PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF
AN APPEAL OF A CRITICAL AREA
RECLASSIFICATION, CASE NO.: ~~20000-0468-C~~,
BA-48-01-C, Civil Action No. C-06-117432

Petition of Wright Investment Group for Administrative Mandamus Directed to CAE & AA Co. in Case of an Appeal of a Critical Area Reclassification
Pleadings Index

No. BA-48-01-C and C-06-117432 2007 MSA_5_1831 - 32
(1066)

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP *
21750 Deveron Cove
Yorba Linda, CA 92607 *

Plaintiff *
v. Case No. C-06-117432
*
MARYLAND DEPARTMENT OF
NATURAL RESOURCES/ *
CRITICAL AREA COMMISSION FOR
THE CHESAPEAKE AND ATLANTIC *
COASTAL BAYS
1804 West Street, Suite 100 *

Defendant *
*
* * * * * * * * * * * * *

PLEADINGS INDEX

1.	October 6, 2006	Complaint for Administrative Mandamus
2.	November 6, 2006	Motion To Dismiss; Memorandum In Support
3.	November 22, 2006	Anne Arundel County's Response to Petition
4.	November 22, 2006	Anne Arundel's County's Motion To Dismiss
5.	November 27, 2006	Petitioner's Oppositions to CAC's Motion To Dismiss
6.	December 12, 2006	Petitioner's Oppositions to Anne Arundel's Motion To Dismiss
7.	December 15, 2006	Motion To Consolidate
8.	February 20, 2007	Order denying Motion To Consolidate
9.	March 13, 2007	Motion For Postponement and Scheduling of Joint Hearing Date

RECEIVED
MAR 15 2007
DNR - LEGAL DIVISION

IN THE CIRCUIT COURT OF MARYLAND FOR ANNE ARUNDEL COUNTY

DARAS	*	
v.	*	**CASE NOS. C-06-118661 and C-06-118663**
CRITICAL AREA COMMISSION	*	
* * * * * * *		
JWL ASSOCIATES and MAGENAU	*	
v.	*	**CASE NO. C-06-118672**
CRITICAL AREA COMMISSION	*	
* * * * * * *		
WRIGHT INVESTMENT GROUP	*	
v.	*	**CASE NOS. C-06-117432**
CRITICAL AREA COMMISSION	*	
* * * * * *		

MOTION FOR POSTPONEMENT
AND
SCHEDULING OF JOINT HEARING DATE

Michael A. Daras, by Anthony F. Christhilf, his attorney, moves this Honorable Court for a postponement of the scheduled hearing date in Case Nos. C-06-118661 and C-06-118663 and for a joint hearing date for all of the above-referenced cases and states:

1. Case Nos. C-06-118661 and C-06-118663 (the "Daras cases") involve a Complaint for Administrative Mandamus and a Petition for Judicial Review from a decision of the Critical Area Commission (the "Commission") of November 1, 2006, remanding a proposed program amendment to Anne Arundel County, Maryland. The Commission filed

Motions to Dismiss both the Complaint and the Petition. The Motions are scheduled for a Complex Motions Hearing at 1:30 p.m. on March 19, 2007.

2. Case No. C-06-118672 (the "Magenau case") involves a Complaint for Administrative Mandamus or in the alternative a Petition for Judicial Review from a decision of the Commission of November 1, 2006, remanding a proposed program amendment to Anne Arundel County. The Commission filed a Motion to Dismiss the Complaint or in the alternative Petition. The case is scheduled for Hearing on the Motion on April 18, 2007.

3. Case No. C-06-117432 (the "Wright case") involves a Petition for Administrative Mandamus or in the alternative a Petition for Judicial Review from a decision of the Commission of September 6, 2006, remanding a proposed program amendment to Anne Arundel County. The Commission filed a Motion to Dismiss the Complaint or in the alternative Petition. The Motion is scheduled for Complex Motion Hearing on April 30, 2007, at 1:30 p.m. Case No. C-06-117695 filed by Wright for Writ of Mandamus, Declaratory Relief and Damages is also scheduled for pending motions on that date.

4. The Motions in the Daras cases, Magenau case and Wright case involve a similar issue of law, namely the appropriate civil procedure by which a property owner may obtain review by the Circuit Court of an action by the Commission. The bases set forth by the Commission in its Motions to Dismiss the Daras cases, Magenau case and Wright case are the same. Logic, judicial economy and the need to establish a single, uniform standard for the appropriate procedure for review dictate that the Motions should be heard before and decided by a single judge of the Circuit Court.

5. Undersigned counsel has conferred with the Assignment Office and confirmed that the time allotted for the Complex Motions Hearing in the Wright case is available and

adequate for a joint hearing in the Daras and Magenau cases. Undersigned counsel has also conferred with Eileen E. Powers, attorney for Magenau, David M. Plott and Benjamin S. Wechsler, attorneys for Wright, Sarah M. Iliff, Senior Assistant County Attorney for Anne Arundel County and Marianne E. Dise and Paul J. Cucuzella, Assistant Attorney Generals for the Commission, who have all authorized him to indicate to this Honorable Court that they join in the request that the Commission's Motions to Dismiss in all of the above cases be scheduled for a joint hearing at the Complex Motions Hearing at 1:30 p.m. on April 30, 2007.

WHEREFORE:

Michael A. Daras prays this Honorable Court to issue its Order postponing the scheduled hearing in the Daras cases and scheduling a joint hearing on the pending Motions in the Daras cases, Magenau case and Wright cases for the Complex Motions Hearing at 1:30 p.m. on April 30, 2007.

Respectfully submitted,

Anthony F. Christhilf
150 South Street, Suite 206
Annapolis, MD 21401
410-269-6424
Attorney for Michael A. Daras

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2007, copies of the foregoing Motion For Postponement And Scheduling Of Joint Hearing Date and accompanying Order were mailed first class, postage prepaid, to

Eileen E. Powers, Esquire
170 Jennifer Road
Annapolis, MD 21401

David M. Plott, Esquire
Benjamin S. Wechsler, Esquire
145 Main Street
Annapolis, MD 21401

Sarah M. Iliff, Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road, 4th Floor
Annapolis, MD 21401

Marianne E. Dise, Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street, Suite 100
Annapolis, MD 21401

and

Paul J. Cucuzella, Assistant Attorney General
Maryland Department of Natural Resources
580 Taylor Avenue
Annapolis, MD 21401

Anthony F. Christhilf

vso/AFC/Pleadings/Daras/Motion.Postponement

IN THE CIRCUIT COURT OF MARYLAND FOR ANNE ARUNDEL COUNTY

DARAS	*	
v.	*	**CASE NOS. C-06-118661 and C-06-118663**
CRITICAL AREA COMMISSION	*	

* * * * * * *

JWL ASSOCIATES and MAGENAU	*	
v.	*	**CASE NO. C-06-118672**
CRITICAL AREA COMMISSION	*	

* * * * * * *

WRIGHT INVESTMENT GROUP	*	
v.	*	**CASE NOS. C-06-117432**
CRITICAL AREA COMMISSION	*	

* * * * * *

ORDER

The foregoing Motion having been read and considered it is thereupon this _____ day of March, 2007, by the Circuit Court for Anne Arundel County ORDERED:

That the Complex Motions Hearing in Case Nos. C-06-118661 and C-06-118663 is hereby postponed; and

That the pending Motions in Case Nos. C-06-118661 and C-06-118663 and Case No. C-06-118672 are scheduled for hearing with the pending Motions in Case Nos. C-06-117695 and C-06-117432 at the Complex Motions Hearing at 1:30 p.m. on April 30, 2007.

_____

JUDGE

WRIGHT INVESTMENT GROUP	*	IN THE
Plaintiff	*	CIRCUIT COURT
VS	*	FOR
CRITICAL AREA COMMISSION FOR THE CHESAPEAKE & ATLANTIC COASTAL BAYS, et al.	*	ANNE ARUNDEL COUNTY
Defendant	*	CASE NO. C-2006-117695 & C-2006-117432

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

ORDER

It is this 20th day of February, 2007, in the Circuit Court for Anne Arundel County, hereby

ORDERED that the Motion to Consolidate is denied at this time, but that the two cases shall travel together. Consolidation may be revisited after the open Motions in both cases have been decided; and it is further

ORDERED that the open Motions in C-2006-117432 shall be set for a hearing on March 26, 2006, at 1:30 p.m. along with the open Motions in C-2006-117695, which is already set for March 26, 2006, at 1:30 p.m.

Pamela L. North
JUDGE

FILED
2007 FEB 26 P 12:50

FEB 28 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

TRUE COPY,
TEST: Robert P. Duckworth, Clerk
By: _____ Deputy

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
Robert P. Duckworth
Clerk of the Circuit Court
7 Church Circle
Post Office Box 71
Annapolis, MD 21404-0071
TTY for Deaf: (410) 222-1429
Civil (410)222-1431

Case Number: 02-C-06-117695

Marianne E Dise Esq
Assistant Attorney General
1804 West Street
Suite 100
Annapolis, MD 21401

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MAR 5 - 2007
DNR - LEGAL DIVISION

cdw
FOLD HERE

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP 21750 Deveron Cove Yorba Linda, CA 92607 **Plaintiff,** **vs.** **CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS** 1804 West Street Annapolis, Maryland 21401 **Defendant** and **ANNE ARUNDEL COUNTY** 2660 Riva Road, 4th Floor Annapolis, Maryland 21401 **Defendant**	)	**CIVIL ACTION NO. C-06-117432**

FILED
2006 DEC 15 P 12:34

WRIGHT INVESTMENT GROUP'S MOTION TO CONSOLIDATE

Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, and pursuant to Maryland Rule 2-503, hereby moves the Court to consolidate this action with Civil Action No. C-06-117695, and states as follows:

(1). These actions involve common questions of law, identical parties, common questions of fact, and common subject matter.

Respectfully submitted,

David M. Plott
Benjamin S. Wechsler
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410.268.0881

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP 21750 Deveron Cove Yorba Linda, CA 92607 **Plaintiff,** **vs.** **CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS** 1804 West Street Annapolis, Maryland 21401 **Defendant** and **ANNE ARUNDEL COUNTY** 2660 Riva Road, 4th Floor Annapolis, Maryland 21401 **Defendant**	)	**CIVIL ACTION NO. C-06-117432**

FILED
2006 DEC 15 P 12:35

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER WRIGHT INVESTMENT GROUP'S MOTION TO CONSOLIDATE

Petitioner Wright Investment Group ("Wright"), by and through its undersigned counsel, respectfully requests that the Court consolidate this action with the action proceeding before this Court as Case No. 06-117695.

BACKGROUND

Both this action as well as Case No. 06-117695 arise out of a six-year adversarial proceeding between Wright and Anne Arundel County (the "County"), culminating in a hearing before the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Commission"). In each action, Wright seeks a Court Order compelling either the Commission or the County to grant a Critical Area map amendment consistent with a

Court of Special Appeals decision and a County Board of Appeals decision. In order to receive adequate relief, Wright was compelled to file both an Administrative Mandamus/Judicial Review action invoking the Court's appellate jurisdiction, as well as a separate Writ of Mandamus/Declaratory Relief action invoking the Court's original jurisdiction. Both actions involve the same parties, the same facts, and the same procedural background. However, in order to comply with separate rules of procedure governing timing and the form of pleadings, the actions were filed as separate actions.

ARGUMENT

Rule 2-503 provides:

> When actions involve a common question of law or fact or a common subject matter, the court, on motion or on its own initiative, may order a joint hearing or trial or consolidation of any or all of the claims, issues, or actions.

This Action and Case No. 06-117695 involve common questions of law, fact, and subject matter, as well as common parties. In the interest of judicial economy, and to avoid the risk of inconsistent rulings, Wright respectfully requests that the Court consolidate Case No. 06-117432 with Case No. 06-117695.

Respectfully submitted,

David M. Plott
Benjamin S. Wechsler
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410.268.0881

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on this 15 day of December, 2006, a true and correct copy of the foregoing **WRIGHT INVESTMENT GROUP'S MOTION TO CONSOLIDATE** was sent via U.S. Mail, first class postage prepaid, addressed to the following:

Marianne Dise, Esq.
Assistant Attorney General
Critical Area Commission
1804 West Street, Suite 100
Annapolis, Maryland 21401

and

Sarah Iliff, Esq.
Deputy County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401-7055

David M. Plott, Esq.

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IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

FOR ADMINISTRATIVE MANDAMUS

Directed to:

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street
Annapolis, Maryland 21401

And

ANNE ARUNDEL COUNTY
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

IN THE CASE OF AN APPEAL OF
A CRITICAL AREA RECLASSIFICATION
CASE NO.: 2000-0468-C, BA-48-01-C

CIVIL ACTION
NO. C-06-117432

2006 DEC 11 P 2:13

PETITIONER'S OPPOSITION TO COUNTY'S MOTION TO DISMISS

Petitioner, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully request that the Court deny Anne Arundel County's (the "County") Motion to Dismiss. As set forth more fully herein, the Commission's Motion to Dismiss must fail because; (1) Wright's petition is an appropriate mandamus action because it seeks to compel the County to engage in a ministerial, non-discretionary act; and (2) in any event the County is an indispensable party that is required to be joined in the action in order to give Wright relief.

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CRITICAL AREA COMMISSION

RELEVANT FACTUAL BACKGROUND

The procedural history of this matter is extensively briefed in Wright's Opposition to the Critical Area Commission's Motion to Dismiss, which was filed on November 22, 2006.

The facts relevant to withstand the County's Motion to Dismiss are straightforward, and have adequately been briefed elsewhere. Wright has litigated this matter against the County for more than six years. Wright sought the remapping of the County's relevant Critical Area Map for a portion of a 15.4 acre property it owns adjoining Route 50 (the "Property"). The County proceeding resulted in an unpublished 60-page Court of Special Appeals decision, declaring that the County had incorrectly mapped the boundaries of the Critical Area as it pertains to a portion of the Property. On remand, the County Board of Appeals ruled that a 2.5 acre portion of the Property was not subject to Critical Area regulation, and that the County must amend the relevant Critical Area map to reflect that the "property is not within the Critical Area." The County submitted the map amendment to the Critical Area Commission for approval, and the Critical Area Commission improperly refused, demanding instead that the County engage in the time-consuming remapping of a number of different parcels in the general vicinity of the Property.

The County states as an undisputed "fact" that the "County has taken all nonlegislative actions required by State and County law and has not failed to fulfill any ministerial function required by law." Mot. to Dismiss, p. 4. Far from stating an undisputed "fact," this legal conclusion goes to the heart of Wright's argument, as set forth further below.

ARGUMENT

The Case Law Cited by the County Is Distinguishable

The County, in urging dismissal, contends that dismissal is warranted because Wright's "complaint does not allege facts demonstrating an entitlement to mandamus as a remedy against the County." Mot. to Dismiss p. 5. This contention is erroneous, as this action is one for Administrative Mandamus, or in the alternative for Judicial Review, both brought under Title 7 of the Maryland Rules. Actions invoking the Court's judicial review jurisdiction do not require a detailed "complaint" reciting the factual basis for relief – rather, they require only a brief Petition whose contents are set forth in the Maryland Rules. *See* Maryland Rules 7-402(a); 7-202(c). No factual allegations are required in the Petition. Rather, the review under both Maryland Rule 7-201 *et seq.* and Rule 7-401 *et seq.* are on the record – a record that has not yet been transmitted.

In support of its contention that the allegations in the "complaint" are insufficient to withstand the County's Motion to Dismiss, the County cites four Maryland cases. Each of these cases relates to the legal sufficiency of a plaintiff's complaint in a civil action invoking the Court's original jurisdiction. None concerns the sufficiency of a petition in a judicial review action. In Dick v. Mercantile-Safe Deposit &Trust Co., concerned the sufficiency of factual allegations ***in a declaration*** to support a demurrer. Dick v. Mercantile-Safe Deposit & Trust Co., 63 Md. App. 270 492 A.2d 674 (1985). The Browning case involved the sufficiency of facts, ***pleaded in a complaint***, to sustain a motion to dismiss. Board of Education v. Browning, 333 Md. 281, 635 A.2d 373 (1994). Likewise, the remainder of the cases relied upon by the County also concern the sufficiency of a pleading's facts and allegations in order to withstand a Motion to Dismiss under Maryland Rule 2-322.

The cited cases are inapplicable in actions relating the Court's judicial review jurisdiction under Title 7, Chapters 200 and 400 of the Maryland Rules.

Wright's Administrative Mandamus Action Seeks to Compel the County to Perform a Ministerial Act

The County incorrectly contends that it has not "refused to perform a required ministerial duty," and that therefore that a mandamus action is inappropriate. Mot. to Dismiss, p. 4. Wright recognizes that the County has made efforts to seek the Critical Area Commission's approval of the map amendment, and that the Critical Area Commission refused to approve the County's map amendment as submitted. Wright contends, however, that given the Court of Special Appeals' and the Board of Appeal's ruling, the County has authority to ministerially amend the relevant Critical Area Map without the Critical Area Commission's approval. Wright asks that the Court allow this matter to proceed, with the County as a party, in order to have the opportunity to fully brief this issue and present oral argument to the Court on the same. Given the final judicial determination that a portion of the Property is outside the Critical Area, and the Critical Area Commission's refusal to comply, Wright must be given the opportunity to fully brief its legal allegations.

The County Is an Indispensable Party That Must Remain Part of the Action in Order to Afford Relief to Petitioner

Maryland Rule 2-211 provides that a person "shall be joined as a party in the action if in the person's absence . . . complete relief cannot be accorded among those already parties." This proceeding has involved over six years of active litigation with the County. It is the County that is compelled by judicial decisions in this case to amend its map, and it is the County that has submitted the map amendment to the Critical Area Commission for approval.

In order for the Court to grant relief to Wright in this matter, ***both*** the Critical Area Commission and the County need to remain as parties to this action. The relief sought by Wright is an order or declaration that the Critical Area Commission wrongfully denied the County's requested map amendment, or in the alternative that the County is permitted to grant the map amendment in the absence of Critical Area Commission approval on account of the Board of Appeals decision regarding the mistaken map. Under the circumstances, and given the relief sought by Wright against the County, the County is a "person" that must be "joined as a party in the action" in order to afford Petitioner relief.

Respectfully submitted,

David M. Plott
Benjamin S. Wechsler
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410.268.0881

REQUEST FOR HEARING

Pursuant to Rule 2-311(f), the Petitioner requests a hearing on its Opposition to County's Motion to Dismiss to be set at the same time as a hearing on the merits.

David M. Plott, Esq.

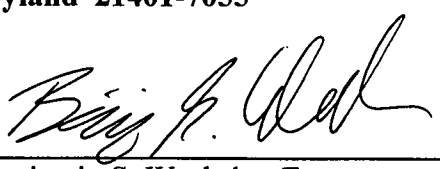
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury of the laws of the State of Maryland, that on this 11th day of December, 2006, a true and correct copy of the foregoing **PETITIONER'S OPPOSITION TO COUNTY'S MOTION TO DISMISS,** was sent via U.S. Mail, first class postage prepaid, addressed to the following:

Marianne Dise, Esq.
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
1804 West Street, Suite 100
Annapolis, Maryland 21401

and

Sarah Iliff, Esq.
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401-7055



Benjamin S. Wechsler, Esq.

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LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

November 22, 2006

David M. Plott
410.268.0881; 410.269.0045
301.261.1668
dplott@linowes-law.com

HAND DELIVERY

Clerk
Circuit Court for Anne Arundel County
Courthouse
Annapolis, Maryland 21401

Re: Petition of Wright Investment Group for Administrative Mandamus
Civil Action No. C-06-117432
Opposition to Motion to Dismiss

Dear Clerk:

Please file the enclosed Wright Investment Group's Opposition to the Motion to Dismiss filed by the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.

Very truly yours,

LINOWES AND BLOCHER LLP

David M. Plott

Enclosure
cc: Marianne E. Dise, Esquire
Sarah M. Iliff, Esquire

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NOV 27 2006
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

FOR ADMINISTRATIVE MANDAMUS

Directed to:

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street
Annapolis, Maryland 21401

And

ANNE ARUNDEL COUNTY
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

IN THE CASE OF AN APPEAL OF
A CRITICAL AREA RECLASSIFICATION
CASE NO.: 2000-0468-C, BA-48-01-C

CIVIL ACTION
NO. C-06-117432

RECEIVED
NOV 27 2006
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

FILED

PETITIONER'S OPPOSITION TO MOTION TO DISMISS, AND REQUEST FOR HEARING

Petitioner, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully request that the Court deny the Critical Area Commission of the Chesapeake and Atlantic Coastal Bays' (the "Commission") Motion to Dismiss. As set forth more fully herein, the Commission's Motion to Dismiss must fail because; (1) this matter clearly is a quasi-judicial proceeding; (2) Wright is entitled to review under the new Rule 7-401 *et seq.* provisions relating to Administrative Mandamus; and (3) the Maryland Rules explicitly contemplate that a state commission, such as the Commission, are subject to judicial review provided that the proceeding is quasi-judicial in nature. To grant the Commission's Motion to

Dismiss would effectively render the Commission's quasi-judicial decisions unreviewable, in direct violation of the Maryland Constitution and relevant case law.

BRIEF PROCEDURAL HISTORY

In its Motion to Dismiss, the Commission characterizes this case as a simple "legislative act of considering a request from Anne Arundel County to amend its local Critical Area Program." Mot. To Dismiss, p. 4. The touchstone of the Commission's Motion to Dismiss is that this case is legislative or "quasi-legislative" in nature, and thus Wright does not have a right of appeal. As the following abbreviated procedural history reveals, this case concerns an individual piece of property, the rights of its owners to build on that property, and extensive adjudicative proceedings concerning the individual property conditions and the application of County mapping criteria to that property. The question of what can be built on the property has been litigated by Wright through the Maryland Court system for almost 6 years, without participation by the Commission at any stage of the proceedings (despite a statutory entitlement to participate). The Commission's current attempt to hide behind the "quasi-legislative" veil is at variance with this matter's long and tortuous administrative history, and exerts a significant injustice upon the property owner's extensive and expensive efforts to correct a mapping mistake with regard to its property.[1]

Wright is a general partnership, owning approximately 15.4 acres of property (the "Property") located between U.S. Route 50 and Whitehall Creek, in Anne Arundel County, Maryland. At the time of purchase, there were no Critical Area restrictions on the Property.

[1] The following factual recitation is drawn heavily from the Court of Special Appeals' decision pertaining to this property and Wright's Verified Complaint in Anne Arundel County Circuit Court Case No. 02-C-6-Court.

In 1988, with the adoption of Anne Arundel County's Critical Area Program, the entire Property was placed within the Chesapeake Bay Critical Area and designated as a "Resource Conservation Area" ("RCA"), the most restrictive classification in the Critical Area overlay. The RCA classification effectively prohibited commercial uses although approximately 2.5 acres of the Property is located adjacent to Route 50, adjoins a McDonald's restaurant and is partially zoned C1 – Neighborhood Commercial District. The RCA classification significantly devalued the Property.

On December 7, 2000, Wright filed a Critical Area reclassification application with the County, seeking removal of the 2.5 acre Non-Critical Area Portion of the Property from the Critical Area based on the County improperly expanding the Critical Area to include that portion of the Property. The reclassification application was based on site-specific conditions, and the application of Commission-approved mapping criteria to the individual Property.

The County's Administrative Hearing Officer ("AHO") denied Wright's application after a hearing on March 27, 2001. The Commission did not participate in the AHO proceeding.

On May 18, 2001 Wright appealed the AHO's denial to the Anne Arundel County of Board of Appeals. The Board of Appeals heard the matter on August 30 and October 2, 2001. The Commission did not participate in the Board of Appeals proceeding. Wright's request to the Board of Appeals was denied by an April 17, 2002 Order. Wright timely filed a Petition for Judicial Review in the Circuit Court for Anne Arundel County.

On December 9, 2002 the Circuit Court for Anne Arundel County heard oral argument on the appeal. The Commission did not participate in the Circuit Court proceeding. On December 26, 2002, Judge Caroom affirmed the County's denial of

Wright's application for reclassification. Wright appealed the Circuit Court decision to the Court of Special Appeals, referenced at Case No. 02609.

The Court of Special Appeals heard oral argument on October 15, 2003. The Commission did not participate in the Court of Special Appeals proceeding. On August 31, 2004 the Court of Special Appeals ruled in favor of Wright in a 60-page opinion authored by Judge Hollander. The Court of Special Appeals ruled that the County had failed to follow its own mapping criteria with regard to this property, and thereby had mistakenly expanded the mapped boundaries of the Critical Area to include the 2.5 acres of the Property. The Court of Special Appeals remanded the case to the Board of Appeals to make findings on the other criteria for its removal from the Critical Area.

The case came back before the Board of Appeals for yet another hearing on April 7, 2005, and resulted in a revised memorandum of opinion dated September 21, 2005. Again, the Commission did not participate in the proceeding. The Board of Appeals ruled that Wright "satisfactorily demonstrated that it meets the criteria for a Critical Area Reclassification," and noted that the County "in a burst of conservationist enthusiasm... neglected to follow either its own Critical Area Mapping Program guidelines, or the State's overarching guidance with respect to increasing or adding to land within the Critical Area." The Board of Appeals noted that "the property is not within the Critical Area [and thus] it need not comply with, or conform to, either State or County Critical Area . . . criteria." The Board of Appeals' decision, like the Court of Special Appeals' decision, was based on the factual record developed with regard to the Property. At no point in any of the proceedings did Wright seek the Board of Appeals' or the court's input on the application of the mapping criteria to properties other than the Wright Property.

Following the Board of Appeals September 21, 2005 Opinion and expiration of the appeal period, counsel to Wright requested that the County revise its official Critical Area map to reflect the final Order in this case. In 2006, the Anne Arundel County Office of Environmental and Cultural Resources prepared an amended Anne Arundel County Critical Area Map No. 17, graphically depicting that the 2.5 acre Non-Critical Area Portion of the Property was not mapped within the Critical Area. The County submitted the revised Map to the Commission for approval as an amendment to the County Critical Area Program. Wright contends that the Commission's approval of the map amendment should have been a purely ministerial act given that the Court of Special Appeals had concluded, as a matter of law, that the Property was outside the Critical Area.

Upon receipt of the proposed Program Amendment from the County, the full Commission appointed a panel of five members to consider whether to approve the Program Amendment. A public meeting was held on August 29, 2006 at which several area residents and the Anne Arundel County representative to the Commission, who also is the County Councilwoman for the area in which the Property is located, attended. At the meeting, the residents attempted to reargue the issue of the mistaken classification, which had been conclusively resolved in the many years of administrative and judicial proceedings.

On September 6, 2006 the panel reconvened for further discussion and recommended, based on the testimony and argument relating to this individual piece of property, that the County's amended map, showing the 2.5 acres removed from the Critical Area, should be remanded to the County for a comprehensive remapping of the

entire area.[2] The full Commission adopted the panel's recommendation by voice-vote, preventing the immediate removal of the 2.5-acre Non-Critical Area Portion from the Critical Area and subjecting Wright to further delay and expense.

ARGUMENT

Wright has a right of review under the new Rule 7-401 *et seq.* "Administrative Mandamus" action, which took effect on January 1, 2006. Specifically, this rule allows "for judicial review of a ***quasi-judicial*** order or action ***of an administrative agency where review is not expressly authorized by law.***" Rule 7-401(a).

As the Commission rightly points out, the Critical Area Protection Program, codified in Title 8 of the Natural Resources Code, does not provide an explicit statutory right of review. Thus, the Administrative Mandamus review sought by Wright is appropriate so long as: (1) the Commission is an "administrative agency"; and (2) the Commission's decision with regard to the remapping was the result of a "quasi-judicial" proceeding.

The Commission is an Administrative Agency Whose Decision is Reviewable Under Rule 7-401 et seq. and Rule 7-201 et seq.

Rule 7-401(b) defines "administrative agency" to mean "any agency, board, department, district, ***commission***, authority, Commissioner, official or other unit of the State ***or of a political subdivision of the state.***" The plan language of the statute applies to the Commission, which is a "commission" organized under Natural Resources Code § 8-1803.

[2] To the extent the Commission believes that the mapping criteria were misapplied to other areas, it could have approved the Wright Property reclassification and advised the County to investigate remapping other properties that could be impacted by similar mapping errors.

The plain language of Rule 7-401(b) conflicts with the Commission's statement in its Motion to Dismiss that "the Commission has no legal identity separate from that of DNR and the State of Maryland. As such, the Commission, itself, lacks the capacity to be sued." This statement is erroneous in several ways. First, the Commission is not being "sued," as that term generally is used to describe the initiation of a civil lawsuit invoking the Court's original jurisdiction. Rather, actions under both Rule 7-401 *et seq.* as well as Rule 7-201 *et seq.* invoke the Court's judicial review or "appellate" jurisdiction, which is distinct from its original jurisdiction. For purposes of this action, the appropriate legal question is not whether the Commission can be "sued," but rather whether its is an "administrative agency" whose decisions or actions are subject to judicial review – a question that appears to be definitively answered by the definition of "administrative agency" in Rule 7-401(b).[3]

The case law cited by the Commission for the proposition that the Commission lacks the capacity to be "sued" is distinguishable and inapplicable to this proceeding. The *Champ v. Baltimore County* decision, cited for the proposition that the Commission cannot be "sued," is a federal civil suit brought under 42 U.S.C. § 1983 alleging deprivation of an individual's federal constitutional rights by a government entity. *See Champ v. Baltimore County*, 1994 WL 395735, 1994 U.S. Dist. LEXIS 10550. It is a Federal case regarding the exercise of a federal court's original jurisdiction to impose liability for an alleged violation of federal civil rights law. This case is irrelevant for purposes of analyzing whether the Commission is subject to judicial review under Rule 7-401 *et seq.* and Rule 7-201 *et seq.*

[3] In a separate action, Wright has sued the Commission invoking the Court's common-law mandamus jurisdiction, an action contemplated under *Bucktail, LLC v. Cty. Council of Tqlbot Cty*, 723 A.2d 440, 352 Md. 530 (1999) and other case law.

Similarly, the *Ashburn v. Anne Arundel County* case cited by the Commission concerns a Plaintiff's civil tort action against the government, thereby invoking the Court's original jurisdiction for an alleged violation of civil rights. It is inapplicable to this matter, where the Wright seeks judicial review of a Commission decision pursuant to either Rule 7-401 *et seq.* or in the alternative Rule 7-201 *et seq*

The Commission's Decision Was Quasi-Judicial in Nature

The second requirement for review under Rule 7-401 *et seq.* is that the proceeding must be "quasi-judicial" as opposed to "quasi-legislative." The criteria to discriminate a "quasi-judicial" action versus a "quasi-legislative" action in the context of the Critical Area Law are discussed extensively in *Bucktail, LLC v. Cty. Council of Tqlbot Cty*, 723 A.2d 440, 352 Md. 530 (1999). The *Bucktail* case concerned Talbot County Council's denial of a growth allocation under the Critical Area Law. Like the matter at bar, there was no statute making the Council's action judicially reviewable. *Bucktail LLC*, 723 A.2d 440, 445. Also, and again like the matter before this Court, the central issue turned on whether the proceeding to establish the growth allocation was "quasi-legislative" or "quasi-judicial" in nature. The Court noted initially that the distinction between the two is "dependent upon the nature of the particular act in which [an agency] is engaged." *Id.* at 447 (quoting *Mayor of Rockville v. Woodmont Country Club*, 705 A.2d 301, 348 Md. 572 (1998) (internal quotations omitted). The Court concluded that, based on the property-specific analysis concerning the suitability of the growth allocation, the proceeding had been quasi-judicial, and thus a right of appeal existed.

The difference between the quasi-judicial and quasi-administrative proceedings is perhaps best reviewed in *Montgomery County v. Woodward & Lothrop, Inc.*:

> The difference between adjudicative and legislative facts is not easily drawn; . . . adjudicative facts are facts about the parties and their activities,

businesses and properties. They usually answer the questions "of who did what, where, when, how why, with what motive or intent" while legislative facts "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." The difference, broadly speaking, involved whether the decision is to be made on individual or general grounds. Simply because an individual has a protected interest does not entitle him to a trial-type hearing where the matter to be determined involves issues of legislative fact. That the effect of a zoning authority's decision may dramatically affect an individual is not determinative of the difference between n adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines the party's right to an adjudicatory hearing. *Montgomery County v. Woodward & Lothrop, Inc.*, 376 A.2d 483, 497, 280 Md. 686, 711-12 (1977) (internal citations omitted), *cert. denied sub nom.*

The proceedings in the case at bar, concluding with the Commission decision, were adjudicatory in nature. Absent from the Commission's Motion to Dismiss is any mention of the six-year adjudicatory proceeding leading up to the County's requested map amendment. Both the County and the Wright called and cross-examined percipient and expert witnesses, authenticated and submitted evidence, and obeyed by the rules of practice and procedure established by the Board of Appeals. The Board of Appeals record was developed exclusively with regard to the Wright Property, and the site-specific application of the County's mapping criteria, which were approved by the Commission.

Following the Board of Appeals decision in favor of the County, Wright exercised its right to seek judicial review, on the site-specific Board of Appeals record, to the Circuit Court for Anne Arundel County pursuant to Rule 7-201 *et seq*. On appeal, the County and Wright again engaged in an adversarial, fact-based adjudicative proceeding concerning the site-specific application of the County's Commission-approved mapping criteria to a portion of the Wright Property. This adjudicative proceeding resulted in a Circuit Court decision, which was eventually appealed to the Court of Special Appeals.

After yet ***another*** adjudicatory proceeding concerning the application of the law to site-specific facts adduced during the Board of Appeals proceeding, the Court of Special Appeals ruled that the County had failed to properly apply its mapping criteria to the Property.

Following the Court of Special Appeals' decision and remand, the County Board of Appeals finally granted Wright's requested map amendment, and noted specifically "the property is not within the Critical Area [and thus] it need not comply with, or conform to, either State or County Critical Area . . . criteria." After six years of adversarial adjudicatory proceedings before the County, the Anne Arundel County Board of Appeals, and the Courts of the State of Maryland, all that was left was for the County to submit the map amendment to the Commission for approval.

The scope of the County's requested map amendment before the Commission for approval was extremely narrow – it concerned the remapping of the Wright's ***individual piece of Property***, pursuant to the Court of Special Appeals' decision. In making its decision, the Commission panel accepted argument and testimony offered by the Wright's counsel, and heard from adjoining property owners who opposed the map correction. At no point did the County's request to the Commission concern any item except for the remapping of the Property in order for the County to be in conformance with the Court of Special Appeals decision.

At the eleventh hour, having declined to exercise its statutory right to participate in the prior proceedings before the initial Board of Appeals proceeding, the Circuit Court proceeding, the Court of Special Appeals proceeding, or the second Board of Appeals decision following remand, the Commission decided to send the requested map amendment back to the County for a remapping of the entire area, significantly

broadening the issues from the site-specific remapping of a single property that had been the subject of the entire proceeding. It is upon this decision that the Commission attempts to bootstrap its argument that the proceeding is "quasi-legislative" instead of "quasi-judicial." The Court should not sanction the Commission's attempt to impermissibly broaden the scope of an adjudicatory hearing in order to evade the right of judicial review of its decision and to further damage Wright by delay and obfuscation.

To the Extent that Rule7-401 is Not Applicable, Wright Should be Permitted Judicial Review Under Rule 7-201

The Commission has moved to dismiss review under Rule 7-201 *et seq.* because there is no statutory right of review of Commission decisions. Lack of statutory right of review is not grounds for dismissal, however. Maryland courts have settled that whether or not an appeal is expressly authorized by statute, an administrative agency's actions are subject to court challenge. *Gianforte v. Board of License Com'rs for Balt. City* , 58 A.2s 902, 190 Md. 492. In the *Bucktail, LLC v. County Council of Talbot County*, Petitioner Bucktail had filed a Petition for Judicial review of a Board of Appeals decision pursuant to Rule 7-201 *et seq.*, despite the lack of statutory authorization for judicial review in the Critical Area Protection Program. The County moved to dismiss "contending that there is no statute making the Council's action judicially reviewable." *Bucktail, LLC v. Cty. Council of Talbot Cty*, 723 A.2d 440, 445, 352 Md. 530, 541 (1999). In denying the County's Motion to Dismiss, the Court recognized that such an action invoked the Court's common-law mandamus jurisdiction, so that the right of review was conferred by Courts and Judicial Proceedings § 12-301. *See also Gisriel v. Ocean City Board of Supervisors*, 345 Md. 477, 693 A.2d 757 (1997), *cert. denied* 522 U.S. 1053, 118 S.Ct. 702, 139 L. Ed. 645 (1998); *Heaps v. Cobb*, 185 Md. 372, 45 A.2d 73 (1945); *Hecht v.*

Crook, 184 Md. 271, 40 A.2d 673. Wright respectfully request that to the extent the Court refuses to recognize Wright's right to administrative mandamus pursuant to Rule 7-401 *et seq*, that the Court treat the remainder of the action under its common law or judicial mandamus jurisdiction, as set forth in *Bucktail* and its predecessors.

Respectfully submitted,

David M. Plott
Benjamin S. Wechsler
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410.268.0881

REQUEST FOR HEARING

Pursuant to Rule 2-311(f), the Petitioner requests a hearing on its Opposition to Motion to Dismiss to be set at the same time as a hearing on the merits.

David M. Plott, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury of the laws of the State of Maryland, that on this 22 day of November, 2006, a true and correct copy of the foregoing **PETITIONER'S OPPOSITION TO MOTION TO DISMISS, AND REQUEST FOR HEARING** was sent via U.S. Mail, first class postage prepaid, addressed to the following:

Marianne Dise, Esq.
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
1804 West Street, Suite 100
Annapolis, Maryland 21401

and

Sarah Iliff, Esq.
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401-7055

David M. Plott, Esq.

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT. GROUP	*	
Plaintiff	*	
v.	*	Case No. C-06-117432
THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et. al.	*	
Defendants	*	

* * * * * * *

DEFENDANT ANNE ARUNDEL COUNTY, MARYLAND'S MOTION TO DISMISS AND RESPONSE TO THE CRITICAL AREA COMMISSION'S MOTION TO DISMISS

The Defendant, Anne Arundel County, Maryland, by undersigned counsel and pursuant to Rules 7-204(b) and 2-322(b) of the Maryland Rules of Civil Procedure, moves this Honorable Court to dismiss the complaint filed against it, and as reasons states:

1. The Complaint fails to state a claim upon which relief may be granted, as is more fully set forth in the accompanying memorandum of law in support of the motion.
2. Unless the Critical Area Commission approves the requested map amendment, Anne Arundel County may not alter its Critical Area map without directly violating the laws of the State of Maryland.

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CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

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Respectfully submitted,

Sarah M. Iliff
Senior Assistant County Attorney
Anne Arundel County Office of Law

2660 Riva Road, 4th Floor
Annapolis, Maryland 21401
(410) 222-7888

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP	*	
	*	
Plaintiff	*	Case No. C-06-117432
v.	*	
THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, *et al.*	*	
Defendants	*	

* * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ANNE ARUNDEL COUNTY'S MOTION TO DISMISS AND RESPONSE TO THE CRITICAL AREA COMMISSION'S MOTION TO DISMISS

The defendant, Anne Arundel County, Maryland, by its undersigned counsel, respectfully submits the following memorandum of law in support of its motion to dismiss and response to the Critical Area Commission's motion to dismiss.

I. BACKGROUND

As allowed by Anne Arundel County law, Wright Investments filed a request to have property that was classified as part of the Chesapeake Bay Critical Area removed from that classification based on an allegation that Anne Arundel County made a mistake in its mapping. §§18-16-302 and 3-1-206, Anne Arundel County Code (2005).[1] Pursuant to County law, the application was set in for hearing before the County Administrative Hearing Officer. When the Hearing Officer dismissed the request, Wright Investments appealed to the County Board of

[1] The Anne Arundel County Code was reorganized in 2005. This case began under prior County law found at Article 28, §11-102.3 and Article 3, §2-106, Anne Arundel County Code (1985).

Appeals. Both the Board of Appeals and, on appeal, the Circuit Court denied the request to remove the property from the Critical Area. An appeal was taken to the Court of Special Appeals. In an unreported opinion, the Court of Special Appeals held that the County had made a mapping mistake and remanded the case to the Board of Appeals with directions to render a decision consistent with the Court's findings. Wright v. Anne Arundel Co., No. 02629, Sept. Term 2002 (August 31, 2004).

On September 21, 2005, the County Board of Appeals revised its prior order and granted Wright's request to remove 2.5 acres of land from the Chesapeake Bay Critical Area. Consistent with that decision, Anne Arundel County prepared a new critical area map showing the 2.5 acres as outside the Chesapeake Bay Critical Area. State law requires all map changes to be transmitted to the Critical Area Commission for final approval based on consistency with the critical area mapping criteria. Md. Nat. Res. Code Ann., §8-1809(h)-(l) (2006 suppl.) On June 8, 2006, Anne Arundel County transmitted a map showing the proposed revision to the Chesapeake Bay Critical Area Commission.

After reviewing the proposed map change as a "program amendment," the Critical Area Commission notified Anne Arundel County on September 20, 2006 that the Commission would not accept the piecemeal revision and directed the County to do a comprehensive remapping of adjacent areas. Comprehensive remapping requires legislative approval by the Anne Arundel County Council and would impact properties other than the Wright property. Anne Arundel County has taken all actions required by County law related to a piecemeal zoning change and may not make the requested map change without State approval.

II. STANDARD OF REVIEW FOR MOTION TO DISMISS

Maryland Rule 2-322 provides that the defense of failure to state a claim upon which relief can be granted may be raised by a preliminary motion to dismiss. In order to withstand a motion to dismiss for legal insufficiency, the complaint must allege facts that, if proven, would entitle a plaintiff to relief. Dick v. Mercantile-Safe Deposit & Trust Co., 63 Md. App. 270, 492 A.2d 674 (1985). Where the facts and allegations, even if proven, would nonetheless fail to afford the plaintiff relief, dismissal is proper. Board of Educ. v. Browning, 333 Md. 281, 286, 635 A.2d 373 (1994); Faya v. Almaraz, 329 Md. 435, 443, 620 A.2d 327 (1993). See also Manikhi v. Mass Transit Admin., 360 Md. 333, 342-45, 758 A. 2d 95 (2000); P.V. Niemeyer & L.M. Schuett, Maryland Rules Commentary 190-192 (2d ed. 1992).

III. UNDISPUTED FACTS

The following facts are undisputed and reveal that Anne Arundel County has performed all legally mandated actions and should therefore be dismissed as a defendant in this action.

1. Anne Arundel County has fully complied with the directives of the Court of Special Appeals and the County Board of Appeals. The County prepared a map removing the affected 2.5 acres from the Chesapeake Bay Critical Area and submitted the map change to the Chesapeake Bay Critical Area Commission for approval of a program refinement. The Commission Chairman determined that the proposed change constituted a "program amendment." §8-1809(n), Md. Nat. Res. Code Ann. (2006 suppl.) State law permits zoning map amendments only if a finding of mistake is made; that finding was made by both the Board of Appeals and the Court of Special Appeals. See §8-1809(h)(2), Md. Nat. Res. Code Ann (2006 suppl.).

2. State law dictates that County critical area maps may not be altered without Commission approval. §8-1809, Md. Nat. Res. Code Ann. The State Critical Area Commission refused to approve the requested map change and directed the County to pursue comprehensive remapping pursuant to legislative action by the County Council.

3. Anne Arundel County has taken all nonlegislative actions required by State and County law and has not failed to fulfill any ministerial function required by law. Although County law allows a piecemeal zoning code amendment based on a court determination of mistake, the County may not alter its Critical Area maps without Critical Area Commission approval.

VI. ARGUMENT/LAW

A. THE COUNTY IS NOT A PROPER PARTY TO THIS ACTION.

Anne Arundel County has taken all steps required by County and State law to remap this property. The Critical Area Commission has refused to approve this piecemeal rezoning without County Council approval of comprehensive mapping. While the County does not object to the Commission's directive it also does not object to remapping the single property as required by the Court of Special Appeals and the County Board of Appeals. Either way the County has not refused to perform a required ministerial duty.

B. MANDAMUS CANNOT ISSUE BECAUSE PLAINTIFF HAS NOT SET FORTH FACTS DEMONSTRATING AN ENTITLEMENT TO MANDAMUS.

An action for writ of mandamus is one maintained at law but it is administered with equitable principles. Rahman v. Oncology Associates, 198 F.3d 502 (4th Cir. 1999). It is a "wildcard" remedy that is only to be granted in extraordinary circumstances and only where the petitioner demonstrates that there are no other adequate means to attain the desired relief. Id., City of Seat Pleasant v. Jones, 364 Md. 663, 774 A.2d 1167 (2001). Homes Oil, Inc. v. Maryland Dept. of Environment, 135 Md.App. 442, 762 A.2d 1012 (2000). A writ of mandamus seeks to compel a person or official to perform an act and may only issue if the party seeking the writ demonstrates that 1) there is a clear and indisputable right to the relief sought, 2) the official action sought to be compelled is a ministerial one, not a discretionary one, and 3) there are no other adequate remedies or means by which to obtain the relief sought. Rahman, supra., City of Seat Pleasant v. Jones, supra. If there is any other adequate remedy, mandamus cannot lie. Goodwich v. Nolan, 343 Md. 130, 680 A.2d 1040 (1996).

Plaintiffs' complaint does not allege facts demonstrating an entitlement to mandamus as a remedy against the County. The complaint does not identify an official against whom the petition is directed, nor does it allege ministerial actions that the County should take. The County has, in fact, performed all ministerial actions required by law and piecemeal change of the critical area maps is not possible without State approval.

C. IF THE COMMISSION IS DISMISSED AS A PARTY, THE COUNTY CAN ONLY BE COMPELLED TO ACT IN VIOLATION OF STATE LAW.

The complaint fails to identify an action that the County is legally required to take if the Commission is dismissed. The County has taken all appropriate steps to remap the property and may do no more absent Commission approval. Unless the Commission is compelled to approve the remapping, the County has no alternative except to pursue the proposed legislative remedy.

V. CONCLUSION

For the reasons stated herein the defendant, Anne Arundel County, respectfully requests that this Honorable Court dismiss the complaint filed against it.

Respectfully Submitted,

Sarah M. Iliff
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401
(410) 222-7888

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of November, 2006, a copy of the foregoing motion to dismiss and response to motion to dismiss and memorandum of law in support thereof was mailed first class with postage prepaid to:

Marianne Dise, Esq.
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street, Suite 100
Annapolis, Maryland 21401
Attorney for Defendant Critical Area Commission

David Plott, Esq.
Benjamin Wechsler, Esq.
Linowes and Blocher, LLP
145 Main Street
Annapolis, Maryland 21401
Attorneys for Plaintiff Wright Investments

Sarah M. Iliff
Senior Assistant County Attorney

PETITION OF:	*	IN THE
WRIGHT INVESTMENT GROUP	*	CIRCUIT COURT
	*	FOR
FOR JUDICIAL REVIEW OF THE DECISION OF: THE COUNTY BOARD OF APPEALS OF ANNE ARUNDEL COUNTY	*	ANNE ARUNDEL COUNTY
IN THE CASE OF AN APPEAL FROM AN ADMINISTRATIVE DECISION OF THE ADMINISTRATIVE HEARING OFFICER CASE NO. BA 48-01C	*	CASE NO. C-06-117432

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

RESPONSE TO PETITION

Pursuant to Maryland Rules 7-204 and 7-402, Anne Arundel County, through its attorneys, Linda M. Schuett, County Attorney, and Sarah M. Iliff, Senior Assistant County Attorney, responds to the Petition and states that Anne Arundel County intends to participate as a Respondent in the above action for judicial review.

LINDA M. SCHUETT
County Attorney

Sarah M. Iliff
Senior Assistant County Attorney
Office of Law
Heritage Office Complex
2660 Riva Road, 4th Floor
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(410) 222-7888

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, That on this 16th day of November, 2006, a copy of the foregoing Response to Petition was mailed, postage prepaid, to **David M. Plott and Benjamin S. Wechsler,** Linowes & Blocher, LLP, 145 Main Street, Annapolis, MD 21401; and **Marianne D. Mason,** Assistant Attorney General, Attorney General's Office, Department of Natural Resources, 580 Taylor Avenue, C-4, Annapolis, MD 21401.

Sarah M. Iliff
Senior Assistant County Attorney

Robert L. Ehrlich, Jr.
Governor

Michael S. Steele
Lt. Governor

Martin G. Madden
Chairman

Ren Serey
Executive Director

STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS
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November 6, 2006

HAND DELIVERED

Clerk of the Court
Circuit Court for Anne Arundel County
Courthouse
P.O. Box 71
Annapolis, Maryland 21404

Re: Petition of Wright Investment v. Critical Area Commission et al.
Case No _____.

Dear Clerk:

Enclosed please find for filing in the above-referenced case the Defendant Critical Area Commission's Motion to Dismiss, Memorandum In Support Of Motion To Dismiss, and proposed Order. Thank you very much for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosures

cc: David M. Plott, Esq.

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDELCOUNTY

PETITION OF
WRIGHT INVESTMENT GROUP

Plaintiff, *

v. * **Case No.**

THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al., *

Defendants. *

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

MOTION TO DISMISS

Defendant Critical Area Commission For The Chesapeake And Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and Marianne E. Dise, Assistant Attorney General, moves pursuant to Maryland Rules 2-322(a)(1) and 2-322(b) to dismiss the Petition For Administrative Mandamus, or in the Alternative, For Judicial Review (the "Petition"), and states for cause:

1. The Critical Area Commission is a commission within the Maryland Department of Natural Resources ("DNR"). DNR is a principal department of State Government, whereas the Critical Area Commission is not. As such, and for reasons more fully set forth in the accompanying Memorandum In Support Of Motion To Dismiss, the Critical Area Commission lacks the legal capacity to be sued.

2. The Critical Area statute does not provide for judicial review of Commission decisions,

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and accordingly, for the reasons set forth in the accompanying Memorandum in Support of Motion to Dismiss, such review is not authorized under Rule 7-201.

3. The action of the Critical Area Commission on the proposed amendment to Anne Arundel County's local Critical Area program was a quasi-legislative action, and, as such, for the reasons set forth in the accompanying Memorandum in Support of Motion to Dismiss, is not subject to Administrative Mandamus under Rule 7-401.

WHEREFORE, defendant Critical Area Commission requests that the Court dismiss the Petition for lack of in personam jurisdiction, and for failure to state a claim on which relief may be granted.

Respectfully Submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Marianne E. Dise
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
Attorneys for Defendant Critical Area Commission

Dated: November 6, 2006

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP	*	
Plaintiff,	*	
v.	*	**Case No.**
CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
	*	
Defendants	*	

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

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and Marianne E. Dise, Assistant Attorney General, files this Memorandum In Support of Motion to Dismiss.

