IN THE CIRCUIT COURT FOR HARFORD COUNTY

IN THE MATTER OF:	*	
	*	
CHESAPEAKE BAY FOUNDATION, INC.,	*	CIVIL ACTION No.
JEAN A. and DOUGLAS J. BONN,	*	C-12-CV-20-000022
AMBER D. KAZMERSKI,	*	
BETH MARIE SHEPARD, and	*	
CYNTHIA ARTHUR	*	
	*	
FOR JUDICIAL REVIEW OF THE DECISION OF	*	
The Harford County Director of Planning and Zoning	*	
	*	
IN THE CASE OF	*	
Abingdon Business Park	*	
Forest Conservation Plan	*	
FCP No. 57-2019	*	
	*	

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MEMORANDUM IN SUPPORT OF PETITIONERS' RENEWED MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Petitioners Chesapeake Bay Foundation, Inc., Jean and Douglas Bonn, Amber Kazmerski, Beth Shepard, and Cynthia Arthur (together, the "Petitioners"), by their undersigned attorney, hereby file this memorandum in support of their renewed Motion for a Temporary Restraining Order (TRO) and Preliminary Injunction pursuant to Rules 2-311 and 15-501 – 15-505.

PROCEDURAL BACKGROUND

The Harford County Director of Planning and Zoning (the "Director of Planning") approved a Forest Conservation Plan for the proposed Abingdon Business Park on December 9, 2019 (the "Forest Conservation Plan" or "the Plan"). The Forest Conservation Plan authorizes the developers to remove over 200 acres of contiguous

forest and fell 49 large trees, known as specimen trees, on the Abingdon Business Park project site.

Petitioners Chesapeake Bay Foundation (CBF) and several local residents who live adjacent to the property at issue, Jean A. and Douglas J. Bonn, Amber D. Kazmerski, Beth Marie Shepard, and Cynthia Arthur timely filed a petition for judicial review of the Forest Conservation Plan in the Harford County Circuit Court on January 9, 2020. Petitioners sought judicial review pursuant to Maryland Rule 7-202 and Harford County Code Section 268-28, which provides "[a]ny interested person whose property is effected [sic] by any decision of the Director of Planning, may within 30 calendar days after the filing of such decision, appeal to the Circuit Court for Harford County." Harford County Code § 268-28(A). The developers of the property along with Harford County, Maryland and the Harford County Department of Planning and Zoning (the "Department"), filed a motion to dismiss on March 27, 2020, contending that the Forest Conservation Plan was not a final agency action subject to judicial review.

The Circuit Court conducted a hearing on August 19, 2020, and held the matter *sub curia* at the conclusion of argument. The Circuit Court issued its Memorandum Opinion and Order granting the motion to dismiss on October 22, 2020. Petitioners brought an appeal from that Order. The Court of Special Appeals heard arguments on the appeal and affirmed the decision of the Circuit Court in a reported opinion dated September 8, 2021, and issued its Mandate on October 12, 2021. Petitioners sought review in this Court and petitioned for a writ of certiorari on October 27, 2021. The Court of Appeals granted the petition in its Order dated January 11, 2022.

Harford County, Maryland issued a grading permit for the Abingdon Business Park on June 29, 2022. Petitioners filed a Motion for a Temporary Restraining Order and Preliminary Injunction in the Circuit Court on July 15, 2022, after tree clearing began while their appeal was pending before the Court of Appeals. The Circuit Court held a hearing on that motion on August 3, 2022, and denied injunctive relief in its Order dated August 4, 2022. Order attached as Exhibit "A." On August 12, the Court of Appeals reversed the Court of Special Appeals and Circuit Court and remanded the matter for briefing on the merits. The slip opinion is attached as Exhibit "B." Thus, Petitioners now renew their motion for a temporary restraining order and preliminary injunction to prevent further tree clearing pending the resolution of their petition for judicial review.

STATEMENT OF FACTS

Abingdon Business Park is a proposed mixed-use commercial development along Interstate 95 in Harford County. Administrative Record ("AR") - 157. The developers, Harford Investors LLP and BTC III I-95 Logistics Center LLC (together, the "Developers"), propose to build multiple large warehouses, some totaling over one million square feet, retail space, restaurants, and a hotel. AR-157. The site consists of five parcels totaling 326.47 acres, more or less, and is zoned Commercial Industrial. AR-138. There are 314.73 acres, more or less, of forest located on the site, virtually all of which is contiguous and unfragmented. AR-138, AR-141, AR-194. The forest also contains 85 specimen trees, which are trees larger than 30 inches in diameter at breast height. AR-153; *See* MD. CODE ANN., NAT. RES. § 5-1607(c)(2)(iii) and Harford County Code § 267-39D(3). The site also contains numerous streams, non-tidal wetlands, and the HaHa

Branch, a tributary of the Bush River, which runs through the property from north to south. AR-138, AR-165. The Bush River flows into the Chesapeake Bay.

