

Talbot County v. Town of Oxford Brief of Appelles Miles Point Property LLC & the Midland Companies, Inc. Sept 2006 MSA\_S\_1831-17

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**IN THE COURT OF SPECIAL APPEALS OF MARYLAND**

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No. 01509  
September Term, 2006

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**TALBOT COUNTY, MARYLAND**

Appellant

v.

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

Cross-Appellant and Appellees

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

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**BRIEF OF APPELLEES**  
**MILES POINT PROPERTY LLC AND THE MIDLAND COMPANIES, INC.**

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## I. STATEMENT OF THE CASE

This case arises out of enactment of certain local critical area legislation known as "Bill 933" by Talbot County, acting through its County Council (the "County"). Pursuant to Bill 933 the County sought to "take back" or rescind growth allocation<sup>1</sup> that was allocated to the Towns of St. Michaels and Oxford when Talbot County's local critical area program was formulated in 1989. In reliance on the County's allocation of a specified amount of growth allocation acreage to St. Michaels and Oxford, both Towns devoted considerable local resources toward establishing and implementing local critical area programs. Like Oxford, St. Michaels' "local program" was approved by the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("CAC"). The cooperation between the County and the municipalities when these government bodies first enacted their local critical area programs in 1989 is in sharp contrast to the total lack of coordination with the affected municipalities exhibited by the County when it unilaterally enacted Bill 933. Bill 933 is a thinly veiled attempt by the County to exercise jurisdictional control over a land use decision in St. Michaels as a result of its award of growth allocation for the "Miles Point Project."

Because Bill 933 constituted a proposed amendment to the County's critical area program, it had to be approved by the CAC in accordance with Section 8-1809(i) of the Natural Resources Article of the Maryland Code ("NR") and in accordance with Section 190-109C of the Talbot County Code ("TCC"). The CAC declined to approve Bill 933

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<sup>1</sup> Growth allocation is an overlay zone reclassification process whereby property located with the Chesapeake Bay Critical Area is permitted to be more intensely developed than one (1) unit per twenty (20) acres.

because it would have created irreconcilable differences between local municipal and County critical area programs. Moreover, Bill 933 was not in compliance with the critical area statute and the applicable critical area criteria set forth in the CAC regulations, specifically COMAR 27.01.01 *et al.* The County filed a complaint for declaratory relief against the CAC on June 11, 2004 challenging the CAC's denial of the County's program amendment. The Towns of St. Michaels and Oxford were permitted to intervene in the case as defendants by Order dated December 1, 2004. Miles Point Property LLC and The Midland Companies, Inc. (collectively "Miles Point") were permitted to intervene as defendants by Order dated December 7, 2005. On cross-motions for summary judgment the Circuit Court for Talbot County entered summary judgment affirming the CAC's decision to decline approval of Bill 933 as a program amendment. The County filed a premature Notice of Appeal on April 13, 2006. The Court of Special Appeals dismissed the County's appeal by Order dated July 7, 2006. Following the entry of a final judgment by the Circuit Court for Talbot County on August 14, 2006, the County filed a Notice of Appeal on September 5, 2006.

## II. QUESTION PRESENTED

Whether it was within the CAC's legislative prerogative to decline to approve Bill 933 as a program amendment based upon the County's failure to coordinate with the affected municipalities by proposing legislation that conflicts with the Towns of Oxford's and St. Michaels' local critical area programs?

## III. BACKGROUND FACTS RELATING TO THE MILES POINT PROJECT

A. The Miles Point Project

Miles Point is the owner of approximately 72 acres of waterfront real property located within the Town (the "Property"), having been annexed into the Town in 1980. The parties to the Annexation Agreement are: (1) Miles Point, as successor-in-title to the Property, (2) the Town, and (3) *the County*. (E 1344-54). The Annexation Agreement intends for the Property to be developed. Specifically, page two of the Annexation Agreement provides "St. Michaels believes that the annexation is desirable and both St. Michaels and the County are agreeable to the proposed development as hereinafter set forth." (E 1345).

Between 1998 and 2000, Miles Point submitted three different plans to the Town pursuant to which Miles Point sought growth allocation to develop the Property as contemplated by the Town and Talbot County in the Annexation Agreement (the "Miles Point Project"). (E1243-44). During the Town's growth allocation deliberations, it sought and obtained direction from the County, specifically Dan Cowee, who was then the Talbot County Director of Planning. With respect to the Town's award of growth allocation for the Miles Point Project, the County Director of Planning advised the Town of St. Michaels Planning Commission (the "Town Planning Commission") as follows:

You're dealing with two separate issues. The first one is growth allocation and I've read your information on it, I read our information on it, and everything that I've seen so far points a finger to the fact that your comprehensive plan, **the County's Comprehensive Plan, our zoning ordinance**, and your zoning ordinance all basically **dictate that that's an area for future growth**, and that's the process that we go through every five to ten years. We go through, we review our comprehensive plans, we locate those areas outside town boundaries, inside town boundaries, for future growth. I, I think that's a given. I think you know

that's a given. **That everything that we read says that's an area to be further developed in one fashion or another.**

(E 1356) (emphasis added). The Talbot County Director of Planning went on to say "[y]ou're going to look at the County's plan and see that it has been approved by the Critical Area Commission and it indicates that growth allocation should be applied to that property at some point in the future." (E 1356).

Following various legal proceedings involving each of the three development plans submitted by Miles Point for the Property, Miles Point and a citizens group from the St. Michaels area appointed by the Town Commissioners participated in mediation in 2002 and 2003 at the request of the Attorney General's Office and the Secretaries of Planning and Smart Growth. (E 1244-45). The purpose of the mediation was to resolve differences concerning the specific development plan for the Miles Point Project. (E 1245). Following input from the Town and various citizens groups, Miles Point submitted an application, referred to as the Miles Point II Application, in 2003 that requested growth allocation for the Property. (E 1245-46). The Miles Point II Application proposed development of not only the subject Property which is already within the Town, but also of approximately 17 acres of land owned by Miles Point located immediately adjacent to the Property, but just outside of the Town's municipal boundaries. (E 1247). Accordingly, the Miles Point II application required the Town to annex that additional 17 acres. After several public hearings between September and November 2003, the Town Planning Commission recommended growth allocation approval of the Miles Point II Application, and the Town of St. Michaels annexed the 17

acres by resolution dated October 28, 2003. (E 1247). However, as a result of the County Council's opposition to the Miles Point development project, the County declined to relinquish zoning authority over the 17 acres of land annexed by the Town of St. Michaels until expiration of five (5) years in accordance with Section 9(c) of Article 23A of the Maryland Code. (E 1247). As a result, Miles Point submitted a revised application, referred to as the Miles Point III Application, that did not include the newly annexed property in the development plan. (E 1249-50). The Town Commissioners unanimously approved the Miles Point III Application and awarded growth allocation to Miles Point to convert approximately 71 acres of the Property from Resource Conservation Area ("RCA") to an Intense Development Area ("IDA"). (E 1250). The designation of the Property as IDA permits Miles Point to develop the Property to the level of density permitted by the underlying R-1 zoning of the Property that the County and the Town agreed to in the Annexation Agreement. (E 1250).

**B. The Miles Point Project has been awarded 70.86 acres of growth allocation by the Town of St. Michaels.**

The Town awarded the Miles Point Project 70.86 acres of growth allocation following numerous lengthy hearings in the fall of 2003 and winter of 2004. In accordance with Section 8-1809(i) of the Natural resources Article, the Town submitted to the CAC its request for an amendment to its local critical area plan as a result of the Town's approval of Miles Point's request for growth allocation. Although the CAC approved the IDA map amendment for the Property on May 5, 2004, the CAC attempted to impose conditions upon the specific development plan associated with the Town's

grant of growth allocation to Miles Point. (E 1369-75). The Circuit Court for Talbot County invalidated the conditions imposed by the CAC on the Miles Point III development plan. (E 1383-93). On remand to the CAC, on May 4, 2005, the CAC awarded a growth allocation map amendment without any conditions subject to its appeal of the circuit court's April 11, 2004 Order. (E 1393). Subsequently, during the pendency of the appeal, Miles Point submitted a revised plan that the CAC determined satisfied all applicable critical area criteria. Accordingly, the CAC entered into a settlement agreement with Miles Point dated September 7, 2005 through which the previously imposed conditions were removed in consideration for Miles Point implementing the development plan known as the "MP III - 150' Plan", which proposed a buffer of development of 150 feet from the landward edge of the Property. (E 1394-1405). Accordingly, the Miles Point Property has been awarded 70.86 acres of growth allocation by the Town which has also been approved by the CAC. The County sought to undo the growth allocation approval for the Miles Point Project through Bill 933. (E 1406-07).

#### IV. FACTS REGARDING BILL 933

A. The County enacted Bill 933 without any coordination with the Town of St. Michaels or the other municipalities affected by the legislation contrary to the Critical Area law and the CAC criteria.

Pursuant to Section 8-1809(j) of the Natural Resources Article, the CAC is required to review a proposed amendment to a local critical area program for consistency with the standards set forth in section 8-1808(b)(1) through (3) and the criteria adopted by the CAC. Among the criteria adopted by the CAC is COMAR 27.01.02.06A(2), which provides in pertinent part as follows:

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). The record in this case is devoid of any coordination between the County and the Town to cooperatively establish a process that would accommodate the Town's growth needs. On the contrary, as set forth below, the County intentionally precluded any input from, or cooperation with, the Town of St. Michaels during the pendency of Bill 933.