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ARGUMENT

1. The Critical Area Commission Lacks Legal Capacity to be Sued.

Plaintiffs have named the Critical Area Commission as the only State defendant in this action, and seek Administrative Mandamus pursuant to Rule 7-401 *et seq*, or Judicial Review pursuant to Rule 7-201 *et seq*. The Critical Area Commission was established by the General Assembly as a commission within and as part of the Maryland Department of Natural Resources ("DNR"). *See* Md. Code Ann., Nat Res. II § 8-1803 ("[t]here is a Critical Area Commission for the Chesapeake and Atlantic Coastal Bays in the Department [of Natural Resources]"). DNR, which

by statute includes "units, programs, boards, *commissions*, and advisory boards and commissions referenced in [the Natural Resources Article]," *id.* § 1-102(a) (emphasis added), is "established as a principal department of State Government." *Id.* § 1-101(a).

As a commission within DNR, the Critical Area Commission has no legal identity separate from that of DNR and the State of Maryland. As such, the Critical Area Commission, itself, lacks the capacity to be sued. *Compare Champ v. Baltimore County*, 1994 WL 395735, 2 (D.Md 1994) (in Maryland, county police departments are agencies of their respective municipality or county, and, as such, have no legal identity separate and distinct from the respective locality, and thus lack the requisite capacity to be sued). *See also Ashburn v. Anne Arundel County*, 306 Md. 617, 620 (1986) (trial court dismissed the county police department because it found that police department was not a separate legal entity from the county itself). Indeed, there is no provision in the Critical Area Law, Md. Code Ann., Nat. Res. II § 8-1801 *et seq.*, establishing that the Critical Area Commission has the legal capacity to be sued.

2. The Critical Area Statute Does Not Provide For Judicial Review of Commission Decisions Under Rule 7-201et seq.

Petitioner seeks judicial review in the form of an administrative appeal under Maryland Rule 7-201 *et seq.* of the Critical Area Commission's decision to return with changes a proposed amendment to Anne Arundel County's local Critical Area Program. Pursuant to Maryland Rule 7-201(a)(1), judicial review of an action of an administrative agency is permitted only where such review is authorized by statute. *See Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 541 (1999). Petitioner does not allege that the Critical Area Law authorizes judicial review of the Commission's action on a proposed local Critical Area program amendment. Indeed the Critical

Area Law does not authorize such review. Moreover, the Maryland Administrative Procedures Act ("APA"), Md. Code Ann., State Gov't § 10-201 *et seq.*, does not entitle Petitioner to judicial review under Rule 7-201 *et seq.* The APA only provides for judicial review of a final decision in a "contested case." Md. Code Ann., State Gov't § 10-222(a). If a proceeding before an administrative agency is not a contested case proceeding, as defined by Md. Code Ann., State Gov't § 10-201(d), any agency action taken as a result of the proceeding is not subject to judicial review on administrative appeal.

The Critical Area Commission's proceedings are not contested case proceedings. *See North v. Kent Island Limited Partnership*, 106 Md.App. 92, 103 (1995) (for a proceeding to meet the definition of "contested case," the agency must provide trial type procedures). Indeed, the Court of Special Appeal in *North* determined that nothing in the Critical Area Commission's program or program amendment review procedure, as outlined in Md. Code Ann., Nat. Res. II § 8-1809, requires a contested case hearing. *Id.* The Court thus specifically held that "[t]he role of the Commission is quasi-legislative and does not encompass a contested case hearing." *Id.* Since the Commission's proceedings that reviewed, and ultimately returned to Anne Arundel County, the proposed Program amendment in this case were not contested case proceedings, Petitioner does not have a right of judicial review under Maryland Rule 7-201 *et seq.*

3. The Critical Area Commission's Action On the Proposed Anne Arundel County Program Amendment for the Wright Investment Property Was Not A Contested Case Action And Therefore Is Not Subject To Administrative Mandamus Under Rule 7-401 et seq.

Petitioners seek Administrative Mandamus under Rule 7-401 et seq. This Rule governs actions for judicial review of a "*quasi-judicial order or action* of an administrative agency where

review is not expressly authorized by law." (Emphasis added) As explained above, the action for which Petitioner seeks Administrative Mandamus is not a quasi-judicial action; rather, the action of the Critical Area Commission was a legislative act of considering a request from Anne Arundel County to amend its local Critical Area Program. Under the Critical Area Law, a locality may not amend its program without first receiving approval of the amendment from the Critical Area Commission. Md. Code Ann., Nat. Res. II § 8-1809(i). Once the Critical Area Commission accepts for review a locality's proposed program amendment, a Commission panel must hold a public hearing on the proposed amendment and the full Commission must act upon the proposed amendment within ninety days of accepting the proposal for review. *Id.* § 8-1909(o)(1). Here, the Critical Area Commission accepted Anne Arundel County's proposal to change its Critical Area program regarding the Wright Investment Property but the Commission did not approve it. Rather, the Commission returned the proposed amendment to the County with changes to be made. As set forth in *North v. Kent Island, id.*, the Commission's action on Anne Arundel County's proposed Critical Area program amendment was a quasi-legislative action, and not a quasi-judicial action. Accordingly, the Commission's action is not subject to administrative mandamus under Rule 7-401.

CONCLUSION

For the foregoing reasons and authorities, Defendant's Motion To Dismiss should be granted.

Respectfully Submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL OF MARYLAND

Marianne E. Dise
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
Attorneys for Defendant Critical Area Commission

Dated: November 6, 2006

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	**Case No.**
CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

ORDER

The Court, having considered defendant's Motion To Dismiss and Memorandum In Support Of Motion To Dismiss, together with any response thereto, and having found that defendant Critical Area Commission for the Chesapeake And Atlantic Coastal Bays lack the legal capacity to be sued, and that the Petition fails to state a claim on which relief may be granted, does, this ___ day of _____, 2006,

ORDER that the Motion to Dismiss is hereby GRANTED and that the Petition is hereby dismissed.

_____
Judge, Circuit Court of Maryland
for Anne Arundel County

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2006, a copy of the foregoing Motion To Dismiss, together with the accompanying Memorandum in Support of Motion to Dismiss, and proposed Order, was sent via first class mail, postage prepaid, to David M. Plott, Linowes and Blocher, LLP, 145 Main Street Annapolis, Maryland 21401, attorneys for Petitioner.

Marianne E. Dise

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

RECEIVED
OCT 10 2006
DNR - LEGAL DIVISION

FILED
2006 OCT -6 P 12: 12

October 6, 2006

Benjamin S. Wechsler, Esq.
410.268.0881
bwechsler@linowes-law.com

The Office of the Clerk of Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Hand-Delivered

Re: Petition for Judicial Administrative Mandamus and Judicial Review
Petition of Wright Investment Group for Administrative Mandamus and Judicial Review of the Critical Area Commission decision dated September 6, 2006

Dear Clerk,

Please file the enclosed Petition for Administrative Mandamus or, in the alternative, Judicial Review. Our check in the amount of $115.00 is enclosed to cover the filing fee and appearance fee.

Very truly yours,
LINOWES AND BLOCHER, LLP

Benjamin S. Wechsler

/cdd

Enclosures
cc: Marianne D. Mason, Esq.
Sally Iliff, Esq.

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

FOR ADMINISTRATIVE MANDAMUS

Directed to:

CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street
Annapolis, Maryland 21401

And

ANNE ARUNDEL COUNTY
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

IN THE CASE OF AN APPEAL OF
A CRITICAL AREA RECLASSIFICATION
CASE NO.: 2000-0468-C, BA-48-01-C

CIVIL ACTION NO.

C-06-117432

FILED
2006 OCT -6 P 12: 12

RECEIVED
NOV 15 2006
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

PETITION FOR ADMINISTRATIVE MANDAMUS, OR IN THE ALTERNATIVE FOR JUDICIAL REVIEW

Petitioner Wright Investment Group, by and through its attorneys, David M. Plott and Linowes and Blocher LLP respectfully petitions the Court for Administrative Mandamus pursuant to Rule 7-401 *et seq*, or in the alternative for Judicial Review pursuant to Rule 7-201 *et seq*. Petitioner seeks either (1) a writ compelling approval by the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") and Anne Arundel County of certain revisions to Critical Area map revisions prepared by Anne Arundel County, or alternatively (2) judicial review of the Critical Area Commission's decision to not approve Anne Arundel County's request for Program Amendment. Petitioner was a party to the Critical Area Commission

proceeding on requested map amendment, and the Anne Arundel County proceedings and subsequent appeal resulting in the Court of Special Appeals order requiring the County to amend the Critical Area map. Further, Petitioner has suffered direct pecuniary harm by the Critical Area Commission's refusal to approve the subject Critical Area map revisions. Finally, the Petitioner is the owner of the property that is the subject of this appeal and presented testimony, evidence, and argument to the Critical Area Commission in support of the requested Critical Area map revision.

Petitioner requests, pursuant to Rules 7-402(d) and 7-206, that the Critical Area Commission and Anne Arundel County be required to transmit a certified copy of the record of its proceedings within 60 days. A hearing is requested by the Petitioner pursuant to Rule 7-402(f).

Respectfully submitted,

David M. Plott
Benjamin S. Wechsler
Linowes and Blocher, LLP
145 Main Street
Annapolis, Maryland 21401
410-268-0881

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TRUE COPY,
TEST: Robert P. Duckworth, Clerk
By:_____ Deputy

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

FOR ADMINISTRATIVE MANDAMUS

Directed to:

CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street
Annapolis, Maryland 21401

And

ANNE ARUNDEL COUNTY
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

IN THE CASE OF AN APPEAL OF
A CRITICAL AREA RECLASSIFICATION
CASE NO.: 2000-0468-C, BA-48-01-C

CIVIL ACTION NO.

FILED
2006 OCT -6 P 12: 12

PETITION FOR ADMINISTRATIVE MANDAMUS, OR IN THE ALTERNATIVE FOR JUDICIAL REVIEW

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Respectfully submitted,

David M. Plott
Benjamin S. Wechsler
Linowes and Blocher, LLP
145 Main Street
Annapolis, Maryland 21401
410-268-0881

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Pleadings
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF

MSA_S_1831_32 (2 of 6)

Pleadings
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF
AN APPEAL OF A CRITICAL AREA
RECLASSIFICATION, CASE NO.: 20000-0468-C,
BA-48-01-C, Civil Action No. _____

IN THE CIRCUIT COURT OF MARYLAND

FOR ANNE ARUNDEL COUNTY

RECEIVED
AUG 24 2007
DNR - LEGAL DIVISION

WRIGHT INVESTMENT GROUP *
Petitioner
v. *

CRITICAL AREA COMMISSION *
Respondent
and *

CASE NO.: C-06-117432

ANNE ARUNDEL COUNTY *
Respondent **C-06-117695**
*

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

MICHAEL DARAS *
Petitioner
v. *

CASE NO.: C-06-118661

CRITICAL AREA COMMISSION *
Respondent **C-06-118663**
*

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

JWL ASSOCIATES *
Petitioner
and *

WILLIAM & MARY MAGENAU *
Petitioner
v. *

CRITICAL AREA COMMISSION *
Respondent **CASE NO.: C-06-118672**
*

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

JAMES & VICTORIA PARKIN *
Petitioner
v. *

CASE NO.: C-07-121963

CRITICAL AREA COMMISSION *
Respondent
*

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

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ORDER

Upon consideration of the written and oral arguments made by counsel and for the reasons stated in the accompanying memorandum opinion, it is on this 17th day of August 2007, by the Circuit Court for Anne Arundel County,

ORDERED that Petitioners' Motion for Administrative Mandamus is **DENIED** and it is further,

ORDERED that Petitioners' Petition for Writ of Mandamus is **DENIED** and it is further,

ORDERED that Petitioners' Motion for Judicial Review is **DENIED**.

The Honorable Joseph P. Manck

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

RECEIVED
AUG 24 2007
DNR - LEGAL DIVISION

WRIGHT INVESTMENT GROUP *
Petitioner
v. *

CRITICAL AREA COMMISSION *
Respondent
and *

CASE NO.: C-06-117432

ANNE ARUNDEL COUNTY *
Respondent

C-06-117695

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

MICHAEL DARAS *
Petitioner
v. *

CASE NO.: C-06-118661

CRITICAL AREA COMMISSION *
Respondent

C-06-118663

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

JWL ASSOCIATES *
Petitioner
and *

WILLIAM & MARY MAGENAU *
Petitioner
v. *

CRITICAL AREA COMMISSION *
Respondent

CASE NO.: C-06-118672

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

JAMES & VICTORIA PARKIN *
Petitioner
v. *

CASE NO.: C-07-121963

CRITICAL AREA COMMISSION *
Respondent

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

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MEMORANDUM OPINION

This matter was before the Court for a Complex Motions Hearing on April 30, 2007. The Court heard the oral arguments of counsel and held the matter *sub curia*. After the hearing, the Court wrote to the various parties' counsel seeking memoranda on whether the Critical Area Commission's decision was an appealable final decision. The Court issues this opinion upon consideration of the submitted legal memoranda, the written briefs and the oral arguments of counsel.

BACKGROUND

These five cases were heard together because each involves an appeal to this Court from a decision by the Critical Area Commission for the Chesapeake and Atlantic Bays (CAC) to remand back to Anne Arundel County Board of Appeals (BOA) applications for a Critical Area Program map amendment or refinement based on mistake. In each decision, CAC remanded the application back to BOA requesting more information concerning the standards used to draw up the county's original Critical Area Program map.

Each petitioner owns lands currently within the Chesapeake Bay Critical Area overlay designated as a Resource Conservation Area (RCA). Lands designated as RCA have the strictest development limitations in order to preserve the natural state of the lands. In all five cases, the Anne Arundel County Board of Appeals (BOA) agreed with the respective Petitioners that Petitioner's lands were included within the RCA due to mistake. Thus, BOA approved either an amendment or a refinement to the county's Critical Area Program map and excluded the subject property from the RCA designation.[1]

[1] Applications submitted by Wright Investment Group, Michael Daras and JWL Associates were reviewed as amendments to the county's Critical Area Program map while the Parkin's application was reviewed as a refinement. Petitioner Wright Investment Group sought to remove its lands from being

After obtaining BOA's approval for either an amendment or a refinement to the county's Critical Area Program map, each petitioner sought approval from CAC to have the amendments or refinement enacted.[2] After reviewing each application for amendment or refinement approved by BOA, CAC remanded each application back to BOA with a request for more information concerning the standards used to draw up the county's original Critical Area Program map. Each Petitioner filed with this Court a Petition for Administrative Mandamus[3] seeking judicial review of CAC's decision and/or a common law writ of mandamus[4] to compel CAC to accept the applications for amendments or refinement. Alternatively, each Petitioner requested a Petition for Judicial Review of CAC's decision.[5]

ISSUES

1. Whether CAC's decision to remand each application back to the county with a request for more information concerning the standards used to draw up the county's original Critical Area Program map was an *ultra vires* act.

2. Whether mandamus is proper to judicially review CAC's decision or whether mandamus is proper to compel CAC to accept Petitioners' application for amendment or refinement to the Critical Area Program map.

---

included in the Critical Area Program due to a mistake in Anne Arundel County's original Critical Area Program map. Petitioners Daras, JWL Associates and Parkin sought to reclassify their lands from the RCA designation to a LDA designation within the Critical Area Program due to mistakes in the county's original Critical Area Program map.

[2] ANNOTATED CODE OF MARYLAND, NATURAL RESOURCES ARTICLE §8-1809(i) declares "[a] program may not be amended except with the approval of the (Critical Area) Commission."

[3] Pursuant to Md. Rule 4-401.

[4] Pursuant to Md. Rule 15-701.

[5] Pursuant to Md. Rule 4-201.

DISCUSSION

CAC's Decisions

Quasi-Judicial v. Quasi-Legislative Decision

CAC argues this Court does not have jurisdiction over these cases because the Petitioners base their claim on Md. Rule 7-201 – Petition for Judicial Review – and Md. Rule 7-401 – Petition for Administrative Mandamus. Judicial review under Rules 7-201 and 7-401 are specifically authorized for decisions of "contested case" proceedings conducted under the MARYLAND ADMINISTRATIVE PROCEDURE ACT (MAPA). CAC argues its review of local critical area program amendments, including map amendments, do not constitute contested case proceedings for MAPA.[6] In *North v. Kent Island Limited Partnership*, the Court of Special Appeals held that CAC acts in a quasi-legislative capacity when it reviews critical area map amendments because "[t]here is nothing in §8-1809 that requires a contested case hearing." 106 Md. App. 92, 103 (1995). The court reasoned:

> [t]he Commission itself does not act as a zoning body. The power of the Commission is to adopt regulations and criteria as well as conduct hearings in connection with 'policies, proposed programs, and proposed regulations or amendments to regulations.' §8-1806. The role of the Commission is quasi-legislative and does not encompass a contested case hearing. *Id.*

The court found, CAC is not authorized to make a factual finding as to whether there is a mistake. *Id.* at 106. Rather, CAC's duty is to determine whether the local authority's finding of mistake and the proposed rezoning meets the State's established criteria. *Id.* at 107. Thus, the court concluded CAC's review of the amendments were not contested case proceedings. *Id.*

The Court of Appeals in *Montgomery County v. Woodward & Lothrop, Inc.*, described the fine line between quasi-legislative and quasi-judicial action in zoning matters. 280 Md. 686,

[6] For a review of the two tiered program amendment review process imposed by ANN. CODE OF MD. NAT. RES. ART. § 8-1801 et seq. *see infra* this opinion's Mandamus Under Common Law section.

712 (1977). In *Woodward & Lothrop*, the Court reasoned that comprehensive rezoning involving a local map amendment proceeding was an exercise of the County's legislative authority while piecemeal rezoning involving a single piece of property to determine whether there had been a mistake in the original zoning involved resolving factual questions through trial-type procedures that are adversarial in nature and are quasi-judicial. In *Bucktail, LLC v. County Council of Talbot County*, the Court of Appeals recognized the administrative process undertaken by a county council in reviewing a proposed critical area map amendment for mistake is a quasi-judicial function because the proceedings at the local level include "adjudicative or administrative fact-finding." 352 Md. 530, 548 (1999). In *Bucktail,* the Court ruled that the determination a proceeding was quasi-judicial or quasi-legislative was based not on whether a zoning decision adversely affects an individual piece of property but rather on whether the decision itself is made on individual or general grounds. *Id.* at 545.

CAC argues its procedures for reviewing a proposed map amendment is akin to the process taken by an administrative agency when it proposes and adopts regulations, a quasi-legislative function. CAC's actions were limited to receiving the request from the local jurisdiction, holding a public hearing, reviewing the request for compliance with the critical area standards and criteria, and acting upon the request within 90 days. CAC argues it did not hold any adversarial or trial like proceeding before it decided to remand the cases back to the county for additional information.

Petitioners contend CAC's decision was quasi-judicial because of the adversarial process conducted by BOA. Petitioners argue CAC's motion should be denied because CAC's decision is merely the next step of the quasi-judicial proceeding to amend the mistake in the County's

critical area map. Petitioners point out, each time, the Board petitioned CAC to amend the County's map with respect to an individual property.

Two distinct processes occurred when Petitioners sought to change the zoning of their respective properties. The first level of review conducted thru the county via the county's administrative hearing officer and then the appeal to BOA. These hearings were adversarial proceedings. As described in *Woodward & Lothrop* and *Bucktail*, at these initial hearings the parties presented evidence and made arguments to resolve factual questions concerning a single piece of property. BOA rendered its fact finding decision on specific individual grounds based on the evidence presented as to whether there was a mapping mistake as applied to a particular Petitioner's land. However, the subsequent review before CAC was not trial like. Nor was CAC to base its decision to approve or disapprove the proposed program amendment on whether CAC agreed with BOA's factual findings. CAC's decision needed to be based on whether the proposed amendment satisfied the State's established criteria. In the cases *sub judice*, it is erroneous to conclude CAC's decision was quasi-judicial simply because each proposed amendment solely dealt with zoning modifications to a single piece of property owner. However, as *Bucktail* instructs, the critical factor is whether CAC's decision is based on individual grounds as opposed to general grounds. 352 Md. at 545.

CAC's decisions to remand to BOA for more information evidences CAC's effort to make a decision on general grounds instead of individual grounds. CAC agreed with BOA on the existence of mistake in the county's original Critical Area map.[7] CAC requested the county provide specific explanation of "all of the mapping rules and procedures included on pages 12-16 of the Anne Arundel Program document, dated August 1988 and how they were applied, and a

[7] CAC's decision in Parkin's case states "[s]pecifically, the Commission relied on its December 2006 determination that there is a clear conflict, mistake, or omission in Anne Arundel County's Critical Area maps."

comprehensive analysis of how the mapping rules were applied consistently and systematically on all Critical Area maps throughout the County." (Decision letters to Daras and JWL Associates applications) There was neither an approval nor a denial of the proposed amendments in all four cases because CAC remanded the proposals back to the county.

CAC's action to remand the proposals back to the county with specific instructions to provide more information is a variation of the option to return the proposed program amendment to the local jurisdiction with a list of the changes to be made as provided in *Nat. Res. Art. §8-1809(o)(3)(iv).* BOA submitted proposed program amendments to CAC with findings of mistake to the original Critical Area map but each program amendment only modified the zoning classification of a single property owner's lands. As a result, without knowing how the mapping mistake affected other similarly situated lands, CAC could not determine whether BOA's finding of mistake impacted more lands. Consequently, CAC was not able to determine whether the proposed program amendments met the State's established criteria. Since CAC could not make a decision without more information to make a comparison between the standards used to create the original Critical Area map and the proposed amendment, CAC remanded each proposal back to the county with a request for specific information on the creation of the original Critical Area map. Therefore, CAC's remand to the county was a decision informing the county what specifically the county needed to change on its proposal to obtain a decision of approval or denial.

Furthermore, because CAC did not know what it did not know, CAC could not have remanded the proposals with specific instructions to modify the proposals to bring the proposals into compliance with the State's established criteria. Petitioners' contention that CAC must have provided specific remedial measures to the proposed program amendments in order to comply

with *Nat. Res. Art. §8-1809(o)(3)(iv)* is too restrictive given the fact CAC had to make decisions with incomplete information as to the magnitude of the mapping mistake's effect during the initial creation of the county's Critical Area Program map. Unlike *Kent Island Limited Partnership,* CAC's decided in the cases *sub judice* not to decide whether there were mistakes in the original zoning classification as to particular lots as revealed in each proposal. CAC decided there were mistakes to the county's Critical Area Program map. However, due to the limited amount of information provided by BOA in each proposed program amendment, CAC decided to remand the proposals by asking for more information in accordance with *Nat. Res. Art. §8-1809(o)(3)(iv)* in order to be able to decide whether the proposed program amendments me the State's established criteria. Thus, CAC's decisions were not *ultra vires.*

Mandamus

Administrative Mandamus under Md. Rule 7-400 et seq.

A writ of mandamus under Md. Rule 7-400 et seq. is appropriate for review of a quasi-judicial order or action of an administrative agency only when no other right of appeal is provided by state or local law. *Heaps v. Cobb*, 185 Md. 372 (1945). *Nat. Res. Art. §8-1801* et seq. does not provide for a right of appeal from CAC's decision to approve or deny proposed program amendments or refinements. There are no other statutory provisions authorizing an appeal from CAC's decision. However, for the reasons stated in the previous section, the Court concludes administrative mandamus is not appropriate because CAC's decision was not a quasi-judicial order.

Furthermore, as a general rule , administrative finality is required for administrative mandamus to issue. *Md. Comm'n on Human Rel. v. B. G. & E.,* 296 Md. 46 (1983). Here, CAC's decisions on Petitioners' amendments are not final decisions because CAC remanded the

proposed program amendments back to the county to be able to make a decision either to approve or deny the amendments once CAC is provided with the information it requested. The Court of Appeals found exception to this general rule in *Holiday Spas v. Montgomery County*, where the county's cease and desist order inflicted sufficient irreparable injury upon the operator to be deemed final for purposes of judicial review. 315 Md. 390 (1989). The cases *sub judice* are distinguishable from *Holiday Spas* because CAC's decision does not change the status quo of Petitioners' situations and does not inflict irreparable harm on Petitioners. Petitioners could not have developed their lands due to the RCA designation on their lands and CAC's decision does not impose any additional burdens or harms on the Petitioners. Therefore, the Court concludes Petitioners are not entitled to an administrative mandamus.

Mandamus under Common Law

The writ of mandamus is generally used to compel inferior tribunals, public officials or administrative agencies to perform their function, or perform some particular imperative duty imposed upon them to which the applicant for the writ has a clear legal right. *Rodgers v. Washington Sub. San. Comm'n*, 32 Md. App. 644, cert. denied, 278 Md. 738 (1976). Here, Petitioners desire this Court to issue a writ of mandamus requiring CAC to approve the Critical Area Program map amendments and refinement as determined by BOA. Mandamus is improper in the cases *sub judice* because Petitioners do not have a clear legal right to have CAC approve their applications for amendments or refinement to the Critical Area Program.

The Chesapeake Bay Critical Area Protection Program is codified in *Md. Code Ann. Nat. Res. Art. §8-1801* et seq. This legislation was passed to protect the Chesapeake Bay and its tributaries by fostering more sensitive development activities for certain shoreline areas to minimize damage to water quality and natural habitats. *Nat. Res. Art. §8-1801(b)(1)*. The

implementation of the protection program is conducted through the cooperation between State and affected local governments, with the local governments establishing and implementing their programs in a consistent and uniform manner to State criteria and oversight. *Nat. Res. Art. §8-1801(b)(2). Nat. Res. Art. §8-1803* creates CAC within the Maryland Department of Natural Resources. Under this cooperative statutory scheme, the local government proposes to CAC amendments and refinements to its adopted program as often as necessary but no more than four times per calendar year. *Nat. Res. Art. §8-1809(h)(1).* A zoning map amendment may be granted by the local authority only on proof of a mistake in the existing zoning. *Nat. Res. Art. §8-1809(h)(2)(ii). Nat. Res. Art. §8-1809(j)* requires CAC to approve program amendments that meet standards set forth in *§8-1808(b)(1)-(3)* and the criteria adopted by CAC. Thus, CAC is required by statute, as part of its oversight role, to conduct a review of the local authority's proposed program amendment to insure the proposal is consistent with the State's established criteria.

The applicant of a writ of mandamus must show a clear legal right to the act sought by the government official. Here, Petitioners seek CAC to approve the proposed Critical Area Program map. However, the statutory scheme established in *Nat. Res. Art. §8-1809* does not require CAC to simply approve the amendment or refinement proposed by BOA.[8] Rather, the

[8] Wright Investment Group's litigation in case C-02-79983 was limited to the validity of BOA's finding that there was no mistake with the original Critical Area Program map's inclusion of Wright's property as part of the Critical Area and its designation as a RCA. In case C-02-79983, Wright Investment Group appealed BOA's decision to this Court and a proposed amendment was never submitted to CAC because BOA concluded there was no mistake to the Critical Area map. Wright Investment Group argues they have a right to have CAC approve their amendment because the Court of Special Appeals found the inclusion of their two and one half acres of land as part of the Critical Area was a mistake. This Court does not dispute the Court of Special Appeals' conclusion and in accordance with the Court of Special Appeals' order this Court remanded the case back to BOA to make findings in accordance with the Court of Special Appeals' decision. On remand, BOA made findings consistent with the Court of Special Appeals' decision. However, the Court of Special Appeals' decision does not direct CAC to approve the map amendment without conducting its statutorily mandated review. Nor does the decision require CAC

statute requires CAC to conduct a review of proposed amendment or refinement. In each of the cases *sub judice*, CAC performed its duty by reviewing the proposed amendments and refinement and remanded each proposal back to BOA with a request for more information.[9] If the Court were to grant Petitioners the writ of mandamus, the Court would be requiring CAC to abdicate its statutory duty to review the proposed amendments and refinement and in essence simply act as a body to rubber stamp the actions of BOA. The express provisions of *Nat. Res. Art.* §8-1809 prevent Petitioners from having a legal right to have CAC approve their proposed program amendments and therefore, mandamus is inappropriate.

Furthermore, Petitioners are not entitled to a writ of mandamus because a discretionary duty may not be enforced by mandamus. *Devin v. Belt*, 70 Md. 352 (1889). Here, approval of the proposed map amendments and refinement are discretionary acts of CAC because CAC could, upon review of the proposals, decide to approve the proposals, reject the proposals for failure to meet the established criteria, conditionally approve the proposal or remand the proposal with specific remedial instructions. *Nat. Res. Art. §8-1809(o)(3).* CAC is not bound to perform a single act – approve Petitioner's proposed program amendment. These choices of action make the duty imposed upon CAC discretionary and mandamus is not a proper remedy.

Finally, the Court declines to grant a writ of mandamus because mandamus will not lie when there is an adequate remedy at law. *Brown v. Bragunier*, 79 Md. 234 (1894). In the cases

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to approve the map amendment after conducting a review. Thus, Wright Investment Group does not have a clear legal right to have CAC approve its map amendment.

[9] Petitioner Parkin argues the Commission must render a decision via one of four options listed in *Nat. Res. Art. §§8-1809(o) and (p)* within 90 days and the Commission's failure to make its decision in accordance with any of the four options within the 90 days deems the program amendment approved. Therefore, Parkin argues mandamus is appropriate because the Commission is refusing to actually approve a program amendment that was legally deemed approved. Parkin's argument assumes the Commission's decision was *ultra vires*, for the reasons stated in this opinion's section on CAC's Decisions the Court finds CAC's action was within the scope of one of the four statutorily listed options and was not *ultra vires*. *See Supra*.

sub judice, a remedy at law exists because Petitioners have the right to seek judicial review of a final decision CAC and each Petitioner sought judicial review as an alternative remedy. Accordingly, mandamus is improper because Petitioners have an adequate remedy at law.

CONCLUSION

For the reasons stated above Petitioners' Motion for Administrative Mandamus, Request for Writ of Mandamus and Motion for Judicial Review are Denied.

8.17.07

The Honorable Joseph P. Manck

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

FOR ADMINISTRATIVE MANDAMUS

Directed to:

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street
Annapolis, Maryland 21401

And

ANNE ARUNDEL COUNTY
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

IN THE CASE OF AN APPEAL OF
A CRITICAL AREA RECLASSIFICATION
CASE NO.: 2000-0468-C, BA-48-01-C

CIVIL ACTION
NO. C-06-117432

PETITIONER'S SUPPLEMENTARY BRIEF REGARDING FINALITY

Petitioner, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully requests that the Court consider this brief in response to its letter of May 7, 2007.

Questions Presented

1. Whether the Critical Area Commission's ("Commission") decision to remand Petitioner's program amendment back to Anne Arundel County for more information constitutes an appealable final decision.

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Chesapeake & Atlantic Coastal Bays

2. Whether the Petitioner seeks a Court Order that the Commission either approve or deny each amendment/refinement or a Court Order that the Commission approve the County's application for a program amendment.

3. What is the status of Anne Arundel County's update of the Critical Area Map with regard to the Wright Investment matter?

Joinder with Arguments Presented in Other Cases

Wright joins with and incorporates by reference the arguments raised in the supplemental brief(s) filed by the petitioners in Case Nos. C-06-118661 and C-06-118663 (*Daras v. Critical Area Commission*), C-06-118672 (*JWL Associates v. Critical Area Commission*), and C-07-121963 (*Parkin v. Critical Area Commission)* (collectively the "Related Cases").

The Commission's Decision is an Appealable Event.

The Court has asked for additional briefing regarding whether the Commission's decision is an "appealable final decision." As noted by the petitioners in the Related Cases, nothing in Rule 7-401 requires a "final" appealable decision. Rather, the Rule governs "quasi-judicial order or action of an administrative agency." Maryland Rule 7-401(a).

There is little question but that the Commission's decision in the Wright matter is an "order or action of an administrative agency."[1] As noted in opening briefs, the Commission had four options in ruling on the program amendment before it in the Wright case and in the Related Cases. Per Natural Resources Code section 8-1809(o), the Commission could have (a) approved the program amendment, (b) denied the program amendment, (c) returned the amendment with conditions, or (c) returned the amendment

with changes. In the Wright matter, after almost seven years of litigation, the Commission chose the fourth option – to return the matter to Anne Arundel County with a request that the County undertake a comprehensive remapping of headwaters of Whitehall Creek.

Had the Commission chosen either the first option available to it (approval) or second option (denial), presumably there would be no question regarding the immediate reviewability of the matter under the new administrative mandamus rule (provided the matter were quasi-judicial). The Commission's choice of the fourth option -- to return the amendment to the County with changes -- should not be the touchstone of whether its decision is appealable. Indeed, the gravamen of Petitioner's argument is that the Commission was ***required*** to approve the program amendment given the Court of Special Appeals' affirmation that the property in question is not within the Critical Area. Petitioner contends that the Commission impermissibly returned the program amendment to the County in a transparent attempt to convert a quasi-judicial proceeding relating to a single property into a quasi-legislative proceeding subject to consideration by the full Anne Arundel County Council (as opposed to County staff) and a vastly different standard of review. Further, by returning the requested program amendment to the County, the Commission also generated a basis for arguing that its decision was not "final," and thus not subject to judicial review under the Administrative Mandamus provision of the Maryland Rules.

The reviewability of the Commission's decision on a program amendment cannot turn on whether the Commission denies the program amendment outright, or returns the requested amendment to the County with conditions or changes. If the Commission's

[1] The question of whether the decision is "quasi-judicial" or "quasi-legislative" has been briefed at length

return of the amendment with changes is deemed non-reviewable, it would allow the Commission to permanently evade judicial review of its decisions through seriatim non-denials of a program amendment. In order to avoid a process that potentially mires program amendments in an endless loop of non-final Commission actions, the better approach is the one contemplated by Rule 7-401 – requiring only a "decision" by the Commission, but not requiring finality. Such an approach is supported not only by the plain text of the Administrative Mandamus rule, but also a robust body of case law relating to when an administrative decision is subject to judicial review. *See, e.g., United Parcel Service v. People's Counsel*, 336 Md. 569, 583-84, 650 A.2d 226 (1994); *Beth Tfiloh Congr. of Balt. City v. Glyndon Comm. Assoc.*, 152 Md. App. 97, 107, 831 A.2d 93, 98; *Nat'l Inst. Health Fed. Cr. Un. v. Hawk*, 47 Md. App. 189, 195, 422 A.2d 55, 58-59 (1980, *cert denied,* 289 Md. 738 (1981).

Petitioner Asks that the Court Order The Commission to Approve the Previously Submitted Program Amendment.

The Court has asked whether Petitioner is "requesting this court to order the Commission to make a decision approving or denying each application" . . . "or to order the Commission to render a decision to approve" the application. Based on the long history of this matter, and a Court of Special Appeals opinion declaring that the subject property is outside the Critical Area, Petitioner contends that the Commission had only ***one*** choice in this matter – to approve the County's map amendment removing the property from the Critical Area. Allowing the Commission to deny the program amendment would be contrary to this order, and would upset the delicate balance of power between the executive branch and the judicial branch contemplated by the

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previously, and was the subject of oral argument heard by the Court on April 30, 2007.

Maryland Constitution. Petitioner requests that the Court order the Commission to approve the program amendment.

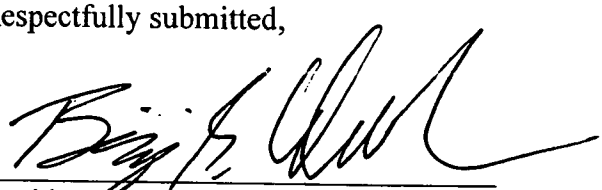
The Status of the County's Remapping Efforts.

The County is in a better position than Petitioner to explain the status of its Countywide mapping efforts and whether it is undertaking a comprehensive remapping. As it pertains to Petitioner's property, the County has undertaken a remapping of the headwaters of Whitehall Creek in response to the Commission's return of the previous map amendment. The map amendment has been approved by the County Council as Bill 22-07, and again is pending before the Commission for approval. As this matter enters its seventh year of litigation, Petitioner has dismal expectations regarding the Commission's prospects for approving this map amendment. If this latest iteration proceeds as has each prior iteration, the Petitioner is likely to be stuck in an endless loop of proceedings unless and until the Court orders the Commission to approve the Program Amendment reflecting the Court of Special Appeals' decision ruling that the Wright property is located outside the Critical Area.

Conclusion

For each of the reasons stated above, Petitioner requests that the Court (1) rule that the Commission's decision on the Wright program amendment is subject to review under Rule 7-401; and (2) issue an order requiring Commission approval of the previously-submitted map amendment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 2007, that **PETITIONER'S SUPPLEMENTARY BRIEF REGARDING FINALITY** was sent via U.S. Mail, first class postage prepaid, addressed to the following:

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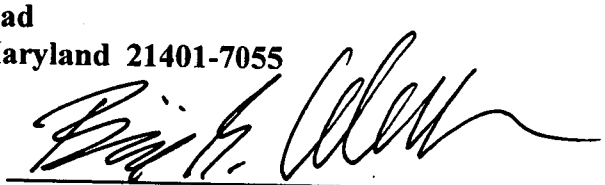

Benjamin S. Wechsler, Esq.

COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Conference Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on October 15, 2004.

Members present:

Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Larry W. Shipley, Clerk
Twilah S. Shipley, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Professor John Lynch, University of Baltimore School of Law
Jack L. B. Gohn, Esq.

The Vice Chair convened the meeting. The Reporter announced that the Report of the Judicial Ethics Committee and 153rd Report of the Rules Committee will be heard by the Court of Appeals on November 8, 2004 at 2:00 p.m. She said that Mr. Maloney was a winner of a Leadership in Law Award, and that the Vice Chair had won the Fannie Lou Hamer Award, named for a civil rights activist. The Reporter also stated that the mother-in-law of

EXHIBIT A

Cathy Cox, Administrative Assistant to the Rules Committee, had passed away, so Ms. Cox would not be present for the meeting.

Agenda Item 1. Consideration of proposed new Title 7, Chapter 400, Administrative Mandamus. New Rule 7-401 (General Provisions), New Rule 7-402 (Procedures), New Rule 7-403 (Disposition); Amendments to: Rule 7-301 (Certiorari in the Circuit Court) and Rule 15-701 (Mandamus)

Mr. Sykes, Chair of the Specific Remedies Subcommittee, told the Committee that the Office of the Attorney General had sent comments about the proposed new Administrative Mandamus Rules that were received this morning. A copy of the comments was distributed. (See Appendix 1). The problems with the current Certiorari and Mandamus Rules were set out in a July 2, 2001 memorandum by Jack L. B. Gohn, Esq., a copy of which is in the meeting materials for today. (See Appendix 2). Because there is an overlap between certiorari and mandamus, practitioners often file petitions for both, sometimes not knowing which one to file. Each remedy has procedures that are different and peculiar from procedures in ordinary litigation. There has been a great deal of dispute over discovery in these cases, both as to what kind is appropriate and when it is available. The Court of Appeals considered this issue in *Montgomery County v. Stevens*, 337 Md. 471 (1995). Discovery was one of the issues that caused the proposed Rules to be remanded to the Subcommittee.

Another question that arose was about damages in mandamus actions. It is difficult to know what acts are reviewable and

what remedy is appropriate. The Subcommittee suggests that certiorari review in the circuit courts be eliminated except for review of actions of the District Court and the Orphans' Court. Mandamus has been divided into two categories, administrative mandamus for review of a quasi-judicial order or action of an administrative agency and regular mandamus.

Mr. Sykes presented Rule 7-401, General Provisions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-401, as follows:

Rule 7-401. GENERAL PROVISIONS

(a) Applicability

The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not authorized by statute or by local law.

Committee note: Where judicial review of an order or action of an administrative agency is authorized by statute, see Rule 7-201 et seq. For review of quasi-judicial actions other than those involving a review of an action by the District Court or an orphans' court, a writ of mandamus is the appropriate remedy.

(b) Definition

As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, Commissioner, official, or other unit of the State or of a political subdivision of the State.

Committee note: This Rule does not apply to writs of mandamus in aid of appellate jurisdiction.

Source: This Rule is new.

Rule 7-401 was accompanied by the following Reporter's Note.

Consistent with Jack L. B. Gohn's suggestions to improve the Mandamus Rules, the Subcommittee proposes creating a new set of Rules entitled "Administrative Mandamus" for review of quasi-judicial actions of administrative agencies where review is not authorized by statute. Rule 7-401 is patterned after Rule 7-201 with the necessary distinctions. A Committee note explaining that mandamus is the appropriate remedy for review of quasi-judicial actions other than an action by the District Court or orphans' court has been added for clarity.

Mr. Sykes stressed that section (a) of Rule 7-401 applies only to actions for judicial review of a quasi-judicial order or action. In these cases, there will be a record and a hearing that can be reviewed. It is similar to ordinary appellate review by a circuit court. The Vice Chair asked whether there is a requirement of finality of the decision below. Mr. Sykes replied that for an action or order to be quasi-judicial, it must be final. Mr. Gohn added that the doctrine of exhaustion of administrative remedies applies. Mr. Brault remarked that mandamus involves ordering an entity to do something routine that

is not discretionary. Mandamus could be applicable to interlocutory non-appealable orders. Mr. Sykes said that some statutes have no provision for appeal of actions of administrative agencies. The only review available is by mandamus because of *Heaps v. Cobb*, 185 Md. 372 (1945), which provides that there must be a remedy for an unconstitutional action. Even though a statute does not provide for or forbid an appeal, appellate review cannot be foreclosed. Administrative mandamus is a substitute for an appeal where there is no statutory authority for an appeal.

Judge Kaplan commented that at-will employees who have been discharged from working for the State government use mandamus, since there is no appeal authorized for an at-will employee who has been wrongfully discharged. Mr. Sykes pointed out this would come under regular mandamus, which is applicable when there is no record. When an agency makes a final decision affecting the rights of parties, an appeal is effected by administrative mandamus if there is no statutory right of appeal.

Mr. Brault reiterated that nothing in the Rule requires that an order has to be final before a writ of mandamus is issued. The Vice Chair noted that the same issue arises in the Chapter 200 Rules of Title 7, Judicial Review of Administrative Agency Decisions. Rule 7-201, General Provisions, uses the same language as proposed Rule 7-401: "review of ... an order or action of an administrative agency ...". Judge Heller suggested

that a reference to the *Heaps* case be added to Rule 7-401. She asked about the comment from Susan Howe Baron, Esq., Assistant Attorney General, which stated that the proposed rules decimate the exclusion of the Parole Commission from the Administrative Procedure Act ("the APA"). Mr. Zarnoch answered that the Parole Commission is excluded from the APA, because the process of petitioning for parole is simplified. Ms. Baron is concerned that the entire record will need to be filed under the proposed Rules. Judge Heller responded that this is not correct. Most of the parole petitions were filed in the Circuit Court for Baltimore City up until eighteen months ago. About 90% of the inmates simply filled out a form. The Attorney General does not always file memoranda in these cases. Judge Heller suggested that memoranda be filed in these cases. Mr. Gohn noted that he did not believe that under administrative or regular mandamus, there would be the necessity to file the entire file. Ms. Baron may have been looking at the certiorari rule, which does not apply.

Judge McAuliffe pointed out a problem in the first Committee note. He suggested that a second sentence be added that would state: "This applies to judicial review not authorized by statute only where there is no other right of appeal provided by statute." Mr. Gohn commented that the language in the Committee note that reads "other than those involving a review of an action by the District Court or an orphans' court" is surplusage, since

these actions are judicial and not quasi-judicial. By consensus, the Committee agreed to delete the language. Mr. Sykes suggested that a reference to the case of *Heaps v. Cobb* should be added to the Committee note. The Committee agreed by consensus to this suggestion.

The Vice Chair questioned as to why adopting administrative mandamus Rules is necessary, instead of amending the current rules of judicial review. Mr. Gohn answered that the Subcommittee's thinking was that there is more of a problem with discovery where the review is not authorized by statute, and the form of action traditionally recognized by the Court of Appeals for non-statutory review is mandamus, which is the common nomenclature and separate from judicial review. The Vice Chair remarked that the proposed new Rules seem to incorporate many of the procedures from Title 7, Chapter 200 of the Rules. In her experience as the County Attorney for Anne Arundel County, suits are filed with no right of review, and they are called a variety of names, including a petition for declaratory relief. Her opinion is that the practice is more akin to judicial review.

Mr. Sykes noted that historically, the *Heaps* case uses certain terminology. Changes to this are sufficiently controversial. It may be necessary to change the nomenclature to eliminate the name of the traditional remedy.

Mr. Sykes drew the Committee's attention to section (b). The Vice Chair asked about the issue of finality to which Mr.

Brault had referred earlier in the discussion. Mr. Sykes responded that there is case law pertaining to exhaustion of administrative remedies. Mr. Gohn said that occasionally, there are situations recognized in case law where there is no finality before judicial review is obtained. If a requirement of finality is put into the Rules, this would not be consistent with the rare cases in which administrative finality is not required as evidenced in *Prince George's County v. Blumberg*, 288 Md. 275 (1980). The issue of finality should be left to case law. Judge McAuliffe suggested that the Committee note could refer to exhaustion of remedies. The Reporter suggested that the language could be to the effect that "ordinarily exhaustion of administrative remedies is required, but see *Prince George's County v. Blumberg*." Mr. Zarnoch suggested that *Holiday Spas v. Montgomery County Human Relations Commission*, 315 Md. 390 (1989), could also be cited in the Committee note. By consensus, the Committee agreed with these suggestions.

By consensus, the Committee approved the Rule as amended.

Mr. Sykes presented Rule 7-402, Procedures, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-402, as follows:

Rule 7-402. PROCEDURES

(a) Complaint and Response

An action for a writ of administrative mandamus shall be commenced by the filing of a complaint, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203. The response to the filing of the writ shall comply with the provisions of Rule 7-204.

(b) Stay

The filing of the writ does not stay the order or action of the administrative agency. The court may grant a stay pursuant to Rule 7-205.

(c) Discovery

The court may permit discovery, in accordance with the provisions of Title 2, Chapter 400 that the court finds to be appropriate, but only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or extreme circumstances which occurred outside the scope of the administrative record, and a remand to the agency is not a viable alternative.

(d) Record

If a record exists, the record shall be filed pursuant to Rule 7-206. If no record exists, the agency shall provide (1) a verified response that shall fully set forth the grounds for its decision below and (2) any written materials supporting the decision. The court may remand the matter to the agency for further supplementation of materials supporting the decision.

(e) Memoranda

Memoranda shall be filed pursuant to

Rule 7-207.

(f) Hearing

The court may hold a hearing pursuant to Rule 7-208.

Source: This Rule is new, except that subsection (c) codifies the decision in *Montgomery County v. Stevens*, 337 Md. 471 (1995).

Rule 7-402 was accompanied by the following Reporter's Note.

Rule 7-401 is designed to incorporate many of the procedures of Title 7, Chapter 200. The Subcommittee recommends adding a provision for discovery to be available only upon a showing of fraud or extreme circumstances which occurred outside the scope of the administrative record, and if a remand to the agency is not a viable alternative. This is consistent with the decision in *Montgomery County v. Stevens*, 337 Md. 471 (1995). The Subcommittee has added a provision that would apply if no record exists below.

Mr. Sykes explained that the procedures for this Rule are derived from Title 7, Chapter 200. The Vice Chair asked why a response to a complaint is verified, but the complaint is not. Mr. Sykes replied that when there is an administrative record, the best evidence of the agency proceedings is in the administrative record, which is filed with the court. If no record exists, the verification requirement provides some assurance as to the authenticity of the matters set forth in the response. There is no similar need for verification of the complaint.

Mr. Sykes pointed out that the word "writ" in section (b) should be changed to the word "action," and the Committee agreed by consensus to this change.

Turning to section (c), Mr. Sykes observed that there had been a dispute about the availability of discovery in administrative mandamus cases. After much discussion, the Subcommittee decided to codify the rule in *Montgomery County v. Stevens*, 337 Md. 471 (1995), against the recommendation of Mr. Gohn. This is reflected in the language of section (c). Discovery is limited only to cases where the party challenging the agency action makes a strong showing of fraud or extreme circumstances not reflected in the administrative record.

Judge Heller noted that the APA allows additional evidence to be considered. She asked why section (c) does not follow the APA. Mr. Sykes remarked that the APA allows additional evidence that is generally confined to the merits of the case. This does not take into consideration new developments. It is related to whether the decision below is correct. Mr. Gohn pointed out that the agency may be unprepared to create a record. It may be difficult to establish what happened and to determine the facts. Because administrative decision-makers think that their actions may not be scrutinized, improprieties may occur. The decision in *Stevens* protects the integrity of the process. The Vice Chair observed that the law permits the introduction of additional evidence into a hearing in the administrative mandamus process.

The Title 7, Chapter 200 Rules do not permit extra evidence. Mr. Gohn said that the statutory or APA law gives one a basic framework of evidence available to insure the integrity of the process. This is not so with administrative mandamus, because there is no enabling statute. Rule 7-208 provides: "Additional evidence in support of or against the agency's decision is not allowed unless permitted by law." The Vice Chair inquired as to the source of the language that states that discovery is permitted only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or other extreme circumstances. Mr. Gohn replied that this comes from the *Stevens* decision. Mr. Brault pointed out that Rule 2-535, Revisory Power, provides that the circuit court may exercise revisory power at any time in case of fraud, mistake, or irregularity. He asked why more discovery is allowed when there is no rule or statute available. Mr. Gohn responded that there is not more discovery. The Vice Chair noted that there are disputes over whether discovery is available in the Title 7, Chapter 200 Rules. It might be better to also state in those Rules that discovery is available. Mr. Sykes suggested that a cross reference to the *Stevens* case be added to the appropriate Title 7, Chapter 200 Rule. The Committee agreed by consensus to this suggestion.

The Vice Chair pointed out that section (f) of Rule 7-402 provides that the court <u>may</u> hold a hearing, although it is not

required. Rule 7-208 requires that a hearing be held. Mr. Leahy commented that the word "may" could be changed to the word "shall." Mr. Gohn referred to the written comment from Ms. Baron, who indicated that she was not pleased that sometimes in the Parole Commission cases, a hearing is not held. Mr. Sykes remarked that there should be a hearing in every parole matter. Judge Missouri pointed out that the petition for parole may be totally frivolous. Mr. Gohn responded that it may be difficult to determine if the petition is frivolous. Judge Missouri said that the pleadings may indicate this. The Vice Chair noted that there may be no agency record. Judge Kaplan observed that on its face, the petition may have no merit. The Vice Chair commented that one could make the same argument about the Title 7, Chapter 200 Rules. Mr. Sykes noted that the federal rules permit disposition, including summary judgment motions, without a hearing if the court determines one is not necessary.

Mr. Leahy suggested that the word "may" be changed to the word "shall" in section (f) of Rule 7-402, tracking Rule 7-208 (a) which states: "Unless a hearing is waived in writing by the parties, the court shall hold a hearing." The Vice Chair responded that the intent is not to require a hearing if the claim appears frivolous, but the idea of a dispositive ruling without a hearing is troubling. Judge Missouri remarked that one can rely on the circuit court judge's discretion. The Vice Chair said that she does rely on this, but Rule 7-208 requires a hearing. Judge Heller observed that the Parole Commission cases

automatically have hearings. This will not make more work for the Office of the Attorney General, because these cases are automatically on the fast track. Some judges decide that they may not want a hearing, but Judge Heller said that she always holds a hearing, even if it is a very brief one. Most of the cases are affirmed, but a few are remanded to the Parole Commission. Mr. Sykes inquired as to whether Parole Commission cases are exempted from the APA. Judge Heller replied in the affirmative. Mr. Sykes referred to the concern expressed by Ms. Baron that the exemption of Parole Commission cases from the APA has been decimated. Mr. Zarnoch suggested that the word "may" should be retained. Mr. Leahy commented that section (f) of Rule 7-402 should not refer to Rule 7-208 in its entirety if "may" is not changed to "shall." If "may" is retained, section (f) should refer only to the applicable sections of Rule 7-208. The Reporter suggested that the language of section (f) could read: "The court may hold a hearing in accordance with the procedures set forth in Rule 7-208 (b) and (c)." Judge Norton suggested that the word "shall" should be in section (f), with the waiver language of Rule 7-208 (a) included.

