growth management efforts. Farmland preservation in the Rural West will help establish a critical mass of preserved farmland in central Maryland.
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> Id., p. 7.

This chapter focuses on the preservation of the Rural West, the area of the County outside the Planned Service Area for public water and sewer

Id., p. 35.

The State mandates that local authorities may not issue building permits unless the water supply and sewerage systems are adequate to serve the proposed development, taking into account all existing and approved developments within the service area. Nor may local authorities record or approve a subdivision plat unless water and sewerage systems would be adequate and completed in time to serve the proposed development. In Howard County, Water and sewer capacity is formally allocated to development at the end of the subdivision or site development plan review process. Howard County has an adopted Master Plan for Water and Sewerage, which must be approved by the Maryland Department of the Environment. This Master Plan establishes and delineates a water and sewerage service area and identifies the remainder of the County as a "no planned service" area.
Prior to the provision of public water or sewer service, a property must be included in the Planned Service Area and must enter the County's Metropolitan District. Within the service area, service expansion is dependent on the County capital projects construction schedule or, in response to a development proposal, by a Developer Agreement to make needed system improvements. This sequence of events presupposes that the proposed sewer or water improvement represents an orderly extension of service and is consistent with the General Plan and subdivision regulations. Therefore, orderly extension of the public water and sewer system is controlled through the County Capital Budget and ten-year Capital Improvement Master Plan, the Metropolitan District entry process, the subdivision plan review process, and the water and sewer capacity allocation.

Id., p. 94.

Expansion of the Planned Service Area
Most expansions to the Planned Service Area (PSA) since 1990 have occurred on a site-specific basis to address failing septic systems, potential well contamination and a few changes in land use. In July 1993, the County Council voted to extend the PSA to include the area around the Alpha Ridge Landfill. This extension was done solely out of concern for potential future groundwater contamination originating from the Alpha Ridge Landfill, therefore, only water service is provided in this area. No change from rural land uses or zoning is intended. Sewer service may be provided in this area only for qualifying parcels and under certain conditions. A qualifying

parcel is one that is owned by either the Howard County Government or the Board of Education of Howard County and that adjoins another parcel where sewer service is available. Sewer service to a qualifying parcel may be extended only if sewer service can be extended without making sewer service available to any intervening non-qualifying parcel not owned by Howard County Government or the Board of Education of Howard County. *[Amended per CB 18-2006, Effective June 7, 2006]*

As discussed in Chapter 2, *Responsible Regionalism*, the boundary of the PSA is important not only to determine which parcels will be served by public water and sewer service, but also because the PSA is Howard County's designated growth area (Priority Funding Area). As such, adjustments to the PSA have major ramifications in terms of both permitted development intensity and the level of other County and State services. Howard County is expected to continue to experience strong demand for economic and residential growth due to its prime location and high quality of life. However, residential land in the PSA is quite limited.

One of the four growth scenarios described previously in Box 4-1 included consideration of an expansion of the present water and sewer service area boundaries to accommodate additional residential units. Based on the fiscal analysis, there is no compelling fiscal need for additional growth that justifies an expansion of the PSA boundary.

Although this General Plan does not propose an expansion of the Planned Service Area to accommodate future residential or commercial growth, it should be anticipated that in the future there may be isolated situations where minor adjustments may be appropriate. Any requests for a General Plan amendment for expansion of the Planned Service Area should be denied unless the following minimum criteria are met: the proposed expansion of the Planned Service Area is part of a proposed zoning and is consistent with the General Plan and Smart Growth policies, or the proposed expansion of the Planned Service Area is intended to provide for a public or institutional use such as a religious facility, charitable or philanthropic institution, or academic school. In each case sewer and water infrastructure capacity *[Amended per CB 44-2002, Effective July 2, 2002]* and costs shall be analyzed to confirm the feasibility and availability of scheduled capacity. Institutional or public use expansions of the Planned Service Area boundary are limited to institutional or public properties adjoining the existing boundary of the Planned Service Area without including an intervening privately owned parcel currently not located in the Planned Service Area. *[Amended per CB 18-2006, Effective June 7, 2006]* An amendment to the Planned Service Area for an institutional use shall only include the minimum parcel size necessary to serve the proposed use. Subdivision of the parcel consistent with the Planned Service Area boundary amendment shall occur subsequent to the Council Bill approving the amendment and prior to the inclusion of the parcel into the Metropolitan District. Any proposed institutional use for the remaining parcels not included in the Planned Service Area may be the subject of an additional

amendment at a subsequent date. If an amendment to the Planned Service Area is approved for a public or institutional use, it shall be approved with conditions limiting the expansion to the particular use proposed at the time of expansion and providing a deadline by which the improvements for the proposed use must be completed and connected to the public water and/or sewerage system. If the parcel is not used for the public or institutional use proposed at the time of passage of the Bill and is not actually constructed and connected to the public water and/or sewerage system by the deadline specified in the Bill, the Planned Service Area expansion and the Metropolitan District inclusion, if applicable, shall be null and void and the Planned Service Area as it relates to the parcel shall revert to that in place prior to the Council Bill approving the expansion, without any additional action of the Council. *[Amended per CB 44-2002, Effective July 2, 2002]*

Policies and Actions

POLICY 4.7: Ensure the adequacy of water and sewer services.

