

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

ZAAP NUMBER 18-110-031

CHAPMAN'S REST APPEAL

SIXTH ELECTION DISTRICT

DATE HEARD: JULY 23, OCTOBER 22, & OCTOBER 29, 2020

ORDERED BY:

**Mr. Hayden, Mr. Brown,
Ms. Delahay, and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: December 17, 2020

Pleadings

John & Elise Thompson, Glenn & Jennifer Thompson, George & Frances Thompson, and Benjamin & Carolyn Clarke (collectively, “the Appellants”) appealed the decision of the Director of Land Use and Growth Management (“Planning Director”) to approve the final plat of the Chapman’s Rest Minor Subdivision (“the Subdivision”) for recording.

Public Notification

The hearing notice was advertised in *The Enterprise*, a newspaper of general circulation in St. Mary’s County, on July 10, 2020 and July 17, 2020. The hearing notice was also posted on the Property. The file contains the certification of mailing to all adjoining landowners, including those located across a street. Each person designated in the application as owning land that is located within two hundred feet of the Subject Property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the St. Mary’s County website on July 15, 2020. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on July 23, October 22, and October 29, 2020 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented.

The Property and Procedural History

Bennett Homes LLC (“The Applicant”) owns the Subject Property, a 137.71-acre property located at Tax Map 69, Grid 8, Parcel 922 at the end of Upton Lane in Hollywood, Maryland. The Subject Property is located in the Rural Preservation District (“RPD”).

In 1998, Judge Femia held in *Adams v. Thompson*, 18-C-97-000798 (Cir. Ct. St. Mary's, MD 1998), that J. Franklin Adams, the prior owner of the Subject Property, held a prescriptive easement "over the land of John and Elise Thompson." Specifically, the "easement is across the roadway, travel way . . . up to and including that point where there is the 90-degree left hand turn across the plowed field . . . the last direct route back to the Adams property." The use of the prescriptive easement was described as "[f]or the reasonable . . . use of motor vehicles as styled in the Maryland Motor Vehicle Code, and that of course, makes it very broad. That easement includes the right to reasonably maintain the right of way for such vehicles. The Defendants are enjoined from interfering with that reasonable use."

In 2006, George and Frances Thompson and Glenn and Jennifer Thompson signed a Confirmatory Plat of Boundary Line Adjustment "grant[ing] twenty (20) foot private right-of-way through our properties, for the purpose of ingress and egress to the lots as shown hereon." Moreover, they wrote, "We further establish the minimum building restriction lines as required by the zoning ordinance of St. Mary's County and dedicate the streets, walkways, easements, rights-of-way, and other improvements, where applicable to public use."

Three months later, Mr. Adams sold the Subject Property to the Applicant.

In 2007, Judge Femia again ruled on the prescriptive easement. In *Thompson v. Bennett Homes, LLC*, 18-C-07-000446 (Cir. Ct. St. Mary's, MD 2007), Judge Femia held in the Order for Permanent Injunction "that the width of the prescriptive easement granted in Civil Action 97-798 is established to be twelve feet (12'), being six feet (6') on each side of the center line of the existing farm road over which a prescriptive easement was granted in Civil Action 97-798." In limiting the use, Judge Femia further ruled in the Order for Permanent Injunction, "That said prescriptive easement shall be used by the owner of the dominant estate solely for the ingress and

gress of (1) motor vehicles, as styled in the Maryland Motor Vehicle Code; and (2) farm implements and equipment, and shall not be used for any other purpose, including, but not limited to, the installation or extension of utility services.”

The St. Mary’s County Comprehensive Zoning Ordinance

Pursuant to § 30.8.3 of the St. Mary’s County Subdivision Ordinance (“SO”):

3. **General Criteria for Final Plat Approval.** A Final Plat may be approved upon demonstration of compliance with the following criteria:
 - a. The proposed subdivision conforms to all relevant requirements of this Ordinance and any conditions of Planning Commission Preliminary Plan approval, if applicable.
 - b. The lot and block layout provides for safe and convenient vehicular, service and emergency access, efficient utility service connections, and adequate buildable area in each lot for planned uses.
 - c. Rights-of-way and easements of adequate size and dimension are provided for the purpose of constructing the street, utility, and drainage facilities needed to serve the development. This includes requests to the Board of County Commissioners for permission to cross the railroad right-of-way.
 - d. The proposed subdivision provides sufficient land necessary to satisfy the requirements of the open space standards for the zoning district where the subdivision is located.
 - e. The proposed land subdivision is designed in such a manner as to allow for continued development of adjacent, undeveloped lands.

