Legal Advice & Policy - Vol 7 Talbot County No. 20-C-04-005095 11/14/05 - 12/14/05 MSA_S_1831-7

IN THE CIRCUIT COURT FOR TALBOT COUNTY, MARYLAND

TALBOT COUNTY, MARYLAND 142 North Harrison Street Easton, Maryland 21601 Plaintiff v. DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS 1804 West Street Annapolis, Maryland 21401 SERVE: Marianne D. Mason Deputy Counsel Office of the Attorney Gen 580 Taylor Avenue C4 Annapolis, Maryland 21401 Defendant	*	Civil Action No.: 20-C-04-005095

* *

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DNR - LEGAL DIVISION

TALBOT COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	OF MARYLAND FOR
DEPARTMENT OF NATURAL RESOURCES-CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND COASTAL BAYS, et al.	*	TALBOT COUNTY
Defendants	*	Case No. 20-C-04-005095

* * * * * * * * * * * * *

MILES POINT PROPERTY, INC.'S AND THE MIDLAND COMPANIES, INC.'S OPPOSITION TO TALBOT COUNTY'S MOTION FOR SUMMARY JUDGMENT

Miles Point Property, Inc. and the Midland Companies, Inc. (collectively "Miles Point') by and through their attorneys Richard A. DeTar, Demetrios G. Kaouris and Miles & Stockbridge, P.C., hereby files this Opposition to Talbot County's Motion for Summary Judgment and states as follows:

For the reasons set forth in Miles Point's Motion for Summary Judgment, the Town of St. Michaels' Motion for Summary Judgment, the Commissioners of the Town of Oxford's Motion for Summary Judgment and the Department of Natural Resource's Motion for Summary Judgment, which are incorporated herein by reference pursuant to Maryland Rule 2-303(d), the Critical Area Commission's (the "CAC") decision to deny approval of Talbot County's program amendment, specifically Bill 933, should be upheld. Miles Point also incorporates herein by reference pursuant to Maryland Rule 2-303(d) the Oppositions to Plaintiff's Motion for Summary Judgment filed by the Department of Natural Resources, the Town of St. Michaels and the Commissioners of the Town of Oxford. For these reasons, the CAC's decision should be upheld.

WHEREFORE, Miles Point respectfully requests that the Court enter summary judgment in its favor and against Talbot County.

Respectfully submitted,

Richard A. DeTar
Miles & Stockbridge, P.C.
101 Bay Street
Easton, Maryland 21601
(410) 822-5280

Attorneys for Intervenors
The Midland Companies, Inc. and Miles Point Properties, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2005, a copy of the foregoing Opposition was mailed first class, postage prepaid to:

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December 14, 2005

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DEC 16 2005
DNR - LEGAL DIVISION

VIA HAND DELIVERY

Talbot County Circuit Court
Court House
11 N. Washington Street
Easton, Maryland 21601
Attn: Court Clerk

Re: ***Talbot County v. Department of Natural Resources***
Case No.: 20-C-04-005095DJ

Dear Clerk:

Please file the enclosed Opposition to Talbot County's Motion For Summary Judgment, the Memorandum In Opposition for Motion For Summary Judgment and the Exhibits and a Proposed Order attached thereto, on behalf of The Commissioners of St. Michaels in the above-entitled matter.

Thank you for your assistance.

Very truly yours,

H. Michael Hickson

HMH/kr
Enclosures
cc: Michael L. Pullen, Esq. (Via Federal Express)
David R. Thompson, Esq. (Via Federal Express)
Paul J. Cueuzzella, Esq. (Via Federal Express)
Daniel Karp, Esq. (Via Federal Express)
Richard A. DeTar, Esq. (Via Federal Express)

TALBOT COUNTY, MARYLAND,	*	CIVIL CASE NO. 20-C-04-005095DJ
Plaintiff,	*	
Vs.	*	IN THE
DEPARTMENT OF NATURAL RESOURCES, et al.	*	
Defendants.	*	CIRCUIT COURT
* * * * * * * *		
THE COMMISSIONERS OF ST. MICHAELS et al.	*	FOR
Counter-Plaintiffs,	*	
Vs.	*	TALBOT COUNTY
	*	
TALBOT COUNTY, MARYLAND,		
Counter-Defendant.	*	STATE OF MARYLAND

* * * * * * * * * * * * * *

ST. MICHAELS' OPPOSITION TO
TALBOT COUNTY'S MOTION FOR SUMMARY JUDGMENT

The Commissioners Of St. Michaels ("St. Michaels"), Defendant and Counter-Plaintiff herein, by its attorney, H. Michael Hickson, pursuant to Maryland Rule 2-501, in response and opposition to the Plaintiff and Counter-Defendant, Talbot County's Motion for Summary Judgment (the County's Motion), says:

1. Plaintiff and Counter-Defendant, Talbot County (the "County") requests summary judgment on three grounds:

a. The County alleges that The Critical Area Commission For The Chesapeake and Atlantic Coast Bays (the "Commission") failed to take timely action on the County's submission of Talbot County Bill 933 ("Bill 933") pursuant to Md. Code, Nat. Res. Art. §§ 8-1809(m)(2) and 8-1809(o);

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b. The Commission exceeded its statutory authority when it disapproved Bill 933 as an amendment to the Talbot County local critical area program (the "Talbot County Program") when the Commission disapproved Bill 933 as "contrary to the Commission's oversight responsibility to ensure that the local programs are implemented in a consistent and uniform manner"; and

c. The Commission acted in an arbitrary and capricious manner when it disapproved Bill 933 as an amendment to the Talbot County Program.

2. Talbot County's Motion for Summary Judgment should be denied because:

a. There is no genuine dispute that the Commission did, in fact, act in a timely manner pursuant to Md. Code, Nat. Res. Art. §§ 8-1809(m)(2) and 8-1809(o), and, as such, the County's Motion should be denied and the Motion for Summary Judgment of the Commission should be granted;

(1) alternatively, there is a genuine dispute of material fact as to whether the Commission acted timely with respect to Bill 933, thus precluding summary judgment as requested by either the County or the Commission;

b. With respect to the County's request for summary judgment premised on the argument that the Commission's disapproval of Bill 933 is invalid because the Commission exceeded its statutory authority, the County relied upon an incorrect legal standard in the County Motion, and, as such is not entitled to summary judgment;

(1) alternatively, as to this argument, there is a genuine dispute of material fact, precluding the County's request for summary judgment; and

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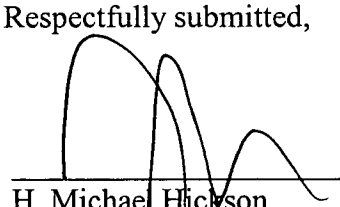
c. With respect to the County's request for summary judgment premised on the argument that the Commission's disapproval of Bill 933 is invalid because the Commission acted in an arbitrary and capricious manner, the County relied upon an incorrect legal standard in the County Motion, and, as such is not entitled to summary judgment;

(1) alternatively, as to this argument, there is a genuine dispute of material fact, precluding the County's request for summary judgment.

WHEREFORE, for these reasons, and as further explained in the St. Michaels Memorandum In Opposition To Talbot County's Motion For Summary Judgment, which, along with the Exhibits attached thereto, is incorporated herein by reference, St. Michaels requests that the County's Motion be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2005, a copy of the foregoing Opposition of St. Michaels to Talbot County's Motion for Summary Judgment, and the Memorandum in Support were sent via Federal Express to:

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TALBOT COUNTY, MARYLAND,	*	CIVIL CASE NO. 20-C-04-005095DJ
Plaintiff,	*	
Vs.	*	IN THE
DEPARTMENT OF NATURAL RESOURCES, et al.	*	
Defendants.	*	CIRCUIT COURT
* * * * * * * *		
THE COMMISSIONERS OF ST. MICHAELS et al.	*	FOR
Counter-Plaintiffs,	*	
Vs.	*	TALBOT COUNTY
TALBOT COUNTY, MARYLAND,	*	
Counter-Defendant.	*	STATE OF MARYLAND
* * * * * * * * * * * * * *		

ST. MICHAELS' MEMORANDUM IN OPPOSITION TO TALBOT COUNTY'S MOTION FOR SUMMARY JUDGMENT

The Commissioners Of St. Michaels ("St. Michaels"), Defendant and Counter-Plaintiff herein, by its attorney, H. Michael Hickson, submits this Memorandum of Law in Opposition to Plaintiff and Counter-Defendant, Talbot County's Motion for Summary Judgment, and states the following in support thereof.[1]

SUMMARY

Talbot County, Maryland, (the "County") requests summary judgment premised on,

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[1] St. Michaels adopts the arguments made by the Town of Oxford ("Oxford") and Miles Point Property, LLC and the Midland Companies, Inc. (collectively "Midland") set forth in their respective motions for summary judgment and their respective responses to the County's Motion (and the exhibits attached thereto) as if fully set forth herein.

primarily, two arguments.[2] Procedurally, the Memorandum in Support of the County's Motion for Summary Judgment (the "County's Memorandum" and the "County's Motion", respectively) argues that the decision of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Commission"), disapproving Talbot County Bill 933 ("Bill 933") is ineffective because the Commission failed to act within ninety (90) days of the Commission's acceptance of Bill 933.[3] Substantively, the County argues that the Commission exceeded its statutory authority and acted in an arbitrary and capricious manner by disapproving Bill 933 as an amendment to the County's local critical area program (the "County Program"). Because the Commission's decision, however, complied with the State Critical Area Program,[4] as explained below, the County's Motion should be denied.[5]

In summary, while it appears beyond dispute that the Commission did, in fact, act in a timely manner with regard to its consideration of Bill 933, there is, at minimum, a genuine dispute with regard thereto, and the County's Motion, as to this issue, should be denied. Substantively, it is clear that the Commission's disapproval of Bill 933 is within the "legal

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2 While the Memorandum in Support of the County's Motion for Summary Judgment can be distilled to two principal arguments, it makes numerous, often repetitive, arguments throughout the seventy-two pages it covers. For the convenience of the Court, and so that the Court can be sure that St. Michaels opposes each and every argument set forth by the County, this Opposition includes a heading in response to each heading utilized by the County.

3 In its headings with regard to this argument, the County erroneously states that 'BILL 933 WAS APPROVED BY OPERATION OF LAW BECAUSE THE COMMISSION FAILED TO ACT WITHIN 90 DAYS OF ***RECEIPT*** OF THE BILL." County's Memorandum at pg. 38. [***Emphasis added.***] It is undisputable that NR § 8-1809(o) requires that the Commission act "within 90 days of the Commission's ***acceptance***" of Bill 933. NR § 8-1809(o).

4 As used herein, the term the "State Critical Area Program" shall mean and collectively refer to Maryland Code, Natural Resources Article, Title 8 (Waters), Subtitle 18 (Chesapeake Bay Critical Area Protection Program) (hereinafter the "State Critical Area Law"), and the State Critical Area Regulations adopted by the Commission, pursuant to the State Critical Area Laws, codified at Code Of Maryland Regulations, Title 27 (Chesapeake Bay Critical Area Commission) (hereinafter the "State Critical Area Regulations").

5 There is no pending motion for summary judgment against the counterclaims filed by either St. Michaels or the Town of Oxford (sometimes collectively referred to herein as the "Towns"). As such, there is no basis for the Court to enter summary judgment in favor of the County with respect to the counterclaims of the Towns.

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boundaries"[6] of the Commission, and, as such, the County's Motion should be denied and the Commission's decision upheld.

The Commission, as evidenced by the Panel Report and Supplement thereto,[7] disapproved Bill 933 as violative of the expressed statutory purpose of the State Critical Area Program – to ensure that local critical area programs are "implemented in a consistent and uniform manner."[8] Md. Code, Nat. Res. Art. ("NR") § 8-1801(b)(2). As the Panel Report reflects, the Commission also recognized that the County failed to coordinate with the Towns prior to enacting Bill 933, and that Bill 933 fails to accommodate the growth needs of the Towns.[9] For all of these reasons, the Commission's quasi-legislative decision should be upheld and the County's Motion denied.

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6 *See Department of Natural Resources v. Linchester Sand and Gravel Corp.*, 274 Md. 211, 223-24, 334 A.2d 514 (1975) (citing the standard applicable to quasi-legislative functions of administrative agencies).

7 Copies of the Commission's Panel Report and the Supplement thereto are attached to the County's Memorandum as Exhibits 19 and 21, respectively.

8 In short, the Commission found that Bill 933 creates inconsistencies between the County Program and the local critical area programs of several towns within the County (the "Town Programs"), and would have negated at least one prior Commission action (the approval of an amendment to the St. Michaels Program). The Commission likewise found that the County failed to coordinate with the Towns with regard to Bill 933, and that Bill 933 fails to accommodate the Towns' growth needs. As such, had the Commission approved Bill 933 notwithstanding these noted statutory deficiencies, the Town Programs and the County Program would have lacked uniformity (which is required by the State Critical Area Law) and the Commission would have endorsed a program amendment that evidences a lack of coordination and accommodation, which is prohibited by the State Critical Area Regulations.

9 In the Commission's Panel Report (County Ex. 19), the Commission states: "In accordance with §27.01.02.06A(2) of COMAR, [c]ounties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities. Although Bill 933 removes provisions pertaining to the reservation of growth allocation acreages for the Towns from the County Code, the Bill does not itself set forth a process for the County's Towns to obtain future growth allocation acreage." County Ex. 19, pg. 3. [Internal quotations omitted.] Later, the Commission noted that "[t]he Panel has considered the information about the various processes and procedures used by the Critical Area counties with regard to municipalities' use of growth allocation. They have discussed the importance of the procedures being clearly set forth in a ***coordinated manner in the ordinances and programs of the counties and affected municipalities.*** They have also discussed the significance of amending one local program in such a way that it creates conflicts with other approved programs." *Id.* at pg. 4. [***Emphasis added.***]

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Regardless of these findings, the County argues that the Commission is required to approve Bill 933. The County reasons that because the General Assembly's codified purpose for enacting the State Critical Area Law is not listed among the "criteria" contained in the State Critical Area Regulations or the "standards" set forth in the State Critical Area Law, the Commission is precluded from considering the purpose, and the Commission must approve an amendment even if the Commission specifically finds (as it did here) that the proposed amendment violates the stated purpose of the State Critical Area Law. This is clearly an absurd result, and, as argued herein, contrary to simple statutory construction. Accordingly, the County's Motion should be denied.

As a general matter, the County's Memorandum evidences a fundamental philosophical difference of opinion both as to the relationship between the County and St. Michaels with regard to land-use in and around St. Michaels,[10] as well as between the County on the one hand, and the Commission and the Towns on the other with regard to the State Critical Area Program. As to land-use, the County continually opines that the maps used by the Towns and the County in 1988 and 1989, to designate areas for growth in and around the Towns and throughout the County, are outdated and freeze the County in a "time warp."[11] St. Michaels, on the other hand,

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[10] One of the many arguments made by the County is that Bill 933 is needed so that the County can have some say in growth in St. Michaels because such growth, the County argues, affects the County. Based on this reasoning, however, it seems logical that St. Michaels should have some participation in County growth that borders on St. Michaels because this affects the services provided by and the citizens of St. Michaels. It is undisputed that over the last several decades most of the growth affecting St. Michaels has occurred immediately outside the town. Clearly, based on the County's logic for Bill 933, growth immediately outside St. Michaels, especially growth immediately to the north of St. Michaels (which requires the residents thereof to travel through St. Michaels) should not occur without some coordination with St. Michaels. The County has conveniently ignored (or failed to recognize) this logical extension of the purported reasoning behind Bill 933.

[11] As to this theory, the County's arguments and actions paint decidedly different pictures. The County argues that Bill 933 is necessary because, without it, the Towns are free to horde growth allocation thus preventing the County from requesting that the State release additional growth allocation to the County. At the same time, County officials have gone to great lengths to stymie St. Michaels' award of growth allocation for development within its own borders.

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has relied upon the very same maps to, for example, award growth allocation (which was approved by the Commission) and to compile its Comprehensive Plan,[12] thus implementing the St. Michaels Program in a consistent and uniform manner as required by NR § 8-1801(b)(2). St. Michaels Exhibit 38, attached hereto and incorporated herein by reference.

As to the State Critical Area Program, the County's argument robs the Commission of its oversight authority and renders it powerless to disapprove any proposed local program amendment that violates the codified purpose of the State Critical Area Program so long as the proposed amendment meets the "criteria" and the "standards" of the State Critical Area Program. The County also argues that by unilaterally (allegedly) adopting a "joint-review" process through Talbot County Bill 762 ("Bill 762")[13] the County has established a process to accommodate the growth needs of the Towns. This argument shows a fundamental misunderstanding of, or intentional disregard for, the coordination required by COMAR, § 27.01.02.06A(2), which requires that the County coordinate with affected Towns prior to establishing, and in order to establish, the process to accommodate the Towns' growth needs, not, as the County appears to argue, the unilateral imposition of a process that, because it calls for joint-review of growth allocation applications, allegedly calls for coordination after the process is adopted.

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[12] St. Michaels adherence to the maps and growth policies adopted in 1988 are in furtherance of and consistent with the State policy set forth in NR § 8-1801(b)(2) that local programs are to be implemented in a "consistent and uniform" manner.

[13] Because Bill 933 unquestionably fails to provide a process to accommodate the Towns' growth needs (as the Commission found) the County argues that by withdrawing all reserved growth allocation from the Towns, the County implicitly adopts the process for *supplemental* growth allocation of Bill 762, adopted in 2000.

BACKGROUND

In 1988, St. Michaels adopted the St. Michaels local critical area program (the "St. Michaels Program"). St. Michaels Exhibit 7.[14] Included in the St. Michaels Program is a map, submitted to the County prior to adoption of the St. Michaels Program,[15] showing tracts of land ***in and around***[16] St. Michaels designated as areas allocated for "Town Development." St. Michaels Exhibit 39, attached hereto and incorporated herein by reference. The map specifically identifies the Perry Cabin Farm as appropriate for growth.[17] The County included that map as part of the County Program, recognizing the Perry Cabin Farm, which is within the borders of St. Michaels, as appropriate for growth. County Exhibit 13, pg. 190:A9.

The St. Michaels Program was drafted and implemented with the express understanding that the County intended to reserve growth allocation for St. Michaels; this is reflected in the maps that both the County and St. Michaels incorporated in their local programs, which

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[14] All exhibits to the St. Michaels Motion and Memorandum are referred to herein as "St. Michaels Ex. __". Exhibits 1 through 37 are attached to the St. Michaels Memorandum. All exhibits after Exhibit 37 are attached hereto and incorporated herein by reference.

[15] County Exhibit 13, pg. 190:A9.

[16] The County mistakenly states that the "acres of growth allocation reserved for the Towns consisted of land (1) that was located in the County, ***not in the Town***; and ...." County Memorandum at pg. 8. [***Emphasis added.***] A copy of the map submitted to the County and used by St. Michaels to compile the St. Michaels Program and each St. Michaels Comprehensive Plan since 1988 (attached as St. Michaels Exhibit 38), identifies property ***within*** St. Michaels that had been designated for growth (and as a result for growth allocation), including the very property at issue in the MP2 growth allocation application, to which Bill 933 was a direct response.

Moreover, although the County states that the map is "outdated", the map is part of the current St. Michaels Comprehensive Plan. The fact that the County considers the map that St. Michaels uses for its Comprehensive Plan as outdated further reflects the County's failure to coordinate with St. Michaels with regard to its anticipated growth needs and the fundamental philosophical land-use differences between the County and St. Michaels. It also evidences that St. Michaels continues to implement the St. Michaels Program in a consistent and uniform manner (as required by NR § 8-1801(b)(2)), unlike the County.

[17] The Perry Cabin Farm is the shaded area, bordering on the Miles River, in approximately the center of the map. The Perry Cabin Farm comprises the bulk of the land that Midland proposed to develop in its six applications for growth allocation, the fourth of which (MP2), the St. Michaels Planning Commission recommended for approval by The Commissioners Of St. Michaels at approximately the same time that the County introduced Bill 933. This is the same property which is shaded in green on Exhibit 39 and identified as the Perry Cabin Farm.

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identified land ***in and around*** St. Michaels as planned for future growth.[18] For the ten years following the adoption of its local program, St. Michaels received no requests for growth allocation.

In 1998, Midland submitted to St. Michaels the first of its six (6) applications for the award of growth allocation, all of which included the Perry Cabin Farm. Between 1998 and 2002, the first three Midland applications were submitted to St. Michaels, processed, denied and the subject of judicial review, all of which cost St. Michaels in excess of $1 million. Throughout this long and expensive process, the County gave no indication that it considered the growth maps or the information contained therein, which were used by the County and St. Michaels, outdated. Nor did the County give any indication that it intended to unilaterally revoke all growth allocation previously reserved to St. Michaels, or any of the other Towns. St. Michaels Ex. 11, ¶ 10.[19]

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[18] The fact that land in and around St. Michaels was designated for growth, is consistent with the policy of the General Assembly in implementing the State Critical Area Program which requires that future conversion of resource conservation area to intensely developed area and limited development area should occur adjacent to areas that were, as of 1985 already developed, *i.e.*, municipalities. Moreover, continuing to designate for growth land in and around the Towns furthers the State evidenced by the State Smart Growth initiatives.

[19] To the contrary, County officials reaffirmed the fact that St. Michaels' reserve of 245 acres of growth allocation would not be affect by actions of the County and that St. Michaels need only write a letter to the County when it decided to award growth allocation. In March of 2000 the County informed St. Michaels that the then-recent changes to the County's Program did not impact St. Michaels, and that St. Michaels continued to have the sole power, even according to the County Program, to award the 245 acres of growth allocation without interference from the County. *See* St. Michaels Ex. 12 (stating that: "[e]ach Town was granted specific acreage for conversion from ... RCA to LDA or IDA. This acreage can and has been used subject to your Town's ordinance with no review by the County. Notification to the County in writing [of] the growth allocation acres used ***is all that is required***"). [***Emphasis added.***]

In fact, then-County Councilman Robert D. Higgins testified as such during the public hearings regarding the changes to the County's changes to the County Program in 2000. Mr. Higgins stated: "[the 2000 changes to the County Program do] not affect St. Michaels ... at this time ... because [it has] not gone through [its] ***initial allocation*** ... so [it] will fall into this same procedure if at any future point in time" St. Michaels exhausts its initial growth allocation. St. Michaels Ex. 13, pgs. 77-78. [***Emphasis added.***] In fact, when asked if Councilman Higgins interpretation of the impact of the 2000 changes on St. Michaels was correct, the County Attorney confirmed Councilman Higgins' interpretation. *Id.* at p. 78, lines 13-18.

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Ultimately, St. Michaels determined that it was in its best interest to work with Midland to formulate a development plan that was the most satisfactory to St. Michaels. As a result, the fourth Midland application for growth allocation, involving a proposed project referred to as "Miles Point II" (hereafter "MP2"), was submitted to St. Michaels in September of 2003,[20] and hearings with regard to MP2 were held before the St. Michaels Planning Commission (the "Planning Commission"). During this time, the Talbot County Council (the "County Council") publicly opposed the MP2 application and lobbied St. Michaels to disapprove the MP2 growth allocation application;[21] not once, however, did the County so much as imply that it intended to revoke the very growth allocation at issue in the MP2 application.

Despite the County's attempt to influence the Planning Commissions' decision with regard to MP2, it soon became apparent that the Planning Commission would issue a favorable recommendation on the MP2 application to The Commissioners Of St. Michaels.[22] It was not until this time that Bill 933 publicly appeared for the first time on the County website. St. Michaels Ex. 11, ¶ 15. Notwithstanding the fact that the County Council continuously and

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[20] The MP2 application included approximately 70 acres of the land previously annexed to St. Michaels in 1980 (the Perry Cabin Farm), and 17 acres of land (the Hunteman Property) located immediately outside of, but proposed to be annexed into, St. Michaels.

[21] On November 21, 2003, the Talbot County Council publicly admonished the Commissioner's of St. Michaels for considering the MP2 application and unanimously voted to recommend to The Commissioners Of St. Michaels that they deny the application; on December 1, 2003, the President of the Talbot County Council wrote to the Chairman of the Commission requesting that growth allocation be denied for the MP2 project; and, on December 16, 2003 the Talbot County Council voted to refuse to relinquish zoning authority over a portion of the property that was included in the MP2 application.

[22] For example, The Planning Commission of St. Michaels, at a hearing on October 9, 2003, adopted Ordinances 290 and 297. *See* St. Michaels Ex. 16. Ordinance 297 addressed a proposed amendment to the St. Michaels Zoning Ordinance to include a Traditional Neighborhood Development Zone, which was necessary to approve the development proposed by MP2. St. Michaels Ex. 16. Ordinance 290 addressed whether to approve a Development Rights and Responsibilities Agreement between St. Michaels and Midland for the MP2 project. St. Michaels Ex. 16, p. 99, line 17 through p. 100, line 8; p. 129, lines 13-21. On November 24, 2003, the St. Michaels Planning Commission issued a written recommendation to the St. Michaels Commissioners in favor of awarding growth allocation for the MP2 project.

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publicly voiced its opposition to the MP2 application, prior to the introduction of Bill 933 on November 18, 2003, the County never contacted St. Michaels to inform St. Michaels of its intent to withdraw all reserved growth allocation,[23] even though, at least as early as October 29, 2003,[24] the County contacted the Commission with regard to Bill 933 and the subject matter thereof. Based on the timeline of events surrounding Bill 933, it was (and continues to be) evident that Bill 933 is an eleventh hour attempt by the County to thwart the development proposed by the MP2 application, that the County so publicly opposes, even to this day. *See supra* notes 21 though 25. Notwithstanding all of this, the Towns have made numerous, unrequited offers to work with the County to solve the problems that the County stated were its motivation for Bill 933.[25]

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[23] No one from St. Michaels was aware of Bill 933 until Friday, November 14, 2003, when a Town employee reviewed the County website to determine the County Council's agenda for the County Council meeting scheduled for the following Tuesday, November 18, 2003. St. Michaels Ex. 11, ¶ 15. And County officials refused to provide St. Michaels with so much as a copy of Bill 933 until several days *after* the November 18, 2003 meeting of the County Council. *Id.*

[24] Notwithstanding the fact that the County failed to even notify (much less coordinate with) the Towns that it was considering revoking all previously reserved growth allocation, the County, commencing on October 29, 2003, began a dialogue with the Critical Area Commission staff, excluding the Towns with regard thereto. On October 29, 2003, the County Manager informed the executive director of the Critical Area Commission that Bill 933 would be introduced on November 18th or November 25th. *See* Exhibit A to the Town of Oxford's Response to the County's Motion, incorporated herein by reference. The Commission's records indicate the following contacts initiated by the County:

October 29, 2003: The County Manager called the Commission's Executive Director, Mr. Ren Serery, and informed him that Bill 933 would be introduced on November 18 or 25; that there would be a public hearing on December 16 or 23; that Bill 933 would be voted on in late December or early January; and that Bill 933 would be to the Commission in January.

November 19, 2003: County Councilman Carroll again called Mr. Serey, this time about growth allocation regarding Midlands and Easton, and suggested a conference with the County Attorney.

November 24, 2003: There was a conference call with the County Manager.

November 25, 2003: There was a meeting about growth allocation between several Commission staff members and County Councilman Carroll, the County Manager, the County Attorney, and the County Planner. They discussed taking all growth allocation from the Towns.

[25] On December 16, 2003, the County Council conducted its first substantive public hearing regarding Bill 933. Representatives from the Towns of St. Michaels and Oxford appeared and offered to meet

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ARGUMENT

I.

The Standard of Review

The Commission's review of a proposed amendment to a local program – such as Bill 933 – is a quasi-legislative action. *See North v. Kent Island Ltd. P'ship*, 106 Md. App. 92, 103, 664 A.2d 34 (1995). The test to determine whether an action is quasi-legislative or quasi-judicial turns on whether "the action is one making new law, i.e., an enactment of general application prescribing a new plan or policy"[26] (quasi-legislative), or whether the agency is "adjudicating the personal rights"[27] on a case specific basis (quasi-judicial). As the Court of Special Appeals has clearly stated, when the Commission conducts "hearings in connection with ... proposed programs ... [t]he role of the Commission is ***quasi-legislative*** ...." *Id.* [***Emphasis added.***] Because the Commission's decision with regard to Bill 933 was quasi-legislative, the Commission is not require to set forth a written opinion, containing findings of fact and

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and coordinate with County officials to construct a solution to the County's perceived problems. Throughout the County's consideration of Bill 933, St. Michaels (and Oxford) continued to offer solutions addressing the issues that allegedly spawned Bill 933. During the Commission's March 24, 2004 panel hearing, for example, St. Michaels submitted into the Commission's record a compromise designed to alleviate both the County's alleged lack of growth allocation for Easton and the County's concern that St. Michaels and Oxford could prevent the County from accessing additional growth allocation from the State. St. Michaels Ex. 24. With the unanimous consent of the St. Michaels Town Commissioners, St. Michaels offered to relinquish all its growth allocation into a "common pool" that any local jurisdiction, including the County or Easton, could use to accommodate growth.

[26] *Id.* at 103. With regard to the proper standard of judicial review, while not controlling in this case, the Maryland Administrative Procedures Act ("MAPA") is instructive. Under MAPA, the review of a quasi-legislative decision is "wholly different" than the review of a quasi-judicial decision; a quasi-judicial decision is reviewed to insure, *inter alia*, that it is not arbitrary and capricious (*see* State Gov't Art § 10-222(h)((3)(iv)); on the other hand, a quasi-legislative action is reviewed to determine if "the provision violates any provision of the United States or Maryland Constitution ... exceeds the statutory authority of the unit; or ... [whether t]he unit failed to comply with the statutory requirements for adoption of the provision." State Gov't Art. § 10-125(d)(1) – (3). The review of a quasi-judicial action centers on the agency's "findings of fact ... conclusions of law ... and ... [t]he order." Md. Code, State Gov't Art. § 10-221(b)(1). An agency acting in a quasi-legislative capacity is not required to set forth a formal ruling. *See generally*, State Gov't Art. §§ 10-120 through 10-125. As such, this Court is to review the agency's decision (here, the disapproval of Bill 933) to determine if the action "violates any provision of the United States or Maryland Constitution ... exceeds the statutory authority of the unit; or ... [fails] to comply with the statutory requirements for adoption of the provision." *See, e.g.*, State Gov't Art. § 10-125(d)(1) – (3).

[27] *Spencer v. Board of Pharmacy*, 380 Md. 515, 527, 846 A.2d 515 (2004).

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conclusions of law; and this Court's review is not limited to the face of any purported "opinion" as proffered by the County.

Because the role of the Commission with regard to Bill 933 is "quasi-legislative", the scope of this Court's review is more circumscribed than if the Commission's actions were "quasi-judicial." *See, e.g., Storch v. Zoning Board of Howard County*, 267 Md. 476, 487, 289 A.2d 8 (1972). As to quasi-legislative actions, the "judiciary's scope of review ... is limited to assessing whether the agency was acting within its legal boundaries." *Fogle v. H&G Rest. Inc.*, 337 Md. 441, 455, 654 A.2d 449 (1995) [Internal quotations and citations omitted.] "[I]n determining whether a state administrative agency is authorized to act in a particular manner, the statutes, legislative background and ***policies*** pertinent to that agency ***are controlling***." *Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 686, 684 A.2d 804 (1996). [***Emphasis added.***] Stated differently, the Court's review is limited to determining whether the Commission's decision "is consistent with the letter and spirit of the law under which the agency acts." *Id.* (*quoting Christ v. Department of Natural Resources*, 335 Md. 427, 437, 644 A.2d 34 (1994)). Because the Commission's decision clearly is consistent with the letter of the law it is charged with enforcing, the County's Motion should be denied.

II.
The Commission Acted Within Ninety (90) Days Of Receipt Of Bill 933

Procedurally, the County argues that Bill 933 was approved by operation of law because the Commission failed to act on Bill 933 within ninety (90) days of receipt thereof. County's Memorandum at pp. 38-39. As set forth in the Memorandum of Law accompanying the Commission's Motion for Summary Judgment (the "Commission's Memorandum"), the

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Commission's decision was timely.[28] *See* Commission's Memorandum at pp. 13-14. At a minimum, because there is a genuine dispute as to the material facts underlying whether the Commission acted in a timely manner,[29] summary judgment is inappropriate. Therefore, at least with regard to this argument, the County's Motion should be denied. *Compare* Commission's Memorandum at pp. 13-14, *and* the County's Memorandum at pp. 38-39.

III.

The Commission Did Not Exceed Its Statutory Authority or Act In An Arbitrary and Capricious Manner By Disapproving Bill 933

In Section III. and subsection IV.A. of its Memorandum, the County argues that the Commission exceeded its statutory authority by disapproving Bill 933 for the reasons cited in the Supplement to the Commission's Panel Report, and, as a result, acted in an arbitrary and capricious manner. *See* County's Memorandum at pp. 39-44. As set forth above, however, the County relies upon the wrong standard for this argument and attempts to improperly limit this Court's review by focusing on the Commission's Panel Report and the Supplement thereto, as if they were "quasi-judicial" written opinions; they are not. Instead, this Court is to decide if the Commission's decision is consistent with the State and Federal Constitutions, the enabling statute, legislative background and policy of the law the Commission is to follow; in other words, was the Commission's decision "legal"? Here, as the Commission's Panel Report reflects, the County failed to coordinate with the Towns or accommodate the growth needs thereof (as required by COMAR 27.01.02.06A(2)), and Bill 933 lacks consistency with and

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[28] St. Michaels incorporates herein by reference all arguments of the Commission as set forth in its Motion for Summary Judgment, the Memorandum in support thereof and the Commission's response to the County's Motion.

[29] For example, the County argues that Bill 933 was mailed to the Commission on January 19, 2004. *See* County's Memorandum at pg. 38. The Commission correctly notes that January 19, 2004 was a federal holiday on which post offices are closed. Thus, Bill 933 could not, as the County argues, have been mailed on January 19, 2004. As such, there is at minimum a genuine dispute as to when Bill 933 was mailed.

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uniformity with other approved local programs (as required by NR § 8-1801(b)(2)). As such, the Commission's decision to disapprove Bill 933 was within its legal bounds and should be upheld.

In support of its argument that the Commission exceeded its statutory authority, the County cites to NR § 8-1809(j), which states, *inter alia*, that the Commission "shall approve" program amendments that meet the "standards" set forth in subsections (b)(1) – (3) of NR § 8-1808[31] and the "criteria"[32] set forth in the State Critical Area Regulations. This argument cannot prevail because: (1) the Commission's decision is quasi-legislative and must be affirmed so long as it is within the Commission's legal boundaries (*see Fogle, surpa*); (2) the decision of the Commission with regard to Bill 933 complies with the General Assembly's stated purpose for the State Critical Area Program, set forth at NR § 8-1801(b)(2), as well as the "standards" and "criteria", including NR § 8-1801(b)(2) and COMAR, § 27.01.02.06A(2); and (3) it would, with regard to Bill 933, render the policy statements codified at NR § 8-1801 mere surplusage and nugatory, violating standard principals of statutory construction.

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[30] In addition, The fact that the Commission found that when enacting Bill 933 the County failed to coordinate with the Towns, or to establish a process to accommodate the growth needs thereof, Bill 933 is also inconsistent with numerous other standards and criteria. *See infra* notes 31 and 32.

[31] Among the standards set forth in NR § 8-1808(b)(1) through (b)(3) is that a program must "establish land use policies for development ... which ***accommodate growth*** ...." § 8-1808(b)(3). [***Emphasis added.***] Undeniably, the revocation of all reserved growth allocation by the County does not accommodate growth as required by NR § 8-1808(b)(3).

[32] Among the numerous criteria set forth in the State Critical Area Regulations is that "each jurisdiction ***shall attempt*** to ***establish cooperative arrangements with adjacent jurisdictions*** ... for lands within and adjoining the jurisdiction's Critical Area" (COMAR 27.01.10.01.I) [***Emphasis added.***]; that "Counties and municipalities within their political boundaries are encouraged to develop their ... [local programs] ... ***cooperatively*** so that programs can be developed more ***efficiently*** and so that ***common land use objectives can be realized***" (COMAR 27.01.10.01.P) [***Emphasis added.***]; and when "planning future expansion of intensely developed and limited development areas, ***counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities.***" (COMAR 27.01.10.06.A). [***Emphasis added.***] Clearly, the County did not "attempt to establish cooperative arrangements" with the Towns, develop Bill 933 "cooperatively" with the Towns or act "in coordination" with the Towns to "accommodate" their growth needs, all as required by the very criteria against which the County claims Bill 933 is to be judged.

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A.
The Commission Must Uphold The Express, Codified Policy and Purposes of the State Critical Area Program.

Clearly, when interpreting the statutes and regulations that the General Assembly has charged it with interpreting and enforcing, the Commission must be mindful of and follow the ***expressly stated*** underlying policy thereof; the failure to do so renders the Commission's decision illegal and unenforceable. *See Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 686, 684 A.2d 804 (1996) (holding that, to be valid, a quasi-legislative action must comply with the enabling statute, the legislative background and the underlying policy of the statutory scheme).[33]

The policy of the State Critical Area Program is clear. In NR § 8-1801(b)(2) the General Assembly expressly stated that the "purpose of the General Assembly in enacting [the State Critical Area Law was] ... [t]o implement the Resource Protection Program on a cooperative basis ... ***with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria and oversight.***" *Id.* [***Emphasis added.***][34] Even a cursory review of the Panel Report, and the Supplement thereto (County Motion, Exs. 19 and 21, respectively), reflects that this is exactly what the Commission did. The Commission found that Bill 933 violates the State Critical Area Program because: (1) Bill 933 would reverse a refinement to St. Michaels' Program that awarded growth allocation to the Strausburg property; and (2) Bill 933 would create conflicts between the growth allocation processes that the County

[33] Even utilizing the County's proffered arbitrary and capricious standard, an action of the Commission which violates the policy goals of the General Assembly (as specifically set forth in NR § 8-1801(b)) is unenforceable. *See Harvey v. Marshall,* 389 Md. 243, 884 A.2d 1171, 1207 (2005) (stating that "[a]n agency decision ... may be deemed arbitrary or capricious if it is contrary to or inconsistent with an enabling statute's language or policy goals"); *Hurl v. Board of Educ.*, 107 Md. App. 286, 306, 667 A.2d 970, 980 (1995). *See also,* Arnold Rochvarg, *Maryland Administrative Law* § 4.38 at 129 (2001, 2004 Supp.) (stating that "[a]n agency decision that is contrary to the enabling statute's language or policy goals is a decision that is arbitrary or capricious").

[34] The Maryland Court of Special Appeals has likewise held that the Commission's role is to ensure that local programs are adopted and implemented "in a consistent and uniform manner subject to State criteria and oversight." *North v. Kent Island Ltd. P'ship*, 106 Md. App. 92, 103-04, 664 A.2d 34 (1995) (*quoting* NR § 8-1801(b)(2)).

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purports to adopt through Bill 933, and those adopted years ago in the Town Programs. Accordingly, as required by NR Section 8-1801(b)(2), the Commission disapproved Bill 933 as "contrary to the Commission's oversight responsibility to ***ensure that local programs are implemented in a consistent and uniform manner.***" County's Memorandum, Ex. 21. [***Emphasis added.***] Indeed, having found that Bill 933 is inconsistent with other local programs,[35] to decide otherwise would have violated the policy underlying the very law the Commission is charged to uphold.[36] *See Harvey, supra.*

The County's Interpretation of the State Critical Area Program Is Contrary to The Canons of Statutory Interpretation

The County's principal argument is that, by considering whether Bill 933 is "consistent and uniform", the Commission entertained factors wholly irrelevant to the "only matters the [Commission is] permitted to consider in deciding whether to approve Bill 933 as a local program amendment." County Motion at p. 41. [Emphasis in original.] Stated differently, the

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[35] On pages 8 and 60 of its Memorandum, the County argues that the growth allocation it reserved for the Towns was voluntary, that "it was not required by any State law", and, as a result, the County was free to "unreserve" the same. The County states: "there is no law that prevents the County from deciding to 'unreserve' growth allocation as part of its comprehensive review of land use policies in the Critical Area." County Memorandum at pg. 60. The County is mistaken. Clearly COMAR, § 27.01.02.06A(2) requires that the County establish a process to accommodate the growth needs of the Town. The County did coordinate with the Towns and accommodate their growth needs when it reserved the growth allocation. Thus, notwithstanding the County's interpretation of the State Critical Area Program to the contrary, the County is not free to "unreserve" growth allocation; instead the County must coordinate with the Towns to accommodate their growth needs. This is what the State Critical Area Program requires.

[36] Having found that Bill 933 creates conflicts with the Town Programs, the Commission was required to disapprove Bill 933. The Commission is required to ensure that the State Critical Area Program is implemented "on a ***cooperative basis*** between the State and affected local governments, with local governments establishing and implementing their programs in a ***consistent and uniform manner,*** subject to State criteria and oversight." *Id.* at § 8-1801(b)(2). [***Emphasis added.***] In furtherance thereof, COMAR, § 27.01.02.06A, requires that "***counties***, in ***coordination*** with affected municipalities, ***shall establish a process*** to ***accommodate*** the growth needs of the municipalities." [***Emphasis added.***] Thus, when the County wishes to amend the County Program in a way that affects one or more of the Towns, the County is required by COMAR, § 27.01.02.06A, to communicate and work together with the affected Town or Towns to develop, draft and adopt a process that attempts to satisfy, to the extent reasonably possible, the growth needs of the affected Towns, consistent with their Local Programs.

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County argues that even if a proposed amendment to a local program is found by the Commission to directly violate the expressed purpose of the State Critical Area Law (as set forth in NR § 8-1801(b)(2)), the Commission must approve the amendment, so long as the "criteria" and "standards" are met. The rules of statutory construction do not permit such an interpretation.[37]

The County's interpretation of the State Critical Area Law defeats the stated intent of the General Assembly, thus violating the "cardinal rule" of statutory construction – to "ascertain and carry out the real intention of the Legislature" – and runs directly contrary to the Commission's interpretation, which is accorded substantial deference.[38] *Rylans, supra* at 549. Here, the General Assembly clearly enunciated and codified the purpose of the State Critical Area Program – to ensure that local programs are "implemented in a uniform and consistent manner." NR § 8-1801(b)(2). Yet, inexplicably, the County argues that the Commission is prohibited from

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[37] There are six principal tenets of statutory construction, and the interpretation of the State Critical Area Program advanced by the County violates just about all of them. *See Mazor v. Department of Correction*, 279 Md. 355, 360-61, 368 A.2d 1005 (1977). The "cardinal rule" of statutory construction is to "ascertain and carry out the real intention of the Legislature." *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 549, 814 A.2d 469 (2002). Second, the primary source from which this Court is to ascertain the true intention of the Legislature is through the "language of the statute itself." *Id.* Third, the words of a statute are accorded their "ordinary and natural signification." *Id.* Fourth, where possible, a statute is to be interpreted such that "no word, phrase, clause, or sentence is rendered surplusage or meaningless." *Id.* at 550. Fifth, "wherever possible an interpretation should be given to statutory language which will not lead to absurd consequences." *Id.* Finally, where the statute is part of a general statutory scheme or system, the sections are to be "read together to ascertain the true intention of the Legislature." *Id.*

[38] In *Ideal Federal v. Murphy*, 339 Md. 446, 462, 663 A.2d 1272 (1995), the Court of Appeals, citing to the United States Supreme Court, described the deference owed to an agency's interpretation of its own statutes as follows:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration....When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

Id., (*citing Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965)).

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considering whether Bill 933 is uniform and consistent with the local programs of other local jurisdictions. *See* County Motion at pg. 44. Such an interpretation is untenable.

The County's interpretation renders the language setting forth the codified purpose of the State Critical Area Law meaningless surplusage. Such an interpretation leads to the absurd result – indeed, the very result that the County argues is mandated – that so long as Bill 933 satisfies the "criteria" and "standards" (which it does not), it must be approved even if it directly violates the expressly stated *purpose* of the statute. The County's interpretation of the State Critical Area Law defies simple statutory construction. *Mazor, surpa* at 360-61.

Proper statutory construction requires that, whenever possible, if a statute is part of a general statutory scheme, the various sections are to be read together to give life to the intent of the General Assembly. *Id.* Here, the intent of the General Assembly was to ensure that local critical area programs are implemented in a "consistent and uniform manner." N.R. § 8-1801(a)(10). The interpretation of the State Critical Area Program espoused by the County, however, requires that the Commission ignore the intent of the General Assembly, as set forth in NR § 8-1801, so long as the "criteria" and "standards" are met. The County's argument in this regard is irreconcilable both with the State Critical Area Law and sound statutory construction. Accordingly, the legal premise of the County's argument is flawed, and the County's Motion should be denied.

B.
The Conflict Between The County Program And The Town Programs Created By Bill 933 Evidences The Lack Of Coordination That Is Required By COMAR 27.01.02.06A(2)

Because Bill 933 violates numerous "criteria" that the Commission is required to enforce, the Commission's decision to disapprove Bill 933 must be upheld.[39] COMAR, §

[39] *See, supra* notes 31 and 32.

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27.01.02.06A(2) for example, requires that that County coordinate with affected Towns so that, collaboratively, the County and the affected Towns can establish a process to accommodate the growth needs of the Towns. Moreover, the County is supposed to establish "cooperative arrangements" with adjacent jurisdictions (COMAR 27.01.10.01) and is encouraged to develop its program cooperatively with the municipalities within its borders so that programs can be developed and implement more efficiently so that "common land use objectives" can be realized. *Id.* All of these criteria, designed by the Commission and approved by the General Assembly, are in furtherance of the underlying policy of the State Critical Area Program – to develop and enforce local programs in a "uniform and consistent manner." Because Bill 933 violates the statutes and regulations that the Commission is required to enforce, including the requirement that the County coordinate with the Towns, and accommodate the growth needs thereof, the Commission's disapproval of Bill 933 should be upheld, and the County's Motion denied.

IV.
The Commission's Decision Was Not Arbitrary or Capricious

A.
The Commission's Bases For Rejecting Bill 933 Were Not Arbitrary And Capricious

For the reasons set forth in Section III., *supra*, the Commission's decision was not arbitrary or capricious. It is worth noting, however, that throughout Section IV.A. of the County's Memorandum, the County asserts that the Commission expressly provided that Bill 933 met the State's "goals and criteria." At page 46 of the County's Memorandum, the County states: "the CAC ***specifically*** stated that ***Bill 933*** met the state goals and criteria." County's Memorandum at pg. 46. [***Emphasis added.***] This argument mischaracterizes the subject of the comments of Mrs. Mason, counsel for the Commission. Mrs. Mason was referring to Bill 762 –

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which was not incorporated into (or even mentioned in) Bill 933 and deals with only "supplemental" growth allocation – not Bill 933. *See* County's Exhibit 22, pg. 141, lines 5-12.

B.
Neither St. Michaels Nor Oxford Have Requested That The Court Affirm the Commission's Decision On Grounds Other Than Set Forth In the Commission's Decision

In Section IV. B. of its Memorandum, the County argues that this Court may not affirm the Commission's decision based on issues raised by the Towns in their respective requests for declaratory relief; namely, that Bill 933 violates Articles 23A and 66B and because the County failed to "coordinate" with the Towns, the County failed to establish a "process" to accommodate the growth needs of the Towns, and Bill 933 fails to "accommodate" the growth needs of the Towns, it also violates COMAR 27.01.02.06A(2).[40] *See, e.g.*, County Memorandum at pgs. 58-59. The County seems to ignore, however, that neither Oxford nor St. Michaels has requested that this Court affirm the Commission's decision on these grounds. Instead, this Court permitted St. Michaels and Oxford to intervene in order to assert counterclaims against the County in which the Towns request, *inter alia*, a declaratory judgment that Bill 933 violates Articles 23A and 66B and COMAR 27.01.02.06A(2).[41]

Having agreed to entertain the Towns' respective requests for declaratory judgment, Maryland law requires that this Court now determine the rights of the parties subject to the request for declaratory judgment, so long as a declaratory judgment is appropriate. The purpose

[40] For the sake of clarity, St. Michaels is not arguing that the State Critical Area Program violates Articles 23A and 66B. Instead, St. Michaels argues that the County's unilateral passage of Bill 933, allegedly retroactively adopting the "joint-review process" of Bill 762 violates Articles 23A and 66B because it impedes St. Michaels inherent right to exercise planning and zoning authority over approximately 85% of developable land within St. Michaels. Clearly, had the County coordinated with St. Michaels, and the two sovereign jurisdictions come to an agreement on the growth allocation process to be utilized St. Michaels' Article 23A and 66B rights would have been respected. This cooperation is exactly what is required by COMAR, § 27.01.06.02A(2).

[41] *See, supra* note 5.

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of the Maryland Uniform Declaratory Judgments Act (the "Act") is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Md. Code, Cts. & Jud. Proc. § 3-402.[42] Here, it is clear that there is uncertainty and a controversy with regard to the conflict between Bill 933 and the Towns' rights according to Articles 23A and 66B and COMAR 27.01.02.06A(2).[43] As such, a declaratory judgment is appropriate.

Notwithstanding the fact that this case will most likely be resolved on the pending motions for summary judgment, declaratory relief is still appropriate; arguably, it is required.[44] *Phillips v. Allstate Indemnity Co.*, 156 Md. App. 729, 738, 848 A.2d 681 (2004). As set forth above, and argued in the Towns' motions for summary judgment and motions to intervene (which are incorporated herein by reference), the conflicts between Bill 933 and Articles 23A, 66B and COMAR, § 27.01.02.06A(2), are appropriate for resolution by declaratory judgment. That being the case, this Court should render a declaratory judgment, resolving the rights of the respective parties on these issues as requested in the Towns' counterclaims and motions for summary judgment.

