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July 8th, 2020

Mayor and City Council
Fairfax City Hall
10455 Armstrong Street
Fairfax, VA 22030

Dear Mayor Meyer and Members of the City Council:

We, the undersigned 24 organizations and individuals, are extremely concerned with the current Northfax West redevelopment proposal and **request that you do not approve the project in its current form nor grant and a special exception to the City’s Chesapeake Bay Preservation regulations (“CBP Regulations”)**.

This proposed development is environmentally damaging and violates the overall goals of the CBP Regulations, City of Fairfax Zoning Ordinance §4.18¹. The newly adopted Northfax Small Area Plan² bestows a new identity for Northfax as an “ecologically sensitive place” and the CPB Regulations state clearly a goal to “[p]rotect sensitive environmental lands within the city.” And yet, the City Council seems intent to culvert a significant section of the North Fork of Accotink Creek and remove its Resource Protection Area (“RPA”) and 100-year floodplain despite the City’s Chesapeake Bay Preservation Ordinance. **If approved, the unwarranted overreach of this special exception would set a terrible regional, and even statewide, precedent regarding the protections set forth under the Chesapeake Bay Protection regulations for Resource Protection Areas. The City Council must not set this bad environmental precedent.**

The current Northfax West proposal is prohibited under the CBP Regulations §4.18.7.

There is no dispute that the CBP Regulations *apply* pursuant to §4.18.2.A. However, the current Northfax West development proposal, as planned, is prohibited under several facets of §4.18.7.

¹ Chesapeake Bay Preservation Ordinance: <https://www.fairfaxva.gov/home/showdocument?id=7885>

² Small Area Plans: <https://www.fairfaxva.gov/government/community-development-planning/planning/current-studies-projects-plans/small-area-plans>

The North Fork of Accotink Creek on the Northfax West property is contained within 5.99 acres of an RPA as detailed in the applicant's Statement of Justification³. The proposal would destroy 4.84 acres of RPA (a loss of over 80 percent), remove the 100-year floodplain, and culvert over *1,600 linear feet* of the stream.

This is not an *encroachment* into the ecologically sensitive RPA. It is the *significant destruction* of one.

The CBP Regulation is designed "to minimize erosion and sedimentation potential, reduce land application of nutrients and toxics, and maximize rainwater infiltration" and "to prevent a net increase in nonpoint source pollution from new development and to achieve a 10 percent reduction in nonpoint source pollution from redevelopment." (CBP Regulation §4.18.7.A.1 & .2.) Under §4.18.7.C.1, "Redevelopment shall be permitted in the resource protection area *only if there is no increase in the amount of impervious cover within the RPA* and no further encroachment within the RPA." (Emphasis added.) "[A] 100-foot buffer area of vegetation that is effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff *shall* be retained if present and established where it does not exist. The 100-foot buffer area shall be deemed to achieve a 75 percent reduction of sediments and a 40 percent reduction of nutrients." (CBP Regulation §4.18.7.D.)

The applicant is seeking a special exception because the current Northfax West proposal is prohibited under the CBP Regulations §4.18.7.

The applicant is aware that the current Northfax West development proposal, as planned, is prohibited under the CBP Regulations §4.18.7, which is why the applicant is seeking a special exception for disturbance (in this case, a removal) of the RPA to build the culvert.

Required findings

As per CBP Regulation §4.18.11.D.1 and .3, before approving any waiver or special exception, the Zoning Administrator or the City Council shall make a written finding that "[t]he request is the minimum necessary to afford relief" and that "[t]he exception request is not based upon conditions or circumstances that are self-created or self-imposed". The Virginia Department of Environmental Quality ("DEQ") provides clear guidance for the CBP Regulations in the "Guidance on the Chesapeake Bay Preservation Area Designation and Management Regulations"⁴ document ("DEQ Guidance"). **We believe these two showings have *not* and *cannot* be made.**

³ Statement of Justification: <https://www.fairfaxva.gov/home/showdocument?id=15445>

⁴ This guidance document was developed when staff of the current DEQ Office of Local Government Programs were part of the Department of Conservation and Recreation (DCR) and identified as the Division of Chesapeake Bay Local Assistance. This department was moved to DEQ in June of 2013. <https://www.deq.virginia.gov/Portals/0/DEQ/Water/ChesapeakeBay/CBPA/CBPA%20Guidance/Exceptions.pdf?ver=2017-09-27-150909-447>

Required findings: D.1

Regarding “[t]he request is the minimum necessary to afford relief” finding, the DEQ Guidance provides this clear and relevant example:

“In this instance, the sole reason for the exception request relates, not to a use of the property, but to the extent that the applicant wishes to use the property. In this example, consideration of relocation...or resizing...[of development features]...are all potential solutions that may result in the property owner achieving their desired use without the need for an exception.”