On November 18, 2003, after the County recognized that the Miles Point Project would receive growth allocation from the Town, several County Council members introduced Bill 933 without any prior consultation with the Town. (E 1359-67). At the time of submission of Bill 933, the County Council openly opposed the Miles Point Project, going so far as to issue an unsolicited public recommendation to the Town that it deny the growth allocation request for the Miles Point Project. (E 1417).

Bill 933 purported to repeal, or take back, all growth allocation acreage that Talbot County previously delegated to each of the Towns, including the 245 acres of growth allocation delegated to St. Michaels.<sup>2</sup> (E 1327-1334). At the time Bill 933 was enacted (and currently), there was no major growth allocation request pending in any of the Towns within Talbot County except for the Miles Point Project.

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<sup>2</sup> When the County adopted its critical area program in 1989, 245 acres of growth allocation were provided to the Town of St. Michaels. See Talbot County Zoning Ordinance § 190-109D(9)(a). The Town adopted its own local critical area program to administer this growth allocation acreage.

Following its introduction, the County forwarded Bill 933 to the Talbot County Planning Commission (the "County Planning Commission") for its recommendation. At a public hearing before the County Planning Commission, representatives of the Towns of Oxford, St. Michaels and Trappe objected to Bill 933 because the County had failed to coordinate with them prior to its introduction. (E 1418-19). Because the County failed to cooperatively work with the municipalities, *the County Planning Commission recommended against the adoption of Bill 933.* (E 1421-22).

Thereafter, on December 16, 2003, at a public hearing before the County Council on Bill 933, the Towns of Oxford and St. Michaels requested that the County delay enactment of Bill 933 to provide time for the municipalities to coordinate with the County relative to the establishment of a process to accommodate their anticipated growth needs and their need for growth allocation to accommodate those needs. (E 1427-34). The Town Attorney for St. Michaels, H. Michael Hickson, pleaded with the County Council to work with the St. Michaels Commissioners to cooperatively establish a process for the awarding of growth allocation within the Town, as follows:

Looking at the Bill itself, it would appear that at the very least the County Council is going to assume a veto power over any development proposal that may come forth in the town in the critical area. **To this point I respectfully suggest that there has been no indication to the towns as to what the problem is and the invitation to the towns to get together collectively with the County and work on solving this problem in a less drastic way.** I would suggest that this is an extremely drastic way to withdraw all of the growth allocation from the towns and start over again. **It may well be if the towns can get together we can come up with some sort of formula that would please every one, or at least please most of the people.**

(E 1428-29) (Emphasis added). Mr. Hickson summed up his comments to the County Council by stating: "I'm trying to be conciliatory. The town would like to find a way we can work together." (E 1441).

The comments from various citizens and citizens groups at the December 16, 2003 public hearing demonstrate that Bill 933 was intended by the County Council to thwart the Miles Point Project and to control growth within the Town of St. Michaels. (E 1424-26; 1435-37; 1438-40). The attorney for the Talbot Preservation Alliance, a citizens group openly opposed to the Miles Point Project, commented as follows during the hearing:

The passage of this bill would not mean by any means that, for example, the [Miles Point] project in St. Michaels would not go forward. It does not mean that. What it would mean is that the County would have some ability to participate in negotiations that it should have been included in but has not been included in. The current project proposes to include the construction of 320 dwelling units, a 30 room inn, and 15,000 acres of commercial space on a piece of property outside of St. Michaels, and proposes to have approximately three to four entrances on to a County road with only one entrance on to Route 33. The County has not been consulted in any fashion with regard to necessary improvements on that County road. More importantly, as some of the members of the Council alluded to earlier in discussions this afternoon, this project would add a huge amount of volume to the waste water system. The County should be involved in discussions about a result of that magnitude.

(E 1424-25). Beth Jones, President of the Bay Hundred Foundation, another citizens' group openly opposed to the Miles Point Project, stated:

There's a ground swell of support, as I mentioned before, for this Bill 933. In fact, just over the last week a hearty bunch of about 40 folks went out and collected 1,037 signatures and also stimulated, I believe, as far as I know, 55 e-mails and at least two letters in support of 933. So where is this coming from. Well, I think we have learned a lesson as we have watched the St. Michaels Commissioners and the St. Michaels Planning

Commission grapple with a mega development proposal at the north end of town that would affect us all and yet many of us who have signed the petition do not have a voice at the table. And so we look to the County Council to represent us in a decision that will affect us.

(E 1434-35).

The County Council voted to approve Bill 933 on December 23, 2003, despite the unfavorable recommendation of the County Planning Commission. The President of the County Council, Phil Foster, admitted that the County had failed to cooperate with the Towns of St. Michaels and Oxford when enacting Bill 933 or to establish cooperatively with the municipalities a process to accommodate growth within the towns. Voting against Bill 933, Mr. Foster commented as follows:

This bill really is about power and it's about control. And I guess I am reacting against this nonsense of a partnership. It isn't a partnership when you grant somebody authority to do something and then take it back from them. It is a re-taking.

(E 1444).

In conclusion, the record in this matter demonstrates an utter and complete lack of coordination between the County and the Town to establish a process to accommodate municipal growth needs. The County's failure to coordinate with the municipalities is expressly contrary to the criteria adopted by the CAC.

It should also be noted that Talbot County does not need to take back the 245 acres of growth allocation it previously gave to the Town of St. Michaels in order for the County to maintain a reserve of growth allocation. On the contrary, when Talbot County initially granted 595 acres of growth allocation to the Towns of Easton, Oxford and St. Michaels, it retained 618 acres of growth allocation for the County to administer outside

of the towns. See TCC § 190-109D(9)(a). Talbot County has not utilized all of the acres of growth allocation retained by it. (E 1329). The former Planning Director for Talbot County, Mr. Cowee, explained to the Planning Commission for St. Michaels that Talbot County does not even need the growth allocation acres it has retained for itself. In fact, Talbot County has so little need for growth allocation outside of that to be used for growth in the municipalities that it has contemplated whether it could sell its growth allocation acres to Anne Arundel County. (E 1357).

**B. The County's motive in enacting Bill 933 was to stop the Miles Point Project.**

The timing of the introduction of Bill 933, on the eve of the Town Planning Commission's favorable recommendation to grant growth allocation approval for the Miles Point Project, illustrates the County's motive to halt the Miles Point Project. However, more direct evidence establishes without question the County enacted Bill 933 primarily, perhaps solely, to stop the Miles Point Project.

Prior to the introduction of Bill 933, the County took the unprecedented step of recommending to the Town that it deny Miles Point's growth allocation request. (E 1417). At the December 16, 2003 public hearing on Bill 933, County Councilman Duncan, recognizing Bill 933's direct impact on the Miles Point Project, asked what effect Bill 933 would have upon the Annexation Agreement between the County and Miles Point relative to development on the Property. Councilman Duncan stated:

Is there a statute of limitations on contractual agreements when things completely change. I mean the way of doing business in '76 and '80 was entirely different as it is now in 1989, and how can we as a Government body sign a contractual agreement to permit something to happen when all the rules through the state agency, not from the local agency, the state

agency changed the rules as far as the development process is concerned. And so my question is, I guess, one, is there a statute of limitations, and, two, if so, what is the time frame. And the second question would be, when there's agreements made and there is state legislation that comes down that more or less changes the tenants of the whole agreement, so to speak, where do we stand.

(Apx. E 1210). These comments are clearly directed to consideration of whether the County Council is obligated to support the Miles Point development plan pursuant to the Annexation Agreement or whether the County Council can prevent the Miles Point Project through Bill 933.

A few months later, the County, acting through its County Council (and the County attorney), identified the Honorable John C. North ("Judge North") as an agent and spokesperson on behalf of the County in connection with Bill 933. At the hearing before the CAC on March 24, 2004 relating to Bill 933, the County expressly called upon Judge North to speak to the CAC panel during the time allocated to the County for its presentation. (E 42).<sup>3</sup> It is noteworthy that Judge North was appointed by the County Council and currently serves on the County Planning Commission. (E 1448). At the public hearing on the Miles Point growth allocation request before the panel of the CAC on April 1, 2004, Judge North acknowledged that the County enacted Bill 933 only after it became apparent that the Commissioners of St. Michaels would grant growth allocation for the Miles Point Project. (E 1451). Specifically, Judge North stated:

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<sup>3</sup> Judge North's opposition to growth allocation for the Midland/Miles Point project is quite personal because Judge North's resides on Yacht Club Road, adjacent to the development site. (E 1450-51).

I applaud the efforts of the Town Council to have attempted so long and so vigorously to ward off what they very accurately perceived as a gross imposition on this entire community.

But after having raised taxes in the Town twice to meet legal expenses exceeding a million dollars, ladies and gentlemen, fending off [Miles Point], after doing that they ran out of steam and consequently the Town voted to grant the growth allocation to this project.

**Fortunately, the County of Talbot, in the form of the County Council, came galloping to the rescue and said this matter should not proceed in this fashion, and consequently they instituted a bill to recover unused growth allocation from all municipalities in the County of Talbot. [Emphasis added].<sup>4</sup>**

(E 1451). In conclusion, the County's own designated representative made it abundantly clear that the County enacted Bill 933 for the purpose of preventing the Miles Point Project in the Town.