By consensus, the Committee decided to retain the word "may." Mr. Sykes reiterated the Reporter's suggestion that section (f) refer to sections (b) and (c) of Rule 7-208. Mr. Gohn noted that circuit court judges examine petitions for mandamus on their face, so a compromise position could be that different criteria for assessing the petitions could be added to

the Rule. It should not be that judges never hold hearings, but the word "may" appears to make this permissible. Judge McAuliffe added that the petitions on which hearings are held should not be "demurrable" or frivolous. Judge Missouri agreed with Judge McAuliffe. The Reporter suggested that the language of former Rule 345, Demurrer, could be obtained. The Vice Chair suggested that parts of Rule 7-208 should be incorporated into Rule 7-402, including setting the date, rather than simply referring to sections (b) and (c) of Rule 7-208. Judge McAuliffe remarked that the Style Subcommittee could redraft the Rule.

Judge Missouri commented that to require a hearing in all cases is a waste of time. Referring back to the Title 7, Chapter 200 Rules, yet using the word "may" in section (f) may be confusing. Mr. Sykes responded that Rule 7-402 is not using the Title 7, Chapter 200 Rules as authority, just as a model. There is a distinction between the nature of the cases under Rule 7-402 compared to the Title 7, Chapter 200 Rules. The Reporter asked if the Committee agreed with the suggestion to retain the word "may" and incorporate the pertinent parts of Rule 7-208 into Rule 7-402. The Committee agreed by consensus to make these changes.

The Committee approved the Rule as amended.

Mr. Sykes presented Rule 7-403, Disposition, for the Committee's consideration.

language of subsection (G) is taken from the concurring opinion by the Honorable Glenn T. Harrell, Jr. in the case MTA v. King, 369 Md. 274 (2002). The Subcommittee is in agreement with Judge Harrell that abuse of discretion should be added to the list of grounds for issuing the writ in judicial review of agency decisions.

Mr. Sykes explained that the list of grounds in Rule 7-403 is taken from the APA, except for the last ground in subsection (G), which is derived from a concurring opinion by the Honorable Glenn T. Harrell in *MTA v. King*, 369 Md. 274 (2002).

Judge McAuliffe inquired as to whether the litany of reasons in Rule 7-403 is consistent with the common law. Mr. Sykes answered that only subsection (D) does not reach constitutional dimensions -- it is an addition. Judge McAuliffe asked if the laundry list is different from the APA. Mr. Gohn replied that only subsection (G) is different. Judge McAuliffe pointed out that an appeal is being created on every ground that is available from the APA, and he asked why there has to be a separate procedure. Mr. Gohn responded that the constitutional and judicial tradition is to title the proceeding "mandamus." Judge McAuliffe observed that legislative bodies create a statutory right of appeal in some situations but not in others, and he questioned the extent of the non-statutory review created by the proposed new Rules. Mr. Gohn replied that the *Heaps* case provides that one gets a genuine review of his or her case regardless of whether the legislature has provided for an appeal.

There is no reason why non-statutory review should not get the benefit of the best practices drawn from the APA and the Title 7, Chapter 200 Rules. Mr. Gohn said that he was unaware of a case that provides that review pursuant to *Heaps* or *Bucktail v. Talbot County*, 352 Md. 530 (1999) is of a lesser magnitude than Title 7, Chapter 200 or APA review.

The Committee, by consensus, approved the Rule as presented.

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

JAMES M. AND VICTORIA L. PARKIN *

v. Case No. C-07-121963

*

CRITICAL AREA COMMISSION et al.

WRIGHT INVESTMENT GROUP *

v. Case Nos. C-06-117432 & 117695

CRITICAL AREA COMMISSION et al. *

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REPORT OF ANNE ARUNDEL COUNTY'S RESPONSE TO THE CRITICAL AREA COMMISSION FINDING OF A "CLEAR MISTAKE, OMISSION, OR CONFLICT" RELATED TO CRITICAL AREA MAPPING

THE CLEAR MISTAKE, OMISSION, OR CONFLICT

On January 2, 2007, the Critical Area Commission notified Anne Arundel County of the following determination unanimously accepted by the 27-member State Critical Area Commission:

> The Program Subcommittee finds that there is a clear conflict, mistake, or omission in Anne Arundel County's Critical Area Program relative to the County's Critical Area maps, and the amendment of those maps on the basis of mistake in accordance with the mapping standards in the County's Critical Area Program document.
>
> In accordance with Section 8-1809(l) of the Natural Resources Article, the Commission will notify the County of this deficiency, and within 90 days, the County shall submit program amendments or refinements to correct this deficiency. Any future local approvals of map amendments on the basis of mistake shall be null and void until this deficiency is corrected.
>
> Until this deficiency is corrected, the Commission respectfully requests that the County not submit any further map amendments on the basis of mistake.

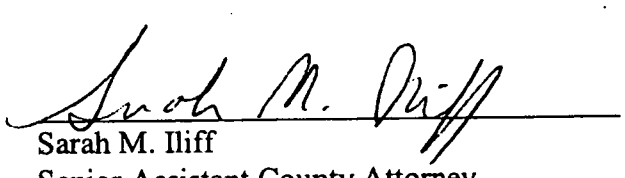
COUNTY ACTION

Because the above description failed to explain the exact conflict with State law, the County has struggled to respond to the finding of deficiency in County law. Supplemental memoranda from the Commission suggested that its concerns related to piecemeal reclassification from RCA to LDA based on location of property within 2000 feet of public water or sewer. The Program Document, an uncodified supplement to the County's Critical Area Program, describes the process used in 1985-1988 to map properties as LDA. It is this description, found at portions of pages 12-16 of the Program Document, that the Commission cited as grounds for its finding of "clear mistake." See Attachment A. At no time has the Commission identified the State law that conflicts with the process nor has the Commission explained why this "clear mistake, conflict, or omission" was not identified in 1988 when properties with public water or sewer were initially mapped as LDA. According to the Program Document, County staff viewed properties within 2000 feet of public water or sewer as having water or sewer since County law requires developers proposing development within 2000 feet of public water or sewer lines to connect to water or sewer before obtaining development approval. This mapping standard was part of the process approved by Critical Area Commission staff at the time and was described in the Program Document, which was adopted by the County Council as Bill 49-88 and later approved by the Critical Area Commission. Since properties are no longer being mapped, the Program Document description of the remapping process is primarily an historical record. As an historical document, however, the Program Document has played a valuable role in establishing past processes and has been essential to proof of mistake in requests for piecemeal reclassifications as

allowed by §18-16-302 of the Anne Arundel County Code.[1] While the Commission cited this document as the basis for its finding of mistake, it was immediately clear to County staff that changing the historical record would be an ineffective way to alter the finding of mistake in relation to a piecemeal remapping.

The first task for County staff, then, was to answer the Commission's question which, simplified, seemed to be "How many more of these mistakes are we likely to see?" That process involved a tedious and careful review of all of the County's critical area maps and a comparison of those maps with the County water and sewer maps. The process used is described in Attachment B. To allow this evaluation to be completed, it has been necessary for the County to request, and the Commission to grant, two time extensions to its original time deadlines. At present, the County deadline has been extended to August 2. Nonetheless, as described in Attachment B, data suggests that mistakes may have been fewer than expected. Although the County has submitted corrective legislation eliminating the so-called "2000-foot rule" as a basis for mistake, Commission staff members have suggested that such legislation may not be necessary. Whether the Commission will withdraw its sanction if that is the case remains an open question.

Respectfully submitted,



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[1] In 2005, the County Code was recodified. The piecemeal reclassification process has been part of County law since the adoption of the County's initial critical area law in 1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of June, 2007, a copy of the foregoing Memorandum was mailed first class with postage prepaid to:

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

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

Limited Development Areas

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

(1) Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre;
(2) Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space;
(3) Areas meeting the conditions of Regulation A, but not B, under intensely developed areas; or
(4) Areas having public sewer or public water, or both.

Resource Conservation Areas

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

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

The first step in the process was to map all wetlands as Resource Conservation Areas. After this was completed, the remaining land was placed in one of the three categories (Intense, Limited, or Resource Conservation).

Platted subdivisions were given a classification based on the average density of houses in the subdivision, unless some lots were in wetlands which were classified as Resource Conservation. Average density was determined by placing a grid over an aerial photograph and counting houses. The grid was divided into acre cells at the scale of the photograph. The number of lots in the subdivision shown on the tax map was used as a check in determining density, since some of the houses

were difficult to see on the photograph. Dark roofed houses and houses nestled into the trees were particularly hard to see.

Subdivisions with four or more units to the acre, as well as subdivisions with three or more units to the acre with water and sewer service were classified as Intensely Developed Areas (IDA's) if they were at least 20 acres in size. They were also classified as IDA's if they were adjacent to land eligible for classification as an IDA and the total acreage was at least 20 acres. A portion of the 20 acres could be outside of the Critical Area. Land shown to have industrial, institutional, or commercial facilities on the aerial photograph were also mapped as IDA's if they met the 20 acre minimum requirement.

Land used for industrial, institutional, or commercial purposes that did not meet the 20 acre minimum requirement was classified as a LDA. Residential land with an average density of less than four units to the acre and greater than or equal to one unit per five acres was also classified as an LDA except as discussed above.

Land within 2,000 feet of an existing water or sewer line, as shown on the water and sewer maps, without any development, was also classified as an LDA (unless it was a wetland or public property); if sewer service was scheduled within the 6-10 year period (or earlier) in the County water and sewer plan, or water service was scheduled in the 11-20 year period (or earlier) in the County water and sewer plan. This land was determined to have water or sewer service, or both, since the developer would be required to connect and extend service from the existing line as a condition of development under existing County subdivision regulations (Article 26, Sections 3-305 and 3-312). Land that was developed at less than one dwelling unit per five acres and did not meet any of the above conditions was classified as Resource Conservation.

The 1000-foot Critical Area boundary was transferred from State Wetland Boundary Maps (scale 1" = 200') to County topographic maps (scale 1" = 1000'). The boundary was expanded when it was less than 1000 feet from tidal wetlands shown on the National Wetlands Inventory (NWI) maps prepared by the U.S. Fish and Wildlife Service or shown on aerial photographs. The four-foot contour was used as the cutoff for tidal wetlands when the NWI maps showed tidal wetlands extending further upstream.

Aerial photographs, water and sewer maps (1" = 3500') amended through 1986, and tax maps (1" = 1200') were used to classify land. Two sets of photographs were used: (1) color prints at a scale of 1" = 1000' taken in July and September 1985; (2) black and white prints at a scale of 1" = 800', taken in April, 1984.

The primary criterion for placing property within one of the three classifications (Intense, Limited or Resource Conservation) was land use existing on December 1, 1985. This date was approximated using the aerial photographs. The water and sewer maps were used to determine

properties served by water or sewer lines, or both, on December 1, 1985 and properties within 2000 feet of a water or sewer line on that date. The tax maps were used to define property and subdivision boundaries.

Revisions to the Maps

When the land use classification maps were made available to the public in December, 1986, many people disagreed with the designation placed on their property. A petition process was initiated in December, 1986, through a legal notice in the Annapolis Capital and the Maryland Gazette. A copy of the notice is available as an appendix to this document. Petitioners were asked to state why they felt the classification of their property was incorrect based on the definitions in the Criteria. A hearing was held in February, 1987, to inform the public about the County's Critical Area Program. The hearing also provided a forum for public comments on the draft program elements and draft maps. As of August, 1987, Anne Arundel County had received 112 petitions. The requests were reviewed and a revised set of land use classification maps were drafted. The maps adopted as working maps under Bill 90-86 will remain in effect until 1998 for projects now being reviewed. Revised maps will be in effect for new projects submitted after County Council approval of the Critical Area Program. The revised set of maps is being presented with this document to the Critical Area Commission for its approval and then to the County Council for adoption.

Most of the changes to the land use classification maps in September included shifts from Resource Conservation to Limited due to the availability of water or sewer service. The Criteria state that areas having public water or sewer qualify as Limited Development Areas. Existing County law, Article 26, Sections 3-305 and 3-312, requires that public water or sewer service must be extended to property in the "6-10 year sewer service area" and in the "11-20 year water service area" which is within 2,000 feet of an existing line. This is imposed upon an applicant for development as a condition of subdivision approval. Therefore, properties within these distances and timings are considered to have water or sewer service within the context of the definition of Limited Development Areas in the Criteria. Property beyond these distances and timings is not required to extend and construct utility lines and therefore is deemed not to have water or sewer and remains in the Resource Conservation designation. Wetlands and public property were left in the Resource Conservation category and wetlands originally mapped as Limited were placed in the Resource Conservation classification. In November, property that was changed to Limited Development in September that did not abut a water or sewer line, was reclassified to Resource Conservation.

As directed by the Chesapeake Bay Critical Area Commission Panel, Anne Arundel County made a further investigation of the land mapped Limited Development Areas (LDA's) due to the water and sewer criteria as stated above. The following criteria were used in this investigation:

1. Land that met the density requirement and met the water and sewer criteria remained LDA.

2. Land with approved subdivision activity with recorded platted lots remained LDA.

3. Land with environmentally sensitive features along perennial and tributary streams were reviewed and an approximately 300 feet buffer along these streams, including adjacent wetlands, went back to RCA. The few areas of Critical State Concern that were classified as LDA had increased portions going to RCA.

4. Land that involved citizens' requests for land use classification changes was reviewed and either remained LDA or went back to RCA.

As of November maps, Anne Arundel County still had 2829.38 acres that changed to LDA because of water and sewer.

2829	
-728	Land use/existing sewer and water service - stays LDA
2101	
-566	Subdivision activity - stays LDA
1535	
-673	Buffer protection - goes back RCA
862	Still in LDA strictly from water and sewer changes

These changes have resulted in proposed acreage computations as follows:

	Jan.	Sept.	Nov.	Current Proposed
RCA	23699	21163	22031	22807
LDA	17411	22453	21613	20929
IDA	5580	5229	5215	5133
TOTALS	46690	48846	48859	48869

Grandfathering

Section 14.15.02.07 of the Critical Area Criteria contain provisions for grandfathering development under certain conditions. These provisions have been administered in Anne Arundel County in the following manner. All development in the Critical Area approved after December 1, 1985, under a building permit for land that was not otherwise subject to compliance with the Critical Area Criteria has been exempted from the Criteria. Major subdivisions, minor subdivisions, rezonings, variances and special exceptions which were submitted before April 21, 1986 (the effective date of Bill 42-86) were

RCA Mapping Evaluation

Task

Identify potential remaining mapping errors that may have occurred when the original maps were prepared with regard to RCA classification as it relates to water and/or sewer service. This evaluation does not include any areas that have already undergone amendments to correct such errors.

Methodology

1. The 1984 Water and Sewer Maps were evaluated and any parcel that was shown as RCA and mapped as "existing" water and/or "existing" sewer was identified.

2. Any feature specific to that property that may have been the basis for the RCA classification was then identified. In the majority of instances, there were environmental features (i.e. wetlands, streams, etc.) although in two cases the parcels identified were County owned parks.

3. Each of the parcels identified thus far was then evaluated for the presence of either water or sewer on the current maps. The logic being that if service does not exist today, it would not have been present when the maps were prepared. The purpose of this level of the evaluation was to further refine the number of parcels with the potential for mapping error.

4. Any remaining parcel was then evaluated through the use of MapOptix as well as the DPW operational website. Through DPW's site, we were able to view "as built" documents for the service lines that were present and determine the date that the line was actually constructed. From this information we were able to determine if the line was present during the mapping operation.

Conclusion

This first level of evaluation indicates that there were no mapping errors for the sites identified as "existing" sewer or water and mapped as RCA. Each of the areas identified was impacted by an environmental feature, which would have justified the RCA classification at the time it was mapped. This information was presented to Commission staff and it was concluded that the "error" might have been the methodology used for reclassification of such parcels after the maps were approved. The discussion also included the fact that the application of "facts" in past reclassifications may not have actually been an error but an inability to access many of the documents necessary, all of which are not accessible by computer, to prove/disprove the cases in question. The Commission Staff visited this Office for a demonstration of the many layers, which are now available on the computer and how this information would be used in any future reclassification cases. Commission staff has requested that this Office look at four specific sites as a method of testing the process that we have gone through thus far. These sites will be evaluated and the findings discussed with staff at our in house monthly meeting at which point a decision will be made as to whether or not legislation is necessary, which at this point it does not appear that it will be, or an acknowledgement of where it appears the errors occurred with the establishment of a process to prevent such errors in the future will be put into place.

Attachment B

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

JAMES M. AND VICTORIA L. PARKIN	*	
v.	*	Case No. C-07-121963
CRITICAL AREA COMMISSION et al.	*	
WRIGHT INVESTMENT GROUP	*	
v.	*	Case Nos. C-06-117432 & 117432
THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et. al.	*	

* * * * * * *

ANNE ARUNDEL COUNTY'S MEMORANDUM OF LAW ON THE ISSUE OF WHETHER THE CRITICAL AREA COMMISSION'S DECISION ON THE REMAPPING CASES IS A FINAL DECISION

APPLICABLE LAWS

Anne Arundel County mapped its critical area in 1988. The mapping process was conducted as required by State law and was supervised by State Critical Area Commission staff members and subsequently approved by the agency now titled the "Critical Area Commission for the Chesapeake and Atlantic Coastal Bays" (hereinafter the "Commission"). §§8-1807, 8-1808, and 8-1809, Md. Nat. Res. Code Ann. (2000). County Council Bill No. 49-88 adopted critical area maps for the entire County, designating the 1000-foot critical area and categorizing land within that area into three subcategories: resource conservation area (RCA), limited development area (LDA), and intensely developed area (IDA). Criteria for mapping as well as the maps themselves were approved by Critical

Area Commission staff and ultimately formally approved by vote of the entire Commission.

Anne Arundel County's program addressed mistakes in critical area classifications in the same manner as County law addresses zoning mistakes. Both allow piecemeal reclassification of individual properties upon proof of mistake in the original zoning.[1] §18-6-302, Anne Arundel County Code (2005). Thus, to prove mistake in a critical area classification, an applicant must prove that the County made a mistake in mapping based on "land use or features in existence on December 1, 1985." §18-6-302(b)(1), County Code. This process is consistent with State law as found at §8-1809(h)(2)(i) of the Natural Resources Article and also with the Express Powers Act, which is the enabling law for Charter Counties. See Article 25A, §§5(U) and (X), Md. Code Ann. (2005). Other than changes based on mistake, County law does not allow map alterations unless the County Council elects to undertake a comprehensive reclassification of large areas of the critical area, a process also subject to Commission approval. §8-1809(o)(2), Md. Nat. Res. Code Ann.

State law is clear that local jurisdictions have "primary responsibility for developing and implementing a program, subject to review and approval by the Commission." 8-1808(a). Commission authority to approve or disapprove local projects is therefore strictly circumscribed. The General Assembly did not intend to create a "super zoning board" and the Commission was designed to be an oversight committee. §8-1801(b) Md. Nat. Res. Code Ann. and North v. Kent Island Limited Partnership, 106 Md. App. 92, 106 (1992). In order for the Commission to provide appropriate review and approval of the local program, State law requires the Commission to review and approve any amendments or refinements to the County's critical area program. §8-1809 (h) and (i), Md. Nat. Res.

1 The two processes are distinguishable in that zoning may be altered based on change in the character of the neighborhood, as well as upon a finding of mistake. §18-16-303(b)(1). State critical area law, however, allows critical area reclassification based only upon mistake. §8-1809(2)(i), Md. Nat. Res. Code Ann.

Code Ann. Map amendments, being part of the adopted program, must always come before the Commission for approval. §8-1809(h), Md. Nat. Res. Code Ann.

The four piecemeal remappings that are the subject of this litigation were all based on mistake in the original critical area maps. County law required a public hearing before the County administrative hearing officer, submission of evidence, and testimony from the applicant and any witnesses. §§18-16-301 and 18-16-302, County Code (2005). The hearing is public and publicly advertised and opponents may participate and submit evidence in opposition to the remappings. §18-16-301, County Code. The Critical Area Commission's staff always receives notice of hearings and always provides either written comments or testimony. §18-16-302(b)(5), County Code. The County hearing officer granted three of the four remappings and none of the three was appealed or opposed by the Critical Area Commission or by anyone else. Only the Wright Investment remapping was opposed by both the community and the County and was subsequently appealed. Denials at the Board of Appeals and Circuit Court level were ultimately overturned by the Court of Special Appeals and remanded to the Board of Appeals for correction. The Commission, although allowed by law to participate in the process, never testified or argued any part of the Wright case. Ultimately piecemeal rezonings were approved for all four properties.

The County then submitted all four remappings to the Commission.[2] After a project is submitted, the Chairman of the Critical Area Commission makes a determination as to whether the remapping constitutes a "program amendment" or a "program refinement." 8-1809(n) The distinction between the two appears significant since a program amendment, presumably because of its greater

[2] The submissions took place over an extended period of time since State law permits only four submissions per year. Although the Commission previously allowed "batching" of applications, a new interpretation of State law last year, limited each submission to a single application or a single project. 8-1809(h)(1). Because of this policy, a

significance, requires a public hearing and a vote by the entire Commission. 8-1809(o). By contrast, a refinement allows the Chairman to approve the refinement, deny it, attach conditions or return it to the local jurisdiction with changes to be made. 8-1809(p)(3)(iii).

Although three remappings were designated as amendments and one was deemed to be a refinement, the ensuing approval process deviated substantially from the requirements of State law. In part the deviations in at least three of the remappings were driven by the Commission's finding in January of 2007 that the Anne Arundel County program contained a "clear mistake, omission, or conflict with the criteria or law." §8-1809(l), Md. Nat. Res. Code Ann. When such a finding is made, State law dictates that "Local project approvals granted under a part of the program that the Commission has determined to be deficient shall be null and void after notice of the deficiency." §8-1809(l)(3), Md. Nat. Res. Code Ann. While the interplay between approval of program amendments and refinements and the findings made under §8-1809(l) is unclear, the Commission has interpreted the law to allow it to cast three of the four approvals into limbo pending County action to correct its entire program. State law does not sanction such a process.

As a result of this apparent misapplication of State law, all four remappings have been delayed and only one of the applicants has been given direction as to how it might proceed. Had State law as to program refinements or amendments been correctly applied, each of the four would have been given clear direction that their applications had been approved, denied, approved with conditions, or returned to the local jurisdiction with a "list of changes to be made." §8-1809(o) and (p), Md. Nat. Res. Code Ann. In the alternative, action taken pursuant to §8-1809(l) would provide equally clear, though unpleasant, direction by rendering three of the remappings "null and void." §8-1809(l). In a

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ruling on the Parkin property was delayed for six months to allow for a calendar change.

distinct departure from State law, the Commission made no findings on the piecemeal rezonings and used two of the four requests as a springboard to a finding that County law was in some unspecified way inconsistent with State law; the Parkin case, coming later in time, was subsequently added to the list of projects that were inconsistent with an unspecified provision of State law.

State law requires the Commission to make a final decision, whether decision-making occurs under the amendment/refinement process or whether it occurs in the course of determination of a "clear mistake, omission, or conflict." By blurring the lines between approvals and by failing to treat these applications as separate remapping requests, the Commission has violated State law.

WHAT DECISIONS DID THE COMMISSION MAKE?

1. **Wright Investements.**

The request to remove the Wright Investment property from the Critical Area was forwarded to the Critical Area Commission on March 3, 2006. The application included the final decision on the remapping as well as site information. On March 21, Commission staff member Lisa Hoerger wrote to Anne Arundel County and requested additional information, including "all previous written decisions from the Board [of Appeals], the Circuit Court and the Court of Special Appeals" as well as the County Planning and Zoning Officer's report that was submitted to the County Board of Appeals for both the original case and the remand from the Court of Special Appeals. In addition, the Commission staff asked for the County's entire Critical Area Map sheet #17 in addition to the site plan previously submitted as well as "any other information that was available since 1985 that the County believes is relevant to the case." The requested information was submitted on June 8, 2006. The Commission responded on June 12, noting that

they could not accept the submitted information because it was missing the Circuit Court and Court of Special Appeals decisions and "could not be considered a complete submittal." On June 26, the Commission notified the County that it was now in possession of the "complete submittal."

On August 14, the Commission staff notified the County that the Wright request had been deemed to be a program amendment and that a public hearing would be held at the Commission office on August 18, 2006. Despite the fact that the requested amendment dealt with the removal of 2.5 acres of land, the Commission voted on September 6, 2006 to return the amendment to the County and require a comprehensive map revision. In response, County staff followed the Commission's directive and prepared a new critical area map showing removal of some 14 acres of land from the Critical Area. The County Council passed the legislation which has now been resubmitted to the Commission for approval as a program amendment. What originated as a piecemeal reclassification was converted into a demand that the County Council alter its program comprehensively. The legal authority for this action does not exist.

2. **Parkin.**

On June 19, 2006, the County Administrative Hearing Officer found that the Parkin property was mistakenly mapped as RCA and approved the change of 1.8 acres of land to LDA. The County submitted the map change to the Critical Area Commission and was notified by Commission staff that the County had already made four submissions for the year and would be allowed no more until 2007. At the request of the applicant, Anne Arundel County resubmitted the Parkin remapping on February 2, 2007. On February 21, the County was notified that the Commission had received the request. On March 21, 2007, the Acting Commission Chairman determined that the request would be

processed as a "refinement." The request was submitted to the entire Commission without public hearing and put to a vote. §8-1809(p), Md. Nat. Res. Code Ann. By letter dated April 10, 2007, the request for remapping was returned with the following statement:

> During its afternoon session, the Commission unanimously voted to concur with the Chairman's determination of refinement for the County's request and to recommend that the Chairman send back the County's request for the Parkin mapping mistake pending correction of the deficiencies identified within the County's mapping for the Critical Area Program. Specifically, the Commission relied on its December 2006 determination that there is a clear conflict, mistake, or omission in Anne Arundel County's critical area maps. It was the Commission's view that for the Chairman to decide to approve or deny the Parkin mapping mistake would have been inconsistent with the previous direction provided to the County to submit program amendments or refinements to correct the identified deficiencies. Further, the Commission had previously requested that the County not submit any additional requests for map amendments on the basis of mistake until such time that the identified mapping deficiencies have been corrected.

Given this language it is clear that the action taken was based on §8-1809(l) and not on the actions permitted under §8-1809(p). The only project action permitted under §8-1809(l) is to render a project "null and void."

3. **Daras and Magenau.**

On March 1, 2005, the Daras reclassification request was approved by the Administrative Hearing Officer on the basis of mistake in the critical area maps. The decision was not appealed. On June 25, 2006, the Hearing Officer reached a decision on the Magenau case, determining that 2.848 acres should be reclassified from RCA to LDA on the basis of mistake. In August 2006, the Commission noted that both Daras and Magenau were among the submissions for 2006. Because both were found to be "program amendments," a public hearing was held before the Critical Area Commission on October 16, 2006. Instead of ruling on the requests, the Commission returned the amendments to the County and asked for additional information including a map of sewer lines in the area of the requested remappings for the apparent purpose

of determining whether mistakes occurred as to other properties that had not requested remapping. The request also questioned whether the County correctly applied its own mapping standards. Subsequently, the Daras and Magenau properties formed the basis for a determination under §8-1809(l) that the County program contained a "clear mistake, omission or conflict." At no time did the panel or the Commission rule on either the Daras or Magenau request.

ARE THE DECISIONS FINAL?

1. Wright Investments.

The Wright case was initiated as a piecemeal rezoning and was ultimately approved by the Court of Special Appeals. By the time the decision was submitted to the Commission for review, the determination of mistake was final. The County submitted the application to the Commission for action on a program amendment. Although the Commission took jurisdiction only over the question of whether a piecemeal rezoning should have been granted to this property, the Commission impermissibly expanded its jurisdiction to include all similarly situated properties. Nothing in the law related to program amendments permits such an action. As a result of this expanded jurisdiction, the Commission ignored its mandate to act on the Wright property and reached no decision at all as to whether or not this property met the established criteria for the critical area. Failure to act on an application mandates automatic approval of the application. Md. Nat. Res. Code Ann., §8-1809(o)(1).

Rather than address the application itself, the Commission converted a quasi-judicial determination into an entirely different request for legislative action. Nothing in State law or

County law allows such an action. When the application came before the Commission, the Commission was required by law to "determine if the proposed amendment is consistent with the purposes, policies, goals, and the provision of [Subtitle 18 of the Natural Resources article] and all criteria of the Commission." §8-1809(o)(2), Md. Nat. Res. Code Ann. Once that determination is made the Commission must act on the program amendment, not on the entire County program. Rather than approving, denying or conditioning the approval, the Commission elected to use the Wright Investment property as a pawn in its campaign to require the County to alter the law impacting other properties. One action has nothing to do with the other. The Commission has sufficient oversight authority to encourage the County to remap portions of the critical area and could have taken action under §8-1809(l) without interfering with a legitimate judicial determination. In fact, nothing at all indicates that Anne Arundel County would not have made the requested change voluntarily. In effect, the Commission made a determination that a broad swath of a County map contained a "clear mistake, omission or conflict" and required the County government to make a comprehensive map change. If the Commission intended such action it should have correctly cited the law.

The Court of Special Appeals has addressed the role of the Critical Area Commission with respect to rezonings and has noted that the Commission's role is to "examine the rezoning and determine whether the rezoning meets the established criteria." North v. Kent Island, 106 Md. App. at 107. The rezoning itself is not to be relitigated. In this case, the Commission has ignored its responsibility to determine whether the reclassification was consistent with State law and criteria and shifted its attention to the County's program. By so doing, the Commission transformed a judicially approved piecemeal rezoning into a comprehensive rezoning. Such

action was outside the jurisdictional confines of the matter that was put before the Commission and left the applicant without recourse as to its initial request. Wright Investment was entitled to the review mandated by State law as found at §8-1809(o) of the Natural Resources Article. This review did not happen and has not happened to date. The application merited a decision as required by law. If the piecemeal rezoning is consistent with the criteria for LDA mapping, approval is mandated. If not, denial is required. Either way, the basis for approval or denial should be identified.

2. **If the Critical Area Commission acted on the Parkin, Daras, and Magenau reclassifications under §8-1809(l) of the Natural Resources Article, the local projects are "null and void."**

The apparent justification for the actions taken on three of the map changes is a determination that County law "may contain" other mistakes. Such a finding, however, is meaningless as to mistakes already identified. Even if other mistakes exist, County law allows the remedy that Daras, Magenau and Parkin sought. §18-16-302, County Code. Each project applicant followed County law, hired experts, and proved their case in public hearings. The existence of other mistakes is irrelevant to the already final decision that mistakes occurred on each property.

At no time did the Commission explain why the existence of other mistakes impacts its ability to consider the three properties. Are the applicants to assume that their applications are to be denied if other mistakes exist? Or are they to conclude that absence of other mistakes will result in approval? And how can any of the three ever get the decision required under §§8-1809(o) and (p)?

Because the Commission failed to apply the law as set forth at §§8-1809(o) and (p), it could only have processed these applications as permitted by §8-1809(l). If the action is taken under §8-

1809, the only permissible result is to render these decisions null and void. §8-1809(l)(3). No other action on local projects is permitted under the explicit provisions of §8-1809(l). A decision to render these applications null and void constitutes a "final operative event" and is clearly subject to either judicial review or reversal.

3. **In the alternative, if the Parkin, Daras, and Magenau decisions were evaluated under §§8-1809(o) AND (p), the Commission or Chairman failed to make the determinations required by law. Failure to act on the amendments within 90 days results in automatic approval.**

Rather than citing inconsistencies with State law as required, the Commission rejected all three applications on the assumption that County law might support other findings of mistake. This is an action nowhere permitted under either section 8-1809(o) or 8-1809(p). The duty of the Commission was to evaluate the individual projects and to assess the consistency of each project with State law. Once a determination is made as to consistency with State law, the Commission must take one of four actions. It failed to act. While the Commission clearly did not deny the application, it also neither approved the amendments nor approved them with conditions. Instead, the Commission returned all three remappings and directed the County to justify its entire mapping scheme. No list of changes was provided and no comment indicated that any change to any of the projects would allow for future Commission action on any of the amendments or on the refinement. All three were held in abeyance without suggestion of what the Commission expected or intended to do. In effect, consideration of all three projects was deferred without decision.

Because no action has been taken on any of the three proposed map amendments, the Commission did not act as required by State law. Failure to act within 90 days under §8-1809(o)(3)

results in approval of the proposed program amendments. §8-1809(o)(1), Md. Nat. Res. Code Ann.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of June, 2007, a copy of the foregoing Memorandum was mailed first class with postage prepaid to:

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Attorney for Petitioner JWL Associates et al.

Sarah M. Iliff
Senior Assistant County Attorney

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DNR - LEGAL DIVISION

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

FOR ADMINISTRATIVE MANDAMUS

Directed to:

CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street
Annapolis, Maryland 21401

And

ANNE ARUNDEL COUNTY
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

IN THE CASE OF AN APPEAL OF
A CRITICAL AREA RECLASSIFICATION
CASE NO.: 2000-0468-C, BA-48-01-C

CIVIL ACTION
NO. C-06-117432

PETITIONER'S SUPPLEMENTARY BRIEF REGARDING FINALITY

Petitioner, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully requests that the Court consider this brief in response to its letter of May 7, 2007.

Questions Presented

1. Whether the Critical Area Commission's ("Commission") decision to remand Petitioner's program amendment back to Anne Arundel County for more information constitutes an appealable final decision.

2. Whether the Petitioner seeks a Court Order that the Commission either approve or deny each amendment/refinement or a Court Order that the Commission approve the County's application for a program amendment.

3. What is the status of Anne Arundel County's update of the Critical Area Map with regard to the Wright Investment matter?

Joinder with Arguments Presented in Other Cases

Wright joins with and incorporates by reference the arguments raised in the supplemental brief(s) filed by the petitioners in Case Nos. C-06-118661 and C-06-118663 (*Daras v. Critical Area Commission*), C-06-118672 (*JWL Associates v. Critical Area Commission*), and C-07-121963 (*Parkin v. Critical Area Commission)* (collectively the "Related Cases").

The Commission's Decision is an Appealable Event.

The Court has asked for additional briefing regarding whether the Commission's decision is an "appealable final decision." As noted by the petitioners in the Related Cases, nothing in Rule 7-401 requires a "final" appealable decision. Rather, the Rule governs "quasi-judicial order or action of an administrative agency." Maryland Rule 7-401(a).

There is little question but that the Commission's decision in the Wright matter is an "order or action of an administrative agency."[1] As noted in opening briefs, the Commission had four options in ruling on the program amendment before it in the Wright case and in the Related Cases. Per Natural Resources Code section 8-1809(o), the Commission could have (a) approved the program amendment, (b) denied the program amendment, (c) returned the amendment with conditions, or (c) returned the amendment

with changes. In the Wright matter, after almost seven years of litigation, the Commission chose the fourth option – to return the matter to Anne Arundel County with a request that the County undertake a comprehensive remapping of headwaters of Whitehall Creek.

Had the Commission chosen either the first option available to it (approval) or second option (denial), presumably there would be no question regarding the immediate reviewability of the matter under the new administrative mandamus rule (provided the matter were quasi-judicial). The Commission's choice of the fourth option -- to return the amendment to the County with changes -- should not be the touchstone of whether its decision is appealable. Indeed, the gravamen of Petitioner's argument is that the Commission was ***required*** to approve the program amendment given the Court of Special Appeals' affirmation that the property in question is not within the Critical Area. Petitioner contends that the Commission impermissibly returned the program amendment to the County in a transparent attempt to convert a quasi-judicial proceeding relating to a single property into a quasi-legislative proceeding subject to consideration by the full Anne Arundel County Council (as opposed to County staff) and a vastly different standard of review. Further, by returning the requested program amendment to the County, the Commission also generated a basis for arguing that its decision was not "final," and thus not subject to judicial review under the Administrative Mandamus provision of the Maryland Rules.

The reviewability of the Commission's decision on a program amendment cannot turn on whether the Commission denies the program amendment outright, or returns the requested amendment to the County with conditions or changes. If the Commission's

[1] The question of whether the decision is "quasi-judicial" or "quasi-legislative" has been briefed at length

return of the amendment with changes is deemed non-reviewable, it would allow the Commission to permanently evade judicial review of its decisions through seriatim non-denials of a program amendment. In order to avoid a process that potentially mires program amendments in an endless loop of non-final Commission actions, the better approach is the one contemplated by Rule 7-401 – requiring only a "decision" by the Commission, but not requiring finality. Such an approach is supported not only by the plain text of the Administrative Mandamus rule, but also a robust body of case law relating to when an administrative decision is subject to judicial review. *See, e.g., United Parcel Service v. People's Counsel*, 336 Md. 569, 583-84, 650 A.2d 226 (1994); *Beth Tfiloh Congr. of Balt. City v. Glyndon Comm. Assoc.*, 152 Md. App. 97, 107, 831 A.2d 93, 98; *Nat'l Inst. Health Fed. Cr. Un. v. Hawk*, 47 Md. App. 189, 195, 422 A.2d 55, 58-59 (1980, *cert denied,* 289 Md. 738 (1981).

Petitioner Asks that the Court Order The Commission to Approve the Previously Submitted Program Amendment.

The Court has asked whether Petitioner is "requesting this court to order the Commission to make a decision approving or denying each application" . . . "or to order the Commission to render a decision to approve" the application. Based on the long history of this matter, and a Court of Special Appeals opinion declaring that the subject property is outside the Critical Area, Petitioner contends that the Commission had only ***one*** choice in this matter – to approve the County's map amendment removing the property from the Critical Area. Allowing the Commission to deny the program amendment would be contrary to this order, and would upset the delicate balance of power between the executive branch and the judicial branch contemplated by the

---

previously, and was the subject of oral argument heard by the Court on April 30, 2007.

Maryland Constitution. Petitioner requests that the Court order the Commission to approve the program amendment.

The Status of the County's Remapping Efforts.

The County is in a better position than Petitioner to explain the status of its Countywide mapping efforts and whether it is undertaking a comprehensive remapping. As it pertains to Petitioner's property, the County has undertaken a remapping of the headwaters of Whitehall Creek in response to the Commission's return of the previous map amendment. The map amendment has been approved by the County Council as Bill 22-07, and again is pending before the Commission for approval. As this matter enters its seventh year of litigation, Petitioner has dismal expectations regarding the Commission's prospects for approving this map amendment. If this latest iteration proceeds as has each prior iteration, the Petitioner is likely to be stuck in an endless loop of proceedings unless and until the Court orders the Commission to approve the Program Amendment reflecting the Court of Special Appeals' decision ruling that the Wright property is located outside the Critical Area.

Conclusion

For each of the reasons stated above, Petitioner requests that the Court (1) rule that the Commission's decision on the Wright program amendment is subject to review under Rule 7-401; and (2) issue an order requiring Commission approval of the previously-submitted map amendment.

Respectfully submitted,

David M. Plott
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June, 2007, that **PETITIONER'S SUPPLEMENTARY BRIEF REGARDING FINALITY** was sent via U.S. Mail, first class postage prepaid, addressed to the following:

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and

Sarah Iliff, Esq.
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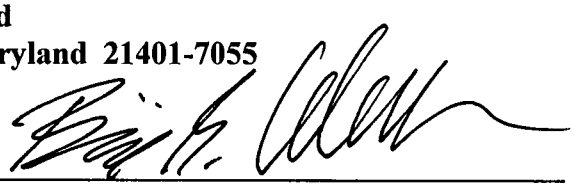

Benjamin S. Wechsler, Esq.

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STATE OF MARYLAND
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June 13, 2007

Clerk of the Court
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Re: Wright Investment Group v. Critical Area Commission, C-06-117432
Daras v. Critical Area Commission, C-06-118661 & 118663
JWL Associates v. Critical Area Commission, C-06-118672
Parkin v. Critical Area Commission, C-07-121963

Dear Clerk:

Enclosed for filing, one each in the five above-referenced matters, please find the original and four copies of respondent State of Maryland, Critical Area Commission's Supplemental Memorandum In Support Of Motions To Dismiss. I have separately provided a copy of this Memorandum to Judge Manck, as requested.

Thank you very much for your assistance.

Truly yours,

Paul J. Cucuzzella
Assistant Attorney General

Enclosures

cc: Honorable Joseph P. Manck
Benjamin S. Wechsler, Esq.
Anthony F. Christhilf, Esq.
Eileen E. Powers, Esq.
Kathleen E. Byrne, Esq.
Sarah M. Iliff, Esq.

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

MICHAEL A. DARAS,	*		
Petitioner,	*		
v.	*	Case Nos.:	C-06-118661 C-06-118663
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

JWL ASSOCIATED, et al.,	*		
Petitioners,	*		
v.	*	Case No.:	C-06-118672
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

WRIGHT INVESTMENT GROUP,	*		
Petitioner,	*		
v.	*	Case No.:	C-06-117432
CRITICAL AREA COMMISSION, et al.,	*		
Respondents.	*		

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

JAMES M. AND VICTORIA L. PARKIN,	*	
Petitioners,	*	
v.	*	Case No. C-07-121963
CRITICAL AREA COMMISSION, et al.	*	
Respondents.	*	
	*	

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

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS

Respondent Critical Area Commission for the Chesapeake and Atlantic Coastal Bay (the "Critical Area Commission" or the "Commission"), by its attorneys, Douglas F. Gansler, Attorney General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, in compliance with the Court's request by letter date May 7, 2007 for additional memoranda on the Commission's Motions To Dismiss each of these cases, provides this Supplemental Memorandum In Support Of Motions To Dismiss.

Questions Presented by the Court

As understood by the Critical Area Commission, the Court asks the parties to address the following issues:

1. The Court inquires as to the position of the parties on the issue of whether the respective decisions of the Critical Area Commission challenged in each of these actions are "appealable final decisions." It is apparently unclear to the Court as to whether the petitioners seek orders from the Court directing the Commission to make a decision either approving or denying the respective Critical Area Map amendment applications, or whether the petitioners seek orders

specifically directly the Commission to approve the applications.

2. The Courts asks for an update as to whether Anne Arundel County has complied with the Critical Area Commission's requests that it provide additional information to the Commission relevant to these map amendment requests.

Response

The Court's first question highlights and focuses upon the exact reasons that each of these cases should be dismissed. As discussed in the Critical Area Commission's Reply To Oppositions To Motions To Dismiss (the "Reply Memo") at 4-8, the actions of the Commission in each of these cases on Anne Arundel County's requested Critical Area Map amendments were not actions for which appellate review in the Circuit Court under Title 7 of the Maryland Rules is permitted. As such, it is irrelevant for purposes of the Motions to Dismiss whether the actions of the Commission are cast as "final decisions" of an administrative agency. Similarly, it is of no consequence for purposes of these actions against the Commission whether the administrative decisions involved were "final" when the Commission acted, or whether finality will occur when Anne Arundel County ultimately chooses to take action on the Commission's decisions. In either event, appellate review of the *Commission's* decision in unavailable.

As explained in the Reply Memo at 8-11, Petitioners only recourse is to proceed under the Court's general jurisdiction by filing civil action pleadings in conformance with Title 2, Chapter 300, of the Maryland Rules. If Petitioners can establish through civil actions filed and adjudicated in accordance with Title 2 that the Commission acted outside its lawful authority when it rendered the respective decisions involved, the Court would then have the authority under its general jurisdiction to direct the Commission to re-consider the actions. *See North v. Kent Island Limited Partnership*,

106 Md.App. 92, 108 (1995) (having found that the Critical Area Commission exceeded its authority under NR § 8-1809 in the manner that the Commission went about reviewing a proposed local Critical Area program amendment, the Court remanded the matter to the Commission with instructions to conduct its proceedings consistent with the Court's opinion). However, even if the cases are properly pled, the Court has no authority, as contemplated in the Court's May 7, 2007 letter, "to order the Commission to render a decision to approve each of the four [map amendment] applications." *See Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 224-25 (1975). Indeed, any decision respecting approval or disapproval of these map amendments necessarily invokes the exercise of judgment vested by the legislature with the Critical Area Commission alone, *see* NR § 8-1809, and judicial review of quasi-legislative actions of an administrative agency does not include the authority of the judiciary to substitute "[it's] judgment for that of the agency." *Id.*

Though, as stated, the actions of Anne Arundel County subsequent to the Commission's actions are irrelevant with respect to whether jurisdiction is proper under Title 7 of the Maryland Rules, to address the Court's second question, County Council Bill 22-07, signed May 11, 2007, removes from the County's Critical Area Map addition acreage surrounding the property at issue in the Wright Investment case (Case No. C-06-117432). On June 7, 2007, the Bill was accepted by the Critical Area Commission for review, and, if approved by Commission – which is anticipated at the Commission's July 11, 2007 meeting – Wright Investment would receive the relief requested: removal of Critical Area designation over its property. Regarding the other cases, Critical Area Commission staff has had recent discussions with County officials regarding how the County might go about resolving the various issues identified by the Commission relevant to the map amendment

requests, but the County has not, to date, submitted corrected or revised requests for map amendments.

Conclusion

For the foregoing reasons, together with those set forth in the Critical Area Commission's previous memoranda in support of the Motions to Dismiss, the Critical Area Commission's Motions to Dismiss each of these five cases should be granted.

Respectfully Submitted,

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Dated: June 13, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2007, copies of the foregoing Supplemental Memorandum In Support Of Motions To Dismiss were sent via U.S. Mailed, postage prepaid, to:

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Attorney for Petitioners James and Victoria Parkin

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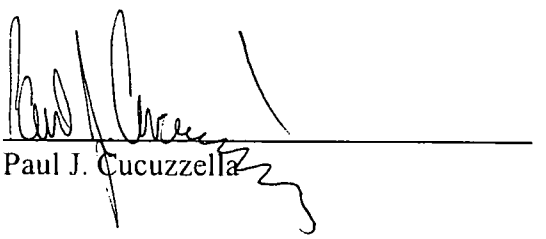

Paul J. Cucuzzella

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April 4, 2007

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Re: (1) Michael A. Daras v. Critical Area Commission, Case. No. C-06-118661
(2) Michael A. Daras v. Critical Area Commission, Case. No. C-06-118663
(3) JWL Associates, et al. v. Critical Area Commission, Case No. C-06-118672
(4) Wright Investment Group v. Critical Area Commission, et al., Case No. C-06-117432

Dear Clerk:

Enclosed for filing in each of the above-referenced matters by respondent State of Maryland, Critical Area Commission, please find the Reply To Oppositions To Motions To Dismiss. Thank you very much for your assistance.

Truly yours,

Paul J. Cucuzzella
Assistant Attorney General

Enclosure

cc: Anthony F. Christhilf, Esq.
Eileen E. Powers, Esq.
Benjamin S. Wechsler, Esq.
Sarah Iliff, Esq.

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

MICHAEL A. DARAS,	*		
Petitioner,	*		
v.	*	Case Nos.:	C-06-118661 C-06-118663
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

JWL ASSOCIATED, et al.,	*		
Petitioners,	*		
v.	*	Case No.:	C-06-118672
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

WRIGHT INVESTMENT GROUP,	*		
Petitioner,	*		
v.	*	Case No.:	C-06-117432
CRITICAL AREA COMMISSION, et al.,	*		
Respondents.	*		

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

REPLY TO OPPOSITIONS TO MOTIONS TO DISMISS

Respondent Critical Area Commission for the Chesapeake and Atlantic Coastal Bay (the "Critical Area Commission" or the "Commission"), by its attorneys, Douglas F. Gansler, Attorney

General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, hereby responds to the oppositions to the Motions to Dismiss filed in each of these cases.

Procedural Posture

These four cases arise from actions taken by the Critical Area Commission on three separate requests made by Anne Arundel County (the "County") to amend its Critical Area Map (the "Map") as a consequence of what the County alleged were mistakes that the County had made when it originally crafted the Map in 1987. Following enactment in 1984 of the Critical Area Law – Md. Code Ann., Nat. Res. ("NR") § 8-1801 *et. seq.* – all jurisdictions with land areas within the Chesapeake Bay Critical Area were required to map that jurisdiction's critical area[1], and have their respective maps approved by the Critical Area Commission. NR § 8-1808(c). Foreseeing the inevitability that diverse local jurisdictions would make geographic and other mistakes during the course of the mapping process, the General Assembly provided a procedure whereby, following approval by the Critical Area Commission of a local jurisdiction's critical area map, the local jurisdiction could, upon proof of mistake in the original map, propose to the Commission an amendment to that jurisdiction's map. NR § 8-1809(h).

Here, the three Map amendments requested by Anne Arundel County involved, respectively, property owned by: (1) Michael A. Daras, the petitioner in case numbers C-06-118661 and C-06-118663 (the "Daras Actions"); (2) JWL Associated and William and Mary Magenau, the petitioners in case number C-06-118673 (the "Magenau Action"); and (3) the Wright Investment Group, the

[1] The "critical area" includes of all land and water areas within 1,000 feet beyond the heads of tide of the waters of the Chesapeake Bay and its tributaries. NR § 8-1807(a).

petitioner in case number C-06-11743 (the "Wright Investment Action").[2] In each instance, the owners of the subject parcels requested that their respective property be reclassified from Resources Conservation Area (RCA), the most restrictive of the three critical area land classification, to Limited Development Area (LDA). As to each, the Commission received from the County a request pursuant to NR § 8-1809(h) for a map amendment, formed a Panel of Commission members to review the request and report to the full Commission as required by NR § 8-1809(o), and, in a timely manner, voted to return the proposed amendments to the County for further action. The Commission's action of the Wright Investment request occurred on September 6, 2006, and its actions on the Magenau request and the Daras request both occurred on November 1, 2006.

On October 6, 2006, Wright Investment filed the Wright Investment Action seeking administrative mandamus under Title 7, Chapter 400, of the Maryland Rules, and judicial review under Title 7, Chapter 200, of the Commission's decision regarding its property. On December 1, 2006, the Daras Actions were filed which, respectively, seek Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the Critical Area Commission's decision regarding Mr. Daras' property. On December 11, 2006, the Magenau Action was filed which, similarly, seeks Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the decision on the Magenaus' property. In separate Motions on each case, the Critical Area Commission has sought dismissal of all four actions on grounds that the decisions of the Critical Area Commission denying each of the three proposed Map amendments are not subject to

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[2] A fifth case, civil number C-06-117695, was filed Wright Investment and seeks a writ of mandamus under Title 15, Chapter 700 of the Maryland Rule. The Critical Area Commission filed an Answer to that action and it is therefore not subject to any of the Commission's motions to dismiss.

administrative mandamus under Title 7, Chapter 400, or judicial review under Title 7, Chapter 200. Each petitioner has responded separately in opposition to the Commission's Motions. The Court has scheduled a joint hearing on all four Motions for April 30, 2007, because the four Motions present similar issues of law and fact. By this Memorandum, the Critical Area Commission replies to the common questions of law and fact addressed in each of the petitioners' oppositions to the Motions to Dismiss.