---

[42] Section 3-406 of the Act permits interested parties to seek determination of a question of the construction of, among other things, a statute, ordinance or administrative regulation, which is exactly what the Towns have requested. *Id.* A court "may grant" a declaratory judgment where doing so will "serve to terminate the uncertainty or controversy giving rise to the proceeding, and if: (1) An actual controversy exists between contending parties; (2) Antagonistic claims are present between the parties involved which indicated imminent and inevitable litigation; or (3) A party asserts a legal relation, status, right, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it." *Id.* at § 3-409.

[43] On the one hand, the Towns argue that Bill 933 directly contravenes these laws; on the other hand, the County argues that Bill 933 does not violate Articles 23A and 66B (*see* County Memorandum at pgs. 59-70), nor COMAR 27.01.02.06A(2) of the State Critical Area Program (*see* County Memorandum at pgs. 51-52, in which the County argues it coordinated with the Towns).

[44] As the Maryland Court of Appeals has "reiterated time after time ... when a declaratory judgment action is brought, and the controversy is appropriate for resolution by declaratory judgment, the trial court must render a declaratory judgment." *Id.* (quoting *Harford Mut. Ins. Co. v. Woodfin Equities Corp.*, 344 Md. 399, 414, 687 A.2d 652 (1997)). In other words, "[w]hile it is permissible for trial courts to resolve matters of law by summary judgment in declaratory judgment actions, the trial court must still declare the rights of the parties." *Id.* (quoting *Megonnell v. United Servs. Auto. Ass'n*, 368 Md. 633, 642, 796 A.2d 758 (2002)).

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C.
Bill 933 Does Not Establish a Process To Accommodate the Growth Needs of the Towns

The County argues that the County did coordinate[45] with the municipalities and did establish a process to accommodate the growth needs of municipalities. *See* the County's Memorandum at pg. 51-53. Because Bill 933 contains no "process" to "accommodate the growth needs of municipalities", however, the County posits that Bill 762,[46] which long ago established a process for the award of *supplemental* growth allocation for Easton, evidences the coordination and accommodation required by COMAR, § 27.01.02.06A(2). This argument, however, rests on a tortured attempt by the County to associate the two independently adopted ordinances,[47] belies the statutory history of Bill 762, and evidences the County's misunderstanding of the requirements of COMAR, § 27.01.02.06A(2) with respect to the County's obligation to "coordinate" with the affected municipalities to establish a "process" to "accommodate" the Towns' growth needs.

At the time that Bill 762 was adopted, the Towns were advised that it applied only to Easton; the purpose of Bill 762 was to provide for *supplemental* growth allocation for Easton,

---

[45] The County argues: "the County did 'coordinate' with the Towns in enacting Bill 933 because Bill 933 merely eliminated the restriction that acres previously reserved would be used exclusively by a particular Town and initiated the same joint review process already established by Bill 762." County Memorandum at pg. 51. Thus, the County seems to argue, though it is less than clear, that because Bill 933 strips the Towns of all reserved growth allocation, and because the only section of the County Code that could possibly be interpreted as establishing a process for the award of growth allocation – albeit *supplemental* allocation – is Bill 762, and because the County distributed copies of Bill 762 to the Towns and counsel therefore, the County cooperated with the Towns to accommodate their growth needs. This is tortured logic indeed. The County has no other option, however, because it is undisputed that the County never contacted the Towns regarding Bill 933, notwithstanding the fact that the County was in contact with the Commission approximately three weeks before the introduction of Bill 933. *See supra* note 24.

[46] Bill 762 is codified as Section 190-109D(9)(d) of the Talbot County Code and is attached to Midland's Memorandum as Exhibit 22.

[47] The County's argument that Bill 933 "initiated the same joint review process established by Bill 762" (County Memorandum at pg. 51) is directly contrary to the plain language of Bill 933; nowhere on the face of Bill 933 does it incorporate, or, for that matter, even mention Bill 762.

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which had exhausted all its reserve, not St. Michaels and Oxford, which had not exhausted their reserves.[48] Because St. Michaels had an initial reserve of 245 acres of growth allocation, all of which was unused at that time, St. Michaels did not have nearly the level of substantive interest or concern with the procedures established by Bill 762 as it would have had if the County had given notice to all the Towns with reserved growth allocation that their growth allocation would be rescinded and their only method to obtain growth allocation would be through the procedure established by Bill 762.

Unquestionably, the County did forward copies of Bill 762 to the Towns and counsel for the Towns, *after* the "process" established in Bill 762 had been drafted.[49] In fact, after receiving a copy of Bill 762 from the County in 2000, undersigned counsel for St. Michaels wrote to the County Council and inquired whether Bill 762 would substantively change the Section of the County Code (19-14(c)(i)), which reserved 245 acres of growth allocation to St. Michaels. *See* Midland Ex. 23. In response to the undersigned's letter, the County made clear that Bill 762 was not intended to change the growth allocation reserved for St. Michaels or any other town in the County.[50] This assurance was reaffirmed during the public hearing in which the County Council

---

[48] Not only did St. Michaels and the County not believe that Bill 762 was adopted to apply to all awards of growth allocation to the Towns (as opposed to *supplemental* awards), it is likely that the Commission did not either. At the Commission's March 24, 2004 Panel Meeting on Bill 933, Mr. Larry Duket of the Maryland Department of Planning ("MDP") testified about the County's assertion that Bill 762 provides a mechanism for the County to accommodate the Towns' growth needs. Mr. Duket stated: "Bill 762 ... was really originally created for narrower purposes ... the supplemental growth allocation process, and was approved as a refinement by the Commission ...." *See* St. Michaels Ex. 35, p. 6, lines 7-10. Mr. Duket opined that had the Commission known of the County's intentions for Bill 762 (a mechanism to award *any* growth allocation, as opposed to *supplemental* growth allocation) "it seems unlikely that ... the Commission would have treated such a ***significant change to the growth allocation process*** as a mere refinement were it not for the retention at the time of specific language giving allocations to the town." *Id.* at p. 6, lines 12-17. [***Emphasis added.***]

[49] Again, this is not the cooperation required by COMAR, § 27.01.02.06A(2), which requires that the County coordinate with the Towns in order to establish the process, not after the County has established the process.

[50] On numerous occasions County officials reassured the Towns that Bill 762 did not affect their reserved growth allocation. In March of 2000, for example, Mr. Cowee, the County's Planning

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addressed Bill 762; the County Council and the County Attorney commented, with regard to Bill 762, that:

> MR. HIGGINS: . . . it does not affect St. Michaels and Oxford at this time –
>
> MS. SPENCE: Right.
>
> MR. HIGGINS: -- because they have not gone through their initial allocation, which is around 200 acres for each of those municipalities, so they will fall into this same procedure if at any future point in time they've gone through theirs.
>
> MR. FOSTER: Well, would they necessarily have to exhaust it, or might they still not chose to apply for this, perhaps reserving some of it for some future project and deciding that that's all they would have left, and a new one comes along, that wouldn't they still be able to make the application?
>
> MR. COWEE: It's my understanding that until that acreage is used up, they would not be under this process.
>
> MS. SPENCE: Right, until its used up.
>
> MR. FOSTER: They could not? Is that your understanding, Mr. Pullen?
>
> MR. PULLEN: I think that, I think that is, in fact, in the existing ordinance –
>
> MR. FOSTER: Okay.
>
> MR. PULLEN: -- in one of the two sections that we referred to earlier.

St. Michaels Ex. 13.

Finally, the County's assertion that Bill 762, which was not referenced in Bill 933, represents the County's coordination with and accommodation of the Towns, evidences a misunderstanding of the plain language used by the Commission in COMAR, § 27.01.02.06A(2). The County argues that because Bill 762, after it was drafted, was sent to the Towns for

---

Officer, wrote to Mrs. Thomas, St. Michaels' Town Manager, and informed St. Michaels that the then-recent changes to the County's Program (*i.e.*, Bill 762) did not impact St. Michaels, and that St. Michaels continued to have the sole power, even according to the County Program, to award the 245 acres of growth allocation without interference from the County. *See* St. Michaels Ex. 12. On behalf of the County, Mr. Cowee stated: "[e]ach Town was granted specific acreage for conversion from ... RCA to LDA or IDA. This acreage can and has been used subject to your Town's ordinance with no review by the County. Notification to the County in writing [of] the growth allocation acres used *is all that is required.*" [*Emphasis added.*]

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comment, the County coordinated with the Towns. But that is not what COMAR, § 27.01.02.06A(2) requires. Instead, COMAR, § 27.01.02.06A(2) requires that the process be established by the County and the Towns, in coordination, thus requiring at least some communication ***before*** the process is established; not that the County may unilaterally establish a process and thereafter circulate the unilaterally established process to the Towns.

D-G

The arguments in Section IV., D through G of the County's Memorandum are addressed in Section III of this Memorandum of Law. For the reasons set forth in Section III, *supra*, the Commission's decision was not arbitrary and capricious.

V.
"EXTRANEOUS ISSUES" RAISED BY THE TOWNS

A.
The Towns Have Not Requested That This Court Affirm The Commission's Decision On Grounds Other Than Set Forth In The Commission's Decision.

For the reasons set forth in Section IV, B., *supra*, the County's argument that the Towns advocated that this Court uphold the Commission's decision based on the Towns' arguments regarding Articles 23A and 66B is without merit and mischaracterizes the relief sought by the Towns in their requests for declaratory judgment.[51]

B.
Bill 933 Is Illegal

For the reasons set forth in St. Michaels Memorandum and Oxford's Memorandum of Law in support of its Motion for Summary Judgment, which are incorporated by reference as if specifically set forth herein, Bill 933 violates rights vested in St. Michaels by Articles 23A and 66B.

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[51] *See also, supra* note 5.

CONCLUSION

With respect to the County's argument that Bill 933 is validated by operation of law – *i.e.*, that the Commission failed to act in a timely manner – it is clear that the Commission did act in a timely manner; alternatively, there is, at minimum, a genuine dispute as to the facts upon which the County bases its Motion on this issue. For either reason, summary judgment in favor of the County on this issue is inappropriate.

As to the County's argument that the Commission exceeded its authority in deciding as it did, on the grounds stated in the Commission's Panel Report and Supplement thereto, summary judgment, as requested by the County, is likewise inappropriate. The proper level of review on a quasi-legislative action – such as the one at issue here – requires only that this Court find that the Commission was acting within its legal boundaries. *See Fogle, supra.* Because the County failed to coordinate with the Towns; failed to accommodate the growth needs of the Towns; failed to establish "cooperative arrangements" with adjacent jurisdictions; failed to develop its program cooperatively with the municipalities within its borders; and attempted to implement a program amendment that lacked uniformity and consistency with other local programs and prior decisions of the Commission, the Commission acted within its legal boundaries when disapproving Bill 933. To rule otherwise and uphold the County's interpretation of the State Critical Area Program – that the Commission is required to approve amendments that meet the "criteria" and "standards" *even if* the proposed amendment violates the express purpose of the State Critical Area Law – violates the principal tenets of statutory construction and would require a result that, in and of itself, is arbitrary and capricious. For these reasons, and as further explained above, the County Motion should be denied.

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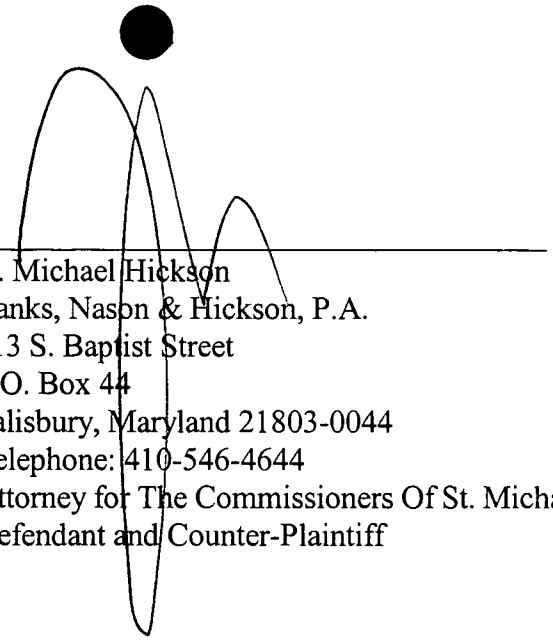

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Defendant and Counter-Plaintiff

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Green area is Strausburg property

Designated Critical Area Growth Allocation Areas

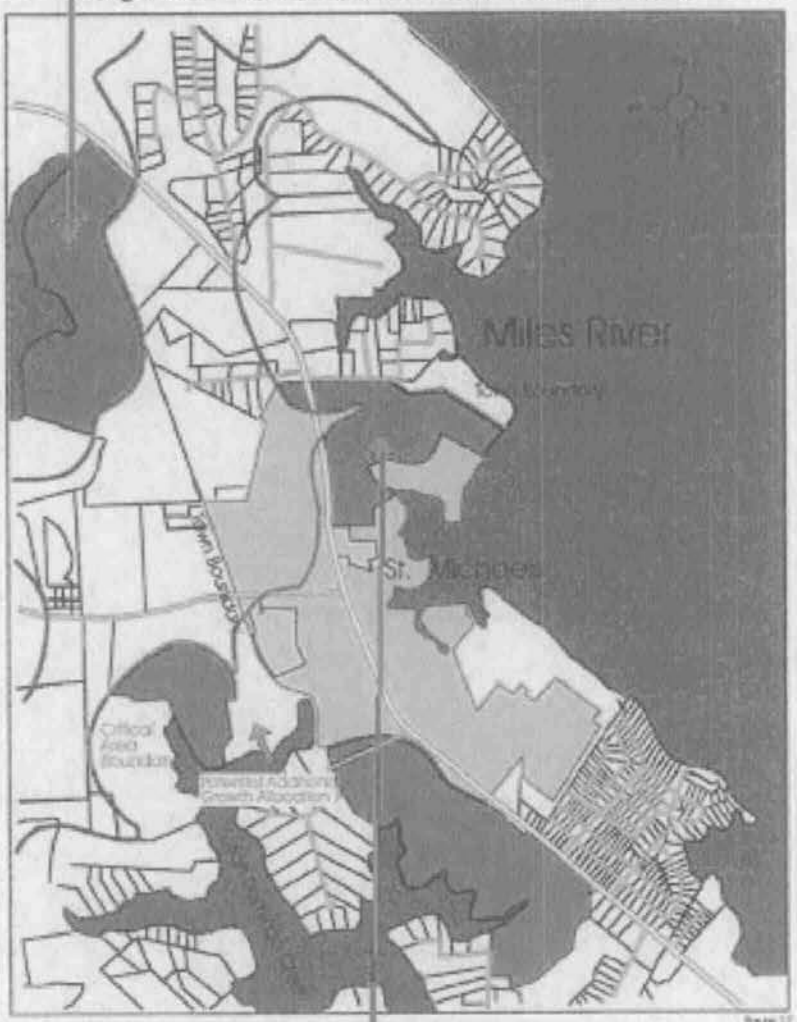
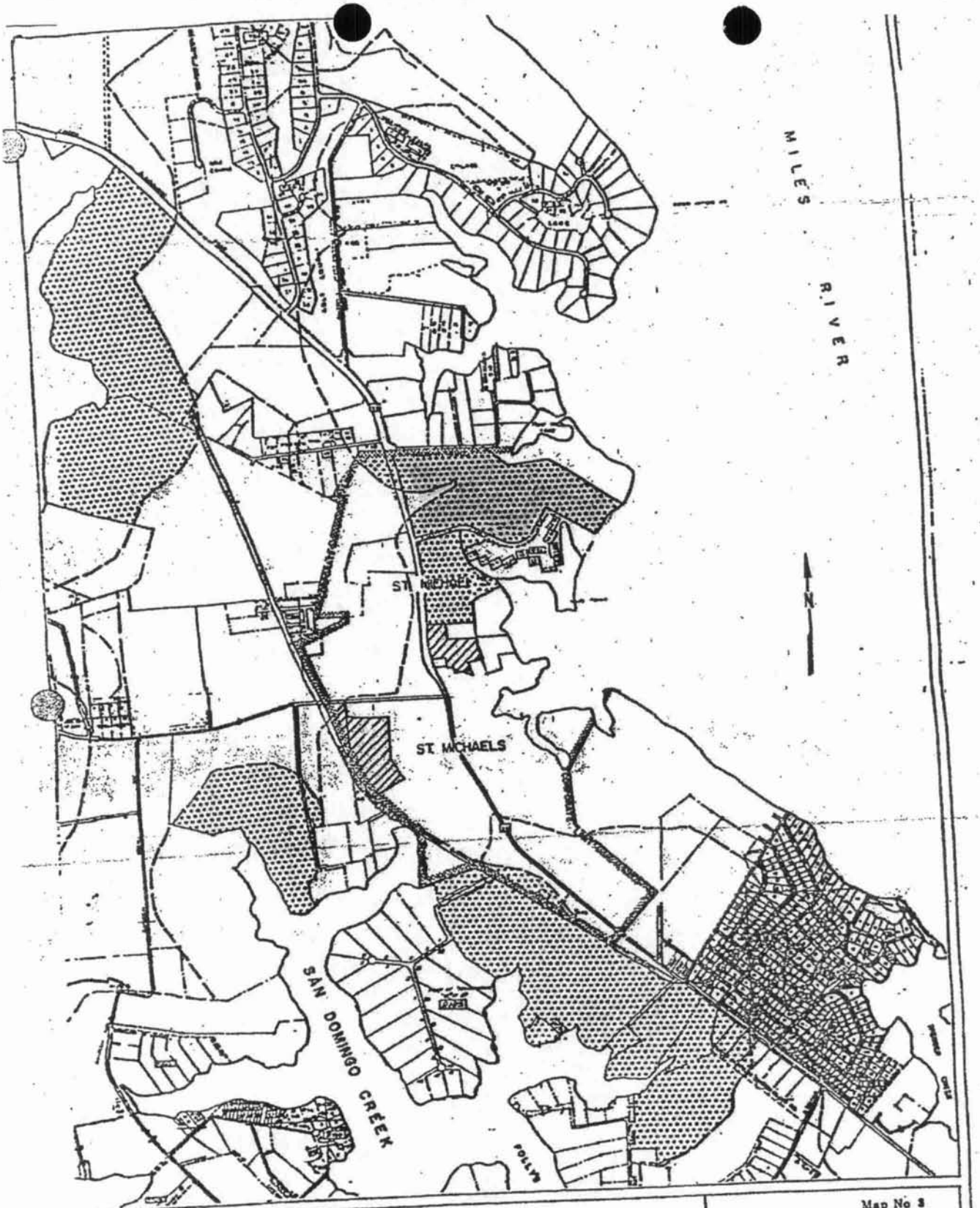


Figure 17

Areas identified for future growth allocation and suitable for development in both the Talbot County Critical Area Program and the St. Michaels Critical Area Program

RCA for annexation or rezoning LDA for rezoning

This green area is Perry Cabin Farm



Area Allocated for Town Development

TOWN OF ST MICHAELS

Talbot County, Maryland

RCA for Annexation or Rezoning

LDA for Rezoning

Map No 3

N

miles

2 1 0 2 4 6

Wiles Dailey Pronske

Reston, Va Sarasota, Fla

TALBOT COUNTY, MARYLAND,	*	CIVIL CASE NO. 20-C-04-005095DJ
Plaintiff,	*	
Vs.	*	IN THE
DEPARTMENT OF NATURAL RESOURCES, et al.	*	
Defendants.	*	CIRCUIT COURT

* * * * * * * *

THE COMMISSIONERS OF ST. MICHAELS et al.	*	FOR
Counter-Plaintiffs,	*	
Vs.	*	TALBOT COUNTY
	*	
TALBOT COUNTY, MARYLAND,		
Counter-Defendant.	*	STATE OF MARYLAND

* * * * * * * * * * * * * * *

OPINION AND FINAL ORDER
GRANTING SUMMARY JUDGMENT
AND DECLARATORY RELIEF

OPINION

FINAL ORDER GRANTING SUMMARY JUDGMENT AND DECLARATORY RELIEF

NOW THEREFORE, based on the findings and reasoning set forth in the foregoing Opinion, and having found that there is no genuine dispute of any material fact relating to the issues which decided by this Order, it is, this _____ day of _____, 20___, by the Circuit Court for Talbot County, Maryland:

ORDERED, that summary judgment is hereby GRANTED to the Defendant, the Maryland Department Of Natural Resources, to the extent of the issues raised therein and hereby decided; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the disapproval of Talbot County Bill No. 933 ("Bill 933") by the Maryland Critical Area Commission For The Chesapeake And Atlantic Coastal Bays (the "Critical Area Commission") is hereby AFFIRMED; and

IT IS FURTHER ORDERED, that summary judgment is hereby GRANTED to the Defendants and Counter-Plaintiffs, The Commissioners Of St. Michaels ("St. Michaels") and the Town Of Oxford ("Oxford") (St. Michaels and Oxford being herein referred to collectively as the "Towns"), to the extent of the issues raised therein and hereby decided; and

IT IS FURTHER ORDERED, that summary judgment is hereby DENIED to the Plaintiff and Counter-Defendant, Talbot County, to the extent of the issues raised therein and hereby decided; and

IT IS FURTHER ORDERED, DECLARED and DECREED as follows; as the full and final response by this Court to the declaratory relief requested by the Counterclaims For Declaratory Judgment filed in this case by the Towns; pursuant to the Maryland Uniform Declaratory Judgments Act; having found that each issue herein decided and declared constitutes a justiciable issue or controversy related to the interpretation of Bill 933, the interpretation of the laws and regulations

relating thereto, and/or the rights of the parties relating thereto, each of which is within the jurisdiction of this Court pursuant to Maryland Code, Courts Art., § 3-406:

1. Bill 933 is invalid because the Talbot County (the ""County") made no good faith effort to coordinate with the affected Towns in developing and enacting Bill 933; and

2. Bill 933 is invalid because it does not establish a process to accommodate the growth needs of the affected Towns; and

3. Bill 933 is invalid because it does not establish a process that is in good faith reasonably calculated to accommodate the growth needs of the affected Towns, at least taking into consideration the needs of the County and all affected Towns for growth allocation, State policy relating to growth, and the total amount of unused growth allocation remaining; and

4. The County Local Critical Area Program must include a provision that establishes a process that is in good faith reasonably calculated to accommodate the growth needs of the affected Towns, at least taking into consideration the needs of the County and all affected Towns for growth allocation, State policy relating to growth, and the total amount of unused growth allocation remaining; and

5. Any provision in the County Local Critical Area Program that establishes a process to accommodate the growth needs of the affected Towns which consists of the review of facts related to individual applications for growth allocation for the purpose of determining whether, on their merits, such applications should be granted, would create a relationship between the County and a Town that is not contemplated by the State Critical Area laws and regulations, and would either replace or reduce the role of the Town and their local Critical Area programs; and

6. Any provision in the County Local Critical Area Program that establishes a process to accommodate the growth needs of the Towns that is inconsistent with or contrary to the provisions of Maryland Code, Article 66B, would be invalid and repealed; and

7. Any decision or action by the County, pursuant to a provision in the County Local Critical Area Program to establish a process to accommodate the growth needs of the Towns, if inconsistent with or contrary to the provisions of Maryland Code, Article 66B, would be invalid.

8. Any amendment to the County Local Critical Area Program that contains language that purports to establish a process to accommodate the growth needs of the Towns that either exercises planning, zoning or subdivision powers over land located within the Towns, or frustrates the exercise by the Towns of planning, zoning or subdivision powers over land located within the Towns, shall be invalid.

9. The process to accommodate the growth needs of the affected Towns shall not dictate or attempt to control growth policies and needs of the respective Towns, and shall not reward or penalize the respective Towns based on their growth policies and needs.

AND IT IS FURTHER ORDERED, ADJUDGED and DECREED, that this Opinion And Final Order Granting Summary Judgments And Declaratory Relief shall constitute the final appealable order, resolving all issues, in the above-captioned case.

_____

John W. Sause, Jr., Judge,
Circuit Court for Talbot County

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL
DONNA HILL STATON
DEPUTY ATTORNEY GENERAL
MAUREEN M. DOVE
DEPUTY ATTORNEY GENERAL

STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

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December 13, 2005

Via Overnight Delivery

Clerk of the Court
Circuit Court for Talbot County
11 N. Washington Street
P.O. Box 723
Easton, Maryland 21601

Re: Talbot County, Maryland v. Department of Natural Resources
Case No.: 2-C-04-005095 DJ

Dear Clerk:

Enclosed for filing please find defendant Department of Natural Resources' Memorandum in Opposition to Talbot County's Motion for Summary Judgment to be filed in the above-referenced matter. Thank you for your assistance.

Very truly yours,

Marianne D. Mason
Assistant Attorney General

Enclosures

cc: Victoria M. Shearer, Esq.
Michael L. Pullen, Esq.
H. Michael Hickson, Esq.
David R. Thompson, Esq.
Richard A. DeTar, Esq.

IN THE CIRCUIT COURT OF MARYLAND
FOR TALBOT COUNTY

TALBOT COUNTY, MARYLAND,	*	
Plaintiff,	*	
v.	*	Case No.: 2-C-04-005095 DJ
DEPARTMENT OF NATURAL RESOURCES, *et al.*	*	
Defendants.	*	

* * * * * * * * * * * * * * *

DEPARTMENT OF NATURAL RESOURCES'
MEMORANDUM IN OPPOSITION TO TALBOT COUNTY'S
MOTION FOR SUMMARY JUDGMENT

Defendant Department of Natural Resources ("DNR") and its Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission" or "Commission"), by its attorneys, J. Joseph Curran, Jr., Attorney General, and Joseph P. Gill, Marianne D. Mason, and Paul J. Cucuzzella, Assistant Attorneys General, file this Memorandum in opposition to Talbot County's Motion for Summary Judgment ("County Motion").

INTRODUCTION

Talbot County does not dispute (although at times it does misstate) the material facts in this matter, which are set forth succinctly in the Critical Area Commission's Memorandum in Support of Motion for Summary Judgment ("Commission Memorandum") at 1-10. The Commission will not repeat those facts here but, as necessary, will discuss them in the context of its opposition to the County's Motion. In its Motion, the County argues that the Commission exceeded its statutory authority, and acted arbitrarily and capriciously, in denying approval of its proposed Critical Area

Amendment (Bill 933).[1] As the County misunderstands the standard of review and the relevant law, and how that law is applied to the Commission's action, its Motion should be denied and the Commission's Motion for Summary Judgment should be granted.

ARGUMENT

Talbot County contends that the standard of review of the Critical Area Commission's denial of its proposed program amendment is the same standard applicable to review of administrative agency adjudicatory decisions under the Maryland Administrative Procedure Act (APA). County Motion at 37. Thus, the County asserts, the Commission's action may not be upheld unless it is sustainable "on the agency's findings and for the reasons stated by the agency." *Id.* at 37, 49-50. The County is mistaken.

A. The Standard of Review

As discussed in the Commission Memorandum at 10-11, the Critical Area Commission acts in a "quasi-legislative" and not a judicial capacity when it reviews local critical area programs and program amendments. *North v. Kent Island Limited Partnership,* 106 Md. App. 92, 103 (1995). "The power of the Commission is to adopt regulations and criteria as well as conduct hearings in connection with 'policies, proposed programs, and proposed regulations or amendments to regulations'." *Id, citing* NR § 8-1806. While the Commission is required to hold a public hearing when it reviews a proposed program amendment under NR § 8-1809, the hearing is not a "contested case hearing" for purposes of the Maryland APA. *Id.* Indeed, as stated in *North*, "there is nothing

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[1] The County also argues, without brio, that the Commission acted untimely. County Motion at 38-39. The argument has no merit. *See* Affidavit of Lisa Hoerger (Exhibit A) (explaining that Talbot County was informed prior to expiration of the 10-business day period for the Commission to accept a proposed program change for review that information in addition to that which was contained in Talbot County's initial submission of Bill 933 was needed). *Accord* January 15, 2004 correspondence from Ren Serey, Executive Director of the Critical Area Commission to George Kinney, Talbot County Office of Planning and Zoning (Exhibit B). *See also*, Commission Memorandum at 13-14 (Commission acted timely; in any event, no legal consequence for failure to process application within 10 working days).

in [NR] § 8-1809 that requires a contested case hearing." *Id.*

Thus, the Commission's action in its denial of Bill 933 is a legislative, not a judicial action. The law is clear that review of such an action is narrow. "Where an administrative agency is acting in a manner which may be considered legislative in nature (quasi-legislative), the judiciary's scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries." *County Council of Prince George's County v. Offen,* 334 Md. 499, 507 (1994), *quoting Dep't of Natural Resources v. Linchester Sand and Gravel Corp.,* 274 Md. 211, 221-24 (1975); *cf. Givner v. Commissioner of Health*, 207 Md. 184, 192 (1955); *Homes Oil Co., Inc. v. Maryland Department of the Environment*, 135 Md. App. 442, 466 (2000) ("only adjudicatory decisions of agencies . . . are subject to full judicial review, not legislative decisions"). Accordingly, this Court may uphold the Commission's action for any reason within the scope of the Commission's legal authority.

B. The Commission's Action

Contrary to the County's contentions, the Critical Area Commission acted well within its legal authority in rejecting Bill 933 as a program amendment while offering to assist the County in developing new growth allocation procedures. Pursuant to NR §8-1809(j), a program amendment must comply with the "criteria adopted by the Commission under [NR] §8-1808," including COMAR 27.01.02.06A(2), which states: "When planning future expansion of intensely developed and limited development areas, counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities." Bill 933 fails to meet this criteria. The record is clear that Bill 933 was not adopted in coordination with the Towns of St. Michaels, Oxford and Easton. In its Motion, Talbot County *argues* that it did coordinate with the Towns because Bill 933 "merely adopted the same procedure utilized in Bill 762." County Motion

at 34. Not only was Bill 762 enacted four years earlier, but it concerned a different topic – "supplemental growth allocation." Supplemental growth allocation is growth allocation *in addition to* the growth already reserved for the Towns. Further while it is clear that Bill 762 was drafted "in coordination with affected municipalities," Second Amended Complaint, ¶37, it is equally clear that no such coordination or consultation occurred with the Towns on Bill 933.

Nor does Bill 933, by its terms, make any provision to accommodate the future growth of the Talbot Towns. While the County again *argues* that approval of future Town growth was to occur through Bill 762, County Motion at 21, there is no mention of Bill 762 in Bill 933. Further, Bill 762, as discussed, concerned "supplemental" growth allocation. Supplemental growth allocation presumes the existence of reserved Town growth – *growth which Bill 933 eliminated.* As Commission Member Dave Blazer noted, while the process in Bill 762 "may be a desirable growth allocation process, . . . as presently drafted, Bill 933 really doesn't harmonize or come in line with the supplemental growth allocation process of the County Code." County Memorandum at 35.[2] The County twists Mr. Blazer's words in contending that the Commission recognized Bill 933 as a "joint cooperative review process." County Motion at 45-46.

The County's chief argument is that the Commission rejected Bill 933 based upon " factors other than the statutory criteria." County Motion at 41-42. The County misses the boat. The Critical Area Law is established "on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform

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[2] Nor did counsel for the Commission "concede" that the joint review process "implemented by Bill 933 was appropriate," as the County contends. County Motion at 35. Counsel stated that the process in *Bill 762* was "appropriate" under state law, "but the actual wording of the bill [933] is what the panel had to look at. . . ." *Id.* (emphasis added).

manner subject to State criteria and oversight." NR §§8-1801(b)(2). As the Commission Panel and Commission recognized, Bill 933, if approved, would have created inconsistencies among approved County and Town Critical Area programs by eliminating growth allocation reserved for and by the Towns,[3] and by blatantly stopping projects previously approved by St. Michaels[4] and the Commission. The best that Talbot County can offer to rebut the fact that Bill 933 would have undermined projects approved by the Towns and the Commission is weakly, and wrongly, to invoke a severability clause.[5]

The Critical Area Commission applies the standards and criteria in light of its "oversight responsibility" to assure that all local jurisdictions act "in a consistent and uniform manner subject to State criteria and oversight." *North,* 106 Md. App. at 103-04 (1995) (*quoting* NR §8-1801(b)(2)); *id.* at 106 ("Commission was designed to be an oversight committee"). S*ee also Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md. App. 684, 686-87 (2002) (Critical Area Commission performs oversight of local Critical Area programs); *Bellanca v. County Commissioners of Kent County*, 86 Md. App. 219, 222 (1991) (same). The Commission's rejection of Bill 933 on the basis of the program inconsistencies and impact on prior Town and Commission

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[3] St. Michaels' Critical Area program is a good example. It states, "The Growth Allocation Process is intended to insure that the Town's limited growth allocation, as determined in the Talbot County Local Chesapeake Bay Program . . . is managed to insure equity in the award of growth." Commission Memorandum, Exhibit 9, p. III-30.

[4] As this record shows, not long before the County's enactment of Bill 933, the Town of St. Michaels awarded 21 acres of growth allocation for the Strausberg subdivision project, and awarded 70.29 acres of growth allocation for the Miles Point III project. If the Critical Area Commission had approved Bill 933 as a Talbot County Program Amendment, that action would have sanctioned the retroactive withdrawal of these approved growth allocations.

[5] The County now asserts that the Commission should have not have considered the impact of Bill 933 on its prior approval of the Strausberg project in October 2003 because Bill 933 has a provision stating that if a "Court" holds any portion of the ordinance invalid, the remaining provisions are still effective. County Motion at 56-57. The Commission is not a Court.

actions fits squarely within the statutory criteria and its oversight responsibilities in reviewing program amendments for a Statewide resource protection program.[6]

CONCLUSION

Accordingly, DNR respectfully requests this Court to deny Talbot County's motion for summary judgment and to grant the Critical Area Commission's Motion for Summary Judgment.

Respectfully Submitted,
J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

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Assistant Attorneys General
Maryland Department of Natural Resources
580 Taylor Avenue, C-4
Annapolis, Maryland 21401
(410) 260-8350
Attorney for Defendant
Department of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2005, a copy of the foregoing

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[6] Contrary to its contention, County Motion at 56-57, the County does not have the unilateral legal authority to enact a local ordinance ostensibly to "protect the public health, safety and welfare" if that ordinance affects land or water in the State Critical Area. Any such local ordinance requires approval from the Critical Area Commission as part of the County's Critical Area Program before the ordinance becomes effective. Moreover, if the Critical Area Commission denies approval to a proposed County ordinance , then that ordinance is, by law, not effective in the County's Critical Area. *Cf. Kent Island Defense League, LLC v. Queen Anne's County Bd. of Elections,* 145 Md. App. 684, 689 ("legislative acts by a local jurisdiction that conflict with a public general law or that deal with an area in which the General Assembly has occupied the entire field or which deal with an area that the General Assembly has expressly reserved to itself, are invalid"), cert. denied, 371 Md. 615 (2002).

Department Of Natural Resources' Memorandum in Support of Motion for Summary Judgment was sent via first class mail, postage prepaid, to:

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100 Bay Street
Easton, Maryland 21601

Marianne D. Mason

IN THE CIRCUIT COURT OF MARYLAND
FOR TALBOT COUNTY

TALBOT COUNTY, MARYLAND,	*	
Plaintiff,	*	
v.	*	Case No.: 2-C-04-005095 DJ
DEPARTMENT OF NATURAL RESOURCES, *et al.*	*	
Defendants.	*	

* * * * * * * * * * * * * * *

AFFIDAVIT OF LISA HOERGER

I, Lisa Hoerger, am over the age of eighteen (18) and am competent to testify to the matters set forth herein.

1. I am currently employed as a Natural Resources Planner with the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission"), a position that I have held for at least 10 years.

2. On December 31, 2003, the Critical Area Commission received a correspondence from the Talbot County Office of Planning & Zoning concerning Talbot County Bill 933. The correspondence, in substance, inquired as to when the Critical Area Commission might hold a public hearing on Bill 933 and when the Commission might "discuss" Bill 933.

3. Some time after receiving the December 31, 2004 correspondence, but before January 15, 2004, I received a phone call from May Kay Verdery with the Talbot County Office of Planning & Zoning. Ms. Verdery inquired as to when the Critical Area Commission might considered Bill

EXHIBIT
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933. During the conversation, and upon reviewing the correspondence received from Talbot County on December 31, 2003, I informed Ms. Verdery that additional information was needed from Talbot County before the Critical Area Commission could accept Bill 933 for processing. The additional information that I requested during this telephone conversation was ultimately received by the Critical Area Commission by correspondence from Talbot County dated January 19, 2004.

I declare under penalties of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief.

Lisa Hoerger

Lisa Hoerger

State of Maryland)
) ss
County of Anne Arundel)

Sworn and subscribed to before me, this 12th day of December, 2005.

K. Christine Ward

Notary Public

My commission expires: 3-1-06

Robert L. Ehrlich, Jr.
Governor

Michael S. Steele
Lt. Governor

Martin G. Madden
Chairman

Ren Serey
Executive Director

STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

January 15, 2004

Mr. George Kinney, AICP
Talbot County Office of Planning and Zoning
Court House
11 N. Washington Street
Easton, Maryland 21601

RE: Reallocation of Reserved Acres of Growth Allocation
Talbot County Bill 933

Dear Mr. Kinney:

Thank you for providing information on the referenced change to the Talbot County Critical Area Program. As we discussed, it is my understanding that the County will be submitting this Bill and several others resulting from the comprehensive review of the County's Critical Area Program with a formal request for approval by the Commission in the next few weeks. Please include the dates that the County Council approved the Bills in the request. It is anticipated that receiving all of the Bills together will allow the Commission to process and review the Program changes most effectively.

If you have any questions, please feel free to contact me at (410) 260-3462.

Sincerely,

Ren Serey
Executive Director

cc: Ms. Mary Kay Verdery

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DNR - LEGAL DIVISION

TALBOT COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
DEPARTMENT OF NATURAL RESOURCES CRITICAL AREA COMMISSION, et al.	*	TALBOT COUNTY, MARYLAND
Defendants	*	Case No. 20-C-04-005095DJ
* * * * * * *		
THE TOWN OF OXFORD, et al.	*	
Counter-Plaintiffs.	*	
v.	*	
TALBOT COUNTY, MARYLAND,	*	
Counter-Defendant		
* * * * * * * * * * * * *		

TOWN OF OXFORD'S OPPOSITION TO TALBOT COUNTY'S MOTION FOR SUMMARY JUDGMENT

The Town of Oxford ("Oxford"), Defendant/Counter-Plaintiff, by its attorneys, David R. Thompson, Brynja M. Booth and Cowdrey, Thompson & Karsten, files this Response to Talbot County's Motion for Summary Judgment, stating the following in support thereof.

I. PROCEDURAL STATUS

Talbot County (sometimes referred to herein as the "County" or "Talbot County") commenced this action with a three count Complaint against the Department of Natural Resources Critical Area Commission (sometimes hereinafter referred to as the "Critical Area Commission" or "CAC") seeking a declaratory judgment (Count I), mandamus (Count II), and an "administrative appeal" (Count III). Having failed to verify its Complaint as required in a mandamus action, Talbot County filed an Amended Complaint to which it appended an affidavit

of the County Attorney attesting to the truthfulness of the allegations therein, and incorporated by reference its original complaint.

The Critical Area Commission filed a Motion to Dismiss, resulting in the dismissal of the administrative appeal count (Count III). The Court granted Motions to Intervene by the Town of Oxford and the Town of St. Michaels (sometimes hereinafter referred to as the "Towns"). Both Towns filed Answers to the Complaint, and each Town filed its own Counterclaim against the County. The County answered both Counterclaims, and filed a Second Amended Complaint, recognizing the status of the Towns as Counter-Plaintiffs, and naming each of them as Intervenor-Defendants. The Towns answered the County's Second Amended Complaint. The claims to be resolved in this case are set forth in the Towns' Counterclaims and the County's Second Amended Complaint.

In its Motion for Summary Judgment and supporting Memorandum, Talbot County narrowly focuses upon the actions of the Critical Area Commission. Indeed, a review of the County's proposed order submitted with its Motion confirms that the County's Motion for Summary Judgment seeks only to "reverse and remand" the Critical Area Commission's determination not to approve Bill 933 as a local program amendment. Talbot County has not moved for summary judgment upon the issues raised by the Town of Oxford, nor has Talbot County addressed in its Motion for Summary Judgment the matters set forth in the Towns' Counterclaims, except as related to the Critical Area Commission's decision.

There is no pending motion for summary judgment against the Town of Oxford (or the Town of St. Michaels for that matter). Accordingly, there is no basis for the Court to enter summary judgment in favor of Talbot County with respect to the counterclaims of the Towns. In its Memorandum in support of its Motion for Summary Judgment, the County provides no

evidence with respect to the Town of Oxford. While the County has appended 26 exhibits to its Motion, none of the exhibits references the Town of Oxford or its claims in this case, except for a transmittal letter relating to Bill 762, enacted in April, 2000, in a different context than Bill 933, and a transcript of a Critical Area Commission public hearing on March 24, 2004, in which two Oxford representatives opposed Critical Area Commission approval of Bill 933.

The County's only summary judgment arguments that address the Towns' positions in this case are contained in pages 50-70 of the County's supporting Memorandum. The County's arguments with respect to the Town of Oxford are not supported by evidentiary facts, and do not address the counterclaims of the Towns. As a matter of procedure and as a matter of law, there is not a sufficient basis to grant summary judgment against the Town of Oxford in favor of Talbot County. As to the Town of Oxford's claims, the County's motion is most accurately characterized as a motion for partial summary judgment, addressing only the effectiveness of Bill 933 as it relates to the Critical Area Commission's actions.

In addition to the arguments set forth herein, the Town of Oxford adopts by reference and relies upon the arguments and exhibits presented by the Department of Natural Resources/Critical Area Commission, the Commissioners of St. Michaels, and Miles Point Property, LLC and The Midland Companies, Inc., in support of their Motions for Summary Judgment, and in Response to the County's Motion for Summary judgment.

II. LEGAL STANDARD

In order to prevail on its Motion for Summary Judgment, Talbot County must establish that there are no material facts in dispute, and that it is entitled to summary judgment as a matter of law. Md. Rule 2-501(a). As a plaintiff, Talbot County has the burden to establish the factual predicate for its legal arguments. The pleadings filed by the County fail to establish the facts

necessary to support summary judgment for the County. Moreover, the County has either failed to provide the Court with applicable law, or has missed the mark in its legal analysis, or both.

III. STANDARD OF REVIEW OF AGENCY'S DECISION

In its motion for summary judgment, the County incorrectly relies upon the standard of judicial review applicable to review of agency decisions pursuant to the Administrative Procedure Act. See County's memorandum, p. 37. The County's reliance upon these cases is misplaced because the CAC was acting in a quasi-legislative capacity, as opposed to a quasi-judicial capacity.

The CAC's approval or denial of a program amendment to a local jurisdiction's critical area program is a legislative function. See North v. Kent Island Ltd. Partnership, 106 Md. App. 92 (1995). When courts review an action that is legislative in nature, the scope of review is limited to whether the agency was acting within legal boundaries. Department of Natural Resources v. Linchester Sand and Gravel Corporation, 274 Md. 211 (1975). The Court of Appeals has described the role of the courts with regard to review of agency action that is legislative in nature as follows:

> This power of review, whether authorized by statute, or assumed inherently, cannot be a substitution of the court's judgment for that of the agency. **In those instances where an administrative agency is acting in a manner which may be considered legislative in nature (quasi-legislative), the judiciary's scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries**...; furthermore, when an agency is acting in a fact-finding capacity (quasi-judicial) the courts review the appealed conclusions by determining whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner.

Id. at 224 (citations omitted); see also Gisriel v. Ocean City Elections Board, 345 Md. 477, 490, note 12 ("Legislative or quasi-legislative decisions of local legislative bodies or administrative

agencies, are, of course, not subject to ordinary judicial review; instead, they are subject to very narrow limited review by the courts.")

An agency must follow its own rules and regulations. Anastasi v. Montgomery County, 123 Md. App. 472, 491 (1998). The Court of Appeals has repeatedly held that "a great deal of deference is owed to an administrative agency's interpretation of its own regulations." MTA v. King, 369 Md. 274, 288 (2002). In Ideal Federal v. Murphy, the Court of Appeals, citing the United States Supreme Court, described the deference owed to an agency's interpretation of its own statutes as follows:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration....When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

Ideal Federal v. Murphy, 339 Md. 446, 462 (1995) (citing Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965).

A. The CAC Acted Within Its Legal Boundaries in Denying Approval of Bill 933.

In its motion, the County contends that the CAC exceeded its statutory authority in rejecting Bill 933 as a critical area program amendment. See County's motion, pp. 39-45. To support its position, the County contends that the CAC must narrowly interpret and apply the standards set forth in § 8-1808(b)(1) through (3), and the COMAR regulations in a vacuum, and that the CAC may not consider other provisions of the State Critical Area Law, including the "purposes" of the Critical Area Statute, in approving or disapproving a program amendment. See page 44 of the County's memorandum. The County's rigid interpretation ignores the fundamental cannons of statutory construction, which the Court of Appeals recently summarized as follows:

> The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature. Statutory Construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology. In construing the plain language, a court may neither add nor delete language so as to reflect an intent not evident in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or exceed its application. Statutory text should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory. **The plain language of a provision is not interpreted in isolation. Rather, we analyze the statutory scheme as a whole and attempt to harmonize provisions dealing with the same subject so that each may be given effect.**

Kushell v. Department of Natural Resources, 385 Md. 563, 576-577 (2005) (emphasis added) (citation omitted).

The Town of Oxford submits that as a matter of law, the statutory goals and criteria for approving a program or program amendment must be read in conjunction with the underlying, express statutory policy and purposes of the Critical Area Law. In Section 8-1808.1, entitled "Declaration of Public Policy", the Legislature set forth the express purposes of Critical Area Program which include the following:

> (2) To implement the Resource Protection Program on a cooperative basis between the state and affected local governments, **with local governments establishing and implementing their programs in a consistent and uniform manner subject to State Criteria and oversight.**

(emphasis added). To suggest that the CAC was not permitted to consider the express purposes behind the Critical Area Laws in denying approval of Bill 933 is inconsistent with established law. See Harvey v. Marshall, 389 Md. 243, footnote 31 (2005) (..."we recognize an agency decision may be deemed 'arbitrary or capricious' if ignores the expressly stated policy goals of the agency.") (citing Arnold Rochvarg, *Maryland Administrative Law* § 4.38 (2001, 2004 Supp.). In denying approval of Bill 933, the CAC correctly noted that:

> Accepting Bill 933 would create conflicts between the County program and several approved municipal programs. The municipal programs have their own approved growth allocation procedures premised on the growth allocation reserves provided by the County. The conflict that Bill 933 would create is contrary to the Commission's oversight responsibility to ensure that local programs are implemented in a consistent and uniform policy.

See Oxford's motion for summary judgment, Exhibit K. The CAC was legally correct, and within its legal boundaries to consider the applicable provisions of Natural Resources Article §§ 8-1809(j), 8-1808(b), and the declaration of public policy and the purposes of the Critical Area Law as set forth in Section 8-1801.

The County's tunnel vision approach is flawed because not only did the CAC consider the statutory purposes of the Critical Area Law, it also specifically looked to the COMAR regulations in denying approval of Bill 933. The COMAR regulations promulgated by the CAC specifically provide that: "Counties, **in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities.**" COMAR § 27.01.02.06A(2) (emphasis added). In rendering its decision to disapprove Bill 933 as a local program amendment, the CAC panel made specific reference to this regulation, and interpreted the definition of "coordination":

> The Panel has discussed the meaning of the COMAR provisions relation to 'coordination' between counties and affected municipalities. The Panel has acknowledged the various potential interpretations of this term. The Panel believed that the definition in Webster's Dictionary, to "harmonize a common effort" seems to be a comprehensive and reasonable definition. The Panel seemed to agree that at a minimum "coordination" involves the participation of affected parties."

See Oxford's Motion for Summary Judgment, Exhibit J, p. 5[1]. The CAC interpreted and applied its own regulations in denying approval of Bill 933, which is entitled to "great deference."

The CAC correctly interpreted its own regulations and found that there was a lack of coordination which created conflicts between Bill 933 and the approved Town programs. In interpreting its own regulations, the CAC correctly noted that coordination would have necessarily involved the participation of the affected parties, which would have included participation by the Towns. Exhibit J, p. 5. As set forth more fully *infra.*, the uncontroverted and undisputed evidence is that the County failed to engage in any policy or planning dialogue concerning proposed changes to the growth allocation process within the community. See affidavit of Sidney S. Campen, Jr., attached to Oxford's Memorandum as Exhibit "B." It is undisputed that the County failed to act in coordination with the Towns when it introduced and enacted Bill 933.

The Critical Area Commission was correct to disapprove Bill 933. Its decision was not arbitrary; rather it was consistent with the Commission's obligation to require cooperative planning between municipal and county governments and to implement the local resource protection programs "in a consistent and uniform manner", and "to establish land use policies for development...which accommodate growth...". Md. Code Ann. Natural Resources Art. §§ 8-1801(b)(2) and 8-1808(b)(3). The CAC was clearly within its legal boundaries in rejecting the proposed plan amendment, and the Commission's decision should be upheld.