**C. Enactment of Bill 933 would cost the Town of St. Michaels millions of dollars.**

As stated above, because almost twenty (20) years ago the County committed 245 acres of growth allocation to the Town of St. Michaels so that it could plan growth in the critical area within the Town, the Town developed its own local critical area program. After spending in excess of one million dollars on attorneys' fees and other related professionals, the Town determined that the fourth development plan proposed by Miles Point, unlike the prior more dense proposals, would constitute a benefit to the Town and therefore awarded growth allocation for the Property. In order to recapture expenses

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<sup>4</sup> In response to Judge North's baseless assertion that the Commissioners of St. Michaels simply ran out of steam to oppose the project, the Town attorney advised the CAC panel that the Town Planning Commission voted 5-0 in favor of the Miles Point growth allocation request and the Commissioners voted 5-0 in favor of awarding growth allocation. (E 1732).

incurred by the Town in connection with its local growth allocation processes and to generate much needed additional revenues that the Town has not been able to procure as a result of years of declining population (while the County has permitted sprawl growth immediately outside of the Town which has strained infrastructure resources), the Town entered into the Developer's Rights and Responsibilities Agreement with Miles Point dated February 19, 2004 (the "DRRA"). (E 1452). Among other benefits, the DRRA obligates Miles Point to donate a public waterfront park for the citizens of the Town and requires each of the proposed 279 units in the Miles Point III Plan to pay to the Town \$1,000 per year for thirty (30) years over and above real property taxes that the Town of St. Michaels would receive from the Miles Point III development. (E 1453-54). In today's dollars, the financial benefit to the Town of St. Michaels from the thirty years of payments, ignoring all other benefits set forth in the DRRA, amounts to \$11,370,000.<sup>5</sup>

In summary, the Town of St. Michaels has incurred millions of dollars to establish a local critical area program, implement the critical area program, plan for growth based upon its local critical area program, administer its growth allocation program (including for at least five separate applications for growth allocation by Miles Point), and negotiate a DRRA with Miles Point. After all these years, the Miles Point Project represents the Town's first significant use of its growth allocation. Through negotiation of the DRRA, the Town will finally recoup millions of dollars it has invested in its local critical area program. After all of this effort, in one fell swoop the County, through Bill 933,

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<sup>5</sup> The DRRA provides that these payments shall be adjusted every two years based upon the consumer price index so that actual payments will increase commensurate with inflation.

attempted to take all of this away from the Town while leaving it with a huge financial setback.

**D. The CAC refused to approve Bill 933 as a Program Amendment to the County's critical area plan because it failed to comply with the critical area law and regulations.**

Prior to and during the public hearing before the CAC on March 24, 2003, various parties had the opportunity to testify and present argument in support of or opposition to Bill 933. As to the lack of coordination between the County and the Town in enacting Bill 933, on behalf of the Town of St. Michaels Mr. Hickson testified:

Now, what the Town didn't know at that time, and in fact, didn't know until today, that on October 29, 2003, the County representatives had contacted the staff at the Critical Area Commission and, in fact, it advised them of the existence of County Bill 933, predicted when it would be introduced, when a hearing would be conducted on it, when it would be adopted, and when it would be ready for the State Critical Area Commission.

**No contact, no consultation, no request for input, no advice even that there was a problem from the County to any of the towns in this county.**

(E 1447). The Maryland Department of Planning expressed its concern that "CB-933, by striking reserved amounts of growth allocation for each town, placed the County as the final decision-maker for all municipal requests for growth allocation." (E 1493).

Following the public hearing, the CAC prepared a Panel Report. (E 1494-95). In the Panel Report, the CAC noted the applicability of COMAR 27.01.02.06.A, stating in pertinent part:

The Panel has discussed the meaning of COMAR provisions relating to "coordination" between counties and affected municipalities. The Panel acknowledged the various interpretations of this term. The Panel believed

that the definition in Webster's Dictionary, "to harmonize in common effort," seems to be a comprehensive and reasonable definition. **The Panel seemed to agree that a minimum "coordination" involves participation of the affected parties.**

(E 1500).

In a Supplemental Report, the CAC Panel noted that inconsistencies would arise between the County's and the municipalities' critical area programs if it were to approve the County's program amendment. The Supplemental Report provides:

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

(E 1501). At a public hearing on May 5, 2004, with Michael Pullen, the County attorney, in attendance, the CAC voted to not approve the County's Program Amendment. (E 141-42).<sup>6</sup> Shortly thereafter the Chairman of the CAC issued a letter confirming its May 5 vote denying approval for the County's proposed Program Amendment. (E 1502).

#### V. STANDARD OF REVIEW

The CAC's approval or denial of a program amendment to a local jurisdiction's critical area program is a legislative function. See North v. Kent Island Ltd. Partnership, 106 Md. App. 92, 664 A.2d 34, 41 (1995). Legislative functions generally involve public policy while adjudicative (judicial) functions deal with specific facts and individuals. In Montgomery County v. Woodward & Lothrop, 280 Md. 686, 711-13, 376 A.2d 483, 497-

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<sup>6</sup> The May 5, 2004 decision was within 90 days of the date the CAC had accepted Bill 933 as an amendment to the County's Critical Area program.

98 (1997), the Court of Appeals explained the distinction between legislative facts and adjudicative facts as follows:

“adjudicative facts are facts about the parties and their activities, businesses and properties ... while legislative facts ‘do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.’ ... The difference, broadly speaking, involves whether the decision is to be made on individual or general grounds.”

See also Mayor of Rockville v. Woodmant Country Club, 348 Md. 572, 588, 705 A.2d 301, 308 (1998) (noting quasi-legislative decisions are made on general grounds and usually involve questions of policy and discretion); Adventist Healthcare Midatlantic, Inc. v. Suburban Hosp., Inc., 350 Md. 104, 711 A.2d 158 (1997) (noting adoption and updating of State Health Plan is a quasi-legislative foundation because it involves the promulgation of public policy). When the courts review an action that is legislative in nature, the scope of review is limited to whether the agency was acting within its legal boundaries. See Department of Nat. Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 223, 334 A.2d 514, 523 (1975). See also Gisriel v. Ocean City Bd. of Superv., 345 Md. 477, 490 n. 12, 693 A.2d 757, 763 n. 12 (1997) (“Legislative or quasi-legislative decisions of local legislative bodies or administrative agencies are, of course, not subject to ordinary judicial review; instead they are subject to very limited review by the courts.”).

An agency must follow its own rules and regulations. See e.g. Anastasi v. Montgomery County, 123 Md. App. 472, 491, 719 A.2d 980 (1998)(citing Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499 (1954)). It is a principle of Maryland

administrative law that deference is owed to an agency's interpretation of its own regulations. See MTA v. King, 369 Md. 274, 799 A.2d 1246 (2002). In Ideal Federal v. Murphy, 339 Md. 446, 461, 663 A.2d 1272, 1279 (1995), the Court of Appeals explained the substantial deference the Courts provide an agency's interpretation of a statute with which it is charged to administer and its own regulations, stating:

In Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965), the Supreme Court of the United States noted that:

When faced with a problem, of statutory construction, this Court shows great deference to the interpretation given a statute by the officers or agency charged with its administration.

...

When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

See also First Gibraltar Bank FSB, 19 F.3d [1032] at 1047. Additionally, an agency's interpretation of an administrative regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, 89 L.Ed. 1700, 1702 (1945).

It is with this standard of review in mind that this Court should review the Circuit Court's decision upholding the CAC's denial of Bill 933 as an amendment to the County's critical area program.

## VI. ARGUMENT

- A. The Program Amendment fails to comply with criteria established by the CAC pursuant to Section 8-1808(e) of the Natural Resources Article because the County failed to cooperate with the municipalities when it enacted Bill 933.

The standards for approval by the CAC of a program amendment are set forth in Section 8-1809(j) of the Natural Resources Article, which provides as follows:

(j) *Standards for approval by Commission.* – The Commission shall approve programs and program amendments that meet:

- (1) The standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and
- (2) The criteria adopted by the Commission under § 18-1808 of this subtitle.

Section 18-1808(e) of the Natural Resources Article provides that the criteria of the CAC shall be adopted by regulation. See also COMAR 27.01.01.02 (“Every provision of this subtitle constitutes part of the ‘criteria for program development’ within the meaning and intent of Natural Resources Article, §8-1808(d).”). Among the criteria set forth in the regulations promulgated by the CAC is COMAR 27.01.02.06A(2), which provides as follows:

**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.**

The program amendment of the County fails to comply with COMAR 27.01.02.06. Rather than cooperating with the municipalities to establish a process that accommodates the growth needs of the affected municipalities within the County, the County enacted Bill 933 without any input from or coordination with the municipalities. Stated differently, the County did not cooperatively establish a process with the municipalities to accommodate growth, but undertook to establish a process unilaterally without involving the Towns of Oxford and St. Michaels in the process. This violates COMAR

27.01.02.06, and therefore the proposed amendment is not in compliance with the CAC criteria. Moreover, it is clear that the County sought adoption of Bill 933 for the specific purpose of frustrating the Town of St. Michaels' decision to permit development on this site. Even Talbot County mapped the subject Property for growth in its Comprehensive Plan. (E 1504).

COMAR 27.01.02.06 does not provide the County with authority to unilaterally develop a process for awarding growth allocation that applies to municipalities. The language of the regulation states unequivocally that the establishment of the process for accommodating growth must be done in coordination with municipalities. The phrase "in coordination with affected municipalities" set forth in the regulation must be given meaning. To refuse to give meaning to this phrase violates a cardinal principal of statutory construction that each portion of a statute is to be given effect and that no portion of a statute is to be rendered nugatory. See Bienkowski v. Brooks, 386 Md. 516, 538, 873 A.2d 1122, 1141 (2005); Board of Educ. v. Lendo, 295 Md. 55, 63, 453 A.2d 1185, 1189 (1982).

The County has previously argued that County Bill 762 sets forth a coordinated process for awarding growth allocation and that the County received input from the towns when it enacted Bill 762.<sup>7</sup> Bill 762 was introduced by the County Council to establish a joint Town/County hearing process for awarding additional growth allocation within the Town of Easton because (unlike the Towns of St. Michaels and Oxford) Easton had already granted all of the growth allocation originally provided to it by Talbot

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<sup>7</sup> Bill 762 is codified as Section 190-109D(9)(d) of the Talbot County Code.

