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TO: Bernard J. McMullen, City Manager
City of Peachtree City

FROM: Theodore P. Meeker, III
City Attorney

DATE: July 16, 2010

RE: Lake Buffers/Vested Rights

I have been asked to provide a legal opinion regarding the enforcement of certain buffer requirements with respect to the lakes that are, and will be, located within the City. This request for a legal opinion was made in connection with the number of issues that have arisen regarding the application of such buffers to various subdivisions that are adjacent to Lake Kedron, Lake Peachtree, and Lake McIntosh.

At the core of this issue is whether the property owners have vested rights to use their properties despite the buffer requirements that were adopted by the City after the approval and platting of the adjacent subdivisions. In particular, properties adjacent to Lake Peachtree were approved and developed long before any such buffer requirements were put into effect under state law or local ordinance. For Lake Kedron, there were a couple of subdivisions that were approved and platted prior to the adoption of the relevant buffers.

The relevant buffer requirements are as follows:

Section 1004 requires an undisturbed natural buffer of 25 feet adjacent to any state water. In addition, an undisturbed natural buffer of 100 feet is required adjacent to any reservoir or tributary of a drinking water source. Finally, no impervious surfaces are allowed within 150 feet of a reservoir or tributary of a drinking water source.

Section 1012, which is mandated by the Metropolitan North Georgia Water Planning District requirements, requires an undisturbed natural buffer of 50 feet from a stream, with no impervious surfaces allowed within 75 feet of such stream.

These requirements have been adopted at various times over the years. That has led to further confusion as to which regulations apply to which properties, taking into account the rules that were in effect at the time each subdivision was approved.

Whether a property owner has a vested right is a fact-specific determination. As a result, it is difficult to make an across-the-board determination that will literally affect numerous parcels in various subdivisions. The purpose of this memo, therefore, is to provide a guide for staff to use in assessing the various permit applications that may be submitted for properties that abut the above-referenced lakes.

In Clairmont Development Company v. Morgan, an action was filed by a developer against Gwinnett County regarding the County's attempt to re-zone certain property from a commercial classification to a residential classification. Clairmont Development Company v. Morgan, 222 Ga. 255 (1966). In Clairmont, the property was re-zoned from a residential classification to a commercial classification in August, 1965. Once the re-zoning became final, the Plaintiff was legally obligated under the terms of a contract to purchase the subject property. Once the property was acquired, the Plaintiff expended a great deal of time, effort and money to plan and develop the re-zoned property as a shopping center. Based upon these facts, the Court found that the Plaintiff had from its reliance upon such re-zoning ordinance and the expenditures it made in consequence thereof acquired a vested property right. The Court stated :

> When this property right became vested, this Plaintiff indisputedly had a right under the rezoning ordinance of August, 1965, to use the shopping center and the Zoning Authority of Gwinnett County cannot legally devest this right by subsequent adoption of an ordinance prohibiting such use.

In Clairmont, the Supreme Court adopted the following rule with respect to vested rights:

> It appears that where substantial expenditures are made in the acquisition of property or in the preparations of the construction of a building in reliance upon the granting of a permit, vested rights are acquired which cannot be displaced by the passage of a new ordinance.

In Barker v. Forsyth County, 248 Ga. 73 (1981), the property owner made plans to develop a commercial recreation facility. The property at issue was zoned Agricultural, which purportedly allowed commercial recreation within such zoning district. The property owner alleged that he met with the county zoning administrator who informed him that the project would be permissible under the existing agricultural zoning as a commercial recreation use provided that certain modifications were made. Similar assurances were also made by other zoning officials within the County. Based upon this information, the property owner proceeded with engineering, marketing, and traffic studies incurring expenses. Subsequently, the County amended its zoning ordinance so as to delete commercial recreation as a permitted use in agricultural districts. Upon the denial of the development permits filed by the property owner, the litigation ensued.

In Barker, the Supreme Court recognized that its previous rulings in Clairmont and Keenan v. Acker, 226 Ga. 896 (1970) considered the issue of vested rights subsequent to and in reliance on the issuance of valid permits. Unlike those previous cases, the issue in Barker focused on the scenario wherein there were allegations of substantial expenditures that were made in reliance upon an existing zoning ordinance plus verbal expressions of approval given by officials rather than subsequent to the issuance of a permit. In addressing this issue, the Supreme Court adopted the following rule:

> Where a land owner makes substantial change in position by expenditures in reliance upon the probability of the issuance of a building permit, based upon an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit.