The Evidence Submitted at the Hearing by the Appellants

The Appellants submitted the following evidence, which will be broken down by party:

- John and Elise Thompson
 - In 2007, Judge Femia order ordered a 12-foot easement for motor vehicles and farm equipment only and no other purpose.
 - Pursuant to the February 15, 2019 letter from the Planning Director to John and Elise Thompson, prior attempts to subdivide properties along Upton Lane were not

permitted. Ex. 4, Att 1., Ex. Z.

- That letter further states that the prescriptive easement does not extend to a public road. *Id.*
- The owners of Upton Lane did not record a plat “dedicat[ing the] street to public use.”
- John and Elise Thompson aver that the St. Mary’s County Attorney stated during a meeting on April 1, 2019 that the prescriptive easement was too restrictive to allow subdivision.
- John and Elise Thompson also presented several letters from their previous attorney, John B. Norris, III, in which Mr. Norris stated his legal opinion concerning the prescriptive easement and potential to subdivide the Subject Property. *See, e.g.*, Ex. 4, Att 1., Exs. B, D, I, M.
- The Maryland State Highway Administration (“SHA”) wrote former Planning Director Phil Shire on June 14, 2006 that the existing entrance onto MD 245 shall be upgraded to current design standards for the appropriate number of users, require a developer to acquire property adjacent to MD 245 for the necessary upgrade. Ex. 4, Att 1., Ex. C.
- The Subdivision, as proposed, does not address the adverse effects of public safety (fire & rescue), nuisance, speed of traffic, dust and endangerment to children, pets and livestock.
- As proposed, the Subdivision has no responsibility for maintenance and upkeep of the prescriptive easement. Such lack of responsibility would pose a substantial burden to the Thompsons and increased vehicular traffic on an unimproved road.

- There is a well serving George and Frances Thompson, which is located 18.5 feet from the property line and would prevent the widening of Upton Lane. Similarly, there is utility pole that is 18 feet from the property line that would prevent the same.
- Cars are unable to pass one another on Upton Lane without trespassing outside of the prescriptive easement.
- John and Elise Thompson state that on September 30, 2020, Jonathan Makhoul advised John O. Thompson advised that the reason there was no comment on the Technical Evaluation Committee (“TEC”) review was that SHA inadvertently thought that Upton Lane was a county road and that if it were a private road, improvements may have to be made at the intersection with Sotterley Road.
- An R-22 Driveway requires a minimum width of 22 feet along with additional width for the shoulders, and the Applicant does not have a right-of-way over the entrance to Upton Lane. Ex. 4, Att. 4. The existing driveway of 10 feet in width along with the obstructions previously mentioned does not allow for the expansion necessary.
- Benjamin and Carolyn Clarke
 - The owners of Upton Lane did not dedicate the street to public use in a recorded plat.
 - The current easement used to access the Chapman’s Rest Subdivision does not extend to a County Road
 - Pursuant to an April 9, 2012 LUGM memorandum, in order to subdivide Paracletes Paradise Farm, improvements to the right of way would be required to include

upgrading to 22-foot easement with pull offs every 500 to 600 feet and turnouts every 1,000 feet for accommodation of emergency vehicles. Ex. 4, Att 1., Ex. T.

- Pursuant to a memorandum from former Planning Director Phil Shire to former County Attorney—now Judge—Christy Holt Chesser dated February 11, 2008, the prescriptive right of way is 12 feet and is to be used for vehicular access only and not for any other purpose, including extension of utility service. Ex. 4, Att 1., Ex. E.
- Upton Lane is currently used by family members and was built and is maintained by those family members.
- The entrance to Upton Lane from Sotterley Road has a sharp turn with an existing 11-foot width. Such a width of the driveway will not allow for large vehicles to enter, and numerous accidents have occurred at this location.
- The Clarkes and Thompsons are currently maintaining Upton Lane, including plowing snow.
- Glenn & Jennifer Thompson
 - Judge Femia ordered a 12-foot easement for motor vehicles and farm equipment use only and for no other purpose.
 - Prior attempts to subdivide along Upton Lane were not permitted.
 - The owners of Upton Lane did not dedicate the street to public use in a recorded plat
 - The current easement used to access the Subdivision does not extend to a County Road
 - Reiterating the argument of John and Elise Thompson, Glenn & Jennifer Thompson

state that the County Attorney previously determined that the prescriptive easement was too restrictive to allow the Chapman's Rest Subdivision.