The project seeks excessive culverting of the RPA and is not the minimum necessary to redevelop the property. Attached as Exhibits 1-2 are photographs that show the proposed plans and how they overlay with the current forest and RPA. As seen in Exhibit 2, the proposal will result in the nearly complete destruction and undergrounding of the streams that now runs along the west and south sides of the site. Exhibit 3 shows the section of the stream — section A1 on the west — that we believe can and should be preserved.

In documents obtained through the Freedom of Information Act from DEQ, it is clear that the applicant has not in fact proposed any alternative layouts or alternative building compositions which seek to minimize the impact to the stream and the RPA, or work within the CPB Regulations which were in place 13 years before the applicant began consolidating the properties⁵. Exhibit 4 shows the sole proposed alternative – a culverting option without an associated change in suggested development. While there could be many alternatives to consider, ANS has included some basic ideas in Exhibits 5-6 for alternate configurations that meet commercial and residential goals.

Required findings: D.3

Regarding the related “[t]he exception request is not based upon conditions or circumstances that are self-created or self-imposed” finding, the original June 23rd staff report indicates that “The applicant did not create the existing conditions or circumstances on the subject property.”⁶ However, the DEQ Guidance provides this clear and relevant example which underscores the staff report’s inadequate interpretation of question at hand:

“[T]his finding focuses more on the actions of the property owner. For instance, if a lot area is 10,000 square feet, and encumbered by the RPA, then a property owner’s desire to place a 7,000 square foot house on the lot would essentially be a self-imposed condition, in that a smaller house would be more suitable for the lot size. In general, this

⁵ The City’s CBPO was adopted in 1990: <https://www.fairfaxva.gov/home/showdocument?id=666#page=4> and the applicant began purchasing properties in 2003.

⁶ Page 48 of June 23, 2020 staff report: https://fairfax.granicus.com/MetaViewer.php?view_id=11&event_id=1921&meta_id=81570#page=48

finding relates, in most cases, to a property owner's failure to realize that their property is not suited for their intended use. When the circumstance for the request is "self-created", the request should be denied by the local body, board or commission."

The configuration of the current proposal in which the applicant requires a culvert is a "self-created" circumstance and should be denied.

Furthermore, the DEQ Guidance clearly states that "...the criteria for granting an exception are based on the minimum necessary to provide for use of the property, not convenience or desire for a particular level of development."

The proposed resolution language in the staff report conflicts with the reasoning in the Water Quality Impact Assessment.

The language included in the June 23rd staff report for the resolution to approve the special exception (in accordance with §6.17.7. Approval criteria) states that "[t]he proposal is based on the physical constraints and land use specifics, rather than the economic hardship of the applicant."⁷ **We believe this has *not* been demonstrated.** In fact, the Water Quality Impact Assessment⁸ clearly states that a "...partial stream piping scenario was also considered..." However, "...the IRR for the alternative [was] well below the target, thus this alternative was deemed infeasible to meet the projects purpose and need." This alternative, demonstrated in Exhibit 6, "...results in an unacceptable IRR of 9.85%." Thus, this current proposal appears to be significantly based on the IRR, and thus, "economic hardship".

Two additional zoning ordinance considerations are of concern.

In addition to the significant concerns with the special exception of the CBP Regulation, two other egregiously inadequate responses to additional zoning ordinances from the June 23rd staff report were also identified:

- The staff's response to §6.6.8. Approval considerations (L)⁹ for rezoning to planned development fall short for "[t]he effectiveness with which the proposed planned development protects and preserves the ecologically sensitive areas within the development". The removal of over 80 percent of the Resource Protection Area *within the development* is in direct conflict with this consideration.
- The staff's response to if the proposed development is consistent with the purpose and intent of §4.16 (b) "[t]he development will not result in significant disruption of the hydrology of the site" was frankly unbelievable. Staff's analysis claims that the

⁷ Page 454 of June 23, 2020 staff report:

https://fairfax.granicus.com/MetaViewer.php?view_id=11&event_id=1921&meta_id=81570#page=454

⁸ Water Quality Impact Assessment: <https://www.fairfaxva.gov/home/showdocument?id=14722>

⁹ Page 41 of June 23, 2020 staff report:

https://fairfax.granicus.com/MetaViewer.php?view_id=11&event_id=1921&meta_id=81570#page=41

“...construction the culvert would support the hydrology of this site...”¹⁰ But in fact, the intent of the current plan is to *significantly alter* the hydrology of the site by removing the 100-yr floodplain from the majority of the site. And, in fact, this significant alteration of the site's hydrology is what would allow for development of the site.

In conclusion

If the City approves this development, an important headwater stream will be buried and an ecologically sensitive place destroyed. Approval of this project also sets a dangerous precedent more broadly in terms of what protections the Chesapeake Bay Preservation Act offers for these valuable streams and associated Resource Protection Areas.