- ***Plant Capacity Expansion.*** Accommodate flows from projected growth in the Planned Service Area by constructing the planned expansion of the Little Patuxent Water Reclamation Plant.

- ***Master Plan for Water and Sewerage.*** Do not include capital projects for capacity expansion beyond the needs of the current Planned Service Area.

- ***Priority Category Shifts.*** Defer shifts into the 0-5 year priority status for development proposals until they have received Adequate Public Facilities Ordinance approval.

- ***Developer Agreements.*** Assess the merits of refining the current method of financing water and sewer extensions through developer agreements.

General Plan 2000, Amended (Effective June 7, 2006)
Chapter 1: Balanced and Phased Growth.

Id., p 97-98.1.

3. **Edges**. Edges are generally strong or visible boundary lines such as major roads; others may be less distinct, softer edges such as stream valleys. Boundaries are important to defining places. The Planned Service Area will be a visually recognizable edge that defines the extent of urban development and the transition to the rural landscape. Within each level of places – neighborhoods, communities and areas - some edges will be

permanent separators, while others may be more flexible and adjustable to respond to changing conditions.

Id., p. 169.

Smart Growth
• Confirm that the Planned Service Area and growth projections meet State Priority Funding Area requirements.
• Use the County's growth boundary in decision-making regarding the provision of public facilities and services.

Id., p. 246.

7. Mr. Joseph Rutter, former Director of the Department of Planning and Zoning for Howard County and for Anne Arundel County, and Petitioners' planning consultant who was qualified as an expert on land planning, testified as to the subject property's inclusion in the PSA and the implications of that fact. He indicated that the subject property had been outside of the PSA at the time of the 2004 Comprehensive Zoning. Mr. Rutter testified that RC-DEO and RR-DEO were the only zoning designations for residential properties outside the PSA according to the General Plan. He further testified that the basis of the subject property's zoning in the RC-DEO District at the 2004 Comprehensive Zoning, therefore, was the fact that it was not in the PSA. He testified that in his opinion the placement of the subject property in the PSA effective June 8, 2010 constituted an event or fact occurring subsequent to the 2004 Comprehensive Zoning that showed that the premises upon which the RC-DEO comprehensive zoning was based had proven to be incorrect with the passage of time. Mr. Rutter testified that based on the inclusion of the subject property in the PSA, RC-DEO zoning was no longer proper and was a mistake in comprehensive zoning. He reasoned that while RC-DEO (or RR-DEO) was the only proper zoning classification for a residential property not in the PSA or in the "Rural West" because such a property would not be served by public water and sewer, once a property like the

subject property was placed in the PSA, it was no longer in the "Rural West", could only be served by public water and sewer if subdivided, and should therefore no longer be zoned RC-DEO.

Mr. Rutter acknowledged that the close proximity in time of the change in the PSA boundary with respect to the subject property and the claim of mistake based on that change was unique to this case. Mr. Rutter's recollection was that the change in the PSA boundary line with respect to the Maple Lawn Farms property in the 1990s was several years before the actual change to the Zoning Map implemented by the subsequent 1992-1993 Comprehensive Zoning. Mr. Rutter noted that the zoning category of MXD was not created in the Zoning Regulations until the 1993 Comprehensive Zoning, so that a piecemeal rezoning case for MXD on the Maple lawn Farms property would not have been immediately possible to implement the 1990 General Plan PSA change based on existing law at that time. He also indicated that there was a gap of several years between the adoption of the General Plan and Comprehensive Zoning in the 1970s and 1980s, and that during the period of time between the General Plan adoption and the subsequent implementation by Comprehensive Zoning in those instances, dozens of rezoning requests were filed based on changes in those General Plans.

Mr. Rutter testified that one subdividing RC-DEO land had two choices for dealing with sewage- a shared septic or individual septic system pursuant to Section 104E of the Zoning Regulations and the Subdivision Regulations, and that one couldn't use public sewerage in those circumstances. He further testified that one subdividing property in the PSA could only be approved for public sewerage systems pursuant to Section 16.131 of the Subdivision and Land Development Regulations.

Mr. Rutter also testified that in addition to a PSA-included property not being able to subdivide using well and septic, such a development would be inconsistent with the State's "Smart Growth" principles that encourage the development of properties in the priority funding area rather than in rural areas. The Board notes that Howard County's PSA is Howard County's priority funding area.