[1] Unless otherwise stated, all references to exhibits herein are the exhibits to Oxford's Motion for Summary Judgment and Memorandum (sometimes hereinafter referred to as Oxford's "Motion"

B. Bill 933 Was Not Approved by Operation of Law.

The County has taken the position that Bill 933 was "approved" by operation of law because the Critical Area Commission failed to act within 90 days, and that therefore judicial consideration of the County's power to enforce Bill 933 is flawed. Oxford rejects the County's argument, and adopts and incorporates by reference the arguments made by the Department of Natural Resources.

C. The Court's Analysis of this Case is Not Limited to the "Substantial Evidence" Standard Applied to Judicial Review of "Quasi-Judicial" Decisions of Administrative Agencies.

In its Motion for Summary Judgment, Talbot County has narrowly argued to this Court that the Court may only uphold the CAC's decisions for reasons stated by the agency. See County's Memorandum in Support of Motion for Summary Judgment, pp. 37, 49-52. In support of its position, the County cites several administrative procedure cases. The County's reliance on these cases is misplaced. Oxford disagrees with this analysis because unlike all of the cases relied upon by the County, this case involves a review of an agency action while the agency was acting in a quasi-legislative capacity instead of a quasi-judicial capacity. Accordingly, Oxford contends that the CAC was not required to make "findings of fact", nor is the Court bound by any so-called findings of fact.

Moreover, unlike every case cited by the County, this case involves competing claims for declaratory judgment. The County's narrow approach ignores the fact that the Town of St. Michaels and the Town of Oxford have filed counterclaims seeking a declaratory judgment concerning the legality of Bill 933 separate and apart from the Critical Area Commission's rejection of the Bill as an amendment to the Talbot County Critical Area Program.

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or "Memorandum"). These exhibits are adopted and incorporated by reference into this

The purpose of the Declaratory Judgment Act is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Md. Code Ann. Courts and Judicial Proceedings Article, § 3-402. The declaratory judgment statute provides that it should be "liberally construed and administered." Id. The statute provides that the court has the authority to grant declaratory relief to "[a]ny person interested under a deed, will, trust, land patent, written contract, or other writing constituting a contract, **or whose rights, status, or other legal relations are affected by a statute, municipal ordinance**, administrative rule or regulation, contract, or franchise". Cts. and Jud. Proc. Article § 3-406 (emphasis added).

As set forth more fully in Oxford's Motion for Summary Judgment and supporting Memorandum, Bill 933 has a significant and detrimental impact upon the Town's independent planning and zoning powers conferred by state law, and attempts to set up a county growth allocation process that is in direct conflict with the Oxford Critical Area Program. The Town of Oxford seeks a declaration of its rights, *vis a vis* Bill 933, irrespective of the Critical Area Commission's approval or disapproval. To suggest that the Court cannot consider Oxford's claims outside of the position taken by the Critical Area Commission in disapproving Bill 933 is wholly without merit.

D. The County Has Not Demonstrated The Required Coordination or Cooperation With the Town of Oxford That is a Condition Precedent to an Amendment of the County Critical Area Plan.

In order to create a valid critical area program for Talbot County, or to amend Talbot County's Critical Area Program, Talbot County must, as a matter of law, comply with the process required by the Legislature and the CAC. That process, acknowledged by the County at page 14 of its memorandum, provides that "each jurisdiction **shall** attempt to establish

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Response.

cooperative arrangements with adjacent jurisdictions" and that "counties and municipalities...are encouraged to develop their...programs cooperatively...so that common land use objectives can be realized." COMAR 27.01.10.01 (emphasis added). Moreover, the regulations also provide that the planning process for any expansion of intense or limited development areas **shall** be coordinated with affected municipalities to "establish a process to accommodate the growth needs of the municipalities." COMAR 27.01.02.06(A)(2) (emphasis added).

As set forth more fully in the Town of Oxford and the Town of St. Michaels Motions for Summary Judgment, when the County and the Towns of St. Michaels and Oxford were developing their critical area programs, the three jurisdictions coordinated together and consulted one another, and created consistent maps establishing growth areas around the Towns. See affidavit of Anthony Redman attached to this Response as Exhibit "B". During the development of the programs of all 3 jurisdictions (Talbot County, St. Michaels and Oxford), it was understood and agreed that the plans of all three jurisdictions would include growth areas adjacent to the Towns where growth allocation conversions were likely to occur over the course of time. See Exhibit B, ¶ 5, attached hereto. The County and the Towns worked together, and the areas allocated for town development were mapped and approved by agreement with the Talbot County Planning Commission and the representatives of the Towns of Oxford and St. Michaels, after a series of meetings attended by County and Town representatives. Exhibit B, ¶ 6.

In contrast to the creation of the original maps and original critical area programs, the County totally ignored the above requirements of Maryland law in its haste to enact Bill 933. As the Commissioners of St. Michaels have pointed out, Bill 933 was not a legitimate planning and zoning process. It was a hastily contrived effort to try to defeat a specific project in St. Michaels

that was about to receive growth allocation approval by the Town's planning authorities. Significantly, neither in its 71 page Memorandum, nor in its 26 exhibits supporting its Motion for Summary Judgment, does the County give any example of any consultation, coordination, joint planning, or any other consideration of municipal issues related to Bill 933. The reason for the omission of any reference is that the County failed to consult or coordinate with the Towns in connection with the formulation or enactment of Bill 933. Having failed and refused to participate in the joint planning process required by State law, Bill 933 cannot be viewed as a valid amendment to the County's Critical Area Program.

It is interesting to note that while the County and its representatives made no effort to engage in any critical area planning process with the Towns, commencing on October 29, 2003, the County began a dialogue with the Critical Area Commission staff, excluding the Towns.[2] On October 29, 2003, the County Manager informed the executive director of the Critical Area Commission that the planned Bill 933 would be introduced on November 18th or November 25th. See telephone notes from the Critical Area staff attached as Exhibit A to this Response. The Towns were never notified that the County Council was considering these issues. Significantly, the County Council never even consulted its own Planning Commission concerning the matter. See Exhibit F to Oxford's Memorandum. When the proposed ordinance was finally presented to the Talbot County Planning Commission, the Talbot County Planning Commission

[2] The Town of Oxford discovered the County's efforts to persuade the Critical Area Commission after it served a public information act request on the Critical Area Commission. Since the County stonewalled the Towns, and failed and refused to consult with the Towns on Bill 933, the the Town of Oxford's only means of obtaining any information was through public information act requests. Exhibit "A" includes notes taken by CAC staff during meetings and telephone calls with the County Manager, County Attorney, and members of the County Council, which were obtained by the Town of Oxford pursuant to public information act requests served on the CAC.

recommended against the enactment of Bill 933, and pointed out that there was already a review process provided for in the existing law. See Exhibit F to Oxford's memorandum.

While the County was ignoring the Towns and their interest in critical area program amendments affecting them, the County was engaged in secretive efforts with the Critical Area Commission staff, attempting to lobby them into agreeing to the amendments. See Exhibit A attached hereto. According to records obtained from the Critical Area Commission, County Councilman Peter Carroll lobbied the Executive Director of the Critical Area Commission with several telephone calls, and a meeting on November 25, 2003. Exhibit A. At that meeting, in an effort to convince the Commission staff that there had been coordination with the Towns, Mr. Carroll advised the Commission staff that "Oxford does not want to grow." Exhibit A. Of course, Mr. Carroll had not met with Oxford's Planning Commission, nor had he met with the Oxford Commissioners, nor was he authorized to speak for the Town of Oxford. The County and its representatives had no communications whatsoever with the Town of Oxford concerning Bill 933 and the critical area plans of the two jurisdictions. The County's attempts to lobby the Critical Area Commission staff, while excluding the Towns from any dialogue outside the formal ordinance hearing process, continued through the enactment of Bill 933 on December 23, 2003. Exhibit A.

During the time that the County was attempting to lobby the Critical Area Commission staff, the County failed to advise the Towns that it was even considering the amendment of mapped town growth areas. See affidavit of Sidney S. Campen, Jr., attached to Oxford's Memorandum as Exhibit B. The County failed to discuss the amendments proposed in the Bill 933 with the Towns, it failed to coordinate the substance of the proposed Bill with its own

Planning Commission, and failed to even advise the Critical Area Commission that the Talbot County Planning Commission rejected the Bill.

The County's Motion for Summary Judgment must be denied, among other reasons, because the County failed to follow the law, and failed to coordinate with the Towns, failed to participate in any planning with the Towns, and failed to consider Town growth needs.

D. Talbot County Bill 762 Is Wholly Inapplicable to the Resolution of this Matter.

In an effort to shift the Court's attention from the County's utter lack of consultation or coordination with the Towns in connection with Bill 933, Talbot County attempts to shift the focus to a red herring, Bill 762, and to make Bill 762 a focus of the controversy.

The status and legitimacy of Bill 762 is not at issue in this case. Bill 762 was enacted by the County Council on April 25, 2000, in order to permit the Town of Easton to grow into certain critical area in locations which had not been planned or mapped by the County for municipal growth. Bill 762 was introduced by the County Council to establish a process for creating additional growth allocation acreage for use by the Town of Easton because (unlike the Towns of St. Michaels and Oxford), Easton had used all of the growth allocation acreage that had been cooperatively allocated in 1989. Rather than restricting the Town of Easton from establishing town-scale density in resource conservation areas, Bill 762 was devised and enacted to permit the Town of Easton, subject to County consent, to develop new growth areas in the County. At the time of the creation and enactment of Bill 762, Easton was considering the enactment of an annexation resolution for a project known as Easton Village. Without a commitment from the County to permit the rezoning of the property for a density greater than that contemplated in the County Comprehensive Plan, the development would not have gone forward. The County enacted Bill 762, then used its asserted growth allocation control in the joint hearing process to

exact One Million Dollars ($1,000,000) from the developer as a condition to county approval of the change in density. See Exhibit 34 to St. Michaels Motion for Summary Judgment.

The Town of Oxford never challenged Bill 762 because the Town had ample County/Town agreed development areas to accommodate municipal growth in locations consistent with the Town and County comprehensive plans. Bill 762 was only intended to apply to the award of "supplemental" growth allocation, as set forth in the title of the Bill – "A BILL TO ESTABLISH SUPPLEMENTAL GROWTH ALLOCATION...". See Exhibit 3 to the County's motion. It was not until November, 2003, with the introduction of Bill 933, that the County asserted the right to control all Town rezonings utilizing a critical area growth allocation process.

As the County's motion suggests with its Exhibit 5, at least with respect to Bill 762, the Town of Oxford received a copy of the Bill and formal notice that it was under consideration. Under the then extant critical area plans of both Oxford and Talbot County, there were no reasonable scenarios by which Oxford would ever need or seek supplemental growth allocation. Because of its limited impact, Bill 762 was not considered an amendment to the County program. Rather, it was considered by the Critical Area Commission as a mere "refinement." Moreover, Bill 762 did not give the County any authority to limit the growth allocation conversion of RCAs or LDAs by the Town for property within the Town. The joint review process for supplemental growth allocation set forth in Bill 762 did not apply where a municipality such as Oxford reclassified or rezoned property which had been annexed to the Town for at least 5 years. In that situation, (before the County's attempt to enact Bill 933), both the Talbot County Critical Area Program and the Oxford Critical Area Program recognized that process as an exclusively municipal process. See Exhibit A to Oxford's Motion for Summary

Judgment (Talbot County Code Section 190-109D(15), and Exhibit C to Oxford's Motion (Oxford Zoning Ordinance Section 34.05).

In the context of its failure to engage in any pre-legislation planning process with the Town of Oxford with respect to Bill 933, the County cannot obtain summary judgment by suggesting that three years earlier, in a totally different context, it enacted Bill 762, which only set forth a process for growth allocation where a town has used all of its agreed growth allocation acreage. Accordingly, the County's Motion for Summary Judgment should be denied.

E. As a Matter of Law, Bill 933 Does Not Establish a Process to Accommodate the Growth Needs of the Towns.

As set forth above, and in Oxford's Motion for Summary Judgment, the Town's position in this case is broader than mere support for the Critical Area Commission's rejection of Bill 933. The Town of Oxford contends that Bill 933 is *ultra vires*, regardless of the decision of the Critical Area Commission, because of the County's failure to engage in or participate in a process that would recognize and accommodate towns' rights to growth within the critical area adjacent to their boundaries.

The Critical Area Commission was correct to perceive that the County had failed to participate in the planning process contemplated by the law. The Commission's determination that Bill 933 was inconsistent with the approved plans of other local jurisdictions was based upon the clear information provided at the panel hearing by numerous witnesses. However, even if the Critical Area Commission had approved Bill 933, the Town would still be entitled to challenge Bill 933 because of the County's failure to plan, or to provide for, or make reasonable accommodations for the Towns' growth needs. Analysis of Bill 933 makes clear that the County has set itself up as the sole and final decision maker concerning Oxford's conversion of RCA or LDA lands within the Town to a more intense development category. That assertion of planning

control by the County within the Town of Oxford is invalid, not only for the reasons set forth above, but also for the reasons set forth in Oxford's motion for summary judgment, and supporting memorandum, which is incorporated herein by reference.

Contrary to the County's argument, Bill 933 does not establish a process which accommodates the Town's growth needs. In fact, Bill 933 ignores the Town's exclusive planning and zoning jurisdiction within town boundaries. Bill 933 attempts to provide the County with veto authority over an Oxford growth allocation decision applied to land entirely within the zoning and planning jurisdiction of the Town. Applying the County's "joint review" process for supplemental growth allocations to reclassifications of lands solely within the Town of Oxford, has the effect of setting up Talbot County with a veto authority over reclassifications within the Town. Under the County's Bill 762 "joint review" process, in the event of a disagreement between the Town and County over lands located exclusively within the Town, the request would fail. The Maryland Department of Planning noted this flaw in the process at the panel hearing. Larry Duket, a representative of the MDP noted that "933, by striking reserve amounts of growth allocation to each town, places the County as the final decision maker for all municipal requests for growth allocation." See Exhibit H, p. 99 to Oxford's memorandum.[3]

[3] While in its motion, the County touts the success of the Easton/County "joint approval" process for the Elm Street project, others may view the "joint approval process" as inappropriate leverage for the County. The County has set up a process where it has the authority, in essence, to "sell" growth allocation to the highest bidder. The Easton growth allocation came at a price tag of One Million Dollars, payable to Talbot County, for county road "improvements" which were completely unrelated to the development project (which is located off of a state roadway). As noted by the President of the Easton Town Council, "It is important to bear in mind that this 'success' [of the County/Town "joint" growth allocation approval] occurred because, and only because, the developer was willing to agree to a substantial monetary exaction in order to gain approval of project. The fact that a particular developer is unusually compliant does not demonstrate the efficacy of the joint review process." See Letter from John Ford to the CAC, attached to St. Michaels' Motion for Summary Judgment as Exhibit 34.

The following examples are illustrative. Assume that the Town of Oxford proposes to convert a portion of its existing RCA to LDA to accommodate residential density at more than one dwelling unit per twenty acres. Or assume the Town wishes to reclassify an existing LDA parcel or parcels to IDA, to accommodate maritime commercial development, or to accommodate an expansion of the Town's wastewater treatment system. Under the Oxford Zoning Ordinance, the Town would simply look to the standards of the Town's Growth Allocation District, which is part of the Town's Critical Area Program, approved by the Critical Area Commission, and proceed accordingly. Under Bill 933, however, read together with Bill 762, there would be a requirement that a Town applicant apply to the Town, and comply with county zoning ordinance provisions, including county design standards, which have absolutely no legal effect with the Town. See Bill 762, attached to Talbot County's Motion for Summary Judgment as Exhibit 3, lines 40-46. Reading the two bills together, the County Council is empowered to evaluate the municipal request, involving property within municipal jurisdiction, against the county code, not the municipal code. If the County Council rejects the application, under the County's theory that it "owns" growth allocation, no "growth allocation" would be "transferred" to the municipal corporation, and under the County's approach, no RCA or LDA conversion could take place within the Town, notwithstanding the fact that the Towns have independent growth allocation processes, subject only to the Critical Area Commission review. The County has attempted to create the ability to veto a town planning and zoning action, applicable within the Town.

Simply put, Bill 933 does not accommodate town growth, or town growth allocation processes. It attempts to establish a process in which the county government can veto a project within a town by preventing conversion between critical area land use categories in the town.

That is inconsistent with Maryland law, and is therefore *ultra vires*. Bill 933 is inconsistent with the approved critical area programs of Talbot County's municipalities, and therefore violates the criteria required to be considered by the Critical Area Commission. Bill 933 was not the result of a coordinated planning process, but was a unilateral action by the County Council, in an effort to create a veto over town projects requiring growth allocation conversion. The County failed to participate in a joint planning process, failed to accommodate Town growth needs, and attempted to establish a pocket veto over town processes.

IV. CONCLUSION

For the reasons set forth above, and the arguments set forth in Oxford's Motion for Summary Judgment, and the reasons given by the Department of Natural Resources Critical Area Commission, the Commissioners of St. Michaels, Miles Point Property, LLC and The Midland Companies, Inc. in their Motions and responses to the County's Motion, the Town of Oxford respectfully requests that the Court deny Talbot County's Motion for Summary Judgment, and that the Court order such other and further relief as the nature of this case may require.

David R. Thompson, BMB
David R. Thompson

Brynja M. Booth
Brynja M. Booth
Cowdrey, Thompson & Karsten,
A Professional Corporation
P.O. Box 1747
Easton, MD 21601
(410) 822-6800
Attorneys for the Town of Oxford

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2005, a copy of the foregoing Response was sent first class mail, postage prepaid to:

Daniel Karp, Esquire
Victoria Shearer, Esquire
Allen, Karpinski, Bryant & Karp, P.A.
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100 E. Pratt Street
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Attorney for Talbot County, MD

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Paul J. Cueuzzella, Esquire
Marianne D. Mason, Esquire
Assistant Attorneys General
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Attorneys for The Midland Companies, Inc.
And Miles Point Properties, LLC

David R. Thompson, BMB
David R. Thompson

TALBOT COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
DEPARTMENT OF NATURAL RESOURCES CRITICAL AREA COMMISSION, et al.	*	TALBOT COUNTY, MARYLAND
Defendants	*	Case No. 20-C-04-005095DJ

* * * * * * *

THE TOWN OF OXFORD, et al.	*	
Counter-Plaintiffs.	*	
v.	*	
TALBOT COUNTY, MARYLAND,	*	
Counter-Defendant	*	

* * * * * * * * * * * * *

Affidavit of Brynja M. Booth

1. I am over the age of 18 years, have personal knowledge of the matters contained herein, and I am competent to be a witness.

2. I hereby certify that the records attached hereto are true and accurate copies of handwritten notes of the Critical Area Commission staff, Lisa Hoerger, Ren Serey and Mary Owens, reflecting conversations and meetings between the Critical Area Commission staff and the Talbot County Manager, Andy Hollis, the County Attorney, Michael Pullen, the County Planning Officer, George Kinney, and County Council member Peter Carroll.

3. I reviewed the attached records, pursuant to a public information act request, at the offices of the Critical Area Commission, in Annapolis, Maryland. The attached records were provided to me as those records are kept in the ordinary course of the business by the Critical Area Commission.

I hereby certify under the penalties of perjury that the foregoing is true and correct.

Brynja M. Booth 12/13/05

Brynja M. Booth Date

Lisa Haerger

3/3 Tom Deming (410) 757-0100 - wanted panel members assigned to the Talbot & St. Michaels panels.

3/4 Steve Gilbert (301) 952-5261

RE: County Council Bill CB-1
revised & reform the Z.O. as to notice requirements
making everything 30 days
used to be 10's, 15's, 30's, 60's

For C.A. including 215.107 variance section
Notice of Public Hearing

60 days - rearings to 30 days

3/4 Scott Averspacker [redacted] (?) Dorcester Co. Rec. & Parks
(410) 228-5578 RE: Vienna Boardwalk Project
wanted to know if it was his respon. to alert Mayor to Comm. review I told him no, it is the Circuit Riders

3/4 Eli - (410) 222-7441
RE Program Document - set up a meeting

3/9 Bob Winchester
RE: Sumps Pt. Road - Costello property
Scott Miller was hired to do shoreline work.
↳ permit service (not a contractor)

Office of Law - Dave Plymer &
Chris Westergaard - MDE

Katie & Dave are in touch w/ State

Peter Carroll George Kinney ICS, MU, LH

11/25/03

PC - may be reviewing then entire ord.

AH? Council considering a bill - g.a. process
or 1989 - 3 maps w/ acreage figures extrapolated -
MP? in Ordinance

- 128 - LDAs
- Put restric. on the ability of the Co. to redef. those areas
- 4-yr. reviews of those maps
- Distrib. to 3 towns

→ 4 year review process never occurred so no reallocation
→ Comp. Plan has been reviewed
→ Growth boundaries are differ.
↳ so Council is contempl. elim. those maps & g.a. allotted to the towns on those maps.

2 interpretations of the existing lang

① No town can rec. more than 128 ac. as an IDA

② Generated in 1989 based on actual devel. density on the ground at that time - 128 LDA at the time could be changed to IDA

Total divided in half - 1,213 acres

NOW 2003 → trying to interpret the 128 acre prov. either as 128 is finite for co. or limit can be changed from LDA to IDA

Andy Hollis [redacted] Mike Pullen [redacted], MO, LH
Peter Carroll George Kinney

11/25/03

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Total divided in half - 1,213 acres

NOW 2003 -> trying to interpret the 128 acre prov. either as 128 is finite for Co. or [illegible]

11/25/03

1989 - LDA was limited to,

RS - 128 - 13 exist. LDA to IDA
1,213 - elig. from RCA to LDA or IDA

↳ whether you can go RCA to LDA then later to IDA are you caught? Prob. not because it came from the g.a. pot.

PL - option - not limit to 128 acres
do we want to put IDA & LDA ones always & cannot exceed 1,213 acres

RS - Co. can decide if they want to put a number & send map those acres ahead of time - not req. by law.

PL - put potential g.a. - but not put a label on them (LDA IDA)

↳ Elm St. - IDA & LDA - what type of schedule

RS - If sent a bill that changed the acres - Comm. would want to know the status of other bills
If Co. was changing the whole process then Chairman would decide - if amendment 60-90 days.

PL - Can send copies of ones that were introduced
Discussion on December 9th
Vote on December 16th or 23rd.

AH? or MP? I or Stevens plans to request a joint hearing with the Co. County.

RS - Yes, Spike to talk to Frank. Chairman said will not be able to hold that hearing

11/25/03

AH? or MP? - Oxford has 195 acres - 1,092 = 90% of 1,213 in the current ann. never will get to 90% figure

RS - law says if a juris. cannot limit itself to half the add'l acreage could be used but must be clustered. law - "have to be unable" - 1,215 then g.a. used in part would have to be acc. by a finding by Co. Council & unable to use in RCA ② would be clustered. Comm. would not see those findings as diff. to make.

PC - Oxford - new maps w/ comprehensive review - could be used for reallocation. Oxford does not want to grow do alloc. more freq. w/ probable growth plan

MP - If Co. wanted to play a part in the g.a. request with an annexation. Town got 5% of RCA area

RS - corrected all RCA to Co. the in coordination w/ the municipalities. Talked about Leonardtown

AH? or MP? - Could Talbot do it SM's way?

RS. Yes

AH? or MP? - Do towns have to sign off on that process?

AM - No. - Co. decides when g.a. goes includes the towns

RP - Statute talks about awarding g.a. based on 5% of g.a. to include municipalities

11/25/03

MM - Arrange minutes that gen. g.a. that g.a. went to the County - then in coord. . .

MP - If Co. gave each munic. 5% of RCA, would be ok

PC - get a draft and have Comm. look at it.

RS - to Mr. Carrol. RE: Easton Village - was there a conflict in c.rd. - Does not seem to be.
↳ told Cherly Thomas - a lot of people are calling

Lisa Hoerger

Hamoyki

1/28 Michele ? - Hecedon C.H. Hill (703) 471-6405 ext 4514
RE: WSSC MOU
Returned call - referred her to Dawnn

1/28 Ren - Told St. Michaels that we would send them copies of cities to the county

1/30 Roy Little (410) 266-1160
RE: Carolstown (Osprey Landing - 12/23/03)
① plat note to acc. table
② plat note - no clearing is permitted & Hort can't clear
③ signs - no sample ④ FIDO

1/30 Mike Pullen (410) ~~770~~ 822-1100

Bill #933 & historical issues.

1/30 Roy Little
went over the comment letter
he is putting the notes on the plat and will forward his updates to me at which point I can send a final letter back to Lori Allen

Mike is preparing a response to the Town of St. Michaels letter sent to Senator Madden.

The Town orig. had some areas mapped RCA/LDA/IDA under their own program

1808.1 Growth Alloc. calc on 5% of RCA in a local jurisd when it is approved by

1,213 — ½ of Talbot RCA
- 155 Easton
1,058
- 195 Oxford
863
- 245 St. Michaels
618 Talbot
- 301.771 - G.A. used by Talbot
316.229 Talbot Remaining
- 156 Supplemental G.A. to Easton
160.229 Talbot Remaining

St. Michaels remaining 224.9 acres
Oxford remaining 179.777 acres
404.677 acres to get new total

Talbot bills
933-6A
930
931
929

Ken Serey

VM

George Kinney
- Talbot Co.

1-6-04

re bill 933 - do we need anything?

4-770-8030

1 Cover letter
2 attached bills as approval
3 bold & strike out.
4 other bills not passed?

Cindy Hallis 10-29-03

- Council meets 11/18, 11/25
- Then ad for pub. hearing
  pub. hearing 12/16 or 12/23
  probably vote end of Dec / Jan
- we could get it sometime in Jan

Peter Carroll 11-19-03

(1) Council voted "up" on all CA amd. 4-1 on some, 5-0 on others.

- hearing - 3 wks.
- vote next session after that

(2) Growth Allocation
- Midlands + Easton
- He initiated

need to give LDA + IDA to Easton Village

- restriction on total ac. can be given to Towns.

- 8 ac. is separate fr.
He thinks Co has lost itself in for giving GA to Easton Village

Mike Pullen doesn't agree w/ him.

156 ac would be needed
for Easton V. – (E Lu St.)
~~Co~~ Council introduced
bill for giving 156 to Easton.

96 IDA
61 CDA.

400± left fr. orig. 618

~~maybe cant give~~
~~me~~

– get together on phone
w/ Mike Pullen
– If Co wants to give
E. 156 ac. & E.
[illegible]

look IDA + LDA, the
grant p. the Co is p. Co's LDA
fool of orig to 12.3 GA.

- so, p. Co's 618.

Is Tr. bound re what
it can do M ET - ge
i.e. - give same LDA +
same IDA.

- Call 410-476-5219
or leave message

May 11-21-03

(T.W) Peter Carroll 11-24-03
setting time for Tues.
10 or 11 - wt Mike Pullen.
Andy's off will call
George & Andy

Andy Hollis 11-24-03
- ~~10:00~~ - Conf call
11:00
Call Lund.

Andy will send new bills
- discussion
vote 12/16 or 23

(1) 90%

(2) Wind for
Easton Village

(V.M) Roley 11-25-03
Talk to Cheril Thomas.
Cheril 410-745-9535

Cheril Thomas
- St. Michaels & Easton
both want to come 12/3

Talbot Plng. Com. ~~12/13~~ 12/3
Council - hearing 12/16 &
could vote 12/16

* Jan 7
or Feb

Peter Carroll 11-25-03
Andy Hollis
Mike Pullen
George Kinney
Tico Hoerger
Marianne Mason

re Talbot Co. Council GA

- County bill -
1989 - Co. adopted 3 maps
for growth areas - extrapolated
acreages from maps

Andy
~~Proposed~~ 1989: n128 new IDA ac & restricted
Co. - 1/yr. reviews for GA

1989 maps outdated - new
Comp. Plan adopted - maps no longer
~~new bill~~ significant

- Council contemplating new GA
process

VM George Kinney 12/8/03
770-8030

George Kinney 12/8/03
- G. Car vote tomorrow. 2nd reading
- May vote on 12/16/03
- George will email Andy's office re room at 6:00 on Jan 5th

B

TALBOT COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
DEPARTMENT OF NATURAL RESOURCES CRITICAL AREA COMMISSION, et al.	*	TALBOT COUNTY, MARYLAND
Defendants	*	Case No. 20-C-04-005095DJ

* * * * * * *

THE TOWN OF OXFORD, et al.

*

Counter-Plaintiffs.

*

v.

*

TALBOT COUNTY, MARYLAND,

*

Counter-Defendant

* * * * * * * * * * * * *

Affidavit of Anthony D. Redman

1. I am over the age of 18 years, have personal knowledge of the matters contained herein, and I am competent to be a witness.

2. From 1977 to 1984, I served as the Talbot County Planning Officer.

3. From 1984 through 1985, I served as a consultant to the Critical Area Commission of the State of Maryland.

4. In 1987, 1988, and 1989, I served as a consultant to the Town of St. Michaels and the Town of Oxford for the development of their local critical area programs, and the coordination of their programs with the Talbot County Critical Area Program.

5. During the development of the programs of all three jurisdictions, it was understood and agreed that the plans of all three jurisdictions would include growth areas adjacent to the Towns, where future annexation would be reasonably anticipated, and where growth allocation conversions were likely to occur over the course of time.

6. The areas allocated for town development were mapped and approved by agreement with the Talbot County Planning Commission and the representatives

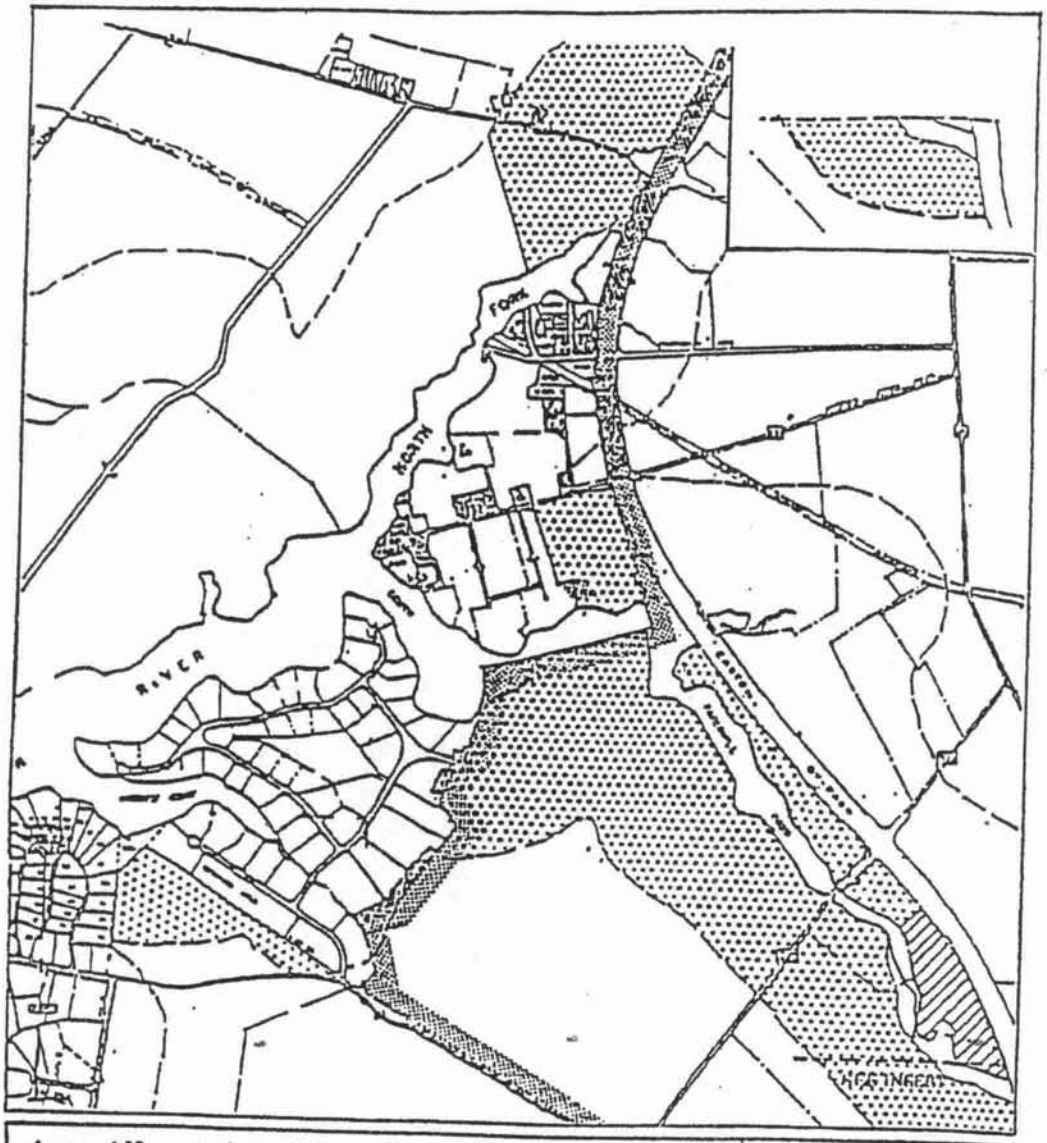
of the Town of Oxford and the Town of St. Michaels, after a series of planning meetings attended by Town and County representatives. Copies of those maps are attached.

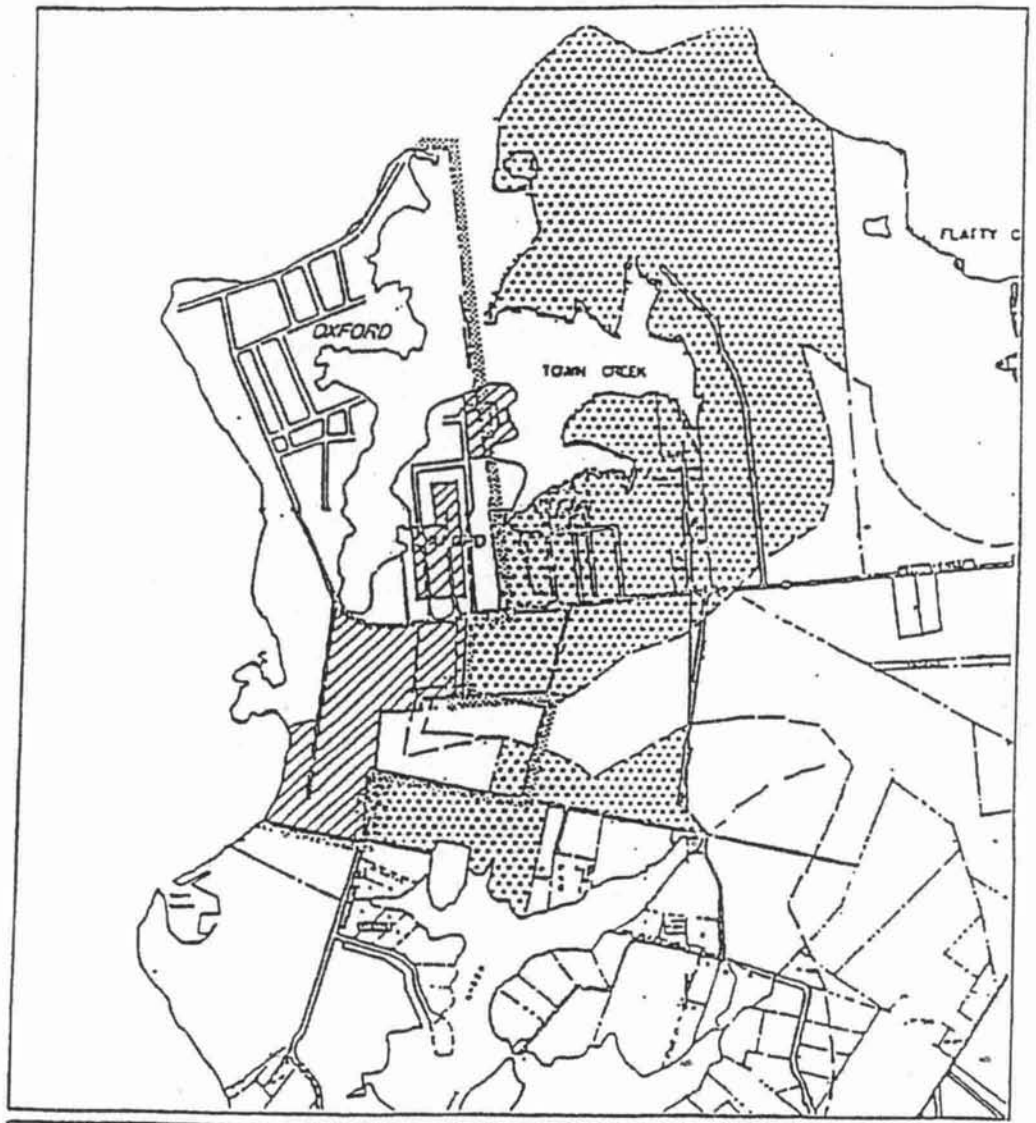
7. These maps were adopted by the Talbot County Council as part of the Talbot County Zoning Ordinance.

I hereby certify under the penalties of perjury that the foregoing is true and correct, to the best of my information, knowledge and belief.

12-14-2005

Anthony D. Redman Date


Area Allocated for Town Development
TOWN OF EASTON
Talbot County, Maryland
RCA for Annexation or Rezoning
LDA for Rezoning
Map No 1
N
miles
Wilce Dailey Pronske



Area Allocated for Town Development

TOWN OF OXFORD

Talbot County, Maryland

RCA for Annexation or Rezoning

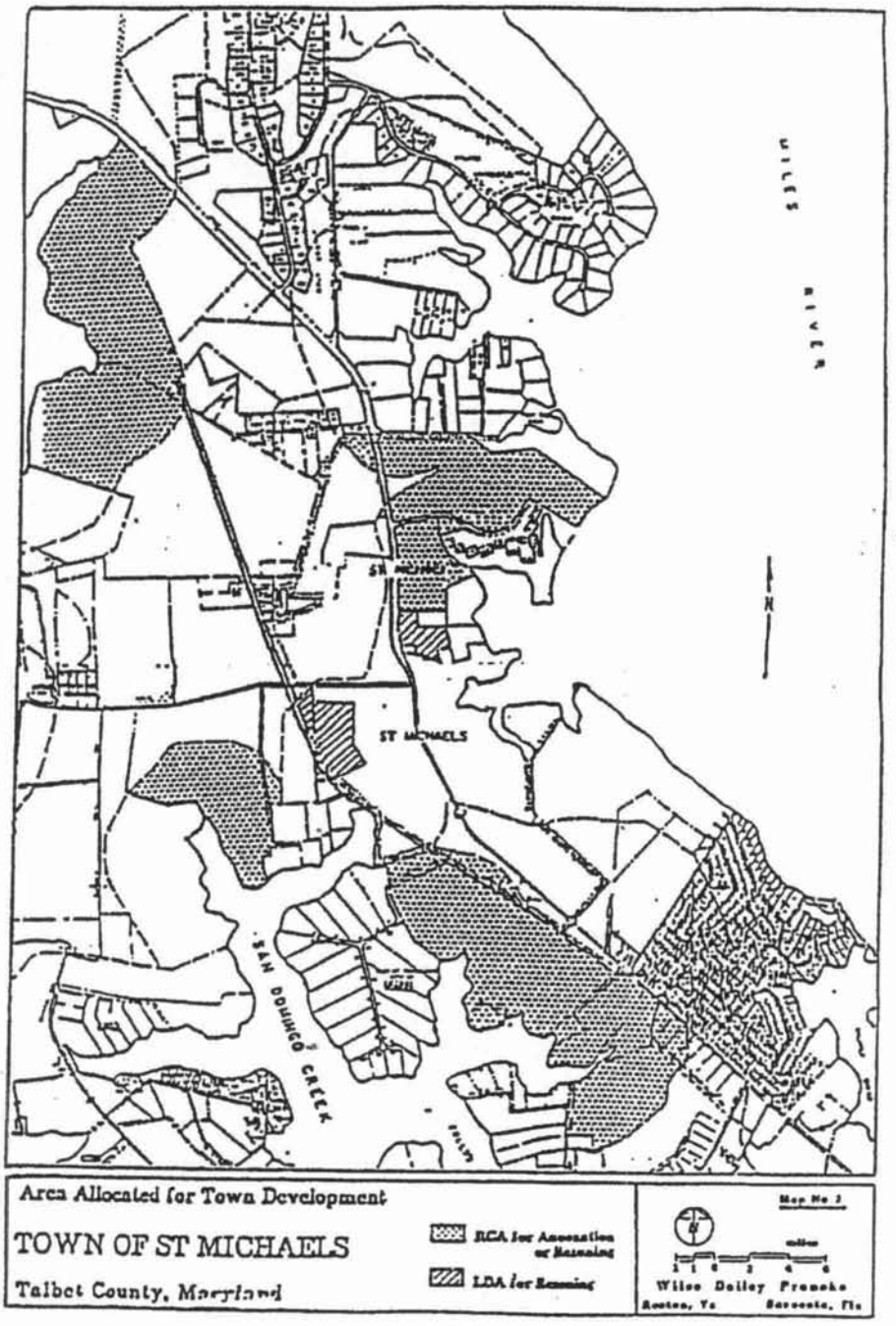
LDA for Rezoning

Map No

N

miles

Wilce Dailey Prouske


MILES RIVER
ST MICHAELS
SAN DOMINGO CREEK
N
Area Allocated for Town Development
TOWN OF ST MICHAELS
Talbot County, Maryland
RCA for Annexation or Rezoning
LDA for Rezoning
Map No 3
miles
Wilse Dailey Pronoke
Boston, Va
Sarasota, Fla

RECEIVED

DEC 12 2005

DNR - LEGAL DIVISION

THE CIRCUIT COURT FOR TALBOT COUNTY

CIRCUIT COURT
OF TALBOT COUNTY
EASTON, MARYLAND
2005 DEC 8 PM 2 45

TALBOT COUNTY MARYLAND :

v. : Civil # 2-C-04-005095 DA

DEPARTMENT OF NATURAL RESOURCES :
CRITICAL AREA COMMISSION, et al :

: : : : :

ORDER GRANTING RIGHT TO INTERVENE AND SUPPLEMENTAL SCHEDULING ORDER

The Court having carefully considered the splendid memoranda addressing the motion to intervene filed on October 19, 2005, by Miles Point Property, LLC and the Midland Companies, Inc. (movants) and finding that no hearing is required; that movants claim an interest relating to the property or transaction which is the subject of this action and that movants are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest; that their private, parochial interest is not adequately represented by existing parties; and that, upon application of the provisions of paragraph 4 of this Order, the motion is timely, it is **ORDERED** that:

1. Subject to the remaining provisions of this Order, movants are allowed to intervene, designated as defendants, in this action.

2. The proposed answer attached to movants' motion to intervene, having already been served upon all parties with that motion, is accepted as movants' answer to the complaint as of the date when this Order is filed, without necessity for further service upon other parties.

3. Movants shall have sole responsibility to acquaint themselves with all pleadings, motions and other papers previously filed in this action, without any requirement or necessity for any other party to serve or otherwise furnish copies of any paper heretofore filed by it.

4. This Order is conditioned upon the following:

a-As promised in their memorandum, movants may not initiate any discovery under Title 2, Chapter 400, of the Rules.

b-The motion for summary judgment previously filed by plaintiff shall be taken and construed as including a request for such relief against movants.

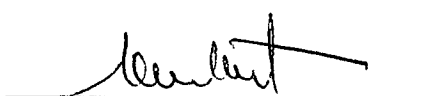
c-Movants must file any motion for summary judgment or response to plaintiff's motion for summary judgment on or before December 22, 2005.

d-Responses to movants' motion for summary judgment must be filed on or before January 15, 2006. Other parties are urged to make liberal use of Rule 2-303 (d) in their responses and not restate argument, recitations of fact or affidavits contained in papers previously filed by them.

e-Responses shall be limited to those referred to in Rule 2-311. Responses to a response are not permitted.

e-This action may be set for trial or hearing at any time after January 15, 2006. Movants may not object to the scheduling of any trial or hearing on the basis of a need for additional time to prepare for such proceeding.

f-Except as provided in this paragraph, all other provisions of the prior scheduling order remain in effect.



John W. Sause, Jr.
Chief Judge (ret)
Sitting by Designation

December 7, 2005

THE CIRCUIT COURT FOR TALBOT COUNTY

2005 DEC 8 PM 2 45
CIRCUIT COURT
OF TALBOT COUNTY
EASTON, MARYLAND

TALBOT COUNTY MARYLAND	:	
v.	:	**Civil # 2-C-04-005095 D**
DEPARTMENT OF NATURAL RESOURCES CRITICAL AREA COMMISSION, et al	:	

: : : : :

ORDER ACCEPTING MOTION FOR SUMMARY JUDGMENT

Having carefully considered plaintiff's motion and accompanying affidavit and finding that the delay in filing the motion for summary judgment is wholly excusable; that the attempt to effect remedial action was promptly filed; that no party has filed any objection to the relief sought; that there is no conceivable prejudice to the Court schedule or any party; and that the Court has full power to modify its orders relating to scheduling[1].

It is **ORDERED**, that the Motion for Summary Judgment filed by plaintiff on November 15, 2005, is hereby accepted as filed and shall be considered for all purposes as if it had been filled within the period allowed in the Scheduling Order.

John W. Sause, Jr.
Chief Judge (ret)
Sitting by Designation

December 7, 2005

[1] We expressly deny the request that this Order be given effect *nunc pro tunc*. See *In re Timothy C.*, 376 Md. 414, 429, footnote 10; *Short v. Short*, 136 Md. App. 570 , 578-579, and cases cited in those decisions.

CIRCUIT COURT FOR TALBOT COUNTY
Mary Ann Shortall
Clerk of the Circuit Court
11 N. Washington Street
P.O. Box 723
Easton, MD 21601
(410)-822-2611, TTY for Deaf: (410)-819-0909
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Case Number: 20-C-04-005095 DJ

Paul J Cucuzzella Esq
Assistant Attorney General Dept. Of Natural Resources
580 Taylor Ave
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NOV 16 2005
DNR - LEGAL DIVISION

TALBOT COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
DEPARTMENT OF NATURAL RESOURCES, et al.	*	TALBOT COUNTY,
	*	MARYLAND
Defendants	*	Case No. 20-C-04-005095DJ

* * * * * * * * * * * * * *

MOTION FOR SUMMARY JUDGMENT BY THE TOWN OF OXFORD

The Town of Oxford ("Oxford"), Defendant/Counter-Plaintiff, by its attorneys, David R. Thompson, Brynja M. Booth and Cowdrey, Thompson & Karsten, files this Motion for Summary Judgment, and in support thereof, incorporates by reference the Memorandum in Support of its Motion for Summary Judgment, which has been filed simultaneously herewith. The Town of Oxford also incorporates by reference the Memorandum in Support of St. Michaels Motion for Summary Judgment, and the Motion for Summary Judgment filed by Miles Point Property, LLC, and The Midland Companies, Inc., which are incorporated by reference herein.

WHEREFORE, for all of the reasons stated in the attached Memorandum, and the memoranda incorporated by reference, the Town of Oxford respectfully requests that the Court order and declare as follows:

(1) That County Bill 933 violates the State Critical Area Program;

(2) That the Critical Area Commission correctly disapproved Bill 933 as an amendment to Talbot County's Critical Area Program;

(3) That County Bill 933 violates and is in conflict with the Constitution and the laws of the State of Maryland, including Article 23A, and Article 66B;

(4) That the Town of Oxford has exclusive planning and zoning jurisdiction within the town boundaries, and Talbot County and the Talbot County Council have no right to enact or enforce zoning laws within the Town of Oxford;

(5) That County bill 933 is inconsistent with Oxford's Critical Area Program, and is therefore ineffective within the Town of Oxford; and

(6) That the Town of Oxford be entitled to such other and further relief as the nature of this case may require.

David R. Thompson

Brynja M. Booth
Cowdrey, Thompson & Karsten,
A Professional Corporation
P.O. Box 1747
Easton, MD 21601
(410) 822-6800
Attorneys for the Town of Oxford

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2005, a copy of the foregoing Motion was sent first class mail, postage prepaid to:

Daniel Karp, Esquire
Victoria Shearer, Esquire
Allen, Karpinski, Bryant & Karp, P.A.
Suite 1540

Joseph Gill, Esquire
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And Miles Point Properties, LLC

David R. Thompson

TALBOT COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
DEPARTMENT OF NATURAL RESOURCES, et al.	*	TALBOT COUNTY,
	*	MARYLAND
Defendants	*	Case No. 20-C-04-005095DJ

* * * * * * * * * * * * * *

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY THE TOWN OF OXFORD

The Town of Oxford ("Oxford"), Defendant/Counter-Plaintiff, by its attorneys, David R. Thompson, Brynja M. Booth and Cowdrey, Thompson & Karsten, files this Memorandum in Support of its Motion for Summary Judgment, stating as follows:

I. STATEMENT OF ACTS

The Town of Oxford is an incorporated municipality founded in 1695, located entirely within the geographic boundaries of Talbot County, a charter county. Virtually the entire Town of Oxford, and all reasonably contiguous land, is located within 1000 feet of the Chesapeake Bay or its tributaries.

A. Critical Area Framework Under State Law.

In 1984, the Maryland General Assembly enacted Chapter 794, Laws of 1984, entitled the "Chesapeake Bay Critical Area Protection Program", which is codified in Md. Code Ann. Natural Resources Article, §§ 8-1801-1816. The purposes of the General Assembly were:

> (1) To establish a Resource Protection Program for the Chesapeake Bay and its tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and

(2) To implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State Criteria and oversight.