County in 1989. After receiving a copy of Bill 762 from the County in 2000, Mr. Hickson, Town of St. Michaels attorney, wrote to the County Council and inquired specifically whether there was to be any substantive change to Section 19-14(c)(i) of the County Code, which established the 245 acres of growth allocation that the County had reserved to St. Michaels. (E 1508-09). The Town of St. Michaels was assured that Bill 762 was not intended to change the growth allocation processes for the Towns of St. Michaels and Oxford until after it had utilized all of the growth allocation that the County had allocated to it. (E. 764-65). Making this point crystal clear, the County Council members stated as follows during the public hearing on Bill 762:

MR. HIGGINS: . . . Now, in my opinion, it does not affect St. Michaels and Oxford at this time –

MS. SPENCE: Right.

MR. HIGGINS: -- because they have not gone through their initial allocation, which is around 200 acres for each of those municipalities, so they will fall into this same procedure if at any future point in time they've gone through theirs.

MR. FOSTER: Well, would they necessarily have to exhaust it, or might they still not chose to apply for this, perhaps reserving some of it for some future project and deciding that that's all they would have left, and a new one comes along, that wouldn't they still be able to make the application?

MR. COWEE: It's my understanding that until that acreage is used up, they would not be under this process.

MS. SPENCE: Right, until its used up.

MR. FOSTER: They could not? Is that your understanding, Mr. Pullen?

MR. PULLEN: I think that, I think that is, in fact, in the existing ordinance –

MR. FOSTER: Okay.

MR. PULLEN: -- in one of the two section that we referred to earlier.

(E 1513). It would be disingenuous for Talbot County to contend that Bill 762 is intended to apply to the growth allocation processes for St. Michaels or Oxford unless and until their previously allocated growth allocation is exhausted.<sup>8</sup>

**B. The County's Program Amendment does not comply with Section 8-1808(b) because it fails to accommodate municipalities' growth needs in the Critical Area.**

A program amendment must comply with the standards set forth in Section 8-1808(b) of the Natural Resources Article. See NR § 8-1809(j)(1). Section 8-1808(b) provides as follows:

(b) *Goals of program.* - A program shall consist of those elements which are necessary or appropriate:

(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

(2) To conserve fish, wildlife, and plant habitat; and

(3) To establish **land use policies for development in the Chesapeake Bay Critical Area** or the Atlantic Coastal Bays Critical Area **which accommodate growth** and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts. [Emphasis added].

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<sup>8</sup> It is noteworthy that Town of Easton officials do not believe that the County has applied Bill 762 in a particularly coordinated manner with that Town. (E 1258-60).

As explained throughout this Brief, Talbot County proposed to take back all of the Town of St. Michaels' growth allocation through Bill 933. Once St. Michaels' growth allocation is taken back by Talbot County, Bill 933 does not contain legislation establishing a new process for growth allocation within the Town of St. Michaels (or Oxford). This faulty legislation is silent with respect to the means, if any, through which any growth can occur in the critical area within the Towns of St. Michaels and Oxford. (E 1327-33).

As explained above, Talbot County's response to this is that Bill 762, adopted several years prior to Bill 933, will apply to the Town's of Oxford and St. Michaels. Given the legislative history of Bill 762, which expressly establishes that it was not intended to apply to the Towns of Oxford and St. Michaels unless and until they exhausted the growth allocation already delegated to them, there is no way that Bill 762 can be lawfully applied to St. Michaels and Oxford. Moreover, the legislative history of Bill 762 clearly reflects that the decision to award growth allocation under that process is left entirely to the County's discretion. (E. 771-72).

Because there has been no consultation or coordination by Talbot County with the Commissioners for St. Michaels (or Oxford), the local critical area program for St. Michaels (and Oxford) does not contemplate a joint process with Talbot County. Moreover, the Town of St. Michaels was five years into the Miles Point growth allocation request when Talbot County suddenly, and without warning or input from the Town of St. Michaels, quickly proposed and passed Bill 933 (subject to CAC review). At a minimum, in order to satisfy the cooperative element of COMAR 27.01.02.06A(2),

Talbot County should not have drafted Bill 933 to retroactively rescind growth allocation that the Commissioners of St. Michaels were already in the process of awarding for a project.<sup>9</sup>

Bill 933 fails to comply with Section 8-1808(b)(3) of the Natural Resources Article because it does not accommodate St. Michaels' growth needs. Rather, the County's program amendment allows the County discretion to unilaterally reject proposed growth within a municipality's critical area. In other words, the decision to award growth allocation for real property located within a municipality may be unilaterally left to the County's discretion. If Bill 933 is approved, the County could deny a growth allocation request that a municipality's governing body determines is appropriate for its municipality, thus prohibiting growth within the municipality. In essence, Bill 933 empowers the County to determine whether growth shall occur within a municipality's boundaries. Because Bill 933 does not accommodate growth needs of the municipalities in violation of Section 8-1808(b)(3) of the Natural Resources Article, the CAC properly declined to approve Bill 933 as an amendment to the County's critical area program.

C. **The CAC properly rejected the program amendment because it would create conflicts between the County's critical area program and the approved programs of municipalities located within the County.**

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<sup>9</sup> Miles Point does not believe it would be appropriate for Talbot County to take back any of the 245 acres of growth allocation awarded to the Town of St. Michaels. The instant case is more egregious (i.e., less coordinated) for Talbot County to retroactively take back growth allocation that the Town has already identified for a specific project (i.e., Miles Point) than it is to take back growth allocation acreage for future growth allocation requests that have not yet commenced under the local processes.

The CAC is charged with the responsibility to approve not only the County's critical area program but also the programs established by municipalities within the County. See NR § 8-1809. The intent of the critical area program is that "each local jurisdiction shall have primary responsibility for developing and implementing a program." NR § 8-1808(a). Stated differently, within its boundaries, each local jurisdiction has the authority to implement a critical area program that applies to property within its jurisdiction. The General Assembly noted that a purpose of enacting the critical area program was "[t]o 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.**" NR § 8-1801(b)(2) (Emphasis added).

The CAC approved both the Town's and County's critical area programs. When adopted and approved by the CAC, both the County program and the Town's program accommodated growth needs by recognizing that the County provided each municipality with a certain amount of growth allocation to address their local growth needs. Each municipality's critical area ordinance is premised upon the County's delegation of growth allocation acreage to the municipalities for their future growth needs.

In summary, the County, without any consultation or coordination with the municipalities, enacted Bill 933 to "take back" the growth allocation previously delegated to the municipalities, and unilaterally sought to establish a joint planning and zoning process for awarding growth allocation in the future. This so-called joint process would

require approval from the County Council of every development project within each municipality that is located in the critical area. The approved local programs for the Towns of St. Michaels and Oxford do not have provisions for a joint hearing process with the County. Furthermore, the local municipal criteria for evaluating growth allocation applications may be quite different than the criteria within the County's growth allocation process. As noted above, the municipalities' critical area programs are premised on the process that was established in 1989, pursuant to which the County fully delegated a specified amount of growth allocation acreage to each of the municipalities to individually address local growth needs and concerns.

It is also significant that although Bill 933 is drafted to have broad application, its impetus was to prevent the Miles Point Project within the Town of St. Michaels. In fact, Bill 933 is drafted to become retroactive such that it would rescind the growth allocation approval previously granted by the Town of St. Michaels and subsequently by the CAC for the Miles Point Project. Although Talbot County had been aware of the pendency of a growth allocation application for the Miles Point Project in St. Michaels for several years, and specifically advised the Town that it had total discretion based upon its own local program to approve or disapprove growth allocation, after the fact Talbot County enacted Bill 933 to interfere with the Town of St. Michaels' use of its growth allocation.

The CAC recognized that if Bill 933 were approved there would be a conflict between the County's and the municipalities' approved critical area programs. Consistent with the General Assembly's express policy of promoting consistent and

uniform critical area programs, the CAC properly declined to approve the County's program amendment within its legislative prerogative.

## VII. CONCLUSION

The Circuit Court for Talbot County did not err in concluding that the CAC lawfully declined to approve Bill 933 as an amendment to the County's critical area program. The proposed amendment violates CAC criteria, specifically COMAR 27.01.02.06.A, and section 8-1808(b) of the Natural Resources Article. Moreover, adoption of the County's program amendment would have created irreconcilable conflicts between the previously approved local programs of the municipalities and the County's program. For these reasons, the CAC lawfully declined to approve Bill 933 and the Court properly entered summary judgment against the County and in favor of the CAC, the Towns and Miles Point.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27<sup>th</sup> day of March 2007 a copy of the foregoing Appellees' Brief was mailed first class, postage prepaid to:

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**STATEMENT PURSUANT TO MARYLAND RULE 8-504(a)(8)**

The foregoing document was prepared with proportionally spaced type using Times New Roman 13 point font.



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Richard A. DeTar

**§ 8-1801. Declaration of public policy.**

(a) *Findings.*- The General Assembly finds and declares that:

- (1) The Chesapeake and the Atlantic Coastal Bays and their 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) Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus it is necessary wherever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;
- (5) 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;
- (6) Those portions of the Chesapeake and the Atlantic Coastal Bays and their tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor and along the Atlantic Coast;
- (7) 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 and the Atlantic Coastal Bays, and their tributaries;
- (8) The restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands, particularly in the buffer;
- (9) The cumulative impact of current development and of each new development activity in the buffer is inimical to these purposes; and
- (10) 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 and the Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

(b) *Purpose.*- It is the purpose of the General Assembly in enacting this subtitle:

- (1) To establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and

their 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.