The Board finds that the above citations of Howard County law, both General Plan and implementing Regulations, are not disputed with respect to the relation between the PSA and public water and sewer service. The Board also finds Mr. Rutter's testimony as indicated above to be convincing and undisputed by the opposition that subdivision of land in the PSA requires that public sewer facilities be provided while subdivision of land outside the PSA requires provision of private facilities, namely well and septic.

8. Those in opposition to the proposed rezoning offered the following evidence and arguments to counter the Petitioners' "subsequent events" basis for mistake in comprehensive zoning due to the subject property's inclusion in the PSA:

a. The Zoning Counsel argued that the enacting clause of the General Plan Amendment extending the PSA to the subject property (CB 9-2010) provided for two possible reversions of the PSA inclusion as to the subject property- one if a Development Rights and Responsibilities agreement ("DRRA") was not executed within 215 days of CB 9-2010's effective date, and another if the subject property was not rezoned to a density equal to or less than the density allowed in R-ED within one year of the effective date of CB 9-2010. The Zoning Counsel contended that the uniqueness of the proximity in time of the PSA change and the alleged consequential mistake in zoning, and the possibility of reversion of the PSA, made the

PSA change one that did not constitute an event occurring subsequent to comprehensive zoning upon which a mistake argument could be based;

b. The opposition contended that the proposed "zoning" referred to on page 98.1 of the 2000 Howard County General Plan ("Any requests for a General Plan amendment for expansion of the Planned Service Area should be denied unless the following minimum criteria are met: the proposed expansion of the Planned Service Area is part of a proposed zoning and is consistent with the general Plan and Smart Growth policies. . . and costs shall be analyzed to confirm the feasibility and availability of scheduled capacity") does not refer to a proposed "piecemeal" rezoning such as this zoning petition but refers to a "zoning" in Comprehensive Zoning only; and

c. The opposition presented Protestant's Exhibit 3, a chart showing a number of PSA property inclusion bills passed by the County Council between 2000 and 2007. Other than institutional use inclusions or water-only Plan inclusions, there are two instances of properties in the chart in which individual properties were included in the PSA - the Narr property (CB 39-2001) and the Mauck property (CB 52-2006). The opposition's contention was that these properties were included in the PSA but retained their existing zoning - RR for the Narr property and B-1 for the Mauck property. The Mauck property was included to address "existing sewage disposal problems" (*p. 1 of CB 52-2006)*. While the Narr property inclusion is silent in the bill as to the reason for the PSA inclusion, CB 39-2001 does note that there is an existing residence on the .988 acre property and that "the nature and intensity of the residence's use are consistent with the Rural Residential uses indicated in the General Plan, and the proposed amendment would not permit new development at a density greater than currently permitted" (*CB 39-2001)*. As to the Mauck property, on page 2 of CB 52-2006 it is stated that the property included in the PSA, a

3.06 acre B-1–zoned property, "is already designated as part of the Community Center for Fulton and has already received its appropriately proposed zoning of B-1, the inclusion of it into the PSA will not result in any land use or zoning changes in the character of the neighborhood."

9. Those in opposition to the proposed rezoning also contended that the proposed rezoning was part of a comprehensive development plan for the property which included the General Plan Amendment PSA inclusion, the proposed rezoning, a Development Rights and Responsibilities Agreement (DRRA) and the County's planned purchase of development rights for much of the larger DM property (Council Bills 31 and 32-2010), and that the rezoning therefore amounted to "contract" or "conditional" zoning, which is not permitted by law. The Board notes that Petitioners' petition refers to these various inter-related steps that could result in the property owners developing their property pursuant to R-ED zoning subject to a DRRA including selling the development rights for a part of the larger DM property via an Agricultural Preservation easement to be purchased by the County. However, the Board did not take into consideration in deciding this case anything other than the inclusion of the subject property in the PSA by CB 9-2010 or other evidence as to mistake in deciding whether there was sufficient evidence of "subsequent events" mistake produced by Petitioners to justify rezoning. There was no evidence produced by those opposed to the rezoning that there was any agreement between the Zoning Board and the Petitioners as to the rezoning or development of the property.

10. There was evidence presented by the Petitioners as to the appropriateness of R-ED zoning assuming the Board finds mistake in comprehensive zoning. On the other hand, there was evidence presented by the opposition that it would be most appropriate to retain RC-DEO zoning on the subject property, even if the Board finds mistake.

Mr. Rutter testified that the R-ED District was the most appropriate density-based residential zoning category for the subject property if the Board determined that there was a mistake in the RC-DEO zoning of the subject property. He indicated that the subject property, if rezoned to R-ED, would be at the "edge" of the PSA, and that R-ED zoning would be the lowest density zone possible for PSA-included property. In addition, Mr. Rutter testified that R-ED is the most appropriate zoning category for the development of environmentally sensitive properties such as the subject property and for maximizing provision of recreational facilities due to the clustering options which are not available under R-20 zoning. Mr. Rutter summarized that R-ED is the least dense residential zoning category available for PSA-included properties consistent with the State's Smart Growth principles of directing growth to priority funding areas.

