

Talbot County v. Town of Oxford No. 1509 Appellant's Reply to Brief of Town of Oxford Sept 2006 MSA-S-1831-15

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**In The  
Court of Special Appeals of Maryland**

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No. 01509  
September Term, 2006

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**TALBOT COUNTY, MARYLAND**

Appellant,

vs.

**TOWN OF OXFORD, MARYLAND, et al.**

Cross-Appellant and  
Appellees.

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APPEAL FROM THE CIRCUIT COURT FOR  
TALBOT COUNTY, MARYLAND  
(Honorable John W. Sause, Judge)

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**APPELLANT'S REPLY TO BRIEF OF  
TOWN OF OXFORD**

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## **I. STANDARD OF REVIEW.**

The County's arguments with respect to the appropriate standard of review are set forth in its Reply to the Department of Natural Resources' brief, which is incorporated herein as if fully set forth.

## **II. TALBOT COUNTY BILL 933 IS A VALID ENACTMENT.**

### **A. The CAC's Decision Cannot Be Sustained For a Reason Not Relied Upon by the CAC.**

Intervenor, the Town of Oxford, asserts that the Critical Area Law and Bill 933 are invalid for a variety of alleged reasons. However, the CAC did not reject Bill 933 on the basis that it, or the Critical Area Law in general, are purportedly invalid, unconstitutional, or "preempted." Therefore, even assuming this Court agrees with the Towns' arguments, this Court may not affirm the CAC's decision regarding Bill 933 on this basis because it was not relied upon by the CAC. Bucktail v. Talbot County, 352 Md. 530, 552-553, 723 A.2d 440, 450-451 (1999)(in non-statutory judicial review action, the Court held that "[a] reviewing Court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency."). Oxford may not collaterally attack the validity or constitutionality of Bill 933 or otherwise argue that the CAC should have rejected Bill 933 on some basis other than it did.

### **B. Oxford's Arguments Are Not Ripe.**

In addition, this Court should not consider Oxford's arguments regarding the alleged invalidity of the Critical Area statute or Bill 933 "as applied" to Oxford because of the well established axiom that courts should avoid ruling on a constitutional issue whenever possible. See, e.g., Rios v. Montgomery County, 386 Md. 104, 121, 872 A.2d 1, 10 (2005)("We have consistently followed 'the principle that a court will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality.'")(citing R.A. Ponte Architects, LTD v. Investors' Alert, Inc., 382 Md. 689, 718, 857 A.2d 1, 18 (2004), quoting Becker v. State, 363 Md. 77, 92, 767 A.2d 816, 824 (2001)). In fact, inasmuch as Oxford challenges Bill 933 on an "as-applied" basis, its challenge may not be brought prior

to the time that Bill 933 actually becomes effective. See, e.g., Jordahl v. Democratic Party, 122 F.3d 192, 198 (4<sup>th</sup> Cir. 1997)(“No evidence exists that the VLC is currently under an actual or threatened application of the new VCFDA.”).

Moreover, the Town’s constitutional challenge is not ripe for review because it is based on pure speculation as to what may occur if Bill 933 is approved and becomes effective, rather than any actual concrete harm inflicted upon Oxford by Bill 933, if and when it takes effect. See, e.g., Md. Reclamation Assocs., Inc. v. Harford County, 342 Md. 476, 502-06, 677 A.2d 567, 581-82 (1996). Assuming this Court reverses the decision of the CAC, and if and when Bill 933 eventually takes effect, Oxford will be able to challenge the constitutionality of Bill 933 “as applied” if and when Oxford perceives that it is applied to it in an unconstitutional manner.

