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MCHALE vs. BEASLEY
CIRCUIT COURT OF QUEEN ANNE'S COUNTY
Case No.: 17-C-07-012458

Closed

Pleadings Index McHale v. Beasley Circuit Court of Queen Anne's Co. No. 17C-07-012458 2007 MSA_S1831-30 (1 of 6)

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF:	*	
MARGARET MCHALE,	*	
Critical Area Commission for the		
Chesapeake and Atlantic Coastal Bays	*	
		Civil Action No.: 17-C-07-012458
FOR JUDICIAL REVIEW OF	*	
THE DECISION OF:		
THE QUEEN ANNE'S COUNTY BOARD	*	
OF APPEALS		
	*	
IN THE CASE OF:		
V-0100100	*	
ROBERT J. AND CONNIE B. BEASLEY		
Variance to Exceed 15% Impervious Surface	*	
In the Critical Area		

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

Pleadings Index

1.	May 17, 3007	Petition for Judicial Review
2.	May 23, 2007	Notice of Filing of Petition for Judicial Review
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6.	July 11, 2007	Memorandum of Petitioner
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8.	August 21, 2007	Reply Memorandum of Petitioner
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11.	April 9, 2008	Findings and Decision, Excerpts of the Minutes

Queen Anne's County

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

Telephone : (410) 758-1255
Fax: (410-758-2905

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

April 25, 2008

RECEIVED
APR 29 2008
CRITICAL AREA COMMISSION

Mr. & Mrs. Robert J. Beasley
205 Benton's Pleasure Rd.
Chester, MD 21619

RE: BOARD OF APPEALS CASE NO. V-010010
VARIANCE TO EXCEED 15% IMPERVIOUS SURFACE IN THE CRITICAL AREA
CIVIL ACTION NO. 17-C-07-012458

Dear Mr. & Mrs. Beasley:

Enclosed are the Board's formal Decision and the Excerpts of the Minutes from the 4/9/08 Open Meeting in accordance with the decision of the Circuit Court for Queen Anne's Co.

If you have any questions, please call.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

Enc.

CC: Circuit Court for Queen Anne's Co.
Margaret McHale, Chair
Marianne E. Dise, Esq.
LeeAnne Chandler
Board Members
Steve Kehoe, Esq.
Co. Commissioners
Pat Thompson, Esq.
Chris Drummond, Esq.
Steve Cohoon
James H. Barton
Gene Palmatary
Permit Dept.
Lynn Kimbles

RECEIVED
APR 29 2008
CRITICAL AREA COMMISSION

IN THE MATTER OF		BOARD OF APPEALS
THE APPLICATION OF		OF
ROBERT J. BEASLEY and	*	QUEEN ANNE'S COUNTY
CONNIE M. BEASLEY	*	Case No. V-010010

FINDINGS AND DECISION

This matter came before the Board of Appeals for hearing on Wednesday, April 9, 2008 at 5:45 p.m., at Board of Appeals office at 160 Coursevall Drive, Centreville, MD 21617, to hear and decide the application of ROBERT J. BEASLEY and CONNIE M. BEASLEY (the "Applicant"), being Case No. V-010010. All legal requirements pertaining to the filing of this application and notice of public hearing were substantiated and there were no objections made to the jurisdiction of this Board. This matter was heard by William D. Moore, Chairman, Kenneth L. Scott, Vice Chairman, and Howard A. Dean, Member, of the Board of Appeals of Queen Anne's County.

PURPOSE OF THE HEARING

The Applicant had requested a Variance from strict application of §14:1-38.D.(8) of Chapter 14, of the *Code of Public Laws of Queen Anne's County, 1996 ED.*, to exceed the 15% impervious surface requirement of §14:1-38.D.(8) of the Code to construct a 26' x 36' detached garage in the Critical Area. In a decision dated April 26, 2007, the Board granted the variance. The Board's decision was appealed to the Circuit Court for Queen Anne's County in a matter styled *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake Bay and Atlantic Coastal Bays for Judicial Review of the Decision of the Queen Anne's County Board of Appeals in the Case on V-010010 Robert J. and Connie B. Beasley* (Civil Action No. 17-C-07-012458). In a Memorandum and

Order dated February 19, 2008, the Circuit Court found that there was no competent evidence to support the granting of the requested variance and ordered " that the decision of the Board of Appeals in its case # V10010 is reversed and that this matter is remanded to the Board with instructions to deny the variance."

PROPERTY DESCRIPTION

The property which is the subject of this application is located at 205 Benton's Pleasure Road in the Benton's Pleasure Subdivision. The property is located in the Fourth Election District, and is designated as Zoning Map 57, Parcel 378, Lot 84, zoned NC-20 and is in the LDA Critical Area. The property consists 1 acre.

BOARD'S DECISION

The Board of Appeals of Queen Anne's County has given consideration to the limitations, guidelines and standards set forth in the *Code* and given due consideration to the Order of the Circuit Court for Queen Anne's County set forth in Civil Action No. 17-C-07-012458 and makes the following specific findings:

1. There are no special conditions or circumstances existing that are peculiar to the land or structures involved and that the literal enforcement of provisions and requirements of the County Critical Area Program would not result in unwarranted hardship.

2. A literal interpretation of the provisions of the Critical Area Program and related ordinances will not deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area.

3. Granting of the variance will confer upon the applicant a special privilege that would be denied by the County Critical Area Program to other lands or structures within the Critical Area.

4. The requested variance is based upon conditions or circumstances which are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed. The request does not arise from a condition relating to land or building use, either permitted or non-conforming on any neighboring property.

5. The granting of the variance will adversely affect water quality or adversely affect fish, wildlife, or plant habitat within the Critical Area and the granting of the variance will not be in harmony with the general spirit and intent of the State Critical Area Law and the County Critical Area Program.

The Board finds that there is no competent evidence to support the granting of the variance.

STATE OF MARYLAND

QUEEN ANNE'S COUNTY

I HEREBY CERTIFY that the foregoing is a true and correct copy of the Finding and Decision of the executive meeting of the Board of Appeals of Queen Anne's County held on Wednesday, April 9, 2008 and that the said minutes now remain on file in the Board's office.

In testimony whereof, I have hereunto subscribed my name this 25th day of April, 2008.

Cathy Maxwell
Clerk

Stephen H. Kehoe
Attorney for Board of Appeals

7692Y:\Steve\QuACoBZA\New Opinions\Beasley V010010 Remand.wpd

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

Telephone : (410) 758-1255
Fax: (410-758-2905

EXCERPTS OF THE MINUTES OF THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY

CASE NO:	V-010010
APPLICANT:	Robert J. & Connie M. Beasley
MEETING DATE:	4/9/08
REQUESTING:	A variance from Chapter 14, §14:1-38.D.(8), of the Code of Public Laws of Queen Anne's Co. (1996 ED), to exceed the 15% impervious surface requirement to construct a 26 ft. x 36 ft. detached garage. Located at 205 Benton's Pleasure Rd., Benton's Pleasure Subdiv., 4th E.D., Map 57, Parcel 378, Lot 84, zoned NC-20 and LDA.
IN ATTENDANCE:	William D. Moore, Chairman; Kenneth R. Scott, Vice-Chairman; Howard A. Dean, Member; Member; Stephen H. Kehoe, Esq., Attorney for the Board; Cathy Maxwell, Clerk to the Board; Gene Palmatary, Zoning Inspector.

CHAIRMAN: We are here to hear case V-010010. This matter is before the Board by order of the Circuit Court for Queen Anne's County, MD in a Memorandum and Order issued on February 19, 2008 in Civil No. 12458 reversing the decision of the Board to grant the variance and remanding this matter to the Board with directions that the Board deny the variance. Mr. Kehoe, would you read the criteria.

KEHOE: Do you find special conditions or circumstances exist that are peculiar to the land or structures involved and that the literal enforcement of provisions and requirements of the County Critical Area Program would result in unwarranted hardship.

CHAIRMAN: No.

SCOTT: No.

DEAN: No.

KEHOE: Do you find a literal interpretation of the provisions of the Critical Area Program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area.

CHAIRMAN: No.

SCOTT: No.

DEAN: No.

KEHOE: Do you find the granting of the variance will not confer upon the applicant any special privilege that would be denied by the County Critical Area Program to other lands or structures within the Critical Area.

CHAIRMAN: No.

SCOTT: No.

DEAN: No.

KEHOE: Do you find that the variance is not based upon conditions or circumstances which are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed.

CHAIRMAN: No.

SCOTT: No.

DEAN: No.

KEHOE: Do you find that the request for a variance arises from a condition relating to land or building use, either permitted or non-conforming on any neighboring property.

CHAIRMAN: No.

SCOTT: No.

DEAN: No.

KEHOE: Do you find that the granting of the variance shall not adversely affect water quality or adversely affect fish, wildlife, or plant habitat within the Critical Area.

CHAIRMAN: No.

SCOTT: No.

DEAN: No.

KEHOE: Do you find that the granting of the variance will be in harmony with the general spirit and intent of the State Critical Area Law and the County Critical Area Program.

CHAIRMAN: No.

SCOTT: No.

DEAN: No.

CHAIRMAN: Mr. Kehoe has read the criteria. Is there a motion.

SCOTT: I'll make a motion that we deny the application in Case No. V-010010 because there is no competent and substantial evidence to support the granting of this variance.

CHAIRMAN: We have a motion.

DEAN: I'll second it.

CHAIRMAN: We have a motion and second. All in favor, aye.

SCOTT: Aye.

DEAN: Aye.

CHAIRMAN: Let the record show that Case V-010010 has been denied. I now declare this meeting to be adjourned.

Cathy Maxwell
Clerk

4/11/08
Date

CC: Robert J. & Connie M. Beasley
Circuit Court for Queen Anne's Co.
Margaret McHale, Chair
Marianne E. Dise, Esq.
LeeAnne Chandler
Boare Members
Steve Kehoe, Esq.
Co. Commissioners
Pat Thompson, Esq.
Chris Drummond, Esq.
Steve Cohoon
James H. Barton
Gene Palmatary
Permit Dept.

IN THE MATTER OF	*	BOARD OF APPEALS
THE APPLICATION OF	*	OF
ROBERT J. BEASLEY and	*	QUEEN ANNE'S COUNTY
CONNIE M. BEASLEY	*	Case No. V-010010

FINDINGS AND DECISION

This matter came before the Board of Appeals for hearing on Wednesday, March 14, 2007 at 6:15 p.m., at Board of Appeals office at 160 Coursevall Drive, Centreville, MD 21617, to hear and decide the application of ROBERT J. BEASLEY and CONNIE M. BEASLEY (the "Applicant"), being Case No. V-010010. All legal requirements pertaining to the filing of this application and notice of public hearing were substantiated and there were no objections made to the jurisdiction of this Board. This matter was heard by William D. Moore, Chairman, Kenneth L. Scott, Vice Chairman, and Howard A. Dean, Member, of the Board of Appeals of Queen Anne's County.

RELIEF REQUESTED

The Applicant has requested a Variance from strict application of §14:1-38.D.(8) of Chapter 18, of the *Code of Public Laws of Queen Anne's County, 1996 ED.*, to exceed the 15% impervious surface requirement of §14:1-38.D.(8) of the Code to construct a 26' x 36' detached garage in the Critical Area.

PROPERTY DESCRIPTION

The property which is the subject of this application is located at 205 Benton's Pleasure Road in the Benton's Pleasure Subdivision. The property is located in the Fourth Election District, and is designated as Zoning Map 57, Parcel 378, Lot 84, zoned NC-20 and LDA and is in the LDA Critical Area. The property consists of 1 acre.

PLANNING AND ZONING

Gene Palmatary addressed the application on behalf of the Department of Planning and Zoning. He stated that with the addition of the proposed garage, the improvements to the property would exceed the 15% limitation on impervious areas. He noted that there was a blacktop driveway that had originally had a gravel surface. In addition to the residence, there is a swimming pool with decking. With the addition of the proposed garage, the impervious area would be 15.99%. He stated that there Department had no objection to the granting of the application, however, if it was approved that the Applicant be required to mitigation by planting at least 8 trees.

APPLICANT'S CASE

Robert Beasley spoke on behalf of the application. He stated that he wanted to do things the right way. He stated that his driveway was sloped and he stated that it consisted of river rock and a drain pipe to mitigate the effect of storm water flow from his driveway. He did not want to remove the blacktop area. Nor did he want the garage to encroach on the pool area. He also did not want the garage to be jammed up against his neighbor's property. He stated that he had no problem with the planting trees for mitigation.

OPPOSITION

Marianne Dise, Esquire, represented the Critical Area Commission (the "Commission"), which opposed to the application. Ms. Dise called LeeAnne Chandler, Science Advisor to the Commission, as an expert witness. Ms. Chandler was accepted as an expert witness by the Board. Ms. Chandler's testimony was as follows:

Once a watershed surpasses the impervious surface limitation water quality declines. Section 8-1808.3 of the Natural Resources Article limits the impervious area on lots of one acre to 15%. The standard for granting a variance was whether the property owner could have a reasonable use of the parcel without the variance. The subject property did have a reasonable use because it was currently being used for a residence. Since there was a house and a pool on the subject property, the standard for granting a variance under the Critical Area law simply could not be met. The lot was grandfathered as having been created prior to 1989, but the conditions for the proposed variance are the result of the actions of the Applicant. By paving the driveway, the property exceeded the permissible limit on impervious surface allowed in the Critical Area. The property could be brought into compliance by removing the middle strip of the driveway and having two tire tracks. She stated that the adverse effects from impervious surfaces are cumulative. Given the size of the proposed garage, it could accommodate five cars. Section 8-1808(d)(2) of the Natural Resources Article provides that any application for a variance is presumptively not in conformance with the Critical Area law. Mitigation was not an appropriate option. The Commission considered gravel as an impervious surface.

REBUTTAL TESTIMONY

Mr. Beasley stated that he did not think that it served anyone's interest for him to jack hammer the driveway and repave it. He also said that the proposed garage was designed to accommodate the trucks that he owned.

Mr. Palmatary stated that the County did not consider gravel as an impervious surface.

BOARD'S DECISION

The Board of Appeals of Queen Anne's County has given consideration to the limitations, guidelines and standards set forth in the *Code* and makes the following specific findings:

1. The Board finds that a literal interpretation of Chapter 14:1 would result in unnecessary hardship as a result of specified conditions which hardship is not shared by owners of other properties in the same area.

2. The Board also finds that the conditions are peculiar to the property involved.

3. The Board finds that the conditions are not the result of any action taken by the Applicant.

4. The Board finds that the variance will not be contrary to the public interest, policies, goals and objectives of Chapter 14-1 in the Queen Anne's County Critical Area Program. In this regard, the Board believes that tearing up the driveway would serve no purpose. Mr. Beasley has made a significant effort to mitigate the effects of the impervious surface of his driveway by surrounding it with river rock and drain pipes. A driveway of different configuration might have eliminated the total lot coverage, but would not necessarily be designed to reduce the adverse effects associated with a black top driveway.

5. The Board also finds that the variance will not confer upon the Applicant any special privilege denied to other owners of like property and/or structures within the Critical Area.

6. The Board finds that the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area. Although the application is for an accessory building, much of the discussion related to the driveway. As the Board noted, Mr. Beasley had taken efforts to reduce its impact.

7. The Board finds that the variance is the minimum deviation for the provisions of Chapter 14:1 would make possible the reasonable use of land and structures.

8. The Board finds that the variance will be in harmony with the general purpose and intent of Chapter 14:1 of the Queen Anne's Critical Area Program and the variance will not result in a use not permitted in the applicable development area or increase the applicable density limitations.

The Board grants the application shown as Case No. V-010010 granting a variance from the 15% impervious area limitation to permit the Applicant to construct a 26' x 36' detached garage with the condition that the Applicant plant eight (8) trees as mitigation.

Chairman Moore voted against granting the variance.

STATE OF MARYLAND

QUEEN ANNE'S COUNTY

I HEREBY CERTIFY that the foregoing is a true and correct copy of the Finding and Decision of the executive meeting of the Board of Appeals of Queen Anne's County held on Wednesday, March 14, 2007, and that the said minutes now remain on file in the Board's office.

In testimony whereof, I have hereunto subscribed my name this 26th day of April, 2007.

Cathy Maxwell
Clerk

Stephen H. Kehoe
Attorney for Board of Appeals

7692Y:\Steve\QuACoBZA\New Opinions\Beasley V010010.wpd

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS
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Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

EXCERPTS OF THE MINUTES OF THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY

CASE NO:	V-010010
APPLICANT:	Robert J. & Connie M. Beasley
HEARING DATE:	3/14/07
REQUESTING:	A variance from Chapter 14, §14:1-38.D.(8), of the Code of Public Laws of Queen Anne's Co. (1996 ED), to exceed the 15% impervious surface requirement to construct a 26 ft. x 36 ft. detached garage. Located at 205 Benton's Pleasure Rd., Benton's Pleasure Subdiv., 4th E.D., Map 57, Parcel 378, Lot 84, zoned NC-20 and LDA.
IN ATTENDANCE:	William D. Moore, Chairman; Kenneth R. Scott, Vice-Chairman; Howard A. Dean, Member; Member; Stephen H. Kehoe, Esq., Attorney for the Board; Cathy Maxwell, Clerk to the Board; Gene Palmatary, Zoning Inspector; Robert J. Beasley, Applicant; Marianne E. Dise, Esq., and LeeAnne Chandler, Critical Area Commission.

KEHOE: Do you find that a literal enforcement of Chapter 14:1 would result in unnecessary hardship as a result of the specified conditions, which hardship is not shared by owners of other property in the same development area.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the conditions are peculiar to the property involved.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the conditions are not the result of any action taken by the applicant.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: No.

KEHOE: Do you find that the variance will not be contrary to the public interest or policies, goals and objectives of Chapter 14:1 and the Queen Anne's Co. Critical Area Program.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: No.

KEHOE: Do you find that the variance will not confer upon the applicant any special privilege denied to other owners of like property and/or structures within the Critical Area.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: No.

KEHOE: Do you find that the variance is the minimum deviation from the provisions of Chapter 14:1 that will make possible the reasonable use of the land or structures.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the granting of the variance will be in harmony with the general purpose and intent of this Chapter 14:1 and the Queen Anne's Co. Critical Area Program and the variance will not result in a use not permitted in the applicable development area or an increase in the applicable density limitations.

CHAIRMAN: No.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: Do we have a motion.

SCOTT: I'll make a motion and this is solely based on testimony that stone is an impervious surface apparently. Tearing up the blacktop and putting down stone isn't going to help him at all as far as what Mrs. Chandler said. So on that note, I'll make a motion that Case V-010010, Beasley, be approved. A variance to exceed the 15% impervious cover allowed to construct a 26 ft. x 36 ft. detached garage and plant eight (8) trees of mitigation in the yard.

DEAN: I'll second it.

CHAIRMAN: The motion has been made and seconded. All in favor of the motion signify by saying "Aye".

SCOTT: Aye.

DEAN: Aye.

CHAIRMAN: No. Let the record show that Case V-010010 was approved by a two-to-one vote. There will be a formal decision forthcoming. When you receive this, you may proceed with your permitting process. I declare this hearing adjourned.

Cathy Maxwell

Cathy Maxwell, Clerk

3/15/07
Date

CC: Robert J. & Connie M. Beasley
Marianne E. Dise, Esq.
LeeAnne Chandler
Bd. Members
Stephen H. Kehoe, Esq.
Gene Palmatary
James H. Barton
Permit Dept.

Queen Anne's County

BOARD OF APPEALS
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Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

MEMORANDUM

TO: **ALL INTERESTED PARTIES**

FROM: **CATHY MAXWELL, CLERK TO THE BD. OF APPEALS**

RE: **NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW**
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

DATE: **FEBRUARY 19, 2008**

Enclosed is the Memorandum and Order from Circuit Court which reversed the decision of the Board of Appeals.

Enc.

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FEB 25 2008
CRITICAL AREA COMMISSION

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

RECEIVED
FEB 19 2008
QUEEN ANNE'S COUNTY
LAND USE, GROWTH MGT & ENVRMT

Petition of	:	
MARGARET MCHALE **Chairman, etc.**	:	
For Judicial Review of the Decision of	:	**Civil # 12458**
QUEEN ANNE'S COUNTY **BOARD OF APPEALS**	:	
Agency # V 10010	:	

: : : : :

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FEB 25 2008
CRITICAL AREA COMMISSION

MEMORANDUM AND ORDER

The Board of Appeals of Queen Anne's County (the Board) granted a variance from the provisions of the critical area statute (Title 8, Subtitle 18, of the Natural Resources Article of the *Code*, hereafter recited as NR § 8-18–) and companion provisions of the *Queen Anne's County Code*.,[1] The Chairman of the Critical Area Commmission Commission (petitioner) her challenges that decision in this proceeding for judicial review.[2]

2008 FEB 14 PM 2:
QUEEN ANNE'S COUNTY
CIRCUIT COURT
RECEIVED

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[1] References in this Memorandum to QA § — are to the provisions of that *Code*.

[2] The Chairman's authority is established by §8-1812 "the chairman of the Commission has standing and the right and authority to initiate or intervene in any administrative, judicial, or other original proceeding or appeal in this State concerning a project approval in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area" and (although the Commission did participate in the hearing before the Board of Appeals) "The chairman may appeal an action or decision even if the chairman was not a party to or is not specifically aggrieved by the action or decision."

The County Commissioners have participated in this Court, although we find little basis for standing in that they did not participate in the proceeding before the Board. The landowners who received the variance neither filed a response as required by Rule 7-204 and did not participate in the hearing in this Court and so have abandoned their status as parties. *State Farm Mut. Auto. Ins. Co. v. Insurance Comm'r*, 283 Md. 663, 668; *Morris v. Howard Research & Development Corp.*, 278 Md. 417, 424.

The law

Five paragraphs of NR § 8-1808 (d) place strong restriction upon the granting of variances under critical area law. Subsection (d)(6), titled "Granting of variance", is unequivocal in its statement of supremacy:

> Notwithstanding any provision of a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the provisions of this subsection shall apply to, and shall be applied by, a local jurisdiction in the consideration, processing, and decision on an application for a variance.

Paragraph (2)(i) is equally specific in establishing a presumption against variance:

> 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.

Under paragraph (3) "An applicant has the burden of proof and the burden of persuasion to overcome the presumption established under paragraph (2)(i) of this subsection" and the Board must make a finding in that regard "[b]ased on competent and substantial evidence."

Paragraph (4) established the findings prerequisite to granting of a variance:

> 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. [Emphasis supplied]

The words italicized in our statement of subparagraph (i) are defined in § 8-1808 (d)(1) as meaning 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."

A decision by the Board of Appeals must be "Based on competent and substantial evidence . . . [and contain] written findings as to whether the applicant has overcome the presumption established under paragraph (2)(i) [*supra*] of this subsection." § 8-1808 (d)(3)(ii)1).

The facts

Owners of property within the Limited Development Area established by the critical area provisions of the *Queen Anne's County Code*, filed an application for "A variance to exceed the 15% impervious cover requirement of § 14:1-38 .D(8) [of the *Queen Anne's County Code*] to construct a 26 ft. x 36 ft. detached garage." As previously noted, they are not parties in this proceeding.

The requirement for which variance was sought is that "Development and redevelopment[3] requiring project approvals within the LDA shall be subject to the following conditions and restrictions . . . Impervious surfaces shall be limited to 15% of the gross site

[3] Under QA § 14:1-10, development means "Any construction, modification, extension or expansion of buildings or structures . . . or action that results in construction, modification, extension or expansion of buildings or structures . . . ."

area proposed for development."[4] The section further provides that "The Board of Appeals may grant a variance from the provisions of this subsection in accordance with [QA] § 14:1-61 et seq."

Testimony of one of the applicants indicates that they purchased the subject property in 2003. It contains 43,500 square feet, thus allowing impervious surface of 6,525 square feet. The property was improved by a residence and a gravel driveway. These improvements did not cover more than 15% of the gross site area. Either then or subsequently, the property was further improved by a pool and surrounding deck but, according to the Zoning Inspector, "they still met the 15%." The gravel driveway was later converted to a blacktop driveway and a fence was constructed "in the 100 ft. buffer." Neither of these actions required zoning approval.

The Zoning Inspector testified that "when you look at the house, the driveway, the pool, the patio and then the sidewalk, and you figure in the proposed garage, that's 8,124 sq. ft." – that is, 1,999 square feet over the impervious limit. We pause to note that the proposed garage is to cover only 936 square feet – meaning that impervious surface exceeds the 15% limit by some 1,063 square feet even before the variance here requested. Therefore, the variance would *sub silentio* give retroactive effect to the existing excess as well as the area requested in the application, or 32% more than allowable impervious surface.

The Zoning Inspector also testified that the Department of Planning and Zoning had no objection to granting the variance, but by way of explanation stated only that:

> . . . our Department has no objections. I mean there's two ways you could look at it. Our perspective, we can say, he could have said he'll remove te 1,600 sq. ft. [of the blacktop driveway] that's necessary to comply or he has a choice of coming here and that's why he's here. He made that choice and you gentlemen will have to make a decision.

Perhaps recognizing that this provided no affirmative reason for granting a variance, he

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[4] This provision is contained in compliance with the provisions of NR § 8-1808 (c)(1)(v) that a local critical area program contain "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."

continued that "If for some reason it gets approved, I think it would be only fair they plant some, do some mitigation on that property which would equal probably eight trees."[5]

Testimony in opposition

The witness for the Critical Area Commission Chairman first reviewed the importance of impervious surface regulation:

> . . . the impervious surface limits are a vital part of the Critical Area law in addressing the goal of the Critical Area law to conserve and protect water quality. The more impervious surface, the more runoff you have. Each little piece tarts to add up. In, I think it was 2004, again the General Assembly re-emphasized that the cumulative impacts are what's causing a lot of these issues. So they re-emphasized all the findings that were made when the Critical Area law was originally passed. Every property owner within the LDA of the critical area is subject to certain impervious limits, depending on the size of your lot.

She also testified in more detail that:

> The limits to impervious surface within the Critical Area was a means of addressing the cumulative impact of impervious surface within a watershed over time. The specific studies that have shown once a watershed surpasses a certain amount of impervious coverage, you start seeing the water quality decline. Many studies have been done on things like trout streams and their decline. So when the General Assembly passed the Critical Area criteria, this was one means of getting it back on a property-by-property basis which is as we have to review it.

The witness carefully reviewed each aspect of the statute. With respect to the requirements of § 8-1808 (4)(1) – "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."[6] The witness testified that the requirement itself was not peculiar to applicant's property: "the impervious surface

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[5] The applicant agreed to this suggestion and as granted by the Board, the variance contains this condition.

[6] Clearly the requirement involves the existence of two factors: (1) circumstances peculiar to land or structure and (2) unwarranted hardship.

limits have been in the County program in the County Code since 1989. It's been 15% that entire time." "[T]he house was not there and it wasn't already over the impervious surface as of 1989. The house was newly built within the limits."

The witness also evaluated unwarranted hardship – the phrase being defined in § 8-1808 (d)(1), page 3, *supra*, as meaning 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." She testified that:

> . . . what I did was look at the application, look at the site plan, I've driven by the site to see what it looked like and went through the specific application that is before you tonight. As Mr. Palmatary [the zoning inspector] said, the applicant's property is already exceeding the impervious surface limits. It's likely from the paving of the driveway and the expansion of the driveway as it existed when the house was originally built. As it is existing, developed with several accessory structures, the standard of unwarranted hardship, denial of reasonable use of the lot, it's obvious that the applicant has reasonable use of the property with his house, the driveway, the pool and the patio. It all adds up to reasonable use. So we feel that that standard just cannot be met.

She even provided alternatives:

> As we had previously recommended, if some way where impervious surface could be taken up, we don't oppose the garage, we oppose the additional impervious surface. So we had previously recommended that some impervious surface be taken up, such that a variance would not be necessary and the lot could be brought into compliance with the Critical Area law. There's several things that could be done. The garage could be moved to a different location. If there's some issues with piping, it could be made smaller. Parts of the driveway could be removed. Sometimes people take out the center strip of the driveway and replace it with grass and just have the paved travel ways. There's various porches around the house, there's the impervious patio around the pool that could be taken up. So there's several options and we recommend that the applicant go back and redesign so that it could be accommodated within the restrictions and the law.

The applicant refused these and other alternatives: "I'm just trying to do it the right way. I could do just like everybody else and put the garage up, take the driveway out, get my variance . . . I'm coming to you to do it the right way, get the variance."

Conclusion

We need not prolong this Memorandum. Based upon the facts as above recited, there is not one scintilla of evidence to support the granting of the variance in this case.

- The proof presented to the Board did not address and therefore did not overcome the statutory presumption "that the specific development activity . . . 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." § 8-1808 (d)(2)(i), quoted on page 2.

- Based upon that fact, there is a complete lack of "competent and substantial evidence" from which the Board could make the affirmative finding required by § 8-1808 (d)(3)(ii)1, quoted on page 2, "as to whether the applicant has overcome the presumption" – and it did no do so.

- There is no evidence that "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." § 8-1808 (d)(4)(i), quoted on page 3 – unwarranted hardship meaning the presence of circumstances under which "without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested. § 8-1808 (d)(1), quoted on page 3.

The short of the matter is that there is no evidence from which the Board

could have made the findings required for a variance under § 8-1808 (d)(4), quoted on pages 2 and 3. Its written decision is mute proof of its inability to do so. Approval of the variance was by definition arbitrary and capricious. It will be reversed.

ORDER

For the reasons stated above:

1. The decision of the Board of Appeals in its case # V10010 is **REVERSED**.

2. Pursuant to Rule 7-209 the matter is remanded to the Board with instructions to deny the variance.

3. If appellate review has not been sought within 30 days after this Order is entered on the docket, the Clerk shall return the record of the agency proceeding to the Board of Appeals. If appellate review is sought within that period, the Clerk, unless otherwise ordered by the appellate court, shall return the record of the agency proceedings to the Board of Appeals upon the conclusion of the appellate review.

4. The Clerk will send copies of this Memorandum and Order to counsel for the parties and to the Board of Appeals of Queen Anne's County.

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

February 14, 2008

TRUE COPY, TEST.
SCOTT MACGLASHAN, CLERK
BY: _____
DEPUTY CLERK

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Attorney General

KATHERINE WINFREE
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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338

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mdise@oag.state.md.us

August 21, 2007

Mr. Scott MacGlashan, Clerk of the Court
Circuit Court for Queen Anne's County
100 Court House Square
Centreville, Maryland 21617

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Queen Anne's County Board of Appeals, In the Case of: Robert and Connie Beasley*
Civil No. C-17-07-012458

Dear Mr. MacGlashan:

Enclosed please find for filing in the above-referenced case the Reply Memorandum of Law of Petitioner Margaret McHale, Chair of the State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF:	*	
MARGARET MCHALE,		
Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	
	*	
FOR JUDICIAL REVIEW OF THE DECISION OF:	*	Civil Action No.: 17-C-07-012458
THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	
IN THE CASE OF:	*	
V-010010		
ROBERT J. AND CONNIE B. BEASLEY	*	

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

REPLY MEMORANDUM OF PETITIONER

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Rule 7-207(a), files this Reply Memorandum.

INTRODUCTION

This case is a text-book example of a local zoning Board's failure to follow, or even to acknowledge, the State-mandated standards for Critical Area variances. The Queen Anne's County Board of Appeals simply ignored the required Critical Area variance standards. The County's Memorandum of Law at pages 5-9, relying on cases which were superseded by statute in 2002 and 2004, condones this action. Moreover, the County seems to suggest (Mem. of Law at 5-6) that, rather than using the State standard of "unwarranted hardship," the County Code supplies a somewhat different standard for "unnecessary hardship," and that the Board satisfied

the County standard by considering whether it is "environmentally ineffective" to replace a blacktop driveway with gravel. The County's position is erroneous. Pursuant to both State statute (2007 Laws of Maryland, Ch. 221) and controlling caselaw, *Becker v. Anne Arundel County,* 174 Md. App. 114, 136 (2007), the variance requirements of State Critical Area law are mandatory, regardless of whether or not a local jurisdiction has incorporated those requirements into its local code.

By advocating interpretations of law which have been expressly superseded by statute, the County has attempted to justify the Board's granting of this variance. The Chair of the Critical Area Commission urges this Court to reject the County's arguments and to reverse the Board.

I. The County Erroneously Relies on Cases Which Have Been Superseded by Statute.

The County appears unaware that the cases cited in its Memorandum at 5-9 (*Belvoir Farms v. North, White v. North, Mastandrea v. North)* have been expressly superseded by statute. Chapters 431 and 432 of the 2002 Laws of Maryland amended the Critical Area Law, Code, Nat. Res. II §8-1808 in response to the *Belvoir, White,* and *Mastandrea* decisions. The General Assembly made the abundantly clear finding that "these recent rulings by the Court of Appeals are contrary to the intent of the General Assembly in enacting the Chesapeake Bay Critical Area Protection Act." Preamble to H.B. 528 and S.B. 326, Chs. 431 and 432, 2002 Laws of Maryland (Attached to this Reply Memorandum as Exhibits 1 and 2, respectively). Moreover, the 2002 amendments to the Critical Area law expressly stated that the "intent of this Act [is] to overrule these recent decisions of the Court of Appeals regarding variances to Critical Area regulations." *Id.*

Since June 1, 2002, an applicant for a Critical Area variance in every county has been

required to meet **each one** of the variance provisions in Nat. Res. II §8-1808(d), including the standard of "unwarranted hardship." Code, Nat. Res. II §8-1808(d)(1)(I) (Supp. 2002). This statutory amendment rejects the contrary holding of the Court of Appeals in *White,* advocated by the County at pp. 8-9 of its Memorandum. The 2002 amendments to the State Critical Area law also required local zoning boards to consider the reasonable use of the entire property or lot for which the variance was requested. This amendment to Code, Nat. Res. II §8-1808(d)(2) (Supp. 2002) expressly rejected the contrary holding of the Court of Appeals in *Mastandrea*, cited by the County at pp. 7-8 of its Memorandum. The 2002 amendments also provided that "rights commonly enjoyed" were to be compared to the uses of land or structures "permitted to others in accordance with the provisions of the Critical Area program." (Code, Nat. Res. II §8-1808(d)(3) (Supp. 2002). This amendment expressly discards another contrary statement in *White,* which the County argues at p. 8 of its Memorandum. [1]

In 2004, the General Assembly again amended the Critical Area law, in response to another case from the Court of Appeals, *Lewis v. DNR*, 377 Md. 382 (2003). This time, the General Assembly defined the term "unwarranted hardship" as "without at variance, an applicant would be denied reasonable and significant use of the *entire parcel or lot* for which the variance is

---

[1] In *Becker v. Anne Arundel County*, 174 Md. App. 114, 132 (2007), the Court of Special Appeals observed that "the preambles to the bills [House Bill 528 and Senate Bill 326] expressly stated that it was the intent of the General Assembly to overrule recent decisions of the Court of Appeals, in which the Court had ruled that,

> (1) when determining if the denial of a variance would deny an applicant rights commonly enjoyed by others in the critical area, a board may compare it to uses or development that predated the critical area program; (2) an applicant for a variance may generally satisfy variance standards rather than satisfy all standards; and (3) a board could grant a variance if the critical area program would deny development on a specific portion of the applicant's property rather than considering the parcel as a whole."

requested." (Emphasis added) Code, Nat. Res. II §8-1808(d)(1) (Supp. 2004). The 2004 amendments to the Critical Area Law overruled *Lewis,* and "reestablished the understanding of unwarranted hardship that existed before being 'weakened by the Court of Appeals.'" *Becker v. Anne Arundel County*, id. at 132, *quoting* the preamble to Ch. 526, 2004 Laws of Maryland.

The interpretations of Critical Area Law argued by the County at pages 5-9 of its Memorandum, and the cases cited therein, are no longer good law, and this Court should reject the County's interpretation.

II. The State Critical Area Variance Requirements Apply to All Local Zoning Boards, Whether or Not the County or Municipality Has Incorporated Those Requirements into Local Code.

All of the State law standards for variances apply to all local jurisdictions in Critical Area variance cases. *Becker*, id. at 136 ("[T]he criteria contained in [Nat. Res. II] §8-1808, including the criteria for granting a variance, are mandatory.") In granting this variance for a new detached garage, the Queen Anne's County Board of Appeals heard testimony from the Applicant that he would have to replace his blacktop driveway if the variance were denied. (County Mem. of Law at 6). Yet, the Applicant did not claim that he would be denied reasonable use of his entire property without the garage. Given the well-developed state of the property, which is improved with a large home, pool, attached garage, patio, and driveway, it is not credible for the County to suggest that the Board of Appeals used the correct standard for unwarranted hardship in this case.