Law and Argument

A. The Circuit Court Lacks Jurisdiction Under Title 7, Chapter 200, and Title 7, Chapter 400, To Review The Critical Area Commission's Decisions.

As discussed in the memoranda in support of the Motions to Dismiss, the Circuit Court has jurisdiction under Title 7, Chapter 200, to review an action of an administrative agency only when judicial review of that action is separately authorized by statute. *See* Rule 7-201(a). While judicial review under Chapter 200 is specifically authorized for decisions of "contested case" proceedings conducted under the Maryland Administrative Procedure Act (MAPA), Md. Code, Ann, State Gov't § 10-201 *et. seq.*, the proceedings of the Critical Area Commission in reviewing local critical area program amendments, including map amendments, do not constitute contested case proceedings for purposes of MAPA. *North v. Kent Island Limited Partnership*, 106 Md.App. 92, 103 (1995) ("there is nothing in [NR] § 8-1809 that requires a contested case hearing"). Accordingly, since Commission proceedings are not contested case proceeding, and no provision of the Critical Area Law specifically authorizes Chapter 200 judicial review of Commission proceedings, the Circuit Court lacks jurisdiction under Chapter 200 to review the Commission's decisions. *Accord* Maganau Petitioners' Memorandum Of Law In Opposition To Motion To Dismiss Complaint/Petition

("Magenau Mem.") at 10 ("Title 8 of the Natural Resources Article does not expressly permit a right of appeal from an action of the Commission relating to critical area classifications"); Wright Investment Petitioner's Opposition To Motion To Dismiss ("Wright Investment Mem.") at 6 ("[a]s the Commission rightly points out . . . Title 8 of the Natural Resources Code . . . does not provide an explicit statutory right of review") .

Regarding the availability of Title 7, Chapter 400 administrative mandamus review, such review is only appropriate where the administrative action complained of was by nature "quasi-judicial," as opposed to quasi-legislative. *See* Rule 7-401(a) ("the Chapter governs action for judicial review of a quasi-judicial order or action of an administrative agency"). Chapter 400 review is therefore not available here because, as the Court of Special Appeals has held, the Critical Area Commission acts in a "quasi-legislative" capacity when it reviews local critical area programs and proposed program amendments, including critical area map amendments. *See North*, 106 Md.App. at 103 ("[t]he power of the Commission is to adopt regulations and criteria as well as conduct hearings in connections with 'policies, proposed programs, and proposed regulations or amendments to regulations'"), *citing* NR § 8-1806.[3]

Notwithstanding petitioners' assertions to the contrary, the Court's conclusion in *North* that the Commission acts in a quasi-legislative capacity when it reviews proposed program amendments is in accord with longstanding principals of administrative law. As the Court of Appeals stated in *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686 (1977), the distinction between

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[3] As the Court of Appeals recognized in *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530 (1999), the administrative process undertaken by a county in reviewing a proposed critical area map amendment for mistake is, contrary to the Critical Area Commission's role, a quasi-judicial function because the proceedings at the local level include "adjudicative or administrative fact-finding." *Id.* at 548.

whether an administrative agency acts in a judicial or legislative capacity is often "not easily drawn," and is determined based upon whether the agency considered either adjudicative or legislative facts and upon the nature of the function performed by the agency. *Id.* at 711-12. In determining that Montgomery County Council acts in a legislative capacity when it reviews comprehensive rezoning, versus an adjudicatory capacity when it reviews piecemeal rezoning, the Court stated that while piecemeal rezoning considers only a single piece of property to determine whether there has been a change in the physical character of the neighborhood or whether there had been a mistake in the original zoning – factual questions that are adversarial in nature and are resolved through trial-type procedures – comprehensive rezoning involved with a local map amendment proceeding is premised upon legislative determinations. *Id.* at 712. Reasoning that comprehensive rezoning involves legislative determinations, the Court noted that such zoning "takes into account future public need and purposes; whether [the rezoning] is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional need; and ultimately whether [the rezoning] bears the requisite relationship to the public health, safety and general welfare." *Id. See also Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 35 (2006) (piecemeal rezoning constitutes "zoning action" which is quasi-judicial, while comprehensive rezoning is not); *County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (recognizing the established administrative law principal that the process of comprehensive rezoning is quasi-legislative) (citations omitted).

Although only single parcels of property are involved in each of the three matters here, the nature and purposes of the Critical Area Commission's proceedings with respect to reviewing proposed critical area program maps and proposed map amendments are more in line with

comprehensive rezoning as was at issue in *Montgomery County v. Woodward & Lothrop*, than with piecemeal rezoning. *See Bucktail*, 351 Md. at 545 (the determination as to whether an administrative act regarding zoning is adjudicative or legislative "is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds").[4] As mandated within Critical Area Law, the Commission must review proposed program map amendments – including those predicated upon a mistake in the original mapping – to ensure compliance with all of the critical area statutory standards and regulatory criteria which, among other things, take into account public and environmental needs and purposes far beyond those directly affected by the individual parcels considered. *See* NR § 8-1809(o)(2) ("[t]he Commission shall determine if the proposed amendment is consistent with the purposes, policies, goals, and the provisions of this subtitle, and all criteria of the Commission"). In the instant cases, this included, at a minimum, review of the Map amendments to ensure compliance with the statutory goals and policies, and the Commission's criteria set forth at COMAR 27.01.02.04 regarding critical area lands designated LDA. *Id.* at 107.

Moreover, the Commission's procedure when it reviews a proposed map amendment is limited to receiving the request from the local jurisdiction, holding a public hearing, reviewing the request for compliance with the critical area standards and criteria, and acting upon the request within 90 days of receipt. *See* NR § 8-1809(o). Consistent with the Court's conclusion in *North*,

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[4] It is important to note, however, that while amendments to a locality's critical area map may share characteristics of zoning, such amendments are not zoning matters. *See Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md.App. 684, 693 (2002). A locality's zoning ordinance is separate and apart from its critical area program. *Id.* Moreover, the "[Critical Area] Commission does not act as a zoning body." *North*, 106 Md.App. at 103.

these statutory procedures do not contemplate nor accommodate trial-type proceedings; rather they are tantamount to the legislative proceedings and public hearings conducted by administrative agencies that propose and adopt regulations. *See, e.g.*, Md. Code Ann., State Gov't § 10-111. As the Court of Appeals stated in *Montgomery County v. Woodward & Lothrop*, that an administrative agency's "decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines [whether the proceedings are adjudicatory or legislative]." *Id.*, 280 Md. at 712.

Because the Circuit Court lacks jurisdiction under either Chapter 200 or Chapter 400 of Title 7 of the Maryland Rules, the Wright Invest Actions, the Daras Actions, and the Magenau Action should be dismiss for failure to properly invoke the jurisdiction of the Court, and for failure to allege a cause of action upon which relief can be granted.

B. Petitioners Fail To Raise Issues Of Fact As To Whether The Critical Area Commission Breached Its Lawful Authority.

In apparent recognition of the inadequacy of Title 7 of the Maryland Rules as a basis for judicial review of the decisions of the Critical Area Commission, each of the petitioners, in one form or another, turn to the "inherent right of the courts to review decisions of government agencies that affect individual property rights" as a basis for the Circuit Court's jurisdiction. *See* Magenau Mem. at 13 (citations omitted). *See also* Mr. Daras' Petitioner's Opposition To Motion To Dismiss Petition ("Daras Mem.") at 5-6; Wright Investment Mem. at 11-12. Where, as here, there is no basis for Title 7 judicial review of the decision of an administrative agency, judicial review by way of mandamus, injunction, declaratory action, or certiorari may be permitted within the original

jurisdiction of the Circuit Court as an adjunct of the Court's inherent authority. *See Armstrong v. Major and City Council of Baltimore*, 169 Md.App. 655, 667 (2006).

The standard of review applicable to any such proceeding under the Court's original jurisdiction is dependent upon the nature of the challenged administrative action. *Id.* at 668. If the administrative action complained of was by nature quasi-judicial, it is subject to review as is normally associated with Title 7, Chapter 200 statutory appeals of administrative actions: under the "substantial evidence or arbitrary and capacious test." *Id.* If, however, the administrative action complained of was by nature legislative, the review undertaken by the Circuit Count is narrow in scope and limited to an assessment of "whether the agency was acting within its legal boundaries." *Id., quoting Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 221-24 (1975). Indeed, quasi-legislative decisions of administrative agencies may only be invalidated by the judiciary if the decisions are found to be inconsistent with the letter and spirit of the law under which the agency operates. *See, e.g., County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (quasi-legislative decisions of administrative bodies are not subject to ordinary judicial review, but very limited review by the courts); *Givner v. Commissioner of Health*, 207 Md. 184, 192 (1955) (it is not the function of the courts to "pass upon the wisdom" of the agency's legislative action, or to approve or disapprove it, if it does not exceed the agency's lawful authority).

While conceding the correctness of the decision in *North* that the Commission's statutory role in reviewing requests for map amendments is by nature quasi-legislative, the Magenau Petitioners argue that the Commission's review in this regard is quasi-legislative only in those instances where the Commission "correctly performs its statutory role." Magenau Mem. at 11 (emphasis omitted).

The Magenua Petitioners then assert that, in this instance, the Commission abrogated its statutory role by reviewing and challenging Anne Arundel County's findings of mistake, and therefore acted in a quasi-judicial capacity. *Id.* As such, the Magenau Petitoners assert that the decision is subject to review under Title 7, Chapter 400, *id.* at 13, which would include substantive review of the Commission's decision under the substantial evidence and arbitrary and capricious tests. *See* Rule 7-403(E)-(F). Mr. Daras appears to makes a similar argument. *See* Daras Mem. at 4-5 (stating that, consistent with *North*, the Commission's review under NR § 8-1809 "should be quasi-legislative," thus implying that the Commission's decision regarding Daras' map amendment request was something other than quasi-legislative) (emphasis in original).

This argument, however, belies the distinction in scope of review between quasi-legislative and quasi-judicial actions. As stated, quasi-legislative decisions are reviewed for the sole purpose of determining whether the administrative agency acted consistent with its lawful authority. If the Court, in reviewing an administrative decision which, as here, is by statute quasi-legislative, determines that the agency exceeded its lawful authority by venturing into the judicial, the matter must return be to the agency with instructions to reconsider the matter consistent with the agency's authority. *See North*, 106 Md.App. at 108 (having found that the Commission exceeded its authority under NR § 8-1809, the Court remanded the matter to the Commission to conduct proceedings consistent with the Court's opinion). Given the legislative prerogative of the administrative agency in such instances, the Court, through its review, may not address the substance of the matter. *Linchester Sand & Gravel*, 274 Md. at 224-25 (the judiciary's authority to review quasi-legislative actions does not include the authority for the judiciary to substitute "[it's] judgment for that of the agency"). Here, to the extent that petitioners seek orders from the Court directing

approvals of their respective Map amendment requests, petitioners would have the Court exceed the scope of review by impermissibly substituting the Court's judgment for that of the Commission's.

In any event, the record and allegations here fail to establish any issue of fact as to whether the Commission in reviewing the three Map amendment requests acted outside its lawful authority under NR § 8-1809(o) to ensure compliance with applicable critical area criteria.[5] Both the Magenau and Daras Map amendment requests alleged that the subject properties should have been reclassified as LDA because of the properties' respective proximity to public water and sewer services in place at the time of the original mapping. *See* Magenau Mem. at Exhibit C, Critical Area Commission Panel Report; Daras Mem. at Exhibit A, Critical Area Commission Panel Report. The Commission reviewed and considered the requests, and determined as to each that the information provided by the County was insufficient for the Commission to determine whether the standards regarding proximity to water and sewer were applied "consistently and systematically to all Critical Area maps throughout the County" when the maps were originally drawn. *Id.* The Commission then sent both

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[5] Each of the four initial pleadings filed by the respective petitioners fail to set forth with any degree of particularity the facts upon which the petitioners contend that the Commission breached its lawful authority. The substantive sparsity of these pleading might be sufficient if judicial review was proper under Title 7 – *see* Rules 7-202(c) and 7-402(a) – but is wholly insufficient for a civil action under the Court's general jurisdiction. *See* Rule 2-303(b) ("a pleading shall contain . . . such statements of fact as may be necessary to show the pleader's entitlement to relief"). As such, dismissals of each action under Rule 2-322(b) for failure to state claims is appropriate. Nonetheless, in their respective memoranda in opposition to the Motions to Dismiss, each petitioner sets forth allegations of fact, not included in their initial pleadings, that the petitioners rely upon in asserting that the Commission acted beyond its statutory authority. While this is clearly contrary to proper pleadings practice inasmuch as the Commission has filed motions to dismiss and not motions for summary judgment supported by affidavit, the Commission is willing to stipulate that the allegations of fact as contained in the respective memoranda should be considered by the Court for purposes of the Commission's Motions to Dismiss as if those allegations of fact were fully set forth in the petitioners' respective initial pleadings.

proposed Map amendments back to the County with a request that the County provide an explanation as to how the mapping rules were applied during the original mapping. *Id.* This explanation is necessary so that the Commission, in furtherance of its oversight role for all local critical area programs,[6] can adequately assess whether the County's alleged oversight was limited to the Magenau and Daras properties, or whether the standards were incorrectly applied County-wide. *Id.* In this regard, the actions by the Commission on Anne Arundel County's request to reclassify the Magenau and Daras properties were consistent with, and in furtherance of, the Commission's statutory mandate to ensure that local critical area maps are consistent with applicable critical area criteria. *See* COMAR 27.01.02.04A.(4) (establishing that one of the features that qualify an area as LDA is for the area have public sewer or public water). Furthermore, the Commission's decisions to send the requested Map amendments back to the County were clearly authorized as one of four permissible options under NR § 8-1809(o)(3), which includes as an option the "[r]eturn [by the Commission of] the proposed program amendment to the local jurisdiction with a list of the changes to be made."

Regarding the Commission's denial of the Wright Investment Map amendment request, the Wright Investment Petitioners similarly fail to establish an issue as to whether the Commission acted contrary to its lawful authority. Wright Investment minimally alleges that the Commission remanded its Map amendment request to the County "for a comprehensive remapping of the entire area." Wright Investment Mem. at 5-6. Wright Investment fails to provide any information as to

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[6] *See Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md.App. 684, 686-87 (2002) (the Critical Area Commission performs oversight of local critical area programs); *North*, 106 Md.App. at 96 (noting that the Critical Area Commission was created, in part, to provide State oversight of local critical area programs); *Bellanca v. County Commissioners of Kent County*, 86 Md.App. 219, 222 (1991) (same).

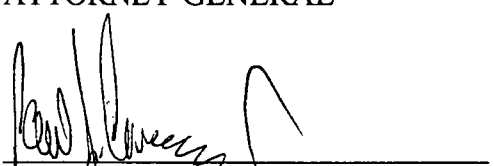
the context within which the Commission made its decision, and therefore provides no basis upon which the Court could conclude that the decision was contrary to the Commission's lawful authority. Wright Investment simply presumes that since the Commission's panel charged with reviewing the matter heard testimony during the statutorily mandated public hearing, these proceedings somehow impermissibly morphed from the quasi-legislative to the quasi-judicia. *Id.* at 10-11. As recognized in *North*, however, these statutory proceedings are by nature legislative and not judicial. *North*, 106 Md.App. at 103.

Conclusion

For the foregoing reasons, together with those set forth in the memoranda in support of the Motions to Dismiss, the Critical Area Commission's Motions to Dismiss each of the four cases should be granted.

Respectfully Submitted,

DOUGLAS F. GANSLER
ATTORNEY GENERAL



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Attorneys for Critical Area Commission

Dated: April 4, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April, 2007, copies of the foregoing Reply To Oppositions To Motions To Dismiss were sent via U.S. Mailed, postage prepaid, to:

Anthony F. Christhilf, Esq.
150 South Street, Suite 206
Annapolis, Maryland 21401
Attorney for Mr. Daras

Eileen E. Powers, Esq.
Blumenthal, Delavan & Williams, P.A.
170 Jennifer Road, Suite 240
Annapolis, Maryland 21401
Attorney for Magenau Petitioners

Benjamin S. Wechsler, Esq.
Linowes and Blocher LLP
145 Main Street
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Attorney for Wright Investment Petitioners

Sarah Iliff, Esq.
Senior Assistant County Attorney
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2660 Riva Road
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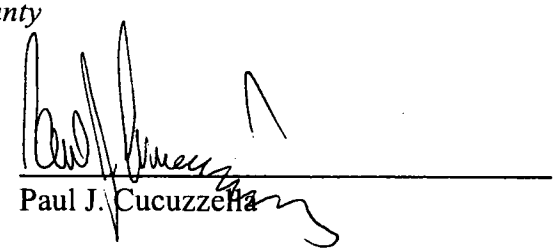
Attorney for Respondent Anne Arundel County



Paul J. Cucuzzella

IN THE CIRCUIT COURT OF MARYLAND FOR ANNE ARUNDEL COUNTY

DARAS	*	
v.	*	**CASE NOS.** [redacted] **and** [redacted]
CRITICAL AREA COMMISSION	*	
* * * * * * *		
JWL ASSOCIATES and MAGENAU	*	
v.	*	[redacted]
CRITICAL AREA COMMISSION	*	
* * * * * * *		
WRIGHT INVESTMENT GROUP	*	
	*	**CASE NOS. C-06-117432**
CRITICAL AREA COMMISSION	*	
* * * * * *		

FILED
2007 MAR 16 P 2: 28

ORDER

The foregoing Motion having been read and considered it is thereupon this 14th day of March, 2007, by the Circuit Court for Anne Arundel County ORDERED:

That the Complex Motions Hearing in Case Nos. C-06-118661 and C-06-118663 is hereby postponed; and

That the pending Motions in Case Nos. C-06-118661 and C-06-118663 and Case No. C-06-118672 are scheduled for hearing with the pending Motions in Case Nos. C-06-117695 and C-06-117432 at the Complex Motions Hearing at 1:30 p.m. on April 30, 2007.

Paul A. Hackner, Judge
Circuit Court for
Anne Arundel County

JUDGE

Paul A. Hackner, Judge
Circuit Court for
Anne Arundel County

TRUE COPY,
TEST: Robert P. Duckworth, Clerk
By: _____ Deputy

Correspondence
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF

MSA_S_1831_32 (3 of 5)

Correspondence
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF
AN APPEAL OF A CRITICAL AREA
RECLASSIFICATION, CASE NO.: 20000-0468-C,
BA-48-01-C, Civil Action No. _____

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Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

JOSEPH P. GILL
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Department of Natural Resources

FAX NO.: 410-260-8364

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pcucuzzella@dnr.state.md.us

May 17, 2007

Honorable Joseph P. Manck
Judge, Fifth Judicial Circuit
Anne Arundel County Courthouse
7 Church Circle
Annapolis, Maryland 21401

Re: Wright Investment Group v. Critical Area Commission, C-06-117432 & 117695
Daras v. Critical Area Commission, C-06-118661 & 118663
JWL Associates v. Critical Area Commission, C-06-118672
Parkin v. Critical Area Commission, C-07-121963

Dear Judge Manck:

I am in receipt of your letter of May 7, 2007 asking for additional memoranda in the above-referenced cases, and note that your letter does not provide a date by which you would like receipt of the parties' respective memoranda. I have therefore conferred with all counsel involved, and we have all agreed, in the absence of direction from the Court, to file our respective memoranda by June 15, 2007. If this is disagreeable to Your Honor for whatever reason, please let us know as we will obviously accommodate your schedule.

Respectfully yours,

Paul J. Cucuzzella
Assistant Attorney General

cc: Benjamin S. Wechsler, Esq.
Anthony F. Christhilf, Esq.
Eileen E. Powers, Esq.
Kathleen E. Byrne, Esq.
Marianne E. Dise, Esq.
Sarah M. Iliff, Esq.

RECEIVED
MAY 14 2007
DNR - LEGAL DIVISION

STATE OF MARYLAND
FIFTH JUDICIAL CIRCUIT
ANNE ARUNDEL COUNTY COURTHOUSE
ANNAPOLIS
21401

JOSEPH P. MANCK
JUDGE

TELEPHONE (410) 222-1185
TDD-FOR HEARING AND
SPEECH IMPAIRED
(410) 222-1429

May 7, 2007

Benjamin S. Wechsler, Esq.
Anthony F. Christhilf, Esq.
Eileen E. Powers, Esq.
Kathleen E. Byrne, Esq.
Paul J. Cucuzzella, Esq.
Marianne E. Dise, Esq.
Sarah M. Iliff, Esq.

RE: Wright Investment Group v. Critical Area Commission, et al. (C-06-117432 & 117695)
Michael Daras, et al. v. Critical Area Commission (C-06-118661 & 118663)
JWL Associates, et al v. Critical Area Commission (C-06-118672)
James Parkin, et al. v. Critical Area Commission, et al. (C-07-121963)

Dear counsel:

Please provide a legal memorandum dealing with the issue whether the Critical Area Commission's decision to remand each Petitioner's amendment/refinement application back to Anne Arundel County for more information is an appealable final decision. It is not clear to the Court whether the Plaintiffs are requesting this Court to order the Commission to make a decision approving or denying each application based on the submitted applications, as is, or to order the Commission to render a decision to approve each of the four applications.

Furthermore, it is the Court's understanding the Commission ordered Anne Arundel County to provide a comprehensive update as to the County's mapping mistakes. Please include an update on the status of the information the Commission requested of Anne Arundel County. To wit, whether the County has already provided the information to the Commission or when the County expects to meet the Commission's request for information. Thank you.

Sincerely,

Joseph P. Manck

JPM:jhk

Cucuzzella, Paul

From: Dise, Marianne E.
Sent: Tuesday, May 15, 2007 5:13 PM
To: Cucuzzella, Paul
Cc: Canedo, Saundra
Subject: Mistake cases

Sally wants a month - June 15th. She says that the county is 'close' to having the response to the info requested by the CAC, but I get the distinct impression that the response will not be the full explanation the Commission wanted. I have not reached Eileen.

I'm tied up this week with another matter (Four Seasons) that's even older than Miles Point and now involves the BPW. Can you handle the coordination w/ the others for a time to file memoranda? Many thanks!

Oh, and p.s. - we've got a referral for enforcement from Caroline county government re: a guy who cut @1 acre of trees, built a road, and parked a camper in the buffer - and the neighbors wrote directly to Gansler, so I expect that we'll hear from Central about that one, too.

Cucuzzella, Paul

From: Dise, Marianne E.
Sent: Tuesday, May 15, 2007 10:29 AM
To: Cucuzzella, Paul
Subject: RE: letter from Judge Manck

Yes, I got it.
By the way, the county council passed a bill last week adopting a new map which removes Wright's property from the Critical Area. The county has not yet submitted the map to the CAC, but, from what I read in the paper, it sounds as if the new map will moot the case(s). As for Judge Manck's request, I want to talk to Margaret about that, before we choose a course of action for response. What are your thoughts?

-----Original Message-----
From: Cucuzzella, Paul
Sent: Monday, May 14, 2007 12:58 PM
To: Dise, Marianne E.
Cc: Canedo, Saundra
Subject: letter from Judge Manck

Marianne, did you get the letter from Judge Manck asking for additional briefs on the Wright Inv., et al. cases? If not, I'll fax over a copy. If so, let's discuss.

Paul J. Cucuzzella
Assistant Attorney General
Maryland Department of Natural Resources
580 Taylor Ave., C-4
Annapolis, Maryland 21401
(410) 260-8352
fax (410) 260-8364
pcucuzzella@dnr.state.md.us

Cucuzzella, Paul

From: Dise, Marianne E.
Sent: Tuesday, April 03, 2007 4:15 PM
To: Cucuzzella, Paul
Subject: RE: Magenau, et al.

Hi Paul, as usual you did a great job! I fixed a few typos, and added several sentences (in bold), so that you could see where I supplemented. I think that the 2006 amendments give us strong support for the Commission's ability to look at all criteria, goals, etc. see NR 8-1809 (o). thanks, MED

-----Original Message-----
From: Cucuzzella, Paul
Sent: Tuesday, April 03, 2007 3:20 PM
To: Dise, Marianne E.
Subject: Magenau, et al.

Marianne, attached is the draft Reply we discussed. Your comments are welcome. As usual, the issues seem to have taken on a life all their own.

Paul J. Cucuzzella
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IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

MICHAEL A. DARAS,	*		
Petitioner,	*		
v.	*	Case Nos.:	C-06-118661 C-06-118663
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

JWL ASSOCIATED, at al.,	*		
Petitioners,	*		
v.	*	Case No.:	C-06-118672
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

WRIGHT INVESTMENT GROUP,	*		
Petitioner,	*		
v.	*	Case No.:	C-06-117432
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

REPLY TO OPPOSITIONS TO MOTIONS TO DISMISS

Respondent Critical Area Commission for the Chesapeake and Atlantic Coastal Bay (the "Critical Area Commission" or the "Commission"), by its attorneys, Douglas F. Gansler, Attorney

General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, hereby responds to the oppositions to the Motions to Dismiss filed in each of these cases.

Procedural Posture

These four cases arise from actions taken by the Critical Area Commission on three separate requests made by Anne Arundel County (the "County") to amend its Critical Area Map (the "Map") as a consequence of what the County alleged were mistakes that the County had made when it originally crafted the Map in 1987. Following enactment in 1984 of the Critical Area Law – Md. Code Ann., Nat. Res. ("NR") § 8-1801 *et. seq.* – all jurisdictions with land areas within the Chesapeake Bay Critical Area were required to map that jurisdiction's critical area[1], and have their respective maps approved by the Critical Area Commission. NR § 8-1808(c). Foreseeing the inevitability that diverse local jurisdictions would make geographic and other mistakes during the course of the mapping process, the General Assembly provided a procedure whereby, following approval by the Critical Area Commission of a local jurisdiction's critical area map, the local jurisdiction could, upon proof of mistake in the original map, propose to the Commission an amendment to that jurisdiction's map. NR § 8-1809(h).

Here, the three Map amendments requested by Anne Arundel County involved, respectively, property owned by: (1) Michael A. Daras, the petitioner in case numbers C-06-118661 and C-06-118663 (the "Daras Actions"); (2) JWL Associated and William and Mary Magenau, the petitioners in case number C-06-118673 (the "Magenau Action"); and (3) the Wright Investment Group, the

[1] The "critical area" includes of all land and water areas within 1,000 feet beyond the heads of tide of the waters of the Chesapeake Bay and its tributaries. NR § 8-1807(a).

petitioner in case number C-06-11743 (the "Wright Investment Action").[2] In each instance, the owners of the subject parcels requested that their respective property be reclassified from Resources Conservation Area (RCA), the most restrictive of the three critical area land classification, to Limited Development Area (LDA). As to each, the Commission received from the County a request pursuant to NR § 8-1809(h) for a map amendment, formed a Panel of Commission members to review the request and report to the full Commission as required by NR § 8-1809(o), and, in a timely manner, voted **to return the proposed amendments to the County for further action,** and thereafter notified the County of same.

On October 6, 2006, Wright Investment filed the Wright Investment Action seeking administrative mandamus under Title 7, Chapter 400, of the Maryland Rules *et seq.*, and judicial review under Title 7, Chapter 200, of the Commission's decision regarding its property. On December 1, 2006, the Daras Actions were filed which, respectively, seek Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the Critical Area Commission's decision regarding Mr. Daras' property. On December 11, 2006, the Magenau Action was filed which, similarly, seeks Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the decision on the Magenaus' property. In separate Motions on each case, the Critical Area Commission has sought dismissal of all four actions on grounds that the decisions of the Critical Area Commission denying each of the three proposed map amendments are not subject to administrative mandamus under Title 7, Chapter 400, or judicial review under Title 7, Chapter

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[2] A fifth case, civil number C-06-117695, was filed Wright Investment and seeks a writ of mandamus under Title 15, Chapter 700 of the Maryland Rule. The Critical Area Commission filed an Answer to that action and it is therefore not subject to any of the Commission's motions to dismiss.

200. Each petitioner has responded separately in opposition to the Commission's Motions. The Court has scheduled a joint hearing on all four Motions for April 30, 2007, because the four Motions present similar issues of law and fact. By this Memorandum, the Critical Area Commission replies to the common questions of law and fact addressed in each of the petitioners' oppositions to the Motions to Dismiss.

Law and Argument

A. The Circuit Court Lacks Jurisdiction Under Title 7, Chapter 200, and Title 7, Chapter 400, To Review The Critical Area Commission's Decisions.

As discussed in the memoranda in support of the Motions to Dismiss, the Circuit Court has jurisdiction under Title 7, Chapter 200, to review an action of an administrative agency only when judicial review of that action is separately authorized by statute. *See* Rule 7-201(a). While judicial review under Chapter 200 is specifically authorized for decisions of "contested case" proceedings under the Maryland Administrative Procedure Act (MAPA), Md. Code, Ann, State Gov't § 10-201 *et. seq.*, the proceedings of the Critical Area Commission in reviewing local critical area program amendments, including map amendments, do not constitute contested case proceedings for purposes of MAPA. *North v. Kent Island Limited Partnership*, 106 Md.App. 92, 103 (1995) ("there is nothing in [NR] § 8-1809 that requires a contested case hearing"). Accordingly, since Commission proceedings are not contested case proceeding, and no provision of the Critical Area Law specifically authorizes Chapter 200 judicial review of Commission proceedings, the Circuit Court lacks jurisdiction under Chapter 200 to review the Commission's decisions. *Accord* Maganau Petitioners' Memorandum Of Law In Opposition To Motion To Dismiss Complaint/Petition ("Magenau Mem.") at 10 ("Title 8 of the Natural Resources Article does not expressly permit a right of appeal from an

action of the Commission relating to critical area classifications"); Wright Investment Petitioner's Opposition To Motion To Dismiss ("Wright Investment Mem.") at 6 ("[a]s the Commission rightly points out . . . Title 8 of the Natural Resources Code . . . does not provide an explicit statutory right of review") .

Regarding the availability of Title 7, Chapter 400 administrative mandamus review, such review is only appropriate where the administrative action complained of was by nature "quasi-judicial," as opposed to quasi-legislative. Rule 7-401(a). Chapter 400 review is therefore not available here because, as the Court of Special Appeals has held, the Critical Area Commission acts in a "quasi-legislative" capacity when it reviews local critical area programs and proposed program amendments, including critical area map amendments. *See North*, 106 Md.App. at 103 ("[t]he power of the Commission is to adopt regulations and criteria as well as conduct hearings in connections with 'policies, proposed programs, and proposed regulations or amendments to regulations'"), *citing* NR § 8-1806.[3]

The Court's conclusion in *North* that the Commission acts in a quasi-legislative capacity when it reviews proposed program amendments is in accord with longstanding principals of administrative law. As the Court of Appeals stated in *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686 (1977), the distinction between whether an administrative agency acts in a judicial or legislative capacity is often "not easily drawn," and is determined based upon whether the agency considered either adjudicative or legislative facts and upon the nature of the function performed by

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[3] As the Court of Appeals recognized in *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530 (1999), the administrative process undertaken by a county in reviewing a proposed critical area map amendment for mistake is, in contrast to the Critical Area Commission's role, a quasi-judicial function because the proceedings at the local level include "adjudicative or administrative fact-finding." *Id.* at 548.

the agency. *Id.* at 711-12. In determining that Montgomery County Council acts in a legislative capacity when it reviews comprehensive rezoning, versus a adjudicatory capacity when it reviews piecemeal rezoning, the Court stated that while piecemeal rezoning considers only a single piece of property to determine whether there has been a change in the physical character of the neighborhood or whether there had been a mistake in the original zoning – factual questions that are adversarial in nature and are resolved through trial-type procedures – comprehensive rezoning involved with a local map amendment proceeding is premised upon legislative determinations. *Id.* at 712. Reasoning that comprehensive rezoning involves legislative determinations, the Court noted that such zoning "takes into account future public need and purposes; whether [the rezoning] is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional need; and ultimately whether [the rezoning] bears the requisite relationship to the public health, safety and general welfare." *Id. See also Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 35 (2006) (piecemeal rezoning constitutes "zoning action" which is quasi-judicial, while comprehensive rezoning is not); *County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (recognizing the established administrative law principal that the process of comprehensive rezoning is quasi-legislative) (citations omitted).

Although only single parcels of property are involved in each of the three matters here, the nature and purposes of the Critical Area Commission's proceedings with respect to reviewing proposed critical area program maps and proposed map amendments are more in line with the comprehensive rezoning at issue in *Montgomery County v. Woodward & Lothrop*, than with piecemeal rezoning. *See Bucktail*, 351 Md. at 545 (the determination as to whether an administrative act regarding zoning is adjudicative or legislative "is not based on whether the zoning decision

adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds").[4] As required by NR **§8-1809(o)**, the Commission must review proposed program map amendments – including those predicated upon a mistake in original mapping – to ensure compliance with **all of** the critical area statutory standards and regulatory criteria which take into account public and environmental needs and purposes far beyond those directly affected by the individual parcels considered. **"The Commission shall determine if the proposed amendment is consistent with the purposes, policies, goals, and the provisions of this subtitle, and all criteria of the Commission." Id.** In the instant cases, this included, at a minimum, review of the map amendments to ensure compliance with the statutory goals and policies, and the Commission's criteria set forth at COMAR 27.01.02.04 regarding critical area lands designated LDA. *Id.* at 107.

Moreover, the Commission's procedure when it reviews a proposed map amendment is limited to receiving the request from the local jurisdiction, holding a public hearing, reviewing the request for compliance with the critical area standards and criteria, and acting upon the request within 90 days of receipt. *See* NR § 8-1809. Consistent with the Court's conclusion in *North*, these statutory procedures do not contemplate nor accommodate trial-type proceedings; rather they are tantamount to the legislative proceedings and public hearings conducted by administrative agencies that propose and adopt regulations. *See, e.g.*, Md. Code Ann., State Gov't § 10-111. As the Court of Appeals stated in *Montgomery County v. Woodward & Lothrop*, that an administrative agency's

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[4] It is important to note, however, that while amendments to a locality's critical area map may share characteristics of zoning, such amendments are not zoning matters. *See Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md.App. 684, 693 (2002). A locality's zoning ordinance is separate and apart from its critical area program. *Id.* Moreover, the "[Critical Area] Commission does not act as a zoning body." *North*, 106 Md.App. at 103.

"decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines [whether the proceedings are adjudicatory or legislative]." *Id.*, 280 Md. at 712.

Because the Circuit Court lacks jurisdiction under either Chapter 200 or Chapter 400 of Title 7 of the Maryland Rules, the Wright Invest Actions, the Daras Actions, and the Magenau Action should be dismiss for failure to properly invoke the jurisdiction of the Court, and for failure to allege a cause of action upon which relief can be granted.

B. Petitioners Fail To Raise Issues Of Fact As To Whether The Critical Area Commission Breached Its Lawful Authority.

In apparent recognition of the inadequacy of Title 7 of the Maryland Rules as a basis for judicial review of the decisions of the Critical Area Commission, each of the petitioners, in one form or another, turn to the "inherent right of the courts to review decisions of government agencies that affect individual property rights" as a basis for the Circuit Court's jurisdiction. *See* Magenau Mem. at 13 (citations omitted). *See also* Daras Petitioner's Opposition To Motion To Dismiss Petition ("Daras Mem.") at 5-6; Wright Investment Mem. at 11-12. Where, as here, there is no basis for Title 7 judicial review of the decision of an administrative agency, judicial review by way of mandamus, injunction, declaratory action, or certiorari may be permitted within the original jurisdiction of the Circuit Court as an adjunct of the Court's inherent authority. *See Armstrong v. Major and City Council of Baltimore*, 169 Md.App. 655, 667 (2006).

The standard of review applicable to any such proceeding under the Court's original jurisdiction is dependent upon the nature of the challenged administrative action. *Id.* at 668. If the

administrative action complained of was by nature quasi-judicial, it is subject to review as is normally associated with Title 7, Chapter 200 statutory appeals of administrative actions: under the "substantial evidence or arbitrary and capacious test." *Id.* If, however, the administrative action complained of was by nature legislative, the review undertaken by the Circuit Count is narrow in scope and limited to an assessment of "whether the agency was acting within its legal boundaries." *Id., quoting Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 221-24 (1975). Indeed, quasi-legislative decisions of administrative agencies may only be invalidated by the judiciary if the legislative acts are found to be inconsistent with the letter and spirit of the law under which the agency operates. *See, e.g., County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (quasi-legislative decisions of administrative bodies are not subject to ordinary judicial review, but very limited review by the courts); *Givner v. Commissioner of Health*, 207 Md. 184, 192 (1955) (it is not the function of the courts to "pass upon the wisdom" of the agency's legislative action, or to approve or disapprove it, if it does not exceed the agency's lawful authority).

While conceding the correctness of the decision in *North* that the Commission's statutory role in reviewing requests for map amendments is by nature quasi-legislative, the Magenau Petitioners argue that the Commission's review in this regard is quasi-legislative only in those instances where the Commission "correctly performs its statutory role." Magenau Mem. at 11 (emphasis omitted). The Magenua Petitioners then assert that, in this instance, the Commission abrogated its statutory role by reviewing and challenging Anne Arundel County's findings of mistake and therefore acted in a quasi-judicial capacity. *Id.* As such, the Magenau Petitoners assert that the decision is subject to review under Title 7, Chapter 400, *id.* at 13, which would include substantive review of the

Commission's decision under the substantial evidence and arbitrary and capricious tests. Rule 7-403(E)-(F). Mr. Daras appears to makes a similar argument. *See* Daras Mem. at 4-5 (stating that, consistent with *North*, the Commission's review under NR § 8-1809 "should be quasi-legislative," thus implying that the Commission's decision regarding Daras' map amendment request was something other than quasi-legislative) (emphasis in original).

This argument, however, belies the distinction in scope of review between quasi-legislative and quasi-judicial actions. As stated, quasi-legislative decisions are reviewed for the sole purpose of determining whether the administrative agency acted consistent with its lawful authority. If the Court, in reviewing an administrative decision which, as here, is by statute quasi-legislative, determines that the agency exceeded its lawful authority by venturing into the judicial, the matter must return be to the agency with instructions to reconsider the matter consistent with the agency's authority. *See North*, 106 Md.App. at 108 (having found that the Commission exceeded its authority under NR § 8-1809, the Court remanded the matter to the Commission to conduct proceedings consistent with the Court's opinion). Given the legislative prerogative of the administrative agency in such instances, the Court, through its review, may not address the substance of the matter. *Linchester Sand & Gravel*, 274 Md. at 224-25 (the judiciary's authority to review quasi-legislative actions does not include the authority for the judiciary to substitute "[it's] judgment for that of the agency"). Here, to the extent that petitioners seek orders from the Court directing approvals of the respective map amendments, petitioners would have the Court exceed the scope of review by impermissibly venturing into the realm of substituting the Court's judgment for that of the Commission's.

In any event, the record and allegations here fail to establish any issue of fact as to whether

the Commission in reviewing the three Map amendment requests acted outside its lawful authority under NR § 8-1809 to ensure compliance with applicable critical area criteria.[5] Both the Magenau and Daras Map amendment requests alleged that the subject properties should have been reclassified as LDA because of the properties' respective proximity to public water and sewer services in place at the time of the original mapping. *See* Magenau Mem. at Exhibit C, Critical Area Commission Panel Report; Daras Mem. at Exhibit A, Critical Area Commission Panel Report. The Commission reviewed and considered the requests, and determined as to each that the information provided by the County was insufficient for the Commission to determine whether the standards regarding proximity to water and sewer were applied "consistently and systematically to all Critical Area maps throughout the County" when the maps were originally drawn. *Id.* The Commission then sent both proposed Map amendments back to the County with a request that the County provide an explanation as to how the mapping rules were applied during the original mapping so that the Commission, in

[5] Each of the four initial pleadings filed by the respective petitioners fail to set forth with any degree of particularity the facts upon which the petitioners contend that the Commission breached its lawful authority. The substantive sparsity of these pleading might be sufficient if judicial review was proper under Title 7 – *see* Rules 7-202(c) and 7-402(a) – but is wholly insufficient for a civil action under the Court's general jurisdiction. *See* Rule 2-303(b) ("a pleading shall contain . . . such statements of fact as may be necessary to show the pleader's entitlement to relief"). As such, dismissals of each action under Rule 2-322(b) for failure to state claims is appropriate. In their respective memoranda in opposition to the Motions to Dismiss, however, each petitioner sets forth allegations of fact, not included in their initial pleadings, that the petitioners rely upon in asserting that the Commission acted beyond its statutory authority. While this is clearly contrary to proper pleadings practice inasmuch as the Commission has filed motions to dismiss and not motions for summary judgment supported by affidavit, the Commission is willing to stipulate that the allegations of fact as contained in the respective memoranda should be considered by the Court for purposes of the Commission's Motions to Dismiss as if those allegations of fact were fully set forth in the petitioners' respective initial pleading.

furtherance of its oversight role for all local critical area programs,[6] could adequately assess whether the County's alleged oversight was limited to the Magenau and Daras properties, or whether the standards were incorrectly applied County-wide. *Id.* In this regard, the actions by the Commission on Anne Arundel County's request to reclassify the Magenau and Daras properties were consistent with, and in furtherance of, the Commission's statutory mandate to ensure that local critical area maps are consistent with applicable critical area criteria. *See* COMAR 27.01.02.04A.(4) (establishing that one of the features that qualify an area as LDA is for the area have public sewer or public water). **Furthermore, the Commission's decisions to send back the requested map amendments to the County were clearly authorized as one of four permissible options under Code, NR § 8-1809(o)(3)(iv). "The Commission shall.....[r]eturn the proposed program amendment to the local jurisdiction with a list of the changes to be made."**

Regarding the Commission's denial of the Wright Investment Map amendment request, the Wright Investment Petitioners similarly fail to establish an issue as to whether the Commission acted contrary to its lawful authority. Wright Investment minimally alleges that on September 6, 2006, the Commission remanded its Map amendment request to the County "for a comprehensive remapping of the entire area." Wright Investment Mem. at 5-6. Wright Investment fails to provide any information as to the context within which the Commission made its decision, and therefore provides no basis upon which **the Court could** conclude that the decision was contrary to the Commission's lawful authority. Wright Investment simply presumes that, since the Commission's

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[6] *See Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md.App. 684, 686-87 (2002) (Critical Area Commission performs oversight of local Critical Area programs); *North*, 106 Md.App. at 96 (noting that the Critical Area Commission was created, in part, to provide State oversight of local critical area programs); *Bellanca v. County Commissioners of Kent County*, 86 Md.App. 219, 222 (1991) (same).

panel charged with reviewing the matter heard testimony during the statutorily mandated public hearing, these proceedings somehow impermissibly morphed from the quasi-legislative to the quasi-judicial proceeding. *Id.* at 10-11. As recognized in *North*, however, these statutory proceedings are by nature legislative **and not judicial**. *North*, 106 Md.App. at 103.

Conclusion

For the foregoing reasons, together with those set forth in the memoranda in support of the Motions to Dismiss, the Critical Area Commission's Motions to Dismiss each of the four cases should be granted.

Respectfully Submitted,

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ATTORNEY GENERAL

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Dated: April __, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of April, 2007, a copies Reply To Oppositions To Motions To Dismiss were sent via U.S. Mailed, postage prepaid, to:

Anthony F. Christhilf, Esq.
150 South Street, Suite 206
Annapolis, Maryland 21401
Attorney for Petitioner

others

_____
Paul J. Cucuzzella

Cucuzzella, Paul

From: Cucuzzella, Paul
Sent: Tuesday, April 03, 2007 3:20 PM
To: Dise, Marianne E.
Subject: Magenau, et al.

Marianne, attached is the draft Reply we discussed. Your comments are welcome. As usual, the issues seem to have taken on a life all their own.

Paul J. Cucuzzella
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IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

MICHAEL A. DARAS,	*		
Petitioner,	*		
v.	*	Case Nos.:	C-06-118661 C-06-118663
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

JWL ASSOCIATED, at al.,	*		
Petitioners,	*		
v.	*	Case No.:	C-06-118672
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

WRIGHT INVESTMENT GROUP,	*		
Petitioner,	*		
v.	*	Case No.:	C-06-117432
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

REPLY TO OPPOSITIONS TO MOTIONS TO DISMISS

Respondent Critical Area Commission for the Chesapeake and Atlantic Coastal Bay (the "Critical Area Commission" or the "Commission"), by its attorneys, Douglas F. Gansler, Attorney

General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, hereby responds to the oppositions to the Motions to Dismiss filed in each of these cases.

Procedural Posture

These four cases arise from actions taken by the Critical Area Commission on three separate requests made by Anne Arundel County (the "County") to amend its Critical Area Map (the "Map") as a consequence of what the County alleged were mistakes that the County had made when it originally crafted the Map in 1987. Following enactment in 1984 of the Critical Area Law – Md. Code Ann., Nat. Res. ("NR") § 8-1801 *et. seq.* – all jurisdictions with land areas within the Chesapeake Bay Critical Area were required to map that jurisdiction's critical area[1], and have their respective maps approved by the Critical Area Commission. NR § 8-1808(c). Foreseeing the inevitability that diverse local jurisdictions would make geographic and other mistakes during the course of the mapping process, the General Assembly provided a procedure whereby, following approval by the Critical Area Commission of a local jurisdiction's critical area map, the local jurisdiction could, upon proof of mistake in the original map, propose to the Commission an amendment to that jurisdiction's map. NR § 8-1809(h).

Here, the three Map amendments requested by Anne Arundel County involved, respectively, property owned by: (1) Michael A. Daras, the petitioner in case numbers C-06-118661 and C-06-118663 (the "Daras Actions"); (2) JWL Associated and William and Mary Magenau, the petitioners in case number C-06-118673 (the "Magenau Action"); and (3) the Wright Investment Group, the

[1] The "critical area" includes of all land and water areas within 1,000 feet beyond the heads of tide of the waters of the Chesapeake Bay and its tributaries. NR § 8-1807(a).

petitioner in case number C-06-11743 (the "Wright Investment Action").[2] In each instance, the owners of the subject parcels requested that their respective property be reclassified from Resources Conservation Area (RCA), the most restrictive of the three critical area land classification, to Limited Development Area (LDA). As to each, the Commission received from the County a request pursuant to NR § 8-1809(h) for a map amendment, formed a Panel of Commission members to review the request and report to the full Commission as required by NR § 8-1809(o), and, in a timely manner, voted unfavorably on the requests and thereafter notified the County of same.

On October 6, 2006, Wright Investment filed the Wright Investment Action seeking administrative mandamus under Title 7, Chapter 400, of the Maryland Rules *et seq.*, and judicial review under Title 7, Chapter 200, of the Commission's decision regarding its property. On December 1, 2006, the Daras Actions were filed which, respectively, seek Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the Critical Area Commission's decision regarding Mr. Daras' property. On December 11, 2006, the Magenau Action was filed which, similarly, seeks Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the decision on the Magenaus' property. In separate Motions on each case, the Critical Area Commission has sought dismissal of all four actions on grounds that the decisions of the Critical Area Commission denying each of the three proposed map amendments are not subject to administrative mandamus under Title 7, Chapter 400, or judicial review under Title 7, Chapter 200. Each petitioner has responded separately in opposition to the Commission's Motions. The

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[2] A fifth case, civil number C-06-117695, was filed Wright Investment and seeks a writ of mandamus under Title 15, Chapter 700 of the Maryland Rule. The Critical Area Commission filed an Answer to that action and it is therefore not subject to any of the Commission's motions to dismiss.

Court has scheduled a joint hearing on all four Motions for April 30, 2007, because the four Motions present similar issues of law and fact. By this Memorandum, the Critical Area Commission replies to the common questions of law and fact addressed in each of the petitioners' oppositions to the Motions to Dismiss.

Law and Argument

A. The Circuit Court Lacks Jurisdiction Under Title 7, Chapter 200, and Title 7, Chapter 400, To Review The Critical Area Commission's Decisions.

As discussed in the memoranda in support of the Motions to Dismiss, the Circuit Court has jurisdiction under Title 7, Chapter 200, to review an action of an administrative agency only when judicial review of that action is separately authorized by statute. *See* Rule 7-201(a). While judicial review under Chapter 200 is specifically authorized for decisions of "contested case" proceedings under the Maryland Administrative Procedure Act (MAPA), Md. Code, Ann, State Gov't § 10-201 *et. seq.*, the proceedings of the Critical Area Commission in reviewing local critical area program amendments, including map amendments, do not constitute contested case proceedings for purposes of MAPA. *North v. Kent Island Limited Partnership*, 106 Md.App. 92, 103 (1995) ("there is nothing in [NR] § 8-1809 that requires a contested case hearing"). Accordingly, since Commission proceedings are not contested case proceeding, and no provision of the Critical Area Law specifically authorizes Chapter 200 judicial review of Commission proceedings, the Circuit Court lacks jurisdiction under Chapter 200 to review the Commission's decisions. *Accord* Maganau Petitioners' Memorandum Of Law In Opposition To Motion To Dismiss Complaint/Petition ("Magenau Mem.") at 10 ("Title 8 of the Natural Resources Article does not expressly permit a right of appeal from an action of the Commission relating to critical area classifications"); Wright Investment Petitioner's

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capacity when it reviews comprehensive rezoning, versus a adjudicatory capacity when it reviews piecemeal rezoning, the Court stated that while piecemeal rezoning considers only a single piece of property to determine whether there has been a change in the physical character of the neighborhood or whether there had been a mistake in the original zoning – factual questions that are adversarial in nature and are resolved through trial-type procedures – comprehensive rezoning involved with a local map amendment proceeding is premised upon legislative determinations. *Id.* at 712. Reasoning that comprehensive rezoning involves legislative determinations, the Court noted that such zoning "takes into account future public need and purposes; whether [the rezoning] is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional need; and ultimately whether [the rezoning] bears the requisite relationship to the public health, safety and general welfare." *Id. See also Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 35 (2006) (piecemeal rezoning constitutes "zoning action" which is quasi-judicial, while comprehensive rezoning is not); *County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (recognizing the established administrative law principal that the process of comprehensive rezoning is quasi-legislative) (citations omitted).