**C. Even Assuming, Arguendo, That The Court Were Permitted to Affirm the CAC’s Rejection of Bill 933 For a Reason Not Relied Upon by the CAC, and Assuming Oxford’s Claims Were Ripe, the Critical Area Statute and Bill 933 Are Plainly Valid and Constitutional.**

Though Oxford purports to be attacking Bill 933, it is also clearly attacking the validity of the Critical Area law itself, since it is the Critical Area statute which provides the exercise of power by the County about which Oxford complains. Neither the Critical Area law nor Bill 933 are invalid. In addressing Oxford’s assertions, the Court must begin with a presumption of validity. Md. State Bd. of Educ. v. Bradford, 387 Md. 353, 387, 875 A.2d 703, 723 (2005). “[S]ince every presumption favors the validity of a statute, it cannot be stricken down as void, unless it plainly contravenes a provision of the Constitution.” Id. (quoting McGlaughlin v. Warfield, 180 Md. 75, 78, 23 A.2d 12, 13 (1941)) and cases cited there. As the party challenging the statutory scheme, Oxford bears the burden of demonstrating its unconstitutionality. State v. Wyand, 304 Md. 721, 727-28, 501 A.2d 43, 46 (1985).

**(1) Bill 933 Does Not “Take” Anything From Oxford That It Was Entitled to Under the Critical Area Law, Nor Does Bill 933 Apply to Oxford’s Growth Allocation.**

Oxford complains that the joint County-municipal review process to be utilized under Bill 933 will allegedly infringe upon the Town’s zoning powers under Article 66B. This argument misconstrues the Critical Area statute and, moreover, it ignores portions of the statute. First, the State 5% formula creates County growth allocation using the 51,000 RCA Critical Area acres in the County’s unincorporated areas. County citizens’ RCA Critical Area properties are the overwhelming source of the County’s growth allocation, not municipal RCA. Second, Bill 933 does not apply to municipal RCA. E. 1927 (Bill 933, Section 2, Para. 1 (b)). County RCA generates County growth allocation. In 1989, fourteen years before Bill 933, certain planning assumptions were made in §§190-109 D (9)(a), (b), and (c) of the Talbot County Code. Even though it is apparent those plans are no longer current or meaningful, and even though the County has now had three intervening Comprehensive Plans, Oxford seeks to prohibit the County from repealing its own ordinance and, thus, trap the County in a time warp.

Oxford pays lip service to “coordination” and “cooperation.” Oxford wants to exclude the County from having any input regarding how County growth allocation is utilized. Bill 933 affects only County growth allocation. Oxford continuously asserts that the growth allocation affected by Bill 933 is “within” Oxford. It is not. “Growth allocation” is not acres of land which are fixed in place. Rather, it is a calculation of how much RCA is permitted to be developed in a local jurisdiction. It is akin to a “floating zone” that overlays traditional zoning districts. The only instance where County growth allocation possibly becomes intertwined with municipal “boundaries” is when there is or has been a municipal annexation of County land after 1989, when the County’s initial local program was approved. See Md. Code, Nat. Res. Art., §1808.1(b) (“[g]rowth allocation for a local jurisdiction shall be calculated based on 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, not including tidal wetlands or land owned by the federal government.") (emphasis added). The lack of any provisions regarding municipal annexations in the Critical Area law, together with the statutory definition of growth allocation as within a jurisdiction at the time a program is enacted, demonstrate a clear legislative intent that annexations should not have any affect upon the provisions of the Critical Area statute or the 5% formula for calculating growth allocation. In other words, the fact that a municipality within Talbot County annexes County land does not render the County growth allocation "within" the Towns. In fact, Oxford has specifically rejected growth into the areas shown on the 1989 map as being reserved for Oxford's growth and for which the County reserved its growth allocation in 1989.