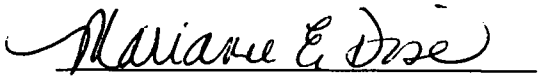
Neither the County nor the Applicants can support the assertion that denial of *an additional garage* would result in denial of reasonable and significant use of the *entire* property in this case. Indeed, the Queen Anne's Board did not even try to make this finding. The Applicants'

property already exceeds the State law maximum of 15% impervious surface coverage, and the variance for the extra garage makes this non-compliant situation worse. The issue is not, as stated by the County, whether the Applicant would have to remove his blacktop driveway. The question is whether denial of a variance for an extra detached garage would deny the Applicants reasonable and significant use of the entire parcel. Most assuredly, the answer to that question is "no."

CONCLUSION

The Chair of the Critical Area Commission urges this Court to reverse the Board, because the Board's Decision is suffused with serious errors of law. As set forth fully in the Chair's initial Memorandum of Law, the Board failed to recognize, or to use, the standard of "unwarranted hardship" as required by Code, Nat. Res. II § 8-1808(d)(1). The Board failed to recognize, or to use, the standard of "rights commonly enjoyed" as required by Code, Nat. Res. II §8-1808(d)(4)(iii). The Board failed to make written findings on each of the variance factors and on the presumptions required in the Critical Area law. Code, Nat. Res. II §8-1808(d)(3). Any one of these errors of law, in itself, provides sufficient basis for this Court to reverse the Board. Taken together, these errors of law utterly undermine the Board's Decision, and this Honorable Court should reverse the Board.

Respectfully submitted,
DOUGLAS F. GANSLER
Attorney General of Maryland



Marianne E. Dise, Assistant Attorney General

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(410) 260-3466
Attorneys for Margaret McHale, Chair,
Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays

August 21, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, on this 21st day of August, 2007, I mailed a copy of the foregoing Reply Memorandum, by U.S. Postal Service, first class mail, to:
Mr. and Mrs. Robert Beasley
205 Benton's Pleasure Road
Chester, MD 21619
and to
Patrick E. Thompson, Esquire
Foster, Braden, and Thompson, LLP
102 E. Main Street, Suite 203
Stevensville, MD 21666.

Marianne E. Dise

HOUSE BILL 528

Unofficial Copy
M3
SB 607/01 - EEA

2002 Regular Session
2lr1206
CF 2lr0915

By: **Delegate Weir (Chairman, Joint Committee on the Chesapeake Bay Critical Areas), the Speaker (Administration), and Delegates W. Baker, Cadden, and Owings**
Introduced and read first time: January 31, 2002
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 22, 2002

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested; providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; providing for the application of this Act; and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Exhibit 1

Preamble

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

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

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

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

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

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

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

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

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

Article - Natural Resources

8-1801.

(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

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

(i) Subdivision regulations;

(ii) Comprehensive or master plan;

(iii) Zoning ordinances or regulations;

(iv) Provisions relating to enforcement; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(3)~~ (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

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

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

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

SENATE BILL 326
~~EMERGENCY BILL~~

Unofficial Copy
M3

2002 Regular Session
(2lr0915)

ENROLLED BILL
-- Education, Health, and Environmental Affairs/Environmental Matters --

Introduced by **Senator Dyson (Chairman, Joint Committee on the Chesapeake Bay Critical Areas)** ~~**and Senators Frosh and Sfikas,**~~ **the President (Administration), and Senators Frosh, Sfikas, Blount, Hollinger, Collins, Conway, Harris, Schrader, and Stone**

Read and Examined by Proofreaders:

_____
Proofreader.

_____
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this _____ day of _____ at _____ o'clock, _____M.

_____
President.

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; ~~requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;~~ *requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;* providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; ~~making this Act an emergency measure~~ *providing for the application of this Act;*

Exhibit 2

and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Preamble

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

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

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

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

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

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

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

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

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

Article - Natural Resources

8-1801.

(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

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

(i) Subdivision regulations;

(ii) Comprehensive or master plan;

(iii) Zoning ordinances or regulations;

(iv) Provisions relating to enforcement; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(3)~~ (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

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

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

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

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

Marianne

IN THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	CIVIL NO. 12458
FOR JUDICIAL REVIEW OF THE DECISION OF THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	
IN THE CASE OF Case No. C-010010, Robert J. and Connie M. Beasley	*	

RECEIVED
AUG 7 2007
DNR - LEGAL DIVISION

MEMORANDUM
(Md. Rule 7-207)

The County Commissioners of Queen Anne's County by Patrick E. Thompson and Foster, Braden & Thompson, their attorneys file this Memorandum pursuant to Maryland Rule 7-207:

STATEMENT OF THE CASE

This proceeding is an effort by the State Critical Area Commission to overturn the decision of the Queen Anne's County Board of Appeals which granted a variance from impervious surface limitations to allow Robert J. Beasley, Jr. and Connie M. Beasley, his wife, to construct a garage on their inland lot in Benton's Pleasure, a residential subdivision located on Kent

Island, Queen Anne's County, Maryland.

STANDARD OF REVIEW

In a Petition for Judicial Review of an administrative decision the Court's function is to determine whether (i) there was substantial evidence in the record as a whole to support the agency's findings and conclusions, and (ii) the decision of the administration agency was based upon an erroneous conclusion of law. As a general proposition, "the order of an administrative agency, such as a county zoning board, must be upheld on review if it is not premised upon an error of law and if the agency's conclusions may 'reasonably based upon the facts proven'". AD + Soil, Inc. v. County Commissioners of Queen Anne's County, 307 Md. 307 (1986) quoting Annapolis v. Annap. Waterfront Co., 284 Md. 383, 399 (1979).

The test of appellate review is frequently phrased as whether a reasoning mind could reasonably have reached the conclusion reached by the agency, consistent with a proper application of the law. If so, the decision of the administrative agency must be upheld. Gray v. Anne Arundel County, 73 Md. App. 301, 309 (1987). Administrative agency decisions are not set aside unless the decision is arbitrary,

illegal or capricious. In determining whether such a decision was arbitrary, illegal or capricious, the reviewing Court must decide whether the question before the agency was "fairly debatable". The test is "reasonableness" not "rightness". Becker v. Anne Arundel County, 174 Md. 114 (2007).

Where the issue involves review of the agency's factual determinations or a mixed question of law and fact, the correct standard of review is whether there is substantial evidence in the record to support the factual findings and whether a reasoning much could have reached the conclusion reached by the agency. Thames Point Associates v. Supervisor, 68 Md. App. 1, (1986).

QUESTIONS PRESENTED

Was there substantial evidence in the record as a whole to support the findings of the Queen Anne's County Board of Appeals?

ARGUMENT

The Appellant raises three distinct arguments with respect to the decision of the Board of Appeals:

A. The Board erred in finding "unwarranted hardship";

B. The Board did not have a factual basis to find the Applicants had met the criteria for a variance; and

C. The Board failed to make written findings required by State law.

In each of these arguments, the State misinterprets the law and seeks to usurp the proper function of the local jurisdiction in deciding applications for variances under the Critical Area Act.

A. The Queen Anne's County Board of Appeals applied the correct standard of "unnecessary hardship".

In 1984 the State adopted a Chesapeake Bay Critical Area Protection Program which is codified in Md. Code Ann. Natural Resources Article, §8-1801 et seq. Each local jurisdiction, including Queen Anne's County, is required to adopt a local Critical Area Program. Queen Anne's County's program is codified in Chapter 14 of the Code of Public Local Laws. The County program is required to be approved by the State Critical Area Commission, NR, §8-1801.

State law is clear that "[i]t is the intent of [Subtitle 18 of Title 8 of the Natural Resources Article] that each local jurisdiction shall have primary responsibility for developing and implementing a program ...". NR 8-1808(a). Despite the vesting of "primary responsibility" in the local jurisdictions, the State requires that there be a finding of "unwarranted hardship to the

applicant" before a variance may be granted. NR §8-1801(d)(4)(i). The Queen Anne's County program requires a finding of "unnecessary" hardship as a result of specified conditions which hardship is not shared by other properties in the same area. County Code §14:1-66. The Court of Appeals have held these two standards to be "undistinguishable". Belvoir Farms Homeowner's Association v. North, 355 Md. 259 at p. 276 (1999).

The applicants in this case sought to build a 26' x 36' garage (Record, "R" Applicants Ex. 6). Their property (lot 84 of Benton's Pleasure) contains an area of 43,500 square feet. Under County Code, Section 14:1-38(8) a site may not have impervious surface of more then 15% or 6,525 square feet. Construction of the proposed garage would give the Beasleys a total impervious surface of 7,124 square feet or 1,599 more than allowed by the County Code. (Transcript "Tr." at p. 4).

It is clear from a reading of the transcript that the Board of Appeals was concerned that a denial of the variance would result in the Beasleys having to tear up their blacktop driveway in order to meet impervious surface limitations (Tr. 16). This was especially troubling because the representatives from the Critical Area Commission testified that they considered a gravel

driveway an impervious surface (even though the County does not) (Tr. 15). In determining that unnecessary hardship existed, the Board considered the distinct possibility that a denial would result in the applicants replacing the existing blacktop driveway with gravel and that the State Critical Area Commission was of the position that there was no difference, in an environmental-impact sense, between blacktop and gravel. Given the testimony of the State Critical Area representatives, it was entirely reasonable for the Board to find such environmentally ineffective action to be a hardship on the applicant, unreasonable and unwarranted.

B. The Board had a factual basis for finding Applicants had met the criteria for a variance.

There was ample testimony before the Board that the applicants had made efforts to minimize the impacts of impervious surface on stormwater run-off. Mr. Beasley testified (Tr. 5) that he sloped his driveway, installed "river rock" to slow the runoff of stormwater and that he installed a penetrable felt underlayment under the river rock "so that rain water will penetrate" (Tr. 5). He removed an existing shed on his property to reduce the amount of impervious surface (Tr. 21).

In this case the applicants simply wished to construct a garage to house their vehicles, hardly a "special privilege" denied to others in the critical area (County Code, § 14:1-66 E.) and a "reasonable use" of his property (Code, § 14:1-66 G.). The efforts undertaken by the applicant, as outlined above, were clearly sufficient for a reasoning mind to find that the public interest and the policies, objective and goals of the County Critical Area Program were met (Code § 14: 1-66 D. and H.) and would not adversely affect the water quality or impact fish, wildlife or plant habitat in the critical area (County Code, § 14: 1-66 F.).

In Mastandrea v. North, 361 Md. 107 (2000) the Critical Area Commission also sought to overturn a critical area variance. The factors to be considered by the Talbot County Board of Appeals in Mastandrea were virtually identical to the Queen Anne's County requirements under its Critical Area Program (see Mastandrea at p. 114, 115).

In holding that the Talbot County Board of Appeals correctly granted a variance to the Mastandreas, the Court noted that "unwarranted hardship is a lesser standard than that required to prove an unconstitutional taking" (at p. 136, citing belvoir Farms v. North, 355 Md. 259 (1977) and that "whether a property

owner has been denied reasonable and significant use of his property is a question of fact best addressed by the expertise of the Board of Appeals". The Board of Appeals did not have to consider whether denying the variance would deny the Mastrandrea's reasonable and significant use of the "entire" lot. Rather they should (and did) consider whether the denial of the variance denied the property owner a reasonable and significant use (such as, in this case, a garage) on a portion of the property.

In White v. North, 356 Md. 1 (1999) the Critical Area Commission sought to overturn a variance granted by the Anne Arundel County Board of Appeals which allowed the Whites to construct a swimming pool in the Critical Area. In that case the Critical Area Commission testified before the Board of Appeals that "reasonable use" should only be interpreted to mean a primary residence and that granting a variance for an accessory structure (such as a pool, or in this case, a garage) would grant a "special privilege" to the applicants.

The White Court stated that "the essential determination [in a variance request] is whether an unwarranted hardship exists" and that "if total compliance with every specific requirement were necessary, relief would be nearly impossible and serious

'takings' questions might arise. It is our view that these specifically stated requirements are to be considered in the context of the entire variance ordinance, to the end that, when interpreted as a whole either they are or are not generally met". (at. p. 50, emphasis in original).

The White Court also specifically rejected the lower Court decisions (and the position of Appellant in this case as set forth at p. 11 of Appellant's Memorandum) that in determining whether a grant of variance would confer a right commonly enjoyed by others, the Board should only consider uses resulting under the critical area variance procedures. The correct interpretation, and the standard that the Board applied, is whether a denial of a variance would deprive the Petitioners of rights commonly enjoyed by other property owners in the area, and within the critical area. The correct standard is not whether other properties in the area have been given a variance from impervious surface limitations but whether the denial of a variance in this case would deny applicants a right (i.e., the right to construct a garage) commonly enjoyed by others in the neighborhood.

The construction of a garage is clearly a right commonly enjoyed by other property owners in the area and in the critical

area. The granting of the variance in this case confers no "special privilege" on the applicants. Its denial would result in an unnecessary hardship not shared by owners of other property in the area.

C. The written findings of the Board were sufficient.

In a case cited by Appellant Gray v. Anne Arundel County, 73 Md. App. 301 (198) the argument was made that the Board of Appeals had failed to make adequate findings of fact. The Court stated in that case (at p. 313):

> "Appellants ... acknowledge that the Board referred to each of the factors required to be considered before granting a permit for the installation of pilings; however they argue that the Board utterly failed to make a finding regarding each factor. We do not agree.
>
> Unlike the situation in Ocean Hideway Condo. v. Boardwalk Plaza, 68 Md. App. 650, 515 A. 2d 485 (1986), the Board's Opinion and Order, consisting of ten pages, made adequate findings of fact. Not only did the Board summarize the testimony of the various witnesses that appeared before it, but it discussed the relevant ordinance, and made findings and drew conclusions, albeit some of the findings were made by reference back to the summarized testimony, and applied the law. Although the findings are not set out in the form that appellants would prefer, reviewing the Opinion and Order in context and in its entirety (emphasis added), we are convinced that the decision in this case does not suffer from the deficiencies noted in the cased relied upon by appellant." (at p. 313, 314)."

Just as in Gray, supra, in this case the written decision summarized the testimony of each witness, discussed each of the criteria for a variance and made a specific finding with respect to each of the criteria. It is clearly sufficient to constitute the "written findings" required by NR § 8-1808 (d).

Patrick E. Thompson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 6th day of August, 2007, I served a copy of the aforegoing by mailing the same first class mail, postage prepaid to:

Douglas F. Gansler, Esquire
Saundra K. Canedo, Esquire
Marianne E. Dise, Esquire
Attorneys for Margaret McHale
Department of Natural Resources
580 Taylor Avenue
Annapolis, Maryland 21401

Mr. and Mrs. Robert J. Beasley
205 Benton's Pleasure Road
Chester, Maryland 21619

Patrick E. Thompson

I:\39-kr\COUNTY\Pleadings\Memo Beasley case.wpd

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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

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mdise@oag.state.md.us

July 11, 2007

Mr. Scott MacGlashan, Clerk of the Court
Circuit Court for Queen Anne's County
100 Court House Square
Centreville, Maryland 21617

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Queen Anne's County Board of Appeals, In the Case of: Robert and Connie Beasley*
Civil No. C-17-07-012458

Dear Mr. MacGlashan:

Enclosed please find for filing in the above-referenced case the Memorandum of Law of Petitioner Margaret McHale, Chair of the State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	
FOR JUDICIAL REVIEW OF THE DECISION OF: THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	Civil Action No.: 17-C-07-012458
IN THE CASE OF: V-010010 ROBERT J. AND CONNIE B. BEASLEY	*	

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

MEMORANDUM OF PETITIONER

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Saundra K. Canedo and Marianne E. Dise, Assistant Attorneys General, pursuant to Rule 7-207, files this Memorandum.

INTRODUCTION

Petitioner, Chair of the Critical Area Commission, seeks review of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals ("Board"), in which the Board granted a variance to exceed the 15% impervious surface requirements of the Critical Area law. The Board's Decision permits Robert and Connie Beasley (the "Applicants") to construct a 26' x 36' detached garage on their property at 205 Benton's Pleasure Road in Queen Anne's County's Critical Area. The Applicants' property already exceeds the State law maximum of 15% impervious surface coverage. The variance granted by the Board for the new garage would exacerbate the non-compliant

situation on Applicants' property. The Critical Area Commission urges this Court to reverse the Board's decision, because the Board erred as a matter of law: by failing to apply the statutory standard of "unwarranted hardship;" by failing to apply all of the variance standards required by the Critical Area law; and by failing to make the written findings required by the Critical Area law. Accordingly, the Board's decision to grant the variance is legally deficient as a matter of law, and this Court should reverse the Board.

PROCEEDINGS BY BOARD OF APPEALS

The Queen Anne's County Board of Appeals held a public hearing in the matter of a variance application by Robert J. and Connie M. Beasley (the "Applicants") on March 14, 2007. No County witness addressed the statutory standards required for granting variances in the Critical Area. In fact, the County did not make any specific recommendations to the Board; rather County staff stated no objection to the granting of the variance in the Planning & Zoning Staff Report (the "Report"), noting that the applicant is currently "over 1,599 sq. ft. of impervious cover". Report at 1. At the hearing, Gene Palmatary testified on behalf of the County that the County had no objection to the variance so long as the Applicant was required to mitigate. Transcript of Board hearing, March 14, 2007 ("Tr.") at 4.

The Critical Area Commission introduced expert testimony from Lee Ann Chandler, the Commission's Science Advisor. Tr. at 9. Ms. Chandler testified as to the State Critical Area variance standards and especially that of unwarranted hardship. Tr. at 10. Testifying about the General Assembly's amendments to the Critical Area law in 2002 and 2004, Ms. Chandler observed that the General Assembly specifically strengthened the standards which must be met by an applicant for a variance to the

Critical Area law. She testified that she reviewed the Applicants' request for a new detached garage in light of the strict standards in State law, and she concluded that the Application did not meet the standard of "unwarranted hardship." Tr. at 10. She informed the Board that the Applicants' property exceeded the impervious surface limits set by State law, Annotated Code, Natural Resources Article §8-1808.3. Ms. Chandler explained the scientific background for the 15% limitation on impervious surfaces: "The specific studies [that] have shown once a watershed surpasses a certain amount of impervious coverage, you start seeing the water quality decline." Tr. at 9.

Consistent with State law, the Queen Anne's County Critical Area law requires that the Applicants satisfy each and every variance standard in order to be granted a variance[1]. Md. Code Ann., Nat. Res. Art. § 8-1808(d); County Code, Article XIII, §14:1-66 In addition, State law requires the Board to make written findings to support its decision on a variance application. Md. Code Ann., Nat. Res. Art. §8-1808(d)(3)(ii). The Board made findings of fact, but the Board's decision merely recites, without analysis, the variance standards in the County Code.[2] Bd. Decision at 4. In this case, the Board erroneously granted the variance, using an incorrect legal standard for the required finding of "unwarranted hardship."[3] State law defines "unwarranted hardship"

---

[1] The County Code does not follow the precise language of the State law, requiring "each and every" standard be met; however, the variance standards are written so as to indicate a necessity to meet all standards. Because the State law does require that each standard be met, the State law controls. *Becker v. Anne Arundel County*, 174 Md. App. 114, 136-137 (2007).

[2] In its decision, the Board does provide some discussion about whether the variance is contrary to the "public policies, goals and objectives of Chapter 14-1 in the Queen Anne's County Critical Area Program." Bd. Decision at 4.

[3] The County Code defines the hardship standard as an "unnecessary hardship . . . which hardship is not shard by owners of other property in the same development area." County Code, §14:1-66 A.

as, "without a variance, an applicant would be denied reasonable and significant use of the *entire parcel or lot* for which the variance is requested." Code, Natural Resources Art.§8-1808(d)(1)(emphasis added). The definition in State law Natural Resources Article §8-1808(d)(1) controls over any inconsistent definition in County law. *Becker v. Anne Arundel County*, 174 Md. App. 114, 136 (2007)("The criteria contained in [Natural Resources Article] §8-1808, including the criteria for granting a variance, are mandatory.").

Similarly, State law mandates that, for Critical Area variance cases, the burdens of proof and persuasion lie with the Applicants. Code, Nat. Res. Art. 8-1808. *Becker v. Anne Arundel County*, id. at 133. In the instant case, the Board failed to require the Applicants to provide evidence to meet those burdens and to support the variance application. Moreover, the Board failed to make the requisite written findings and failed to require the Applicants to overcome the assumption of non-conformance with the general purpose and intent of the critical area law. Given these numerous legal errors, the Board's decision should be reversed.

BACKGROUND OF CRITICAL AREA ACT

In an effort to protect the Chesapeake Bay from further decline, the General Assembly enacted Chapter 794 of the Laws of 1984, the Chesapeake Bay Critical Area Protection Program, Md. Code Ann. Nat. Res. II, §8-1801 et seq. (the "Critical Area Law"). In doing so, the General Assembly made findings that:

> (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; . . .
>
> (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 systems, and tidal wetlands; . . .

(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 Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

Code, NR §8-1801(a). As required by the Critical Area Law, each affected local government, including Queen Anne's County, developed a Resource Protection Program – or "Critical Area Program" – which is implemented "on a cooperative basis between the State and local governments." Code, NR §8-1808(b)(2). Queen Anne's County administers its Critical Area Program subject to the oversight of the Critical Area Commission.

VARIANCES TO THE CRITICAL AREA LAW

Relevant here, Queen Anne's County law requires the Applicants to apply for and receive a variance to the Critical Area Program before the Applicants can build the proposed garage in the Critical Area. This is because the garage would cause the Applicants' property to further exceed the impervious surface limitation. Under the Critical Area law, man-made impervious surfaces are limited to 15% of a parcel or lot. Code, NR §8-1808.3(d).

The Critical Area Act requires that when local zoning boards consider variance applications, they must presume that the requested project "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." Code, NR §8-1808(d)(2)(i). The variance applicant bears the burden of proof and the burden of persuasion to overcome this statutory presumption. Code, NR §8-1808(d)(3). In this case, the Board did not address whether or not the applicant overcame the presumption of non-conformance as required by the Critical Area Act. To the contrary, the Board acknowledged that the Applicants were already exceeding the impervious surface limit. Then, without explanation, the Board granted a variance to permit *more* coverage of the land with impervious surface beyond the legal limit.

In addition to overcoming the presumption of non-conformance, the applicant must meet all of the County's enumerated variance standards. County Code, §14:1-66. Specifically, the Board must find that without the variance, the applicant would suffer an "unwarranted hardship." "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." (emphasis added). Code, NR §8-1808(d).[4]

The Queen Anne's County Code establishes eight specific criteria for Critical Area variances,[5] all of which must be met and satisfied. County Code, §14:1-66. The State Critical Area Act requires that, "**a local jurisdiction shall make written findings** as to whether the applicant has overcome the presumption of non-conformance." NR 8-

[4] The County Code refers to this hardship standard as an "unnecessary hardship."

[5] The Board Decision at 4 and 5 sets forth the text of the county variance standards.

1808(d)(3)(ii))(emphasis added). Moreover, a variance to a local jurisdiction's critical area program may not be granted unless "the applicant has satisfied each one of the variance provisions." NR §8-1808(d)(4)(ii). In this case, the Board's written decision contains *no* findings. Thus, the Board's Decision is facially deficient. Even if this Court were to search the record for support, the oral testimony is scant, at best, and it provides no basis upon which this Court could sustain the Board.

In a recent Critical Area variance case, the Court of Special Appeals held that a "reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking." *Becker v. Anne Arundel County*, 174 Md. App. 114, 138-139 (2007). *See also, Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)(Court's review limited to determining if there is "substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is based upon an erroneous conclusion of law."); *Ocean Hideaway Condominium Association v. Boardwalk Plaza Venture*, 68 Md.App. 650, 661 (1986).

In this case, the Queen Anne's County Board did not analyze each variance standard, but merely recited each standard in the County Code. Thus, this Court has no basis upon which to sustain the Board. "Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." *Becker v. Anne Arundel County, id.* at 139, *quoting Buckatil LLC v. County Council of Talbot County*, 352 Md. 530, 553(1999). A review of the record in this case leads to only one conclusion: the Board's Decision was based on an incorrect application of the Critical Area law to the facts in the record and the Board should be reversed.

QUESTION PRESENTED

Did the Board err as a matter of law, by failing to apply the correct standard of unwarranted hardship; by failing to require the Applicant to meet the burden of satisfying each variance standard of the Queen Anne's County Code; and by failing to make the written findings required by State law?

ARGUMENT

The Board erred as a matter of law by failing to apply the correct standard of unwarranted hardship; by failing to require the Applicants to meet all of the variance standards; and by failing to make written findings. For Critical Area variances, the law is clear.

> We reiterate that appellants had the burden of meeting all of the requirements...as to the critical area variances, and they faced a presumption, i.e., the presumption that the development activity for which a variance is required did not conform to the general purpose and intent of the Critical area Program. Appellants had the burden of production and the burden of persuasion to overcome the presumption. See §8-1808(d)(3)(1).

Becker v. Anne Arundel County, 174 Md. App. 114, 142 (2007).

In this case, the Board made an error of law by failing to apply the statutory standard of unwarranted hardship. Moreover, the Board's Decision was legally deficient, because the Decision did not require the Applicants to meet each variance standard, as required by law, nor did the Decision contain the required written findings.

A. Applicants failed to prove that, without the requested variance to exceed the impervious surface limitation for the construction of a garage, they would suffer an "unwarranted hardship" as defined by the General Assembly. The Board erred as a matter of law by finding an "unwarranted hardship."

Under the State and County Critical Area law, a variance applicant must prove that, without the specific requested variance, he will be denied "reasonable and significant use of the entire parcel or lot for which the variance is requested," and thus, will suffer an "unwarranted hardship." Code, NR §8-1808(d)(1). This standard is intentionally strict, and the General Assembly expressly required that it be applied by every local Board of Appeals in Critical Area variance cases. *Becker v. Anne Arundel County,* 174 Md. App. 114, 124 (2007). In the instant case, the Applicants presented no evidence on which the Board could have based a finding that the Applicants would be denied reasonable and significant use of their *entire property* without this variance[6]. In fact, the record contains evidence that shows Applicants have more than reasonable and significant use of their property.

The property consists of 1 acre, and it is fully developed with a house, pool, patio, driveway, and sidewalk. Bd. Decision at 2; Tr. at 3. The fact that the Applicants have already built structures that exceed the legal impervious surface limit shows beyond a doubt that they are enjoying a reasonable and significant use of their property. Clearly, the Applicants cannot, and did not, prove that without the requested variance for an additional structure on their lot, they would be denied reasonable and significant use of the entire property.

Again, "unwarranted hardship" is defined in the State Critical Area law as without the specific requested variance, that the landowner will be denied "reasonable and significant use of the entire parcel or lot for which the variance is requested." Code, Nat.

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[6] The Court of Special Appeals has previously held that, "[A]lthough unwarranted hardships may be alleged, those hardships must be such as would preclude . . . from developing their lot." *Citrano v. North*, 123 Md.App. at 241.

Res. Art. §8-1808(d)(1). Here, the Applicants are already over the 15% impervious surface limit for land in the County's Limited Development Area. The Applicants' property is developed in excess of the legal limit in part to accommodate a large driveway, which, in the Applicant's words, "wouldn't be that big if my wife could get out and drive and stay in the driveway." Tr. at 5. Clearly, the General Assembly did not anticipate that poor driving would satisfy the unwarranted hardship standard, especially when the property is fully developed with a home and numerous accessory uses.

The only mention, during testimony, of the hardship standard was by a Board member who stated, "He could have moved his garage over top some of the blacktop. That seems like he had a hardship with that because of the pool pump pipes." Tr. at 23. To accommodate the supporting equipment for another accessory structure previously built by the Applicant does not meet the unwarranted hardship standard. If anything, this would work against the granting of the variance as it is a condition that is the result of the actions of the Applicant. There was no evidence proffered which would satisfy the requirement of unwarranted hardship. The Applicants enjoy numerous reasonable uses of their property. The Board erred as a matter of law, because the Board did not apply the definition of unwarranted as required by the General Assembly in Code, NR §8-1808 (d)(1). For this reason alone, the Board should be reversed.

B. Applicants failed to show that they met all of the variance standards required by the County Program. The Board erred as a matter of law by failing to require the Applicants to prove that each and every standard was satisfied.

A variance applicant's failure to meet just one of the variance standards provides the legal basis for a Court to reverse a zoning board's decision to grant a Critical Area variance. However, in this case, the Applicants failed to show that they met *any* of the

standards. In particular, the Applicants failed to prove that denial of a second garage in further violation of the impervious surface limitation would deprive Applicants of a right commonly enjoyed by others under the County Critical Area program.

1. Special Privilege/Rights Commonly Enjoyed

The Critical Area program expressly limits the amount of impervious surface for a lot in the Limited Development Area to 15% for a lot of this size. Here, the Board's granting a variance to allow additional impervious surface, on a lot that already exceeds the statutory limit, does not deprive the Applicants of a right commonly enjoyed by others. Instead, the decision grants a special privilege to the Applicants that would be "denied to other owners of like property." County Code, §14:1-66 E.

Other than the Board's mere assertion in its written findings that the granting of this variance will not confer upon the Applicant any special privilege, there is no evidence in the record to support this finding. Bd. Decision at 4. In order for this standard to be met, **evidence** must be provided to show the nature of the "right" that would allegedly be denied to the Applicant by denial of the variance. At the very least, the record should contain some discussion of whether or not exceeding the impervious surface limitations is a right that is commonly enjoyed by others. In fact, the Applicant and the County representative mentioned numerous times that the applicant was, prior to this application, already over the 15% impervious surface limit by 1, 599 square feet.

Other applicants seeking a variance for additional impervious surface in the critical area would need to meet all the enumerated variance standards and would likely be denied such a variance; therefore to grant the variance to this Applicant is to convey a

special privilege. Failure to meet this standard is reason for this Court to reverse the decision of the Board.

2. Conditions are not the result of any action taken by the Applicant.

There was ample evidence in the testimony at the hearing that the need for *this particular variance* is precisely the result of action by the Applicant. Board Member Scott asked the Applicant, "Could you move the whole garage up over top some of the existing blacktop so you can do a little bit of mitigation that way?" The Applicant responded, "I thought about that but the reason why I can't do that is because of the pool." Tr. at 6. Further, Mr. Palmatary for the County, testified that,

> When the house was built, there was a gravel drive. . When it was finaled[sic] out they met their 15%. Then I think a pool was applied for . . . they had decking around it and they still made their 15%. Then for some reason, you know everybody wants a nice blacktop driveway. . . Then when he comes in for a shed or a garage, then he's way over what he's allowed.

Tr. at 3. The impervious surface limit was exceeded by the Applicant's paving his gravel driveway. Although the Applicant may have been unaware of the limits, the fact of the matter is that it is the Applicant's actions which caused the 15% impervious surface limit to be exceeded. Tr. at 11. Clearly, the need for this variance is driven by the already abundant impervious surface on the property. The Applicants cannot overcome this standard.

3. Adverse effect on fish, wildlife, or plant habitat; harmony with the spirit and intent of the Critical Area program.

The Applicants did not submit any evidence from which the Board could make a finding that the variance would not cause an adverse effect on fish, wildlife, or plant habitat, and that the variance would be in harmony with the spirit and intent of the

County's Critical Area program. Instead, the Board merely stated that the "variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area" and the Board noted that the Applicant had "taken efforts to reduce its impact."[7] The Applicants failed to provide *any* supporting evidence for this statement. Nor did the Board Decision cite to testimony for support of this statement. Indeed, the only evidence in the record points directly to the opposite conclusion: the expert testimony of the Critical Area Commission's Science Advisor informed the Board about the adverse effects of impervious surfaces on water quality in the Critical Area. Tr. at 9-10. Without factual support in the record, the Board's 'finding' is without substance, and is erroneous as a matter of law.

C. The Board failed to make the written findings required by State and County law.

An examination of the Board's Decision reveals that the Decision is fatally flawed, because the Decision contains no written findings as required by Code, NR §8-1808(d). As the Court of Special Appeals recently observed, "A reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking." *Becker v. Anne Arundel County,* 174 Md. App. 114, 138 (2007). An applicant for a variance to the Critical Area Act bears a heavy burden to prove that application of the law will result in an unwarranted hardship and that the proposed variance meets each of the legislatively-prescribed standards. In this case,

[7] The impacts sought to be reduced are related to the already existing impervious surface that was transformed from a pervious surface to an impervious surface, causing the property to already be in violation of the impervious surface limits prior to this variance application.

the Applicants did not meet their burdens, and the Board erroneously granted the variance.

The burden is placed on the Applicant in a variance case. *See Becker v. Anne Arundel County, id.* In the present case, the Applicants had the obligation to submit evidence sufficient to carry this burden. Applicants did not meet their burdens of proof and persuasion on any of the statutory variance standards. The Board failed to make the required written findings to support its Decision. The Board's Decision to grant the Critical Area variance is incorrect under the law and the facts, and this Honorable Court should reverse the Board.

CONCLUSION

For the reasons and authorities cited above, the Chair of the Critical Area Commission respectfully requests this Honorable Court to reverse the decision of the Queen Anne's County Board of Appeals.

Respectfully submitted,
DOUGLAS F. GANSLER
Attorney General of Maryland

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Department of Natural Resources
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Attorneys for Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays

July 11, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July 2007, I sent a copy of the foregoing Memorandum of Law via U.S. Mail, postage prepaid to: Stephen H. Kehoe, Esq., Attorney for the Board of Appeals, Patrick E. Thompson, Foster, Braden, and Thompson, 102 East Main Street, Suite 203 Stevensville, Maryland, 21666, Attorney for the County Commissioners of Queen Anne's County, and Mr. and Mrs. Beasley, 205 Benton's Pleasure Road, Chester, Maryland 21619.

Marianne E. Dise

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107 North Liberty St
Centreville MD 21617

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CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

:

vs. :

: Civil No. 17-C-07-012458

:

the Matter of Margaret McHale

:

Queen Anne's County Board of Appeals

:

IN THE CASE OF :

V-010010

: : : : :

NOTICE OF FILING OF AGENCY RECORD
QUEEN ANNE'S COUNTY BOARD OF APPEALS AND DATE OF HEARING

In accordance with Rule 7-206(e), you are hereby notified that the record of the administrative agency was filed on Wednesday, June 13, 2007.

In accordance with Rule 7-208, a **hearing will be held on Tuesday , October 16, 2007 , at 01:30 P.M.**, at the Courthouse, Centreville, Maryland, unless waived by all parties as provided in that Rule 7-208. **Please consult the enclosed provisions of the Administrative Order regarding differentiated case management which pertain to requests for change of the hearing date.**

A copy of Rule 7-207, which contains important information concerning the requirements for filing of memoranda, is also enclosed.

SCOTT MACGLASHAN, CLERK

COPY

Sara Bridges/Deputy Clerk

June 14, 2007

EXCERPT OF CASE MANAGEMENT PLAN

Changes of assignment

1.10. **How made.** A date contained in an Order for Conference, Scheduling Order, Pretrial Order, Notice of Hearing or Notice of Trial may be changed (i) by th Court on its own initiative or (ii) on request by a party for Court approval in the manner provided in paragraph 1.11 of this Administrative Order.

1.11 **Change of trial, hearing or conference dates**. A party who desires a change of the time of any trial, hearing or conference must obtain several possible alternate times from the Assignment Commissoner and, within 5 days thereafter (i) attempt to secure the agreement of all other parties to one of those alternate times and (ii) file with the Assignment Commissioner a written request for change to one of those alternate times. If all parties are agreed, the request may be made by letter. On its own initiative, or if all parties are not agreed, the Court may act upon the request ex parte or submit the matter to conference under Rule 2-504.1(a)(2). Whether or not the parties have discussed and/or agreed upon an alternate date, any existing Notice of Trial. Scheduling Order or Pretrial Order remains in full effect until the change has been approved in writing by the Court or the Assignment Comissioner. If a change of date is approved, all instructions or provisions of the original Notice or Order so modified remain fully applicable to the new date.

RULE 7-207

(a) Generally.-Within 30 days after the clerk sends notice of the filing of the record, a petitioner shall file a memorandum setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on. Within 30 days after service of the memorandum, any person who has filed a response, including the agency when entitled by law to be a party to the action, may file an answering memorandum in similar form. The petitioner may file a reply memorandum within 15 days after service of an answering memorandum. Except with the permission of the court, a memorandum shall not exceed 35 pages. In an action involving more than one petitioner or responding party, any petitioner or responding party may adopt by reference any part of the memorandum of another.

(b) ....

(c) Modification of time requirements.-The time for filing a memorandum may be shortened or extended by (1) stipulation of the parties filed with the clerk so long as the first memorandum and any answering memorandum are filed at least 30 days, and any reply memorandum is filed at least ten days, before the scheduled hearing, or (2) order of the court entered pursuant to Rule 1-204.

(d) Sanctions for late filing of memoranda.-If a petitioner fails to file a memoradum within the time prescribed by this Rule, the court may dismiss the action if it finds that the failure to file or the late filing caused prejudice to the moving party. A person who has filed a response but who fails to file an answering memorandum within the time prescribed by this Rule may not present argument except with the permission of the court.

