

DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 1519

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (the "Board") at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 7:30 p.m., June 15, 2009, on the administrative appeal filed by **MORTON A. BENDER** and **ANGEL ENTERPRISES LIMITED PARTNERSHIP** ("AELP"). (Mr. Bender is the general partner of AELP.) The Appeal challenges two administrative abatement orders dated January 23, 2009 and February 19, 2009, each issued by the Chief Code Compliance Officer for Talbot County. The subject property is located at 7751 Rollyston Drive, St. Michaels, Maryland and is in the Rural Conservation/Western Rural Conservation (RC/WRC) zone. The Property owner is AELP. The request is made in accordance with Talbot County Code §58-12, §73-17A, §73-18A(2)(a), and §190-103.

Members of the Board of Appeals participating in the matter were Paul Shortall, Jr., Chairman, Phillip Jones, Vice Chairman, John Sewell, Margaret Young, and Russel Kacher. Eileen E. Powers, Esquire, and Harry C. Blumenthal, Esquire, 170 Jennifer Road, Suite 240, Annapolis, Maryland 21401 represented the AELP. Michael L. Pullen, Esquire, County Attorney, represented Talbot County. Glenn D. Klakring was the attorney for the Board of Appeals.

It was noted for the record that all members of the Board had visited the site.

The following exhibits were offered and admitted into evidence as Board's Exhibits as indicated:

1. Administrative Appeal with attached Statement of Case.
2. Letter from Talbot County Office of Code Compliance, dated February 19, 2009.

3. Letter from Talbot County Office of Code Compliance, dated January 23, 2009.
4. Administrative Appeal Checklist.
5. Administrative Appeal witness list.
6. Photocopies of portions of the Talbot County tax maps with the subject property highlighted in yellow (two pages).
7. Appeals Notice of Public Hearing.
8. Certificate of Publication from the Star Democrat.
9. Copy of notice of hearing mailed to nearby property owners with an attached list of those property owners having been sent such notice.
10. Sign maintenance agreement.
11. Site, Stormwater & Sediment Control Plans for the lands of Morton Bender.
12. Letter from the Chesapeake Bay Critical Area Commission, dated April 28, 2009.
13. Certificate of Service, dated March 20, 2009.
14. Letter from U.S. Army Corps of Engineers, dated March 20, 2009.
15. Aerial photograph of subject property.
16. Talbot County Board of Appeals minutes of March 9, 2009 meeting.
17. Acknowledgement Form for Administrative Appeal.
18. Notice of Intention to Participate by Talbot County.
19. Applicant's Pre-hearing Statement.
20. Letter from Eileen E. Powers, Esquire, dated May 18, 2009.
21. Notice of Intent to Participate by Christy Pickford Bartlett.
22. Maryland Department of the Environment letter, dated May 29, 2009.
23. Maryland Department of the Environment letter, dated May 19, 2009.

24. Talbot County's Pre-hearing Statement.
25. Letter from Eileen E. Powers, Esquire, dated June 10, 2009, with attachment.
26. Letter from Eileen E. Powers, Esquire, dated June 10, 2009, with attachments.
27. Letter from Eileen E. Powers, Esquire, dated June 12, 2009, with attachment.
28. Letter from Eileen E. Powers, Esquire, dated June 12, 2009, with attached Motion to Stay Administrative Appeal.
29. Letter from Eileen E. Powers, Esquire, dated June 12, 2009, regarding recording of hearings.
30. Authorization form.
31. Copy of letter from Eileen E. Powers, dated June 11, 2009, releasing witness.
32. Copy of email from Chris Corkell regarding recording of hearings.
33. Subpoena duces tecum to Dennis Evans.
34. Applicant's Supplemental Pre-Hearing Statement.
35. Letter from Michael L. Pullen, Esquire, dated July 2, 2009.
36. Affidavit of service.
37. Affidavit of service.
38. Affidavit of service.
39. Talbot County's Supplemental Pre-Hearing Statement.
40. Affidavit of service.
41. Talbot County's Supplemental Pre-Hearing Statement.
42. Talbot County's Supplemental Pre-Hearing Statement.
43. Affidavit of service.

44. Letter from Eileen E. Powers, Esquire, dated September 8, 2009, with attached Applicant's Proposed Findings Of Fact And Conclusions Of Law.
45. Talbot County's Proposed Findings Of Fact And Conclusion Of Law.
46. Talbot County Exhibit List.
47. Applicant's Identification of Applicant's Exhibits.

This case comes before the Board as an administrative appeal filed by Morton A. Bender and Angel Enterprises Limited Partnership. Mr. Bender is the general partner of AELP and his personal participation and involvement throughout this case is described in further detail below¹. This appeal challenges the issuance of two administrative abatement orders dated January 23, 2009, and February 19, 2009, issued by Robert D. Graham, Chief Code Compliance Officer for Talbot County. The appeal challenges almost every aspect of the issuance of these two abatement orders. This opinion addresses the claimed errors that appear to the Board to merit discussion, those which are necessary for the Board to evaluate to decide the case based on the law and the facts as presented. To the extent this opinion omits discussion of any claimed error, it is because the facts as presented do not appear to warrant specific discussion. The Board heard testimony and received numerous exhibits from the County and from AELP and Mr. Bender at hearings held on June 15, 2009, June 29, 2009, July 27, 2009, August 3, 2009, and August 6, 2009. The Board received numerous exhibits from the County and from AELP and Mr. Bender. Thereafter the parties were invited to submit proposed findings of facts and conclusions of law. Both parties did so.

¹ Mr. Bender has been described as "... being AELP". In his individual capacity Mr. Bender has personally signed applications for various permits, plats, plans, wetlands disclaimers, and building permit applications that have expressly and specifically denied authorization to build a driveway through the wooded portion of the parcel.

On October 5, 2009, the Board met to consider the appeal and reach a decision. After addressing some questions to the lawyers representing the parties the Board members discussed the matter in open session and voted 5 to 0 to affirm the Code Compliance Officer. The Board's findings follow.

Talbot County Code Compliance Officers made a site visit to 7751 Rollyston Drive, St. Michael's, Maryland 21663² (the "Property") on January 22, 2009, as a result of information received from the Maryland Department of the Environment. The Property was titled in the name of AELP³. The site visit revealed that all trees, underbrush, and vegetation had been cut and cleared in a large swath through a forested area, beginning in the Chesapeake Bay Critical Area and proceeding approximately 1,290 feet, approximately ¼ of a mile, in a southwesterly direction toward Md. Rt. 33. The road was approximately 33 feet wide and had been constructed on fill creating a raised roadbed approximately 30 inches above grade. All vegetation and trees, including stumps and roots, had been cleared for the entire width and length of the road/driveway. Photographs showing the road/driveway as constructed were introduced as County Ex. No. 47 and appear at pages 182-217 of Talbot County's Proposed Exhibit List.⁴

An aerial photograph of the Property dated March/April 2007 taken by Talbot County Department Public Works (County Ex. No. 48, page 218) shows the 33' wide road/driveway cut diagonally through the widest area on the Property containing forest between Md. Rt. 33 in the lower left corner of the photograph and the agricultural fields to the Northeast. The irregular red line depicts the boundary between the Critical Area (to the top and right side) and the non-critical

² County Ex. No. 60, page 225

³ However a check with the Maryland Department of Assessments and Taxation indicated that its charter had been forfeited and that at that time it was no longer in good standing. This forfeiture has since been corrected and AELP is currently in good standing.