As required by the Maryland Forest Conservation Act (the "FCA") and Harford County law,[1] in order to build the Abingdon Business Park, the Developers first completed a forest stand delineation, which identified eighty-five (85) specimen trees on the development site subject to the Forest Conservation Plan. AR-161. Additional specimen trees were identified elsewhere on the property. *Id.* The Developers then submitted an application for a forest conservation plan in February of 2019 to the Director of Planning to clear approximately 221 acres of forest. AR-142, AR-150. In the application, the Developers also requested a waiver to remove 58 large specimen trees from the property (the "Specimen Tree Waiver"). AR-181, AR-184 The Director of Planning finally approved the Forest Conservation Plan and the Specimen Tree Waiver for Abingdon Business Park on December 9, 2019. The approved Forest Conservation Plan allows the developer to clear over 219 acres of forest and associated habitat.

Harford County issued a grading permit, GRA-011545-2021, for Abingdon Business Park Lots 1, 2, 3, 7 on June 29, 2022. Attached as Exhibit "C." The grading permit allows the Developers to clear land and fell trees. The Developers may only remove trees where permitted by the Forest Conservation Plan. Thus, the grading permit is predicated on the Forest Conservation Plan and Specimen Tree Waiver approvals that are subject to this petition for judicial review. By their own admission in their prior

[1] Harford County incorporates its forest conservation program in Article VI of its zoning code. Harford County Code §§ 267-34 – 267-48.

filings and at the August 3 hearing, the Developers began active clearing on the Abingdon Business Park project site on or about July 5, 2022. It has since continued apace. Affidavit of Douglas Bonn, attached as Exhibit "D." Petitioners filed an administrative appeal of the grading permit on July 8, 2022. Attached as Exhibit "E." This appeal was subsequently denied. Attached as Exhibit "F." Petitioners filed a petition for a writ of administrative mandamus on July 29, 2022. Attached as Exhibit "G." The County filed a motion to dismiss that action. Attached as Exhibit "H."

Since Petitioners prevailed in their appeal on the procedural issue, this matter will shortly be remanded to this Court for briefing and a hearing on the merits of the County's decision to approve the Forest Conservation Plan and Specimen Tree Waiver. Should the Circuit Court subsequently reverse the County's decision, the grading permit will be rendered invalid as a matter of law since it is dependent on the Forest Conservation Plan and Specimen Tree Waiver. The Developer ought to be prevented from destroying the very trees at issue in Petitioners' appeal until the merits of their claims are resolved. The destruction of those trees, some of which may be over 80 years old, would irreparably harm Petitioners' interests.

ARGUMENT

Courts grant temporary restraining orders (TROs) and preliminary injunctions to protect the status quo while a case is pending. *Maloof v. State*, 136 Md. App. 682, 692-93 (2001); Maryland Rule 15-501(b). When "immediate, substantial, and irreparable injury will result," a TRO may be granted without an adversarial hearing. *Fuller v. Republican Cent. Comm.*, 444 Md. 613, 635-36 (2015); Md. Rule 15-504. Such is the case here,

where the Developers are actively removing trees at the Abingdon Business Park project site. Affidavit of Douglas Bonn.

A party seeking either form of injunctive relief must show the existence of the following four factors: (1) an irreparable injury (that is immediate and substantial for a TRO), (2) the balance of convenience tilts in their favor, (3) a likelihood of success on the merits, and (4) the public interest favors granting the injunction. *Fuller v. Republican Cent. Comm.*, 444 Md. 613, 635-36 (2015); *Fogle v. H & H Restaurant*, 337 Md. 441, 455-56 (1995). Here, Petitioners have demonstrated the existence of each of these factors for the reasons explained below.

I. PETITIONERS WILL SUFFER SUBSTANTIAL, IMMEDIATE, AND IRREPARABLE INJURY FROM TREE CLEARING ON THE PROJECT SITE BEFORE THE COURT DECIDES THIS CASE ON ITS MERITS.

The first factor requires proof that "the plaintiff will suffer irreparable injury unless the injunction is granted." *Fogle*, 337 Md. at 455. An injury is *irreparable* when, "from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money." *Bey v. Moorish Sci. Temple of Am.*, 362 Md. 339, 356 (2001) (quoting *Coster v. Dept. of Personnel*, 36 Md. App. 523, 526 (1977)). However, "irreparable injury does not need to 'be beyond all possibility of compensation in damages, nor need it be very great.'" *Maloof*, 136 Md. App. at 717 (quoting *Maryland-National Capital Park and Planning Comm'n v. Washington Nat'l Arena*, 282 Md. 588, 616 (1978)). Nevertheless, "facts must be adduced to prove that a

petitioner's apprehensions are well-founded." *Bey*, 362 Md. at 356; *see also*, *Maloof*, 136 Md. App. at 717-18 (observing in the context of irreparable injury that "it would be difficult to affix monetary damages caused to the environment by the actions of appellants," who were alleged to be operating a landfill on their farm without a permit).