CIRCUIT COURT FOR QUEEN ANNE'S COUNTY
Scott MacGlashan
Clerk of the Circuit Court
100 Court House Square

Centreville, MD 21617
(410)-758-1773, TTY for Deaf: (410)-758-6739

Case Number: 17-C-07-012458 AA

Saundra K Canedo Esq
Assistnat Attorney General Dept. Of Natural Resources
580 Taylor Ave
C-4
Annapolis, MD 21401

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Queen Anne's County

County Commissioners:
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Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

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BOARD OF APPEALS
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Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

MEMORANDUM

TO: **ALL INTERESTED PARTIES**

FROM: **CATHY MAXWELL, CLERK TO THE BD. OF APPEALS**

RE: **NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW**
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

DATE: **JUNE 15, 2007**

Enclosed for your information is the Notice of Filing of Court Record and Date of Hearing.

If you have any questions, please call.

Enc.

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PLANNING & ZONING

CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

:

vs. :

: Civil No. 17-C-07-012458

:

the Matter of Margaret McHale

:

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SCOTT MACGLASHAN, CLERK

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Sara Bridges/Deputy Clerk

June 14, 2007

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(a) Generally.-Within 30 days after the clerk sends notice of the filing of the record, a petitioner shall file a memorandum setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on. Within 30 days after service of the memorandum, any person who has filed a response, including the agency when entitled by law to be a party to the action, may file an answering memorandum in similar form. The petitioner may file a reply memorandum within 15 days after service of an answering memorandum. Except with the permission of the court, a memorandum shall not exceed 35 pages. In an action involving more than one petitioner or responding party, any petitioner or responding party may adopt by reference any part of the memorandum of another.

(b) .....

(c) Modification of time requirements.-The time for filing a memorandum may be shortened or extended by (1) stipulation of the parties filed with the clerk so long as the first memorandum and any answering memorandum are filed at least 30 days, and any reply memorandum is filed at least ten days, before the scheduled hearing, or (2) order of the court entered pursuant to Rule 1-204.

(d) Sanctions for late filing of memoranda.-If a petitioner fails to file a memoradum within the time prescribed by this Rule, the court may dismiss the action if it finds that the failure to file or the late filing caused prejudice to the moving party. A person who has filed a response but who fails to file an answering memorandum within the time prescribed by this Rule may not present argument except with the permission of the court.

DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
160 COURSEVALL DRIVE
CENTREVILLE, MARYLAND 21617

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Saundra K .Canedo, Esq.
Dept. of Natural Resources
580 Taylor Ave.
Annapolis, MD 21401

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IN THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	CIVIL NO. 12458
FOR JUDICIAL REVIEW OF THE DECISION OF THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	
IN THE CASE OF Case No. C-010010, Robert J. and Connie M. Beasley	*	

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RESPONSE TO PETITION FOR JUDICIAL REVIEW

The County Commissioners of Queen Anne's County by Patrick E. Thompson, and Foster, Braden & Thompson, their attorneys and pursuant to Maryland Rule 7-204 respond that they intend to participate in the above-referenced Action for Judicial Review.

Respectfully submitted:

Patrick E. Thompson
Foster, Braden & Thompson
102 East Main Street, Suite 203
Stevensville, Maryland 21666
Telephone: 410-643-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 14th day of June, 2007, I served a copy of the aforegoing Response to Petition for Judicial Review by mailing a copy of the same to the following:

Douglas F. Gansler, Esquire
Saundra K. Canedo, Esquire
Marianne E. Dise, Esquire
Attorneys for Margaret McHale
Department of Natural Resources
580 Taylor Avenue
Annapolis, Maryland 21401

Patrick E. Thompson

I:\39-kr\COUNTY\Pleadings\Petition to Participate Beasley.wpd

LAW OFFICES
FOSTER, BRADEN & THOMPSON
L.L.P.
STEVENSVILLE CENTER
102 EAST MAIN STREET
SUITE 203
STEVENSVILLE, MARYLAND 21666

Douglas F. Gansler, Esquire
Saundra K. Canedo, Esquire
Marianne E. Dise, Esquire
Department of Natural Resources
580 Taylor Avenue
Annapolis, MD 21401

21401-2337-99 0036

3

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

May 30, 2007

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BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

Telephone Planning: (410) 758-1255
Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

TO ALL INTERESTED PARTIES:

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

Dear Interested Party:

A petition for judicial review has been filed in the above matter. It was filed on May 21, 2007 in the Circuit Court for Queen Anne's Co., Md., 100 Courthouse Square, Centreville, MD 21617, under Civil Action No. 17-C-07-012458.

It was received by the Dept. of Planning & Zoning by certified mail on May 24, 2007 and was received by the undersigned Clerk to the Bd. of Appeals on May 30, 2007.

If you wish to oppose the petition filed by Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, you must file a response with the Court within thirty (30) days of this Notice, unless the Court shortens or extends the time.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

CC: Board of Appeals File No. V-010010

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JUN 1 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF:
MARGARET MCHALE,
Chair, Critical Area Commission for
the Chesapeake and Atlantic Coastal Bays
1801 West Street, Suite 100
Annapolis, Maryland 21401

*

FOR JUDICIAL REVIEW OF
THE DECISION OF THE
QUEEN ANNE'S COUNTY BOARD
OF APPEALS
160 Coursevall Drive
Centreville, Maryland 21617

*

IN THE CASE OF
Case No. V-010010,
Robert J. And Connie M. Beasley
Variance to Exceed 15% Impervious Surface in
the Critical Area

* CIVIL ACTION No. 12458

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

PETITION FOR JUDICIAL REVIEW

Margaret McHale, Chair of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, ("Chair McHale") by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Saundra K. Canedo and Marianne E. Dise, Assistant Attorneys General, pursuant to Maryland Rule 7-202, files this Petition for Judicial Review and states:

1. Chair McHale hereby requests judicial review of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals in the above-captioned Case No. 3V-010010, Robert J. and Connie M. Beasley. The Board's Decision granted a variance to the 15% impervious surface limit for a lot, for property in Chester, in the Queen Anne's County Critical Area land designated as a limited development area.

2. Chair McHale received the Decision from the County on April 30, 2007.

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CIRCUIT COURT
QUEEN ANNE'S COUNTY

3. Chair McHale has standing and the right and authority to file this Petition pursuant to Annotated Code of Maryland, Natural Resources Article §8-1812 (a) and (c).

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

Saundra K. Canedo
Marianne E. Dise

Saundra K. Canedo
Marianne E. Dise
Assistant Attorneys General
Department of Natural Resources
580 Taylor Avenue
Annapolis, MD 21401
(410) 260-8356

Attorneys for Margaret McHale, Chair
Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays

2

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MAY 30 2007
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CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

PETITION OF :
:
:
: Civil # 17-C-07-012458
FOR JUDICIAL REVIEW :
OF THE DECISION OF THE :
:
Queen Anne's County Board of Appeals
:
IN THE CASE OF :
V-010010

: : : : :

NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW

TO THE ADMINISTRATIVE AGENCY NAMED ABOVE:

In accordance with Rule 7-202, you are notified that the attached petition for judicial review of an order or action of your agency was filed in this Court on May 21, 2007, and assigned the above civil action number for judicial review.

You are required to give written notice promptly by ordinary mail to all parties to the referenced agency proceeding. That notice must set forth (1) that the petition for judicial review has been filed, the date of the filing, the name of this Court, the civil action number and (2) that a party wishing to oppose the petition must file a response in this Court within 30 days after your notice is mailed unless the Court shortens or extends the time.

You are further required to file with this Court, within 5 days after mailing such notice, a certificate of compliance with the requirements of the preceding paragraph, showing the date of the agency's notice and the names and addresses of the persons to whom it was mailed.

SCOTT MACGLASHAN, CLERK

COPY

Sara Bridgs/Deputy Clerk

Date: May 23, 2007

Civil # 17-C-07-012458

CIRCUIT COURT FOR QUEEN ANNE'S COUNTY
Scott MacGlashan
Clerk of the Circuit Court
100 Court House Square

Centreville, MD 21617
(410)-758-1773, TTY for Deaf: (410)-758-6739

RECEIVED
MAY 30 2007
DNR - LEGAL DIVISION

Case Number: 17-C-07-012458 AA

Saundra K Canedo Esq
Assistnat Attorney General Dept. Of Natural Resources
580 Taylor Ave
C-4
Annapolis, MD 21401

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SCOTT MACGLASHAN
CLERK OF THE CIRCUIT COURT
FOR QUEEN ANNE'S COUNTY
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CENTREVILLE, MARYLAND 21617

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DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF NATURAL RESOURCES

JOSEPH P. GILL
Assistant Attorney General
Principal Counsel

SHAUN P.K. FENLON
RACHEL L. EISENHAUER
ROGER H. MEDOFF
SHARA MERVIS ALPERT
SAUNDRA K. CANEDO
PAUL J. CUCUZZELLA
KRISTEN O. MANEVAL
Assistant Attorneys General

FAX NO.: 410-260-8364

WRITER'S DIRECT DIAL NO.
(410) 260-8356
scanedo@oag.state.md.us

May 17, 2007

Mr. Scott MacGlashan, Clerk
Circuit Court for Queen Anne's County
100 Courthouse Square
Centreville, Maryland 21617

RE: Petition of Margaret McHale for Judicial Review of the Decision of the Queen Anne's County Board of Appeals in Case No. V-010010, Robert J. and Connie M. Beasley, Variance to Exceed 15% Impervious Surface in the Critical Area

Dear Mr. MacGlashan:

Enclosed for filing pursuant to Rule 7-202, please find a Petition for Judicial Review on behalf of Margaret McHale, Chair of the State of Maryland Critical Area Commission for the Chesapeake and Atlantic Coastal Bays. Pursuant to the Annotated Code of Maryland, Courts and Judicial Proceedings Article, Section 7-202(b), the State is exempt from paying court filing fees. Also enclosed, pursuant to Rule 7-202(d), is a copy of the Petition for your use in notifying the Queen Anne's County Board of Appeals.

Thank you for your assistance.

Sincerely,

Saundra K. Canedo
Assistant Attorney General

cc: Chair Margaret McHale

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF:
MARGARET MCHALE, *
Chair, Critical Area Commission for
the Chesapeake and Atlantic Coastal Bays
1801 West Street, Suite 100
Annapolis, Maryland 21401 *

FOR JUDICIAL REVIEW OF
THE DECISION OF THE
QUEEN ANNE'S COUNTY BOARD
OF APPEALS *
160 Coursevall Drive
Centreville, Maryland 21617
*

IN THE CASE OF
Case No. V-010010, * CIVIL ACTION No.
Robert J. And Connie M. Beasley
Variance to Exceed 15% Impervious Surface in
the Critical Area *

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

PETITION FOR JUDICIAL REVIEW

Margaret McHale, Chair of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, ("Chair McHale") by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Saundra K. Canedo and Marianne E. Dise, Assistant Attorneys General, pursuant to Maryland Rule 7-202, files this Petition for Judicial Review and states:

1. Chair McHale hereby requests judicial review of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals in the above-captioned Case No. 3V-010010, Robert J. and Connie M. Beasley. The Board's Decision granted a variance to the 15% impervious surface limit for a lot, for property in Chester, in the Queen Anne's County Critical Area land designated as a limited development area.

2. Chair McHale received the Decision from the County on April 30, 2007.

3. Chair McHale has standing and the right and authority to file this Petition pursuant to Annotated Code of Maryland, Natural Resources Article §8-1812 (a) and (c).

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

Saundra K. Canedo
Marianne E. Dise

Saundra K. Canedo
Marianne E. Dise
Assistant Attorneys General
Department of Natural Resources
580 Taylor Avenue
Annapolis, MD 21401
(410) 260-8356

Attorneys for Margaret McHale, Chair
Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays

Notes for Beasley Argument

INTRODUCTION

The Chair of the Critical Area Commission seeks reversal of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals which granted a variance to the Critical Area law to allow construction of a detached garage on Mr. Beasely's property.

The garage would be big enough to hold 5 cars.

The applicant needed a variance because his one-acre property is already covered with more than THE 6,500 square feet of impervious surface allowed under State and County law.

The new garage would add over 900 square feet of impervious surface to this property, which, again, already exceeds the State law limit on impervious surface. In other words, this applicant has maxed-out his lot, and then some, and he wants more.

The Board granted this variance, with no supporting evidence to show how this application met the standards required by State law.

This Court owes NO deference to the Decision , because the Decision is suffused with basic errors of law.

ERRORS OF LAW

My memorandum of law describes, and argues, the errors of law. Here today, I'd like to highlight just the THREE MAJOR errors :

FIRST, the Board did not make the finding, required by State law, that the applicant has overcome the presumption in the State law

that the new garage does not conform to the purpose and intent of the Critical area program.

The presumption is mandatory, and so is the finding. The Board did not even mention either one.

That is legal error # 1.

****

SECOND, the Board did not use the state law standard of unwarranted hardship.

Again, the Board did not even mention the correct standard, much less make the required finding.

That is legal error # 2.

****

THIRD, the Board did not require the applicant to satisfy each one of the variance standards, and I'll focus on the self-created hardship standard. If ever there was a case of self-created hardship, this is it.

That is legal error # 3.

Two Court of Special Appeals cases within the past six months leave no room for doubt about these errors of law.

The Cases are Becker v. Anne Arundel County and Chesley v. City of Annapolis.

Becker v. Anne Arundel County, cited in my memorandum of law and reply memorandum, 174 Md App 114, instructs that , for Critical Area variances, "The criteria contained in Natural Resources Article 8-1808" are "MANDATORY."

This language could not be more direct. The State law criteria are mandatory. Local zoning Boards, including the Queen Anne's County Board, MUST apply these state law standards.

These state law standards include the presumption that a construction project that needs a variance does not conform to the Critical Area program.
And the state law defines unwarranted hardship.
The Becker case says that both of these state law standards, are mandatory.

The other Court of Special Appeals case, decided only 2 weeks ago, and reported, is Chesley v. City of Annapolis (offer copies). The Chesleys, who had a 5.000 square foot house, decks, and a pool, lost their bid for a variance for a detached garage. Here's what the Court said: "When they built their house and pool, the Chesleys eliminated the possibility of locating a garage where no variance would be required.....the Chesley's claimed hardship was self-created."

The Chesley case also confirms that the White, Mastandrea, and Lewis cases, cited by the County, are no longer good law.

The good law is contained in the Code book, and in these two Court of Special Appeals cases.

The Board's first error of law was in not making the required finding that the applicant has overcome the presumption of non-conformance with the Critical Area program.

1. There is a presumption that the activity requiring a variance does not conform to the "general purpose and intent of " the Critical Area law and the local jurisdiction's program." NR 8-1808 d-2-I. This presumption MUST be overcome by the applicant by "competent and substantial evidence."

What is the purpose and intent of the Critical Area law with regard to limiting the amount of a lot that can be covered by impervious surfaces?

The Critical Area Commission's expert witness told the Board the scientific reasons behind the law's limit on 15% impervious surface.

The evidence offered by the county's witness and the applicant was that Mr. Beasely built a large house with attached garage, a swimming pool, and a series of decks and patios. He built all of this without planning for an additional, detached garage. So he used up even more than he was allowed already. Despite this, he wants more, because his truck will not fit in the garage attached to the house.

That's it.

Again, the State law required the Board to make a written finding as to "whether the applicant [for a variance[has overcome the presumption of non-conformance." The Board simply did not make any finding on this mandatory state standard. We submit that, from the evidence in the record, there is no conceivable way that the Board COULd have made the finding that the new detached garage would conform to the purpose and intent of the Critical Area program. This alone is reason for the Court to reverse the Board.

The Board's second error of law was in not using the State law standard of unwarranted hardship.

This standard, put in place by the General Assembly, and discussed in the Becker decision , is very very strict.

As my memorandum of law explains, unwarranted hardship was defined in 2004 by the Gen. Asbly as "without the variance, the applicant would be deprived of reasonable and significant use of the entire parcel or lot." 8-1808 d-1.

That is definitely NOT the standard used by the QA Board in this case.

They didn't even say that they were using the correct standard.
They heard no testimony from the applicant, nor from the county witness, on which they could make a finding of unwarranted hardship.

In fact, the only testimony the Board heard on any of the variance standards, was from the Critical Area commission's expert witness. She testified that the applicant did not meet any of the standards.

The Board never discussed how the lack of an additional 5-car garage would deprive the applicant of reasonable and significant use of his entire property. And they didn't make the finding required by state law. Because , on this record, they COULD not make it. This alone is reason for the Court to reverse the Board.

The third error of law is the Board's statement, made without supporting evidence, that the conditions requiring the variance were not the result of any action taken by the applicant, in other words, that this is not a self-created hardship.

This error of law is exposed by the Chesley case.

That case, involving a person who built a large home, pool, and patios, and then claimed that he needed a variance for a detached garage, is factually nearly identical to the Beasley case.

The Court of Special Appeals had no trouble finding that the building of a 5000 square foot house is not a hardship. The hardship was caused by the applicants, who filled up their lot to the limit, and then wanted more.

In Chesley, as in this case, any hardship is entirely self-created.

The Board's Decision to the contrary is legally incorrect, and this Court should reverse.

Hand Written Notes MSA_S_1831_30 (2 of 6)

MCHALE vs. BEASLEY
CIRCUIT COURT OF QUEEN ANNE'S COUNTY
Case No.: 17-C-07-012458

Notes for Beasley Argument

INTRODUCTION

The Chair of the Critical Area Commission seeks reversal of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals which granted a variance to the Critical Area law to allow construction of a detached garage on Mr. Beasely's property.

The garage would be big enough to hold 5 cars.

The applicant needed a variance because his one-acre property is already covered with more than THE 6,500 square feet of impervious surface allowed under State and County law.

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The Board granted this variance, with no supporting evidence to show how this application met the standards required by State law.

This Court owes NO deference to the Decision , because the Decision is suffused with basic errors of law.

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338

WRITER'S DIRECT DIAL NO. (410) 260-3466
mdise@oag.state.md.us

July 11, 2007

RECEIVED
JUL 13 2007
DNR - LEGAL DIVISION

Mr. Scott MacGlashan, Clerk of the Court
Circuit Court for Queen Anne's County
100 Court House Square
Centreville, Maryland 21617

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Queen Anne's County Board of Appeals, In the Case of: Robert and Connie Beasley*
Civil No. C-17-07-012458

Dear Mr. MacGlashan:

Enclosed please find for filing in the above-referenced case the Memorandum of Law of Petitioner Margaret McHale, Chair of the State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	
FOR JUDICIAL REVIEW OF THE DECISION OF: THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	Civil Action No.: 17-C-07-012458
IN THE CASE OF: V-010010 ROBERT J. AND CONNIE B. BEASLEY	*	

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

MEMORANDUM OF PETITIONER

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Saundra K. Canedo and Marianne E. Dise, Assistant Attorneys General, pursuant to Rule 7-207, files this Memorandum.

INTRODUCTION

Petitioner, Chair of the Critical Area Commission, seeks review of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals ("Board"), in which the Board granted a variance to exceed the 15% impervious surface requirements of the Critical Area law. The Board's Decision permits Robert and Connie Beasley (the "Applicants") to construct a 26' x 36' detached garage on their property at 205 Benton's Pleasure Road in Queen Anne's County's Critical Area. The Applicants' property already exceeds the State law maximum of 15% impervious surface coverage. The variance granted by the Board for the new garage would exacerbate the non-compliant

situation on Applicants' property. The Critical Area Commission urges this Court to reverse the Board's decision, because the Board erred as a matter of law: by failing to apply the statutory standard of "unwarranted hardship;" by failing to apply all of the variance standards required by the Critical Area law; and by failing to make the written findings required by the Critical Area law. Accordingly, the Board's decision to grant the variance is legally deficient as a matter of law, and this Court should reverse the Board.

PROCEEDINGS BY BOARD OF APPEALS

The Queen Anne's County Board of Appeals held a public hearing in the matter of a variance application by Robert J. and Connie M. Beasley (the "Applicants") on March 14, 2007. No County witness addressed the statutory standards required for granting variances in the Critical Area. In fact, the County did not make any specific recommendations to the Board; rather County staff stated no objection to the granting of the variance in the Planning & Zoning Staff Report (the "Report"), noting that the applicant is currently "over 1,599 sq. ft. of impervious cover". Report at 1. At the hearing, Gene Palmatary testified on behalf of the County that the County had no objection to the variance so long as the Applicant was required to mitigate. Transcript of Board hearing, March 14, 2007 ("Tr.") at 4.

The Critical Area Commission introduced expert testimony from Lee Ann Chandler, the Commission's Science Advisor. Tr. at 9. Ms. Chandler testified as to the State Critical Area variance standards and especially that of unwarranted hardship. Tr. at 10. Testifying about the General Assembly's amendments to the Critical Area law in 2002 and 2004, Ms. Chandler observed that the General Assembly specifically strengthened the standards which must be met by an applicant for a variance to the

Critical Area law. She testified that she reviewed the Applicants' request for a new detached garage in light of the strict standards in State law, and she concluded that the Application did not meet the standard of "unwarranted hardship." Tr. at 10. She informed the Board that the Applicants' property exceeded the impervious surface limits set by State law, Annotated Code, Natural Resources Article §8-1808.3. Ms. Chandler explained the scientific background for the 15% limitation on impervious surfaces: "The specific studies [that] have shown once a watershed surpasses a certain amount of impervious coverage, you start seeing the water quality decline." Tr. at 9.

Consistent with State law, the Queen Anne's County Critical Area law requires that the Applicants satisfy each and every variance standard in order to be granted a variance[1]. Md. Code Ann., Nat. Res. Art. § 8-1808(d); County Code, Article XIII, §14:1-66 In addition, State law requires the Board to make written findings to support its decision on a variance application. Md. Code Ann., Nat. Res. Art. §8-1808(d)(3)(ii). The Board made findings of fact, but the Board's decision merely recites, without analysis, the variance standards in the County Code.[2] Bd. Decision at 4. In this case, the Board erroneously granted the variance, using an incorrect legal standard for the required finding of "unwarranted hardship."[3] State law defines "unwarranted hardship"

---

[1] The County Code does not follow the precise language of the State law, requiring "each and every" standard be met; however, the variance standards are written so as to indicate a necessity to meet all standards. Because the State law does require that each standard be met, the State law controls. *Becker v. Anne Arundel County*, 174 Md. App. 114, 136-137 (2007).

[2] In its decision, the Board does provide some discussion about whether the variance is contrary to the "public policies, goals and objectives of Chapter 14-1 in the Queen Anne's County Critical Area Program." Bd. Decision at 4.

[3] The County Code defines the hardship standard as an "unnecessary hardship . . . which hardship is not shard by owners of other property in the same development area." County Code, §14:1-66 A.

as, "without a variance, an applicant would be denied reasonable and significant use of the *entire parcel or lot* for which the variance is requested." Code, Natural Resources Art.§8-1808(d)(1)(emphasis added). The definition in State law Natural Resources Article §8-1808(d)(1) controls over any inconsistent definition in County law. *Becker v. Anne Arundel County*, 174 Md. App. 114, 136 (2007)("The criteria contained in [Natural Resources Article] §8-1808, including the criteria for granting a variance, are mandatory.").

Similarly, State law mandates that, for Critical Area variance cases, the burdens of proof and persuasion lie with the Applicants. Code, Nat. Res. Art. 8-1808. *Becker v. Anne Arundel County*, id. at 133. In the instant case, the Board failed to require the Applicants to provide evidence to meet those burdens and to support the variance application. Moreover, the Board failed to make the requisite written findings and failed to require the Applicants to overcome the assumption of non-conformance with the general purpose and intent of the critical area law. Given these numerous legal errors, the Board's decision should be reversed.

BACKGROUND OF CRITICAL AREA ACT

In an effort to protect the Chesapeake Bay from further decline, the General Assembly enacted Chapter 794 of the Laws of 1984, the Chesapeake Bay Critical Area Protection Program, Md. Code Ann. Nat. Res. II, §8-1801 et seq. (the "Critical Area Law"). In doing so, the General Assembly made findings that:

> (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; . . .
>
> (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 systems, and tidal wetlands; . . .

(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 Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

Code, NR §8-1801(a). As required by the Critical Area Law, each affected local government, including Queen Anne's County, developed a Resource Protection Program – or "Critical Area Program" – which is implemented "on a cooperative basis between the State and local governments." Code, NR §8-1808(b)(2). Queen Anne's County administers its Critical Area Program subject to the oversight of the Critical Area Commission.

VARIANCES TO THE CRITICAL AREA LAW

Relevant here, Queen Anne's County law requires the Applicants to apply for and receive a variance to the Critical Area Program before the Applicants can build the proposed garage in the Critical Area. This is because the garage would cause the Applicants' property to further exceed the impervious surface limitation. Under the Critical Area law, man-made impervious surfaces are limited to 15% of a parcel or lot. Code, NR §8-1808.3(d).

The Critical Area Act requires that when local zoning boards consider variance applications, they must presume that the requested project "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." Code, NR §8-1808(d)(2)(i). The variance applicant bears the burden of proof and the burden of persuasion to overcome this statutory presumption. Code, NR §8-1808(d)(3). In this case, the Board did not address whether or not the applicant overcame the presumption of non-conformance as required by the Critical Area Act. To the contrary, the Board acknowledged that the Applicants were already exceeding the impervious surface limit. Then, without explanation, the Board granted a variance to permit *more* coverage of the land with impervious surface beyond the legal limit.

In addition to overcoming the presumption of non-conformance, the applicant must meet all of the County's enumerated variance standards. County Code, §14:1-66. Specifically, the Board must find that without the variance, the applicant would suffer an "unwarranted hardship." "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." (emphasis added). Code, NR §8-1808(d).[4]

The Queen Anne's County Code establishes eight specific criteria for Critical Area variances,[5] all of which must be met and satisfied. County Code, §14:1-66. The State Critical Area Act requires that, "**a local jurisdiction shall make written findings** as to whether the applicant has overcome the presumption of non-conformance." NR 8-

[4] The County Code refers to this hardship standard as an "unnecessary hardship."

[5] The Board Decision at 4 and 5 sets forth the text of the county variance standards.

1808(d)(3)(ii))(emphasis added). Moreover, a variance to a local jurisdiction's critical area program may not be granted unless "the applicant has satisfied each one of the variance provisions." NR §8-1808(d)(4)(ii). In this case, the Board's written decision contains *no* findings. Thus, the Board's Decision is facially deficient. Even if this Court were to search the record for support, the oral testimony is scant, at best, and it provides no basis upon which this Court could sustain the Board.

In a recent Critical Area variance case, the Court of Special Appeals held that a "reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking." *Becker v. Anne Arundel County*, 174 Md. App. 114, 138-139 (2007). *See also, Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)(Court's review limited to determining if there is "substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is based upon an erroneous conclusion of law."); *Ocean Hideaway Condominium Association v. Boardwalk Plaza Venture*, 68 Md.App. 650, 661 (1986).

In this case, the Queen Anne's County Board did not analyze each variance standard, but merely recited each standard in the County Code. Thus, this Court has no basis upon which to sustain the Board. "Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." *Becker v. Anne Arundel County, id.* at 139, *quoting Buckatil LLC v. County Council of Talbot County*, 352 Md. 530, 553(1999). A review of the record in this case leads to only one conclusion: the Board's Decision was based on an incorrect application of the Critical Area law to the facts in the record and the Board should be reversed.

QUESTION PRESENTED

Did the Board err as a matter of law, by failing to apply the correct standard of unwarranted hardship; by failing to require the Applicant to meet the burden of satisfying each variance standard of the Queen Anne's County Code; and by failing to make the written findings required by State law?

ARGUMENT

The Board erred as a matter of law by failing to apply the correct standard of unwarranted hardship; by failing to require the Applicants to meet all of the variance standards; and by failing to make written findings. For Critical Area variances, the law is clear.

> We reiterate that appellants had the burden of meeting all of the requirements...as to the critical area variances, and they faced a presumption, i.e., the presumption that the development activity for which a variance is required did not conform to the general purpose and intent of the Critical area Program. Appellants had the burden of production and the burden of persuasion to overcome the presumption. See §8-1808(d)(3)(1).

Becker v. Anne Arundel County, 174 Md. App. 114, 142 (2007).

In this case, the Board made an error of law by failing to apply the statutory standard of unwarranted hardship. Moreover, the Board's Decision was legally deficient, because the Decision did not require the Applicants to meet each variance standard, as required by law, nor did the Decision contain the required written findings.

A. Applicants failed to prove that, without the requested variance to exceed the impervious surface limitation for the construction of a garage, they would suffer an "unwarranted hardship" as defined by the General Assembly. The Board erred as a matter of law by finding an "unwarranted hardship."

Under the State and County Critical Area law, a variance applicant must prove that, without the specific requested variance, he will be denied "reasonable and significant use of the entire parcel or lot for which the variance is requested," and thus, will suffer an "unwarranted hardship." Code, NR §8-1808(d)(1). This standard is intentionally strict, and the General Assembly expressly required that it be applied by every local Board of Appeals in Critical Area variance cases. *Becker v. Anne Arundel County,* 174 Md. App. 114, 124 (2007). In the instant case, the Applicants presented no evidence on which the Board could have based a finding that the Applicants would be denied reasonable and significant use of their *entire property* without this variance[6]. In fact, the record contains evidence that shows Applicants have more than reasonable and significant use of their property.

The property consists of 1 acre, and it is fully developed with a house, pool, patio, driveway, and sidewalk. Bd. Decision at 2; Tr. at 3. The fact that the Applicants have already built structures that exceed the legal impervious surface limit shows beyond a doubt that they are enjoying a reasonable and significant use of their property. Clearly, the Applicants cannot, and did not, prove that without the requested variance for an additional structure on their lot, they would be denied reasonable and significant use of the entire property.

Again, "unwarranted hardship" is defined in the State Critical Area law as without the specific requested variance, that the landowner will be denied "reasonable and significant use of the entire parcel or lot for which the variance is requested." Code, Nat.

---

[6] The Court of Special Appeals has previously held that, "[A]lthough unwarranted hardships may be alleged, those hardships must be such as would preclude . . . from developing their lot." *Citrano v. North*, 123 Md.App. at 241.

Res. Art. §8-1808(d)(1). Here, the Applicants are already over the 15% impervious surface limit for land in the County's Limited Development Area. The Applicants' property is developed in excess of the legal limit in part to accommodate a large driveway, which, in the Applicant's words, "wouldn't be that big if my wife could get out and drive and stay in the driveway." Tr. at 5. Clearly, the General Assembly did not anticipate that poor driving would satisfy the unwarranted hardship standard, especially when the property is fully developed with a home and numerous accessory uses.

The only mention, during testimony, of the hardship standard was by a Board member who stated, "He could have moved his garage over top some of the blacktop. That seems like he had a hardship with that because of the pool pump pipes." Tr. at 23. To accommodate the supporting equipment for another accessory structure previously built by the Applicant does not meet the unwarranted hardship standard. If anything, this would work against the granting of the variance as it is a condition that is the result of the actions of the Applicant. There was no evidence proffered which would satisfy the requirement of unwarranted hardship. The Applicants enjoy numerous reasonable uses of their property. The Board erred as a matter of law, because the Board did not apply the definition of unwarranted as required by the General Assembly in Code, NR §8-1808 (d)(1). For this reason alone, the Board should be reversed.

B. Applicants failed to show that they met all of the variance standards required by the County Program. The Board erred as a matter of law by failing to require the Applicants to prove that each and every standard was satisfied.

A variance applicant's failure to meet just one of the variance standards provides the legal basis for a Court to reverse a zoning board's decision to grant a Critical Area variance. However, in this case, the Applicants failed to show that they met *any* of the

standards. In particular, the Applicants failed to prove that denial of a second garage in further violation of the impervious surface limitation would deprive Applicants of a right commonly enjoyed by others under the County Critical Area program.

1. Special Privilege/Rights Commonly Enjoyed

The Critical Area program expressly limits the amount of impervious surface for a lot in the Limited Development Area to 15% for a lot of this size. Here, the Board's granting a variance to allow additional impervious surface, on a lot that already exceeds the statutory limit, does not deprive the Applicants of a right commonly enjoyed by others. Instead, the decision grants a special privilege to the Applicants that would be "denied to other owners of like property." County Code, §14:1-66 E.

Other than the Board's mere assertion in its written findings that the granting of this variance will not confer upon the Applicant any special privilege, there is no evidence in the record to support this finding. Bd. Decision at 4. In order for this standard to be met, **evidence** must be provided to show the nature of the "right" that would allegedly be denied to the Applicant by denial of the variance. At the very least, the record should contain some discussion of whether or not exceeding the impervious surface limitations is a right that is commonly enjoyed by others. In fact, the Applicant and the County representative mentioned numerous times that the applicant was, prior to this application, already over the 15% impervious surface limit by 1, 599 square feet.

Other applicants seeking a variance for additional impervious surface in the critical area would need to meet all the enumerated variance standards and would likely be denied such a variance; therefore to grant the variance to this Applicant is to convey a

special privilege. Failure to meet this standard is reason for this Court to reverse the decision of the Board.

2. Conditions are not the result of any action taken by the Applicant.

There was ample evidence in the testimony at the hearing that the need for *this particular variance* is precisely the result of action by the Applicant. Board Member Scott asked the Applicant, "Could you move the whole garage up over top some of the existing blacktop so you can do a little bit of mitigation that way?" The Applicant responded, "I thought about that but the reason why I can't do that is because of the pool." Tr. at 6. Further, Mr. Palmatary for the County, testified that,

> When the house was built, there was a gravel drive. . When it was finaled[sic] out they met their 15%. Then I think a pool was applied for . . . they had decking around it and they still made their 15%. Then for some reason, you know everybody wants a nice blacktop driveway. . . Then when he comes in for a shed or a garage, then he's way over what he's allowed.

Tr. at 3. The impervious surface limit was exceeded by the Applicant's paving his gravel driveway. Although the Applicant may have been unaware of the limits, the fact of the matter is that it is the Applicant's actions which caused the 15% impervious surface limit to be exceeded. Tr. at 11. Clearly, the need for this variance is driven by the already abundant impervious surface on the property. The Applicants cannot overcome this standard.

3. Adverse effect on fish, wildlife, or plant habitat; harmony with the spirit and intent of the Critical Area program.

The Applicants did not submit any evidence from which the Board could make a finding that the variance would not cause an adverse effect on fish, wildlife, or plant habitat, and that the variance would be in harmony with the spirit and intent of the

County's Critical Area program. Instead, the Board merely stated that the "variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area" and the Board noted that the Applicant had "taken efforts to reduce its impact."[7] The Applicants failed to provide *any* supporting evidence for this statement. Nor did the Board Decision cite to testimony for support of this statement. Indeed, the only evidence in the record points directly to the opposite conclusion: the expert testimony of the Critical Area Commission's Science Advisor informed the Board about the adverse effects of impervious surfaces on water quality in the Critical Area. Tr. at 9-10. Without factual support in the record, the Board's 'finding' is without substance, and is erroneous as a matter of law.

C. The Board failed to make the written findings required by State and County law.

An examination of the Board's Decision reveals that the Decision is fatally flawed, because the Decision contains no written findings as required by Code, NR §8-1808(d). As the Court of Special Appeals recently observed, "A reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking." *Becker v. Anne Arundel County,* 174 Md. App. 114, 138 (2007). An applicant for a variance to the Critical Area Act bears a heavy burden to prove that application of the law will result in an unwarranted hardship and that the proposed variance meets each of the legislatively-prescribed standards. In this case,

[7] The impacts sought to be reduced are related to the already existing impervious surface that was transformed from a pervious surface to an impervious surface, causing the property to already be in violation of the impervious surface limits prior to this variance application.

the Applicants did not meet their burdens, and the Board erroneously granted the variance.

The burden is placed on the Applicant in a variance case. *See Becker v. Anne Arundel County, id.* In the present case, the Applicants had the obligation to submit evidence sufficient to carry this burden. Applicants did not meet their burdens of proof and persuasion on any of the statutory variance standards. The Board failed to make the required written findings to support its Decision. The Board's Decision to grant the Critical Area variance is incorrect under the law and the facts, and this Honorable Court should reverse the Board.

CONCLUSION

For the reasons and authorities cited above, the Chair of the Critical Area Commission respectfully requests this Honorable Court to reverse the decision of the Queen Anne's County Board of Appeals.

Respectfully submitted,
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July 11, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July 2007, I sent a copy of the foregoing Memorandum of Law via U.S. Mail, postage prepaid to: Stephen H. Kehoe, Esq., Attorney for the Board of Appeals, Patrick E. Thompson, Foster, Braden, and Thompson, 102 East Main Street, Suite 203 Stevensville, Maryland, 21666, Attorney for the County Commissioners of Queen Anne's County, and Mr. and Mrs. Beasley, 205 Benton's Pleasure Road, Chester, Maryland 21619.

Marianne E. Dise

ERRORS OF LAW

My memorandum of law describes, and argues, the errors of law. Here today, I'd like to highlight just the THREE MAJOR errors :

FIRST, the Board did not make the finding, required by State law, that the applicant has overcome the presumption in the State law

that the new garage does not conform to the purpose and intent of the Critical area program.