The rules set forth by the Supreme Court in Barker was addressed further in WMM Properties, Inc. v. Cobb County, 255 Ga. 436 (1986). In WMM Properties, the facts indicated that the former County Commission Chairman had approached the President of WMM regarding One Hundred Fifty-six (156)

acres of land located in Cobb County. The property owner had previously told the Commission Chairman of his company's plans to find property in the County suitable for a mobile home development. Prior to the property being purchased, the property owner obtained a certification of zoning from the Cobb County Planning Commission. The zoning designations contained in such certification indicated that the zoning designations were compatible with WMM's plans and would allow development of a mobile home park with eight (8) units per acre. WMM purchased the property in February, 1983, and submitted development plans to County officials for approval shortly after the acquisition. Those plans showed that the property would be developed in four (4) phases and included a preliminary master site plan for the entire development. The plans also contained detailed site plans for phase one of the development, which included water and drainage plans, storm and sewer profiles, street plans and an entrance detail for access to the property from an adjacent road. Those plans were approved by the County in July, 1983, subject to certain conditions.

WMM proceeded with the development. Subsequently, however, Cobb County noted that certain conditions regarding the subject property's previous zoning had not been carried forward. Without notice to the property owner, Cobb County voted to reaffirm the stipulations that were applicable to the property under the previous zoning. Those conditions, if carried forward, would eliminate certain access rights that the property owner would have had to an adjacent road. WMM brought the action against the county claiming that the County's imposition of stipulations affecting its property to be a denial of the vested right to develop the property as zoned.

In WMM Properties, the Supreme Court dealt with the following issue:

> When do the rights of a land owner to use his property for a given use become vested? Stated conversely, when does the power of a governing authority to rezone properties cease to exist, so that the governing authority can no longer amend its zoning ordinance so as to affect the land owner's property?

The Supreme Court noted that the question becomes particularly pertinent in the development of properties such as WMM's which involve planning and construction phases over a lengthy period of time. The Supreme Court addressed certain rules which have evolved dealing with the time that property rights and property as zoned vest:

1. **Right to rely upon building and/or other permits once issued.** Once a building permit has been issued, a land owner has the right to develop the property pursuant to that permit notwithstanding a zoning or regulatory change subsequent to the issuance of the building permit, and not withstanding the fact that there has been no substantial expenditure in reliance upon the building permit. Clark v. International Horizons, Inc., 243 Ga. 63 (1979).

2. **Right to Issuance of a Building Permit.** A landowner has a right, enforceable by mandamus, to be issued a building permit in accordance with zoning regulations as such regulations exists at the time of proper application for a building permit is submitted to the proper authority. City of Atlanta v. Westinghouse Electric Corp., 241 Ga. 560 (1978).

3. **Right to rely upon an approved Development Plan.**

   A. **Formally approved.** A land owner has the right to develop property pursuant to a development plan duly approved by the appropriate zoning authority even though the development plan varied from the existing zoning where the land owner has expended large sums of money in furtherance of the development and has dedicated land for use as parks and schools in reliance upon its approved development plan. Dekalb County v. Chapel Hill, Inc., 232 Ga. 238, 244 (1974).

   B. **Informally approved.** A land owner has the right to develop property where the property was purchased in reliance upon the assurance of one County Commissioner that the property was zoned for the use intended, the development plan was in accordance with the existing zoning and was approved, albeit informally, by the County Commissioners, and the landowner has expended money in reliance upon the development of plan and the existing zoning. Spalding County v. East Enterprises, Inc., 232 Ga. 887 (1974).

4. **Right to rely upon official assurances that a building permit would probably issue.** Where a land owner makes a substantial change in position by expenditures and reliance upon a probability of the issuance of a building permit, based upon the existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit. Barker v. County of Forsyth, 248 Ga. 73, 76 (1981). Also, when a landowner makes expenditures in addition to paying the purchase price, in reliance on the existing zoning and assurances by zoning officials they would be able to get a permit for the use planned, County officials may not subsequently place a moratorium on the issuance of all building permits for the use intended. Cannon v. Clayton County, 255 Ga. 63 (1985).

Applying the foregoing rules to the facts of the case, the Court found that WMM had a vested right in the property as zoned free of the subsequent stipulations. First, WMM obtained approval for development plans from all relevant county departments. Secondly, WMM's right to develop vested because of its substantial expenditures plus the official assurances that future permits would probably be issued for the development.

In City of Duluth v. Riverbrooke Properties, Inc, 233 Ga. App. 46 (1998), the City of Duluth filed an action to enjoin the Defendant's from the continued violation of the City's development regulations and require the developer to file an as-built survey and certification for a lake contained within the subdivision. In February, 1991, the original development plans for the entire subdivision with all five phases and the three segments as one development plan, were filed with the City and were approved under the City's 1971 development regulations. In January 1992, the City adopted new and stricter development regulations. The City contended that the 1992 Regulations grand-fathered only completed subdivisions so that Riverbrooke Subdivision, which had been commenced under the 1971 regulations, now was subject to the new regulations. These contentions, according to the Court, ignored the fact that the City had given preliminary approval to the entire Riverbrooke Subdivision in 1991 under the 1971 regulations, which action occurred prior to the adoption to the 1992 regulations.