⁴ Note: All page numbers will refer to *Talbot County's Proposed Exhibit List* unless otherwise noted.

area (the lower left-hand corner of the photograph). In contrast to the highly visible clear cutting for the new road/driveway, Rollyston Drive, the pre-existing private road that serves the Property, is also physically located within the aerial view or boundaries of that photograph, but is virtually non-detectable. Rollyston Drive lies Southeast of the new road/driveway and also cuts through the forested area to connect to the driveway closest to the bottom right corner of the aerial photograph. From that point Rollyston Drive proceeds both Northwest, along the boundary between the forested area to the left and the agricultural fields on the right, to the Property, (the light-colored lot in the upper middle-third of the photograph), and also Southwest, directly through the forested area to Md. Rt. 33⁵. But Rollyston Drive is not visible in the photograph because the trees on either side provide a virtually unbroken canopy. They are both closer to either side of Rollyston Drive, which is only approximately 12 to 14 feet wide, not 33 feet wide, and the vegetation has not been cleared and stripped. The County introduced photographs of Rollyston Drive, collectively, obtained from Lane Engineering, Inc. (Lane), Mr. Bender's and AELP's agent, as County Ex. No. 45, LE-14 through LE-23.

Following the site visit Code Compliance Officers reviewed the County's files to determine whether the forest/vegetation cutting and clearing had been properly reviewed and approved and determined it had not. On January 23, 2009, Code Compliance Officers issued Notice of Zoning Violation/Order to Abate to AELP (County Exhibit No. 60, page 225) that advised AELP with respect to cutting and clearing of vegetation, "An inquiry with the Office of Planning & Zoning revealed no permit or approved Forest Preservation Plan had been issued for

⁵ For a plan view of Rollyston Drive without vegetation in relation to Maryland Route 33 and the Property, County Ex. No. 11, page 8, the Henry Subdivision Plat recorded April 16, 2002, shows the layout of Rollyston Drive in relation to the Property and in relation to the forest and large areas of non-tidal wetlands lying in the forested area between Rollyston Drive and Maryland Route 33.

this activity. The current condition of the property was compared to aerial photographs taken in 2006. The comparison clearly shows illegal cutting of vegetation has taken place." AELP was ordered:

1. To correct the illegal cutting in the Critical Area by submitting a Critical Area Forest Preservation Plan, to include an inventory of removals and a planting plan for the required mitigation rate at a rate of three trees planted for every tree removed.
2. To apply for Forest Conservation Ordinance Exemption, Forestry Declaration of Intent for the area encompassing the roadway not in the Critical Area.
3. To apply for any required license from the Maryland Department of the Environment in the US Army Corps of Engineers for the roadway crossing non-tidal wetlands.
4. To obtain all required County, State, and federal permits and approvals, unless a written extension of the time limit is authorized by the Code Compliance Officer for good cause; and,
5. To bring the property into compliance with all requirements of this Administrative Abatement Order.

AELP was advised that its failure to do so would subject it to civil penalties under the Talbot County Code § 58-5 of up to \$1,000 per calendar day for each violation, and that civil penalties for continuing violations may be assessed separately for each violation for each day each violation continues.

On February 19, 2009, Code Compliance Officers sent a Supplemental Administrative Abatement Order (Supplemental Abatement Order) (County Ex. 61, page 230-234) to AELP and to Morton Bender, individually. Investigation through the Maryland State Department of Assessments and Taxation had revealed that the charter of AELP had been forfeited. Consequently, the Supplemental Abatement Order was addressed to Mr. Bender individually as well as in his capacity as general partner of AELP. Mr. Bender was also advised that the County was issuing the Supplemental Abatement Order to him in his individual capacity because of the

County's view that removal of trees, natural vegetation and habitat was done willfully, with knowledge of existing requirements, and in intentional disregard of those requirements.

The Supplemental Abatement Order cited Talbot County Code § 73-3B (1) including the following verbatim excerpt:

B. The following development or activities are exempt from the requirement of this chapter, provided that a declaration of intent is filed with the Department [of Planning & Zoning] in accordance with § 73-3C of this chapter:

(1) Any residential construction conducted on a single lot 40,000 feet square or greater in size, where such lot is legally existing as of the effective date of this chapter, if the activity:

(a) Does not result in the cumulative cutting, clearing, or grading of 40,000 square feet or more of forest;

...

An inquiry with the Office of Planning & Zoning shows no Forestry Declaration of Intent has been filed. Accordingly, §§ 73-3C (6)-(7) of the Code apply. These sections provide:

(6) The Department [of Planning & Zoning] may require a person failing to file a declaration of intent or found in noncompliance with the declaration of intent to:

(a) Meet the retention, afforestation and reforestation requirements established in this chapter;

...

(7) In its determination of appropriate enforcement action, the Department may consider whether failure to file a declaration of intent by a person required to file is a knowledge (sic)⁶ or willful violation of this chapter.

The Office of Planning & Zoning is electing to implement these requirements. Before this road was illegally constructed, Angel Enterprises Limited Partnership, and you, individually, had been advised these activities could not be permitted without appropriate approvals from the Maryland Department of the Environment and from Talbot County and, despite that knowledge, you, individually, and on behalf of Angel Enterprises Limited Partnership, elected to construct this road without seeking or obtaining those required approvals. Further, the subject property is specifically "denied direct access to Maryland Highway No. 33 unless

⁶ The actual language in the Code is "... knowing or willful..."

approved by the Maryland State Highway Administration, Talbot County Planning and Zoning and Talbot County Public Works.” That restriction is contained on the plat recorded at Plat No. 81, page 134 on April 16, 2002. You were specifically aware of this prohibition on direct access to Maryland Route 33, and have intentionally elected to ignore it to partially construct this access through non-tidal wetlands to the edge of Maryland Route 33.”

With respect to those portions of the Property in the non-critical area, the Supplemental Abatement Order Ordered AELP and Mr. Bender, individually, on or before April 6, 2009 to submit a Forest Conservation Plan meeting all the requirements of Chapter 73 of the Code, to include the following:

1. A Full Forest Standard Delineation pursuant to § 73-6 of the Code to be reviewed and approved by the Office of Planning & Zoning;
2. A Forest Conservation Plan pursuant to § 73-7 of the Code to be reviewed and approved by the Office of Planning & Zoning, to include without limitation, a planting plan, with the timetable and description of needed site and soil preparation, species, size, and spacing to be used pursuant to § 73-7B (4), and a binding two-year maintenance agreement pursuant to § 73-7B (8);
3. Retention requirements established in § 73-10B of the Code: trees, shrubs and plants located in the 100-year floodplain, and non-tidal wetlands and their buffers shall be replanted to re-create their pre-existing undisturbed condition; and
4. Reforestation requirements and §73-12 of the Code for vegetation cleared outside the 100-year floodplain, and non-tidal wetlands and their buffers.

With respect to those portions of the Property in the Critical Area, the Supplemental Abatement Order stated:

Building a road through the Critical Area is a “development activity” as defined in § 190-14 of the Code. Development activities in the Critical Area are regulated by § 190-93. Section 190-903D requires submission and review of plans that ensure the proposed development meets the purposes described in § 190-93A. Because there is no permitted or permissible access to Maryland Route 33, there is no purpose to be served by this roadway. Therefore, destruction of the pre-existing natural habitat inherent in its construction is inimical to the goal and purpose of the Critical Area Program, which is to conserve natural habitat to the extent practicable.