Natural Resources Article § 8-1801(b). In order to achieve these purposes, the General Assembly created the Chesapeake Bay Critical Area Commission ("Commission"). Pursuant to Natural Resources Article §§ 8-1808(a)(1), "**each local jurisdiction** shall have the primary responsibility for developing and implementing a program, subject to review and approval by the Commission." (emphasis added). "Local jurisdiction" means a county, or a municipal corporation with planning and zoning powers, in which any part of the Chesapeake Bay Critical Area, is located. Natural Resources Article § 8-1802(a)(13). "Program" means the critical area protection program of a local jurisdiction and includes any amendments to the program. § 8-1802(a)(14).

The Natural Resources Article sets forth the requirements for approval, adoption, and amendment of the local critical area protection programs, and gives each local government the right to make critical area land use decisions within its boundaries. Each local jurisdiction was required to advise the Commission whether it planned to "develop a critical area protection program to control the use and development of that part of the Chesapeake Bay Critical Area located within its territorial limits." § 8-1809(a)(1). If a local jurisdiction chooses not to develop a program, the Commission is permitted to prepare and adopt a program for the critical area located in that jurisdiction. § 8-1809(b). If the local jurisdiction decides to develop a program, the local jurisdiction must prepare and submit the program to the Commission

approval. § 8-1809(c).[1] A local jurisdiction may not thereafter amend its program except with approval from the Commission. § 8-1809(i).

Pursuant to Natural Resources Article § 8-1808(e), the Critical Area Commission promulgated regulations establishing the criteria for local critical area programs. COMAR 27.01.02. The criteria require each local jurisdiction to classify and map lands as one of three types of development areas: (1) Intensely Developed Areas ("IDA"); (2) Limited Development Areas ("LDA"); and (3) Resource Conservation Areas ("RCA"). COMAR 27.01.02.02(A).

The Court of Special Appeals has summarized the requirement as follows:

> Each jurisdiction was to identify each of the three areas within its jurisdiction based on criteria and develop policies and programs to achieve the objectives proposed by the Commission. COMAR 27.01.02.02(E). The designation was made based on the land use and development in existence on December 1, 1985. COMAR 27.01.02.07(C).

North v. Kent Island Ltd. Partnership, 106 Md. App. 92, 99 (1995). Each local jurisdiction was required to establish zoning maps for the critical area lands within the jurisdiction in accordance with these classifications. Natural Resources Article § 8-1808(c).

The legislature placed a cap on the expansion of intense development and limited development areas, and the statute and regulations set forth criteria by which lands classified as RCA may be reclassified to IDA or LDA classifications, which permit a greater development

[1] Within 30 days after the program is submitted, the Commission is required to appoint a panel of five of its members to conduct a public hearing in the jurisdiction on the proposed program. § 8-1809(d)(1). Within 90 days after the Commission receives a proposed program, the Commission shall approval the proposal or notify the local jurisdiction of any specific changes required for the proposal to be approved. If the Commission does neither, the program is deemed approved. § 8-1809(d)(2). Each local jurisdiction is to review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every six years. § 8-1809(g).

density. Through the growth allocation process, property may be remapped from RCA to either IDA or LDA. State law defines "growth allocation" as follows:

> "Growth allocation" means the number of acres of land in the...critical area...that a local jurisdiction may use to create new intensely developed areas and new limited development areas.

Natural Resources Article § 8-1802(a)(10). The General Assembly set forth the initial growth allocation cap in § 8-1808.1(b):

> (b) *Calculation of Growth Allocation.* – The growth allocation for a local jurisdiction shall be calculated based on five percent of the total resource conservation area in the local jurisdiction at the time of the original approval of the local jurisdiction's program by the Commission...

B. Talbot County Critical Area Program.

Pursuant to state law and the critical area regulations, including the critical area local program criteria, in 1989, Talbot County adopted its local critical area protection program (the "County Program"), and identified and mapped the Resource Conservation Area in the unincorporated areas, resulting in a computation of the total acreage (growth allocation) available within the unincorporated areas of the County for conversion from a resource conservation designation to a limited development area classification, which permits more intense development.[2] See Talbot County Complaint, ¶ 11. The Talbot County Program was approved by the Critical Area Commission. Id.

Based upon the mapping required by the critical area statute and regulations, it was determined that there were a total of 1,213 acres of Resource Conservation Areas within the County which could initially be re-classified from Resource Conservation to a more intense land

[2] As part of the Talbot County Program, the County enacted three zoning maps classifying areas contiguous to Oxford, Easton and St. Michaels as growth areas and annexation areas. The maps are reproduced as the last three pages of Exhibit A.

use classification. See Talbot County Code § 190-109D(9), which is attached hereto as Exhibit "A." Additionally, a cap of 128 acres was established for the conversion of LDA to IDA within the geographical area of Talbot County, including the incorporated towns. The Town of Oxford was assigned 44 acres of the total LDA acreage in the County available for conversion to IDA. Exhibit A.

The state critical area legislation and the follow-up COMAR regulations were specifically approved by the legislature against the backdrop of the annexation provisions of the Maryland code and decades of case law addressing municipal expansion through annexation. Annexation is the vehicle for expansion of municipal boundaries, and includes the transfer of planning and zoning responsibility from the county government to the municipal government, subject to a five year transitional period. See Md. Code Ann. Article 23A, §§ 9(c) and 19.

The initial county and town critical area programs were mandated by the same statute, controlled by the same regulations, and were developed in the same time frame. Pursuant to the criteria established by the Commission, the county and municipal governments were required to "attempt to establish cooperative arrangements...concerning the policies and objectives for lands within and adjoining the Critical Area." COMAR 27.01.10.01.I. The criteria further stated that "counties and municipalities within their political boundaries are encouraged to develop the Critical Area protection programs so that common land use objectives can be realized." COMAR 27.01.10.01.P.

The Talbot County Planning Commission and the Talbot County Planning Officer and his staff were primarily responsible for developing the Talbot County Critical Area Program. Recognizing their obligation to coordinate the county and town plans, there was extensive discussion, consultation, and coordination between county and town planners to develop

coordinated critical area programs among Talbot County, the Town of Easton, the Town of Oxford, and the Town of St. Michaels. As the result of that cooperative planning, municipal growth areas contiguous to the towns, within the unincorporated area of Talbot County, were identified and mapped. The Talbot County Council adopted three zoning maps identifying the RCA areas adjacent to the towns were mapped for future municipal annexation, and conversion from the RCA to LDA classification pursuant to the growth allocation conversion process. These growth areas were identified in the comprehensive land use plans of all four jurisdictions. The resulting critical area plans for the County and the Town of Oxford were developed through a coordinated and cooperative basis. The county zoning ordinance implementing the agreed plans addressed the relationship of the growth allocation processes in the towns and the County in the context of state law annexation provisions. See Exhibit A, Talbot County Code, § 190-109D(10), (14) and (15).

The county program and the town programs were approved by the Critical Area Commission. The County Program mapped specific acreage adjacent to the towns of Easton, St. Michaels, and Oxford as "growth allocation" lands. Exhibit A, Talbot County Code § 190-109D(9)(a). The County's original critical area zoning ordinance, adopted in 1989, designated 155 acres adjacent to the Town of Easton, 195 acres adjacent to the Town of Oxford, and 245 adjacent to the Town of St. Michaels. Id. As part of the new zoning ordinance, in consultation with the towns, the County enacted three zoning maps classifying these areas contiguous to Oxford, Easton and St. Michaels as growth allocation and annexation areas, in a coordinated approach to planned town growth. Exhibit A. Additionally, the County and towns agreed upon a unified and cooperative approach to the conversion of LDA lands to IDA lands, limiting the total IDA conversion in the entire county, including the towns, to 128 acres and dividing that acreage

available for IDA reclassification among the four affected jurisdictions in accordance with their needs as identified during the cooperative planning process. See Exhibit A, Talbot County Code § 190-109D(10). The coordinated plans of the County and the towns were agreed upon, implemented, and approved by the Commission.

C. **Town of Oxford Critical Area Program.**

Pursuant to the same statutory and regulatory provisions, and the coordinated planning referenced above, the Town of Oxford (and other Talbot County municipalities) adopted its own critical area program (the "Oxford Critical Area Program"), which was also approved by the Critical Area Commission. The Oxford Critical Area Program has been updated and amended on several occasions, all with the approval of the Critical Area Commission. The Oxford Zoning Ordinance, which contains Oxford's critical area regulations, identifies identifies IDA, LDA and RCA critical area zoning classifications within its corporate boundaries. Pertinent excerpts of the Oxford Zoning Ordinance are attached hereto as Exhibit "C"; see also affidavit of Sidney S. Campen, Jr., attached hereto as Exhibit "B." The Town of Oxford has adopted an official zoning map, which identifies and maps IDA, LDA, and RCA lands within its boundaries. A copy of the official zoning map of Oxford is attached hereto as Exhibit "D."

The Oxford Critical Area Program and the Oxford Zoning Ordinance, as approved by the Critical Area Commission, include a "Growth Allocation District" provision, whereby the Oxford Planning Commission and the elected Commissioners of Oxford have the exclusive right and authority, subject to Critical Area Commission review, to process and approve any change in critical area zoning classifications, and to rezone land within the boundaries of the Town of Oxford. Exhibit C. The Oxford Zoning Ordinance sets forth the Town's growth allocation process, which is an exclusively municipal process, with Critical Area Commission review. See

Exhibit C, Oxford Zoning Ordinance § 34.05. Applications for growth allocation are submitted to the Town for review by the Oxford Planning Commission. After review by the Oxford Planning Commission, and after public hearings, the Town Commissioners may apply growth allocation classifications. Id. Under state law, and under the Oxford Zoning Ordinance, the Commissioners of Oxford have the exclusive right and authority to amend critical area land use classifications within the corporate boundaries of the Town of Oxford, subject only to the Critical Area Commission's review and oversight. Id.

During the development of the original Talbot County Critical Area Program and during the development of the independent critical area programs of Oxford, St. Michaels and Easton, previous Talbot County Councils recognized the legal and jurisdictional relationships between the independent town governments and the county government. During those years, in compliance with state law, the county government worked with the towns to identify growth areas contiguous to the towns, wherein the towns were expected to exercise critical area growth allocation and zoning prerogatives in accordance with state laws applicable to municipal annexation. That balance changed with the 2002 local election. The current Talbot County Council, elected in November, 2002, rejected the principles of county/town land use coordination, and began to assert a policy of county control over growth allocation zoning reclassifications, culminating in the unilateral enactment of Bill 933.

D. Talbot County Bill 933.

On December 23, 2003, the Talbot County Council enacted legislative Bill 933 in an effort to amend the County Program to eliminate the previously adopted county zoning maps attached as Exhibit A, to eliminate the LDA to IDA conversion provisions previously agreed upon, implemented, and relied upon by the towns, and to assert county ownership of the growth

allocation reclassification process. See copy of Legislative Bill 933, attached hereto as Exhibit "E." The purpose, intent, and purported effect of County Bill 933, *inter alia*, was to withdraw from the incorporated municipalities their rights to exercise growth allocation rezoning and reclassification and control within their own municipal boundaries,[3] and to require the towns, including the Town of Oxford, to seek and obtain County Council approval for critical area land use reclassifications. Bill 933 purports to give the Talbot County Council specific approval authority and/or veto authority over the reclassification, rezoning, and development and redevelopment of critical area lands within town boundaries.[4] Exhibit E.

Contrary to state law and regulations concerning critical area plan development and amendments, the Talbot County Council and the Talbot County planning office staff had no communications with the Talbot County municipalities about either the substance or procedure related to Bill 933. Exhibit B, ¶ 7. Other than presiding at the mandatory public hearing prior to its prearranged vote to amend the Talbot County Zoning Ordinance with the enactment of Bill 933, the County Council had **no** communication with the representatives of Talbot County's

[3] A major reason for the County Council's decision to create and enact Bill 933 was to oppose and attempt to prevent a specific development project within the Town of St. Michaels which requested growth allocation reclassification. See memoranda submitted on behalf of the the Commissioners of St. Michaels, and the proposed intervenor, The Midland Companies, Inc., and Miles Point Property, LLC. That memorandum is incorporated hereby by reference, and is offered in further support of the Motion for Summary Judgment by the Town of Oxford.

[4] Although Bill 933 deletes the provisions of the County Code mapping growth allocation acreage adjacent to the towns, and deletes the provisions of the Talbot County Code which recognize the towns' autonomy under State law to exercise exclusive planning and zoning authority, including growth allocation reclassifications (see Talbot County Code Section 190-109D(15)), the Bill does not set forth a growth allocation reclassification process within the Towns. Instead, the County has stated that it will use other provisions of the Talbot County Code, relating to supplemental growth allocation. See Talbot County Code Section 190-109D(9). As set forth more fully in this Memorandum, the application of 190-109D(9) to critical area reclassifications within the incorporated limits of the towns violates the Town's exclusive zoning and planning functions which are set forth under State law.

municipalities concerning coordination of critical area plans. Exhibit B, ¶ 7; see also Motion and Memorandum of the Commissioners of St. Michaels.

Significantly, not only did the County Council fail to consult or coordinate with the affected municipalities, the Talbot County Council failed to consult with the Talbot County Planning Commission prior to the creation and introduction of Bill 933. At the Talbot County Planning Commission meeting on December 3, 2003, the Chairman of the Planning Commission, Richard Hutchison, advised the County Attorney that the proposed legislation should have been presented to the Planning Commission prior to its introduction by the County Council. See Talbot County Planning Commission meeting minutes, attached hereto as Exhibit "F". Chairman Hutchison stated that he believed that the legislation was flawed and unfair. Exhibit F, p. 2. The Talbot County Planning Commission did not support Bill 933, and recommended that the County Council withdraw the Bill. Id.

The Talbot County Council held a perfunctory public hearing on December 16th pursuant to the requirements for zoning ordinance amendments. At the hearing, the towns of St. Michaels and Oxford spoke out against the proposed bill, and recommended that the County engage in a dialogue with the affected towns prior to the proposed county legislative action. See portions of transcript of Council meeting on December 16, 2003, attached hereto as Exhibit G. The Talbot County Council ignored the comments and suggestions made by its own Planning Commission, and by the various Talbot County towns, and the Maryland State Department of Planning, and on December 23rd, voted to enact Bill 933, to take effect 60 days after its enactment, on February 22, 2004. Exhibit E.

Because Bill 933 was a critical area program amendment, approval by the Critical Area Commission was required as a condition to the legislation's viability. The Town of Oxford,

together with other Talbot County municipalities and the Maryland State Department of Planning, participated in the Critical Area Commission review process and testified at the public hearing conducted by the Critical Area Commission. The towns, including the Town of Oxford, and the Department of State Planning, reiterated their opposition of Bill 933 as an illegal usurpation of municipal authority. The utter lack of required interjurisdictional coordination was cited by the towns and the Maryland Department of Planning. See excerpts of transcript of the Critical Area Commission public hearing on March 24, 2004, attached hereto as Exhibit "H." The Department of Planning expressed its concern that Bill 933 established the County as the final decision-maker for all municipal expansion within the critical area, and noted the proposed County Council veto authority over growth allocation reclassification of properties within municipal boundaries. See Exhibit H, p. 98-99.

Following the hearing, and after considering objections of the Department of State Planning and those of the Town of Oxford, the Town of St. Michaels and the Town of Easton, the Critical Area Commission, on May 5, 2004, completed its review of County Bill 933 pursuant to Maryland Code, Nat. Res. Art., § 8-1809. The Critical Area Commission disapproved County Bill 933. As a result, Bill 933 did not take effect as an amendment to the County Program. The Critical Area Commission rendered its decision at a public meeting on May 5, 2004. See Excerpts from the transcript of the May 5th Critical Area Commission Meeting attached hereto as Exhibit "I", and the Critical Area Commission Panel Report, attached hereto as Exhibit "J". The County Attorney, Michael Pullen, was present on the County Council's behalf, and advocated his client's position at that hearing. Exhibit I, p. 120.

In disapproving County Bill 933, the Critical Area Commission commented on the mutual planning interests shared by Oxford, the Commission and others. One of the stated reasons for the disapproval of Bill 933 was that:

> Accepting Bill 933 would create conflicts between the County program and several approved municipal programs. The municipal programs have their own approved growth allocation procedures premised on the growth allocation reserves provided by the County. The conflict that Bill 933 would create is contrary to the Commission's oversight responsibility to ensure that local programs are implemented in a consistent and uniform manner.

Exhibit J, Critical Area Commission, Supplement to Panel Report, dated May 5, 2004; see also letter from the Critical Area Commission to the Talbot County Planning Officer, attached hereto as Exhibit "K."

While the Critical Area Commission's analysis was limited to a narrow range of issues, the Critical Area Commission was correct in its decision to disapprove Bill 933. The Bill, as it purports to apply to lands within the corporate boundaries of the Town of Oxford, is illegal, *ultra vires*, and invalid as a matter of law.

II. STANDARD OF REVIEW

Maryland Rule 2-501(e) provides that "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." A material fact is one that will alter the outcome of the case, depending upon the factfinder's resolution of the dispute. King v. Bankerd, 303 Md. 98 (1985). In this case, there is no genuine dispute of material fact with respect to the matters raised in this motion. The issues before the Court are purely legal questions; namely, whether the Critical Area Commission was correct in its decision to disapprove Bill 933 as an amendment to the Talbot

County Critical Area Program; and whether Bill 933 is invalid and *ultra vires*, as applied to the Town of Oxford, as a matter of law; and whether Bill 933 can be applied within the Town of Oxford to limit the Town's ability to process growth allocation reclassification applications for land located within the Town's boundaries, and whether the Talbot County Council can exercise land use planning and zoning control within the Town of Oxford.

III. LEGAL ANALYSIS

A. Bill 933 Illegally Interferes with the Planning and Zoning Power of the Town of Oxford.

The Town of Oxford is an incorporated municipality formed under the Constitution and laws of the State of Maryland. The Maryland Constitution, Article XI-E, § 3 provides that:

> Any...municipal corporation, now existing or hereafter created, shall have the power and authority (a) to amend or repeal an existing charger or local laws relating to the incorporation, organization, government or affairs of said municipal corporation enacted by the General Assembly of Maryland, and (b) to adopt a new charter, and to amend or repeal any charter adopted under the provisions of this Article.

The Court of Special Appeals has summarized the objective of the constitutional home rule provision as follows:

> One of the objectives of home rule was to assure Maryland municipalities the power of self government....The intent of Article XI-E was specifically to grant Maryland municipalities the **power to control their own local affairs, and was designed to permit local legislation to be enacted solely by those directly affected.**

Campbell v. Mayor and Alderman of the City of Annapolis, 44 Md. App. 525 (1980) (emphasis added). Under state law, municipalities have the authority to pass such ordinances "...as they deem necessary in order to assure the good government of the municipality, to protect the municipality's rights, property and privileges, to preserve peace and good order, to secure

persons and property from danger and destruction, and to protect the health, comfort and convenience of the citizens of the municipality...". See Article 23A, § 2(a). State law also confers upon a municipality the right to enact zoning and subdivision regulations, and the right to adopt its own comprehensive plan. See Article 23A, § 2(b)(3) and Article 66B, § 3.01.

Under Maryland law (Article 23A, and Article 66B), the basic, fundamental tenet of county/municipal land use law is that a municipality has exclusive planning, zoning and subdivision control over property located within the municipal boundaries, with the limited exception that for a period of five years following annexation, no substantially different land use (from those uses specified in the current master land use plans) may be permitted without express county council approval. This limitation on the town's ability to rezone newly annexed land to a substantially different land use classification, is set forth in Article 23A, § 9(c):

> Except that where any area is annexed to a municipality authorized to have and having then a planning and zoning authority, the municipality shall have exclusive jurisdiction over planning and zoning and subdivision control within the area annexed; provided nothing in this exception shall be construed or interpreted to grant planning and zoning authority or subdivision control to a municipality not authorized to exercise that authority at the time of such annexation; and further provided, that no municipality annexing land may for a period of five years following annexation, place that land in a zoning classification which permits a land use substantially different from the use for land specified in the current and duly adopted master plan or if there is no adopted or approved master plan, the adopted or approved general plan or plans of the county...having planning and zoning jurisdiction over the land prior to its annexation without the express approval of the...county council of the county in which the municipality is located.

Other than this limited exception, which prohibits a municipality, without the express approval of the county council, from rezoning newly annexed property to a substantially different land use classification for a period of five years following annexation, the county has no planning or zoning role with respect to land within a municipality. Article 66B expressly confers upon a

municipality the right to adopt its own municipal comprehensive plan. Article 66B, § 3.01(a). Article 66B, § 4.01(a)(1) provides that: "It is the policy of this State that: (ii) Planning and zoning controls shall be implemented by local government." Under Article 66B, § 1.00, "local legislative body" is defined as "...(iii) a governing body of a municipal corporation." Under Article 23A and Article 66B, municipalities have exclusive planning and zoning authority, with the exception of the 5 year annexation exception set forth above. See Southland Corporation 7-Eleven Stores v. Mayor & City Council, 75 Md. App. 375 (1988) ("As to the City of Laurel..., it is clearly established that it is empowered with exclusive planning and zoning authority within its corporate boundaries.").

In Gordon v. Commissioners of St. Michaels, 278 Md. 128 (1976), the Court of Appeals struck down a provision of the Maryland code which gave Talbot County municipalities extraterritorial zoning authority over county lands within a one mile radius of town boundaries. The Court of Appeals held that the Talbot County municipalities were "without power to zone beyond their corporate boundaries." Id. At 136. Just as the Talbot County municipalities have no planning and zoning authority over contiguous land outside municipal boundaries, the County has no authority under Maryland law to exercise planning and zoning authority over land within municipalities. Nothing in the State's critical area legislation or regulations alters this basic tenet of municipal/county land use control. There is nothing in the critical area law or its legislative history (Natural Resource Article § 8-1801, et seq.) to indicate that growth allocation concept was intended by the Legislature to shift the exclusive power of planning and zoning by municipalities to the counties. To the contrary, each "local jurisdiction", which is defined to include a municipality, is authorized to create its own program, subject only to the oversight of the Critical Area Commission. It is the Commission's responsibility to make sure that local

jurisdictions' critical area programs are established and implemented "in a consistent and uniform manner subject to State criteria and oversight." Natural Resources Article § 8-1801(b)(2). The Commission appropriately concluded that Bill 933 did not implement the County's plan in a manner consistent with the approved plans of the Talbot municipalities.

In approving the original critical area programs of Talbot County, the Town of Oxford, and the Town of St. Michaels, the Critical Area Commission recognized that the original County Program – pre-Bill 933 -- observed the legal distinction and separation between the municipalities' and county's zoning authority in the growth allocation reclassification process. In the pre-933 program, the Talbot County Code, Section 190-109.D(15) provided that:

> Growth allocation requests for property that has been annexed within five years of the request shall be reviewed by the County for consistency with the County Comprehensive Plan. **Growth allocation request(s) for property that has been in the town for more than five years prior to the request does not require review by the County; however, the towns shall inform the County of such reclassification to ensure that the total reserved acres, listed above, are not exceeded**.

Exhibit A (emphasis added). Section 190-109.D(15) recognizes that but for the 5 year annexation hold, Talbot County has no planning or zoning authority within the incorporated municipalities, and that the growth allocation process within municipal boundaries is an exclusively municipal prerogative. Section 190-109D(15) also recognizes the total cap on growth allocation conversions within the geographical confines of the County, and requires municipal reporting of growth allocation conversions. Bill 933 attempts to repeal this section in its entirety. See Exhibit E. The Critical Area Commission correctly and appropriately recognized that the County's requested amendment, as embodied in Bill 933, was not consistent with the local programs approved for Oxford and St. Michaels. The Critical Area Commission correctly declined to approve Talbot County's program amendment request. While the Critical Area Commission

limited its disapproval to the inconsistencies created within the Oxford and St. Michaels program, there are other state law bases for the invalidity of Bill 933.

Under the legal doctrine of preemption, a local government, including Talbot County, is preempted from enacting ordinances or other regulations that conflict with State law. The Court of Appeals has summarized the doctrine of preemption as follows:

> Under Maryland law, State law may preempt local law in one of three ways: (1) preemption by conflict, (2) express preemption, or (3) implied preemption....[W]hen a local government ordinance conflicts with a public general law enacted by the General Assembly, the local ordinance is preempted by State law and is rendered invalid...The local ordinance is preempted when it either prohibits an act that under State law is permitted, or it permits and act that under State law is prohibited....Not all conflicts fit squarely within the "prohibit-permit" category. A local law may conflict with a state public general law in other respects and will, therefore, be preempted.

Worton Creek v Claggett, 381 Md. 499, 512-514 (2004)(citations omitted) (holding that a local Kent County ordinance, which attempted to regulate boat mooring during hunting season, was preempted by conflict with State law).

Bill 933 is inconsistent with the exclusive planning and zoning authority conferred upon the Town of Oxford by State law, and is therefore preempted as a matter of law. Under Bill 933, the County Council would effectively exercise planning and zoning control over critical area lands located within the Town of Oxford. Under Bill 933, the Talbot County Council, not the Commissioners of Oxford, would be the legislative body which decides critical area reclassification issues for property located exclusively within the Town of Oxford. The usurpation of this authority by the Talbot County Council would have a significant impact upon Oxford and its citizens, as virtually the entire Town of Oxford is located within the critical area. Under Bill 933, the County Council would have the authority to determine all growth allocation and critical area zoning reclassifications within town boundaries, without regard or consideration

of the town's zoning laws, or comprehensive plan. The County Council would have the authority to grant or deny the zoning reclassification without regard to any decision by the town authorities – the Oxford Planning Commission and the town legislative body -- on the same issue. Bill 933 attempts to remove the Town's ability to use its own growth allocation process to reclassify lands within its boundaries from RCA to another critical area land use classification, and attempts to give the County Council the exclusive right to determine whether Oxford can use the growth allocation process to convert RCA lands to another land use classification. The effect of Bill 933 would be to transfer planning and zoning authority from the Town of Oxford and the Oxford Commissioners to the County Council over critical area lands within the boundaries of Oxford.

Under Maryland law, the County Council's only role in land use changes within a municipality is pursuant to Article 23A, § 9(c). Bill 933 attempts to expand the county government's role within the towns, and is not consistent with state law, and therefore is invalid to the extent that it reserves all growth allocation conversions, even those within the towns, to the discretion of the County Council. Article 66B, § 7.05 provides that: "Except as otherwise provided in this article, any law ordinance that is inconsistent with or contrary to the provisions of this article is repealed to the extent of the inconsistency." The Town of Oxford submits that the Critical Area Commission's disapproval of Bill 933 is legally correct because the Bill is inconsistent with Oxford's exclusive planning and zoning authority conferred by Article 66B. Bill 933 is preempted by state law, and is therefore invalid.

B. Bill 933 Is Flawed as a Matter of Law, Because The County Does Not "Control" the Growth Allocation Process Under State Law.

Bill 933 is defective as a matter of law because it assumes that the County "controls" the growth allocation process within municipal boundaries. The County contends that since the

original growth allocation calculation for the County was based upon "5 percent of the total resource conservation area in the local jurisdiction at the time of the original approval of the local jurisdiction's program by the Commission", (Natural Resources Article § 8-1808.1) that the County therefore "owns" and "controls" the growth allocation process. The County's position is flawed as a matter of law, because the County assumes that it owns the growth allocation process, and therefore, has the authority to dictate Oxford's use of the growth allocation process. As set forth below, the County has no such authority under Maryland law.

> Md. Code Ann. Natural Resources Article § 8-1808(a)(1) provides that:
>
> It is the intent of this subtitle that **each local jurisdiction shall have primary responsibility for developing and implementing a program,** subject to review and approval by the Commission.

(emphasis added). The state critical area law defines "local jurisdiction" as "a county, **or a municipal corporation, with planning and zoning powers**...in which any part of the...critical area...is located." § 8-1802(a)(13) (emphasis added). "Growth allocation" is defined as follows: "Growth Allocation" means the number of acres of land in the...critical area...that a local jurisdiction may use to create new intensely developed areas and new limited developed areas." § 8-1802(a)(10). "Program" is defined as "the critical area protection program of a local jurisdiction." § 8-1802(a)(14)(i).

Contrary to the County's position, there is no support for the proposition that Talbot County owns or controls growth allocation. To the contrary, the statute explicitly gives local jurisdictions, including the incorporated municipalities, the authority to adopt their own programs, including a growth allocation reclassification procedure.

Oxford, like St. Michaels and Easton, is a jurisdiction with planning and zoning powers, in which critical area lands are located. In fact, like St. Michaels, virtually the entire Town of

Oxford is located within the critical area. Oxford is a "local jurisdiction" with the authority to develop a critical area program, including a growth allocation process.

The Town of Oxford has exercised the authority conferred by state law, and has adopted a critical area program, which was approved by the Critical Area Commission. Exhibit B, ¶ 3; Exhibit C. Oxford's official zoning map identifies the critical area land classifications within its boundaries. See Oxford Zoning Map, Exhibit D. The Oxford zoning ordinance sets forth the Town's growth allocation process, which is an exclusively municipal process, subject only to Critical Area Commission review. Exhibit C, § 34.00. Applications for growth allocation are submitted to the Town for review by the Oxford Planning Commission. Exhibit C. Under the Oxford Zoning Ordinance, the Commissioners of Oxford have the exclusive right and authority to apply the growth allocation process within Oxford's corporate boundaries, subject only to the Critical Area Commission's review and oversight. Exhibit C. The Oxford growth allocation process is consistent with the approved Talbot County Program, which Bill 933 seeks to repeal, in that both the County's and Town's approved programs recognize that Oxford's growth allocation is an exclusively municipal process. Compare Exhibit C, Oxford Zoning Ordinance Section 34.05, and Exhibit A, Talbot County Code, Section 190-109(15), and Md. Code Ann. Article 23A, § 9(c).

The Oxford Zoning Ordinance, including the Oxford growth allocation process, was approved by the Critical Area Commission, and is presumed to be a validly enacted ordinance. See Annapolis v. Annapolis Waterfront Co., 284 Md. 383, 394 (1979) ("Where a municipal legislative body has enacted a zoning ordinance under powers granted by the General Assembly, a presumption of validity attaches to that act as an exercise of the police power."). The State's critical area protection program expressly recognizes that the municipalities and counties have

independent planning and zoning powers, and expressly authorizes a "local jurisdiction", such as the Town of Oxford, to adopt a growth allocation process for lands within its planning and zoning boundaries. The Talbot County towns of Oxford, St. Michaels and Easton each have local critical area programs which have been approved by the Critical Area Commission. Each of those programs has provisions for dealing with the creation of new or expanded development areas through the use of a municipal growth allocation process to convert RCA lands to LDA or IDA.

In enacting Bill 933, the Talbot County Council failed to recognize that the municipalities are independent and coequal political subdivisions with the power to enact and administer public local laws, including local critical area programs which address growth allocation reclassification within the municipal boundaries. The Talbot County municipalities have independent rights, duties and obligations to address land use issues, including the use of growth allocation, within their boundaries. In adopting Bill 933, Talbot County has imposed a concept of "ownership" of the growth allocation process which has no basis in law or in fact. The critical area law's creation of the growth allocation concept did not, and was not intended to alter the fundamental right of towns to control planning, zoning and subdivision within their boundaries. As a matter of law, the County has no authority to control Oxford's reclassification of lands within its boundaries to an LDA or an IDA classification. Accordingly, Bill 933 is invalid as a matter of law to the extent that it inserts the county government as the controlling body with respect to land use issues.

C. **The Critical Area Commission Correctly Disapproved Bill 933 Because the Bill Is Inconsistent with the Oxford Critical Area Program.**

As set forth more fully above, Oxford adopted its initial critical area program in 1988. Oxford has annexed lands, and has mapped and zoned its critical area lands with Critical Area Commission approval. See Exhibits C and D. The Oxford critical area program, and its zoning maps, were approved by the Critical Area Commission. Bill 933 deletes the provisions of the county code mapping growth allocation acreage adjacent to the towns, but Bill 933 does not itself prescribe the county's role in the growth allocation reclassification process. During the 933 Critical Area Commission hearings, the County advised that it would rely upon other provisions of the County Code relating to supplemental growth allocation, which is the county procedure currently in place for allocating previously unmapped growth allocation lands. Exhibit H, p. 30.[5] The supplemental growth allocation process, which was adopted by the County through Bill 762 in 2000, is set forth in Section 190-109D(9).

[5] The only Talbot County town that has agreed to participate in the joint growth allocation review process created by Bill 762 is the Town of Easton, which is the only town that has reclassified all of its originally mapped growth allocation. Pursuant to annexation, the Town of Easton requested that supplemental growth allocation lands be mapped by the County. The joint review process for supplemental growth allocation does not apply where a municipality, such as Oxford, reclassifies its previously mapped growth allocation. In that situation, both the Oxford Program and the County Program recognize that process as an exclusively municipal process. See Exhibit A (Talbot County Code Section 190-109D(15) and Exhibit C (Oxford Zoning Ordinance Section 34.05). As members of the Critical Area Commission noted at the panel hearing, the hearing process in the County Code for supplemental growth allocation does not address a situation where the town and county disagree on the reclassification of an area already within the Town from RCA to IDA, or LDA to IDA. See Exhibit H, 40. Talbot County Code Section 190-109D(15), which the County Council has attempted to repeal with Bill 933, addresses that circumstance, and keeps the County Code consistent with state law applicable to exclusive municipal planning and zoning control within its boundaries. Under the County's joint review process, in the event of a disagreement between the Town and the County, the request for growth allocation would fail. As noted by the Maryland State Department of Planning, "933, by striking reserve amounts of growth allocation to each town, places the County as the final decision maker

Bill 933, and the supplemental growth allocation process in the County Code are in direct conflict with the Oxford Critical Area Ordinance, which vests exclusive and ultimate authority for growth allocation requests within its boundaries with the Commissioners of Oxford. Compare Exhibit C and Exhibit A. These provisions of the County Code are similarly inconsistent with, and are preempted by, the annexation provisions set forth in Md. Code Ann Article 23A, §§ 19 and 9(c).

The Critical Area Commission has the authority and responsibility to approve program amendments of local jurisdictions that: "meet: (1) the Standards set forth in § 1-1808(b)(1) through (3) of this subtitle; and (2) the criteria adopted by the Commission under § 8-1808 of this subtitle." The Critical Area Commission correctly disapproved Bill 933 as being inconsistent with both the state law standards and the regulations. Natural Resources Article § 8-1808(b) provides that:

> b. *Goals of program.* - A program shall consist of those elements which are necessary or appropriate:
>
> (1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have runoff from surrounding lands'
>
> (2) To conserve fish, wildlife, and plant habitat; and
>
> (3) **To establish land use policies for development in the Chesapeake Bay Critical Area which accommodate growth**....

(emphasis added). The Critical Area regulations provide that: "...Counties, **in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities**." COMAR § 27.01.02.06A(2) (emphasis added). Local programs are required to be established in a "**consistent and uniform manner subject to State criteria and**

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for all municipal requests for growth allocation." See Exhibit H, p. 99, (Remarks of Larry

oversight. Natural Resources Article § 8-1801(b)(2). The regulations also require coordination and cooperation between the jurisdictions in adopting, amending and implementing their programs:

> I. Each jurisdiction **shall** attempt to establish cooperative arrangements with adjacent jurisdictions...concerning the policies and objectives for lands within and adjoining the jurisdiction's Critical Area.
>
> P. Counties and municipalities within their political boundaries are encouraged to develop their Critical Area protection programs cooperatively so that programs can be developed more efficiently and so that common land use objectives can be realized.

COMAR 27.01.10.01. J. and P.

The Critical Area Commission correctly disapproved Bill 933 as being inconsistent with other approved municipal programs. Talbot County wholly failed to coordinate with the municipalities, or take their programs, ordinances, or maps into consideration. In fact, the County failed to even consult with the municipalities. It did nothing more than preside at a public hearing. Exhibit B, ¶ 6.

Under State law, the Critical Area Commission is charged with overseeing the implementation of local critical area programs, to ensure that local programs are implemented "on a cooperative basis between State and affected local governments, **with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria and oversight**." Natural Resources Article § 8-1801(b)(2) (emphasis added). The Critical Area Commission correctly found that:

> Accepting Bill 933 would create conflicts between the County program and several approved municipal programs. The municipal programs have their own approved growth allocation procedures premised on the growth allocation reserves provided by the County. The conflict that Bill 933 would create is

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contrary to the Commission's oversight responsibility to ensure that local programs are implemented in a consistent and uniform manner.

Exhibit H. Approval of Bill 933 by the Critical Area Commission would create a direct conflict between the growth allocation process in the Oxford Critical Area Program, and the Talbot County Program. Accordingly, the Critical Area Commission was correct in disapproving Bill 933.

IV. CONCLUSION

The original critical area plans adopted by Talbot County and the Town of Oxford were created in a cooperative and coordinated process, led by the county and town planning commissions. The result of the process was Critical Area Commission approval of the critical area programs for both Talbot County and the Town of Oxford. The programs were implemented with zoning ordinance provisions in both jurisdictions, and subsequent zoning ordinance amendments, including map amendments, all of which have been approved by the Critical Area Commission. The resulting land use regulations for the critical area lands within the two jurisdictions were consistent and appropriately uniform, especially with respect to the application of the growth allocation process, and the role of the growth allocation process in relation to municipal annexations.

Bill 933, introduced and adopted by the Talbot County Council, was a departure from the coordinated process envisioned by state law. The County Council made no effort to work with its own Planning Commission, or to coordinate with the Town of Oxford, and instead has asserted with Bill 933 the right to control zoning reclassifications over critical area lands within the Town of Oxford. Bill 933 is in direct conflict with the Town of Oxford's exclusive planning and zoning authority conferred by Article 23A and Article 66B. Talbot County has attempted to confer upon its self the right to reclassify lands located exclusively within the towns, which is in

direct conflict with the authority given to municipalities under state law. The Critical Area Commission correctly determined that Bill 933 was inconsistent with the well-planned and coordinated critical area provisions of the incorporated towns of Talbot County, and disapproved Bill 933.

That disapproval was appropriate and proper. For the reasons set forth above, and for the additional reasons set forth in the Memorandum in Support of St. Michaels Motion for Summary Judgment, and the Motion for Summary Judgment filed by Miles Point Property, LLC, and The Midland Companies, Inc., which are incorporated by reference herein, the Town of Oxford respectfully requests that the Court declare the Town of Oxford has exclusive planning and zoning authority to reclassify critical area lands within its boundaries, subject to the provisions of state law, and the review and approval of the Critical Area Commission, of both zoning map amendments and zoning text amendments, which impact upon Oxford's critical area program.

WHEREFORE, for all of the reasons stated in this Memorandum, and the memoranda incorporated by reference, the Town of Oxford respectfully requests that the Court order and declare as follows:

(1) That County Bill 933 violates the State Critical Area Program;

(2) That the Critical Area Commission correctly disapproved Bill 933 as an amendment to Talbot County's critical area program;

(3) That County Bill 933 violates and is in conflict with the Constitution and the laws of the State of Maryland, including Article 23A, and Article 66B;

(4) That the Town of Oxford has exclusive planning and zoning jurisdiction within the town boundaries, and Talbot County and the Talbot County Council have no right to enact or enforce zoning laws within the Town of Oxford;

(5) That County bill 933 is inconsistent with Oxford's Critical Area Program, and is therefore ineffective within the Town of Oxford; and

(6) That the Town of Oxford be entitled to such other and further relief as the nature of this case may require.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2005, a copy of the foregoing Memorandum was sent first class mail, postage prepaid to:

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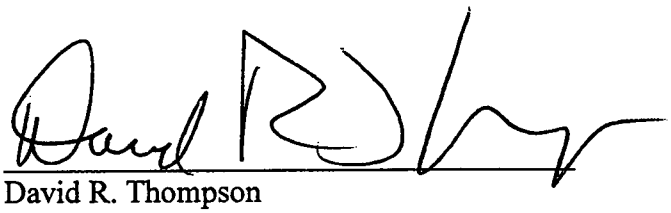

David R. Thompson

Exhibit A

(6) Upon bill (legislation) introduction, the Council shall hold a public hearing in order that interested parties and citizens shall have the opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112.

(7) A complete record shall be kept of the hearing, including the vote of all members of the Council in deciding all questions relating to the proposed amendment.

D. Growth allocation district boundary amendments in the Critical Area.

(1) Growth allocation district boundary amendments in the Critical Area may be initiated by the County Council, Planning Commission, Planning Officer or by a person with a committed financial, contractual, or proprietary interest in the property to be affected by the proposed amendment.

(2) An application for a growth allocation district boundary amendment shall be filed in the Planning Office on the prescribed application form with the accompanying filing fee, where applicable. Each application shall include a proposed site plan and/or subdivision plat that meets the applicable design standards in Articles X and XII of this chapter. Each application request should make the maximum effort to meet the intent of the Critical Area policies and the applicable design standards. The request should:

(a) Create lots or parcels that maximize the opportunities for clustered development that protect habitat and agricultural resources;

(b) Locate structures so as to minimize impact on habitat protection areas and agricultural areas;

(c) Provide a minimally disturbed buffer along the shoreline;

(d) Minimize soil erosion and runoff;

(e) Maximize protection of eroding shorelines;

(f) Have a minimal impact or cause an improvement to stormwater, floodplain and stream characteristics;

(g) Minimize impacts on nontidal wetlands;

(h) Maximize protection of plant and wildlife habitats, particularly for threatened and endangered species, plant and wildlife common to the Chesapeake Bay Region, and anadromous fish propagation waters; and

(i) Maximize protection of forests.

(3) The application shall first be referred by the Council to the Planning Officer for an investigation and recommendation.

(a) The Planning Officer shall cause such investigation to be made as he deems necessary.

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(b) The Planning Officer may hold such informal public hearings as he deems appropriate.

(c) The Planning Officer shall refer all such amendments to the Planning Commission for their review and subsequent recommendations.

(d) The Planning Officer shall submit his recommendation, the recommendation of the Planning Commission and any pertinent information to the County Council within 60 days of application filing.

(4) Introduction of bill; considerations.

(a) After receiving the recommendation of the Planning Officer and Planning Commission concerning a proposal for a growth allocation district boundary amendment and before approval or denial, the Council shall introduce a bill (legislation) for the proposed amendment and hold a public hearing in order that interested parties and citizens shall have an opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112.

(b) In deciding whether to approve or disapprove an application for a growth allocation district boundary amendment, in addition to the specific requirements and purposes set forth elsewhere in this chapter, the Council may also consider:

[1] Consistency with the purposes and intent of the Talbot County Comprehensive Plan;

[2] Compatibility with existing and proposed development and land use in the surrounding area;

[3] Availability of public facilities;

[4] The effects on present and future transportation patterns;

[5] The effect of population change within the immediate area;

[6] The past, present, and anticipated need for future growth of the County as a whole;

[7] The location, nature, and timing of the proposed growth allocation in relation to the public interest in ordered, efficient, and productive development and land use;

[8] The protection of the public health, safety and welfare.

(c) The fact that an application for a growth allocation district boundary amendment complies with all the specific requirements and purposes set forth in this chapter shall not be deemed to create a presumption that the proposed growth allocation district boundary amendment would in fact be compatible with surrounding land uses, and is not, in itself, sufficient to require approval.

(5) A complete record shall be kept of the hearing including the vote of all members of the Council in deciding all questions relating to the proposed growth allocation district boundary amendment.

(6) Site visit. The Council shall not approve or disapprove any applications for a growth allocation district boundary amendment unless and until a site visit has been made by at least a majority of the Council members in order to inspect the physical features of the property and to determine the character of the surrounding area.

(7) Critical Area Commission approval.

(a) All requests approved by the County Council shall be submitted by the County to the Maryland Critical Area Commission for approval as an amendment to the County's Critical Area Program. By state law, the Commission has 90 days to act on a request. If no action is taken in 90 days, the request will be considered approved. A request approved by the County Council shall take effect 60 days after adoption by the Council, and upon approval by the Critical Area Commission.

(b) If a project receiving growth allocation approval, in accordance with the provisions of this subsection, does not obtain final subdivision recordation or final site plan approval, as appropriate, within two years of the final growth allocation approval, the Critical Area and zoning classifications may revert to the previously designated classifications, upon recommendation of the Planning Officer and approval by the County Council.

(c) Upon receipt of a written request by the property owner or the applicant, a time extension may be granted to the two-year period, upon a recommendation by the Planning Officer and approval by the County Council.

(d) A request denied by the Critical Area Commission may be reconsidered by the County Council. Such a request shall be revised by the applicant to address the reasons for Critical Area Commission denial. The revised request shall be submitted to the Planning Officer for reconsideration by the County Council within 90 days of Critical Area Commission denial. An extension of the ninety-day deadline may be requested for a specific period of time, if the applicant can demonstrate, to the satisfaction of the Planning Officer, circumstances beyond the applicant's control.

(8) Growth allocation district boundary amendment requests for property outside of the towns and outside of areas shown as possible annexation areas should be reviewed by the County on an annual cycle, with requests submitted to the Planning Officer by October 1st of each year.

(9) Awarding of supplemental growth allocation to municipalities in County.

(a) Not more than 1,213 acres of the Critical Areas of the County, including all land lying within the Critical Area within incorporated towns, shall be

reclassified from the Rural Conservation (RC) District (or town zoning districts established for the Resource Conservation Area of the Critical Area) to any other zoning district. Of these 1,213 acres, 155 acres is reserved for the Town of Easton, 195 acres is reserved for the Town of Oxford, 245 acres is reserved for the Town of St. Michaels for growth allocation associated with annexations, and 618 acres is reserved for the County.

(b) When 1,092 acres (90% percent of 1,213 acres) has been approved for growth allocation by the towns and/or the County, then the County shall request permission from the Maryland Critical Area Commission to double the maximum number of acres that may be reclassified from the Rural Conservation District (or comparable town districts) from 1,213 to 2,426 acres. Upon Critical Area Commission approval, the County shall reserve acreage for each town.

(c) If the Commission approves the doubling of the number of acres that may be rezoned under this subsection, the County will have its full allocation of 2,554 acres for growth as specified in the County's Critical Area Plan, that is 1,213 acres (original limit) + 1,213 acres (potential additional limit) + 128 acres (amount reserved in Subsection D(10) below = 2,554 acres). The Maryland Critical Area law does not allow for the full 2,426-acre allocation (1,213 + 1,213) at the time of the establishment of this section (August 13, 1989).

(d) Upon request for supplemental growth allocation by any municipal corporation within the County, the County Council may transfer growth allocation to the municipal corporation and may impose such conditions, restrictions, and limitations upon the use of any such supplemental growth allocation, if any, as the Council may consider appropriate. All such requests shall comply with the following requirements:

[1] Application process. The applicant shall file the application with the municipality. In addition to complying with all municipal requirements, the applicant shall also provide the information required by § 190-109D(2) of this chapter, as amended, and shall also comply with the design standards set forth in § 190-109D(2)(a) through (i) of this chapter, as amended. The municipality shall forward the application to the County Council for consideration and review within five working days.

[2] Staff and Planning Commission review. The planning staff and the Planning Commission shall review the application in accordance with the procedures set forth in § 190-109D(9)(d)[1] through [4], except that municipal and county staff reports shall be forwarded to the Planning Commissions of both jurisdictions, and the planning staff shall schedule a joint hearing on the application before the Planning Commissions of both jurisdictions. The designated Chairperson of each Planning Commission shall co-chair the hearing. Each Planning Commission shall vote separately and make its recommendations to its respective

council or commission. Each Planning Commission shall provide a copy of its recommendations to the other jurisdiction.

[3] Council review. The county and municipal councils or commissions shall hold a joint hearing on the application, co-chaired by the designated Chairperson of each council or commission which may be coordinated jointly with the Critical Area Commission. The county and municipal councils or commissions shall make their respective decisions separately as independent entities. The County Council shall evaluate the application in accordance with § 190-109D(4).

[4] Amendments to approved projects. Any amendment to an approved project shall be subject to County Council review and approval for a period of five years following the date of initial approval.

(10) Reclassification of land within incorporated towns.

(a) Not more than 128 acres of the Critical Area of the County, including lands within the incorporated towns, shall be reclassified from a Limited Development Area (LDA) to an Intensely Developed Area (IDA). For purposes of this section, LDA Zoning Districts include Rural Residential (RR), Town Residential (TR) and Village Center (VC) or areas of less than 20 contiguous acres of Limited Commercial (LC), General Commercial (GC) or Limited Industrial (LI). Town zoning districts include all districts classified as LDA. The requested IDA classification shall include areas of 20 or more contiguous acres of LC, GC, LI or town zoning districts established for the IDA of the Critical Area.

(b) In determining whether the twenty-acre threshold has been reached, the contiguous areas of existing commercial and/or industrial zoning districts, whether located in the Critical Area or Non-Critical Area, shall be considered. Of the 128 acres, 24 acres is reserved for the Town of Easton, 44 acres for the Town of Oxford, 24 acres for the Town of St. Michaels for growth allocation or growth allocation associated with annexations, and 36 acres for the County for growth allocation for property outside of the towns and outside of areas shown as possible annexation areas. (See Maps 1, 2 and 3.)[8]

(11) The number of reserved areas allocated among the towns for rezoning in § 190-109D(9) and (10) should be reviewed by the County and Towns by June 1, 1993 for possible reallocation and at least every four years thereafter.