The presumption is mandatory, and so is the finding. The Board did not even mention either one.

That is legal error # 1.

****

SECOND, the Board did not use the state law standard of unwarranted hardship.

Again, the Board did not even mention the correct standard, much less make the required finding.

That is legal error # 2.

****

THIRD, the Board did not require the applicant to satisfy each one of the variance standards, and I'll focus on the self-created hardship standard. If ever there was a case of self-created hardship, this is it.

That is legal error # 3.

Two Court of Special Appeals cases within the past six months leave no room for doubt about these errors of law.

The Cases are Becker v. Anne Arundel County and Chesley v. City of Annapolis.

Becker v. Anne Arundel County, cited in my memorandum of law and reply memorandum, 174 Md App 114, instructs that , for Critical Area variances, "The criteria contained in Natural Resources Article 8-1808" are "MANDATORY."

This language could not be more direct. The State law criteria are mandatory. Local zoning Boards, including the Queen Anne's County Board, MUST apply these state law standards.

These state law standards include the presumption that a construction project that needs a variance does not conform to the Critical Area program.
And the state law defines unwarranted hardship.
The Becker case says that both of these state law standards, are mandatory.

The other Court of Special Appeals case, decided only 2 weeks ago, and reported, is Chesley v. City of Annapolis (offer copies). The Chesleys, who had a 5.000 square foot house, decks, and a pool, lost their bid for a variance for a detached garage. Here's what the Court said: "When they built their house and pool, the Chesleys eliminated the possibility of locating a garage where no variance would be required.....the Chesley's claimed hardship was self-created."

The Chesley case also confirms that the White, Mastandrea, and Lewis cases, cited by the County, are no longer good law.

The good law is contained in the Code book, and in these two Court of Special Appeals cases.

Beasley Response 7-207(a)

*Use HB 528. (2002) ch. 431, 432 Preamble.

Stndrd of Review
- "clearly erroneous"

Start at 8-1808.3(h). Variances: "in accordance w/ regs adopted by CBC"

4. State seeks "usurp the proper function of the local jurisdiction"

QA BOA applied correct stndrd of "unnecessary hardship." -
See Becker at 132.
& Ch. 221 md. Laws

Quote Def. in 8-1808(d)(4).

5. Bd was "concerned that denial of variance w/ result in Beasleys having to tear up their blacktop driveway."
"reasonable for Bd to find entirely appropriate action to be a hardship, unreasonable & unwarranted."
Issue is not gravel vs. blacktop. It's whether denial of extra garage is denial of R+S use of entire property."

8-1808.3

"Special privilege" - no mention of stndrd re: exceeding imp. surf. limit.

p. 8-9 Mastandrea. did not have to consider "entire" lot.
White - did not have to meet every standard. compared to other lts in neighborhood (lt to construct garage).

p-9- Rt commonly enjoyed = rt to construct a garage.
"in the area"
- no mention of exceeding expiring limits
- no comparison to others under CA program.

written findings. not sufficient -
Becker at 138.
145
"The Board must provide a statement of reasons for its decision that go beyond repeating the words in the Code"

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August 21, 2007

Mr. Scott MacGlashan, Clerk of the Court
Circuit Court for Queen Anne's County
100 Court House Square
Centreville, Maryland 21617

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Queen Anne's County Board of Appeals, In the Case of: Robert and Connie Beasley*
Civil No. C-17-07-012458

Dear Mr. MacGlashan:

Enclosed please find for filing in the above-referenced case the Reply Memorandum of Law of Petitioner Margaret McHale, Chair of the State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

1804 West Street, Suite 100,
Annapolis, Maryland 21401

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	
FOR JUDICIAL REVIEW OF THE DECISION OF: THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	Civil Action No.: 17-C-07-012458
IN THE CASE OF: V-010010 ROBERT J. AND CONNIE B. BEASLEY	*	

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

REPLY MEMORANDUM OF PETITIONER

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Rule 7-207(a), files this Reply Memorandum.

INTRODUCTION

This case is a text-book example of a local zoning Board's failure to follow, or even to acknowledge, the State-mandated standards for Critical Area variances. The Queen Anne's County Board of Appeals simply ignored the required Critical Area variance standards. The County's Memorandum of Law at pages 5-9, relying on cases which were superseded by statute in 2002 and 2004, condones this action. Moreover, the County seems to suggest (Mem. of Law at 5-6) that, rather than using the State standard of "unwarranted hardship," the County Code supplies a somewhat different standard for "unnecessary hardship," and that the Board satisfied

the County standard by considering whether it is "environmentally ineffective" to replace a blacktop driveway with gravel. The County's position is erroneous. Pursuant to both State statute (2007 Laws of Maryland, Ch. 221) and controlling caselaw, *Becker v. Anne Arundel County,* 174 Md. App. 114, 136 (2007), the variance requirements of State Critical Area law are mandatory, regardless of whether or not a local jurisdiction has incorporated those requirements into its local code.

By advocating interpretations of law which have been expressly superseded by statute, the County has attempted to justify the Board's granting of this variance. The Chair of the Critical Area Commission urges this Court to reject the County's arguments and to reverse the Board.

I. The County Erroneously Relies on Cases Which Have Been Superseded by Statute.

The County appears unaware that the cases cited in its Memorandum at 5-9 (*Belvoir Farms v. North, White v. North, Mastandrea v. North)* have been expressly superseded by statute. Chapters 431 and 432 of the 2002 Laws of Maryland amended the Critical Area Law, Code, Nat. Res. II §8-1808 in response to the *Belvoir, White,* and *Mastandrea* decisions. The General Assembly made the abundantly clear finding that "these recent rulings by the Court of Appeals are contrary to the intent of the General Assembly in enacting the Chesapeake Bay Critical Area Protection Act." Preamble to H.B. 528 and S.B. 326, Chs. 431 and 432, 2002 Laws of Maryland (Attached to this Reply Memorandum as Exhibits 1 and 2, respectively). Moreover, the 2002 amendments to the Critical Area law expressly stated that the "intent of this Act [is] to overrule these recent decisions of the Court of Appeals regarding variances to Critical Area regulations." *Id.*

Since June 1, 2002, an applicant for a Critical Area variance in every county has been

required to meet **each one** of the variance provisions in Nat. Res. II §8-1808(d), including the standard of "unwarranted hardship." Code, Nat. Res. II §8-1808(d)(1)(I) (Supp. 2002). This statutory amendment rejects the contrary holding of the Court of Appeals in *White,* advocated by the County at pp. 8-9 of its Memorandum. The 2002 amendments to the State Critical Area law also required local zoning boards to consider the reasonable use of the entire property or lot for which the variance was requested. This amendment to Code, Nat. Res. II §8-1808(d)(2) (Supp. 2002) expressly rejected the contrary holding of the Court of Appeals in *Mastandrea*, cited by the County at pp. 7-8 of its Memorandum. The 2002 amendments also provided that "rights commonly enjoyed" were to be compared to the uses of land or structures "permitted to others in accordance with the provisions of the Critical Area program." (Code, Nat. Res. II §8-1808(d)(3) (Supp. 2002). This amendment expressly discards another contrary statement in *White,* which the County argues at p. 8 of its Memorandum. [1]

In 2004, the General Assembly again amended the Critical Area law, in response to another case from the Court of Appeals, *Lewis v. DNR*, 377 Md. 382 (2003). This time, the General Assembly defined the term "unwarranted hardship" as "without at variance, an applicant would be denied reasonable and significant use of the *entire parcel or lot* for which the variance is

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[1] In *Becker v. Anne Arundel County*, 174 Md. App. 114, 132 (2007), the Court of Special Appeals observed that "the preambles to the bills [House Bill 528 and Senate Bill 326] expressly stated that it was the intent of the General Assembly to overrule recent decisions of the Court of Appeals, in which the Court had ruled that,

> (1) when determining if the denial of a variance would deny an applicant rights commonly enjoyed by others in the critical area, a board may compare it to uses or development that predated the critical area program; (2) an applicant for a variance may generally satisfy variance standards rather than satisfy all standards; and (3) a board could grant a variance if the critical area program would deny development on a specific portion of the applicant's property rather than considering the parcel as a whole."

requested." (Emphasis added) Code, Nat. Res. II §8-1808(d)(1) (Supp. 2004). The 2004 amendments to the Critical Area Law overruled *Lewis,* and "reestablished the understanding of unwarranted hardship that existed before being 'weakened by the Court of Appeals.'" *Becker v. Anne Arundel County*, id. at 132, *quoting* the preamble to Ch. 526, 2004 Laws of Maryland.

The interpretations of Critical Area Law argued by the County at pages 5-9 of its Memorandum, and the cases cited therein, are no longer good law, and this Court should reject the County's interpretation.

II. The State Critical Area Variance Requirements Apply to All Local Zoning Boards, Whether or Not the County or Municipality Has Incorporated Those Requirements into Local Code.

All of the State law standards for variances apply to all local jurisdictions in Critical Area variance cases. *Becker*, id. at 136 ("[T]he criteria contained in [Nat. Res. II] §8-1808, including the criteria for granting a variance, are mandatory.") In granting this variance for a new detached garage, the Queen Anne's County Board of Appeals heard testimony from the Applicant that he would have to replace his blacktop driveway if the variance were denied. (County Mem. of Law at 6). Yet, the Applicant did not claim that he would be denied reasonable use of his entire property without the garage. Given the well-developed state of the property, which is improved with a large home, pool, attached garage, patio, and driveway, it is not credible for the County to suggest that the Board of Appeals used the correct standard for unwarranted hardship in this case.

Neither the County nor the Applicants can support the assertion that denial of *an additional garage* would result in denial of reasonable and significant use of the *entire* property in this case. Indeed, the Queen Anne's Board did not even try to make this finding. The Applicants'

property already exceeds the State law maximum of 15% impervious surface coverage, and the variance for the extra garage makes this non-compliant situation worse. The issue is not, as stated by the County, whether the Applicant would have to remove his blacktop driveway. The question is whether denial of a variance for an extra detached garage would deny the Applicants reasonable and significant use of the entire parcel. Most assuredly, the answer to that question is "no."

CONCLUSION

The Chair of the Critical Area Commission urges this Court to reverse the Board, because the Board's Decision is suffused with serious errors of law. As set forth fully in the Chair's initial Memorandum of Law, the Board failed to recognize, or to use, the standard of "unwarranted hardship" as required by Code, Nat. Res. II § 8-1808(d)(1). The Board failed to recognize, or to use, the standard of "rights commonly enjoyed" as required by Code, Nat. Res. II §8-1808(d)(4)(iii). The Board failed to make written findings on each of the variance factors and on the presumptions required in the Critical Area law. Code, Nat. Res. II §8-1808(d)(3). Any one of these errors of law, in itself, provides sufficient basis for this Court to reverse the Board. Taken together, these errors of law utterly undermine the Board's Decision, and this Honorable Court should reverse the Board.

Respectfully submitted,
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Attorney General of Maryland

Marianne E. Dise

Marianne E. Dise, Assistant Attorney General

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August 21, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, on this 21st day of August, 2007, I mailed a copy of the foregoing Reply Memorandum, by U.S. Postal Service, first class mail, to:
Mr. and Mrs. Robert Beasley
205 Benton's Pleasure Road
Chester, MD 21619
and to
Patrick E. Thompson, Esquire
Foster, Braden, and Thompson, LLP
102 E. Main Street, Suite 203
Stevensville, MD 21666.

Marianne E. Dise

HOUSE BILL 528

Unofficial Copy
M3
SB 607/01 - EEA

2002 Regular Session
2lr1206
CF 2lr0915

By: **Delegate Weir (Chairman, Joint Committee on the Chesapeake Bay Critical Areas), the Speaker (Administration), and Delegates W. Baker, Cadden, and Owings**
Introduced and read first time: January 31, 2002
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 22, 2002

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested; providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; providing for the application of this Act; and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Exhibit 1

Preamble

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

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

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

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

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

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

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

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

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

Article - Natural Resources

8-1801.

(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

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

(i) Subdivision regulations;

(ii) Comprehensive or master plan;

(iii) Zoning ordinances or regulations;

(iv) Provisions relating to enforcement; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(3)~~ (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

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

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

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

SENATE BILL 326
~~EMERGENCY BILL~~

Unofficial Copy
M3

2002 Regular Session
(2lr0915)

ENROLLED BILL
-- Education, Health, and Environmental Affairs/Environmental Matters --

Introduced by **Senator Dyson (Chairman, Joint Committee on the Chesapeake Bay Critical Areas)** ~~**and Senators Frosh and Sfikas,**~~ **the President (Administration), and Senators Frosh, Sfikas, Blount, Hollinger, Collins, Conway, Harris, Schrader, and Stone**

Read and Examined by Proofreaders:

_____
Proofreader.

_____
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this _____ day of _____ at _____ o'clock, _____M.

_____
President.

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; ~~requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;~~ *requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;* providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; ~~making this Act an emergency measure~~ *providing for the application of this Act;*

Exhibit 2

and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Preamble

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

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

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

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

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

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

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

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

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

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(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

~~(3)~~ (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

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

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

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

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

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338

WRITER'S DIRECT DIAL NO. (410) 260-3466
mdise@oag.state.md.us

August 21, 2007

Mr. Scott MacGlashan, Clerk of the Court
Circuit Court for Queen Anne's County
100 Court House Square
Centreville, Maryland 21617

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Queen Anne's County Board of Appeals, In the Case of: Robert and Connie Beasley*
Civil No. C-17-07-012458

Dear Mr. MacGlashan:

Enclosed please find for filing in the above-referenced case the Reply Memorandum of Law of Petitioner Margaret McHale, Chair of the State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

1804 West Street, Suite 100,
Annapolis, Maryland 21401

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	
FOR JUDICIAL REVIEW OF THE DECISION OF: THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	Civil Action No.: 17-C-07-012458
IN THE CASE OF: V-010010 ROBERT J. AND CONNIE B. BEASLEY	*	

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

REPLY MEMORANDUM OF PETITIONER

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Rule 7-207(a), files this Reply Memorandum.

INTRODUCTION

This case is a text-book example of a local zoning Board's failure to follow, or even to acknowledge, the State-mandated standards for Critical Area variances. The Queen Anne's County Board of Appeals simply ignored the required Critical Area variance standards. The County's Memorandum of Law at pages 5-9, relying on cases which were superseded by statute in 2002 and 2004, condones this action. Moreover, the County seems to suggest (Mem. of Law at 5-6) that, rather than using the State standard of "unwarranted hardship," the County Code supplies a somewhat different standard for "unnecessary hardship," and that the Board satisfied

the County standard by considering whether it is "environmentally ineffective" to replace a blacktop driveway with gravel. The County's position is erroneous. Pursuant to both State statute (2007 Laws of Maryland, Ch. 221) and controlling caselaw, *Becker v. Anne Arundel County,* 174 Md. App. 114, 136 (2007), the variance requirements of State Critical Area law are mandatory, regardless of whether or not a local jurisdiction has incorporated those requirements into its local code.

By advocating interpretations of law which have been expressly superseded by statute, the County has attempted to justify the Board's granting of this variance. The Chair of the Critical Area Commission urges this Court to reject the County's arguments and to reverse the Board.

I. The County Erroneously Relies on Cases Which Have Been Superseded by Statute.

The County appears unaware that the cases cited in its Memorandum at 5-9 (*Belvoir Farms v. North, White v. North, Mastandrea v. North)* have been expressly superseded by statute. Chapters 431 and 432 of the 2002 Laws of Maryland amended the Critical Area Law, Code, Nat. Res. II §8-1808 in response to the *Belvoir, White,* and *Mastandrea* decisions. The General Assembly made the abundantly clear finding that "these recent rulings by the Court of Appeals are contrary to the intent of the General Assembly in enacting the Chesapeake Bay Critical Area Protection Act." Preamble to H.B. 528 and S.B. 326, Chs. 431 and 432, 2002 Laws of Maryland (Attached to this Reply Memorandum as Exhibits 1 and 2, respectively). Moreover, the 2002 amendments to the Critical Area law expressly stated that the "intent of this Act [is] to overrule these recent decisions of the Court of Appeals regarding variances to Critical Area regulations." *Id.*

Since June 1, 2002, an applicant for a Critical Area variance in every county has been

required to meet **each one** of the variance provisions in Nat. Res. II §8-1808(d), including the standard of "unwarranted hardship." Code, Nat. Res. II §8-1808(d)(1)(I) (Supp. 2002). This statutory amendment rejects the contrary holding of the Court of Appeals in *White,* advocated by the County at pp. 8-9 of its Memorandum. The 2002 amendments to the State Critical Area law also required local zoning boards to consider the reasonable use of the entire property or lot for which the variance was requested. This amendment to Code, Nat. Res. II §8-1808(d)(2) (Supp. 2002) expressly rejected the contrary holding of the Court of Appeals in *Mastandrea*, cited by the County at pp. 7-8 of its Memorandum. The 2002 amendments also provided that "rights commonly enjoyed" were to be compared to the uses of land or structures "permitted to others in accordance with the provisions of the Critical Area program." (Code, Nat. Res. II §8-1808(d)(3) (Supp. 2002). This amendment expressly discards another contrary statement in *White,* which the County argues at p. 8 of its Memorandum. [1]

In 2004, the General Assembly again amended the Critical Area law, in response to another case from the Court of Appeals, *Lewis v. DNR*, 377 Md. 382 (2003). This time, the General Assembly defined the term "unwarranted hardship" as "without at variance, an applicant would be denied reasonable and significant use of the *entire parcel or lot* for which the variance is

---

[1] In *Becker v. Anne Arundel County*, 174 Md. App. 114, 132 (2007), the Court of Special Appeals observed that "the preambles to the bills [House Bill 528 and Senate Bill 326] expressly stated that it was the intent of the General Assembly to overrule recent decisions of the Court of Appeals, in which the Court had ruled that,

> (1) when determining if the denial of a variance would deny an applicant rights commonly enjoyed by others in the critical area, a board may compare it to uses or development that predated the critical area program; (2) an applicant for a variance may generally satisfy variance standards rather than satisfy all standards; and (3) a board could grant a variance if the critical area program would deny development on a specific portion of the applicant's property rather than considering the parcel as a whole."

requested." (Emphasis added) Code, Nat. Res. II §8-1808(d)(1) (Supp. 2004). The 2004 amendments to the Critical Area Law overruled *Lewis,* and "reestablished the understanding of unwarranted hardship that existed before being 'weakened by the Court of Appeals.'" *Becker v. Anne Arundel County*, id. at 132, *quoting* the preamble to Ch. 526, 2004 Laws of Maryland.

The interpretations of Critical Area Law argued by the County at pages 5-9 of its Memorandum, and the cases cited therein, are no longer good law, and this Court should reject the County's interpretation.

II. The State Critical Area Variance Requirements Apply to All Local Zoning Boards, Whether or Not the County or Municipality Has Incorporated Those Requirements into Local Code.

All of the State law standards for variances apply to all local jurisdictions in Critical Area variance cases. *Becker*, id. at 136 ("[T]he criteria contained in [Nat. Res. II] §8-1808, including the criteria for granting a variance, are mandatory.") In granting this variance for a new detached garage, the Queen Anne's County Board of Appeals heard testimony from the Applicant that he would have to replace his blacktop driveway if the variance were denied. (County Mem. of Law at 6). Yet, the Applicant did not claim that he would be denied reasonable use of his entire property without the garage. Given the well-developed state of the property, which is improved with a large home, pool, attached garage, patio, and driveway, it is not credible for the County to suggest that the Board of Appeals used the correct standard for unwarranted hardship in this case.

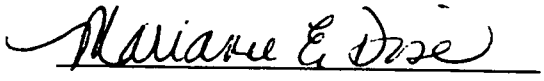
Neither the County nor the Applicants can support the assertion that denial of *an additional garage* would result in denial of reasonable and significant use of the *entire* property in this case. Indeed, the Queen Anne's Board did not even try to make this finding. The Applicants'

property already exceeds the State law maximum of 15% impervious surface coverage, and the variance for the extra garage makes this non-compliant situation worse. The issue is not, as stated by the County, whether the Applicant would have to remove his blacktop driveway. The question is whether denial of a variance for an extra detached garage would deny the Applicants reasonable and significant use of the entire parcel. Most assuredly, the answer to that question is "no."

CONCLUSION

The Chair of the Critical Area Commission urges this Court to reverse the Board, because the Board's Decision is suffused with serious errors of law. As set forth fully in the Chair's initial Memorandum of Law, the Board failed to recognize, or to use, the standard of "unwarranted hardship" as required by Code, Nat. Res. II § 8-1808(d)(1). The Board failed to recognize, or to use, the standard of "rights commonly enjoyed" as required by Code, Nat. Res. II §8-1808(d)(4)(iii). The Board failed to make written findings on each of the variance factors and on the presumptions required in the Critical Area law. Code, Nat. Res. II §8-1808(d)(3). Any one of these errors of law, in itself, provides sufficient basis for this Court to reverse the Board. Taken together, these errors of law utterly undermine the Board's Decision, and this Honorable Court should reverse the Board.

Respectfully submitted,
DOUGLAS F. GANSLER
Attorney General of Maryland



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(410) 260-3466
Attorneys for Margaret McHale, Chair,
Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays

August 21, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, on this 21st day of August, 2007, I mailed a copy of the foregoing Reply Memorandum, by U.S. Postal Service, first class mail, to:

Mr. and Mrs. Robert Beasley
205 Benton's Pleasure Road
Chester, MD 21619
and to
Patrick E. Thompson, Esquire
Foster, Braden, and Thompson, LLP
102 E. Main Street, Suite 203
Stevensville, MD 21666.

Marianne E. Dise

DOUGLAS F. GANSLER
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JOHN B. HOWARD, JR.
Deputy Attorney General

MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338

WRITER'S DIRECT DIAL NO. (410) 260-3466
mdise@oag.state.md.us

August 21, 2007

Mr. Scott MacGlashan, Clerk of the Court
Circuit Court for Queen Anne's County
100 Court House Square
Centreville, Maryland 21617

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Queen Anne's County Board of Appeals, In the Case of: Robert and Connie Beasley*
Civil No. C-17-07-012458

Dear Mr. MacGlashan:

Enclosed please find for filing in the above-referenced case the Reply Memorandum of Law of Petitioner Margaret McHale, Chair of the State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	
FOR JUDICIAL REVIEW OF THE DECISION OF: THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	Civil Action No.: 17-C-07-012458
IN THE CASE OF: V-010010 ROBERT J. AND CONNIE B. BEASLEY	*	

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

REPLY MEMORANDUM OF PETITIONER

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Rule 7-207(a), files this Reply Memorandum.

INTRODUCTION

This case is a text-book example of a local zoning Board's failure to follow, or even to acknowledge, the State-mandated standards for Critical Area variances. The Queen Anne's County Board of Appeals simply ignored the required Critical Area variance standards. The County's Memorandum of Law at pages 5-9, relying on cases which were superseded by statute in 2002 and 2004, condones this action. Moreover, the County seems to suggest (Mem. of Law at 5-6) that, rather than using the State standard of "unwarranted hardship," the County Code supplies a somewhat different standard for "unnecessary hardship," and that the Board satisfied

the County standard by considering whether it is "environmentally ineffective" to replace a blacktop driveway with gravel. The County's position is erroneous. Pursuant to both State statute (2007 Laws of Maryland, Ch. 221) and controlling caselaw, *Becker v. Anne Arundel County,* 174 Md. App. 114, 136 (2007), the variance requirements of State Critical Area law are mandatory, regardless of whether or not a local jurisdiction has incorporated those requirements into its local code.

By advocating interpretations of law which have been expressly superseded by statute, the County has attempted to justify the Board's granting of this variance. The Chair of the Critical Area Commission urges this Court to reject the County's arguments and to reverse the Board.

I. The County Erroneously Relies on Cases Which Have Been Superseded by Statute.

The County appears unaware that the cases cited in its Memorandum at 5-9 (*Belvoir Farms v. North, White v. North, Mastandrea v. North)* have been expressly superseded by statute. Chapters 431 and 432 of the 2002 Laws of Maryland amended the Critical Area Law, Code, Nat. Res. II §8-1808 in response to the *Belvoir, White,* and *Mastandrea* decisions. The General Assembly made the abundantly clear finding that "these recent rulings by the Court of Appeals are contrary to the intent of the General Assembly in enacting the Chesapeake Bay Critical Area Protection Act." Preamble to H.B. 528 and S.B. 326, Chs. 431 and 432, 2002 Laws of Maryland (Attached to this Reply Memorandum as Exhibits 1 and 2, respectively). Moreover, the 2002 amendments to the Critical Area law expressly stated that the "intent of this Act [is] to overrule these recent decisions of the Court of Appeals regarding variances to Critical Area regulations." *Id.*

Since June 1, 2002, an applicant for a Critical Area variance in every county has been

required to meet **each one** of the variance provisions in Nat. Res. II §8-1808(d), including the standard of "unwarranted hardship." Code, Nat. Res. II §8-1808(d)(1)(I) (Supp. 2002). This statutory amendment rejects the contrary holding of the Court of Appeals in *White*, advocated by the County at pp. 8-9 of its Memorandum. The 2002 amendments to the State Critical Area law also required local zoning boards to consider the reasonable use of the entire property or lot for which the variance was requested. This amendment to Code, Nat. Res. II §8-1808(d)(2) (Supp. 2002) expressly rejected the contrary holding of the Court of Appeals in *Mastandrea*, cited by the County at pp. 7-8 of its Memorandum. The 2002 amendments also provided that "rights commonly enjoyed" were to be compared to the uses of land or structures "permitted to others in accordance with the provisions of the Critical Area program." (Code, Nat. Res. II §8-1808(d)(3) (Supp. 2002). This amendment expressly discards another contrary statement in *White*, which the County argues at p. 8 of its Memorandum. [1]

In 2004, the General Assembly again amended the Critical Area law, in response to another case from the Court of Appeals, *Lewis v. DNR*, 377 Md. 382 (2003). This time, the General Assembly defined the term "unwarranted hardship" as "without at variance, an applicant would be denied reasonable and significant use of the *entire parcel or lot* for which the variance is

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Attorneys for Margaret McHale, Chair,
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August 21, 2007

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Chester, MD 21619
and to
Patrick E. Thompson, Esquire
Foster, Braden, and Thompson, LLP
102 E. Main Street, Suite 203
Stevensville, MD 21666.

Marianne E. Dise

HOUSE BILL 528

Unofficial Copy
M3
SB 607/01 - EEA

2002 Regular Session
2lr1206
CF 2lr0915

By: **Delegate Weir (Chairman, Joint Committee on the Chesapeake Bay Critical Areas), the Speaker (Administration), and Delegates W. Baker, Cadden, and Owings**
Introduced and read first time: January 31, 2002
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 22, 2002

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested; providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; providing for the application of this Act; and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Exhibit 1

Preamble

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

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

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

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

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

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

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

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

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

Article - Natural Resources

8-1801.

(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

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

(i) Subdivision regulations;

(ii) Comprehensive or master plan;

(iii) Zoning ordinances or regulations;

(iv) Provisions relating to enforcement; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(3)~~ (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

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

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

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

SENATE BILL 326
~~EMERGENCY BILL~~

Unofficial Copy
M3

2002 Regular Session
(2lr0915)

ENROLLED BILL
-- Education, Health, and Environmental Affairs/Environmental Matters --

Introduced by **Senator Dyson (Chairman, Joint Committee on the Chesapeake Bay Critical Areas)** ~~**and Senators Frosh and Sfikas,**~~ **the President (Administration), and Senators Frosh, Sfikas, Blount, Hollinger, Collins, Conway, Harris, Schrader, and Stone**

Read and Examined by Proofreaders:

_____
Proofreader.

_____
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this _____ day of _____ at _____ o'clock, _____M.

_____
President.

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; ~~requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;~~ *requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;* providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; ~~making this Act an emergency measure~~ *providing for the application of this Act;*

and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Preamble

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

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

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

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

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

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

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

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

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

Article - Natural Resources

8-1801.

(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

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

(i) Subdivision regulations;

(ii) Comprehensive or master plan;

(iii) Zoning ordinances or regulations;

(iv) Provisions relating to enforcement; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(3)~~ (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

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

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

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

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

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS

160 Coursevall Drive
Centreville, MD 21617

Telephone Planning: (410) 758-1255
Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

MEMORANDUM

TO: **ALL INTERESTED PARTIES**

FROM: **CATHY MAXWELL, CLERK TO THE BD. OF APPEALS**

RE: **NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW**
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

DATE: **JUNE 15, 2007**

Enclosed for your information is the Notice of Filing of Court Record and Date of Hearing.

If you have any questions, please call.

Enc.

RECEIVED
JUN 20 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

RECEIVED
JUN 15 2007
QUEEN ANNE'S COUNTY
PLANNING & ZONING

CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

:

vs. :

: Civil No. 17-C-07-012458

:

the Matter of Margaret McHale

:

Queen Anne's County Board of Appeals

:

IN THE CASE OF :

V-010010

: : : : :

NOTICE OF FILING OF AGENCY RECORD
QUEEN ANNE'S COUNTY BOARD OF APPEALS AND DATE OF HEARING

In accordance with Rule 7-206(e), you are hereby notified that the record of the administrative agency was filed on Wednesday, June 13, 2007.

In accordance with Rule 7-208, a **hearing will be held on Tuesday , October 16, 2007 , at 01:30 P.M.**, at the Courthouse, Centreville, Maryland, unless waived by all parties as provided in that Rule 7-208. **Please consult the enclosed provisions of the Administrative Order regarding differentiated case management which pertain to requests for change of the hearing date.**

A copy of Rule 7-207, which contains important information concerning the requirements for filing of memoranda, is also enclosed.

SCOTT MACGLASHAN, CLERK

COPY

Sara Bridges/Deputy Clerk

June 14, 2007

EXCERPT OF CASE MANAGEMENT PLAN

Changes of assignment

1.10. **How made.** A date contained in an Order for Conference, Scheduling Order, Pretrial Order, Notice of Hearing or Notice of Trial may be changed (i) by th Court on its own initiative or (ii) on request by a party for Court approval in the manner provided in paragraph 1.11 of this Administrative Order.

1.11 **Change of trial, hearing or conference dates.** A party who desires a change of the time of any trial, hearing or conference must obtain several possible alternate times from the Assignment Commissoner and, within 5 days thereafter (i) attempt to secure the agreement of all other parties to one of those alternate times and (ii) file with the Assignment Commissioner a written request for change to one of those alternate times. If all parties are agreed, the request may be made by letter. On its own initiative, or if all parties are not agreed, the Court may act upon the request ex parte or submit the matter to conference under Rule 2-504.1(a)(2). Whether or not the parties have discussed and/or agreed upon an alternate date, any existing Notice of Trial. Scheduling Order or Pretrial Order remains in full effect until the change has been approved in writing by the Court or the Assignment Comissioner. If a change of date is approved, all instructions or provisions of the original Notice or Order so modified remain fully applicable to the new date.

RULE 7-207

(a) Generally.-Within 30 days after the clerk sends notice of the filing of the record, a petitioner shall file a memorandum setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on. Within 30 days after service of the memorandum, any person who has filed a response, including the agency when entitled by law to be a party to the action, may file an answering memorandum in similar form. The petitioner may file a reply memorandum within 15 days after service of an answering memorandum. Except with the permission of the court, a memorandum shall not exceed 35 pages. In an action involving more than one petitioner or responding party, any petitioner or responding party may adopt by reference any part of the memorandum of another.

(b) ....

(c) Modification of time requirements.-The time for filing a memorandum may be shortened or extended by (1) stipulation of the parties filed with the clerk so long as the first memorandum and any answering memorandum are filed at least 30 days, and any reply memorandum is filed at least ten days, before the scheduled hearing, or (2) order of the court entered pursuant to Rule 1-204.

(d) Sanctions for late filing of memoranda.-If a petitioner fails to file a memoradum within the time prescribed by this Rule, the court may dismiss the action if it finds that the failure to file or the late filing caused prejudice to the moving party. A person who has filed a response but who fails to file an answering memorandum within the time prescribed by this Rule may not present argument except with the permission of the court.

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
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Acting Director: J. Steven Cohoon

MEMORANDUM

TO: **ALL INTERESTED PARTIES**

FROM: **CATHY MAXWELL, CLERK TO THE BD. OF APPEALS** CM

RE: **NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW**
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

DATE: **JUNE 13, 2007**

Enclosed for your information is the Court Record which I filed with Circuit Court today.

If you have any questions, please call.

Enc.

RECEIVED
JUN 20 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
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Acting Director: J. Steven Cohoon

June 13, 2007

Mr. Scott MacGlashan, Clerk of Court
Circuit Court for Queen Anne's Co.
100 Court House Square
Centreville, MD 21617

RE: CIVIL ACTION NO. 17-C-07-012458

Dear Mr. MacGlashan:

Enclosed is the Court Record for the above case.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

Enc.

PETITION OF:	*	**IN THE CIRCUIT COURT**
	*	
MARGARET MCHALE,	*	**FOR QUEEN ANNE'S CO., MD**
Chair, Critical Area Commission for	*	
the Chesapeake and Atlantic Coastal Bays	*	
1801 West St., Suite 100	*	
Annapolis, MD 21401	*	
	*	
Petitioners	*	
	*	
FOR JUDICIAL REVIEW OF THE	*	
DECISION OF:	*	
	*	
THE BOARD OF APPEALS OF	*	
QUEEN ANNE'S CO., MD	*	
	*	
Defendant	*	
	*	
IN THE CASE OF:	*	
	*	
CASE NO. V-010010	*	**CIVIL ACTION NO. 17-C-07-012458**
Robert J. and Connie M. Beasley	*	
Variance to Exceed 15% Impervious	*	
Surface in the Critical Area	*	
* * * * * * *	*	* * * * * *

STATE OF MARYLAND, QUEEN ANNE'S COUNTY, TO WIT:

I HEREBY CERTIFY that the following are all the original papers filed in:

CIVIL ACTION NO. 17-C-07-012458
NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Board of Appeals Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area

Cathy Maxwell

Cathy Maxwell, Clerk

June 13, 2007
Date

IN THE MATTER OF	**IN THE CIRCUIT COURT**
THE APPEAL FROM THE DECISION	**FOR QUEEN ANNE'S CO.**
OF THE BOARD OF APPEALS OF	**STATE OF MARYLAND**
QUEEN ANNE'S CO.	
IN CASE NO. V-010010	**Civil Action No. 17-C-07-012458**

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

RECORD

I. FOLLOWING BOARD'S EXHIBITS:

Board's Exhibit No. 1 – Certificate of Publication of Notice of Hearing; Certificate of Posting of Property; and One (1) photograph of posting notice presented by the Planning & Zoning Administrator of Queen Anne's Co for Case No. V-010010.

II. FOLLOWING APPLICANT'S EXHIBITS:

Applicant's Exhibit No. 1 – Copy of Application filed in Case V-010010, received 1/19/07.

Applicant's Exhibit No. 2 – Deed to subject property – Liber SM142/444.

Applicant's Exhibit No. 3 – Copy of zoning, tax assessment, and critical area maps.

Applicant's Exhibit No. 4 – Location Drawing, Lot 84, Benton's Pleasure, prepared by Steven H. Jupitz, Inc., dated 7/30/03.

Applicant's Exhibit No. 5 – Letter dated 2/15/07 to Cathy Maxwell from LeeAnne Chandler, Critical Area Commission.

Applicant's Exhibit No. 6 - Building Permit No. B06-1864.

Applicant's Exhibit No. 7 – Letter dated 11/20/06 to Robert J. & Connie M. Beasley from Gene Palmatary, Zoning Inspector.

III. **FOLLOWING OPPOSITION'S EXHIBITS:**

Opposition Exhibit No. 1 – Résumé for LeeAnne Chandler, Critical Area Commission.

Opposition Exhibit No. 2 – Letter dated 3/14/07 to Q. A. Co. Board of Appeals from LeeAnne Chandler, Critical Area Commission.

Opposition Exhibit No. 3 – Page 76 of §8-1808, Natural Resources Article D.2.

IV. **FOLLOWING PLANNING & ZONING EXHIBITS:**

P&Z Exhibit No. 1 - Planning & Zoning Staff Report prepared by Gene Palmatary.

V. **TRANSCRIPT OF TESTIMONY** of the witnesses taken down and transcribed by Cathy Maxwell, Clerk to the Board of Appeals, at the public hearing held on March 14, 2007, and made a part of the Minutes of said hearing.

VI. **FORMAL DECISION AND EXCERPTS OF THE MINUTES** of the Board of Appeals of Queen Anne's Co. given at the Executive Meeting held on March 14, 2007.

Pleadings MSA S 1531 L 30 (4 of 6)

Petition of Margaret McHale for Judicial Review of the Decision of the Queen Anne's County Board of Appeals in Case No. V-010010, Robert J. And Commie M. Beasley, Variance to Exceed 15% Impervious Surface in the Critical Area

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1104

September Term, 2006

WILLIAM F. CHESLEY, ET UX.

v.

CITY OF ANNAPOLIS, MARYLAND

Davis,
Eyler, James R.,
Adkins,

JJ.