While the Critical Area Law does not contain any provisions regarding municipal annexations, both the Maryland Code and the Talbot County Code do contain such provisions. The Maryland Code, Article 23A, § 9 (c)(1) limits the power of municipalities and preserves the zoning of the pre-annexation jurisdiction for a period of five years. See Mayor and Council of Rockville v. Rylyns Enters., Inc., 372 Md. 514, 814 A.2d 469 (2002)(holding that city was required to obtain pre-annexation jurisdiction's approval to rezone the annexed land within five years of the annexation). The Talbot County Code, Article XIV, §190-109D(14) provides that "[s]pecific annexation requests for property included in the acres reserved for the towns in §190-109 D (9) and (10) above and 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." Id. In subsection (15), the County Code provides 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." Id. Thus, consistent with state law regarding the County's continued zoning control of an annexed area for five-years after a municipal annexation, the County also determines pursuant to its Code whether an

annexation utilizing the County's growth allocation is consistent with the County's Comprehensive Plan.<sup>1</sup> The County has the right to participate in the process for utilizing its growth allocation, regardless of whether a municipality has annexed it. The CAC acted arbitrarily and outside its legal boundaries when, without question, it accepted the Towns' assertion that Bill 933 would affect growth allocation "within" the Towns, or otherwise would "interfere" with the Towns' zoning and land use powers. It would not. Rather, if effective, Bill 933 would "undo" the 1989 voluntary reservation of County growth allocation for the Towns and would cause the joint review process already established by Bill 762 (approved by the CAC) to apply to all requests for County growth allocation. E. 1692-96. 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.

The Towns were given a blank check in 1989 and were not required to coordinate with the County when using County growth allocation. All that the County seeks through Bill 933 is to have a voice in how its growth allocation acres are utilized. Bill 933 specifically recognizes vested rights and does not interfere with them. E. 1702. The theory of vested rights, when applied in the Critical Area context, provides that growth allocation awarded for a project but not vested may lawfully be "unreserved." Sycamore Realty v. People's Counsel, 344 Md. 57, 67, 684 A.2d 1331, 1336 (1996); Sterling Homes Corp. v. Anne Arundel County, 116 Md. App. 206, 217-18, 695 A.2d 1238, 1244 (1997). Just as a local legislative body has the lawful prerogative to legislatively change or control a zoning approval where rights are not vested, similarly, the Talbot County Council has the legislative prerogative to "unreserve" un-vested growth allocation it previously reserved. Bill 933 merely returns to the state of things under the Critical Area law as they were prior to the County's 1989 reservation of growth allocation. Nothing is being "taken" from Oxford which

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<sup>1</sup> Under Bill 933, these provisions would be deleted from the Code because County growth allocation would no longer be "reserved" for use by the Towns; rather, the joint County-municipal review process would be utilized.

it was given under the Critical Area law, and the Town of Oxford may not preclude the County from legislatively changing its method for allocating the County's growth allocation.

By viewing County growth allocation as "within" its boundaries and Bill 933 as effecting its planning and zoning power, Oxford misconstrues the statutory scheme and confuses Article 66B and the Critical Area statute. The General Assembly was well aware of municipalities' planning and zoning authority when it adopted the Critical Area statute. When the Critical Area law was enacted in 1984, it provided that each local jurisdiction (the counties and municipalities) would have 5% of its RCA to use as growth allocation. §8-1808.1(b). Thus, Talbot County had growth allocation of 5% of its RCA, and each municipality had growth allocation of 5% of its RCA. The Critical Area law was essentially a State-wide environmental "downzoning" intended to better and more closely control development in Maryland's Critical Area. However, the statute made some concession for development by allocating 5% of the RCA for growth (minus wetlands and federal property). Each local jurisdiction was to establish its own local program to decide how to use its 5% of its RCA, *i.e.*, its growth allocation. The General Assembly anticipated that much of this "growth" in the Critical Area would occur in, near, or around municipalities and, thus, in planning future IDAs and LDAs through the use of growth allocation, the regulations require the "counties, in coordination with affected municipalities, to establish a process to accommodate the growth needs of the municipalities." COMAR 27.01.02.06(A)(2). Thus, contrary to Oxford's claims, the County is charged by the Critical Area regulations with establishing a process and, contrary to Oxford's assertion, "coordination" does not require the County to obtain Oxford's permission before enacting that process. Bill 933 establishes a joint review process that coordinates with the affected municipalities and establishes a process to accommodate growth.