[1984, ch. 794; 1990, ch. 6, § 2; 1991, ch. 55, § 1; 2002, chs. 431, 432, 433; 2004, chs. 25, 526.]

**§ 8-1808. Program development.**

*(a) Local jurisdictions to implement; grants.-*

(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) (i) 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.

(ii) Each local jurisdiction shall submit to the Governor a detailed request for funds that are equivalent to the additional costs incurred in developing the program under this section.

(iii) The Governor shall include in the fiscal year 2003 budget a sum of money to be used for grants to reimburse local jurisdictions in the Atlantic Coastal Bays Critical Area for the reasonable costs of developing a 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) Goals of program.-* A program shall consist of those elements which are necessary or appropriate:

(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

(2) To conserve fish, wildlife, and plant habitat; and

(3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

*(c) Elements of program.-*

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

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

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

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

1. Subdivision regulations;

2. Comprehensive or master plan;

3. Zoning ordinances or regulations;

4. Provisions relating to enforcement; and

5. Provisions as appropriate relating to grandfathering of development at the time the program is adopted or approved by the Commission;

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

(v) 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;

(vi) 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;

(vii) Requirements for minimum setbacks for structures and septic fields along shorelines, including the establishment of a minimum buffer landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

(viii) 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;

(ix) 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;

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

(xi) 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;

(xii) 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;

(xiii) 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; and

(xiv) Penalty provisions establishing that, in addition to any other penalty applicable under State or local law, a person who violates a provision of this subtitle or of a program is subject to a fine not exceeding \$10,000.

(2) In determining the amount of the penalty to be assessed under paragraph (1)(xiv) of this subsection, a local jurisdiction may consider:

(i) The gravity of the violation;

(ii) Any willfulness or negligence involved in the violation; and

(iii) The environmental impact of the violation.

(d) *Granting of variance.*-

(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) (i) In considering an application for a variance, a local jurisdiction shall presume that the specific development activity in the critical area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction's program.

(ii) If the variance request is based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, a local jurisdiction may consider that fact.

(3) (i) An applicant has the burden of proof and the burden of persuasion to overcome the presumption established under paragraph (2)(i) of this subsection.

(ii) 1. Based on competent and substantial evidence, a local jurisdiction shall make written findings as to whether the applicant has overcome the presumption established under paragraph (2)(i) of this subsection.

2. With due regard for the person's experience, technical competence, and specialized knowledge, the written findings may be based on evidence introduced and testimony presented by:

A. The applicant;

B. The local jurisdiction or any other government agency; or

C. Any other person deemed appropriate by the local jurisdiction.

(4) 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 critical area program.

(5) 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) *Criteria for program development; joint committee.*-

(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) *Dredging not prevented.*- 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.

(g) *Initial land classification.*- In adopting the initial land classification for the Atlantic Coastal Bays Critical Area, the local program:

(1) Of the Town of Ocean City shall classify as an intensely developed area that area that is within the municipal boundaries of Ocean City as of January 1, 2002; and

(2) Of Worcester County shall classify as an intensely developed area that area located on the western mainland that is east of Golf Course Road, south of Charles Street, and north of Route 707 (Old Bridge Road).

(h) *Application.*- The provisions of this subtitle and Title 27 of the Code of Maryland Regulations apply to the Atlantic Coastal Bays Critical Area.

[1984, ch. 794; 1987, ch. 631; 1988, ch. 234; 1990, ch. 6, § 2; 1991, ch. 55, § 8; 1994, ch. 3, § 1; 2000, ch. 475; 2002, chs. 431, 432, 433; 2004, ch. 526; 2005, ch. 25, § 1.]

**§ 8-1809. Approval and adoption of program.**

*(a) Statements of intent.-*

(1) Within 45 days after the criteria adopted by the Commission under § 8-1808 of this subtitle become effective, each local jurisdiction shall submit to the Commission a written statement of its intent either:

(i) To develop a critical area protection program to control the use and development of that part of the Chesapeake Bay Critical Area located within its territorial limits; or

(ii) Not to develop such a program.

(2) On or before July 15, 2002, each local jurisdiction in the Atlantic Coastal Bays Critical Area shall submit to the Commission a written statement of its intent either:

(i) To develop a critical area protection program to control the use and development of that part of the Atlantic Coastal Bays Critical Area located within its territorial limits; or

(ii) Not to develop such a program.

*(b) Commission may adopt program.-* If a local jurisdiction states the local jurisdiction's intent not to develop a program or fails to submit a timely statement of intent, the Commission shall prepare and adopt a program for the part of the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in that local jurisdiction.

*(c) Submission of locally developed program.-*

(1) If a local jurisdiction states the local jurisdiction's intent to develop a Chesapeake Bay Critical Area program, the local jurisdiction shall prepare a proposed program and submit the program to the Commission within 270 days after the effective date of the criteria adopted under § 8-1808 of this subtitle. However, if the local jurisdiction submits evidence satisfactory to the Commission that the local jurisdiction is making reasonable progress in the development of a program, the Commission may extend this period for up to an additional 180 days. Before submission of a program to the Commission within the time allowed by this subsection, a local jurisdiction shall hold at least 1 public hearing on the proposed program, for which 2 weeks notice shall be published in a newspaper of general circulation in the local jurisdiction.

(2) If a local jurisdiction states the local jurisdiction's intent to develop an Atlantic Coastal Bays Critical Area program, the local jurisdiction shall prepare a proposed program meeting the requirements of the criteria adopted under § 8-1808 of this subtitle and submit the program to the Commission on or before January 1, 2003. However, if the local jurisdiction submits evidence satisfactory to the Commission that the local jurisdiction is making reasonable progress in the development of a program, the Commission may extend this period for up to an additional 30 days. Before submission of a program to the Commission within the time allowed by this subsection, a local jurisdiction shall hold at least 1 public hearing on the proposed program, for which 2 weeks' notice shall be published in a newspaper of general circulation in the local jurisdiction.

*(d) Public hearing; approval by Commission.-*

(1) Within 30 days after a program is submitted, the Commission shall appoint a panel of 5 of its members to conduct, in the affected jurisdiction, a public hearing on the proposed program.

(2) (i) Within 90 days after the Commission receives a proposed Chesapeake Bay Critical Area program from a local jurisdiction, the Commission shall approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither, the proposal shall be deemed approved.

(ii) Within 60 days after the Commission receives a proposed Atlantic Coastal Bays Critical Area program from a local jurisdiction, the Commission shall approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither, the proposal shall be deemed approved.

(3) A changed proposal shall be submitted to the Commission in the same manner as the original proposal, within 40 days after the Commission's notice. Unless the Commission approves a changed proposal or disapproves a changed proposal and states in writing the reasons for the Commission's disapproval within 40 days, the changed proposal shall be deemed approved.

(e) *Adoption of program.*- Within 90 days after the Commission approves a proposed Chesapeake Bay Critical Area program or a proposed Atlantic Coastal Bays Critical Area program, the local jurisdiction shall hold hearings and adopt the program in accordance with legislative procedures for enacting ordinances. If the governing body of the local jurisdiction wishes to change any part of the approved proposal before adoption, the governing body shall submit the proposed change to the Commission for approval. Unless the Commission approves the change or disapproves the change and states in writing the reasons for the Commission's disapproval within 30 days after the Commission receives the change, the change shall be deemed approved. A changed part may not be adopted until the changed part is approved by the Commission.

(f) *Programs effective within 760 days.*-

(1) Within 760 days after criteria adopted by the Commission become effective, there shall be in effect throughout the Chesapeake Bay Critical Area programs approved or adopted by the Commission.

(2) On or before September 29, 2003, there shall be in effect throughout the Atlantic Coastal Bays Critical Area programs approved or adopted by the Commission.

(g) *Review and proposed amendment of entire program.*- Each local jurisdiction shall review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every 6 years. Each local jurisdiction shall send in writing to the Commission, within 60 days after 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.

(h) *Proposed program amendments and refinements.*-

(1) As often as necessary but not more than 4 times per calendar year, each local jurisdiction may propose program amendments and program refinements to its adopted program.

(2) (i) Except for program amendments or program refinements developed during program review under subsection (g) of this section, a zoning map amendment may be granted by a local approving authority only on proof of a mistake in the existing zoning.

(ii) The requirement in paragraph (2)(i) of this subsection that a zoning map amendment may be granted only on proof of a mistake does not apply to proposed changes to a zoning map that:

1. Are wholly consistent with the land classifications in the adopted program; or
2. Propose the use of a part of the remaining growth allocation in accordance with the adopted program.

(i) *Program not to be amended without approval of Commission.*- A program may not be amended except with the approval of the Commission.

(j) *Standards for approval by Commission.*- The Commission shall approve programs and program amendments that meet:

- (1) The standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and
- (2) The criteria adopted by the Commission under § 8-1808 of this subtitle.

(k) *Program to be available for public inspection.*- Copies of each approved program, as the program is amended or refined from time to time, shall be maintained by the local jurisdiction and the Commission in a form available for public inspection.

(l) *Correction of clear mistakes, omissions, or conflicts with criteria or laws.*-

(1) If the Commission determines that an adopted program contains a clear mistake, omission, or conflict with the criteria or law, the Commission may:

- (i) Notify the local jurisdiction of the specific deficiency; and
- (ii) Request that the jurisdiction submit a proposed program amendment or program refinement to correct the deficiency.

(2) Within 90 days after being notified of any deficiency under paragraph (1) of this subsection, the local jurisdiction shall submit to the Commission, as program amendments or program refinements, any proposed changes that are necessary to correct those deficiencies.