Those in opposition to R-ED zoning offered the following concerns as reasons for the Zoning Board to deny the requested R-ED zoning, even if the Board finds mistake:

(a) The State Highway Administration commented in its December 22, 2009 letter on the proposed rezoning that it would approve only one access from the subject property onto MD 144, and that it recommended that an additional access be provided via an extension of Burnside Drive, a County road, which those in opposition were against;

(b) The rezoning of the subject property with public sewerage facilities raised the possibility of sewage pre-treatment of nutrients on the subject property or on some other property, both of which were opposed by those in opposition;

(c) Development under R-ED rezoning could result in the re-districting of schools;

(d) Development under R-ED zoning could adversely affect the watershed;

(e) There was insufficient benefit to the public under R-ED zoning and development in terms of public access to, and guaranteed maintenance of, the manor house on the larger DM property and of the additional donation of land for Kiwanis-Wallis Park.

The Board finds the following facts as to the above-raised issues:

(f) While the SHA conditioned its lack of objection to the proposed rezoning on the provision of a second access to the subject property using Burnside Drive, Howard County has prohibited the extension of Burnside Drive through CR 43-1989 so that this access cannot be made at this time. If R-ED zoning is granted, the developer of the subject property under that zoning would have to meet the requirements of the Adequate Public Facilities Ordinance (APFO). In addition, the Board notes that the development of the subject property as part of the larger DM property under RC-DEO zoning would be subject to all the same circumstances noted above, including the SHA's restriction of access to MD 144, the SHA's desired additional access via Burnside Drive which is prohibited by Howard County law and the fact that all development must comply with APFO's requirements

(g) The Department of Public Works in its January 7, 2010 comments on the proposed rezoning indicated that there was sufficient capacity as to both public water supply and sewer facilities for R-ED development, even though several options, including on-site treatment of wastewater, would have to be explored in the development process to address the issue of reduction of nutrients produced by development so as to not adversely affect the County's allowed nutrient capacity at the Little Patuxent Water Reclamation Plant.

11. Mr. Rutter also testified that there was mistake in the RC-DEO zoning of the subject property at the time of the 2004 Comprehensive Zoning based on the existence of an underground sewer line going through the subject property constructed in the 1990s to serve

adjacent properties based on a negotiated easement agreement between the Carrolls and Howard County. It was Mr. Rutter's testimony that the existence of these sewer lines underneath the property would have been something that the County Council would not have been aware of at the time of the 2004 Comprehensive Zoning because the lines would not have been readily visible in actuality or on the Howard County Water and Sewer Plan maps, which did not show the location of all sewer lines. Petitioners indicated that they did not participate at all in the 2004 Comprehensive Zoning process so the County Council would not have known from Petitioners as to the existence of the sewer lines in question. Petitioners contended that these sewer lines are readily available for use to provide sewer service to the subject property and were so available at the time of the 2004 Comprehensive Zoning.

12. With respect to the "mistake in fact" theory of Petitioners related to the sewer line's alleged "hidden" existence on and through the subject property, the Zoning Counsel pointed out that the County Council is presumed to be aware of and take into account all relevant facts and circumstances including the fact that the sewer line runs through the subject property based on an agreement with the County, as testified to by Mr. Rutter. Petitioners did not present any evidence to indicate that that the County, including the County Council, was not aware of the existence and location of the sewer lines underneath the subject property. Petitioners also did not present any testimony as to how the alleged unknown existence of the sewer line on the subject property related to the particular parcel for which R-ED zoning is requested.

13. The Board, based on the above findings, makes the following specific findings as to mistake in comprehensive zoning based on "subsequent events":

a. The 221.1 acre subject property was included in the Planned Service Area by the County Council by its adoption of CB 9-2010, an amendment to the 2000 Howard County

General Plan, effective June 8, 2010. This GPA amendment to extend the PSA's boundaries to include the subject property was in effect at the time of the close of evidence of the case on July 23, 2010 and at the time of the issuance of this decision. The conditions subsequent in Council Bill 9-2010's enacting clause that could cause the PSA boundary to revert to its prior location as noted above with respect to the subject property had not occurred by the close of evidence or by the issuance of the decision in this case;

b. This inclusion of the subject property in the PSA is a change in events subsequent to the 2004 Comprehensive Zoning of the subject property;

c. The 2000 Howard County General Plan provides that the PSA is Howard County's boundary for requiring that public water and sewer be provided, and the Howard County Subdivision and Land Development Regulations, in Section 16.131, provide that property in the PSA, if subdivided, is required to provide public sewer systems to deal with sewage. Conversely, the Howard County General Plan provides that the area outside the PSA is Howard County's Rural West, and that with respect to residential zoning, RC or RR zoning are the only zoning options for Rural West properties, and that these properties, if subdivided, may only be served by private sewer facilities as recognized by Section 104E.1.b of the Zoning regulations;

