

Talbot County v. Town of Oxford No. 1509 Brief of Appellee Department of Natural Resources Sep 2006 USA S. 1831-16

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IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

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September Term, 2006

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No. 01509

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TALBOT COUNTY, MARYLAND

*Appellant,*

v.

TOWN OF OXFORD, MARYLAND, et al.,

*Appellees.*

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On Appeal from the Circuit Court for Talbot County  
(John W. Sause, Jr., Chief Judge, Ret.)

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**BRIEF OF APPELLEE DEPARTMENT OF NATURAL RESOURCES**

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March 22, 2007

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Appeal From the Circuit Court for Talbot County,  
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**BRIEF OF APPELLEE DEPARTMENT OF NATURAL RESOURCES**

**STATEMENT OF THE CASE**

In 2004, Talbot County asked the Critical Area Commission (“Commission”) to approve County Council Bill 933 an amendment to the County’s local Critical Area program pursuant to the Critical Area law, Annotated Code of Maryland, Natural Resources II §8-1801 *et seq.* (“Critical Area Law”). E. 1059. If approved, the amendment to Talbot County’s Critical Area program would have withdrawn Critical Area growth allocation acreage that the County had previously reserved for the Towns of St. Michaels, Easton and Oxford in 1989, and that the Towns had relied on in implementing their independent Critical Area

programs. E. 1039. Talbot County's proposal would also have negated two development projects previously approved by the Town of St. Michaels. E. 1759. One of those development projects, the Strausburg growth allocation, had also been approved, on October 2, 2003 by the Critical Area Commission as an official change to the Town of St. Michaels' Critical Area program. E. 63.

In its oversight role, the Critical Area Commission held a public hearing, considered an extensive record, and voted unanimously to disapprove Talbot County's Bill 933 as an amendment to the County's Critical Area program, because Bill 933 did not meet the State law and regulations' criteria for approval. E. 485. Although the Commission invited Talbot County to work with the Commission to develop an acceptable amendment that would be consistent with State law, (E. 487), the County instead filed suit.

The Towns of Oxford and St. Michaels, and the Midlands Companies intervened as parties defendant. On January 26, 2006, the Circuit Court for Talbot County (Hon. John W. Sause, Jr.) held a hearing on the parties' motions for summary judgment. In an Opinion and Judgment (E. 2240-2259) dated March 23, 2006, the circuit court denied Talbot County's requests for relief, and declared, *inter alia*: (1) that the County's Bill 933 represented only a proposal to amend the County's Critical Area Program, and "was not in any sense an actual amendment to that program;" (2) that the Commission had "not only the right, but also the duty" to carry out the purposes of the State Critical Area law, including to ensure consistency and uniformity of implementation of local Critical Area programs; (3) that the Commission

had "a duty and the authority under NR §8-1809(j) to withhold approval from proposed program amendments that do not meet the criteria adopted by the Commission and correctly decided that Bill 933 did not meet those criteria." E. 2240-2241. This appeal followed.

### QUESTIONS PRESENTED

1. Did the Critical Area Commission correctly deny Bill 933 as an amendment to Talbot County's local Critical Area Program because Bill 933 would create an inconsistency with other approved local Critical Area programs?
2. Did the Critical Area Commission correctly deny Bill 933 as an amendment to Talbot County's local Critical Area program because Bill 933 would negate valid action previously taken by the Commission?
3. Did the Critical Area Commission act within the time prescribed by statute for accepting and processing Bill 933?

### STATEMENT OF FACTS

In 1984, the General Assembly enacted the Critical Area law with the purpose of fostering "more sensitive development activity for certain shoreline areas [of the Chesapeake Bay and its tributaries] so as to minimize damage to water quality and natural habitats." Code, Nat. Res. II § 8-1801(b)(1). The Critical Area law established a Statewide 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." Nat. Res. II §8-

1801(b)(2). In order to achieve the purposes of the Critical Area law, particularly with respect to oversight of the 63 local jurisdictions (16 counties, 46 municipalities, and Baltimore City) with approved Critical Area programs, the General Assembly created the Critical Area Commission. Nat. Res. II §§8-1803(a), 1806, 1808(a) (“each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval of the Commission”). The Commission developed criteria to guide the implementation of local Critical Area programs, and those criteria were approved by Joint Resolution of the General Assembly in 1986.<sup>1</sup>

The Critical Area Law mandates that each local jurisdiction with lands in the “critical area” – those lands within 1,000 feet of the heads of tide of the Chesapeake Bay and its tributaries– develop a critical area program. Nat. Res. II §8-1807(a); §8-1808. Each program is to include, at a minimum, a comprehensive program map that designates lands in the Critical Area as one of three categories: Resource Conservation Area (RCA), Limited Development Area (LDA), or Intensely Developed Area (IDA). Nat. Res. II §8-1808(c)(1). The designations depended upon existing land use and development as of the date of enactment of the local jurisdiction’s program.<sup>2</sup> *Id.* § 8-1808(c) ; COMAR 27.01.02.02A.

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<sup>1</sup> At the 1986 Session, the General Assembly resolved that “the criteria for local critical area program development adopted by the Chesapeake Bay Critical Area Commission are hereby affirmed as being reasonable and acceptable to accomplish the goals of the Chesapeake Bay Critical Area Protection Program.” H.J.Res. 17 and S.J. Res. 9, 1986 Laws of Maryland at 3578-80.

<sup>2</sup> Resource Conservation (RCA) land is characterized by natural environments dominated by wetlands, forests and abandoned fields, COMAR 27.01.02.05A. It may only

The Critical Area designations of RCA, LDA, and IDA guide future development of lands in those areas in accordance with the local jurisdiction's Critical Area program.

To accommodate future growth in the Critical Area, the General Assembly created a process for a local jurisdiction to request Commission approval for changes in land designation from a less-intense to a more intense development designation. Nat. Res II §8-1808.1. This is known as "growth allocation." Growth allocation is "the number of acres of land in the Chesapeake Bay Critical Area that a local jurisdiction may use to create new intensely developed areas and new limited development areas." Nat. Res. II § 8-1802 (a)(11). Under the applicable Critical Area criteria,

*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 27.01.02.06A(2) (emphasis added).

In 1989, Talbot County adopted and the Critical Area Commission approved the County's Critical Area Program. E. 1515. The County's program accommodated the growth needs of the Talbot County municipalities by including Planning Maps 1, 2 and 3 "showing anticipated growth areas around the towns of Easton, Oxford and St. Michaels." E. 1698;

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be developed at a rate of one residential unit per twenty acres. COMAR 27.01.02.05C(4). Limited Development (LDA) land is characterized by low or moderate development (up to four dwelling units per acre), and contains some natural plant and animal habitats. 27.01.02.04A. Intensely Developed (IDA) land is an area where developed land uses predominate, where little natural habitat exists, and where housing density equals or exceeds four dwelling units per acre. COMAR 27.01.02.03A.

1705-1707. Using those 1989 planning maps, Talbot County codified a reserve of growth allocation for Easton (155 acres), Oxford (195 acres), and St. Michaels (245 acres). E. 1699-1700 (Talbot County Code §190-109 (D)(9)(deleted provisions). Talbot County thus expressly planned for the Towns to be able to exercise their independent authority under their respective Critical Area programs, to award growth allocation acreage for lands within the Towns. The reserved allocations for the three Towns remained in Talbot County's ordinance from 1989 until the enactment of Bill 933 in 2003. E. 1700.<sup>3</sup>

In the years following passage of the Critical Area Law, the Towns of Easton, Oxford and St. Michaels moved forward to adopt their own Critical Area Programs. Easton, Oxford and St. Michaels each based their respective growth allocation procedures on the growth allocation reserves allotted by the County in 1989. E. 1074-1075. In the past 15 years, the three Towns have awarded, and the Critical Area Commission has approved as amendments to the Towns' programs, growth allocation for specific project developments pursuant to the Towns' respective adopted ordinances. E. 1103. Talbot County played no role in these municipal growth allocation approvals.

In an effort to change the way the Towns handled Critical Area growth allocations for lands within the Towns, the Talbot County Council enacted Bill 933 on December 23, 2003. E. 1039-1049. Although the original (1989) Talbot County Critical Area ordinance required

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<sup>3</sup> Bill 933 deleted the reserved growth allocation acreage from each of the Towns and returned that acreage to Talbot County. E. 1700, amendment to §190-109(D)(9)(a), Talbot County Code.

the County to review the progress and process for growth allocation every four years<sup>4</sup>, and the Critical Area Law provided for local program review every four years,<sup>5</sup> Bill 933 was the “first comprehensive review and revision to the County’s local program since it was adopted in 1989.” E. 319. Among other things, the Bill:

- Repealed Planning Maps 1, 2 and 3;
- Eliminated the reserved growth allocations for the Towns of Easton, Oxford, and St. Michaels; and
- Provided that any growth allocation awarded to any of the three Towns that was “unutilized” on the effective date of the ordinance shall revert to the County. “Unutilized” growth allocation is growth allocation previously allocated to the Towns, **including growth allocation already awarded by a Town for a project** where, as of the effective date of the ordinance, there has been no actual physical commencement of some significant and visible construction.
- Made no provision to accommodate future growth of the Towns, and provided no process that could be used to accommodate future growth in the Towns.

The Critical Area criteria require Talbot County to work “in coordination with affected

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<sup>4</sup> In Talbot County’s 1989 Critical Area ordinance, the County specified that the “number of reserved areas allocated among the towns for rezoning . . . should be reviewed by the County and Towns by June 1, 1993 for possible reallocation and at least every four years thereafter.” E. 1701, Talbot County Code §190-109 D (11) (deleted provisions).

<sup>5</sup> From 1984 until 2002, each Critical Area local jurisdiction was required to review its local program and program map at least every four years, Nat. Res. II § 8-1809(g), and could propose to the Critical Area Commission program or map amendments as many as four times per year. *Id.* § 8-1809(h). In 2002, the General Assembly changed the every four-year review requirement to every six years. 2002 Laws of Maryland, ch. 431, 432.

municipalities” to “*establish a process to accommodate* [municipal] growth needs.” COMAR 27.01.02.06A(2) (emphasis added). That the County knows how to accomplish this required coordination is evident. In 1999, four years before enacting Bill 933, the County cooperated and coordinated with the Towns of St. Michaels, Easton and Oxford in drafting Talbot County Bill 762. Bill 762 created a process for the Towns to request, and the County to award, “supplemental” growth allocation.<sup>6</sup> “Supplemental growth allocation” is acreage required by a municipality after the Town has exhausted its initial supply of growth reserved for the Town in 1989.<sup>7</sup> By its terms, Bill 762 did not apply to Oxford and St. Michaels, because those Towns had not yet exhausted their initial growth allocation acreage.<sup>8</sup> E. 773-774.

In July of 2000, the Critical Area Commission approved Bill 762 as a change to Talbot County’s Critical Area program. E. 1690a. The Commission staff described Bill 762 as creating a process “in anticipation of future growth” due to the fact that the “Town of Easton has used most of its original allocation.” *Id.* Staff noted that Bill 762 had not been in place

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<sup>6</sup> By 1999, Easton had awarded most of the 155 acres reserved for it in Talbot County’s 1989 Critical Area Ordinance. The process established in Bill 762 was used in 2003 when the County granted 156 “supplemental” acres of growth allocation to Easton, “to **increase the acreage reserved** to the Town of Easton from 155 to 311 acres.”(emphasis added) E. 1692-1693 (Talbot County Bill 925).

<sup>7</sup> The County enacted Bill 762, “Supplemental Growth Allocation to Municipalities in Talbot County,” in 2000. E. 2209-2211. Bill 762 gave the County joint review, in conjunction with affected municipalities, over supplemental awards of growth allocation to municipalities. E. 2210. “The bill was drafted in coordination with affected municipalities, circulated to the municipalities and their attorneys for comment, amended to incorporate their suggested changes and approved by the Critical Area Commission.” E. 321.

<sup>8</sup> See Transcript of Hearings on Bill 762 before Talbot County Council, April 18, 2000. E. 771-775.

when, in 1999, Easton requested additional acres from the County, but the County denied the request. E. 1690a.