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Moreover, the Commission's procedure when it reviews a proposed map amendment is limited to receiving the request from the local jurisdiction, holding a public hearing, reviewing the request for compliance with the critical area standards and criteria, and acting upon the request within 90 days of receipt. *See* NR § 8-1809. Consistent with the Court's conclusion in *North*, these statutory procedures do not contemplate nor accommodate trial-type proceedings; rather they are tantamount to the legislative proceedings and public hearings conducted by administrative agencies that propose and adopt regulations. *See, e.g.*, Md. Code Ann., State Gov't § 10-111. As the Court of Appeals stated in *Montgomery County v. Woodward & Lothrop*, that an administrative agency's "decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines [whether the proceedings are adjudicatory or

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complained of was by nature legislative, the review undertaken by the Circuit Count is narrow in scope and limited to an assessment of "whether the agency was acting within its legal boundaries." *Id., quoting Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 221-24 (1975). Indeed, quasi-legislative decisions of administrative agencies may only be invalidated by the judiciary if the legislative acts are found to be inconsistent with the letter and spirit of the law under which the agency operates. *See, e.g., County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (quasi-legislative decisions of administrative bodies are not subject to ordinary judicial review, but very limited review by the courts); *Givner v. Commissioner of Health*, 207 Md. 184, 192 (1955) (it is not the function of the courts to "pass upon the wisdom" of the agency's legislative action, or to approve or disapprove it, if it does not exceed the agency's lawful authority).

While conceding the correctness of the decision in *North* that the Commission's statutory role in reviewing requests for map amendments is by nature quasi-legislative, the Magenau Petitioners argue that the Commission's review in this regard is quasi-legislative only in those instances where the Commission "correctly performs its statutory role." Magenau Mem. at 11 (emphasis omitted). The Magenua Petitioners then assert that, in this instance, the Commission abrogated its statutory role by reviewing and challenging Anne Arundel County's findings of mistake and therefore acted in a quasi-judicial capacity. *Id.* As such, the Magenau Petitoners assert that the decision is subject review under Title 7, Chapter 400, *id.* at 13, which would include substantive review of the Commission's decision under the substantial evidence and arbitrary and capricious tests. Rule 7-403(E)-(F). Mr. Daras appears to makes a similar argument. *See* Daras Mem. at 4-5 (stating that, consistent with *North*, the Commission's review under NR § 8-1809 "<u>should</u> be quasi-legislative,"

thus implying that the Commission's decision regarding Daras' map amendment request was something other than quasi-legislative) (emphasis in original).

This argument, however, belies the distinction in scope of review between quasi-legislative and quasi-judicial actions. As stated, quasi-legislative decisions are reviewed for the sole purpose of determining whether the administrative agency acted consistent with its lawful authority. If the Court, in reviewing an administrative decision which, as here, is by statute quasi-legislative, determines that the agency exceeded its lawful authority by venturing into the judicial, the matter must return be to the agency with instructions to reconsider the matter consistent with the agency's authority. *See North*, 106 Md.App. at 108 (having found that the Commission exceeded its authority under NR § 8-1809, the Court remanded the matter to the Commission to conduct proceedings consistent with the Court's opinion). Given the legislative prerogative of the administrative agency in such instances, the Court, through its review, may not address the substance of the matter. *Linchester Sand & Gravel*, 274 Md. at 224-25 (the judiciary authority to review quasi-legislative actions does not include the authority for the judiciary to substitute "[it's] judgment for that of the agency"). Here, to the extent that petitioners seeks orders from the Court directing approvals of the respective map amendments, petitioners would have the Court exceed the scope of review by impermissibly venturing into the realm of substituting the Court's judgment for that of the Commission's.

In any event, the record and allegations here fail to establish any issue of fact as to whether the Commission in reviewing the three Map amendment requests acted outside its lawful authority

under NR § 8-1809 to ensure compliance with applicable critical area criteria.[5] Both the Magenau and Daras Map amendment requests alleged that the subject properties should have been reclassified as LDA because of the properties' respective proximity to public water and sewer services in place at the time of the original mapping. *See* Magenau Mem. at Exhibit C, Critical Area Commission Panel Report; Daras Mem. at Exhibit A, Critical Area Commission Panel Report. The Commission reviewed and considered the requests, and determined as to each that the information provided by the County was insufficient for the Commission to determine whether the standards regarding proximity to water and sewer were applied "consistently and systematically to all Critical Area maps throughout the County" when the maps were originally drawn. *Id.* The Commission then sent both proposed Map amendments back to the County with a request that the County provide an explanation as to how the mapping rules were applied during the original mapping so that the Commission, in furtherance of its oversight role for all local critical area programs,[6] could adequately assess whether

---

[5] Each of the four initial pleadings filed by the respective petitioners fail to set forth with any degree of particularity the facts upon which the petitioners contend that the Commission breached its lawful authority. The substantive sparsity of these pleading might be sufficient if judicial review was proper under Title 7 – *see* Rules 7-202(c) and 7-402(a) – but is wholly insufficient for a civil action under the Court's general jurisdiction. *See* Rule 2-303(b) ("a pleading shall contain . . . such statements of fact as may be necessary to show the pleader's entitlement to relief"). As such, dismissals of each action under Rule 2-322(b) for failure to state claims is appropriate. In their respective memoranda in opposition to the Motions to Dismiss, however, each petitioner sets forth allegations of fact, not included in their initial pleadings, that the petitioners rely upon in asserting that the Commission acted beyond its statutory authority. While this is clearly contrary to proper pleadings practice inasmuch as the Commission has filed motions to dismiss and not motions for summary judgment supported by affidavit, the Commission is willing to stipulate that the allegations of fact as contained in the respective memoranda should be considered by the Court for purposes of the Commission's Motions to Dismiss as if those allegations of fact were fully set forth in the petitioners' respective initial pleading.

[6] *See Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md.App. 684, 686-87 (2002) (Critical Area Commission performs oversight of local Critical

the County's alleged oversight was limited to the Magenau and Daras properties, or whether the standards were incorrectly applied County-wide. *Id.* In this regard, the actions by the Commission on Anne Arundel County's request to reclassify the Magenau and Daras properties were consistent with, and in furtherance of, the Commission's statutory mandate to ensure that local critical area maps are consistent with applicable critical area criteria. *See* COMAR 27.01.02.04A.(4) (establishing that one of the features that qualify an area as LDA is for the area have public sewer or public water access).

Regarding the Commission's denial of the Wright Investment Map amendment request, the Wright Investment Petitioners similarly fails to establish an issue as to whether the Commission acted contrary to its lawful authority. Wright Investment minimally alleges that on September 6, 2006, the Commission remanded its Map amendment request to the County "for a comprehensive remapping of the entire area." Wright Investment Mem. at 5-6. Wright Investment fails to provide any information as to the context within which the Commission made its decision, and therefore provides no basis upon which to conclude that the decision was contrary to the Commission's lawful authority. Wright Investment simply presumes that, since the Commission's panel charged with reviewing the matter heard argument and testimony during the statutorily mandated public hearing, these proceedings somehow impermissibly morphed from the quasi-legislative to the quasi-judicial proceeding. *Id.* at 10-11. As noted recognized in *North*, however, these statutory proceedings are not by nature legislative. *North*, 106 Md.App. at 103.

Area programs); *North*, 106 Md.App. at 96 (noting that the Critical Area Commission was created, in part, to provide State oversight of local critical area programs); *Bellanca v. County Commissioners of Kent County*, 86 Md.App. 219, 222 (1991) (same).

Conclusion

For the foregoing reasons, together with those set for in the memoranda in support of the Motions to Dismiss, the Critical Area Commissions Motions to Dismiss each of the four cases should be granted.

Respectfully Submitted,

DOUGLAS F. GANSLER
ATTORNEY GENERAL

Paul J. Cucuzzella
Marianne E. Dise
Assistant Attorneys General
Maryland Department of Natural Resources
580 Taylor Avenue, C-4
Annapolis, Maryland 21401
(410) 260-8352
Fax: (410) 260-8364
Attorneys for Critical Area Commission

Dated: April __, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of April, 2007, a copies Reply To Oppositions To Motions To Dismiss were sent via U.S. Mailed, postage prepaid, to:

Anthony F. Christhilf, Esq.
150 South Street, Suite 206
Annapolis, Maryland 21401
Attorney for Petitioner

others

_____
Paul J. Cucuzzella

Working copy

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDELCOUNTY

PETITION OF WRIGHT INVESTMENT GROUP		
Plaintiff,	*	
v.	*	**Case No.**
THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

MOTION TO DISMISS

Defendant Critical Area Commission For The Chesapeake And Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and Marianne E. Dise, Assistant Attorney General, moves pursuant to Maryland Rules 2-322(a)(1) and 2-322(b) to dismiss the Petition For Administrative Mandamus, or in the Alternative, For Judicial Review (the "Petition"), and states for cause:

1. The Critical Area Commission is a commission within the Maryland Department of Natural Resources ("DNR"). DNR is a principal department of State Government, whereas the Critical Area Commission is not. As such, and for reasons more fully set forth in the accompanying Memorandum In Support Of Motion To Dismiss, the Critical Area Commission lacks the legal capacity to be sued.

2. The Critical Area statute does not provide for judicial review of Commission decisions,

and accordingly, for the reasons set forth in the accompanying Memorandum in Support of Motion to Dismiss, such review is not authorized under Rule 7-201.

3. The action of the Critical Area Commission on the proposed amendment to Anne Arundel County's local Critical Area program was a quasi-legislative action, and, as such, for the reasons set forth in the accompanying Memorandum in Support of Motion to Dismiss, is not subject to Administrative Mandamus under Rule 7-401.

WHEREFORE, defendant Critical Area Commission requests that the Court dismiss the Petition for lack of in personam jurisdiction, and for failure to state a claim on which relief may be granted.

Respectfully Submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Marianne E. Dise
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
Attorneys for Defendant Critical Area Commission

Dated: November 6, 2006

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	**Case No.**
CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

ORDER

The Court, having considered defendant's Motion To Dismiss and Memorandum In Support Of Motion To Dismiss, together with any response thereto, and having found that defendant Critical Area Commission for the Chesapeake And Atlantic Coastal Bays lack the legal capacity to be sued, and that the Petition fails to state a claim on which relief may be granted, does, this ___ day of _____, 2006,

ORDER that the Motion to Dismiss is hereby GRANTED and that the Petition is hereby dismissed.

_____
Judge, Circuit Court of Maryland
for Anne Arundel County

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 2006, a copy of the foregoing Motion To Dismiss, together with the accompanying Memorandum in Support of Motion to Dismiss, and proposed Order, was sent via first class mail, postage prepaid, to David M. Plott, Linowes and Blocher, LLP, 145 Main Street Annapolis, Maryland 21401, attorneys for Petitioner.

Marianne E. Dise

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT GROUP	*	
Plaintiff,	*	
v.	*	**Case No.**
CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants	*	

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

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and Marianne E. Dise, Assistant Attorney General, files this Memorandum In Support of Motion to Dismiss.

ARGUMENT

1. The Critical Area Commission Lacks Legal Capacity to be Sued.

Plaintiffs have named the Critical Area Commission as the only State defendant in this action, and seek Administrative Mandamus pursuant to Rule 7-401 *et seq*, or Judicial Review pursuant to Rule 7-201 *et seq*. The Critical Area Commission was established by the General Assembly as a commission within and as part of the Maryland Department of Natural Resources ("DNR"). *See* Md. Code Ann., Nat Res. II § 8-1803 ("[t]here is a Critical Area Commission for the Chesapeake and Atlantic Coastal Bays in the Department [of Natural Resources]"). DNR, which

by statute includes "units, programs, boards, *commissions*, and advisory boards and commissions referenced in [the Natural Resources Article]," *id.* § 1-102(a) (emphasis added), is "established as a principal department of State Government." *Id.* § 1-101(a).

As a commission within DNR, the Critical Area Commission has no legal identity separate from that of DNR and the State of Maryland. As such, the Critical Area Commission, itself, lacks the capacity to be sued. *Compare Champ v. Baltimore County*, 1994 WL 395735, 2 (D.Md 1994) (in Maryland, county police departments are agencies of their respective municipality or county, and, as such, have no legal identity separate and distinct from the respective locality, and thus lack the requisite capacity to be sued). *See also Ashburn v. Anne Arundel County*, 306 Md. 617, 620 (1986) (trial court dismissed the county police department because it found that police department was not a separate legal entity from the county itself). Indeed, there is no provision in the Critical Area Law, Md. Code Ann., Nat. Res. II § 8-1801 *et seq.*, establishing that the Critical Area Commission has the legal capacity to be sued.

2. The Critical Area Statute Does Not Provide For Judicial Review of Commission Decisions Under Rule 7-201et seq.

Petitioner seeks judicial review in the form of an administrative appeal under Maryland Rule 7-201 *et seq.* of the Critical Area Commission's decision to return with changes a proposed amendment to Anne Arundel County's local Critical Area Program. Pursuant to Maryland Rule 7-201(a)(1), judicial review of an action of an administrative agency is permitted only where such review is authorized by statute. *See Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 541 (1999). Petitioner does not allege that the Critical Area Law authorizes judicial review of the Commission's action on a proposed local Critical Area program amendment. Indeed the Critical

Area Law does not authorize such review. Moreover, the Maryland Administrative Procedures Act ("APA"), Md. Code Ann., State Gov't § 10-201 *et seq.*, does not entitle Petitioner to judicial review under Rule 7-201 *et seq.* The APA only provides for judicial review of a final decision in a "contested case." Md. Code Ann., State Gov't § 10-222(a). If a proceeding before an administrative agency is not a contested case proceeding, as defined by Md. Code Ann., State Gov't § 10-201(d), any agency action taken as a result of the proceeding is not subject to judicial review on administrative appeal.

The Critical Area Commission's proceedings are not contested case proceedings. *See North v. Kent Island Limited Partnership*, 106 Md.App. 92, 103 (1995) (for a proceeding to meet the definition of "contested case," the agency must provide trial type procedures). Indeed, the Court of Special Appeal in *North* determined that nothing in the Critical Area Commission's program or program amendment review procedure, as outlined in Md. Code Ann., Nat. Res. II § 8-1809, requires a contested case hearing. *Id.* The Court thus specifically held that "[t]he role of the Commission is quasi-legislative and does not encompass a contested case hearing." *Id.* Since the Commission's proceedings that reviewed, and ultimately returned to Anne Arundel County, the proposed Program amendment in this case were not contested case proceedings, Petitioner does not have a right of judicial review under Maryland Rule 7-201 *et seq.*

3. The Critical Area Commission's Action On the Proposed Anne Arundel County Program Amendment for the Wright Investment Property Was Not A Contested Case Action And Therefore Is Not Subject To Administrative Mandamus Under Rule 7-401 et seq.

Petitioners seek Administrative Mandamus under Rule 7-401 et seq. This Rule governs actions for judicial review of a "*quasi-judicial order or action* of an administrative agency where

review is not expressly authorized by law." (Emphasis added) As explained above, the action for which Petitioner seeks Administrative Mandamus is not a quasi-judicial action; rather, the action of the Critical Area Commission was a legislative act of considering a request from Anne Arundel County to amend its local Critical Area Program. Under the Critical Area Law, a locality may not amend its program without first receiving approval of the amendment from the Critical Area Commission. Md. Code Ann., Nat. Res. II § 8-1809(i). Once the Critical Area Commission accepts for review a locality's proposed program amendment, a Commission panel must hold a public hearing on the proposed amendment and the full Commission must act upon the proposed amendment within ninety days of accepting the proposal for review. *Id.* § 8-1909(o)(1). Here, the Critical Area Commission accepted Anne Arundel County's proposal to change its Critical Area program regarding the Wright Investment Property but the Commission did not approve it. Rather, the Commission returned the proposed amendment to the County with changes to be made. As set forth in *North v. Kent Island, id.,* the Commission's action on Anne Arundel County's proposed Critical Area program amendment was a quasi-legislative action, and not a quasi-judicial action. Accordingly, the Commission's action is not subject to administrative mandamus under Rule 7-401.

CONCLUSION

For the foregoing reasons and authorities, Defendant's Motion To Dismiss should be granted.

Respectfully Submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL OF MARYLAND

Marianne E. Dise
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
Attorneys for Defendant Critical Area Commission

Dated: November 6, 2006

Background Information
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF

MSA_S_1831_32 (4 of 6)

Background Information
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF
AN APPEAL OF A CRITICAL AREA
RECLASSIFICATION, CASE NO.: 20000-0468-C,
BA-48-01-C, Civil Action No. _____

FACSIMILE TRANSMITTAL

TO: Paul Cucuzzella (COAG) FAX: 410 260 8364

COMPANY: _____

FROM: CAC

DATE: _____ TIME: ___ : ___ a.m. p.m. NO. PAGES: _____

COMMENTS:

Martin O'Malley
Governor

Anthony G. Brown
Lt. Governor

Margaret G. McHale
Chairman

Ren Serey
Executive Director

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

June 7, 2007

Ms. Suzanne Schappert
Office of Planning and Zoning
Anne Arundel County
P. O. Box 6675
Annapolis, Maryland 21401

RE: Bill No. 22-07
Critical Area Map Amendment for Wright Investment, Inc.

Dear Ms. Schappert:

Thank you for providing the above-referenced Bill and related Critical Area Map. The Commission staff has accepted the information as a complete submittal. The Chair will make an amendment or refinement determination within 30 days of the date of this letter, and Commission staff will advise you of her determination and the procedures for review by the Critical Area Commission.

Please telephone me at (410) 260-3480 if you have any questions.

Sincerely,

Mary R. Owens

Mary R. Owens, Chief
Program Implementation Division

ANNE ARUNDEL COUNTY
M A R Y L A N D
County Executive John R. Leopold

2664 RIVA ROAD, P.O. BOX 6675
ANNAPOLIS, MARYLAND 21401
OFFICE OF PLANNING AND ZONING

May 22, 2007

Ms. Margaret Mc Hale, Chair
Critical Area Commission
1804 West Street Suite 100
Annapolis, MD 21401

RE: **Bill No. 22-07** Critical Area Map Amendment for Wright Investment, Inc.
Revell Highway --- St. Margarets --- Annapolis, MD 21409

Dear Ms. Mc Hale,

Enclosed is County Council Bill No. 22-07 concerning a Critical Area Map amendment in the Broadneck area for Wright Investment, Inc. removing 22.95 acres from the Chesapeake Bay Critical Area. The Critical Area Commission, in a letter dated September 20, 2006 directed the County to remap the entire surrounding area based on the mistake that was found to apply to the Wright property.

On May 7, 2007, the County Council of Anne Arundel County read and passed Bill No. 22-07. Bill No. 22-07 was signed by the County Executive, John R. Leopold on May 11, 2007.

I, respectfully, submit the signed legislation and map for the Critical Area Commission's approval. Should you have any questions regarding this matter, please do not hesitate to contact me. I can be reached at 410-222-7437.

Thank you for your attention in this matter.

Sincerely,

Suzanne Schappert

Suzanne Schappert
Planning Administrator, Zoning Division

cc: Larry R. Tom, Planning and Zoning Officer
David Plott, Esquire

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MAY 23 2007
CRITICAL AREA COMMISSION

FINAL

COUNTY COUNCIL OF ANNE ARUNDEL COUNTY, MARYLAND

Legislative Session 2007, Legislative Day No. 6

Bill No. 22-07

Introduced by Mr. Dillon, Chairman
(by request of the County Executive)

By the County Council, March 19, 2007

Introduced and first read on March 19, 2007
Public Hearing set for and held on April 16, 2007
Bill VOTED on May 7, 2007
Bill Expires June 22, 2007

By Order: Judy C. Holmes, Administrative Officer

A BILL ENTITLED

AN ORDINANCE concerning Critical Area Map amendment—Broadneck Area

FOR the purpose of altering the County Critical Area map as directed by the Chesapeake Bay Critical Area Commission

WHEREAS, by Bill No. 49-88 and subsequent amendments the County Council adopted the Critical Area Maps for Anne Arundel County, which became effective on August 22, 1988; and

WHEREAS, County law as set forth at §18-16-302 of the Anne Arundel County Code (2005, as amended) permits a property owner who believes that those maps contain an error to apply for a reclassification or declassification of the property upon proof of mistake; and

WHEREAS, Wright Investment, Inc., owns property within the Chesapeake Bay Critical Area; and

WHEREAS, on December 7, 2000, Wright Investment, Inc., applied to the County Administrative Hearing Officer to remove 2.5 acres from the Chesapeake Bay Critical Area as allowed by County law; and

WHEREAS, on August 31, 2004, after multiple appeals of unfavorable decisions, Wright prevailed at the Court of Special Appeals, which ruled that Anne Arundel County had incorrectly applied its mapping methodology and remanded the case to the County Board of Appeals for correction of its opinion; and

WHEREAS, on September 21, 2005, the Anne Arundel County Board of Appeals issued a revised memorandum that corrected its prior findings as directed by the Court of Special Appeals and ordered the remapping of the Wright property to exclude 2.5 acres; and

WHEREAS, as required by State and County law, County staff prepared a Critical Area map amendment showing the 2.5 acres as outside the County's critical area; and

WHEREAS, the map amendment and accompanying documentation were initially submitted to the Critical Area Commission on March 3, 2005 and, after an additional request from Commission staff for more information, were accepted by the staff and designated a "program amendment" by Commission Chairman Martin Madden; and

WHEREAS, the Critical Area Commission held a public hearing on August 28, 2006 and, as a result of that hearing, the Critical Area Commission returned the County's application on September 20, 2006, with a letter directing the County to remap the entire surrounding area based on the mistake that was found to apply to the Wright property; and

WHEREAS, the remapping resulted in removal of a total of 22.95 acres from the County's Chesapeake Bay Critical Area and now requires the approval of the County Council to amend the County's official Critical Area Maps; now therefore,

SECTION 1. *Be it enacted by the County Council of Anne Arundel County, Maryland,* That the official Critical Area Map for Anne Arundel County is hereby adjusted as follows:

On Sheet No. 17 of the Official Critical Area Map adopted by the Anne Arundel County Council on July 8, 1988, effective August 22, 1988, by Bill No. 49-88, remove the hatched area as shown on Exhibit 1 from Chesapeake Bay Critical Area.

SECTION 2. *And be it further enacted,* That this Ordinance shall take effect 45 days from the date it becomes law or upon approval by the State Critical Area Commission, whichever is later.

READ AND PASSED this 7th day of May, 2007

By Order:

Judy C. Holmes
Administrative Officer

PRESENTED to the County Executive for his approval this 8th day of May, 2007

Judy C. Holmes
Administrative Officer

APPROVED AND ENACTED this 11th day of May, 2007

JOHN R. LEOPOLD
County Executive

EFFECTIVE DATE: June 25, 2007

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF BILL NO. 22-07, THE ORIGINAL OF WHICH IS RETAINED IN THE FILES OF THE COUNTY COUNCIL.

Judy C. Holmes
Administrative Officer

Bill No. 22-07
Exhibit 1

Critical Area Map Amendment - Broadneck - March 19, 2007

JUN-12-07 TUE 02:20 PM CRITICAL AREA COMM FAX NO. 410 974 5338 P. 07/08

Amendment 2000-0468-C: Wright Property

Bill 22-07

Approved May 11, 2007

JUN-12-07 TUE 02:21 PM CRITICAL AREA COMM FAX NO. 410 974 5338 P. 08/08

Post-it® Fax Note 7671 | Date | # of pages ▶ 3
To Paul Cucuzzella | From M. Dise
Co./Dept. | Co. | Phone # | Fax #
Phone # | Fax # 8/3/04

PROPOSED Wright Investment

COUNTY COUNCIL OF ANNE ARUNDEL COUNTY, MARYLAND

Legislative Session 2007, Legislative Day No. 6

Bill No. 22-07

Introduced by Mr. Dillon, Chairman
(by request of the County Executive)

By the County Council, March 19, 2007

Introduced and first read on March 19, 2007
Public Hearing set for April 16, 2007
Bill Expires June 22, 2007

By Order: Judy C. Holmes, Administrative Officer

A BILL ENTITLED

AN ORDINANCE concerning Critical Area Map amendment—Broadneck Area

FOR the purpose of altering the County Critical Area map as directed by the Chesapeake Bay Critical Area Commission

WHEREAS, by Bill No. 49-88 and subsequent amendments the County Council adopted the Critical Area Maps for Anne Arundel County, which became effective on August 22, 1988; and

WHEREAS, County law as set forth at §18-16-302 of the Anne Arundel County Code (2005, as amended) permits a property owner who believes that those maps contain an error to apply for a reclassification or declassification of the property upon proof of mistake; and

WHEREAS, Wright Investment, Inc., owns property within the Chesapeake Bay Critical Area; and

WHEREAS, on December 7, 2000, Wright Investment, Inc., applied to the County Administrative Hearing Officer to remove 2.5 acres from the Chesapeake Bay Critical Area as allowed by County law; and

WHEREAS, on August 31, 2004, after multiple appeals of unfavorable decisions, Wright prevailed at the Court of Special Appeals, which ruled that Anne Arundel

EXPLANATION: CAPITALS indicate new matter added to existing law.
[Brackets] indicate matter stricken from existing law.

County had incorrectly applied its mapping methodology and remanded the case to the County Board of Appeals for correction of its opinion; and

WHEREAS, on September 21, 2005, the Anne Arundel County Board of Appeals issued a revised memorandum that corrected its prior findings as directed by the Court of Special Appeals and ordered the remapping of the Wright property to exclude 2.5 acres; and

WHEREAS, as required by State and County law, County staff prepared a Critical Area map amendment showing the 2.5 acres as outside the County's critical area; and

WHEREAS, the map amendment and accompanying documentation were initially submitted to the Critical Area Commission on March 3, 2005 and, after an additional request from Commission staff for more information, were accepted by the staff and designated a "program amendment" by Commission Chairman Martin Madden; and

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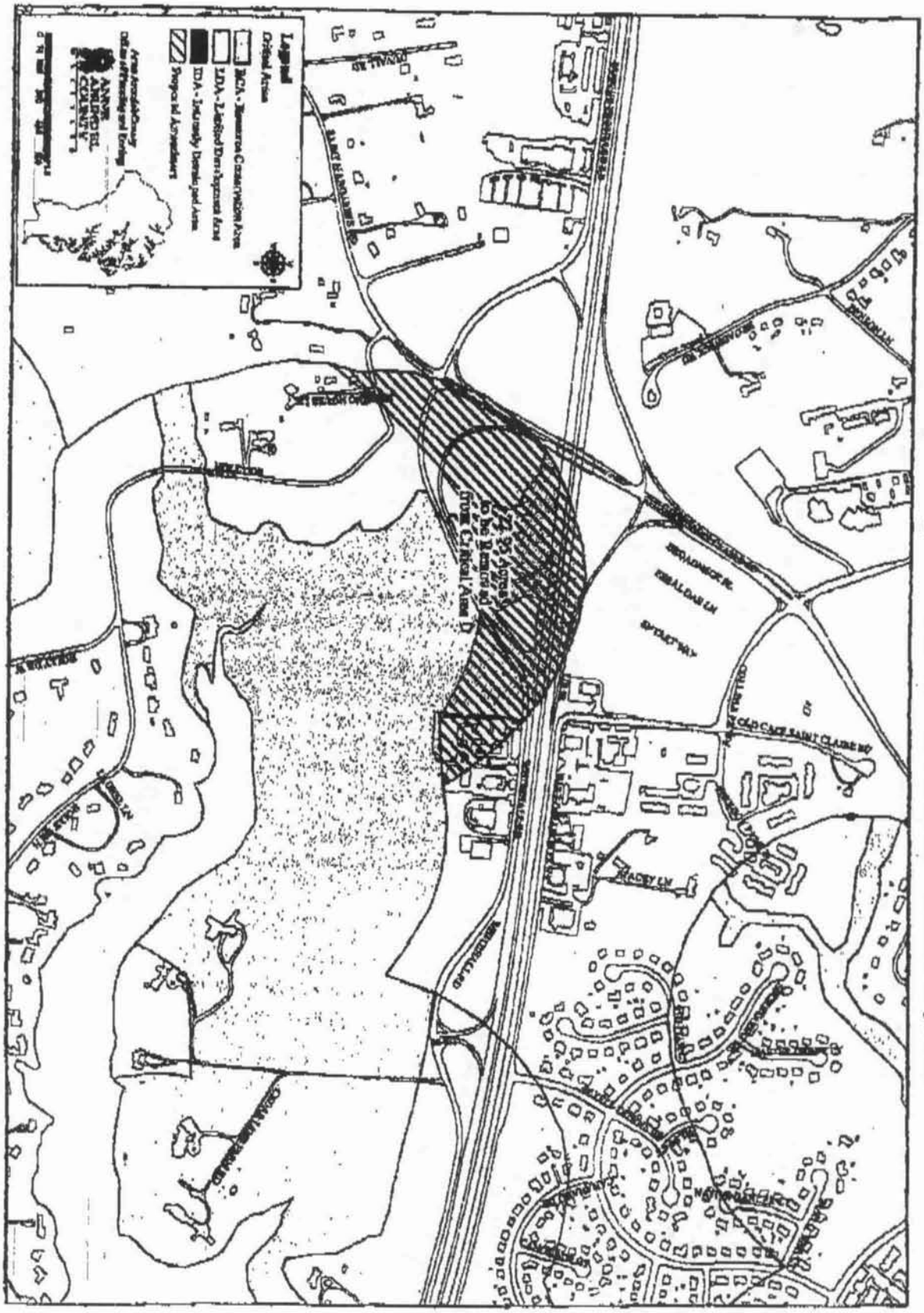
SECTION 2. *And be it further enacted,* That this Ordinance shall take effect 45 days from the date it becomes law or upon approval by the State Critical Area Commission, whichever is later.

Bill No. 22-07
Exhibit 1



Critical Area Map Amendment - Broadneck - March 19, 2007

Post-it® Fax Note 7671	Date	# of pages ▶
To Rem	From	
Co./Dept.	Co.	
Phone #	Phone #	
Fax #	Fax #	

September 6, 2006

APPLICANT: Anne Arundel County

PROPOSAL: Amendment - Critical Area Boundary Line Change, Wright Investment Group, LLC

PANEL: Frank Dawson, Chair, David Carroll, Judith Evans, Ella Ennis, Thomas McKay

PANEL RECOMMENDATION:

COMMISSION ACTION: Vote

8-1809(o) determine if proposed amend is consistent w/ ....

STAFF: Lisa Hoerger

APPLICABLE LAW/ REGULATIONS: Natural Resources Article §8-1809 (o) Program Amendments

DISCUSSION:

On Monday, August 29, 2006, the five member panel held a public hearing to receive public comments on the proposed Critical Area Boundary Line change submitted by Anne Arundel County. The property is known as the Wright Investment Group, LLC property and is located on Tax Map 40, Block 23, Parcel 225. The County has requested that 2.5 acres be removed from the Critical Area on County Critical Area map # 17.

→ Add From Lisa's Memo

The record was closed following the public hearing. The Anne Arundel County panel met the evening of the hearing and earlier today to discuss the Wright Investment Group, LLC Critical Area Boundary Line change submitted by Anne Arundel County. ~~As a result of their discussions~~, the Panel agrees that the property in question has been incorrectly mapped. However, they do not agree that the ~~correction of the map proposed by the County~~ is consistent with the mapping standards that should be used to properly revise the map.

Because of the decision of the CSA in Catocase

method proposed by The City to correct the mapping mistake

The Panel believes that in correcting ~~their~~ its maps the County should be guided by § 8-1807 of the Critical Area Act, which outlines the methodology used to determine the planning area for the Critical Area. These provisions describe the Critical Area as "*All land and water areas within 1,000 feet* (emphasis added) beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 9 of this article." This means and has been consistently interpreted on Critical Area maps used by many

jurisdictions, that a Critical Area boundary line is delineated in the appropriate location and then *all* lands between that boundary line and tidal waters or tidal wetlands are determined to be Critical Area lands. ~~The law~~ § 8-1808(c) requires ~~this to be~~ an essential element of a local Critical Area program. The law then describes two types of areas that may be excluded from the Critical Area and describes them as "areas" as opposed to parcels or properties. These two types of areas are 1) developed urban areas with existing laws and restrictions such that the imposition of a Critical Area Program would not substantially improve protection of water quality and habitat; and 2) areas located at least 1,000 feet from open water by an area of wetlands that are found to serve to protect water quality and habitat. In the former situation, the law specifies that the excluded area must be at least 60 acres or must encompass the entire Critical Area within the boundaries of a municipality.

In jurisdictions where the Commission has approved the "exclusion" of certain areas, the "excluded area" is delineated as a section of the Critical Area, encompassing all lands between the 1,000 foot boundary line and tidal water and tidal wetlands. In most cases, excluded areas include multiple parcels and the mapping is performed in such a way that the excluded area is clearly delineated as a separate "zone."

The County's proposal involves a map correction ~~that has been~~ called a "declassification" ~~and involves~~ the "removal" of the Wright Investment Property from the Critical Area in a manner that is similar to an exclusion. ~~The law~~ does not address the exclusion of individual properties in the manner proposed by the County, nor ~~would~~ this property qualify for an exclusion under the standards in the law. The Critical Area law and Criteria do not include the concept of "declassification." ~~There does not appear to be~~ any other mapping methodology that would allow the Critical Area boundary to be drawn around a single specific property in such a way as to exclude the property from the ~~application of the~~ Critical Area ~~regulations~~, while all of the surrounding properties remained within the Critical Area ~~and were subject to the regulations~~.

Throughout the Critical Area law and Criteria, there are references to planning and zoning terms. It seems likely that the General Assembly contemplated that the Critical Area would function as a special protective "zone" and would be implemented in a manner similar to the way zoning regulations are implemented. In general, local governments do not allow a property owner to petition to be excluded from a specific zone and then approve a zoning map amendment to do so, without a comprehensive evaluation of the entire area. The purpose of avoiding site specific rezonings is to ensure that zoning regulations can be consistently and uniformly applied.

The importance of consistency is highlighted in § 8-1801.a(9) of the Critical Area law, which states, "There is a critical and substantial 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 so as to minimize damage to water quality and natural habitats." The "declassification" proposed by the County for ~~the~~ the Wright Investment Property does not appear to facilitate a consistent and uniform approach to regulating development activity, especially when it is likely that similar

as an essential element of a local critical area program

a "map designating the CA in a local jurisdiction."

and separated from open water

on the appropriate map

to implement a county process

The County proposed

does the Panel believe that

The Panel notes that the State C.A. law

The County has not proposed, & the Panel does not know of,

mapping of the

results in a map that does not clearly "designate" the "Critical Area."

The County's proposal

corrections may be warranted on neighboring properties ~~as well as throughout~~ other portions of the Critical Area. If the County continues to amend its Critical Area maps by identifying ~~various~~ properties within the Critical Area boundary to which the Critical Area regulations would not apply, it could become nearly impossible to effectively and efficiently implement the County's Critical Area Program.

Because the proposal ~~before the Commission includes~~ a map revision that ~~is~~ inconsistent with the mapping provisions in the law ~~and Criteria~~ and does not ~~allow for~~ the implementation of the Critical Area regulations in a consistent and uniform manner, the Panel recommends the following to the full Commission:

Pursuant to Natural Resources Article §8-1809 (o)

The proposed program amendment shall be returned to the County and the following changes shall be made:

1. **The County shall identify the edge of tidal wetlands based on the 1972 Tidal Wetlands Maps and properly draw the Critical Area boundary line 1,000 feet from the edge of tidal wetlands in the area identified on the attached sketch.**

2. **All affected property owners shall be notified.**

3. **The official Critical Area maps shall be amended by the County using an appropriate process.**

4. **The revised maps shall be submitted to the Critical Area Commission for review and approval.**

CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100
Annapolis, Maryland 21401

MEMORANDUM

To: Frank Dawson, Chair, Judith Evans, Ella Ennis, Thomas McKay, David Carroll

From: Lisa Hoerger

Date: August 8, 2006

Subject: Anne Arundel County – Wright Investment Group, LLC
Mapping Amendment Request

Thank you for agreeing to serve on the Anne Arundel County Panel reviewing the Wright Investment Group, LLC Mapping Amendment Request. The public hearing is scheduled for Monday, August 28th at 7:00 p.m. at the Critical Area Commission office located at 1804 West Street, Suite 100, Annapolis. Directions to the office are attached for your convenience. Parking should be available directly in front of or behind the building. The entrance to our office is located along the Admiral Drive side of the building.

Site Visit- Since this case involve the location of the 1,000 foot Critical Area line, we will not take the panel on site visit. Instead, staff will provide aerial photography for the panel to examine.

Request

The County Board of Appeals approved a request to "declassify" (remove from the Critical Area) 2.5 acres of land. The property is located on the south side of White Hall Road, approximately 1,000 feet east of St. Margarets Road. It is found on Tax Map 40, Block 23, Parcel 225 and has a Critical Area designation of Resource Conservation Area (RCA), and has C1- Local Commercial District, RLD and OS – Open Space zoning. The Board found that based on the County's mapping rules and the requirements of the County Code, a portion of this property was mistakenly included in the County's 1,000 Critical Area boundary. Anne Arundel County extended the Critical Area line that was drawn from the 1972 State Tidal Wetlands maps when the National Wetlands Inventory (NWI) maps showed wetlands extended further. In those cases the County used the four-foot topographic contour line from which the 1,000-foot boundary was measured. However, in this case the 1972 wetlands extended beyond the NWI map wetlands, therefore the 1972 wetland map applies, rather than the alternative method the County used for mapping the 1,000-foot Critical Area boundary.

This case was appealed to the Court of Special Appeals who found that the County incorrectly applied its own mapping criteria with reference to the property and mistakenly mapped the

Critical Area. They rejected the Boards conclusion and remanded the case back to the Board for further proceedings consistent with the Court's opinion.

Unfortunately, the methodology the County used to correct the Critical Area boundary line on this parcel (see attached map) involved the County simply determining that the property be "declassified" as no longer within the Critical Area. Based on the Court of Special Appeals decision it is clear that this property is not within the Critical Area as defined by law; however, the proper way to correct this error is to re-draw the Critical Area boundary in the affected area. What the County has done is to create a "hole" in the Critical Area which is inherently inconsistent with the way the Critical Area overlay is defined and implemented through local land use regulations. This approach could appear to be a form of spot zoning and is clearly inconsistent with effective and consistent application of the Critical Area regulations.

In order to properly effect a boundary line change on the Wright property in a manner consistent with the mapping standards included in the Law and Criteria, multiple properties in that area would be affected. Although subsection 3-1-201 of the County Code delegates the authority to the Board of Appeals to approve map changes affecting specific properties, it is not clear whether the County Council has also delegated authority to the Board of Appeals to approve Critical Area boundary line changes that affect multiple properties and a significant land area.

If you have any questions prior to the hearing, please contact me at (410) 260-3478 or via email at lhoerger@dnr.state.md.us

Wright Investment 8/28/2006
Public Hearing AA County

Panel Hearing
Elinor Gawell
Dave Plott
1.5 acres C-1 of 16 acres (next to McDonalds)
now 1 acre R-1
rest RLD
All RCA
2.5 acres proposed to be removed
Edged property removed in 1996
CSA - mistake issue -
E. Gawell -
no applicant for change on other parcels
Can't submit legislation now - till January
would need to do under comp. update.

Public Comment -

Doug Heisler - Pres. Amberley Comm. Assoc.
AACty added declassification to county code
Applic. does not comply w/ County Comp. Plan -
filed 12/1/2000 - new comp. plan (Broadneck SAP)
not compatible
County had discretion to extend CA boundary to
protect Whitehall Creek.

County fixed map by drawing a hole in map
Bud County had comp. update & decided
not to update maps comprehensively.
Many O. no other local governments punch holes
in map.
AA Cty does not change lines based on field verifications.
Local jurisdictions or prop. owners can request
change in C.A. line via amending STATE T. W. maps.

Paul Berdette.

Stream restration to be done by SHA to restore
Whitehall Creek
16 years of siltation in Creek due to interchange

Pat Lynch

Past Pres. Amberley Commun. Assoc.
Slopes 2-40% Watershed
need to "clarify research" - do J.D.
where are the boundaries

Blit Griswold

Current Pres. Amberley

- "Map is wrong - make it right -"

12:00 arbm

8-1808(c)
A map designating the CA ~~for~~ in the local jurisdiction

David C.

Problem w/ county's submission —
By removing a parcel · not changing boundary
New boundary.

Tom McKay —

What is a "map designating the C.A. ?"

idea that the shipowner pledges the ship's bottom, or keel. Cf. RESPONDENTIA.

bottomry bond. See BOND (2).

bought and sold notes. Two memoranda prepared by a broker to record the sale of a note. • The broker sends the *bought note* to the purchaser, and sends the *sold note* to the seller.

bought note. See NOTE (3).

boulevard rule. The principle that the driver of a vehicle approaching a highway from a smaller road must stop and yield the right-of-way to all highway traffic.

boulwarism. *Labor law.* A bargaining tactic in which an employer researches the probable outcome of collective bargaining and uses the information to make a firm settlement offer to a union on a take-it-or-leave-it basis, so that there is no real negotiation. • *Boulwarism* is now considered to be an unfair labor practice by the National Labor Relations Board. The practice takes its name from Lemuel Boulware, vice president for employee relations at General Electric Company, who used the technique during the mid–20th century.

bounced check. See *bad check* under CHECK.

bound, *n.* (*usu. pl.*) **1.** BOUNDARY <metes and bounds>. **2.** A limitation or restriction on action <within the bounds of the law>.

bound, *vb.* To delineate a property boundary <property bounded by the creek>. Cf. BIND.

bound, *adj.* **1.** Constrained by a contractual or other obligation <they are bound to make the payments by the first of each month>. **2.** (Of a court) constrained to follow a precedent <bound by a Supreme Court decision>.

boundary. 1. A natural or artificial separation that delineates the confines of real property <the creek serves as a boundary between the two properties>. See METES AND BOUNDS.

> "The object of all rules for the establishment of boundaries is to ascertain the actual location of the boundary as made at the time. The important and controlling consideration, where there is a conflict as to a boundary, is the parties intention, whether express or shown by surrounding circumstances . . . ." 11 C.J.S. *Boundaries* § 3 (1995).

natural boundary. Any nonartificial thing (such as a river or ocean) that forms a boundary of a nation, a political subdivision, or a piece of property. — Also termed *natural object.*

private boundary. An artificial boundary marker.

public boundary. A natural formation that marks the beginning of a boundary line. — Also termed *natural boundary.*

2. *Int'l law.* A line marking the limit of the territorial jurisdiction of a state or other entity having an international status.

boundary by acquiescence. See DOCTRINE OF PRACTICAL LOCATION.

boundary by agreement. See DOCTRINE OF PRACTICAL LOCATION.

boundary traffic. The movement of persons or goods across an international boundary.

bound bailiff. See BAILIFF.

bounded tree. A tree that marks a corner of a property's boundary.

bounder. A visible mark that indicates a territorial limit in a land survey.

bounty. 1. A premium or benefit offered or given, esp. by a government, to induce someone to take action or perform a service <a bounty for the killing of dangerous animals>. **2.** A gift, esp. in a will; generosity in giving <the court will distribute the testator's bounty equally>.

bounty hunter. A person who for a fee pursues someone charged with, or suspected of committing, a crime; esp., a person hired by a bail-bond company to find and arrest a criminal defendant who has breached the bond agreement by failing to appear in court as ordered. — Also termed *bail-enforcement agent.*

bounty land. See LAND.

bourse (buurs). [French] *French law.* An exchange; a stock exchange. — Also termed *bourse de commerce.*

boutique (boo-**teek**). A small specialty business; esp., a small law firm specializing in one particular aspect of law practice <a tax boutique>.

bovata terrae (boh-**vay**-tə **ter**-ee). [Law Latin] *Hist.* See OXGANG.

Westlaw.

CJS BOUNDARIES § 127

11 C.J.S. Boundaries § 127

Corpus Juris Secundum
Database updated May 2006

Boundaries
III. Establishment
C. Determination by Judicial Proceedings

References

§ 127. Admissibility of evidence--Maps and plats

West's Key Number Digest

West's Key Number Digest, 59TT_Boundaries ⚿59k36(3)

Generally, maps or plats of surveys, maps or plats attached to deeds or grants or referred to therein, maps which have been recognized as correct by former owners of the land, ancient maps and plats, and maps referred to in the evidence, are admissible when verified or authenticated.

As a general rule, maps or plats of surveys are admissible in evidence.[FN44] These include maps or plats made by the county surveyor or other official surveyors,[FN45] plats of unofficial surveys when made by a qualified surveyor,[FN46] maps from the land office[FN47] although made subsequent to the beginning of the action,[FN48] and maps made by order of the state land board.[FN49]

Likewise, plats and maps attached to and made a part of deeds or grants or referred to therein, either expressly or by clear implication,[FN50] maps which have been recognized as correct by a former owner of the land,[FN51] and ancient maps and plats when duly authenticated,[FN52] are admissible to prove a disputed boundary. A map or plat referred to in the testimony is admissible as explanatory of it.[FN53]

In all cases the map or plat must be verified or authenticated,[FN54] and in the case of a surveyor's plat proof offered that the surveyor making the same actually traced the lines on the ground as depicted.[FN55] A plat of a survey is not admissible to control a description, where the survey calls for the line of an old established patent running from one known and fixed point to another.[FN56] A plat is not inadmissible because it incorrectly represents the size of a tract of land where the question of size is immaterial.[FN57] Where a map or plat offered in evidence is unintelligible to the court and jury, it should be rejected.[FN58]

Maps and plats of cities, counties, subdivisions, etc.

Where a map of a city, town, or county is referred to in a deed or a grant, it is admissible in evidence on the question of boundary.[FN59] So, too, where lands of individuals are bounded on public lands, ancient maps of the latter made by public authority are competent evidence in controversies between such individuals,[FN60] and a county map required to be kept in the surveyor's office is competent between the state and an individual.[FN61]

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Where such maps or plats are offered it must be shown when, how, by whom, and for what purpose they were made.[FN62] The admission of only part of a plat of a subdivision and the exclusion of the remainder is error when the whole plat is material as to monuments and corners.[FN63]

[FN44] Ala.—Clarke v. Earnest, 139 So. 223, 224 Ala. 165.

Ky.—Kentucky Union Co. v. Shepherd, 234 S.W. 10, 192 Ky. 447.

Me.—Susi v. Davis, 177 A. 610, 133 Me. 354, 97 A.L.R. 1222.

Miss.—Bay Springs Forest Products, Inc. v. Wade, 435 So.2d 690.

Mo.—Yocom v. Kindle, App., 766 S.W.2d 140.

N.J.—Stickle v. Vreeland, 123 A. 753, 99 N.J.Law 468.

Pa.—Mosher v. Commonwealth, 494 A.2d 56, 90 Pa.Cmwlth. 126.

S.C.—Culbertson v. Culbertson, 254 S.E.2d 558, 273 S.C. 103.

Tex.—Falls County v. Young, Civ.App., 77 S.W.2d 912, error dismissed.

Va.—Woody v. Abrams, 169 S.E. 915, 160 Va. 683.

Wis.—Nickel v. Chapman, 158 N.W. 90, 163 Wis. 348.

Failure to test instruments

In an ejectment action, admission in evidence of a surveyor's plat was held not incompetent, notwithstanding it did not appear that the surveyor had made a test of his instruments, and his chain, such facts going merely to the weight of the evidence.

Or.—Cody v. Black, 191 P. 319, 97 Or. 343, rehearing denied 192 P. 282, 97 Or. 343.

Amended plat

Where amended protest plat was offered in evidence in boundary dispute to correct errors in original protest plat, and not to change it, amended plat was properly received.

Ga.—Darnell v. Betty's Creek Baptist Church, 197 S.E.2d 714, 230 Ga. 461.

Plats of adjoining grants

In a suit involving the question whether there is a vacancy between two leagues on the west and a survey on the east to which plaintiffs are entitled by an award from the state, it was held that, when an attempt was made to locate the boundaries of the leagues on the ground by the field notes in the grant, and an

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ambiguity appeared, court did not err in admitting maps and plats of adjoining grants.

Tex.—Barrow v. Murray, Civ.App., 212 S.W. 178.

Plat copied from another map

When a plat is copied from another map, it is proper to consult the latter, and the survey made thereunder, to locate the boundaries.

Or.—Bernitt v. City of Marshfield, 174 P. 1153, 89 Or. 556.

County assessor's plat map

Plat maps from county assessor's office were properly admitted to show plats on which parties to boundary dispute had paid taxes, rather than for purpose of establishing boundary lines.

Tenn.—Whitworth v. Hutchison, App., 731 S.W.2d 915.

Tax map

Copies of tax map from county tax office, containing information as to size of tract and width of tract adjoining it to the east, were relevant and admissible in boundary dispute.

Tex.—City of Carrollton v. Duncan, App.-Fort Worth, 742 S.W.2d 70.

[FN45] N.C.—Redmond v. Mullenax, 18 S.E. 708, 113 N.C. 505.

To show location of streets

In an action to quiet title to lands fronting on certain streets, the county surveyor's map was admissible for the purpose of showing the difference, if any, between the location of one of the streets at the time of the trial and the location of the south line of one of the blocks as established by a previously recorded map.

Cal.—Price v. De Reyes, 119 P. 893, 161 C. 484.

[FN46] Iowa—Heinricks v. Terrell, 21 N.W. 171, 65 Iowa 25.

Minn.—Baldwin v. Fisher, 124 N.W. 1094, 110 Minn. 186.

Mont.—Nemitz v. Reckards, 38 P.2d 980, 98 Mont. 229.

S.C.—Lucius v. Du Bose, 103 S.E. 759, 114 S.C. 375.

Wis.—Nickel v. Chapman, 158 N.W. 90, 163 Wis. 348.

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[FN47] Tex.—Giraud v. Huffman, Civ.App., 46 S.W.2d 367, error dismissed.

Letter accompanying map

In trespass to try title involving boundary, where a map was properly filed in the General Land Office, a letter, although accompanying the map and filed, was not admissible, except that part certifying to the map's correctness, in the absence of a law authorizing its filing.

Tex.—Land v. Dunn, Civ.App., 226 S.W. 801.

Map not filed

A map, not filed in the surveyor's office or the General Land Office, does not become an archive in either office, and is not admissible to determine boundaries in trespass to try title.

Tex.—Land v. Dunn, Civ.App., 226 S.W. 801.

[FN48] Tex.—Kirby Lumber Co. v. Adams, Civ.App., 291 S.W. 279, dismissed w.o.j.

[FN49] Mont.—Nemitz v. Reckards, 38 P.2d 980, 98 Mont. 229.

[FN50] Ga.—Daniel v. Finn, Garrett & Holcomb, 119 S.E. 307, 156 Ga. 310.

Mo.—McDaniel v. Leuer, 230 S.W. 633.

Plat not referred to in deed

Fact that plat was not referred to in any deed in chain of title of owners of one tract involved in dispute and that they were unaware of its existence prior to time of trial did not preclude admission of copy of plat in boundary dispute.

S.C.—Culbertson v. Culbertson, 254 S.E.2d 558, 273 S.C. 103.

[FN51] Conn.—Nichols v. Turney, 15 Conn. 101.

Ohio—Burgan v. Siegman, 9 Ohio App. 84.

Ignorance of errors in map

Where it is shown that a recorded plat was affirmed as correct by the grantors, it is competent to show, in rebuttal, that when this was done they were ignorant of any error in the plat.

Iowa—Thrush v. Graybill, 81 N.W. 798, 110 Iowa 585.

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Map not recognized by grantor

In action involving dispute as to location of corner of grant, a map made by a county surveyor and the certificate of the surveyor were incompetent against defendant, where there was no evidence that map was made at the instance of the grantor, under whom defendant claimed title, or that map had been accepted or recognized by such grantor.