Here, too, the record supports Petitioners' well-founded concerns of irreparable injury. Specifically, Developers began clearing trees on the Abingdon Business Park site well before briefing or hearing on the merits of the County's decision to approve the Forest Conservation Plan and Specimen Tree Waiver. They continue to destroy trees on the site and will continue to raze the forest, irreparably damaging its ecological and aesthetic value. Affidavit of Matthew Baker, attached as Exhibit "I." Trees capture and filter pollution before it enters our waterways and alleviate flooding by stabilizing the soil. Contiguous forest cover provides this service on a large scale while providing habitat for wildlife. Until much of it was recently cleared by the Developers, this tract of forest and its canopy shaded and cooled waters of the HaHa Branch, a tributary of Otter Point Creek. It also helped stabilize stream banks and reduced erosion.

This injury is irreparable because the nature of the act—clearing mature forest—is such that "it cannot be readily, adequately, and completely compensated for with money." *Bey*, 362 Md. at 356. The United States Supreme Court observed that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). The trees marked for removal comprise acres of mature forest cover that cannot be easily replaced, and their loss and its

potential impacts on water quality cannot be adequately compensated by a court award for damages. For example, the specimen trees alone all have a diameter at breast height (DBH) of greater than or equal to 30 inches or a DBH of 75% or greater of the State Champion Tree of that species. AR-153. Such trees are essential to forest ecosystems. Affidavit of Matthew Baker.

If the Court ultimately concludes that the decision approving the Forest Conservation Plan and Specimen Tree Waiver in this case was unlawful, the Developers may very well have already cleared trees that otherwise would be entitled to retention and protection. Even requiring Developers to replant every tree cleared could not adequately redress this harm, because it would take years for the new trees to provide benefits equivalent to those that the current mature trees and forest currently provide—including those to water quality. Affidavit of Matthew Baker. Therefore, Petitioners have a real fear of immediate and substantial injury that is truly irreparable absent immediate injunctive relief.

II. THE BALANCE OF CONVENIENCE WEIGHS IN FAVOR OF GRANTING PETITIONERS A TRO AND PRELIMINARY INJUNCTION BECAUSE LARGE, MATURE TREES CANNOT BE REPLACED.

Next, the party seeking an injunction must prove that the balance of convenience weighs in their favor. In other words, courts will examine whether "lesser injury would be done to the [opposing party] by granting the injunction than would result to [the injunction seeker] by denying it." *State v. Maryland State Family Child Care Ass'n*, 184 Md. App. 424, 433 (2009). To succeed in the balance of convenience, therefore, the

injunction seeker must show that their benefits received from the injunction equal or outweigh the potential harm to the other side. *Rowe v. Chesapeake & Potomac Tel. Co.*, 56 Md. App. 23, 30 (1983). *Compare, e.g.*, *Antwerpen Dodge v. Herb Gordon Auto World*, 117 Md. App. 290, 307 (1997) (concluding preliminary injunction was improper where less potential for loss of business to injunction-seeker than to the opposing party, and where sales history could provide basis to measure any loss of business to injunction-seeker, but no sales history available to quantify loss of business to opponent), *with Ademiluyi v. Egbuonu*, 466 Md. 80, 131-33 (2019) (upholding lower court balance of convenience in favor of injunction-seeker (plaintiff) where plaintiff would have suffered greater harm from including defendant's name on a certified general election ballot than defendant, who did not meet requirements for the judicial nomination, would suffer from being excluded).

In this case, the balance of convenience weighs heavily in favor of Petitioners. Since environmental injury is inherently irreparable, if such injury is likely, or has indeed occurred and will continue to occur as it has here, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 545. While the Developers may experience delays in the construction of Abingdon Business Park due to an injunction, Petitioners risk the loss of acres of forest cover and potential damage to water quality that, as explained above, cannot be easily or wholly remedied with money damages or injunctive relief. Construction delays are compensable with damages, however, in the event that the injunction is wrongly issued. Regardless of the costs incurred by the Developers in clearing the land, this warehouse

project is built on speculation. The administrative record reflects that there are no confirmed tenants for their proposed warehouses. AR- 4-5, -114. Accordingly, potential for serious irreparable harm to Petitioners if the injunction were denied significantly outweighs the possible economic harm to Respondents if the injunction were granted. Respondents are taking a calculated business risk clearing and grading the land. The ecological harm caused by allowing the Respondents to continue to destroy irreplaceable trees and habitat during the pendency of this litigation is not speculative, but fully realized.