Despite its legal obligation to coordinate with other local governments, and its prior history of cooperation with the Towns, Talbot County had no discussions with the Towns of St. Michaels, Easton and Oxford before introducing Bill 933. *See, e.g.*, E. 1050-1052, December 16, 2003 letter from the President of the Commissioners of St. Michaels to the President of the County Council of Talbot County.<sup>9</sup> The transcripts of the December 16, 2003 Talbot County Council hearing on Bill 933 are instructive as to the County's lack of coordination with the affected Towns. E. 395-412.

By letter dated December 29, 2003, Talbot County sent Bill 933 to the Critical Area Commission, but Commission staff requested additional information before accepting the Bill for processing. E. 1058. The County provided the requested information, along with the Bill, in a letter dated January 19, 2004. E. 1059. By letter of February 5, 2004, the Commission accepted Bill 933 for review and processing. E. 1062. Acceptance of the proposal on February 5, 2004 started the 90-day period mandated by law, within which the Commission was required to act on the proposed Talbot County Critical Area program amendment. Nat.

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<sup>9</sup> The letter states: "So far as we can determine with regard to other municipalities in Talbot County, and to be sure with regard to St. Michael's, in advance of the introduction of Bill 933 the County did not:

- Inform us of any problem that would require such legislation;
- Seek our suggestions for a solution or cooperation in solving such a problem;
- Provide us with a copy of the proposed Bill for comments and suggestions, on a matter that is important to the Town."

Res. II §8-1809(o)(1) ("Commission shall act on the proposed program amendment within 90 days of the Commission's acceptance of the proposal").

For proposed local program amendments, a panel of five members of the Critical Area Commission must conduct a public hearing in the jurisdiction that proposed the amendment. Nat. Res. II §8-1809(o)(1). The Commission appointed a panel ("Panel") of five members, who conducted a well-attended public hearing on March 24, 2004 in Easton. E. 1063-1064. The Panel received numerous public comments on the proposed amendment. *See, e.g.*, E. 913-933; 962-968; 995-1010; 1214-1285; 1714-1757.

Thereafter, the Panel met in public sessions on April 7, April 19, and May 5, 2004 to discuss the Bill 933 proposed program amendment. E. 1065-1077. Prior to the meetings, each member of the Panel received a copy of all public comments submitted before the close of the record on April 5, 2004. E. 1067. Panel members also received information on the growth allocation processes of the Towns of Easton, Oxford and St. Michaels, including copies of relevant pages of their respective Critical Area programs or ordinances. E. 1068-1076.

At its April 19, 2004 meeting, the Panel reviewed the growth allocation processes of other county and municipal Critical Area programs. E. 1071-1077. The Panel received information from Commission staff that no County, other than Talbot, had changed its original growth allocation procedures. The Panel also reviewed the impact of Bill 933 on each of the Talbot County Towns' approved Critical Area programs. In particular, the St.

Michaels' approved program provides that the Town would develop and implement its own process for awarding growth allocation. E. 1085. ("It is the purpose of the St. Michaels Growth Allocation Process to establish objectives, procedure, standards and criteria for determining appropriate locations and projects where growth allocation may be awarded.")

*Id.* According to the Town's adopted Program, the Growth Allocation process will "insure that the Town's limited growth allocation, as determined in the Talbot County Local Chesapeake Bay Critical Area Protection Program, ... is managed to insure equity in the award of growth. . . ." *Id.*

According to the minutes of the April 19, 2004 Panel meeting, the St. Michaels' Critical Area Program "shows a reliance on the previously awarded growth allocation by the County, and carries over to their ordinance regarding Growth Allocation Districts." E. 1074-1075. Similarly, the Panel noted that the Town of Oxford's approved Critical Area program is premised on the Town's controlling a specific amount of growth allocation acreage to award within the Town limits. E. 1075, 1090-1094. The Oxford Critical Area Program establishes a process for the Town Planning Commission and the Town Commissioners to use "to determine if the location of the [future growth allocation] is consistent with the *Town of Oxford* Critical Area program." E. 1090 (emphasis added). Oxford's Program also requires deduction of parcels that receive growth allocation "from the total Town Growth Allocation." E. 1092. The same is true for the Critical Area program for the Town of Easton: "As part of its [Critical Area] program, development, Easton has identified IDA and/or LDA areas within

the Town or on the fringe of the Town in which it expects growth of the Town to occur.” E. 1099.

The Panel continued its deliberations on May 5, 2004. E. 1286-1317. At the May 5th meeting, the Panel reviewed the impact of Bill 933 on specific development projects which had already received growth allocation from the Towns and which would be affected by Bill 933. E. 1102-1107. The Panel discussed that, under Bill 933, growth allocation awarded by a Town that had not yet resulted in “actual physical commencement of some significant and visible construction... pursuant to a validly issued building permit” shall revert to the County. E. 1044, 1103. The Town of St. Michaels had awarded 21 acres for the Strausburg subdivision, which the Critical Area Commission approved as a change to St. Michaels’ Program in October 2003.<sup>10</sup> E. 1103. Also, in 2003, St. Michaels awarded 70.29 acres of growth allocation for the Miles Point III Project, which the Town submitted to the Critical Area Commission as a proposed Town Critical Area Program amendment. E. 1103. The Town of Oxford had received 195 acres of growth allocation in 1989, and had awarded 15.223 of those acres as of 2004. E. 1103.

By May of 2004, the Town of Easton had used all of the 155 acres of growth allocation originally reserved for it in 1989. E. 1102. In fact, Easton had awarded over 183 acres of

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<sup>10</sup> The Strausburg growth allocation was approved as a “refinement.” A program “refinement” is any change to an adopted program “that the Commission determines will result in a use of land or water . . . in a manner consistent with the adopted program.” Code, Nat. Res. II §8-1802(a)(16)(i)(2000 Repl. Vol. Supp. 2004). A program refinement may be approved by the Chairman of the Commission within 30 days and without a public hearing. Nat. Res. II §8-1809(p).

growth allocation, having obtained an additional 28.762 acres of "Supplemental" growth allocation from the County via the process established in 2000 by Talbot Bill 762. E. 1103. The Town gave part of this supplemental growth allocation to the Cooke's Hope Project, which had been approved by the Town but not yet approved by the Critical Area Commission as an amendment to Easton's Program. E. 993. Because the Cooke's Hope project had not yet been constructed, the awarded growth allocation would be considered "unutilized" under Bill 933. E. 1044. Thus, the Panel believed that Easton's award of growth acreage to Cooke's Hope might also revert to the County. E. 1102, 1104.

As noted in the Panel Report, two of the above projects – the Strausburg Subdivision in St. Michaels and Miles Point III – certainly were projects for which "growth allocation has been awarded by [the Town of St. Michaels], but under Bill 933, would be considered unutilized and accordingly would revert to the County." E. 1103. The Panel was well aware that, were the Commission to approve Bill 933, neither project, both of which had been authorized by the Town of St. Michaels under its approved Critical Area program, could lawfully proceed. Moreover, the Panel knew that Commission approval of Bill 933 would rescind the Commission's October, 2003 approval of the change to St. Michaels' Critical Area program for the Strausburg growth allocation. E. 1103.

Finally, the Panel reviewed growth allocation procedures in other Critical Area programs. Panel members discussed the importance of "procedures being clearly set forth in a coordinated manner in the ordinances and programs of the counties and affected

municipalities,” and the “significance of amending one local program in such a way that it creates conflicts with other approved programs.” E. 1105. At the close of discussion, the Panel voted to recommend denial of Talbot County’s proposed amendment, citing two reasons: (1) that accepting Bill 933 “would negate at least one previous Commission action approving a local program change” (the Strausburg allocation in St. Michaels); and (2) that accepting Bill 933 would “create conflicts between the County program and several approved municipal programs....contrary to the Commission’s oversight role to ensure that local programs are implemented in a consistent and uniform manner.” E. 1107.

At its regular meeting on May 5, 2004, the full Commission voted to deny Talbot County’s proposed program amendment for Bill 933. The Commission also voted to ask the County to work with Commission staff to develop growth allocation provisions that would be compatible with the Critical Area Law. E. 1115-1116. The County Attorney was present at both the Panel meeting and the full Commission meeting. As stated in the Minutes of the May 5, 2004 Commission meeting:

Dave Blazer [a member of the Panel] moved on panel recommendation 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 manner. The motion was seconded by [Commission Member] Bill Giese and carried unanimously.

E. 1115-1116.

On May 14, 2004, Commission staff formally advised Talbot County of the Commission's vote to deny the County's proposed amendment, but that 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." E. 1117-1118. The County declined the Commission's offer and filed suit. After a hearing on the parties' motions for summary judgment, the circuit court granted judgment for the Commission, and affirmed the Commission's rejection of Bill 933 for the reasons stated by the Commission. E. 2240-2242.

#### ARGUMENT

#### **I. THE CRITICAL AREA COMMISSION PROPERLY DENIED TALBOT COUNTY'S BILL 933 AS A REQUEST TO AMEND THE LOCAL CRITICAL AREA PROGRAM.**

Talbot County's Bill 933 flouted the standards, criteria, and purposes of the Critical Area Law. Bill 933 would have negated at least one previous valid State approval of a

Critical Area Program amendment from the Town of St. Michaels. Bill 933 would have needlessly created conflicts between Talbot County's Critical Area Program and the lawfully-enacted Critical Area Programs of St. Michaels, Oxford, and Easton. The Critical Area Commission had not only the authority, but the duty, to reject Bill 933 as an amendment to Talbot County's Critical Area Program.

The Critical Area Commission acts in a "quasi-legislative" capacity when it reviews local critical area programs and program amendments. *North v. Kent Island Limited Partnership*, 106 Md. App. 92, 103 (1995). "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). Under the narrow standard of judicial review for a quasi-legislative action, the Critical Area Commission's denial of Talbot County's proposed amendment to the County's Critical Area program must be affirmed.

**A. The Critical Area Commission Acted Within Its Legal Authority In Denying Talbot County's Proposed Program Amendment Because That Proposed Amendment Would Have Created An Inconsistency Between Talbot County's Program And Other Approved Critical Area Programs.**

The Critical Area Commission "was designed to be an oversight committee." *North v. Kent Island*, 106 Md. App. at 106. In its oversight capacity, the Commission was obligated to reject Bill 933 because the Bill did not meet the standards or goals of the Critical Area law

and criteria. In particular, Bill 933 defies the legislative charge that Critical Area programs are to be implemented in a "consistent and uniform manner." Nat. Res. II §8-1801(b)(2).

Bill 933 directly undermines the purpose of the Critical Area Law's statutory scheme for a land-use program that is consistently implemented throughout Maryland's Bay region. See *Boyle v. Maryland-National Capital Park and Planning Commission*, 385 Md. 142, 154 (2005) ("Important in determining legislative intent . . . is the purpose of the statutory scheme of which the statute under review is a part"). The General Assembly designed the Critical Area program as a Resource Protection Program to be 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." Nat. Res. II §8-1801(b)(2)(emphasis added). By its terms, Bill 933 is antithetical to the cooperation and consistency called for by the General Assembly.

The Bill created inconsistencies among the County's and three Towns' Critical Area programs, all of which were functioning independently, and all of which had been approved by the Commission. The approved municipal programs provide Town processes and standards for the Towns to use in processing applications for growth allocation. Under Bill 933 those Town ordinances are rendered nugatory, because the Towns no longer have any significant growth allocation acreage.<sup>11</sup> By its application, Bill 933 renders null and void projects and Critical Area program changes previously approved, not by Talbot County, but

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<sup>11</sup> According to Talbot County, St. Michaels would have approximately 4.9 acres of growth allocation, and Oxford would have a smaller amount. E. 322.

by other jurisdictions with full planning and zoning powers. The Critical Area Commission correctly recognized the inconsistencies created by Bill 933 in the approved programs of the Talbot County municipalities, and, for that reason, the Commission correctly rejected the Bill.