We, the undersigned organizations and individuals, urge the City of Fairfax to deny the Northfax West application as it stands today, and thus the special exception to the CBP Regulations, or request a 90-day delay, in order to allow time for the applicant to submit an alternative proposal that preserves the A1 parts of the RPA and stream valley, as indicated on Exhibit 3.

We appreciate the opportunity to comment on this important decision. If you have any questions about our comments, please contact Renee Grebe by email at renee.grebe@anshome.org or by phone at 703-261-4668.

Sincerely,

Audubon Naturalist Society, Renee Grebe, Northern Virginia Conservation Advocate
Audubon Society of Northern Virginia, Tom Blackburn, President
Chesapeake Legal Alliance, Hannah Brubach, Staff Attorney
Clean Fairfax, Jennifer Budlong Cole, Executive Director
Clean Water Action, Michael Bochynski, Virginia Program Coordinator
Climate Reality Project, NOVA Chapter, Molly Bakal, Co-chair
Earth Rise Indivisible, Molly Bakal, Chair
EcoAction Arlington, Elenor Hodges, Executive Director
EcoLogics Design and Consulting, LLC, Judy Fraser, Owner
Fairfax County Restoration Project, Amy Gould, Chair
Faith Alliance for Climate Solutions, Meg Mall, Executive Director
Friends of Accotink Creek, Sandy Collins, Primary Conservator
Friends of Holmes Run, Whitney Redding, Co-founder
Friends of Little Hunting Creek, Paul Siegel, Treasurer
Friends of Long Branch Stream Valley, Bryan Campbell, President
Green Muslims, Sevim Kalyoncu, Executive Director
Historic Fairfax Neighborhood Association, Steve Oldfield, President

¹⁰ Page 46 of June 23, 2020 staff report:

https://fairfax.granicus.com/MetaViewer.php?view_id=11&event_id=1921&meta_id=81570#page=46

Lands and Waters, Jeanette Stewart, President & Founder
Natural Resources Defense Council, Rebecca Hammer, Senior Attorney
Potomac Riverkeeper Network, Phillip Musegaas, Vice President of Programs & Litigation
Dean Naujoks, Potomac Riverkeeper
Prince William Conservation Alliance, Kim Hosen, Executive Director
The Rappahannock League for Environmental Protection, Phil Irwin, Vice President & Founder
Waterkeepers Chesapeake, Betsy Nicholas, Executive Director

And the following individuals:

Dr. R. Christian Jones, City of Fairfax Resident; Professor of Environmental Science and Policy at George Mason University; Founding Director, Potomac Environmental Research and Education Center

Cathy Ledec, Fairfax County resident; 2019 Fairfax County Environmental Excellence awardee; 2018 Fairfax County Citizen of the Year

Cc:

Eliza Cava, Director of Conservation, ANS
Robert Stalzer, City Manager, City of Fairfax
Brooke Hardin, Director of Community Development and Planning, City of Fairfax
David Summers, Director of Public Works, City of Fairfax
Jason Sutphin, Division Chief, Community Development, City of Fairfax
Paul Nabti, Planning Division Chief, Community Development & Planning, City of Fairfax
Wendy Block Sanford, Transportation Director, City of Fairfax
Christina Alexander, Transportation Capital Projects Manager, City of Fairfax
Satoshi Eto, Stormwater Resource Engineer, City of Fairfax
Stefanie Kupka, Sustainability Coordinator, City of Fairfax
Michelle Coleman, Zoning Administrator/Deputy Director, City of Fairfax
Albert Frederick, Planner III, Community Development & Planning, City of Fairfax
Justin Williams, Director, Central Office Division of Land Protection and Revitalization, DEQ
Daniel Moore, Principal Environmental Planner, Office of Local Government Programs, DEQ
Brian Lubkeman, City of Fairfax Attorney
Steve Descano, Commonwealth's Attorney

Exhibit 1: Property as seen on Google Maps



Exhibit 2: Applicant proposal of redevelopment



Exhibit 3: The A1 section of the North Fork of Accotink Creek, the healthiest section as documented in the Joint Permit Application¹¹.



Exhibit 4: The sole alternative proposed by the applicant (obtained in a FOIA request to DEQ) is merely an alternative culverting, not a full alternative of the buildout. The Internal Rate of Return for this proposal was indicated to be 9.85% (versus 18.5% of the current proposal). ANS's alternatives suggest culverting more of the stream than the applicant suggested here.



¹¹ Pages 27-28: <https://webapps.mrc.virginia.gov/public/habitat/getADD.php?id=106355#page=27>

Exhibit 5: Alternative Idea 1: A reduction of the size of the development proposal and a rerouting of the Farr Ave road extension can preserve more of the A1 section of the stream.



Exhibit 6: Alternative Idea 2: A reduction of the size of the development proposal and a rerouting of the Farr Ave road extension can preserve more of the A1 section of the stream.

