APPENDIX

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APPENDIX A

[Filed July 7, 2017]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1890

KEVIN QUINN; QUEEN ANNE'S RESEARCH AND DEVELOPMENT CORPORATION,

Plaintiffs - Appellants,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND; QUEEN ANNE'S COUNTY SANITARY COMMISSION; PH.D ROBERT M. SUMMERS; MARYLAND DEPARTMENT OF THE ENVIRONMENT,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. George L. Russell, III, District Judge. (1:14-cv-03529-GLR)

Argued: May 9, 2017 Decided: July 7, 2017

Before WILKINSON, TRAXLER, and AGEE, Circuit Judges.

ARGUED: David G. Sommer, GALLAGHER EVELIUS & JONES LLP, Baltimore, Maryland, for Appellants. Kurt James Fischer, VENABLE LLP, Baltimore, Maryland; Nancy W. Young, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland for Appellees. **ON BRIEF:** Anatoly Smolkin, GALLAGHER EVELIUS & JONES LLP, Baltimore, Maryland, for Appellants. Amor Neill Thupari, VENABLE LLP, Baltimore, Maryland, for Appellees Board of County Commissioners for Queen Anne's County, Maryland and Queen Anne's County Sanitary Commission. Brian E. Frosh, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees Maryland Department of the Environment and Robert M. Summers, Ph.D.

WILKINSON, Circuit Judge:

Kevin Quinn, a landowner, challenges a comprehensive plan to extend sewer service to South Kent Island and a so-called Grandfather/Merger Provision designed to limit overdevelopment of the area. He asks us to protect a speculative land investment by finding a regulatory taking as well as violations of his due process and equal protection rights. Doing so, however, would invalidate a standard zoning tool whose legitimacy was recently upheld by the Supreme Court. It would also revolutionize zoning law and "frustrate

municipalities' ability" to undertake basic land use planning. *Murr v. Wisconsin*, No. 15-214, slip op. at 16 (U.S. June 23, 2017). We thus affirm the district court's dismissal of Quinn's claims.

I.

Quinn and his company Queen Anne's Research own undeveloped land on South Kent Island, a community in Queen Anne's County, Maryland. Beginning in the 1950s, land speculators purchased thousands of small lots on the island. Between 1984 and 2002, Quinn bought over 200 of these undeveloped lots on South Kent Island. Quinn built homes on some of the lots and hoped to develop the rest.

His development plans were delayed because his lots could not accommodate septic systems. South Kent Island had no sewer service, so every home required the construction of a septic system. Unfortunately, the soil on the island was not well-suited to septic systems, especially those built on small lots. Shortly after Quinn began buying land, the requirements for a septic system were tightened, forcing him, as he described in an affidavit, "to wait on his development plans until sewer was available on South Kent Island." J.A. 280.

County requirements also limited the construction of new septic systems, and thus the development of the small lots. The existing septic systems on South Kent Island, however, deteriorated. Many of the septic systems are now considered failing—in two developments, a full eighty percent are. As the district court noted,

"[f]ailed septic systems discharge untreated or undertreated sewage onto the surface or into groundwater polluting the ground and surface waters and increasing the risk of disease caused by human contact with bacteria and viruses in human fecal matter." *Quinn v. Bd. of Cty. Comm'rs*, 124 F. Supp. 3d 586, 590 (D. Md. 2015).

Queen Anne's County created—and Quinn is now challenging—a plan to address these problems by extending sewer service to homes with failing septic systems while at the same time limiting any resulting new development. In the course of creating the plan, the County found itself whipsawed by many competing considerations and regulatory requirements. The County recognized that many lots were vacant because they could not support a septic system, but it feared also that a new sewer system might lead to excessive development. In addition, the County needed State funding for any sewer extension, but because South Kent Island was not in a "Priority Funding Area," the State of Maryland would not provide funding for a sewer extension that would serve new development. However, the County could not just exclude all vacant lots from sewer service because of a Maryland statute that requires providing a sewer connection to all properties that abut a sewer line, including undeveloped lots.

In order to satisfy all these various constraints, the County planned to extend sewer service to all streets with failing septic systems. Both developed and undeveloped lots on those streets would receive sewer service. In an effort to limit further development, there would be no sewer lines

constructed on streets with only vacant lots. The vacant lots on those streets would be excluded from service because none would abut a sewer line. The plan also prevents future connections outside the initial service area.

In order to control excessive new development threatened by the sewer extension, the County enacted in 2014 a Grandfather/Merger Provision. Under this provision, the County would not grant a building permit for a lot smaller than the minimum size under the zoning regulations unless that lot was merged with any contiguous lots under common ownership. Many of the initial lots recorded on South Kent Island did not meet the minimum size, and a developer who owned a group of those lots would have to merge them into fewer, larger lots to obtain a building permit. If a developer, though, owned an isolated undersized lot, he would still be able to obtain a building permit. As noted by the Supreme Court in *Murr*, Grandfather/Merger Provisions are "a common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners" by limiting building on lots that do not meet the current minimum lot size while ensuring that all property owners can still build on their land. *Murr*, slip op. at 16.

Taken together, the sewer extension and the Grandfather/Merger Provision would provide sewer service to the failing septic systems on South Kent Island and 632 vacant lots, many of which could not have been developed without sewer service. The plan would also exclude hundreds of vacant lots, leaving them undevelopable. The impact on Quinn mirrored

the impact on the entire island. He had several vacant lots that would receive sewer service and, subject to being merged with contiguous lots, will now be developable. However, Quinn also owned a large tract of nearly two hundred vacant lots that would not receive sewer service, meaning that he will continue to be unable to build on this land.

Quinn filed this action against Queen Anne's County and the Maryland Department of Environment challenging the sewer extension and the Grandfather/Merger Provision. He argued that the County had effected a regulatory taking, requiring compensation under the Fifth Amendment, and had violated his due process and equal protection rights. He also argued that the State had violated his due process rights by approving the sewer extension plan. The State filed a motion to dismiss, and the County filed a motion to dismiss or, in the alternative, for summary judgment, incorporating an affidavit from a county official describing the County's land-use plan. The district court dismissed Quinn's claim against the State and granted the County summary judgment. *Quinn*, 124 F. Supp. 3d at 600. Quinn filed a motion to amend the judgment, requesting additional discovery into the County's motivations. The district court denied the motion because Quinn's requested discovery would not create any issues of fact material to his claims. Quinn now appeals.

II.

Quinn first contends that the County took his property without compensation in violation of the

Fifth Amendment by failing to provide sewer service to all of his land and by enacting the Grandfather/Merger Provision. The Takings Clause of the Fifth Amendment requires compensation for "direct government appropriation or physical invasion of private property," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005), and for, as Justice Holmes put it, "regulation [that] goes too far" in restricting the use of private property. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It does not, however, create an affirmative obligation on local governments "to enhance the value of real property," *Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998), or require compensation for all "land-use regulations that destroyed or adversely affected recognized real property interests." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978). Here, Quinn made a speculative investment in land that had no sewer service, and the Grandfather/Merger Provision he attacks is a "classic way" for local governments to accomplish the important goal of "preserv[ing] open space while still allowing orderly development." *Murr*, slip op. at 16. He has failed to show that either the extension of sewer service or the Grandfather/Merger Provision goes too far in interfering with his property so as to require compensation.[1]

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[1] The County argues that Quinn's takings claim is not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), because Quinn failed to pursue compensation in state court. *Williamson County*,

A.

Quinn's Takings Clause claim based on his lack of sewer service fails because he never had a property interest in obtaining that service. "The Takings Clause protects private property; it does not create it." *Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000). Thus, "[t]he analysis in a takings case necessarily begins with determining whether the government's action actually interfered with the landowner's antecedent bundle of rights." *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005). The property rights contained in this bundle are "determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). The property owner must show more than a mere hope or expectation; "[h]e must, instead, have a legitimate claim of entitlement." *Roth*, 408 U.S. at 577.

We have rejected a Takings Clause claim based on a municipality's failure to extend sewer service because the plaintiff, which bought the land without access to public sewer service, failed to show a

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however, is a prudential standard, and "we may determine that in some instances, the rule should not apply and we still have the power to decide the case." *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013). The district court elected to decide the merits of Quinn's takings claim, and we find that our doing the same here is in the interests of fairness and judicial economy.

sufficient property interest in that service. *Front Royal*, 135 F.3d at 287. In that case, a Virginia Annexation Court ordered a town to provide the plaintiff with sewer service, but the town put off doing so until after years of litigation. The town's unreasonable delay in providing sewer service was not a taking, though, because when the plaintiff bought the land, "it had no legitimate expectation that that land came with the public provision of sewer service." *Id.*

Quinn is in a similar position here. He cannot point to anything in the land records that would suggest he has a right to obtain sewer service; he bought the land knowing that development would depend on septic systems. Likewise, Maryland law does not create a property right in the access to a sewer system. *Neifert v. Dep't of Envir.*, 910 A.2d 1100, 1122 (Md. 2006). Quinn may hope for sewer service or even need it to make his investment profitable, but like the property owner in *Front Royal*, Quinn's desire for sewer service "is nothing but an inchoate interest in the conferral of a benefit to enhance market value." *Front Royal*, 135 F.3d at 286. The County's failure to confer that benefit is not a compensable taking.