(3) Local project approvals granted under a part of a program that the Commission has determined to be deficient shall be null and void after notice of the deficiency.

(m) *Regulations.*-

(1) The Commission may adopt regulations that prescribe the procedures and information requirements for program amendments and program refinements.

(2) In the absence of regulations under paragraph (1) of this subsection, a local jurisdiction may propose changes to adopted programs. Within 10 working days of receiving a proposal under this paragraph, the Commission shall:

- (i) Mail a notification to the local jurisdiction that the proposal has been accepted for processing; or
- (ii) Return the proposal as incomplete.

(n) *Specification of change as amendment or refinement.*- A local jurisdiction may specify whether it intends a proposed change to be a program amendment or program refinement. However, the Commission shall treat a proposed change as a program amendment unless the chairman determines that the proposed change is a program refinement.

(o) *Adoption of proposed amendment.*-

(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 purposes, policies, goals, 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 60 days of its intent to adopt the conditions.

(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) *Adoption of proposed refinement.*-

(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

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

B. Deny the program refinement;

C. Approve the proposed program refinement subject to one or more conditions; or

D. Return the proposed program refinement back to the local jurisdiction with a list of the changes to be made.

(iv) 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 60 days of its intent to 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) *Combination of amendments or refinements for approval of project.*-

(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.

(r) *Adoption of amended criteria.*- Within 6 months after the adoption of amended criteria, a local jurisdiction shall send to the Commission:

(1) Proposed program amendments or program refinements that address the amended criteria; or

(2) A statement describing how the adopted program conforms to the amended criteria and certifying that the adopted program is consistent with the amended criteria.

(s) *Regulations concerning use of growth allocation.* - If the Commission adopts a regulation concerning the use of the growth allocation, any use of the growth allocation must be in accordance with that regulation for the change to be considered a program refinement.

[1984, ch. 794; 1986, ch. 601; 1987, ch. 11, § 1; 1990, ch. 6, § 2; ch. 649, § 2; 1993, ch. 5, § 1; 2002, chs. 431, 432, 433; 2006, ch. 55.]

27.01.01.02

**.02 Explanation of Certain Terms.**

Every provision of this subtitle constitutes part of the "criteria for program development" within the meaning and intent of Natural Resources Article, §8-1808(d), whether that provision is termed a "definition", "general policy", "policy", or "criteria".

27.01.02.06

**.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.

**§ 190-109. Amendments. [Amended 9-10-1991 by Bill No. 459, effective 11-9-1991; 1-28-1992 by Bill No. 465, effective 3-28-1992; 8-11-1992 by Bill No. 487, effective 10-10-1992; 2-25-1997 by Bill No. 642, effective 4-16-1997; 10-27-1998 by Bill No. 691, effective 12-26-1998; 3-30-1999 by Bill No. 699, effective 5-29-1999; 4-15-2000 by Bill No. 762, effective 6-24-2000; 8-24-2001 by Bill No. 837, effective 10-23-2001]**

The provisions of this Chapter 190, Zoning, or the boundaries of any zoning district may be amended by the County Council in accordance with the procedures set forth in this section. For the purposes of this section, amendments are separated into four categories: amendments to the Zoning Ordinance text, amendments to the Official Zoning District Maps excepting properties within the boundaries of the Critical Area where growth allocation is requested, amendments to the Critical Area provisions of this Chapter 190, Zoning, and growth allocation district boundary amendments in the Critical Area.

**A. Amendments to the Zoning Ordinance Text.**

- (1) An amendment to text of this Chapter 190, Zoning, may be initiated by any interested party, the County Council, Planning Commission or Planning Officer.
- (2) An application for an amendment to the text of this Chapter 190, Zoning, shall be filed in the Planning Office on the prescribed forms with the accompanying filing fee where applicable.
- (3) The application shall first be referred by the County Council to the Planning Officer for an investigation and recommendation.
  - (a) The Planning Officer shall cause such investigation to be made as he deems necessary.
  - (b) The Planning Officer may hold such informal public hearings as he deems appropriate.
  - (c) The Planning Officer shall refer all such amendments to the Planning Commission for their review and subsequent recommendations.
  - (d) The Planning Officer shall submit his recommendation, the recommendation of the Planning Commission and any pertinent information to the County Council within 60 days of application filing.
- (4) After receiving the recommendations of the Planning Officer and Planning Commission concerning a proposal for an amendment to the text of this Chapter 190, Zoning, the Council shall determine whether or not the proposal is suitable to warrant the introduction of legislation. The Council may conduct any informal hearings it deems appropriate in making its determination.
- (5) Upon bill (legislation) introduction, the Council shall hold a public hearing in order that interested parties and citizens shall have the opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112.
- (6) A complete record shall be kept of the hearing, including the vote of all members of the Council in deciding all questions relating to the proposed amendment.

**B. Amendments to the Official Zoning District Maps excepting properties within the boundaries of the Critical Area where growth allocation is requested.**

- (1) An amendment to the Official Zoning District Maps may be initiated by the County Council, Planning Commission, Planning Officer or by a person with a committed financial, contractual or proprietary interest in the property to be affected by the proposed amendment.
- (2) An application for an amendment to the Official Zoning District Maps shall be filed in the Planning Office on the prescribed application forms with the accompanying filing fee where applicable. Each application shall also be accompanied by a plat drawn to scale showing the existing and proposed boundaries and other information the Planning Officer may need in order to locate the amendment on the Official Zoning District Maps. Such plat shall not be required for sectional or comprehensive redistricting.
- (3) The application shall first be referred by the Council to the Planning Officer for an investigation and recommendation.
  - (a) The Planning Officer shall cause such investigation to be made as he deems necessary.
  - (b) The Planning Officer may hold such informal public hearings as he deems appropriate.
  - (c) The Planning Officer shall refer all such amendments to the Planning Commission for its review

and subsequent recommendations.

- (d) The Planning Officer shall submit his recommendation, the recommendation of the Planning Commission and any pertinent information to the County Council within 60 days of application filing.
- (4) After receiving the recommendations of the Planning Officer and Planning Commission concerning a proposal for an amendment to the Official Zoning District Maps and before approval or denial, the Council shall introduce a bill (legislation) for the proposed amendment and hold a public hearing in order that interested parties and citizens shall have an opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112.
- (5) Site visit. The Council shall not approve or disapprove any application for an Official Zoning Map amendment unless and until a site visit has been made by at least a majority of the Council members in order to inspect the physical features of the property and to determine the character of the surrounding area. Such site visit shall not be required for sectional or comprehensive redistricting.
- (6) In granting approval for an amendment to the Official Zoning Maps, the Council shall take into consideration findings of fact in each specific case including but not limited to the following:
  - (a) Consistency with the purposes and intent of the Talbot County Comprehensive Plan;
  - (b) Compatibility with existing and proposed development and land use in the surrounding area;
  - (c) Availability of public facilities;
  - (d) The effects on present and future transportation patterns; and
  - (e) The effect on population change within the immediate area.
- (7) After a review of the applicable findings, the Council may:
  - (a) Grant the amendment based upon a finding that there was a substantial change in the character of the neighborhood where the property is located; or
  - (b) Grant the amendment based upon the fact that there was a mistake in the existing zoning classification.
- (8) Editor's Note: Former Subsection B(8), providing an exception to the requirement that the Council find either a change in the character of the neighborhood or a mistake in the original zoning to downzone property, as amended, was repealed 12-9-2003 by Bill No. 923, effective 2-7-2004. This bill also redesignated former Subsection B(9) through B(12) as B(8) through B(11), respectively. The fact that an application for a district boundary amendment complies with all the specific requirements and purposes set forth in this chapter shall not be deemed to create a presumption that the proposed district boundary amendment would in fact be compatible with surrounding land uses and is not, in itself, sufficient to require approval.
- (9) A complete record shall be kept of the hearing, including the vote of all members of the Council in deciding all questions relating to the proposed amendment.
- (10) New application. Following denial of a district boundary amendment for property, either in whole or in part, no application shall be accepted for filing by the County Council within one year from the date of the decision. The Council may allow an applicant to withdraw an application for district boundary amendment at any time, provided that if the request for withdrawal is made after publication of the public notice of hearing, no application for district boundary amendment of all or any part of the property which is subject to the application shall be allowed within one year from the date of the public hearing unless the Council specifies that the time limit shall not apply.
- (11) Changing of Official Zoning Maps. The Planning Officer shall change the Official Zoning Maps within 60 days after the adoption of any amendments, in order that said maps shall always be an up-to-date public record of the zoning districts in Talbot County.