III. PETITIONERS HAVE A REAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Next, the injunction-seeker must show that they are likely to succeed on the merits of the case, meaning that the party "has a real *probability* of prevailing on the merits, not merely a remote *possibility* of doing so." *Ehrlich v. Perez*, 394 Md. 691, 708 (2006) (quoting *Fogle*, 337 Md. at 456) (emphasis in original; internal quotations omitted). *See DMF Leasing v. Budget Rent-a-Car of Md.*, 161 Md. App. 640, 649-51 (2005) (holding that DMF raised "a substantial question going to the merits of its case," and "carried its burden of showing the potential likelihood of success on the merits," which dealt with the interpretation of a settlement agreement provision). Based on the facts in the administrative record highlighted below, Petitioners have serious and substantial questions going to the merits of the County's decision to approve the Forest Conservation Plan and Specimen Tree Waiver and are likely to prevail in this case. *See* Affidavit of Matthew Baker. Furthermore, "the greater the hardship on the party seeking the

injunction, the less of a showing of success on the merits need to be made." *DMF Leasing*, 161 Md. App. at 648. Here, the irreparable injury to the Petitioners in the form of the removal of mature forest is ongoing, tangible, and significant.

A. Petitioners are likely to succeed on the merits of their challenge.

Notwithstanding the substantial hardship Petitioners will suffer should a temporary restraining order and preliminary injunction not be issued, they have a real probability of succeeding on the merits of this appeal. As Petitioners will further discuss in their opening memorandum, the approved Forest Conservation Plan and Specimen Tree Waiver does not satisfy the requirements set forth in the Harford County Code and the State Forest Conservation Act, nor does it comport with the spirit of these laws. MD. CODE ANN., NAT. RES. § 5-1601 *et seq.* ("Forest Conservation Act"). Specifically, there is insufficient evidence in the record to support the Planning Director's Approval because there is scant consideration of both the impacts from removing contiguous forest and compliance with the statutory findings required for removing specimen trees. As a result, the Planning Director's Approval is arbitrary, capricious, and contrary to law.

1. As approved, the Forest Conservation Plan fails to demonstrate that the proposed project cannot reasonably be altered to protect contiguous forest.

The State General Assembly passed the Forest Conservation Act in 1991 at the recommendation of Governor Schaeffer's task force. The primary purpose of the Act is to minimize forest loss due to land development activities "by making the identification and protection of forests and other sensitive areas an integral part of the site planning process." *Forest Conservation Act*, Maryland Department of Natural Resources,

https://dnr.maryland.gov/forests/Pages/programapps/newFCA.aspx. To that end, the Forest Conservation Act requires most developers to identify forest stands on the project site and complete a Forest Stand Delineation, which then informs the developer's forest conservation plan. The forest conservation plan marks areas for tree retention, reforestation, and afforestation, as appropriate. *See* Harford County Code § 267-37(B); MD. CODE ANN., NAT. RES. § 5-1605. *See also Harford County Forest Cover Conservation & Replacement Manual* 4.1 (rev. 2019) ("County Manual").

Recognizing that certain forest areas and plants are not easily replaced, however, the General Assembly elevated certain forests and trees as priorities for retention. Section 5-1607(c)(1) of the Forest Conservation Act includes "[c]ontiguous forest that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site" as one of these priority areas that "shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the State or local authority, that reasonable efforts have been made and the plan cannot reasonably be altered." "Contiguous forest" has been interpreted to mean forest cover that is at least 100 acres in size or 300 feet wide and connects offsite forest area that is at least 100 acres. *State Forest Conservation Technical Manual* 3.1.1 (3d ed. 1997) ("State Manual"); *see also County Manual* at 4.6.01.

Because the roughly 320-acre Abingdon Business Park site contains approximately 314 acres of forest cover, the forest on this site constitutes "contiguous forest" under this definition. *See* AR-134, -138. Accordingly, the Developers may only disturb the forest if the Planning Director determines that the Developers have made

reasonable efforts to protect as much contiguous forest as possible, and that the Developers cannot reasonably alter the project plans. *See* MD. CODE ANN., NAT. RES. § 5-1607(c)(1).

While the Forest Conservation Act does not define what it means to make "reasonable efforts" or for the plan to be incapable of "reasonably be[ing] altered" to protect contiguous forest, the State Manual illuminates the Act's intent. Specifically, the State Manual specifies that to remove priority areas like contiguous forest, a developer "must demonstrate [in the forest conservation plan application] that: (a) All techniques for retention of these areas have been exhausted; (b) Why these areas cannot be left undisturbed, and (c) How reforestation will be accomplished . . . ." *State Manual*, 3.1.1. The developer's demonstration "shall contain [a] statement addressing these questions signed by the applicant and appended to or on the [Forest Conservation Plan] map, and [a] [c]ertification by the [Forest Conservation Plan] preparer . . . ." *Id.* Further, where contiguous forest will be disturbed, the developer "must identify the retention priority of its composite stands according to water quality, wildlife habitat benefits . . , and landowner objectives." *Id.*