- George & Frances Thompson
 - George and Frances Thompson restated the contentions of Glenn and Jennifer Thompson in their entirety.
 - George & Frances Thompson granted a right-of-way to John & Elise Thompson, Glenn & Jennifer Thompson, Carolyn & Ben Clarke to access their properties.
 - During a January 2019 meeting at LUGM with Bill Hunt, Brandy Glenn, George & Frances Thompson, John & Elise Thompson, it was advised that the Appellants did not grant Bennett Homes a right-of-way and that the 12-foot prescriptive easement did not extend to a public road. Ex. 4, Att. 3.
 - The existing entrance from Sotterley Road to Upton Lane will not support additional vehicles. Adding additional homes that will use Upton Lane will create an unsafe condition on Sotterley Road. There is presently no room for vehicles entering or leaving Upton Lane, which presently causes vehicles to stack. Numerous accidents have occurred at this location, including 1 fatality.
 - They further alleged that approving the Subdivision would place an unnecessary burden on George and Frances Thomspson and greatly reduce the value of their property.

The Evidence Submitted at the Hearing by the Applicant

The Applicant submitted the following evidence:

- Mr. Bennett visited the Subject Property for the first time in the late 1950s to visit his great uncle and aunt, who used to harvest timber and hold Girl Scouts events. Mr. Bennett

accessed the Subject Property through Upton Lane and continues to access the Subject Property via that same route.

- Mr. Bennett testified that there have been no problems passing cars during ingress to and egress from the Subject Property on Upton Lane.
- The Applicant purchased the Subject Property in 2006, and the deed stated that the Subject Property was to be accessed by Upton Lane. Upton Lane runs from Sotterley Road to the Subject Property.
- The Applicant is proposing 3 farmsteads and 3 outparcels, and there are 4 lots on Upton Lane at this time, thus maintaining the exemption from the private roads' standards of the Subdivision Ordinance.
- A 1938 St. Mary's Conservation District aerial photo shows the Subject Property was accessed by Upton Lane at that time. Ex. 6, Att. 1, p. 12. In fact, the Subject Property has been accessed by Upton Lane through an easement for at least 100 years.
- The Applicant has visited the Subject Property 100 times. When visiting, if two cars are driving towards one another on Upton Lane, one car will pull over where a pullover is available or go around the other car. However, there is enough width on the prescriptive easement for two cars to pass without driving outside the prescriptive easement pursuant to measurements by Mr. Bennett. If there was not enough room, the owners of lots within the Subject Property would not pull off into the Appellants' property.
- Thompson Farm Lane serves as another access to Sotterley Road, which intersects with Upton Lane.
- The Applicant is not seeking to construct a road over the Thompson land; rather, the Applicant seeks to continue to use the access that was theirs was granted previously, which

did not require improvements to the access.

- The Applicant averred that the easement granted by Judge Femia ran from Parcel 922, the Subject Property, to the next public road.
- The Applicant is seeking 3 farmsteads and 3 outparcels, and the Subdivision was approved by the Planning Director on December 12, 2019. Ex. 2.
- The private right-of-way and prescriptive easement were recorded before 2002, which exempts these from the private roads' standards in the Subdivision Ordinance.
- General Note 36 of the recorded 2018 Paracletes Paradise Minor Subdivision and signed by John and Elise Thompson states, "There shall be 4 lots (Parcels 205, 835, 922) and Farmstead 500-1 and Lot 1 shall be accessed by the existing 20-foot private right of way, Upton Lane and the 12 [foot] prescriptive easement as shown on this plat. These lots shall be accessed by an existing R-20 driveway entrance, as per the St. Mary's County Road Ordinance." Ex. 3, Att. 5.
- Moreover, the 2006 recorded Confirmatory Plat of Boundary Line Adjustment ("BLAP") for the George Thompson Property, signed by George R. Thompson, Frances T. Thompson, Glenn A. Thompson, and Jennifer W. Thompson states that that the undersigned "dedicate the streets, walkways, easements, rights-of-way, and other improvements, where applicable to public use." Ex. 3, Att. 3. The phrase "where applicable" means that it is applicable to the lot owners on Upton Lane.
- Were the outparcels in Chapman's Rest to be developed, additional width would be required to adhere to the private roads' standards.
- The Applicant has spoken with James Horstkamp of Energy Select in Leonardtown about installing solar on the lots inside the Subdivision. However, the utility easement