Oxford's arguments appear to simply assume that the County will necessarily deny any and all requests for County growth allocation in the areas annexed by the municipalities. There is absolutely no basis for this incorrect assumption. One of Bill 933's purposes is to

accommodate growth by causing the other half of the County RCA growth allocation to be released by the CAC. Bill 933 will end the unilateral control of the Towns over County growth allocation in municipally annexed areas, permitting the County to have input and an equal voice with the Towns.

Oxford asserts that Bill 933 is an attempt to usurp the Town's authority, when just the opposite is true. It is the Town of Oxford that is attempting to usurp the County's authority by excluding it from participation in the process for utilizing County growth allocation. Bill 933 provides that where a town requests the use of a portion of the County's growth allocation, it engage in a joint review process with the County. Bill 933 thus establishes a process that "coordinates" with the municipalities and "accommodates growth." Accordingly, it was arbitrary and illegal for the CAC to refuse to approve it.

**(2) Neither the Critical Area Statute Nor Bill 933 "Conflict" With or Are "Preempted" By Other State Law.**

Oxford contends that the Critical Area Law and/or Bill 933 are in conflict with or preempted by Article 66B. However, neither Bill 933 nor the Critical Area Law can be in "conflict" with or "preempted" by Article 66B of the Maryland Code because both the Critical Area statute and Article 66B were enacted by the same legislative body, the Maryland General Assembly. The State cannot "preempt" itself. Rather, the two statutes must be read together in a manner that will not cause them to conflict. To the extent any provisions of the two statutes are irreconcilable, the later enactment (the Critical Area law) would prevail. Haub v. Montgomery County, 353 Md. 448, 461-62, 727 A.2d 369, 376 (1999).

The Critical Area statute and Article 66B do not conflict. On the one hand, Article 66B grants municipalities traditional planning and zoning powers. On the other hand, the Critical Area statute establishes density and land use restrictions State-wide in the Critical Area, to encircle and protect the Chesapeake Bay and its tributaries regardless of county/municipal boundaries or annexations. By asserting that Bill 933 is invalid because it

allegedly infringes upon the Towns' Article 66B zoning powers, Oxford necessarily attacks the General Assembly's power to enact the Critical Area law itself. However, the General Assembly plainly had the authority to enact the Critical Area statute. The General Assembly is the sole source of all municipal zoning authority in Maryland. Rylyns Enters., 372 Md. at 575, 814 A.2d at 500 ("Municipalities wield only such zoning powers as are granted to them by the Legislature."). As the source of municipal zoning power, the General Assembly may withdraw that power altogether. Certainly it may limit development in the Critical Area, enact the 5% rule giving the overwhelming mass of growth allocation to the counties, and then require counties, in coordination with affected municipalities, to develop a process to accommodate the growth needs of the municipalities. Article 66B cannot be interpreted in a manner that preempts or supersedes the authority of the State to enact the Critical Area Law and protect the Chesapeake Bay.<sup>2</sup>

The Critical Area statute delineates three categories of land within the Critical Area: RCA, LDA and IDA. These Critical Area categories are unrelated to traditional (Euclidean) zones. The Critical Area law required the local jurisdictions, both counties and municipalities, to identify those areas initially based upon the amount of developed and/or undeveloped land within an area. See COMAR 27.01.02.03, .04, and .05. Unlike a traditional "rezoning" (whether piecemeal or comprehensive), a change from one land category to another under the Critical Area statute is governed solely by the provisions and criteria contained within the Critical Area statute, not based upon Article 66B or law applicable to traditional zoning. In this regard, a change in classification of Critical Area land does not require a change in the underlying Euclidean zone of the land (although the two may occur

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<sup>2</sup> Oxford relies upon the preemption provision of Article 66B, §7.05, but ignores the provision of Article 66B, §4.01(d)(4) stating that the powers granted to a local jurisdiction with respect to general development regulations and zoning "do not . . . [p]reempt or supersede the regulatory authority of any State department or agency under any public general law."