Therefore, on or before April 6, 2009, you are hereby ORDERED to:

1. Submit plans to be reviewed and approved by the Office of Planning & Zoning for removal of the illegal roadway and restoration of the affected area to its pre-existing natural habitat. Submittal shall address and include the following items:
 - Soil Erosion Sedimentation Control Plan (§ 190-93E (4));
 - Stormwater, Floodplain, and Tributary Stream Management Plan (§ 190-93E (6));
 - Nontidal Wetlands Management Plan (§ 190-93E (7));
 - Habitat Protection Plan (§ 190-93E (8)); and
 - Forest Replacement Plan (§ 190-93E (9))...
3. Remove the existing illegal roadway in accordance with the requirements of the above referenced plans; and
4. Bring the property into compliance with all requirements of the Notice of Zoning Violation/Order to Abate dated January 23, 2009 and this Supplemental Administrative Abatement Order.

Historical Background and Findings of Fact

On December 12, 2001 Richard and Hilary Henry recorded a Plat Showing Revision of Lot Lines (County Ex. No. 8, page 3⁷) that depicted the existence of a large irregularly shaped area of non-tidal wetlands lying in a forested area of the parcel along Maryland Route 33. That Plat was soon followed by a subdivision plat recorded by the Henry's on April 16, 2002 (County Ex. No. 11, page 8) that included a plat note, "Lots 1 & 2 shall be denied direct access to Maryland Highway No. 33 unless approved by the Maryland State Highway Administration, Talbot County Planning and Zoning and Talbot County Public Works." The deed by which Angel Enterprises Limited Partnership acquired the subject Property, and also the second of two

⁷ Note, all page numbers refer to "Talbot County's Proposed Exhibit List". Page numbers that refer to the Board of Appeals Record in Case No. 1403 are designated "BOA page No. _____"

parcels it currently owns, referred specifically to this Plat, and by operation of law the plat was incorporated by reference into the deed, making this plat note a legally enforceable restriction upon the title acquired by Angel Enterprises Limited Partnership. The bundle of property rights acquired by Angel Enterprises Limited Partnership when it purchased this Property, including the second lot, did not include the right to direct access to Maryland Route 33 without the approval of the Maryland State highway Administration, Talbot County Planning and Zoning, and Talbot County Public Works.

On September 10, 2002 Angel Enterprises Limited Partnership acquired Parcel 182, Lot 1, by deed from Richard and Hilary Henry. At that time, title to that parcel was encumbered by a subdivision restriction prohibiting direct access from that lot to Maryland Route 33 unless approved by the Maryland State Highway Administration, Talbot County Planning and Zoning, and Talbot County Department of Public Works. That subdivision regulation was legally created and was, and is, binding on all subsequent owners. Its validity and binding effect has not been challenged in this proceeding⁸.

⁸ Talbot County Code *Subdivision Regulations*, § 168-28 F. (in effect in 2002 when this Property was subdivided) creates design standards for subdivision review and approval, including:

“The following specific areas shall be preserved to the extent consistent with the rational utilization of land, and in accordance with applicable local, State and federal regulations. (1) Nontidal wetlands as determined by local ordinance and State and federal regulations... (5) Forests, woodlands and significant trees as determined by local ordinance.”

See, for example, *City of Annapolis v. Waterman*, 357 Md. 484, 7 45 A.2d 1000 (2000) in which the Court of Appeals held that conditions may be imposed by a municipal planning commission in connection with the approval of a proposed subdivision map or plan. A subdivision plat may be disapproved where it fails to comply with subdivision legal requirements, applicable zoning laws, or reasonable conditions imposed on the development. A “reservation,” a type of condition, is a setting aside of specified land for a specific public purpose; it effects no conveyance to the government, but it restricts the right of the subdivider to use the reserved land. The reservation imposed when this Property had previously been subdivided in 2002, before AELP purchased it, that direct access to Maryland Route 33 be denied unless approved by the Maryland State Highway Administration, Talbot County Department of Public Works, and Talbot County Office of Planning and Zoning, was not an unconstitutional taking because these conditions imposed on subdivision had been previously agreed to by the subdivider, and there was no

On May 6, 2005, AELP acquired Revised Parcel 182, Lot 2 from Alfred A. Rapetti, subject to the same subdivision restriction.

Bender and AELP had both constructive and actual knowledge of this restriction because it appears of record in the chain of title and because Mr. Bender also requested and personally attended a meeting held with representatives of the County on February 3, 2005, to discuss his request for direct access from this Property to Maryland Route 33. Mr. Bender, accompanied by Elizabeth Fink, his representative from Lane Engineering, Inc., ("Lane") requested the meeting to question County representatives about why he was being denied direct access from the Property to Maryland Route 33. The County Manager, County Engineer, Assistant County Engineer, Assistant County Planning Officer, County Director of Permits and Inspections and County Attorney all attended. In the discussion Mr. Bender was told that the Property could not have direct access to Md. Rt. 33.⁹ Shortly thereafter Mr. Bender, through Lane, submitted a Request for a Major Plat Revision to the Talbot County Planning Commission to revise the Henry Plat to abandon Rollyston Drive, the private road created by the Henry plats that provided and still provides existing access to the Property. The purpose for that Request was to obtain the County's approval of direct access from the Property to Md. Rt. 33. (County Ex. 28, page 93-94).

The Major Revision Plat Staff Report (County Ex. 25, page 74-77) prepared by Mary Kay Verdery, Assistant Planning Officer quoted from the County Comprehensive Plan:

"The County should maintain and review protection measures for sensitive areas including streams and their buffers, 100 year floodplains, steep slopes adjacent to streams and habitats of threatened and endangered species to reinforce existing regulatory protection programs...New development shall be restricted in sensitive areas and environmental protection standards must insure that environmental

evidence that the subdivider or any subsequent purchaser was deprived of all remaining economically viable uses for subdivision.

⁹ Transcript August 6, 2009, page 25, line 17 through page 26, lines 6.

resources are protected and enhanced....The State should emphasize system conservation and enhancement measures designed to improve operations on MD 33 from the Easton Bypass to St. Michaels [the stretch of Md. Rt. 33 including these access points/Rollyston Drive]. Strict access controls should apply, with each property of record limited to one access drive, unless safety considerations dictate otherwise....

The Staff Report described the Property's physical characteristics, "... the non-critical area portions of each parcel are encumbered with areas of non-tidal wetlands." (County Ex. 25, page 75), that there were "... significant areas of non-tidal wetlands on the western side of these three parcels. The Applicant is requesting approval to abandon an existing private road access and to establish a new 50' wide access easement across parcel 194 impacting several areas of non-tidal wetlands and their associated buffers." (County Ex. 25, page 76). Concerning the Forest Plan the Staff Report stated:

If the requested activity is permitted the appropriate Forest Conservation measures shall be complied with based on the total forest clearing within the non-critical area. A Forest Preservation Plan shall be filed for the removal of trees within the Critical Area portion of the subject lands. *Ib.*

Staff recommended denial of the Major Revision Plat based on the comments outlined in the Technical Advisory Committee Notice to Proceed dated June 14, 2005 (County Ex. 25, page 77). That Technical Advisory Committee report indicated that, "Staff does not support the abandonment of the existing road right-of-way and creation of the new road right-of-way through the forest and wetlands to serve the Critical Area portion of the subject lands." (County Ex. No. 25, page 79). However, the Report continued,

"Should the Planning Officer, County Engineer and State Highway¹⁰ grant approval, as noted on the previously recorded plat, and Planning Commission approve the private road right-of-way abandonment and relocation, staff recommends the following conditions of approval:

¹⁰ These three agencies were the ones identified as being required to give their approval in the Henry plat note.