Opinion by Adkins, J.

Filed: September 27, 2007

William and Robin Chesley, appellants, challenge the denial of a front yard setback variance that would enable them to build a one car garage within three feet of the street along their Chesapeake Bay waterfront property in Annapolis. They present two questions for our review:

> I. Did the Board of Appeals err in denying the Chesleys' zoning variance because the Board's conclusions are not supported by substantial evidence and because the Board failed to apply the law correctly?
>
> II. When the City appears as a party at a public hearing before the Board of Appeals through officials who work for the City's Planning Department, and when those City officials testify in favor of a variance application, is it improper for the City in a subsequent petition for judicial review of the Board's decision to oppose the variance by taking positions contrary to the positions City officials took before the Board?

Finding no error, substantial evidence in the administrative record to support the Board's denial of this variance, and no impropriety in the City's advocacy, we shall affirm the judgment.

City Regulations

The Annapolis City Code sets minimum setbacks of six feet for side yards and 30 feet for front yards for accessory structures in an R2 zone, such as the Chesleys' proposed garage. *See* Annapolis City Code § 21.18.040(C)(hereafter cited as "Code"). The Chesley property is subject to other building restrictions, however, due to its location at 15 Eastern Avenue in the Eastport section of Annapolis, on the Chesapeake Bay.

First, the approximately one-third acre lot is in the Chesapeake Bay Critical Area, and

therefore all buildings on this lot must be set back at least 44 feet from the shoreline. Impervious surfaces may not cover more than fifty percent of the lot. As a result, the residence, driveway, and accessory structures may not occupy more than approximately 7,870 square feet of the Chesley property.

Second, the Chesley property lies in a Residential Conservation Overlay District, which requires formal Site Design Plan Review by the City's Department of Planning and Zoning prior to issuance of all building permits for any construction that impacts the street facade. *See* Code § 29.69.030. The purpose of this regulation

> is to preserve patterns of design and development in residential neighborhoods characterized by a diversity of styles and to ensure the preservation of a diversity of land uses, together with the protection of buildings, structures or areas the destruction or alteration of which would disrupt the existing scale and architectural character of the neighborhood. The general purpose includes . . . . [c]ompatibility of new construction . . . with the existing scale and character of surrounding properties[.]

Code § 21.69.010. The RC overlay standards encourage traditional urban design, *inter alia,* by permitting reduced building setbacks to the extent that the proposed new construction maintains building patterns of the neighborhood. *See* City of Annapolis Dep't of Planning and Zoning, *The Eastport Residential Conservation Overlay District: A Guide to the Process and Design Guidelines* 2.

The third and final factor affecting use of the property is that the Chesley lot lies within the Eastport Residential Conservation Overlay District. *See id.* Eastport originated

in the late 19th century, and remained an independent town until the City of Annapolis (the City) annexed it in 1951. *See id.* at 8. The neighborhood is located within walking distance to downtown Annapolis and the City Dock, on the Horn Point peninsula, between Spa Creek and Back Creek, where the Severn River enters the Chesapeake Bay. *See id.* Eastport homes reflect that community's working-class and maritime roots, characterized architecturally by "social and physical diversity, together with its small, intimate scale" and an ambiance described as "[d]elicate, unique, special, charming, historic, quiet, [and] personal[.]" *See id.* To preserve that character, "all new construction, including . . . accessory structures which may be visible from the street [must] be reviewed for compliance with the guidelines in Section 21.98.050.D[.]" *Id.* With respect to building setbacks from the street, these must "observe the established setbacks for the block on which [the construction] is proposed, or the setback requirement of the underlying zone, whichever is less[.]" *Id.* at 4.

The Annapolis City Code permits the Board to grant a variance from applicable setback requirements, *see* Code § 21.28.040.A, upon finding that the following conditions have been satisfied:

> 1. Because of the particular physical surroundings, shape or topographical conditions of the specific property involved, a **particular hardship to the owner would result as distinguished from a mere inconvenience** if the strict letter of the regulations were to be carried out;
>
> 2. The conditions upon which a petition for a variation is based are unique to the property for which the variance is sought, and are not applicable, generally, to other property within the same zoning classification;

3. The purpose of the variance is not based exclusively upon a desire to increase financial gain;

4. The alleged **difficulty or hardship is caused by this title and has not been created by any persons presently having an interest in the property;**

5. The granting of the variation will not be detrimental to the public welfare or **injurious to other property or improvements in the neighborhood in which the property is located;**

6. The proposed variation will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or **substantially diminish or impair property values with [sic] the neighborhood.**

Former Code § 21.80.030(A)(1996)(emphasis added). *See also* Code § 21.28.050 (2005)(current variance standards and conditions are substantially the same).

The Chesleys' Development Proposals

Immediately after purchasing the property in 2000, the Chesleys consulted with the City's Department of Planning and Zoning regarding their wish to replace the existing residence with new construction, including a house with attached two car garage and a pool. As a result of negotiations over 18 months, during which the Department of Planning and Zoning (the Department) pressed for a public view corridor along the southern boundary of the property and design changes to make the new home "more Eastport-like," the Chesleys

amended their plans to propose a detached two car garage.[1] The Department noted that this would require side and front yard setback variances, but told the Chesleys that the Department would "support" the request. *See* Code § 21.28.020.B (planning staff reviews variance applications and makes reports and recommendations to the Board).

In support of their garage variance, the Chesleys advised that when Mr. Chesley's wheelchair-bound adult son Billy visits, he uses a special van with a metal lift and ramp that becomes slippery in rain, snow, or ice. In addition, waterfront lot owners along Eastern Avenue treat their front yards as their rear yards for purposes of garages. The Chesleys contend that "[n]o waterfront property along Eastern Avenue has its water view blocked by a detached garage built between the home and the water." Moreover, the lots on each side of the Chesleys have detached garages within a few feet of the street.

The City approved plans for a new 5,000 sq. ft. residence, but concluded that further review of the pool and garage proposals was necessary. In addition to those exclusions, the City's approval was subject to specific conditions. One condition was that the Chesleys enter into a "View Cone Covenant and Agreement"[2] with two neighbors across the street,

---

[1]The Planning Department advised that these two goals could be met, *inter alia,* by detaching the garage and locating it in the front yard next to the detached garage located on the Russell property next door. The Planning Director characterized this area of the Chesley property as a "dead zone" where a detached garage would not adversely impact the neighbors or streetscape. In addition, planning authorities advised that construction in this location would add an "inexact" symmetry consistent with Eastport's eclectic character.

[2]A "view cone" is "a space defined by two projected lines from the centerline of a street right-of-way that is to be kept free of obstructions so as to preserve a distant view." (continued...)

in order to preserve a public view to the Chesapeake Bay. They did so. These two agreements prohibit development of an 18-20 foot wide strip along the westerly side of the lot. According to Mr. Chesley, his is the only lot that the City has required a recorded view cone agreement as a condition of approval.

The Chesleys proceeded to build their house as approved by the City, *i.e.,* without a garage. During construction, they petitioned for approval of a variance that would allow them to build a one story, two car, detached garage, within three feet of Eastern Avenue, in the location suggested by planning authorities. As promised, the Planning Department submitted a staff report supporting this request. After a public hearing, at which neighbors opposed the Chesleys' proposal, the Board unanimously denied the application on July 17, 2002.

The Chesleys completed construction of both the house and the pool, then occupied their home for the next 18 months, during which time they had a daughter.[3] In 2005, the Chesleys filed a second application for a variance, this time to build a scaled-back one story, one car garage in the same location, also requiring a variance to allow a three foot setback, but no side setback variance. The garage would be custom-designed to accommodate the van used to transport Billy. The Department again supported the variance application.

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[2](...continued)
Code § 21.72.010.

[3]After the Chesleys petitioned for judicial review in 2005, Mrs. Chesley's mother moved into the home for health reasons. She resides there full-time.

At a June 7, 2005 hearing, counsel for the Chesleys proffered the testimonies and qualifications of an architect and a land planner, as well as Mr. Chesley's testimony.[4] Two neighbors then testified for, and two against, the proposal.

On June 29, after public deliberation, the Board issued a written 2-1 decision denying the variance. A majority of the Board quorum[5] concluded that the Chesleys failed to satisfy the six required conditions for a setback variance. Specifically, the Board found that no hardship exists, that the claimed hardship was self-created, and that the proposed garage would have a negative impact on the neighborhood.

The Chesleys petitioned for judicial review in the Circuit Court for Anne Arundel County. The City Attorney, acting as counsel for the Board, gave notice of the Board's intent to participate. Later, outside counsel appeared on behalf of the City. The circuit court affirmed the Board's decision, and the Chesleys filed this timely appeal.

DISCUSSION

I.
Setback Variances

A variance authorizes the property owner "'to use his property in a manner

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[4]Consideration of the Chesley variance application began at 12:30 a.m. on June 8. Responding to the perception that the Board wanted a short hearing, counsel for the Chesleys submitted most of their evidence in documentary form and by proffer.

[5]The Board has five members. Four were present for the 2005 hearing, two of those having voted to deny the Chesleys' 2002 variance application. Three of the members present at the 2005 hearing, including both who were on the Board in 2002, participated in the deliberations and decision in 2005. Two of those members voted to deny the application, while one of the 2002 Board members voted to grant it.

forbidden'" by applicable zoning restrictions. *See Cromwell v. Ward,* 102 Md. App. 691, 700 (1995)(citation omitted). In contrast to special exceptions, which "'contemplate[] a permitted use . . . [once] the prescribed conditions therefor are met[,]'" a variance "'contemplates a departure from the terms of the [zoning] ordinance in order to preclude confiscation of the property[.]'" *Id.* at 699-700 (citation omitted). Although "the purpose of a variance is to protect the landowner's rights from the unconstitutional application of zoning law[,]" variances are frequently permitted in circumstances when application of the setback requirement would not constitute a "taking." *See Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 281 (1999).

There are different types of variances, including the "ordinary" front yard setback variance at issue here and the variances from the setbacks established by statute for critical areas in an effort to regulate development of waterfront properties. Not surprisingly then, "there are different criteria that must be met for 'ordinary' or 'general' zoning variances and critical area variances." *Becker v. Anne Arundel County*, 174 Md. App. 114, 139 (2007). The criteria for a yard setback variance are established by the City, as set forth above.

The Board's Findings

During deliberations, the two Board members in the majority articulated what amounts to a "*caveat* builder" perspective concerning the Chesleys' predicament. In their view, because the Chesleys knew that they would need a front yard setback variance to build a detached garage in the location recommended by planning authorities, they should have

either (a) waited to construct their home and pool until they obtained a variance for the garage, or (b) "redesigned [the house] in a way that they wouldn't have this problem." Referring to how the footprint of the house sits on the lot, the other Board member in the majority observed that the Chesleys could have addressed concerns about the 30 foot setback by "modif[ying] the size of the home to allow for a detached garage next to it from the opposite [side] from the view cone and they could have changed the configuration in the house."

In its written opinion, the Board concluded that the Chesleys did not satisfy the threshold requirement in the Code that there be a hardship resulting from "the particular physical surroundings, shape or topographical conditions." Concern regarding the large size of the house in relation to the lot is evident in the Board's findings:

> Through Site Design Plan Review, the applicant established a view cone covenant along the southwestern end of the property in order to preserve the views, from the public right of way, out to the Chesapeake Bay. **The Board finds as it did once before that despite the view cone restriction, there was adequate room on the property to construct a reasonable size residence with a detached or an attached garage without the need for the requested variance. The applicant chose to construct a larger home, and then request a variance rather than plan for a home when it had the space and ability to construct the garage within existing restrictions.** Accordingly, the Board again finds that no hardship exists. (Emphasis added.)

With respect to the second requirement that "[t]he conditions upon which a petition for a variation is based are unique to the property[,]" the Board found "that the typical

constraints of waterfront development within the critical area and the view cone covenant do not in and of themselves necessitate the requested variance."

With respect to the fourth condition that "[t]he alleged difficulty or hardship is caused by this title and has not been created by" the Chesleys, the Board ruled:

> Although a view cone covenant was supported by Planning and Zoning prior to the site design approval for the new residence, the applicant consented to the covenant as part of the overall redevelopment of the property and could have planned for the redevelopment with a garage and the viewcone. The Board finds that the claimed hardship has been created by the applicant.

Finally, with respect to the fifth and sixth requirements that the variance "will not," *inter alia*, be "injurious to other property . . . in the neighborhood[,]" or "substantially diminish or impair property values with[in] the neighborhood," the Board concluded:

> Testimony was presented at the hearing about the location of the garage on that side of Eastern Avenue. Concerns were raised about the negative impact on the streetscape. **The Board finds that adding a garage at this location will contribute to the walling off of that side of Eastern Avenue with structures and create a visually unattractive streetscape.** The Board finds that this would substantially diminish or impair property values in the neighborhood. (Emphasis added.)

The circuit court ruled that the Chesleys cannot challenge the Board's 2005 findings that the Chesleys did not suffer hardship and that any hardship they claim to have suffered was self-created, because they did not challenge the Board's 2002 finding on the same

questions by seeking judicial review of that decision.[6]

The Chesley Challenges

The Chesleys contend that "[t]he Board premised its negative findings on a misunderstanding of Maryland law applicable to the variance concepts of 'hardship' and 'self-created hardship.'" With respect to neighborhood impact, the Chesleys assert that the Board's negative findings are arbitrary and capricious because they are not based on any empirical data or other competent evidence that refute the undisputed evidence provided by the Chesleys' expert witnesses and the City's professional planners. The City contends that the Board's decision is legally correct and supported by the record.[7]

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[6]In its 2002 decision, the Board found that,

> despite the cone view restriction, there was adequate room on the property to plan for and construct a reasonable size residence with a detached or attached garage without the need for the requested variance. The applicant chose to construct a larger home and then request this variance to build the garage in the requested location, rather than plan to construct the garage within the existing restrictions.

[7]The City also argues that the Chesleys are collaterally estopped from challenging the Board's hardship findings, because they did not seek review of the Board's substantially similar hardship findings in 2002. "Under settled Maryland law, appellate review of administrative decisions is limited to those issues and concerns raised before the administrative agency." *Capital Commercial Props., Inc. v. Montgomery County Planning Bd.*, 158 Md. App. 88, 96 (2004). A court "may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency." *Eastern Outdoor Adver. Co. v. Mayor of Baltimore*, 128 Md. App. 494, 516 (1999)(emphasis and citation omitted), *cert. denied*, 358 Md. 163 (2000). Moreover, "[i]t is the function of the reviewing court to review only the materials that were in the record before the agency at the time it made its final decision." *Dep't of Labor v. Boardley*, 163 Md. App. 404, 415 (2005).
(continued...)

Satisfying Conditions For Variance

"The burden of showing facts to justify . . . [a] variance rests upon the applicant[.]" *Easter v. Mayor of Baltimore,* 195 Md. 395, 400 (1950). In cases involving critical area variances, it has been made clear by statute that applicants "have the burden of meeting all of the requirements" enumerated in the law governing such variances. *See* Md. Code (1973, 2000 Repl. Vol., 2006 Cum. Supp.), § 8-1808(d)(4)(ii) of the Natural Resources Article

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[7](...continued)
For these reasons, "[w]e do not allow issues to be raised for the first time in actions for judicial review of administrative agency orders[.]" *Delmarva Power & Light Co. v. Public Serv. Comm'n of Md.*, 370 Md. 1, 32, *motion for reconsideration granted on other grounds*, 371 Md. 356 (2002). *See, e.g., Cicala v. Disability Review Bd. for Prince George's County*, 288 Md. 254, 261-63 (1980) (failure to argue at administrative hearing that the board did not have a report that it was required to obtain and consider prevented consideration of that issue on judicial review); *Swoboda v. Wilder*, 173 Md. App. 615, 641 (2007)(opponents of proposed building permit waived objection to zoning board's consideration of expert testimony by failing to object at administrative hearing); *Cremins v. County Com'rs of Washington County,* 164 Md. App. 426, 445 (2005) (property owners waived argument that unsworn testimony before zoning authority should not be considered by failing to object at administrative hearing); *Capital Commercial Props.,* 158 Md. App. at 102 (declining to consider whether board's decision complied with certain statutory requirements because that issue was not presented to the board). A contrary rule "would allow the courts to resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency." *Delmarva Power & Light,* 370 Md. at 32.

Here, the issue of whether the Chesleys were collaterally estopped in 2005 as a result of the Board's hardship finding in 2002 was not preserved for judicial review, because (1) the City did not argue collateral estoppel to the Board; (2) the administrative record does not include the 2002 records necessary to determine whether collateral estoppel is warranted; (3) the Board did not conduct the requisite inquiry into whether the proceedings on the 2002 variance "embraced elements of adjudicatory procedure consistent with established principles of due process," *see Batson v. Shiflett,* 325 Md. 684, 705 (1975)(citation omitted); and (4) the Board did not rest its decision to deny the variance on principles of collateral estoppel.

(NR)(to obtain a critical area variance, applicant must satisfy each one of the statutory conditions); *Becker*, 174 Md. App. at 130-32 (reviewing legislative history of criteria for critical area variances, including recent change requiring satisfaction of all statutory conditions). Whether the applicant must satisfy all of the City's enumerated conditions for an "ordinary" front yard setback variance is less clear.

In a line of critical area variance cases that prompted legislative action, the Court of Appeals held that the "determinative factor" in granting a variance was whether there is hardship, so that all other conditions for the grant of such a variance were construed as merely providing guidance and could not be individually cited as grounds to deny the variance. In *White v. North,* 356 Md. 31, 50 (1999), the Court explained, using language that is arguably broad enough to encompass all types of variances, that the dispositive question is whether denial of the requested variance will create hardship:

> The variance provisions of the ordinance at issue include, as do most such ordinances, a list of other factors that must be considered with respect to the grant or denial of a variance. They are described as (1) a deprivation of rights commonly enjoyed by others; (2) that no special privilege will be conferred on an applicant; (3) that the need for relief not be caused by an applicant's own acts; (4) the need for a variance does not arise from conditions on adjacent property; (5) a variance will not adversely affect water quality, fish, wildlife, or plant habitat; (6) a variance will be in harmony with the general spirit of the particular zoning regulation; (7) that the variance is the minimal necessary to afford relief; (8) the variance will not alter the essential character of a neighborhood; (9) the variance will not impair an appropriate use of adjacent property; (10) the variance will not counter acceptable clearing and replanting requirements; and (11) the variance will not be

> detrimental to the public welfare. If total compliance with every specific requirement were necessary, relief would be nearly impossible and serious "taking" questions might arise. It is our view that these specifically stated requirements are to be considered in the context of the entire variance ordinance, to the end that, when interpreted as a whole, either they are or are not *generally* met.
>
> Moreover, the essential determination is whether an unwarranted hardship exists. The specific factors that must be considered cannot be construed individually to overrule a finding of unwarranted hardship any more than they could overrule a finding of an unconstitutional taking of one's property. The individual provisions that must be considered are part of the entire matrix that defines what information is necessary to reach a finding as to the existence or nonexistence of an unwarranted hardship.

White, 356 Md. at 50-51. *See also Lewis v. Dep't of Natural Resources,* 377 Md. 382, 413 (2003)("We have recently held, in *White*, that these criteria must be applied in total and generally, and that no individual factor is to be determinative").

In response to *White,* the 2002 General Assembly amended the critical area law to explicitly require compliance with all the variance conditions set by statute. *See* 2002 Md. Laws, ch. 431, 432; *Becker*, 174 Md. App. at 131-33. There is no analogous certainty in cases involving other types of variances. Unlike the revised critical area statute, the City's zoning code does not specifically address whether all the enumerated variance conditions must be satisfied. Nor have we been cited to a case affirming the denial of a variance for a single reason unrelated to hardship. *Cf. Stansbury v. Jones*, 372 Md. 172, 204 (2002)(declining to decide "whether self-created hardship alone is sufficient to deny an area

variance[,] while noting that Court of Appeals has "assumed, without any extensive investigation of the matter, that it was sufficient").

Here, the City did not argue to either the Board or this Court that the denial of the Chesleys' variance application should be affirmed on the basis of non-hardship factors. Nor did the Board rest its decision solely on a negative finding regarding a single factor. For that reason, we shall address whether the Board erred in determining both that the Chesleys failed to establish a hardship that was not self-created and that the proposed garage would have a negative impact on the neighborhood.

Appellate Review Of The Board's Decision

The standard governing appellate review of variance decisions is "the same whether the agency grants or denies" the application. *See Stansbury,* 372 Md. at 185. "Our role in reviewing whether the Board, as an administrative agency, correctly reached the conclusions required by the Zoning Ordinance for . . . a variance . . . 'is precisely the same as that of the circuit court.' This means we must review the administrative decision itself." *Mastandrea v. North*, 361 Md. 107, 133 (2000)(citation omitted). Thus, we repeat the task performed by the circuit court. *See Red Roof Inns, Inc. v. People's Counsel for Baltimore County,* 96 Md. App. 219, 224 (1993).

Because we review the Board decision, rather than the circuit court decision, our focus is on the reasons given by the Board. *See Gigeous v. Eastern Corr. Inst.,* 363 Md. 481, 495-96 (2001). Consequently, this Court may consider any ground cited by the Board

for its decision, even if the circuit court did not reach that issue in affirming the Board. *See, e.g., Md.-Nat'l Capital Park and Planning Comm'n v. Friendship Heights,* 57 Md. App. 69, 83 (reviewing issue of whether there was substantial evidence to support zoning agency's decision, after ruling that circuit court erred in deciding that it lacked jurisdiction to entertain the action for judicial review), *cert. denied,* 300 Md. 89 (1984); *Wheaton Moose Lodge No. 1775 v. Montgomery County,* 41 Md. App. 401, 417-18 (1979)(fact that circuit court affirmed zoning board's denial of rezoning petition on only one of multiple issues decided by the Board did not preclude Court of Special Appeals from reviewing the sufficiency of the evidence in the administrative record for the Board's findings on other issues).

On a legal issue, "a reviewing court is under no constraints in reversing an administrative decision which is premised solely upon an erroneous conclusion of law." *People's Counsel for Baltimore County v. Md. Marine Mfg. Co.,* 316 Md. 491, 497 (1989). The zoning ordinance central to this appeal is former section 21.80.030 of the Annapolis City zoning ordinance, now recodified without change material to this appeal at Code § 21.28.050. We give considerable weight to the Board's interpretation and application of this ordinance, because of that administrative agency's expertise in administering it. *See Marzullo v. Kahl,* 366 Md. 158, 172 (2001).

For factual findings, "'the correct test . . . is whether the issue before the administrative body is 'fairly debatable,' that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions.'" *White,* 356

Md. at 44 (citation omitted). If we find evidence to support the Board's finding, we may not substitute our judgment, even if the evidence also supports different factual inferences. *See Mastandrea,* 361 Md. at 134. However, when "an administrative agency's conclusions are not supported by competent and substantial evidence, or where the agency draws impermissible or unreasonable inferences and conclusions from undisputed evidence, such decisions are due no deference." *Lewis,* 377 Md. at 407. "Whether reasoning minds could reasonably reach a conclusion from facts in the record is the essential test." *Stansbury,* 372 Md. at 182.

Hardship

The Chesleys argue that the Board erred in concluding that their need for the setback variance did not result from a hardship within the meaning of established case law. We disagree.

In *Belvoir Farms Homeowners Ass'n, Inc. v. North,* 355 Md. 259 (1999), the Court of Appeals recognized that the purpose of zoning restrictions is "to prevent exceptions as far as possible," so that the specific need for the variance "must be substantial and urgent and not merely for the convenience of the applicant[.]" *Id.* at 276 (citing *Carney v. City of Baltimore,* 201 Md. 130, 137 (1952)). The *Belvoir Farms* Court held that a variance is warranted if the "'applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership.'" *Id.* at 276 (quoting *Marino v. Mayor of*

Baltimore, 215 Md. 206, 217 (1957)). Alternatively, if application of the zoning ordinance would deny the property owner "a reasonable and significant use for the property," there is also "unwarranted hardship" justifying a variance. *See id.* at 282. This hardship standard is "less restrictive than the unconstitutional taking standard." *See id.* "Whether a property owner has been denied a reasonable and significant use of the property is a question of fact best addressed by the expertise of the Board of Appeals, not the courts." *Id.*

In *White v. North,* 356 Md. 31, 49 (1999), the Court of Appeals confirmed that "an unwarranted hardship can result from the denial of a reasonable and significant use," and that the local zoning agency is presumed to possess the "necessary expertise to decide what is reasonable and significant." In that case, the Court reversed judicial decisions that the local zoning board acted arbitrarily and capriciously in granting a buffer variance to construct a concrete swimming pool on a sloped lot. *See id.* at 52. The *White* Court emphasized that determination of whether the proposed pool was a reasonable and significant use, and whether denial of a variance was an unwarranted hardship, are factual findings on which courts must give deference to the Board. *See id.* at 50.

The Chesleys rely on *Mastandrea v. North* for the proposition that their circumstances constitute a hardship. In that case, the Court of Appeals affirmed the local board's grant of a critical area variance to build a brick path along the waterfront of the Mastandreas' Talbot County home, for the purpose of enabling their wheelchair-bound child to enjoy that portion of the property. *See Mastandrea,* 361 Md. at 143. The Court held that the Talbot County

Board of Zoning Appeals "was required to (and did) consider whether the property owners, in light of their daughter's disability, would be denied a reasonable and significant use of the waterfront of their property without the access that the path provided." *Id.* at 136. After examining the administrative record, the Court concluded that there was substantial evidence "establishing that, without the path, a person in a wheelchair could not enjoy the waterfront portion of the property." *Id.* In these circumstances, the board correctly granted the variance. *See id.* at 143.

The Chesleys argue that, like the Mastandreas, they are being denied a reasonable and significant use of their property, both to accommodate Billy's disability and to enhance pick-up and drop off for the Chesleys' elderly mothers and young daughter. *Mastandrea*, however, has been largely abrogated by statutes, enacted in 2002 and 2004. *See Becker v. Anne Arundel County*, 174 Md. App. 114, 131-33 (2007)(reviewing the legislative enactments). The General Assembly amended the critical area law for the explicit purpose of eliminating the "reasonable use within the buffer standard" used in *Mastandrea* and *Lewis v. Dep't of Natural Resources*, 377 Md. 382, 419 (2003).[8] As explained in *Becker*, the 2002 amendment

> added a requirement that in considering an application for a variance, the Board should consider the reasonable use of the

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[8]In *Lewis v. Dep't of Natural Resources.*, 377 Md. 382 (2003), the Court of Appeals held that, "with respect to variances in [critical area] buffer zones, the correct standard was . . . whether he or she was being denied reasonable use within the buffer[.]" *Becker v. Anne Arundel County*, 174 Md. App. 114, 132 (2007) (reviewing *Lewis*).

> *entire parcel or lot* for which the variance is requested. The preambles to the bills expressly stated that it was the intent of the General Assembly to overrule recent decisions of the Court of Appeals, in which the Court had ruled that . . . . a board could grant a variance if the critical area program would deny development on a specific portion of the applicant's property rather than considering the parcel as a whole.

Becker, 174 Md. at 132 (emphasis in original). Judge James Eyler, writing for this Court in *Becker,* explained the 2004 amendment to the critical area law:

> The General Assembly expressly stated that its intent in amending the law was to overrule *Lewis* and reestablish the understanding of unwarranted hardship that existed before being "weakened by the Court of Appeals." . . . The amendment also created a presumption that the use for which the variance was being requested was not in conformity with the purpose and intent of the Critical Area Program. *See* § 8-1808(d)(2)(1).

Id. at 132-33 (quoting 2004 Md. Laws, ch. 526); NR § 18-1808(d).

The *Mastandrea* Court cited, *inter alia*, the daughter's disability as a legitimate consideration by the Board. There is no question that a resident's disability could, in an appropriate case, be a non-controlling factor for the Board to consider in determining whether a hardship would exist if the variance in question is not granted. [9]

The problem here is that we cannot say that the evidentiary record is so compelling that the Board was obligated to conclude that, without a garage to accommodate Billy's disability, a hardship exists. The record shows merely that Billy visits the Chesleys, and

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[9] As in *Mastandrea v. North*, 361 Md. 107, 128-29 (2000), we do not decide whether federal disability laws can *compel* the granting of a variance to accommodate a disability.

does not reside there. It does not reveal the frequency or duration of his visits. Moreover, there was no evidence to prove a "particular physical surrounding[], shape or topographical condition of the specific property" prevents the vehicular loading for which the Chesleys seek this garage variance. *See* former Code § 21.80.030(a). Indeed, the testimony was that the Chesleys were successfully using the property "as is" for parking and loading, by Billy and the Chesleys.

Rather, the essence of the Chesleys' argument is that a garage would make loading more convenient, and that a variance will allow them to locate the garage where the City's Planning Department preferred. The City Code requires more than a showing of "mere inconvenience[.]" *See* former Code § 21.80.030(A). As the Court of Appeals has recognized, it generally is not a hardship to be without a desired convenience or amenity on one's property, because zoning restrictions are to be enforced in the absence of a "substantial and urgent" need for a variance. *See Belvoir Farms Homeowners Ass'n,* 355 Md. at 126. When a variance would be required to build within the critical area buffer, for example, the fact that a particular improvement would enhance the owner's enjoyment of the property did not establish that it would be a hardship to continue using the property without the variance. *See, e.g., Citrano v. North*, 123 Md. App. 234 (1998)(fact that proposed deck created "pleasant amenity" did not create hardship); *North v. St. Mary's County*, 99 Md. App. 502, 519 (owner's desire to build gazebo to read and view creek is not evidence of hardship), *cert. denied sub nom. Enoch v. North,* 336 Md. 224 (1994). The City Code's distinction

between "mere inconvenience" and true hardship reflects the application of this principle to setback variances.

We conclude, therefore, that the Board drew an appropriate distinction between hardship and "mere inconvenience." Whether this particular variance is necessary to avoid hardship is a question of fact for the Board. *See Mastandrea,* 361 Md. at 143; *Belvoir Farms Homeowners Ass'n*, 355 Md. at 282. We find substantial evidence in the administrative record to support the Board's determination that the denial of a 27 ft. front yard setback variance would not be a "particular hardship" on the Chesleys, given their undisputed current use of their front yard for loading and the evidence supporting the Board's conclusion that the garage would be a "mere convenience."

"Self-Created" Hardship[10]

Similarly, we are not persuaded by the Chesleys' contention that City planning authorities' insistence on the view cone covenant created their need for this garage variance. The Court of Appeals examined self-inflicted hardships in *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County,* 368 Md. 294 (2002); *Stansbury v. Jones,* 372 Md. 172 (2002); and *Lewis v. Dep't of Natural Resources,* 377 Md. 382 (2003). The lessons from those cases are instructive here.

In *Roeser*, a developer bought a lot with knowledge that a variance from the critical

[10]We address this variance criteria because the Board cited it as additional reason to deny the variance.

area buffer would be necessary to build a house of the size that it planned. The local zoning board denied the variance on the ground that the conditions surrounding the request were "'self-created.'" *See Roeser*, 368 Md. at 297. The circuit court reversed, holding that "'[h]ardships of this type are normally those which are created by the owners of the property and not by the property itself.'" *Id.* at 298. The court reasoned that Roeser had not created the topography and placement of the property, which were the reasons that the lot required a variance. *See id.*

The Court of Appeals affirmed the circuit court's decision and rationale. *See id.* at 320. Writing for the Court, Judge Cathell explained that

> [t]he types of hardships that are normally considered to be self-created in cases of this type do not arise from purchase, but from those actions of the landowner, himself or herself, that create the hardship, rather than the hardship impact, if any, of the zoning ordinance on the property.

Id. at 314. Thus, the "typical type of self-created hardship [is] . . . an act of commission by the owner[.]" *Id.* at 317. Mere purchase of a property, even with knowledge that a variance will be needed in order to accomplish the purchaser's plans, does not constitute a self-created hardship meriting denial of a variance request, because zoning law regulates the property itself, rather than the title to it. *See id.* at 319. Therefore, "'[i]t should not be within the discretion of a board of appeals to deny a variance solely because a purchaser bought with knowledge of zoning restrictions[.]'" *Id.* at 304 (quoting 3 Arden H. Rathkopf & Daren A. Rathkopf, *The Law of Zoning and Planning* § 58.22, 141-48 (1991)).

To illustrate this principle, the *Roeser* Court contrasted the mere purchase of a property in the hope of obtaining a variance with instances in which the property owner took some affirmative action that created the hardship for which the variance was sought. The cited case law included examples of buildings constructed in violation of established setbacks, height restrictions, and building permit requirements. *See id.* at 314-16. *See, e.g., Ad + Soil, Inc. v. County Comm'rs of Queen Anne's County,* 307 Md. 307, 316, 340 (1986)(construction that violated setbacks was self-inflicted condition creating need for requested variance request); *Randolph Hills, Inc. v. Montgomery County,* 264 Md. 78, 83 (1972)(subdivision that created unbuildable lot was self-inflicted condition creating variance request); *Salisbury Bd. of Zoning Appeals v. Bounds,* 240 Md. 547, 554-55 (1965)(construction without building permit was self-inflicted condition creating variance request); *Wilson v. Mayor of Elkton,* 35 Md. App. 417, 428 (1977)(addition of unit to non-conforming apartment building was self-inflicted condition creating need for setback variance).

In *Stansbury*, the Court considered a variance request by a property owner who, in accordance with local ordinances encouraging her to do so, combined "antiquated lots" that did not conform with current lot size requirements, then sought to re-subdivide them into "closer-to-standard" size lots. The problem was that some of the resulting lots were subject to percolation requirements that made them unbuildable without a variance. The owner attempted to obtain variances from those restrictions. *See Stansbury,* 372 Md. at 175.

The Court of Appeals held that the variance request did not result from self-inflicted conditions or self-created hardship. *See id.* at 198-201. The Court recognized that the need to obtain a variance arose from the property owner's combination of non-conforming lots, which admittedly was an act of "commission," but distinguished that action as one the legislature actively encouraged. *See id.* at 200-01. It reiterated that "[t]raditionally, self-created hardship requires an affirmative action, exclusively by a property owner or his predecessor in title, that is itself the sole reason for the need for the variance[,]" and reasoned that "subdividing property in accordance with all applicable statutes does not, generally, constitute a self-created hardship[.]" *Id.* at 192, 198.

In *Lewis v. Dep't of Natural Resources,* the Court of Appeals again rejected the notion that a property owner's purchase of land that cannot be developed as the owner wishes without a variance constitutes a self-created hardship. There, Lewis began to build a hunting camp for his personal use, on an island that he already used for hunting. He belatedly discovered that the critical area buffer consumed 96 percent of the property, including the camp site, then halted construction and sought a variance. The Court of Appeals vacated the local board's denial of the variance, holding, *inter alia,* that the request did not result from a self-inflicted hardship. *See id.* at 422.

The Court emphasized that Lewis's premature construction did not create the hardship. "The existence of the partially constructed camp, in no way, was determinative of his need for a variance." *Id.* at 424. Lewis still would have needed a variance even if

there had been no construction. *See id.* Thus, the presence of already constructed buildings was "a 'red herring'" because the owner "needed a variance to build any camp on the island[.]" *Id.* at 425.

The Chesleys cite *Stansbury* in support of their argument that they did not create the hardship they now claim. *Stansbury* is easily distinguished, as are *Lewis* and *Roeser*, because there was substantial evidence to support the Board's finding that the Chesleys' need for this variance resulted from their unilateral decision to build a large house before obtaining a decision on whether the garage variance would be granted.

The Chesleys' argument that the Planning Department negotiated this plan, then failed to deliver a final approval, has some superficial appeal. To be sure, correspondence from the City makes it clear that the view corridor easement was required by the City as a condition to approval of the Chesleys' house and pool plans. City planners took the site plan review criterion that scenic views "shall be preserved and protected to the maximum extent as practicable" (Code § 21.98.050.E) as justification for making the view corridor "a major factor" in approving the plans for the Chesley residence. The Planning Director insisted that preservation of the water view across the Chesley property was required by law, citing several code sections, and told the Chesleys that it "will be necessary" to execute "appropriate documents to preserve the view across your side yard." The Planning Department explicitly conditioned approval of the Chesleys' home plans and a demolition permit for the existing house on the lot upon recordation of the view cone agreements.

Given the course of dealing between the Chesleys and the Planning Department, however, the record supports the Board's determination that the view cone agreements were not a binding *quid pro quo* for the ***garage*** variance, but a negotiated part of the Chesleys' deal to obtain the City's permission to demolish the existing ***house*** and build a much larger one. The Board was entitled to conclude, as it apparently did, that given Mr. Chesley's extensive experience as a real estate developer and the Board's denial of the Chesley variance application in 2002, the Chesleys understood that the Board alone had the power to grant the variance they would need to build the garage in the location favored by planning authorities. *See infra*, part II. Although the Planning Department promised to support such a variance, there was never a binding promise that the Board would approve one.