surrounding the Clarke property may permit the Applicant to install utilities through that means, rather than obtaining electricity through solar.

The Evidence Submitted at the Hearing by the Appellee

The Appellee submitted the following evidence:

- As proposed, the Chapman’s Rest Subdivision meets the density requirements in § 6.3 of St. Mary’s County Comprehensive Plan (“Comp Plan”). The Subdivision is located in the RPD, the density requirement for the RPD is 1 dwelling unit for 5 acres, and the Applicant is proposing 3 farmsteads and 3 outparcels over approximately 137 acres.
- As described in the plat, individual wells will be drilled, septic will be installed, and stormwater facilities will be provided.
- The Subdivision did not require Planning Commission approval because it is a minor subdivision.
- General Note 9 of the 2019 Paracletes Paradise BLAP granted a 10-foot utilities easement “along all lot lines,” which would allow SMECO or other utilities to reach the Subdivision. Ex. 3, Att. 7. Moreover, the St. Mary’s County building code does not require homes to have electricity.
- The private right-of-way and prescriptive easement were recorded prior to May 13, 2002 and thus are exempt from the private roads’ standards in the Subdivision Ordinance pursuant to § 30.14.3. Thus, private right-of-way and easement may serve up to 7 lots without upgrading to the private roads’ standards and presumed to provide safe and convenient access to the Subdivision.
- In contrast, Upton Lane inside the Subdivision is required to adhere to the private roads’ standards, as it will not have been recorded prior to May 13, 2002.

- All reviewing TEC agencies approved the Subdivision.
- The Maryland State Highways Administration wrote in an email, “We can always say no objection to the subdivision, however, any buildout that will result in 5 or more homes will require AP” and “At this time we do not have any additional questions or concerns regarding the subdivision. would note that if and when the total number of dwelling units with access via Upton Ln reaches five (5), we will need to review for entrance and potentially access upgrades. It appears the existing driveway and access is rather narrow and would not support five (5) or more dwelling units as it exists today.” Ex. 3, Att. 8.
- The April 9, 2012 staff memo, Ex. 4, Att. 1., Ex. T, which required upgrading the easement will pull offs and turnouts was incorrect, as the Thompson should not have needed to upgrade the private road at that time.
- The adequate buildable area requirements are met by the setbacks.
- General Note 36 of the recorded 2018 Paracletes Paradise Minor Subdivision and signed by John and Elise Thompson states, “There shall be 4 lots (Parcels 205, 835, 922) and Farmstead 500-1 and Lot 1 shall be accessed by the existing 20-foot private right of way, Upton Lane and the 12 [foot] prescriptive easement as shown on this plat. These lots shall be accessed by an existing R-20 driveway entrance, as per the St. Mary’s County Road Ordinance.” Ex. 3, Att. 5.
- General Note 36 of the recorded 2010 Paracletes Paradise Minor Subdivision similarly states, “There shall be 3 lots (Parcel 205, Parcel 835 and Parcel 922) and Farmstead 1 accessed by the existing 20-foot private right-of-way, Upton Lane, as shown on this plat. These lots shall be accessed by an existing R-20 driveway entrance, as per the St. Mary’s County Road Ordinance.” Ex. 3, Att. 6.