simultaneously or subsequently). Rather, the two processes are distinct. Article 66B relates to the planning and zoning authority of a town with respect to land planning and use categories; while the Critical Area law relates to protection of the Bay and whether requested changes in the three identified Critical Area land categories should be granted under the statutory criteria adopted. This in no manner implicates nor intrudes upon a municipality's Article 66B planning and zoning authority. The General Assembly plainly intended for the municipalities to exercise traditional planning and zoning authority within their boundaries, while at the same time the counties in Maryland are the governmental bodies charged with establishing a process for growth allocation by which the growth needs of the municipalities seeking expansion in the County's Critical Areas will be accommodated.

The General Assembly could have included the Critical Area Statute within Article 66B, as it did with the Historic Area Zoning Act, but it chose not to do so. This further evidences the intent of the General Assembly that the Critical Area statute (the authority for the enactment of Bill 933) does not implicate the municipal zoning powers in Article 66B, much less conflict with them. Even the Historic Area Zoning Act, which gives municipalities (rather than the State or counties) the power to enact laws regarding historic districts, has been interpreted by the Courts in Maryland as substantively different from traditional zoning powers. See Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974)(court recognized and emphasized the substantive differences between historic area zoning and traditional zoning). Unlike the Historic Area Zoning Act, the Critical Area law requires the counties (rather than the municipalities) to establish a process applicable for use of growth allocation within each county at the time of adoption of the initial critical area program.

In North v. Kent Island, the Court of Special Appeals specifically rejected the notion that the Critical Area law can be equated with typical Article 66B zoning, or that the CAC has any role with respect to traditional zoning, stating as follows:

It is not the role of the Commission to reexamine whether there was an actual mistake in the original zoning. To allow the Critical Area Commission to

revisit the question of mistake would render meaningless the hearings before the Planning Commission and the County Commissioners. **In addition, this would create a state level zoning board, which was not the intention of the General Assembly in establishing the Critical Area Commission.** The Commission was designed to be an **oversight committee.** Section 8-1801(b)(2). The original drafting group considered forming the Commission as a permitting agency for all projects in the critical area. The drafting group concluded that such a role was undesirable because the Commission would become tangled in collisions with local agencies and developers over the specifics of particular projects. George W. Liebmann, The Chesapeake Bay Critical Area Act: The Evolution of a Statute, The Daily Record, April 20, 1985, at 1. The drafting group also considered constituting the Commission as an appeal board. **Because this would impose substantial hearing burdens on the Commission and create a conflict between the Commission and local zoning boards, the group decided against such a provision.** The drafting group also considered allowing an appeal directly to the Commission from the permit granting agency. **The drafting group rejected this approach because it would either result in duplicative appeals or grant the Commission pendent jurisdiction to address issues which did not fall under its regulations.** Because there was a need for the Commission to check upon local permit determinations involving zoning and subdivision, the group drafted a provision granting the Commission the right to intervene at any stage of administrative, judicial, or 'other original proceeding concerning project approvals. Section 8-1812. In this case, once the Planning Commission determined that there was a mistake in the original zoning, the program amendment should have been referred to the Critical Area Commission to determine whether it met the criteria. The Commission has jurisdiction to examine the rezoning and determine whether the rezoning meets the established criteria. The sole issue before the Commission should have been whether the property satisfies the definition of IDA as set forth in the criteria. **Instead, the Critical Area Commission undertook an independent review to determine whether there was a mistake in the rezoning. This action was outside the scope of its power. The Commission has jurisdiction as the final arbiter of program changes, but does not have jurisdiction to review piecemeal rezoning.** The legislative charge to the Critical Area Commission does not include the quasi-judicial function of evaluating whether there was a mistake in the original mapping.

Id., 106 Md. App. at 106-107, 664 A.2d at 41 (emphasis added).