Ultimately, the Chesleys' contention that the Board erred in finding that they could have avoided the need for a setback variance by designing their home differently rests on the flawed premise that they cannot be held accountable for choosing to build a 5,000 sq. ft. residence before obtaining the variance necessary to build the garage. In contrast to the hunting camp in *Lewis*, then, the Chesley garage might have been built without a variance. Moreover, in contrast to *Stansbury*, there is substantial evidence in this record to support the Board's determination that the Chesleys' predicament did not result from mere compliance with applicable zoning and development laws, but from the Chesley's own actions in developing the property.

The record supports the Board's finding that the Chesleys created the need for the

variance by developing the property before obtaining the garage variance. When they built their house and pool, the Chesleys eliminated the possibility of locating a garage where no variance would be required. Among the options the Chesleys chose not to pursue was designing a smaller house that would permit a detached garage on the side of the property, opposite the viewshed that City planners were seeking to protect, in a location that would not require a setback variance. Alternatively, the Chesleys could have waited for a ruling on their garage variance application before proceeding with construction of the larger house and pool. Instead of getting the Board's answer first, so that they could reconsider their development plans if the Board denied a front yard setback, the Chesleys proceeded to build the house and pool at the risk of what happened here – that the Board would not approve a front yard variance for the garage, notwithstanding support by the Planning Department for the Chesleys' applications. In these circumstances, we find no legal or factual error in the Board's conclusion that the Chesleys' claimed hardship was self-created.

Neighborhood Impact

Citing testimony and community "[c]oncerns . . . about the negative impact on the streetscape[,]" the Board found "that adding a garage at this location will contribute to the walling off [of] that side of Eastern Avenue with structures and create a visually unattractive streetscape." This phenomenon "would substantially diminish or impair property values in the neighborhood." The Chesleys argue that the testimony of two neighbors in opposition to the variance on the question of how the proposed garage would impact the neighborhood

does not provide a reasonable basis for the Board's conclusions.

Marty Russell, the Chesleys' next door neighbor, opposed the variance, claiming that "seven out of the ten immediate neighbors across the street" also opposed the garage in letters to the City.[11] Ms. Russell complained that

> the walling off of that side of Eastern with structures creates a visibly unattractive street scape for the neighbors and it could have a negative effect on property values. And it has already been mentioned, it completely blocks our house from view. And I have two realtor friends [who] . . . feel that it would definitely impact and lower our property values slightly which is not a really big issue but it's there. The garage also for me personally, if you are asking about neighborhood impact, and I'm the immediate neighbor, will cut out light and air coming into my kitchen and my side of the house. I've already got their house structure which totally obliterates all the southern sun that . . . used to come into my home. . . . and that's gonna eliminate completely the rest of that late afternoon sun which is the only sun that I get on that side of the house anymore.

Carolyn Kantor, a neighbor whose house is situated "across the street and two houses over" and who is a named beneficiary of the view cone agreement, also opposed the Chesleys' garage at the hearing. Kantor complained, *inter alia,* that "overbuilding and overcrowding loom on the horizon" due to the "rush to build the largest house possible and sell it for top dollar." She stated that she wants to enjoy the "beauty of Eastern [Avenue] from my front porch without having to look at another imposing structure across the street and find the solace that first attracted me" to the street in 1997.

---

[11]The record presented to this Court does not contain any such letters.

During public deliberations, the Board reviewed and considered, *inter alia,* its July 17, 2002 ruling on the Chesleys' previous variance application for a two car garage. The Board's 2002 opinion mirrors the Board's subsequent findings regarding neighborhood impact of the 2005 proposal:

> *Neighborhood Impact:* There was much testimony presented, both in writing and at the hearing, that neighboring property owners objected to the location of the proposed garage. A petition signed by over forty property owners was submitted objecting to any variances on the property. Some of those signatories withdrew their initial objection when the applicant agreed to withdraw his request for the side yard variance; however there remained numerous parties still objecting to any setback variance to permit a garage. **The testimony was that the new residence under construction is substantially larger than the structure it replaced and the neighbors are concerned about additional bulk on the property. Concerns were also raised about the negative impact on the streetscape of the proposed garage so near to the street. Adding a garage at this location will contribute to the walling off that side of Eastern Avenue with structures and create a visually unattractive streetscape for the neighbors and could have a negative effect on property values.** . . . [F]or the reasons stated above, the Board finds that the requested variance would have a negative impact on the neighborhood. (Emphasis added.)

During deliberations, both members of the Board's majority also noted the next-door neighbor's concern about property devaluation and that the Chesley "garage would block the view of her home."

In support of their "arbitrary and capricious" challenge to the Board's negative findings regarding neighborhood impact, the Chesleys rely on the Court of Appeals'

decision in *Lewis v. Dep't of Natural Resources,* 377 Md. 382, 407-09 (2003), vacating the denial of a critical area variance. Specifically, they cite the *Lewis* Court's ruling that "the record contains little or no empirical data to support the Board's conclusions or to refute the studies and reports of petitioner's experts." *See id.* at 409. The Chesleys posit that all evidence presented to the Board, with the exception of the testimony of the two neighbors recounted above, supported the Chesley variance. In their view, this record does not provide a reasonable basis for the Board's negative findings. We disagree.

As a threshold matter, the Chesleys' argument ignores the photographic and map evidence. These exhibits, presented by the Chesleys themselves, support the Board's finding that the proposed garage will "contribute to the walling off" of the streetscape on this waterfront side of Eastern Avenue, by adding a structure that blocks significant portions of both the Russell and Chesley lots from street view.

The Chesleys acknowledge in this Court that the garage would directly obstruct approximately 25 percent of their own facade, consuming "20 feet of the 85 feet of street frontage" when viewed from directly in front of the Chesley home. At the Board hearing, the Chesleys' attorney conceded that the planned one-story garage "somewhat masks the Russell garage" next door, as well as "the Chesley home" itself.

The extent of the streetscape impact is shown by the plans and photographs confirming that the new structure would sit next to the Russells' detached garage in such a way as to obscure portions of both the Russell and Chesley facades from the streetscape. For

example, the Chesleys' photographic illustration of the street with the proposed garage "photo-shopped" in place demonstrates that an existing view of the front part of the Russell home, now visible from the street and Ms. Kantor's property, between the Russell garage and the Chesley home, would be entirely blocked by the proposed garage.

In addition to this evidence, the Board was entitled to consider and credit the neighbors' complaints regarding the effect of the proposed garage on the Eastern Avenue streetscape. Observations and opinions regarding the view from and to one's own property, and the effect that diminished views would have on enjoyment of one's property, are not the type of lay opinions that must be supported by empirical data or expert testimony. *Cf. Anderson v. Sawyer,* 23 Md. App. 612, 618-19 (1974)(lay witness testimony about "traffic congestion" concerns did not rebut qualified traffic expert's testimony that street was capable of absorbing traffic increase created by proposal) .

Here, Russell had a reasonable basis, as the next-door neighbor who would look out her window onto the new Chesley garage rather than the Eastern Avenue streetscape, and whose own house would become completely obstructed from street view to pedestrians and vehicles traveling toward Horn Point, to complain about the elimination of her home from that streetscape, as well as the negative effect of the proposed garage on her property's views, air, and light. Similarly, Kantor had a reasonable basis, as a neighbor whose view of the Chesley and Russell properties would be affected by the proposed garage, to complain that overcrowding and "imposing structure[s]" harm her views and enjoyment of the

neighborhood. Moreover, because the City is charged with preserving the "small, intimate scale" of Eastport, the City was entitled to rely on this evidence in determining that the proposed garage would damage this streetscape. *See* City of Annapolis Dep't of Planning and Zoning, *The Eastport Residential Conservation Overlay District: A Guide to the Process and Design Guidelines* 2.

II.
City's Appearance Before The Board

The Chesleys ask this Court to "either dismiss the City as a party to the petition for judicial review or bar the City from presenting any argument in the courts that is contrary to the positions it took before the Board of Appeals." They argue that,

> when the City appears as a party at a public hearing before the Board, through officials who work for the City's Planning Department, and when those officials testify in favor of a variance, it is improper for the City in a petition for judicial review of the Board's decision to oppose the variance by taking positions contrary to the positions the City took before the Board.

Citing principles of judicial estoppel, the Chesleys point to the testimony of City planners Kevin Scott and Tom Smith that the Chesleys suffer a hardship caused by the three sets of zoning regulations, as well as Planning Director Jon L. Arason's written report to the same effect.

To be sure, a party may not take a position in an administrative proceeding and then take the contrary position in a subsequent court proceeding. *See Abrams v. Am. Tennis Courts, Inc.,* 160 Md. App. 213, 224-25 (2004), *cert. denied*, 386 Md. 181 (2005); *Chaney*

Enter. Ltd. P'ship v. Windsor, 158 Md. 1, 45 (2004). But the Chesleys' argument fundamentally mischaracterizes the positions of the Planning and Zoning Director and his staff as binding decisions made by the City itself. The Board of Zoning Appeals, not the Planning Director, is the entity authorized to make the City's final decision on a variance application. *See* City Code § 21.08.040. The Board's decision not to accept the recommendations of the Planning Department must be permitted, or else the Planning Department would effectively become the final arbiter of every variance. Thus, the City's position on this variance was established when the Board denied the Chesleys' application, and is consistent with the City's subsequent opposition to the variance during judicial review.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

RECEIVED
JUL 3 2007
DNR - LEGAL DIVISION

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

Telephone Planning: (410) 758-1255
Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

MEMORANDUM

TO: **ALL INTERESTED PARTIES**

FROM: **CATHY MAXWELL, CLERK TO THE BD. OF APPEALS** CM

RE: **NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW**
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

DATE: **JUNE 13, 2007**

Enclosed for your information is the Court Record which I filed with Circuit Court today.

If you have any questions, please call.

Enc.

RECEIVED
JUN 20 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
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BOARD OF APPEALS
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Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

June 13, 2007

Mr. Scott MacGlashan, Clerk of Court
Circuit Court for Queen Anne's Co.
100 Court House Square
Centreville, MD 21617

RE: CIVIL ACTION NO. 17-C-07-012458

Dear Mr. MacGlashan:

Enclosed is the Court Record for the above case.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

Enc.

PETITION OF:	*	**IN THE CIRCUIT COURT**
	*	
MARGARET MCHALE,	*	**FOR QUEEN ANNE'S CO., MD**
Chair, Critical Area Commission for	*	
the Chesapeake and Atlantic Coastal Bays	*	
1801 West St., Suite 100	*	
Annapolis, MD 21401	*	
	*	
Petitioners	*	
	*	
FOR JUDICIAL REVIEW OF THE	*	
DECISION OF:	*	
	*	
THE BOARD OF APPEALS OF	*	
QUEEN ANNE'S CO., MD	*	
	*	
Defendant	*	
	*	
IN THE CASE OF:	*	
	*	
CASE NO. V-010010	*	**CIVIL ACTION NO. 17-C-07-012458**
Robert J. and Connie M. Beasley	*	
Variance to Exceed 15% Impervious	*	
Surface in the Critical Area	*	

STATE OF MARYLAND, QUEEN ANNE'S COUNTY, TO WIT:

I HEREBY CERTIFY that the following are all the original papers filed in:

CIVIL ACTION NO. 17-C-07-012458
NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Board of Appeals Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area

Cathy Maxwell

Cathy Maxwell, Clerk

June 13, 2007
Date

IN THE MATTER OF	IN THE CIRCUIT COURT
THE APPEAL FROM THE DECISION	FOR QUEEN ANNE'S CO.
OF THE BOARD OF APPEALS OF	STATE OF MARYLAND
QUEEN ANNE'S CO.	
IN CASE NO. V-010010	Civil Action No. 17-C-07-012458

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

RECORD

I. FOLLOWING BOARD'S EXHIBITS:

Board's Exhibit No. 1 – Certificate of Publication of Notice of Hearing; Certificate of Posting of Property; and One (1) photograph of posting notice presented by the Planning & Zoning Administrator of Queen Anne's Co for Case No. V-010010.

II. FOLLOWING APPLICANT'S EXHIBITS:

Applicant's Exhibit No. 1 – Copy of Application filed in Case V-010010, received 1/19/07.

Applicant's Exhibit No. 2 – Deed to subject property – Liber SM142/444.

Applicant's Exhibit No. 3 – Copy of zoning, tax assessment, and critical area maps.

Applicant's Exhibit No. 4 – Location Drawing, Lot 84, Benton's Pleasure, prepared by Steven H. Jupitz, Inc., dated 7/30/03.

Applicant's Exhibit No. 5 – Letter dated 2/15/07 to Cathy Maxwell from LeeAnne Chandler, Critical Area Commission.

Applicant's Exhibit No. 6 - Building Permit No. B06-1864.

Applicant's Exhibit No. 7 – Letter dated 11/20/06 to Robert J. & Connie M. Beasley from Gene Palmatary, Zoning Inspector.

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338

WRITER'S DIRECT DIAL NO. (410) 260-3466
mdise@oag.state.md.us

August 21, 2007

RECEIVED
AUG 22 2007
DNR - LEGAL DIVISION

Mr. Scott MacGlashan, Clerk of the Court
Circuit Court for Queen Anne's County
100 Court House Square
Centreville, Maryland 21617

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Queen Anne's County Board of Appeals, In the Case of: Robert and Connie Beasley*
Civil No. C-17-07-012458

Dear Mr. MacGlashan:

Enclosed please find for filing in the above-referenced case the Reply Memorandum of Law of Petitioner Margaret McHale, Chair of the State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF:	*	
MARGARET MCHALE,		
Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	
	*	
FOR JUDICIAL REVIEW OF THE DECISION OF:	*	Civil Action No.: 17-C-07-012458
THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	
IN THE CASE OF:	*	
V-010010		
ROBERT J. AND CONNIE B. BEASLEY	*	

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

REPLY MEMORANDUM OF PETITIONER

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Rule 7-207(a), files this Reply Memorandum.

INTRODUCTION

This case is a text-book example of a local zoning Board's failure to follow, or even to acknowledge, the State-mandated standards for Critical Area variances. The Queen Anne's County Board of Appeals simply ignored the required Critical Area variance standards. The County's Memorandum of Law at pages 5-9, relying on cases which were superseded by statute in 2002 and 2004, condones this action. Moreover, the County seems to suggest (Mem. of Law at 5-6) that, rather than using the State standard of "unwarranted hardship," the County Code supplies a somewhat different standard for "unnecessary hardship," and that the Board satisfied

the County standard by considering whether it is "environmentally ineffective" to replace a blacktop driveway with gravel. The County's position is erroneous. Pursuant to both State statute (2007 Laws of Maryland, Ch. 221) and controlling caselaw, *Becker v. Anne Arundel County,* 174 Md. App. 114, 136 (2007), the variance requirements of State Critical Area law are mandatory, regardless of whether or not a local jurisdiction has incorporated those requirements into its local code.

By advocating interpretations of law which have been expressly superseded by statute, the County has attempted to justify the Board's granting of this variance. The Chair of the Critical Area Commission urges this Court to reject the County's arguments and to reverse the Board.

I. The County Erroneously Relies on Cases Which Have Been Superseded by Statute.

The County appears unaware that the cases cited in its Memorandum at 5-9 (*Belvoir Farms v. North, White v. North, Mastandrea v. North)* have been expressly superseded by statute. Chapters 431 and 432 of the 2002 Laws of Maryland amended the Critical Area Law, Code, Nat. Res. II §8-1808 in response to the *Belvoir, White,* and *Mastandrea* decisions. The General Assembly made the abundantly clear finding that "these recent rulings by the Court of Appeals are contrary to the intent of the General Assembly in enacting the Chesapeake Bay Critical Area Protection Act." Preamble to H.B. 528 and S.B. 326, Chs. 431 and 432, 2002 Laws of Maryland (Attached to this Reply Memorandum as Exhibits 1 and 2, respectively). Moreover, the 2002 amendments to the Critical Area law expressly stated that the "intent of this Act [is] to overrule these recent decisions of the Court of Appeals regarding variances to Critical Area regulations." *Id.*

Since June 1, 2002, an applicant for a Critical Area variance in every county has been

required to meet **each one** of the variance provisions in Nat. Res. II §8-1808(d), including the standard of "unwarranted hardship." Code, Nat. Res. II §8-1808(d)(1)(I) (Supp. 2002). This statutory amendment rejects the contrary holding of the Court of Appeals in *White,* advocated by the County at pp. 8-9 of its Memorandum. The 2002 amendments to the State Critical Area law also required local zoning boards to consider the reasonable use of the entire property or lot for which the variance was requested. This amendment to Code, Nat. Res. II §8-1808(d)(2) (Supp. 2002) expressly rejected the contrary holding of the Court of Appeals in *Mastandrea*, cited by the County at pp. 7-8 of its Memorandum. The 2002 amendments also provided that "rights commonly enjoyed" were to be compared to the uses of land or structures "permitted to others in accordance with the provisions of the Critical Area program." (Code, Nat. Res. II §8-1808(d)(3) (Supp. 2002). This amendment expressly discards another contrary statement in *White,* which the County argues at p. 8 of its Memorandum. [1]

In 2004, the General Assembly again amended the Critical Area law, in response to another case from the Court of Appeals, *Lewis v. DNR*, 377 Md. 382 (2003). This time, the General Assembly defined the term "unwarranted hardship" as "without at variance, an applicant would be denied reasonable and significant use of the *entire parcel or lot* for which the variance is

---

[1] In *Becker v. Anne Arundel County*, 174 Md. App. 114, 132 (2007), the Court of Special Appeals observed that "the preambles to the bills [House Bill 528 and Senate Bill 326] expressly stated that it was the intent of the General Assembly to overrule recent decisions of the Court of Appeals, in which the Court had ruled that,

> (1) when determining if the denial of a variance would deny an applicant rights commonly enjoyed by others in the critical area, a board may compare it to uses or development that predated the critical area program; (2) an applicant for a variance may generally satisfy variance standards rather than satisfy all standards; and (3) a board could grant a variance if the critical area program would deny development on a specific portion of the applicant's property rather than considering the parcel as a whole."

requested." (Emphasis added) Code, Nat. Res. II §8-1808(d)(1) (Supp. 2004). The 2004 amendments to the Critical Area Law overruled *Lewis,* and "reestablished the understanding of unwarranted hardship that existed before being 'weakened by the Court of Appeals.'" *Becker v. Anne Arundel County*, id. at 132, *quoting* the preamble to Ch. 526, 2004 Laws of Maryland.

The interpretations of Critical Area Law argued by the County at pages 5-9 of its Memorandum, and the cases cited therein, are no longer good law, and this Court should reject the County's interpretation.

II. The State Critical Area Variance Requirements Apply to All Local Zoning Boards, Whether or Not the County or Municipality Has Incorporated Those Requirements into Local Code.

All of the State law standards for variances apply to all local jurisdictions in Critical Area variance cases. *Becker*, id. at 136 ("[T]he criteria contained in [Nat. Res. II] §8-1808, including the criteria for granting a variance, are mandatory.") In granting this variance for a new detached garage, the Queen Anne's County Board of Appeals heard testimony from the Applicant that he would have to replace his blacktop driveway if the variance were denied. (County Mem. of Law at 6). Yet, the Applicant did not claim that he would be denied reasonable use of his entire property without the garage. Given the well-developed state of the property, which is improved with a large home, pool, attached garage, patio, and driveway, it is not credible for the County to suggest that the Board of Appeals used the correct standard for unwarranted hardship in this case.

Neither the County nor the Applicants can support the assertion that denial of *an additional garage* would result in denial of reasonable and significant use of the *entire* property in this case. Indeed, the Queen Anne's Board did not even try to make this finding. The Applicants'

property already exceeds the State law maximum of 15% impervious surface coverage, and the variance for the extra garage makes this non-compliant situation worse. The issue is not, as stated by the County, whether the Applicant would have to remove his blacktop driveway. The question is whether denial of a variance for an extra detached garage would deny the Applicants reasonable and significant use of the entire parcel. Most assuredly, the answer to that question is "no."

CONCLUSION

The Chair of the Critical Area Commission urges this Court to reverse the Board, because the Board's Decision is suffused with serious errors of law. As set forth fully in the Chair's initial Memorandum of Law, the Board failed to recognize, or to use, the standard of "unwarranted hardship" as required by Code, Nat. Res. II § 8-1808(d)(1). The Board failed to recognize, or to use, the standard of "rights commonly enjoyed" as required by Code, Nat. Res. II §8-1808(d)(4)(iii). The Board failed to make written findings on each of the variance factors and on the presumptions required in the Critical Area law. Code, Nat. Res. II §8-1808(d)(3). Any one of these errors of law, in itself, provides sufficient basis for this Court to reverse the Board. Taken together, these errors of law utterly undermine the Board's Decision, and this Honorable Court should reverse the Board.

Respectfully submitted,
DOUGLAS F. GANSLER
Attorney General of Maryland

Marianne E. Dise

Marianne E. Dise, Assistant Attorney General

Saundra K. Canedo
Assistant Attorney General
Critical Area Commission for the Chesapeake and
Atlantic Coastal Bays
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Attorneys for Margaret McHale, Chair,
Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays

August 21, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, on this 21st day of August, 2007, I mailed a copy of the foregoing Reply Memorandum, by U.S. Postal Service, first class mail, to:
Mr. and Mrs. Robert Beasley
205 Benton's Pleasure Road
Chester, MD 21619
and to
Patrick E. Thompson, Esquire
Foster, Braden, and Thompson, LLP
102 E. Main Street, Suite 203
Stevensville, MD 21666.

Marianne E. Dise

HOUSE BILL 528

Unofficial Copy
M3
SB 607/01 - EEA

2002 Regular Session
2lr1206
CF 2lr0915

By: **Delegate Weir (Chairman, Joint Committee on the Chesapeake Bay Critical Areas), the Speaker (Administration), and Delegates W. Baker, Cadden, and Owings**
Introduced and read first time: January 31, 2002
Assigned to: Environmental Matters

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 22, 2002

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested; providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; providing for the application of this Act; and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Exhibit 1

Preamble

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

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

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

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

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

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

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

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

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

Article - Natural Resources

8-1801.

(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

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

(i) Subdivision regulations;

(ii) Comprehensive or master plan;

(iii) Zoning ordinances or regulations;

(iv) Provisions relating to enforcement; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(3)~~ (2) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL JURISDICTION SHALL CONSIDER THE REASONABLE USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS REQUESTED.

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

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

(i) Harford, Cecil, and Kent counties;

(ii) Queen Anne's, Talbot, and Caroline counties;

(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

SENATE BILL 326
~~EMERGENCY BILL~~

Unofficial Copy
M3

2002 Regular Session
(2lr0915)

ENROLLED BILL
-- Education, Health, and Environmental Affairs/Environmental Matters --

Introduced by **Senator Dyson (Chairman, Joint Committee on the Chesapeake Bay Critical Areas)** ~~**and Senators Frosh and Sfikas,**~~ **the President (Administration), and Senators Frosh, Sfikas, Blount, Hollinger, Collins, Conway, Harris, Schrader, and Stone**

Read and Examined by Proofreaders:

_____
Proofreader.

_____
Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this _____ day of _____ at _____ o'clock, _____M.

_____
President.

CHAPTER_____

AN ACT concerning

Chesapeake Bay Critical Area Protection Program

FOR the purpose of altering the requirements for local critical area programs to include certain variance provisions; prohibiting a variance from being granted unless certain conditions are met; ~~requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;~~ *requiring a local jurisdiction, in considering an application for a variance, to consider reasonable use of the entire parcel or lot for which the variance is requested;* providing that certain provisions of this Act do not apply to certain permits or activities which comply with certain buffer exemption plans or buffer management plans; revising the period of time for the review of certain critical area programs by local jurisdictions; ~~defining a certain term;~~ removing certain obsolete language; ~~making this Act an emergency measure~~ *providing for the application of this Act;*

Exhibit 2

and generally relating to the Chesapeake Bay Critical Area Protection Program.

BY repealing and reenacting, without amendments,
Article - Natural Resources
Section 8-1801
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

BY repealing and reenacting, with amendments,
Article - Natural Resources
Section 8-1808 and 8-1809(g)
Annotated Code of Maryland
(2000 Replacement Volume and 2001 Supplement)

Preamble

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

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

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

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

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

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

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

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

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

Article - Natural Resources

8-1801.

(a) The General Assembly finds and declares that:

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

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

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

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

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

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

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

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

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

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

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

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

8-1808.

(a) (1) It is the intent of this subtitle that each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission.

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

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

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

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

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

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

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

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

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

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

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

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(iii) Dorchester, Somerset, and Wicomico counties;

(iv) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

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

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

8-1809.

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

(1) A statement certifying that the required review has been accomplished;

(2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;

(3) An updated resource inventory; and

(4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

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

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

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

IN THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

PETITION OF: MARGARET MCHALE, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays	*	CIVIL NO. 12458
FOR JUDICIAL REVIEW OF THE DECISION OF THE QUEEN ANNE'S COUNTY BOARD OF APPEALS	*	
IN THE CASE OF Case No. C-010010, Robert J. and Connie M. Beasley	*	

RECEIVED
AUG 7 2007
DNR - LEGAL DIVISION

MEMORANDUM
(Md. Rule 7-207)

The County Commissioners of Queen Anne's County by Patrick E. Thompson and Foster, Braden & Thompson, their attorneys file this Memorandum pursuant to Maryland Rule 7-207:

STATEMENT OF THE CASE

This proceeding is an effort by the State Critical Area Commission to overturn the decision of the Queen Anne's County Board of Appeals which granted a variance from impervious surface limitations to allow Robert J. Beasley, Jr. and Connie M. Beasley, his wife, to construct a garage on their inland lot in Benton's Pleasure, a residential subdivision located on Kent

Island, Queen Anne's County, Maryland.

STANDARD OF REVIEW

In a Petition for Judicial Review of an administrative decision the Court's function is to determine whether (i) there was substantial evidence in the record as a whole to support the agency's findings and conclusions, and (ii) the decision of the administration agency was based upon an erroneous conclusion of law. As a general proposition, "the order of an administrative agency, such as a county zoning board, must be upheld on review if it is not premised upon an error of law and if the agency's conclusions may 'reasonably based upon the facts proven'". AD + Soil, Inc. v. County Commissioners of Queen Anne's County, 307 Md. 307 (1986) quoting Annapolis v. Annap. Waterfront Co., 284 Md. 383, 399 (1979).

The test of appellate review is frequently phrased as whether a reasoning mind could reasonably have reached the conclusion reached by the agency, consistent with a proper application of the law. If so, the decision of the administrative agency must be upheld. Gray v. Anne Arundel County, 73 Md. App. 301, 309 (1987). Administrative agency decisions are not set aside unless the decision is arbitrary,

illegal or capricious. In determining whether such a decision was arbitrary, illegal or capricious, the reviewing Court must decide whether the question before the agency was "fairly debatable". The test is "reasonableness" not "rightness". Becker v. Anne Arundel County, 174 Md. 114 (2007).

Where the issue involves review of the agency's factual determinations or a mixed question of law and fact, the correct standard of review is whether there is substantial evidence in the record to support the factual findings and whether a reasoning much could have reached the conclusion reached by the agency. Thames Point Associates v. Supervisor, 68 Md. App. 1, (1986).

QUESTIONS PRESENTED

Was there substantial evidence in the record as a whole to support the findings of the Queen Anne's County Board of Appeals?

ARGUMENT

The Appellant raises three distinct arguments with respect to the decision of the Board of Appeals:

A. The Board erred in finding "unwarranted hardship";

B. The Board did not have a factual basis to find the Applicants had met the criteria for a variance; and

C. The Board failed to make written findings required by State law.

In each of these arguments, the State misinterprets the law and seeks to usurp the proper function of the local jurisdiction in deciding applications for variances under the Critical Area Act.

A. The Queen Anne's County Board of Appeals applied the correct standard of "unnecessary hardship".

In 1984 the State adopted a Chesapeake Bay Critical Area Protection Program which is codified in Md. Code Ann. Natural Resources Article, §8-1801 et seq. Each local jurisdiction, including Queen Anne's County, is required to adopt a local Critical Area Program. Queen Anne's County's program is codified in Chapter 14 of the Code of Public Local Laws. The County program is required to be approved by the State Critical Area Commission, NR, §8-1801.

State law is clear that "[i]t is the intent of [Subtitle 18 of Title 8 of the Natural Resources Article] that each local jurisdiction shall have primary responsibility for developing and implementing a program ...". NR 8-1808(a). Despite the vesting of "primary responsibility" in the local jurisdictions, the State requires that there be a finding of "unwarranted hardship to the

applicant" before a variance may be granted. NR §8-1801(d)(4)(i). The Queen Anne's County program requires a finding of "unnecessary" hardship as a result of specified conditions which hardship is not shared by other properties in the same area. County Code §14:1-66. The Court of Appeals have held these two standards to be "undistinguishable". Belvoir Farms Homeowner's Association v. North, 355 Md. 259 at p. 276 (1999).

The applicants in this case sought to build a 26' x 36' garage (Record, "R" Applicants Ex. 6). Their property (lot 84 of Benton's Pleasure) contains an area of 43,500 square feet. Under County Code, Section 14:1-38(8) a site may not have impervious surface of more then 15% or 6,525 square feet. Construction of the proposed garage would give the Beasleys a total impervious surface of 7,124 square feet or 1,599 more than allowed by the County Code. (Transcript "Tr." at p. 4).

It is clear from a reading of the transcript that the Board of Appeals was concerned that a denial of the variance would result in the Beasleys having to tear up their blacktop driveway in order to meet impervious surface limitations (Tr. 16). This was especially troubling because the representatives from the Critical Area Commission testified that they considered a gravel

driveway an impervious surface (even though the County does not) (Tr. 15). In determining that unnecessary hardship existed, the Board considered the distinct possibility that a denial would result in the applicants replacing the existing blacktop driveway with gravel and that the State Critical Area Commission was of the position that there was no difference, in an environmental-impact sense, between blacktop and gravel. Given the testimony of the State Critical Area representatives, it was entirely reasonable for the Board to find such environmentally ineffective action to be a hardship on the applicant, unreasonable and unwarranted.

B. The Board had a factual basis for finding Applicants had met the criteria for a variance.

There was ample testimony before the Board that the applicants had made efforts to minimize the impacts of impervious surface on stormwater run-off. Mr. Beasley testified (Tr. 5) that he sloped his driveway, installed "river rock" to slow the runoff of stormwater and that he installed a penetrable felt underlayment under the river rock "so that rain water will penetrate" (Tr. 5). He removed an existing shed on his property to reduce the amount of impervious surface (Tr. 21).

In this case the applicants simply wished to construct a garage to house their vehicles, hardly a "special privilege" denied to others in the critical area (County Code, § 14:1-66 E.) and a "reasonable use" of his property (Code, § 14:1-66 G.). The efforts undertaken by the applicant, as outlined above, were clearly sufficient for a reasoning mind to find that the public interest and the policies, objective and goals of the County Critical Area Program were met (Code § 14: 1-66 D. and H.) and would not adversely affect the water quality or impact fish, wildlife or plant habitat in the critical area (County Code, § 14: 1-66 F.).

In Mastandrea v. North, 361 Md. 107 (2000) the Critical Area Commission also sought to overturn a critical area variance. The factors to be considered by the Talbot County Board of Appeals in Mastandrea were virtually identical to the Queen Anne's County requirements under its Critical Area Program (see Mastandrea at p. 114, 115).

In holding that the Talbot County Board of Appeals correctly granted a variance to the Mastandreas, the Court noted that "unwarranted hardship is a lesser standard than that required to prove an unconstitutional taking" (at p. 136, citing belvoir Farms v. North, 355 Md. 259 (1977) and that "whether a property

owner has been denied reasonable and significant use of his property is a question of fact best addressed by the expertise of the Board of Appeals". The Board of Appeals did not have to consider whether denying the variance would deny the Mastrandrea's reasonable and significant use of the "entire" lot. Rather they should (and did) consider whether the denial of the variance denied the property owner a reasonable and significant use (such as, in this case, a garage) on a portion of the property.

In White v. North, 356 Md. 1 (1999) the Critical Area Commission sought to overturn a variance granted by the Anne Arundel County Board of Appeals which allowed the Whites to construct a swimming pool in the Critical Area. In that case the Critical Area Commission testified before the Board of Appeals that "reasonable use" should only be interpreted to mean a primary residence and that granting a variance for an accessory structure (such as a pool, or in this case, a garage) would grant a "special privilege" to the applicants.

The White Court stated that "the essential determination [in a variance request] is whether an unwarranted hardship exists" and that "if total compliance with every specific requirement were necessary, relief would be nearly impossible and serious

'takings' questions might arise. It is our view that these specifically stated requirements are to be considered in the context of the entire variance ordinance, to the end that, when interpreted as a whole either they are or are not generally met". (at. p. 50, emphasis in original).

The White Court also specifically rejected the lower Court decisions (and the position of Appellant in this case as set forth at p. 11 of Appellant's Memorandum) that in determining whether a grant of variance would confer a right commonly enjoyed by others, the Board should only consider uses resulting under the critical area variance procedures. The correct interpretation, and the standard that the Board applied, is whether a denial of a variance would deprive the Petitioners of rights commonly enjoyed by other property owners in the area, and within the critical area. The correct standard is not whether other properties in the area have been given a variance from impervious surface limitations but whether the denial of a variance in this case would deny applicants a right (i.e., the right to construct a garage) commonly enjoyed by others in the neighborhood.

The construction of a garage is clearly a right commonly enjoyed by other property owners in the area and in the critical

area. The granting of the variance in this case confers no "special privilege" on the applicants. Its denial would result in an unnecessary hardship not shared by owners of other property in the area.

C. The written findings of the Board were sufficient.

In a case cited by Appellant Gray v. Anne Arundel County, 73 Md. App. 301 (198) the argument was made that the Board of Appeals had failed to make adequate findings of fact. The Court stated in that case (at p. 313):

> "Appellants ... acknowledge that the Board referred to each of the factors required to be considered before granting a permit for the installation of pilings; however they argue that the Board utterly failed to make a finding regarding each factor. We do not agree.
>
> Unlike the situation in Ocean Hideway Condo. v. Boardwalk Plaza, 68 Md. App. 650, 515 A. 2d 485 (1986), the Board's Opinion and Order, consisting of ten pages, made adequate findings of fact. Not only did the Board summarize the testimony of the various witnesses that appeared before it, but it discussed the relevant ordinance, and made findings and drew conclusions, albeit some of the findings were made by reference back to the summarized testimony, and applied the law. Although the findings are not set out in the form that appellants would prefer, reviewing the Opinion and Order in context and in its entirety (emphasis added), we are convinced that the decision in this case does not suffer from the deficiencies noted in the cased relied upon by appellant." (at p. 313, 314)."

Just as in Gray, supra, in this case the written decision summarized the testimony of each witness, discussed each of the criteria for a variance and made a specific finding with respect to each of the criteria. It is clearly sufficient to constitute the "written findings" required by NR § 8-1808 (d).

Patrick E. Thompson
Foster, Braden & Thompson, LLP
102 E. Main Street, Suite 203
Stevensville, Maryland 21666
Telephone: 410-643-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 6th day of August, 2007, I served a copy of the aforegoing by mailing the same first class mail, postage prepaid to:

Douglas F. Gansler, Esquire
Saundra K. Canedo, Esquire
Marianne E. Dise, Esquire
Attorneys for Margaret McHale
Department of Natural Resources
580 Taylor Avenue
Annapolis, Maryland 21401

Mr. and Mrs. Robert J. Beasley
205 Benton's Pleasure Road
Chester, Maryland 21619

Patrick E. Thompson

I:\39-kr\COUNTY\Pleadings\Memo Beasley case.wpd

P&Z #1

PLANNING & ZONING STAFF REPORT

PROJECT NAME: Beasley, Robt. J. FILE NO. V-010010
APPLICANT: Robert J. Jr. & Connie M. Beasley AGENT:
205 Benton's Pleasure Rd., Chester, MD 21619

PROJECT DESCRIPTION: To construct a 26 ft. x 36 ft. detached garage with storage attic above.

LOCATION: Tax Map 57, Block 19, Parcel 378, Lot 84.
EXISTING ZONING: Neighborhood Conservation (NC-20)
SIZE OF EXISTING PARCEL: 43,500 sq. ft.
EXISTING NATURAL RESOURCES: None.

REQUESTED ACTION: A variance from §14:1-38.D.(8) to exceed the 15% impervious cover allowed to construct a 26 ft. x 36 ft. detached garage.

STAFF COMMENTS:

1. The only issue with regards to this application pertains to the applicant being over the 15% impervious cover allowed.
2. The applicant is over 1,599 sq. ft. of impervious cover.
3. See drawing of existing black top driveway.
4. Refer to letter from Critical Area Commission.

ACTION RECOMMENDED FROM STAFF: Staff has no objection to the granting of this variance.

