



January 21, 2009

Mr. John Dwelley  
The Nature Conservancy  
4245 North Fairfax Drive, Suite 100  
Arlington, VA 22203

Dear Mr. Dwelley,

In her bequest of Old Colony Cove Farm, Virginia Quigley expressed her hope that the Nature Conservancy (TNC) could “use the properties to the extent possible for one or more nature sanctuaries.” Although TNC’s corporate policies preclude long-term ownership of this property, the Conservancy can achieve Mrs. Quigley’s vision and contribute to the ecological health of the Herring Bay by strengthening the covenants governing its development and use. This letter explains why the Advocates for Herring Bay believe new covenants are necessary and recommends goals and strategies for implementing them.

### **Summary of Key Weaknesses in the Existing Easement**

As discussed in previous correspondence, several ambiguities in the existing easement could result in the loss of important estuarine and forest habitats. Major areas of concern include the following:

- The absence of a definition of “private recreational use” opens the door for commercial or quasi-commercial development that conflicts with Mrs. Quigley’s intent and risks destruction of pristine shorelines and other ecological resources.
- Priority habitats are not clearly listed or delineated as “conservation values” in the existing easement. The list in Exhibit B lacks references to two habitats targeted by the State of Maryland for protection: (a) shoreline areas designated as breeding, nesting, and foraging habitat; and (b) forest areas designated as habitat for forest interior dwelling species (FIDS) within the Critical Area and as “green infrastructure hubs and corridors.”
- Provisions allowing for waivers and exceptions to the restrictions in the easement apply broadly to the entire 311 acres, without regard to ecological diversity or sensitivity.
- The easement is silent on the rights of future owners to modify the shoreline and adjacent waters. That omission, coupled with the waivers authorized by the easement, could be interpreted as permissive authority to alter the shoreline in ways that would degrade essential habitat.

## Purpose of New Environmental Covenants

Ambiguities in the existing easement will be contested after TNC sells the property. Such challenges could be formidable: the Magothy River and Herrington Harbour cases noted in our June 2008 letter are just two examples of development that circumvented regulatory requirements by neglecting to get permits, fighting off regulatory or court challenges, and/or getting special legislative waivers. Efforts to restore the health of the Chesapeake Bay have failed largely because of our government's inability or unwillingness to stem development pressures.<sup>1</sup>

Mrs. Quigley's environmental easement bolsters control over development of this property, especially in regard to the construction of new homes. However, as noted above, it leaves certain ecological assets unprotected. As the interim owner, the Nature Conservancy is in a unique position to close those gaps, thereby securing the integrity of key habitats and reducing the odds of costly and risky litigation. In our view, new covenants are needed to achieve three goals:

***Clearly define "private recreational use" in a way that conforms to Mrs. Quigley's intent and sound environmental management.*** Our November 2008 letter noted that Mrs. Quigley expressly deleted language that would have allowed for even "*de minimis*" commercial recreational use of the property. Unless covenants are added to define what is meant by "private recreational use" in Article II-A, we believe that future owners—and possibly the courts—will have the latitude to interpret that term as allowing Old Colony Cove Farm to be developed for recreational use by "private" membership clubs or similar quasi-commercial entities. In southern Anne Arundel County, such uses have resulted in extensive modifications to shorelines, clearing of natural vegetation, filling of wetlands, and other practices that resulted in the loss of habitat.

***Preserve and protect the shoreline and adjacent waters as breeding, nesting, and foraging habitat.*** As noted in our June letter, this property features about one mile of pristine shoreline that has been designated by the State of Maryland as breeding, nesting, and foraging habitat for horseshoe crabs, terrapins, bald eagles, and colonial nesting shorebirds. The adjacent waters are integral to that habitat. For example, horseshoe crabs not only need sandy beaches for spawning, they also need shallow waters and inter-tidal and sub-tidal flats for juvenile development and access to deeper waters for foraging adults and larger juveniles.<sup>2</sup> Similarly, the submerged aquatic vegetation (SAV) provides essential foraging habitat for aquatic species and colonial waterbirds. The existing easement lists a 100-foot buffer as a conservation value but does not account for the biological significance of this shoreline or protect the adjacent waters.