...

8. The plat shall define the cumulative cutting, clearing or grading for the proposed road both within and outside of the Critical Area.
9. The appropriate Forest Conservation measures shall be complied with based on the total forest clearing within the non-critical area.
10. A Forest Preservation Plan shall be submitted to the Office of Planning & Zoning for the removal of trees within the Critical Area portion of the subject lands.

The County's Staff Report (County Ex. 26, page 88) also included a "TAC [Technical Advisory Committee] Review, Revised: Tuesday, June 7, 2005, that stated specifically:

- Proposed portion of driveway that is in RAC [non-critical area] needs a Forest Conservation Plan if tree removal is more than 40,000 sq. ft. or a Residential DOI [declaration of intent] if less than 40,000 sq.ft.
- Proposed portion of driveway that is an RC [Rural Conservation -- Critical Area] needs a CA [Critical Area] Forest Preservation Plan.

This part of the Staff Report specifically spelled out these requirements, and this Staff Report was made available to AELP, Mr. Bender, and their representatives, Lane, and was specifically the subject of the July 6, 2005 Planning Commission review and discussion concerning AELP's application for approval of a Major Revision Plat seeking to abandon Rollyston Drive in order to build the proposed driveway to create alternate access to the Property.

As part of that Staff Report, Talbot County Department of Public Works submitted a Memorandum to Mary Kay Verdery dated June 8, 2005, that stated:

Talbot County Department of Public Works does not support this proposed private road abandonment plat. As proposed, an additional access point will be necessary on MD Route 33. This public road is a high speed arterial highway in vicinity of the subject lands. A new access creates an additional conflict point on the highway, potentially reducing safety for the traveling public.

Public Works strives to balance public safety with the rights of property owners to develop land. This proposed right-of-way abandonment appears to reduce safety,

by adding an additional conflict point, without intention to further subdivide the subject lands.

During review of the existing subdivision plat, which created Lots 1 and 2 (MAS 81/134 -- April 16, 2002), our recollection is that staff pursued denial of all direct access to the public road from the subject lands, except at the private road [Rollyston Drive]. The Planning Commission recognized that a portion of these lands, with development potential, were bounded by the public road and non-tidal wetlands. Accordingly, to avoid the necessity of filling these wetlands for access, the final plat provided for the possibility of an additional public road access with concurrence of the Planning Office, Public Works and State Highway Administration. It appears that the proposed change in access is not for this purpose and requires the filling of non-tidal wetlands.

... A private road maintenance agreement was recorded after December 12, 2001 [the Rapetti plat recordation date] without the knowledge of, or review by Public Works.

Public Works does not knowingly concur with private road maintenance agreements that allow road abandonment without specific authorization from the County Engineer. This road maintenance agreement (executed December 13, 2001) specifies road abandonment after construction of new direct access for Parcel 182 (Lots 1 and 2), which this Department does not support.

Public Works interest in this proposed change is based upon concerns for public safety, associated with a second access point to the public road. (County Ex. No. 25, page 81-82).

In addition, the State Highway Administration noted in its letter of May 16, 2005, part of the Staff Report, that,

“If Rollyston Drive does not get abandoned then all access to Lot 1 and Lot 2 must be off of Rollyston Drive with no direct access to MD 33.” (County Ex. No. 26, page 85)

Following a presentation by Lane, representing Mr. Bender and AELP, the Planning Commission adopted a motion, “... that we do not approve the revision plat covering private road right-of-way abandonment and relocation for the applicants Al Rapetti and Angel Enterprises Limited Partnership because of concerns over disturbance of wetlands and safety entrance onto Route 33.” (County Ex. 28, page 107). The motion carried 4-1.

This decision was communicated to AELP, c/o Morton Bender, by letter dated July 12, 2005 (County Ex. No. 30, page 112), which also advised AELP and Mr. Bender that if they disagreed with that decision they could file an appeal to the Board of Appeals within 30 days, which AELP did by letter dated August 11, 2005 (County Ex. No. 31, BOA-2).¹¹ That

Allegation of Error stated

The decision of the Talbot County Planning Commission communicated to the applicant by letter dated July 12, 2005, entitled "Notice to Proceed" was erroneous as a matter of law, and arbitrary and capricious as a matter of law and fact. The Planning Commission was without authority under the law and in the context of the true facts, in denying the property owners the ability to abandon an existing right-of-way and create a new access to Maryland Route 33." (County Ex. No. 32, BOA-3).

Ultimately, AELP and Mr. Bender withdrew that appeal to the Board by letter dated February 9, 2006 (County Ex. No. 38 and 39, page BOA 139 and 140). The effect of that decision to withdraw their administrative appeal was to make the decision of the Planning Commission final and binding on AELP and Mr. Bender. Under *Karabetis v. Mayor and City Council of Baltimore*, 72 Md. App. 407, 416-417, 530 A.2d 293 (1987), "The decision of an administrative agency 'has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.' Restatement of Judgments § 83 (1) (1982). Further, objections or questions which were not raised in the administrative proceeding will not be considered on review by an appellate court." "A party who knows or should have known that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceeding, may not raise an objection for the first time in a judicial review proceeding"

¹¹ Note: "County Ex. BOA" refers to the County's Proposed Exhibit List containing portions of the record before the Talbot County Board of Appeals captioned "Angel Enterprises Limited Partnership, Appeal No. 1403, Allegation of Error concerning Planning Commission's Decision of July 12, 2005 Entitled "Notice to Proceed".

(citations omitted) *Cicala v. Disability Review Bd. for Prince George's County*, 288 Md. 254, 261-262, 418 A.2d 205 (1980). AELP and Mr. Bender are now foreclosed from challenging the original 2002 Planning Commission decision to require the restriction on the Henry subdivision plat to deny direct access to Md. Rt. 33. They are also now foreclosed from challenging the 2005 Planning Commission decision to deny direct access to Md. Rt. 33 because of concerns about impacts to non-tidal wetlands and impacts to public safety caused by creation of additional access points on Md. Rt. 33.