The County Manual compliments these requirements and provides information for developers to determine which forested areas are to be retained on the site. *County Manual* at 4.6. Using the Forest Stand Delineation materials, developers are to label contiguous forest (and specimen trees) as high priority for forest retention. *Id.* at 4.6.01. The County Manual further clarifies that priority areas "shall be set aside as forest retention areas in descending order." *Id.* at 4.6.02. Where there are two (or more) forest

stands in the project site that have "apparently equal value," the County Manual sets forth a series of criteria that "shall be used to help determine which stand is of greater value for retention purposes." *Id.* Those criteria include:

> Neighboring land uses – Adjacent land use which is incompatible with the proposed development shall be buffered.
>
> Site-specific climate needs – Forests act as windbreaks and moderate temperature extremes. When applicable, the climatic benefits of forested areas shall be considered.
>
> Susceptibility to disease or pest infestation – There may be diseases or pests noted on the Forest Stand Delineation which are not life threatening to trees. These health concerns, however, may be the deciding factor between two stands of apparently equal value.
>
> Recharge to hydrology – Forested areas may border but may not be technically within the buffer region of a wetland, stream or spring. Disturbance of these areas shall be avoided. In many cases, expansion of buffer areas shall be emphasized.
>
> Contiguous forested lands – Small forested areas within the proposed development site shall be retained if they are connected to large off-site forested areas.

Id.

Here, the Developers have met neither the State Manual nor the County Manual's requirements. While the State and County Manuals contain a mixture of requirements and guidance, the use of "must" in State Manual Section 3.1.1 and the use of "shall" in County Manual 4.6.02 makes these provisions mandatory. Further, even if they are guidance, they fulfill the technical manual requirement of MD. CODE ANN., NAT. RES. § 5-1603 (c)(ii), and they provide useful parameters for the vague "reasonable efforts" language in the Forest Conservation Act.

The record in this case fails to demonstrate that "reasonable efforts have been made and the plan cannot reasonably be altered" to protect contiguous forest in accordance with MD. CODE ANN., NAT. RES. § 5-1607(c)(1). Nowhere in the record do the Developers include a demonstration of the techniques they have considered and exhausted in their efforts to retain the maximum amount of priority forest possible on the project site, nor does any submittal in the record explain the priority of each forest stand in relation to water quality, wildlife habitat benefits, and landowner objectives. *See State Manual*, 3.1.1.

Moreover, while almost all forest stands on site are rated as "priority," (*see* AR-149), there is no consideration of the County Manual criteria to help determine which priority stands should be retained and which should be allowed to be impacted by the development. In describing the retained forest area, the developers' Forest Conservation Report merely states: "Primarily, the retained forest is associated with the site's nontidal wetlands, streams, FEMA 100-year floodplain, steep slopes, and the [Natural Resources District (NRD)] or are in areas that are isolated from the rest of the site by the NRD . . . ." AR-150. There is no meaningful analysis in the record of the above factors or any other explanation as to why the Developers are removing certain sections of priority forest cover in forest stands and preserving others. Without such a discussion, the Forest Conservation Plan approval cannot stand.

Nevertheless, even if the Court were to find it acceptable for the Planning Director to conduct a different analysis than the one provided for in the State and County Manuals, the Planning Director's Approval in this case still fails to ensure the Developers made

reasonable efforts to protect as much contiguous forest as possible. There is only limited explanation for why the Developers chose the proposed building footprint, and that discussion occurs in their request to remove individual specimen trees, not contiguous forest. AR-157-159. Even in that context, there is little support for why the proposed development is necessary, and it is less clear yet why the warehouses and mixed commercial development cannot be smaller in size to protect more forest cover. Instead of a modest design, the proposed project requires clearing approximately 220 acres of forest and leaving only 95 forested acres—effectively clearing all of the site's contiguous forest. *See State Manual* at 3.1.1 (defining "contiguous forest").

The State Manual directs Developers to include a "statement addressing the [above] questions" with the Forest Conservation Plan submittal and the MD. CODE ANN., NAT. RES. § 5-1607(c)(1) thereby placing the burden on the developer to demonstrate "that reasonable efforts have been made and the plan cannot reasonably be altered." However, there is no such statement or any other justification in the record as to why the Developers cannot reasonably alter the Abingdon Business Park plans to protect the contiguous forest on site. Because the Developers have not made the required demonstrations, the contiguous forest must remain in an undisturbed condition. The Planning Director's contradictory decision approving the Forest Conservation Plan was thus arbitrary, capricious, and contrary to law.

2. The Specimen Tree Waiver contained within the Forest Conservation Plan Approval fails to make legally required findings.

Moreover, the approval for the Developers to remove 49 protected specimen trees on the project site is inconsistent with the State Forest Conservation Act and the Harford County Code. In addition to elevating protections for contiguous forest, section 5-1607(c)(2) of the Forest Conservation Act provides a list of certain plants and areas with even greater protection. Relevant here, this list includes "[t]rees having a diameter measured at 4.5 feet above the ground of: (1) 30 inches; or (2) 75% of the diameter . . . of the current State Champion Tree of that species as designated by the Department" (collectively, "specimen trees"). These trees must not be disturbed "unless the applicant has demonstrated, to the satisfaction of the State or local authority, that the applicant qualifies for a variance under § 5-1611 of this subtitle." MD. CODE ANN., NAT. RES. § 5-1607(c)(2). Like section 5-1607(c)(1), section 5-1607(c)(2) has been applied in Harford County through Section 267-39 of the Harford County Code.