Quinn attempts to manufacture a property right to sewer service through a Maryland statute which requires that when a local sanitary commission constructs a sewer line, it must provide a connection to "each parcel that abuts" that sewer line. Md. Code Ann., Envir. § 9-661(a)(1). Quinn argues that he owns property that abuts a sewer line but that will not be connected. First off, Quinn's interpretation of

the statute appears incorrect. The sewer line to which Quinn refers is a so-called "interceptor line," which transports sewage from areas receiving sewer service to the treatment facility but is not designed to connect to individual properties. In responding to a question from Queen Anne's County, the Maryland Attorney General concluded that § 9-661(a)(1) does not require providing connection to "interceptor lines." 90 Md. Op. Att'y Gen. 60 (2005).

But even if the Maryland Attorney General's interpretation of the law were somehow incorrect, a local government's failure to provide sewer service in violation of state law does not create a Takings Clause claim. In fact, it would put Quinn in the same position as the plaintiff in *Front Royal*, where the town missed a state court deadline to provide sewer service by nearly ten years. Perhaps, if Quinn's interpretation of the law is correct, he could get a state court to order the County to provide him with sewer connections. But like the plaintiff in *Front Royal*, he bought his land without any sewer service, and that is exactly where his land stands today.

By excluding many of Quinn's lots from sewer service, the County here does not "prohibit the realization of investment-backed expectations, but merely refuses to enhance the value of real property." *Front Royal*, 135 F.3d at 285–86. Viewed another way, Quinn cannot develop some of his lots because the land will not accommodate septic systems, not because the County will extend sewer service to other lots on South Kent Island—including some of Quinn's property. As we have recognized, finding a

compensable taking in such a situation "would open an incredible Pandora's Box." *Id.* at 286. The Takings Clause simply does not create an affirmative obligation for local governments to make good on speculative private investments or to increase property owners' land value. The real constraints of costs, congestion, public health and environmental hazards, and a host of other local concerns mean that local governments may extend services to some properties but not to others. This is a trade-off inherent in local politics. It does not deprive the owners who do not receive the services of their property, so it does not give rise to a Takings Clause claim.

B.

Quinn's Takings Clause claim based on the Grandfather/Merger Provision fails as well. The provision is a standard zoning tool, is designed "for a specific and legitimate purpose", *Murr*, slip op. at 17, and does "not unacceptably interfere with [Quinn]'s existing property interests under the regulatory takings framework." *Henry v. Jefferson Cty. Comm'n*, 637 F.3d 269, 276 (4th Cir. 2011).

Quinn first contends that the Grandfather/Merger Provision deprives him of all valuable use of his land and is thus a *per se* regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Supreme Court held that a *per se* taking occurs "where regulation denies all economically beneficial or productive use of land." *Id.* at 1015. The Court reasoned that such regulations "carry with them a heightened risk that

private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018. For example, in *Lucas*, the regulation at issue prevented the owner of beachfront property from making any use of his land in order to preserve the coastline. The state could have achieved the same outcome by buying the land and creating a nature preserve, which would have obviously required compensation. *See id.* at 1019.

Here, for starters, the regulation is of a very different form than the regulation in *Lucas*. The Grandfather/Merger Provision does not resemble a regulation that is pressing Quinn's land "into some form of public service." *Id.* at 1018. Instead, it resembles standard zoning tools—such as minimum lot sizes, setback requirements, or restrictions on subdividing lots—that local governments use all the time to temper the density of development. *See Murr*, slip op. at 15–16. Not only are local governments concerned about congestion on roads, overcrowding in schools, overuse of sewer systems, and exhaustion of other public services, they must consider the costs of overdevelopment on the environment and on the fundamental character of the community. Managing the density of development—even if it disappoints a particular developer—is thus a crucial goal of land use planning.

Quinn argues that, even if the Grandfather/Merger Provision is a common zoning tool, it deprives his property of all economically beneficial use and is a *per se* taking under *Lucas*. His complaint alleges that each of his lots was worth

between $30,000 and $50,000 before the enactment of the Grandfather/Merger Provision and that he has now been "deprived of all reasonable uses of" his land. J.A. 22. An affidavit he filed later, though, clarifies that it is the lack of sewer service, not the Grandfather/Merger Provision, that leaves his "property—whether merged or unmerged—undevelopable and valueless." J.A. 285. These lots are "undevelopable and valueless" because they cannot accommodate a septic system, not because of any government action.

Quinn does not provide evidence of the effect of the Grandfather/Merger Provision on his lots that will receive sewer service, but he has at least twelve lots—subject to merger into four lots—that will. Quinn cannot point to any reason these lots cannot be developed, and it is clear that the Grandfather/Merger Provision does not deprive these lots of all economically beneficial use. The multifactor standard established by the Supreme Court's decision in *Murr* suggests that the lots subject to merger should be viewed as a collective. In that case, the Supreme Court held that the Murr siblings' two adjacent lots, which were subject to a merger provision, "should be evaluated as a single parcel" for purposes of regulatory taking analysis. *Murr*, slip op. at 17. As in *Murr*, the merged lots here are contiguous, and no physical or topographical barriers have been identified that would limit joint development. *See id.*, slip op. at 18. Further, in some respects, the collective nature of the merged lots is clearer here than in *Murr*: unlike in that case, each of Quinn's lots was purchased as a speculative

investment, rather than for personal use, and each lot remains undeveloped. *See id.* at 3–4. Viewed as a collective, the lots are still developable, albeit less densely than Quinn had hoped. Even if viewed individually, however, each of the twelve lots retains value for assemblage into the four lots on which Quinn can now build. Because the Grandfather/Merger Provision does not deprive Quinn of all economically beneficial use of his land, it is not a *per se* taking under *Lucas*.

C.

In the alternative, Quinn contends that the Grandfather/Merger Provision is a taking under the three-factor *Penn Central* test. The Court in *Penn Central* recognized that many regulatory takings challenges involve "essentially ad hoc, factual inquiries," but identified three significant factors: the economic harm of the regulation, "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Penn Cent.*, 438 U.S. at 124. As with cases finding a *per se* taking, the inquiry "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. Quinn's challenge to the Grandfather/Merger Provision fails to satisfy any of the three factors.

The Grandfather/Merger Provision does not cause economic harm that rises to the level of a constitutional violation. As noted above, Quinn has claimed that it is the lack of sewer service that

renders much of his land valueless, so the Grandfather/Merger Provision could not, by Quinn's own admission, have affected the economic value of those lots. As to his lots that were scheduled to receive sewer service, Quinn argues that they cannot be developed separately and that some rights tied to the individual lots, such as beach access, are extinguished because there are fewer lots after the merger. He does not, however, present evidence of the actual change in value of these lots. Nonetheless, it is clear that the economic harm from the Grandfather/Merger Provision is not severe. As in *Murr*, slip op. at 18–19, Quinn can still build homes on his land; the Provision only requires that the development be less dense than he had hoped. A regulation is not a taking merely because it "prohibit[s] the most beneficial use of the property," *Penn Cent.*, 438 U.S. at 125, and the Supreme Court has upheld regulations causing diminutions in value far greater than any diminution here. *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 409–10 (1915).

Next, the Grandfather/Merger Provision does not interfere with Quinn's reasonable investment-backed expectations because his investment in the land was highly speculative. Quinn claims that he bought the lots expecting to develop them individually. Even assuming this was a reasonable investment-backed expectation when he started buying the land, Quinn knew any development would require septic systems, and it was soon clear that his land would not support septic systems. As he acknowledged, he had "to wait on his development plans until sewer was available on South Kent Island." J.A. 280. Any hope of

developing the land thus depended on receiving sewer service—a speculative proposition and one to which, as discussed above, Quinn had no entitlement. These types of speculative hopes—dependent on receiving a government service to which the plaintiff has no entitlement—are not the reasonable investment-backed expectations relevant to the *Penn Central* analysis. *See Henry*, 637 F.3d at 277.