***Preserve and protect FIDS, green infrastructure, and wetland habitats.*** Our June letter included maps showing the forested areas on this property that have been designated by the State of Maryland as habitat for forest interior dwelling species and as a green infrastructure hub and corridor. Several streams and a three-acre wetland are located within those areas. Unfortunately,

---

<sup>1</sup> See "Bay restoration efforts show few positive results after 25 years" and "A call for bay cleanup reform," by Pamela Wood, *The Capital*, December 7, 2008 and December 7, 2008, respectively. See also "Broken Promises on the Bay," by David A. Fahrenthold, *Washington Post*, December 27, 2008.

<sup>2</sup> See "Draft Fishery Management Report of the Atlantic States Marine Fisheries Commission, Fishery Management Plan for the Horseshoe Crab, August 1998. <http://www.virtualbirder.com/vbirder/realbirds/dbhsc/ASMFC9808.html>

neither Exhibit B (the list of conservation values) nor Article II-F (forest harvesting and management requirements) mentions those state designations. As a result, the existing easement affords limited protection of these high-priority resources, only requiring management plans that comply with general guidelines for forest harvesting operations and erosion and sediment control. The easement also allows owners to use the wetlands for man-made ponds and as drainage ditches for agricultural discharges (Article II-E).

## **Proposed Environmental Covenants for Old Colony Cove Farm**

The legal terminology used to implement those goals could take different forms. Based on our knowledge of local environmental and economic pressures, the Advocates for Herring Bay believe that preserving the habitats within Old Colony Cove Farm requires measures that:

**1. *Limit the scope of allowable recreational uses:*** This loophole imperils the property's ecological value. It is essential that TNC incorporate a definition that would limit "private recreational use" to incidental recreational use by the occupants of the existing residential dwellings on the property and clearly prohibit recreational activities by commercial entities, private membership clubs or associations, or for income-generating activities, public events, or other similar activities.

**2. *Impose restrictions on shoreline development applicable to the entire property.*** Studies have shown that development and associated human activities—ranging from the hardening of shorelines to the running of boat propellers—put species like horseshoe crabs, terrapins, shorebirds, and SAV at risk. Man-made alterations to the shoreline or adjacent waters could affect shore currents, changing the hydrology that naturally creates and maintains the sandy beaches that support wildlife. Even "living shorelines" can impair breeding habitat.<sup>3</sup> We urge TNC to adopt covenants that would prohibit modifications to the natural shoreline and adjacent waters unless the Grantees, in consultation with state and federal regulatory and scientific agencies, determine that such changes are necessary to preserve the ecological functions of this habitat. We also recommend that the covenants:

a. Prohibit hardened shorelines; the addition or expansion of piers, jetties, docks, ramps, and similar temporary or permanent facilities; and excavation, grading, dredging, or any other modifications or improvements to the natural beaches and adjacent waters; and

b. Require scientific review and approval of erosion control methods like living shorelines to preclude adverse impacts on breeding habitat.

---

<sup>3</sup>As noted by terrapin expert Willem Roosenburg: "*Planting of beach grasses is generally assumed to be a nondestructive form of erosion control. However, the rhizomes of the grasses frequently penetrate terrapin eggs and kill them. Additionally, the roots of these grasses frequently surround the nests and use the eggs as a source of nutrients for the plants, either killing the eggs outright or entangling the hatchlings which then fail to emerge and die underground.*" Roosenburg, Willem M., "The Diamondback Terrapin: Population Dynamics, Habitat Requirements, and Opportunities for Conservation," Chesapeake Research Consortium Publication No. 137, 1990.

**3. Create and protect special “Habitat Sanctuary Zones.”** We recommend using covenants to create geographically distinct “habitat sanctuary zones,” within which protection of key ecosystems would take precedence over other land-use activities. As envisioned here, the covenants governing those sanctuaries would be akin to the regulatory “overlays” used by Anne Arundel County for the Critical Area, bogs, and Tier II waters. Activities within the sanctuary zones would be subject to restrictive terms and conditions tailored to each ecosystem while areas outside the sanctuaries would be governed by the general terms of the easement. The two zones that warrant special protection are:

*a. Shoreline Habitat Sanctuary* - The entire shoreline of Old Colony Cove Farm serves as breeding, nesting, and foraging habitat, so it would be optimal to keep the whole shoreline in its natural condition without any modifications. At a minimum, a “shoreline habitat sanctuary” should begin at the northeastern tip of the property, continue south to a point at least 200-300 feet<sup>4</sup> beyond the property’s central stream and wetland, extend inland for 200-300 feet, and include streams, wetlands, and the adjacent waters of Herring Bay. Those contours would largely conform to buffers required for Resource Conservation Areas under Maryland’s Critical Area law.