In implementing the Act, the Code allows developers to seek "waivers" (called "variances" in the Act) to remove specimen trees where "the applicant has demonstrated to the satisfaction of the Department [of Planning and Zoning] that enforcement [i.e., requiring retention] would result in unwarranted hardship." Harford County Code, § 267-39(F). Applicants seeking such a waiver from the Planning Director must make six showings. Specifically, Section 267-39(F) states that the applicant must:

> (1) Describe the special conditions peculiar to the property which would cause the unwarranted hardship; (2) Describe how enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas; (3) Verify that the granting of the waiver will not confer on the

> applicant a special privilege that would be denied to other applicants; (4) Verify that the waiver request is not based on conditions or circumstances which are the result of actions by the applicant; (5) Verify that the waiver request is not based on conditions relating to land and building use, either permitted or nonconforming, on a neighboring property; and (6) Verify that the granting of a waiver will not adversely affect water quality.

These showings build on those required for a variance to remove specimen trees pursuant to Section 5-1607(c)(2) and Section 5-1611 of the Forest Conservation Act. As explained in more detail below, the Forest Conservation Plan Approval—which grants the waiver—includes conclusory statements as to most of these requirements without sufficient findings of fact. In its current state, the Planning Director's decision to grant the waiver and approve the Forest Conservation Plan is therefore legally unsound.[2]

First, before demonstrating the six elements, Harford County Code Section 267-39(F) requires the developer to establish an "unwarranted hardship" would result from enforcing the specimen tree protections in the Code. *Compare* Forest Conservation Act, § 5-1611 (requiring applicants seeking a variance from forest conservation requirements to show enforcement "would result in unwarranted hardship"). The approved Forest Conservation Plan fails to make this prerequisite showing. Affidavit of Matthew Baker.

An unwarranted hardship exists where "the applicable zoning restriction, when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic rights of private ownership." *Belvoir Farms Homeowners Ass'n v. North*, 355 Md. 259, 276 (1999) (quoting *Marino v.*

[2] These findings of fact are very similar to the findings required to grant a variance from the strict application of the provisions of the Critical Area law. There is a robust body of case law defining the relevant terms and proof necessary when a local jurisdiction considers such a variance application, the most recent being *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112 (2016).

Mayor of Baltimore, 215 Md. 206, 217 (1957)). To receive an exception to zoning rules under the "unwarranted hardship" standard, the applicant must demonstrate that "[t]he need . . . [is] substantial and urgent and not merely for the convenience of the applicant." *Id.* (quoting *Carney v. City of Baltimore*, 201 Md. 130, 137 (1952)). After all, "a liberal construction allowing exceptions for reasons that are not substantial and urgent would have a tendency to cause discrimination and eventually destroy the usefulness of the ordinance." *Id.*

In this case, the Developers submitted their request for a waiver to remove 58, later reduced to 49, specimen trees during the construction of Abingdon Business Park. AR-154. In support of their request, the Developers claimed that they would suffer an unwarranted hardship if they were forced to conserve these trees during construction. However, nowhere in the Forest Conservation Plan approval does the Planning Director make a finding that the Developers suffer from any unwarranted hardship. In fact, the phrase "unwarranted hardship" is not even mentioned. AR-138-40.

Nevertheless, even if a reviewing court read the Forest Conservation Plan approval as adopting the rationale provided in the waiver request, *see* AR-153-160, the Developers have not shown that their need to remove the specimen trees amounts to anything more than a matter of convenience. There is certainly nothing to demonstrate that complying with the zoning law produces a result that is "so unreasonable as to constitute an arbitrary and capricious interference with the basic rights of private ownership." *See Belvoir Farms Homeowners Ass'n*, 355 Md. at 276 (quoting *Marino*, 215 Md. at 217).

The property is zoned for "Commercial Industrial" use, and it may still be used for these purposes without requiring the destruction of hundreds of acres of trees. While the natural features might require a certain layout, there is no reason provided in the record why the layout cannot be modified to shrink the development's footprint. Many of the trees slated for clearing are in grading zones, stormwater management areas, or near the fringes of the proposed development footprint. *See* AR-155-156, 192. With some plan alterations, many of these specimen trees would be protected. Instead, the Developers take an all-or-nothing approach: the waiver request simply states that after considering the terrain, natural resources, and boundaries of the site, a development footprint that preserves *all* of the specimen trees would not meet their needs. AR-159. However, the record fails to explain why the potential need to remove some specimen trees negates the need to protect as many as reasonably possible. Affidavit of Matthew Baker.