Finally, the character of the Grandfather/Merger Provision does not suggest a taking. Interference with property is less likely to be considered a taking when it "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124. Regulations that control development based "on density and other traditional zoning concerns" are the paradigm of this type of public program. *Henry*, 637 F.3d at 277. The Grandfather/Merger Provision at issue here, like the one in *Murr*, is "a reasonable land-use regulation, enacted as part of a coordinated [] state[] and local effort to preserve the … surrounding land." *Murr*, slip op. at 20. Local governments need to be able to control the density of development to prevent the overburdening of public services, environmental damage, and other harms. In the context of this case, specifically, the Grandfather/Merger Provision is an effort to facilitate the extension of sewer service while mitigating the potential for ensuing overdevelopment.

The Grandfather/Merger Provision is not a *per se* taking under *Lucas* or a taking under the *Penn*

Central standard. It is, rather, a standard zoning provision designed to manage the density of development, a crucial part of local land use planning. To find a taking here would revolutionize zoning law and severely constrict local governments' ability to direct democratically the very nature and character of the community.

III.

Quinn next contends that the district court erred in dismissing his due process claims against the County and against the Maryland Department of the Environment. He argues that both the sewer extension and the Grandfather/Merger Provision violate his substantive due process rights. To succeed on this claim, he must show "(1) that [he] had property or a property interest; (2) that the state deprived [him] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 827 (4th Cir. 1995) (emphasis in original). This is a high bar, and an action is illegitimate "only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning." *Id.* The "significant hurdles" for substantive due process claims in this area reflect "our oft-repeated 'extreme[] reluctan[ce] to upset the delicate political balance at play in local land-use disputes.'" *Henry*, 637 F.3d at 278 (quoting *Shooting Point, L.L.C. v. Cumming*, 368 F.3d 379, 385 (4th Cir. 2004)) (alterations in original).

Quinn's substantive due process challenge to the sewer extension fails because, as discussed above, Quinn never had an entitlement to receive sewer service. He bought his land knowing it lacked sewer service, and Maryland law does not recognize a property interest in access to sewer service. *Neifert*, 910 A.2d at 1122. Quinn had nothing "more than a unilateral expectation," *Roth*, 408 U.S. at 577, of his lots being included in any sewer extension, and a unilateral expectation which did not pan out is insufficient to support a substantive due process claim.

His substantive due process challenge to the Grandfather/Merger Provision fails because of his complete "inability to show that the [provision] bore no rational relationship to the exercise of the state's traditional police power through zoning." *Sylvia Dev. Corp.*, 48 F.3d at 828. The Grandfather/Merger Provision is patently a legitimate government action. None of the factors that suggest illegitimacy are present: Quinn does not point to any procedural irregularity; the Grandfather/Merger Provision applies generally to all lots in the area; and it is consistent with the County's longstanding desire to limit development on undersized lots. The evidence is overwhelming that the Grandfather/Merger Provision here is part of a comprehensive plan to address the serious public health and environmental problems arising from failing septic systems, obtain state funding for the sewer extension, and limit the subsequent potential for over-development. These are legitimate government goals, and the

Grandfather/Merger Provision is clearly related to them. There is no substantive due process violation.

IV.

Finally, Quinn argues that the district court erred in granting the County's motion for summary judgment on his claim that the sewer extension and the Grandfather/Merger Provision violate his right to equal protection of the law by disproportionately affecting his property. The Equal Protection Clause of the Fourteenth Amendment "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Government action, though, will inevitably "differentiate in some fashion between" people, *id.*, so outside of certain suspect groups like race or national origin, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Thus Quinn must show that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). He has failed to do so.

Here, the County plainly has a "rational basis for the difference in treatment." *Id.* The County will provide sewer service to streets with homes with failing septic systems and, in order to comply with a state statute, all vacant lots on those streets as well. The County will not provide sewer service to streets

with only vacant lots for two reasons: one, in order to obtain state funding for and lower the cost of the aforementioned sewer extension; and two, to alleviate the threat of overdevelopment brought about by the earlier sewer expansion. Moreover, the County enacted the Grandfather/Merger Provision to limit development on sub-sized lots. Any difference in treatment Quinn suffered was thus "rationally related to a legitimate state interest," *City of Cleburne*, 473 U.S. at 440, and is not a violation of his equal protection rights.[2]

V.

Quinn made a speculative investment in land that needed sewer service to be developed. He now asks us to force the County and State to assure him profitability. But finding a property interest in receiving sewer service or requiring compensation for the standard zoning tool of the Grandfather/Merger

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[2] Quinn submitted a Rule 56(d) affidavit attached to his Opposition to the County's Motion for entry of judgment. However, he fails to establish how additional discovery would shake the legal foundations of the trial court's ruling. He seeks, for example, to discover the "reasons" and "motivations" and "other forces" behind the water and sewer plan and the Grandfather/Merger Provision. None of Quinn's vague speculation, however, brings into material dispute the fact that, as explained above, Quinn had no entitlement to sewer service, that the Grandfather/Merger Provision rested on recognized zoning and land use concerns and did not deprive Quinn of the economically beneficial use of his property, and did not evince the kind of arbitrariness that would give rise to any sort of due process or equal protection claim. It is clear, therefore, that the district court did not abuse its discretion in denying Quinn's discovery request.

Provision would be a severe blow to communities' ability to manage growth in a constructive manner. Not putting in sewer connections can cause human waste to back up in failing septic systems; putting in new sewer connections, especially on vacant lots, can provide an impetus for excessive growth. Local governments require flexibility to expand services like sewer in response to community needs; those governments also must be able to control the density of development in order to prevent overcrowding in schools, clogging of streets, overload on sewer facilities, degradation of the environment, and a host of other concerns. As recognized in *Murr*, adding a highly dubious constitutional overlay to the already complex mixture of legal requirements risks making land use planning a well-nigh impossible undertaking. *See Murr*, slip op. at 8–9. Quinn's equal protection and due process claims are likewise without merit. The judgment of the district court is affirmed in all respects.

AFFIRMED

APPENDIX B

[Filed August 13, 2015]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

KEVIN QUINN, et al.,	:	
Plaintiffs,	:	
v.	:	
		Civil Action No.
THE BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND, et al.,	:	GLR-14-3529
Defendants.	:	

MEMORANDUM OPINION

Pending before the Court are Defendants', the Board of County Commissioners for Queen Anne's County, Maryland, ("Commissioners") and the Queen Anne's County Sanitary Commission ("Sanitary Commission" – collectively, the "County"), Motion to Dismiss or, in the Alternative, for Summary Judgment (ECF No. 13) and Defendants', the Maryland Department of Environment ("MDE") and

Robert Summers, in his official capacity as Secretary of the MDE (collectively "MDE"), Motion to Dismiss Count IV of the Complaint (ECF No. 14). Having reviewed the pleadings and supporting documents, the Court finds no hearing necessary. See Local Rule 105.6 (D.Md. 2014). For the reasons outlined below, the Motions will be granted.

I. BACKGROUND

Queen Anne's County Queen Anne's County is a political subdivision of the State of Maryland. It is governed by the Commissioners, who have — among other police powers to protect the public health, safety, and welfare — the power to regulate land use in unincorporated communities such as South Kent Island. The Sanitary Commission is the public authority created pursuant to Md. Code Ann., Envir. § 9- 607 (West 2015) to "exercise[] public and essential government functions, for the public health and welfare." The sanitary district consisting of Queen Anne's County (the "Sanitary District") is under the jurisdiction and control of the County Commissioners, who sit as the Sanitary Commission. Queen Anne's County Code §§ 24-1, 24-4.

The opening of the initial span of the Chesapeake Bay Bridge brought with it widespread residential development on South Kent Island, an area with abundant waterfront, prior to Queen Anne's County's adoption of zoning and subdivision regulations. Developers were able to create thousands of small lots simply by recording a plat among the land records. Most residential lots platted during that

time were relatively small, and all of the developed lots exclusively rely on wells and septic systems. It became clear over time, however, that the land is unsuited for intense residential development that relies on septic systems.

Environmental and practical concerns related to and arising from the Chesapeake Bay watershed shape the County's regulation of land use and administration of the Sanitary District, particularly in the South Kent Island area. This area is low-lying, and has a high water table and poor soil for disposing of sewage in septic systems. At least eighty percent of the septic systems in two South Kent Island subdivisions meet the State of Maryland's definition of a failed septic system. Failed septic systems discharge untreated or undertreated sewage onto the surface or into groundwater polluting the ground and surface waters and increasing the risk of disease caused by human contact with bacteria and viruses in human fecal matter. To address the public health problems presented by failing septic systems, the County seeks to extend municipal sewerage service to certain areas of South Kent Island.