C. Amendments to the Critical Area provisions of this Chapter 190, Zoning.

- (1) Amendments to the Critical Area provisions in any section of this Chapter 190, Zoning, shall be consistent with Maryland State Critical Area Law and shall be referred to the Chesapeake Bay Critical Area Commission for their review and approval in accordance with § 190-109D(7) of this chapter. Any such request shall not result in permitting uses that would adversely affect any wildlife or plant habitats as a result of the uses' intrinsic nature and potential impact. Specifically, such requests shall not be

granted if they would allow the following development or redevelopment activities in the Critical Area:

- (a) Non-maritime 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);
  - (c) Permanent sludge handling, storage, and disposal facilities with the exception of those facilities associated with current wastewater treatment operations in Talbot County, and excepting the agricultural or horticultural land applications of sludge (with Maryland state approvals and approved application methods and rates) outside of the shoreline development buffer;
  - (d) Any development activity that would be detrimental to water quality or fish, wildlife or plant habitats identified in this chapter;
  - (e) Solid or hazardous waste collection or disposal facilities;
  - (f) Sanitary landfills; and
  - (g) Septage storage or holding facilities excepting those facilities on the site of a Talbot County Wastewater Treatment Plant.
- (2) An amendment to the Critical Area provisions of this chapter may be initiated by any interested party, the County Council, Planning Commission or Planning Officer.
  - (3) An application for an amendment to the text of this Chapter 190, Zoning, shall be filed in the Planning Office on the prescribed forms with the accompanying filing fee where applicable.
  - (4) The application shall first be referred by the County Council to the Planning Officer for an investigation and recommendation.
    - (a) The Planning Officer shall cause such investigation to be made as he deems necessary.
    - (b) The Planning Officer may hold such informal public hearings as he deems appropriate.
    - (c) The Planning Officer shall refer all such amendments to the Planning Commission for their review and subsequent recommendations.
    - (d) The Planning Officer shall submit his recommendation, the recommendation of the Planning Commission and any pertinent information to the County Council within 60 days of application filing.
  - (5) After receiving the recommendations of the Planning Officer and Planning Commission concerning a proposal for an amendment to the text of this chapter, the Council shall determine whether or not the proposal is suitable to warrant the introduction of legislation. The Council may conduct any informal hearings they deem appropriate in making its determination.
  - (6) Upon bill (legislation) introduction, the Council shall hold a public hearing in order that interested parties and citizens shall have the opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112.
  - (7) A complete record shall be kept of the hearing, including the vote of all members of the Council in deciding all questions relating to the proposed amendment.
- D. Growth allocation district boundary amendments in the Critical Area.
- (1) Growth allocation district boundary amendments in the Critical Area may be initiated by the County Council, Planning Commission, Planning Officer or by a person with a committed financial, contractual, or proprietary interest in the property to be affected by the proposed amendment.
  - (2) An application for a growth allocation district boundary amendment shall be filed in the Planning Office on the prescribed application form with the accompanying filing fee, where applicable. Each application shall include a proposed site plan and/or subdivision plat that meets the applicable design standards in Articles X and XII of this chapter. Each application request should make the maximum effort to meet the intent of the Critical Area policies and the applicable design standards. The request should:
    - (a) Create lots or parcels that maximize the opportunities for clustered development that protect

- habitat and agricultural resources;
- (b) Locate structures so as to minimize impact on habitat protection areas and agricultural areas;
  - (c) Provide a minimally disturbed buffer along the shoreline;
  - (d) Minimize soil erosion and runoff;
  - (e) Maximize protection of eroding shorelines;
  - (f) Have a minimal impact or cause an improvement to stormwater, floodplain and stream characteristics;
  - (g) Minimize impacts on nontidal wetlands;
  - (h) Maximize protection of plant and wildlife habitats, particularly for threatened and endangered species, plant and wildlife common to the Chesapeake Bay Region, and anadromous fish propagation waters; and
  - (i) Maximize protection of forests.
- (3) The application shall first be referred by the Council to the Planning Officer for an investigation and recommendation.
- (a) The Planning Officer shall cause such investigation to be made as he deems necessary.
  - (b) The Planning Officer may hold such informal public hearings as he deems appropriate.
  - (c) The Planning Officer shall refer all such amendments to the Planning Commission for their review and subsequent recommendations.
  - (d) The Planning Officer shall submit his recommendation, the recommendation of the Planning Commission and any pertinent information to the County Council within 60 days of application filing.
- (4) Introduction of bill; considerations.
- (a) After receiving the recommendation of the Planning Officer and Planning Commission concerning a proposal for a growth allocation district boundary amendment and before approval or denial, the Council shall introduce a bill (legislation) for the proposed amendment and hold a public hearing in order that interested parties and citizens shall have an opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112.
  - (b) In deciding whether to approve or disapprove an application for a growth allocation district boundary amendment, in addition to the specific requirements and purposes set forth elsewhere in this chapter, the Council may also consider:
    - [1] Consistency with the purposes and intent of the Talbot County Comprehensive Plan;
    - [2] Compatibility with existing and proposed development and land use in the surrounding area;
    - [3] Availability of public facilities;
    - [4] The effects on present and future transportation patterns;
    - [5] The effect of population change within the immediate area;
    - [6] The past, present, and anticipated need for future growth of the County as a whole;
    - [7] The location, nature, and timing of the proposed growth allocation in relation to the public interest in ordered, efficient, and productive development and land use;
    - [8] The protection of the public health, safety and welfare.
  - (c) The fact that an application for a growth allocation district boundary amendment complies with all the specific requirements and purposes set forth in this chapter shall not be deemed to create a presumption that the proposed growth allocation district boundary amendment would in fact be compatible with surrounding land uses, and is not, in itself, sufficient to require approval.

- (5) A complete record shall be kept of the hearing including the vote of all members of the Council in deciding all questions relating to the proposed growth allocation district boundary amendment.
- (6) Site visit. The Council shall not approve or disapprove any applications for a growth allocation district boundary amendment unless and until a site visit has been made by at least a majority of the Council members in order to inspect the physical features of the property and to determine the character of the surrounding area.
- (7) Critical Area Commission approval.
  - (a) All requests approved by the County Council shall be submitted by the County to the Maryland Critical Area Commission for approval as an amendment to the County's Critical Area Program. By state law, the Commission has 90 days to act on a request. If no action is taken in 90 days, the request will be considered approved. A request approved by the County Council shall take effect 60 days after adoption by the Council, and upon approval by the Critical Area Commission.
  - (b) If a project receiving growth allocation approval, in accordance with the provisions of this subsection, does not obtain final subdivision recordation or final site plan approval, as appropriate, within two years of the final growth allocation approval, the Critical Area and zoning classifications may revert to the previously designated classifications, upon recommendation of the Planning Officer and approval by the County Council.
  - (c) Upon receipt of a written request by the property owner or the applicant, a time extension may be granted to the two-year period, upon a recommendation by the Planning Officer and approval by the County Council.
  - (d) A request denied by the Critical Area Commission may be reconsidered by the County Council. Such a request shall be revised by the applicant to address the reasons for Critical Area Commission denial. The revised request shall be submitted to the Planning Officer for reconsideration by the County Council within 90 days of Critical Area Commission denial. An extension of the ninety-day deadline may be requested for a specific period of time, if the applicant can demonstrate, to the satisfaction of the Planning Officer, circumstances beyond the applicant's control.
- (8) Growth allocation district boundary amendment requests for property outside of the towns and outside of areas shown as possible annexation areas should be reviewed by the County on an annual cycle, with requests submitted to the Planning Officer by October 1st of each year.
- (9) Awarding of supplemental growth allocation to municipalities in County.
  - (a) Not more than 1,213 acres of the Critical Areas of the County, including all land lying within the Critical Area within incorporated towns, shall be reclassified from the Rural Conservation (RC) District (or town zoning districts established for the Resource Conservation Area of the Critical Area) to any other zoning district. Of these 1,213 acres, 155 acres is reserved for the Town of Easton, 195 acres is reserved for the Town of Oxford, 245 acres is reserved for the Town of St. Michaels for growth allocation associated with annexations, and 618 acres is reserved for the County.
  - (b) When 1,092 acres (90% percent of 1,213 acres) has been approved for growth allocation by the towns and/or the County, then the County shall request permission from the Maryland Critical Area Commission to double the maximum number of acres that may be reclassified from the Rural Conservation District (or comparable town districts) from 1,213 to 2,426 acres. Upon Critical Area Commission approval, the County shall reserve acreage for each town.
  - (c) If the Commission approves the doubling of the number of acres that may be rezoned under this subsection, the County will have its full allocation of 2,554 acres for growth as specified in the County's Critical Area Plan, that is 1,213 acres (original limit) + 1,213 acres (potential additional limit) + 128 acres (amount reserved in Subsection D(10) below = 2,554 acres). The Maryland Critical Area law does not allow for the full 2,426-acre allocation (1,213 + 1,213) at the time of the establishment of this section (August 13, 1989).
  - (d) Upon request for supplemental growth allocation by any municipal corporation within the County, the County Council may transfer growth allocation to the municipal corporation and may impose such conditions, restrictions, and limitations upon the use of any such

supplemental growth allocation, if any, as the Council may consider appropriate. All such requests shall comply with the following requirements:

