

**MINUTES OF THE ST. MARY'S COUNTY BOARD OF APPEALS MEETING  
ROOM 14 \* GOVERNEMENTAL CENTER \* LEONARDTOWN, MARYLAND  
Tuesday, December 28, 2004**

Present: Marie Underwood, Chairperson  
George Allan Hayden, Vice Chair  
Greg Callaway, Member  
Ronald C. Delahay, Member  
Michael Hewitt, Member  
Joseph R. Densford, Attorney for the Board of Appeals  
Denis Canavan, Director, Department of Land Use & Growth Management (LUGM)  
Yvonne Chaillet, Planner III, LUGM  
Sharon Sharrer, LUGM Recording Secretary

Present as an observer was the Board's Second Alternate, David Wayne Miedzinski. A sign-in sheet is on file in the Department of Land Use & Growth Management. The Chair called the meeting to order at 6:30 p.m.

**PUBLIC HEARING**

**ZAAP #99-0093 – MCINTOSH SUBDIVISION APPEAL**

Pursuant to Section 66.1 of the St. Mary's County Zoning Ordinance, adopted August 1, 1990, appeal of the St. Mary's County Planning Commission's February 28, 2000 decision to approve Section I, Phase I and the phasing plan for McIntosh Subdivision. The property contains 792.836 acres, is zoned Rural Preservation District (RPD), and is located on the west side of McIntosh Road approximately 3,800 feet southeast of MD Route 235 in Hollywood, MD; Tax Map 19, Block 18, parcel 59.

Owner: Robert S. Gollahon  
Present: Gorman E. Getty, III, representing Robert Gollahon  
Heidi Dudderar, Assistant County Attorney, representing St. Mary's  
County  
Joseph R. Densford, representing the Board of Appeals

Testimony in this case was heard on December 7, 2004 and December 8, 2004. The hearing was opened to public comment, and closed with no comments being made, on December 8, 2004. At that time, the Board made the decision to continue with the hearing at 6:30 p.m. on Tuesday, December 28, 2004, in Room 14 of the Governmental Center in Leonardtown.

The Chairperson explained that this was the third meeting on ZAAP #99-0093, the McIntosh Subdivision appeal. She summarized that, in the two prior meetings, the Board heard arguments and listened to the expert witnesses. Since then, the Board members have reviewed the exhibits as well as the memorandums that came to them from each of the lawyers, summarizing their side of the case. Ms. Underwood said that she thought the time had come for the Board members to express their feelings, to find out whether they were in some sort of agreement, and to determine if they could come to a conclusion. She asked the Board members what they thought about the situation; whether they felt that they ought to allow houses to be built at the site, whether they ought not allow houses to be built at the site, or if they thought that certain conditions should be met before building would be allowed at the site.

Ms. Underwood explained that she felt that it is not reasonably certain that the site is safe, as it currently exists. She said that she thought there is still the potential for injury to someone living there, to some child digging, or to someone building something at that site. Ms. Underwood explained that she felt that the previous geophysical surveys, at 20 foot intervals, were not adequate to find the tiny little things that they were looking for at the site. While many of these items are small, some could blow off a person's

finger or injure an eye. She said that she was convinced by Mr. Lewallen's testimony concerning areas he had remediated for residential development in other states; and by the recommendations he made in terms of geophysical surveys at 3 foot intervals that went down to 10 feet, or down to 4 feet below whatever the level of excavation was to be. She explained that her inclination, before hearing the feelings of the other members, would be to say that the applicant could build on this site but only if certain conditions, which she felt would ensure the safety of the site, were met.

Mr. Hayden said that, after listening to everything and going through all of the materials that were given to the Board members, he didn't feel that the site was as safe as a similar lot that didn't have the same history. He explained that he felt that, if the Board decided to vote in favor of allowing residential development on the site, there would have to be some lots that weren't allowed to be built on; or that maybe another survey would still need to be done.

Mr. Delahay said that he felt that there is still reasonable doubt that the land is safe for development at this time. He said that he agreed with Ms. Underwood and Mr. Hayden. He explained that he felt that Mr. Hayden was right and, if another survey was done, he could work with that. Mr. Delahay continued that, as it stands right now, he was not happy with the safety of the site.

