



By Janie L. Rhoads, ESQ.

Janie L. Rhoads is an attorney with the Alexandria office of MercerTrigiani. Rhoads' practice encompasses a broad range of commercial and residential real estate matters, including the representation of common-interest community associations with respect to daily business operations, contract matters, voting and proxy issues, and quorum and meeting requirements as well as common interest community developers.

# Mitigation Banking 101

AND WHY YOUR COMMUNITY ASSOCIATION SHOULD CARE

For those who have experienced the hot, muggy and mosquito-laden summers so typical in the Washington, D.C., area, it may come as no surprise to you that the district was built on a swamp. It also may come as no surprise that if D.C. or the surrounding metropolis were developed today, those areas would look very different.

This is due, in part, to a continually increasing appreciation of the environmental importance of wetlands as well as a more comprehensive understanding of how development impacts those wetlands. Regulations have steadfastly tracked this increased awareness—most notably the Clean Water Act, which, as amended in 1977, is the primary federal law in the United States governing water pollution.

The Clean Water Act established numerous programs to regulate the discharge of

pollutants, including the Section 404 Program. Section 404 regulates the discharge of dredge or fill material into United States waters, including wetlands, by imposing permitting requirements. Most states, including Virginia and Maryland, and many local jurisdictions also have established wetlands programs, some of which are modeled after Section 404.

Perhaps no one has been more affected by these regulations than property owners seeking to develop property containing wetlands. Section 404 requires that property owners not only avoid and minimize impacts on the aquatic environment as a result of development, but also compensate for those impacts upon the aquatic environment, which are unavoidable. Compensation oftentimes consists of actions taken by the developer to provide some form of substitute aquatic resource for the impacted

aquatic resource. Such actions may include the restoration of former wetlands, enhancement of degraded wetlands, creation of new wetlands or preservation of existing wetlands. Developers may often perform their own compensatory mitigation on the development site or they may pay third parties for mitigation, usually actions other than the development site.

Mitigation by third parties can occur under different types of arrangements, but in the Washington metro-area, this frequently involves the purchase of mitigation credits from approved mitigation bank sponsors. Mitigation bank sponsors, often private profit entities, undertake wetland stream restoration and protection activities on privately and publicly-owned lands. These bank sponsors then sell mitigation credits associated with those activities to developers. Developers can purchase mitigation credits to compensate for impacts to wetlands resulting from the developer's proposed activities on another site.

This mitigation compensation technique is referred to as mitigation banking. Mitigation banking involves several distinct components, including:

- The Bank Site—the property being restored or protected.
- The Bank Instrument—the formal agreement between the property owner and regulatory agency establishing liability, performance standard and management and monitoring responsibilities in connection with activities on the bank site.
- The Interagency Review Team—the team responsible for the regulatory review, approval and administration with respect to the bank site.
- Also, the property owner may be asked to sign documents, which, upon recordation, will amend the appropriate land records, grant easement rights related to the restoration and pro-

**Building On Our Reputation For Quality Engineering For Over 45 Years**

- Capital Reserve Studies
- Transition Engineering
- Site Drainage Corrections
- Roof & Siding Replacements
- Construction Management
- Asphalt Paving Design
- Structural Corrections
- Litigation Support
- Mechanical Systems Upgrades
- Mold Investigation

**BECHT ENGINEERING**  
BUILDING TECHNOLOGIES

For All Of Your Engineering Services

10717 Birmingham Way, Woodstock, MD 21163  
410-461-3904 ■ billh@becht.com  
www.bechtengineering.com

DC ■ Delaware ■ Maryland ■ Virginia

LEED AP

MEMBER OF community ASSOCIATIONS INSTITUTE

tion activities within the bank site, as well as establish certain restrictions to ensure perpetual protection of the bank site.

### Why Should My Community Association Care?

Mitigation banking could be relevant to your association if wetlands or streams are located within your community. Keep in mind that land does not have to be consistently wet in order to qualify as a wetland. The Washington metro area, particularly the suburbs, is chock-full of wetlands and streams.

Although not as robust as years' past, development in the Washington metro area continues. So long as there is development, mitigation credits will remain in demand. Consequently, the need to identify properties containing wetlands or streams requiring restoration persists. It is not uncommon for developers and mitigation banks to approach community associations with a wetland or stream component to discuss restoration efforts. In the absence of such advances, especially if extensive wetland or stream restoration is needed, the association may want to initiate such conversations.

Some preliminary considerations are necessary for the association involved in mitigation banking negotiations. A primary consideration involves the authority of the association or the association board of directors to enter into the bank instrument and associated documents. Do the governing documents require membership or mortgagee approval or otherwise impose restrictions relative to those documents or the proposed restoration activities? Also, is the bank site encumbered by existing easements, the terms of which require prior approval of the easement beneficiary with respect to the proposed documents and activities? A title search may be necessary to confirm existing easements. The precise authority of the association and the association board, and the limitations upon that authority, should be determined at the onset of negotiations.

Once authority is established, the association board should review the banking instrument and other proposed documents carefully to ensure the terms are acceptable to the board. Business terms desired by the board should be incorporated into those

documents or otherwise memorialized in writing. For instance, depending upon the circumstances and the parties, the board may be able to negotiate that expenses incurred by the association in connection with restoration negotiations and arrangements, such as legal expenses and increased insurance costs, be reimbursed. Or, the board may be able to negotiate a share in proceeds generated from the sale of mitigation credits.

The board should have the association insurance carrier review the proposed documents to ensure insurance coverage currently maintained is adequate, especially in light of proposed restoration activities. If not, the board should obtain recommendations for additional coverage. A review by association legal counsel also is advisable to, among other things, confirm authority and ensure the association interests are protected.

Communication with association members also may be appropriate, especially if restoration work will be extensive or protracted. Of particular concern, are activities creating elevated noise levels or affecting access to or parking within the community. □

## PLOUTIS PAINTING & CONTRACTING

*Over 50 years of Quality Service!*

**We Do It All! When You Call, We Come Quick!**

- Specializing in Property Managed Condominiums and HOA's
- Residential & Commercial
- Interior & Exterior Painting
- Industrial Coatings
- General Carpentry Services
- And Many Other Services.....



**703-360-0205**  
www.ploutispainting.com  
Alexandria, VA 22309

Neat & Professional  
Excellent Referrals  
Licensed and Insured

Restored US Capitol's Original Colors for the 1976 Bicentennial Celebration!

## TWC SERVICES LLC

EXTERIOR BUILDING SERVICES

### Commercial & Residential

**Repair, Replacement & Inspections**  
**Specializing in Roofing, Siding, Gutters**  
**Snow-Ice Management**

**703-971-6016**

info@twcserv.com

www.twcserv.com



NATIONAL ROOFING CONTRACTORS ASSOCIATION  
MEMBER



MEMBER OF