- The 2006 recorded Confirmatory Plat of Boundary Line Adjustment (“BLAP”) for the George Thompson Property, signed by George R. Thompson, Frances T. Thompson, Glenn A. Thompson, and Jennifer W. Thompson states that that the undersigned “dedicate the streets, walkways, easements, rights-of-way, and other improvements, where applicable to public use.” Ex. 3, Att. 3. The phrase “where applicable” means that the right-of-way was dedicated to public use.
- Likewise, the Owner’s Certification in the recorded 2018 Paraclete’s Paradise Minor Subdivision and 2019 Paracletes Paradise BLAP both “dedicate the “streets, walkways, easements, rights-of-way and other improvements, where applicable, to public use.” Ex. 3, Att. 5; Ex. 3, Att. 7.
- Open space standards are inapplicable pursuant to SO § 32.1 because the proposed subdivision is a minor subdivision.
- The Subdivision is designed in such a manner as to allow for continued development of adjacent, undeveloped lands because it proposes three farmsteads and three outparcels, permitting one more farmstead under the Sustained Growth and Agricultural Preservation Act of 2012 (the “Septic Bill”), thus allowing the development of adjacent, undeveloped lands.

Decision

Upon review of the facts and circumstances, the Board finds and concludes that the Subdivision satisfied SO §§ 30.8.3.a, .d, and .e. However, the Subdivision failed to satisfy subsections .b and .c, thus warranting reversal of the Planning Director’s decision to approve the Subdivision for recording. Several factors support our determination.

First, the Subdivision satisfies SO § 30.8.3.a. To begin, the Subdivision easily meets the

density requirements in the Comp Plan. Specifically, it is located in the RPD, the density requirement for the RPD is 1 dwelling unit for 5 acres, and the Applicant is proposing 3 farmsteads and 3 outparcels over approximately 137 acres. Next, individual wells will be drilled, septic will be installed, and stormwater facilities will be provided. General Note 9 of the 2019 Paracletes Paradise BLAP granted a 10-foot utilities easement “along all lot lines” of the Clarke property which would allow SMECO and other utilities to reach the Subdivision. Ex. 3, Att. 7. Lastly, there were no Planning Commission Preliminary Plan approval conditions because the Subdivision is a minor subdivision and the Applicant was therefore not required to appear before the Planning Commission.

Next, while the Subdivision provides for “efficient utility service connections, and adequate buildable area in each lot for planned uses,” it fails to “provide for safe and convenient vehicular[and] service and emergency access” and thus does not satisfy § 30.8.3.b. Although installing utilities is not allowed over the prescriptive easement, the Board has already concluded above that the Subdivision could use the 10-foot utility easement over the Clarke property lot lines. Ex. 3, Att. 7. Moreover, the Applicant has already begun conversations with Energy Select about the possibility of installing solar to meet the electricity needs of the Subdivision. Next, the adequate buildable area in each lot is met by the setbacks. Concerning emergency access, the Board rejects as unrealistic Appellee’s suggestion that, were a vehicle to break down on Upton Lane and obstruct access, fire or emergency vehicles would know to use Thompson Farm Lane as an alternative route to reach the Subdivision. Moreover, it remains unclear whether, and the Applicant did not prove that, larger emergency vehicles could make the turn onto Upton Lane and continue through the narrow width of the right-of-way. Further, while SHA did not outright reject the Subdivision, its comments are illustrative and militate against approving the Subdivision. SHA

wrote, “[A]ny buildout that will result in 5 or more homes will require AP” and “[I]f and when the total number of dwelling units with access via Upton Ln reaches five (5), we will need to review for entrance and potentially access upgrades. It appears the existing driveway and access is rather narrow and would not support five (5) or more dwelling units as it exists today.” Ex. 3, Att. 8. Such caution is dispositive and reiterates the Thompsons’ and Clarkes’ statements that ingress into and egress from Upton Lane is dangerous. Moreover, the 12-foot width of the prescriptive easement does not allow safe everyday vehicular travel without the risk of collision, trespass onto the Thompson property, or requiring either the Thompsons or Clarkes to drive off the prescriptive easement onto their own property to avoid entering or leaving the Subdivision.