Mr. Hewitt explained that his feelings were similar to those already expressed by Ms. Underwood. He said that he had taken a lot of time with this case. He said that both of the reports talk about the inability to determine the exact location of buried ordnance. He explained that there is a sentence in the Order from the Board of Appeals' previous hearing on this case discussing the sloppiness in the way items were buried. Mr. Hewitt said that he saw a lack of continuity between the different cleanup operations, and that he felt there was inconsistency in the reports. He explained that the mystery pits, and the fact that the Fire Marshal was not able to certify the site, worried him. The lack of clarity regarding the Fire Marshal's approval, and then his seeming retraction, concerned him. He said that each time a cleanup was done, additional unexploded ordnance were found. Each time the amount recovered was a little bit less than the time before, but it was still there. Mr. Hewitt explained that the geophysical surveys didn't seem to be accurate. He explained that he was concerned with the hit or miss ability of these surveys to find septic tanks and oil tanks; and with the 20 foot intersects, when the reports seemed to indicate that they only covered 3 feet from the outside, that seemed to leave a lot of area uncovered. He said that the unexplained explosions in 1992 which seemed to be from static electricity concerned him, as well as the interviews with former employees which were done 10 to 40 years after the time the manufacturing took place. He said that Mr. Burch, one of the former employees who was interviewed, even stated that he was an office employee who was involved in invoices inside the main office building and not in the field operations, but that he kind of had a sense of what was going on out there. Mr. Hewitt said that the thing that concerned him the most was the cleanup. He said that the reports mentioned that stuff could have been buried to 10 feet deep; but the cleanup was only done to a depth of one foot except in Site 23, where the cleanup was to a depth of 4 feet. He said that if there is potential for unexploded ordnance to be 10 feet down, it seems like they should have gone 10 feet down. Mr. Hewitt said that Mr. Parker talked about doing surveys, and that the surveys go down 80 feet, but it still seems like they missed some areas. On the positive side, Mr. Hewitt said that the County presented a witness who stated that other similar sites have been remediated, and those sites do have residential housing on them today. He said that he felt that the County had not presented any new information and that their witness never went to the site, so all he could do was talk about the methodology that was used. Mr. Hewitt said that he did have a motion which is contingent upon certain conditions being met, because he does believe there is a certain amount of unreasonable risk involved as things stand.

Mr. Callaway explained that he felt Mr. Hewitt had said it all.

Ms. Underwood asked Mr. Hewitt to read the motion he had written. Mr. Hewitt explained that his motion was to approve the request with the following conditions:

1. Copies of all reports, including federal reports, state reports, and cleanup reports from all of the contractors, will be made available to St. Mary's County Libraries and to the Southern Maryland

Regional Library in Charlotte Hall so that the public will have access to the same information that was available to the Board.

2. The property will be deed restricted, and a record of the property history will be connected to the deed, so someone who wants to buy a house or a piece of property in this subdivision will know the intent of the ordinance people when they had it. Potential buyers will be able to read the same reports about the sloppy burial of the ordinance, as well as all of the other information available to the Board.

Mr. Densford explained that it would be bulky to put the Board's opinion, which could run 8 to 15 pages long, as an attachment to a deed. He said that this would be a lot of material to put in the Land Records with a simple deed. Mr. Densford suggested putting a reference to the Board of Appeal's decision on the deeds, or a reference to whatever restrictions are made. He said that, in terms of where the information can be found, it could be explained on the deed that that record is available at the Department of Land Use and Growth Management.

Mr. Hewitt explained that he felt it was important to make the information available to the people who initially buy the property, as well as to anyone who might buy a piece of this property at a later date. He continued with his suggested conditions:

3. The areas where the manufacture and testing of munitions was performed will be both deed and access restricted. Mr. Hewitt explained that this area would be approximately 24 acres, plus a 50 foot extension on all sides. He said that 50 feet might be considered arbitrary, but he thought 50 feet could be used to be consistent with the measure used in the surveys.
4. Access restriction will include fencing and warning signage consistent with Applicant's Exhibit A-24 on page 177, D48. He explained that the sign pictured in this exhibit said "Danger. Explosive Hazards. Danger – Partially Buried and Otherwise Concealed Explosive Items Located on Site. Direct or Indirect Contact May Result in Serious Injury or Death."
5. In order for the access restriction to be lifted, the Applicant will need to do a geophysical survey with 6 foot by 6 foot grids, to a minimum depth of 50 feet. Geophysicals will be performed with current equipment by a licensed company. Any unexploded ordinance (UXO) found will be reported to the State Fire Marshal and to MDE for proper disposal.
6. For any areas to be disturbed, the limits of disturbance (LOD), anytime anyone decides to put in a driveway, a house, a barn, a deck, or an addition the entire area to be disturbed will be geophysically surveyed at 6 foot by 6 foot grids, to 50 foot depths. He explained that these limitations would be for areas outside of the actual manufacture and test site area. This restriction would include any additional permits for outbuildings, swimming pools, or any other improvements which would require any kind of digging.