While Article 66B and traditional zoning authority ensures that zones are created and

uniformity within those zones is assured, the purpose and intent of the Critical Area law is to protect the identified "critical areas" of the Bay and its tributaries which require environmental protection. The change in classification of land from RCA to LDA or IDA, or from LDA to IDA is the separate, exclusive function of the Chesapeake Bay Protection Act, not Article 66B or traditional Euclidean planning and zoning. A change in classification of Critical Area land is purely a function of protecting the Chesapeake Bay by applying the environmental regulations under the Critical Area law, including guidelines and criteria for approving growth allocation to reclassify land in one Critical Area category to another. The powers provided to the Towns by Article 66B simply are not infringed by that process.

**(3) Bill 933 Utilizes a Joint County-Municipal Review Process and Does Not Provide the County With A "Veto" Over Growth Allocation Requests.**

Oxford argues that Bill 933 will provide the County with "control" and, thus, a "veto" over proposed development in and around their boundaries. Oxford's brief, pp. 31-33. Oxford also asserts that "[in] adopting Bill 933, Talbot County has imposed a concept of 'ownership' of the growth allocation process which has no basis in law or fact." Oxford's brief, p. 33. These assertions are factually incorrect and, furthermore, they misconstrue the Critical Area legislation. First, the Critical Area regulations require the "counties, in coordination with affected municipalities, to establish a process to accommodate the growth needs of the municipalities." COMAR 27.01.02.06(A)(2). Thus, the County is required to establish a process. Bill 933 complies with the statute by establishing a joint County-municipal hearing and review process by which the County and municipalities participate equally in deciding how County growth allocation is to be utilized. The notion that the County is nefariously attempting to "impose" a concept of "ownership" and "hijack" the process (Oxford's brief, p. 33) is simply absurd. The County does not need to "hijack" a process it is required by law to establish. The County could have adopted a process in which it alone controlled County growth allocation. The Critical Area Commission has approved several County programs wherein the municipalities have no input regarding how the

counties' growth allocation is utilized. See County's Reply to the CAC's brief, Section V. Instead, the County, through Bill 933, provides a joint review process in which the towns have equal participation. This joint review process has already been established by Bill 762. Utilizing that joint review process, Easton has recently been awarded 156 acres of County growth allocation. State law requires counties to develop a process to accommodate the growth needs of municipalities. Talbot County has done so; the CAC has acknowledged and approved that process when it approved Bill 762. That process has worked, and there is no reason to assume it will not continue to do so.

Oxford complains about the joint review process to be utilized under Bill 933, claiming that it will provide "veto authority" to the County Council. Oxford's brief, pp. 12 and 19 n.6. The joint review process established by Bill 762 and which will apply under Bill 933 does not provide the County with a "veto" over municipalities regarding County growth allocation. Instead, it provides the County and each affected municipality with shared input and equal authority regarding how the public trust over citizens' growth allocation is utilized, for the benefit of the entire County, not for the exclusive privilege of landowners and developers in or around the towns, as determined exclusively by those municipalities. No doubt, there may be instances where honest differences of opinion compel elected officials with the courage of their convictions to disagree. However, the process does not provide either the County nor the towns with a veto power. Neither counties nor towns may arbitrarily deny growth allocation requests. If they were to do so, there would be judicial recourse. However, those instances were not to be presumed or imagined by the CAC, and then used as a reason to reject Bill 933.

Growth allocation is a limited, County-wide resource. How it is used is important for the well-being and the future of the entire County. County citizens in unincorporated areas, from whose properties growth allocation is derived, should fairly receive consideration in the process. Oxford and St. Michaels currently enjoy exclusive control of 71% of RCA growth allocation available to the entire County. Easton, although much larger, has none. The only

basis for that inequity is the 1989 County planning map and voluntary reservation based on those long out-dated plans. The County's 1989 plans are now long-since obsolete, and the County is authorized to enact legislation to alter those plans consistent with the Critical Area statute and regulations.