(12) In any one rezoning review cycle, not more than 100 acres should be approved by the County for reclassification from the Rural Conservation District to any other zoning district. Not more than 20 acres should be reclassified from the Rural Residential, Town Residential, or Village Center Districts or area of less than 20 contiguous acres of Limited Commercial, General Commercial, and/or Limited Industrial Districts to establish a total area of 20 or more contiguous acres of

8. **Editor's Note: Maps 1, 2 and 3 are included at the end of this chapter.**

Limited Commercial, General Commercial, and/or Limited Industrial Districts (including contiguous areas of existing Commercial or Industrial Zoning Districts).

(13) Zoning Map amendments from the LDA Zoning District to another LDA Zoning District or from one IDA Zoning District to another IDA Zoning District shall not require growth allocation, but shall instead be required to follow the procedures of a Non-Critical Area Zoning Map amendment as prescribed in § 190-109B.

(14) Specific annexation requests for property included in the acres reserved for the towns in § 190-109D(9) and (10) above and as shown in Maps 1, 2, and 3, shall be reviewed by the County for consistency with the County Comprehensive Plan and shall be subject to all current ordinances regulating annexations. The County shall not act on rezoning requests adjacent to the towns as shown on Map 1, 2, and 3 until an annexation request for the property has been denied by the town or until 12 months after an annexation request for the property has been submitted to the town, whichever occurs first. If the County approves a rezoning request not associated with an annexation request for property adjacent to the towns as shown on Maps 1, 2 and 3, then the acreage of the property rezoned shall be subtracted from the acres reserved for the Town for annexation in § 190-109D(9) and (10).

(15) Growth allocation requests for property that has been annexed within five years of the request shall be reviewed by the County for consistency with the County Comprehensive Plan. Growth allocation request(s) for property that has been in the town for more than five years prior to the request does not require review by the County; however, the towns shall inform the County of such reclassification to ensure that the total reserved acres, listed above, are not exceeded.

(16) The location of growth allocation requests within Towns or growth allocation requests associated with annexation requests is not limited to the areas shown in Maps 1, 2 and 3, however, the total acres reserved per town shall not be exceeded.

(17) When considering growth allocation requests from the Rural Conservation District, priority shall be given based on the district requested in the following order: Village Center, Town Residential, Rural Residential, Limited Commercial, General Commercial, Limited Industrial. When considering growth allocation requests from the Rural Residential, Town Residential, or Village Center District, priority shall be given based on the district requested in the following order: Limited Commercial, General Commercial, Limited Industrial.

(18) A growth allocation request for the Rural Residential District should be adjacent to existing Rural Residential, Town Residential, or Village Center Districts. Such requests should not be adjacent to Limited Commercial, General Commercial, or Limited Industrial Districts of any size. Property proposed for the Town Residential District should be adjacent to the Rural Residential, Town Residential, or Village Center Districts or to an area of less than 20 contiguous acres of Limited Commercial, General Commercial, or Limited Industrial Districts, or to any area of Limited Commercial or General Commercial Districts. Property proposed for the Village Center District should be adjacent to an existing Rural Residential, Town Residential, or Village Center District or to any size area of

Limited Commercial, General Commercial, or Limited Industrial Districts. For purposes of this section adjacency means at least 25% of the perimeter land boundary of the subject parcel is in common with the referenced zoning district(s). Land boundaries shall be measured at the center line of any rights-of-way.

(19) A growth allocation request to establish a total area of less than 20 contiguous acres of Limited Commercial, General Commercial, and/or Limited Industrial Zoning Districts (including contiguous areas of existing commercial or industrial Zoning Districts) shall be adjacent to the Town Residential, Village Center, Limited Commercial, General Commercial, or Limited Industrial District. Such requests should not be adjacent to the Rural Residential District. For purposes of this section, adjacency means at least 25% of the perimeter land boundary of the subject parcel is in common with the referenced zoning district(s). Land boundaries shall be measured at the center line of any rights-of-way.

(20) A growth allocation request to establish a total area of 20 or more contiguous acres of Limited Commercial, General Commercial, and/or Limited Industrial Zoning Districts (including contiguous areas of existing commercial or industrial zoning districts) should not be approved unless the proposed development activity is water-dependent, will have substantial economic benefit to Talbot County, and cannot be located within the limits of an incorporated town. Such a request should be located within or adjacent to a Village Center, Limited Commercial, General Commercial or Limited Industrial Districts. For purposes of this section, adjacency means at least 25% of the perimeter land boundary of the subject parcel is in common with the referenced zoning district(s). Land boundaries shall be measured at the center line of any rights-of-way. Such a request should be located so as not to conflict with the character and purpose of the Rural Conservative District.

(21) Growth allocation for specific uses in the Rural Conservation RC Zone. Specific uses in the Rural Conservation RC Zoning District listed in § 190-19, General Table of Land Use Regulations, are permitted to expand only with the issuance of growth allocation. The process for granting growth allocation for specific Rural Conservation RC uses is as follows: **[Added 12-9-2003 by Bill No. 932, effective 2-7-2004]**

(a) Application for growth allocation shall accompany an application for site plan review and shall be made on forms provided by the Planning Office.

(b) An application shall be submitted to the Planning Office meeting all of the general site plan requirements as stipulated in § 190-92 of this chapter. The application shall indicate the area and number of growth allocation acres requested.

(c) The Planning Officer, or his or her designated representative, shall review the application materials, including the site plan and all attachments, for completeness and, if found to be in order, shall accept the application.

(d) The application shall be submitted by the Planning Officer or his or her designated representative to the Technical Advisory Committee (TAC) for review and comment.

(e) Upon completion of the Technical Advisory Committee review, all comments shall be passed on to the Planning Officer. The Planning Officer or his or her designated representative shall prepare a staff report, which shall accompany the site plan report required under § 190-92 of this chapter and forward to the Planning Commission.

(f) The Planning Commission shall review the application, related materials and the Planning Office staff report for both the site plan and the application for growth allocation at a regular public meeting. Upon favorable approval by the Planning Commission and the Planning Officer, the Planning Officer shall forward the recommendation on the growth allocation request to the County Council.

(g) After receiving the recommendation of the Planning Officer and the Planning Commission concerning a proposal for growth allocation associated with a use expansion in the Rural Conservation RC Zone, the Council shall hold a public hearing in order that interested parties and citizens shall have an opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112 of this chapter.

(h) In deciding whether to approve or disapprove an application for a growth allocation for expansion of specific uses in the Rural Conservation RC Zone as listed in § 190-19 of this chapter, the Council shall consider the following:

[1] Consistency with the purposes and intent of the Talbot County Comprehensive Plan;

[2] Compatibility with existing and proposed development and land use in the surrounding area;

[3] Availability of public facilities;

[4] The effects on present and future transportation patterns;

[5] The effect of population change within the immediate area;

[6] The past, present, and anticipated need for future growth of the County as a whole;

[7] The location, and nature of the proposed use and/or expansion of the use; and

[8] The protection of the public health, safety and welfare.

(i) The fact that an application for a growth allocation complies with all the specific requirements and purposes set forth in this chapter shall not be deemed to create a presumption that the proposed growth allocation would in fact be compatible, and is not, in itself, sufficient to require approval with surrounding land uses.

(j) A complete record shall be kept of the hearing, including the vote of all members of the Council in deciding all questions relating to the proposed growth allocation.

(k) Site visit. The Council shall not approve or disapprove any applications for a growth allocation unless and until a site visit has been made by at least a majority of the Council members in order to inspect the physical features of the property and to determine the character of the surrounding area.

(l) All requests approved by the County Council shall be submitted by the County to the Maryland Critical Area Commission for approval as an amendment to the County's Critical Area Program. By state law, the Commission has 90 days to act on a request. If no action is taken in 90 days, the request will be considered approved. A request approved by the County Council shall take effect 60 days after adoption by the Council, and upon approval by the Critical Area Commission.

(m) The County Council may reconsider a request denied by the Critical Area Commission. Such a request shall be revised by the applicant to address the reasons for Critical Area Commission denial. The revised request shall be submitted to the Planning Officer for reconsideration by the County Council within 90 days of Critical Area Commission denial. An extension of the ninety-day deadline may be requested for a specific period of time, if the applicant can demonstrate, to the satisfaction of the Planning Officer, circumstances beyond the applicant's control.

§ 190-110. Appeals to the Courts.

Any person aggrieved by any decision of the Board of Appeals may appeal the same to the Circuit Court of Talbot County according to Subtitle B of the Maryland Rules of Procedure.[11]

§ 190-111. Duties of Planning Officer, Board of Appeals and County Council.

A. It is the intent of this chapter that all questions of interpretation and enforcement shall be first presented to the Planning Officer and that such questions shall be presented to the Board of appeals only on appeal from the decision of the Planning Officer, and that recourse from the decisions of the Board or Appeals shall be the courts.

B. It is further the intent of this chapter that the duties of the County Council in connection with this chapter shall not include hearing and deciding questions of interpretation and enforcement that may arise. Under this chapter the County Council shall have only the duties of considering and adopting or rejecting proposed amendments to the text and maps, or the repeal of this chapter.

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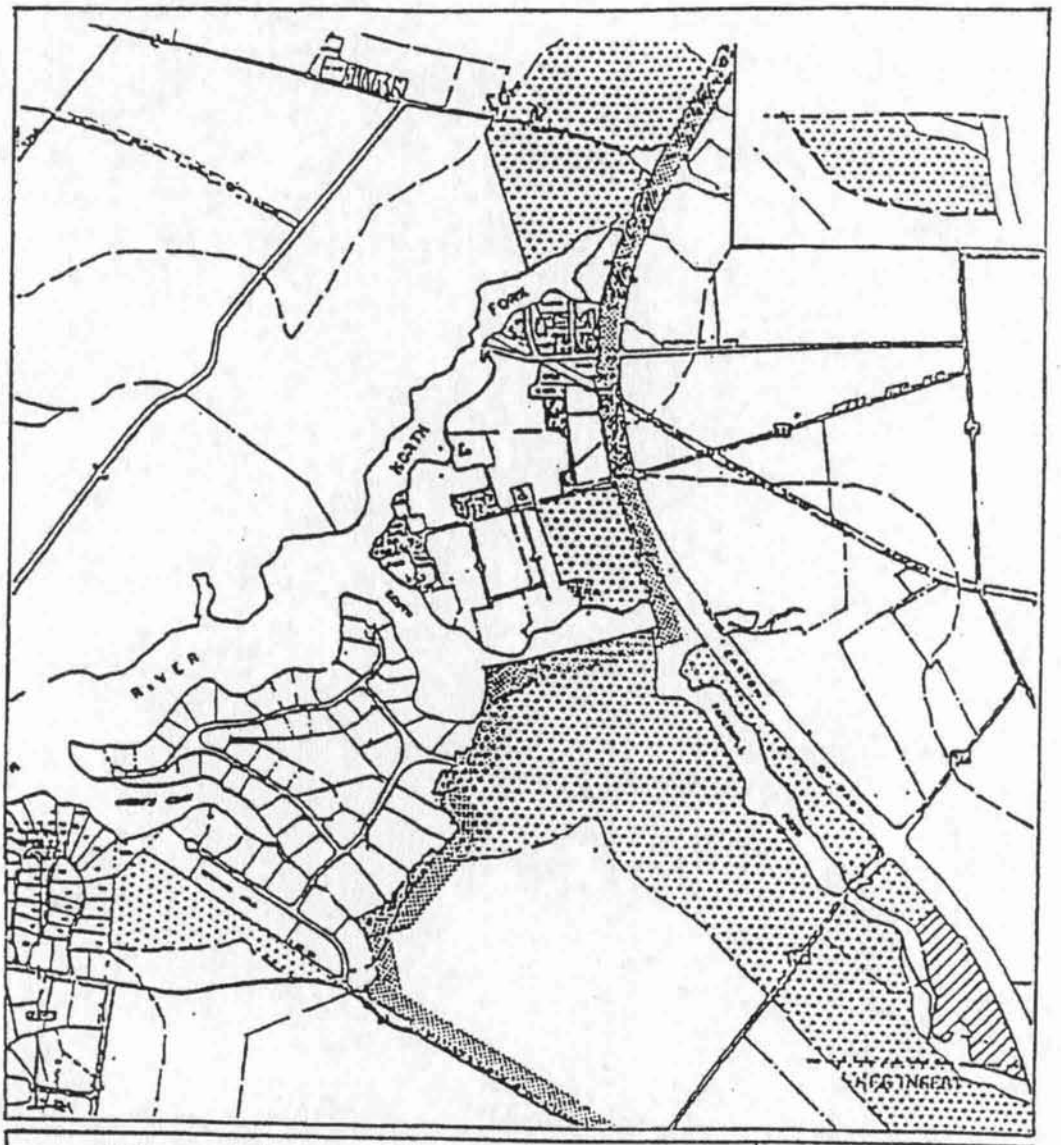
11. Editor's Note: Former Sections 19.14(e), Enforcement and Penalties, and 19-14(f), Injunction Powers, were repealed 1-18-2000 by Bill No. 751, effective 3-18-2000. See now Article XV of this chapter.


Area Allocated for Town Development
TOWN OF EASTON
Talbot County, Maryland
RCA for Annexation or Rezoning
LDA for Rezoning
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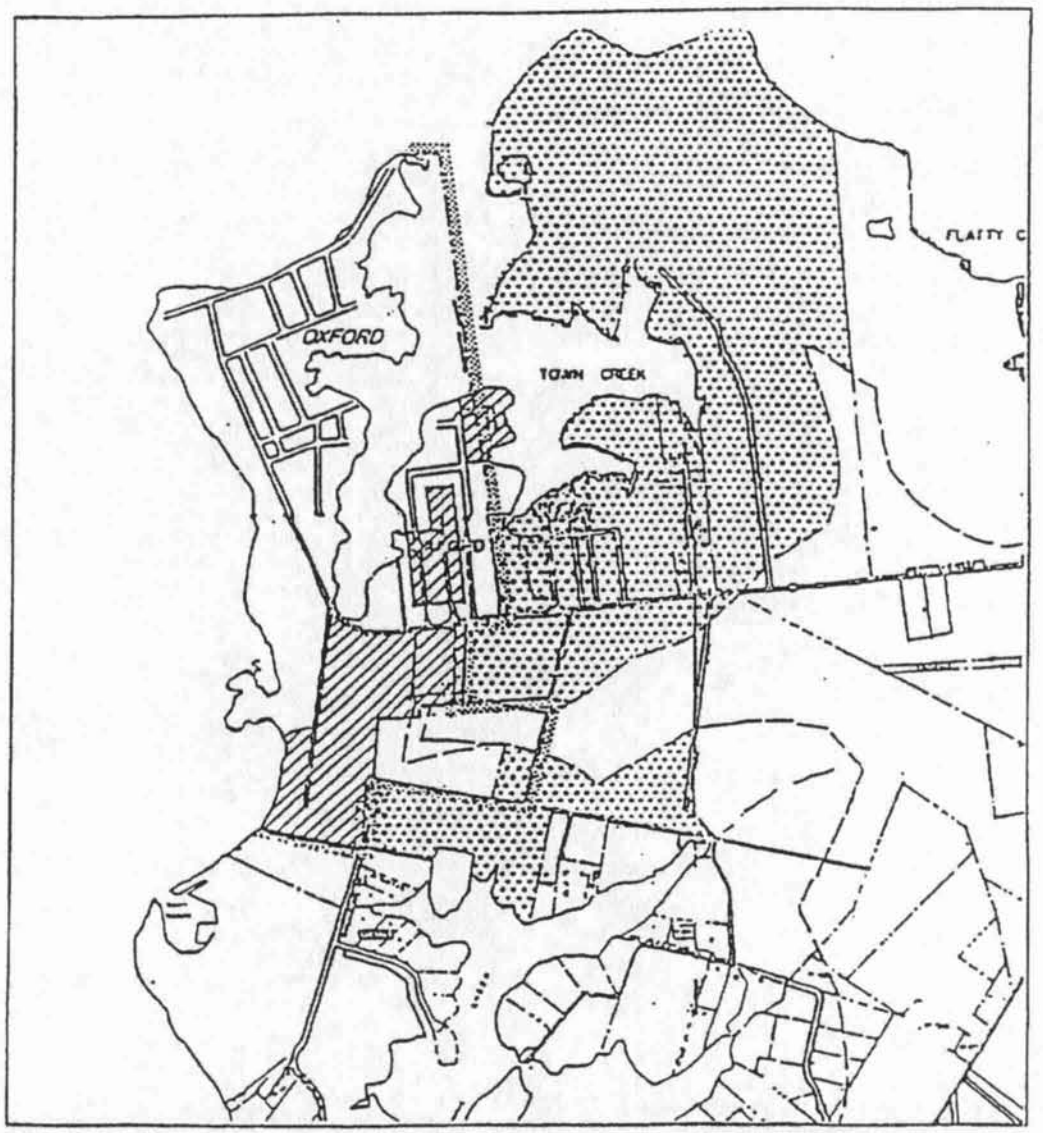

Area Allocated for Town Development

TOWN OF OXFORD

Talbot County, Maryland

RCA for Annexation or Rezoning

LDA for Rezoning

Map No

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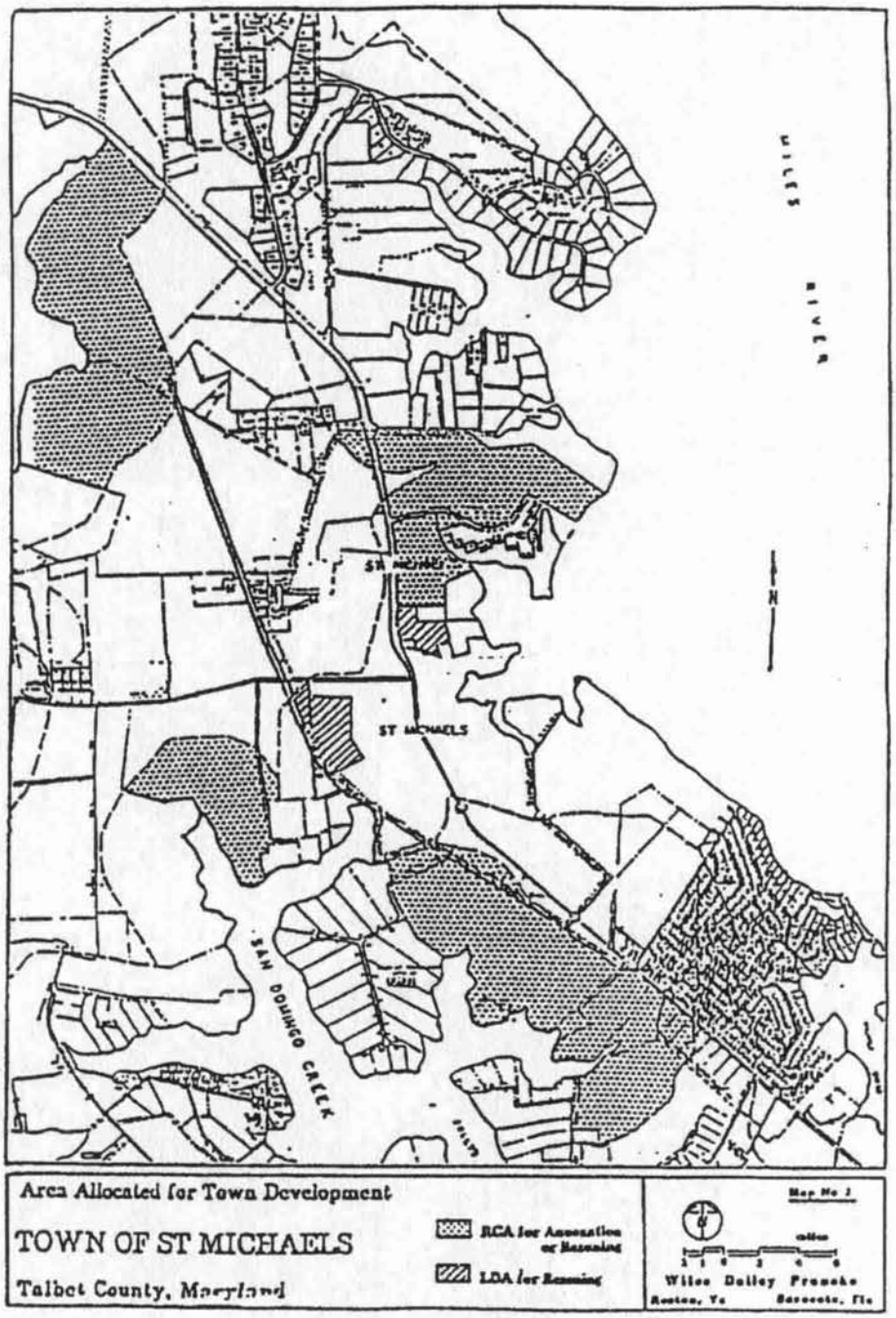

ST MICHAELS
SAN DOMINGO CREEK
Area Allocated for Town Development
TOWN OF ST MICHAELS
Talbot County, Maryland
RCA for Annexation or Rezoning
LDA for Rezoning
Map No 1
Wilco Dailey Franeke

Exhibit B

TALBOT COUNTY, MARYLAND	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
DEPARTMENT OF NATURAL RESOURCES	*	TALBOT COUNTY,
	*	MARYLAND
Defendant	*	Case No. 20-C-04-005095DJ

* * * * * * * * * *

AFFIDAVIT OF SIDNEY S. CAMPEN, JR.

1. I am over the age of 18 years old, have personal knowledge of the matters contained herein, and I am competent to be a witness.

2. I have been a Commissioner of the Town of Oxford since 1998. I am currently the President of the Commissioners of Oxford.

3. The Town of Oxford adopted its own Critical Area Program in 1988, which was approved by the Critical Area Commission on or about March 8, 1988.

4. The Oxford Critical Area Program has been updated and amended on several occasions, all with the approval of the Critical Area Commission.

5. Exhibit C to this Memorandum is a true and accurate copy of pertinent provisions of the Oxford Zoning Ordinance. Exhibit D is a true and accurate copy of the Town of Oxford's Zoning Map.

6. Prior to enacting Bill 933, the County Council declined to consult or discuss with the Talbot County municipalities either the substance or the procedure in the creation and enactment of Bill 933. Other than presiding at a mandatory public hearing, the County Council had no communication with the representatives of the Talbot County municipalities concerning their current, pending or future growth plans, and made no effort to coordinate the proprosed critical area plan changes with the Commissioners of Oxford.

I hereby certify under the penalties of perjury that the foregoing is true and correct, to the best of my information, knowledge and belief.

Sidney S. Campen, Jr.

ALL-STATE LEGAL®
EXHIBIT
B

State of Maryland
Talbot County

Subscribed and sworn to before me, a notary public, of and for the jurisdiction aforesaid this 14 day of November, 2005.

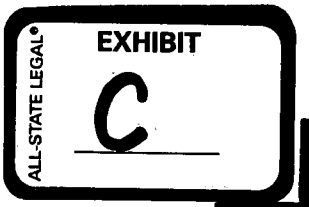
Patricia E. Campen
Notary Public
My Commission Expires: 6/1/08

Exhibit C

ZONING ORDINANCE

Oxford, Maryland

Adopted July 9, 1996



"WS/WC"	Wildlife Sanctuary/Corridor District
"O"	Critical Area Overlay District
"GA"	Growth Allocation District

SECTION 4. PROVISION FOR OFFICIAL ZONING MAP

4.00 - Establishment, Attestation, and Location.

The boundaries of the zoning districts are shown on the Official Zoning Map of Oxford, Maryland, which together with all notations and explanatory matter thereon are hereby made a part of this ordinance. The Official Zoning Map shall be properly attested and shall remain on file with the Clerk/Treasurer of the Town of Oxford, with a copy to be provided to the Clerk of the Circuit Court for Talbot County and the Planning Officer for Talbot County.

4.01 - Changes to Official Zoning Map.

If, in accordance with the provisions of this ordinance, changes are made in district boundaries or other matter portrayed on the Official Zoning Map, such changes shall be entered on the Official Zoning Map promptly after the amendment has been approved by the Town Commissioners. No changes of any nature shall be made on the Official Zoning Map or matter shown thereon except in conformity with the procedures set forth in this ordinance. Any unauthorized changes of whatever kind by any person shall be considered a violation of this ordinance and punishable as provided under Section 17.

4.02 - Replacement of Official Zoning Map.

In the event that the Official Zoning Map becomes damaged, destroyed, lost or difficult to interpret because of the nature or number of changes and additions, the Town Commissioners may by resolution adopt a new Official Zoning Map. The new Official Zoning Map may correct drafting or other errors or omissions in the prior Official Zoning Map, but no such correction shall have the effect of amending the original Official Zoning Map or any subsequent amendment thereof. The new Official Zoning Map shall be properly attested, and a notation of the date of adoption shall be entered on the map. Unless the prior Official Zoning Map has been lost or totally destroyed, the prior map and any significant parts thereof remaining shall be preserved, together with all available records pertaining to the adoption and amendment of the prior map.

4.03 - Official Critical Area Overlay District Maps.

Official Critical Area Overlay District Maps shall be prepared and maintained in force as part of the Official Zoning Maps of the Town of Oxford. They shall delineate the extent of the Critical Area Overlay District ("O") that shall correspond to the Chesapeake Bay Critical Area.

1. The Critical Area Overlay District shall include all lands and waters defined in Section 8-1807 of the Natural Resources Article, Annotated Code of Maryland. They include:

   a. All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands designated under Title 9 of the Natural Resources Article, Annotated Code of Maryland.

   b. All lands and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 9 of the Natural Resources Article, Annotated Code of Maryland; and

   c. Modification to these areas through inclusion or exclusion proposed by the Town of Oxford and approved by the Commission as specified in Section 8-1807 of the Natural Resources Article, Annotated Code of Maryland.

2. Within the designated Critical Area all land shall be assigned one of the following land use management classifications:

   a. Intensely Developed Area (IDA)

   b. Limited Development Area (LDA)

   c. Resource Development Area (RCA)

   The land use management classification shall be as designated in the Town of Oxford Critical Area Program, as amended. The Critical Area Overlay District Maps may be amended by the Town Commissioners in compliance with amendment provisions in this ordinance, the Maryland Critical Area Law and Critical Area Criteria.

was a substantial change in the character of the area where the property is located, or that there is a mistake in the existing zoning classification.

5. Where the decision involves a text amendment, the resolution shall be accompanied by an opinion of the Town Commissioners setting forth their conclusions and reasons therefore.

15.06 - Filing Fee for Reclassification.

A filing fee, in an amount which shall be determined by the Town Commissioners, shall be charged for processing an application for reclassification.

15.07 - Repeated Application for Reclassification.

No application for reclassification shall be accepted for filing by the Town Commissioners if the application is for the reclassification of the whole or any part of land for which reclassification has been denied within 18 months from the date of the Town Commissioners decision.

15.08 - Changing of Official Zoning Map.

It shall be the duty of the Town Commissioners to change the Official Zoning Map promptly upon the adoption of any amendments, in order that said Map shall always be an up-to-date public record of the zoning districts in the Town.

15.09 - Amending Land Use Management Classifications.

The Town Commissioners may from time to time amend the provisions of this ordinance as they relate to the Critical Area District, amend the land use management classification of properties in the Critical Area District or amend the Critical Area District Boundary.

In addition, the Town Commissioners shall review and propose any necessary amendments, as required, to the land use management classifications in the Critical Area District at least every four (4) years.

All such amendments shall be approved by the Maryland Chesapeake Bay Critical Area Commission as established in Subsection 8-1803 of the Critical Area Law, Subtitle 18. Standards for Critical Area Commission approval of proposed amendments are as set forth in the Critical Area Law, Subtitle 18 Subsection 8-1809 (I). The Critical Area Commission process for approval of proposed amendments are as set forth in the Critical Area Law, Subtitle 18, Subsection 8-1809 (d).

15.10 - Amendment Procedures for Land Use Management Classification.

1. Proposed amendments to the text of this Ordinance as it relates to the Critical Area District may only be initiated by the Planning Commission and Town Commissioners.

Commercial Dock. A facility for the mooring, berthing, storing, or securing of watercraft, and which is operated as a commercial enterprise, e.g. compensation is received in exchange for the provision of service(s). Included may be such services and sales operations as are directly incidental to the mooring, berthing, storing, securing or operation of watercraft.

Community Piers. Boat docking facilities associated with subdivisions and similar residential areas, and with condominium, apartment, and other multiple-family dwelling units. Private piers are excluded from this definition.

Comprehensive Plan. A plan prepared by the Oxford Planning Commission and adopted by the Town Commissioners which contains goals and objectives for the future of the Town and which sets forth policy and desirable actions for attaining those goals and objectives.

Condominium. A form of property ownership providing for individual ownership of a specific apartment (or other space not necessarily on the ground level) together with an undivided interest in the land or other parts of the structure in common with other owners.

Conservation Easement. A non-possessory interest in land that restricts the manner in which the land may be developed in an effort to conserve natural resources for future use.

Conventional Construction. Buildings which are fabricated or assembled in the greater part at the site where such buildings are to be located, not including mobile homes, or recreational trailers and vehicles, or buildings which are designed to be portable.

Critical Area. All lands and waters defined in Section 8.1807 of the Natural Resources. Article, Annotated Code of Maryland. They include:

1. All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the state wetlands maps, and all state and private wetlands designated under Title 9 of the Natural Resources Article, Annotated Code of Maryland;

2. All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 9 of the Natural Resources Article, Annotated Code of Maryland; and

3. Modification to these areas through inclusions or exclusions proposed by the Town of Oxford and approved by the Commission as specified in Section 8.1807 of the Natural Resources Article, Annotated Code of Maryland.

Critical Area Commission. The Maryland Chesapeake Bay Critical Area Commission.

Critical Area District. The Town of Oxford portions of the Critical Area, as defined in this ordinance.

Deck. A flat floored structure or impervious surface, without a roof, used in connection with (or by the occupants of) another structure on the property. A deck or patio may be attached to or separated from another structure.

Demolition. An action which results in the destruction or removal of a building or structure or portion thereof representing 20% or more of the floor area of the principal structure.

Density. The number of dwelling units per acre of gross area of a development tract, unless otherwise specified.

Development or Development Activities. Any construction, modification, extension or expansion of buildings or structures; placement of fill or dumping; storage of materials; land excavation; land clearing; land improvement; or any combination thereof, including the subdivision of land.

Developed Woodlands. Areas one (1) acre or more in size that predominantly contain trees and natural vegetation and that also include residential, commercial, or industrial structures and uses.

Directional Signs. Signs which display the name and/or nature of a commercial activity, geographical area, or public building and indicate through writing or graphic material the geographic location of such an activity or building.

District. A portion of territory lying within the zoning jurisdiction of Oxford and subject to certain uniform requirements and regulations under the provisions of this ordinance.

Disturbed Area. The area of a site where natural cover has been removed for construction of buildings, placement of septic systems or shared facilities, drives, roads, parking area, etc. and not replaced.

Drainageways. Minor watercourses that are defined either by soil type or by the presence of intermittent or perennial streams or topography that indicates a swale where surface sheet flows join, including: The land, except where areas are designated as floodplain, on either side of and within fifty (50) feet of the centerline of any intermittent or perennial stream shown on the U.S. Geological Service's 7 ½ minute Quadrangle sheets covering the incorporated areas of Talbot County.

Duplex. A single dwelling consisting of two single family units, situated side by side and having a common interior wall with separate utilities for each dwelling unit.

Dwelling, Multi-family. A residential building designed for or occupied by three or more families.

Dwelling, Single Family. A detached residential building designed for and occupied by one family only.

Forest Management. The protection, manipulation, and utilization of the forest to provide multiple benefits, such as timber harvesting, wildlife habitat, etc.

Forest Practice. The alteration of the forest either through tree removal or replacement in order to improve the timber, wildlife, recreational, or water quality values.

Freeboard. An increment of elevation added to the Base Flood elevation to provide a factor of safety for uncertainties in calculations, wave actions, subsidence, or other unpredictable effects.

Garden Type Apartment. A type of multi-family dwelling in which a single building contains three or more dwelling units. Such units may share a common entrance, as well as common utilities and service facilities. Each story of a garden apartment building may contain separate dwelling units, but no building shall contain more than three stories or exceed the height requirements of this ordinance.

Grandfathered. The term describes the status accorded certain properties and development activities that are of record prior to the date of adoption of this Ordinance or provisions of this Ordinance.

Gross Floor Area. The total floor area of all finished and usable floors, or portions thereof, when measured from outside to outside of exterior walls.

Growth Allocation.

1. An area of land calculated as five (5%) percent of the total Resource Conservation Area (excluding tidal wetlands and federally owned land) in the County, a portion of which the Town may convert to more intense management areas to accommodate land development; also

2. An act of the Town Commissioners, (i.e., approving the Growth Allocation), which provides for conversion of a property or properties located in a Resource Conservation Area (RCA) and/or the Limited Development Area (LDA) in the Critical Area District to another land management classification which allows an increase in the permitted density.

Guesthouse. Living quarters within a residence or a detached accessory building located on the same premises, such quarters not rented or otherwise used as a separate dwelling and having no separate utility meter.

Habitat Protection Areas. The Buffer, Non-Tidal Wetlands, Threatened and Endangered Species and species in Need of Conservation, Plant and Wildlife Habitat, and Anadromous Fish Propagation waters as defined in the Oxford Critical Area Program and COMAR 14.15.09.

Height. (See Building height)

SECTION 33. TOWN OF OXFORD CRITICAL AREA OVERLAY DISTRICT ("O")

33.01 - Statement of Intent.

The purpose of the Critical Area Overlay District ("O") is to implement Oxford Critical Area Program and to protect and enhance water quality and habitat resources located within the Oxford Critical Area. The geographic areas for which the following district regulations apply shall be the Oxford Critical Area District as defined in Section 4.03 and as designated on the Town of Oxford Critical Area Overlay District Maps.

The intent of this district is to provide special regulatory protection for the resources located within the Oxford Critical Areas and to foster more sensitive development activity for shoreline areas. Another objective is to minimize adverse impacts to water quality and natural habitats. As such, the Town of Oxford considers the Oxford Critical Area Program to be legally part of this Zoning Ordinance. The Program shall require that all project approvals are consistent with the Critical Area Law and therefore minimize adverse impacts on water quality, conserve fish, wildlife and plant habitat and establish policies for growth management.

33.02 - Land Use Management District Classifications.

Within the Town of Oxford Critical Area Overlay District ("O") there shall be three land use management area classifications:

1. Intensely Developed Areas (IDA);

2. Limited Development Areas (LDA); and

3. Resource Conservation Areas (RCA) which shall be as shown on the Official Critical Area Map. These land use management areas correspond to the definitions established in the Chesapeake Bay Critical Area Criteria, as amended, for each area and specifically as identified on the Town of Oxford Critical Area maps, adopted as part of the Oxford Critical Area Program. Mapped land use management area classifications are based on land uses established on or before 1 December 1985, except for areas where the land classification may be changed by granting the Growth Allocation (GA) floating zone district classification. The following regulations shall be applied based on the specific land management classification.

33.03 - Density Provisions

1. Intensely Developed Areas (IDA)

   Permitted density in the Intensely Developed Area (IDA) shall be as established in the underlying base zone.

2. Limited Development Areas (LDA)

The density of development and minimum lot sizes permitted within a Limited Development Area (LDA) shall be as established in the underlying base zone.

3. Resource Conservation Areas (RCA)

Residential densities in Resource Conservation Areas (RCAs) shall be no more than one (1) dwelling unit per twenty (20) acres, except as provided for in 5 below, and Section 9.01.

4. Determining Density

Determination of density shall be based on the gross site area of the parcel, excluding tidal wetlands, except that in determining residential densities for a site in the RCA, private wetlands may be included in the calculation of one (1) unit per twenty (20) acre density, provided the development density on the upland portion of the site does not exceed one (1) dwelling unit per eight (8) acres.

Minimum and maximum lot sizes shall be governed by standards applicable to the underlying base zoning districts, and this ordinance. Nothing in this regulation shall limit the ability of a participant in the Agricultural Easement Program to convey real property impressed with such an easement to family members, provided no such conveyance shall result in a density of greater than one (1) dwelling unit per twenty (20) acres -- except as provided in 5 below.

5. Intra-family Transfer: The one (1) unit per twenty (20) acre density limitation in the RCA shall not prevent a bona fide intra-family transfer subjected to the following limitations:

a. Intra-family transfer will be permitted on parcels of land in Oxford where it is shown that the parcel was recorded on or before 1 March 1986 and such parcel is at least seven (7) acres and not more than sixty (60) acres in size.

b. A bona fide intra-family transfer shall be subject to all the requirements to the Town of Oxford Subdivision Regulations and a notion shall be placed on the final subdivision plan denoting the lot(s) that are created under these provisions.

c. Subdivision of land under the bona fide intra-family transfer provisions contained herein shall be subject to the following limitations:

(1) Parcels 7 acres to less than 12 acres cannot be subdivided into more than a total of 2 lots.

(2) Parcels 12 acres to less than 60 acres cannot be subdivided into more than 3 lots.

SECTION 34. "GA" GROWTH ALLOCATION DISTRICT

34.01 - Purpose and Intent

Growth Allocation is an area of land calculated as five (5%) percent of the total Resource Conservation Area (excluding tidal wetlands and federally owned land) in the County, a portion of which the Town may convert to more intense management areas to accommodate land development. The Growth Allocation District is designated for use within the Critical Area District on lands classified as Resource Conservation Areas (RCA) and/or Limited Development Areas (LDA). The purpose of the "GA" District is to designate areas of the Critical Area District where the Planning Commission and Town Commissioners may approve a change in the current land management classification on specific sites and for specific development projects that they may be developed to the extent permitted by this ordinance and the new land use management classification. Only specific development projects, for which the preliminary plat has been approved by the Planning Commission, shall be approved for the "GA" Growth Allocation District reclassification and thereby receive Critical Area Growth Allocation.

34.02 - Location.

The granting of the "GA" Growth Allocation District reclassification shall be consistent with the Town of Oxford Critical Area program. When approving the "GA" Growth Allocation District, the Planning Commission and the Town Commissioners shall use the following guidelines to determine if the location of the proposed land management classification under the "GA" District classification is consistent with the Town of Oxford Critical Area Program:

1. New IDA will be located in existing LDA or adjacent to existing IDA;

2. New LDA will be located adjacent to existing LDA or IDA;

3. To the extent possible no more than half of the growth allocated will be located in the RCA.

4. If the Town is unable to utilize any portion of its Growth Allocation within or adjacent to existing IDA or LDA, that portion of the Growth Allocation which cannot be so located may be located in the RCA;

5. New IDA and LDA will be located so as to minimize impacts to Habitat Protection Areas and in a manner that optimizes benefits to water quality.

6. New IDA or LDA located in the RCA will conform to all criteria of the Town of Oxford Critical Area Program for such areas; and

7. When Growth Allocation is permitted in RCA not adjacent to IDA or LDA the developer will be required to minimize the impact of the development on water quality and wildlife habitat and provide for resource enhancement in the design of such development.

34.03 - Conditions of Approval.

1. A condition of approval shall be that the projects approved for the "GA" Growth Allocation District shall be substantially completed within three (3) years of the date of approval. If after three years the project is not completed, the "GA" Growth Allocation District classification shall be withdrawn.

2. The Supervisor of Public Works shall determine whether a project is substantially completed or not. Substantially completed projects are defined as projects in which all public improvements, such as roads, community sewer and/or water facilities, etc., have been built, as required by the Town or State.

3. The development of a proposed project must demonstrate to the Planning Commission that the following design standards will be met or exceeded in order to be approved:

   a. All applicable requirements of the Town of Oxford Critical Area Program, the Zoning Ordinance and the Subdivision regulations.

   b. Limit the area of disturbance for non-residential development to no more than 60 percent of the total site area.

   c. The design of the development enhances the water quality and resource and habitat values of the area, e.g., results in additional planting of forest cover in the Buffer or implementation of Best Management Practices on portions of the site to be retained in agriculture use.

   d. The development incorporates the comments and recommendations of the Planning Commission and the Maryland Department of Natural Resources in the project design.

   e. The developer executes covenants that guarantee maintenance of the required open space areas.

34.04 - Computing the Use of the Growth Allocation.

1. Subdivision of any parcel of land that was recorded as of December 1, 1985, and classified as RCA or LDA, where all or part of the parcel is identified by the Town of Oxford as a Growth Allocation area, shall result in the acreage of the entire parcel counting against the Growth Allocation, unless conditions such as the following obtain:

   a. On Qualifying Parcels as described in d below, on which a change in classification is requested, a single development envelope will be specified, the acreage of which would be counted against the Growth Allocation. The envelope will include: 1) individually owned lots; 2) any required buffers; 3) impervious surfaces, utilities,

stormwater management measures, on-site sewage disposal measures; 4) any areas subject to human use such as active recreation areas; and, 5) any additional acreage needed to meet the development requirements of the criteria.

b. The remainder of the parcel may not count against the Town's growth allocation if it is contiguous and at least 20 acres in size, retained its natural features or its use by resource utilization activities (agriculture, forestry, fisheries activities, or aquaculture) and was restricted from future subdivision and/or development through restrictive covenants, conservation easements, or other protective measures approved by the Planning Commission. A Forest Management Plan is required for any forested areas in the undeveloped portion of the parcel. Replanting should be accomplished on lands abandoned from agriculture.

c. A minimum 100 foot naturally vegetated Buffer must be established and included in any acreage deductions. In the case of Growth Allocation being applied in an RCA area, a 300 foot naturally vegetated Buffer is strongly encouraged, and in the case where it is provided, the Buffer shall not be deducted from the Town's Growth Allocation, even if that Buffer does not meet the 20-acre minimum.

d. Qualifying Parcels: Parcels of land that qualify for application of the above accounting guidelines are the following:

(1) Those parcels designated as new IDA's which are located within an LDA or adjacent to an existing IDA, where the development on the parcel is located at least 300 feet from the edge of tidal waters, tidal wetlands or tributary streams providing such designation:

(a) minimizes adverse impacts to agriculture, forest lands, fisheries or aquaculture;

(b) minimizes adverse impacts to Habitat Protection Areas; and

(c) optimize benefits to water quality.

(2) Those parcels designated as new LDA's which are located adjacent to existing LDA's or IDA's and where the development on the parcel is located at least 300 feet from the edge of tidal waters, tidal wetlands, or tributary streams providing such designation conforms to the requirements of 1 (b) and (c) above.

e. On all other parcels that receive Growth Allocation and that do not meet these qualifications the entire parcel of record as of December 1985 will be deducted from the total Town Growth Allocation.

34.05 - Process.

The Town's Growth Allocation may be used on a proposed development site to permit densities that are consistent with the Comprehensive Plan, the Critical Area Program, and the existing zoning when a specific development project is proposed. The procedures set forth in Section 15.10 and following procedures will be followed in determining if a site and/or project qualifies for Growth Allocation.

1. All applications for Growth Allocation shall be submitted to the Planning Commission for investigation and recommendation to the Town Commissioners for Growth Allocation.

2. All applications for the Growth Allocation District Classification shall be accompanied by a sketch plan, or development plan which provides sufficient information to permit Planning Commission review for consistency with Critical Area Program requirements.

3. The Planning Commission will review concept, sketch, or comprehensive development plans submitted for consistency with the Critical Area Program and will provide technical comments and recommendations to the applicant prior to submission of preliminary plats consistent with the requirements of Town Subdivision regulations. Permitted development density or intensity will be determined at this time, subject to the applicant obtaining approvals from local, State and Federal authorities for such things as sewer, water, access, dredging permits, and forest management plans.

4. After the applicant has addressed the Planning Commission's recommendations, a sketch plan may be revised and submitted for review with respect to Growth Allocation District designation.

5. A public hearing on the application for Growth Allocation amendment will be held by the Town Commissioners.

6. In approving an application for Growth Allocation, the Town Commissioners may establish conditions of approval that are consistent with the intent of the Oxford Critical Area Program.

7. Applications for Growth Allocation will be forwarded to the Critical Area Commission after the Town Commissioners have conducted their public hearing and granted an approval subject to Critical Area Commission review (conditional approval). The Town Commissioners may only adopt Growth Allocation requests that have been approved by the Critical Area Commission.

8. Following adoption by the Town Commissioners, the applicant may proceed to the preparation of the final site plan or subdivision plat for recordation.

9. Prior to approving the final site plan or subdivision plat, the Planning Commission will ensure that all conditions of approval are incorporated into the final plan, public works agreement, deed covenants, etc.

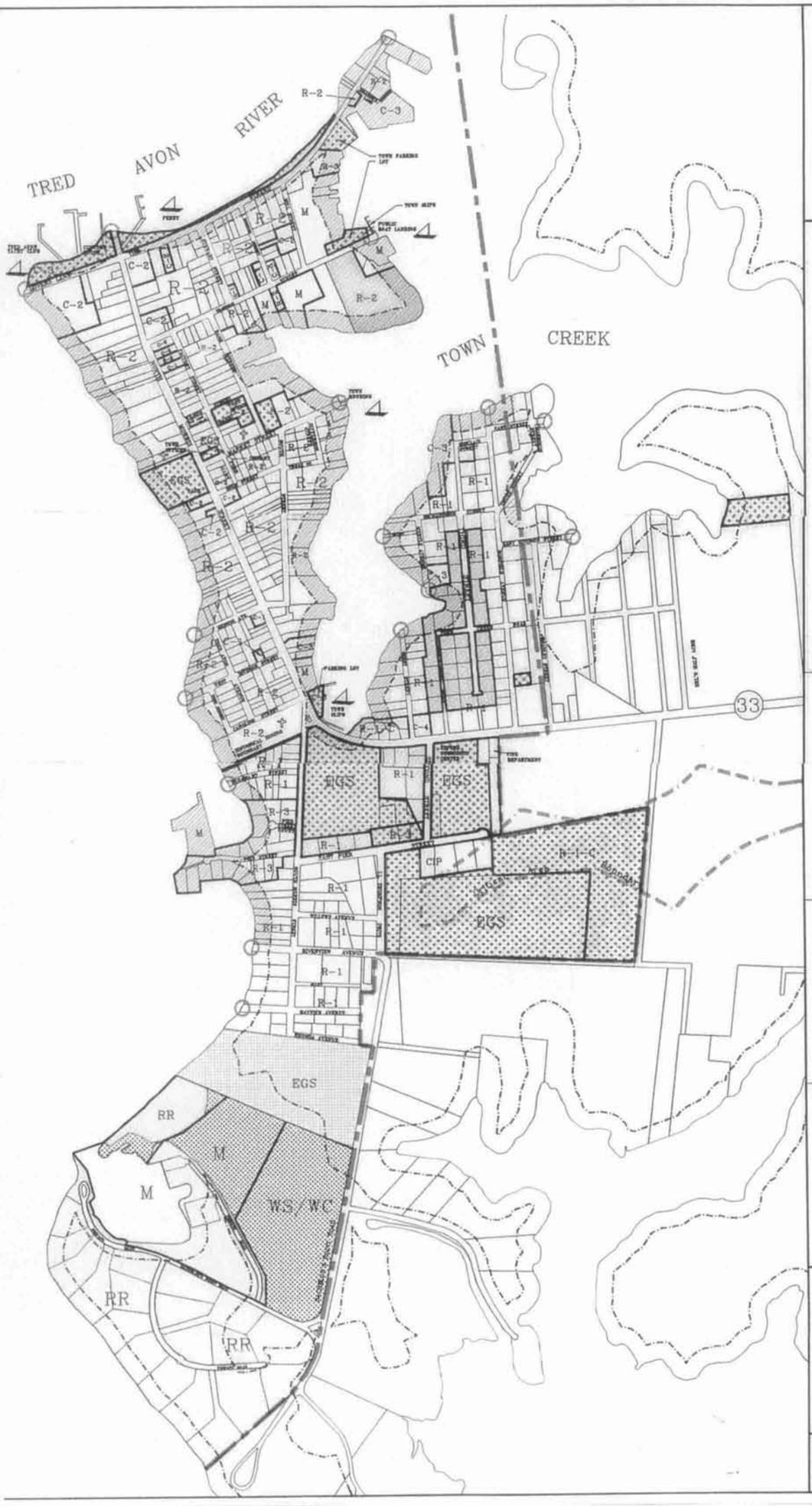
10. Final Subdivision Plats and Site Plans shall be processed as per the requirements of this Ordinance and/or the Town of Oxford Subdivision Regulations.

34.06 - <u>Recording a change in the "GA" Growth Allocation District.</u>

1. The Official Critical Area Map(s) will be amended to reflect the new "GA" district classification along with a notation of the new land management classification.

2. Successful projects granted the "GA" district classification will be submitted for final site plan or final subdivision approval as per the requirements of the Zoning and/or Subdivision Regulations and shall delineate the Growth Allocation District on the record plat or site plan.

Exhibit D



OFFICIAL ZONING MAP

OXFORD, MARYLAND

ZONING DISTRICTS

- R-1 SINGLE FAMILY RESIDENTIA
- R-1-C R-1 CLUSTER
- R-2 HISTORIC RESIDENTIAL
- R-3 MULTI-FAMILY RESIDENTIAI
- RR RURAL RESIDENTIAL
- C-1 NEIGHBORHOOD COMMERCI/
- C-2 GENERAL COMMERCIAL
- C-3 MARITIME COMMERCIAL
- C-4 HIGHWAY COMMERCIAL
- M MARITIME INDUSTRIAL
- CIP COMMERCIAL INDUSTRIAL PARK
- EGS ESSENTIAL GOVERNMENT SERVICES
- WS/WC WILDLIFE SANCUTARY/ WILDIFE CONSERVATION

CRITICAL AREA LAND USE CLASSIFICATION

- IDA – Intensely Developed Area
- LDA – Limited Development Area
- RCA – Resource Conservation Area
- BEA – Buffer Exemption Area

BOUNDARIES

- Corporate Limits
- Critical Area Overlay District Boundary
- Critical Area Buffer
- Historic District Boundary

- FEDERAL GOVERNMENT
- TOWN PROPERTY
- TOWN-OWNED STREET END OR RIGHT-OF-WAY

Adopted July 9, 1996

THIS IS TO CERTIFY THAT THIS IS THE OFFICIAL ZONING MAP REFERRED TO IN SECTION 4 OF THE OXFORD ZONING ORDINANCE.