There is even less support in the record regarding the Developers' "needs" with relation to this project. As the Developers acknowledged during the Community Input Meeting in January 2019 and at the DAC meeting in March 2019, Abingdon Business Park had no confirmed tenants and the plans beyond Lots 1-3 are speculative. AR-4-5, -80, -114. Even with the approval of site plans for Lots 1-3, there is no indication in the record regarding a need for this particular site design.

The features on the site do not prevent a commercial or industrial use—just the one as currently proposed by the Developers. This interference is not the sort of "substantial and urgent" need that supports the granting of a waiver, but instead represents a mere inconvenience to the Developers, who cannot build the property out as

envisioned. *See Belvoir Farms Homeowners Ass'n*, 355 Md. at 276 (quoting *Carney*, 201 Md. at 137). There is therefore no interference "so unreasonable as to constitute an arbitrary and capricious interference with the basic rights of private ownership," and the Developer did not show that an unwarranted hardship exists, as required by the Forest Conservation Act and County Code. *Id.* (quoting *Marino*, 215 Md. at 217). *See also* MD. CODE ANN., NAT. RES. § 5-1611; Harford County Code § 267-39(F).

There are also flaws with the Planning Director's findings as required by Harford County Code Section 267-39(F).[3] While the Developers' request included a subheading for each of the six specific requirements, many of the supporting statements are conclusory. *See* AR-157-160. The Forest Conservation Plan approval is also devoid of support for granting the specimen tree waiver. These six requirements comprise only one paragraph of the approved Forest Conservation Plan. AR-139. Instead of explaining how each has been demonstrably satisfied and why a waiver is justifiable for each of the specimen trees, the Planning Director's conclusory statements merely echo language of

[3]The Director of Planning may grant a waiver from [the requirement that certain trees, shrubs, plants and specific areas shall be considered priorities for retention and protection and shall be left in an undisturbed condition] if the applicant has demonstrated to the satisfaction of the Department that enforcement would result in unwarranted hardship. The applicant shall:
(1) Describe the special conditions peculiar to the property which would cause the unwarranted hardship;
(2) Describe how enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas;
(3) Verify that the granting of the waiver will not confer on the applicant a special privilege that would be denied to other applicants;
(4) Verify that the waiver request is not based on conditions or circumstances which are the result of actions by the applicant;
(5) Verify that the waiver request is not based on conditions relating to land and building use, either permitted or nonconforming, on a neighboring property; and
(6) Verify that the granting of a waiver will not adversely affect water quality.
Harford County Code Section 267-39(F)

the Code. *Id*. Because the applicant has not "verif[ied]" that the waiver meets the above requirements, it was arbitrary, capricious, and contrary to law for the Planning Director to be "satisfy[ied]" that these elements are met. *See* Harford County Code, § 267-39(F).

For all these reasons, Petitioners are likely to succeed on the merits of their petition for judicial review. The Court should accordingly grant the requested injunctive relief to prevent further tree clearing during the pendency of this action.

Finally, Petitioners reiterate that when weighing the four factors which guide the Court in deciding whether to grant a preliminary injunction or temporary restraining order, the likelihood of success on the merits factor ought not overshadow the other three. Indeed, these factors are not rigid elements to be proven, but "related points along a continuum" to be considered in crafting an equitable remedy. *DMF Leasing, Inc. v. Budget Rent-A-Car of Md., Inc.*, 161 Md. App. 640, 648 (2005). However, before considering the likelihood of success, a court must first balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant. *Lerner v. Lerner*, 306 Md. 771, 783 (1986). Here, the Developers have made it clear in prior briefing and testimony that they intend to clear as much of the forest as possible, in as short a time as possible, to effectively moot any potential claims on judicial review. They are moving forward at their own risk and assuming any potential self-created hardship. On the other hand, every moment that goes by before the Developers are enjoined results in further destruction of mature forest and associated natural resources on the project site and represents continued irreparable harm to Petitioners. Affidavit of Douglas Bonn. These facts present a "decided imbalance of hardship" in the plaintiff's favor and the

likelihood of success on the merits test ought to be displaced. Petitioners have "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Id.* at 784 (internal quotations omitted). As they unabashedly admit, the Developers made a deliberate business decision and took a calculated risk to begin clearing trees during the pendency of the appeal of this matter before the Court of Appeals. They did so knowing full well that their actions may ultimately be found to be unlawful and that replacement of the trees they destroy is impossible. Affidavit of Matthew Baker. Furthermore, there are additional specimen trees for which the waiver was granted that are not covered in the current grading permit but would be covered in a subsequent permit, so this issue remains ripe.