N.C.—Gates v. McCormick, 97 S.E. 626, 176 N.C. 640.

[FN52] Ohio—Burgan v. Siegman, 9 Ohio App. 84.

[FN53] Cal.—Taylor v. McConigle, 52 P. 159, 120 C. 123.

Ga.—Darnell v. Betty's Creek Baptist Church, 197 S.E.2d 714, 230 Ga. 461.

Or.—O'Hara v. Brace, 482 P.2d 726, 258 Or. 416.

[FN54] Ga.—Thompson v. Colter, 251 S.E.2d 526, 242 Ga. 784.

Va.—Christian v. Bulbeck, 90 S.E. 661, 120 Va. 74.

Plat based on reputation

Defendants in boundary dispute could not rely upon plat allegedly based on reputation in the community, where surveyor's information as to such "reputation" was derived from statements of defendants and their predecessor in title, and where surveyor did not use prior plats which were indispensable elements in the chain of title, though such plats were available since they had been recorded.

U.S.—U.S. v. Williams, C.A.Ga., 441 F.2d 637.

Water bureau map

Water bureau map, offered for admission into evidence in quiet title action, was not admissible as business record to prove boundary where no foundation was laid and no offer of proof meeting statutory prerequisites was made.

Conn.—Feuer v. Henderson, 435 A.2d 1011, 181 Conn. 454.

Right of way map

In suit to determine correct boundary between the lands of parties, department of transportation's right-of-way map was not competent evidence of the location of the disputed corner monument, upon which location of the boundary turned, as no testimony was offered indicating the purpose for which the map was prepared, whether it followed the original government field notes or if it even purported to fix the location of the disputed corner.

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Fla.—Gilman Paper Co. v. Newman, App., 398 So.2d 887.

Maps not tied to survey

Exhibits consisting of maps should have been excluded in boundary dispute where subject exhibits were merely opinions and conclusions of their respective draftsmen and had no probative force because they contained no factual information tying them to the original survey.

Tex.—Waldrop v. Manning, Civ.App., 507 S.W.2d 626, error refused no reversible error Manning v. King, 514 S.W.2d 899.

Plat made on information received

Plat made to show boundaries at order of one of interested parties, made merely on information furnished by him, was held admissible only for purpose of illustration.

Md.—Marvil Package Co. v. Ginther, 140 A. 95, 154 Md. 213.

Proof of correct portrayal on plat

In ejectment, plat offered in connection with deed without preliminary proof that boundary lines fixed in deed could be and were ascertained on ground, and, as ascertained, were correctly portrayed on plat, was held properly excluded.

Mo.—Cashion v. Meredith, 64 S.W.2d 670, 333 Mo. 970.

[FN55] Cal.—Marcone v. Dowell, 173 P. 465, 178 C. 396.

Miss.—Pope v. Ivy, 78 So. 367, 117 Miss. 501, motion granted 78 So. 581.

Map compiled from notes of another surveyor

Admission, to establish boundary, of map compiled from field notes left by another surveyor, without showing as to accuracy of survey, was held error.

Tex.—Maxcy v. Norsworthy, Civ.App., 19 S.W.2d 926.

Certification by land commissioner

In trespass to try title, sketch or map showing location of lands and certified to by land commissioner as a true and correct compilation of all field notes shown thereon from patented field notes on file in his office was held not admissible, since sketch represents merely the opinion of the draughtsman.

Tex.—Falls County v. Young, Civ.App., 77 S.W.2d 912, error dismissed.

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[FN56] Ky.—Bell v. Powers, 121 S.W. 991.

[FN57] Ga.—Calhoun v. Georgia Veneer & Package Co., 144 S.E. 356, 38 Ga.App. 506.

[FN58] Md.—Budd v. Brooke, 3 Gill 198.

[FN59] Va.—Neill v. Ward, 153 A. 219, 103 Vt. 117.

[FN60] Cal.—Morcom v. Baiersky, 117 P. 560, 16 C.A. 480.

N.H.—Adams v. Stanyan, 4 Fost. 405, 24 N.H. 405.

Vt.—Aldrich v. Griffith, 29 A. 376, 66 Vt. 390.

United States reservation

Part of a map of a United States reservation when certified by the legal custodian thereof has been held admissible.

Cal.—Galvin v. Palmer, 45 P. 172, 113 C. 46.

[FN61] Tex.—Boon v. Hunter, 62 Tex. 582.

[FN62] N.Y.—Donohue v. Whitney, 30 N.E. 848, 133 N.Y. 178.

[FN63] Ky.—Oliver v. Muncy, 89 S.W.2d 617, 262 Ky. 164.

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418 A.2d 1249

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46 Md.App. 491, 418 A.2d 1249
(Cite as: 46 Md.App. 491, 418 A.2d 1249)

C

Court of Special Appeals of Maryland.
MONTGOMERY COUNTY, Maryland
v.
Frederick L. HORMAN, Jr. et al.
No. 1648.

Sept. 8, 1980.

Landowners brought action challenging county council's zoning action. The Circuit Court, Montgomery County, Stanley B. Frosh, J., reversed zoning action, and county appealed. The Court of Special Appeals, Thompson, J., held that: (1) landowners failed to meet heavy burden on them to show that council's actions did not bear substantial relationship to public health, comfort, order, safety, convenience, morals, or general welfare, as it was reasonable for county council to conclude that desirability of preserving rural and residential character of area required the comprehensive zoning changes, and (2) master plan did not support legislative action outside boundaries of the plan based on recommendations contained within plan.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Zoning and Planning 414 ⚿684

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k684 k. Amendment or Rezoning. Most Cited Cases
Landowners did not meet heavy burden on them to show that county council's actions in enacting comprehensive rezoning did not bear substantial relationship to public health, comfort, order, safety, convenience, morals, or general welfare, as it was reasonable for council to conclude that desirability of preserving rural and residential character of area required downzoning of property.

[2] Zoning and Planning 414 ⚿684

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k684 k. Amendment or Rezoning. Most Cited Cases
Burden is upon property owner to show that there is no substantial basis for decision to comprehensively rezone property.

[3] Zoning and Planning 414 ⚿159

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k159 k. Comprehensive Plan. Most Cited Cases
In comprehensive rezoning it is proper for zoning authority to consider opinions of the citizens.

[4] Zoning and Planning 414 ⚿604

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k604 k. Amendment or Rezoning. Most Cited Cases
So long as there is any rational basis for legislative action in comprehensive rezoning property, that action will be upheld by the courts.

[5] Zoning and Planning 414 ⚿29.5

414 Zoning and Planning

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414II Validity of Zoning Regulations
414II(A) In General
414k29.5 k. Maps, Plats, or Plans, Requirements in General. Most Cited Cases
Master plan did not support legislative action outside boundaries of the plan based upon recommendations contained within plan.

[6] Zoning and Planning 414 ⚿3

414 Zoning and Planning
414I In General
414k3 k. Power in General. Most Cited Cases
Function of zoning is to preserve various types of neighborhoods, be they residential, industrial, commercial, or historical.

****1250 *491** Henry C. Clarke, Jr., Asst. County Atty. for ***492** Montgomery County, with whom were Paul A. McGuckian, County Atty. for Montgomery County, and Robert G. Tobin, Jr., Deputy County Atty. for Montgomery County, on the brief, for appellant.
Harry W. Lerch, Bethesda, with whom were Robert G. Brewer, Jr., and Lerch, Early & Roseman Chartered, Bethesda, on the brief, for appellees.

Argued before THOMPSON, J., and KLAVAN, STANLEY and FIGINSKI, M. ALBERT, Specially Assigned Judges.

THOMPSON, Judge.
Montgomery County, the appellant, appeals from a judgment of the Circuit Court for Montgomery County reversing the zoning action by the County Council of Montgomery County (Council) insofar as it involved land of the appellees, Frederick L. Horman, Jr. and Russell Coleman, Trustee, appellees. The trial judge made findings of fact which we accept and with moderate editing adopt as our own.

Appellees purchased approximately 124 acres of land northwest of the town of Boyds, Maryland, in 1966. The property is bounded on the west by the Chessie System railroad tracks and on the south by Bucklodge Road. When the appellees purchased the property, 89 acres were zoned as I-1, and 35 acres were zoned R-R (now the R-200 zone; 1/2 acre residential). The industrially zoned portion had been so classified by the Council by local zoning map amendments in 1958 and 1963.

In 1973, The Montgomery County Planning Board (Board) and the Council proposed the Rural Zone Sectional Map Amendments. The studies preceding this action identified in detail certain areas to be downzoned, while recommending that other property be retained in existing zoning categories because of attributes such as proximity to railroad tracks and access to existing commercial areas. The planners recommended retention of the I-1 zoning of appellees' 89 acres of I-1 zoned property in accordance with this policy. On August 20, 1974, the Council effectuated the Rural Zone Map Amendments in Resolution 7-1909, thereby retaining the I-1 status of 89 acres of appellees' land. The Maryland ***493** Court of Special Appeals affirmed Resolution 7-1909 in an unreported decision, W.C. & A.N. Miller Development Co. v. Montgomery County, Maryland (No. 1107, Sept. Term, 1977, filed August 8, 1978).

In 1976, while the appeals of the Rural Zone Sectional Map were still pending, the Board began work on a new master plan for the Boyds area. As required by Md. Code, ****1251** Art. 66D, s 7-108 (1957), the boundaries of the Boyds Master Plan were described with particularity. These boundaries indicate that the Boyds Master Plan includes 99.6 acres of the appellees' land, but excludes 24.4 acres of appellees' I-1 zoned land. On December 2, 1977, a "Final Draft" of the Boyds Master Plan was released and submitted to the Council. The boundary continued to exclude approximately 24.4 acres of appellees' property. In this version of the Boyds Master Plan, the Board recommended retention of the I-1 zoning of the 89 acres of appellees' property, with the suggestion that further comment on the retention of I-1 zoning be pursued at the public hearing on the final draft plan. In another "Final Draft" of the Boyds Master Plan, dated March 31, 1978, the proposals of the earlier (December 2) draft were substantially revised to recommend that the amount of I-1 zoned land on appellees' site be reduced to 50-75 acres. Public hearings were held prior to both drafts. On April 6,

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1978, the Board accepted the revised language proposing downzoning to 50-75 acres of I-1 land. However, upon presentation of the final "Final Draft " of the plan to the Council on April 11, 1978, the Council further reduced the I-1 acreage on appellees' land from 50-75 to 10-35. On May 9, 1978, the Council approved this final form of the Boyds Master Plan, recommending that the 89 acres of appellees' I-1 zoned land be reduced to 10-35 acres.

On May 22, 1978, the Board transmitted rezoning application number G-119, known as the Boyds Sectional Map Amendment, to the Council. This rezoning application requested, inter alia, the downzoning of approximately 69 acres of appellees' property from the I-1 zone to the rural zone, reducing appellees' I-1 zoned property from 89 acres to 20 acres. Included within the downzoning requested in the application G-119 were 24.4 acres of appellees' I-1 zoned land ***494** which lay outside the boundaries of the Boyds Master Plan. The Technical Staff of the Montgomery County Planning Board, in a report dated June 26, 1978, recommended approval of the Boyds Sectional Map Amendment. The rationale offered in this report, based upon projected traffic levels in the area was as follows: "While the theoretical capacity of the local roads may be higher, it is the opinion of the staff that the traffic levels recommended here are consistent with the rural nature of the Boyds area." On July 12, 1978, at a public hearing held by the Board, concerns related to industry-generated traffic and its impact on safety were voiced by the president and vice president of the Boyd Civic Association and by individual citizens. On October 10, 1978, the Council, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, by Resolution 8-2217 (as amended on October 31, 1978) granted application G-119 for a sectional **map** amendment reclassifying 1019.56 acres including 89 acres of appellees' property, 24.4 of which lay outside the designated **boundaries** of the Boyds Master Plan. As stated in the Resolution, the Council's decision to downzone 69 of the 89 acres of appellees' I-1 zoned land was based upon the concerns with respect to traffic conditions and their effect on rural character of the Boyds area voiced at the public hearing and in the Board's technical staff report.

The trial judge quite properly found the zoning involved here was comprehensive rezoning but fell into error because he applied standards of review applicable to other types of rezoning and not applicable to comprehensive rezoning.[FN1]

> FN1. The cases relied on by the trial judge, Dundalk Holding Co. v. Horn, 266 Md. 280, 292 A.2d 77 (1972) (which involved a special exception) and Hedin v. Board of County Commissioners, 209 Md. 224, 233, 120 A.2d 663, 667 (1956) and Offutt v. Board of Zoning Appeals, 204 Md. 551, 562, 105 A.2d 219, 224 (1954) (both of the latter cases involve piecemeal rezoning) are not comprehensive rezoning cases.

The Court of Appeals has set forth the function of Maryland courts in reviewing comprehensive rezoning legislation in ****1252**Ark Redi-Mix Concrete Corp. v. Smith, 251 Md. 1, 4, 246 A.2d 220, 221-22 (1968) as follows:
"Zoning is a legislative function, and when ***495** reviewing the acts of zoning authorities, the duty of the courts is to decide whether such action was arbitrary, discriminatory or illegal (citations omitted). . . . When a comprehensive map designed to cover a substantial area is adopted, it is entitled to the same presumption of correctness as an original zoning (citations omitted). Thus, persons attacking the correctness of the map's classifications have a heavy burden of overcoming the presumption of their validity. This burden is heavier in the case of comprehensive zoning than in the case of a piecemeal reclassification (citations omitted)."

As this Court said in Stump v. The Grand Lodge of Ancient, Free and Accepted Masons of Maryland, 45 Md.App. 263, 269, 412 A.2d 1305 (1980):
"Zoning decisions which are made during a comprehensive rezoning process are strongly presumed to be correct. See Heller v. Prince

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George's County, 264 Md. 410, 412, 286 A.2d 772 (1972); Iverson v. Zoning Bd., 22 Md.App. 265, 267-68, 322 A.2d 569 (1974). The reason for this strong presumption is that when engaged in comprehensive rezoning, the County Council is not considering individual properties on an isolated or piecemeal basis, but rather, it is considering the overall needs and development of the County as a whole. See McBee v. Baltimore County, 221 Md. 312, 316-17, 157 A.2d 258 (1960); Grooms v. LaVale Zoning Board, 27 Md.App. 266, 279, 340 A.2d 385 (1975).
"Comprehensive rezoning is a vital legislative function, and in making zoning decisions during the comprehensive rezoning process, a County Council is exercising what has been described as its 'plenary ' legislative power. The power is broad and is limited only by the constitutional restriction that the Council's action 'bears a substantial relationship to the public health, comfort, order, ***496** safety, convenience, morals and general welfare. . . .' Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 66, 254 A.2d 700 (1969); Coppolino v. County Board of Appeals, 23 Md.App. 358, 370, 328 A.2d 55 (1974)."

(1) It is apparent to us that the appellees did not meet the heavy burden on them to show that the Council's actions did not bear a substantial relationship to public health, comfort, order, safety, convenience, morals or general welfare. We will, however, briefly answer the appellees' arguments.

(2) Appellees make the argument that there is no evidence to show a substantial relationship of the rezoning to the public health, comfort, order, safety, convenience, morals and general welfare. Once again, reliance upon piecemeal zoning cases such as County Commissioners of Anne Arundel County v. Fairwinds Beach Club, Inc., 230 Md. 569, 187 A.2d 845 (1963) is misplaced. The burden is upon the property owner to show that there is no substantial basis for the decision. Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 67, 254 A.2d 700 (1969).

Appellees next argue that the downzoning of the property constituted an impermissible "change of mind" by the appellant. In support of their argument, they cite Schultze v. Montgomery Co. Planning Board, 230 Md. 76, 185 A.2d 502 (1962) and Kay Construction Co. v. County Council for Montgomery County, 227 Md. 479, 177 A.2d 694 (1962) which involved piecemeal zoning, and Lambert v. Seabold, 246 Md. 562, 229 A.2d 116 (1967) and Polinger v. Briefs, 244 Md. 538, 224 A.2d 460 (1966) which involve the "change-mistake " rule.

Appellees next argue that the Council's action in downzoning the property was arbitrary and capricious because of the absence of change. In making this argument, they concede under ****1253** Coppolino v. County Board of Appeals, 23 Md.App. 358, 328 A.2d 55 (1974) the " change-mistake" rule does not apply to the comprehensive rezoning yet say that some change is necessary to prevent a rezoning from being arbitrary and capricious. In that case (***49**723 Md.App. at 370, 328 A.2d 55), we specifically held "that the absence of a showing of either change or mistake prior to a comprehensive rezoning does not constitute error." The appellees have misconstrued our holding in Coppolino. There was substantial evidence to support the Boyds Sectional Map Amendment as a whole. It was neither arbitrary nor capricious for the Council to conclude that the preservation of the rural and residential character of Boyds was a desirable end.

(3)(4) Appellees assert that the zoning action was arbitrary because it was based upon a plebiscite of the neighborhood citing the various "decisions to revise a number of acres of land there was to be permitted on the appellees' property." In comprehensive rezoning it is proper for the zoning authority to consider the opinions of the citizens. So long as there is any rational basis for legislative action, that action will be upheld by the courts. As we have stated it was reasonable for the Council to conclude that the desirability of preserving the rural and residential character of Boyds required the zoning changes.

(5) Appellees further contend that the rezoning of the 24.4 acres of the land outside of the Boyds area was improper. They concede that under Chapman v.

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Montgomery County Council, 259 Md. 641, 271 A.2d 156 (1970), a Master Plan is only a guide for further development and has no mandatory legal effect. They, nevertheless, argue the plan does not support a legislative action outside the boundaries of the plan based upon recommendations contained within the plan. We agree. The Council's reliance upon Montgomery County v. Woodward and Lothrop, Inc., 280 Md. 686, 703-04, 376 A.2d 483 (1977), cert. denied, sub nom. Funger v. Montgomery County, 434 U.S. 1067, 98 S.Ct. 1245, 55 L.Ed.2d 769 (1978) is misplaced. In that case the rezoned area was a small area within the Master Plan area.

(6) Finally, relying upon Mayor and City Council v. Mano Swartz, Inc., 268 Md. 79, 299 A.2d 828 (1973), appellees argue that an ordinance based solely upon aesthetic considerations is invalid. They allege that the Council's sole ground for the downzoning was aesthetic because it was based upon preserving the rural character of Boyds. It seems ***498** to us that the function of zoning is to preserve various types of neighborhoods, be they residential, industrial, commercial or historical, and it was quite a legitimate consideration for the Council's zoning to preserve the rural character of the Boyds community. See, Mano Swartz, supra, 268 Md. at 92, 299 A.2d at 835; Norbeck Village, supra, 254 Md. at 65-66, 254 A.2d at 704; County Commissioners v. Miles, 246 Md. 355, 365, 228 A.2d 450, 455 (1967).

JUDGMENT AFFIRMED IN PART, REVERSED IN PART.

CASE REMANDED FOR PASSAGE OF ORDER IN CONFORMITY WITH THIS OPINION.

COSTS TO BE EQUALLY DIVIDED.

Md.App., 1980.
Montgomery County v. Horman
46 Md.App. 491, 418 A.2d 1249

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Maryland Law Encyclopedia
Database updated January 2006

Zoning and Planning

Jonathan M. Purver, J.D.

III. JUDICIAL REVIEW OR RELIEF

Topic Summary References Correlation Table

§ 53. Evidence--Rezoning or changes in zoning classifications

West's Key Number Digest

West's Key Number Digest, Zoning and Planning ⇐601 et seq.

A presumption of reasonableness and constitutional validity applies to rezoning as well as to original zoning,[FN49] although not with as great weight or force.[FN50] However, even though the presumption is less strong in rezoning than in original zoning it is a substantial one.[FN51] Where a new zoning map for the entire county is adopted it is entitled to the same presumption that it is correct as is an original zoning map.[FN52]

In a proceeding involving rezoning, there is also a presumption that the original zoning of an area was well planned and intended to be permanent.[FN53] However, this presumption must be applied to the facts of the particular case.[FN54] As stated in some cases, although there is a presumption that all rezoning is reasonable, in piecemeal rezoning there is a counter presumption that the original zoning was well planned and designed to be reasonably permanent, and such counter presumption may be overcome only by proof that there was either a basic mistake in the original zoning or that there has been a substantial change in the character of the neighborhood; if neither is shown, the presumption of reasonableness of the rezoning is destroyed.[FN55]

> **Observation:** Counsel seeking a change has a heavy burden,[FN56] hence to sustain a piecemeal change counsel must gather and present credible evidence of mistake in the original zoning or a substantial change in conditions.[FN57] Counsel attacking the denial of rezoning has the burden to show that the denial was arbitrary or capricious.[FN58] Counsel who seeks a rezoning on the basis of unconstitutional classification must gather and present solid evidence that the client has been deprived of all reasonable use of property and that it cannot be used for any permitted use.[FN59]

In a proceeding attacking rezoning or an amendment to a zoning ordinance on the ground that no error or change of conditions warranting the change existed, those objecting to the rezoning or the amendment have the burden to show lack of error in the original zoning and absence of a change in conditions.[FN60]

In various cases, the evidence has been held to sustain the action of the zoning board or legislative or administrative body in denying an application to rezone land,[FN61] such as where no mistake in the original zoning or change in conditions was shown,[FN62] or to sustain its action in rezoning land or changing zoning classifications,[FN63] such as rezoning from residential to commercial[FN64] or business,[FN65] rezoning from residential to industrial,[FN66] rezoning from agricultural to commercial,[FN67] or rezoning to a classification which would permit use of the land as a shopping center.[FN68]

In other cases the evidence has been held to show that the denial of an application for rezoning was improper,[FN69] or to show that the action in rezoning was improper.[FN70]

> **Illustration:** In a landowners' action for declaratory decree as to the validity of an ordinance rezoning the landowners' property for residential use, evidence sustained the trial court's finding that the plaintiff's property had always been commercial and that there was little chance of its ever being used for residential purposes and that rezoning would result in preventing landowners from making any practical use of land, and that therefore, because landowners' property was thereby being taken from them without compensation, the ordinance was void as to their land.[FN71]

Sometimes the evidence shows the rezoning to be improper because there was not shown to be a mistake in the original zoning or a change in conditions.[FN72]

The presumption of validity is stronger in comprehensive rezoning cases than it is in instances of piecemeal rezoning.[FN73] Where a new land use map is comprehensive in character and covers a substantial area, it is entitled to the same presumption of correctness as original zoning,[FN74] and, whether the adoption of a new land use map constitutes zoning or rezoning, a heavy burden of overcoming the strong presumption of validity of the legislative action in making the classification rests upon those attacking it.[FN75]

The re-adoption of a county zoning map and plan, without change as to a particular property, is entitled to the presumption that it was a deliberate confirmation of the earlier decision, but changes between the time of the initial zoning and the confirmation should not be wholly disregarded.[FN76]

In various proceedings involving a judicial review of the action of county authorities in rezoning particular tracts of land as part of a comprehensive new plan, the sufficiency of the evidence to sustain such rezoning has been adjudicated.[FN77]

> **Illustration:** In an action attacking the validity of the action of a County Council in rezoning, as part of a comprehensive new plan, an 83-acre largely undeveloped tract of land, formerly classified as partly commercial and partly residential to a partially business major classification permitting erection of a shopping center and partially residential with a requirement of 20,000 square feet per residence, the plaintiffs failed to establish that the action of the City Council was either arbitrary or capricious, despite contentions that classification constituted illegal spot zoning, and that the requirements of the Baltimore County Code relating to reduction of congestion on the roads were not complied with. [FN78]

[FN49] Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483 (1977); Prince George's County Council v. Prestwick, Inc., 263 Md. 217, 282 A.2d 491 (1971); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969); Stocksdale v. Barnard, 239 Md. 541, 212 A.2d 282 (1965).

[FN50] Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 202 A. 2d 612 (1964).

[FN51] Jobar Corp. v. Rodgers Forge Community Ass'n, 236 Md. 106, 202 A.2d 612 (1964); Missouri Realty, Inc. v. Ramer, 216 Md. 442, 140 A.2d 655 (1958).

[FN52] McBee v. Baltimore County, 221 Md. 312, 157 A.2d 258 (1960).

[FN53] Howard County, Md. v. Dorsey, 292 Md. 351, 438 A.2d 1339 (1982); MacDonald

v. Board of County Com'rs for Prince George's County, 238 Md. 549, 210 A.2d 325 (1965); Montgomery County v. Ertter, 233 Md. 414, 197 A.2d 135 (1964); Muhly v. County Council for Montgomery County, 218 Md. 543, 147 A.2d 735 (1959).

[FN54] Mettee v. County Com'rs of Howard County, 212 Md. 357, 129 A.2d 136 (1957); Northwest Merchants Terminal v. O'Rourke, 191 Md. 171, 60 A.2d 743 (1948).

[FN55] Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973); Cabin John Limited Partnership v. Montgomery County Council, 259 Md. 661, 271 A.2d 174 (1970).

[FN56] Hoy v. Boyd, 42 Md. App. 527, 401 A.2d 1047 (1979).

[FN57] Heller v. Prince George's County, 264 Md. 410, 286 A.2d 772 (1972); Chevy Chase Village v. Montgomery County Council, 258 Md. 27, 264 A.2d 861 (1970); Potomac Valley League v. County Council for Montgomery County, 43 Md. App. 56, 403 A.2d 388 (1979); Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975).

[FN58] Plant v. Board of County Com'rs for Prince George's County, 262 Md. 120, 277 A.2d 77 (1971); Montgomery County Council v. Shiental, 249 Md. 194, 238 A.2d 912 (1968).

[FN59] Mayor and Council of Rockville v. Henley, 268 Md. 469, 302 A.2d 45 (1973); Roberts v. Grant, 20 Md. App. 247, 315 A.2d 103 (1974).

[FN60] Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966); Overton v. Board of County Com'rs of Prince George's County, 225 Md. 212, 170 A.2d 172 (1961); West Ridge, Inc. v. McNamara, 222 Md. 448, 160 A.2d 907 (1960); Hoy v. Boyd, 42 Md. App. 527, 401 A.2d 1047 (1979).

[FN61] Cardon Investments v. Town of New Market, 302 Md. 77, 485 A.2d 678 (1984); Messenger v. Board of County Com'rs for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970); Renz v. Bonfield Holding Co., 223 Md. 34, 158 A.2d 611 (1960), on reargument, 223 Md. 34, 161 A.2d 436 (1960); Quinn v. Tolle, 217 Md. 643, 143 A.2d 481 (1958); Montgomery County Council v. Scrimgeour, 211 Md. 306, 127 A.2d 528 (1956).

[FN62] Reese v. Mandel, 224 Md. 121, 167 A.2d 111 (1961); Renz v. Bonfield Holding Co., 223 Md. 34, 158 A.2d 611 (1960), on reargument, 223 Md. 34, 161 A.2d 436 (1960).

[FN63] Bowman Group v. Moser, 112 Md. App. 694, 686 A.2d 643 (1996), reconsideration denied, (Jan. 9, 1997); Wier v. Witney Land Co., 257 Md. 600, 263 A.2d 833 (1970); Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968); Overton v. Board of County Com'rs of Prince George's County, 225 Md. 212, 170 A.2d 172 (1961).

[FN64] Montgomery v. Board of County Com'rs for Prince George's County, 263 Md. 1, 280 A.2d 901 (1971); Fallon v. City of Baltimore, 219 Md. 110, 148 A.2d 709 (1959); Walker v. Board of County Com'rs of Talbot County, 208 Md. 72, 116 A.2d 393 (1955) (borough engineer stated that land, which was sought to be used for erection of a shopping center, was not fit for residential purposes, and such land, although available for residential building for nearly 30 years, had never been developed as such, and rezoning of such property to commercial district from residential district would have beneficial effect on the downtown parking problem).

[FN65] Vestry of St. Mark's on the Hill Episcopal Church v. Doub, 219 Md. 387, 149 A.2d 779 (1959).

[FN66] Bowie v. Board of County Com'rs of Howard County, 253 Md. 602, 253 A.2d 727 (1969); Kirkman v. Montgomery County Council, 251 Md. 273, 247 A.2d 255 (1968); Offutt v. Board of Zoning Appeals of Baltimore County, 204 Md. 551, 105 A.2d 219 (1954).

[FN67] Scheydt v. Pratt Properties, Inc., 229 Md. 31, 181 A.2d 464 (1962); West Ridge, Inc. v. McNamara, 222 Md. 448, 160 A.2d 907 (1960).

[FN68] Pressman v. City of Baltimore, 222 Md. 330, 160 A.2d 379 (1960); Loughborough Development Corp. v. Rivermass Corp., 213 Md. 239, 131 A.2d 461 (1957); Eckes v. Board of Zoning Appeals of Baltimore County, 209 Md. 432, 121 A.2d 249 (1956).

[FN69] Board of County Com'rs of Prince George's County v. Oak Hill Farms, Inc., 232 Md. 274, 192 A.2d 761 (1963); Hedin v. Board of County Com'rs of Prince Georges County, 209 Md. 224, 120 A.2d 663 (1956) (denial of petition to rezone tract of 4.75 acres from classification permitting only single family dwelling use to classification permitting low density apartment use); Neuman v. City of Baltimore, 23 Md. App. 13, 325 A.2d 146 (1974).

[FN70] Zinn v. Board of Zoning Appeals of Baltimore County, 207 Md. 355, 114 A.2d 614 (1955); American Oil Co. v. Miller, 204 Md. 32, 102 A.2d 727 (1954); Quinn v. County Com'rs of Kent County, 20 Md. App. 413, 316 A.2d 535 (1974).

[FN71] Kracke v. Weinberg, 197 Md. 339, 79 A.2d 387 (1951).

[FN72] Mayor and Council of Rockville v. Henley, 268 Md. 469, 302 A.2d 45 (1973); Montgomery v. Board of County Com'rs for Prince George's County, 263 Md. 1, 280 A.2d 901 (1971); Overton v. Board of County Com'rs of Prince George's County, 223 Md. 141, 162 A.2d 457 (1960) (evidence was insufficient to establish that there was error in original zoning or any change in conditions warranting a commercial-office building classification for tract of land located in midst of rural-residential zone to provide housing for the elderly); Board of County Com'rs of Talbot County v. Troxell, 214 Md. 135, 132 A.2d 845 (1957) (evidence failed to show that original zoning by board of county commissioners was a mistake, so as to authorize rezoning of tract of land from "waterfront" to "suburban" without showing of a change of condition); Hardesty v. Board of Zoning Appeals of Baltimore County, 211 Md. 172, 126 A.2d 621 (1956).

[FN73] Pattey v. Board of County Com'rs for Worcester County, 271 Md. 352, 317 A.2d 142 (1974); Montgomery County Council v. Leizman, 268 Md. 621, 303 A.2d 374 (1973); City of Baltimore v. National Ass'n for Advancement of Colored People, 221 Md. 329, 157 A.2d 433 (1960); JMC Const. Corp., Inc. v. Montgomery County, 54 Md. App. 1, 456 A.2d 931 (1983).

[FN74] Mayor and Council of Rockville v. Stone, 271 Md. 655, 319 A.2d 536 (1974); Trustees of McDonogh Ed. Fund and Institute v. Baltimore County, 221 Md. 550, 158 A.2d 637 (1960); Stump v. Grand Lodge of Ancient, Free and Accepted Masons of Maryland, 45 Md. App. 263, 412 A.2d 1305 (1980); Von Lusch v. Board of County Com'rs of Queen Anne's County, 24 Md. App. 383, 330 A.2d 738 (1975).

[FN75] Pattey v. Board of County Com'rs for Worcester County, 271 Md. 352, 317 A.2d 142 (1974); Hewitt v. County Com'rs of Baltimore County, 220 Md. 48, 151 A.2d 144 (1959); Montgomery County v. Horman, 46 Md. App. 491, 418 A.2d 1249 (1980).

[FN76] Chevy Chase Village v. Montgomery County Council, 258 Md. 27, 264 A.2d 861 (1970); Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975).

[FN77] County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975); Hewitt v. County Com'rs of Baltimore County, 220 Md. 48, 151 A.2d 144 (1959); Montgomery County v. Horman, 46 Md. App. 491, 418 A.2d 1249 (1980); Anne Arundel County v. Maryland Nat. Bank, 32 Md. App. 437, 361 A.2d 134 (1976); Iverson v. Zoning Bd. of Howard County, 22 Md. App. 265, 322 A.2d 569 (1974).

[FN78] Trustees of McDonogh Ed. Fund and Institute v. Baltimore County, 221 Md. 550, 158 A.2d 637 (1960).

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MD-ENC ZONING § 53

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106 Md.App. 92, 664 A.2d 34

Court of Special Appeals of Maryland.
John C. **NORTH**, II, Chairman, et al.
v.
KENT ISLAND LIMITED PARTNERSHIP.
No. 1228, Sept. Term, 1994.
Aug. 31, 1995.

Property owner sought redesignation of portion of its property in the Chesapeake Bay Critical Area from limited development area (LDA) to intensely developed area (IDA) on the grounds of mistake in the original mapping. After county planning commission found there had been mistake and recommended map amendment, board of county commissioners submitted proposed amendment to the Chesapeake Bay Critical Area Commission ("Commission"), a Commission panel determined there had been no mistake, and the Commission denied the amendment. Property owner sought judicial review. The Circuit Court, Queen Anne's County, John W. Sause, Jr., J., reversed the Commission's denial of redesignation and remanded for a contested case hearing under the Maryland Administrative Procedure Act (MAPA). Parties appealed. The Court of Special Appeals, Fischer, J., held that: (1) role of the Commission is quasi-legislative and does not encompass contested case hearing, and (2) Commission has jurisdiction to examine proposed map amendment to determine if consistent with criteria for development, but not to reexamine whether there was mistake in the original zoning. Reversed and remanded.

West Headnotes

[1] KeyCite Notes

⇦15A Administrative Law and Procedure
⇦15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
⇦15AIV(D) Hearings and Adjudications
⇦15Ak469 Hearing
⇦15Ak472 k. Elements and Essentials in General. Most Cited Cases

When proceeding before agency meets definition of "contested case" found within the Maryland Administrative Procedure Act (MAPA), the agency must provide trial type procedures. Code, State Government, § 10-201 (Repealed).

[2] KeyCite Notes

⇦414 Zoning and Planning
⇦414VIII Permits, Certificates and Approvals
⇦414VIII(C) Proceedings to Procure
⇦414k436 Hearing and Determination
⇦414k436.1 k. In General. Most Cited Cases

There is nothing in statute governing approval and adoption of local critical area protection programs that requires use of contested case hearing to determine propriety of proposed map amendment. Code, Natural Resources, § 8-1809.

[3] KeyCite Notes

⇦414 Zoning and Planning

North r. Kent Island

⊂=414I In General
⊂=414k13.5 k. Regional or Interstate Agencies. Most Cited Cases

Chesapeake Bay Critical Area Commission has the right to intervene at any time in any proceeding concerning project approval in the Chesapeake Bay Critical Area. Code, Natural Resources, § 8-1812.

***35 *94** Thomas A. Deming, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., Marianne D. Mason and Judith F. Plymyer, Asst. Attys. Gen., on the brief), Annapolis, for appellants.
Warren K. Rich (William D. Evans, Jr. and Rich and Henderson, P.C., on the brief), Annapolis, for appellee.

Argued before FISCHER, CATHELL and HARRELL, JJ.

***95** FISCHER, Judge.
Appellant/Cross-Appellee, Chesapeake Bay Critical Area Commission ("Critical Area Commission" or the "Commission"), appeals from an order of the Circuit Court for Queen Anne's County directing it to hold a contested case hearing on the request of Appellee/Cross-Appellant, Kent Island Limited Partnership ("Pier One"), for a redesignation of a portion of its property in the critical area from limited development area (LDA) to intensely developed area (IDA), on the grounds of mistake in the original mapping.
The Critical Area Commission asks us to decide the following question:
I. Did the trial court err in finding that a determination of the Critical Area Commission under Nat.Res.Md.Ann.Code, § 8-1809 is subject to the contested case provisions of State Government Md.Ann.Code., § 10-205?
Pier One cross-appeals and asks us to address the following questions:
II. Was the Panel's [of the Critical Area Commission] determination supported by substantial evidence?
III. Did the Circuit Court err in granting the motion to strike?
IV. (a). Did the Circuit Court err in not determining the extent of jurisdiction of the Chesapeake Bay Critical Area Commission with regard to individual case by case adjudication and the standard of review to be applied?
(b). Has there been an invalid delegation of legislative authority?

BACKGROUND

In 1984, the Maryland General Assembly enacted Chapter 794, Laws of 1984, entitled the "Chesapeake Bay Critical Area Protection Program," which is codified in Md.Code (1974, 1990 Repl. Vol., 1994 Cum.Supp.), ***96** §§ 8-1801-1816 of the Natural Resources Article.[FN1] The purposes of the General Assembly were:

> FN1. All references are to Md.Code (1974, 1990 Repl.Vol., 1994 Cum.Supp.), §§ 8-1801-1816 of the Natural Resources Article, unless otherwise noted.

***36** (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.
Section 8-1801(b).
In order to achieve these purposes, the General Assembly created the Chesapeake Bay Critical Area Commission. Each local jurisdiction [FN2] has the primary responsibility for developing and implementing a program [FN3], subject to review and approval by the Commission. Section 8-1808(a). The Commission was required to "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." Section 8-1808(d) [FN4] .

FN2. "Local jurisdiction" means a county, or a municipal corporation with planning and zoning powers, in which any part of the Chesapeake Bay Critical Area, as defined in this subtitle, is located. § 8-1802(a)(7).

FN3. "Program" means the critical area protection program of a local jurisdiction and includes any amendments to the program. § 8-1802(a)(8).

FN4. § 8-1808(b) provides:

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

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

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

(3) To establish land use policies for development in the Chesapeake Bay Critical Area 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.

97** Section 8-1809 addresses the approval and adoption of the local critical area protection programs. Each local jurisdiction is required to advise the Commission whether it plans to "develop a critical area protection program to control the use and development of that part of the Chesapeake Bay Critical Area located within its territorial limits." Section 8-1809(a)(1). If the local jurisdiction chooses not to develop a program, the Commission is permitted to prepare and adopt a program for the critical area located in that local jurisdiction. Section 8-1809(b). If the local jurisdiction decides to develop a program, the local jurisdiction must prepare and submit the program to the Commission. Section 8-1809(c). Within 30 days after the program is submitted, the Commission is required to appoint a panel of five of its members to conduct a public hearing in the jurisdiction on the proposed program. Section 8-1809(d)(1). Within 90 days after the Commission receives a proposed program, the Commission shall approve the proposal or notify the local jurisdiction of any specific changes required for the proposal to be approved. If the Commission does neither, the program is deemed approved. Section 8-1809(d)(2). Each local jurisdiction is to review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every four years. Section 8-1809(g). In addition, local jurisdictions may propose program amendments [FN5] as often as necessary, but not more than four times per calendar year. Section 8-1809(h). "Except for program amendments or program refinements98** developed during program review under subsection (g) of this section, a zoning map amendment may be granted by a local approving authority only on proof of a mistake in the ***37** existing zoning." Section 8-1809(h)(2)(i).[FN6] The Commission must approve any program amendments. Section 8-1809(i). Section 8-1809(j) provides that the Commission shall approve programs and program amendments that meet: "(1) The standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and (2) The criteria adopted by the Commission under § 8-1808 of this subtitle."

FN5. (9)(i) "Program amendment" means any change to an adopted program that the Commission determines will result in a use of land or water in the Chesapeake Bay Critical Area in a manner not provided for in the adoptive program.

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

§ 8-1802(a)(9).

FN6. This is distinguished from the general practice allowing a zoning amendment based on change of circumstances or mistake. *Stratakis v. Beauchamp*, 268 Md. 643, 652-653, 304 A.2d 244 (1973).

Pursuant to § 1808(d), the Commission promulgated regulations establishing the criteria for local critical area development. COMAR 27.01.02 (the "criteria"). The Commission recognizes three types of development areas: (1) Intensely Developed Areas; FN7 (2) Limited Development Areas; FN8 and (3) ***99** Resource Conservation Areas. FN9 COMAR 27.01.02.02(A). Intense development is to be directed outside the Critical Area and future intense development is to be directed towards intensely developed areas. COMAR 27.01.02.02(B). Low intensity development is permitted in limited development areas, but subject to strict regulations. COMAR 27.01.02.02(C). In addition, development is to be limited in the resource conservation areas. COMAR 27.01.02.02(D). Each jurisdiction was to identify each of the three areas within its jurisdiction based on criteria and develop policies and programs to achieve the objectives proposed by the Commission. COMAR 27.01.02.02 (E). The designation was made based on the land uses and development in existence on December 1, 1985. COMAR 27.01.02.07(C).

FN7. COMAR 27.01.02.03(A) provides:

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

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

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

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

FN8. COMAR 27.01.02.04 provides:

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

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

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

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

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

FN9. COMAR 27.01.02.05 provides:

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

(1) Density is less than one dwelling unit per 5 acres; or

(2) Dominant land use is in agriculture, wetland, forest, barren land, surface water, or open space.

The Commission placed a cap on the growth of intense development and limited development areas. COMAR 27.01.02.06A provides:
Intensely developed and limited developments areas may be increased subject to these guidelines:
(1) The area of expansion of intensely developed or limited development areas, or both, may not exceed an area equal to 5 percent of the county's portion of the resource conservation area lands that are not tidal wetlands or federally owned.
(2) When planning future expansion of intensely developed and limited development areas, counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities.
***100** Growth allowed in each county's critical area under this provision is known as a county's "growth allocation." Section 8-1809(h)(2)(ii) provides:
****38** The requirement in paragraph (2)(i) of this subsection that a zoning map amendment may be granted only on proof of a mistake does not apply to proposed changes to a zoning map that:
1. Are wholly consistent with the land classifications in the adopted program; or
2. Propose the use of a part of the remaining growth allocation in accordance with the adopted program.
The amount of growth allocation available to each local jurisdiction is five percent of the Resource Conservation Area. Redesignations based on mistake do not count against the county's growth allocation.
The Queen Anne's County critical area program was approved by the Critical Area Commission on June 29, 1988 and, as amended, on February 15, 1989. It was adopted as the comprehensive planning guide by the County Commissioners on March 15, 1989. It was designated as the Queen Anne's County Critical Area Protection Program (County Program).

FACTS

Pier One owns approximately 52 acres of property on Kent Island at the southeastern end of the Chesapeake Bay Bridge in Queen Anne's County. Approximately 50 acres of the 52 acre property are within the Chesapeake Bay Critical Area. The critical area is divided into 28.84 acres of Intensely Developed Area and 21.3 acres of Limited Development Area.[FN10] The property is improved with a marina and non-residential structures including a restaurant. In order to make modifications to the property, in September of 1990, ***101** Pier One petitioned Queen Anne's County to amend the classification of the 21.3 acres of Limited Development Area to Intensely Developed Area. There were two ways in which the County could have redesignated the parcel: (1) The County could have redesignated the parcel based on a mistake in the original mapping; or (2) The County could have redesignated the parcel based on the use of the County's growth allocation.

FN10. The intense development and limited development areas are overlay zones superimposed over existing zones. Overlay zones are used to place property simultaneously in two zones. The record does not indicate the zoning for the underlying areas.

Pier One petitioned Queen Anne's County Board of Commissioners ("County Commissioners") for a redesignation of a portion of its property in the critical area, from limited development area (LDA) to intensely developed area (IDA). Pier One based the petition on the fact that the LDA designation was a mistake within the contemplation of § 8-1809(h)(2). The County Commissioners referred the petition to the Queen Anne's County Planning Commission ("Planning Commission") for review. On January 10, 1991, the Planning Commission held a public hearing to determine if there was a mistake in the original mapping. Pier One presented testimony and exhibits. The Planning Commission concluded that a mistake had been made in the designation of the property and recommended in favor of the map amendment. The County Commissioners then submitted the redesignation as a proposed amendment to the Chesapeake Bay Critical Area Commission for approval as an amendment to the County's critical area program. The Critical Area Commission referred the

amendment to a panel of five. On April 15, 1991, the panel of five held a public hearing with testimony and exhibits presented by Pier One, found no mistake in the mapping, and recommended against the amendment. Subsequently, there was a public meeting of the Critical Area Commission sitting as a whole. The panel chairman recommended that the Commission deny the petition. Pier One was not permitted to present any witnesses or testimony. The Critical Area Commission denied the amendment based on the panel report. As a result of the Commission's decision, the County Commissioners denied Pier One's petition for redesignation.

On July 5, 1991, Pier One requested, on substantive and procedural grounds, judicial review of the adverse rulings of ***102** the Critical Area Commission and the County Commissioners. The Critical Area Commission moved to dismiss the appeal and to strike the constitutional issues raised in Pier One's opposition***39** to the motion to dismiss. The circuit court granted the motion to strike the constitutional issues, denied the motion to dismiss, and reversed the Critical Area Commission's denial of redesignation. The circuit court remanded the case to the Critical Area Commission with instructions to hold a contested case hearing under the Maryland Administrative Procedure Act (MAPA). The circuit court agreed with Pier One's argument that LDA and IDA map designations are licenses issued by a state agency and therefore subject to the contested case hearing requirements of the MAPA. The circuit court did not address the substantive issues or the standard the Critical Area Commission should apply in reviewing the redesignation.

DISCUSSION

The Commission argues that the circuit court erred in two respects. The first is that a Critical Area Commission determination concerning a local map amendment is a quasi-legislative action, not a quasi-judicial action of a state agency issuing a license under the APA. Second, a contested case hearing is not required by § 8-1809 or any other section. Pier One argues that the Commission's denial of the proposed map amendment was a quasi-judicial act requiring the due process protections afforded by the MAPA. It avers that the Commission's role was to resolve the issue of whether there was a mistake in the original mapping of the LDA portion of the Pier One property, through a contested case hearing as defined by Maryland's Administrative Procedure Act, Md.Code (1984, 1993 Repl.Vol.), §§ 10-201 through 10-217 of the State Government Article.

[1] A "contested case" is defined by the MAPA as follows:

§ 10-201. Definitions.

* * * * * *

***103** (c) *Contested Case.*-"Contested case" means a proceeding before an agency to determine:

(1) a right, duty, statutory entitlement, or privilege of a person that is required by law to be determined only after an opportunity for an agency hearing; or

(2) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by law to be determined only after an opportunity for an agency hearing.

When a proceeding meets the definition of a "contested case" the agency must provide trial type procedures. The MAPA "itself does not grant a right to a hearing. The right must come from another source such as a statute, a regulation, or due process principles." *Sugarloaf v. Waste Disposal,* 323 Md. 641, 652, 594 A.2d 1115 (1991) (citations omitted).

[2] [3] [4] There is nothing in § 8-1809 that requires a contested case hearing. In addition, "[t]he test to determine whether an action is legislative or administrative is whether the action is one making new law, i.e., an enactment of general application prescribing a new plan or policy, or is one which merely looks to or facilitates the administration, execution or implementation of a law already in force." *Prince George's County v. Silverman,* 58 Md.App. 41, 50, 472 A.2d 104 (1984). The actual acts of zoning and rezoning are quasi-legislative functions. *Hyson v. Montgomery County,* 242 Md. 55, 63, 217 A.2d 578 (1966). The Commission itself does not act as a zoning body. The power of the Commission is to adopt regulations and criteria as well as conduct hearings in connection with "policies, proposed programs, and proposed regulations or amendments to regulations." § 8-1806. The role of the Commission is quasi-legislative and does not encompass a contested case hearing.

The Commission, therefore, contends that the only purpose of its proceedings was to determine

whether the County's proposed local program amendment met certain standards set forth in § 8-1808 (b)(1)-(3) and the criteria for local program development adopted by the Commission. The Commission argues that this determination is part of its oversight responsibility ***104** under § 8-1801 (b)(2), to assure that, in proposing mapping amendments based on mistake, all local jurisdictions act "in a consistent and uniform manner subject to State criteria and oversight."

****40** The initial question we must answer is who has jurisdiction to determine whether there was a mistake in the original mapping. Pier One argues that the Critical Area Commission resolved the disputed question of adjudicative fact as to whether the property was mistakenly designated LDA.

[5] [6] [7] It is clear that the General Assembly did not wish to allow local jurisdictions to amend their local programs at will. As a safeguard, § 8-1809(h)(2)(i) provides that "··· a zoning map amendment may be granted by a local approving authority only on proof of mistake." In response, Queen Anne's County adopted § 7008 of the County Program. Section 7008(B) of the County Program provides:

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* based on the application of the Method for Delineating Land Use Management Classification contained in the Queen Anne's County Critical Area Program *and the amendment is approved by the Critical Area Commission.* (Emphasis added.)

County Program § 7012 describes the procedures for map amendments. All proposed amendments "shall be referred to the Planning Commission for investigation and recommendation." The Planning Commission is to hold a public hearing at which parties of interest and citizens shall have an opportunity ***105** to be heard. County Program § 7012(B). The Planning Commission is the body to decide initially whether there has been a mistake in the mapping. The Planning Commission is to forward its recommendations to the County Commissioners and request that the County Commissioners forward the application for map amendment to the Critical Area Commission. County Program § 7012(C). Once the Critical Area Commission approves the amendment pursuant to § 8-1809, "the County Commissioners shall hold a public hearing on the proposed amendments ··· at which citizens in interest and citizens shall have an opportunity to be heard." County Program § 7012 (C). The County Commissioners "shall not approve any amendment unless it finds that such amendment is consistent with the purposes contained in Section 8-1800, et seq. of the Natural Resources Article of the Annotated Code of Maryland, in the Queen Anne's County Critical Area Program, the Comprehensive Plan and this Ordinance." County Program § 7012(D). The role of the Critical Area Commission is to examine the amendment to determine whether the amendment is consistent with the criteria. In contrast to § 8-1809(h)(2)(i), which requires the *local approving authority* to make a finding of mistake,[FN11] § 8-1809(j) provides a separate standard of review to be applied. Section 8-1809(j) provides:

FN11. For a discussion on the standard used to determine whether there was a mistake in the existing zoning, *see Bellanca v. County Commissioners,* 86 Md.App. 219, 229-233, 586 A.2d 62, *cert. denied*323 Md. 33, 591 A.2d 249 (1991).

(j) *Standards for approval by Commission.*-The Commission shall approve programs and program amendments that meet:
(1) The standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and
(2) The criteria adopted by the Commission under § 8-1808 of this subtitle.
The standards set forth in § 8-1808(b)(1) through (b)(3) are the goals of the Critical Area Program:
***106** (b) *Goals of program.*-A program shall consist of those elements which are necessary or appropriate:
(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances****41** 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.