- [1] Application process. The applicant shall file the application with the municipality. In addition to complying with all municipal requirements, the applicant shall also provide the information required by § 190-109D(2) of this chapter, as amended, and shall also comply with the design standards set forth in § 190-109D(2)(a) through (i) of this chapter, as amended. The municipality shall forward the application to the County Council for consideration and review within five working days.
  - [2] Staff and Planning Commission review. The planning staff and the Planning Commission shall review the application in accordance with the procedures set forth in § 190-109D(9) (d)[1] through [4], except that municipal and county staff reports shall be forwarded to the Planning Commissions of both jurisdictions, and the planning staff shall schedule a joint hearing on the application before the Planning Commissions of both jurisdictions. The designated Chairperson of each Planning Commission shall co-chair the hearing. Each Planning Commission shall vote separately and make its recommendations to its respective council or commission. Each Planning Commission shall provide a copy of its recommendations to the other jurisdiction.
  - [3] Council review. The county and municipal councils or commissions shall hold a joint hearing on the application, co-chaired by the designated Chairperson of each council or commission which may be coordinated jointly with the Critical Area Commission. The county and municipal councils or commissions shall make their respective decisions separately as independent entities. The County Council shall evaluate the application in accordance with § 190-109D(4).
  - [4] Amendments to approved projects. Any amendment to an approved project shall be subject to County Council review and approval for a period of five years following the date of initial approval.
- (10) Reclassification of land within incorporated towns.
- (a) Not more than 128 acres of the Critical Area of the County, including lands within the incorporated towns, shall be reclassified from a Limited Development Area (LDA) to an Intensely Developed Area (IDA). For purposes of this section, LDA Zoning Districts include Rural Residential (RR), Town Residential (TR) and Village Center (VC) or areas of less than 20 contiguous acres of Limited Commercial (LC), General Commercial (GC) or Limited Industrial (LI). Town zoning districts include all districts classified as LDA. The requested IDA classification shall include areas of 20 or more contiguous acres of LC, GC, LI or town zoning districts established for the IDA of the Critical Area.
  - (b) In determining whether the twenty-acre threshold has been reached, the contiguous areas of existing commercial and/or industrial zoning districts, whether located in the Critical Area or Non-Critical Area, shall be considered. Of the 128 acres, 24 acres is reserved for the Town of Easton, 44 acres for the Town of Oxford, 24 acres for the Town of St. Michaels for growth allocation or growth allocation associated with annexations, and 36 acres for the County for growth allocation for property outside of the towns and outside of areas shown as possible annexation areas. (See Maps 1, 2 and 3.) Editor's Note: Maps 1, 2 and 3 are included at the end of this chapter.
- (11) The number of reserved areas allocated among the towns for rezoning in § 190-109D(9) and (10) should be reviewed by the County and Towns by June 1, 1993 for possible reallocation and at least every four years thereafter.
- (12) In any one rezoning review cycle, not more than 100 acres should be approved by the County for reclassification from the Rural Conservation District to any other zoning district. Not more than 20 acres should be reclassified from the Rural Residential, Town Residential, or Village Center Districts or area of less than 20 contiguous acres of Limited Commercial, General Commercial, and/or Limited Industrial Districts to establish a total area of 20 or more contiguous acres of Limited Commercial, General Commercial, and/or Limited Industrial Districts (including contiguous areas of existing Commercial or Industrial Zoning Districts).
- (13) Zoning Map amendments from the LDA Zoning District to another LDA Zoning District or from one

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

- (14) Specific annexation requests for property included in the acres reserved for the towns in § 190-109D (9) and (10) above and as shown in Maps 1, 2, and 3, shall be reviewed by the County for consistency with the County Comprehensive Plan and shall be subject to all current ordinances regulating annexations. The County shall not act on rezoning requests adjacent to the towns as shown on Map 1, 2, and 3 until an annexation request for the property has been denied by the town or until 12 months after an annexation request for the property has been submitted to the town, whichever occurs first. If the County approves a rezoning request not associated with an annexation request for property adjacent to the towns as shown on Maps 1, 2 and 3, then the acreage of the property rezoned shall be subtracted from the acres reserved for the Town for annexation in § 190-109D(9) and (10).
- (15) Growth allocation requests for property that has been annexed within five years of the request shall be reviewed by the County for consistency with the County Comprehensive Plan. Growth allocation request(s) for property that has been in the town for more than five years prior to the request does not require review by the County; however, the towns shall inform the County of such reclassification to ensure that the total reserved acres, listed above, are not exceeded.
- (16) The location of growth allocation requests within Towns or growth allocation requests associated with annexation requests is not limited to the areas shown in Maps 1, 2 and 3, however, the total acres reserved per town shall not be exceeded.
- (17) When considering growth allocation requests from the Rural Conservation District, priority shall be given based on the district requested in the following order: Village Center, Town Residential, Rural Residential, Limited Commercial, General Commercial, Limited Industrial. When considering growth allocation requests from the Rural Residential, Town Residential, or Village Center District, priority shall be given based on the district requested in the following order: Limited Commercial, General Commercial, Limited Industrial.
- (18) A growth allocation request for the Rural Residential District should be adjacent to existing Rural Residential, Town Residential, or Village Center Districts. Such requests should not be adjacent to Limited Commercial, General Commercial, or Limited Industrial Districts of any size. Property proposed for the Town Residential District should be adjacent to the Rural Residential, Town Residential, or Village Center Districts or to an area of less than 20 contiguous acres of Limited Commercial, General Commercial, or Limited Industrial Districts, or to any area of Limited Commercial or General Commercial Districts. Property proposed for the Village Center District should be adjacent to an existing Rural Residential, Town Residential, or Village Center District or to any size area of Limited Commercial, General Commercial, or Limited Industrial Districts. For purposes of this section adjacency means at least 25% of the perimeter land boundary of the subject parcel is in common with the referenced zoning district(s). Land boundaries shall be measured at the center line of any rights-of-way.
- (19) A growth allocation request to establish a total area of less than 20 contiguous acres of Limited Commercial, General Commercial, and/or Limited Industrial Zoning Districts (including contiguous areas of existing commercial or industrial Zoning Districts) shall be adjacent to the Town Residential, Village Center, Limited Commercial, General Commercial, or Limited Industrial District. Such requests should not be adjacent to the Rural Residential District. For purposes of this section, adjacency means at least 25% of the perimeter land boundary of the subject parcel is in common with the referenced zoning district(s). Land boundaries shall be measured at the center line of any rights-of-way.
- (20) A growth allocation request to establish a total area of 20 or more contiguous acres of Limited Commercial, General Commercial, and/or Limited Industrial Zoning Districts (including contiguous areas of existing commercial or industrial zoning districts) should not be approved unless the proposed development activity is water-dependent, will have substantial economic benefit to Talbot County, and cannot be located within the limits of an incorporated town. Such a request should be located within or adjacent to a Village Center, Limited Commercial, General Commercial or Limited Industrial Districts. For purposes of this section, adjacency means at least 25% of the perimeter land boundary of the subject parcel is in common with the referenced zoning district(s). Land boundaries shall be measured at the center line of any rights-of-way. Such a request should be located so as not

to conflict with the character and purpose of the Rural Conservative District.

- (21) Growth allocation for specific uses in the Rural Conservation RC Zone. Specific uses in the Rural Conservation RC Zoning District listed in § 190-19, General Table of Land Use Regulations, are permitted to expand only with the issuance of growth allocation. The process for granting growth allocation for specific Rural Conservation RC uses is as follows: **[Added 12-9-2003 by Bill No. 932, effective 2-7-2004]**
- (a) Application for growth allocation shall accompany an application for site plan review and shall be made on forms provided by the Planning Office.
  - (b) An application shall be submitted to the Planning Office meeting all of the general site plan requirements as stipulated in § 190-92 of this chapter. The application shall indicate the area and number of growth allocation acres requested.
  - (c) The Planning Officer, or his or her designated representative, shall review the application materials, including the site plan and all attachments, for completeness and, if found to be in order, shall accept the application.
  - (d) The application shall be submitted by the Planning Officer or his or her designated representative to the Technical Advisory Committee (TAC) for review and comment.
  - (e) Upon completion of the Technical Advisory Committee review, all comments shall be passed on to the Planning Officer. The Planning Officer or his or her designated representative shall prepare a staff report, which shall accompany the site plan report required under § 190-92 of this chapter and forward to the Planning Commission.
  - (f) The Planning Commission shall review the application, related materials and the Planning Officer staff report for both the site plan and the application for growth allocation at a regular public meeting. Upon favorable approval by the Planning Commission and the Planning Officer, the Planning Officer shall forward the recommendation on the growth allocation request to the County Council.
  - (g) After receiving the recommendation of the Planning Officer and the Planning Commission concerning a proposal for growth allocation associated with a use expansion in the Rural Conservation RC Zone, the Council shall hold a public hearing in order that interested parties and citizens shall have an opportunity to be heard. The Council shall provide public notice of such hearing in accordance with the provisions set forth in § 190-112 of this chapter.
  - (h) In deciding whether to approve or disapprove an application for a growth allocation for expansion of specific uses in the Rural Conservation RC Zone as listed in § 190-19 of this chapter, the Council shall consider the following:
    - [1] Consistency with the purposes and intent of the Talbot County Comprehensive Plan;
    - [2] Compatibility with existing and proposed development and land use in the surrounding area;
    - [3] Availability of public facilities;
    - [4] The effects on present and future transportation patterns;
    - [5] The effect of population change within the immediate area;
    - [6] The past, present, and anticipated need for future growth of the County as a whole;
    - [7] The location, and nature of the proposed use and/or expansion of the use; and
    - [8] The protection of the public health, safety and welfare.
  - (i) The fact that an application for a growth allocation complies with all the specific requirements and purposes set forth in this chapter shall not be deemed to create a presumption that the proposed growth allocation would in fact be compatible, and is not, in itself, sufficient to require approval with surrounding land uses.
  - (j) A complete record shall be kept of the hearing, including the vote of all members of the Council in deciding all questions relating to the proposed growth allocation.
  - (k) Site visit. The Council shall not approve or disapprove any applications for a growth allocation

unless and until a site visit has been made by at least a majority of the Council members in order to inspect the physical features of the property and to determine the character of the surrounding area.

- (l) All requests approved by the County Council shall be submitted by the County to the Maryland Critical Area Commission for approval as an amendment to the County's Critical Area Program. By state law, the Commission has 90 days to act on a request. If no action is taken in 90 days, the request will be considered approved. A request approved by the County Council shall take effect 60 days after adoption by the Council, and upon approval by the Critical Area Commission.
- (m) The County Council may reconsider a request denied by the Critical Area Commission. Such a request shall be revised by the applicant to address the reasons for Critical Area Commission denial. The revised request shall be submitted to the Planning Officer for reconsideration by the County Council within 90 days of Critical Area Commission denial. An extension of the ninety-day deadline may be requested for a specific period of time, if the applicant can demonstrate, to the satisfaction of the Planning Officer, circumstances beyond the applicant's control.