



Ten Mile Creek Plan Upheld - Federal Judge Rejects Pulte's Takings Claim

By Diane Cameron
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A few years ago, Conservation Montgomery, along with 30 other groups, was part of the Save Ten Mile Creek Coalition. In 2013 and 2014, we rallied, lobbied, and testified at hearings to save what we call our "last, best creek." The result of this collective effort was the Montgomery County Council's approval on April 1, 2014 of the Ten Mile Creek Limited Master Plan Amendment – which amended the 1994 Clarksburg Master Plan. Six months after enactment of the Ten Mile Creek plan, Pulte Corporation sued Montgomery County seeking compensation for an alleged taking. Coalition water protectors were also in Pulte's legal crosshairs. In August 2017, Judge George J. Hazel of the U.S. District Court (District of Maryland) found in favor of Montgomery County, and dismissed Pulte's complaint.

The Ten Mile Creek plan established a 6% cap on impervious surfaces in the two most high-quality, sensitive sub-watersheds of Ten Mile Creek. The Council's plan was a compromise that was far from the full protection that the Save Ten Mile Creek Coalition requested based on the science, as it allowed significant construction in the watershed's most-sensitive areas. On the other hand, the plan's 6% imperviousness cap, forest and buffer protection requirements will reduce the extent and rate of future damage. As Conservation Montgomery Board member Pablo Blank observed at the time, "The Ten Mile Creek plan is a major step forward in the long journey to protect this stream."

In November 2014, Pulte Home Corporation and Shiloh Farm Investments, LLC sued Montgomery County and the Planning Commission, seeking \$86 million in damages. (Case No. GJH-14-3955) Pulte alleged that the County's Ten Mile Creek plan amounted to a "taking" that prevented their reasonable use of the land in question. However, Pulte's complaint ignored the fact that the Ten Mile Creek plan approved by the Council in 2014 was a compromise that allows hundreds of housing units to be built in the watershed's two most sensitive

areas. It also failed to acknowledge that the 1994 Clarksburg Master Plan did not guarantee a specific zoning density or number of housing units in the Ten Mile Creek watershed.

In the spring of 2016, Pulte served subpoenas on a dozen civic and watershed groups and activists, including Conservation Montgomery. The subpoenas amounted to a fishing expedition in which Pulte sought to obtain documents it hoped would prove that the County had succumbed to “intense political pressure” in adopting “extraordinary restrictions” on development in Ten Mile Creek, without “valid scientific support.” (Case 8:14-cv-03955-GJH Document 86; Filed 08/15/16).

Attorney Donald B. Mitchell, Jr. of Arent Fox represented the subpoenaed parties. Mitchell argued forcefully that the subpoenas should be denied because they infringed upon and had a chilling effect on our exercise of our First Amendment rights, including freedom of association; freedom of speech; and freedom to petition our government. He further argued that Pulte’s document requests were not relevant to the underlying case, and were overly broad and unduly burdensome. Magistrate Judge Timothy J. Sullivan allowed Pulte’s subpoenas of our communications with the County and Planning Commission (the Defendants), but denied Pulte’s attempted collection of documents recording our internal, private communications. (Case 8:14-cv-03955-GJH Document 141 Filed 3/24/17.)

Judge Hazel held a hearing on August 8, and issued his decision on August 25, 2017, granting Montgomery County’s motion to dismiss Pulte’s complaint. (Case 8:14-cv-03955-GJH Document 195 Filed 8/25/17.)

Among the highlights from Judge Hazel’s decision:

- Plaintiffs did not possess a property interest in the zoning status of their property or in their right to water or sewer access;
- Defendants acted rationally; and,
- Plaintiffs have not sufficiently pleaded a public taking in violation of the Fifth Amendment’s Takings Clause. Regarding his finding that Pulte did not have a property interest in the zoning status or water or sewer access of their property, Judge Hazel noted that the County “possessed significant discretion to change the zoning requirements Plaintiffs’ property was subject to, as well as to delay or deny water and sewer change requests.” (Case 8:14-cv-03955-GJH Document 195 Filed 8/25/17; page 10.)

Our community learned many valuable lessons through our work with the Save Ten Mile Creek Coalition. The multi-faceted, often-grueling work to protect our last, best creek continues through the leadership of the Friends of Ten Mile Creek and Little Seneca Reservoir. Ten Mile Creek is the cleanest source of water to the DC region’s only nearby emergency drinking water supply – Little Seneca Reservoir. Please join us in remaining vigilant and continuing to walk together on this journey to protect a vital natural resource.

We wish to thank Donald Mitchell and Sylvia Costelloe of Arent Fox LLP for their many months of hard work on behalf of those who were subpoenaed from the Save Ten Mile Creek Coalition.

Author Diane Cameron is a co-founder and member of the Board of Conservation Montgomery and the Coordinator of the Save Ten Mile Creek Coalition in 2013-2014. The coalition work was under the auspices of Audubon Naturalist Society, for whom Diane served as the Conservation Director from 2008 to 2016.

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