Interspersed throughout the long history of AELP's and Mr. Bender's efforts to obtain direct access from this Property to Maryland Route 33 are repeated but uniformly unsuccessful attempts to persuade the Maryland Department of Environment (MDE) and the Maryland State Highway Administration (SHA) to grant permission required from those State agencies to allow construction of the proposed road/driveway. Those efforts not only show AELP's and Mr. Bender's repeated and persistent efforts, consistently unsuccessful, to obtain direct access, but also AELP's and Mr. Bender's actual subjective knowledge that direct access had been specifically and repeatedly denied. The County's Exhibits include:

- A letter dated May 27, 2003 from SHA to Morton Bender revoking SHA access permits for direct access from the Property to Md. Rt. 33 (County Ex. No. 19, page 38);
- The notation on the County Building Permit 03-335, signed by Morton Bender, individually, on May 13, 2003, indicating that the driveway is permitted to access Rollyston Drive ONLY (all-caps in original) and that direct access to Maryland Route 33 is not approved at this time (County Ex. 15, page 31);
- The Plat with Mr. Lane's handwritten notes crossing off the proposed direct access to Maryland Route 33 with the note "Pending approval from ACOA, DNR, MDE, TCPW,

TCPC" initialed by Mr. Lane, with the County staff handwritten note, "DRIVEWAY REVISED 20 May 2003 to use Rollyston Drive access instead of Rt. 33 directly."; (County Ex. 18, page 37)

- The replacement County Building Permit No. 04-850 issued for the 2 ½ story residence to Morton Bender on February 4, 2005 with the note, "This Building Permit includes driveway accessing Rollyston Drive only. Direct access to Rt. 33 not approved at this time." (County Ex. 20, page 57)
- The County's Major Revision Plat Staff Report indicating County Department of Planning and Zoning and County Department of Public Works opposition to abandonment of Rollyston Drive and creation of direct access to Maryland Route 33 (County Ex. 25, page 74-77)
- The County's Technical Advisory Committee Notice to Proceed dated June 14, 2005 indicating that the County's Department of Public Works does not support direct access from the residence to Maryland Route 33, SHA's comment that if Rollyston Drive is not abandoned then access to the property must be *via* Rollyston Drive; (County Ex. 26, pages 78-88)
- The transcript of the hearing before the County Planning Commission of July 6, 2005, denying AELPs and Mr. Bender's request for abandonment of Rollyston Drive to enable construction of a new direct access from the residence to Maryland Route 33 based on concerns of disturbance to non-tidal wetlands and creation of additional access points on Maryland Route 33, causing additional traffic hazards. (County Ex. No. 28, page 90-109)

- The letter from Talbot County Office of Planning & Zoning dated July 12, 2005 to AELP c/o Morton Bender advising them of the Planning Commission's denial of their request for direct access to Maryland Route 33 (County Ex. No. 30, page 112)
- AELPs allegation of error against the Planning Commission decision and appeal of that decision to the Talbot County Board of Appeals, Appeal No. 1403 (County Exhibits No. 31 & 32, BOA pages 2, 3-4)
- AELPs withdrawal of Appeal No. 1403 (County Ex. 38 and 39, BOA pages 139, 140)
- MDE's letter dated May 19, 2006 to Morton Bender disapproving Mr. Bender's request to construct this driveway through non-tidal wetlands (County Exhibit 42, page 140)
- MDEs letter of May 29, 2009 to the Talbot County Board of Appeals, re: Morton Bender non-tidal wetlands violation 7751 Rollyston Drive, St. Michaels, Talbot County, Maryland:

Morton Bender made application to the Maryland Department of the Environment, Nontidal Wetlands and Waterways Division for authorization to impact non-tidal wetlands and non-tidal wetlands buffers for a driveway that would connect his proposed residence to St. Michael's Road (Maryland Route 33), on Lot 1 of Parcel 194. Mr. Bender's request was subsequently denied based on the access test required under Code of Maryland Regulation (COMAR) 26.23.02.04C. Specifically, COMAR 26.23.02.04C (1) states "In determining whether the proposed project requires access to a non-tidal wetlands as a central element of its basic function, the Department shall consider whether access could be accomplished at another location that would first avoid and then minimize non-tidal wetlands impacts." The Department determined that access to the proposed residence using the existing Rollyston Drive would completely avoid non-tidal wetlands and non-tidal wetlands buffer impacts. Mr. Bender was informed by letter dated May 19, 2006 (attached) of the Department's denial of his request and his application was withdrawn."

The "Site, Stormwater, Erosion Control Plan for Morton Bender" (County Ex. No. 18, page 37) is particularly significant. This plat contains handwritten notes dated May 20, 2003 by Tom Lane, principal, Lane Engineering, crossing off the driveway shown on the plat from the

residence to Maryland Route 33. Mr. Lane's note explains the cross off, "Pending approval from ACOE [Army Corps of Engineers], DNR [Department of Natural Resources] MDE [Maryland Department of Environment] TCPW [Talbot County Public Works] TCPZ [Talbot County Planning & Zoning]". Mr. Lane initialed the note "TL" and identified the handwriting as his. (Transcript, June 29, page 47 line 9 through page 48, line 11). These notations show actual knowledge, communicated by the County to Lane as agent for AELP and Mr. Bender, specifically disapproving construction of this driveway through the forested area containing non-tidal wetlands absent the required approvals from the listed agencies. The evidence before the Board makes it abundantly clear that the listed agencies did not give those approvals and that Mr. Bender, individually and as agent for AELP, was specifically advised and therefore had actual knowledge that those agencies had denied approval of this proposed driveway. County Ex. 19, page 38, is a letter dated May 27, 2003 from SHA to Morton Bender revoking access permits that had been mistakenly issued. Talbot County Building Permit Application number 03-335, personally signed by Mr. Bender on May 13, 2003 to construct a new 2½ story residence on the Property, specifically noted, "Building Permit includes driveway accessing Rollyston Drive ONLY [capitalized in original]. Direct access to Rt. 33 not approved at this time." The "Site, Stormwater, Erosion Control Plan for Morton Bender" prepared by Lane (County Ex. 18, page 37) referenced above, showing Mr. Lane's handwritten notes, also indicates in County staff handwriting, "DRIVEWAY REVISED [capitalized in original] 20 May 2003 to use Rollyston Drive access instead of Rt. 33 directly." One of the many claims AELP and Mr. Bender have asserted is that issuance of the County building permit for the residence authorized construction of this driveway from the residence directly to Md. Rt. 33. This claim is simply incorrect. To the contrary, the record clearly shows that AELP and Mr. Bender had actual knowledge that the

County Building Permit specifically refused to grant permission for direct access from the residence to Md. Rt. 33.

The purpose of the roadway/driveway was to create direct access from the residential property to Maryland Route 33. All the plans and plats prepared by Lane showed through access to Maryland Route 33 from the residence. These include:

- The "Site, Stormwater, Erosion Control Plan for Morton Bender" (County Ex. No. 18, page 37).
- Major Revision Plat for Planning Commission consideration July 6, 2005 (County Ex. No. 24)
- Site Stormwater and Sediment Control Plan for Morton Bender dated July 12, 2005 (County Ex. No. 40, pages 113-116)

These plans and plats showed the intent to build a driveway for direct access from the residence to Maryland Route 33. Dennis Evans, the contractor Mr. Bender and AELP hired to build the road and who performed the work, testified that the road had to be finished up to the house and out to Maryland Route 33 (Transcript, June 29, 2009 page 142, lines 7-12). Neither AELP nor Mr. Bender made, nor produced any evidence to support, any claim that the road/driveway had any other purpose, or, if it did, to explain what that purpose was. The County's efforts to solicit that information from AELPs and Mr. Bender's agent, Mr. Lane, were unsuccessful. (Transcript June 29, 2009 page 24, line 21, through page 26, line 3).