The Critical Area Law provides that the Critical Area Commission shall approve a program amendment if the amendment meets “(1) [t]he standards set forth in [Nat. Res. II] §8-1808(b)(1) through (3) . . . and (2) [t]he criteria adopted by the Commission under [Nat. Res. II] §8-1808. Code, Nat. Res. II §8-1809(j). Bill 933 failed to meet these standards and criteria in several ways. First, the Bill did not “accommodate growth” as required by Code, Nat. Res. II §8-1808(b)(3). In fact, on its face, Bill 933 *removed* growth allocation acreage that the County previously granted to the Towns of St. Michaels, Easton, and Oxford.

Second, Bill 933 purported to rescind lawful actions of the Town of St. Michaels in approving growth allocation applications for lands within the Town, for the Strausburg and Miles Point III projects. This result of Bill 933 flies in the face of the requirement in COMAR 27.01.02.06 for “counties, in coordination with affected municipalities, [to] establish a process to accommodate the growth needs of the municipalities.” As the circuit court observed, the word “coordination” means “to harmonize, work together, or bring into a common action, effort or condition.” E. 2257, quoting *Network Commerce, Inc. v. Microsoft Corp.*, 260 F. Supp.2d 1034, 1041 (W.D. Wash. 2003), *aff’d*, 422 F.3d 1353 (Fed. Cir. 2005). In the Commission’s and the circuit court’s view, Bill 933 established absolutely no process for coordination between the County and its Towns.

Nor did Talbot County develop Bill 933 "in coordination" with the Towns of St. Michaels, Easton or Oxford, as required by the Criteria, and as it had done in 2000 with its "supplemental" growth allocation bill (Bill 762). All three Towns have at all times opposed Bill 933. See E. 761, Affidavit of Cheril Thomas, Town Manager of St. Michaels; E. 1132, Affidavit of Sidney S. Campen, Jr., President of Commissioners of Oxford; and E. 992-994, Letter from John F. Ford, President, Easton Town Council.<sup>12</sup>

Not only did Bill 933 purport to revoke prior, lawful actions of the Towns, but moreover, the Bill made absolutely no provision for *future* coordination with the Towns to accommodate their growth needs. Although Talbot County asserts (Brief at 29-32) that the "joint review process" of Bill 762 (Supplemental Growth Allocation) would apply to Bill 933, that assertion is belied by the language of Bill 933.<sup>13</sup> The County argued this theory before the Panel, and the full Commission. E. 1103-1106. Neither the Panel nor the Commission accepted the County's argument, for the simple reason that Bill 933 set up no process at all.

Talbot County baldly claims that the Commission "conceded that the joint review process established by Bill 933 complies with the goals and criteria of the Critical Area statute." Brief at 34. The record contains not one shred of support for this assertion. Neither

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<sup>12</sup> Mr. Ford's March 24, 2004 letter to the Chairman of the Commission states: "It is clear that the attempt by the County to reserve to itself the power to impose conditions and limitations on land use projects within municipal boundaries is at variance with every notion of appropriate relations between counties and municipalities in this State." E. 994.

<sup>13</sup> Bill 762 specifically re-enacted the County Code provision granting specific growth allocation acreage to St. Michaels, Oxford, and Easton. These acreage allotments were repealed by Bill 933.

the Panel, nor Commission counsel, nor the Commission has ever agreed with the County's wishful thinking that Bill 933 established any "process" whatsoever for accommodating the growth needs of the Towns. Contrary to the County's argument (Brief at 15) that Bill 933 "set up a joint review process," Bill 933 simply **revokes** all growth allocation acreage from the Towns, and by its terms establishes **no** process for the Towns to reclaim that acreage. E. 1039-1044. Moreover, the Town of Easton, which had used the Bill 762 "joint review" process to obtain supplemental growth allocation, informed the Critical Area Commission that "the process did not reflect close cooperation between the Town and the County on either a procedural or a substantive basis" E. 993.

Bill 933 would have unilaterally changed the way that the Towns had been administering their Critical Area growth for over 15 years. As the circuit court stated, "[p]lainly, in the context of critical area law, 'the ordinary meaning of the word 'coordinate' does not connote a dominating influence.'" E. 2257, *quoting Network Commerce v. Microsoft, supra*. In proposing Bill 933 as an amendment to its Critical Area program, Talbot County ignored its obligation under the Critical Area law to coordinate with the Towns and to accommodate the future growth needs of the Towns. Bill 933 created conflicts between Talbot County's approved Critical Area program and the Critical Area programs of the County's incorporated municipalities. In order to approve Bill 933, the Commission would have had to turn a blind eye to the inconsistency and chaos created by this Bill and thereby abandon its oversight obligations in reviewing proposed local program amendments. *North,*

106 Md. App. at 106. This, the Commission could not and did not do.

**B. The Critical Area Commission Acted Within Its Authority To Deny Approval To Talbot County Bill 933 Because Bill 933 Would Have Negated Previous Lawful State Approval Of A Change To St. Michaels' Critical Area Program.**

Talbot County's Bill 933 left no room for doubt as to its effect upon the 2003 Strausburg growth allocation amendment to the Town of St. Michaels' Critical Area Program: Bill 933 would void the approvals granted to that development by both the Town and by the Critical Area Commission. To contend, as Talbot County does (Brief at 25-30), that the Critical Area Commission could not consider this plainly stated effect of Bill 933 is to demand that the Commission ignore reality.<sup>14</sup>

In October, 2003, the Commission considered the Town of St. Michaels' submission of a proposal to amend its Critical Area program by changing the designation of 21 acres (the Strausburg property) within the Town limits from Resource Conservation Area to Limited Development Area. E. 63. The Commission's approval of St. Michaels' proposed change to its Critical Area maps marked the final step in accomplishing the change to St. Michaels' Critical Area Program. E. 2253. Less than six months later, Talbot County, through Bill 933,

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<sup>14</sup> Talbot County maintains that the Commission may consider only carefully selected sections of the Critical Area Law and criteria. Brief at 27. Talbot County is wrong. In 2006, the General Assembly addressed this misguided notion by "clarifying the authority of the Critical Area Commission and the Chairman regarding program amendments and program refinements." In Chapter 55, 2006 Laws of Maryland, the General Assembly provided that **the Commission "shall determine if the proposed amendment is consistent with the purposes, policies, goals, and the provisions of this subtitle, and all criteria of the Commission."** (Emphasis added, Nat. Res. II 8-1809(o)(2)(Supp. 2006))

in effect attempted to rescind this lawful State approval. Bill 933 provided for the reversion of "unutilized" growth allocation acreage previously awarded by any Town, and, as the circuit court noted, " the Strausburg Subdivision lay squarely within the sights of this automatic reverter." E. 2254. Yet, the Critical Area Commission had no reason to rescind its prior approval. The circuit court summarized:

In essence, what CAC was asked to do by the County was to indirectly ratify a nullification of its own approval of the Strausburg Subdivision. That approval had not been given to action by the County, but to action of the Town of St. Michaels. The approval was wholly valid under the critical area statute, the Town's critical area program and existing provisions of the Talbot County zoning Ordinance. We believe it perfectly obvious that the County has no right to require CAC to approve a measure which has the effect of revoking prior action by [the] Commission.

E. 2254.

The circuit court was right. If the Commission had approved Bill 933, and its concomitant rescission of the approved October, 2003 St. Michaels' program change, the Commission's action would have been challengeable as arbitrary and capricious. The Commission had no choice but to reject Bill 933, a bill that would have blatantly stopped growth allocation projects previously approved by both the Commission and the Town of St. Michaels.<sup>15</sup>

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<sup>15</sup> In addition to the Strausburg growth allocation, the Town of St. Michaels had, in 2003, approved a growth allocation for the Miles Point project, on lands within the Town boundaries. The Town submitted the proposed Miles Point growth allocation to the Critical Area Commission, and the Commission processed the Town's request as a Program amendment. E. 1112-1113. Bill 933 would have rendered the Town's action on the Miles

Talbot County weakly attempts to rebut the fact that Bill 933 would have rescinded approvals granted by both the Town of St. Michaels and the Critical Area Commission by invoking a severability clause in Bill 933 (Brief at 33).<sup>16</sup> The County's argument fails, because Bill 933's severability clause provides that if a "Court" holds any portion of the ordinance invalid, the remaining provisions are still effective. E. 1044-1045. The Commission is not a court. The Commission cannot pick and choose the provisions of a proposed local Critical Area Program amendment that the Commission will consider; rather, the Commission had to give full effect to all provisions of the Bill, as submitted by the County.

The Critical Area Commission, in its oversight authority to review proposals for amendment to local critical area programs, must consider the effect that a local proposal would have on the entire Critical Area, and not merely on one jurisdiction in isolation. In *Kent Island Defense League, LLC v. Queen Anne's County Bd. of Elections*, this Court considered, and rejected, a claim by citizens in Queen Anne's County, that the County's enactment of an ordinance to amend its critical area program was purely "local" action. 145 Md. App. 684, *cert. denied*, 371 Md. 615 (2002). This Court first noted the purpose of the General Assembly to establish a land-use protection program that would be consistent and

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Point project a nullity.

<sup>16</sup> Section 2 of Bill 933 provides that "[i]f 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."

uniform throughout the State-wide Critical Area. 145 Md. App. at 686. While Queen Anne's County had enacted the ordinances in question, the ordinances were "enacted pursuant to a public general law, ...[and] all of the County's actions with respect to its Critical Area program were taken pursuant to mandatory language in the State Critical Area law, a public general law, binding on the County." 145 Md. App. at 692.

Expressly rejecting the argument that the ordinances were enacted pursuant to the County's zoning and land use powers, the *Kent Island* Court stated: "Amendments to the County Critical Area program, ... are not zoning matters. ... The ordinances were part of the implementation of a State program in which *uniformity is required and in which the Commission is given authority to achieve such uniformity.*" *Id.* at 693 (emphasis added).

The *Kent Island* Court's reasoning is instructive here: Because the ordinances "...were enacted pursuant to a public general law, ... they are not purely local in origin or effect. *Any change to the County's Critical Area program has a potential effect on the entire Critical Area.*" *Id.* at 695 (emphasis added). This conclusion is precisely what the Commission articulated in rejecting Talbot County's Bill 933: the Bill would have affected other Critical Area programs, previously approved and legitimately in force, in contravention of the Commission's duty to ensure consistent and uniform implementation of the Critical Area law.

The Critical Area Commission's rejection of Bill 933 on the basis of the impact on prior Town and Commission actions fits squarely within the Commission's statutory criteria

and oversight responsibilities in reviewing proposed amendments for a Statewide resource protection program.

**II. THE CRITICAL AREA COMMISSION ACTED IN A TIMELY MANNER IN ACCEPTING AND PROCESSING TALBOT COUNTY'S PROPOSED AMENDMENT.**

The lower court was correct in its factual finding that insufficient evidence supported the County's claim that the Commission missed any mandatory deadline for processing Bill 933. E. 2298. The facts support the Commission's position that the Commission staff met the 10 working day administrative processing time provided by Nat. Res. II §8-1809(m)(2); and, even if the Commission did not meet the time deadline, the statute establishes no penalty for such a failure.

The Critical Area Law provides that, within 10 working days of receiving a proposed amendment, the Commission shall mail a notification to the local jurisdiction that the proposal has been accepted or return the proposal as incomplete. Code, Nat. Res. II §8-1809(m)(2). In this case, Talbot County initially sent Bill 933 to the Critical Area Commission in a letter dated December 29, 2003, inquiring when the Commission might "discuss" Bill 933. E. 1060; E. 2033. The Commission received this correspondence on December 31, 2003. E. 2033. Subsequent phone conversations ensued between Commission staff and County staff, (E. 2034) and, on January 15, 2004, Ren Serey, the Executive Director of the Commission, wrote to the County to confirm that the County would provide additional information as requested

by the Commission.<sup>17</sup> E. 2035.

By letter of January 19, 2004, the County acknowledged that Commission staff had determined that the initial submission was incomplete, and that additional information had been requested. E. 1060 (“Mr. Ren Serey has requested additional information regarding Bill 933 which has been outlined within this cover letter.”). As the lower court found, “[i]t is undisputed that the County’s original submission was found to be incomplete, which resulted in extensive exchanges, telephonic and otherwise, between staff personnel of CAC and the County. Ultimately, all parties recognized that sufficient information had been provided and the matter moved forward.” E. 2259.