The availability of funding has been a key factor in the County's ability to proceed with the construction of sewerage infrastructure. Thus, the County has undertaken this program in cooperation with the State of Maryland by entering into a funding agreement in anticipation of a grant. The State's Bay Restoration Fund, which awards grants to counties and municipalities for the purpose of connecting developed properties with failing septic

systems to a wastewater treatment plant, was initially restricted to certain properties located within the State's "priority funding areas" ("PFA"). Md. Code Ann., Envir. § 9-1605.2 (West 2015). This restriction on funding is premised on Maryland's Smart Growth Law, codified primarily in Md. Code Ann., State Finance and Procurement §§ 5-7B-01 *et seq*. (West 2015), which limits State funding for growth-related projects outside PFAs.

South Kent Island is located outside the State's PFA and, thus, was not eligible for State funding. In 2014, however, the Legislature amended Envir. § 9-1605.2(h)(5) in order to allow the MDE to subsidize a sewerage system that serves areas outside of a PFA if certain requirements were satisfied. The Legislature imposed two conditions that are relevant here: (1) it required a PFA exception under State Fin. & Proc. § 5-7B-06 (West 2015), which required approval of the Smart Growth Coordinating Committee ("SGCC"); and (2) it required a funding agreement to include provisions to ensure denial of access to future connections outside the service area. Envir. § 9-1605.2(h)(5)(iv)2 to (v). The funding agreement at the center of this dispute incorporated the restrictions required by this amendment.

To proceed with the construction of sewerage infrastructure, the County was required to reconcile its obligations under State law to serve certain properties with municipal sewer service once the line was constructed with the limitations on the availability of State funding to improve those properties. Specifically, stricter zoning and percolation requirements have resulted in numerous

small and unimproved lots contiguous with improved lots with existing homes being barred from employing individual septic systems.[1] Under Maryland's Smart Growth Law, State funding is not available to serve new development, vacant lots, or other properties along the path of the sewerage system. State law, however, requires a county sanitary commission to provide services to abutting property owners with the "Service Area."[2]2 Md. Code Ann., Envir. § 9-661.

The County and SGCC are also concerned with the potential overdevelopment caused by providing sewer service to existing, but currently unbuildable, vacant lots within the planned Service Area. (MDE's Mot. to Dismiss Count IV of the Complaint ["MDE's Motion"] Ex. 1, at 7-8, ECF No. 14-2). The County is concerned that continued overdevelopment of the NC-20 District would negatively impact its ability to evacuate Kent Island in the event of an emergency and provide adequate roads, schools, and other public facilities to serve an increased population. Id. at 8. SGCC also found that restricting the number of lots eligible to receive sewer service was necessary

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[1] The County imposed strict percolation requirements in the late 1980s, preventing residential improvement using septic systems on many of the undeveloped lots in South Kent Island. Moreover in 1987, the County enacted a zoning ordinance which included provisions prohibiting any property within the NC-20 District platted and recorded after 1987 from being used for residential development unless the lot size is 20,000 square feet or greater.

[2] The "Service Area" sets forth the geographical boundaries of an area to be provided with sewer service.

because of the limited sewage capacity at the wastewater treatment plant. Id. at 9.

To minimize development while also complying with the State's environmental and Smart Growth statutes, the County implemented several measures. First, the County amended its comprehensive Water and Sewer Plan to exclude large blocks of contiguous vacant lots from the "Service Area" and to only include vacant lots interspersed among existing homes.[3] Streets and blocks with only vacant lots along with fully undeveloped streets were generally excluded from the Service Area because the extension of service to those areas was deemed unnecessary to correct the existing public health problems created by failing septic systems and not financially justifiable or feasible in light of the limited resources available.

Second, the County reduced the number of potential vacant lots by passing Ordinance No. 13-24 (the "Grandfather/Merger Provision"), which essentially requires unimproved lots to merge with contiguous unimproved or improved lots that were under the same ownership on November 12, 2013, as needed to achieve conformity with the NC-20 District's 20,000-square foot minimum lot size requirement or to prevent leaving a contiguous substandard "orphan" lot that is under the same

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[3] Although the Complaint alleges that Resolution No. 14-07 creates the geographic boundaries of the Service Area, it merely imposes the benefit assessments within the Wastewater Subdistrict to help finance the sewer project.

ownership. These two steps had the effect of reducing the number of vacant lots to receive municipal sewer service from approximately 1600 to 632. (MDE's Motion Ex. 2, at 6, ECF No. 14-3). Moreover, as a condition of funding and a requirement of the 2014 Legislative Amendment, the final funding agreement included a "Denied-Access Provision," which denies all future connections outside the project's proposed service area.

Plaintiffs Kevin Quinn and Queen Anne Research and Development Corporation (collectively "Quinn") purchased no fewer than 232 lots on South Kent Island (the "Quinn Properties"), ranging in size from 5,000 to 70,200 square feet, between 1984 and 2002. Each of the individual and separate lots provided an unrestricted right of access to a private beachfront on the Chesapeake Bay and certain Transferrable Development Rights under the local County Code. At the time of acquisition, many of the lots were exempt from zoning restrictions and Quinn was entitled to develop and build residential housing on each of the individual lots irrespective of its area or frontage. Further, the soil condition on most of the Quinn Properties satisfied the percolation testing requirements to permit residential development on a number of the properties. Several years later, however, the percolation test requirements changed, forcing Quinn to wait on his development plans until municipal sewer service was available on South Kent Island.

Many of the lots constituting the Quinn Properties are contiguous and undeveloped such that they form a large tract of undeveloped land. As a

result, most of the Quinn Properties are excluded from the County's Service Area, even while many are contiguous to and surrounded by lots that are included. Quinn contends that by drawing and approving a sewer service area that excludes his parcels, his parcels become permanently ineligible for sewer service, effectively rendering his lots undevelopable and denying him all economically viable use of his property. He alleges this government action constitutes an unconstitutional taking under the Fifth Amendment and a violation of his substantive and procedural due process rights under the Fourteenth Amendment.

Moreover, Quinn alleges the County's Grandfather/Merger Provision, forcing the merger of his separately recorded and platted lots as a condition to obtaining a building permit, unconstitutionally interferes with his distinct investment-backed expectations when he purchased each of the lots separately and individually. As the owner of the largest number of contiguous, non-conforming, and undeveloped lots in the Kentmorr subdivision of South Kent Island, Quinn alleges he has been disproportionately affected by the Ordinance which deprives him of all economically viable use of his land.

On November 11, 2014, Quinn filed a Complaint for declaratory and injunctive relief and damages alleging the County's Grandfather/Merger Provision and Water and Sewer Plan, separately and together, constitute: (1) a taking of his unimproved lots without just compensation in violation of the Fifth Amendment to the United States Constitution

(Count I) and Article 24 of the Maryland Constitution (Count V) – (collectively the "Takings Claim"); (2) violations of equal protection under the Fourteenth Amendment to the United States Constitution (Count II) and Article 24 of the Maryland Constitution (Count VI) – (collectively the "Equal Protection Claim"); and (3) violations of substantive and procedural due process under the Fourteenth Amendment to the United States Constitution (Count III). Quinn also alleges the MDE acted in violation of his substantive and procedural due process under the Fourteenth Amendment to the United States Constitution (Count IV) by approving the 2011 Queen Anne's County comprehensive Water and Sewer Plan excluding his parcels.

II. DISCUSSION

A. Standard of Review

A Federal Rule of Civil Procedure 12(b)(6) motion should be granted unless an adequately stated claim is "supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007); *see* Fed.R.Civ.P. 12(b)(6). "'[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint' and not to 'resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (alterations omitted)(quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements

of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555. A complaint is also insufficient if it relies upon "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (alteration in the original) (quoting *Twombly*, 550 U.S. at 557).

To survive a Rule 12(b)(6) motion to dismiss, a complaint must set forth "a claim for relief that is plausible on its face." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. "In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

"When 'matters outside the pleading are presented to and not excluded by the court, the [12(b)(6)] motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.'"[4]

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[4] The United States Court of Appeals for the Fourth Circuit has articulated two requirements for proper conversion of a Rule 12(b)(6) motion. First, the "parties [must] be given some indication by the court that it is treating the 12(b)(6) motion as a motion for summary judgment" and, second, "the parties [must] first be afforded a reasonable opportunity for discovery." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 281 (4th Cir. 2013) (quoting *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985)). The alternative

Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 260-61 (4th Cir. 1998) (alteration in original) (quoting Fed.R.Civ.P. 12(b)). Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a).

In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an

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caption of the County's Motion and the attached exhibits are sufficient indicia that the Motion might be treated as one for summary judgment. *See Moret v. Harvey*, 381 F.Supp.2d 458, 464 (D. Md. 2005).

Once notified, "summary judgment is appropriate only after 'adequate time for discovery.'" *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The failure to file an affidavit specifying legitimate needs for discovery "is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) (quoting *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994)). Here, because Quinn has failed to specify a need for discovery, construing the County's Motion as one for summary judgment is appropriate.

otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (alteration in original).