Ms. Underwood explained that her suggested motion followed Mr. Lewallen's advice about 3 foot grids. She read her motion to the Board Members:

In response to the remand from the Court of Special Appeals with regard to development of the McIntosh Subdivision, we reaffirm our belief that the site has not been properly remediated and may still contain potentially dangerous explosive materials, posing an unacceptable risk for residential housing.

There is enough ambiguity about possible burial sites that no part of the site can be said with reasonable certainty to be free of buried explosives, despite previous remediation efforts.

Previous geophysical surveys at twenty foot intervals would not have detected small but dangerous explosives. If ordinance still exists on the property, the risk of harm is extreme.

The potential for substantial injury to builders or residents is unknown until more thorough and accurate surveys are conducted.

Before any residential development is allowed on the site, the following conditions must be met:

1. Additional geophysical surveys must be done on any part of the property designed for residential use, including building lots, and any areas contiguous to building lots that are not access restricted. These surveys should be conducted on all physically accessible parts of the property such that magnetic assessment spectrums meet or overlap. Additionally, the surveyor is required to certify that assessment depths reach down at least ten feet below the surface or four feet below the deepest planned excavation.
2. If ordnance is discovered during the new surveys, after it is all removed and disposed of, a new or revised work plan should be constructed and implemented. The work plan should include, at a minimum, a requirement that a construction support crew be present on the property during all phases of construction. This crew would be comprised of people who are skilled and experienced in the areas of explosive location, identification, removal and disposal, and would oversee the construction and instruct as to the appropriate methods of safe evacuation.
3. Deed restrictions or covenants should perpetually run with the land to provide that any future excavation in an area where ordnance was previously recovered would require the presence of a construction support crew. This would also put subsequent purchasers on notice regarding the history of the property.

Mr. Hewitt explained that he made his suggested grids 6 foot by 6 foot because his understanding was that once you punched a hole, it went out three feet from the center. He said that the key would be that the coverage overlapped. Ms. Underwood explained that she thought Mr. Lewallen had said that if the surveys were done on three foot intervals, they would overlap.

Mr. Delahay explained that he felt that Mr. Hewitt's suggested motion covered more in detail and in depth. Ms. Underwood asked if anyone had said anything previously about going to a depth of 50 feet. Mr. Hewitt explained that Mr. Parker had talked about the potential to go down to 100 feet, and had said that it's not unusual to go down 80 feet. He said that a pool might only go down about 15 feet, but if a gauge on a piece of equipment is going to be set to a certain depth, he didn't think that overkill would hurt anything since the equipment seems to be able to penetrate the earth at a great distance.

Mr. Hayden said that he wouldn't have a problem seconding Mr. Hewitt's motion, with just a couple of amendments. He suggested taking Ms. Underwood's grid sizing of 3 feet by 3 feet, explaining that the Board would know that there was overlapping coverage using this interval. Ms. Underwood suggested that perhaps the interval wouldn't have to be defined; the wording could just require overlapping coverage. Mr. Delahay explained that he thought that a certain interval would need to be specified, to be certain the overlapping coverage was provided. Mr. Hewitt said that he agreed that the important goal is to make certain that everything is covered. Mr. Hayden suggested that if the Board said that the geophysical survey must provide overlapping coverage, that would be all that was required. Ms. Underwood agreed. Mr. Hayden suggesting rewording the motion to say that the survey would overlap and cover all of the territory that needed to be covered, and suggested reducing the suggested depth to 10 foot below the depth of the proposed digging. Mr. Delahay explained that different types of building would require different depths, and that Mr. Hewitt's suggestion of a 50 foot survey depth would eliminate the need for any guessing about what might be built at any particular location in the future. Ms. Underwood agreed with this assessment.

Mr. Densford explained that the Board is required, based on the Court's Opinion, to make a finding that the level of risk to the public health, safety, and welfare from development of this site is unreasonable without these conditions being met. He reminded the Board to keep that in mind as a part of their motion.

Mr. Densford also explained to the Board that the County had withdrawn its appeal of the subdivision approval for Section I, Phase I. He explained that this portion of the property should not be addressed in the motion made by the Board.