The County’s letter submitting the requested additional information was dated January 19, 2004. That day, however, was Martin Luther King Day and therefore a legal holiday.<sup>18</sup> Thus, the earliest date that the letter could have been mailed was January 20, 2004, and the earliest date the Critical Area Commission could have received it was January 21, 2004.<sup>19</sup> Ten working days after January 21, 2004<sup>20</sup> was February 5, 2004, the date Commission mailed

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<sup>17</sup> Mr. Serey’s letter stated: “As we discussed, it is my understanding that *the County will be submitting this Bill [933]* 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.*” (Emphasis added).

<sup>18</sup> The United States Post Office is closed on legal holidays.

<sup>19</sup> The Commission received the letter, but the date stamp on it is illegible. *See* E. 1059-1060.(copy of letter).

<sup>20</sup> “In computing any period of time prescribed or allowed by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included.” Code, Art. 1, §36.

a letter to Talbot County stating that Bill 933 had been accepted for processing. E. 1062. Ninety (90) days from that date was May 5, 2004, the date the Commission acted timely to deny the proposed amendment. As the lower court observed, “the County does not claim that it was unaware that the proposal had been accepted for processing or that it actively participated in various hearings and other proceedings on that basis.” E. 2259.

Second, even if the Commission missed the 10 working day window for determining whether to accept for processing the County’s application, there is no legal consequence associated with failure to comply with this deadline. The lower court recognized that “the critical area statute provides no penalty for failure to provide notice of acceptance. Under the circumstances here, we decline to provide one.” E. 2259. The fact that there is no consequence stated in the statute means that the 10 working day processing time frame is directory, not mandatory. “The question of whether a statutory provision using the words ‘shall’ is mandatory or directory ‘turns upon the intention of the Legislature. . . .’” *Solomon v. Board of Physician Quality Assur.*, 132 Md.App. 447, 456 (2000) (internal quotation marks omitted). “One indication that the Legislature intended a time limitation to be directory instead of mandatory is if . . . there is no sanction for noncompliance.” *Id.* See also *Resetar v. State Board of Education*, 284 Md. 537, 548, *cert. denied*, 444 U.S. 838 (1979) (“we have regarded as significant the fact that the language of the statute under consideration provided no penalty for failure to act within the time prescribed”). Here, as the lower court correctly observed, there is no penalty for failure to meet the 10 working day requirement. E. 2259.

The only sanction provided in the Critical Area Law for the Commission's failure to act is set forth in Code, Nat. Res. II §8-1808(o). If the Commission does not act on (vote on) on a proposed amendment "within 90 days of the Commission's acceptance of the proposal" the proposal is deemed approved. Here, it is undisputed that the Commission acted to disapprove Bill 933 on May 5, 2004. The lower court found as a fact that the Commission acted within 90 days of the date the Commission accepted the County's proposal (February 5, 2004). E. 2259.<sup>21</sup> This Court should not disturb that finding of fact.

### CONCLUSION

For the reasons and authorities cited above, the Department of Natural Resources, Critical Area Commission, respectfully requests this Honorable Court to affirm the action of the Critical Area Commission.

Respectfully Submitted,

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<sup>21</sup> "Plaintiff had the burden of proving that [Commission] action was not taken within 90 days of acceptance. We have no hesitation in finding as matters of fact that plaintiff has not met that burden and that, in any event, the most credible proof is that acceptance of the [proposed] program occurred within 90 days prior to May 5, 2004." E. 2259.

Date: March 22, 2007

Statement Pursuant to Rule 8-504(a)(8): This Brief was prepared in Times New Roman, thirteen (13) point font.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd day of March, 2007, two copies of the foregoing  
Department of Natural Resources' Brief were sent via overnight mail to:

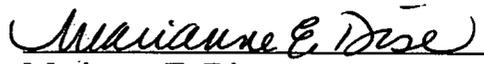
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# Annotated Code of Maryland

RULES OF INTERPRETATION

Art. 1, § 36

## § 36. How computed.

In computing any period of time prescribed or allowed by any applicable statute, the day of the act, event, or default, after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless: (1) It is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday or a holiday; or, (2) the act to be done is the filing of some paper in court and the office of the clerk of said court on said last day of the period is not open, or is closed for a part of a day, in which event, the period runs until the end of the next day which is neither a Sunday, Saturday, a legal holiday, or a day on which the said office is not open the entire day during ordinary business hours. When the period of time allowed is more than seven days, intermediate Sundays and holidays shall be considered as other days; but if the period of time allowed is seven days or less, intermediate Sundays and holidays shall not be counted in computing the period of time. (An. Code, 1951, § 2; 1941, ch. 522; 1957, ch. 399, § 40; 1991, ch. 352; 1997, ch. 31, § 6.)

**Cross references.** — As to computation of time under Election Code, see § 1-301 of the Election Law Article.

For provisions of Maryland Rules as to computation of time, see Maryland Rule 1-203 (a), (b).

**Legislative intent.** — The purpose of this section is to establish a uniform method of computing any period of time prescribed or allowed by the rules of any court, or by order of court, or by any applicable statute. A uniform procedure for computing statutory periods is equitable for two reasons: First, a set method of time computation brings a degree of certainty to the law; second, by excluding the first day and counting from the first whole day following the event, a party will not be prejudiced if the triggering event occurs toward the end of the day. *Hampton v. University of Md.*, 109 Md. App. 297, 674 A.2d 145 (1996), cert. denied, 343 Md. 333, 681 A.2d 68 (1996), cert. denied, 519 U.S. 1032, 117 S. Ct. 592, 136 L. Ed. 2d 521 (1996).

**Computation of period for lottery tickets.** — One-year period allowed for claim of prize on winning State lottery ticket commences on the day following the drawing in which the ticket became a winner and runs up to, but not including, the correspondingly identified month and day of the next successive year. 60 Op. Att'y Gen. 439 (1975).

Under Maryland Rule 1-203 and Art. 1, § 36, the three-year statute of limitations on woman's claim began to run on April 4, 1997, and expired on April 3, 2000. *Mason v. Bd. of Educ.*, 143 Md. App. 507, 795 A.2d 211 (2002), aff'd, 375 Md. 504, 826 A.2d 433 (2003).

**Applicability of section to § 6-308 of the Tax - Property Article.** — The provisions of this section, providing that, in computing time periods, the day of the event from which the period runs is not counted, but the last day of the period is counted, are applicable to former Article 81, § 232C (d) (now see § 6-308 of the Tax - Property Article). 64 Op. Att'y Gen. 20 (1979).

**Applicability to § 16-203 of the Insurance Article.** — Former Article 48A, § 390 (now § 16-203 (a) and (b) of the Insurance Article) was not exempted from the policy of uniformity mandated by this section, and therefore, the date of issue of a life insurance policy must be excluded in computing the period during which the policy remains contestable. *Equitable Life Assurance Soc'y of United States v. Jalowsky*, 306 Md. 257, 508 A.2d 137 (1986).

Where the last day for a defendant to file a post conviction petition fell on a Saturday, Maryland Rule 1-203 and this section, gave him until the following Monday to file his petition. *Grayson v. State*, 354 Md. 1, 728 A.2d 1280 (1999).

**Effect of legal holiday on swearing in official.** — State's Attorney would be sworn in on Tuesday, January 3, 1995, rather than the first Monday in January, which was a legal holiday. 79 Op. Att'y Gen. 438 (December 12, 1994).

**Stated in** *Mason v. Bd. of Educ.*, 375 Md. 504, 826 A.2d 433 (2003).

**Cited in** *Hyder v. Montgomery County*, 160 Md. App. 482, 864 A.2d 279 (2004), cert. denied, — Md. —, 872 A.2d 47 (2005).

# Annotated Code of Maryland

## § 8-1802

## NATURAL RESOURCES

(13) "Local jurisdiction" means a county, or a municipal corporation with planning and zoning powers, in which any part of the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area, as defined in this subtitle, is located.

(14) (i) "Program" means the critical area protection program of a local jurisdiction.

(ii) "Program" includes any amendments to the program.

(15) (i) "Program amendment" means any change to an adopted program that the Commission determines will result in a use of land or water in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner not provided for in the adopted program.

(ii) "Program amendment" includes a change to a zoning map that is not consistent with the method for using the growth allocation contained in an adopted program.

(16) (i) "Program refinement" means any change to an adopted program that the Commission determines will result in a use of land or water in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner consistent with the adopted program.

(ii) "Program refinement" includes:

1. A change to a zoning map that is consistent with the development area designation of an adopted program; and

2. The use of the growth allocation in accordance with an adopted program.

(17) (i) "Project approval" means the approval of development, other than development by a State or local government agency, in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area by the appropriate local approval authority.

(ii) "Project approval" includes:

1. Approval of subdivision plats and site plans;

2. Inclusion of areas within floating zones;

3. Issuance of variances, special exceptions, and conditional use permits; and

4. Approval of rezoning.

(iii) "Project approval" does not include building permits.

(b) *Parties subject to obligation imposed by subtitle.* — Wherever this subtitle requires Prince George's County to exercise any power or authority Prince George's County shares with the Maryland-National Capital Park and Planning Commission, the obligation imposed by this subtitle rests on both the county and the Maryland-National Capital Park and Planning Commission in accordance with their respective powers and authorities. (1984, ch. 794; 1990, ch. 6, § 2; ch. 649, § 2; 1995, ch. 626; 2002, ch. 433; 2004, chs. 526, 546.)

**Effect of amendments.** — Chapter 433, Acts 2002, effective June 1, 2002, inserted present (a) (2) through (4) and redesignated former (a) (2) as present (a) (5); in present (a) (5), deleted "Chesapeake Bay" preceding "Critical Area," and inserted "for the Chesapeake and Atlantic Coastal Bays"; inserted present (a) (6) and redesignated the remaining paragraphs accordingly; inserted "or Atlantic Coastal Bays

Critical Area" in present (a) (8) and (10); and inserted "or the Atlantic Coastal Bays Critical Area" in present (a) (11), (13) (i), (14) (i), and (15) (i).

Chapter 526, Acts 2004, effective June 1, 2004, inserted present (a)(4) and redesignated the remaining subsections accordingly.

Chapter 546, Acts 2004, effective June 1, 2004, inserted the paragraph designated herein

# 2006 Laws of Maryland

ROBERT L. EHRLICH, JR., Governor

Ch. 55

(1) compare the credentialing system for health providers used in the State to the systems used in other states;

(2) compare the uniform credentialing form used in the State to the format used by the Council for Affordable Quality Healthcare;

(3) identify the mechanisms used by physicians and other health care providers to complete credentialing; and

(4) identify ways to improve the credentialing system used in the State.

(b) On or before January 1, 2007, the Administration shall report its findings, in accordance with § 2-1246 of the State Government Article, to the Senate Finance Committee and the House Health and Government Operations Committee.

SECTION 2. 3. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2006.

Enacted April 7, 2006.

## CHAPTER 55

(Senate Bill 751)

AN ACT concerning

**Chesapeake and Atlantic Coastal Bays Critical Area Protection Program -  
Critical Area Commission - Authority**

FOR the purpose of clarifying the authority of the Critical Area Commission and the chairman regarding program amendments and program refinements; altering the guidelines for local jurisdictions for the location of new intensely developed and limited development areas; altering the Commission's approval process for program amendments and program refinements; clarifying the procedures for growth allocation requests by local jurisdictions; clarifying certain terms; defining certain terms; and generally relating to the authority of the Commission and the Chairman of the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program.

BY repealing and reenacting, with amendments,

Article - Natural Resources

Section 8-1802(a), 8-1808.1(c), and 8-1809(o), (p), and (q)

Annotated Code of Maryland

(2000 Replacement Volume and 2005 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - Natural Resources

8-1802.

(a) (1) In this subtitle the following words have the meanings indicated.

(2) "Atlantic Coastal Bays" means the Assawoman, Isle of Wight, Sinepuxent, Newport, and Chincoteague Bays.