A "material fact" is one that might affect the outcome of a party's case. *Id.* at 248; *see also JKC Holding Co. v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001) (citing *Hooven-Lewis v. Caldera*, 249 F.3d 259, 265 (4th Cir. 2001)). Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *accord Hooven-Lewis*, 249 F.3d at 265.

B. Standard of Review

1. Due Process Claims

Quinn claims he was denied substantive due process by Defendants failure to extend sewer service to his parcels, which effectively has rendered his lots undevelopable and denied him all economically viable use of his property. Because Queen Anne's County land-use regulations confer upon the Sanitary Commission and the MDE significant discretion to define the County's sewer Service Area, however, Quinn has failed to demonstrate a constitutionally protected property interest in public sewer access.

In considering any due process claim, the starting point is identifying a constitutionally protected property interest. *Gardner v. City of Balt. Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992); *see also*

Frall Developers, Inc. v. Bd. of Cty. Comm'rs for Frederick Cty., No. CCB-07-2731, 2008 WL 4533910, at *8 (D. Md. Sept. 30, 2008) ("[T]he "starting point" for analyzing any procedural due process claim is to determine whether the plaintiff has a protected property interest 'sufficient to trigger federal due process guarantees.'" (quoting *Scott v. Greenville Cty.*, 716 F.2d 1409, 1418 (4th Cir. 1983))). Property interests under the Fourteenth Amendment "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.* (alteration in the original) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). In *Roth*, the Supreme Court of the United States explained that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

The Fourth Circuit applies *Roth*'s "claim of entitlement" standard to municipal land-use decisions such as the one at issue here. *Gardner*, 969 F.2d at 68. Under this approach, any significant discretion conferred upon the Sanitary Commission and the MDE to define the County's sewer Service Area defeats Quinn's claim of a property interest in being included in the Service Area. *See id.* Thus, Quinn's interest in public sewer access-if he has any at all-is created and defined by Md. Code Ann., Envir. §§ 9-601 *et seq.*

Under Maryland law, a sanitary commission may create or alter individual service areas and service

subareas within the district without any qualifying criteria, Md. Code Ann., Envir. §§ 9-647, 648, 652; and MDE may approve, disapprove, approve in part, or modify the proposal without any qualifying criteria, Md. Code Ann., Envir. § 9-507(a). Thus, Maryland's Environment Article confers significant discretion upon the Sanitary Commission and the MDE to define and approve the service areas within the county.

Nevertheless, Quinn argues that Md. Code Ann., Envir. § 9-661 creates an independent obligation by the Sanitary Commission to construct a connector to the property line of each parcel that abuts the sewer line. Thus, Quinn argues, Md. Code Ann., Envir. § 9-661 establishes a legitimate claim of entitlement to a sewer-line connector under State law. The obligation created by Envir. § 9- 661, however, extends only to properties within the defined Service Area.

In isolation, Envir. § 9-661(a)(1) may be interpreted to require a connector for any abutting property; however, the sections of the statute must be read together to ascertain the true intention of the Legislature. *See Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 464 (1934). Envir. § 9-666 gives the Sanitary Commission the discretion to extend a project to properties that are contiguous to a service area. Moreover, a sanitary commission's significant discretion to define service areas would be undermined if it were required to provide sewage service to every property that is either contiguous to a service area or that abuts interceptor lines transporting sewage from a designated service area to a treatment plant. Thus, the Court concludes that

Md. Code Ann., Envir. § 9-661 does not create an "entitlement" to public sewer access. Accordingly, Quinn's due process claim fails as a matter of law.[5]

2. Takings Claim

Quinn alleges the Grandfather/Merger Provision and the County's Water and Sewer Plan, separately and collectively, deprive him of all economically viable use of his property constituting an unconstitutional taking under the Fifth Amendment.

The Takings Clause of the Fifth Amendment does not bar the taking of private property, but rather requires compensation in the event an "otherwise proper interference [with private property] amount[s] to a taking." *First English Evangelical Lutheran Church of Glendale v. L.A. Cty., Cal.*, 482 U.S. 304, 314-15 (1987); U.S. Const. Amend. V. Thus, to the extent Quinn does not seek compensation for a taking of his property, but rather an injunction against the enforcement of the County's regulatory scheme that Quinn alleges to be arbitrary and irrational, his claim sounds in due process and has been addressed above. To the extent Quinn seeks declaratory relief, "property may be regulated to a certain extent, if regulation goes too far[, however,] it will be recognized as a taking." *Lingle v. Chevron*

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[5] Because Quinn has failed to demonstrate a constitutionally protected property interest, there is no need to reach the question of whether excluding his properties from the County's Water and Sewer Plan was arbitrary or capricious. *See Gardner*, 969 F.2d at 68.

U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Regulations that deny a property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). In *Lucas*, the Supreme Court held that where a regulation completely deprives a property owner of all economically beneficial use, the government must pay compensation "except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property." *Id.* at 1004.

First, Quinn contends that because the Grandfather/Merger Provision independently prohibits a residential dwelling from being built upon an individual non-conforming lot, no market exists for the sale of his individual non-conforming lots; therein wholly depriving him of the value of each individual non-conforming lot including the value of each individual lot's unrestricted right of access to the private beachfront and certain Transferrable Development Rights. The Grandfather/Merger Provision, however, does not deprive Quinn of all economically viable use of his property. The Grandfather/Merger Provision merely merges the individual lots to form a larger residential lot. While the challenged action does cause some economic harm associated with the loss of individual unrestricted rights of access to the private

beachfront and certain Transferrable Development Rights of each individual lot,[6] the Court finds that the lots are not stripped of all beneficial use because they are simply developable as larger residential lots.

Next, Quinn contends that collectively the County's Water and Sewer Plan and the Grandfather/Merger Provision deprives him of all economically viable use of his property because the regulatory scheme permanently denies him sewer service, which effectively renders his merger lots undevelopable. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use" without compensation, *Lucas*, 505 U.S. at 1027, the limitation "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," *id.* at 1029.

Here, Quinn has not demonstrated that his exclusion from the County's Water and Sewer Plan is the proximate cause of his lots being undevelopable. In fact, Quinn concedes that the implementation of stricter percolation test requirements left his lots undevelopable until the possibility of sewer service came to fruition. (Quinn Aff. ¶5, ECF No. 17-1). Quinn never gained eligibility for municipal sewer access and has alleged no facts to support a legitimate expectation that his undeveloped parcels would ever be eligible for municipal sewer service. Indeed, inherent in the title when Quinn invested in

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[6] *See* discussion *infra* (addressing Quinn's Taking Claim with respect to the diminished value of his property).

his properties on South Kent Island was the implied limitation that he would have to provide his own water and sanitary waste disposal. All developed properties on South Kent Island are currently, and have always been, serviced by septic tanks and the County does not provide municipal sewer service to any property. (Quinn Aff. ¶13).

Further, while Quinn contends that the Sanitary Commission adopted a 2006 Water Service Area for South Kent Island that outlines areas that were expected to receive sewer service in the future, he does not allege that his properties were included in the 2006 geographic Service Area. (*See* Quinn Aff. ¶14). Even assuming his properties were identified in 2006 for potential future sewer service, Quinn purchased his properties between 1984 and 2002. (*See* Quinn Aff. ¶5); (*see also* Compl. ¶ 9). Quinn, therefore, has failed to allege his investment was backed by any legitimate expectation that his parcels would be provided with public sewer service.

Moreover, even assuming Quinn's lots were ever included in the County's Water and Sewer Plan, eligibility for a sewer connector does not necessarily guarantee a right to sewer service. Other lawful restrictions may result in the further denial of service. *See Neifert v. Dep't of Env't*, 910 A.2d 1100, 1119 (Md. 2006) (finding, under facts very similar to those in the instant dispute, that the denials of plaintiffs' sewer permits did not constitute a taking because they fell within the nuisance exception recognized by the Supreme Court in *Lucas*).

To the extent the challenged action does diminish the value of Quinn's property with respect to the loss associated with the unrestricted rights of access to the private beachfront and certain Transferrable Development Rights of each individual lot, "regulatory takings challenges are governed by the standards set forth in *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538 (explaining that outside of the discrete category of regulatory deprivation governed by *Lucas*, *Penn Central* analysis applies).

Although the Court in *Penn Central* did not develop a set formula for evaluating regulatory takings claims, it identified several factors of particular significance. *Penn Cent. Transp. Co.*, 438 U.S. at 124. Among those factors are the economic impacts of the regulation, particularly to the extent the regulation interferes with the claimant's distinct investment-back expectations, and the character of the governmental action. *Id.* A "taking," however, is less likely to be found when interference with property "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* Indeed, zoning laws are the classic example of permissible governmental action even where they prohibit "a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." *Id.* at 125.