DATE: 2/28/07

Gene A Pelusky
Zoning Inspector

P&Z EXHIBIT NO. 1

FACSIMILE TRANSMITTAL

TO: Saundra Canedo FAX: 410 260 8364

COMPANY:

FROM: LeeAnne Chandler

DATE: 7/9/07 TIME: 9:40 a.m. p.m. NO. PAGES: 2

COMMENTS:

Correspondence MSA_S_1831_30 (S.C6)

MCHALE vs. BEASLEY
CIRCUIT COURT OF QUEEN ANNE'S COUNTY
Case No.: 17-C-07-012458

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

Telephone Planning: (410) 758-1255
Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

June 5, 2007

Ms. Shirley Massenburg
Critical Area Commission for the Chesapeake
and Atlantic Coastal Bays
1804 West Street Suite 100
Annapolis MD 21401

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

Dear Ms. Massenburg:

Regarding the above, the cost for the transcript is:

33 pages @ $3.00 per page = $ 99.00

Please make check payable to: Queen Anne's Co. Commissioners

And mail check to: Cathy Maxwell, Dept. of Planning & Zoning, 160 Coursevall Dr., Centreville, MD 21617.

A copy of the transcript was sent to Ms. Saundra Canedo, Dept. of Natural Resources, Office of Attorney General, 580 Taylor Ave., Annapolis, MD.

If you have any questions, please call.

Sincerely,

Cathy Maxwell
Clerk

Enc.

CC: Marianne E. Dise, Esq. LeeAnne Chandler
Saundra Canedo

RECEIVED
JUN 6 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

June 5, 2007

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

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Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

Ms. Saundra Canedo
Dept. of Natural Resources
Office of Attorney General
580 Taylor Ave.
Annapolis, MD 21401

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

Dear Ms. Canedo:

Enclosed is the transcript regarding the above captioned Board of Appeals case. I am sending the bill to Ms. Shirley Massenburg, Critical Area Commission, for payment.

If you have any questions, please call.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

Enc.

CC: Marianne E. Dise, Esq.
LeeAnne Chandler
Shirley Massenburg

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

May 30, 2007

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

Telephone Planning: (410) 758-1255
Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

TO ALL INTERESTED PARTIES:

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

Dear Interested Party:

A petition for judicial review has been filed in the above matter. It was filed on May 21, 2007 in the Circuit Court for Queen Anne's Co., Md., 100 Courthouse Square, Centreville, MD 21617, under Civil Action No. 17-C-07-012458.

It was received by the Dept. of Planning & Zoning by certified mail on May 24, 2007 and was received by the undersigned Clerk to the Bd. of Appeals on May 30, 2007.

If you wish to oppose the petition filed by Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, you must file a response with the Court within thirty (30) days of this Notice, unless the Court shortens or extends the time.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

CC: Board of Appeals File No. V-010010

RECEIVED
JUN 01 2007
CRITICAL AREA COMMISSION

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF:
MARGARET MCHALE, *
Chair, Critical Area Commission for
the Chesapeake and Atlantic Coastal Bays
1801 West Street, Suite 100
Annapolis, Maryland 21401 *

FOR JUDICIAL REVIEW OF
THE DECISION OF THE
QUEEN ANNE'S COUNTY BOARD
OF APPEALS *
160 Coursevall Drive
Centreville, Maryland 21617

*

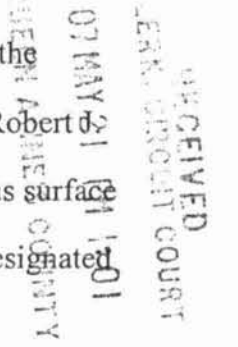
IN THE CASE OF
Case No. V-010010, * CIVIL ACTION No. 12458
Robert J. And Connie M. Beasley
Variance to Exceed 15% Impervious Surface in
the Critical Area *

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

PETITION FOR JUDICIAL REVIEW

Margaret McHale, Chair of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, ("Chair McHale") by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Saundra K. Canedo and Marianne E. Dise, Assistant Attorneys General, pursuant to Maryland Rule 7-202, files this Petition for Judicial Review and states:

1. Chair McHale hereby requests judicial review of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals in the above-captioned Case No. 3V-010010, Robert J. and Connie M. Beasley. The Board's Decision granted a variance to the 15% impervious surface limit for a lot, for property in Chester, in the Queen Anne's County Critical Area land designated as a limited development area.



2. Chair McHale received the Decision from the County on April 30, 2007.

3. Chair McHale has standing and the right and authority to file this Petition pursuant to Annotated Code of Maryland, Natural Resources Article §8-1812 (a) and (c).

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

Saundra K. Canedo
Marianne E. Dise

Saundra K. Canedo
Marianne E. Dise
Assistant Attorneys General
Department of Natural Resources
580 Taylor Avenue
Annapolis, MD 21401
(410) 260-8356

Attorneys for Margaret McHale, Chair
Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays

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

March 14, 2007

Mr. William D. Moore, Chairman
Queen Anne's County Board of Appeals
160 Coursevall Drive
Centreville, Maryland 21617

Re: Robert J. Beasley – Supplemental Comments
V-010010

Dear Chairman Moore:

The Critical Area Commission for the Chesapeake and Atlantic Coastal Bays hereby submit further comments in the above referenced case. The applicants are requesting a variance from the 15% impervious surface limit on the subject property, otherwise known as Tax Map 57, Parcel 378, Lot 84. The property is located in a Limited Development Area or LDA and is 43,500 square feet in size. It is not waterfront. It was developed with a single-family dwelling in 2003. The impervious surface limits within the Critical Area LDA have been in the County's ordinance since the inception of the Critical Area Program.

In 2002 and 2004, the General Assembly strengthened the Critical Area Law, and reiterated its commitment to the Chesapeake Bay Critical Area's water quality and wildlife habitat values. In particular, the General Assembly reaffirmed the stringent standards, which an applicant must meet in order for a local jurisdiction to grant a variance to the Critical Area law. The State law provides that variances to a local jurisdiction's Critical Area program may be granted **only** if a Board of Appeals finds that an applicant has satisfied its burden to prove that the applicant meets each one of the county's variance standards, including the standard of "unwarranted hardship." The General Assembly defined that term as follows: **"without the variance, the applicant would be denied reasonable and significant use of the entire parcel or lot."** Furthermore, the State law establishes presumption that a proposed activity for which a Critical Area variance is requested does not conform to the purpose and intent of the Critical Area law. The County Board of Appeals must make an affirmative finding that the applicant has overcome this presumption, based on the evidence presented.

In this case the applicant is proposing to construct a detached garage measuring 26 feet by 36 feet, approximately 70 feet from the end of the existing driveway. (Please note that it is unclear if the driveway to the proposed garage has already been installed or not.) The property, as it is developed today, already exceeds the impervious surface limits by 663 square feet. By supposition, County staff

indicated it was likely that the impervious surface limits were exceeded when the property owners expanded and paved their driveway. We recommend denial of the variance requested and further recommend that the County require removal of any impervious area above the 6,525 square foot limit. The variance to the impervious surface limit cannot be granted unless the applicant proves, and the Board finds, that without the variance, the applicant would suffer an unwarranted hardship, that is "denial of reasonable and significant use of the entire parcel or lot." We do not believe that this standard is met, and accordingly the variance should be denied. I have discussed each one of the variance standards below as it pertains to this site:

1. A literal enforcement of this Chapter 14:1 would result in unnecessary hardship as the result of specified conditions, which hardship is not shared by owners of other property in the same development area;

Currently, the lot is developed with a single family home, a large pool and patio area, an expansive driveway (up to 28 feet wide in places) and a shed. All similarly-sized properties within the Limited Development Area are subject to the same impervious surface limits. The applicant has the opportunity to remove some existing impervious surface to accommodate the desire garage. As stated above, the General Assembly defined "unwarranted hardship" to mean that the applicant must prove that, without the requested variance, he would be denied reasonable and significant use of **the entire parcel or lot**. Based on the existing use and developed condition of the lot, we do not believe that the Board has evidence on which to base a favorable finding on this factor for the garage.

2. The conditions are peculiar to the property involved;

There is nothing peculiar about the property involved. As indicated above, it is a residentially-developed lot within a residential subdivision where the impervious surface limit is 15%.

3. *Those conditions are not the result of any action taken by the applicant;*

The applicant owned the property at the time the driveway was expanded and paved. Thus, the conditions <u>are</u> the result of actions taken by the applicant.

4. The variance will not be contrary to the public interest or the policies, goals and objectives of this Chapter 14:1 and the Queen Anne's County Critical Area Program;

The goals of the Critical Area Program include protection of water quality and conservation of fish, wildlife and plant habitat. Numerous studies have shown that water quality decreases as the amount of development within a watershed increases. The impervious surface limits are a means to protect water quality on a lot by lot basis. Therefore, approving the variance to exceed these limits would be contrary to the goals of the Critical Area Program.

5. The variance will not confer upon an applicant any special privilege denied to other owners of like property and/or structures within the Critical Area;

All property owners of similarly sized properties are subject to the 15% impervious surface limit. Residential use can be accommodated within those limits. Therefore, approval of the variance would confer a special privilege.

6. The variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitats within the Critical Area;

As indicated above, the impervious surface limits are a means to address the cumulative adverse impacts of impervious surfaces to water quality. No evidence has been provided that indicates water quality will be unaffected by the proposal.

7. The variance is the minimum deviation from the provisions of this Chapter 14:1 that will make possible the reasonable use of land or structures;

This request has not been minimized as it could easily be avoided. There are opportunities to remove some existing impervious areas such that the garage could be accommodated on the property within the defined limits. In addition, the garage has a footprint of 936 square feet or enough area to accommodate at least five (5) cars. We do not agree that the variance is the minimum deviation from the requirements.

8. The granting of the variance will be in harmony with the general spirit and intent of this Chapter 14:1 and the Queen Anne's County Critical Area Program and the variance shall not result in a use not permitted in the applicable development area or an increase in the applicable density limitations.

Granting of this variance is not in harmony with the general spirit and intent of the Critical Area law and regulations. An increase in impervious surface and consequential disturbance to the land results in increased stormwater and sediment runoff and the loss of essential infiltration opportunities. Given that the applicant can adequately make use of the property without the detached garage, approval of this variance would not be in harmony with the general intent and spirit of the Critical Area Law.

In conclusion, it is our position that, unless the Board finds, by competent and substantial evidence, that the applicant has met the burden of proof to overcome the presumption of non-conformance, and the burden to prove that the applicant has met each one of the County's variance standards, the Board must deny the application for variance to the impervious surface limits.

Thank you for the opportunity to provide comments. Please include this letter in the record for this variance. Also, please notify the Commission in writing of the decision made in this case.

Sincerely,

LeeAnne Chandler

LeeAnne Chandler
Science Advisor

cc: QC43-07

4/26/07

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

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APR 30 2007
CRITICAL AREA COMM.
Chesapeake & Atlantic Coastal Bays

RECEIVED
FEB 16 2007
QUEEN ANNE'S COUNTY
PLANNING & ZONING

February 15, 2007

Ms. Cathy Maxwell
Queen Anne's Dept. of Planning and Zoning
160 Coursevall Drive
Centreville, Maryland 21617

design a Hadd

AE#5

Re: Robert J. Beasely
V-010010

Dear Ms. Maxwell:

Thank you for forwarding the above-referenced variance request to this office for review and comment. The site is located in the Limited Development Area (LDA) and is improved with a single family dwelling, driveway and several accessory structures. The application states the applicant is seeking a variance to the 15% impervious surface limitations afforded to this lot. I have provided our comments and recommendations below.

It appears the lot already exceeds the 15% allowable impervious surface limit by 633 square feet, which equates to 17% of the site. The request is to permit an additional 926 square feet of impervious area for a garage, which would equate to 19% of the site. This office cannot support a variance to exceed the impervious surface limits on this site. While the lot may be grandfathered, the lot was not improved until 2003. Therefore, it is unclear why the existing impervious area on the lot already exceeds the 15% impervious surface limitation well after the adoption and subsequent implementation of the Queen Anne's County Critical Area Program.

We understand the applicant's desire for additional storage and covered parking, however, due to the extensive paved driveway and accessory structures, it is not permitted. We recommend that the applicant utilize a portion of the paved driveway to place the new garage. Ideally, the site would be brought into compliance with the County's Critical Area ordinance through removal of some existing impervious surface. As requested, the applicant does not meet the burden of having an unwarranted hardship which is defined as being denied any reasonable use of the entire parcel or lot. Since the property already supports a new dwelling and accessory structures, this standard cannot be met and this variance should be denied.

The applicant can easily avoid the need for a variance for the desired garage by moving its proposed location and removing some existing impervious cover. There is no reason development on this parcel should be in violation of the County's Critical Area Program.

Thank you for the opportunity to comment. Please include this letter in your file and submit it as part of the record for variance. Please notify the Commission of the decision made in this case. If you have any questions, please telephone me at (410) 260-3477.

Sincerely,

LeeAnne Chandler

LeeAnne Chandler
Science Advisor

cc: QC 43-07

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

Telephone Planning: (410) 758-1255
Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

April 26, 2007

Mr. & Mrs. Robert J. Beasley
20 Benton's Pleasure Rd.
Chester, MD 21619

RE: BOARD OF APPEALS CASE NO. V-010010
VARIANCE FOR DETACHED GARAGE
BUILDING PERMIT NO. B06-1864

Dear Mr. & Mrs. Beasley:

Enclosed are the Board's formal Decision and the Excerpts of the Minutes from the 3/14/07 hearing. Your request for a variance from Chapter 14, §14:1-38.D.(8), of the Code of Public Laws of Queen Anne's Co. (1996 ED), to exceed the 15% impervious surface requirement to construct a 26 ft. x 36 ft. detached garage was approved.

Your addition must be constructed as shown on your Applicant's Exhibit No. 4.

Please contact our Permit Dept. at 410-758-4088 concerning your pending permit.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

Enc.

CC: Marianne E. Dise, Esq.
LeeAnne Chandler
Bd. Members
Stephen H. Kehoe, Esq.
Gene Palmatary
James H. Barton
Permit Dept.

IN THE MATTER OF	*	BOARD OF APPEALS
THE APPLICATION OF	*	OF
ROBERT J. BEASLEY and	*	QUEEN ANNE'S COUNTY
CONNIE M. BEASLEY	*	Case No. V-010010

FINDINGS AND DECISION

This matter came before the Board of Appeals for hearing on Wednesday, March 14, 2007 at 6:15 p.m., at Board of Appeals office at 160 Coursevall Drive, Centreville, MD 21617, to hear and decide the application of ROBERT J. BEASLEY and CONNIE M. BEASLEY (the "Applicant"), being Case No. V-010010. All legal requirements pertaining to the filing of this application and notice of public hearing were substantiated and there were no objections made to the jurisdiction of this Board. This matter was heard by William D. Moore, Chairman, Kenneth L. Scott, Vice Chairman, and Howard A. Dean, Member, of the Board of Appeals of Queen Anne's County.

RELIEF REQUESTED

The Applicant has requested a Variance from strict application of §14:1-38.D.(8) of Chapter 18, of the *Code of Public Laws of Queen Anne's County, 1996 ED.*, to exceed the 15% impervious surface requirement of §14:1-38.D.(8) of the Code to construct a 26' x 36' detached garage in the Critical Area.

PROPERTY DESCRIPTION

The property which is the subject of this application is located at 205 Benton's Pleasure Road in the Benton's Pleasure Subdivision. The property is located in the Fourth Election District, and is designated as Zoning Map 57, Parcel 378, Lot 84, zoned NC-20 and LDA and is in the LDA Critical Area. The property consists of 1 acre.

BOARD'S DECISION

The Board of Appeals of Queen Anne's County has given consideration to the limitations, guidelines and standards set forth in the *Code* and makes the following specific findings:

1. The Board finds that a literal interpretation of Chapter 14:1 would result in unnecessary hardship as a result of specified conditions which hardship is not shared by owners of other properties in the same area.

2. The Board also finds that the conditions are peculiar to the property involved.

3. The Board finds that the conditions are not the result of any action taken by the Applicant.

4. The Board finds that the variance will not be contrary to the public interest, policies, goals and objectives of Chapter 14-1 in the Queen Anne's County Critical Area Program. In this regard, the Board believes that tearing up the driveway would serve no purpose. Mr. Beasley has made a significant effort to mitigate the effects of the impervious surface of his driveway by surrounding it with river rock and drain pipes. A driveway of different configuration might have eliminated the total lot coverage, but would not necessarily be designed to reduce the adverse effects associated with a black top driveway.

5. The Board also finds that the variance will not confer upon the Applicant any special privilege denied to other owners of like property and/or structures within the Critical Area.

6. The Board finds that the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area. Although the application is for an accessory building, much of the discussion related to the driveway. As the Board noted, Mr. Beasley had taken efforts to reduce its impact.

7. The Board finds that the variance is the minimum deviation for the provisions of Chapter 14:1 would make possible the reasonable use of land and structures.

8. The Board finds that the variance will be in harmony with the general purpose and intent of Chapter 14:1 of the Queen Anne's Critical Area Program and the variance will not result in a use not permitted in the applicable development area or increase the applicable density limitations.

The Board grants the application shown as Case No. V-010010 granting a variance from the 15% impervious area limitation to permit the Applicant to construct a 26' x 36' detached garage with the condition that the Applicant plant eight (8) trees as mitigation.

Chairman Moore voted against granting the variance.

STATE OF MARYLAND

QUEEN ANNE'S COUNTY

I HEREBY CERTIFY that the foregoing is a true and correct copy of the Finding and Decision of the executive meeting of the Board of Appeals of Queen Anne's County held on Wednesday, March 14, 2007, and that the said minutes now remain on file in the Board's office.

In testimony whereof, I have hereunto subscribed my name this 26th day of April, 2007.

Cathy Maxwell
Clerk

Stephen H. Kehoe
Attorney for Board of Appeals

7692Y:\Steve\QuACoBZA\New Opinions\Beasley V010010.wpd

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS
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Acting Director: J. Steven Cohoon

EXCERPTS OF THE MINUTES OF THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY

CASE NO: V-010010
APPLICANT: Robert J. & Connie M. Beasley
HEARING DATE: 3/14/07
REQUESTING: A variance from Chapter 14, §14:1-38.D.(8), of the Code of Public Laws of Queen Anne's Co. (1996 ED), to exceed the 15% impervious surface requirement to construct a 26 ft. x 36 ft. detached garage. Located at 205 Benton's Pleasure Rd., Benton's Pleasure Subdiv., 4th E.D., Map 57, Parcel 378, Lot 84, zoned NC-20 and LDA.

IN ATTENDANCE: William D. Moore, Chairman; Kenneth R. Scott, Vice-Chairman; Howard A. Dean, Member; Member; Stephen H. Kehoe, Esq., Attorney for the Board; Cathy Maxwell, Clerk to the Board; Gene Palmatary, Zoning Inspector; Robert J. Beasley, Applicant; Marianne E. Dise, Esq., and LeeAnne Chandler, Critical Area Commission.

KEHOE: Do you find that a literal enforcement of Chapter 14:1 would result in unnecessary hardship as a result of the specified conditions, which hardship is not shared by owners of other property in the same development area.

CHAIRMAN: Yes.
SCOTT: Yes.
DEAN: Yes.
KEHOE: Do you find that the conditions are peculiar to the property involved.
CHAIRMAN: Yes.
SCOTT: Yes.
DEAN: Yes.
KEHOE: Do you find that the conditions are not the result of any action taken by the applicant.
SCOTT: Yes.
DEAN: Yes.
CHAIRMAN: No.

KEHOE: Do you find that the variance will not be contrary to the public interest or policies, goals and objectives of Chapter 14:1 and the Queen Anne's Co. Critical Area Program.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: No.

KEHOE: Do you find that the variance will not confer upon the applicant any special privilege denied to other owners of like property and/or structures within the Critical Area.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: No.

KEHOE: Do you find that the variance is the minimum deviation from the provisions of Chapter 14:1 that will make possible the reasonable use of the land or structures.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the granting of the variance will be in harmony with the general purpose and intent of this Chapter 14:1 and the Queen Anne's Co. Critical Area Program and the variance will not result in a use not permitted in the applicable development area or an increase in the applicable density limitations.

CHAIRMAN: No.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: Do we have a motion.

SCOTT: I'll make a motion and this is solely based on testimony that stone is an impervious surface apparently. Tearing up the blacktop and putting down stone isn't going to help him at all as far as what Mrs. Chandler said. So on that note, I'll make a motion that Case V-010010, Beasley, be approved. A variance to exceed the 15% impervious cover allowed to construct a 26 ft. x 36 ft. detached garage and plant eight (8) trees of mitigation in the yard.

DEAN: I'll second it.

CHAIRMAN: The motion has been made and seconded. All in favor of the motion signify by saying "Aye".

SCOTT: Aye.

DEAN: Aye.

CHAIRMAN: No. Let the record show that Case V-010010 was approved by a two-to-one vote. There will be a formal decision forthcoming. When you receive this, you may proceed with your permitting process. I declare this hearing adjourned.

Cathy Maxwell

Cathy Maxwell, Clerk

3/15/07
Date

CC: Robert J. & Connie M. Beasley
Marianne E. Dise, Esq.
LeeAnne Chandler
Bd. Members
Stephen H. Kehoe, Esq.
Gene Palmatary
James H. Barton
Permit Dept.

Canedo, Saundra

From: Dise, Marianne E.
Sent: Monday, June 04, 2007 2:50 PM
To: 'Cathy Maxwell'
Cc: Massenburg, Shirley; Canedo, Saundra
Subject: RE: Beasley Appeal - garage over impervious

Hi Cathy, Please send the bill to the
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays 1804 West Street
Suite 100 Annapolis MD 21401
Attn: Shirley Massenburg
Thanks, Marianne Dise

-----Original Message-----
From: Cathy Maxwell [mailto:CMaxwell@qac.org]
Sent: Monday, June 04, 2007 1:30 PM
To: Dise, Marianne E.
Subject: Beasley Appeal - garage over impervious

Dear Ms. Dise, I have received the appeal from Circuit Court and am currently working on the court record. This involves typing the transcript which is $3.00 per page. Could you advise how this should be billed when I have completed it? Thank you. Cathy Maxwell

Canedo, Saundra

From: Dise, Marianne E.
Sent: Tuesday, June 05, 2007 9:05 AM
To: Canedo, Saundra
Subject: FW: Beasley Appeal

-----Original Message-----
From: Cathy Maxwell [mailto:CMaxwell@qac.org]
Sent: Tuesday, June 05, 2007 8:46 AM
To: Dise, Marianne E.
Subject: FW: Beasley Appeal

Yes, I will send the transcript shortly, when I get it all tidy. Most of my "appeal transcripts" are at least 4-5 hours of testimony so this one was much more enjoyable!! I will also send you a "draft" court record for your review before I file it. And will send the bill as you requested. Cathy

-----Original Message-----
From: Dise, Marianne E. [mailto:MDise@dnr.state.md.us]
Sent: Tuesday, June 05, 2007 8:31 AM
To: Cathy Maxwell
Cc: Canedo, Saundra
Subject: RE: Beasley Appeal

Kathy -
Thank you. Will you be sending us a copy of the transcript?
If so, please send to Saundra Canedo at DNR, Office of Attorney General, 580 Taylor Ave. Annapolis, MD 21401. Thank you , Marianne

-----Original Message-----
From: Cathy Maxwell [mailto:CMaxwell@qac.org]
Sent: Monday, June 04, 2007 4:16 PM
To: Dise, Marianne E.; Chandler, LeeAnne
Subject: Beasley Appeal

FYI.....I have finished typing the transcript so am now proceeding to complete the court record to file at Circuit Court. Thank you. Cathy Maxwell

Canedo, Saundra

From: Dise, Marianne E.
Sent: Tuesday, June 05, 2007 8:31 AM
To: 'Cathy Maxwell'
Cc: Canedo, Saundra
Subject: RE: Beasley Appeal

Kathy -
Thank you. Will you be sending us a copy of the transcript?
If so, please send to Saundra Canedo at DNR, Office of Attorney General, 580 Taylor Ave. Annapolis, MD 21401. Thank you , Marianne

-----Original Message-----
From: Cathy Maxwell [mailto:CMaxwell@qac.org]
Sent: Monday, June 04, 2007 4:16 PM
To: Dise, Marianne E.; Chandler, LeeAnne
Subject: Beasley Appeal

FYI.....I have finished typing the transcript so am now proceeding to complete the court record to file at Circuit Court. Thank you. Cathy Maxwell

MSA_S_1831_30
(6 PG)

Background Information

MCHALE vs. BEASLEY
CIRCUIT COURT OF QUEEN ANNE'S COUNTY
Case No.: 17-C-07-012458

§ 14:1-38. Development standards in limited development areas. [Amended 10-17-1997 by Ord. No. 97-07]

A. Permitted uses. Except as provided herein, uses permitted within LDA development areas shall be those permitted in the applicable underlying base zoning district. For a specific determination of permitted uses refer to the Queen Anne's County Zoning Ordinance. Editor's Note: See Ch. 18:1, Zoning and Subdivision Regulations. All permitted uses shall be subject to the following development standards and/or conditions in addition to those established in other sections of this Chapter 14:1.

B. Uses not permitted or strictly limited. The following uses are prohibited in LDAs due to their adverse impact on habitats and water quality:

(1) Transportation facilities and utility transmission facilities (except those serving permitted uses or where regional or interstate facilities must cross tidal waters);

(2) Sludge handling, storage and disposal facilities, other than those associated with wastewater treatment facilities;

(3) Non-maritime heavy industry;

(4) Waste disposal uses as defined in Chapter 18 of the Queen Anne's County Code; and

(5) The land application of sludge.

C. Density.

(1) The density of development and minimum lot sizes permitted within LDA development areas shall be governed by applicable provisions of the Queen Anne's County Zoning Ordinance.

(2) The density on an individual parcel of LDA land may be increased under the transfer of development rights (TDR) provisions of the Queen Anne's County Zoning Ordinance, provided a minimum of 20 acres of RCA land is permanently deed restricted as open space for each development right transferred from the RCA.

D. Site performance standards. Development and redevelopment requiring project approvals within the LDA shall be subject to the following conditions and restrictions:

(1) For proposed development activities that require subdivision or site plan approval, all environmental or natural features on that portion of a site within the critical area shall be identified.

(2) Site development shall be designed to assure that habitat protection areas are not adversely affected.

(3) Roads, bridges and utilities serving development shall be located to avoid disturbances to habitat protection areas. When no alternative exists and such infrastructure must cross or be located in habitat protection areas, the developer shall demonstrate how impacts to habitats have been minimized and that no feasible alternative location for such infrastructure exists.

(4) All development activities which must cross or are located adjacent to tributary streams shall:

(a) To the extent possible avoid location in the critical area Buffer, and, if no other location is feasible, the development shall be designed in a manner to reduce increases in flood frequency and severity;

(b) Provide for the retention of natural streambed substrate;

(c) Minimize adverse water quality and quantity impacts of stormwater runoff; and

(d) Retain the existing tree canopy so as to maintain stream water temperature within

normal variation.

(5) Development activities shall be located and designed to maintain and enhance existing wildlife and plant habitats and to establish new wildlife corridors for continuity with those on adjacent sites. When wildlife corridors exist or are proposed, they shall include any existing habitat protection areas and shall connect large forested areas or most vegetative areas on or immediately adjacent to the site. Existing and proposed wildlife corridors shall be identified on proposed development plans. All existing or proposed wildlife corridors shall be described by metes and bounds or other legally sufficient means of describing property. The property description shall be included in restrictive covenants or easements. Such restrictive covenants or easements shall be submitted to and approved by the Planning Commission Attorney prior to project approval and shall be recorded among the land records of Queen Anne's County in accordance with Part IX of the Queen Anne's County Zoning Ordinance. Editor's Note: See now Part 7 of Ch. 18:1, Zoning and Subdivision Regulations.

(6) Forests and developed woodlands shall be created or protected in accordance with the following:

(a) When forest on the site totals less than 15% of the site area, additional forested areas shall be established so that at least 15% of the site area is in forest cover. The location of the afforested area shall be designed to protect habitats or to provide continuity with forested areas on adjacent sites.

(b) When forests or developed woodlands exist on the site and proposed development requires the cutting or clearing of trees, areas proposed for clearing shall be identified on the proposed development plan. The developer shall submit development plans to the Maryland Forest Service for comments and recommendations and shall transmit such comments to the Department of Planning and Zoning. In addition, cutting or clearing which is associated with development shall be subject to the following limits and replacement conditions:

[1] Except as provided in Subsection D(6)(b)[3] below, no more than 20% of a forested or developed woodland area of a site proposed for development may be removed. The remaining 80% shall be maintained as forest cover. Restrictive covenants or easements in legally recordable form prohibiting the removal of remaining forest cover shall be submitted to and approved by the Planning Commission Attorney prior to project approval and shall be recorded among the land records of Queen Anne's County in accordance with Chapter 18, Part IX of the Queen Anne's County Code. Editor's Note: See now Part 7 of Ch. 18:1, Zoning and Subdivision Regulations.

[2] Clearing of forest or developed woodlands up to 20% shall be replaced on an area basis of one to one on site or, if reforestation is impracticable on site, elsewhere within the critical area as proposed by the applicant and approved by the Planning Director.

[3] Subject to the limitations imposed upon the clearing and cutting of woodlands imposed in the Queen Anne's County Code, a developer may propose clearing up to 30% of the forested or developed woodland area of a site proposed for development without the need to obtain a variance under this Chapter 14:1. However, any such area removed must be replaced at the rate of 1.5 times the area removed on site or, if reforestation is impracticable on site, elsewhere within the critical area as proposed by the applicant and approved by the Planning Department.

[4] A variance under this Chapter 14:1 and the Queen Anne's County Code is required for removal of existing forest in excess of 30% of the forested or developed woodland area on a site proposed for development. Forested or

developed woodland areas removed must be replaced at the rate of three times the total area removed on site or, if reforestation is impracticable on site, within the critical area as proposed by the applicant and approved by the Planning Department.

[5] A sediment control permit shall be required prior to any clearing or cutting of trees associated with any development or development activities. If the cutting or clearing of forests or developed woodlands occurs before a sediment control permit is obtained, the area removed must be replaced on site at the rate of three times the area removed.

(c) Guarantees as prescribed in Article XVI of Part 7 of this Chapter 14:1 shall be provided in an amount suitable to assure forest replacement or afforestation.

(d) Forests and developed woodlands required to be retained or created through afforestation or reforestation shall be maintained through restrictive covenants or easements.

(7) Development on slopes greater than 15% shall be prohibited unless such development is demonstrated to be the only effective way to maintain or improve slope stability.

(8) Impervious surfaces shall be limited to 15% of the gross site area proposed for development, except as follows:

(a) If a parcel or lot 1/2 acre or less in size was a lot of record on or before December 1, 1985, then man-made impervious surfaces associated with that use are limited to 25% of the parcel or lot.

(b) If a parcel or lot 1/4 acre or less in size was in nonresidential use on or before December 1, 1985, then man-made impervious surfaces associated with that development are limited to 25% of the parcel or lot. If a parcel or lot 8,000 square feet or less in size was a lot of record on or before December 1, 1985, then man-made impervious surfaces on the lot are limited to 25% of the parcel or lot plus 500 square feet, provided:

[1] New impervious surfaces on the parcel or lot have been minimized;

[2] Stormwater quality impacts have been minimized through site design and/or use of best management practices agreed on by the County and the Critical Area Commission; and

[3] On-site mitigation is performed or payment of a fee-in-lieu is made to offset adverse water quality impacts.

(c) If a parcel or lot greater than 8,000 square feet, but less than or equal to 21,780 square feet, was a lot of record on or before December 1, 1985, then man-made impervious surfaces on the lot are limited to 31.25% of the parcel or lot, provided the requirements of § 14:1-38D(8)(b)[1], [2] and [3] are met.

(d) If a parcel or lot greater than 21,780 square feet but less than or equal to 36,300 square feet was a lot of record on or before December 1, 1985, then man-made impervious surfaces on the lot are limited to 5,445 square feet, provided the requirements of § 14:1-38D(8)(b)[1], [2] and [3] are met.

(e) If an individual lot one acre or less in size is part of a subdivision approved after December 1, 1985, then man-made impervious surfaces of the lot may not exceed 25% of the lot. However, the total of the impervious surfaces over the entire subdivision may not exceed 15%.

(f) These provisions do not apply to a legally existing manufactured home park that was in residential use on or before December 1, 1985.

(g) The Board of Appeals may grant a variance from the provisions of this subsection in accordance with § 14:1-61 et seq.

E. Site performance standards for building permits. Development and redevelopment requiring only the issuance of a building permit within the LDA shall be subject to the following conditions and restrictions:

(1) All environmental and natural features on that portion of the site within the critical area shall be identified, including habitat protection areas as defined in Section VI of the Queen Anne's County Critical Area Program.

(2) Development and redevelopment activities shall be located to avoid disturbance to habitat protection areas as defined in Section VI of the Queen Anne's County Critical Area Program. When no alternative exists and such activities must cross or be located in habitat protection areas, the applicant shall minimize impacts to habitats and show that no reasonable feasible alternative location for such activity exists.

(3) Forests and developed woodlands shall be protected in accordance with the following:

(a) Except as provided in § 14-28B(3), the clearing or cutting of forested or developed woodland for development or redevelopment shall provide insofar as possible that no more than 20% of the forest or woodland is removed.

(b) When proposed development or redevelopment requires the cutting or clearing of trees, areas proposed for clearing must be identified on the plan accompanying the building permit application.

(c) Trees with a diameter at breast height (DBH) greater than four inches that are cut or cleared during development or redevelopment shall be replaced on site on a one-to-one basis. Replacement trees shall be non-bare-root, native species and at least four to six feet in height.

(d) If a person demonstrates to the satisfaction of the Planning and Zoning Office that mitigation requirements, on-site or off-site, cannot be reasonably accomplished, the person shall contribute money (a fee-in-lieu), at a rate to equal the total cost of replacing forest land to be cleared.

(e) The fees-in-lieu collected may only be used for projects within the critical area for the benefit of wildlife habitat, water quality improvement or environmental education. These sites will be planted with more than one native species and will remain in a forest management plan held with the Maryland Forest Service.

(4) Development on slopes greater than 15% shall be prohibited unless the slope is unstable and such development is demonstrated to be the only effective way to maintain or improve slope stability.

(5) Impervious surfaces shall be limited to 15% of the gross site area proposed for development except as follows:

(a) If a parcel or lot 1/2 acre or less in size was a lot of record on or before December 1, 1985, then man-made impervious surfaces associated with that use are limited to 25% of the parcel or lot.

(b) If a parcel or lot 8,000 square feet or less in size was a lot of record on or before December 1, 1985, then man-made impervious surfaces on the lot are limited to 25% of the parcel or lot plus 500 square feet, provided:

[1] New impervious surfaces on the parcel or lot have been minimized;

[2] Stormwater quality impacts have been minimized through site design and/or use of best management practices agreed on by the County and the Critical Area Commission; and

[3] On-site mitigation is performed or payment of a fee-in-lieu is made to offset adverse water quality impacts.

(c) If a parcel or lot greater than 8,000 square feet, but less than or equal to 21,780 square feet, was a lot of record on or before December 1, 1985, then man-made impervious surfaces on the lot are limited to 31.25% of the parcel or lot, provided § 14-38D(8)(a), (b) and (c) are met.

(d) If a parcel or lot greater than 21,780 square feet, but less than or equal to 36,300 square feet, was a lot of record on or before December 1, 1985, then man-made impervious surfaces on the lot are limited to 5,445 square feet, provided § 14:1-138D(8)(a), (b) and (c) are met.

(e) If an individual lot one acre or less in size is part of a subdivision approved after December 1, 1985, then man-made impervious surfaces of the lot may not exceed 25% of the lot. However, the total of the impervious surfaces over the entire subdivision may not exceed 15%.

(f) These provisions do not apply to a legally existing manufactured home park that was in residential use on or before December 1, 1985.

(g) The Board of Appeals may grant a variance from the provisions of this subsection in accordance with Part 7 of this Chapter 14:1.

Post-It™ brand fax transmittal memo 7671 | # of pages ▸ 4
To Saundra Canela | From Marshall Johnson
Co. | Co.
Dept. | Phone #
Fax # | Fax #

C. Areas where the use of renewable resource la
or agricultural land or degradation of water qu

D. The Buffer.

§ 14:1-58. Mineral extraction performance stan

A. Reclamation. All mined areas shall be reclaim
discontinued.

B. Vegetated buffer. To the extent possible, a minimum one-hundred-foot vegetated buffer, approved by the Board of Appeals, will be maintained around existing mining operations.

C. End use plan. An end use plan shall accompany any application for a mineral extraction use in the critical area.

§ 14:1-59. (Reserved)

§ 14:1-60. (Reserved)

Part 7 Administration, Enforcement and Special Provisions

ARTICLE XIII Board of Appeals, Variances, and Buffer Exemptions

§ 14:1-61. Powers of the Board of Appeals.

In addition to the powers of the Queen Anne's County Board of Appeals established in the Queen Anne's County Zoning Ordinance, Editor's Note: See Ch. 18:1, Zoning and Subdivision Regulations. the Board is hereby empowered to grant variances from the requirements of this Chapter 14:1.