It is not the role of the Commission to reexamine whether there was an actual mistake in the original zoning. To allow the Critical Area Commission to revisit the question of mistake would render meaningless the hearings before the Planning Commission and the County Commissioners. In addition, this would create a state level zoning board, which was not the intention of the General Assembly in establishing the Critical Area Commission. The Commission was designed to be an oversight committee. Section 8-1801(b)(2). The original drafting group considered forming the Commission as a permitting agency for all projects in the critical area. The drafting group concluded that such a role was undesirable because the Commission would become tangled in collisions with local agencies and developers over the specifics of particular projects. George W. Liebmann, *The Chesapeake Bay Critical Area Act: The Evolution of a Statute,* The Daily Record, April 20, 1985, at 1. The drafting group also considered constituting the Commission as an appeal board. Because this would impose substantial hearing burdens on the Commission and create a conflict between the Commission and local zoning boards, the group decided against such a provision. The drafting group also considered allowing an appeal directly to the Commission from the permit granting agency. The drafting group rejected this approach because it would either result in duplicative appeals or grant the Commission pendent jurisdiction to address issues which did not fall under its regulations. Because there was a need for the Commission ***107** to check upon local permit determinations involving zoning and subdivision, the group drafted a provision granting the Commission the right to intervene at any stage of administrative, judicial, or other original proceeding concerning project approvals. Section 8-1812.

In this case, once the Planning Commission determined that there was a mistake in the original zoning, the program amendment should have been referred to the Critical Area Commission to determine whether it met the criteria. The Commission has jurisdiction to examine the rezoning and determine whether the rezoning meets the established criteria. The sole issue before the Commission should have been whether the property satisfies the definition of IDA as set forth in the criteria. Instead, the Critical Area Commission undertook an independent review to determine whether there was a mistake in the rezoning. This action was outside the scope of its power. The Commission has jurisdiction as the final arbiter of program changes, but does not have jurisdiction to review piecemeal rezoning. The legislative charge to the Critical Area Commission does not include the quasi-judicial function of evaluating whether there was a mistake in the original mapping. If the Commission determines that the amendment complies with the criteria, then the County Commissioners may change the development area classification if it is satisfied that there was an original mistake. If the amendment does not comply with the criteria, then the petition for reclassification must be denied.[FN12]

FN12. *See West Montgomery v. MNCPPC,* 309 Md. 183, 197, 522 A.2d 1328 (1987), where the Court of Appeals addressed another type of overlay zones-transfer of development rights (TDR). The Court noted that the hearing before the District Council "would involve the determination of legislative rather than adjudicative facts, and thus there would be no requirement for a trial type hearing."

[8] Once the County Commissioners decides either to grant or deny the amendment, either party may then appeal to the Circuit Court for Queen Anne's County. County Program § 7034. Even if the Commission determines that the amendment is consistent with the criteria, it still has standing ***108** to appeal the decision of the County Commissioners to grant the amendment. The Commission***42** has the right to intervene at any time. Section 8-1812 provides, in pertinent part:

(a) In general.-After the Commission has approved or adopted a program, 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.

* * * * * *

(c) Appeal authorized.-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.

See North v. St. Mary's County, 99 Md.App. 502, 507-08, 638 A.2d 1175, *cert. denied sub nom.* Enoch v. North, 336 Md. 224, 647 A.2d 444 (1994).

CONCLUSION

The circuit court should remand this case to the Critical Area Commission so that the Commission may review the amendment to determine whether it meets the criteria for IDA designation. If it does, then the County Commissioners may either grant or deny the petition depending on how it is persuaded on the issue of mistake. At this point, the circuit court may review the record to determine whether the decision of the County Commissioners is supported by substantial evidence. Because the circuit court has not yet addressed this issue, we shall refrain from addressing it on appeal. Because we answer the appellant/cross-appellee's question in the affirmative and reverse the decision of the circuit court, we need not address the issues on cross-appeal.
JUDGMENT REVERSED.
REMANDED TO THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY WITH INSTRUCTIONS TO REMAND TO THE CRITICAL AREA COMMISSION FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.
***109** COSTS TO BE PAID ONE-HALF BY APPELLANTS AND ONE-HALF BY APPELLEE.
Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works Md.App.,1995.
North v. Kent Island Ltd. Partnership
106 Md.App. 92, 664 A.2d 34

END OF DOCUMENT

(C) 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Date: August 28, 2006

Amendment: Wright Investment Group, LLC (A. A. Co.)

Name and Address	Do You Wish to Testify? Yes	No	
Paul Burdette 712 Holly Drive 21409	X		✓
Pat Lynch 1648 Homewood Rd Annap.	X		✓
Britt Griswold 823 Holly Drive East Annap. 21409	X		✓
John Avallone 704 Holly DRIVE N Amberley, Annap MD 21409	X		
Doug Heussler 850 Holly Drive Annapolis MD 21409	X		✓

Date: August 28, 2006

Amendment: Wright Investment Group, LLC (A.A. Co.)

Name and Address	Do You Wish to Testify? Yes	No
Saundra Canedo DNR-OAG Annapolis MD		✓
BILL PARLATORE 858 HOLLY DR S ANNAPOLIS MD 21409		✓
David Plott 145 Main St. Annapolis MD 21401		
Dan Bowler 716 Holly Dr. N. Annapolis, MD 21409		✓
Susan Bowler 716 Holly Dr. N. Annapolis MD 21409	✓	✓
ANDREW STREET Representing Severn River Keeper. 454 Hoenering Trail Annapolis MD 21401	✓	
Kathleen Bell 1654 Poplar Lane Annapolis, MD 21409		✓

Date: _____

Amendment: _____

Name and Address	Do You Wish to Testify? Yes	No
Lisa Banting 1634 Ridout Rd Annapolis, MD 21409		✓
Bill Phelps Jr 946 Holly Dr N Annapolis MD 21409		✓
LINDY CURRIER 746 Holly DR. NORTH ANNAPOLIS, MD. 21409		✓
Sheila Perry 754 Holly Drive Annapolis MD 21409		✓
Bob & Karen Olsen 1612 Ridout Road Annapolis, MD 21409		✓
Jane Paul 1670 Homewood Landing Rd Annapolis, MD 21409		✓

Cucuzzella, Paul

From: Dise, Marianne E.
Sent: Monday, June 11, 2007 12:50 PM
To: Cucuzzella, Paul
Cc: McHale, Margaret; Serey, Ren
Subject: RE: Reply to Judge Manck's letter on map amendment cases

Hi Paul, funny I was just thinking about these cases this morning. I think that the short approach is the best one - and your memo is right on point. More explanation would probably only make the court's mind more fuzzy. I will check on the status of the information from the county --- I believe that they sent in the Wright investment map, but I will find out for sure. Thanks, Marianne

-----Original Message-----
From: Cucuzzella, Paul
Sent: Monday, June 11, 2007 10:07 AM
To: Dise, Marianne E.
Subject: Reply to Judge Manck's letter on map amendment cases

Marianne, after pondering this for a while, I've come to the conclusion that there isn't much more to say then that which I've included in the attached draft. Thoughts? This is due on Friday.

Paul J. Cucuzzella
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Maryland Department of Natural Resources
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Annapolis, Maryland 21401
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fax (410) 260-8364
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Handwritten Notes
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF

MSA_S_1831_32 (5 of 6)

Handwritten Notes
PETITION OF WRIGHT INVESTMENT GROUP
FOR ADMINISTRATIVE MANDAMUS
DIRECTED TO: CRITICAL AREA COMMISSION
AND ANNE ARUNDEL COUNTY IN THE CASE OF
AN APPEAL OF A CRITICAL AREA
RECLASSIFICATION, CASE NO.: 20000-0468-C,
BA-48-01-C, Civil Action No. _____

ANNE ARUNDEL COUNTY
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ANNAPOLIS, MARYLAND 21401

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sschappe@aacounty.org

file 12/19

• North. Kent Island

- doesn't apply to AA. program b/c commissioner can't appeal its own decision

• 2006 Amendment to C.A.L.

- more directive to what the CAC needs to ensure

Davis | Magenau | Wright Inv.

- mistake case, AA. approved as amendment

Wright Inv. → if AA reduces the map, case will end

Petition of Wright Investment Group for Administrative Mandamus Directed to CAC & AA Co. in the Case of an Appeal of a Critical Area Reclassification

Nr. C-06-117431, BA-48-01-C

2007 MSA S-1931-32 (6-06)

UNREPORTED

IN THE COURT OF SPECIAL

APPEALS OF MARYLAND

No. 02629

SEPTEMBER TERM, 2002

WRIGHT INVESTMENT GROUP

v.

ANNE ARUNDEL COUNTY, MARYLAND, ET. AL.

Hollander,
Eyler, Deborah S.
Thieme, Raymond G.
(Retired, specially assigned)

JJ.

Opinion by Hollander, J.

Filed: August 31, 2004

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CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

C0279983

This appeal concerns a 2.5 acre portion of land (the "Land") currently located within the Anne Arundel County Chesapeake Bay Critical Area (the "Critical Area"). The Land is part of a parcel that totals 15.367 acres (the "Property"), owned by appellant, Wright Investment Group ("Wright"), a general partnership. At issue is the decision of the Anne Arundel County Board of Appeals (the "Board") denying Wright's application for a Critical Area reclassification (the "Reclassification Application").[1] Wright sought to remove the Land from the Critical Area, on the ground that it was "erroneously mapped...." As a result of the alleged mapping error, Wright claims that it has been "denied practically all viable uses" of the Land.

Anne Arundel County (the "County"), appellee, along with Amberley Community Association, Inc., Kevin and Terry Nolan, Paul and Anne Burdett, and Whitehall-Meredith Residents Association (collectively, the "Protestants"), opposed appellant's Reclassification Application.[2] Among other things, they disputed Wright's claim that the County improperly measured the Critical Area boundary when the Critical Area was established in the 1980's.

Concluding that the County did not make a mapping error and that appellant failed to meet the applicable criteria for reclassification under Article 3, §2-106 of the Anne Arundel County Code ("County Code"), the Board denied Wright's Reclassification

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[1] We have not found a copy of the Reclassification Application in the Record or the Record Extract.

[2] The Protestants are not parties to the appeal.

Application. In an opinion dated December 26, 2002, the Circuit Court for Anne Arundel County affirmed. This appeal followed, in which Wright poses two questions:

> I. Was the Board of Appeal's [sic] Denial of Wright's Critical Area reclassification based upon an error of law and not supported by substantial evidence in the record?
>
> II. Was the Board of Appeal's [sic] Denial of Wright's application arbitrary and capricious in light of the Critical Area reclassification of the adjacent Enyart property and, therefore, a denial of equal protection?

For the reasons discussed below, we shall vacate the circuit court's judgment and remand for further proceedings.

STATUTORY SCHEME

In order to understand the parties' contentions, we shall first review the State's Chesapeake Bay Critical Area Protection program, codified in Md. Code (1973, 2000 Repl. Vol., 2003 Supp.), §§ 8-1801 to 8-1817 of the Natural Resources Article ("Nat. Res.").[3] Where relevant, we shall also refer to the Environment Article ("Environ. Art.") of the Maryland Code (1982, 1996 Repl. Vol., 2003 Supp.), as well as Titles 26 ad 27 of the Code of Maryland Regulations ("COMAR"). And, we shall discuss the County's

[3] The statute has been amended over the years. For example, the statute now includes the Atlantic Coastal Bays Critical Area Protection Program. However, the revisions are not material to the issues presented here. Therefore, although the amendments have, in some instances, caused renumbering of statutory provisions, we shall cite to the current provisions of the statute, unless otherwise noted.

Critical Area law, found in Articles 3 and 28 of the County Code (1985, as amended). *See generally Lewis v. Dep't of Natural Resources*, 377 Md. 382, 391-92 (2003); *White v. North*, 356 Md. 31, 36 (1999); *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 268 (1999); *Bellanca v. County Com'rs of Kent County*, 86 Md. App. 219, 223-24, *cert. denied*, 323 Md. 33 (1991).

In 1984, the State enacted the Chesapeake Bay Critical Area Protection Program, recognizing as a matter of "public policy" that the Chesapeake Bay and its tributaries "are natural resources of great significance to the State and the Nation." Nat. Res. § 8-1801(a)(1). The General Assembly endeavored to "foster[] more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats...." Nat. Res. § 8-1801(b)(1). It also sought, *inter alia*, "to implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their [own] programs in a consistent and uniform manner subject to State criteria and oversight." Nat. Res. § 8-1801(b)(2). To effectuate the law, the Legislature created the Chesapeake Bay Critical Area Commission (the "Commission"). Nat. Res. §§ 8-1803 - 8-1806.

COMAR 27.01.01.01B(18) defines "Critical Area" as follows:

> (18) "Critical Area" means all lands and waters defined in Natural Resources Article, §8-1807, Annotated Code of Maryland. They include:
> (a) All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the

State wetlands maps, and all State and private wetlands....
(b) All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides....
(c) Modification to these areas through inclusions or exclusions proposed by local jurisdictions and approved by the Commission as specified in Natural Resources Article, §8-1807, Annotated Code of Maryland.

See also COMAR 26.23.01.01B(19)(b) (providing the same definition).

Nat. Res. § 8-1807(a) is also pertinent. It states:

§ 8-1807. Chesapeake and Atlantic Coastal Bays Critical Areas.

(a) *Initial planning - Chesapeake Bay.* - The initial planning area for determination of the Chesapeake Bay Critical Area consists of:

(1) All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands designated under Title 16 of the Environment Article; and

(2) All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 16 of the Environment Article.

Title 16 of the Environment Article is titled "Wetlands and Riparian Rights." Section 16-102(b) provides that it is "the public policy of the State ... to preserve the wetlands and prevent their despoliation and destruction." Section 16-101(n) provides:

(n) *State wetlands.*- "State wetlands" means any land under the navigable waters of the State below the mean high tide, affected by the regular rise and fall of the tide. Wetlands of this category which have been transferred by the State by valid grant, lease, patent or grant confirmed by Article 5 of the Maryland Declaration of Rights shall be considered "private wetland" to the extent of the interest transferred.

COMAR 26.24.01.02B is also relevant. It provides:

> (36) "Nontidal wetland" means an area that is inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, commonly known as hydrophytic vegetation, and is determined according to the Corps of Engineers Wetlands Delineation Manual, 1987.
>
> * * *
>
> (57) "Tidal wetlands" means all State and private tidal wetlands, marshes, submerged aquatic vegetation, lands, and open water affected by the daily and periodic rise and fall of the tide within the Chesapeake Bay and its tributaries, the coastal bays adjacent to Maryland's coastal barrier islands, and the Atlantic Ocean to a distance of 3 miles offshore of the low water mark.

The Critical Area includes the "initial planning area," except any area excluded in accordance with the statute, as well as "[a]dditional areas proposed for inclusion by local jurisdictions and approved by the Commission." Nat. Res. § 8-1807(d). Thus, local jurisdictions may seek to expand the Critical Area by proposing additional areas for inclusion.

Natural Resources § 8-1808 is titled "Program development." Under Nat. Res. §8-1808(a)(1), local jurisdictions, such as the County, have "primary responsibility for developing and implementing a program, subject to review and approval by the Commission." The "goals of the program" include, *inter alia*, minimizing "adverse impacts on water quality" and establishment of "land use policies for development" in the Critical Area. *See* Nat. Res. § 8-1808(b)(1), (b)(3). To "meet the goals" of a "program," several "elements" must be included, "[a]t a minimum...." Nat.

Res. § 8-1808(c). These include the production of a "map designating the critical area in a local jurisdiction," "[a] comprehensive or master plan," and "[z]oning ordinances or regulations." *See* §§ 8-1808 (c)(1), (c)(3)(ii), and (c)(3)(iii).

In accordance with State-mandated provisions, in July 1988 the Anne Arundel County Council adopted, and the Commission later approved, County Council Bill No. 49-88. It created the County's Critical Area program and maps. County Code, Article 28, Title 1A is titled "Critical Area." Art. 28, § 1A-101 (15 I) defines "Critical area" as "all wetlands and all land and water areas in the County within 1,000 feet measured planimetrically beyond the landward boundaries of tidal wetlands and the heads of tides." County def.

Article 28, § 1A-103(a) provides that, "[w]ithin the Critical Area," the "land use classifications are shown on the maps adopted by the County Council in Bill No. 29-88 and are divided into" three classifications.[4] These are either limited development areas ("LDA"), intensely developed areas ("IDA"), or resource conservation areas ("RCA"). COMAR 27.01.02.05.A defines "Resource Conservation Area" as follows:

> A. Resource conservation areas are those areas characterized by nature-dominated environments (that is, wetlands, forests, abandoned fields) and

[4] Natural Resources Article, §8-1802(a)(12) states: "Land classification" means the designation of land in the Chesapeake Bay Critical Area in accordance with the criteria adopted by the Commission as an intensely developed area or district, a limited development area or district, or a resource conservation area or district."

> resource-utilization activities (that is, agriculture, forestry, fisheries activities, or aquaculture). These areas shall have at least one of the following features:
> (1) Density is less than one dwelling unit per 5 acres; or
> (2) Dominant land use is in agriculture, wetland, forest, barren land, surface water, or open space.

When the County established its Critical Area program in 1988, Wright's Property was placed in the Critical Area, with a classification of RCA, the most restrictive designation. Article 28, § 1A-103(h) sets forth the permitted uses in an RCA. Although the County's Critical Area law does not prohibit all commercial use of land in the Critical Area, there are limited uses in an RCA district, as well as environmental protections for construction within the Critical Area. *See* Article 28, §§ 1A-103, 1A-104, and 1A-105.

The mapping process that led to the establishment of the County's Critical Area is at issue here. As noted, under Nat. Res. § 8-1807(a)(2), the "initial planning area" for determination of the Critical area consisted of "[a]ll land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands...." Therefore, in order for the County to establish the Critical Area, it was essential for it to determine the proper point from which to measure the 1,000 feet. In doing so, it is undisputed that the County referred to several maps: State wetlands boundary maps created in 1972; the National Wetlands Inventory ("NWI") Map created in 1982 or 1983; and a County topographical map, apparently adopted in 1983.

The State measured the 1,000 foot area from the tidal wetlands as depicted on the State wetlands map.[5] To ascertain the County's Critical Area, the County, like the State, generally measured from the edge of tidal wetlands, *except* when the tidal wetlands extended above the four-foot contour on the County's topographical map. In that circumstance, to determine the 1000-foot measurement, the County measured from the intersection of the four-foot contour and the tidal wetlands, as shown on the NWI Map. The State's Critical Area boundary extends several hundred feet to the north of the County's Critical Area boundary. Therefore, although the Land (2.5 acres) does not fall within the State's Critical Area, the County's method of measurement resulted in the inclusion of the Land in the County's Critical Area.

During the mapping process, citizens were provided with the opportunity to object to the map designations as applied to their particular properties. Wright did not object to the Critical Area designation pertaining to its Property, nor did Wright challenge the RCA designation. After the Critical Area was mapped by the County, the maps were submitted for approval to the Commission. Following approval by the Commission and adoption by the County Council, the maps became law in Anne Arundel County.

The County's Critical Area reclassification process is

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[5] The parties interchangeably refer to "wetland" and "wetlands."

governed by County Code, Art. 3, § 2-106(a). It provides, in part:

> **§ 2-106.** Standards and procedures for granting or denying critical area reclassifications.
>
> (a) Critical area reclassifications shall be granted or denied in accordance with compatibility with the underlying zoning district, but a reclassification may not be granted except on the basis of an affirmative finding that:
>
> (1) there was a mistake in the approved Chesapeake Bay Critical Area map based on land uses in existence on December 1, 1985;
>
> (2) the proposed critical area classification conforms to the State and County Chesapeake Bay Critical Area mapping criteria;
>
> (3) the proposed critical area classification conforms to the environmental goals and standards of the general development plan;
>
> (4) there is compatibility between the uses of the property as reclassified and surrounding land uses, so as to promote the health, safety, and welfare of present and future residents of the County and to promote effective environmental land use management; and
>
> (5) the applicant has notified the Chesapeake Bay Critical Area Commission of the proposed critical area reclassification in writing at least 30 days before any hearing.

FACTUAL AND PROCEDURAL SUMMARY

In 1985, Roderick Mack Wright, Tim Wallach,[6] and Janet Walters, general partners of Wright, contracted to purchase the Property. The Property consists of approximately 15.4 acres of

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[6] Appellee's brief refers to "Tim Well," and the transcript refers to "Woll." We shall use the name that appears in Wright's brief.

waterfront land located between U.S. Route 50 and the headwaters of Whitehall Creek on the Broadneck Peninsula. It is situated approximately 1,000 feet south of Whitehall Road, and about 1,000 feet east of St. Margaret's Road, the service road on the south side of Route 50. The northern edge of the Property fronts on Route 50, a heavily traveled thoroughfare. The Land represents about 16% of the total Property.

The Property has had multiple zoning classifications. When Wright acquired the Property, it was primarily zoned "Residential Agricultural" or "RA," although the portion closest to Route 50 was zoned "C1B-Community Retail District." The C1B-Community Retail Districts were later reclassified to C1-Local Commercial Districts. In 1989, the portion of the Property that was zoned RA was rezoned to Residential Low Density ("RLD"). However, about one acre of the Property, which faces U.S. Route 50 and is adjacent to an existing McDonald's, retained its zoning classification of C1-Local Commercial District. The remaining portion of the Property is zoned "Open Space" or "OS."

When Wright acquired fee title to the Property on March 20, 1986, the Property was almost entirely vacant; it remains unimproved and is not subdivided. Moreover, at the time of Wright's acquisition of the Property, there were no Critical Area restrictions applicable to the Property; Critical Area restrictions were first established by the County in mid 1986, pursuant to

County Bill No. 42-86, which imposed a limited moratorium on development.

As noted, in 1988, the County Council adopted Bill 49-88, the County's Critical Area Program and maps. At that time, Wright's entire Property was placed in the Critical Area and designated as an RCA District.

On June 9, 2000, the County Council adopted Bill No. 12-00, which barred most commercial uses within the RCA portion of the Critical Area. According to appellant, this "practically elimintat[ed] commercial use of the C-1 portion of the Property." Appellant asserts that there are approximately 60 permitted, conditional, and special exception uses allowed within the C1 District, but only commercial telecommunications towers, churches (on a minimum two-acre site), and public utility special exceptions are allowed within the RCA District. *See* County Code, Art. 28, § 1A-103(h).

Claiming an error in the mapping process, appellant filed its Reclassification Application on December 7, 2000, seeking to remove the 2.5 acres of Land from the County's Critical Area classification. Wright's Reclassification Application was heard on March 27, 2001, by an Administrative Hearing Officer ("AHO"). *See* County Code, Art. 28, § 16-101.

At the hearing, the Anne Arundel County Office of Planning and Zoning ("OPZ") submitted an undated "Finding and Recommendation,"

in which it expressed "no objection to the modification of the County's Critical Area line by measuring 1000 feet from the field delineated wetland in keeping with the State maps...." And, it had "no objection" to the Reclassification Application, based on what it called a "drafting error...."

In addition, Wright submitted a letter dated February 8, 2001, from Lee Anne Chandler, Natural Resources Planner at the Commission, stating: "This Office does not oppose the reclassification." She suggested that the Wright Property was "similarly affected by the same drafting error" that applied to a neighboring property, referred to as the Enyart property. *See In Re: John W. Enyart,* Anne Arundel County Office of Administrative Hearings, Case No. 1995-0382-C (1996).

Residents of the Amberly subdivision, along with members of various community and environmental organizations, opposed Wright's application. They "expressed concern that the proposal will adversely impact Whitehall Creek and Amberly "a community recreation property."

On April 18, 2001, the AHO issued a written ruling in which he denied Wright's application. The AHO concluded that County Code, Art. 28, § 11-102.3, "does not cover removing property from the Critical area." Thereafter, Wright noted an appeal to the County Board of Appeals. *See* County Code, Art. 28, § 16-212; *see also* Md. Code (1957, 1996 Repl. Vol.), §5(U) of Article 25A. The Board

conducted a *de novo* hearing on August 30, 2001, and October 2, 2001. At the hearing, all parties, including the Protestants, were represented by counsel.[7]

Wright pointed out that it filed its Reclassification Application after the Board removed the neighboring Enyart property from the Critical Area based on a mapping error. Appellant claimed that the same mapping error affected its property. Appellant also argued that, with the passage of Bill No. 12-00, its Property was rendered commercially useless, even though it faced Route 50, "an interstate grade road with existing commercial development on both sides and a McDonald's restaurant operating next door...."

During the course of the hearing, counsel for the parties offered numerous exhibits into evidence, including the NWI Map; a color coded Critical Area Map; the Critical Area Reclassification Site Plan; photographs depicting the condition of the Property as

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[7] At the outset of the hearing, the County agreed with appellant, rather than the Protestants, that if the Board determined that it lacked authority to hear the case, it would amount to a denial of due process. Indeed, the County's lawyer asserted that the Board was "mandated by both State law and county law to hear" the matter. Referring to Nat. Res. § 8-1809, the County's lawyer said:

> "[A] zoning map amendment may be granted by a local approving authority only on proof of a mistake in the existing zoning."
>
> The local approving authority in Anne Arundel County, by virtue of Article 25A and the Anne Arundel County charter, is this Board. This Board exercises the adjudicatory functions in this county. The County Council has not reserved for itself any adjudicatory functions.

of August 28, 2001; an excerpt of the County Mapping Criteria; "Classification of Wetlands" by the U.S. Fish & Wildlife Service dated December 1979; the October 3, 1999, Environmental Recommendation from OPZ in regard to the Enyart property; correspondence and memoranda; the County's Critical Area map; and the Wetland Boundary Overlay Plan, which shows the County Critical Area line, the State Critical Area line, the State tidal wetland boundary line, and wetland boundaries from the NWI Map.

At the hearing, Roderick Wright identified appellant's Property on both the vicinity and tax maps offered into evidence. He testified that "an abandoned home" was on the Property at the time of the purchase, which was uninhabitable. It was later destroyed by fire. Although the remnants of "an old garage" remain on the Property, the Property is otherwise vacant.

Wright stated that he and his two partners acquired the Property in 1986 primarily for the value of the commercially zoned land facing U.S. Route 50. At the time, the McDonald's restaurant, adjacent to the Land, "was the highest grossing McDonald's in the United States...." Wright maintained that, as a result of the inclusion of the Land in the Critical Area, appellant has essentially been deprived of all use of the commercially zoned portion. The following colloquy is relevant:

> [APPELLANT'S COUNSEL]: And at the time of the acquisition, prior to critical area law, was the property zoned for those [commercial] uses at that time?

[MR. WRIGHT]: Yes. The front portion was zoned C-1-D-4, which is approximately 1.54 acres, and the other use would have been an acceptable use with a special exception.

* * *

[APPELLANT'S COUNSEL]: Now, subsequent to the enactment of the critical area regulations, were there also zoning changes made in 1989 to your property?

[MR. WRIGHT]: Yes, I believe it was.

[APPELLANT'S COUNSEL]: Again, this is a certified zoning map. Does it correctly indicate the subject property?

[MR. WRIGHT]: Yes. It shows the front northeast portion of the property that's contiguous to the McDonald's restaurant as reflecting a C-1 zoning, with the remaining portion of the property in an RLD zoning.

Mr. Wright explained that appellant filed the Reclassification Application because of the financial plight of one of his partners, who needed "to liquidate" her investment following the death of her husband in a "tragic accident." The partners decided that they "need to do something with the property to try to move the property or to use it so we can get some economic benefit out of it."

Mark Weber,[8] an expert in site planning and engineering design, testified in support of Wright's Reclassification Application. He referred to two large, aerial photographs known as State Map 55 and State Map 56. Each is a certified copy of "Wetlands Boundaries", and each purports to denote the "Chesapeake Bay Critical Area Boundary." Further, each map indicates that it

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[8] The name is spelled "Webber" in the transcript, but we shall use the spelling that appears on the resume.

shows "1000' From Landward Boundary of Wetlands." Weber prepared the Critical Area Reclassification Site Plan (the "Plan") based on the two State maps. In addition, Weber explained that the Wetland Boundary Overlay Plan "shows the Anne Arundel County critical area limit and the Maryland critical area limit on it. ..." He added: "All I did was copy this and then put the national wetland inventory lines on that map. So that's just overlaid on what was previously submitted. These are not new lines."

Weber stated that the Plan accurately depicts the "Maryland tidal wetland boundary," and the State Critical Area line, consistent with State maps. It also shows the County's Critical Area line. He agreed that the State Critical Area line is "drawn 1,000 feet back from the [State] tidal wetland line," as shown on the State's official 1972 map.

Weber reiterated that, to determine the Critical Area, the State measured 1,000 feet from the "Maryland tidal boundary." In contrast, he explained that the County measured 1,000 feet from a four foot contour or "elevation." The difference in methodology resulted in a discrepancy between the two critical areas of about 350 feet. Significantly, Mr. Weber testified that the 2.5 acres proposed for reclassification is situated outside the State's Critical Area, as "mapped on the state maps," but within the County's Critical Area.

In Weber's view, appellant's proposed reclassification was

compatible with the surrounding land uses. *See* County Code, Article 28, §11-102.3(c)(4). The following colloquy is relevant:

> [APPELLANT'S COUNSEL]: ... [B]ased on your analysis of the surrounding land uses, is it your view that there is compatibility between the uses of the property as the reclassification is proposed and those surrounding land uses so as to promote health, safety, and welfare of present and future residents of the county?
>
> [MR. WEBER]: Well, yes, it is ... particularly because the state critical area line where it was drawn is approximately at the back of the commercially-zoned McDonald's property which has been recently redeveloped as a bigger and better McDonald's.
>
> [APPELLANT'S COUNSEL]: So you believe there's compatibility?
>
> [MR. WEBER]: Yes.

On cross-examination by the Protestants, Mr. Weber admitted that he had not performed a field survey of the topography of appellant's property. Further, he noted that although the County's Critical Area map included more property than the State's 1972 map, the Commission approved the County map.

Eric See testified about environmental planning, wetlands mapping, and Critical Area mapping and planning.[9] Until mid 1987, See worked at the Department of Natural Resources, in the State Tidal Wetlands Division, and he interpreted the legislation establishing the Critical Area. See moved to the County's OPZ in

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[9] Appellant claims that See testified as an expert. However, appellant has not provided a citation to the record extract to support the assertion, and we have found none. We note that See was also involved in the effort to remove the Enyart property from the Critical Area in 1996.

June 1987, at the time when the County was engaged in Critical Area mapping.

Mr. See testified that the State's Critical Area was measured "1,000 feet from the edge of tidal waters or from the head of tide." But, as See explained, "[e]ach local jurisdiction was given the task of mapping the critical area ...." However, because some counties were unable to map the Critical Area, the State developed and distributed a map of the Critical Area to those counties, and the counties then used the State's map as needed for their own map development.

According to See, the tidal wetland boundary maps created by the State to develop the State's Critical Area maps were promulgated "under the Maryland Tidal Wetlands Act." The following colloquy is relevant:

> [APPELLANT'S COUNSEL]: So, in terms of the [S]tate critical area line, this initial 1,000-foot line from the wetland boundaries, did the presence of actual wetlands have any influence on that, or was it simply mapping from those [S]tate lines?
>
> [MR. SEE]: It was a rote mapping from the current legally promulgated tidal wetland boundaries.
>
> [APPELLANT'S COUNSEL]: And that was consistent, though, with the [S]tate law requirement for delineating the 1,000 feet, right?
>
> [MR. SEE]: Exactly.

See acknowledged that, under certain circumstances, local jurisdictions are permitted to expand the State's "initial planning area," or Critical Area boundary, beyond 1,000 feet of the official

State tidal wetland boundary line. *See* Nat. Res. § 8-1807(d)(2). He explained that the County's Critical Area boundary could be expanded, either by expansion of the boundary on a specific property or by expansion under the County's mapping criteria. With respect to the first option, the record does not reveal any application, proposal, or approval by the County or the Commission for expansion of the Critical Area boundary for Wright's Property. The following exchange is pertinent:

> [APPELLANT'S COUNSEL]: Now, are there provisions in the [S]tate law ... for expansion or exemption of areas from the 1,000-foot critical area?
>
> [MR. SEE]: Yes. The law gave local jurisdictions the ability to exclude areas from the critical area if they felt there was no way they could make critical areas criteria work or they had the opportunity to add additional areas, but in each case [the] local jurisdiction had to obtain the approval of the State Critical Area Commission.
>
> [APPELLANT'S COUNSEL]: Okay. So a local jurisdiction couldn't just expand the critical area on their own; they would have to then go to the [S]tate and get the blessing of the Critical Area Commission for such an expansion?
>
> [MR. SEE]: That's correct.
>
> * * *
>
> [APPELLANT'S COUNSEL]: *Now, Mr. See, in your review of the official county documents did you find any document under which the critical area was expanded, the boundary of the critical area was expanded with respect to the subject property?*
>
> [MR. SEE]: There was no specific request to do that.

(Emphasis added).

The County's Critical Area Program, adopted by County Council

Bill No. 49-88, set forth the criteria to be utilized by the County in the creation of the County's Critical Area. Through Mr. See, appellant introduced an excerpt of the relevant portion of the County's mapping criteria, contained in its 1988 Critical Area program document. It states:

> The 1,000-foot Critical Area boundary was transferred from State Wetland Boundary Maps (scale 1" = 1,000'). The boundary was expanded when it was less than 1,000 feet from tidal wetlands shown on the National Wetlands Inventory (NWI) maps prepared by the U.S. Fish and Wildlife Service or shown on aerial photographs. The four-foot contour was used as the cutoff for tidal wetlands when the NWI maps showed tidal wetlands extending further upstream.

Significantly, See testified that, based on a proper application of the County's Critical Area mapping criteria, contained in the County's Critical Area program, the Land is not located within the Critical Area. See explained that the County's mapping criteria permit expansion of the Critical Area boundary beyond the State line *only* if the State line is less than 1,000 feet from tidal wetlands, as shown on the NWI Maps. Of note, See maintained that the State's Critical Area boundary line is *not* less than 1,000 feet from the tidal wetlands as shown on the NWI map. Therefore, See opined that the County erroneously mapped the Critical Area boundary by using the four-foot contour. In his view, "the county critical area line should be coterminous with the Maryland critical area limit."

The following testimony is relevant:

[APPELLANT'S COUNSEL]: Now, with respect the estuarine wetlands, it appears that they do extend beyond the Maryland tidal boundary, which would have been transferred from the state map, correct?

[SEE]: They do, and it's probably a scale problem. You can see on some of the lots on Amberly they have -- just a direct translation of what was on that small-scale map takes the tidal wetlands as mapped up to about the 20-foot contour, which, of course, could not exist in reality.

[APPELLANT'S COUNSEL]: Uh-huh. But the effect of - under the county mapping criteria of this expansion, slight expansion of the estuary wetland beyond the Maryland tidal boundary, what is the effect of that in terms of the mapping of the critical area?

[SEE]: Well, in that location the four-foot contour that's shown in yellow is very close to the edge of the wetlands, so the expansion would be minimal.

[APPELLANT'S COUNSEL]: Okay. So does that affect then the county critical area limit under the mapping criteria?

[SEE]: In this case, not at all.

The following colloquy on cross-examination is also pertinent:

[PROTESTANT'S COUNSEL]: Now, did I understand your testimony correctly that that which is designated in blue [on Wright's Exhibit 12] is tidal wetlands?

[SEE]: Yes, it is. It's estuarine or tidal wetlands.

* * *

[PROTESTANT'S COUNSEL]: Now, even though it is just a little bit, don't tidal wetlands extend further upstream than the yellow line used by the county?

[SEE]: I disagree with you in the sense that the orientation of the blue that's on the property is going 90 degrees or more away from the actual stream channel.

[PROTESTANT'S COUNSEL]: Is there any blue farther upstream than the county's four-foot yellow -- shown in

yellow contour line?

[SEE]: It's not in the stream. It's up on a hillside.

[PROTESTANT'S COUNSEL]: Is it blue?

[SEE]: Yes, it is.

[PROTESTANT'S COUNSEL]: And blue is wetlands, tidal wetlands?

[SEE]: No. The blue is the transcription of the mapping that U.S. Fish and Wildlife Service did without any corrections for whether or not it's technically wetlands.

[PROTESTANT'S COUNSEL]: Now wait a minute. Isn't the definition of wetland not what you see but what the U.S. Fish and Wildlife Service put on their maps? Isn't that the definition of the wetland, whether it's tidal or non-tidal? I mean, you can see ebb and flow of tide with your eyes, but if they don't have it on their maps as tidal it is non-tidal, is that correct, by definition?

[SEE]: That was a long question.

[PROTESTANT'S COUNSEL]: Right. Let me rephrase it. What's the definition of a tidal wetland? What's the definition of a non-tidal wetland?

[SEE]: Tidal wetland is a wetland that is subject to periodic rise and fall of the tide up to the level of mean high or high water. A non-tidal wetland is any wetland that is above the mean high or high water line.

[PROTESTANT'S COUNSEL]: If something is shown as tidal wetlands on the U.S. wetlands map, is it considered to be a tidal wetland until it is - unless and until it is re-mapped?

[SEE]: It is -- the map is informational only, and it has no bearing at all as to whether or not it's technically wetlands by the Corps of Engineers' Wetlands Delineation Manual.

[PROTESTANT'S COUNSEL]: You're saying that something shown as tidal wetlands on the U.S. wetlands map is not necessarily tidal wetlands as a matter of law?

[SEE]: That's correct.

[PROTESTANT'S COUNSEL]: And yet you're showing -- or this plat is showing tidal wetlands extending farther into the property, or it is showing blue, whatever that means, farther into the property than the county's yellow line; is that correct?

[SEE]: That's correct.

* * *

[PROTESTANT'S COUNSEL]: ... The county said that the 1,000-foot critical area boundary was transferred from the state wetland boundary maps.

[SEE]: That's the first step. Yes.

[PROTESTANT'S COUNSEL]: All right. What line is that, if any, on Exhibit 12?

[SEE]: It is the red line labeled, "Maryland critical area line."

* * *

There's two red lines. The one next to Whitehall Creek is the Maryland tidal boundary, and that's the limit of tidal waters as mapped on the state map.... The line that goes through -- it's called St. Margaret's. It's now Whitehall Road. The red line with black dashes is the Maryland critical area line which Mr. Webber transferred directly from the state tidal wetland boundary map.

[PROTESTANT'S COUNSEL]: And is that supposed to be 1,000 feet from tidal water?

[SEE]: As mapped on the state tidal wetlands boundary maps as provided in the state law.

[PROTESTANT'S COUNSEL]: All right. Well, if that is 1,000 feet, the county's program says that that boundary was expanded in some instances when it was less than 1,000 feet. My question to you is, how can it be less than 1,000 feet if the state used 1,000 feet consistently?

[SEE]: The county staff at the time had the opinion that there were errors in the state tidal wetland boundary maps and they developed this four-foot rule as, I guess, a surrogate for fixing any alleged mistakes in the state maps.

[PROTESTANT'S COUNSEL]: Well, what is the distance, if you know, between the two red lines on Exhibit 12? Is it more or less? Using what you claim to be as the state boundary, doesn't that include more than 1,000 feet between the red lines at the widest point? I'd like to have a scale on that.

[SEE]: The point is you go to the narrowest point. You go to the very head of the stream. If you were to draw a series of arcs from the state tidal boundary, the red line that's labeled "Maryland critical area line" is, in fact -- in some cases it does include more than 1,000 because you're matching arcs. So if you drew an arc from the shoreline on adjoining property to the east, you would have a flat section of shore of critical area boundary running back through the McDonald's site.

[PROTESTANT'S COUNSEL]: All right. So it is fair to say, is it not, that if you measured in a straight line the easternmost boundary of the subject site between the two red lines, you're going to come up with something like 1,350, 1,400 feet?

[SEE]: That's correct. And there's numerous occasions in the county where these overlapping arcs do take in land that's more than 1,000 feet from a specific section of shoreline, but it is 1,000 feet from individual points of wetlands that stick out.

[PROTESTANT'S COUNSEL]: All right. And, again referring to the county's own document, the county indicates to us that the four-foot contour was used as a cut-off when the U.S. maps, the National Wetland Inventory maps, showed tidal wetlands extending further upstream. Now, the map shows tidal wetlands extending further upstream; is that correct?

[SEE]: I disagree.

[PROTESTANT'S COUNSEL]: ... Does the map show tidal wetlands extending further upstream? I'm not asking

whether you believe they're wetlands, but does the map indicate there are wetlands further upstream?

[SEE]: But they're not in the stream. They're on a hill that's away from the stream.

[PROTESTANT'S COUNSEL]: Does the map indicate there are wetlands further upstream?

[SEE]: No.

[PROTESTANT'S COUNSEL]: There's no blue to the north?

[SEE]: There no stream there.

[PROTESTANT'S COUNSEL]: Does blue stand for wetlands on this map?

[SEE]: Yes, it does.

[PROTESTANT'S COUNSEL]: So there is blue to the north of the yellow line?

[SEE]: Off to the side of the stream.

[PROTESTANT'S COUNSEL]: North of it? North of the yellow line? That's all my question is.

[SEE]: Yes.

[PROTESTANT'S COUNSEL]: You disagree as to whether that is or is not wetlands. I understand. But the map shows -- by the engineer's own exhibit -- wetlands further into the property? All right.

[SEE]: Yes.

[PROTESTANT'S COUNSEL]: Is there anything in the law that you know of that precludes Anne Arundel County from expanding the critical area more than 1,000 feet, period? Is there anything that prevents them, if they are so inclined, to expand the critical area more than 1,000 feet from whatever demarcation is used?

[SEE]: The only requirement is that they obtain the approval of the Chesapeake Bay Critical Area Commission.

See opined that the same mapping error that occurred with

respect to the Enyart property occurred with regard to the Land. Moreover, he indicated that both the OPZ and the Commission agreed with his analysis as to a mapping error concerning the Enyart property, which led to its removal from the Critical Area.

Through See, appellant introduced a memo dated October 3, 1995, from the County's Environmental Team to OPZ, recommending declassification of the Enyart property. It stated:

> It appears that the County Critical Area Boundary (in this area) was drawn 1,000 feet from the four foot contour (as shown on County topographic maps). If the four foot contour was used, then it can be reasoned that the NWI maps showed a tidal wetland "extending further upstream." This is not the case. The mapped tidal wetlands, as shown on the NWI maps, appear approximately in the same location as shown on the state maps. A non-tidal wetland is shown to extend further upstream. It appears that the non-tidal wetland may have been mistakenly identified as a tidal wetland, therefore the four foot contour "correction" was used and a greater Critical Area Boundary was mapped.
>
> *It appears a mistake was made, therefore, this Office recommends approval of the Critical Area Reclassification.*

(Italics added).

In addition, Mr. See referred to a letter of October 16, 1995, which was admitted in evidence. It was authored by Lisa Hoerger, "Environmental Specialist" at the Commission, and sent to Kevin Dooley, Office of Planning and Code Enforcement, regarding Enyart's request to remove a portion of his property from the Critical Area. In the letter, Hoerger discussed a mapping error, stating:

> The 1972 State Tidal Wetlands Maps provide the 1000 Critical Area Boundary. I have compared the state maps

at the Department of Natural Resources with the county's maps. Indeed, the state map shows only a small portion of the southern corner of Mr. Enyart's lot to be within the critical area.

This discrepancy appears to be a drafting error on the county's part. Drafting errors are legitimate indicators of mapping mistakes.

* * *

Critical Area boundaries are established by measurement, not by existing land uses or situations.... Simply stated, 1000 feet is 1000 feet. The Critical Area can be expanded beyond 1000 feet to protect sensitive areas, but only at the County's request and with formal Commission approval.

* * *

The Critical Area boundary is not discretionary. It is a measurement of 1000 feet from the heads of tides and from beyond the landward boundaries of State or private wetlands. The Critical Area designation is based on existing land use as of December 1985, not on what may be permitted under local zoning.

(Emphasis added).

During See's testimony, Wright also introduced the letter of February 8, 2001, from Lee Chandler, at the Commission, to OPZ, indicating that the Commission "does not oppose" Wright's reclassification request. The letter provided, in part:

The applicant is requesting a reclassification that would remove 2.5 acres of land from the Critical Area. Currently, the property is designated RCA.

In 1995, the owner of a neighboring property pursued a reclassification to remove 1.15 [acres] from the Critical Area. It is my understanding that the reclassification was approved by the Administrative Hearing Officer and then the map change was submitted to the Critical Area Commission as an amendment to the County's Critical Area program. The finding that a drafting error had occurred

> on the part of the County during the original Critical Area mapping was the primary reason for the reclassification. The Critical Area Commission approved the amendment based on the documented mapping mistake.
>
> *The property currently in question is similarly affected by the same drafting error. This office does not oppose the reclassification.* However, we do note, that such a reclassification does not become official until a formal map amendment is submitted to and reviewed and approved by the Critical Area Commission....

(Emphasis added).

Appellant's counsel asked See whether the current County Critical Area line was "based on an expansion from the non-tidal wetlands that are mapped under the National Wetlands Inventory map." See responded: "It obviously has to be because it is significantly further north or upstream from what was mapped by the Department of Natural Resources in 1987." Appellant's counsel also asked whether "the County's National Wetland Inventory map expansion criteria for mapping the critical area should not have been applied to the subject property?" See replied: "That is correct, because there were no tidal - - normally tidal wetlands extending upstream or north of the head of tide as mapped on the state tidal wetland boundary map, so that would be a mistake." According to Mr. See, "the state tidal wetland boundary map legally promulgates the limits of tidal boundaries in the state and it was, therefore, used and then amended to add the 1,000-foot critical area boundaries map. The 1,000-foot critical areas boundary, therefore, it [sic] is legally useful in this case."

In See's view, appellant's Reclassification Application conformed to the State and County Critical Area mapping criteria. Moreover, See opined that the removal of the 2.5 acres of Land from the Critical Area would be compatible with the promotion of effective environmental land use management. He reasoned:

> First of all, ... the site portion that is proposed to be removed from the critical area basically is surrounded in virtually three sides by roads and commercial properties. The site currently has a heavy growth of a lot of invasive vegetation. In fact, if the Board members were to attempt to walk from one end of the site to the other they probably couldn't do it. There's lots of multiflora rose, fragmites (phonetic), oriental bittersweet, so it is not a pristine site, and therefore, you know, it doesn't require more special protections than any other site that is located out of the critical area.

Further, See noted that, even if reclassified, the Land would be subject to various conservation restrictions. Because the Land would not be "free of environmental review," See stated that the proposed reclassification would be compatible with the County's General Development Plan, whose goal is to protect the Chesapeake Bay and its associated waters. Moreover, See maintained that reclassification of the Land would be consistent with another goal of the General Development Plan, concerning the concentration of "growth adjacent to existing roads and commercial development zoned properties."

Douglas Edwin Heussler, President of the Amberley Community Association, read a prepared statement, stating: "We [Amberley Community Association] strongly urge that minimizing further damage

to Whitehall Creek was the probable reason for extending the [County] boundary." David Wallace, President of the Severn River Association, also opposed appellant's Reclassification Application, pointing to the Chesapeake 2000 agreement, which was signed by the County Executive as a commitment to nurture and sustain the Chesapeake Bay watershed. He testified that he performed a site visit of the Property on March 21, 2001, and believed that the wetlands extend further upstream from the wetlands' current location on the State maps.

Terry Elizabeth Nolan, an Amberley resident, testified as to the historical significance of Whitehall Creek. She offered into evidence photographs of a sign, submerged under water, near the Property, to show that "the tidal wetlands and wildlife refuge [are] well within the 1,000 foot buffer zone required by the critical area protection." Ms. Nolan also offered into evidence a redacted copy of "Gems of the Severn," in which Whitehall Creek is listed under the "Survey of Ecologically Important Areas of the Chesapeake Bay."

Anne Sweeney Burdett testified that she was not put on notice of the Reclassification Application, even though she resides within 175 feet of the Property. She offered into evidence photographs of the sign in Whitehall Creek. Rear Admiral Daniel Bowler also testified in opposition to appellant's reclassification. He claimed the creek has already been damaged.

Patricia Miley, a planner with the County's OPZ, testified for appellee. She stated:

> The Office of Planning and Zoning reviewed this application for the request. In reviewing it we determined that - - based our decision on the fact that Anne Arundel County utilized the 1972 state wetland boundary maps, the 1983 U.S. Fish and Wildlife Service maps, and the county topography maps when the boundaries of the critical area was originally established. The four-foot contour which was shown in the county topo was used as a cut-off for tidal wetlands when the '83 maps showed the tidal wetlands extended further upstream.

The OPZ issued a "Finding and Recommendation" of August 30, 2001, authored by Miley, recommending the denial of the Reclassification Application. The report, admitted in evidence, stated, in part:

> Anne Arundel County utilized the 1972 State Wetland Boundary Maps, the 1983 U.S. Fish and Wildlife Service maps and the County topography maps when the boundaries of the [County] Critical Area were established. The four foot contour shown on the County topo was used as a cut-off for tidal wetlands when the 1983 maps showed the tidal wetlands extended farther upstream. For this property, measurement of 1000 feet from the four-foot contour placed the entire property within the limits of the Chesapeake Bay Critical Area. This line was approved by both the County Council and the Chesapeake Bay Critical Area Commission. The applicant maintains that the 1,000 foot line should be measured from the wetlands which are shown on the State Wetlands maps. Under County policy, again approved by both the County Council and the Critical Area Commission, this standard is incorrect. In drawing its maps, Anne Arundel County modified the 1972 maps by use of the more recent 1983 Fish & Wildlife Map in conjunction with the four-foot contour line.

Ms. Miley testified that "the measurement of 1,000 feet from the four-foot contour placed [Wright's] entire property within the limits of the Chesapeake Bay critical area." She added: "This line

was approved by both the County Council at the time the maps were adopted and the Chesapeake Bay Critical Area Commission." Thus, Miley disputed appellant's claim "that the 1,000-foot line should be measured from the wetlands which are shown on the state wetlands map." She explained: "Under the county policy - - again, that policy approved by both the Council and the Critical Area Commission - - this standard is incorrect. In drawing its maps, the county modified the '72 maps by use of the more recent 1983 U.S. Fish and Wildlife Service maps in conjunction with the four-foot contour."

Miley explained that "the 1972 state wetlands map was used as a base and a minimum" for the County's initial mapping of the Critical Area, but the "baseline" State map was then augmented by other maps. Specifically, the County "modified or updated" the 1972 State map by using "the three sets of maps," i.e., the State Wetland Boundary map, the NWI map, and the County topographical map. Moreover, the County used "the topo" to "determine the four-foot contour. According to Miley, the mapping process that she described conformed to the mapping criteria in the program document, which was part of the Critical Area legislation. Therefore, Miley claimed that the County "met the [appellant's] property measuring 1,000 feet from the four-foot contour, as shown on the applicant's site plan." Reiterating that the County properly measured "1,000 feet from the four-foot contour, Miley

asserted that appellant's property "is within the Chesapeake Bay critical area."

Further, Ms. Miley was of the view that there was no mistake in the Critical Area map based on existing land uses in December 1, 1985. Nor did she believe that the County made a mistake when it mapped the Land as part of the Critical Area based on the four-foot contour. With regard to the County's reliance on the four-foot contour to ascertain the Critical Area, Miley said:

> Basing on - - there's two points that could be utilized, and I believe we took the more conservative approach. There's a four-foot contour that's on the middle of the property and there's one further north on the site. Utilizing the one that's closer to the western side of the property, it's roughly 1,000 feet. If you go to the farthest north, it appears that the - - from that four-foot contour, then it is only approximately 900 feet. So there is a point on the property where it is 1,000 feet measured from the four-foot contour.