*b. Forest Habitat Sanctuary* - A “forest habitat sanctuary” should include areas designated as “green infrastructure hubs and corridors” and as habitat for forest-interior dwelling species. Those perimeters would likely cover the “approximately 200 acres of forested wildlife habitat” identified as a conservation value in the existing easement and would include streams and wetlands on the property.

Attachment A illustrates possible contours for such sanctuaries. Taken together, the shoreline and forest sanctuaries approximate the acreage referenced as conservation values in the existing easement. Thus, we believe that explicitly defining the zones above and strengthening the protections afforded to them is entirely consistent with Mrs. Quigley's intent and would provide needed clarification that is lacking in the original easement. Geographic overlays also may facilitate compliance with the covenants. Both the owner and the Grantees would know where certain activities are allowed, reducing the odds of disputes that pit the easement’s development rights against its conservation values. Such mapping also could make it easier for the Grantees to monitor compliance using the aerial photographs maintained by state and local governments.

Performance standards for activities within the sanctuaries should be developed on a holistic basis, reflecting the best available scientific guidance for the affected species and habitats. At a minimum, sanctuary covenants should eliminate the exceptions in sections B, C, and D of Article II regarding dumping and placement of materials; excavation, dredging, and removal of materials; and signage. Wetlands within the sanctuaries should be off-limits for man-made ponds and agricultural drainage activities. In addition, areas identified by the State of Maryland as FIDS and green infrastructure habitats should be required to comply with the stricter performance standards

---

<sup>4</sup> Riparian buffers should ideally extend 100 meters. See Environmental Law Institute, *Conservation Thresholds for Land Use Planners*, 2003. Maryland’s Critical Area law currently provides for a 200-foot shoreline buffer.

applicable to such forests.<sup>5</sup> We also recommend updating the forest-management plans more frequently than the 15-year interval required in the easement to ensure they reflect best available practices as well as changes in government laws and policies.

### **Call to Action**

After decades of intense development in the Chesapeake Bay area, there are few pristine properties along Maryland's western shore that are large enough to qualify as a "protected area" by groups like the IUCN<sup>6</sup> or as an acquisition target for the TNC. Nevertheless, the Advocates for Herring Bay believe that the principles governing those assessments are applicable at all scales. When viewed within the larger context of the Herring Bay watershed, it is clear that Old Colony Cove Farm could serve as the anchor for a network of protected forest habitat and provide a model for protecting the breeding beaches in nearby communities.

According to recent press accounts, habitat destruction has led to a stunning decline in the aquatic and wildlife species that once thrived in the bay region. Mrs. Quigley has laid the foundation for creating nature sanctuaries that could help slow and perhaps reverse that loss. The Advocates for Herring Bay hope the Nature Conservancy will use this opportunity to build on her legacy and permanently protect this precious resource.

Sincerely,

Kathleen Gramp  
President

Cc:

Jon Chapman, Maryland Environmental Trust  
Ren Serey, Maryland Critical Area Commission  
G. Michael Haramis, USGS Patuxent Wildlife Research Center  
Paula Henry, USGS Patuxent Wildlife Research Center  
Timothy Larney, Maryland DNR, Wildlife and Heritage Programs  
Michael Luisi, Maryland DNR, Estuarine and Marine Fisheries, Atlantic Program  
Neal Welch, Maryland DNR, Land Acquisition and Planning

Attachment A: Illustration of Possible Contours of Habitat Sanctuaries

---

<sup>5</sup> See *A Guide to the Conservation of Forest Interior Dwelling Birds in the Chesapeake Bay Critical Area*, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, June 2000. Those guidelines advocate prohibiting development in FIDS areas; avoiding forest fragmentation; protecting older stands as well as the forest understory; and avoiding disturbances during FIDS breeding seasons.

<sup>6</sup> International Union for Conservation of Nature, [http://www.unep-wcmc.org/protected\\_areas/categories/eng/i.htm](http://www.unep-wcmc.org/protected_areas/categories/eng/i.htm)

Attachment A  
Illustration of Possible Contours of Shoreline and Forest Habitat Sanctuaries at  
Old Colony Cove Farm