d. The subject property was not in the PSA at the time of the 2004 Comprehensive Zoning, so that its RC-DEO zoning was premised on that fact;

e. The 2000 Howard County General Plan contemplates that "requests for a General Plan amendment for expansion of the Planned Service Area should be denied unless the following minimum criteria are met: the proposed expansion of the Planned Service Area is part of a proposed zoning and is consistent with the General Plan and Smart Growth policies . . . and

costs shall be analyzed to confirm the feasibility and availability of scheduled capacity" (*Howard County General Plan, p. 98.1).* The expansion of the PSA to include the subject property pursuant to the County Council's adoption of CB 9-2010 is part of a proposed zoning - this piecemeal rezoning request. There is nothing in the wording of this provision that limits its application to zonings in comprehensive zoning. In fact there is an explicit reference in the General Plan, which the Board finds convincing, that would indicate the reference to "zoning" on page 98.1 of the General Plan more reasonably refers to a piecemeal "rezoning" rather than a comprehensive zoning.

As indicated in Finding of Fact 4, the General Plan, on page 41, in referring to this section on "Expansion of the Planned Service Area" states "pressure will increase to extend water and sewer service into the Rural West via piecemeal requests (*Emphasis supplied).* Chapter 4, *Balanced and Phased* growth, defines the very limited conditions under which a rezoning might be considered. The reference on page 98.1 of the General Plan to "zoning" is explicitly stated on page 41 of the General Plan to refer to "piecemeal rezoning" requests.

While this case is unique in that prior to this case no non-institutional change to the PSA has been followed so close in time by a proposed zoning, there is nothing in the General Plan that explicitly prohibits it. The inclusion of the subject property in the PSA is consistent with the policy of the General Plan and Maryland's Smart Growth to direct growth in areas planned to be served by public water and sewer and not to direct growth in areas not planned to be served by public water and sewer.

f. There have been two instances since 2000 in which non-institutional/non-water-only properties have been included in the PSA by a General Plan amendment, while retaining their existing zoning- the Narr property and the Mauck property. While the Mauck property PSA

bill explicitly noted that the General Plan amendment was done to address sewage problems on that property, the Narr PSA bill was silent as to its purpose. Both PSA bills noted that the intent of the PSA bill was not to affect the property's development potential or existing zoning. The 2000 Howard County General Plan on page 97 notes that "most expansions to the Planned Service Area (PSA) since 1990 have occurred on a site-specific basis to address failing septic systems, potential well contamination and a few changes in land use." The change in the subject property's PSA designation by the General Plan amendment via CB 9-2010 was not done to address well or septic issues, but to change the policy as to the provision of public water and sewer facilities to the subject property.

14. The Board, based on the above findings, makes the following specific findings as to mistake in comprehensive zoning based on the sewer line on the subject property:

a. Petitioners contend that the County Council was not aware of the sewer line constructed on the subject property in the 1990s at the time of the 2004 Comprehensive Zoning. This contention is based on the fact that the sewer lines are underground and therefore not readily visible, the fact that not all sewer lines are shown on Howard County's sewer plan maps and because the existence of the sewer lines on the subject property was not brought to the attention of the County Council at the 2004 Comprehensive Zoning because the Carrolls did not participate in that process. The Petitioners did not present any evidence to indicate that the County, including the County Council, was unaware of the easement agreement entered into between the Carrolls and the County to allow the sewer lines to be located on the subject property.

15. If the Board finds that there is enough evidence presented to permit the rezoning of the property based on mistake in comprehensive zoning, the Board must make findings as to

what the most appropriate zoning is for the subject property at this time. Since Petitioners did not allege that they would be denied all reasonable use of property if RC-DEO was retained on the subject property despite its inclusion in the PSA, the Board must find whether it is appropriate to retain the RC-DEO zoning or rezone the property to the requested R-ED zoning. The choice for the Board is whether to wait for the implementation of the PSA boundary change to include the subject property and/or revisit the issue of the subject property's PSA and zoning status as part of the next comprehensive zoning or implement the PSA change now.

In deciding whether to rezone the property for PSA-related zoning now or wait for the next General Plan and Comprehensive Zoning process, the Zoning Board must balance the concerns expressed by the opposition as to the proposed rezoning's possible impact on traffic and roads, nutrient capacity and public schools against the concerns regarding the development pressures on the larger DM parcel, including the subject property, to develop under the existing RC-DEO zoning. If the Board postpones the implementing/zoning part of the policy decision begun with the General Plan amendment decision to allow the possibility of a portion of the larger DM property, the subject property, to develop with public facilities through PSA inclusion, the risk would be that the DM property, or substantial portions of it, could develop without public water and sewer facilities, which is contrary to the policies of the General Plan and Smart Growth. In addition, if the larger DM property develops with private well and septic systems, all of the remaining concerns regarding the possible development impacts mentioned above would still have to be faced. Under either PSA or non-PSA development, there would be impacts on public roads and schools, impacts which will be regulated by Howard County's Adequate Public Facilities laws. In striking that balance, the Board finds that implementing the R-ED zoning at this time will implement the initial policy decision made with inclusion of the

subject property in the PSA by the adoption of Council Bill 9-2010, and is preferable to waiting to see how development pressures may affect the prospect of the undesirable development of the larger DM property with well and septic if rezoning of the subject property were to be denied.