Abatement Orders

The February 19, 2009 Supplemental Abatement Order cited the Talbot County Forest Conservation Ordinance, § 73-3B (1) for the proposition that any residential construction conducted on a single lot 40,000 feet square or greater in size that does not result in the

cumulative cutting, clearing, or grading of 40,000 square feet or more of forest is exempt from the requirements of Chapter 73, provided that a declaration of intent is filed with the Office of Planning & Zoning in accordance with § 73-3C. Talbot County Code § 73-3C (1) provides that a person seeking an exemption under 73-3B shall file a declaration of intent with the Office of Planning & Zoning. It should also be noted that the definition of "Forest" in Chapter 73 includes not only a "...biological community dominated by trees and other woody plants covering the land area of 10,000 square feet or greater, "but also "areas that have been cut but not cleared." The exemption under § 73-3 B (1) applies separately to both cutting and clearing of forest. In this instance, because the forest was both cut and cleared, both cutting and clearing separately triggered the requirement for filing a declaration of intent to qualify for the exemption. Further, testimony from the contractor who built the road indicated that several hundred tons of fill¹² have been placed in the roadway to create the raised road bed, thereby permanently preventing natural re-growth of the forest throughout the length and width of the roadbed.

It is undisputed that AELP and Mr. Bender filed no declaration of intent with the Office of Planning & Zoning before cutting and clearing the large swath of forest shown on the aerial photograph introduced as County Ex. No. 48, page 218 and on the photographs of the road/driveway through the woods introduced as County Ex. No. 47, pages 182-217. The February 19, 2009, Supplemental Abatement Order correctly cited §§ 73-3C (6) and (7) of the Talbot County Code, which were quoted verbatim in that Order, notifying AELP and Mr. Bender that:

(6) The Department [defined as the Talbot County Office of Planning & Zoning] may require a person failing to file a declaration of intent... to: (a) meet the retention, afforestation and reforestation requirements established in [Chapter 73]

¹² Testimony of Dennis Evans, Transcript June 29, 2009, page 133, line 6; page 137, line 11.

Section 73-3C (7) provides that, in its determination of appropriate enforcement action, the Office of Planning & Zoning may consider whether failure to file a declaration of intent by a person required to file one was knowing or willful. The Office of Planning and Zoning notified AELP and Mr. Bender that it was electing to implement those requirements because it determined that the failure to file a declaration of intent met those criteria. The excerpt from the Supplemental Abatement Order quoted on page 5 of this Opinion, County Ex. 61, page 232, explained the basis for the County's decision, including, *inter alia*:

Before this road was illegally constructed, Angel Enterprises Limited Partnership, and you, individually, had been advised these activities could not be permitted without appropriate approvals from the Maryland Department of the Environment and from Talbot County and, despite that knowledge, you, individually and on behalf of Angel Enterprises Limited Partnership, elected to construct this road without seeking or obtaining those required approvals. Further, the subject property is specifically "denied direct access to Maryland Highway No. 33 unless approved by the Maryland State Highway Administration, Talbot County Planning and Zoning and Talbot County Public Works." that restriction is contained on the plat recorded at plat No. 81, page 134 on April 16, 2002. You were specifically aware of this prohibition on direct access to Maryland Route 33, and have intentionally elected to ignore it to partially construct this access through non-tidal wetlands to the edge of Maryland Route 33.

This determination by the Talbot County Code Compliance Office is well established by the evidence produced before the Board, identified above in this opinion. The Board finds that the above cited sections of Chapter 73 are plain and unambiguous and that the Office of Code Compliance correctly understood and applied them to the facts of this case. The determination that the failure to file the required declaration of intent was knowing and willful is amply demonstrated and supported by the evidence produced before the Board, and the Board finds that the Office of Code Compliance was correct in reaching the conclusions it did.

Section 73-3C (6) (a) provides that the Office of Planning & Zoning may require a person failing to file a declaration of intent to meet the retention, afforestation and reforestation

requirements established in Chapter 73. The Board notes that this section permits the Office of Planning & Zoning to require retention of forest even without a finding that the failure to file the required declaration of intent was knowing or willful, and therefore, even if the determination in this case that the failure was knowing or willful is not supported by the evidence, that would not necessarily mean that the election to require retention of the existing forest would have been erroneous. In this case, because there is no legal right for direct access from this property to Maryland Route 33, and therefore no legal or legitimate purpose for this roadway (certainly none established by any evidence offered by AELP or Mr. Bender), the election to require its removal and retention of the existing forest is also appropriate, particularly when the plans showing construction of this roadway through this forested area of non-tidal wetlands had been specifically disapproved by the County. County Ex. No. 18, page 37 (Plat with Lane's handwritten notes); County Ex. 15, page 31 (Building Permit specifically denying direct access to Maryland Route 33); County Ex. 20, page 57 (Replacement Building Permit, specifically denying direct access to Maryland Route 33), and all of the other evidence referenced above in this opinion.

Having found that the Office of Code Compliance could legally elect to require forest retention in this instance under § 73-3C (6) (a), having found that § 73-3C (6) (a) permits the County to elect to require forest retention even without a finding that the violation had been knowing or willful, and having found that the County's determination that this failure to file the declaration of intent was in fact knowing or willful within the meaning of § 73-3C (7), as amply shown by the evidence of this case, the Board finds that the County's election to require forest retention in this instance is appropriate.

The County has required AELP and Mr. Bender to prepare and file plans required by law, as set forth in the January 23, 2009, and February 19, 2009, Administrative Abatement Orders, for County review to determine the location, nature, and extent of the required forest retention, and to approve the methods and means by which the removal of the several hundred tons of fill is to take place and by which the appropriate replanting is to occur. AELP and Mr. Bender have made no challenge to the County's requirement for submission of these plans, and the Board finds that the County's requirements for and the direction to AELP and Mr. Bender for their submission are correct.

Critical Area

The February 19, 2009 Supplemental Abatement Order states that building a road through the Critical Area is a "development activity" as defined in § 190-14 of the County Code.

That definition provides:

Development Activities (CA)¹³ -- Any activity that:

- A. Is shown on a subdivision plat, revised plat, site plan, building/zoning permit or Forest Preservation Plan; and/or
- B. Results in the construction or substantial alteration of any residential, commercial, industrial, institutional, recreational (including golf courses), or transportation facilities or structures. The Planning Officer shall determine whether a proposed alteration is substantial.

The Code defines "Transportation Facilities" (CA) as "Anything that is built, installed, or established to provide a means of transport from one place to another." Construction of this road is a development activity. The Supplemental Abatement Order stated:

Development activities in the Critical Area are regulated by § 190-93. Section 190-93D requires submission and review of plans that ensure the proposed

¹³ Note, the "CA" designation indicates this definition is a Critical Area definition that is part of the County's local Critical Area program, which is subject to review and approval by the Critical Area Commission before it may be changed.

development meets the purposes described in § 190-93A. Because there is no permitted or permissible access to Maryland Route 33, there is no purpose to be served by this roadway. Therefore, destruction of the pre-existing natural habitat inherent in its construction is inimical to the goal and purpose of the Critical Area Program, which is to conserve natural habitat to the extent practicable.

The Board has reviewed the above reasoning in the County's Supplemental Abatement Order. Section 190-93A provides:

The following sections serve as supplemental provisions to the general site plan requirements in § 190-92 for all development activities in the Chesapeake Bay Critical Area:

A. Purpose.

(1) Development activities in all zoning districts in the Critical Area shall:

- (a) Be consistent with the goals of the Critical Area Plan;
- (b) Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that runoff from surrounding lands
- (c) Conserve fish, wildlife, and plant habitat; and
- (d) Be designed to address, beyond pollution control, the adverse environmental impacts created by the number, movement, and activities of persons in the project.