(3) "Atlantic Coastal Bays Critical Area" means the initial planning area identified under § 8-1807 of this subtitle.

(4) "Buffer" means an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from man-made disturbances.

(5) "Chesapeake Bay Critical Area" means the initial planning area identified under § 8-1807 of this subtitle.

(6) "Commission" means the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays established in this subtitle.

(7) "Critical Area" means the Chesapeake Bay Critical Area and the Atlantic Coastal Bays Critical Area.

(8) "DEVELOPER" MEANS:

(I) A PERSON WHO UNDERTAKES DEVELOPMENT AS DEFINED IN THIS SECTION; OR

(II) A PERSON WHO UNDERTAKES DEVELOPMENT ACTIVITIES AS DEFINED IN THE CRITERIA OF THE COMMISSION.

(9) "Development" means any activity that materially affects the condition or use of dry land, land under water, or any structure.

[(9)](10) (i) "Dwelling unit" means a single unit providing complete, independent living facilities for at least one person, including permanent provisions for sanitation, cooking, eating, sleeping, and other activities routinely associated with daily life.

(ii) "Dwelling unit" includes a living quarters for a domestic or other employee or tenant, an in-law or accessory apartment, a guest house, or a caretaker residence.

[(10)](11) "Growth allocation" means the number of acres of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area that a local jurisdiction may use to create new intensely developed areas and new limited development areas.

[(11)](12) "Includes" means includes or including by way of illustration and not by way of limitation.

[(12)] (13) "Land classification" means the designation of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in accordance with the criteria adopted by the Commission as an intensely developed area or district, a limited development area or district, or a resource conservation area or district.

[(13)] (14) "Local jurisdiction" means a county, or a municipal corporation with planning and zoning powers, in which any part of the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area, as defined in this subtitle, is located.

[(14)] (15) (i) "Program" means the critical area protection program of a local jurisdiction.

(ii) "Program" includes any amendments to the program.

[(15)] (16) (i) "Program amendment" means any change OR PROPOSED CHANGE to an adopted program [that the Commission determines will result in a use of land or water in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner not provided for in the adopted program] THAT IS NOT DETERMINED BY THE COMMISSION CHAIRMAN TO BE A PROGRAM REFINEMENT.

(ii) "Program amendment" includes a change to a zoning map that is not consistent with the method for using the growth allocation contained in an adopted program.

[(16)] (17) (i) "Program refinement" means any change OR PROPOSED CHANGE to an adopted program that the Commission CHAIRMAN determines will result in a use of land or water in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner consistent with the adopted program, OR THAT WILL NOT SIGNIFICANTLY AFFECT THE USE OF LAND OR WATER IN THE CRITICAL AREA.

(ii) "Program refinement" [includes] MAY INCLUDE:

1. A change to [a zoning map that is consistent with the development area designation of] an adopted program THAT RESULTS FROM STATE LAW; [and]

2. [The use of the growth allocation in accordance with an adopted program] A CHANGE TO AN ADOPTED PROGRAM THAT AFFECTS LOCAL PROCESSES AND PROCEDURES;

3. A CHANGE TO A LOCAL ORDINANCE OR CODE THAT CLARIFIES AN EXISTING PROVISION; AND

4. A MINOR CHANGE TO AN ELEMENT OF AN ADOPTED PROGRAM THAT IS CLEARLY CONSISTENT WITH THE PROVISIONS OF THIS SUBTITLE AND ALL OF THE CRITERIA OF THE COMMISSION.

[(17)](18) (i) "Project approval" means the approval of development, other than development by a State or local government agency, in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area by the appropriate local approval authority.

(ii) "Project approval" includes:

1. Approval of subdivision plats and site plans;
2. Inclusion of areas within floating zones;
3. Issuance of variances, special exceptions, and conditional use permits; and
4. Approval of rezoning.

(iii) "Project approval" does not include building permits.

8-1808.1.

(c) (1) When locating new intensely developed or limited development areas, local jurisdictions ~~{shall use the following guidelines;} AND THE COMMISSION SHALL ENSURE THAT THE GUIDELINES IN THIS SUBSECTION HAVE BEEN APPLIED IN A MANNER THAT IS CONSISTENT WITH THE COMMISSION'S PURPOSE, POLICIES, GOALS, ALL CRITERIA, AND THE PROVISIONS OF THIS SUBTITLE.~~

~~(b) THE GUIDELINES FOR LOCATING NEW INTENSELY DEVELOPED OR LIMITED DEVELOPMENT AREAS ARE AS FOLLOWS:~~

[(1) New intensely developed areas should be located in limited development areas or adjacent to existing intensely developed areas;

(2) New limited development areas should be located adjacent to existing limited development areas or intensely developed areas;]

(I) LOCATE A NEW INTENSELY DEVELOPED AREA SHOULD BE LOCATED IN A LIMITED DEVELOPMENT AREA OR ADJACENT TO AN EXISTING INTENSELY DEVELOPED AREA;

(II) LOCATE A NEW LIMITED DEVELOPMENT AREA SHOULD BE LOCATED ADJACENT TO AN EXISTING LIMITED DEVELOPMENT AREA OR AN INTENSELY DEVELOPED AREA;

(III) LOCATE A NEW LIMITED DEVELOPMENT AREA OR AN INTENSELY DEVELOPED AREA SHOULD BE LOCATED IN A MANNER THAT MINIMIZES IMPACTS TO A HABITAT PROTECTION AREA AS DEFINED IN COMAR 27.01.09, AND IN AN AREA AND MANNER THAT OPTIMIZES BENEFITS TO WATER QUALITY; AND

(IV) LOCATE A NEW INTENSELY DEVELOPED AREA OR A LIMITED DEVELOPMENT AREA TO BE LOCATED IN A RESOURCE CONSERVATION AREA SHOULD BE LOCATED AT LEAST 300 FEET BEYOND THE LANDWARD EDGE OF TIDAL WETLANDS OR TIDAL WATERS;

[(3)](V) Except as provided in [paragraph (5)] ITEM (VII) of this [subsection] PARAGRAPH, no more than one-half of the expansion allocated in the criteria of the Commission may be located in resource conservation areas;

[(4)](VI) New intensely developed or limited development areas to be located in the resource conservation area shall conform to all criteria of the Commission [for intensely developed or limited development areas] and shall be designated on the comprehensive zoning map submitted by the local jurisdiction as part of its application to the Commission for program approval or at a later date in compliance with § 8-1809(g) of this subtitle; and

[(5)](VII) In Calvert, Caroline, Cecil, Charles, Dorchester, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester counties, if the county is unable to utilize a portion of the growth allocated to the county in [paragraphs (1) and (2)] ~~THIS PARAGRAPH OR PARAGRAPH (1) OF THIS SUBSECTION~~ ITEMS (I) AND (II) OF THIS PARAGRAPH within or adjacent to existing intensely developed or limited development areas as demonstrated in the local plan approved by the Commission, then that portion of the allocated expansion which cannot be so located may be located in the resource conservation area in addition to the expansion allocated in [paragraph (3) of this subsection] ~~ITEM (V) OF THIS PARAGRAPH~~ ITEM (V) OF THIS PARAGRAPH. A developer shall be required to cluster any development in an area of expansion authorized under this paragraph.

(2) THE COMMISSION SHALL ENSURE THAT THE GUIDELINES IN PARAGRAPH (1) OF THIS SUBSECTION HAVE BEEN APPLIED IN A MANNER THAT IS CONSISTENT WITH THE PURPOSES, POLICIES, GOALS, AND PROVISIONS OF THIS SUBTITLE, AND ALL CRITERIA OF THE COMMISSION.

8-1809.

(o) (1) For proposed program amendments, a Commission panel shall hold a public hearing in the local jurisdiction, and the Commission shall act on the proposed program amendment within 90 days of the Commission's acceptance of the proposal. If action by the Commission is not taken within 90 days, the proposed program amendment is deemed approved.

(2) THE COMMISSION SHALL DETERMINE IF THE PROPOSED AMENDMENT IS CONSISTENT WITH THE COMMISSION'S PURPOSE PURPOSES, POLICIES, GOALS, ALL CRITERIA, AND AND THE PROVISIONS OF THIS SUBTITLE, AND ALL CRITERIA OF THE COMMISSION.

(3) IN ACCORDANCE WITH THE COMMISSION'S DETERMINATION IN PARAGRAPH (2) OF THIS SUBSECTION, THE COMMISSION SHALL:

(I) APPROVE THE PROPOSED PROGRAM AMENDMENT AND NOTIFY THE LOCAL JURISDICTION;

(II) DENY THE PROPOSED PROGRAM AMENDMENT;

(III) APPROVE THE PROPOSED PROGRAM AMENDMENT SUBJECT TO ONE OR MORE CONDITIONS; OR

(IV) RETURN THE PROPOSED PROGRAM AMENDMENT TO THE LOCAL JURISDICTION WITH A LIST OF THE CHANGES TO BE MADE.

(4) IF THE COMMISSION APPROVES A PROPOSED PROGRAM AMENDMENT SUBJECT TO ONE OR MORE CONDITIONS UNDER ITEM (3)(III) OF THIS SUBSECTION, THE LOCAL JURISDICTION SHALL NOTIFY THE COMMISSION WITHIN 30 ~~60~~ DAYS OF ITS INTENT TO ~~COMPLY WITH~~ ADOPT THE CONDITIONS.

[(2)](5) The local jurisdiction shall incorporate the approved program amendment AND ANY REQUIRED CONDITIONS into the adopted program within 120 days of receiving notice from the Commission that the program amendment has been approved.

(p) (1) Proposed program refinements shall be determined as provided in this subsection.

(2) (i) Within 30 days of the Commission's acceptance of a proposal to change an adopted program, the chairman, on behalf of the Commission, may determine that the proposed change is a program refinement. Immediately upon making a determination under this paragraph, the chairman shall notify the Commission of that determination.

(ii) If a proposed change that was specifically submitted as a program refinement is not acted on by the chairman within the 30-day period, the Commission shall notify the appropriate local jurisdiction that the proposed change has been deemed to be a program amendment.

(3) (i) The Commission may vote to override the chairman's determination only at the first Commission meeting where a quorum is present following the chairman's determination.

(ii) If the chairman's determination is overridden, the proposed change is deemed a program amendment, which shall be decided by the Commission in accordance with the procedures for program amendments provided in this section, except that the Commission shall act on the program amendment within 60 days after a vote to override the chairman.

(iii) If the chairman's determination is not overridden, within 10 working days after the opportunity to override the chairman's decision under item (i) of this paragraph, the chairman, on behalf of the Commission, shall:

1. DETERMINE IF THE PROGRAM REFINEMENT IS CONSISTENT WITH THE PURPOSES, POLICIES, GOALS, AND PROVISIONS OF THIS SUBTITLE, AND ALL CRITERIA OF THE COMMISSION; AND

~~1.~~ 2. A. Approve the proposed program refinement and notify the local jurisdiction;

~~2.~~ B. Deny the program refinement; [or]

3. C. [Send the proposed program refinement back to the local jurisdiction with a list of specific changes to be made] APPROVE THE PROPOSED PROGRAM REFINEMENT SUBJECT TO ONE OR MORE CONDITIONS; OR

4. D. RETURN THE PROPOSED PROGRAM REFINEMENT BACK TO THE LOCAL JURISDICTION WITH A LIST OF THE CHANGES TO BE MADE.

(iv) [Within 10 working days of receiving a changed program refinement changed in accordance with item (iii)3 of this paragraph, the chairman shall approve or deny the program refinement.] IF THE COMMISSION APPROVES A PROPOSED PROGRAM REFINEMENT SUBJECT TO ONE OR MORE CONDITIONS UNDER ITEM (III)3 OF THIS PARAGRAPH, THE LOCAL JURISDICTION SHALL NOTIFY THE COMMISSION WITHIN ~~30~~ 60 DAYS OF ITS INTENT TO ~~COMPLY WITH~~ ADOPT THE CONDITIONS.

(4) A local jurisdiction shall incorporate an approved program refinement AND ANY REQUIRED CONDITIONS into its adopted program within 120 days of receiving notice from the chairman that the program refinement has been approved.