Here, the Court finds that the County's Grandfather/Merger Provision is substantially related to the promotion of the general welfare by (1) regulating land use to reduce the impact of

overdevelopment on the environment and limited municipal facilities; and (2) achieving minimum lot sizes consistent with modern land use principles and necessary to maximize its limited financial resources in addressing the public health crisis facing the fully-developed and partially-developed areas of South Kent Island with failing septic tanks. "[W]here the public interest is involved[,] preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." Miller v. Schoene, 276 U.S. 272, 279-80 (1928). Accordingly, the Court concludes that the Grandfather/Merger Provision and the County's Water and Sewer Plan, separately[7] and collectively, do not constitute an unconstitutional taking as a matter law.

3. Equal Protection Claim

Quinn generally alleges that the geographical boundaries of the Service Area and the

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[7] The Court will not consider whether exclusion from the County's Water and Sewer Plan constitutes a taking independent of the Grandfather/Merger Provision because the Court has already concluded that Quinn has failed to demonstrate a constitutionally protected property interest in public sewer access. *See Frall Developers, Inc. v. Bd. of Cty. Comm'rs for Frederick Cty.*, No. CCB-07-2731, 2008 WL 4533910, at *8 (D. Md. Sept. 30, 2008) ("To make a successful claim under the Takings Clause, a plaintiff must establish that it possesses a constitutionally protected property interest before the court will examine whether governmental use or regulation of that property constitutes a taking." (citing *Washlefske v. Winston*, 234 F.3d 179, 184–86 (4th Cir. 2000))).

Grandfather/Merger Provision are targeted measures undertaken by the County Commissioners to prevent him from developing his property. Quinn contends that because he owns a majority of the contiguous, nonconforming, and undeveloped lots in the Kentmorr subdivision of South Kent Island, the Grandfather/Merger Provision will disproportionately deprive him of a significant number of his lots previously eligible for residential building. He further alleges the boundaries of the Service Area are arbitrarily defined in a manner that disproportionately affects his property and excludes them from the geographical area that would be served with public sewer access, although it provides for sewer service to properties contiguous with and adjacent to his. Quinn, however, has failed to allege any facts demonstrating that he is being treated differently than similarly-situated property owners and demonstrate either the County's decision to exclude large tracts of undeveloped land from its Water and Sewer Plan or the Grandfather/Merger Provision are not rationally related to a legitimate state interest.

The Fourteenth Amendment's Equal Protection Clause prohibits state action that denies a person equal protection "through the enactment, administration, or enforcement of its laws and regulations." *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 818 (4th Cir. 1995). The Supreme Court of the United States has also recognized an equal protection claim as a "class of one" where a plaintiff alleges it has "been intentionally treated differently from others similarly situated and that there is no

rational basis for the difference in treatment." *Tri Cty. Paving, Inc. v. Ashe Cty.*, 281 F.3d 430, 439 (4th Cir. 2002) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

The County argues that Quinn has failed to allege he has been treated differently because other owners of undeveloped lots are subject to both the Grandfather/Merger Provision and have been excluded from the Service Area. Indeed, the Grandfather/Merger Provision is a zoning ordinance of general application and applies to all unimproved lots in the NC-20 District. Additionally, at least thirty-nine similarly-situated properties on South Kent Island have been excluded from the Service Area. Moreover, not all of Quinn's Properties have been excluded from the Service Area. Thus, Quinn has failed to allege any facts demonstrating that he is being treated differently than similarly-situated property owners.

Even assuming Quinn did allege sufficient facts demonstrating that he is being treated differently than similarly-situated property owners, he has failed to allege facts sufficient to demonstrate that such differential treatment resulted from purposeful discrimination under the "class of one" theory.[8] Quinn, therefore, has failed to state a claim for relief

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[8] While Quinn argues *Olech* merely requires a showing of differential treatment, *Olech* actually requires a showing that differential treatment resulted from purposeful discrimination. *Olech*, 528 U.S. at 564-65 (requiring factual allegations showing an element of "subjective ill will" to state a claim for relief under a "class of one" equal protection analysis).

under the traditional[9] or "class of one" equal protection analysis.

Additionally, "[o]rdinarily, when a state regulation or policy is challenged under the Equal Protection Clause, unless it involves a fundamental right or a suspect class, it is presumed to be valid and will be sustained 'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Veney v. Wyche*, 293 F.3d 726, 731 (4th Cir. 2002) (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)). Here, neither a "fundamental right" nor a "suspect" classification is at issue. Rather, Quinn alleges the Grandfather/Merger Provision and the geographical boundaries of the Service Area, separately and collectively, disproportionately targeted and arbitrarily affected his property.

Regardless of the actual motivation for the County's action, "the pertinent question for determining whether the governmental action violated the Equal Protection Clause is whether [County] officials reasonably could have believed that the action was rationally related to a legitimate governmental interest." *Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal, Va.*, 135

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[9] Under the traditional equal protection analysis, "[t]o prove that a statute has been administered or enforced discriminatorily, more must be shown than the fact that a benefit was denied to one person while conferred on another. A violation is established only if the plaintiff can prove that the state *intended* to discriminate." *Sylvia Dev. Corp.*, 48 F.3d at 819 (emphasis in the original) (citation omitted).

F.3d 275, 290 (4th Cir. 1998); *see also id.* (setting aside actual motivation for an objectively-reasonable analysis).

It is undisputed that the County has a legitimate state interest in preserving and enhancing the public health, safety, and welfare of fully-developed and partially-developed areas of South Kent Island with failing septic tanks. To ensure that it devised a regulatory scheme in accordance with State law, the County sought the advice of the Attorney General of Maryland (the "Attorney General") concerning the law governing the County's extension of sewerage service. *See generally* 90 Op. Att'y 60 (April 13, 2005).

The Attorney General concluded that under State law, the County is required to provide a sewer "connector for each vacant lot within a service area that is interspersed among developed lots along a right-of-way in which the sewer line is laid." *Id.* at 61. If it is feasible to design a sewer system without including a street with vacant lots, however, the County is not obligated to provide service to that street. *Id.* Further, the County is not required to provide sewerage service outside the defined service area. *Id.* at 62. Because the availability of funding has been a key factor in the County's ability to address the public health problems presented by the failing septic systems, it entered into a funding agreement in anticipation of a grant from the State. Under Maryland's Smart Growth Law, however, State funding is not available to serve new development, vacant lots, or other properties along the path of the sewerage system. Thus, the State's

funding restrictions, combined with the County's interest in reducing the impact of overdevelopment, required it to devise a regulatory scheme that limited the eligibility of sewer service to a minimum number of lots.

The Court concludes the County reasonably believed that both its Water and Sewer Plan and the Grandfather/Merger Provision, separately and collectively, were rationally related to its obligations under State law to serve certain properties with municipal sewer service while establishing a mechanism for financing a waste disposal service appropriate for the conditions on South Kent Island. Moreover, the County has an independent legitimate governmental interest in regulating land use to reduce the impact of overdevelopment on the environment and limited public facilities. The Court concludes the County reasonably believed that the Grandfather/Merger Provision advances that interest by achieving minimum lot sizes consistent with modern land use principles. Accordingly, Quinn's Equal Protection Claim fails as a matter of law.

III. CONCLUSION

For the reasons given above, the County's Motion to Dismiss or, in the Alternative, for Summary Judgment (ECF No. 13) and the MDE's Motion to Dismiss Count IV of the Complaint (ECF No. 14) are GRANTED. A separate Order will follow.

Entered this 13th day of August, 2015

/s/
George L. Russell, III
United States District Judge

APPENDIX C

[Filed July 6, 2016]

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of
George L. Russell, III
United States District Judge

101 West Lombard Street
Baltimore, Maryland 21201
410-962-4055

July 6, 2016

MEMORANDUM TO COUNSEL RE:

Kevin Quinn, et al. v. The Board of County Commissioners for Queen Anne's County, Maryland, et al.

Civil Action No. GLR-14-3529

Dear Counsel:

Pending before the Court are Quinn's[1] Motion to Alter or Amend Judgment under Federal Rule of Civil Procedure 59(e) (ECF No. 24) and Motion for Stay of Proceedings (ECF No. 34). The Motions are ripe for disposition. Having reviewed the Motions and supporting documents, the Court finds no

[1] Defined terms retain their definitions from the Court's August 13, 2015 Memorandum Opinion (ECF No. 22).

hearing necessary pursuant to Local Rule 105.6 (D.Md. 2016). For the reasons outlined below, the Court will deny Quinn's Motions.

On August 13, 2015, the Court entered an Order granting the County's Motion to Dismiss or, in the Alternative, for Summary Judgment (ECF No. 13) and MDE's Motion to Dismiss Count IV of the Complaint (ECF No. 14). (ECF No. 23). In its accompanying Memorandum Opinion, the Court determined it would treat the County's Motion as one for summary judgment because Quinn failed to specify a need for discovery. (ECF No. 22). Applying Rule 56, the Court then concluded that the County was entitled to judgment as a matter of law on all of Quinn's claims. (*Id.*).