ORDINANCE# _____ DATE ADOPTED _____

TOWN COMMISSIONER _____ DATE _____

TOWN COMMISSIONER _____ DATE _____

TOWN COMMISSIONER _____ DATE _____

David R. Thompson, Town Attorney
COWDREY, THOMPSON & KARSTEN, P.A.

REDMAN/JOHNSTON ASSOCIATES, LTD.

0 200 400 800

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D

Exhibit E

COUNTY COUNCIL

OF

TALBOT COUNTY, MARYLAND

2003 Legislative Session, Legislative Day No. November 18, 2003

Bill No. 933*

AS AMENDED

Expiration Date: January 22, 2004

Introduced by: Mr. Carroll, Ms. Harrington, Mr. Duncan

A BILL TO REVIEW AND REALLOCATE THE NUMBER OF RESERVED ACRES OF GROWTH ALLOCATION ALLOCATED AMONG THE TOWNS FOR REZONING TO COMPLY WITH THE CHESAPEAKE BAY CRITICAL AREA COMMISSION FOUR-YEAR REVIEW REQUIREMENT

By the Council November 18, 2003

Introduced, read first time, ordered posted, and public hearing scheduled on Tuesday, December 16, 2003 at 1:30 p.m. at the County Council Chambers, 142 North Harrison Street, Easton, Maryland 21601.

By Order Janice Mans
Secretary

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A BILL TO REVIEW AND REALLOCATE THE NUMBER OF RESERVED ACRES OF GROWTH ALLOCATION ALLOCATED AMONG THE TOWNS FOR REZONING TO COMPLY WITH THE CHESAPEAKE BAY CRITICAL AREA COMMISSION FOUR-YEAR REVIEW REQUIREMENT

WHEREAS, when Talbot County adopted its Critical Area Program effective August 13, 1989, it adopted three maps showing then anticipated growth areas around the Towns of Easton, St. Michaels, and Oxford, and

WHEREAS, at the time of adoption, § 190-109 D (11) provided that the number of reserved areas allocated among the towns based on those maps for rezoning for growth allocation should be reviewed by June 1, 1993 for possible reallocation, and at least every four years thereafter. None of the four-year reviews have occurred and these maps continue to reflect a prospective look to the future from 1989; and

WHEREAS, the 1989 maps do not reflect current Town boundaries, nor any development during the ensuing 14 years, nor do they represent current planning for growth areas around the towns. Since 1989, the County has awarded 301.771 acres, the Town of Easton has awarded 183.762 acres, St. Michaels has conditionally awarded up to 20 acres, and Oxford has awarded 15. 223 acres of growth allocation; and

WHEREAS, the 1989 projections have no continued validity for any planning or zoning purpose; and

WHEREAS, these 1989 maps have been used to justify "leap-frog" or "pipe-stem" annexation, which is inconsistent with current principles of proper planning and the land use goals and polices in the existing and draft Talbot County Comprehensive Plans; and

WHEREAS, the process created by the 1989 zoning ordinance is both redundant and inconsistent or potentially inconsistent with the Comprehensive Planning Process; the Comprehensive Planning Process required by Art. 66B, Md. Ann. Code, more appropriately accomplishes planning for growth areas around Towns; and

WHEREAS, Talbot County had a total of 2,554 acres of growth allocation under the State formula for calculating the total amount for each county [5% of the total resource conservation area located within the County]; and

WHEREAS, § 8-1808.1 (c) (3), Natural Resources Art., Md. Ann. Code provides, with certain exceptions, no more than one-half of the expansion permitted by growth allocation in the critical area may be located in resource conservation areas (RCA); and

WHEREAS, § 8-1801.1 (c) (5) Natural Resources Art., Md. Ann. Code provides that if Talbot County is unable to utilize a portion of the County's total growth allocation within or adjacent to exiting intensely or limited development areas, then that portion of the growth allocation which cannot be so located may be located in an RCA; and

WHEREAS, Talbot County has followed this requirement of State law by restricting the use of available growth allocation through § 190-109 D. (9) (a) of the Talbot County Code. That section provides that not more than 1,213 acres of land lying within the Critical Areas of the County shall be reclassified from RCA to any other zoning district. [The 1,213 acres is derived from the total acreage available for growth allocation in the entire county by the following formula: (5% of total acres in resource conservation areas; equal to 2,554 acres = total available growth allocation), less 128 acres reserved for reclassification from limited development areas to intensely developed areas, divided by 50%. The calculation is: 2,554 acres minus 128 acres divided by ½ = 1,213 acres.]; and

WHEREAS, the County may not utilize the remaining 50% of available growth allocation [1,213 acres] until the Critical Area Commission grants permission, under the exception provided in § 8-1801.1 (c) (5), cited above, based upon a showing that the County is unable to utilize that portion of its available growth allocation in areas adjacent to limited or intensely developed areas; and

WHEREAS, to trigger release of the withheld 50% of the County's growth allocation, § 190-109 D. (9) (b) provides that when 1,092 acres [90% of 1,213 acres] has been approved for growth allocation by the towns and/or the County, then the County shall request permission from the Maryland Critical Area Commission to double the maximum number of acres that may be reclassified from RCA from 1,213 to 2,426 acres; and

WHEREAS, Section 190-109 D. (9) (a) of the Talbot County Code adopted in 1989 reserved 155 acres of growth allocation for the Town of Easton, 195 acres for the Town of Oxford, 245 acres for the Town of St. Michaels, and 618 acres for Talbot County; and

WHEREAS, the Town of Oxford has allocated only 15.223 acres of growth allocation, and the Town of St. Michaels has conditionally allocated only up to 20 acres of growth allocation. The Town of Oxford has 139.777 acres remaining, and the Town of St. Michaels has 225 acres remaining. Combined, Oxford and St. Michaels have 364.777 acres of growth allocation; and

WHEREAS, the County currently has a total of 316.229 acres of growth allocation. If it grants a pending application for supplemental growth allocation submitted by the Town of Easton for 156 acres, the County will have 160.229 acres of growth allocation; and

WHEREAS, under current law the Town of Oxford, or the Town of St. Michaels, either separately or in combination, could forever block the County from accessing the remaining growth allocation under § 190-109 D. (9) (b), by preventing the total acres utilized to equal or exceed 1,092 acres, the required trigger under § 190-109 D. (9) (b); and

WHEREAS, the Town of Easton has fully allocated the growth allocation reserved to it, and Talbot County has worked, and continues to work, cooperatively with the Town of Easton in approving projects for which the Town has requested supplemental growth allocation; and

WHEREAS, growth in and around the towns affects not only the particular town, but also the County as a whole, and the County should, therefore, have some ability to protect the County's legitimate interests as they are affected by development in the critical area, as contemplated by State law when it gave this control to the counties under the Chesapeake Bay Critical Area Protection Program, § 8-1801, et. seq., Md. Ann. Code; and

WHEREAS, § 8-1809 (g), Natural Resources Art., Md. Ann. Code, requires that Talbot County review its entire critical area program and propose any necessary amendments to its entire program, including local zoning maps, at least every 4 years beginning in 1993 and every 4 years thereafter; and

WHEREAS, Talbot County is currently near completion of such a 4-year review, and as part of that process desires to make the following amendments to the County's critical area program to better reflect the original intent of the State law governing growth allocation, which calculated growth allocation for Talbot County as 5% of the resource conservation area in the County, and gave the County the authority to determine, within the limits imposed by State law and regulations, how that growth allocation would be utilized, and reallocated among the Towns and the County, project by project.

SECTION ONE: BE IT ENACTED BY THE COUNTY COUNCIL OF TALBOT COUNTY, MARYLAND, that Chapter 190, Talbot County Code, "Zoning" shall be and is hereby amended as set forth herein.

Maps 1, 2, and 3, attached, are hereby repealed.

* * *

§ 190-109 D (9)

(a) Not more than 1,213 acres of the Critical Areas of the County, including all land lying within the Critical Area within incorporated towns, shall be reclassified from the Rural Conservation (RC) District (or town zoning districts established for the Resource Conservation Area of the Critical Area) to any other zoning district. ~~Of these 1,213 acres, 155 acres is reserved for the Town of Easton, 195 acres is reserved for the Town of Oxford, 245 acres is reserved for the Town of St. Michaels for growth allocation associated with annexations, and 618 acres is reserved for the County.~~

* * *

§ 190-109 D (10) Reclassification of land within incorporated towns

(a) Not more than 128 acres of the Critical Area of the County, including lands within the incorporated towns, shall be reclassified from a Limited Development Area (LDA) to an Intensely Developed Area (IDA). For purposes of this section, LDA Zoning Districts include Rural Residential (RR), Town Residential (TR) and Village Center (VC) or areas of less than 20 contiguous acres of Limited Commercial (LC), General Commercial (GC) or Limited Industrial (LI). Town zoning districts include all districts classified as LDA. The requested IDA classification shall include areas of 20 or more contiguous acres of LC, GC, LI or town zoning districts established for the IDA of the Critical Area.

(b) In determining whether the twenty-acre threshold has been reached, the contiguous areas of existing commercial and/or industrial zoning districts, whether located in the Critical Area or Non-Critical Area, shall be considered. ~~Of the 128 acres, 24 acres is reserved for the Town of Easton, 44 acres for the Town of Oxford, 24 acres for the Town of St. Michaels for growth allocation or growth allocation associated with annexations, and 36 acres for the County for growth allocation for property outside of the towns and outside of areas shown as possible annexation areas. (See Maps 1, 2 and 3.)EN~~

§ 190-109 D (11)

~~The number of reserved areas allocated among the towns for rezoning in § 190-109D(9) and (10) should be reviewed by the County and Towns by June 1, 1993 for possible reallocation and at least every four years thereafter.~~

* * *

§ 190-109 D (14)

~~Specific annexation requests for property included in the acres reserved for the towns in § 190-109D (9) and (10) above and as shown in Maps 1, 2, and 3, shall be reviewed by the County for consistency with the County Comprehensive Plan and shall be subject to all current ordinances regulating annexations. The County shall not act on rezoning requests adjacent to the towns as shown on Map 1, 2, and 3 until an annexation request for the property has been denied by the town or until 12 months after an annexation request for the property has been submitted to the town, whichever occurs first. If the County approves a rezoning request not associated with an annexation request for property adjacent to the towns as shown on Maps 1, 2 and 3, then the acreage of the property rezoned shall be subtracted from the acres reserved for the Town for annexation in § 190-109D(9) and (10).~~

§ 190-109 D (15)

~~Growth allocation requests for property that has been annexed within five years of the request shall be reviewed by the County for consistency with the County Comprehensive Plan. Growth allocation request(s) for property that has been in the town for more than five years prior to the request does not require review by the County; however, the towns~~

~~shall inform the County of such reclassification to ensure that the total reserved acres, listed above, are not exceeded.~~

§ 190-109 D (16)

~~The location of growth allocation requests within Towns or growth allocation requests associated with annexation requests is not limited to the areas shown in Maps 1, 2 and 3, however, the total acres reserved per town shall not be exceeded.~~

SECTION 2. Effective Date and Severability; legislative intent.

1. Vested Rights: Effective Date of Zoning Text Amendments

This ordinance shall apply to the total growth allocation acreage allocated to the County under § 8-1808.1 (b) Natural Resources Article, Annotated Code of Maryland that remains unutilized on the effective date of this ordinance.

(a) For purposes of this subsection, the term "unutilized" includes the total growth allocation acreage allocated to the County under State law, less growth allocation acreage that (1) has been previously allocated by any town or the County; and, (2) prior to the effective date of this ordinance, has resulted in actual physical commencement of some significant and visible construction; (3) which has been undertaken in good faith, with the intention to carry it through to completion; and, (4) which has occurred pursuant to a validly issued building permit.

(b) For purposes of this subsection, growth allocation acreage allocated to the County does not include growth allocation allocated to the towns under § 8-1808.1 (b) (5% of the total resource conservation area in the town at the time of original approval of the town's critical area program by the Critical Area Commission).

(c) For purposes of this subsection, County growth allocation acreage that has been previously allocated by any town shall first be counted as part of that town's allocation under § 8-1808.1 (b) and, to the extent the town's allocation has been exceeded, growth allocation that has been utilized prior to the effective date of this ordinance shall be deducted against the County's remaining growth allocation. Growth allocation awarded by any town that remains unutilized on the effective date of this ordinance shall revert to the County. Growth allocation awarded by the County, prior to or after the effective date of this ordinance, shall be deducted from the total growth allocation acreage allocated to the County under § 8-1808.1 (b).

2. Severability.

The County Council intends that, if a Court issues a final decision holding that any part of this ordinance, or the application thereof to any person or circumstance, is unconstitutional or

invalid, the remaining provisions hereof and the application thereof to all other persons and circumstances remain in full effect.

SECTION THREE: BE IT FURTHER ENACTED, that this ordinance shall take effect sixty (60) days from the date of its passage.

PUBLIC HEARING

Having been posted and Notice of time and place of hearing and Title of Bill No. 933 having been published, a public hearing was held on Tuesday, December 16, 2003.

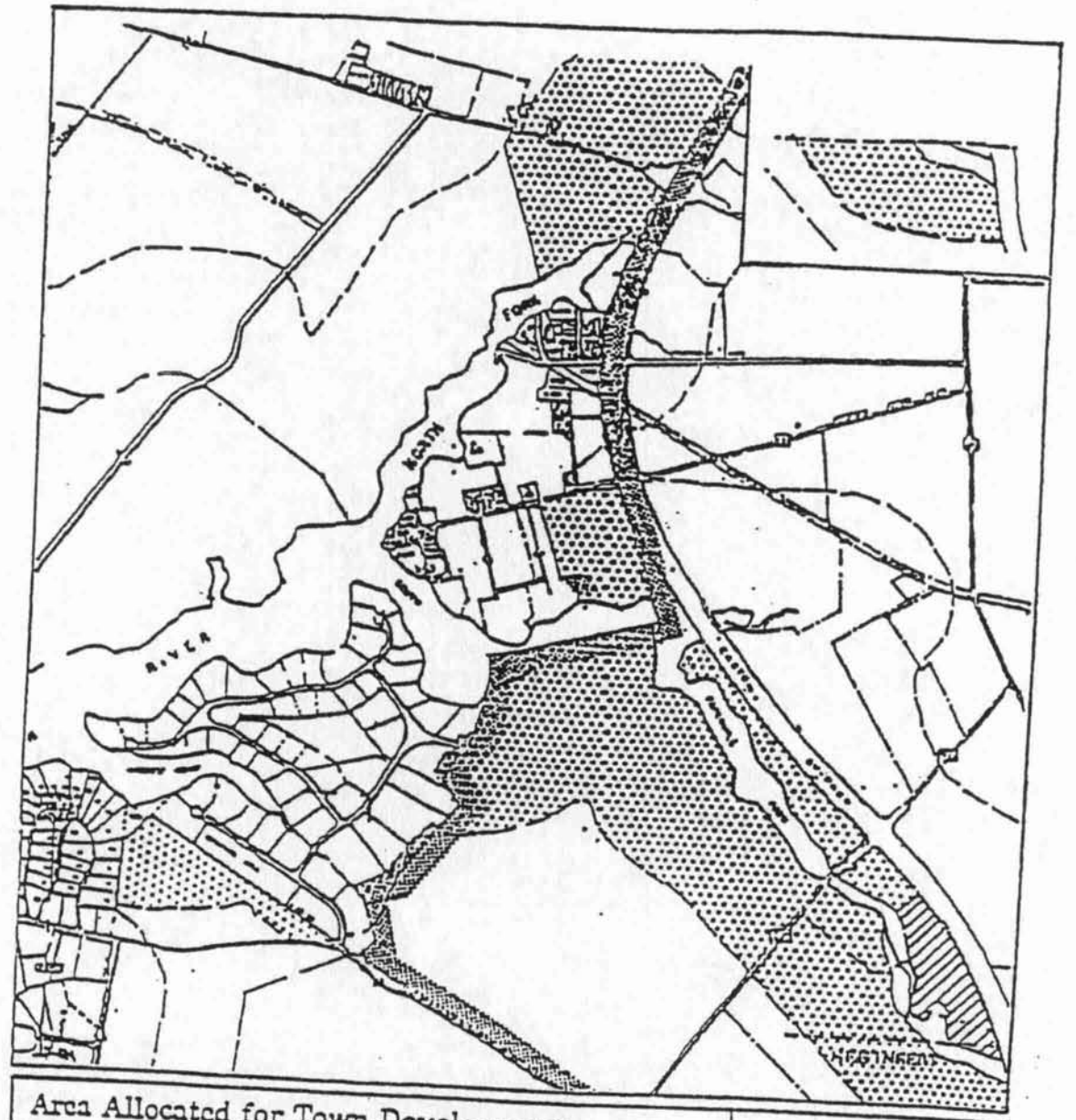
BY THE COUNCIL

Read the third time.

ENACTED December 23, 2003*
AS AMENDED

By Order _____
Secretary

Foster – Nay
Duncan – Aye
Harrington – Aye
Spence – Aye
Carroll - Aye


Area Allocated for Town Development
TOWN OF EASTON
Talbot County, Maryland
RCA for Annexation or Rezoning
LDA for Rezoning
Map No 1
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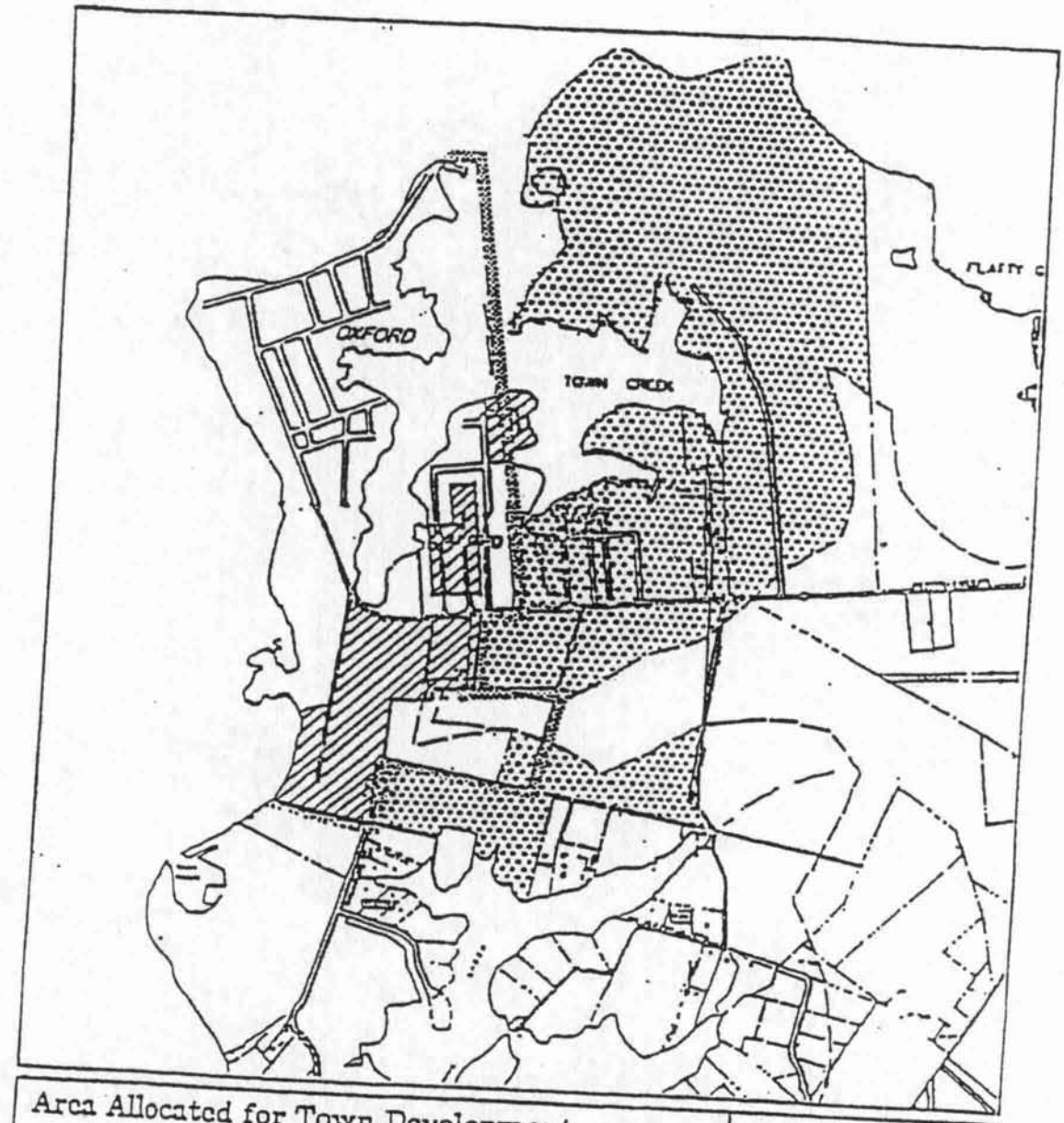
Sarasota, Fla.


OXFORD
TOWN CREEK
Area Allocated for Town Development
TOWN OF OXFORD
Talbot County, Maryland
RCA for Annexation or Rezoning
LDA for Rezoning
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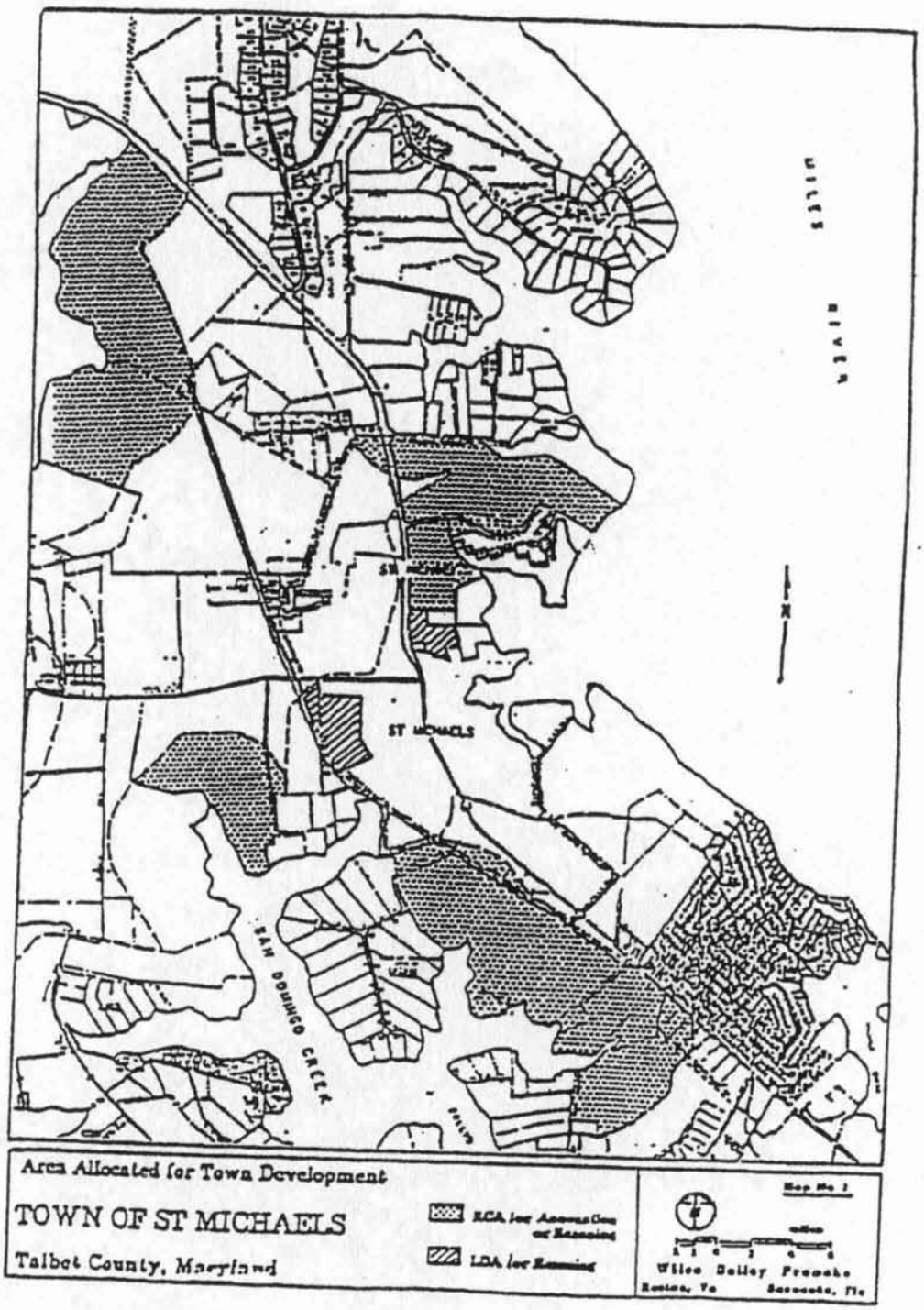
MILES RIVER
ST MICHAELS
SAN DOMINGO CREEK
Area Allocated for Town Development
TOWN OF ST MICHAELS
Talbot County, Maryland
RCA for Annexation or Rezoning
LDA for Rezoning
Map No. 1
Wilco Dailey Franche
Reston, Va
Sarasota, Fla

Exhibit F

TALBOT COUNTY PLANNING COMMISSION
TALBOT COUNTY GOVERNMENT BUILDING
TALBOT COUNTY COUNCIL MEETING ROOM
EASTON, MARYLAND
MINUTES FOR DECEMBER 3, 2003

RECEIVED
MAR 24 2004
CRITICAL AREA COMMISSION

Members Present
Richard Hutchison, Chairman
John Sewell, Vice Chairman
Officer
William C. Boicourt
Linda Makosky
Robert Zuehkle

Staff Present
George Kinney, Planning Officer
Mary Kay Verdery, Assistant Planning

Debbie Moore, Recording Secretary

Zoning Text Amendment – Bill 933
A Bill to review and reallocate the number of reserved acres of growth allocation allocated among the Towns for rezoning in compliance with the requirements of Chapter 190, Talbot County Code, "Zoning" § 190-109 D. (11)

Mr. George Kinney presented the staff report.

Chairman Hutchison noted the Bill was written, partially, with a misunderstanding of growth allocation. He presented figures on how the calculations were supposed to have been calculated. 1, 213 RCA to IDA or LDA is the 1st 1/2, once this is used, the second 1,213 can be requested. It is not correct that 128 acres is the only growth allocation acreage that can go to IDA.

- Mr. Philip Dinkle, Commissioner of Town of St. Michaels.

Mr. Dinkle read a letter the Town had written to the Commission. It noted that Bill 933 would deprive its ability to award growth allocation. The Commissioners of St. Michaels requested the Planning Commission to table their consideration of this Bill until their January meeting, in order to give time for more consideration.

- Michael Hickson, Esq., Banks, Nason, & Hickson, P.A., 113 South Baptist St., Salisbury

Mr. Hickson stated that this legislation would very much affect the future of the Town. Almost all the process is complete in regard to the Strausburg property. This legislation would undo all of the work they have done regarding this property. He noted that to take such a drastic, disruptive, radical step as this, is like throwing the baby out with the bathwater. He stated that the Perry Cabin property was annexed in 1980, pursuant to an Annexation Agreement, and in the 1980's they received 245 acres for IDA, now all of a sudden without any consultation or input, the Council has introduced this Bill. He asked

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that the Planning Commission postpone their hearing on this, not make a recommendation to the County at all, and conduct a workshop where this could be discussed. He asked the Planning Commission to allow the Towns to meet with them, to discuss the problems that prompted this Bill. Possibly conduct a workshop. He stated he felt this Bill is contrary to State law. To put the ultimate control of growth allocation totally in the County hands is counter-productive. Good planning dictates that growth occur in and around the current existing Towns. This takes away the autonomy of the individual Towns. The Towns have the right to determine their own destiny. He also asked that the Commission make no recommendation, and schedule some work sessions to address this issue.

Chairman Hutchison noted that when this growth allocation was determined, they felt that all the acreage would be gone by now. He stated there was a mechanism in the Ordinance to have these discussions with the Towns. They haven't done that till now, because we have had plenty of growth allocation. However, on page 190:178, item 11, of the Planning Ordinance addresses this matter, and that this suggested legislation is not needed, if they follow the current Ordinance. He also noted they are wanting to do away with the maps, however item #16 on page 179, which discusses the maps are to be used as guides only, and not definitive, in deciding growth allocation issues. He feels the legislation is unfair, and flawed.

Mr. Hickson said he feels if the Commission simply makes a recommendation, either for or against, then the County Council can still act. He recommended again, that the Commission have work sessions. Chairman Hutchison stated he was not sure the Council would wait that long for a response.

Mr. Dave Thompson noted his recollection is they have 60 days before the Council can move without a comment from the Commission.

Mrs. Makosky noted the population of the Town vs. the population of the County and the responsibility of the County to address the health, safety and welfare of the majority of the citizens. She believed that the County was justified in exercising this power.

Mr. Sewell noted that for years now, they have been saying that the communication between the Town and the County has been cut off, and this is an excellent example.

- Steve Florkewicz, East Morango Street, St. Michaels

He spoke in favor of acceptance of the Bill. He agreed with Mrs. Makosky in that what happens in St. Michaels will affect the County in general, and that the Town Commissioners have chosen to ignore any comment from people out side of the Town, regarding projects such as Miles Point.

➢ David Thompson, Esq., 130 N. Washington St., Easton

Mr. Thompson spoke as a legal representative of Trappe and Oxford, as well as Mr. and Mrs. Strausburg (whose property received growth allocation from the Town of St. Michaels). Mr. Thompson stated that politics has begun to replace planning. He stated there is a rush to bring to the table a Bill, which we already know is flawed. A good piece of legislation requires multiple drafts, good planning, and thorough planning. He recommended that the Commission not make a decision on this Bill, and suggested meetings to discuss this issue.

➢ Barry Gillman, St. Michaels Town Commissioner

Mr. Gillman spoke against this Bill. He stated it seemed that there was a belief that if St. Michaels doesn't do something that no development will occur. This is just not the case. If Bill 933 is directed at the Inn at Perry Cabin Farm, it is not appropriate. There will be no permits unless the infrastructure, including sewage, can handle it.

➢ Mr. Robert Fletcher, 24640 Yacht Club Rd., St. Michaels

Mr. Fletcher stated he attended the St. Michaels Commissioner meetings, and they were not very accepting of the other residents comments, and felt they were intimidating to people that lived in the County. He stated the Miles Point project, or any other project similar, is total lunacy. The issues facing St. Michaels are huge, and should not be rushed into these decisions.

➢ Michael Hickson

He spoke in defense of the St. Michaels Commissioners in regards to their meetings. He also noted that the Commissioners are working with the County in regards to the quality of the sewage treatment for the Town, along with the expansion.

➢ Mr. Robert Amdur, Bozman

He spoke against the level of density as in regards to the Miles Point project, but had no comment directly toward this Bill.

➢ Mike Pullen, Esq., Talbot County Attorney, Washington St., Easton

Mr. Pullen addressed issues regarding Bill 933. Chairman Hutchison noted legislation should be presented before them before it is introduced to Council. This is an exception, and noted they are not in the 60 day comment period, however, Mr. Pullen clarified that they were in the 60 day comment period.

Mr. Pullen indicated that the maps designating the area allocated for town development in the back of the Zoning Ordinance were adopted in 1989 with the requirement and that

they would be reviewed and amended in four years, by 1993, and every four years thereafter. This was apparently intended to coincide with the State law requirement that the local critical area program be reviewed and proposed amendments be forwarded to the state Critical Area Commission for their quadrennial review and approval. None of those four-year reviews have taken place as anticipated. The maps remain a prospective, forward-looking view from 1989. The maps do not reflect the actual growth that has occurred since then, nor the current town boundaries in some instances.

Mr. Pullen stated that by eliminating these maps from the Zoning Ordinance the planning and zoning functions are separated. The planning function is more appropriately performed through the periodic reviews and updates to the Talbot County Comprehensive Plan and not through the Zoning Ordinance.

State law provides that after subtracting 128 acres reserved for reclassification from LDA to IDA the remaining balance may be reclassified from Rural Conservation zoning to any other zoning classification. Half of the 2,426 acre remaining balance, 1,213 acres, has been allocated between the towns of Easton, Oxford, St. Michaels, and the County. When 90% of this first half has been utilized, the County may request dispensation from the Critical Area Commission of the second 1,213 acre allocation.

Under the existing arrangement, if either the Town of Oxford or the Town of St. Michael's elects to not utilize the growth allocation acreage allotted to them in 1989, individually or collectively, it will be impossible for Talbot County to utilize 90% of the first half of the total amount of growth allocation allotment. This will effectively prevent the County from ever being able to request or utilize the above-mentioned dispensation of the second 1,213 acre allocation from the Critical Area Commission.

Mr. Pullen noted that the Town of Easton has utilized all of its allotted growth allocation acreage and that Talbot County has reviewed subsequent individual applications for growth allocation within the Town of Easton in accordance with existing procedures for supplemental growth allocation in the Zoning Ordinance. This has worked well. Withdrawal of the 1989 allocation from the Towns would simply mean that the Towns' and the County's process to award growth allocation would be coordinated, and that no Town could unilaterally award growth allocation. Adopting this procedure county-wide would put all of the municipalities on the same playing field as the Town of Easton. From a policy standpoint uniformity among the Towns and joint participation in the process, including both the Town and the County, is intended to achieve coordination between the jurisdictions involved, which, hopefully, will result in better development, and greater consistency with the goals of the Critical Area Program.

Mrs. Makosky spoke in favor of the Bill. She feels that it is time for the County to use that power, let the bill take place, and then the negotiations will happen.

Mr. Zuehkle stated his view is opposite of Mrs. Makosky.

Mr. Zuehkle moved to recommend to the County Council to withdraw Bill 933 and instead use the review process as outlined in the current Ordinance, Item 11 on Page 190

Section 178, and within that process recognize that the related maps were intended as guides, as opposed to law. Also as stated in Item 16 Page 190 Section 179.

Mr. Sewell seconded.

Makosky voted NO because she believes it is necessary for the Bill to pass in order to trigger the much wished for process of discussion that everyone has been asking for.

Motion passed 3-1

Exhibit G

written, this bill would recapture the remaining acres from the towns and require them to approach the County in the even of growth allocation as necessary for a specified future town project. This change would afford the County the opportunity to involve itself in the growth allocation award process and further help to achieve 90 percent threshold necessary to request additional allocation acreage from the critical area commission, as Mike has already pointed out. The planning commission recommendation, for the record, they did recommend the following. They moved to recommend that County Council withdraw bill 933 and instead use the existing reallocation process as outlined in the current ordinance. That motion was seconded and passed by a three to one vote. I was asked by one planning commission to articulate her descending vote, and it was her belief it was necessary for the bill to pass in order to prompt a discussion

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that all the parties have been requesting.

MR. FOSTER: In order to what.

MR. KINNEY: To prompt discussion regarding reallocation.

MR. FOSTER: We will now take public comment. As I promised, you can be first. If you'll come over to the microphone. If one of you wants to allow a seated microphone.

KEN THOMPSON: I don't need a seat, I'll be brief.

MR. FOSTER: If there's somebody that needs to sit down, give them that option. Who else would like to speak. Mr. Alspach, you can come take the seat and you'll go after him.

KEN THOMPSON: I'm just astounded on the last --

MR. FOSTER: If you would identify yourself.

KEN THOMPSON: I'm Ken Thompson, we spoke earlier in the day prior to the current meeting. It's a happenstance I showed up

today. But a grammatical change in law, Mr. Council, as you well know, has content and intent in the law, and statutory words do have substantive actions. Grammatical changes in phraseology of statutory text can change the content of the words. And for this Council to sit here and say it's non-substantive, and you as a former counselor, I find appalling. Thank I.

MR. FOSTER: Thank you very much. Mr. Alspach. Who would like to be next. Next person just come up to the microphone.

THOMAS ALSPACH: I thank you, Mr. President. For the record my name is Tom Alspach. I'm speaking on this bill on behalf of Talbot Preservation Alliance. I think above all else it's most important to step back and recognize exactly what this bill would accomplish as opposed to some of the suggestions about what it might do that have been circulating in the press. The purpose of

this bill is not to take away growth allocation from the towns, it does not mean that St. Michaels or Oxford or Easton for that matter will never any longer be able to award growth allocation. It's solely for the purpose of ensuring the County will be a participant in future awards of growth allocations in those communities. In other words, it would put Oxford and St. Michaels on the same footing as Easton is at this point with regard to the need to collaborate with the County when awarding growth allocation. The passage of this bill would not mean by any means that, for example, the midlands project in St. Michaels would not go forward. It does not mean that. What it would mean is that the County would have some ability to participate in negotiations that it should have been included in but has not been included in. That current project proposes to include the construction of 320 dwelling units, a 30 room inn, and 15,000 acres of commercial

space on a piece of property outside of St. Michaels, and proposes to have approximately three or four entrances on to a County road with only one entrance on to Route 33. The County has not been consulted in any fashion with regard to necessary improvements on that County road. More importantly, as some of the members of the Council have alluded to earlier in discussions this afternoon, this project would add a huge amount of volume to the waste water system. The County should be involved in discussions about a result of that magnitude. At the present time the Town of St. Michaels, as I understand it, is engaged in the negotiation of a so-called developers rights and responsibilities agreement with the developer that will set forth the parameters for not just the development but for what contributions the developer will make to the public good. Once again, because of the counties -- because of the impact on the

County, the development of this size, the County should be involved in this project. Now, I just for the record want to note something, I want to read something into the record on the general subject of whether the reallocation of growth allocation is contemplated by existing law. And what this is is a passage from a staff report prepared for the Miles Point project in February 2000, prepared by Mr. Tony Redman of the firm Redman and Johnston on behalf of the Town of St. Michaels. And there's a discussion in this report about what some of the alternatives might be for future use of growth allocation in that area. And Mr. Redman, and I want to make sure the record reflects, Mr. Redman, as many of you know, was very closely involved in the actual drafting of the critical area law. Mr. Redman states, "indeed it is possible that Talbot County could reduce or could take away entirely the amount of growth allocation that

is currently assigned to the Town of St. Michaels. Or use-- for use in other areas of the County. If the County were to take back all unused growth allocation, the fact that an area was premapped would mean nothing." He goes on in this vein. I think that is ample recognition by a drafter of the law that this kind of reallocation was certainly contemplated. There have been a lot of comments in the press and elsewhere about the so-called political nature of this bill. This is not, I believe -- I do not believe this is a political matter. I would like to remind everyone that the last County Council, which hardly could be accused of having been anti-growth or anti-development, I believe it was the last County Council that voted unanimously to require Easton to come back to the County for growth allocation and when Easton ran out of their allocation and wanted to have more allocated to them. So there is

precedence for this in the last County Council. I have some other comments but I won't go on any further because a lot of people may want to speak. I think above all else I want the record to be clear that contrary to arguments you'll hear this afternoon, passage of this bill would not mean the midlands project can not go forward or that St. Michaels or Oxford or Easton for that matter are going to be foreclosed in the future from granting growth allocation.

MR. FOSTER: Thank you. I neglected when this began to indicate that we want to hear from everyone, we want everyone to have an opportunity to tell us all that you have to say. In order to make sure that we don't have a lot of people speaking at great length in the beginning and some people leaving because they were worried we won't get to them, we're going to ask you to keep your initial comments to about three minutes. Ms. Spence will take the

clock on that. And if after the first go around you have more to say, you can come back and expand upon the comments that you made earlier. Also if anybody here has heard somebody make the argument they intended to make, feel free to get up and give us your name and say, I agree with Mr. Jones and sit down. Judge North. Next and who else would like to speak. Anybody else. Mr. Keller, you can follow Judge North. If you'll both come. Great believer of on deck circle. A lot of time is wasted at hearings while people try to get out of the row and so forth, so I'm going to have an on deck person ready to go after each person finishes. Judge North.

JUDGE NORTH: Mr. Chairman, ladies and gentlemen, at the outset I should like to thank each of you for coming to grips with a problem which your predecessors have successfully avoided for the last 14 odd years. It was a source of some embarrassment to me as chairman

of the critical area commission to experience the want of concern and interest demonstrated by Talbot County and complying with the law requiring a quadrennial review of the local critical area program. I'm sure that there were reasons for that. But since I was chairman and this was my home turf, it was a source of some personal embarrassment that the County had not complied with what the law required heretofore. And I'm delighted to see that you ladies and gentlemen are coming to grips with that requirement. With respect to the immediate issue before you, I spoke by phone today with Ren Surry, who is the executive director of the critical area commission, and has been such since I was his chair, to review with him my understanding of the law pertaining to the application of the growth allocation principal. He pointed out several things to me which I was only tangentally aware of. First off that

apparently initially the practice was for the commission to allocate to each County its growth allocation, as determined by 5 percent of the resource conservation area in the County, and the County was then left on its own rather as to how it handled the application of those numbers. Some counties awarded growth allocation to municipalities within the County, some did not. St. Mary's County, Charles County and Caroline County have never, never, granted growth allocation to any municipalities within those counties. Thereby those counties have retained the control which they have today. I would quote to you from COMAR 27010206 subparagraph A-2, and I think this is directly on point, "when planning future expansion of intensely developed and limited development areas, counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities." COMAR, in other words, says,

dictates if you will, that it's the responsibility of the County to work with the municipalities in accommodating municipalities growth needs. So unless you do this, unless you adopt what is being proposed here today, you're not conforming with what the law requires of you.

MR. FOSTER: Thank you.

JUDGE NORTH: That concludes my commentary.

MR. FOSTER: Thank you. Whoever wants to be next, come forward.

PHILIP KELLER: Members of the Council.

MR. FOSTER: And when no one comes forward, this hearing is over.

PHILIP KELLER: I do agree that the County should accommodate the towns with growth allocation. I think on that part Judge North and I agree. Your own planning commission voted three to one against this bill. I believe it takes away self rule in the internal

operations and land that falls within the municipalities. Because towns like St. Michaels have been judicious and careful with their allocation, they're being penalized, whereas the County and other municipalities may have used theirs up is not a good reason to punish those who have to make decisions within the critical area. I think it's disrespectful of the municipalities and it adds another layer of planning commission and veto power to that which goes on inside of our towns. We have known about the sewage problem for decades, and I heard today it's going to take another five years to fix it. I have a hard time believing it's taken the County so long to address this issue. The timing of this on the very day that the commissioners in St. Michaels are considering awarding growth allocation, I find problematic. I'm also going to read very quickly from the annexation agreement which Talbot County Council and Talbot County is a

part of. "Members of the Council for Talbot County hereby consent to the annexation in this agreement and expressly approve the zoning classification of the subdivision of the annexed property under the zoning ordinance and subdivision regulation of St. Michaels as set forth above and approve the concept of the development encompassed in the annexation agreement and full knowledge that the zoning classification allows land use substantially different from the use of the land specified if the current duly adopted master plan of Talbot County." In addition --

MR. DUNCAN: Excuse me, Mr. Foster. Is there a date on that agreement.

PHILIP KELLER: Yes, sir. I think it says 3/2/80.

MS. HARRINGTON: 1980.

MR. FOSTER: Is that during your time.

MS. HARRINGTON: Could you identify yourself.

PHILIP KELLER: I'm Phil Keller, I live in St. Michaels.

MR. CARROLL: Do you know the date that the critical areas commission -- the critical areas legislation came on.

PHILIP KELLER: Yes, I do. It was several years later. But it doesn't invalidate a contract. It also says, "sewer lines, mains and trunks shall be installed, extended to each lot in the subdivision section and connected to the Talbot County sanitary district sewer system at owners expense." I believe the County has an obligation, since this is all about midland anyway, to live up to its contractual agreement despite the fact that that agreement may be a few decades old. Thank you.

MR. FOSTER: Thank you, Mr. Keller. For purposes of information, since I suppose there will be misunderstandings, I met with Sherry Thomas of St. Michaels and Commissioner Dinkle.

How do these things get scheduled on the same day. We actually had scheduled ours, they had some procedural things happen during their process that caused them to reschedule their hearing. They have indicated to me, and I have no reason to doubt, that they did not know that our hearing was scheduled the same -- already scheduled at the time they set theirs up. But I do want to reassure you that the County didn't intentionally set its hearing to conflict with anything going on in St. Michaels or anywhere else. And I accept their assurance that they did not as well. It's just one of those things that happened.

KATHY RADCLIFFE: Kathy Radcliffe, commissioner of Oxford. Mr. Foster and County Council. I gave you a copy of an article by Kathy Daniels a little bit ago about planning from the bottom up. We are just in the process of working on a plan from the bottom up and we will need some growth allocation. I understand

the need for this -- this review, but I would request that you would consider reviewing with municipalities rather than reviewing alone. So when I look at this bill, it says a bill to review, I would like to say who is reviewed, with the County and the municipalities or something to that effect so we could have a part to play in that. And I don't understand how it would work in the future for our plan and how the -- how this growth allocation will be divied out. Thank you.

MR. FOSTER: Commissioner.

MS. SPENCE: 195 acres is reserved for the Town of Oxford. Do you at this point, I know you can't speak for all the commissioners, do you have a sense of what portion of that 195 Oxford might use in the future given the fact that your geographic location and isolation and kind of where you set your boundaries.

KATHY RADCLIFFE: I think it would be fair to say that we have a designated growth area.

If we took the number of acres in the designated growth area and the number of acres that the town has already, and that's part of our planning, we would be able to come up with a number to give you. But I don't have it off the top of my head.

MR. FOSTER: Thank you. Yes.

JIM FRANCOS: My name is Jim Francos, I live in St. Michaels. And I'm not a lawyer so I'm going to attempt to try to do this.

MR. FOSTER: Mr. Carroll will like you much better.

JIM FRANCOS: Thank you.

MR. CARROLL: You're off on the right foot.

JIM FRANCOS: I believe that the challenge for every board that's involved in this project that seems to be focusing on midland, okay, has an awesome responsibility. Because no matter what step you take, somebody is going to be upset. But I do believe precedence has some

importance. This board and your predecessors voted to allow this, as I understand it, over five years ago. And to change it today, once again makes other people who want to work with this County in any position, whether they are developing property or anything else, have to wonder how can you possibly plan for the future when commitments are made and then they are changed. And the only thing it could possibly do, and I certainly hope it wouldn't come to this, is drag it out in another legal battle between whatever parties there are. And the only thing that happens in that is that we have people outside of area making decisions because we can't sit down at a table with a developer and with the towns to sit across a table and work it out. Now, your board is very busy. I have attended a great number of meetings in the last six months. I don't believe I've seen any one of you at any of those meetings in the last six months. And that's not being critical,

it's just exactly what I said. Everybody is so busy, yet this vote that you take has the responsibility at having both sides of this argument understood so that your decision is not influenced by any one party. I just hope that you will take the time to either postpone your decision, postpone your vote, make sure you've garnished all the information involved, and then make whatever vote you choose to make. You can't vote on something unless you've got all the facts and there can't just be one side of the story. That's all I ask. Thank you.

(Reporter changed paper.)

MR. HIXON: President Foster, members of the County Council, thank you for the opportunity today. As I said earlier, I represent all five of the commissioners of St. Michaels and they are very sorry that they couldn't be here today for this extremely important issue. More than 50 percent of the town of St. Michaels is located in the critical

area. And that's what makes this issue so important to this town of St. Michaels. If we were in the middle of Kansas, it would be a different issue. I respectfully suggest it is even somewhat of a different issue for the town of Easton because it's not so intensely surrounded by water. This is a very important issue, and at least all of the town has to go on is the face of this bill. Looking at the bill itself, it would appear that at the very least the County Council is going to assume a veto power over any development proposal or any planning -- any development proposal that may come forth in the town in the critical area. To this point I respectfully suggest that there has been no indication to the towns as to what the problem is and the invitation to the towns to get together collectively with the County and work on solving this problem in a less drastic way. I would suggest that this is an extremely drastic way to withdraw all of the

growth allocation from the towns and start over again. It may well be if the towns can get together we can come up with some sort of formula that would please every one, or at least please most of the people. But this way in my judgment this affects a transfer of power from the towns to the County. Each of the towns in this County have been autonomous up to this point and they all have a different character, different flavor, different goals, different places to live. They appeal to different people. Some of us would want to live in St. Michaels, others of us would not. The same is true with the other three towns in this County. I suggest this is going to homogenize the towns in this County, it's going to take away their important character and flavor, their individuality. I suggest that it's going to be problematic as far as the Maryland constitution and some state laws and other laws are concerned. Judge North referred

to a state regulation. He apparently interprets it one way, I interpret it another. I suggest that there is a cooperative and reasonable process in place right now and that this bill will remove that process. Again, the town of St. Michaels would like to cooperate with the County as much as we can. We have scheduled meetings right now the second and fourth Tuesday of the month. Given advance notice, I'm sure the commissioners would be happy to reschedule their meeting so they could come to a joint meeting of the towns and County and address what the real problem is and try to work toward a real solution. Thank you very much. I have a letter and documents I would like to submit for the record and a copy for each of you.

MR. FOSTER: Thank you. If you would give that to Mr. Urbanczyk.