The General Assembly encourages counties and towns to cooperate to protect the Chesapeake Bay. With Bill 933, Talbot County has enacted a process that requires cooperation and coordination. The County has been responsible and responsive to the growth needs of Easton. Bill 933 accommodates the growth needs of the municipalities and complies with the mandatory provisions of the Critical Area law requiring it to establish the process it adopted under Bill 933 (the joint review process of Bill 762) to accommodate the growth needs of the municipalities. The Critical Area Statute, not Bill 933, gave the County that authority. Oxford asserts that Bill 933 is invalid because the County has "no right to enact or enforce zoning laws within the Town of Oxford." However, again, Bill 933 is not a "zoning" ordinance and it does not affect or even implicate the zoning authority of the Town of Oxford. Bill 933 was enacted pursuant to, and is entirely consonant with, the Critical Area statute.

Oxford's assertion that it possesses exclusivity and is "autonomous" as long as it exercises its planning and zoning powers consistent with the Critical Area statute, again, completely misses the point. All local jurisdictions (including the counties) have the planning and zoning powers granted to them by the General Assembly. However, these planning and zoning powers are, as explained above, separate from the environmental districts created and environmental regulations enacted pursuant to the Critical Area law. Thus, when Oxford attempts to compare the two and allege that they conflict or preempt, it compares apples and oranges. They do not conflict. Contrary to Oxford's assertion, North v. Kent Island Limited Partnership's holding that the CAC may not sit as a "zoning board of appeals" cannot be twisted to stand for the proposition that Bill 933 would establish the County as a "higher authority." Bill 933 is not a zoning law and does not affect any "zoning" function within any

municipality in Talbot County. Rather, Bill 933 is a law passed pursuant to and in full compliance with the Critical Area law. The General Assembly cannot “usurp” the zoning authority which it granted to the Towns. The General Assembly is empowered to enact separate environmental legislation, regardless of whether (allegedly) that legislation “affects” the Towns’ zoning powers granted under Article 66B.

Oxford’s desire to exclude County representatives from having any participation in the process of how County growth allocation is utilized, and its repeated assertions regarding its “autonomy,” belie its alleged desire for cooperation and coordination. Oxford’s half-hearted assertion that County planning concerns can be expressed by attending Town public hearings (Oxford’s brief, p. 33) is insincere because the County is excluded from the process and, moreover, it is simply not what the Critical Area law provides. The Critical Area statute requires the County to establish a process, and that is what Bill 933 does. Contrary to the Towns’ proposed exclusion of the County (except for attending Town Council meetings), Bill 933 would utilize a process with an equal role for the municipalities with Talbot County. The Towns helped to draft Bill 762, and the CAC approved it as a program refinement. Under Bill 933, the County and Towns would be partners in the decision of how to best utilize the very limited amount of Critical Area land in the County permitted under the Critical Area law to be developed at all (5%). There is no reason for Oxford to oppose a joint County-municipal review process for growth allocation which encompasses the exact “coordination” and “cooperation” required by the Critical Area statute and which Oxford at least purports to desire.

Finally, Bill 933 contains a severability clause which states that “[t]he 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.” E. 1697-1707. If this Court were to agree with the arguments raised by Oxford, the Court would be required to evaluate the balance of the Bill under the statutory criteria in light of the severability clause.

CONCLUSION

This Court should hold that the CAC acted illegally, arbitrarily and capriciously and either (1) remand this case to the Circuit Court for entry of an Order determining that Bill 933 is deemed approved by operation of law due to the CAC's failure to timely act upon it; or (2) reverse the decision of the CAC and remand this case to that agency with an Order requiring it to approve Bill 933 as a local program amendment. If the Court addresses the arguments set forth by Oxford in its counterclaim, it should reject those arguments and uphold the validity of Bill 933.

Respectfully submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I HEREBY CERTIFY that on this 27<sup>th</sup> day of April, 2007, fifteen copies of the foregoing Reply Brief of Appellant were filed with the Court and two copies were mailed, first-class, postage prepaid to:

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**FONT AND TYPE SIZE**

The Reply Brief of Appellant Talbot County, Maryland was prepared using Times New Roman 13-point proportionally spaced type.