Construction of this road, as a development activity in the Critical Area, is required to be consistent with the goals of the Critical Area Plan and is required to conserve plant habitat. This property is in the RC (Rural Conservation) Critical Area zone. As such, § 190-93A (2) also applies:

(2) Development activities within the Rural Conservation District shall:

- (a) Conserve, protect, and enhance the overall ecological values of the Critical Area, its biological productivity and its diversity;
- (b) Protect adequate breeding, feeding, and wintering habitats for those wildlife populations that require the Chesapeake Bay, its tributaries, or coastal habitats in order to sustain populations of those species;

- (c) Conserve the land and water resource base that is necessary to maintain and support land uses such as agriculture, forestry, fisheries activities, and aquaculture; and
- (d) Conserve the existing developed woodlands and forest for the water quality benefits that they provide.

The Supplemental Abatement Order found that there was no permitted or permissible access to Maryland Route 33, that there was no purpose to be served by this roadway, and that, therefore, destruction of the pre-existing natural habitat inherent in its construction was inimical to the goal and purpose of the Critical Area program to conserve natural habitat to the extent practicable. The Board finds that the Supplemental Abatement Order correctly interpreted and applied these sections of the Code in light of the evidence produced.

The Supplemental Abatement Order required AELP and Mr. Bender to prepare and submit to the County a number of Plans, listed on County Ex. 61, page 233-234, in connection with the removal of the roadway/driveway in the Critical Area and the replanting and re-establishment of the forested area. AELP and Mr. Bender has made no challenge to the County's Order in this respect, and the Board finds that the County's requirements that they submit these required plans was and is correct.

Talbot County Code § 58-7 *Administrative Abatement Orders*, provides:

A. Issuance. The Chief Code Compliance Officer may issue an administrative abatement order to any person to perform any act or thing required by this Code. The administrative abatement may order such person:

- (1) *To correct, discontinue or abate any violation.*
- (2) *To cease any activity being performed in violation of this Code.*
- (3) *To apply for any permit, approval, special exception, or variance required by this Code.*
- (4) *To remove any construction materials, equipment, and any structures or other construction work built or erected in violation of this Code.*

(5) *To restore any property to its condition as it existed before any violation of this Code.*

(6) To perform any condition or obligation required by this Code or by any permit, approval, special exception, variance, license, contract, deed, or other instrument required or executed pursuant to this Code.

This road/driveway was illegally constructed in violation of the express prohibition contained in the Building Permit for the residence, (County Exhibit 15, page 31) a restriction specifically discussed with AELPs and Mr. Bender's representative, Lane, (County Exhibit 18, page 37), a restriction specifically re-imposed in the Replacement Building Permit (County Ex. 20, page 57). Forest was illegally removed and cleared, and several hundred tons of fill were placed on cleared forested areas without filing the required declaration of intent with the County and without compliance with applicable Critical Area requirements. Not only was forest illegally cut and cleared, but sensitive environmental areas including large areas of non-tidal wetlands were illegally filled. The layout of the road/driveway specifically proposed was mapped to minimize adverse impact on non-tidal wetlands, but the road/driveway as constructed did not even follow that layout, but instead unnecessarily increased those impacts. County Exhibits 58 and 59, pages 223 and 224, showed the (disapproved) plan's proposed route compared to the actual route of the road/driveway as built, clearly showing these increased and wholly unnecessary adverse environmental impacts. The Administrative Abatement Orders of January 23, 2009 and February 19, 2009 correctly ordered AELP and Mr. Bender to remove the illegal road/driveway.

Mr. Bender's Personal Liability

Corporations & Associations Article, § 9A-306, Md. Ann. Code, addresses the liability of a partner of a limited liability partnership:

(a) Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

...

(c) Subject to the provisions of subsection (d) of this section, a partner of a limited liability partnership is not liable or accountable, directly or indirectly, including by way of indemnification, contribution, or otherwise, for any debts, obligations, or liabilities out of or chargeable to the partnership or another partner, whether arising in tort, contract, or otherwise, which are incurred, created, or assumed by the partnership while the partnership as a limited liability partnership solely by reason of being a partner in the partnership or acting or omitting to act in such capacity or rendering professional services or otherwise participating, as an employee, consultant, contractor, or otherwise in the conduct of the business or activities of the partnership.

(d) Subsection (c) of this section does not affect:

(1) The liability of a partner of a limited liability partnership for debts and obligations of the partnership that arise from any negligent or wrongful act or omission of the partner...

In this case, Morton Bender is the general partner of AELP and has participated directly in the transactions that led to the construction of this road/driveway in direct violation of the express prohibition on the building permit issued by the County to Morton Bender. Additionally, plans have been applied for and approved by Mr. Bender in his individual capacity, including signature in his individual capacity of the "Site, Stormwater and Sediment Control Plans for the Lands of Morton Bender" showing the "Private Road through Woods" (County Ex. 40, pages 113-116). Further, the wetlands delineation by the US Army Corps of Engineers dated November 16, 2004 (County Ex. 22, page 61-66) was issued to Mr. Bender personally, making it impossible for him to disclaim personal knowledge of the location and extent of these non-tidal wetlands. In this case, the decision to illegally move forward with this prohibited cutting, clearing, and road/driveway construction is attributable to Mr. Bender and the existence of AELP

as a limited partnership does not shield him from the consequences of his own wrongful acts. The Board finds that Mr. Bender bears personal responsibility for the illegal acts that have taken place and that the February 19, 2009 Supplemental Administrative Abatement Order correctly included him as a responsible party in his individual capacity. Talbot County Code § 58-4. *Responsible persons*, provides, "The following persons may each be held jointly or severally responsible for a violation: (1) persons who apply for or obtain any permit or approval, (2) contractors, (3) subcontractors, (4) property owners, (5) managing agents, or, (5) any other person who has committed, assisted, or participated in the violation." Mr. Bender, individually, is a responsible person under this section.

AELP and Mr. Bender have argued that the County's January 23, 2009 Notice of Zoning Violation/Order to Abate, County Exhibit 60, page 225-227, is legally flawed because it cites § 73-3B (5), which refers to commercial logging and subsequent forest operations as one of several exempt activities provided a declaration of intent is filed. AELP and Mr. Bender argued this is a fatal flaw justifying dismissal of the January 23, 2009 abatement order and a ruling in their favor. Neither AELP nor Mr. Bender have ever attempted to file a declaration of intent as ordered by the January 23, 2009 abatement order, consequently there is no showing they have been misled or prejudiced by that citation. Further, the unconnected road/driveway may well have reasonably appeared to the County Code Compliance Officer as a logging road, because it had not yet been completed to Md. Rt. 33 as Dennis Evans, the road contractor, testified. The TAC Review note of June 2005, County Exhibit 26, page 78-88, at 88, correctly advised AELP and Mr. Bender and their agent, Lane, specifically, that a residential declaration of intent would be required if the proposed road/driveway were permitted. Mr. Lane, AELP and Mr. Bender's agent, testified that he was familiar with the requirement in the County for declarations of intent. (Transcript, June

29, 2009, page 16, line 2). Under the circumstances, the Board finds that neither AELP nor Mr. Bender have been misled or prejudiced and that characterization of the type of declaration of intent required to be filed is not an issue that is determinative of the outcome in this case.

AELP and Mr. Bender have also argued that this road/driveway is justified for the purpose of installation of three-phase electric utilities by Choptank Electric Cooperative. This claim is undermined by the photographs taken by Lane of the existing underground utility electric line placed alongside Rollyston Drive with little or no environmental impact. Exemption for the installation of underground utilities is permissible, but only so long as the Forest disturbances are minimized. Talbot County Code § 73-3 A (4) (b) provides:

§ 73-3 Applicability.