CONCLUSION OF LAW

1. The Petitioners, as the party seeking a piecemeal reclassification, have the onerous burden of establishing substantial evidence of basic and actual mistake in the comprehensive zoning of the subject property in order to justify a rezoning, that is to permit the Zoning Board to grant rezoning. Petitioners have not alleged either a change in the character of the neighborhood of the subject property or denial of all reasonable use of the property as currently zoned as additional bases for rezoning, so the Board will not address those issues in these conclusions of law.

2. There are two "prongs" of the mistake in comprehensive zoning rule- a rezoning applicant may show either or both: 1) That the County Council failed to take into account then existing facts, projects or trends which were reasonably foreseeable of fruition in the future at the time of comprehensive zoning, so that the Council's action was premised initially upon a misapprehension People's Counsel v. Beachwood, 107 Md. App. 627, 670 A.2d 484 (1995); and/or 2) evidence of any events occurring subsequent to the time of the comprehensive zoning which would show that the Council's assumptions and premises have been proven invalid with the passage of time. Howard County v. Dorsey, 292 Md. 643, 304 A.2d 244 (1973).

3. The Petitioners' contentions and evidence presented as to the sewer line through the subject property (as outlined in the findings of fact) as a fact not taken into account by the County Council at the time of the 2004 Comprehensive Zoning, are not sufficient to overcome the substantial presumption of correctness attached to the RC-DEO Comprehensive Zoning of

the subject property. The Board concludes that the Petitioners' evidence in this regard was insufficient or unconvincing to establish mistake in comprehensive zoning for several reasons:

a. It is presumed, as part of the presumption of validity accorded comprehensive zoning that at the time of the adoption of the map the Council had before it and did, in fact consider all the relevant facts and circumstances then existing. Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975). In this case, the Board is unconvinced that the fact that the sewer lines are not visible because they are underground, or that the Carrolls did not participate in the 2004 Comprehensive Zoning and did not raise the fact of the sewer lines' existence on the subject property, or the fact that the County's official sewer maps do not always show all sewer lines, overcomes the presumption that the County, including the Council, was aware of the fact that the County had previously negotiated with the Carrolls to permit the location of the sewer lines on the subject property.

b. Moreover, the Board concludes that there is no connection between the existence of the sewer lines on the subject property, and their potential availability to be accessed, at the time of the 2004 Comprehensive Zoning and any basic and actual mistake in RC-DEO zoning as to the particular 221.1 acre subject property. In fact, Petitioners' arguments as to mistake at the time of the 2004 Comprehensive Zoning contradict their "subsequent events" arguments as to mistake, as addressed below. The Board concludes that the County Council made the intentional policy decision to appropriately zone the subject property and the larger DM property of which the subject property is a part, in the RC-DEO district at the 2004 Comprehensive Zoning, based on the County Council's intentional policy decision not to include the subject property in the PSA in the 2000 Howard County General Plan. The previous contractual arrangement between the Carrolls and the County as to sewer easements cannot

reasonably relate to a mistake with respect to a later-defined portion of the DM property, the subject property, for which a subsequent PSA amendment was applied.

4. Petitioners' principal contention as to mistake in comprehensive zoning was based on the County Council's inclusion of the subject property in the PSA by CB 9-2010. The Board concludes that there was substantial evidence that this change in policy by the County Council to remove the subject property from the non-PSA Rural West and put it in the area of the County in which properties must be served with public water and sewer facilities if subdivided is indisputably an event or fact occurring subsequent to the 2004 Comprehensive Zoning. The Board concludes that this shows that the Council's premise in zoning the property RC-DEO in 2004 has proven to be incorrect with the passage of time. The premise upon which the County Council based its decision to zone the subject property RC-DEO in 2004 was the fact that the subject property was not in the PSA and would have to be developed using well and septic. That premise becomes no longer valid with the subject property's inclusion in the PSA, which requires public sewer for subdivision into residential lots. Petitioners have therefore established, and the Board concludes, that the change in the subject property's PSA status by the General Plan amendment constitutes an event occurring subsequent to the 2004 Comprehensive Zoning establishing a mistake in the 2004 RC-DEO Comprehensive Zoning of the subject property.

The Board rejects all of the following contentions by the Zoning Counsel and the opposition that this change to the subject property's PSA status cannot be considered a "subsequent event" which can constitute substantial evidence of mistake in comprehensive zoning, for the reasons stated below:

a. Opponents contend that the amendment of the General Plan to include the subject property in the PSA by CB 9-2010 cannot be considered under the "subsequent events" prong of

mistake because of the conditions subsequent contained in the enacting clause of the General Plan amendment.