(q) (1) (I) As necessary, a local jurisdiction may combine any or all proposed program amendments or program refinements required for a specific project approval into a single request to the Commission for program amendment, program refinement, or both.

(II) THE COMMISSION SHALL ENSURE THAT ANY REQUESTS RECEIVED IN ACCORDANCE WITH THIS PARAGRAPH ARE CONSISTENT WITH THE PURPOSES, POLICIES, GOALS, AND PROVISIONS OF THIS SUBTITLE, AND ALL CRITERIA OF THE COMMISSION.

(2) A PROJECT FOR WHICH A LOCAL JURISDICTION REQUESTS GROWTH ALLOCATION MAY BE SUBMITTED AS A PROPOSED PROGRAM AMENDMENT, PROGRAM REFINEMENT, OR BOTH.

(3) Approval by the Commission of a program amendment, program refinement, or both does not affect the Commission's authority to receive notice of or intervene in a project approval that was not specifically approved by the Commission as part of its approval of a program amendment or program refinement.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2006.

Enacted April 7, 2006.

**Article - Natural Resources**

8-1801.

(a) The General Assembly finds and declares that:

(1) The Chesapeake Bay and its tributaries are natural resources of great significance to the State and the nation;

(2) The shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats;

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

(5) Those portions of the Chesapeake Bay and its tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor;

(6) The quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake Bay and its tributaries;

(7) The restoration of the Chesapeake Bay and its tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands;

(8) The cumulative impact of current development is inimical to these purposes; and

(9) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity in a consistent and uniform manner along shoreline areas of the Chesapeake Bay and its tributaries so as to minimize damage to water quality and natural habitats.

(b) It is the purpose of the General Assembly in enacting this subtitle:

(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.

8-1808.

(a) (1) 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.

(2) The Governor shall include in the budget a sum of money to be used for grants to reimburse local jurisdictions for the reasonable costs of developing a program under this section. Each local jurisdiction shall submit to the Governor [by October 31, 1984] a detailed request for funds that are equivalent to the additional costs incurred in developing the program under this section.

(3) The Governor shall include in the budget annually a sum of money to be used for grants to assist local jurisdictions with the reasonable costs of implementing a program under this section. Each local jurisdiction shall submit to the Governor by May 1 of each year a detailed request for funds to assist in the implementation of a program under this section.

(b) 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 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 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.

(c) At a minimum, a program sufficient to meet the goals stated in subsection (b) of this section includes:

(1) A map designating the critical area in a local jurisdiction;

(2) A comprehensive zoning map for the critical area;

(3) As necessary, new or amended provisions of the jurisdiction's:

(i) Subdivision regulations;

(ii) Comprehensive or master plan;

(iii) Zoning ordinances or regulations;

(iv) Provisions relating to enforcement; and

(v) Provisions as appropriate relating to grandfathering of development at the time the program is adopted or approved by the Commission;

(4) Provisions requiring that project approvals shall be based on findings that projects are consistent with the standards stated in subsection (b) of this section;

(5) Provisions to limit the amount of land covered by buildings, roads, parking lots, or other impervious surfaces, and to require or encourage cluster development, where necessary or appropriate;

(6) Establishment of buffer areas along shorelines within which agriculture will be permitted only if best management practices are used, provided that structures or any other use of land which is necessary for adjacent agriculture shall also be permitted in any buffer area;

(7) Requirements for minimum setbacks for structures and septic fields along shorelines;

(8) Designation of shoreline areas, if any, that are suitable for parks, hiking, biking, wildlife refuges, scenic drives, public access or assembly, and water-related recreation such as boat slips, piers, and beaches;

(9) Designation of shoreline areas, if any, that are suitable for ports, marinas, and industries that use water for transportation or derive economic benefits from shore access;

(10) Provisions requiring that all harvesting of timber in the Chesapeake Bay Critical Area be in accordance with plans approved by the district forestry board;

(11) Provisions establishing that the controls in a program which are designed to prevent runoff of pollutants will not be required on sites where the topography prevents runoff from directly or indirectly reaching tidal waters; [and]

(12) Provisions for reasonable accommodations in policies or procedures when the accommodations are necessary to avoid discrimination on the basis of physical disability, including provisions that authorize a local jurisdiction to require removal of a structure that was installed or built to accommodate a physical disability and require restoration when the accommodation permitted by this paragraph is no longer necessary; AND

(13) EXCEPT AS PROVIDED IN SUBSECTION (D) OF THIS SECTION, PROVISIONS FOR GRANTING A VARIANCE TO THE LOCAL JURISDICTION'S CRITICAL AREA PROGRAM, IN ACCORDANCE WITH REGULATIONS ADOPTED BY THE COMMISSION CONCERNING VARIANCES SET FORTH IN COMAR 27.01.11.

(D) (1) ~~IN THIS SUBSECTION, "UNWARRANTED HARDSHIP" MEANS THAT, WITHOUT A VARIANCE, AN APPLICANT WOULD BE DENIED REASONABLE AND SIGNIFICANT USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.~~

(2) A VARIANCE TO A LOCAL JURISDICTION'S CRITICAL AREA PROGRAM MAY NOT BE GRANTED UNLESS:

(I) DUE TO SPECIAL FEATURES OF A SITE, OR SPECIAL CONDITIONS OR CIRCUMSTANCES PECULIAR TO THE APPLICANT'S LAND OR STRUCTURE, A LITERAL ENFORCEMENT OF THE CRITICAL AREA PROGRAM WOULD RESULT IN UNWARRANTED HARDSHIP TO THE APPLICANT;

(II) THE LOCAL JURISDICTION FINDS THAT THE APPLICANT HAS SATISFIED EACH ONE OF THE VARIANCE PROVISIONS ~~SET FORTH IN THE LOCAL JURISDICTION'S CRITICAL AREA PROGRAM~~; AND

(III) WITHOUT THE VARIANCE, THE APPLICANT WOULD BE DEPRIVED OF A USE OF LAND OR A STRUCTURE PERMITTED TO OTHERS IN ACCORDANCE WITH THE PROVISIONS OF THE ~~JURISDICTION'S CRITICAL AREA PROGRAM~~.

(2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

(3) THIS SUBSECTION DOES NOT APPLY TO BUILDING PERMITS OR ACTIVITIES THAT COMPLY WITH A BUFFER EXEMPTION PLAN OR BUFFER MANAGEMENT PLAN OF A LOCAL JURISDICTION WHICH HAS BEEN APPROVED BY THE COMMISSION.

(E) (1) The Commission shall adopt by regulation on or before December 1, 1985 criteria for program development and approval, which are necessary or appropriate to achieve the standards stated in subsection (b) of this section. Prior to developing its criteria and also prior to adopting its criteria, the Commission shall hold at least 6 regional public hearings, 1 in each of the following areas:

- (i) Harford, Cecil, and Kent counties;
- (ii) Queen Anne's, Talbot, and Caroline counties;
- (iii) Dorchester, Somerset, and Wicomico counties;
- (iv) Baltimore City and Baltimore County;
- (v) Charles, Calvert, and St. Mary's counties; and
- (vi) Anne Arundel and Prince George's counties.

(2) During the hearing process, the Commission shall consult with each affected local jurisdiction.

(F) Nothing in this section shall impede or prevent the dredging of any waterway in a critical area. However, dredging in a critical area is subject to other applicable federal and State laws and regulations.

8-1809.

(g) Each local jurisdiction shall review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least

every [4] 6 years [beginning with the 4-year anniversary of the date that the program became effective and every 4 years after that date] ~~IN COORDINATION WITH THE REVIEW OF THE COMPREHENSIVE PLAN BY THE PLANNING COMMISSION AS REQUIRED UNDER ARTICLE 66B, §§ 1.03(B) AND 3.05(B) OF THE CODE.~~ Each local jurisdiction shall send in writing to the Commission, within 60 days after [each 4-year anniversary,] ~~THE COMPLETION OF ITS REVIEW,~~ the following information:

- (1) A statement certifying that the required review has been accomplished;
- (2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;
- (3) An updated resource inventory; and
- (4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any variance application for which a petition for judicial review of a decision to grant or deny a variance under a local critical area program was filed before the effective date of this Act.

~~SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2002.~~

SECTION 2-3. AND BE IT FURTHER ENACTED, That this Act is an emergency measure, is necessary for the immediate preservation of the public health or safety, has been passed by a ye and nay vote supported by three fifths of all the members elected to each of the two Houses of the General Assembly, and shall take effect from the date it is enacted shall take effect June 1, 2002.

May 16, 2002.

## CHAPTER 432

(House Bill 528)

AN ACT concerning

### Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested; providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer

every [4] 6 years [beginning with the 4-year anniversary of the date that the program became effective and every 4 years after that date] ~~IN COORDINATION WITH THE REVIEW OF THE COMPREHENSIVE PLAN BY THE PLANNING COMMISSION AS REQUIRED UNDER ARTICLE 66B, §§ 1.03(B) AND 3.05(B) OF THE CODE.~~ Each local jurisdiction shall send in writing to the Commission, within 60 days after [each 4-year anniversary,] ~~THE COMPLETION OF ITS REVIEW,~~ the following information:

- (1) A statement certifying that the required review has been accomplished;
- (2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;
- (3) An updated resource inventory; and
- (4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any variance application for which a petition for judicial review of a decision to grant or deny a variance under a local critical area program was filed before the effective date of this Act.

~~SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2002.~~

SECTION 3. AND BE IT FURTHER ENACTED, That this Act is an emergency measure, is necessary for the immediate preservation of the public health or safety, has been passed by a ye and nay vote supported by three fifths of all the members elected to each of the two Houses of the General Assembly, and shall take effect from the date it is enacted shall take effect June 1, 2002.

May 16, 2002.

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## CHAPTER 432

(House Bill 528)

AN ACT concerning

### Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested; providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer

exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term~~; removing certain obsolete language; providing for the application of this Act; and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,

Article - Natural Resources

Section 8-1801

Annotated Code of Maryland

(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,

Article - Natural Resources

Section 8-1808 and 8-1809(g)

Annotated Code of Maryland

(2000 Replacement Volume and 2001 Supplement)

Preamble

WHEREAS, State lawmakers in 1984 recognized the importance of fostering more sensitive development activity along the shoreline areas of the Chesapeake Bay and its tributaries, from the standpoint of protecting and preserving water quality and natural habitats, with the adoption of the Chesapeake Bay Critical Area Protection Act; and

WHEREAS, The grandfathering provisions of the enabling Act and its accompanying Criteria provided certain exemptions for grandfathered properties from density limits, but the Criteria expressly provided that grandfathered properties were not exempt from Habitat Protection Area (HPA) or water-dependent facilities requirements; and

WHEREAS, The Criteria provide that variances to a jurisdiction's local Critical Area Program may be granted in certain circumstances; and

WHEREAS, Recent decisions by the Maryland Court of Appeals have held that a variance may be granted if the regulations would deny development on a specific portion of an applicant's property rather than considering alternative locations on-site; and

WHEREAS, The Court of Appeals has ruled that a local Board of Appeals, when determining if denial of a variance would deny an applicant rights commonly enjoyed by others in the Critical Area, may compare a proposal to nonconforming uses or development that predated implementation of a local Critical Area Program; and

WHEREAS, The Court of Appeals has ruled that an applicant for a variance from Critical Area requirements may generally satisfy the variance standards of a local zoning ordinance, rather than satisfy all of the standards; and

WHEREAS, These recent rulings by the Court of Appeals are contrary to the intent of the General Assembly in enacting the Chesapeake Bay Critical Area Protection Act; and

WHEREAS, It is the intent of this Act to overrule these recent decisions of the Court of Appeals regarding variances to Critical Area regulations; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

**Article - Natural Resources**

8-1801.

(a) The General Assembly finds and declares that:

(1) The Chesapeake Bay and its tributaries are natural resources of great significance to the State and the nation;

(2) The shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats;

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

(5) Those portions of the Chesapeake Bay and its tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor;

(6) The quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake Bay and its tributaries;

(7) The restoration of the Chesapeake Bay and its tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands;

(8) The cumulative impact of current development is inimical to these purposes; and

(9) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity in a consistent and uniform manner along shoreline areas of the Chesapeake Bay and its tributaries so as to minimize damage to water quality and natural habitats.