As for § 30.8.3.c, while the Board finds that there is physical access from Sotterley Road to the Subdivision, it does not conclude that there is legal access. First, at no time did any party present any evidence of a record easement from Parcel 922 to Sotterley Road. Moreover, Judge Femia only described the width of the prescriptive easement and described the prescriptive easement to be “across the roadway, travel way . . . up to and including that point where there is the 90-degree left hand turn across the plowed field . . . the last direct route back to the Adams property.” *Adams v. Thompson*, 18-C-97-000798 (Cir. Ct. St. Mary’s, MD 1998). At no point did he state, directly or indirectly, that the prescriptive easement extended from Parcel 922 to Sotterley Road. The Board is constrained by the language of Judge Femia’s orders and is not permitted to deviate from or override the court’s mandate so as to expand the prescriptive easement to Sotterley Road. Additionally, as not all property owners along Upton Lane were parties to the 1997 case that imposed the prescriptive easement, the Board does not conclude that Judge Femia imposed a prescriptive easement over the land of such absent persons, and the Board shall not do so in this ruling. Moreover, the Board is unconvinced that any of the dedications to public use granted the

Applicant permanent access over the right-of-way. It is therefore the Board's determination that the prescriptive easement begins at Parcel 922, terminates on the west side of John and Elise Thompson's property where the right-of-way begins, and does not extend west over the right-of-way to Sotterley Road.

Next, the Board agrees with the Appellant that the Applicant's proposed use will overly burden the easement. The Court of Appeals has long held that "when an easement has been acquired by prescription, the character and extent of the use permissible are commensurate with and determined by the character and extent of the use during the prescriptive period." *Washington Land Co. v. Potomac Ridge Dev. Corp.*, 137 Md. 33, 59 (2001) (quoting *Bishiels v. Campbell*, 200 Md. 622, 625 (1952)). Here, the Board looks to the time the prescriptive easement was imposed, during which the dominant parcel was a single undeveloped lot and a three-lot subdivision had not yet been proposed. Adding these additional lots and the vehicles and traffic that would attenuate the Subdivision will "unreasonably burden" the servient parcels, as it was suggested that the Thompsons or Clarkes would or should pull off on their own property if a vehicle from the Subdivision sought to pass. *Mahoney v. Devonshire, Inc.*, 86 Md. App. 624, 631 (1991) ("[T]he use and improvement of this prescriptive easement must not unreasonably burden the servient tenement that is already burdened with the easement."). It is the Board's view, in line with the appellate courts that the Subdivision should not impose anything on the existing users of Upton Lane, particularly when the existing characteristics of Upton Lane do not permit a high volume of traffic.

Concerning § 30.8.3.d, open space standards are inapplicable pursuant to SO § 32.1 because the Subdivision is a minor subdivision.

Finally, as for § 30.8.3.e, the Subdivision allows for the development of adjacent,

undeveloped lands because it proposes three farmsteads and three outparcels, permitting one more farmstead under the Septic Bill.

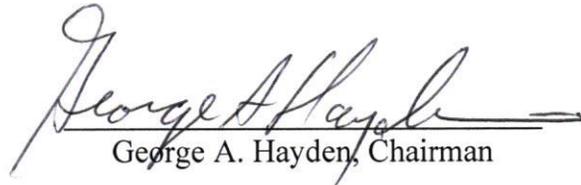
ORDER

PURSUANT to the appeal of John & Elise Thompson, Glenn & Jennifer Thompson, George & Frances Thompson, and Benjamin & Carolyn Clarke of the decision of the Director of Land Use and Growth Management to approve the final plat of the Chapman's Rest Minor Subdivision for recording; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

ORDERED, by the St. Mary's County Board of Appeals, that the Planning Director's decision regarding the approval of the Chapman's Rest Subdivision for recording is reversed.

Date: 12-17, 2020

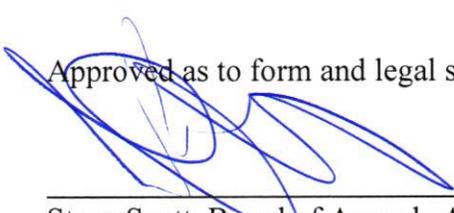

George A. Hayden, Chairman

Those voting to uphold the decision:

Those voting to reverse the decision:

Mr. Hayden, Mr. Brown, Ms. Delahay, and Mr. Richardson

Approved as to form and legal sufficiency



Steve Scott, Board of Appeals Attorney

NOTICE TO APPELLANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order; otherwise, they will be discarded.