Specifically, the Court found as a matter of law that Quinn's due process claim fails because Quinn does not have a constitutionally protected property interest in public sewer access. (Memo Op. at 12–14, ECF No. 22). As for Quinn's Takings Claim, the Court determined there was no unconstitutional taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) or *Penn Central Transportation Co. v. City of New York (Penn Central)*, 438 U.S. 104 (1978) because Quinn did not demonstrate that his lots lost all economic value, his investment was backed by any legitimate expectation that his lots would ever be eligible for public sewer service, or the County's actions were illegitimate or inequitable. (*Id.* at 15–20). Additionally, the Court concluded Quinn's Equal Protection Claim fails because Quinn did not show he is being treated differently than similarly situated property owners

or the County's conduct fails rational basis scrutiny. (*Id.* at 20–25).

Quinn filed a Motion to Alter or Amend Judgment on September 10, 2015 (ECF No. 24). MDE and the County filed Oppositions on October 6 and 7, 2015, respectively (ECF Nos. 29, 30). Quinn submitted a Reply on November 9, 2015 (ECF No. 33). On March 24, 2016, after the Motion to Alter or Amend Judgment was fully briefed, Quinn filed a Motion for Stay of Proceedings (ECF No. 34). MDE and the County submitted Oppositions on April 7, 2016 (ECF Nos. 35, 36), and Quinn filed Replies on April 25, 2016 (ECF Nos. 37, 38).

The Court may only alter or amend a final judgment under Rule 59(e) in three circumstances: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Rule 59(e) "permits a district court to correct its own errors, 'sparing the parties and the appellate courts the burden of unnecessary appellate proceedings.'" *Id.* (quoting *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir.1995)). Altering or amending a final judgment "is an extraordinary remedy which should be used sparingly." *Id.* (quoting 11 Wright, et al., *Federal Practice & Procedure* § 2810.1, at 124 (2d ed. 1995)). Accordingly, a party may not use a Rule 59(e) motion "to raise arguments which could have been raised prior to the issuance of the judgment" or "to argue a

case under a novel legal theory that the party had the ability to address in the first instance." *Id.*

When a party argues that Rule 59(e) relief is necessary to correct a clear error of law or to prevent manifest injustice, mere disagreement with the Court's previous decision will not suffice. *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) (quoting *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993)). Rather, to justify altering or amending a judgment on this basis, "the prior judgment cannot be 'just maybe or probably wrong; it must . . . strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *Fontell v. Hassett*, 891 F.Supp.2d 739, 741 (D.Md. 2012) (alterations in original) (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009)). Hence, a "factually supported and legally justified" decision does not constitute clear error. *See Hutchinson*, 994 F.2d at 1081–82.

Quinn argues the Court clearly erred when it treated the County's Motion as a motion for summary judgment because Quinn submitted a Rule 56(d) affidavit specifying discovery needs. Quinn contends the Court further clearly erred when, after treating the County's Motion as one of summary judgment, it relied on matters outside the Complaint to enter judgment for the County on all of Quinn's claims. Quinn asks the Court to vacate its August 13, 2015 Memorandum Opinion and Order, deny the

County's Motion, and enter a scheduling order.[2] The County responds that the Court did not clearly err because Quinn's discovery requests relate only to his Equal Protection Claim and Quinn's allegations supporting that claim fail to survive a Rule 12(b)(6) motion.

A motion styled as a motion to dismiss or, in the alternative, for summary judgment implicates the Court's discretion under Rule 12(d). *See Kensington Vol. Fire Dept., Inc. v. Montgomery Cty.*, 788 F.Supp.2d 431, 436–37 (D.Md. 2011), *aff'd sub nom*, *Kensington Volunteer Fire Dep't, Inc, v. Montgomery Cty.*, 684 F.3d 462 (4th Cir. 2012). Under Rule 12(d), when "matters outside the pleadings are presented to and not excluded by the court, the [Rule 12(b)(6)] motion must be treated as one for summary judgment under Rule 56." The United States Court of Appeals for the Fourth Circuit has articulated two requirements for treating a Rule 12(b)(6) motion as a Rule 56 motion. First, the "parties [must] be given some indication by the court that it is treating the 12(b)(6) motion as a motion for summary judgment," and second, "the parties [must] first 'be afforded a reasonable opportunity for discovery.'" *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*,

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[2] Although it is unclear whether Quinn moves the Court to alter or amend the portion of its August 13, 2015 Order dismissing Count IV of the Complaint, to the extent he pursues this relief, the Court concludes that it did not clearly err when dismissing Count IV because Quinn did not allege a constitutionally protected property interest in public sewer service.

721 F.3d 264, 281 (4th Cir. 2013) (quoting *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985)).

A nonmovant "cannot complain that summary judgment was granted without discovery unless that party had made an attempt to oppose the motion on the grounds that more time was needed for discovery." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (quoting *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996)). Rule 56(d) provides that the Court may deny or continue a motion for summary judgment "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." "[T]he failure to file an affidavit under Rule 56[(d)] is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) (quoting *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994)). Quinn argues he is not required to divulge his entire discovery plan in his Rule 56(d) affidavit. But, "Rule 56(d) affidavits may not demand discovery for discovery's sake; a Rule 56(d) request is properly denied 'where the additional evidence sought . . . would not have by *itself* created a genuine issue of material fact sufficient to *defeat summary judgment*.'" *Gardner v. United States*, No. JKB-15-2874, 2016 WL 2594826, at *4 (D.Md. May 4, 2016) (emphasis added) (quoting *Strag v. Bd. of Trs.*, 55 F.3d 943, 954 (4th Cir. 1995)).

To be sure, Quinn's affidavit attached to his Opposition to the County's Motion states that he

requires discovery to oppose summary judgment. (*See* Quinn Aff. ¶ 23, ECF No. 17-1). Quinn specifies he needs to discover the "reasons" and "motivations" behind the Water and Sewer Plan and the Grandfather/Merger Provision, as well any as "other forces" that influenced the County. (*Id.*). He also specifies he needs to take Todd Mohn's deposition to test the statements Mohn made in his affidavit attached to the County's Motion ("Mohn's First Affidavit"). (*Id.*). In Mohn's First Affidavit, he discusses the reasons underlying the necessity for a public sewer service in South Kent Island, the constraints associated with implementing and funding such service, and the County's specific motivations for enacting the Water and Sewer Plan and the Grandfather/Merger Provision and defining the Service Area to exclude unimproved lots not abutting a collector sewer line. (*See* Mohn's First Aff., ECF No. 13-2).

The Court will review each of Quinn's claims to determine whether Quinn's Rule 56(d) affidavit requests evidence that would by itself create a genuine dispute of material fact sufficient to defeat summary judgment. As the Court will explain, although the evidence that Quinn seeks would create a genuine dispute as to *some* elements of his claims, the evidence would not generate a genuine dispute as to *all* elements of his claims. As such, the discovery Quinn requests would not by itself create a genuine dispute of material fact sufficient to defeat summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (explaining that summary judgment is warranted against a nonmovant when the

nonmovant has "failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof" because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

Due Process Claim

In considering any due process claim, the starting point is identifying a constitutionally protected property interest. *Gardner v. City of Balt. Mayor*, 969 F.2d 63, 68 (4th Cir. 1992); *see Frall Developers, Inc. v. Bd. of Cty. Comm'rs for Frederick Cty.*, No. CCB-07-2731, 2008 WL 4533910, at *8 (D.Md. Sept. 30, 2008) ("[T]he "starting point" for analyzing any procedural due process claim is to determine whether the plaintiff has a protected property interest 'sufficient to trigger federal due process guarantees.'" (quoting *Scott v. Greenville Cty.*, 716 F.2d 1409, 1418 (4th Cir. 1983))). To have a constitutionally protected property interest in a benefit, an individual must "have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). As the Court explained in its Memorandum Opinion, Section 9-661 of Maryland's Environment Article does not create an "entitlement" to public sewer access because the County has discretion to define sewer service areas and extend a sewer project to properties that are contiguous to a service area. (Memo Op. at 13–14). The evidence that Quinn seeks to discover would not generate a genuine dispute as to whether Quinn is entitled to public service access. Accordingly, the Court did not clearly err in denying Quinn's Rule 56(d) request for

discovery and entering summary judgment for the County on Quinn's due process claim.