JOHN WOLFE: My name is John Wolfe, I'm a resident of St. Michaels. We have a unique

situation in Talbot County, the towns are not autonomous as they would presume. We have a shared sewer responsibility, we have a shared school system responsibility. I don't believe the towns can operate unilaterally in matters of development like this and use of growth allocation becomes primary. I think it's very appropriate for the County and the towns to have a shared responsibility for that issues which certainly affect both of the municipalities and the County. I therefore support the use of growth allocation in the manner which you're suggesting so that we do have that combined discussion, we have a sharing of what are our responsibilities, we come to an agreement, the developer is a part of that, you have a chance for negotiations so that we can find a mutually agreeable situation of which the Elm Street proposal outside of Easton is an excellent example of where when all the parties got involved a much better plan

came out. So I heartily support the 933.

MR. FOSTER: Thank you. Mr. Thompson.

DAVID THOMPSON: Thank you, Mr. President. I am here today on behalf of the commissioners of Oxford. You heard briefly from Kathy Ratcliffe, and Paul Martin is here with her. I had the opportunity --

MR. FOSTER: Mr. Campen is in the hall, so I guess you got --

DAVID THOMPSON: And I was going to tell you I had the opportunity to speak with Sid this morning. I attended the planning commission meeting at which this bill was considered. And the chairman, who probably has the most hands-on experience in the County in terms of the development of the Talbot County critical area plan and the legislation that resulted therefrom, Richard Hutcheson, made a very cogent explanation of the existing law and what it permits. And what he pointed out to those in attendance is that the law in effect

right now contemplates a dialogue with the towns and with the towns planning commissions and the County's planning commission on these growth allocation issues. And he pointed out that the reason that that had not been done to date is because there had been no need to do it. The use of growth allocation acreage had been so minor up to this point that it wasn't necessary. He pointed out, as you all now know, that there is sufficient growth allocation acreage available to accommodate the needs of the town of Easton without the enactment of this bill. It is probably accurate that the town of Oxford has more growth allocation acreage than its current growth area suggests. The town of Oxford would appreciate the opportunity for its planning commission to do its job, that is planning, with the County planning commission. And we believe that the existing legislation is appropriate, that this is an unnecessary step

at this time. Unfortunately what this does is it necessarily brings under the microscope the legal relationships between the towns and the counties. And if the County legislates in a way that many believe violates state law or the state constitution, it necessitates the litigation microscope to resolve that. And then we come up with unintended consequences that none of us really wanted in the first place. The current law does contemplate a dialogue between the planning agencies within the County. That dialogue should be given the opportunity to work without wholesale amendment of the law, which I believe, like Mr. Hixon, will cause other consequences and the unintended consequences that we all have to deal with. Thank you for your time.

MR. FOSTER: Mr. Thompson, are you suggesting that if this bill is defeated that Oxford would voluntarily relinquish some portion of this growth allocation.

DAVID THOMPSON: I am suggesting that Oxford would welcome the opportunity to have its planning commission sit down with the County planning commission and discuss just that circumstance. But Oxford, like the town of St. Michaels, and I'm sure the town of Easton, would like to maintain the autonomy to do its own planning within the town. Your bill, for instance, says that it reaches into the town and gives the County the authority to deal with property inside the towns. I suspect that you will find that legally problematic as we get down the road. You probably don't want to go there. Certainly my municipal clients don't want you to go there. Thank you.

MR. FOSTER: Repeat your name again since it's a new bill.

BETH JONES: My name is Beth Jones and I live at 9005 North St. Michaels Road right outside of St. Michaels and right before Bay Hundred. I'm speaking today as president of

Bay Hundred Foundation, which is part of a seven organization coalition to get the County involved actually in decisions that affect us all. There's a ground swell of support, as I mentioned before, for this bill 933. In fact just over the last week a hearty bunch of about 40 folks went out and collected 1,037 signatures and also stimulated, I believe, as far as I know, 55 e-mails and at least two letters in support of 933. So where is this coming from. Well, I think we have learned a lesson as we have watched the St. Michaels commissioners and the St. Michaels planning commission grapple with a mega development proposal at the north end of town that would affect us all and yet many of us who have signed the petition do not have a voice at the table. And so we look to the County Council to represent us in decisions that will affect us. People have spoken about the sewer implication, the traffic implications, the school

implications, not just for this midland project but for projects of this size throughout the County. We have signers not only from the Bay Hundred and Riverview Terrace and 86 designated St. Michaels residents and then another 70 some who have St. Michaels post office boxes so we're not quite sure yet where they live, but we have people from down the Oxford peninsula who have signed on and a large number of folks from Easton. What we have been hearing is that indeed the way that the County Council has worked with the Easton Town Council in resolving or at least in hearing and considering and improving the Elm Street development that's proposed for 33 and the bypass is a model that we would like to emulate. For the record I would like to give you these petitions.

MR. FOSTER: Thank you. Yes, sir.

ROBY HURLEY: Thank you, Council, my name is Roby Hurley. I'm not a lawyer, I'm a lowly

critical area planner with Maryland Department of Planning. I am a resident but I would like to speak to this issue as a small town guy.

MR. FOSTER: Are you representing the department of planning.

ROBY HURLEY: I am not.

MR. FOSTER: Where do you live, sir?

ROBY HURLEY: Easton. Easton post office, Talbot County. I've been a municipal planner for 13 years with the department of planning. I've worked from Port Deposit to Princess Ann. I currently serve 12 towns on the Mid-shore. Three of those towns are in Talbot County. I would like to give you my thoughts on this bill from the perspective of that municipal Government -- municipal planning. Specifically inconsistency with state regulations or guidance, number one, critical area. The numbers still are misleading even with some of the corrections that are done today. The critical area law, section 8-1809G-4, in

reference to growth allocation, only requires a statement quantifying growth allocation used and remaining, not a wholesale taking of municipal growth allocation. I would also like to point out some of the interjurisdictional cooperation that has taken place between the County and myself representing the three towns. And I refer to a March 29th letter from Dan Cowee to the towns. March 29th, 2000. Once combined, County and town growth allocation usage reaches a specific level, the County may request an additional quantity of acreage that can be used for conservation from RCA. At that time the County may make additional -- may make acreage available for the towns. As Judge North pointed out, there is also reference in the law to interjurisdictional coordination and specifically mandates that for the towns. As the -- your ordinance is currently written, there is coordination existing. And the way it is -- your ordinance is proposed or this 933

basically runs silent or makes the whole ordinance silent and leaves a hole on that process of growth allocation. There's also conflicts with the '92 planning act and general planning principals. The '92 planning act vision states in rural areas growth is directed to existing population centers. There's also a vision saying -- requiring mechanisms -- regulatory mechanisms are stream lined. If you take all those strikeouts as you have listed in 933, it then becomes silent. Thank you.

MR. FOSTER: Thank you. I assume that's everybody. Anybody who was cut off on the first round, want to extend their remarks. Mr. Goetze, I indicated earlier anybody who wants to speak, you need to come forward. If there's anybody who wants to speak after him for the first time, please come up and take the chair.

AL GOETZE: I will be very brief. I am Al Goetze and my address is St. Michaels,

Maryland. I'd like to speak along the lines of approval of this bill. The scenario I would like the Council to think about and remember is this, a group of town citizens from St. Michaels elected to office, charged with the doing the right thing, they -- accordingly to the law and reference the regulations in doing that, and then after saying no to the proposal, which they did, going to court to challenge -- to be challenged about their no and winning. This is the record, is it not. This is what did happen. They were not in favor initially of this development. Then after agonizing over the legal cost for winning, the justifiable prohibitions, mostly of great concern for the decline or trashing of the Miles River industry asset, they caved in to the single purpose profit driven developer land grab. As you all know, I've been involved for a long time in Talbot County, particularly relative to what is happening to Talbot rivers, all of them,

including the Miles. In terms of the commission, rightfully in terms of their defense, they agreed over a three year period to study the waters off of St. Michaels for three years. And the University of Maryland Horn Point laboratory, I think the best authority anyone could ever find, and I was involved as well and assisted in the presentation. And we reported back after three years of study and the final line was that dissolved oxygen in that river today is not capable of sustaining marine life. And also I think when we talk about whether it's marine life or anything that relates to the opportunity for the citizens of this County to make a living, this very definitely relates to the question of whether or not the watermen and the fishing industry can have a product and a possibility of succeeding. Again, I would very much be in support of the bill.

MR. FOSTER: Thank you, Mr. Goetze.

ARNOLD SMITH: This is the first time around.

MR. FOSTER: Yes.

ARNOLD SMITH: Thank you for the opportunity to appear before you. My name is Arnold Smith and I'm a resident of St. Michaels. And until the end of this month I will continue to serve as a member of the planning commission. And my voice was the ~~descending~~ dissenting voice in the planning commission's recent approval of a growth allocation for the midland folks. And because it very much impacts, affects your legislative piece here, I speak primarily to the midland proposal. It was a bad idea when it was proffered, it was dreadfully out of sync with the realities of life in St. Michaels. It was virtually on all four's inconsistent with the comprehensive plan and had some glaring deficiencies in terms of the critical areas program. That was six years ago when this war began. And after waiting for

six years and waiting for improvement, waiting for something else to happen, and having gone through nine successive victories in terms of the town being upheld in rejecting the application, along comes the latest proposal which has been ramrodded through and the one in which I just referenced I was the minority voice. Suffice it to say, the clear evidentiary requirement of having the best example of a critical area -- of a growth allocation award has never met the test in St. Michaels. What has been provided has been minimal on all scores, from the 300-foot buffer which they do not provide, instead going with the legal limit of 100 feet instead of the 300 feet, to all the problems associated with such incredible density, traffic, air pollution, water pollution, the septic situation. All of which were never fully given extra pluses. Thus what they supplied was the minimum instead of giving the maximum. And

this situation continues today. Very little has been accomplished over these six years except the same glaring problems which face us every day in St. Michaels, still are on the table. I had hoped that we would have had a better presentation from midland, but instead we got a minimal presentation. Thank you for your opportunity.

MR. FOSTER: Are you for or against the bill.

ARNOLD SMITH: I'm for your 933.

MR. FOSTER: Okay. Thank you. No other new speakers. Mr. Hixon, you wanted to extend your remarks.

MR. HIXON: Yes, sir. Thank you. I did want to make a few more points. I think land use planning, comprehensive plans, zoning ordinances, all of which the town has in place and has had in place for many decades, all of a sudden I don't know what 933 is going to do to them, but I think they're going to go

substantially off the board. I don't know how the plan is going to plan for the future unless there's going to be a joint town and County comprehensive plan for the town. I just don't how this is going to work. You may have something in your mind and there may be some other bills to come after this, at least on the face of it, and that's all the town has to go by. On the face of it I just can't understand how this is going to work. In case there's any doubt, the town is against this bill and would ask that you postpone this and let us all get together and rethink it. In the letter that I've given you, and it's not my letter, it's a letter signed by President Snyder, the town commissioners, we have referenced and give you copies of a 1976 contract between the town and the Talbot County number two sewer district, which was in existence at that time, which I believe you have assumed. And the 1980 annexation agreement that was referenced

earlier by other speakers. I simply ask that you look at them and give them consideration as to what impact they may have on the County, before we get into a can of worms that is just going to be worse than what it is. The town has been considering -- so much of this seems to be about midlands. The town has been considering proposals from midlands since 1998. So when people say this is being ramrodded through to begin with, nothing is through the town of St. Michaels yet. We are going through with the hearing processes. We have considered now four different plans and we have rejected three of them. Being ramrodded through must mean that on the current plan it began being considered with public hearings that started by the planning commission on September the 24th of this year. And there were -- the public hearing started on that date and there were four nights of public hearing that ended on November the 6th. And there were two more

nights of debate and decision making by the planning commission. The town commissioners started their public hearing today. So nothing is being ramrodded through. Issues of the state road alluded to in the other hearing have been considered. The planning commissions recommendation is 54 pages long containing at least, to my memory, 18 conditions, one of which is no building permit gets issued, no earth gets turned until the County has given written assurance to the developer that it will get sewer. And that written assurance is then given to the town.

MR. FOSTER: Mr. Hixon, if this thing were postponed for a week or a month or a year or whatever, what is it that the town would say to us that they haven't already said to us. They don't support the bill, and I understand their reasons for not supporting the bill, but I mean what new argument would they make, can you proffer it.

MR. HIXON: I would say let's find a better way. Let's look at the growth allocation that we have. If the concern is the town or towns would tie up the growth allocation so that the County could never reach the threshold to get into the second tier, let's talk about that. Let's see what each town has to have and what each town can give up. Let's see about putting it into a pool that can be drawn upon. If getting down to the threshold to get to the second tier is the issue, I'm sure --

MR. FOSTER: I don't think that is the issue. I think the question is whether the County wants to take this back or doesn't want to take it back.

MR. HIXON: That may be. I think that is problematic. And I'm not trying to be -- I'm not trying to be threatening here, I'm trying to be conciliatory. The town would like to find a way where we can work together.

MR. FOSTER: But you can't proffer any particular thing.

MR. HIXON: I can not proffer anything.

MS. HARRINGTON: I would just like to add. After listening to a number of legal presentations and being married to a lawyer, I have legal presentations made at home as well.

MR. DUNCAN: But you overrule him, don't you.

MS. HARRINGTON: Well, we work things out. I believe that this bill, I don't quite understand the ~~human~~ hue and cry. I believe that this bill basically insures that the towns and the County will sit down and work together. Something that, try as we might, has not always happened in the past. I think that that is plain and simple what this is going to do. And I'm surprised that all of you gentlemen are so worried about the fact that -- when all that we propose to do is to make it possible, to make it definitely possible, that the towns and the

County will sit down and talk about this precious commodity of growth allocation before it slips away.

MR. HIXON: And like the planning -- I believe that mechanism is in the Talbot County code as we speak.

MS. HARRINGTON: Thank you, Mr. Hixon.

MR. FOSTER: Thank you very much. And that concludes everybody's extension -- one more.

AUDIENCE: I would like to just echo Mr. Hixon's comments about the comprehensive plan and offer my assistance. I have written quite a few growth allocation ordinances in coordination with Queen Anne's County, with Dorchester County for their towns, and I offer my assistance toward that so that we do not end up with just an empty ordinance. Thank you.

MR. DUNCAN: Mr. Foster, I'd like --

MR. FOSTER: Wait a minute. Is there any other public comment. Okay. The public

hearing is closed. Mr. Duncan.

MR. DUNCAN: Yes, there were several interesting comments made during the presentation, both for and against, and some sort of wetted my appetite to find out who's write and who's wrong. And I would suggest that maybe our County attorney could research that and provide the necessary information. And one -- Judge North presented the fact that we would definitely be in violation of COMAR if we didn't pass this legislation. And then there was other testimony that, no, he read the law wrong. And that's a great interest to me, one, who's right and who's wrong. And the second thing is if in fact we do violate COMAR, what sanctions can be imposed to the County if we violate COMAR. The next thing I think is very interesting, and I don't know the answer, I'm not a lawyer, but in 1976 we're dealing with two documents, contractual documents, 1976 to 1980. Critical law legislation wasn't

passed until '86.

MS. VERDERY: '89.

MR. DUNCAN: '89. Thank you. So this is a number of years after the fact. Is there a statute of limitations on contractual agreements when things completely change. I mean the way of doing business in '76 and '80 was entirely different as it is now in 1989, and how can we as a Government body sign a contractual agreement to permit something to happen when all the rules through the state agency, not from the local agency, the state agency changed the rules as far as the development process is concerned. And so my question is, I guess, one, is there a statute of limitations, and, two, if so, what is the timeframe. And the second question would be, when there's agreements made and there is state legislation that comes down that more or less changes the tenants of the whole agreement, so to speak, where do we stand.

MR. FOSTER: Mr. Duncan, I think what you're talking about is soliciting legal advice. I don't think this is probably the appropriate place to do that. I think we will have our meeting with our attorney about -- I think what you're basically addressing is the enforceability of that agreement in this situation. And I think we need to take our legal advice in executive session first before we make a determination.

MR. DUNCAN: I agree. But those questions were put on the table, Mr. Foster, by the public hearing, and I think any legal advice we get obviously -- we're going to vote on this issue, and I think that the public along with -- is entitled to know are these in fact -- is this true, is the law true, is it not true, is the contractual arrangement true or not true.

MR. FOSTER: Unfortunately all the lawyers in the room can tell you it's not that simple.

People have different interpretations of the same statute or the same regulation, and that's why I think the law allows us to take legal advice and gripe it because there may be many different ways you can go and many different consequences to each of those ways. And in order to formulate a strategy, it's difficult to do that in this context. In any event, the matter before us is bill 933. And what Council -- members of the Council want to make comment on this bill. I darn't try to set it for a vote because somebody may make a motion, so I will wait to hear your pleasure on when we should vote on this. Mr. Carroll, it's your bill, do you want to start.

MR. CARROLL: I have no comment to make at this time. I would like to have a session with Mr. Pullen and I would hope when we reschedule it for a vote there's an opportunity to make comments.

MR. FOSTER: So there's no desire on your

part to schedule this today.

MR. CARROLL: I think we should go ahead and schedule it.

MR. FOSTER: I'm sorry, to vote today.

MR. CARROLL: No, not vote.

MR. FOSTER: Hearing that, I will schedule this for a vote on the 23rd of December at the appropriate hour. And we will have an executive session today and perhaps others with Mr. Pullen regarding the questions Mr. Duncan and other members of the audience have raised. Thank you very much for coming in. We will stand in recess for five minutes to allow the reporter to recover use of his fingers.

(Short break was taken.)

MR. FOSTER: Thank you. We will assume the meeting and move to eligible for vote. There are with some of these bills amendments. Mr. Pullen has indicated that he's prepared to explain each amendment. We have already voted on all of the amendments so far and found them

Exhibit H

PUBLIC HEARINGS

Talbot County Council Bills

922, 926, 927, 929, 931 and 933

BEFORE A PANEL

OF

THE STATE OF MARYLAND

CRITICAL AREA COMMISSION

FOR THE

CHESAPEAKE AND ATLANTIC COASTAL BAYS

Date: Wednesday, March 24, 2004

Time: 7:00 p.m.

Location: Easton High School
Easton, Maryland

Reported by: David M. Schafer, AA, CCR

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EXHIBIT
H

MEMBERS OF THE PANEL:

Dave Blazer, Chair

William Giese

Joseph Jackson

Gary Setzer

Edwin Richards

Marianne Mason, Assistant Attorney General

C-O-N-T-E-N-T-S

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(Meeting recessed 7:25 p.m. to 7:28 p.m.)

TALBOT COUNTY BILL 933

PANEL MEMBER BLAZER: All right. We're going to get started again. Thank you. Thank you. Good to see you all again. It's been so long.

FROM THE FLOOR: Two minutes.

PANEL MEMBER BLAZER: Actually three. Thank you all for being here this evening. We are going to call the public hearing to order.

The purpose of this hearing tonight is to hear public comment on Talbot County Council Bill 933, which withdraws reserves of growth allocation

acreage granted to the municipalities in the original Critical Area Program in Talbot County.

The County approved these changes to their Critical Area Program on December 23, 2003, and they were submitted the Critical Area Commission.

On February 5, 2004, Commission staff determined that the submittal was complete, and on February 27, 2004, Chairman Madden determined that this change was an amendment to Talbot County's Critical Area Program and appointed a panel to hold a public hearing. This hearing is being recorded.

My name is Dave Blazer. I'm the chair of this panel. I'm from Worcester County, the Coastal Bays Watershed.

With me this evening is Bill Giese from Dorchester County; Joe Jackson from Worcester County, the Chesapeake Bay side of the county; Marianne Mason, who is the counsel for the Critical Area Commission, and not a member of the Panel, I might say; Gary Setzer from the Maryland Department

of the Environment; and Ed Richards from Caroline County.

We also have Commission staff present; Ren Serey, the Executive Director; as I mentioned, Marianne Mason; Lisa Hoerger of the Commission staff; and Mary Owens, also of the Commission staff.

Our Chairman, Senator Madden, is here as well, who we introduced before. Again, thank you for being here, Mr. Chairman.

This hearing is conducted in accordance with the provisions of the Annotated Code of Maryland, Natural Resources Article Section 8-18090. This section of the code requires a panel of Commission members to conduct a public hearing in the local jurisdiction submitting the proposed amendment to be its Critical Area Program.

This hearing is part of the Critical Area Commission's duty under State law to evaluate these changes.

The Panel's purpose is to gather information about the proposed amendments to the

County's Critical Area Program.

This panel will not make a decision on Bill 933 tonight. The Panel's role is to hear comments and evaluate the information received tonight and information that may be submitted by members of the public after tonight, until the record of hearing is to be closed.

The order of proceedings; we will have a representative of the County, Michael Pullen, will speak and then we'll offer the Towns an opportunity to give presentations; we'll open the floor to any elected officials who would like to make comments, and then we'll open it up for the general public to provide comments, as well, this evening.

If you wish to speak tonight, please be sure that you have signed up the attendance sheet. We've got a list here that's still on the corner of the stage up here, so make sure you complete that out with your full name and address.

The statements will be recorded this evening.

And speakers should limit their time to about five minutes, if possible.

If there are several speakers from one group in attendance, please choose a spokesperson for your group's comments.

This hearing was advertised in the Star Democrat on March 10, 2004.

The Commission has already received written comments that will be passed on to the Panel members here.

The Panel intends to keep the record open until Monday, April 5, 2004, until the close of business on that Monday.

Written comments will be accepted up until that time, and you should send those comments to the Critical Area Commission at 1804 West Street, Suite 100, Annapolis Maryland 21410.

As part of the Panel's duty to gather information about proposed amendments, the Panel may ask the Critical Area Commission staff to investigate any pertinent issue further and to

provide the Panel with written reports or memorandum. The Panel may also seek guidance and recommendations from other resource agencies, including Maryland Department of Natural Resources and Maryland Department of the Environment. The Panel may also seek the advice of legal counsel.

This panel will meet to discuss the proposed program amendment on Wednesday April 7, 2004, and the morning of the Critical Area Commission's regularly scheduled monthly meeting at the Department of Housing and Community Development in Crownsville, Maryland. The Panel may need to schedule one or more additional meetings, and the Panel will announce any further meetings on that April 7th date when we meet.

The Critical Area Commission will consider the proposed amendments to the Talbot County Critical Area Program at a future meeting. Those meetings are held the first Wednesday of each month at the Department of Housing and Community Development Building in Crownsville, Maryland.

This Panel will provide recommendations to the full Commission concerning Talbot County Bill 933.

At this point we will ask Michael Pullen with Talbot County to give a presentation. Mr. Pullen.

MR. PULLEN: Thank you, Mr. Chairman and members of the Panel. My name is Michael Pullen. I am the County attorney for Talbot County. And thank you for the opportunity to speak to you this evening.

I'd like to talk briefly about Talbot County's Critical Area. We have 600 miles of shoreline. And to make that real, if we were to drive down I-95 south, when you travel 600 miles you'd be in Charleston, South Carolina. So we've got a tremendous amount of shoreline in the county.

We have over 51,000 acres of land in the Resource Conservation Area and nearly 40 percent of the county is in the Critical Area.

Now, our program was adopted in 1989, and

there was growth allocation given to the towns at that time in accordance with the maps that were adopted, and the maps anticipated four-year reviews.

Since that time no reviews have taken place. The maps became outdated. And the Town of Easton has now used all of its growth allocation it was originally allocated in 1989. Oxford and St. Michaels have not.

Bill 933 repeals those outdated 1989 maps and it makes the process that has already been adopted, which I'll discuss in a minute, for supplemental awards of growth allocation to municipalities applicable to all the municipalities in the county.

Talbot's process for awarding supplemental growth allocation was enacted in April of 2000. It was Bill 762. What that bill did was established that process for supplemental awards of growth allocation. At that time it was directed primarily to the Town of Easton, which had used all of its growth allocation and needed this process,

and this process was adopted and worked on in conjunction with the town at the time. And now this process has been in place since 2000. It has been approved by the Critical Area Commission.

This is Bill's 762 process. The process starts with an application filed in the town planning office. That application gets routed over to the County planning office and also to the Town Planning Commission.

The Town Planning Commission -- from the County planning office goes to the County Planning Commission. They schedule a joint hearing. That's the first of two public hearings on the application. The idea is that both Planning Commissions receive a common platform of factual information from which to make their decisions.

The separate -- the Planning Commissions meet separately and make separate recommendations; The town Planning Commission to the Town Council, the County Planning Commission to the County Council.

After receipt of those recommendations the two councils, the Town and the County Council, schedule a second public hearing. This is a joint public hearing at which the public is invited to attend and provide testimony and information.

The respective councils then deliberate separately and each make findings of fact and take a vote, and the result on the application requires the joint approval of both the Town and the County Council.

The County's role in that process is equal to the Town, and the process requires interjurisdictional cooperation and collaboration. And the result of that process is, of course, subject to the Critical Area Commission's review and approval.

In summary, Bill 762, which was adopted in 2000, creates that process to accommodate the growth needs of municipalities. That process is actually required by COMAR, which I'll discuss in a moment. But to date Bill 762 has worked well and

has a proven track record of success.

The first application to be approved using that process was the Cook's Hope. That was 36 acres within the Town of Easton.

The second application to be approved was Easton Village, only recently approved, and also approved by the Critical Area Commission for 156 acres, also within the Town of Easton.

The Easton Village project resulted in an net improvement, a net gain in the nonpoint-source pollution from that site, so at the end of that process, which began somewhat contentiously between various citizen groups and the developer and the Town, it ended collaboratively with approval the developer was happy with and the Town and the County and the citizen groups were apparently pleased with. So the County believes that that process worked very well and collaboratively and ended up with a very good project that has been approved by the Critical Area Commission.

This is the COMAR regulation that I

alluded to earlier in my comments, and it says it requires counties, when planning future expansion of Intensely Developed and Limited Development Areas, the counties, in coordination with affected municipalities, shall -- mandatory -- establish a process to accommodate the growth needs of the municipalities.

This is Judge North's testimony before the Talbot County Council when they were considering whether to enact Bill 933. Judge North brought this particular COMAR reg to the County's attention during the course of his testimony and indicated that that COMAR regulation dictates that it is the responsibility of the County to work with municipalities to accommodate municipal growth. So unless you do this, unless you adopt Bill 933, you are not complying with what the law requires you to.

The point I think that Judge North was making is that COMAR requires a process. Counties are required to establish that process. And that process is designed to accommodate the growth needs

of the municipalities. Simply writing a blank check to the municipalities is not a process and doesn't comply with that COMAR requirement. That process is established by Bill 762. And Bill 933 makes that process apply equally to all the municipalities within the County.

Currently what has happened, since Easton exhausted their growth allocation, St. Michaels and the Town of Oxford have not, there were really two separate ways for municipalities to obtain and award growth allocation in Talbot County. If you were a person in the Town of Easton you would be required to apply under the procedures of Bill 762 and follow that joint review process. If, on the other hand, you were from -- you were in St. Michaels or Oxford, you would not. Those decisions would be made exclusively by the respective Town Councils of those two jurisdictions.

The County believes that COMAR requires that joint review process, or at least permits the County to adopt it as a local option. And in this

case the County has done that with the view towards promoting this interjurisdictional cooperation, with the idea that the protection of the Chesapeake Bay is a universal ethic, that the large amount of shoreline in the County, the large amount of land in the Critical Area in the county made the County's land-use policies, give them a greater effect on the overall health of the Chesapeake Bay than any particular municipality's land-use policies simply because of the difference in size of the respective jurisdictions.

We think that State law gives the counties the primary responsibility under the 5 percent calculation formula and under the COMAR reg that we just talked about, gives the counties the primary responsibility to set this process up and, likewise, requires counties to remain a part of that process rather than simply writing a blank check to the municipalities.

Environmental protection by its nature is collaborative. The State of Maryland has entered

into the Chesapeake Bay Compact with the states of Virginia, West Virginia, Pennsylvania, New York, Delaware, District of Columbia. If those states can cooperate as they are required to do to protect and promote the health of the bay, the County believes that we and our municipal neighbors who are interdependent because of our physical proximity and location can do the same and that, in order to protect the bay, that we are required to do that.

So the County would ask for your approval of 933 as a measure that's designed to promote and enhance the Chesapeake Bay protection.

I'd be happy to answer any questions that the Panel may have.

PANEL MEMBER JACKSON: Any questions from the Panel members?

PANEL MEMBER SETZER: I do.

PANEL MEMBER BLAZER: Okay.

PANEL MEMBER SETZER: Mr. Pullen, you talked about 933 establishing a process.

FROM THE FLOOR: We can't hear you.

PANEL MEMBER SETZER: You talk about 933 establishing a process for the County to deal with the growth allocation.

Under the initial program that was adopted by the County, you had a process that was established, basically a four-year review process. That, in your mind, that doesn't satisfy the COMAR requirement for the County to establish a process?

MR. PULLEN: No, sir. I think that that four-year review requirement was a comprehensive requirement for the entire program to make changes, to fine-tune the program, the substance of the program, to bring it in line with evolving notions of environmental protection, evolving technologies, evolving land-use policies. So I don't think that four-year review requirement was necessarily a process to award growth allocation to the Town.

Initially what the County did was to simply write a blank check, in effect, and give the decision exclusively to the town.

It's almost like herding the cats, I

guess. If you are trying to enforce consistent rules and regulations and polices across the board, I think that the ability for a municipality to act unilaterally impairs the effectiveness of those policies.

So the County believes that it has the obligation to participate in the process.

PANEL MEMBER SETZER: Thank you.

PANEL MEMBER BLAZER: Yes, sir.

PANEL MEMBER RICHARDS: Is it on?

FROM THE FLOOR: No.

PANEL MEMBER RICHARDS: Well, we're going to get some feedback, I guess.

Mr. Pullen, I had some problems getting through all of the whereases there were so many of them in this bill, which led me to believe that you were trying to say something important in the whereases that were not included in the top part of the bill. In reading them I felt that you were indicating that you and the Council were indicating that there were problems created by the 1989 maps

and the allocation. And you've identify a couple of them in the whereases.

You also indicated that you felt that there was a potential of an even bigger problem down the road.

Was this part of the discussion when the bill was adopted by the Council? And have I correctly identified the whereases?

MR. PULLEN: Yes, you have, Mr. Richards. Since drafting that legislation, I have -- and I drafted it, so I can tell you that the whereas clauses were really the product of my own analysis. I think that some of those whereas clauses were probably ill-conceived and probably -- the problems that were addressed could be addressed in other ways. But at the time of the legis -- at the time it was drafted, those were perceived to be real problems. But since then, on reflection, some of those problems can be addressed without adopting 933.

But the fact remains that the policy that

933 promotes, I think, is consistent and is actually required by the COMAR reg that we discussed and is consistent with sound principles of environmental protection.

PANEL MEMBER RICHARDS: But you also mention whereases, the comprehensive planning process requirements of Article 66B. Do you have an alternate set of growth maps as a result of that process?

MR. PULLEN: We do, and I have copies which I'm going to make available to the Panel as exhibits.

The County and the towns are currently -- the County is currently nearing the end of its comprehensive planning process for a comprehensive update. I think some of the towns are closer to the end -- and perhaps have reached the end -- than the County. But in that process the County planning staff and the towns' planning staff, it's my understanding, have worked closely together to redefine the growth areas around the towns. And

those maps, as I indicated, will be made available to you. And they are -- I think when you compare them with the 1989 maps that Bill 933 repeals you will see quite a difference, quite a change in thinking from then to now and the town boundaries have changed and they'll be useful.

PANEL MEMBER RICHARDS: Thank you.

PANEL MEMBER JACKSON: At the end of the process on Bill 762, when you have the final findings by both the municipality and the County government, let's just say the findings are not concurrent. Who has the tie breaker in that?

MR. PULLEN: Well, if -- let me restate your question so I'm sure I understand it. If, for example, the Town imposes a condition and the County imposes a different condition?

PANEL MEMBER JACKSON: That is one set. Let's just say that you have conceptual approval by the Town but County does not or has other conditions that the Town doesn't agree on.

MR. PULLEN: Well, the developer is

subject to the joint review of both the Town and the County; therefore, if the conditions were different but supplemental, I believe the developer would be required to comply with all of the conditions.

If the conditions were different and inconsistent, that would be a problem. And I don't think that -- well, that's never occurred thus far. The problem that that might create would be a situation where a developer, in complying with one set of conditions, by definition couldn't comply with the other. I would hope that the process wouldn't create that dilemma for the developer. It is possible.

I think each particular case would have to be assessed on its own merit, depending on the type of conditions and the type of facts that were produced in the record. It is a problem potentially but not necessarily a fatal one.

PANEL MEMBER JACKSON: But it has not been addressed as far as this bill is concerned?

MR. PULLEN: 933?

PANEL MEMBER JACKSON: Yes.

MR. PULLEN: No. 933 doesn't address that situation because 933 operates by default because it removes the growth allocation from the 1989 maps from other towns. 762 then comes into play automatically. So 933 doesn't itself deal with that process.

PANEL MEMBER JACKSON: Okay.

PANEL MEMBER BLAZER: Thank you.

MR. PULLEN: Mr. Chairman, if I may, I would like to yield the balance of the County's presentation at this point to a person who needs no introduction to the Panel, the Honorable John C. North.

JUDGE NORTH: Good evening, Mr. Chairman, ladies and gentlemen. I'll lower the microphone a bit. Welcome to Talbot County.

PANEL MEMBER BLAZER: Thank you.

JUDGE NORTH: It's a pleasure to see familiar faces.

You have already observed on the screen

Basic responsibilities for growth allocation is the county, subject to the approval of the Critical Area Commission. Respectfully, Harry Hughes.

Thank you, ladies and gentlemen. I'll submit these if I may. Thank you.

PANEL MEMBER BLAZER: Thank you, Judge North. Thank you.

Are there any representatives of the towns that would like to make a presentation? If you'd come up and identify yourself and who you are with, please.

MR. HICKSON: Thank you. My name is Michael Hickson. I'm attorney for the Town of St. Michaels, and I would like to respond.

First of all, the Town would oppose Bill 933.

Mr. Pullen, the County attorney, took you 600 miles down Route 95 to Charleston. I would like to take you, instead, a couple of hundred years back, to 1804, when the village people of St.

Michaels decided that their interests were not exactly the same as those of the county as a whole and they decided to incorporate.

And I think there is the crux of the problem. Some people like to live with lots of land around them and they have one perspective. Other people like to live with lots of people around them and they have a different perspective.

The interests of the County and the interest of the Town are not the same.

The difficulty that the Town has with 933 is that it takes back all of the growth allocation that was previously reserved for the counties and puts it completely in the control of the county; that's to say, the county has the last word.

St. Michaels would not mind if the growth allocation were taken back and put in a common pool. But the difficulty here is not just the taking back of the reserve, but the fact that it then throws the process -- it throws the current process for the awarding of growth allocation out which has been

totally within the control of the town, subject to all the criteria of its laws and its local program which was approved by the Critical Area Commission, and instead sets up a different process for what the County calls supplemental growth allocation, in which the County, in effect, carries on a dual process.

It may be carried on in the same rooms with the members of the St. Michaels town bodies, but in effect it's an entirely separate decision making process. While on the one hand the Town officials look at the Town's laws, the Town's Comprehensive Plan, the Town's local program, if you look at the County program, the County officials are looking at things that are completely different. They are looking at the County's Comprehensive Plan, which does not control the Town under State law. And they are looking at other things that are not a part of the Town's decision-making process and the Town's concerns.

Judge North took a considerable amount of

time reading letters about one particular COMAR provision. And I was thinking to myself, why all these letters about the same thing; he doeth protest too much.

I would commend the panel and the Commission to a careful reading of COMAR 27.01.02.06A2, and I'll quote. "When planning future expansion of intensely developed and Limited Development Areas, counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the affected municipalities.

All we are talking about here is creating a process. We are not talking about sitting in on the judgment.

And, secondly, we are talking about creating a process in coordination with the town; that is, the process of establishing the procedures should be done in coordination with the town.

And, thirdly, it says that it should be done to accommodate the Town's needs.

Now, I've prepared a memorandum and supplied a copy of it to your counsel and other counsel, and I'll submit an original tonight with copies, and I've also prepared written testimony that I'll submit tonight that goes into some of the details, but I want to hit some of the high points. Some of it is legalese and legal oriented. I want to hit the high points of the important facts and I want to focus on this section. That was my intent from the beginning.

Coordination, cooperation, and accommodation. I don't see any of these things in here which, in effect, throws out the current process and throws the towns into a joint decision-making process in which the counties do what the State law, in my opinion, does not permit and what the village people in 1804 wanted to avoid.

The process of the arriving at Bill 933 goes something like this. In 1997 the Town of St. Michaels had never received an application for growth allocation at all. In that year for the

first time it received an application from Midland, a developer that wanted to do a substantial development in Talbot -- in the Town. During that process Midland submitted successive Applications which the Town successively denied, which were successively litigated. There were in all six Circuit Court cases, two of which went to the Court of Appeals. All of this was very highly publicized in the local newspaper.

Three of those Applications were completed, the three cases litigated; all the while the Town is denying growth allocation applications and all the while the County does absolutely nothing but let the Town swing in the breeze and spend more than a million dollars in legal fees, consultants' Fees, time, conducting procedures, participating in litigation to defend its position.

Seeing that nothing was going to happen, the Town took ahold of reality and initiated a nonbinding mediation process with a professional mediator who is, in fact, the head of the department

in land use at the University of Virginia. And Doctor Collins mediated between a group of citizen representatives and the developer all during the summer of, I believe it was 2002, to come up with a rough consensus. Not everybody was in agreement, but they came up with some general principles, one of which was a traditional neighborhood development plan would be preferable to a cookie cutter, old style development, it would fit better with the Town. And there were some environmental discussions, be assured.

After that mediation process, the Town then conducted a public workshop with the developer. And at the close of the public workshop the Town announced some principles of what it would want to see in a development, including traditional neighborhood development, taking care of the shoreline and some other things, open spaces. And a as a result of that the developer submitted his forth application.

(Change audiotape)

This was in the fall of 2003. At that time the application process commenced. The Town Planning Commission received the Application and commenced its public hearing in September of 2003. Those public hearings were heavily participated in by citizens and noncitizens alike; those public hearings ended, I believe, on November 6, 2003, and a written fifty-some page decision was issued, I believe on November 24 of 2003.

Now, what the Town didn't know at that time and, in fact, didn't know until today, that on October 29, 2003, the County representatives had contacted the staff at the Critical Area Commission and, in fact, it advised them of the existence of County Bill 933, predicted when it would be introduced, when a hearing would be conducted on it, when it would be adopted and when it would be ready for the State Critical Area Commission.

No contact, no consultation, no request for input, no advice even that there was a problem from the County to any of the towns in this county.

Subsequent to that there were additional contacts by County representatives with the State Critical Area Commission, and they are in my legal memo and my prepared testimony. Those contacts started, as I said, October 29, 2003, and go into November and December, all relating to either Bill 933 or the Easton and Midland projects.

Now, I submit to you that 933 has its very existence based upon the County's opposition to the Midland Application and the project known as Miles Point, because none of this even started until it appeared that the Town was going to consider, seriously consider granting growth allocation.

As you may know -- let me back up. The fourth Application, which is known as Miles Point II, included 72 acres that was annexed to the Town in 1980 pursuant to an Annexation Agreement, but it also included 18 acres outside of the town that was annexed in the fall of 2003. So, according to State law, the Town cannot change the zoning of land that is newly annexed for five years without the Town's

express permission. That's contained in Article 23A, Section 9C of the Maryland Code.

The Town requested that the County relinquish the zoning control so that this 18 acres could be zoned to fit in with the proposed Miles Point II project. And on December 16, I believe it was, the County refused that request.

The County also -- I should back up. There was a Planning Commission hearing on 933, I believe it was on Octob -- November 2. I testified for the Town. I said at that time that there had been no input, no dialogue. And I asked that there simply be dialogue, that we step back, let us know what the problem is and see if we can't find a better solution.

The Planning Commission of Talbot County opined to the County commissioners that 933 was not necessary.

But the Bill went forward and there was a public hearing on, I believe it was December 16. I testified at that hearing on behalf of the Town. At

that time, on that very day, during that very hearing, a new version of 933 was brought out. Now, we were told at that time that there were no substantive changes, and the County Council voted to that effect. But at very least there was a whole new set of whereas clauses.

Again I asked that we step back, that we have a dialogue, let us know what the problem is, we'll be happy to sit down, talk about it, try to work it out. What the County Council did on that date was -- and I'm certain now that it was the 16 of December, because they voted to postpone the vote on that particular legislation for a week. And, in fact, they did postpone it. On December 23 they voted and passed that bill. Again, no dialog, no contact, no nothing.

But as a result of the County refusing to relinquish it's five-year control over that 18 acres that was newly annexed, the developer withdrew it's fourth application known as Miles Point II, redrew it, left out the 18 acres that was annexed, scaled

it down to only the 72 acres that had been in town since 1980 pursuant to an Annexation Agreement that described R1 zoning and, in fact, that's what the Town -- that's what was agreed to in that Agreement, R1 zoning. So it's not like anybody thought this land wasn't going to be developed. But, anyway, they scaled down the development. It's now called Miles Point III, it's 72 acres, it's a TND, and it's submitted to the Town in late December or early January of this year.

It's very similar to the previous project, except it's smaller, that's all; less units, same features, same environmental stuff, good stuff, really. I mean, we beat each other to death and came out with a pretty good plan.

It's processed, the Planning Commission holds it's hearings and so forth. I mean, we are really up to date. As far as 933, that's the end of it; no consultation, no requests, no accommodation into establishing a new process, and that's what that -- I really commend you to read it. It's not

talking about participating down the road in future decisions on applications, it's talking about process.

And I want to talk about the process that 933 throws us into. One of your members asked about it, and I couldn't see which one from the back, but they were good questions, because this supplemental growth allocation process is not the same as what we have been dealing with, what we've been going through all this time when the County let us goes through at our expense and then yanks it away from us.

It's two separate processes, as I said, that occur at the same time in the same room with different people looking at different laws.

In the end, in my opinion, if the County Council doesn't agree to grant growth allocation, it doesn't happen. If either side -- if the County says no, there is no growth allocation; if the Town says no, there is no growth allocation.

But the interesting thing in here is that

the County in this process, in the County plan it says that the County Council has complete discretion. In other words, they can ignore all the rules and say no.

PANEL MEMBER BLAZER: We're going to have to kind of wind it up.

MR. HICKSON: Okay, I'll try to do that.

Counsel for the County pointed to Easton Village. That's what was happening in Easton Village. I've attached the Easton Village decision to my memorandum of law. It shows that there's a dual process, it shows they can ignore it each other. In the end the developer for Easton Village to make it happen went to the County and said what do you want. And what the County wanted was improvements on Glebe Road, which I'm told exceed a million dollars. Glebe Road is at least a mile and a half from the subject project and, in my opinion, has nothing to do with it.

That's how -- that's the definition of

cooperation, that's the definition of coordination, is the way I've explained to you, totally ignoring us, going to the Critical Area Commission behind our back, yank -- making us twist in the wind when they could have rescued us at that time, and now the yanking away from us when we want to go through with it. That's not my definition of cooperation. And if they can't see it then, how are they going to cooperate in the future? We don't have the same interest.

And State law, in Article 66B, gives us control in planning and zoning. The County does not have control in incorporated municipalities, and that's what this is all about. Thank you.

PANEL MEMBER BLAZER: Thank you.

MR. HICKSON: I will submit by material.

PANEL MEMBER BLAZER: Okay.

MR. HICKSON: I will also submit a letter that I have from Senator Coulburn.

PANEL MEMBER BLAZER: Okay.

MR. HICKSON: And a schedule showing that

84 percent of our town, 84 percent of the undeveloped land in our town is in the Critical Area; 68 percent of the town as a whole is in the Critical Area.

PANEL MEMBER BLAZER: I think we have some questions from the panel members.

MR. HICKSON: Yes, absolutely.

PANEL MEMBER RICHARDS: With your re-reading of the COMAR regulation, I take it that you challenge Judge North's reading of that particular section.

MR. HICKSON: I disagree with his interpretation. And I commend you to read it.

PANEL MEMBER RICHARDS: What do you think of his statements that the County abrogated its responsibility by making the allocation in 1989?

MR. HICKSON: I don't agree with that. Every award of growth allocation by a local jurisdiction goes to the State Critical Area Commission. The purpose is not to re-decide the case, but oversight to make sure that the local

jurisdictions are applying the criteria, not necessarily that you agree with them on the fact that they are applying the law.

I think there is already a dual process here. It's not the same process, but it's a dual process. We don't need three processes.

PANEL MEMBER RICHARDS: Also, Judge North read the letter from Governor Hughes. And if I heard correctly, Governor Hughes' letter said that Governor Hughes felt that the County has the right to withdraw the allocation. Do you agree with that statement?

MR. HICKSON: I think that's a confused area of the law. I think that while the Critical Area laws have been in effect for well over a decade, getting toward two decades, there is a lot of it that is confusing. I will be frank to admit that I had a great deal of time figuring it all out when I had to deal with this because in my town we are dealing with the Zoning Ordinance, a separate local program, the Subdivision Ordinance, the State

regs, the State law, and you are trying to figure out what all that means. And sometimes, frankly, it just -- it's not always consistent.

I don't necessarily -- I don't know what the answer to that question is, frankly. But if they get it back, if you will, I think it then becomes a common pool that every jurisdiction in this County can draw on by granting growth allocation. I don't think anybody owns it.

I think that the -- the determination of how much growth allocation in Talbot County as a whole is, is obviously based on 5 percent of the Critical Area in the County. But it would be inconsistent with not only the critical area laws but some other laws in this state if most of the growth allocation were not granted and used in and around the municipalities. Otherwise, we would be perpetuating sprawl, we would have long, long sewer and water lines, and that's the opposite of what Smart Growth and another initiative that was signed by our current governor in this past October, and

it's quoted in my brief but I don't remember what he's calling it, Priority Places or something like that, those two programs, the same thing with different names, attempt to get most development in and around municipalities for environmental reasons and for economic reasons, in my opinion.

So they may take it back. But if they take it back, it becomes part of a common pool, in my opinion.

PANEL MEMBER RICHARDS: Thank you.

PANEL MEMBER BLAZER: Any other questions? Great. Thank you Mr. Hickson.

Are there any other town representatives?

MR. FORD: I'm John Ford. I'm the president of the Easton Town Council.

Easton is unique among the municipalities in Talbot County in that it has used all of its originally allocated growth allocation for approved developments and has also so gone through a cooperative process of review with the County Council in order to get additional growth allocation

acres approved.

Perhaps the most notable growth allocation award is the most recent one where Easton and Talbot County reviewed and ultimately approved the growth allocation request for the Elm Street development on Ratcliff Farm.

The end product of that review process is something I believe this community can be proud of and will serve as a benchmark for future development. There will be a well-designed, environmentally sensitive PUD of very high quality, along with a number of its actions that will benefit the community both on site and off.

I do not believe, however, that the process used to get to that final approval should serve as a model for future applications. The Town and County Councils did hold joint public hearings on two occasions to consider growth allocation for this project, but the project actually moved forward through a series of individual separate negotiations at several levels.

I think the argument could be made that this project made it through the review process mainly because of the persistence and flexibility of the developer and because of the individual efforts of some elected officials and the efforts of the Talbot Preservation Alliance and the Talbot River Protection Association.

One of the things that the Easton Town Council will be focusing on through the review and update of our Zoning Ordinance is the development of a clearer understanding of what is expected from future developers.

I feel that with the process followed for the Elm Street project we moved in an opposite direction. I suspect that any developer looking at the two-and-a-half-year review of that project would wonder what exactly was expected from the Town and the County.

I'm not suggesting that negotiations with developers can be or should be completely eliminated, but those negotiations should have a

basis from which to begin.

I do not believe that Bill 933 moves us closer to a clearer definition of what is expected from development. In its present form it merely adds another separate level of review, with no guarantee that what a municipality wants will be allowed to occur.

Cooperative planning between the County and the municipalities is essential and it should occur throughout the planning process, not only at the very end of that process. Thank you.

PANEL MEMBER BLAZER: Thank you, Mr. Ford. Any questions? (No response)

Any other town representatives? Good evening.

MR. KEHOE: Good evening. My name is Christopher Kehoe. I'm the Town attorney for Easton. I know you have a long agenda and a long hearing tonight, and I'll be as brief as possible.

First, for the record, I would like to adopt the arguments made by Mr. Hickson on behalf of

the Town of St. Michaels with regard to the argument he makes, and very ably, in his memorandum that Maryland zoning law codified in Article 66B and Article 11E of the Maryland Constitution would prohibit Talbot County or any other county from exercising planning and zoning authority within the boundaries of a municipality, as would be an inevitable consequence if Bill 933 becomes law.

Secondly, I listened with a great deal of interest and respect, of course, to Judge North's comments about what I'm going to characterize here as the original intent of the members of the Critical Area Commission with regard to growth allocation, and I was struck by the fact that the arrangement that's now under challenge here by the County; namely, the allocation of specific acreages back in 1989 to Easton, to St. Michaels and to Oxford, was approved by the very same Commission that these people, individuals were members of at the time.

And I think the Commission today has to

put this into the context of that this is a change from a previously approved arrangement that has been in existence for a number of years.

Easton has used all of its growth allocation, so in one sense we have and we'll deal with in the future the supplemental procedures that Mr. Pullen has outlined. They have worked for Easton and the County in the past. Mr. Ford has suggested, and I certainly agree with him, that they perhaps are not the best model for a way to proceed in the future; nonetheless, they do function for the Town and the County at this point. However, simply because they work for Easton -- Easton has used up it's growth allocation -- it's not a justification for the removal of the growth allocation allotments that have been made to Oxford and St. Michaels.