IV. GRANTING THE REQUESTED INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, the court will consider whether "granting the injunction [is] in the public interest." *Maloof*, 136 Md. App. at 693. For example, the public interest weighed in favor of granting a preliminary injunction in *Ademiluyi*, which examined matters of election law. There, the court stated that barring the defendant, who did not meet the qualifications for judicial office, from appearing on the certified general election ballot was a case "grounded in maintaining the integrity of our elections." *Ademiluyi*, 466 Md. at 135 (internal quotations omitted). "[I]f the preliminary injunction were denied and [the defendant] was elected, Prince George's County would be left with an individual holding a judicial office who subverted the statutory nomination process." *Id.* at 136.

In contrast, the public interest was "virtually nonexistent" in *DMF Leasing*, which confronted a dispute between private companies. The court reasoned that "whether or not the injunction [barring the defendant from terminating the plaintiff's three rental car franchises in Maryland] issues, the franchises will remain in operation, either by DMF or by National Budget; in either case, there will be no rental car crisis in the affected areas." *DMF Leasing*, 161 Md. App. at 652-53. The plaintiff had also agreed to keep all of its employees on staff in another one of its businesses if the franchise were to terminate. Therefore, "[a]t best, the [public interest] breaks evenly for both parties." *Id.* at 653

Unlike *DMF Leasing*, this case is not one between two private parties; granting a TRO and preliminary injunction here plainly serves the public interest. Petitioners ask the Court to enjoin the Developers from clearing trees pending the Court's review of whether the Forest Conservation Plan Approval was legally supported. If tree clearing is permitted to go forward before this dispute can be resolved on the merits, there could be irreparable impacts to water quality, among other things. Indeed, "[t]he preservation of our environment…is clearly in the public interest." *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006). These injuries would stretch beyond the parties in this case to the communities in the local watershed and the Chesapeake Bay region. Affidavit of Matthew Baker. Because all four injunction factors weigh in favor of granting the TRO and preliminary injunction, the Court should enjoin the Developers from clearing any trees on the project site for the duration of this judicial action.

V. PETITIONERS SHOULD BE GRANTED A WAIVER FROM THE BOND REQUIREMENT PURSUANT TO RULE 15-503(C) OR BE REQUIRED TO PAY ONLY A NOMINAL BOND.

A. Petitioners Are Unable to Provide Surety or Other Security

Petitioners are not able to provide surety or other security for the bond. Md. Rule 15-503(c). CBF is a registered nonprofit, 501(c)(3) organization. It relies primarily on private donations and grant money to operate and carry out its mission to "Save the Bay." Accordingly, unlike a private corporation, CBF does not have revenue available to post a large bond or surety. Because of these unique financial limitations, Petitioners are not in a position to provide surety or other security for a substantial bond. Affidavit of David Fogle, attached as Exhibit "J."

B. Substantial Injustice Would Result if the Developers are not Enjoined

This is also a case where "substantial injustice would result if an injunction did not issue" for many of the reasons explained above. Md. Rule 15-503(c). On balance, the harm to Petitioners substantially outweighs any possible harm to the Respondents. If the Developers are permitted to clear land while this action is pending, no monetary award could truly remedy that loss of mature forest cover and specimen trees. The potential environmental water quality impacts threaten not only the interests of the parties to this case, but also the broader Chesapeake Bay watershed and the public as a whole.

On the other hand, the Developers' harm is speculative—at best—without any confirmed tenants to fill the proposed warehouses. *See* AR- 4-5, -80, -114. Moreover, the strong likelihood that Petitioners will succeed on the merits given the facially deficient Forest Conservation Plan makes it even less likely that the Respondents will suffer any

actionable harm in the face of an injunction. Petitioners' harm therefore significantly outweighs any harm to the Respondents, and substantial injustice would occur if a temporary restraining order and preliminary injunction do not issue in this case.

C. This Case Is One of Extraordinary Hardship

Finally, the hardship inflicted here is not a typical hardship experienced in litigation, but an extraordinary one. Specifically, the financial hardship on Petitioners in posting a sizeable bond for this injunction is real and substantial—this is not a case where a bond waiver would simply be convenient for the Petitioners, who are individual homeowners and a non-profit organization. There is also an urgent and substantial risk of irreparable harm—the forest clearing—that will continue to occur in absence of the injunction. Without a waiver, real and irreversible harm threatens not only the Petitioners but also the members of the local community and local ecosystems. Therefore, this case is one of extraordinary hardship.

Because Petitioners have demonstrated they are entitled to a waiver pursuant to Rule 15-503(c), they respectfully ask this Court to dispense with the requirement of surety or other security for a bond in this case. However, should the Court determine that a bond is necessary, Petitioners request that the Court take the above considerations into account and impose a bond for only a nominal amount.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court grant their Renewed Motion for a Temporary Restraining Order and Preliminary Injunction, dispense with the requirement for surety or other security for a bond, and for any further relief as justice requires.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2022 a copy of the foregoing Memorandum in Support of Petitioners' Renewed Motion for a Temporary Restraining Order and Preliminary Injunction was electronically filed with the Clerk of the Court and served through the Maryland Electronic Courts (MDEC) system on the following:

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