The Board concludes that this contention is not correct. The Board must make its decision based on the law in effect now, and at the present time the subject property is indisputably in the PSA. The conditions subsequent in CB 9-2010, as amended by CB 29-2010, which would cause the boundaries of the PSA to revert to their previous boundaries under certain circumstances, may never occur. If those conditions do occur, the parties could seek reconsideration of the Board's findings and conclusions relating to the effect of the General Plan amendment on the mistake in comprehensive zoning.

b. The opposition contends that the General Plan amendment to include the subject property in the PSA cannot be considered a "subsequent events" mistake in comprehensive zoning because the Petitioners' rezoning request follows the amendment too closely in time and/or that the implementation of the General Plan amendment can only occur in a subsequent comprehensive zoning.

The Board concludes that this contention is not correct. While this case may be one of first impression--a rezoning case occurring immediately following a General Plan amendment upon which it is based--it is not illegal for that reason based on any citation of law presented to the Board. The 2000 Howard County General Plan criteria pertinent to this issue require that "the proposed expansion of the Planned Service Area is part of a proposed zoning. . . ." General Plan, p 97-98.1. The Board concludes that "zoning" in this context refers to piecemeal rezoning requests, as explicitly stated on page 41 of the General Plan. In any case, the Board further concludes that it is only logical that the reference to "zoning" in the context of amendments to the General Plan for expansions of the PSA would refer to individual property or piecemeal

requests since it would be inappropriate for the County to consider comprehensive zoning requests in connection with the "isolated situations where minor adjustments" to the PSA are requested as is contemplated by this section. *Howard County General Plan, p. 98.* . The fact that changes in previous General Plans, whether by amendment or adoption of a new General Plan, have previously been followed by Comprehensive Zonings several years later, does not lead the Board to conclude that the process followed in this case is not permitted by law. The issue of whether the Board should wait for the next General Plan and Comprehensive Zoning to deal with the subject property's zoning based on its PSA status is a question relating to the appropriateness of the zoning of the property, which will be addressed below, not the issue of whether substantial evidence of mistake may be established by a General Plan amendment adopted just before a related rezoning case.

c. Opponents contend that the General Plan amendment to include the subject property in the PSA cannot be considered a "subsequent events" mistake in comprehensive zoning because two other individual properties, the Mauck and Narr properties, have been included in the PSA since 2000 by General Plan amendment while the properties existing zoning was retained.

The Board is unconvinced that this is a persuasive reason for concluding that a mistake in comprehensive zoning has not occurred in this case. There is clear evidence that the inclusion of the Mauck property in the PSA was done for the purpose of allowing the property to be connected to public sewer to solve private sewage/septic problems. As to both the Mauck and Narr properties, the General Plan amendments to include the properties in the PSA made it clear that the development potential and/or zoning of the properties would remain unchanged. The PSA amendment in this case was not done to solve a specific septic or well issue but was done for the express purpose of allowing future development using public water and sewerage.

5. Having concluded that the Petitioners established substantial evidence of mistake in comprehensive zoning, the Board is permitted but not compelled to grant the requested rezoning in this case because Petitioners have not even alleged denial of all reasonable use under the current zoning. Hardesty v. Dunphy, 259 Md 718, 271 A.2d 152(1970); White v. Spring, 109 Md. App. 692, 675 A.2d 1023 (1996). The Board concludes that, given the findings and conclusions of mistake in comprehensive zoning, the subject property should be rezoned to the R-ED Zoning District to rectify the mistake now rather than to retain the subject property in the RC-DEO Zoning District for future decision.

The Board concludes that the only choices it has in acting on this application would be to retain RC-DEO zoning on the subject property and defer any decision on the subject property until the next General Plan and Comprehensive Zoning, which could be an additional 3-4 years in the future, or to rezone the subject property to R-ED, the least dense density-based residential zoning category which maximizes protection of the environment and provision of open space, to allow the possibility of development of the subject property to be served by public water and sewer facilities to relieve development pressures on the larger DM property, thus increasing the chances that the remainder of the DM property will not be developed but preserved.

The Board concludes that the R-20 District is not a permissible alternative to R-ED for an appropriate zoning category for the subject property because the R-20 District is a more intensive zoning classification than R-ED under certain circumstances in the Zoning Regulations.

The Board concludes that the concerns of the opposition as to impacts of development of the subject property under R-ED zoning are outweighed by the above-described concerns with RC-DEO development of the DM property, including the subject property, if RC-DEO zoning was retained on the subject property until the next comprehensive zoning, and further that these

impacts will be addressed by existing Howard County law, principally the adequacy of facilities requirements applicable to public roads, schools and water and sewer facilities. The Board concludes that many of these concerns would also exist if the RC-DEO zoning were retained and development occurred under RC-DEO zoning.