Following the suggestion of the Chair, the Board worked through the wording of the individual paragraphs of Mr. Hewitt's motion. Mr. Hewitt explained to Ms. Underwood that his motion does not make reference to the entire site. He said that he refers only to the area where improvements are intended. Ms. Underwood explained that she couldn't agree with that since children could go out in their back yard

and dig, so she said that she wanted to have a survey done on any area that was not to be access restricted. She explained that if someone could go out and play in the woods, and there are woods that they could get to, those woods ought to be surveyed. Mr. Delahay agreed with Ms. Underwood's suggestion. Mr. Hewitt reminded the Board members that his condition #6 spoke of limits of disturbance.

Mr. Hewitt reminded Ms. Underwood that she had a reference to construction support crews in her motion. Ms. Underwood explained that if any ordnance is discovered during the new survey, a team of experts would be required on the site. Mr. Hewitt explained that he thought that the Fire Marshal would be the person to whom reports of any recovered unexploded ordnance would be made. Mr. Hayden said that the Fire Marshal would get a call with any reference to an explosive or bomb type of threat, and then would provide direction on the best person to contact or procedures to follow. Mr. Hewitt explained that he couldn't imagine having support crews standing around waiting for something to happen.

Mr. Densford clarified that the Board was making two different sets of restrictions, one set for the approximately 24 acre plant site and another set for residential development outside of that 24 acres. He asked if there was a set of conditions for the 24 acres which, if satisfied by the owner, could lead to the development of that part of the property. Ms. Underwood agreed that this question had not yet been discussed by the Board.

Ms. Underwood opened the discussion on the question of possible residential development within the 24 acre plant site for the Board. She asked the Board members their opinion on the question of lifting the restrictions if the applicant did a geophysical survey in this area and found nothing. Mr. Hayden said that, in that situation, the deed and access restrictions should probably come off. Mr. Hewitt said that he felt that the access restriction should apply to the 24 acres of the property which had been the plant site. Ms. Underwood asked if he thought the access restrictions would still be necessary if a geophysical survey with overlapping coverage was done down to 50 feet and nothing was found. Mr. Hewitt said that it sounded like the Board was saying that all the applicant would have to do is another geophysical survey. Ms. Underwood stressed that it would be a much more thorough geophysical survey than had been done before. Mr. Hayden explained that he had thought to make the area, where the actual munitions work had taken place, green space. Ms. Underwood asked if he meant that the 24 acre site would be permanently access restricted, no matter what was found on it. Mr. Hayden said that as long as they did the geophysical survey on that piece of property and they come up with nothing, he would be able to agree to residential development in that area. Mr. Hewitt explained that he was not certain about the safety factors of the geophysical survey equipment. He reminded the Board that in 1992, and again in 1999, there was evidence that large tanks were missed during surveys. Ms. Underwood said that these items were missed because such wide grids were used in those surveys. Mr. Hayden said that there was no way to be absolutely certain that nothing dangerous was buried on any property. He said that he thought that the equipment available today would have to be better than the equipment used 25 years ago. If the coverage overlaps, and they go down to the 50 foot depths discussed, and still don't find anything, Mr. Hayden agreed that the 24 acres should be opened up to residential development. But if they go into the plant site area and find disposed property, then maybe the deed restriction should remain on that portion of the property. Mr. Hayden stressed that the Board could not guarantee that any property intended for development, at any point in time, is safe from everything. He said that, as he understood it, the direction that the Board had been given by the Courts was for safety within reason. He said that the geophysical surveys with overlapping coverage, down to 50 foot depths, would provide safety within reason.

Mr. Hewitt explained that his concern is that any kind of equipment is susceptible to failure, or something going wrong. He said that the Board knows what was done on that 24 acre site. He said that he would still like to make that area access restricted. Ms. Underwood said that she had more faith in a geophysical survey on a 3 foot grid to a depth of 50 feet. She said that she felt this type of survey would pick up any anomalies which might still exist. She said that if a whole bunch of stuff was found during the survey, then they would have to dig down as far as necessary and get all of it out. Mr. Hewitt reminded the Board that St. Mary's County calls for green space, certain areas to be left undeveloped. Ms. Underwood reminded him that children could be digging in that green space. She said that she would rather have everything investigated, and get anything that still remained out of there.

Mr. Densford explained to the Board that he didn't think that there is an adequate basis in the record to deny building permits on the 24 acre plant site if the overlapping geophysical surveys are done. He explained that he hadn't heard anyone on either side of this case challenge the technology, only the way that technology was applied to the complete the surveys. He said that if the methodology was done correctly, he thought that even Mr. Lewallen's testimony would say that the property is remediated. Ms. Underwood said that, if that was the case, she would rather see the Board word the resolution so that a geophysical survey with the 3 foot grid would be required for the entire property. Mr. Hayden added that the survey needed to be done to a 50 foot depth.