(b) It is the purpose of the General Assembly in enacting this subtitle:

(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.

8-1808.

(a) (1) 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.

(2) The Governor shall include in the budget a sum of money to be used for grants to reimburse local jurisdictions for the reasonable costs of developing a program under this section. Each local jurisdiction shall submit to the Governor [by October 31, 1984] a detailed request for funds that are equivalent to the additional costs incurred in developing the program under this section.

(3) The Governor shall include in the budget annually a sum of money to be used for grants to assist local jurisdictions with the reasonable costs of implementing a program under this section. Each local jurisdiction shall submit to the Governor by May 1 of each year a detailed request for funds to assist in the implementation of a program under this section.

(b) 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 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 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.

(c) At a minimum, a program sufficient to meet the goals stated in subsection (b) of this section includes:

(1) A map designating the critical area in a local jurisdiction;

(2) A comprehensive zoning map for the critical area;

(3) As necessary, new or amended provisions of the jurisdiction's:

(i) Subdivision regulations;

- (ii) Comprehensive or master plan;
  - (iii) Zoning ordinances or regulations;
  - (iv) Provisions relating to enforcement; and
  - (v) Provisions as appropriate relating to grandfathering of development at the time the program is adopted or approved by the Commission;
- (4) Provisions requiring that project approvals shall be based on findings that projects are consistent with the standards stated in subsection (b) of this section;
- (5) Provisions to limit the amount of land covered by buildings, roads, parking lots, or other impervious surfaces, and to require or encourage cluster development, where necessary or appropriate;
- (6) Establishment of buffer areas along shorelines within which agriculture will be permitted only if best management practices are used, provided that structures or any other use of land which is necessary for adjacent agriculture shall also be permitted in any buffer area;
- (7) Requirements for minimum setbacks for structures and septic fields along shorelines;
- (8) Designation of shoreline areas, if any, that are suitable for parks, hiking, biking, wildlife refuges, scenic drives, public access or assembly, and water-related recreation such as boat slips, piers, and beaches;
- (9) Designation of shoreline areas, if any, that are suitable for ports, marinas, and industries that use water for transportation or derive economic benefits from shore access;
- (10) Provisions requiring that all harvesting of timber in the Chesapeake Bay Critical Area be in accordance with plans approved by the district forestry board;
- (11) Provisions establishing that the controls in a program which are designed to prevent runoff of pollutants will not be required on sites where the topography prevents runoff from directly or indirectly reaching tidal waters; [and]
- (12) Provisions for reasonable accommodations in policies or procedures when the accommodations are necessary to avoid discrimination on the basis of physical disability, including provisions that authorize a local jurisdiction to require removal of a structure that was installed or built to accommodate a physical disability and require restoration when the accommodation permitted by this paragraph is no longer necessary; AND
- (13) EXCEPT AS PROVIDED IN SUBSECTION (D) OF THIS SECTION, PROVISIONS FOR GRANTING A VARIANCE TO THE LOCAL JURISDICTION'S CRITICAL AREA PROGRAM, IN ACCORDANCE WITH REGULATIONS ADOPTED BY THE COMMISSION CONCERNING VARIANCES SET FORTH IN COMAR 27.01.11.

~~(D) (1) IN THIS SUBSECTION, "UNWARRANTED HARDSHIP" MEANS THAT, WITHOUT A VARIANCE, AN APPLICANT WOULD BE DENIED REASONABLE AND SIGNIFICANT USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.~~

~~(2) A VARIANCE TO A LOCAL JURISDICTION'S CRITICAL AREA PROGRAM MAY NOT BE GRANTED UNLESS:~~

~~(I) DUE TO SPECIAL FEATURES OF A SITE, OR SPECIAL CONDITIONS OR CIRCUMSTANCES PECULIAR TO THE APPLICANT'S LAND OR STRUCTURE, A LITERAL ENFORCEMENT OF THE CRITICAL AREA PROGRAM WOULD RESULT IN UNWARRANTED HARDSHIP TO THE APPLICANT;~~

~~(II) THE LOCAL JURISDICTION FINDS THAT THE APPLICANT HAS SATISFIED EACH ONE OF THE VARIANCE PROVISIONS; AND~~

~~(III) WITHOUT THE VARIANCE, THE APPLICANT WOULD BE DEPRIVED OF A USE OF LAND OR A STRUCTURE PERMITTED TO OTHERS IN ACCORDANCE WITH THE PROVISIONS OF THE JURISDICTION'S CRITICAL AREA PROGRAM.~~

~~(2) (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.~~

~~(4) (3) THIS SUBSECTION DOES NOT APPLY TO BUILDING PERMITS OR ACTIVITIES THAT COMPLY WITH A BUFFER EXEMPTION PLAN OR BUFFER MANAGEMENT PLAN OF A LOCAL JURISDICTION WHICH HAS BEEN APPROVED BY THE COMMISSION.~~

[(d)] (E) (1) The Commission shall adopt by regulation on or before December 1, 1985 criteria for program development and approval, which are necessary or appropriate to achieve the standards stated in subsection (b) of this section. Prior to developing its criteria and also prior to adopting its criteria, the Commission shall hold at least 6 regional public hearings, 1 in each of the following areas:

- (i) Harford, Cecil, and Kent counties;
- (ii) Queen Anne's, Talbot, and Caroline counties;
- (iii) Dorchester, Somerset, and Wicomico counties;
- (iv) Baltimore City and Baltimore County;
- (v) Charles, Calvert, and St. Mary's counties; and
- (vi) Anne Arundel and Prince George's counties.

(2) During the hearing process, the Commission shall consult with each affected local jurisdiction.

~~[(e)]~~ (F) Nothing in this section shall impede or prevent the dredging of any waterway in a critical area. However, dredging in a critical area is subject to other applicable federal and State laws and regulations.

8-1809.

(g) Each local jurisdiction shall review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every ~~[4]~~ 6 years [beginning with the 4-year anniversary of the date that the program became effective and every 4 years after that date] ~~IN COORDINATION WITH THE REVIEW OF THE COMPREHENSIVE PLAN BY THE PLANNING COMMISSION AS REQUIRED UNDER ARTICLE 66B, §§ 1-03(B) AND 3-05(B) OF THE CODE.~~ Each local jurisdiction shall send in writing to the Commission, within 60 days after [each 4-year anniversary,] ~~THE COMPLETION OF ITS REVIEW,~~ the following information:

- (1) A statement certifying that the required review has been accomplished;
- (2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;
- (3) An updated resource inventory; and
- (4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any variance application for which a petition for judicial review of a decision to grant or deny a variance under a local critical area program was filed before the effective date of this Act.

SECTION 2. 3. AND BE IT FURTHER ENACTED, That this Act shall take effect June 1, 2002.

Approved May 16, 2002.

**CHAPTER 433**

**(House Bill 301)**

AN ACT concerning

**Atlantic Coastal Bays Protection Act**

FOR the purpose of preserving, protecting, and improving the water quality and natural habitats of the Atlantic Coastal Bays and certain tributaries and streams by designating certain lands and waters as critical areas that require especially sensitive consideration with regard to development; making certain legislative findings; renaming the Chesapeake Bay Critical Area Commission to

# 1986 Laws of Maryland

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## JOINT RESOLUTIONS

No. 36

(House Joint Resolution No. 17)

A House Joint Resolution concerning

### Environmental Protection - Chesapeake Bay - Critical Areas

FOR the purpose of preserving the quality of the Chesapeake Bay and its tributaries by affirming criteria for local critical area program development adopted by the Chesapeake Bay Critical Area Commission.

WHEREAS, In 1984 the Governor and the General Assembly recognized that there is a critical and substantial State interest in restoring the quality and productivity of the Chesapeake Bay and its tributaries; and

WHEREAS, In response to this concern, the Governor proposed and the General Assembly approved a package of 34 initiatives designed to diminish urban and agricultural nonpoint source pollution, upgrade publicly owned sewage treatment plants, improve fishery management, reduce shoreline erosion, and foster more sensitive development along the Chesapeake Bay and its tributaries; and

WHEREAS, Among these initiatives was the establishment of the Chesapeake Bay Critical Area Commission to guide local jurisdictions in their development of a critical area protection program; and

WHEREAS, The Commission was directed to promulgate criteria for program development and approval which would achieve the following goals:

(1) 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) Conserve fish, wildlife, and plant habitat;

(3) Establish land use policies for development in the Chesapeake Bay 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; and

WHEREAS, Prior to developing and adopting its criteria, the Commission held 16 public hearings throughout the State and met representatives from local governments, the agricultural, forestry, real estate, and environmental communities, as well as other concerned citizens; and

HARRY HUGHES, Governor

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WHEREAS, The criteria were submitted to several legislative committees for their review and input during the 1985 interim; and

WHEREAS, The criteria were overwhelmingly endorsed by the Commission, whose members represent diverse geographic and economic interests; and

WHEREAS, The Commission promulgated the final proposed criteria in the November 22, 1985 issue of the Maryland Register under COMAR 14.15.01 through 14.15.11; now, therefore, be it

RESOLVED BY THE GENERAL ASSEMBLY OF MARYLAND, That the criteria for local critical area program development adopted by the Chesapeake Bay Critical Area Commission are hereby affirmed as being reasonable and acceptable to accomplish the goals of the Chesapeake Bay Critical Area Protection Program; and be it further

RESOLVED, That a copy of this Resolution be sent to the Governor of the State of Maryland.

Signed May 13, 1986.

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No. 37

(Senate Joint Resolution No. 9)

A Senate Joint Resolution concerning

Environmental Protection - Chesapeake Bay - Critical Areas

FOR the purpose of preserving the quality of the Chesapeake Bay and its tributaries by affirming criteria for local critical area program development adopted by the Chesapeake Bay Critical Area Commission.

WHEREAS, In 1984 the Governor and the General Assembly recognized that there is a critical and substantial State interest in restoring the quality and productivity of the Chesapeake Bay and its tributaries; and

WHEREAS, In response to this concern, the Governor proposed and the General Assembly approved a package of 34 initiatives designed to diminish urban and agricultural nonpoint source pollution, upgrade publicly owned sewage treatment plants, improve fishery management, reduce shoreline erosion, and foster more sensitive development along the Chesapeake Bay and its tributaries; and

WHEREAS, Among these initiatives was the establishment of the Chesapeake Bay Critical Areas Commission to guide local

## JOINT RESOLUTIONS

jurisdictions in their development of a critical area protection program; and

WHEREAS, The Commission was directed to promulgate criteria for program development and approval which would achieve the following goals:

(1) 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) Conserve fish, wildlife, and plant habitat;

(3) Establish land use policies for development in the Chesapeake Bay 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; and

WHEREAS, Prior to developing and adopting its criteria, the Commission held 16 public hearings throughout the State and met representatives from local governments, the agricultural, forestry, real estate, and environmental communities, as well as other concerned citizens; and

WHEREAS, The criteria were submitted to several legislative committees for their review and input during the 1985 interim; and

WHEREAS, The criteria were overwhelmingly endorsed by the Commission, whose members represent diverse geographic and economic interests; and

WHEREAS, The Commission promulgated the final proposed criteria in the November 22, 1985 issue of the Maryland Register under COMAR 14.15.01 through 14.15.11; now, therefore, be it

RESOLVED BY THE GENERAL ASSEMBLY OF MARYLAND, That the criteria for local critical area program development adopted by the Chesapeake Bay Critical Area Commission are hereby affirmed as being reasonable and acceptable to accomplish the goals of the Chesapeake Bay Critical Area Protection Program; and be it further

RESOLVED, That a copy of this Resolution be sent to the Governor of the State of Maryland.

Signed May 13, 1986.