And with that I will simply submit some written comments and leave you in peace for the evening. Thank you very much.

PANEL MEMBER BLAZER: Thank you, Mr. Kehoe. Any other town representatives?

MR. CAMPEN: Good evening. My name is Sid Campen. I'm here on behalf of the Commissioners of Oxford, of which I'm president.

I would like to address several factual issues that have been raised with you and others about the 750 or so hearty souls that make up the Town of Oxford, perhaps the smallest jurisdiction that is affected by the Critical Areas mandate and 933.

If you look at the map of Oxford you will see that practically all of Oxford is within the Critical Area. I can show you that map. There is probably 5 acres that may not be in the Critical Area.

So 933 really affects Oxford in a rather unique way, because it says to Oxford that all additional growth that will take place within the corporate limits of Oxford will be under 933 and the County will determine whether Oxford will get growth allocation or not.

We've heard a lot tonight about

cooperation and all that is supposed to take place and it may have worked in the earlier bill with the Town of Easton.

There is an opinion or a feeling that the people of Oxford have no appetite for growth. And that may be partially true with respect to extra territorial growth, annexation, expansion of the corporate limits of Oxford. But as a Commissioner I can tell you that growth is inevitable and there is not one part hearty soul in Oxford that disfavors infill growth within that town. And the reason for that is because Oxford has very limited sources of revenue and without some growth we're going to have considerable problems in maintaining the infrastructure that is being provided for the people of Oxford.

And contrary to the belief of a lot of people, Oxford is not comprised of all wealthy people who have just moved here. There are a number of people who have lived in Oxford all their lives, some of them quite old, in their nineties, who are

struggling to pay the taxes that are increased every year so that we can meet our obligations.

There is a critical need in Oxford to see infill expansion within the Town of Oxford, and therein is our problem with 933. We feel that the County Council should have given some consideration to the infill needs of the various towns, particularly Oxford, because we have no ability to expand or to infill in that town without growth allocation. That is significant, because if we are left with the, if you will, coming to the table with our hat in our hand and asking this Council to provide us with growth allocation, we don't know whether we are going to get it or not.

We say, well, the Council is as interested in growth allocation and good Smart Growth as anyone. I suggest to you that no member of this Council or a council of recent memory has been a resident of the Town of Oxford or, for that matter, the Town of St. Michaels.

Consider, if you will, the needs of a

town to govern itself; its Planning and Zoning Commission, it's appeals board, its government that will be run by people who -- it will be controlled by people who have no particular interest in the Town.

People in Oxford are members of Talbot County, but the Commissioners of Talbot County aren't necessarily members of the boards and the committees in the Town of Oxford.

Consider, if you will, that the needs of that small town, the budgetary needs, the wastewater treatment needs, all the other things that we are required to maintain are determined by a council that has no particular interest or, indeed, is not responsible to the people of Oxford or St. Michaels or the towns that they have no part of.

Our concern is jurisdictional and the results, the practical result of what 933 does. We have no quarrel with, nor do we contest the right of the County to take back whatever growth allocation it designated in 1986.

I disagree with my brother who spoke a little earlier. I think that the County Council did, in fact, adopt the original 1989, rather, growth allocation consistent with COMAR, as has been stated by Judge North. It was done then. They have now elected to undo that.

What we ask is that they simply undo the portion outside of the territorial limits of the corporate Town of Oxford, leaving in the areas for infill.

I found it very interesting that the justification for 933 has sort of taken full circle. At first it was to help Easton. Then I read something about, well, Oxford and St. Michaels hold a pocket veto in that if they don't use their growth allocation, then the County cannot get to the 90 percent mark in order to trigger the balance of the twelve hundred acres that it might need for future growth.

Well, consider, if you will, that if the needs -- if the County needs 90 percent in order to

figure the balance of the twelve hundred acre growth allocation that it may wish to hold in a bank or whatever it wants to do, that leaves 10 percent. Ten percent of twelve hundred acres is 125 acres.

Our problem with the County is that all they needed to do was come to us or invite us to come to them and say, look, what are your infill needs, what will you need in the future, in the immediate future, in the next three to five to ten years; and, yes, if you need 20 acres or 30 acres or St. Michaels may need 20 or 30 or 50 or 75, whatever it was, they could have reached that threshold; 125 acres would have provided Oxford and St. Michaels, I suspect, with whatever the infill needs may be in the not too distant future.

We also have a problem in that we were told very specifically in 1989, you have, Oxford, 190 acres of growth allocation and that's all you're going to get, use it wisely. And I dare say Oxford has. We have used 15 acres, I think.

You cannot say that the towns have

squandered or used the growth allocation that they had or that they were allotted unwisely. That is certainly not the case.

We would ask that you reconsider 933 in that it has not taken into consideration the needs of the town, particularly the infill needs, and it does do violence to Article 66B and Article 23, which give the towns zoning authority, 66B does and 23A, gives the towns exclusive jurisdiction over planning and zoning. This bill conflicts with that significantly.

Thank you.

PANEL MEMBER BLAZER: Thank you, Mr. Campen. Another town representative.

MR. THOMPSON: Mr. Chairman, my name is Dave Thompson. I represent the Town of Oxford and the Town of Trappe. I will be very brief.

The Town of Trappe, as you know, has no Critical Area within it at this time, has no Critical Area plan. But as you also may know if you've looked at a map, the Critical Area is 800

feet from the borders of the Town of Trappe. The town's existing sewer facility utilizes as a discharge point a tributary stream.

Trappe is very interested in issues of municipal growth. We have had a substantial annexation within the last year. We are still dealing with the legal issues that pertain to that.

The fundamental problem that both the Town of Oxford and the Town of Trappe have with Bill 933 is its failure to take into account Article 66B and Article 23A. Other speakers made the point, so I will not dwell on it.

But municipalities in the State of Maryland have the same home rule that counties have in the State of Maryland. Municipalities, especially in the area of planning and zoning, have exclusive jurisdiction.

Municipalities grow only two ways; by infill, as Mr. Campen talked about, and by annexation.

Article 23A, Section 9, defines the

relationship between the County and The town as it relates to annexation. It allows the County five -- it allows what I call a transition period of five years by which the County has the right to veto a change of use that is a change from the existing County Comprehensive Plan.

But once land is annexed, it becomes a part of the town. Each of the towns that have Critical Area; Easton, the Town of Oxford and the Town of St. Michaels, have Critical Area plans approved by the Critical Areas Commission, approved by the very gentlemen that Judge North quoted. All of those plans have provisions for the granting of growth allocation and have provisions for review by the Critical Area Commission.

It is my opinion that the way the law works when you read those provisions together, as a judge would do, as a court would do, that once land becomes annexed, subject to the annexation provisions of Article 23A, the town has exclusive zoning control. If that land happens to bear a

Critical Area land-use classification of RCA, therefore making it potential growth allocation conversion land, that the town, without the express consent of the county government, could not authorize a dwelling density of greater than one per 20 for five years. But other than the five-year transition period, the zoning control is exclusively within the towns.

And what Bill 933 purports to do is to give the County the ultimate veto power of land-use classification changes, RCA changes --

(Change audiotape)

-- RCA conversions within the towns.

We don't believe that that will survive judicial review, and we believe, in an exercise of global view, the right thing for the Commission to do is to not approve Bill 933 to the extent that it purports to apply within town boundaries.

I don't think there is any question that the County has the authority to say we're going to change that pre-map growth allocation area. That's

fine. That's County jurisdiction. They can do that. That doesn't change the fundamental right of the town to go through an annexation process, and consistent with 66B, consistent with 23A, to rezone that land, subject to the five-year transition period.

The other thing I would point out and I would offer for the record are a copy of the minutes of Talbot County Planning Commission.

We are fortunate to have a Planning Commission that are very active, they understand these principles, they work hard and they looked at Bill 933. They recognized that it was unnecessary, they recommended to the County Council that they withdraw 933 and that they permit -- and there be some discussions among the towns. You all may or may not have seen some of the tense correspondence that has passed back and forth among Town representatives. That tension is a reflection of the fact that there has been absolutely no dialogue, zero, none, no cooperative effort between the county

government and the towns in coming up with a cooperative approach to the growth management and growth allocation issues.

I think everyone would agree at this point that that discussion, that dialogue between the planning officials of the towns, between the elected officials of the towns would have been preferable.

So we would ask you to not approve this amendment.

I would adopt the legal memorandum that Michael Hickson submitted on behalf of the Town of St. Michaels on behalf of the Town of Oxford, and would offer for the record a copy of the Planning Commission minutes.

PANEL MEMBER BLAZER: Thank you, Mr. Thompson.

MR. THOMPSON: Thank you.

PANEL MEMBER BLAZER: Any other town representatives? (No response)

Any elected officials who would like to

make comments? (No response) I see movement in the back, but nobody is coming forward. Okay. No elected officials. Okay. Thank you.

The Maryland Department of Planning, I think, has a representative here.

MR. DUKET: How are you doing, Mr. Chairman, ladies and gentlemen of the panel, staff, counselor. For the record, I'm Larry Duket of the Maryland Department of Planning.

And I know what's going through your heads; here comes State Planning again.

But I want you all to think about the Critical Area law, but I want you to think about a little bit more than the Critical Area law.

I've been involved in State growth planning for nearly 30 years now. And if I had a couple hours to explain it all, you'd be amazed at how well all of our growth and environmental protection and funding laws fit together to form a pretty good growth strategy for Maryland.

I'm going to go ahead and read this

statement rather than just speak extemporaneously, just to get this over with.

The Maryland Department of Planning appreciates the opportunity to offer comments on Council Bill 933.

The Bill would create a significant change in the manner in which Talbot County addresses the growth allocation needs of incorporated municipalities, or towns as they've been referred to tonight.

The bill is of significant interest to this department because it comes at a time when the State is committing its planning functions, its regulatory programs, its funding, its technical assistance and its capital programming in furtherance of directing growth towards both county designated growth areas and incorporated municipalities, which we now call County and Municipal Smart Growth and Priority Funding Areas, if you will.

With the current governor's Priority and

Places initiative, this department is committed to participate in the debate on issues fundamental to the implementation of a sound growth strategy for Maryland.

The growth allocation process was principally created to allow county and municipal governments to reconcile the comprehensive planning, zoning and capital programs with the new resource conservation rules of the Critical Area law.

The RCA category limits development to only one dwelling unit per 20 acres. From a land-use planning perspective it's unusual and economically inefficient to have land within municipalities relegated to one dwelling unit per 20 acres standard. Yet the Critical Area RCA had this effect on farm and forest lands not yet having public water and sewer that were located within municipalities, within municipal growth boundaries and on adjacent lands eligible for municipal annexation.

Municipal governments in particular when

the law was being written were given assurances in the Critical Area law that their need for growth allocation would be accommodated.

Under Council Bill 933 specific amounts of growth allocation reserved for towns would be deleted from the Talbot County Critical Area program and consequently the County will have approval authority over all future growth allocation requests in town. This would occur through the supplemental growth allocation process that is now part of the County's program.

This process was really originally created for narrower purposes through Council Bill 762, the supplemental growth allocation process, and was approved as a refinement by the Commission, I believe circa 2000.

Looking back on it, it seems unlikely that in 2000 the Commission would have treated such a significant change to the growth allocation process as a mere refinement were it not for the retention at that time of specific language giving

allocations to the town.

Under Council Bill 933, the County and a town with an applicant seeking growth allocation would use a joint hearing process to ostensibly assure that both municipal and county planning and growth issues are considered. And, as a matter of fact, this department supports the use of tools and processes that promote interjurisdictional coordination and cooperation, and appreciates that this is the primary goal of Council Bill 933.

Our concern, however, is that 933, by striking reserve amounts of allocation to each town, places the County as the final decision maker for all municipal requests for growth allocation.

Now, the County's process for accommodating the needs of municipalities for growth allocation should not operate as a blank check for towns. That's not what we are saying; that is, we do not believe that the rule calls for municipalities to always get what they purport to need.

But Council Bill 933 effectively makes the supplemental growth allocation process the primary and only process, and contains no decision-making criteria or standards to account for or accommodate municipal growth needs. Not even the municipal Comprehensive Plan or the municipal zoning map, nor a municipal Critical Area Program, nor a growth allocation map prepared by the town is relevant under the terms of Council Bill 933.

Council Bill 933 can result in the denial of a specific bona fide, good-faith request for growth allocation which meets the accounting and locational criteria of the Critical Area law. It appears that the Commission's growth allocation policy is consistent with Town planning and zoning laws and the Critical Area programs. It's difficult, if a denial should occur in such a situation, how that process accommodates the growth allocation needs of the towns.

Now I'm going to throw you a curve ball here because I want to talk about the Regional

District Act just for a second just to clarify something.

Under the Regional District Act certain incorporated municipalities in Prince George's and Montgomery Counties are under the zoning authority of their respective counties because these municipalities have never been given the authority by the General Assembly to exercise their own zoning powers. That set aside, the concept of county control over municipal land-use decisions is not contemplated in Maryland's planning and zoning law. County and municipal planning and zoning programs are created on equal, separate and, at times, competitive footings. No mystery.

And the General Assembly has been careful to address county-municipal relationships in writing Maryland's planning, growth and environmental laws and, in doing so, uniformly the legislature has both preserved the sanctity of municipal land-use decisions and created laws that embody preferences for continued growth in municipalities that plan and

zone for growth.

Even in that case where municipal annexation of land previously under county jurisdiction occurs the General Assembly has created a pretty clear rule that says that the county can control the zoning the municipal wants to put on there for five years, but after five years there is no longer any county control over municipal land use or zoning.

Now, when the Critical Area law was being drafted there was a lot of legitimate concern that was voiced over the application of the RCA category to farm and forest land that was either within municipal boundaries or at its edges where growth and expansion were planned. Such concerns were based on property interests, public infrastructure investments, long-range capital plans and professional land planning principles, but these concerns were answered very clearly by the creation of the growth allocation law.

The concerns of municipalities in

particular were addressed by the rule that the counties shall have a process to accommodate the growth allocation needs of municipalities.

Now, in hindsight the issue of county control over municipal growth allocation should have been raised in the context of Council Bill 762; however, given that 762 retains specific allocations for each town, perhaps the issue was not as well defined as now presented in the context of Council Bill 933.

We also recognize the many approved programs in other counties with similar practice. We think these programs need to be revisited. Perhaps this can be evaluated during the six-year review process or perhaps it needs to be evaluated sooner if municipalities report to you they are not being accommodated.

Now, much has changed since the first generation of the Critical Area programs. The Commission and local governments know more, they have greater experience with much of the detail and

technical nature of the Critical Area law and the criteria. And also since the adoption of the Critical Area law many new State laws have been enacted; the 1992 Planning Act, which applies to all State agencies and promotes eight different visions or goals for growth in the State; Forest Conservation Act, Priority Funding Areas, Rural Legacy, Smart Codes, on and on it goes. If you look at the details of each of these laws you will find that they favor growth directed to county-designated growth areas and incorporated municipalities. Indeed, these new laws reflect the same spirit as the Critical Area's growth allocation rule. Growth within muni that plan and zone for it should be accommodated.

The Maryland Department of Planning offers its assistance to the County, several towns and the Critical Area Commission to work to resolve issues that show that municipal needs for growth allocation are accommodated.

I thank you for your attention. If

there's any questions, I'll be glad to try to answer them.

PANEL MEMBER BLAZER: Thank you, Mr. Duket, we appreciate it.

MR. DUKET: Would it be alright to -- I'll give this to the staff.

PANEL MEMBER BLAZER: Okay. We'll move on to the general public comments. I've got -- I have most of the names. If you didn't sign up, there's still one over here. We can take names as we are going through.

We're just going to go first come, first served with this. Come up to the front, identify yourself and if you are with any particular organization and approximately where you live. First, Edward Doyle. Mr. Doyle.

MR. DOYLE: Mr. Chairman, I'm coming up -- I'm coming down with a cold. It's very difficult to speak, so I'd prefer to wait and see if other comments need clarification, then I'll speak then.

Exhibit I

ORIGINAL

MEETING OF A PANEL

OF

THE STATE OF MARYLAND

CRITICAL AREA COMMISSION

FOR THE

CHESAPEAKE AND ATLANTIC COASTAL BAYS

Date: May 5, 2004 (Meeting No. 3)

Time: 1:00 p.m.

Location: Department of Housing and Community Development, Crownsville, Maryland

Reported by: Linda A. Crockett

CRC-SALOMON
Baltimore, Maryland
Phone (410) 821-4888 Fax (410) 821-4889

ALL-STATE LEGAL®
EXHIBIT
I

We have another very important issue coming up in front of the Commission right now, Talbot County Bill Number 933, growth allocation procedures. We had a panel that looked into this extensively. Ren is going to give the panel report. And then I will again ask for public comment if anybody wishes to have it.

MR. SEREY: This amendment to the Talbot County Critical Area Program is County Bill 933. As the chairman explained, the panel conducted a public hearing, met on the bill and discussed it several times, and met again this morning. The staff report that went out and the panel report that went out also included a copy of the bill.

In 1989 the Talbot County Council approved the County's Critical Area Program and submitted that to the Commission. The Commission approved that program. The program included what the County called preservation of growth allocation to the towns of St. Michael's, Easton and Oxford. The County used the method of

providing the growth allocation acres to the towns. There were no conditions placed on the use of those acres. That was in the 1989 Critical Areas Program. The County gave the town of Easton 155 acres, town of St. Michael's 245 acres, and the town of Oxford 195 acres. There were maps attached to the Critical Area Program, three maps that showed the potential areas for annexation outside of the towns.

The understanding was that the growth allocation would be used by the towns both within their current boundaries, and the understanding was in annexed areas. As Lisa explained on one of the other previous items -- I was going to say this morning, it seems like this morning, the town of Easton used all of its growth allocation and in 2000 the County instituted a new process which they called their supplemental growth allocation process, and that is a process that involved joint hearings by the County Council and town of Easton and joint approval of growth

allocations.

That process has been used recently for the Easton Village and Ratcliffe growth allocations that you may remember from a couple months ago, I think that was January that the Commission approved those. It's also been used for the Cooke's Hope growth allocation in Easton.

Easton used their growth allocation. Oxford has only used about 15 acres of its growth allocation. And St. Michael's has used approximately 21 acres for the Strausburg growth allocation. And that is, as Lisa explained earlier, a refinement that this Commission approved in October of 2000.

Council Bill 933 prefaces the action that the County took with a lot of explanation about the use of growth allocation. What the bill does is it removes that growth allocation that has been unused by the town and has it revert back to the County. And what the County intends is that the process that they used when

Easton ran out of growth allocation, that is the joint process, the supplemental process, the County informs us that that would be the process now after the growth allocation unused by the towns is removed and reverted back to the County.

There are a lot of planning, growth management clauses that are in the preface to the bill, in the whereas clauses, and you have all that information. It discusses the fact that it was done in 1989 and things have changed. Growth management has changed, that the original county program required a four-year review of the County program in addition to a review of the growth allocation maps and the growth needs of the towns. That review was not done. It has been done now in the form of Bill 933, removing the growth allocation.

The original county total of growth allocation was 2,554 acres. And the County has a process for using a portion of that in the RCA as is set out in the Critical Area law and is

concerned, among other things, that its process for using the growth allocation in the RCA will be compromised unless it regains control of all of the growth allocation that has since been unused.

If you look in your staff report or panel report, on page 2 in the middle, you'll see some of those reasons that the County set out in addition to the ones that I've just described.

As I said, this action, Bill 933, will remove the growth allocation and revert back to the County. In addition, and I think Lisa also described this earlier, it will undo a previously approved growth allocation, and that's the Strausburg growth allocation that this Commission approved as a refinement in October of last year. The reason it would remove that growth allocation is because the bill contains a clause that says if any growth allocation is unutilized, and the County goes on to define unutilized, then by the effective date of the bill, which was I think

February of this year, then that growth allocation also reverts back to the County.

And included in the definition of unutilized is the provision that any growth allocation awarded for which substantial construction has not started based on a valid building permit, that is also affected by the bill and reverts back to the County.

There could be other growth allocations in addition to the Strausburg. We have talked to the towns of Easton and Oxford regarding their previously approved growth allocations, and our understanding is that there are a few lots that are still undeveloped for which there are no building permits yet that could also be affected by this bill. But the Strausburg growth allocation approved in October is obviously affected.

At the panel's request the staff looked into growth allocations and growth allocation systems in use by the other counties, and we

summarized for the panel that generally those growth allocation procedures of the counties fall into three categories. And I'm on Page 4 of your panel report. One category is where the County simply gave the growth allocation to the towns for their use, and that was the process that Talbot County used.

Another selection of programs, another category of growth allocation used is where a county simply identifies a number of acres for a town's use, growth allocation, but then awards that growth allocation on an individual project basis when the town requests it.

And the third category is a coordinated process where both entities make the decisions together. If you look at the bottom of Page 4 you'll see some information that we've been talking about quite a bit today in regard to the other amendments. Here you'll find about three quarters of the way down a quote from the Critical Area law that provides you the standards

for review of a proposed amendment. Those standards are that the Commission must determine or that the program amendments must meet the goals of the Critical Area law, and they are set out at the bottom of page 4, as well as the provisions of the criteria. That is what the panel discussed at length in its meetings and again today.

That's all I have in summary of the bill. Are there any questions regarding the process or what the bill does?

CHAIRMAN MADDEN: Thank you very much. Now we'll allow brief public comment, if anybody chooses to do so. We're allocating a time to the County to come up and address us, and then we'll allow members of the public to address us briefly also.

MR. POLLEN: Thank you, my name is Michael Pollen. I am the Talbot County attorney and I would like to read to you a letter that was addressed to Senator Madden on April 22nd which

contained the County's comments on the subcommittee's review of Bill 933 that had occurred on April 19th.

Dear Senator Madden: During the Critical Area Commission Subcommittee Review on April 19, 2004 of Talbot County's proposed changes to its local program, several members commented on the need for more information to fully understand the various bills' language. I am respectfully submitting this letter to respond to those questions and I will address my comments in the order in which the discussion occurred.

Consistency. The subcommittee initially posed the question whether Bill 933 was consistent with existing Critical Area Commission policies and other approved programs. The first part of the discussion articulated the correct standard by which to judge consistency. The discussion involved approvals of the program for Caroline County, Saint Mary's County, Wicomico County, Queen Anne's County, which all

demonstrate that the Critical Area Commission has approved as a matter of policy different approaches to county municipal growth allocation. Bill 933 falls within the parameters of the previously approved programs and policies of the Critical Area Commission. This is the correct standard and the correct conclusion.

Comparison of Bill 933 to inconsistent provisions of existing municipal programs based on the 1989 ordinance that is being repealed by 933 is not the correct approach to determine consistency. By definition, a program amendment is a change to a program and it will necessarily be different than existing elements of the current program.

In the case of Bill 933, Talbot County municipality has adopted their own local programs based on the 1989 ordinance that gave them specific amounts of growth allocation. Bill 933 changes that. And any existing elements of approved local programs inconsistent with Bill

933 are irrelevant to whether Bill 933 should be approved.

If proposed amendments are compared with inconsistent existing program elements for consistency, no amendment would ever be consistent, and therefore, no amendment would be approved.

I'm sure the subcommittee's intention, based on Ms. Mason's legal advice in considering consistency, does not include consideration of existing elements of the municipal Critical Area programs that were premised on the 1989 ordinance that are being changed by Bill 933.

Municipal reliance. Some of the discussion centered upon expectations of various municipalities premised on the 1989 award of the growth allocation acreage. This is not an appropriate consideration in evaluating Bill 933. Maryland law is quite clear that absent vested rights, which Bill 933 specifically does not impair, zoning laws may be changed by local

government and a property owner, or in this case, a municipality, has no legal right to rely on a preexisting law or any assumption that preexisting law would continue as originally enacted.

There was some discussion about various projects that were pending, and one in particular, Cooke's Hope, was the subject of the next paragraph.

Cooke's Hope. One topic of discussion was the effect of Bill 933 on the Critical Area Commission's previous approval of the Cooke's Hope project. Talbot County Council has already approved its Cooke's Hope project utilizing the procedures adopted under Bill 762. Bill 762 is the bill that was approved by this Commission in 2000 that established a joint review process with the municipalities and the County in which the applicant submits the application to the municipality; it's forwarded to the County; there's a joint review at the Planning Commission

level; there is a joint meeting of the town and the county planning commissions. They separately confer and form separate recommendations to their respective bodies. That is followed by a joint meeting between the town council and the County Council to review the application. They then separately confer among themselves and come up with individual recommendations for approval or not. Both, under Bill 762, both the town and the County must approve the project.

Now, that procedure has been successfully used with the town of Easton on several occasions. The town of Easton has no longer any growth allocation, as Ren Serey indicated.

Back to the letter. One topic of discussion was the effect of Bill 933 on the Critical Area Commission's previous approval of the Cooke's Hope project. The Talbot County Council has already approved the Cooke's Hope project utilizing the procedures adopted under

Bill 762. Bill 933 does not affect that approval. This is readily apparent from the language of the bill itself on page 6, line 216, which states, growth allocation awarded by any town that remains unutilized by the effective date of the ordinance shall revert to the County. Growth allocation awarded by the County prior to or after the effective date of the ordinance shall be deducted from the total growth allocation allocated to the County under section 8-1808(1)(B).

So that project has been through the joint review process and approved, and Bill 933 would have no effect on that project.

I want to skip ahead in the letter to discussion of Bill 762. Other parts of the discussion noted that Bill 762 was premised on the assumption that it pertained to supplemental awards of growth allocation after the use of allocated acreage under the 1981 maps. When Bill 762 was enacted, and that was in 2002 -- or

excuse me, 2000, there was no intention to repeal the 1980 maps. That does not forever enshrine those maps and place them beyond the police power of a future council. The premises or assumptions upon which Bill 762 was enacted do not bear on whether Bill 933 is consistent with the standards and the criteria the Critical Area Commission is required to consider under Natural Resources Article Section 8-1809(J).

Bill 762 is the County-created procedure required by COMAR to accommodate the growth needs of municipalities. COMAR has a specific criteria that says when planning future expansion of limited development and intensely developed area, counties, in coordination with affected municipalities, shall establish procedures to accommodate the growth needs of municipalities.

So COMAR requires the specifically -- that the counties establish this procedure specifically, and that's what Bill 762 did. That's already been approved by the Commission

and utilized with the town of Easton.

Bill 933 simply takes that existing procedure and applies it uniformly throughout the County to all of the towns, including St. Michael's, including the town of Oxford.

Bill 762 is the County-created procedure required by COMAR to accommodate needs of municipalities. Bill 762 was drafted by the town attorneys for the town of Easton and circulated for comment to the town attorneys and town commissioners for the town of Oxford and St. Michael's prior to introduction by the County Council.

The comments offered by the town attorney for the town of St. Michael's, the only comments received were incorporated into the bill. Enactment of Bill 762 was in coordination with affected municipalities, as required by COMAR.

They then go on to discuss other coordination between the County and the

municipalities because that was one of the criteria, one of the elements in the criteria. On the planning level Talbot County has coordinated directly with each municipality to establish growth boundaries around each of the affected municipalities. This effort has resulted in coordinated maps showing common plans between the County and each municipality for growth areas around the town. Examination of those maps shows quite clearly the coordinated result of that county municipal effort to accommodate the growth needs of municipalities.

These maps are the definitive reference point from which to evaluate county municipal cooperation regarding growth boundaries of municipalities and county accommodation of growth needs. The matching plans between the County and each of the effective municipalities shows a level of cooperative effort that speaks for itself. Any claim that there was not adequate political coordination between the town and

county elected officials in connection with enactment of Bill 933 --

CHAIRMAN MADDEN: I'm going to ask you to summarize because your time is expiring.

Mr. POLLEN: Mr. Chairman, it's the County's position that this -- and as Mr. Serey explained in his comments, many counties throughout the state have adopted Critical Area policies that do not give specific acreage growth allocations to municipalities. Those county-wide programs have been previously approved by this Commission.

Bill 933 is within the state-delegated power of the County Council to enact. We're a charter county. We have the obligation to develop our own program, delegate it not only under our charter, but under the Critical Area law. This policy has been previously promoted by other counties and approved by the Critical Area Commission. And we believe that it represents not only good environmental policy, but it's well

within the prerogative of the County Council to adopt that policy being consistent with the goals and criteria of the Critical Area Commission.

It's really designed to enhance and protect the environment of the Chesapeake Bay and protect its future. So we would urge that the Critical Area Commission adopt this as a program amendment to Talbot County's local program.

CHAIRMAN MADDEN: Thank you for your comments? Any member of the public that would like to speak to us briefly on Talbot County Bill 933?

MR. HICKSON: My name is Michael Hickson, I'm the attorney for the town of St. Michael's. The town opposes 933. The towns of Easton and Oxford appeared at the local county hearing and also opposed this bill.

We opposed it for several reasons. First, we think it's different than other situations that you have addressed because in this situation you're yanking back or the County

is attempting to yank back reserved acreage that was originally given to the town and that the town's programs were based on. They have been functioning all these years, and the towns did not receive any complaint from the County that anything wasn't working well until we received notice of this bill.

I testified at the local panel hearing. We found evidence in the record here that the County manager contacted Mr. Serey of this office on October the 29th, 2003 to inform him that the bill was in process and that he could expect it to be up here for processing at the Critical Area Commission in January of 2004. This bill was not introduced to the public until some time in November of 2003, and the towns were not contacted about it and the problem was not raised with the towns before the bill was introduced to the public.

So there has been no coordination. There's been no cooperation, and the effect of

the bill will, as I said, yank back reserved acreage and in my view run contrary to the way that the state Critical Area laws and policies are supposed to work, and that is they're supposed to work in an organized and coordinated fashion. Not to say that every county has to work the same way, but by suddenly yanking back these bills you have towns that in fact don't have them; they can't function at all in terms of Critical Area.

CHAIRMAN MADDEN: Your time is expiring. Please summarize.

MR. HICKSON: We agree with what the panel discussed this morning, that in effect it will undo some decisions that the Critical Area Commission had made, that it's inconsistent with the existing town programs that exist in three municipalities in the town and there's been no cooperation or coordination in bringing this bill forward. So we oppose it.

CHAIRMAN MADDEN: Thank you. Does

anybody else want to make any public comment?

MR. ALSPACH: Thank you again. My name is Tom Alspach. I'm speaking on behalf of the Public Preservation Alliance. I would not agree with Mr. Hickson that the towns cannot function with Bill 933. The purpose of Bill 933 is to ensure that both the County and town and their respective populaces equally have a stake in the Critical Area, have their views taken into account in the grand growth allocation.

The grand growth allocation in a town like St. Michael's or Oxford affects all the residents of the County who utilize the Miles River, the Tred Avon River, Choptank River, et cetera. What this process is intended to do is to establish a joint review procedure whereby both jurisdictions participate in that review. Nothing is being taken away. The only two instances that this process has already been used with regard to the town of Easton, and in both instances the growth allocation requests were

approved.

If you look at a map, some of you who were at the public hearing for the panel, remember I showed you what St. Michael's looks like now. It looks like a big bar bell, a chunk of lead here and a chunk of lead here and a skinny bar that joins the two together. That's what St. Michael's looks like now because they annexed a piece of property three-quarters of a mile out to the country by way of annexing a roadbed. That piece of annexed property is out in the middle of the county on a county river surrounded by county residents, yet the residents of the County had no say whatsoever when growth allocation for this annexation was considered.

Given the fact that they will be directly impacted by it, by annexations like in the future, this procedure would ensure that their concerns are taken into account as well as those of people living in the town. By the way, in response to a question that was asked, I think

by Mr. Jackson at the panel hearing, the question was raised doesn't this give the County a veto and it can prevent any growth allocation whatsoever. No, it doesn't. The law requires the counties to accommodate the growth needs of the town. If the County were arbitrarily denying growth allocation pursuant to this procedure, the town would have relief available to it because the County would not be accommodating its need for growth. So that fear or concern is misplaced. I would urge you to approve this proposed program amendment. It does nothing but assure that all parties affected by growth allocation will be heard in the process.

CHAIRMAN MADDEN: Anything else? I'll turn it over to panel chair for additional comments and recommendations.

MR. BLAZER: I guess a couple things while we're passing out the panel recommendations and report. We only had three people I think speak here. But the night of our panel we were

there for a good two and a half, three hours, had quite a few people talk similar to the other St. Michael's hearing. And a lot was presented and a lot was discussed, and basically some of the issues that we had to deal with and that we focused on were basically -- we wanted to apply the specific sections in the critical areas law. We heard all kinds of things about planning and smart growth and wastewater treatment and some of the problems with the Miles River, you know, we needed to focus on the Critical Area provisions in the criteria and the law that we had. So that's what we tried to focus on in our panel discussions.

So, you know, with that, we also looked at the effect of Bill 933 on other Critical Area programs, program amendments, program refinements, what the Critical Area COMAR section said, so we had several meetings, a lot of discussion, a lot of debate as we went through, and I also want to thank the panel members,

because I think the debate and the discussion was very healthy and I appreciate all of your input on those.

A couple other introductory remarks. In its review of Bill 933, the panel wanted to encourage the County and towns to work together on specific changes on the growth allocation procedures that are going to affect all of them. You heard a couple people talk about process things and I think that's one of the things that we'd like to see as this develops over time.

The panel believed that the time was particularly appropriate for this kind of cooperative effort and the analysis given that the County has engaged in its comprehensive review of its program.

The panel also believes that the supplemental growth allocation process of Bill 762 that I believe Mr. Pollen talked a little bit about which is incorporated in the County code may be a desirable growth allocation process,

however, as presently drafted, Bill 933 really doesn't harmonize or come in line with the supplemental growth allocation process of the County code. There were some inconsistencies that the panel was uncomfortable with in our determination of our recommendation.

I'd like to move on behalf of the panel to deny approval of Talbot County Bill 933 as an amendment to the County's Critical Area program and to invite the County to work with the Commission and its staff to develop new growth allocation provisions that will be compatible with the state Critical Area Act and its criteria.

There are two major bases for the motion. They are: If we accept Bill 933, we would negate at least one previous Commission action of approving a local program change, and that's the refinement to the St. Michael's program for the Strausburg growth allocation we approved back in October 2003. And the second

basis was accepted Bill 933 would create conflicts between the County program and several of the approved municipal programs that the Commission has agreed to. The municipal programs have their own approved growth allocation procedures premised on the growth allocation reserves provided by the County. The conflict that Bill 933 would create was contrary to the Commission's oversight responsibility to ensure that local programs are implemented in a consistent and uniform manner. So that's our recommendation.

CHAIRMAN MADDEN: Do we have a motion for denial of Talbot County Bill 933? Is there a second?

COMMISSIONER: Second.

CHAIRMAN MADDEN: Any discussion? Yes, Barbara?

SPEAKER: I would like to clarify something. It's my understanding that the goals of Bill 933 are consistent with the state

delegation to the County, but the draftmanship is creating some inconsistency, so with appropriate draftmanship the goals could be realized; is that correct?

MS. MASON: The process that the County has said that they intend to use, that is the joint process through Bill 762, the panel believed was definitely in line with or appropriate under the state law and criteria, but the actual wording of the bill which is what the panel had to look at created the problem for this Commission of negating the Commission action.

SPEAKER: So it's basically an inartful drafting as opposed to a noncompliance -- the goals are not noncompliant, the draftsmanship --

CHAIRMAN MADDEN: Denial is articulated in the motion. If we stick to the motion rather than try to read something else into it. Any other discussion?

MS. ENNIS: It seems to me when we look at this issue, the thing that's most inconsistent

is that it will repeal an action that the Commission has already approved, both the town and the County approved and that the Commission approved.

CHAIRMAN MADDEN: The town approved. The Commission --

MS. ENNIS: It didn't have to go through the County?

CHAIRMAN MADDEN: Correct.

MS. ENNIS: If that were corrected, would we still be opposed to this?

CHAIRMAN MADDEN: I think again, we have to look at the motion. The motion cites two issues. The basis for the motion is the first paragraph, accepting 933 would negate at least one previous Commission action and, number two, would create conflicts between the County program and several approved municipal programs. That's what we're basing this motion on. Any other discussion? If not, we have a motion in front of us for denial. All those in favor say aye.

(All said aye.)

CHAIRMAN MADDEN: Opposed nay?

Motion for denial is approved. Thank you again, all panel members and Commission members.

(Proceedings concluded at 5:00 p.m.)

Exhibit J

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Critical Area Commission

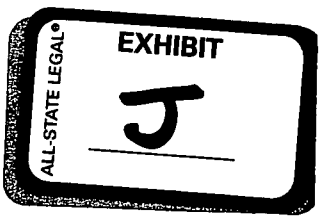
PANEL REPORT
May 5, 2004

APPLICANT:	Talbot County
PROPOSAL:	County Council Bill 933 Review and Reallocation of Growth Allocation for the Towns
COMMISSION ACTION:	Vote
COMMISSION PANEL:	Dave Blazer (Chairman), Bill Giese, Joe Jackson, Ed Richards and Gary Setzer
PANEL RECOMMENDATION:	Pending Panel Discussion
STAFF:	Ren Serey
APPLICABLE LAW/ REGULATIONS:	Natural Resources Article §8-1809 (h)

DISCUSSION:

The Talbot County Council submitted Bill #933 for approval by the Commission. The Bill's stated purpose is "to review and reallocate the number of reserved acres of growth allocation allocated among the [Talbot County] towns." Previously, the County had set aside a specified number of acres of growth allocation for use by the Towns of Easton, St. Michaels, and Oxford. The County's original Critical Area Ordinance, adopted in 1989, reserved 155 acres for the Town of Easton, 195 acres for the Town of Oxford, and 245 acres for the Town of St. Michaels. The 1989 Talbot County Critical Area Program ordinance included three maps of the Towns and surrounding areas. These maps identified potential areas for annexation or rezoning. The Ordinance also specified that the number of reserved acres should be reviewed by June 1, 1993 for possible reallocation, and at least every four years thereafter. These reviews have not taken place.

As of today, Easton has used more than its original allotment of 155 acres of growth allocation. Easton has awarded 183.762 acres (including 28.762 acres of supplemental growth allocation, awarded under the County's "supplemental" growth allocation process, discussed below). This total includes 36.42 acres associated with the Cooke's Hope Project, which has been approved by the Town, but not yet reviewed by the Commission. The Town also



requested an additional 156 acres of supplemental growth allocation from the County. The request for supplemental growth allocation was approved, and those projects are moving forward.

Oxford has awarded 15.223 acres of the original 195 acres allotted by the County.

Of the 245 acres allotted to St. Michaels, the Town has awarded 21.00 acres for the Strausburg Subdivision, which was approved by the Commission as a refinement to the Town's Program in October 2003. The Town has also recently approved the use of 70.92 acres of growth allocation for the Miles Point III Project, which is currently under review by the Commission.

Talbot County Bill 933 repeals the ordinance provisions that allocated specific numbers of growth allocation acres to the Towns.

Bill 933 states that the withdrawal of growth allocation from the municipalities is part of the County's comprehensive review of its local Critical Area Program. The Bill also states that this action is necessary because, among other things:

- The original awards of growth allocation to the towns have "no continued validity for any planning and zoning purpose;"
- The original awards are "inconsistent with current principles of proper planning and the land use goals and policies in the existing and draft Talbot County Comprehensive Plans;" and
- "Growth in and around the towns affects not only the particular town, but also the County as a whole, and the County should, therefore, have some ability to protect the County's legitimate interests as they are affected by development in the critical area, as contemplated by State law when it gave this control to the counties under the Chesapeake Bay Critical Area Protection Program..."

In Bill 933, Talbot County proposes to amend its zoning code to delete all provisions relating to the reservation of growth allocation acreage for the Towns. This includes acreage already awarded by a Town, unless the growth allocation has resulted in "actual physical commencement of some significant and visible construction... pursuant to a validly issued building permit." (Section 2 of Bill 933). It is the County's intent that growth allocation awarded by a Town that has not resulted in physical commencement of some significant and visible construction pursuant to a validly issued building permit shall revert to the County.

Commission staff understands that at this time there are two, and possibly three, growth allocation projects in Talbot municipalities for which growth allocation has been awarded by a Town, but under Bill 933, would be considered unutilized and accordingly would revert to the County. First is the Strausburg Subdivision in St. Michaels, which involved 21.00 acres of growth allocation to change the Critical Area designation from Resource Conservation Area

(RCA) to Limited Development Area (LDA) for a ten lot residential subdivision. The Commission approved this growth allocation request as a refinement to St. Michaels' Critical Area Program on October 1, 2003. Second is the Miles Point III application, which the Town approved for 70.92 acres of growth allocation in January 2004. The Town has submitted this growth allocation request to the Commission, and the Commission is currently reviewing it.

Third, it is possible that Bill 933 may affect the Cooke's Hope Project in Easton. For this project, the Town of Easton used a combination of the original "reserved" growth allocation acreage and some supplemental growth allocation that it received from the County under the process of Bill 762. Thus, the Cooke's Hope project was reviewed through the County's supplemental growth allocation process. The Town of Easton recently sent this growth allocation to the Commission, but it has not yet been reviewed or approved by the Commission, and therefore, has not resulted in physical commencement of some significant and visible construction pursuant to a validly issued building permit

In accordance with §27.01.02.06.A(2) of COMAR, "Counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities." Although Bill 933 removes provisions pertaining to the reservation of growth allocation acreage for the Towns from the County Code, the Bill does not itself set forth a process for the County's Towns to obtain future growth allocation acreage. For that process, the County has informed the Commission that it will use other parts of §190-109 of the County Code which address how the use of growth allocation by the Towns is to be accommodated in the future. County Code Section §190-109 D (9) outlines a joint review and hearing process whereby elected officials from Talbot County and the affected municipality work cooperatively together on projects involving the Town's proposed use of growth allocation. This process, "Procedures for Awarding Supplemental Growth Allocation to Municipalities in Talbot County," was enacted by the County at a time when Easton was close to exhausting its original growth allocation allotment. This process was approved by the Commission as a refinement to Talbot County's Program in June 2000.

A copy of Bill 933 is attached. Within the Bill, **boldface** indicates a heading or defined term; underlining indicates language added to existing law by original bill; ~~strikethrough~~ indicates language deleted from existing law by original bill, and * * * indicates existing law unaffected.

The Panel's discussions to date have focused on the following issues:

- The applicable sections of the Critical Area Law and Criteria governing growth allocation.

- The effect of Bill 933 on other approved Critical Area Programs, program amendments, or program refinements.

- The interpretation of the growth allocation provisions of COMAR 27.01.02.06.A, particularly the provision that states, "When planning future expansion of intensely developed and limited development areas, counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities."

At the Panel's request, Commission staff provided research summarizing the process used by the various Critical Area counties to provide for the use of growth allocation by the municipalities. The various processes appear to fall into three general categories: 1) growth allocation acreage is given by the County to a municipality and the County is not involved in the review and approval process; 2) the County may or may not identify a certain number of acres that are "set aside" for the municipalities, but the County must be consulted, and in some cases, must review the use of growth allocation before the town can use it; and 3) the County participates in a coordinated review process with the municipality, either simultaneously with, or following the Town's review process.

The Panel has considered the information about the various processes and procedures used by the Critical Area counties with regard to municipalities' use of growth allocation. They have discussed the importance of the procedures being clearly set forth in a coordinated manner in the ordinances and programs of the counties and affected municipalities. They have also discussed the significance of amending one local program in such a way that it creates conflicts with other approved programs. At the public hearing on March 24, 2004, and in written comments submitted for the record, the Panel received information from numerous commentors stating their views about the applicability of other State laws, policies, and regulations to the proposed Program amendment from Talbot County. On advice of counsel, the Panel agreed that the Commission's role regarding Bill 933 should be focused on the provisions of the Annotated Code of Maryland §8-1809(j) which state that

> "The Commission shall approve Programs and Program amendments that meet:
> (1) The standards set forth in §8-1808(b)(1) through (3) of this subtitle; and (2) The Criteria adopted by the Commission under §8-1808 of this subtitle."

The goals of the Critical Area law, referenced above are:

1. To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

2. To conserve fish, wildlife, and plant habitat; and

3. To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

The Panel requested information regarding the effect of Bill 933 on other approved Critical Area Programs, program amendments, or program refinements. Commission staff provided this information, and the Panel discussed the information, particularly the approved Programs of Oxford, St. Michaels and Easton. The approved Town programs show that Bill 933 will affect the established growth allocation procedures of St. Michaels and Oxford. Easton is not specifically affected because the Town has already utilized all of its original reserved growth allocation acreage.

In addition to the effect on approved Town programs, Bill 933 will affect the following specific program amendments: the Strausburg Subdivision growth allocation (awarded by the Town of St. Michaels and approved by the Commission in October 2003), the Miles Point III Project growth allocation (awarded by the Town of St. Michaels and currently under review by the Commission) and potentially Cooke's Hope in Easton, depending on the final analysis of how the procedure used affected the 7.66 acres of growth allocation remaining from Easton's original reservation.

The Panel has discussed the meaning of the COMAR provisions relating to "coordination" between counties and affected municipalities. The Panel has acknowledged the various potential interpretations of this term. The Panel believed that the definition in Webster's Dictionary, "to harmonize in a common effort," seems to be a comprehensive and reasonable definition. The Panel seemed to agree that at a minimum "coordination" involves the participation of the affected parties. The Panel has also discussed the effect of Bill 933 on:

- the Strausburg growth allocation;
- the Miles Point III growth allocation;
- established municipal growth allocation processes;
- the effects of Commission actions on prior actions and current procedures.

The Panel will resume its discussion of this matter on May 5, 2004.

Critical Area Commission

SUPPLEMENT TO PANEL REPORT
May 5, 2004

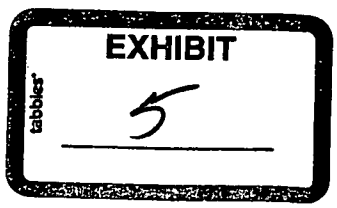
APPLICANT:	Talbot County
PROPOSAL:	Comprehensive Review of Local Program, County Council Bill 933
COMMISSION ACTION:	Vote
PANEL MEMBERS:	Dave Blazer (Chairman), Gary Setzer, Bill Giese, Joe Jackson and Ed Richards
PANEL RECOMMENDATION:	Deny
STAFF:	Ren Serey
APPLICABLE LAW/ REGULATIONS:	Natural Resources Article §8-1809 (j)

DISCUSSION:

I move on behalf of the panel to deny approval of Talbot County Bill 933 as an amendment to the County's Critical Area Program and to invite the County to work with the Commission and its staff to develop new growth allocation provisions that will be compatible with the State Critical Area Act and Criteria.
The basis for the motion is as follows:

Accepting Bill 933 would negate at least one previous Commission action approving a local program change. This is the refinement to the St. Michaels program for the Strausburg growth allocation approved in October 2003.

Accepting Bill 933 would create conflicts between the County program and several approved municipal programs. The municipal programs have their own approved growth allocation procedures premised on the growth allocation reserves provided by the County. The conflict that Bill 933 would create is contrary to the Commission's oversight responsibility to ensure that local programs are implemented in a consistent and uniform manner.



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May 14, 2004

Mr. George Kinney, AICP
Director, Office of Planning and Zoning
108 Maryland Avenue, Suite 102
Easton, Maryland 21601

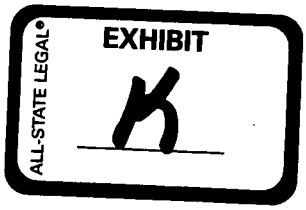
Re: Talbot County Proposal
Program Amendment: Bill 933

Dear Mr. Kinney:

This letter notifies you of action taken by the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays. At its regularly scheduled meeting on May 5, 2004 the Critical Area Commission considered County Bill #933, Talbot County's proposed amendment to its local Critical Area program concerning the reallocation of growth allocation reserve acres. Upon the recommendation of the panel of Commission members who conducted a public hearing on County Bill #933, and further upon consideration of the Panel's Report and its Supplement (both attached), statements made by members of the public who attended the Commission's meeting, and discussion among the Commission members, the Commission voted to deny approval of County Bill #933 as an amendment to Talbot County's local Critical Area program. The vote was unanimous, with one member abstaining.

The basis for the Commission's decision, as set out in the Supplement to the Panel Report, was as follows:

> Accepting Bill 933 would negate at least one previous Commission action approving a local program change. This is the refinement to the St. Michaels program for the Strausburg growth allocation approved in October 2003.
>
> Accepting Bill 933 would create conflicts between the County program and several approved municipal programs. The municipal programs have their own approved growth allocation procedures premised on the growth allocation reserves provided by the County. The conflict that Bill 933 would create is contrary to the Commission's oversight responsibility to ensure that local programs are implemented in a consistent and uniform manner.



The Panel recommended and the Commission fully supported inviting Talbot County to work with the Commission and its staff to develop new growth allocation provisions that will be compatible with the State's Critical Area Act and Criteria. Commission staff are available at your convenience to discuss new growth allocation procedures or to arrange a meeting with the Commission's Program Implementation Subcommittee.

Please contact me if you have questions or need additional information.

Sincerely,

Lisa A. Hoerger

Lisa Hoerger
Natural Resource Planner

cc: Honorable Philip Carey Foster
Mr. R. Andrew Hollis, Talbot County
Mr. Mike Pullen, Talbot County
Ms. Mary Kay Verdery, Talbot County
Ms. Marianne Mason, DNR- AG