Ms. Underwood asked the Board about the access restriction discussed earlier in the hearing. Mr. Densford said that what the Court said, in their Opinion, was that they are expecting the Board to chart a course for the Applicant to work his way through whatever conditions are imposed, and at the end to achieve a piece of property that can be developed. Mr. Hewitt explained that he was not saying that you can't build in that area; he was saying that unless you do the geophysical survey, the area has to be access restricted. Ms. Underwood asked if the motion could be simplified so that it just said that a geophysical survey has to be done on every single piece of that area. She asked if the Board could do away with the whole concept of access restriction and just say that they have to do another geophysical survey of the whole property and clean up whatever is there.

Mr. Densford explained that he was trying to consolidate some of the comments he heard. He said that what he understood was that on the 24 acre plant site there will be a deed restriction. Fences and signs will be put up, and there will be no public access to that site unless or until the geophysical surveys that are overlapping are done there. Then the signs come down, the deed restrictions go away, the fences come down, and if the Applicant wants to come back and propose a subdivision plan for those 24 acres it would be approvable at that point. With respect to the remainder of the property, there will not be access restrictions on it; but none of that property outside the 24 acres in the balance of the Phasing Plan can be built on until such time as a complete overlapping survey is conducted on it.

Mr. Hewitt asked Mr. Densford why he felt that denying building permits on that 24 acre site would not be allowable. Mr. Densford explained that if they did the overlapping survey, he didn't think there would be an unreasonable risk at that point. He said that both parties to the appeal had consistently supported the idea of the technology that is available today. The Board members agreed that Mr. Lewallen had said that the real crux of the issue, in terms of the quality of the work, was the failure to overlap the coverage and depth of the surveys. Mr. Densford explained that, once these issues have been satisfied, he didn't see what would be left to say is unreasonable about the risk. He stressed that this was just his conclusion.

The Board went back to their discussion of the conditions for the motion. Mr. Hewitt said that he thought that the first conditions were fine. He said that if the Board was requiring a geophysical survey of the whole property, making sure there is overlapping coverage, then the condition which required deed and access restrictions for the plant site, could be deleted. Mr. Densford reminded the Board that they did want some restrictions in place until the geophysical survey was actually done.

Mr. Hewitt explained that his condition 5 explained what was necessary for the access restrictions to be lifted. He read the revised condition that, in order for access restrictions to be lifted, the applicant would need to perform geophysical surveys that overlap all areas down to a depth of 50 feet. Any UXO found would be reported to the Fire Marshal and MDE for proper disposal. Ms. Underwood asked if it had previously been said that the rest of the property must also be surveyed. Mr. Hewitt explained that they were putting that requirement in the next condition.

Ms. Underwood recapped that Mr. Hewitt had made a motion and Mr. Hayden had seconded the motion. Mr. Densford reminded the Board that they must also make the requisite finding that without these conditions development on the property poses the unreasonable risk. The Board agreed that without these conditions, the site poses an unreasonable risk for development.

**Mr. Hewitt moved that in the Matter of Case ZAAP #99-0093, the Board approve the Phasing Plan for McIntosh Subdivision with the following conditions, finding that without these conditions the site poses an unreasonable risk for development:**

- 1. Copies of all reports, including federal reports, state reports, and reports from cleanup contractors, will be made available to St. Mary's County Libraries and the Southern Maryland Regional Library in Charlotte Hall.**
- 2. The deeds will be deed restricted, and a record of the property history will be connected to the deed.**
- 3. The 24 acre plant site will be deed and access restricted. With respect to the remainder of the property, there will not be access restrictions on it, but none of that property outside the 24 acres in the balance of the Phasing Plan can be built on until such time as a geophysical survey ensuring overlapping coverage to a depth of 50 feet is performed.**
- 4. The access restriction will include fencing, and this area would be extended 50 feet beyond the area where the work was performed, with warning signage consistent with D48 on page 177 of Applicant's Exhibit A-24.**
- 5. In order for the restrictions to be lifted, all property will be geophysically surveyed to ensure overlapping coverage to a depth of 50 foot. Geophysicals will be performed with current equipment by licensed company. Any UXO found will be reported to the Fire Marshal and MDE for disposal.**

**Mr. Hayden had seconded the motion. The Board voted unanimously in favor of the motion.**

#### **ADJOURNMENT**

The meeting was adjourned at 7:32 p.m.

---

Sharon J. Sharrer  
Recording Secretary

Approved in open session: February 10,  
2005

---

George Allan Hayden  
Vice Chair