**Title 27**  
**CHESAPEAKE BAY CRITICAL AREA COMMISSION**

**Subtitle 01 CRITERIA FOR LOCAL CRITICAL AREA PROGRAM  
DEVELOPMENT**

**Chapter 02 Development in the Critical Area**

Authority: Natural Resources Article, §8-1808(d), Annotated Code of Maryland

**.01 Introduction.**

The Commission is charged with the development of criteria that will accommodate growth, and also provide for the conservation of habitat and the protection of water quality in the Critical Area. In this chapter, criteria are proposed for directing, managing, and controlling development (e.g., residential, commercial, industrial and related facilities) so that the adverse impacts of growth in the Critical Area are minimized. These criteria are based on the general policies found in Regulation .02.

**.02 General Policies.**

A. In order to recognize already existing land uses and development in the Critical Area, the Commission recognizes these three types of development areas:

- (1) Intensely developed areas;
- (2) Limited development areas; and
- (3) Resource conservation areas.

B. Within each jurisdiction, intense development should be directed outside the Critical Area. Future intense development activities, when proposed in the Critical Area, shall be directed towards the intensely developed areas.

C. Additional low intensity development may be permitted in the limited development areas, but shall be subject to strict regulation to prevent adverse impacts on habitat and water quality.

D. Development shall be limited in the resource conservation area, which shall be chiefly designated for agriculture, forestry, fisheries activities, other resource utilization activities and for habitat protection.

E. Local jurisdictions shall identify each of the three areas within their jurisdiction based on the criteria to follow, and develop policies and programs to achieve the objectives as proposed by the Commission.

F. Activities Not Permitted.

(1) Certain new development, or redevelopment activities or facilities, because of their intrinsic nature, or because of their potential for adversely affecting habitats or water quality, may not be permitted in the Critical Area except in intensely developed areas under Regulation .03 of this chapter, and only after the activity or facility has demonstrated to all appropriate local and State permitting agencies that there will be a net improvement in water quality to the adjacent body of water. These activities include the following:

(a) Nonmaritime heavy industry;

(b) Transportation facilities and utility transmission facilities, except those necessary to serve permitted uses, or where regional or interstate facilities must cross tidal waters (utility transmission facilities do not include power plants); or

(c) Permanent sludge handling, storage, and disposal facilities, other than those associated with wastewater treatment facilities. However, agricultural or horticultural use of sludge under appropriate approvals when applied by an approved method at approved application rates may be permitted in the Critical Area, except in the 100-foot Buffer.

(2) Local jurisdictions may preclude additional development activities that they consider detrimental to water quality or fish, wildlife, or plant habitats within their jurisdictions.

G. Certain new development activities or facilities, or the expansion of certain existing facilities, because of their intrinsic nature, or because of their potential for adversely affecting habitat and water quality, may not be permitted in the Critical Area unless no environmentally acceptable alternative exists outside the Critical Area, and these development activities or facilities are needed in order to correct an existing water quality or wastewater management problem. These include:

(1) Solid or hazardous waste collection or disposal facilities; or

(2) Sanitary landfills.

H. Existing, permitted facilities of the type noted in §G(1) and (2), above, shall be subject to the standards and requirements of the Maryland Department of the Environment, under COMAR Title 26.

**.03 Intensely Developed Areas.**

A. Intensely developed areas are those areas where residential, commercial, institutional, and/or industrial, developed land uses predominate, and where relatively little natural habitat occurs. These areas shall have at least one of the following features:

(1) Housing density equal to or greater than four dwelling units per acre;

(2) Industrial, institutional, or commercial uses are concentrated in the area; or

(3) Public sewer and water collection and distribution systems are currently serving the area and housing density is greater than three dwelling units per acre.

B. In addition, these features shall be concentrated in an area of at least 20 adjacent acres, or that entire upland portion of the Critical Area within the boundary of a municipality, whichever is less.

C. In developing their Critical Area programs, local jurisdictions shall follow these policies when addressing intensely developed areas:

(1) Improve the quality of runoff from developed areas that enters the Chesapeake Bay or its tributary streams;

(2) Accommodate additional development of the type and intensity designated by the local jurisdiction provided that water quality is not impaired;

(3) Minimize the expansion of intensely developed areas into portions of the Critical Area designated as habitat protection areas under COMAR 27.01.09 and resource conservation areas under Regulation .05 of this chapter;

(4) Conserve and enhance fish, wildlife, and plant habitats, as identified in COMAR 27.01.09, to the extent possible, within intensely developed areas; and

(5) Encourage the use of retrofitting measures to address existing stormwater management problems.

D. In developing their Critical Area programs, local jurisdictions shall use the following criteria for intensely developed areas:

(1) Local jurisdictions shall develop a strategy to reduce the impacts on water quality that are generated by existing development. This shall include an assessment of water quality and impacts to biological resources prompted by community redevelopment plans and programs and may further include a public education program, the implementation of urban best management practices, and the use of such techniques as are outlined in §D(9)(a), below.

(2) Development and redevelopment shall be subject to the habitat protection area criteria prescribed in COMAR 27.01.09.

(3) Stormwater.

(a) The local jurisdiction shall require, at the time of development or redevelopment, technologies as required by applicable State and local ordinances to minimize adverse impacts to water quality caused by stormwater.

(b) In the case of redevelopment, if these technologies do not reduce pollutant loadings by at least 10 percent below the level of pollution on the site prior to redevelopment, then offsets shall be provided.

(c) In the case of new development, offsets as determined by the local jurisdiction shall be used if they reduce pollutant loadings by at least 10 percent of the predevelopment levels.

(d) Offsets may be provided either on or off site, provided that water quality benefits are equivalent, that their benefits are obtained within the same watershed, and that the benefits can be determined through the use of modeling, monitoring, or other computation of mitigation measures.

(4) If practicable, permeable areas shall be established in vegetation and, whenever possible, redevelopment shall reduce existing levels of pollution.

(5) Areas of public access to the shoreline, such as foot paths, scenic drives, and other public recreational facilities, should be maintained and, if possible, encouraged to be established within intensely developed areas.

(6) Ports and industries which use water for transportation and derive economic benefits from shore access, shall be located near existing port facilities. Local jurisdictions may identify other sites for planned future port facility development and use if this use will provide significant economic benefit to the State or local jurisdiction

and is consistent with the provisions of COMAR 27.01.03.03—.05 and 27.01.09, and other State and federal regulations.

(7) Local jurisdictions shall be encouraged to establish, with assistance from the State, programs for the enhancement of biological resources within the Critical Area for their positive effects on water quality and urban wildlife habitat. These programs may include urban forestry, landscaping, gardens, wetland, and aquatic habitat restoration elements.

(8) To the extent practicable, future development shall use cluster development as a means to reduce impervious areas and to maximize areas of natural vegetation.

(9) When the cutting or clearing of trees in forests and developed woodland areas is associated with current or planned development activities, the following shall be required:

(a) Establishment of programs for the enhancement of forest and developed woodland resources such as programs for urban forestry (for example, street tree plantings, gardens, landscaping, open land buffer plantings);

(b) Establishment by regulation that development activities shall be designed and implemented to minimize destruction of forest and woodland vegetation; and

(c) Protection for existing forests and developed woodlands identified as habitat protection areas in COMAR 27.01.09.

#### **.04 Limited Development Areas.**

A. Limited development areas are those areas which are currently developed in low or moderate intensity uses. They also contain areas of natural plant and animal habitats, and the quality of runoff from these areas has not been substantially altered or impaired. These areas shall have at least one of the following features:

(1) Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre;

(2) Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space;

(3) Areas meeting the conditions of Regulation .03A, but not .03B, of this regulation;

(4) Areas having public sewer or public water, or both.

subtitle and to eliminate all runoff caused by the development in excess of that which would have come from the site if it were in its predevelopment state.

(c) Stormwater management measures shall be consistent with the requirements of Environment Article, §4-201 et seq., Annotated Code of Maryland.

**.05 Resource Conservation Areas.**

A. Resource conservation areas are those areas characterized by nature-dominated environments (that is, wetlands, forests, abandoned fields) and resource-utilization activities (that is, agriculture, forestry, fisheries activities, or aquaculture). These areas shall have at least one of the following features:

- (1) Density is less than one dwelling unit per 5 acres; or
- (2) Dominant land use is in agriculture, wetland, forest, barren land, surface water, or open space.

B. In developing their Critical Area programs, local jurisdictions shall follow these policies when addressing resource conservation areas:

- (1) Conserve, protect, and enhance the overall ecological values of the Critical Area, its biological productivity, and its diversity;
- (2) Provide adequate breeding, feeding, and wintering habitats for those wildlife populations that require the Chesapeake Bay, its tributaries, or coastal habitats in order to sustain populations of those species;
- (3) Conserve the land and water resource base that is necessary to maintain and support land uses such as agriculture, forestry, fisheries activities, and aquaculture; and
- (4) Conserve the existing developed woodlands and forests for the water quality benefits that they provide.

C. In developing their Critical Area programs, local jurisdictions shall use all of the following criteria for resource conservation areas:

- (1) Land use management practices shall be consistent with the policies and criteria for habitat protection areas in COMAR 27.01.09, the policies and criteria for agriculture in COMAR 27.01.06, and the policies and criteria on forestry in COMAR 27.01.05.
- (2) Agricultural and conservation easements shall be promoted in resource conservation areas.

(3) Local jurisdictions are encouraged to develop tax or other incentive/disincentive programs to promote the continuation of agriculture, forestry, and natural habitats in resource conservation areas.

(4) Land within the resource conservation area may be developed for residential uses at a density not to exceed one dwelling unit per 20 acres. Within this limit of overall density, minimum lot sizes may be determined by the local jurisdiction. Local jurisdictions are encouraged to consider such mechanisms as cluster development, transfer of development rights, maximum lot size provisions, and/or additional means to maintain the land area necessary to support the protective uses.

(5) Existing industrial and commercial facilities, including those that directly support agriculture, forestry, aquaculture, or residential development not exceeding the density specified in §C(4), above, shall be allowed in resource conservation areas. Additional land may not be zoned for industrial or commercial development, except as provided in Regulation .06, below.

(6) Local jurisdictions shall develop a program to assure that the overall acreage of forest and woodland within their resource conservation areas does not decrease.

(7) Development activity within the resource conservation area shall be consistent with the criteria for limited development areas in Regulation .04.

(8) 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 that no such conveyance will result in a density greater than 1 dwelling unit per 20 acres.

#### **.06 Location and Extent of Future Intensely Developed and Limited Development Areas.**

A. Intensely developed and limited development areas may be increased subject to these guidelines:

(1) The area of expansion of intensely developed or limited development areas, or both, may not exceed an area equal to 5 percent of the county's portion of the resource conservation area lands that are not tidal wetlands or federally owned;

(2) 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.

B. When locating new intensely developed or limited development areas, local jurisdictions shall use these guidelines:

(1) New intensely developed areas should be located in limited development areas or adjacent to existing intensely developed areas;

(2) New limited development areas should be located adjacent to existing limited development areas or intensely developed areas;

(3) No more than one half of the allocated expansion may be located in resource conservation areas;

(4) New intensely developed areas and limited development areas should be located in order to minimize impacts to habitat protection areas as specified in COMAR 27.01.09 and in an area and in a manner that optimizes benefits to water quality;

(5) New intensely developed areas should be located where they minimize their impacts to the defined land uses of the resource conservation area;

(6) New intensely developed areas and limited development areas in the resource conservation area should be located at least 300 feet beyond the landward edge of tidal wetlands or tidal waters.

#### .07 Grandfathering.

A. After program approval, local jurisdictions shall permit the continuation, but not necessarily the intensification or expansion, of any use in existence on the date of program approval, unless the use has been abandoned for more than 1 year or is otherwise restricted by existing local ordinances. If any existing use does not conform with the provisions of a local program, its intensification or expansion may be permitted only in accordance with the variance procedures outlined in COMAR 27.01.11.

B. Local jurisdictions shall establish grandfather provisions as part of their local Critical Area programs. Except as otherwise provided, local jurisdictions shall permit the types of land described in the following subsections to be developed in accordance with density requirements in effect prior to the adoption of the local Critical Area program notwithstanding the density provisions of this chapter. A local jurisdiction shall permit a single lot or parcel of land that was legally of record on the date of program approval to be developed with a single family dwelling, if a dwelling is not already placed there,