§ 14:1-62. Meetings.

A. When held. Meetings of the Board of Appeals shall be held at the call of the Chairman and at such other times as may be provided by the rules adopted by the Board. Hearings shall not be scheduled, however, until a copy of the variance application has been submitted to the Critical Area Commission, the Commission acknowledges receipt of the application and has been given two weeks to submit written comments on the application.

B. Conduct of meetings. All meetings of the Board of Appeals shall be open to the public. The Chairman or, in his absence, the Vice Chairman or Acting Chairman, shall preside at all meetings of the Board.

C. Transcript. The Board shall provide a transcript of all proceedings. The transcript shall reflect the vote of each member or alternate upon each question or, as the case may be, the fact that the member was absent or failed to vote. The transcript shall be immediately filed in the office of the Board and shall be a public record.

D. Witnesses and oaths. The Chairman or, in his absence, the Vice Chairman or Acting Chairman, shall administer oaths and may compel the attendance of witnesses.

§ 14:1-63. Hearings.

A. When held. All hearings with respect to appeals or applications for variances shall be held at a meeting of the Board of Appeals. The rules of the Board shall provide that hearings be held promptly after the filing of an appeal or an application for a variance.

B. Notice. The rules of the Board shall provide for reasonable notice to the public and to the person who filed the appeal or application for a variance. Such notice shall include, at least:

(1) The posting of notice of the time, place and purpose of the hearing on the property involved at least 14 days prior to the date of the hearing; and

(2) Publication of such notice in at least one newspaper of general circulation in Queen Anne's County once a week for at least two successive weeks prior to the date of the hearing. The last insertion of such newspaper notice shall not be more than six nor less than two days prior to the date of the hearing.

C. Appearance. Any party may appear in person or by agent or attorney at any hearing.

D. Time for decision. The Board of Appeals shall decide any matter submitted within a reasonable time.

§ 14:1-64. Effect of final decision.

A. Generally. No final decision of the Board of Appeals shall:

(1) Authorize or qualify any land, use, or structure not involved in the decision (including lands, uses, and structures adjacent to that involved in the decision) for the same or any other special treatment under the provisions of this Chapter 14:1; or

(2) With respect to any land, use, or structure involved in the decision:

(a) Change the development area classification assigned to property in the critical area on the official critical area maps or the applicable residential density limitations of this Chapter 14:1; or

(b) Authorize any other change or use for which an application for amendment of this Chapter 14:1 or the official critical area maps is required.

B. Denial. If the Board of Appeals does not grant the relief or decision sought by an appeal or application, no appeal or application involving the same property and substantially the same issues shall be filed prior to one year after such disapproval.

C. Withdrawal. If any notice of hearing has been published with respect to any appeal or application and the appellant or applicant thereafter withdraws the appeal or application prior to hearing (or after hearings and prior to decision) by the Board of Appeals, no appeal or application involving the same property and substantially the same issues shall be filed prior to six months after the date of such withdrawal.

D. Effect of section. Nothing in this section shall be construed to authorize any subsequent appeal of application which would not be permitted by any general rule of law or construction relating to the nature and effect of prior determinations by an administrative agency.

§ 14:1-65. Appeals.

A. Right of appeal. An appeal may be taken by any person aggrieved by any decision of the Planning Commission, Planning Director or any other employee of the Department. Prior to filing an appeal involving a variance, the person must obtain a determination by the Planning Director or other employee authorized to make such determination that the use involved is not otherwise permissible under the terms of this Chapter 14:1. As used in this subsection, "person" includes any officer, department, board or bureau of Queen Anne's County.

B. Time for appeal. Notice of appeal shall be filed within a reasonable time after the decision from which the appeal is taken, as prescribed by the rules of the Board of Appeals. Unless otherwise prescribed by those rules, such appeal shall be taken within 30 days of date of the decision from which the appeal is taken.

C. Filing. An appeal shall be taken by filing a notice of appeal with the Planning Director and the Board of Appeals. The notice shall be accompanied by such fee as may be prescribed by the County Commissioners.

D. Contents. Notices of appeal shall contain the name, address and telephone number of the appellant and a description sufficient to identify the property involved by reference to the Zoning Maps and specify the grounds for the appeal and the relief sought.

E. Record. After receiving a notice of appeal, the Planning Director or other employee of the Department of Planning and Zoning with whom it is filed shall transmit to the Board of Appeals all papers constituting the record upon which the action appealed from was taken.

F. Effect of appeal. An appeal stays all proceedings with respect to the action from which the appeal is taken, except when a restraining order is obtained.

§ 14:1-66. Limitations with respect to variances.

A variance shall not be granted unless the Board of Appeals specifically finds that:

A. A literal enforcement of this Chapter 14:1 would result in unnecessary hardship as the result of specified conditions, which hardship is not shared by owners of other property in the same development area;

B. Those conditions are peculiar to the property involved;

C. Those conditions are not the result of any action taken by the applicant;

D. The variance will not be contrary to the public interest or the policies, goals and objectives of this Chapter 14:1 and the Queen Anne's County Critical Area Program;

E. The variance will not confer upon an applicant any special privilege denied to other owners of like property and/or structures within the critical area;

F. The variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the critical area;

G. The variance is the minimum deviation from the provisions of this Chapter 14:1 that will make possible the reasonable use of land or structures; and

H. The granting of the variance will be in harmony with the general purpose and intent of this Chapter 14:1 and the Queen Anne's County Critical Area Program and the variance shall not result in a use not permitted in the applicable development area or an increase in the applicable density limitations.

§ 14:1-67. Conditions on variances.

The Board of Appeals may impose such conditions upon the use or development of property for which a variance is granted as it may find reasonable or necessary, including but not limited to:

A. A condition that, insofar as possible, new or expanded structures or other impervious surfaces be located at the greatest feasible distance from mean high water, tidal wetlands, nontidal wetlands, or tributary streams; and

B. A condition that the applicant takes steps to mitigate adverse impacts, insofar as possible, including:

(1) Reforestation on the site to offset disturbed forested or developed woodlands on at least an equal area basis;

(2) Afforestation of areas of the site so that at least 15% of the gross site is forested; and

(3) Implementation of any mitigation measures for habitat protection areas that are recommended by interested state or County agencies.

§ 14:1-68. Administrative variance. [Amended 10-17-1997 by Ord. No. 97-07]

A. Intent. The purpose of this section is to authorize delegation of Board of Appeals authority as specified in § 14:1-61 to the Planning Director to apply the standards for variance as specified in § 14:1-66 herein for certain proposed construction activities.

B. Applicability. This section applies only to new development or redevelopment within 100 feet of tidal waters, tidal wetlands and tributary streams on single-family lots of record as of June 29, 1988.

C. Criteria.

(1) New development or redevelopment shall minimize the disturbance in the Buffer to the least intrusion necessary.

(2) Development may not impact any habitat protection area (HPA) as defined in Section VI of the Queen Anne's County Critical Area Program, except the Buffer.

(3) Any development in the Buffer approved under the provisions of this section shall be mitigated as follows:

(a) The extent or the lot or parcel shoreward of the new development or redevelopment shall be required to remain, or shall be established and maintained, in natural vegetation; and

(b) Natural vegetation of an area twice the extent of the impervious surface must be created on the property or other similar location approved by the Planning Director.

(4) If a person demonstrates to the satisfaction of the Planning Director that mitigation requirements, on-site or off-site, cannot be reasonably accomplished, the person shall pay a fee-in-lieu equal to the total value of the required plantings. Such fee will be dedicated to County tree replanting programs within the critical area.

(5) Any required reforestation or mitigation or offset areas shall be designated under a development agreement or other instrument and recorded among the land records of Queen Anne's County.

(6) Applications for an administrative variance shall be forwarded to the Critical Area Commission for review.

(7) The Critical Area Commission shall be notified of an administrative action by the Planning Director within 10 days of the action.

D. Fee requirement. The application shall be accompanied by a nonrefundable fee in an amount prescribed by the County Commission.

§ 14:1-69. (Reserved)

§ 14:1-70. (Reserved)

ARTICLE XIV Special Provisions Relating to Development Area Classification and Other Amendments in Critical Area District

§ 14:1-71. Amendments to chapter, development area classifications and critical area boundary. [Amended 5-21-1999 by Ord. No. 99-02; 10-1-1999 by Ord. No. 99-14]

A. In general. The provisions of this Chapter 14:1, the boundaries of the Critical Area District, the development area classification, i.e., IDA, LDA or RCA, and the Buffer exemption area boundaries may be changed by amendment in accordance with the provisions of this article.. All such amendments shall be approved by the Critical Area Commission.

B. Change of development area classification; mistake or growth allocation. The County Commissioners may from time to time change the development area classification of properties in the critical area where it is demonstrated that a mistake was made in the original designation or when growth allocation is used by the County. When proposing a change of development area classification, i.e., intensely developed area (IDA), limited development area (LDA) or resource conservation area (RCA), other than by changing a classification through the growth allocation process, the County Commissioners shall not approve amendments unless it is found that there was a mistake in the original classification.

C. Change of development area classification; Growth allocation. The County Commissioners may use a portion of the County's growth allocation to amend the development area classification of a property located in the Queen Anne's County critical area. Growth allocation may be used to change the land management classification from RCA to LDA or IDA, or from LDA to IDA without regard to the mistake standard established above.

D. Amendment of critical area; deletion of area. The County Commissioners may from time to time elect to amend the critical area boundary to delete areas of the County from the critical area when it can be demonstrated that the critical area, as mapped on the official area maps, is incorrectly drawn.

E. Amendment of critical area; addition of area. The County Commissioners may from time to time elect to amend the critical area to add areas to the critical area beyond that which is delineated on the Official Critical Area Maps.

F. Addition of Buffer exemption areas. The County Commissioners may from time to time elect to amend the critical area maps to add Buffer exemption areas where it can be demonstrated that the pattern of residential, industrial, commercial or recreational development present as of December 1, 1985, prevents the Buffer from fulfilling its intended purposes.

Beasley

RECEIVED
MAY 1 2007
DNR - LEGAL DIVISION

4/30/07:
Lee Anne: I recommend we
1) Discuss w/ Margaret
2) Assuming that she agrees, Appeal to Circuit Ct.
Sandra will handle.

MED

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

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CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

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PLANNING & ZONING

February 15, 2007

Ms. Cathy Maxwell
Queen Anne's Dept. of Planning and Zoning
160 Coursevall Drive
Centreville, Maryland 21617

Re: Robert J. Beasely
V-010010

Dear Ms. Maxwell:

Thank you for forwarding the above-referenced variance request to this office for review and comment. The site is located in the Limited Development Area (LDA) and is improved with a single family dwelling, driveway and several accessory structures. The application states the applicant is seeking a variance to the 15% impervious surface limitations afforded to this lot. I have provided our comments and recommendations below.

It appears the lot already exceeds the 15% allowable impervious surface limit by 633 square feet, which equates to 17% of the site. The request is to permit an additional 926 square feet of impervious area for a garage, which would equate to 19% of the site. This office cannot support a variance to exceed the impervious surface limits on this site. While the lot may be grandfathered, the lot was not improved until 2003. Therefore, it is unclear why the existing impervious area on the lot already exceeds the 15% impervious surface limitation well after the adoption and subsequent implementation of the Queen Anne's County Critical Area Program.

We understand the applicant's desire for additional storage and covered parking, however, due to the extensive paved driveway and accessory structures, it is not permitted. We recommend that the applicant utilize a portion of the paved driveway to place the new garage. Ideally, the site would be brought into compliance with the County's Critical Area ordinance through removal of some existing impervious surface. As requested, the applicant does not meet the burden of having an unwarranted hardship which is defined as being denied any reasonable use of the entire parcel or lot. Since the property already supports a new dwelling and accessory structures, this standard cannot be met and this variance should be denied.

The applicant can easily avoid the need for a variance for the desired garage by moving its proposed location and removing some existing impervious cover. There is no reason development on this parcel should be in violation of the County's Critical Area Program.

Thank you for the opportunity to comment. Please include this letter in your file and submit it as part of the record for variance. Please notify the Commission of the decision made in this case. If you have any questions, please telephone me at (410) 260-3477.

Sincerely,

LeeAnne Chandler

LeeAnne Chandler
Science Advisor

cc: QC 43-07

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS

160 Coursevall Drive
Centreville, MD 21617

Telephone Planning: (410) 758-1255
Telephone Permits: (410) 758-4088
Fax Planning: (410) 758-2905
Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

April 26, 2007

Mr. & Mrs. Robert J. Beasley
20 Benton's Pleasure Rd.
Chester, MD 21619

RE: BOARD OF APPEALS CASE NO. V-010010
VARIANCE FOR DETACHED GARAGE
BUILDING PERMIT NO. B06-1864

Dear Mr. & Mrs. Beasley:

Enclosed are the Board's formal Decision and the Excerpts of the Minutes from the 3/14/07 hearing. Your request for a variance from Chapter 14, §14:1-38.D.(8), of the Code of Public Laws of Queen Anne's Co. (1996 ED), to exceed the 15% impervious surface requirement to construct a 26 ft. x 36 ft. detached garage was approved.

Your addition must be constructed as shown on your Applicant's Exhibit No. 4.

Please contact our Permit Dept. at 410-758-4088 concerning your pending permit.

Sincerely,

Cathy Maxwell
Clerk

Enc.

CC: Marianne E. Dise, Esq.
LeeAnne Chandler
Bd. Members
Stephen H. Kehoe, Esq.
Gene Palmatary
James H. Barton
Permit Dept.

IN THE MATTER OF	*	BOARD OF APPEALS
THE APPLICATION OF	*	OF
ROBERT J. BEASLEY and	*	QUEEN ANNE'S COUNTY
CONNIE M. BEASLEY	*	Case No. V-010010

FINDINGS AND DECISION

This matter came before the Board of Appeals for hearing on Wednesday, March 14, 2007 at 6:15 p.m., at Board of Appeals office at 160 Coursevall Drive, Centreville, MD 21617, to hear and decide the application of ROBERT J. BEASLEY and CONNIE M. BEASLEY (the "Applicant"), being Case No. V-010010. All legal requirements pertaining to the filing of this application and notice of public hearing were substantiated and there were no objections made to the jurisdiction of this Board. This matter was heard by William D. Moore, Chairman, Kenneth L. Scott, Vice Chairman, and Howard A. Dean, Member, of the Board of Appeals of Queen Anne's County.

RELIEF REQUESTED

The Applicant has requested a Variance from strict application of §14:1-38.D.(8) of Chapter 18, of the *Code of Public Laws of Queen Anne's County, 1996 ED.*, to exceed the 15% impervious surface requirement of §14:1-38.D.(8) of the Code to construct a 26' x 36' detached garage in the Critical Area.

PROPERTY DESCRIPTION

The property which is the subject of this application is located at 205 Benton's Pleasure Road in the Benton's Pleasure Subdivision. The property is located in the Fourth Election District, and is designated as Zoning Map 57, Parcel 378, Lot 84, zoned NC-20 and LDA and is in the LDA Critical Area. The property consists of 1 acre.

PLANNING AND ZONING

Gene Palmatary addressed the application on behalf of the Department of Planning and Zoning. He stated that with the addition of the proposed garage, the improvements to the property would exceed the 15% limitation on impervious areas. He noted that there was a blacktop driveway that had originally had a gravel surface. In addition to the residence, there is a swimming pool with decking. With the addition of the proposed garage, the impervious area would be 15.99%. He stated that there Department had no objection to the granting of the application, however, if it was approved that the Applicant be required to mitigation by planting at least 8 trees.

APPLICANT'S CASE

Robert Beasley spoke on behalf of the application. He stated that he wanted to do things the right way. He stated that his driveway was sloped and he stated that it consisted of river rock and a drain pipe to mitigate the effect of storm water flow from his driveway. He did not want to remove the blacktop area. Nor did he want the garage to encroach on the pool area. He also did not want the garage to be jammed up against his neighbor's property. He stated that he had no problem with the planting trees for mitigation.

OPPOSITION

Marianne Dise, Esquire, represented the Critical Area Commission (the "Commission"), which opposed to the application. Ms. Dise called LeeAnne Chandler, Science Advisor to the Commission, as an expert witness. Ms. Chandler was accepted as an expert witness by the Board. Ms. Chandler's testimony was as follows:

Once a watershed surpasses the impervious surface limitation water quality declines. Section 8-1808.3 of the Natural Resources Article limits the impervious area on lots of one acre to 15%. The standard for granting a variance was whether the property owner could have a reasonable use of the parcel without the variance. The subject property did have a reasonable use because it was currently being used for a residence. Since there was a house and a pool on the subject property, the standard for granting a variance under the Critical Area law simply could not be met. The lot was grandfathered as having been created prior to 1989, but the conditions for the proposed variance are the result of the actions of the Applicant. By paving the driveway, the property exceeded the permissible limit on impervious surface allowed in the Critical Area. The property could be brought into compliance by removing the middle strip of the driveway and having two tire tracks. She stated that the adverse effects from impervious surfaces are cumulative. Given the size of the proposed garage, it could accommodate five cars. Section 8-1808(d)(2) of the Natural Resources Article provides that any application for a variance is presumptively not in conformance with the Critical Area law. Mitigation was not an appropriate option. The Commission considered gravel as an impervious surface.

REBUTTAL TESTIMONY

Mr. Beasley stated that he did not think that it served anyone's interest for him to jack hammer the driveway and repave it. He also said that the proposed garage was designed to accommodate the trucks that he owned.

Mr. Palmatary stated that the County did not consider gravel as an impervious surface.

BOARD'S DECISION

The Board of Appeals of Queen Anne's County has given consideration to the limitations, guidelines and standards set forth in the *Code* and makes the following specific findings:

1. The Board finds that a literal interpretation of Chapter 14:1 would result in unnecessary hardship as a result of specified conditions which hardship is not shared by owners of other properties in the same area.

2. The Board also finds that the conditions are peculiar to the property involved.

3. The Board finds that the conditions are not the result of any action taken by the Applicant.

4. The Board finds that the variance will not be contrary to the public interest, policies, goals and objectives of Chapter 14-1 in the Queen Anne's County Critical Area Program. In this regard, the Board believes that tearing up the driveway would serve no purpose. Mr. Beasley has made a significant effort to mitigate the effects of the impervious surface of his driveway by surrounding it with river rock and drain pipes. A driveway of different configuration might have eliminated the total lot coverage, but would not necessarily be designed to reduce the adverse effects associated with a black top driveway.

5. The Board also finds that the variance will not confer upon the Applicant any special privilege denied to other owners of like property and/or structures within the Critical Area.

6. The Board finds that the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area. Although the application is for an accessory building, much of the discussion related to the driveway. As the Board noted, Mr. Beasley had taken efforts to reduce its impact.

7. The Board finds that the variance is the minimum deviation for the provisions of Chapter 14:1 would make possible the reasonable use of land and structures.

8. The Board finds that the variance will be in harmony with the general purpose and intent of Chapter 14:1 of the Queen Anne's Critical Area Program and the variance will not result in a use not permitted in the applicable development area or increase the applicable density limitations.

The Board grants the application shown as Case No. V-010010 granting a variance from the 15% impervious area limitation to permit the Applicant to construct a 26' x 36' detached garage with the condition that the Applicant plant eight (8) trees as mitigation.

Chairman Moore voted against granting the variance.

STATE OF MARYLAND

QUEEN ANNE'S COUNTY

I HEREBY CERTIFY that the foregoing is a true and correct copy of the Finding and Decision of the executive meeting of the Board of Appeals of Queen Anne's County held on Wednesday, March 14, 2007, and that the said minutes now remain on file in the Board's office.

In testimony whereof, I have hereunto subscribed my name this 26th day of April, 2007.

Cathy Maxwell
Clerk

Stephen H. Kehoe
Attorney for Board of Appeals

7692Y:\Steve\QuACoBZA\New Opinions\Beasley V010010.wpd

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

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Acting Director: J. Steven Cohoon

EXCERPTS OF THE MINUTES OF THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY

CASE NO:	V-010010
APPLICANT:	Robert J. & Connie M. Beasley
HEARING DATE:	3/14/07
REQUESTING:	A variance from Chapter 14, §14:1-38.D.(8), of the Code of Public Laws of Queen Anne's Co. (1996 ED), to exceed the 15% impervious surface requirement to construct a 26 ft. x 36 ft. detached garage. Located at 205 Benton's Pleasure Rd., Benton's Pleasure Subdiv., 4th E.D., Map 57, Parcel 378, Lot 84, zoned NC-20 and LDA.
IN ATTENDANCE:	William D. Moore, Chairman; Kenneth R. Scott, Vice-Chairman; Howard A. Dean, Member; Member; Stephen H. Kehoe, Esq., Attorney for the Board; Cathy Maxwell, Clerk to the Board; Gene Palmatary, Zoning Inspector; Robert J. Beasley, Applicant; Marianne E. Dise, Esq., and LeeAnne Chandler, Critical Area Commission.

KEHOE: Do you find that a literal enforcement of Chapter 14:1 would result in unnecessary hardship as a result of the specified conditions, which hardship is not shared by owners of other property in the same development area.

CHAIRMAN: Yes.
SCOTT: Yes.
DEAN: Yes.
KEHOE: Do you find that the conditions are peculiar to the property involved.
CHAIRMAN: Yes.
SCOTT: Yes.
DEAN: Yes.
KEHOE: Do you find that the conditions are not the result of any action taken by the applicant.
SCOTT: Yes.
DEAN: Yes.
CHAIRMAN: No.

KEHOE: Do you find that the variance will not be contrary to the public interest or policies, goals and objectives of Chapter 14:1 and the Queen Anne's Co. Critical Area Program.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: No.

KEHOE: Do you find that the variance will not confer upon the applicant any special privilege denied to other owners of like property and/or structures within the Critical Area.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the Critical Area.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: No.

KEHOE: Do you find that the variance is the minimum deviation from the provisions of Chapter 14:1 that will make possible the reasonable use of the land or structures.

CHAIRMAN: Yes.

SCOTT: Yes.

DEAN: Yes.

KEHOE: Do you find that the granting of the variance will be in harmony with the general purpose and intent of this Chapter 14:1 and the Queen Anne's Co. Critical Area Program and the variance will not result in a use not permitted in the applicable development area or an increase in the applicable density limitations.

CHAIRMAN: No.

SCOTT: Yes.

DEAN: Yes.

CHAIRMAN: Do we have a motion.

SCOTT: I'll make a motion and this is solely based on testimony that stone is an impervious surface apparently. Tearing up the blacktop and putting down stone isn't going to help him at all as far as what Mrs. Chandler said. So on that note, I'll make a motion that Case V-010010, Beasley, be approved. A variance to exceed the 15% impervious cover allowed to construct a 26 ft. x 36 ft. detached garage and plant eight (8) trees of mitigation in the yard.

DEAN: I'll second it.

CHAIRMAN: The motion has been made and seconded. All in favor of the motion signify by saying "Aye".

SCOTT: Aye.

DEAN: Aye.

CHAIRMAN: No. Let the record show that Case V-010010 was approved by a two-to-one vote. There will be a formal decision forthcoming. When you receive this, you may proceed with your permitting process. I declare this hearing adjourned.

Cathy Maxwell

Cathy Maxwell, Clerk

3/15/07
Date

CC: Robert J. & Connie M. Beasley
Marianne E. Dise, Esq.
LeeAnne Chandler
Bd. Members
Stephen H. Kehoe, Esq.
Gene Palmatary
James H. Barton
Permit Dept.

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission Pres
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

May 30, 2007

Saundra – for your files – Marianne

BOARD OF APPEALS
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Centreville, MD 21617

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Fax Permits: (410) 758-3972

Acting Director: J. Steven Cohoon

TO ALL INTERESTED PARTIES:

RECEIVED
JUN 25 2007
DNR - LEGAL DIVISION

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

Dear Interested Party:

A petition for judicial review has been filed in the above matter. It was filed on May 21, 2007 in the Circuit Court for Queen Anne's Co., Md., 100 Courthouse Square, Centreville, MD 21617, under Civil Action No. 17-C-07-012458.

It was received by the Dept. of Planning & Zoning by certified mail on May 24, 2007 and was received by the undersigned Clerk to the Bd. of Appeals on May 30, 2007.

If you wish to oppose the petition filed by Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, you must file a response with the Court within thirty (30) days of this Notice, unless the Court shortens or extends the time.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

CC: Board of Appeals File No. V-010010

RECEIVED
JUN 1 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

May 30, 2007

BOARD OF APPEALS
160 Coursevall Drive
Centreville, MD 21617

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Acting Director: J. Steven Cohoon

RECEIVED
JUN 25 2007
DNR - LEGAL DIVISION

TO ALL INTERESTED PARTIES:

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
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Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

CC: Board of Appeals File No. V-010010

RECEIVED
JUN 1 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

IN THE CIRCUIT COURT OF MARYLAND
FOR QUEEN ANNE'S COUNTY

PETITION OF:
MARGARET MCHALE,
Chair, Critical Area Commission for
the Chesapeake and Atlantic Coastal Bays
1801 West Street, Suite 100
Annapolis, Maryland 21401

FOR JUDICIAL REVIEW OF
THE DECISION OF THE
QUEEN ANNE'S COUNTY BOARD
OF APPEALS
160 Coursevall Drive
Centreville, Maryland 21617

IN THE CASE OF
Case No. V-010010,
Robert J. And Connie M. Beasley
Variance to Exceed 15% Impervious Surface in
the Critical Area

CIVIL ACTION No. 12458

RECEIVED
MAY 30 2007
QUEEN ANNE'S COUNTY
PLANNING & ZONING

PETITION FOR JUDICIAL REVIEW

Margaret McHale, Chair of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, ("Chair McHale") by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Saundra K. Canedo and Marianne E. Dise, Assistant Attorneys General, pursuant to Maryland Rule 7-202, files this Petition for Judicial Review and states:

1. Chair McHale hereby requests judicial review of the April 26, 2007 Decision of the Queen Anne's County Board of Appeals in the above-captioned Case No. 3V-010010, Robert J. and Connie M. Beasley. The Board's Decision granted a variance to the 15% impervious surface limit for a lot, for property in Chester, in the Queen Anne's County Critical Area land designated as a limited development area.

2. Chair McHale received the Decision from the County on April 30, 2007.

RECEIVED
07 MAY 31 PM 1:01
CLERK OF CIRCUIT COURT
QUEEN ANNE'S COUNTY

3. Chair McHale has standing and the right and authority to file this Petition pursuant to Annotated Code of Maryland, Natural Resources Article §8-1812 (a) and (c).

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

Saundra K. Canedo
Marianne E. Dise
Assistant Attorneys General
Department of Natural Resources
580 Taylor Avenue
Annapolis, MD 21401
(410) 260-8356

Attorneys for Margaret McHale, Chair
Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
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Acting Director: J. Steven Cohoon

June 5, 2007

RECEIVED
JUN 7 2007
DNR - LEGAL DIVISION

Ms. Saundra Canedo
Dept. of Natural Resources
Office of Attorney General
580 Taylor Ave.
Annapolis, MD 21401

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

Dear Ms. Canedo:

Enclosed is the transcript regarding the above captioned Board of Appeals case. I am sending the bill to Ms. Shirley Massenburg, Critical Area Commission, for payment.

If you have any questions, please call.

Sincerely,

Cathy Maxwell

Cathy Maxwell
Clerk

Enc.

CC: Marianne E. Dise, Esq.
LeeAnne Chandler
Shirley Massenburg

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
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BOARD OF APPEALS

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Acting Director: J. Steven Cohoon

June 5, 2007

Ms. Shirley Massenburg
Critical Area Commission for the Chesapeake
and Atlantic Coastal Bays
1804 West Street Suite 100
Annapolis MD 21401

RE: NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of Queen Anne's County
Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area
Civil Action No. 17-C-07-012458

Dear Ms. Massenburg:

Regarding the above, the cost for the transcript is:

33 pages @ $3.00 per page = $ 99.00

Please make check payable to: Queen Anne's Co. Commissioners

And mail check to: Cathy Maxwell, Dept. of Planning & Zoning, 160 Coursevall Dr., Centreville, MD 21617.

A copy of the transcript was sent to Ms. Saundra Canedo, Dept. of Natural Resources, Office of Attorney General, 580 Taylor Ave., Annapolis, MD.

If you have any questions, please call.

Sincerely,

Cathy Maxwell
Clerk

Enc.

CC: Marianne E. Dise, Esq. LeeAnne Chandler
Saundra Canedo

QUEEN ANNE'S COUNTY
Department of Planning and Zoning
160 Coursevall Drive
Centreville, Maryland 21617

TO:

Ms. Saundra Canedo
Dept. of Natural Resources
Office of Attorney General
580 Taylor Ave.
Annapolis, MD 21401

RECEIVED
MAY 7 2007
DNR - LEGAL DIVISION

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

RECEIVED
APR 30 2007
CRITICAL AREA COMM.
Chesapeake & Atlantic Co...

RECEIVED
FEB 16 2007
QUEEN ANNE'S COUNTY
PLANNING & ZONING

February 15, 2007

Ms. Cathy Maxwell
Queen Anne's Dept. of Planning and Zoning
160 Coursevall Drive
Centreville, Maryland 21617

Re: Robert J. Beasely
V-010010

Dear Ms. Maxwell:

Thank you for forwarding the above-referenced variance request to this office for review and comment. The site is located in the Limited Development Area (LDA) and is improved with a single family dwelling, driveway and several accessory structures. The application states the applicant is seeking a variance to the 15% impervious surface limitations afforded to this lot. I have provided our comments and recommendations below.

It appears the lot already exceeds the 15% allowable impervious surface limit by 633 square feet, which equates to 17% of the site. The request is to permit an additional 926 square feet of impervious area for a garage, which would equate to 19% of the site. This office cannot support a variance to exceed the impervious surface limits on this site. While the lot may be grandfathered, the lot was not improved until 2003. Therefore, it is unclear why the existing impervious area on the lot already exceeds the 15% impervious surface limitation well after the adoption and subsequent implementation of the Queen Anne's County Critical Area Program.

We understand the applicant's desire for additional storage and covered parking, however, due to the extensive paved driveway and accessory structures, it is not permitted. We recommend that the applicant utilize a portion of the paved driveway to place the new garage. Ideally, the site would be brought into compliance with the County's Critical Area ordinance through removal of some existing impervious surface. As requested, the applicant does not meet the burden of having an unwarranted hardship which is defined as being denied any reasonable use of the entire parcel or lot. Since the property already supports a new dwelling and accessory structures, this standard cannot be met and this variance should be denied.

The applicant can easily avoid the need for a variance for the desired garage by moving its proposed location and removing some existing impervious cover. There is no reason development on this parcel should be in violation of the County's Critical Area Program.

Thank you for the opportunity to comment. Please include this letter in your file and submit it as part of the record for variance. Please notify the Commission of the decision made in this case. If you have any questions, please telephone me at (410) 260-3477.

Sincerely,

LeeAnne Chandler

LeeAnne Chandler
Science Advisor

cc: QC 43-07

Queen Anne's County

County Commissioners:
Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
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BOARD OF APPEALS
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Acting Director: J. Steven Cohoon

April 26, 2007

Mr. & Mrs. Robert J. Beasley
20 Benton's Pleasure Rd.
Chester, MD 21619

RE: BOARD OF APPEALS CASE NO. V-010010
VARIANCE FOR DETACHED GARAGE
BUILDING PERMIT NO. B06-1864

Dear Mr. & Mrs. Beasley:

Enclosed are the Board's formal Decision and the Excerpts of the Minutes from the 3/14/07 hearing. Your request for a variance from Chapter 14, §14:1-38.D.(8), of the Code of Public Laws of Queen Anne's Co. (1996 ED), to exceed the 15% impervious surface requirement to construct a 26 ft. x 36 ft. detached garage was approved.

Your addition must be constructed as shown on your Applicant's Exhibit No. 4.

Please contact our Permit Dept. at 410-758-4088 concerning your pending permit.

Sincerely,

Cathy Maxwell
Clerk

Enc.

CC: Marianne E. Dise, Esq.
LeeAnne Chandler
Bd. Members
Stephen H. Kehoe, Esq.
Gene Palmatary
James H. Barton
Permit Dept.

DRAFT

PETITION OF:	*	**IN THE CIRCUIT COURT**
	*	
MARGARET MCHALE,	*	**FOR QUEEN ANNE'S CO., MD**
Chair, Critical Area Commission for	*	
the Chesapeake and Atlantic Coastal Bays	*	
1801 West St., Suite 100	*	
Annapolis, MD 21401	*	
	*	
Petitioners	*	
	*	
FOR JUDICIAL REVIEW OF THE	*	
DECISION OF:	*	
	*	
THE BOARD OF APPEALS OF	*	
QUEEN ANNE'S CO., MD	*	
	*	
Defendant	*	
	*	
IN THE CASE OF:	*	
	*	
CASE NO. V-010010	*	**CIVIL ACTION NO. 17-C-07-012458**
Robert J. and Connie M. Beasley	*	
Variance to Exceed 15% Impervious	*	
Surface in the Critical Area	*	

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

STATE OF MARYLAND, QUEEN ANNE'S COUNTY, TO WIT:

I HEREBY CERTIFY that the following are all the original papers filed in:

CIVIL ACTION NO. 17-C-07-012458
NOTICE OF FILING OF PETITION FOR JUDICIAL REVIEW
Petition of Margaret McHale, Chair, Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays
For Judicial Review of the Decision of the Board of Appeals of
Queen Anne's County
Board of Appeals Case No. V-010010 – Robert J. and Connie M. Beasley
Variance to Exceed 15% Impervious Surface in the Critical Area

_____ _____

Cathy Maxwell, Clerk **Date**

IN THE MATTER OF	**IN THE CIRCUIT COURT**
THE APPEAL FROM THE DECISION	**FOR QUEEN ANNE'S CO.**
OF THE BOARD OF APPEALS OF	**STATE OF MARYLAND**
QUEEN ANNE'S CO.	
IN CASE NO. V-010010	**Civil Action No. 17-C-07-012458**

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RECORD

I. FOLLOWING BOARD'S EXHIBITS:

Board's Exhibit No. 1 – Certificate of Publication of Notice of Hearing; Certificate of Posting of Property; and One (1) photograph of posting notice presented by the Planning & Zoning Administrator of Queen Anne's Co for Case No. V-010010.

II. FOLLOWING APPLICANT'S EXHIBITS:

Applicant's Exhibit No. 1 – Copy of Application filed in Case V-010010, received 1/19/07.

Applicant's Exhibit No. 2 – Deed to subject property – Liber SM142/444.

Applicant's Exhibit No. 3 – Copy of zoning, tax assessment, and critical area maps.

Applicant's Exhibit No. 4 – Location Drawing, Lot 84, Benton's Pleasure, prepared by Steven H. Jupitz, Inc., dated 7/30/03.

Applicant's Exhibit No. 5 – Letter dated 2/15/07 to Cathy Maxwell from LeeAnne Chandler, Critical Area Commission.

Applicant's Exhibit No. 6 - Building Permit No. B06-1864.

Applicant's Exhibit No. 7 – Letter dated 11/20/06 to Robert J. & Connie M. Beasley from Gene Palmatary, Zoning Inspector.

III. **FOLLOWING OPPOSITION'S EXHIBITS:**

Opposition Exhibit No. 1 – Résumé for LeeAnne Chandler, Critical Area Commission.

Opposition Exhibit No. 2 – Letter dated 3/14/07 to Q. A. Co. Board of Appeals from LeeAnne Chandler, Critical Area Commission.

Opposition Exhibit No. 3 – Page 76 of §8-1808, Natural Resources Article D.2.

IV. **FOLLOWING PLANNING & ZONING EXHIBITS:**

P&Z Exhibit No. 1 - Planning & Zoning Staff Report prepared by Gene Palmatary.

V. **TRANSCRIPT OF TESTIMONY** of the witnesses taken down and transcribed by Cathy Maxwell, Clerk to the Board of Appeals, at the public hearing held on March 14, 2007, and made a part of the Minutes of said hearing.

VI. **FORMAL DECISION AND EXCERPTS OF THE MINUTES** of the Board of Appeals of Queen Anne's Co. given at the Executive Meeting held on March 14, 2007.

6/8/07

Tw/ Mr. Brasley

Brasley - feels he's being singled out

List of people w/ exact situation

feels he's being discriminated agst because he's a minority

Background Information

Petition of Margaret McHale for Judicial Review of the Decision of the Queen Anne's County Board of Appeals in Case No. V-010010, Robert J. And Commie M. Beasley, Variance to Exceed 15% Impervious Surface in the Critical Area

Handwritten Notes

Petition of Margaret McHale for Judicial Review of the Decision of the Queen Anne's County Board of Appeals in Case No. V-010010, Robert J. And Commie M. Beasley, Variance to Exceed 15% Impervious Surface in the Critical Area

Correspondence

Petition of Margaret McHale for Judicial Review of the Decision of the Queen Anne's County Board of Appeals in Case No. V-010010, Robert J. And Commie M. Beasley, Variance to Exceed 15% Impervious Surface in the Critical Area