The Court noted that the property at issue had been annexed into the City at the urging of City officials and that the property owner had therefore willingly incurred a higher ad valorem burden with the understanding and expectation that the development would be under the 1971 regulations. All the engineering and development plans were based upon the 1971 regulations. Such expectation, in submitting the entire future subdivision development in phases, was based upon the 1971 regulations. The Court found that the annexation of the subdivision and the 1991 approved development plans constituted a substantial change in position and an expenditure in reliance upon the existing regulations, so that the defendants acquired a vested property right. Thus, the Court concluded that the Defendants acquired vested property rights under the preliminary development plan filed under the 1971 regulations and, as a matter of law, such vested rights in the entire subdivision were grandfathered from the effect of this subsequently adopted 1992 regulations.

In Beugnot v. Coweta County, 251 Ga. app. 715 (1998), a property owner filed for a writ of mandamus against Coweta County challenging the county's denial of his application for a building permit for a mobile home park. In Beugnot, the County had allowed a property owner to develop a mobile home park over the course of twenty-five years. Building permits were routinely issued during the course of that time period. In 1995, a permit application was denied due in part to the property owner's failure to continue his non-conforming status in that he did not seek a building permit within the previous year. Specifically, the County and the Trial Court had determined that the non-conforming status of the property had ceased when he did not obtain a building permit within the one (1) year time period. The Court, reiterating the principal set forth in Barker, stated that a land owner will be held to have acquired a vested right to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit validly issued, he has, in good faith, made a substantial change in position in relation to the land, made substantial expenditures, or has incurred substantial obligations.

With these principles in mind, it should also be noted that there are limited exceptions, or variances, to the applicable water buffers. EPD has taken the position that there is no variance from the watershed protection buffer. Accordingly, the buffers should be strictly adhered to unless the property owners have vested rights. Accordingly, I offer the following opinion regarding the application of buffers to properties that adjoin the various lakes:

Lake Peachtree

As noted previously, the lots along the west side of Lake Peachtree were approved and platted prior to the adoption of any state law or city ordinance which would impose any type of water buffer. Under the principles set forth in Riverbrook Properties, it is my opinion that those lots have vested rights to be used without any application of the subsequently-adopted buffer requirements.

Lake Kedron

Lake Kedron presents a set of factual distinctions based on when the various subdivisions were approved. The easiest determination regarding Lake Kedron is with respect to the subdivisions on which the applicable buffers are noted on the approved plats. There should be no deviation from those buffers.

For the Interlochen subdivision, the buffers were not indicated. The applicable buffer requirements, however, were adopted prior to the plat being approved for Interlochen. Under Union County v. CGP, Inc., 277 Ga. 349, 349-352, 589 S.E.2d 240, 241 - 243 (Ga.,2003), the fact that the subdivision plat did not have the buffers indicated would not preclude the enforcement of those buffers on the affected lots. In other words, the fact that the subdivision was approved, perhaps in error, without the applicable buffers would not stop the City from enforcing those buffers based on the regulations in effect at that time.

That being said, there are existing encroachments into these buffers, consisting of structures (including houses) and accessory uses such as swimming pools and outbuildings. As you can imagine, the enforcement of these buffers on these developments has caused a lot of confusion over the years. As a result, permits have been issued which, presumably, unknowingly allowed those encroachments. While the City could take a hard line and require those encroachments to be removed, the more practical recommendation is to allow those existing encroachments to exist, but to not allow or permit any further encroachments into those buffers.

For those subdivisions that were approved prior to the adoption of the buffer requirements, the same principles referenced above for lots adjoining Lake Peachtree should apply. It should be noted that the Soil Erosion buffer requirements date back to at least 1975. While the Lake Peachtree lots were platted and approved prior to that date, none of the Lake Kedron lots, to my

knowledge, were approved prior to those regulations being imposed by Georgia statute. Accordingly, those requirements would apply to all lots that adjoin Lake Kedron.

Lake McIntosh

The zoning file for Planterra Ridge indicates that the prior owner sought a determination of the buffer requirements prior to submitting the subdivision plat for this development. In response to that inquiry, the former City Attorney issued an opinion that the buffer requirements did not apply due to the speculative nature of the Lake being developed at that time. Accordingly, the development was approved with none of the water buffers being imposed. I will add that, in my opinion, the former City Attorney's analysis was correct given that, at the time that Planterra Ridge was approved, it would have been challenging to enforce buffers for the lake that, as it turns out, has still not been built some twenty (20) years later.

In my opinion, the assurances given by the former City Attorney, the subsequent development of the property in accordance with the necessary approvals by the city, and the other conditions of development that were imposed results in a distinct similarity with the facts in Riverbooke Properties and other cases where property owners were found to have vested rights and did not have to comply with subsequently adopted regulations. Accordingly, it is my opinion that those parcels that are adjacent to the future Lake McIntosh do not have to comply with those buffer requirements other than the requirements imposed under the Soil Erosion and Sedimentation Control statutes and related city ordinances pertaining to soil erosion and sedimentation control.

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