A. Exemptions. It is the intent of Talbot County to protect forest resources in a manner which is least burdensome to residents wishing to improve their property. The following is a list of activities which typically cause negligible forest disturbance and are therefore exempt from this chapter.

- (1) Any activity on parcels less than 40,000 square feet in size.
- (2) Properties wholly within the Chesapeake Bay Critical Area as depicted on the Maryland Department of Natural Resources Wetlands Maps.
- (3) A preliminary plan of subdivision or a sediment and erosion control plan approved before July 1, 1991.
- (4) *The cutting or clearing of public utility rights-of-way for public service companies licensed under the Public Utilities Article of the Annotated Code of Maryland or land for electric generating stations licensed under the Public Utilities Article of the Annotated Code of Maryland, if:*
 - (a) Required certificates of public convenience and necessity have been issued under Natural Resource Article § 5-1603(f), Annotated Code of Maryland; and
 - (b) *Cutting or clearing of the forest is conducted to minimize the loss of forest.*

County Ex. 45, LE-14 through LE-24 are photographs showing the recent installation of an underground electric utility line along Rollyston Drive. The minimal loss of forest apparent from those photographs, when compared with the aerial photograph at County Exhibit 48, page 218, and the photographs of the road/driveway through the woods, County Exhibit 47, pages 182-217, clearly show that the road/driveway through the woods constructed by Mr. Bender and AELP was not conducted to minimize the loss of forest.

Robert Jump, Supervisor of Field Engineering for Choptank Electric Cooperative, where he has worked for 35 years, supervises field employees doing stakeouts for new services, line improvements, and installation of electric utilities from the pole on the street to customers' residences, and also handles MDE permitting issues for non-tidal wetlands. (Transcript, July 27, 2009 page 61, line 16 through page 62, line 8) Mr. Jump testified that Choptank Electric's policy concerning avoidance of non-tidal wetlands was that they "steered clear of them" (Transcript, July 27, 2009, page 62, line 13). He testified that the trenching machines used to bury three-phase or single phase are the same machine, the width of the trench for both is the same (approximately 6 inches) and that Choptank Electric would typically need to cut a line through a vegetative area of approximately 10 feet, five feet on either side of the trench, and this distance is no different for single phase or three-phase. (Transcript, July 27, 2009 page 65, line 6, through page 66, line 2). Mr. Jump testified that had that road/driveway not been cut through the woods by AELP and Mr. Bender, Choptank Electric would not have run its utility line there because there would have had been no road for access to repair the cable in the event of a cable failure and because of the woods and the wetlands that would have been involved. (Transcript, July 27, 2009 page 67, line 14). Mr. Jump had, the week before, inspected the recently installed underground electric utility line installed along Rollyston Drive, and he described the impacts to

the vegetation and the trees that he observed along the underground cable route along Rollyston Drive, compared to the impacts along the new road built on the Bender property:

Well I wasn't -- I'm not aware of what the cable route looked like prior to the installation of the cable along Rollyston Drive. But it appears that someone went through there and bushhogged a path for a trencher. And by snaking around most of the larger trees, avoided cutting any trees, which is typical in that type of situation. Since Choptank Electric didn't do that, you know, I really can't say what -- I don't know what it looked like before, before that cable was installed. (Transcript July 27, 2009 page 73, line 7)

Mr. Jump testified he did not observe any tree stumps that had been removed along Rollyston Drive. He testified that Choptank Electric was operating under the assumption that the new road built on the Bender property had been properly permitted and that any impacts to wetlands there had been approved and properly mitigated. (Transcript July 27, 2009, page 75, line 9). He further testified that Choptank Electric had not applied for or obtained any wetland permits to put in the electric utilities along the new road, and that when there are no other alternatives but to go through non-tidal wetlands, Choptank Electric's practice was to install the underground utilities using directional boring. (Transcript July 27, 2009, page 75). He further testified that the terms of the removal of vegetation and trees, Choptank Electric's policy is to actually do the minimum amount of removal that is possible to get the cable in. (Transcript July 27, 2009, page 76, line 3). He testified that the environmental impacts he observed on County Exhibit 47, pages 203, 207, and 208 (photographs of the new road on the Bender property) far exceed the minimum impact that would have been necessary to lay electric cable underground. (Transcript July 27, 2009, page 76, line 12, through Page 77, line 11).

Dennis Evans, the road contractor who built the road, testified that he finished the construction as it now exists in the Spring of 2008 and that Choptank Electric didn't come in to install the electric utilities until the late Fall of 2008. (Transcript, June 29, 2009 page 138, line 4).

He also testified that to complete the work, the road had to be finished up to the house and finished out to Route 33, and that crusher run had to be put on the road. (Transcript, June 29, 2009, page 142, line 7).

Recordation of the Henry plat on April 16, 2002 (County Ex. number 11, page 8) and also recordation of the plat revising the lot lines of Alfred A. Rapetti, (County Ex. No. 23, page 70) created a utility easement from Maryland Route 33 along Rollyston Drive to serve the Property. This utility easement along Rollyston Drive is shorter through the forested area as compared to the new road/driveway cut by Mr. Bender and AELP, and this existing utility easement could have been used by Choptank Electric to install an additional utility line to serve Mr. Bender's Property. Mr. Jump testified that if building the road was illegal, Choptank Electric would not have installed the electric cable along that route, (Transcript, July 27, 2009, page 94, line 4), also, that Choptank Electric did not require Mr. Bender to build that road in order to install the three-phase electric along that route (Transcript, July 27, 2009, page 94 line 10), finally, if that road had not been there, Choptank Electric would not have gone through the woods and the non-tidal wetlands to install the underground electric cable there. (Transcript, July 27, 2009, page 94, line 15)

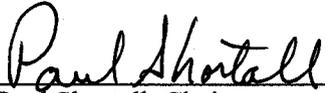
The Board finds that this road/driveway was not built for installation of underground electric utilities. The Board finds that the cutting and clearing of forest caused by construction of this road/driveway far exceed the minimum disturbance necessary to install underground electric utilities, and this road/driveway construction activity and the placement of several hundred tons of fill was not conducted either to install underground electric utilities or to minimize loss of forest. The Board finds that underground electric utilities could have been placed alongside

Rollyston Drive in the existing public utility easement established for that purpose to serve the Property, with far less disturbance to the forested area.

For these reasons, the Board of Appeals affirms the County Code Compliance Officer's issuance of the January 23, 2009 Notice of Zoning Violation/Order to Abate, and the February 19, 2009 Supplemental Administrative Abatement Order.

GIVEN OVER OUR HANDS, this 4th day of November, 2009.

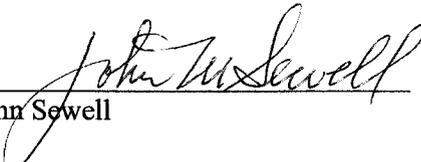
TALBOT COUNTY BOARD OF APPEALS



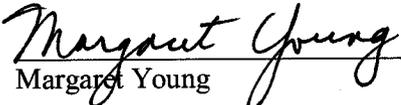
Paul Shortall, Chairman



Phillip Jones, Vice Chairman



John Sewell



Margaret Young

Unavailable for Signature
Russel Kacher

Board of Appeals/1519./AngelEnt.Allegation2