Takings Claim

There are two principal categories of regulatory takings: (1) regulations that deprive a landowner of all economically viable use of his property, which the Court analyzes under *Lucas*; and (2) regulations causing only partial diminutions in property value, which the Court analyzes in accordance with *Penn Central*. Under the *Penn Central* framework, the Court considers "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The Court may also consider "the character of the governmental action." *Id.* The evidence Quinn seeks to discover would not create a genuine dispute as to whether the Water and Sewer Plan or the Grandfather/Merger Provision strips Quinn's lots of all or a portion of their economic value, or whether Quinn had a reasonable expectation that he would be permitted to develop his individual lots and obtain public sewer service. The Court finds, therefore, that it did not clearly err in denying Quinn's Rule 56(d) request for discovery and entering summary judgment for the County on Quinn's Takings Claim.

Equal Protection Claim

To prevail on a "class of one" equal protection claim, a plaintiff must demonstrate that he has "been intentionally treated differently from others similarly situated and that there is no rational basis for the

difference in treatment." *Tri Cty. Paving, Inc. v. Ashe Cty.*, 281 F.3d 430, 439 (4th Cir. 2002) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). Other individuals are "similarly situated" when they "are in all relevant respects alike." *Veney v. Wyche,* 293 F.3d 726, 730 (4th Cir. 2002) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, (1992)). None of the evidence Quinn seeks to discover would generate a genuine dispute as to whether he is similarly situated to property owners whose properties are included in the Sewer Area. For example, Quinn alleges that all of his lots are undeveloped. (Compl. ¶ 9, ECF No. 1). But the facts Quinn seeks to discover would not show that lots within the Service Area are also undeveloped. The Court finds, therefore, that it did not clearly err in denying his Rule 56(d) request for discovery and entering summary judgment for the County on Quinn's Equal Protection Claim.

For the reasons stated above, Quinn's Motion to Alter or Amend Judgment (ECF No. 24) is DENIED. Also, Quinn's Motion to Stay Proceedings (ECF No. 34) is DENIED as moot. Despite the informal nature of this memorandum, it shall constitute an Order of this Court and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

George L. Russell, III
United States District Judge

APPENDIX D

FILED: August 4, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1890
(1:14-cv-03529-GLR)

KEVIN QUINN; QUEEN ANNE'S RESEARCH AND DEVELOPMENT CORPORATION

Plaintiffs - Appellants

v.

THE BOARD OF COUNTY COMMISSIONERS FOR QUEEN ANNE'S COUNTY, MARYLAND; QUEEN ANNE'S COUNTY SANITARY COMMISSION; PH.D ROBERT M. SUMMERS; MARYLAND DEPARTMENT OF THE ENVIRONMENT

Defendants - Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 18, 2017

Mr. David Gerald Sommer
218 North Charles Street
Suite 400
Baltimore, MD 21201

Re: Kevin Quinn, et al.
v. Board of County Commissioners for Queen Anne's County, Maryland, et al.
Applications No. 17A421

Dear Mr. Sommer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on October 18, 2017, extended the time to and including December 29, 2017.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by /s/ Michael Duggan

Michael Duggan
Case Analyst

NOTIFICATION LIST

Mr. David Gerald Sommer
218 North Charles Street
Suite 400
Baltimore, MD 21201

Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street
Room 501
Richmond, VA 23219

APPENDIX F

COUNTY ORDINANCE NO. 13-24
(As Amended)

AN EMERGENCY BILL ENTITLED

AN ACT CONCERNING the Use and Merger of Certain Substandard Lots in the Neighborhood Conservation (NC) District;

FOR THE PURPOSE of requiring that certain contiguous, substandard lots in the NC District be merged to comply with current Zoning Regulations and land use policies; and for the purpose of requiring such merger without interfering with rights guaranteed by the United States and Maryland Constitutions as interpreted by Federal and State Courts; and for the express purpose and intent of giving this Bill retroactive application by imposing such merger requirements based on lot ownership as of November 12, 2013, the date of introduction of this Bill to prevent individuals from defeating or undermining the purposes of this Bill by altering the ownership of properties between the date of introduction of this Bill and the Bill's effective date;

BY ADDING a new Subsection 18:1-19G. to Section 18:1-19 of the Code of Public Local Laws.

SECTION I

BE IT ENACTED BY THE COUNTY COMMISSIONERS OF QUEEN ANNE'S COUNTY, MARYLAND that Chapter 18:1 (Zoning and Subdivision Regulations) of the Code of Public Local Laws be amended by adding the following Subsection 18:1-19G. to Section 18:1-19.

Chapter 18:1
Zoning and Subdivision Regulations

…

§ 18:1-19. Neighborhood Conservation (NC District).

…

G. Use and merger of lots of substandard area or dimensions in Neighborhood Conservation (NC) District in areas designated S-3 or higher in the Comprehensive Water and Sewerage Plan.

(1) The provisions of this subsection shall apply in the NC District in areas designated S-3, S-4, S-5, and S-6 in the Comprehensive Water and Sewerage Plan on or after the effective date of this subsection G and shall apply notwithstanding any other provision in this Article, including, without limitation, those relating to non-conforming uses or lots. The provisions of this subsection shall not be construed to affect the non-conforming use or lot status of lots in Zoning Districts or areas to which this subsection does not apply.

(2) Except as provided in subsections (3) and (4) of this subsection, a dwelling may be constructed

on a lot that does not comply with the minimum area or dimensional requirements of the zoning district in which the lot is located, provided that the lot complied with applicable minimum area and dimensional requirements, if any, at the time it was created.

(3) A dwelling may not be constructed on an unimproved lot or lots that do not comply with the minimum area or dimensional requirements of the zoning district in which the lot or lots are located if the unimproved lot or lots are contiguous with an improved lot under the same ownership on November 12, 2013. An unimproved lot or lots governed by this subsection shall be administratively merged with the contiguous improved lot under the same ownership as of November 12, 2013 prior to the extension of public sewer service to the improved lot. Further, an unimproved lot or lots that must be merged with an improved lot under this subsection shall be merged with an additional contiguous unimproved lot or lots with the same ownership on November 12, 2013 that is or are necessary to prevent leaving an unimproved lot that does not satisfy the minimum area and dimensional requirements of the zoning district. The owner conducting a merger pursuant to this subsection must apply and receive approval of an administrative subdivision pursuant to §18:1-171 of the public local laws of Queen Anne's County prior to the extension of public sewer service to the improved lot. If the owner of a lot or lots required to be merged under this subsection G(3) fails to apply for and receive approval of an administrative subdivision, the Director of Planning shall process, consider and

approve an administrative subdivision effecting the merger pursuant to §18:1-171 of the public local laws of Queen Anne's County.

(4) Except as provided in subsection (5) of this subsection, an unimproved lot that does not comply with the minimum area or dimensional requirements of the NC District in effect at the time an application for a building permit is submitted may not be used for the construction of a dwelling if the lot was contiguous to and under the same ownership as one or more unimproved lots on November 12, 2013.

(5) A lot described in subsection (4) of this subsection may be used for the construction of a dwelling if the lot is merged with the contiguous, unimproved lot or lots in order to create a lot that (i) complies with, or comes as close as possible to complying with, the minimum area and dimensional requirements of the NC District, and (ii) does not leave a contiguous lot under the same ownership that does not comply with minimum area and dimensional requirements of the zoning district. The owner conducting a merger pursuant to this subsection must apply for and receive approval of an administrative subdivision pursuant to §18:1-171 of the public local laws of Queen Anne's County as a condition precedent to receiving a building permit for the dwelling.

(6) The seller of a lot subject to merger under this subsection G. must disclose in writing to any buyer of the lot the fact that the lot is subject to merger with another lot or lots under subsection G. This disclosure shall also be contained in all

contracts of sale, deeds or similar documents relating to the sale and shall cite this subsection G. and be displayed prominently with the heading "Notice of Required Lot Merger."

SECTION II

BE IT FURTHER ENACTED that it is the County Commissioners' express purpose and intent that the provisions of this Bill be given retroactive application to the extent that the provisions impose merger requirements based on lot ownership as of November 12, 2013.

SECTION III

BE IT FURTHER ENACTED that the provisions of this Act shall be severable and a determination that one or more provision is invalid shall not affect the validity of the remaining provisions.

SECTION IV

BE IT FURTHER ENACTED that this shall be declared an emergency bill affecting the public health, safety and welfare of the County and upon the affirmative vote of at least four-fifths of the total membership of the Board of County Commissioners shall take effect immediately, otherwise the same shall not be deemed an emergency bill and shall take effect on the forty-sixth (46th) day following its passage.

INTRODUCED BY: Commissioner Dunmyer

DATE: November 12, 2013

PUBLIC HEARING HELD: May 1, 2014 @ 7 p.m.
Kent Island High School

VOTE: 4 Yea 1 Nay (Commissioner Olds opposed)

DATE OF ADOPTION: May 27, 2014

EFFECTIVE DATE: May 27, 2014