6. The Board rejects the contentions of the opposition and the Zoning Counsel that the existence of a multi-part plan for the development of the subject property, including the possible future execution of a DRRA and the possible future sale of the development rights of portions of the DM property to the County, makes a grant of zoning, absent a contract between the Zoning Board and Petitioners as to use of the property and absent any conditions imposed by this decision, "contract' or "conditional" zoning, neither of which would be permitted by law.

The Board is not charged with any of the subsequent parts of this multi-part plan; it is only concerned with this proposed rezoning case and deciding it according to law. Contract zoning requires an agreement between the ultimate zoning authority and the zoning applicant. City of Bowie v. MIE Properties, Inc., 398 Md. 657, 922 A.2d 509 (2007). Conditional zoning may or may not be permissible depending on the authority to grant the conditions and the type of conditions imposed. Mayor &Council of Rockville v. Rylyns Enterprises, 372 Md. 514, 814 A.2d 469 (2002). The Board concludes that its decision to grant the requested rezoning in this case is not illegal contract or conditional zoning because there is no contract between the Board and Petitioners regarding this zoning decision, and the Board has not placed any conditions on the grant of rezoning in this case.

Maryland cases have treated "contract zoning" narrowly as a situation where the developer of property enters into an express and legally binding contract with the zoning authority. People's Counsel of Baltimore County v. Beachwood I Limited Partnership, 107 Md.

App. 627, 670 A.2d 484 (1995). This zoning change violates neither the rule against contract zoning nor the public policy upon which the rule is based. The County will continue to exercise fully its police powers and sovereignty regarding all aspects of future development on this property.

7. The Board concludes that Petitioners have met the burden of overcoming the strong presumption of correctness of comprehensive zoning by proving mistake in comprehensive zoning. Petitioners have accomplished this based on the evidence of the County Council's adoption of the General Plan amendment to include the subject property in the PSA. This event occurring subsequent to the 2004 Comprehensive Zoning of the subject property in the RC-DEO District, has shown that the premise upon which that RC-DEO zoning was based, that the subject property is a property in the Rural West to be developed with well and septic, is no longer valid because the County Council has made the policy decision through the General Plan/PSA amendment that the subject property should be allowed to subdivide using public water and sewer facilities. The Board further concludes that, given this proof of mistake in comprehensive zoning, the most appropriate zoning for the subject property is the requested R-ED Zoning District for the reasons stated in this decision.

For the foregoing reasons, the Zoning Board of Howard County, Maryland, on this 13th day of September, 2010, hereby GRANTS the Petitioners' request for rezoning of the 221.1 acre subject property from the RC-DEO to the R-ED Zoning District.

ATTEST:

Robin Regner
Administrative Assistant

PREPARED BY HOWARD COUNTY
OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR

Paul T. Johnson
Deputy County Solicitor

ZONING BOARD OF HOWARD COUNTY

Jennifer Terrasa, Chairperson

Calvin Ball, Vice Chairperson

Greg Fox

Mary Kay Sigaty

Courtney Watson

ZB 1087M, Camilla & Philip Carroll
EXHIBIT LIST

Applicants:

1. Curriculum Vitae of Joseph W. Rutter, Jr.
2. Plat of Subject Property - Eastern portion of the property in green–221 acres

3A. Council Bill 9-2010–effective August 9, 2010 adjusting Planned Service Area to incorporate 221 acres as defined in Ex. 2.

3B. Bill 29-2010–minor amendment to PSA boundary to include 221 acres related to Bill 9-2010.

4A 2000 General Plan excerpts Box 3-2–Cluster Zoning & DEO

4B Page 36 of Howard County Zoning Regulations

4C Page 1839 of the Howard County Subdivision Regulations

5. Conceptual lot layout of Carroll Property–colored plan

Opposition:

1. Policies Map 2000/2010 from the 1990 General Plan
2. Official sectional zoning map from 1992
3. General Plan 2000 Amendments (packet)
4. Sewer Map (large map) (revised January, 2001)

5–Bill 4-2010

5A–cover memo submitted with bill (to Lonnie Robbins to DPZ)

6A–cover memo from DPZ to Lonnie re: CB 9-2010 -

7–Enrolled CB Bill 18-2010

7A–cover memo

8 - Council Bill 31-2010

9 - Council Bill 32-2010

10 Page 8 of the TSR for the General Plan

11 Letter dated 12/22/09 from SHA to DPZ–attached to TSR for General Plan

12 Draft TSR for ZB 1087M, Carroll (unofficial)

13. E-mail dated 12/21/09 with attached memo from James Irvin to M. McLaughlin re: Doughoregan Manor Request for Inclusion into PSA

14 Package submitted by Mr. Ballman from a PIA request–agendas & sign-up sheets, transcripts of continued hearings.

Zoning Counsel:

1. Technical Staff Report dated 1/7/10–Adjustment to the PSA boundary of the Master Plan for Water & Sewer