The following colloquy is also pertinent:

> [THE BOARD]: Let me see if I understand why you are relying on the Anne Arundel County four-foot designation of the contour line. You're relying on that based on the 1983 Fish and Wildlife map?
>
> [MS. MILEY]: Yes. The U.S. Fish and Wildlife maps were used because they were more accurate. They were based on satellite photographs that went into close to 1,000 scale, and there is no tidal influence above the four-foot contour, so we utilized the U.S. Fish and Wildlife maps in conjunction with our county topo, and the county topo showing where the four-foot contour is located, and from that point we measured.
>
> Once, in utilizing the state wetlands - - excuse me, the U.S. Fish and Wildlife maps, if the U.S. Fish and Wildlife maps measuring 1,000 feet stop before the four-foot contour, then we use those maps as the boundary. If the - - once utilizing that map, it crossed the four-foot

contour, we stopped at the four-foot contour, so we were being, you know, somewhat conservative, fair in our review.

Through Ms. Miley, the County entered into evidence a letter she received from the Commission, dated October 2, 2001, stating that the "Findings and Recommendations" of OPZ regarding Wright's application "appear to be consistent with the mapping rules established in the County's local Chesapeake Bay Critical Area Program," approved by the Commission in 1988. She added:

> It is the opinion of our office that there was no mistake in the mapping of the subject property, and further, since the mapping of the site was accurate, the proposed reclassification would not conform to the state or county mapping criteria.
>
> Based on this information, we would recommend that the application be denied.

Explaining her recommendation to deny appellant's Reclassification Application, Ms. Miley said:

> We ... had ... the environmental services section of our office, review the application, and they reviewed it and ... they could not support the request.
>
> They pointed out that our county critical area program document states - - and I quote - - "The purpose of the Anne Arundel County critical area program is to minimize adverse impacts on water quality conserving plant, fish and wildlife habitat, and to establish land policies which accommodate growth while requiring more sensitive development activity in shoreline areas."
>
> It is the opinion of our environmental services section that if the property is declassified as critical area it will be permitted to have more impervious surface than permitted within the critical area.
>
> Increased impervious surface increases runoff and decreases water quality. Protection for wildlife will

not be the same, be at the same standards as that which is in the critical area, and the replacement of forest cover will not be required as the same minimum of an equal area replaced for that area removed. Therefore, a lower standard is applied to those properties outside the critical area and this lower standard would allow for an increased loss of plant and wildlife habitat.

The standards, as you can see in our county zoning ordinance, for the granting of a critical area reclassification are very specific in nature. In this case, the applicant is contending that there was a mistake in the approved critical area mapping. The mapping standards used for this property are the same standards which have been consistently utilized throughout Anne Arundel County. They are standards that were approved and promulgated by both the County Council and the Chesapeake Bay Critical Area Commission.

On cross-examination, Ms. Miley was asked to review a memo dated May 2, 2001, from Lori Allen, of the OPZ/Development Division, Team East, Environmental, regarding the Environmental Division's approval of the Reclassification Application. The memo, introduced into evidence, reflects that the Environmental Division had "no objection" to the Reclassification Application.

The following colloquy is also noteworthy:

[APPELLANT'S ATTORNEY]: Ms. Miley it was your testimony that the state critical area limit line in red on the map is more than 1,000 feet from the blue tidal wetlands; correct?

[MILEY]: That is correct.

[APPELLANT'S ATTORNEY]: Now, calling your attention to Applicant's Exhibit 15, which is the county mapping criteria, doesn't it state that the boundary of the critical area was expanded when it was less -- not more, but less -- than 1,000 feet from tidal wetlands shown on the inventory maps?

[MILEY]: That's correct.

[APPELLANT'S ATTORNEY]: So in this case you wouldn't expand it because it is more, correct?

[MILEY]: (No response.)

[APPELLANT'S ATTORNEY]: In other words, that expansion criteria is only invoked ... when it is less than 1,000 feet, and your testimony was that it's more than 1,000 feet in this case.

[MILEY]: Measuring from that point, that is correct.

[APPELLANT'S ATTORNEY]: And then, calling your attention to the last sentence in that provision, it says, "The four-foot contour was used as the cutoff for tidal wetlands when the NWI maps -" the National Wetland Inventory maps -- "showed tidal wetlands extending further upstream," correct?

[MILEY]: That's correct.

[APPELLANT'S ATTORNEY]: Let me call your attention to, again, Applicant's Exhibit 12.

[MILEY]: Okay.

[APPELLANT'S ATTORNEY]: *Does the blue tidal wetlands extend above, upstream from Whitehall Creek, above the red Maryland tidal boundary line?*

[MILEY]: *No, it does not.*

(Emphasis added).

In a three to one "Memorandum of Opinion" issued on April 17, 2002, the Board denied appellant's Reclassification Application (Christopher H. Wilson, Chairman, dissenting). Noting that "[t]he issue in this case is the exact location of the limits of the Critical Area," the Board articulated the nature of the dispute, stating:

> If the Critical Area demarcation was designated as being 1,000 feet from the four-foot elevation line, then the

> commercial portion of this property would be considered within the Critical Area. The State Critical Area line is designated from the tidal line. The County utilized the four-foot topographic contour line. Most of the property is forested. There is a 360-foot difference between the Maryland and Anne Arundel County Critical Area lines along the road frontage.

In its ruling, the Board sought to address each of the five criteria under Article 3, § 2-106 of the County Code, and concluded that appellant only satisfied the fifth factor; Article 3, § 2-106(a)(5) requires "the applicant [to notify] the Chesapeake Bay Critical Area Commission of the proposed critical area reclassification in writing at least 30 days before any hearing." Noting that "[a]n applicant under this Code Section must meet all the criteria," the Board concluded that Wright "failed to meet the [remaining] Code criteria as set forth in Article 3, Section 2-106 of the Code."

To be sure, the Board recognized that "[t]he original critical Area designation by the State of Maryland did not include the subject portion of the property within the Critical Area," and "[t]he County's map included more land area than the State's original map." In this regard, the Board was mindful of Weber's testimony, indicating the County's Critical Area was "more expansive" than the State's. The Board was also cognizant of See's testimony, observing that "[h]e believes that the County's Critical Area line should terminate at the Maryland Critical Area limit." Nevertheless, the Board was persuaded by Miley's view, to the

effect that there was no "mapping mistake" with respect to the Property. The Board said:

> The four-foot contour line shown on the County topographic map was used as a cut-off for the tidal wetlands when the 1983 [U.S. Fish and Wildlife Service] map showed that the tidal wetlands extended further upstream. For this property, the measurement of 1,000 feet from the four-foot contour placed the entire property within the limits of the Chesapeake Bay Critical Area.

In upholding the County's mapping process, the Board found that the County proposed its own map, as permitted by Nat. Res. § 8-1807(c), which was adopted by the County Council and then approved by the Commission. Significantly, the Board determined:

> Both the County Council and the Chesapeake Bay Critical Area Commission approved this line. The applicant maintains that the 1,000-foot line should be measured from the wetlands, which are shown on the State Wetlands Maps. Under County policy, approved by both the County Council and the Critical Area Commission, this standard is incorrect. In drawing its maps, Anne Arundel County modified the 1972 maps by the use of the more recent 1983 Fish and Wildlife Map in conjunction with the four-foot contour line....

Rejecting appellant's claim of a mapping area, the Board said:

> The applicant contends that there is a mistake in the approved critical Area map for this property. The mapping standards used for this property are the same standards that have been consistently utilized throughout Anne Arundel County. They are standards approved and promulgated by both the Anne Arundel County Council and the Critical Area Commission.

Further, while the Board recognized that there were "differing Wetland boundaries" on the various maps, it found that the County was entitled to assume that the NWI maps were more accurate than

the State maps, because they were "more recently drafted." Although appellant claimed that the County incorrectly used the four-foot contour as its starting point, the Board disagreed. It held that "[t]he failure of the County Council to adopt the methods now put forth by Mr. See and Mr. Weber does not result in the County Council being legally mistaken when they imposed the Critical Area limit on this property." The Board determined that the County was entitled to measure from the four-foot contour, stating:

> Differing wetland boundaries were noted between the maps utilized. The assumption was made that the NWI maps, being more recently drafted, would be more accurate than the earlier State maps. The [County's] staff focused on areas where there was a discrepancy between the NWI maps and the State maps. Generally speaking, the NWI Wetland Boundaries were adopted as the starting point for the 1,000-foot Critical Area, except where those wetlands were landward of the four-foot topographic contour line. *In the instances where the NWI Wetland Boundary exceeded the four-foot contour line, the four-foot contour was designated as the boundary.* Once the discrepancies throughout the County were resolved, the 1,000-foot Critical Area Boundary was drawn. Following the review of the proposed Critical Area Boundary Map for Anne Arundel County, the County Council adopted the local program and maps. The Chesapeake Bay Critical Area Commission approved the adopted map.
>
> *On [appellant's] property, there was a discrepancy between the NWI designation and the State maps. Therefore, the four-foot contour line was established as the appropriate beginning line for the County's Critical Area.*

(Emphasis added).

The Board continued:

> *It is clear that the Anne Arundel County Council did*

> *not adopt the 1972 State map as the starting point for the Critical Area. The County adopted its own program, which was typically more expansive than the State map.* Neither the County Council nor the County's planners utilized solely the State map in creating the local program. The Chesapeake Bay Critical Area Commission approved the County's map.

(Emphasis added).

In addition, the Board was of the view that Wright's Reclassification Application presented environmental concerns. It said:

> The environmental Services section of the Office of Planning and Zoning does not support this request. If the property is declassified as Critical Area, it will be permitted to have more impervious surface than permitted within the Critical Area. Increased impervious surface increases runoff and decreases water quality. Protection of wildlife will not be the same as the strict standards for the Critical Area. Reforestation requirements would decrease as well. The lowered standards would increase the loss of plant and wildlife habitat.

In his dissent, Chairman Wilson said: "The four foot contour line established as the beginning line for the County's Critical Area in this area did not and does not meet the established criteria for determining the appropriate starting point."

Appellant sought judicial review in the Circuit Court for Anne Arundel County. In an opinion dated December 26, 2002, the circuit court affirmed the Board. The court concluded that "the Board's decision was based on substantial evidence and that it otherwise has satisfied constitutional standards." Moreover, it ruled that "no impermissible 'taking' has occurred." Further, the court said:

> The Board was not required to rule in favor of

[appellant] simply because [appellant's] evidence was not rebutted by the same type of evidence (i.e., a map). The Board was unpersuaded by [appellant's] evidence of the alleged "mistake" and, therefore, ruled that [appellant] failed to meet its burden of proof on this point. Memorandum of Opinion of the Board, pp.7-8. Therefore, the Board's decision is not based upon legal error and the denial of [the] application was proper. (EII.202)

We shall include additional facts in our discussion.

STANDARD OF REVIEW

"Judicial review of an administrative agency's action is narrow." *Meadows of Greenspring Homeowners Ass'n v. Foxleigh Ent. Inc.*, 133 Md. App. 510, 514 (2000); *see United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 576 (1994). On appeal, our review of an agency's final decision is "'precisely the same as that of the circuit court.'" *Stover v. Prince George's County*, 132 Md. App. 373, 380 (2000)(quoting *Department of Health and Mental Hygiene v. Shrieves*, 100 Md. App. 283, 303-304 (1994)); *see Baltimore Lutheran High Sch. Ass'n v. Employment Sec. Admin.*, 302 Md. 649, 662 (1985); *Foss NIRSystems, Inc. v. Comptroller of Treasury*, 151 Md. App. 44, 51 (2003). This means that we look only at "the decision of the agency, not that of the circuit court." *Lucas v. People's Counsel for Baltimore County*, 147 Md. App. 209, 225 (2002).

Generally, appellate review is limited to "'(1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision.'" *State Highway*

Admin. v. David A. Bramble, Inc., 351 Md. 226, 238 (1998)(quoting *Dep't of Labor, Licensing and Regulation v. Hider*, 349 Md. 71,77-78 (1998)(citations omitted)); *see Motor Vehicle Admin. v. Atterbeary*, 368 Md. 480, 490-91 (2002); *Total Audio-Visual Systems, Inc. v. Dep't. Of Labor, Licensing and Regulation*, 360 Md. 387, 394 (2000). "'Substantial evidence means more than a scintilla of evidence,' such that a reasonable person could come to more than one conclusion." *Wisnieswski v. Department of Labor, Licensing & Regulation*, 117 Md. App. 506, 516-17 (1997) (citation omitted); *see Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 451 (2002).

Due deference will be given to the right of the agency to draw reasonable inferences from the facts and circumstances presented to it. *Board of County Comm'rs v. Holbrook*, 314 Md. 210, 218 (1988); *Moseman v. City Council of Prince George's County*, 99 Md. App. 258, 265, *cert. denied*, 335 Md. 229 (1994). This is because "the tasks of drawing inferences from the evidence and resolving conflicts in the evidence are exclusively the function" of the agency. *Wisniewski*, 117 Md. App. at 517; *see Baltimore Lutheran*, 302 Md. at 663; *Department of Economic & Empl. Dev. v. Propper*, 108 Md. App. 595, 604 (1996). Therefore, an appellate court "'may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.'" *Snowden v.*

Mayor and City Council of Baltimore, 224 Md. 443, 448 (1961) (citation omitted).

We review the agency's decision in the light most favorable to the agency, since "decisions of administrative agencies are prima facie correct," and "carry with them the presumption of validity." *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 513 (1978)(citations omitted); see *Giant Food, Inc. v. Dep't of Labor, Licensing, and Regulation*, 356 Md. 180, 185 (2000); *Catonsville Nursing Home v. Loveman*, 349 Md. 560, 569 (1998). The appellate court must ask whether "reasoning minds could reach the same conclusion from the facts relied upon by the Board." *Hider*, 349 Md. at 78; *Department of Labor, Licensing and Regulation v. Muddiman*, 120 Md. App. 725, 734 (1998).

In our review, we generally defer to "the expertise of an administrative agency acting within the sphere of its regulated activities . . . ." *Marsheck v. Bd. of Trustees of Fire & Police Employees' Retirement Sys. of City of Baltimore*, 358 Md. 396, 402 (2000). Therefore, when we scrutinize the Board's decision, we must not substitute "our judgment for that of the agency when the record contains substantial evidence supporting the agency's determination." *Id.* at 402. As a corollary, we may not engage in judicial fact-finding, *Anderson v. Dep't of Public Safety*, 330 Md. 187, 212 (1993); *Holbrook*, 314 Md. at 218, nor may we supply factual findings that were not made by the Board. *Ocean Hideaway*

Condominium Ass'n v. Boardwalk Plaza Venture, 68 Md. App. 650, 661-62 (1986). "Even if the reviewing court could have reached a different result based on the evidence before the agency, the court must uphold the agency's determination if it is rationally supported by evidence in the record." *Dep't of Econ. & Empl. Dev. v. Lilley*, 106 Md. App. 744, 754 (1995).

But, "when the question before the agency involves one of statutory interpretation or an issue of law, our review is more expansive. Under this more expansive review, we may substitute our judgment for that of the agency." *Muddiman*, 120 Md. App. at 734 (citations omitted); *see Mayberry v. Board of Education of Anne Arundel County*, 131 Md. App. 686, 701 (2000).

Of particular import here, an appellate court may not uphold an agency's decision "'unless it is sustainable on the agency's findings and for the reasons stated by the agency.'" *United Parcel Serv.*, 336 Md. at 577 (citation omitted); *see Harford County v. Preston*, 322 Md. 493, 505 (1991); *Carriage Hill Cabin John, Inc. v. Maryland Health Resources Planning Com'n*, 125 Md. App. 183, 213 (1999); *Rouse-Fairwood Ltd. Partnership v. Supervisor of Assessments of Prince George's County*, 120 Md. App. 667, 686 (1998). Thus, "a reviewing court may only affirm an administrative agency's decision on the same grounds found by the agency." *Dep't of Human Resources v. Thompson*, 103 Md. App. 175, 189 (1995); *Propper*, 108 Md. App. at 607. As a result, appellate review of an

administrative decision focuses on whether the evidence was sufficient to sustain the agency's findings *for the reasons stated by the agency*. *Giant Food*, 356 Md. at 185 (emphasis added).

In the absence of a reasoned analysis for the decision, an appellate court cannot determine the basis of the agency's decision. *Mortimer v. Howard Research & Dev. Corp.*, 83 Md. App. 432, 441, *cert. denied*, 321 Md. 164 (2000). In *Mortimer*, we said, *id.*, that a decision is "not in accordance with law" when it is

> arbitrary, illegal or capricious. In making a determination of whether the [agency] decision is arbitrary, illegal or capricious, the reviewing court must decide whether the question before the agency was fairly debatable. An issue is fairly debatable if reasonable persons could have reached a different conclusion on the evidence and, if so, a reviewing court may not substitute its judgment for that of the administrative agency. The fairly debatable test is analogous to the clearly erroneous standard under Rule 8-131(c) and a decision is fairly debatable if it is supported by substantial evidence on the record taken as a whole.

DISCUSSION

I.

Wright contends that the Board erred in denying its Reclassification Application. Appellant complains that the Board erroneously determined that Wright failed to meet the applicable criteria under Anne Arundel County Code Art. 3, § 2-106(a), and its "finding that no mistake was made in mapping the Reclassification Property within the Critical Area is not supported by substantial evidence in the record." Moreover, appellant contends that the

Board's ruling was "patently arbitrary and capricious in light of the critical Area classification of the adjacent Enyart property...." In its view, the inconsistent result amounts to "a denial of equal protection."

Central to Wright's position is its assertion that "the Board committed an error of law in not basing its decision upon the adopted County Mapping Criteria." According to Wright, the Board "inaccurately interpreted the provisions of the Mapping Criteria, and this erroneous interpretation led the Board to incorrectly apply the law to Wright's situation." Appellant adds that the Board "completely misread" and "fundamentally misstates" the "County Mapping Criteria," which are "the governing County laws for mapping" the County's Critical Area boundary.

In support of its position, Wright explains that "the critical Area Line shown on the State Wetlands Boundary Maps - and not on the NWI maps - was the legislatively mandated 'starting point' for mapping the Critical Area in Anne Arundel County." Appellant also emphasizes that "[t]here was no testimony to the contrary that the Reclassification Property is within 1,000 feet of the NWI tidal wetland line." Thus, Wright challenges the Board's conclusion that "the NWI Wetland Boundaries were adopted as the starting point for the 1,000-foot Critical Area, except where those wetlands were landward of the four-foot topographic contour line. In the instances where the NWI Wetland Boundary exceeded the four-foot

contour line, the four-foot contour line was designated as the [Critical Area] boundary."

As we indicated, appellant claims that the Board misconstrued the County's mapping criteria. Wright summarizes the County's mapping criteria,[10] contained in its program document adopted in 1988, as follows:

> 1) The Critical Area boundary line on the State Wetland Boundary Maps was transferred to the County's topographic maps. This boundary line became the initial Critical Area boundary for the County ("Initial County Boundary").
>
> a) For those areas where the Initial County Boundary was <u>less</u> than 1,000 feet from the NWI map tidal wetland line, the Initial County Boundary was to be expanded upland.
>
> i) In the case of such an upland expansion, the expansion was to extend 1,000 feet from either:
>
> (1) The NWI map tidal wetland line; <u>or</u>
>
> (2) The four-foot topographic contour line, where the NWI map tidal wetland line was upland of the four-

---

[10] For convenience, we again set forth the County's mapping criteria:

> The 1,000-foot Critical Area boundary was transferred from State Wetland Boundary Maps (scale 1" = 200') to County topographic maps (scale 1" = 1,000'). The boundary was expanded when it was less than 1,000 feet from tidal wetlands shown on the National Wetlands Inventory (NWI) maps prepared by the U.S. Fish and Wildlife Service or shown on aerial photographs. The four-foot contour was used as the cutoff for tidal wetlands when the NWI maps showed tidal wetlands extending further upstream.

foot topographic contour line.

b) For those areas where the Initial County Boundary was greater than 1,000 feet from the NWI map tidal wetland line, the Initial County Boundary was not to be expanded at all.

Wright asserts that the first sentence of the County's mapping criteria "establishes the minimum Critical Area boundary line as the Critical Area line shown on State Wetland Boundary maps." According to appellant, the second sentence "sets forth the criteria under which the Critical Area line was to be expanded beyond the State boundary line." Appellant interprets the sentence to mean that "the State Critical Area [boundary] line was expanded *only* when the State line was less than 1,000 feet from tidal wetlands shown on the NWI maps or aerial photos."[11] Further, Wright contends that the third sentence of the mapping criteria provides for the use of the four-foot contour line as the "'cut-off for tidal wetlands' when the NWI maps showed such tidal wetlands extending further upstream. Otherwise, the NWI map tidal wetland line would be used to calculate the expansion."

Based on the County's own mapping criteria, Wright insists that "the starting point for measuring the 1,000-foot Critical Area" was "either the NWI map tidal wetland line or the four-foot

---

[11] As we discuss, *infra*, appellee disputes appellant's insertion of the word "only," noting that it is not part of the text. However, appellant has not suggested that the word "only" is part of the text. Rather, appellant has inserted the word "only" to explain its interpretation of the sentence.

contour line, depending on the relationship between the two lines." In appellant's view, the Board's finding of a "discrepancy between the NWI designation and the State maps," and the establishment of the four-foot contour line as "the appropriate beginning line for the County's Critical Area," was

> contrary to all of the evidence presented at the hearing regarding the respective locations of the [Land], the State wetland boundary, and the NWI tidal wetland boundaries. As for the threshold less-than-1,000-foot difference between the State Wetlands Boundary Maps and the NWI Maps (which condition must exist to trigger expansion), the Board makes no such finding and states only that "there is a discrepancy" between the maps.

Relying, *inter alia*, on the testimony of See, Weber, and Miley, appellant maintains "that the State Critical Area boundary line associated with the subject Property is not located less than 1,000 feet from tidal wetlands shown on the NWI maps. ..." Because, says Wright, the undisputed evidence established that "the State Critical Area line is more than 1,000 feet from the NWI - mapped tidal wetland lines," Wright contends that the County's own mapping criteria "did not permit the Critical Area boundary to be expanded...." In its view, the "substantial evidence on this crucial fact demonstrates that expansion of the Critical Area ... was a mistake." Therefore, Wright argues that "the Critical Area boundary under the County Mapping Criteria is coterminous with the State Critical Area boundary." Consequently, appellant insists that the Land clearly "lies outside of [the State's] initial Critical Area boundary...."

Appellee vigorously disagrees, claiming that appellant has made a "valiant attempt to cloud the issue" by altering the language of the County statute. In appellee's view, Wright has distorted the principles of statutory construction and erroneously inserted the word "only" into the second sentence of the mapping criteria to "creat[e] the false impression that expansion of the 1972 maps was accomplished only according to a single process." (G.11) To the contrary, appellee contends that "two alternatives existed" for measurement. Appellee explains its position:

> If the 1000-foot buffer was less than 1000 feet from tidal wetlands, the line was redrawn. If the tidal wetlands extended past the four-foot contour, however, the four-foot contour substituted for the actual edge of tidal wetlands as the starting point for measurement of the 1000-foot buffer. Contrary to [appellant's] view, the third sentence always applies when tidal wetlands extend beyond the four-foot contour. Nor does [appellant's] argument make sense - the mapping begins at the edge of tidal wetlands wherever they are but only begins at the four-foot contour when, as here, the wetlands extend past that topographical contour.

The County maintains that the Board was not convinced by appellant's "verbal gymnastics." Rather, the Board "clearly understood [that] the four-foot contour was the appropriate beginning for measurement of the 1000-foot buffer." Appellee asserts:

> According to the program document, the 1000-foot critical area buffer was measured from the edge of tidal wetlands except where those wetlands extended beyond the four-foot contour as shown on County topographical maps. Where tidal wetlands extended upstream of the four-foot contour, the starting point for measurement of the 1000-foot buffer was at the four-foot contour.

In its reply brief, Wright reiterates that "the law plainly provides" that "the starting point for measuring the expansion was either the NWI map tidal wetland line or the four-foot contour line, depending on the relationship between the tidal wetland lines shown on the State Wetlands and NWI maps." Challenging the County's contentions in its brief, Wright asserts:

> [T]he 1,000-foot difference was crucial to expansion of the Critical Area boundary, but is ignored in the County's brief. Also notably absent is the fact that Petitioner's Exhibit 12, and the testimony of the County Planner, Ms. Pam Miley, both confirm that the initial State Critical Area line with respect to the Reclassification Property is <u>greater</u> than 1,000 feet from tidal wetlands shown on the NWI maps. The County omits this evidence that the Critical Area was erroneously expanded in the case at bar.
>
> Indeed, the County swiftly dismisses the 1,000-foot provision: "[i]f the 1000-foot buffer was less than 1000 feet from tidal wetlands, the line was redrawn." The County does not explain further.... The County's statement evidences a misunderstanding of the Mapping Criteria. In fact, the County hopes to bypass the significance of the 1,000-foot expansion provision in the Mapping Criteria, because a proper application of this provision demonstrates that the initial Critical Area boundary was mistakenly expanded to encompass the Reclassification Property....
>
> Finally, the County erroneously argues that "the third sentence [of the Mapping Criteria] always applies when tidal wetlands extend beyond the four-foot contour." This construction of the Mapping Criteria text ignores the plain language of the law. As aforementioned, the second sentence of the Mapping Criteria authorizes expansion of the 1,000-foot Critical Area boundary from the NWI tidal wetland line. The third sentence of the Mapping Criteria checks the expansion that is authorized in the preceding sentence. Without a control on such expansions, the law could produce excessive expansion of the Critical Area boundary. To prevent this, the third sentence establishes the method by which expansions are

> to occur. It provides that the four-foot topographic contour line would be used as the "cutoff for tidal wetlands" when the NWI maps showed such tidal wetlands extending further upstream of the State Wetlands boundary line. Otherwise, the NWI map tidal wetland line would be used as the beginning point to calculate the expansion.

Wright also contends that it is the County who "distorts a crucial requirement of the law" when it states that the maps it used in 1987 showed "tidal wetlands extending above the four-foot contour." Appellant emphasizes that "[t]he third sentence of the Mapping Criteria provides that the four-foot contour was used when the NWI maps showed tidal wetlands 'extending further upstream.' The County may not simply excise this condition from the law." Appellant adds:

> All of the testimony and documentary evidence in this case establishes that the NWI tidal wetlands do <u>not</u> extend further upstream of the State Wetlands Boundary line. Thus, even if the Court adopted the County's theory regarding the Mapping Criteria (i.e. that there are "two alternatives" for expansion (CB-11)), the NWI map tidal wetland line would be used as the starting point for measuring the 1,000-foot Critical Area boundary instead of the four-foot contour line.

II.

As we noted, the County was entitled to seek an expansion of its Critical Area boundary, beyond the State's "initial planning area," either by an expansion of the boundary on a particular property or through creation of the County's mapping criteria. We agree with Wright that there is no evidence in the record as to the first alternative. Therefore, any expansion of the County's Critical Area had to be based on the County's mapping criteria.

Appellee concedes that the County's mapping "methodology is contained in the program document that was adopted in concert with Anne Arundel County's critical area law in 1988 as part of County Council Bill 49-88." In other words, County Council Bill No. 49-88 articulated the County's mapping criteria for purposes of establishing the County's Critical Area. Having established its mapping criteria, which was approved by the Commission, the County is required to adhere to it.

It is undisputed that appellant's Land falls within the County's Critical Area, but outside the State's Critical Area. It is also undisputed that, if the County was entitled to measure the 1,000 feet by using the four-foot contour as the starting point, appellant's Land properly falls within the County's Critical Area. Conversely, if the 1,000 foot distance was to be measured based on the NWI Map, the Land would be located outside the Critical Area. Therefore, the permitted methodology of measurement, set forth in the mapping criteria, is key.

This brings us to the terms of the mapping criteria, which we must construe. Again, the County's mapping criteria states:

> The 1,000-foot Critical Area boundary was transferred from State Wetland Boundary Maps (scale 1" = 200') to County topographic maps (scale 1" = 1,000'). The boundary was expanded when it was less than 1,000 feet from tidal wetlands shown on the National Wetlands Inventory (NWI) maps prepared by the U.S. Fish and Wildlife Service or shown on aerial photographs. The four-foot contour was used as the cutoff for tidal wetlands when the NWI maps showed tidal wetlands extending further upstream.

We interpret county ordinances under the same canons of construction that we apply to the interpretation of statutes. *Ahalt v. Montgomery County*, 113 Md. App. 14, 25 (1996). Thus, the principles of statutory construction help to frame our analysis.

The interpretation of a statute is a judicial function. *Muhl v. Magan*, 313 Md. 462 (1988); *Bennett v. State Dept of Assessments and Taxation*, 143 Md. App. 356, 367 (2001); *Rouse-Fairwood Development Ltd. Partnership v. Supervisor of Assessments for Prince George's County*, 138 Md. App. 589, 619 (2001). Our primary goal in construing a statute is to ascertain and effectuate the legislative intent. *Consolidated Construction Services v. Simpson*, 372 Md. 434, 456 (2002); *Ridge Heating, Air Conditioning and Plumbing, Inc. v. Brennen*, 366 Md. 336, 350 (2001); *Mayor and City Council of Baltimore v. Chase*, 360 Md. 121, 128 (2000). In this endeavor, we are guided primarily by the statutory text. *Huffman v. State*, 356 Md. 622, 628 (1999); *State v. Pagano*, 341 Md. 129, 133 (1996). We give the words of the statute their ordinary meaning. *Ridge Heating*, 366 Md. at 350; *Lewis v. State*, 348 Md. 648, 653 (1998).

We first look to the plain meaning of the terms, and give the statutory language its "ordinary and natural meaning [without] resort to subtle or forced interpretations . . ." *Maryland-Nat'l Capital Park & Planning Comm'n v. Department of Assessments & Taxation*, 110 Md. App. 677, 689 (1996), *aff'd.*, 348 Md. 2 (1997);

see also Ridge Heating, 366 Md. at 350; *Montgomery County v. Buckman*, 333 Md. 516, 523 (1994). If we cannot glean the legislature's intent from "the statutory language alone," we may "look for evidence of intent from legislative history or other sources." *Allstate v. Kim*, 376 Md. 276, 290 (2003); *see Motor Vehicle Admin. v. Lytle*, 374 Md. 37, 57 (2003).

When the statute is free of ambiguity we generally will not look beyond the statute to determine legislative intent. *Kaczorowski v. Mayor of Baltimore*, 309 Md. 505, 516 (1987); *Maisel v. Montgomery County*, 94 Md. App. 31, 37 (1992). Conversely,

> where a statute is plainly susceptible of more than one meaning and thus contains an ambiguity, courts consider not only the literal or usual meaning of the words, but their "meaning and effect in light of the setting, the objectives and purpose of the enactment. In such circumstances, the court, in seeking to ascertain legislative intent, may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.

Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75 (1986); *see Kaczorowski*, 309 Md. at 513.

Even under the plain meaning rule, however, we do not ignore the legislature's purpose if it is readily known. *Pagano*, 341 Md. at 133. In this regard, "we may ... consider the particular problem or problems the legislature was addressing, and the objectives it sought to attain." *Sinai Hosp. of Baltimore, Inc. v. Department of Employment & Training*, 309 Md. 28, 40 (1987); *see*

also Romm v. Flax, 340 Md. 690, 693 (1995); *Maryland Auto. Ins. Fund v. Erie Ins. Exch.*, 105 Md. App. 377, 386 (1995).

Further, we are obligated to construe the statute as a whole, so that all provisions are considered together and, to the extent possible, reconciled and harmonized. *Curran v. Price*, 334 Md. 149, 172 (1994); *State v. Crescent, Cities Jaycees Foundat., Inc.*, 330 Md. 460, 468 (1993). Where "appropriate," we interpret a provision "in the context of the entire statutory scheme of which it is a part." *Gordon Family Partnership v. Gar On Jer*, 348 Md. 129, 138 (1997). Therefore, if a provision "is part of a general statutory scheme or system, the sections must be read together to ascertain the true intention of the Legislature." *Mazor v. State Dep't. of Correction*, 279 Md. 355, 360-61 (1977). Moreover, "[i]f reasonably possible," we read a statute so "that no word, phrase, clause, or sentence is rendered surplusage or meaningless," *id.* at 61, or "superfluous or redundant." *Blondell v. Baltimore City Police Dep't.*, 341 Md. 680, 691 (1996); *see also Eng'g Mgmt. Servs. v. Md. State Highway Admin.*, 375 Md. 211, 224 (2003); *Lytle*, 374 Md. at 61-2; *Mayor & Council of Rockville v. Rylyns Enters.*, 372 Md. 514, 551 (2003).

In our effort to effectuate the legislative intent, we may consider "'the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common

sense.'" *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129, 135 (2000) (citation omitted); *see Maryland Division of Labor and Industry v. Triangle General Contractors, Inc.*, 366 Md. 407, 425 (2001); *Board of License Commr's v. Toye*, 354 Md. 116, 123 (1999). We also "avoid construing a statute in a way which would lead to absurd results." *Blandon v. State*, 304 Md. 316, 319 (1985). But, we may not read a meaning into the statute that is not expressly stated or clearly implied, or embellish a statute to expand its meaning. *Department of Econ. & Employment Dev. v. Taylor*, 108 Md. App. 250, 277-78 (1996), *aff'd.*, 344 Md. 687 (1997). Put another way, courts may "'not invade the function of the legislature' by reading missing language into a statute" to correct "'an omission in the language of the statute even though it appeared to be the obvious result of inadvertence.'" *Graves v. State*, 364 Md. 329, 351 (2001) (citation omitted); *see Fisher and Utley v. State*, 367 Md. 218, 292 (2001) (Bloom, J., concurring and dissenting) (stating that courts "may not ... supply missing language when there is a *casus omissus* in the legislative scheme by judicially creating a statutory provision that the legislature would probably have added if it had given any thought to the problem it had not addressed").

Certainly, when the County was drawing the Critical Area, it had the authority to seek an expansion of the Critical Area, beyond what the State had designated. Nat. Res. § 8-1807(d)(2) provides

that the Critical Area shall also consist of "[a]dditional areas proposed for inclusion by local jurisdictions and approved by the Commission." Weber conceded that the County drew its Critical Area to include more property than was included by the State, and the Commission approved the County's map. Ms. Miley maintained that the County Council and the Commission approved "the measurement of 1,000 feet from the four-foot contour," which resulted in the placement of Wright's "entire property within the limits of the Chesapeake Bay critical area." As we see it, however, the approval of the County's map by the County Council and the Commission does not resolve the underlying question of whether they approved a map that was incorrectly drawn in regard to Wright's Property, based on the County's erroneous interpretation of its mapping criteria.

In the subject area, the County's Critical Area boundary was drawn 1,000 feet from the four-foot contour, as shown on the County's topographic map. But, in light of the plain meaning of the County's mapping criteria, the County was permitted to expand the Critical Area *if* the State's Critical Area boundary was less than 1,000 feet from tidal wetlands, as shown on the NWI Map. According to the evidence, the NWI Map showed that the State's critical Area was *not* less then 1,000 feet from the tidal wetlands. Moreover, the County's mapping criteria provides that the four-foot contour was to be used when the NWI maps "showed tidal wetlands extending further upstream." Ms. Miley confirmed Mr. See's

testimony that the NWI maps do not show tidal wetlands extending further upstream of the four-foot contour.

Based on the principles of statutory construction, outlined above, we cannot accept the construction of the County's mapping criteria by the County or the Board. Because the evidence showed that the State's boundary for the Critical Area was *not* located less than 1,000 feet from the tidal wetlands, as shown on the NWI Map, the County's Critical Area should have been coextensive with the State's Critical Area. Moreover, the evidence showed that the tidal wetlands did not "extend further upstream." Therefore, the use of the four-foot contour was not triggered. It follows that, because the County incorrectly applied its own mapping criteria with reference to the Property, it mistakenly mapped the Critical Area. Accordingly, we reject the Board's conclusion that appellant failed to meet the first criterion of Article 3, §2-106(a).

The Board addressed the remaining criteria in light of its erroneous conclusion that the Critical Area was correctly mapped. We decline to speculate as to how the Board might have construed the evidence with regard to the remaining criteria if it had determined that the County incorrectly applied its own mapping criteria. Moreover, as we noted earlier, we may only uphold the Board for the reasons stated by the Board. Our review of an administrative agency decision focuses on whether the evidence was sufficient to sustain the agency *for the reasons cited by the*

agency. *Giant Food*, 356 Md. at 185 (emphasis added). Therefore, the Board's error as to the first criterion requires us to reverse and remand.

Accordingly, we shall remand to the Board to consider the remaining reclassification criteria in Art. 3, § 2-106 in light of this opinion. In view of our conclusion, we need not address appellant's claim that the Board's denial of appellant's Reclassification Application constituted a fundamental denial of appellant's equal protection rights. We express no opinion on the merits of the parties' respective positions as to the remaining criteria.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY VACATED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REMAND THE MATTER TO THE ANNE ARUNDEL COUNTY BOARD OF APPEALS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

CRITICAL AREA COMMISSION MOTIONS HEARING

Intro:

- motions to dismiss 5 cases:
  Daras v. CAC, 06-118661
  Daras v. CAC, 06-118663
  Magenau v. CAC, 06-118672
  Wright Invest. v. CAC, 06-117432
  Parkin v. CAC, 07–0121963

- all related to Anne Arundel County Critical Area Map amendments, 4 proposals in all

- **NR 8-1809(o)**: CAC receives proposed amendment, convenes a panel, holds a public hearing, and acts on amendment w/i 90 days.

  - CAC "shall determine" whether amendment is "consistent with the purposes, policies, goals, and the provision" of the law and criteria

  - CAC can either (1) approve, (2) deny, (3) approve w/ condition, or (4) return w/ list of changes

  - *Parkin* was accepted as a proposed "refinement," standard same. NR 8-1809(p)(iii).

- in each of the 4 instances, **CAC denied and provided guidance**

- 4 petitioners now **invoke jurisdiction under**:

  1. Title 7, Chapter 200, Judicial Review of Administrative Agency Decisions

  2. Title 7, Chapter 400, Administrative Mandamus

Title 7, Chapter 200 judicial review **not available**:

- "judicial review" must be "authorized by statute"

  - the Rule itself does not grant right of appeal; right must be separately authorized by statute. *Urbana Civic Assoc. v. Urbana Mobile Village*, 260 Md. 458 (1971)

- Critical Area Law does not authorize judicial review under 7-200

- CAC proceeding are not "contest case" proceeding w/i meaning of MAPA

- petitioners concede this point (Wright + Magenau)

Title 7, Chapter 400 administrative mandamus **not available**:

- 7-400 captures those cases where judicial review "is not expressly authorized by law"

- However, must be for "review of a quasi-judicial order or action of an administrative agency" 7-401(a)

- **CAC proceeding** in reviewing program amendments and refinements, are established at 8-1809(o) & (p), are **quasi-legislative**: this is a settled issue. *North v. Kent Island Ltd.*, 106 Md.App. 92 (1995)

  - this is consistent with distinction as developed from *Mont. County v. Woodward & Lothrop*, 288 Md. 686 (1977)

    - more akin to comprehensive rezoning b/c CAC reviews program amendments to ensure consistency with CAC law and criteria.

    - process is legislative in nature: results **affect County programs directly, individual propertied indirectly**

    - decisions are made on **"general grounds"**, as opposed to individual grounds: compliance with CA law and criteria. *Bucktail LLC v. Talbot County*, 352 Md. 530 (1999)

- **Petitioners (at least Daras, Magenua and Wright investment) allege** that 7-400 review is appropriate b/c, in their cases, the **CAC ~~went~~ exceeded its statutory authority** and ventured into judicial decision-making

  - **7-400, however, is not the proper vehicle to bring such a claim**

  - In cases where one alleges that a quasi-legislative body exceeded its lawful authority, an aggrieved party can **invoke the Court's general jurisdiction**. *Armstrong v. City of Baltimore*, 169 Md.App. 655 (2006); *DNR v. Linchester Sand & Gravel*, 274 Md. 211 (1975)

    - avenue is Rule 15-702, Mandamus, or Declaratory Judgment. Applies where admin. mandamus under 7-400 does not apply; commence by filing Complaint under Title 2.

    - **review is limited to determining whether agency exceeded it authority**

    - **if so, matter has to be remanded** to agency, as in *North*

  - Here, by alleging that CAC exceeded legal authority and seeking review under 7-400, **petitioners would have the Court go beyond the limited question of whether**

CAC exceeded its authority, and venture impermissibly into weighing whether there was "substantial evidence" to support the CAC's decision.

- standard under 7-403 is same as for review of quasi-judicial decisions

- **Petitioner's recourse is limited to invoking the general jurisdiction** of the Court

- Indeed, that's what *Wright Investment* has done in 06-117695

- as court stated in *Armstrong*, nature of review depends upon nature of action taken

- none of these case have been properly pled, and therefore must be dismissed

→ it doesn't have to consider under general funds.

In any event, **Petitioners have not sufficiently alleged a violation of CAC's lawful authority**:

1. **Daras and Magenau** allege that the **CAC went beyond its lawful authority by making judicial determination**, as it had incorrectly done in *North*, about whether there had been a mapping mistake

   - the **record does not establish a ques. of fact** here

   - **Record establishes** that:

     1. **CAC** ~~reviewed~~ [illegible] and reviewed the requests in a timely manner, and **took action consistent with 8-1809(o)**

        - under 8-1809(o), CAC must determine whether the **"proposed amendment is consistent with the purposes, policies, goals and provisions of"** the law and criteria.

     2. During the review, CAC determined that the **information provided by AA County was insufficient to determine**:

        - not whether a mistake, in fact, had been made

        - but **whether the amendment reflected a consistent application of the program's mapping standards**

        - AA found a mistake based upon **proximity to public sewer**: should have been LDA b/c property was w/i 2,000' of public sewer based on AA's **"sewer service mapping standard."**

        - COMAR 27.01.02.04A.(4)

        - however, there was no explanation by County as to how the "sewer service mapping standards" were applied during the original mapping,

        - abutting sewer v. w/i 2,000' of sewer?

        - testimony of AA Co. official

        - the CAC needs guidance from the County as to how they were applied during the original mapping process

        - entirely consistent with mandate in 8-1809(o) that CAC "determine" whether the proposed amendment is "consistent with" the law and criteria.

§8-1801 (b) purposes uniform consistent manner

2. **Parkin** alleges that the CAC **unlawfully failed to take action** on its request.

- record conclusively establishes that the CAC

1. lawfully handled it as a **"program refinement" under 8-1809(p),**

2. **reviewed in a timely manner** consistent w/ 8-1809(p), and

3. **took one of the four statutorily permissible actions** under 8-1809(p)(iii)(2); returned the refinement to the County.

- action was based on the **same rationale underpinning the Daras and Magenau** actions

3. As for **Wright Investment**, it is not entirely clear as to what it alleges that the CAC did unlawfully

- seems to allege that simply b/c CAC panel heard "testimony" during the statutorily proscribed public hearing, that it exceeded its authority

- 8-1809(0): panel "shall hold a public hearing"

- just b/c public hearing is held, does not mean CAC ventured into the judicial

- *North* recognized that these public hearings do not include trial type procedures

- they are more akin to public hearing b/f legislative committees

→ Clarify 2 weight Investment cases, Title 2 Chap 300

(1)

No, Powers is correct:

→ Inherent right of review

(2) → (- need to state fact of particularity
→ actions presumed lawful

→ 1805(a) standard

(4) "shall determine"

- didn't focus on whether there was a mistake
- focused on the standard applied by County

- issue for CAC was whether it need definition of LDA (North)
- comprehensive re-zoning if standard changes

- individual grounds - true as to County, not as to CAC

(5) 7-201 - Buckstail, CAC was not a party, it was against County

(6) a - ~~argument that I was~~ North establish that proceeding is quasi-legislative
finding quasi-judicial is a finding that CAC exceeded authority
- that should be ultimate ~~dete~~ determination under general jurisdiction

(6) symmetric argument about whether CAC returned list of changes
- places form over substance

ADD new Rule 7-402, as follows:

Rule 7-402. PROCEDURES

(a) Complaint and Response

An action for a writ of administrative mandamus shall be commenced by the filing of a complaint, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203. The response to the filing of the writ shall comply with the provisions of Rule 7-204.

(b) Stay

The filing of the writ does not stay the order or action of the administrative agency. The court may grant a stay pursuant to Rule 7-205.

(c) Discovery

The court may permit discovery, in accordance with the provisions of Title 2, Chapter 400 that the court finds to be appropriate, but only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or extreme circumstances which occurred outside the scope of the administrative record, and a remand to the agency is not a viable alternative.

(d) Record

If a record exists, the record shall be filed pursuant to Rule 7-206. If no record exists, the agency shall provide (1) a verified response that shall fully set forth the grounds for its decision below and (2) any written materials supporting the decision. The court may remand the matter to the agency for further supplementation of materials supporting the decision.

(e) Memoranda

Memoranda shall be filed pursuant to

Rule 7-207.

(f) Hearing

The court may hold a hearing pursuant to Rule 7-208.

Source: This Rule is new, except that subsection (c) codifies the decision in *Montgomery County v. Stevens*, 337 Md. 471 (1995).

Rule 7-402 was accompanied by the following Reporter's Note.

Rule 7-401 is designed to incorporate many of the procedures of Title 7, Chapter 200. The Subcommittee recommends adding a provision for discovery to be available only upon a showing of fraud or extreme circumstances which occurred outside the scope of the administrative record, and if a remand to the agency is not a viable alternative. This is consistent with the decision in *Montgomery County v. Stevens*, 337 Md. 471 (1995). The Subcommittee has added a provision that would apply if no record exists below.

Mr. Sykes explained that the procedures for this Rule are derived from Title 7, Chapter 200. The Vice Chair asked why a response to a complaint is verified, but the complaint is not. Mr. Sykes replied that when there is an administrative record, the best evidence of the agency proceedings is in the administrative record, which is filed with the court. If no record exists, the verification requirement provides some assurance as to the authenticity of the matters set forth in the response. There is no similar need for verification of the complaint.

Mr. Sykes pointed out that the word "writ" in section (b) should be changed to the word "action," and the Committee agreed by consensus to this change.

Turning to section (c), Mr. Sykes observed that there had been a dispute about the availability of discovery in administrative mandamus cases. After much discussion, the Subcommittee decided to codify the rule in *Montgomery County v. Stevens*, 337 Md. 471 (1995), against the recommendation of Mr. Gohn. This is reflected in the language of section (c). Discovery is limited only to cases where the party challenging the agency action makes a strong showing of fraud or extreme circumstances not reflected in the administrative record.

Judge Heller noted that the APA allows additional evidence to be considered. She asked why section (c) does not follow the APA. Mr. Sykes remarked that the APA allows additional evidence that is generally confined to the merits of the case. This does not take into consideration new developments. It is related to whether the decision below is correct. Mr. Gohn pointed out that the agency may be unprepared to create a record. It may be difficult to establish what happened and to determine the facts. Because administrative decision-makers think that their actions may not be scrutinized, improprieties may occur. The decision in *Stevens* protects the integrity of the process. The Vice Chair observed that the law permits the introduction of additional evidence into a hearing in the administrative mandamus process.

The Title 7, Chapter 200 Rules do not permit extra evidence. Mr. Gohn said that the statutory or APA law gives one a basic framework of evidence available to insure the integrity of the process. This is not so with administrative mandamus, because there is no enabling statute. Rule 7-208 provides: "Additional evidence in support of or against the agency's decision is not allowed unless permitted by law." The Vice Chair inquired as to the source of the language that states that discovery is permitted only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or other extreme circumstances. Mr. Gohn replied that this comes from the *Stevens* decision. Mr. Brault pointed out that Rule 2-535, Revisory Power, provides that the circuit court may exercise revisory power at any time in case of fraud, mistake, or irregularity. He asked why more discovery is allowed when there is no rule or statute available. Mr. Gohn responded that there is not more discovery. The Vice Chair noted that there are disputes over whether discovery is available in the Title 7, Chapter 200 Rules. It might be better to also state in those Rules that discovery is available. Mr. Sykes suggested that a cross reference to the *Stevens* case be added to the appropriate Title 7, Chapter 200 Rule. The Committee agreed by consensus to this suggestion.

The Vice Chair pointed out that section (f) of Rule 7-402 provides that the court <u>may</u> hold a hearing, although it is not

required. Rule 7-208 requires that a hearing be held. Mr. Leahy commented that the word "may" could be changed to the word "shall." Mr. Gohn referred to the written comment from Ms. Baron, who indicated that she was not pleased that sometimes in the Parole Commission cases, a hearing is not held. Mr. Sykes remarked that there should be a hearing in every parole matter. Judge Missouri pointed out that the petition for parole may be totally frivolous. Mr. Gohn responded that it may be difficult to determine if the petition is frivolous. Judge Missouri said that the pleadings may indicate this. The Vice Chair noted that there may be no agency record. Judge Kaplan observed that on its face, the petition may have no merit. The Vice Chair commented that one could make the same argument about the Title 7, Chapter 200 Rules. Mr. Sykes noted that the federal rules permit disposition, including summary judgment motions, without a hearing if the court determines one is not necessary.

Mr. Leahy suggested that the word "may" be changed to the word "shall" in section (f) of Rule 7-402, tracking Rule 7-208 (a) which states: "Unless a hearing is waived in writing by the parties, the court shall hold a hearing." The Vice Chair responded that the intent is not to require a hearing if the claim appears frivolous, but the idea of a dispositive ruling without a hearing is troubling. Judge Missouri remarked that one can rely on the circuit court judge's discretion. The Vice Chair said that she does rely on this, but Rule 7-208 requires a hearing. Judge Heller observed that the Parole Commission cases

automatically have hearings. This will not make more work for the Office of the Attorney General, because these cases are automatically on the fast track. Some judges decide that they may not want a hearing, but Judge Heller said that she always holds a hearing, even if it is a very brief one. Most of the cases are affirmed, but a few are remanded to the Parole Commission. Mr. Sykes inquired as to whether Parole Commission cases are exempted from the APA. Judge Heller replied in the affirmative. Mr. Sykes referred to the concern expressed by Ms. Baron that the exemption of Parole Commission cases from the APA has been decimated. Mr. Zarnoch suggested that the word "may" should be retained. Mr. Leahy commented that section (f) of Rule 7-402 should not refer to Rule 7-208 in its entirety if "may" is not changed to "shall." If "may" is retained, section (f) should refer only to the applicable sections of Rule 7-208. The Reporter suggested that the language of section (f) could read: "The court may hold a hearing in accordance with the procedures set forth in Rule 7-208 (b) and (c)." Judge Norton suggested that the word "shall" should be in section (f), with the waiver language of Rule 7-208 (a) included.

By consensus, the Committee decided to retain the word "may." Mr. Sykes reiterated the Reporter's suggestion that section (f) refer to sections (b) and (c) of Rule 7-208. Mr. Gohn noted that circuit court judges examine petitions for mandamus on their face, so a compromise position could be that different criteria for assessing the petitions could be added to

the Rule. It should not be that judges never hold hearings, but the word "may" appears to make this permissible. Judge McAuliffe added that the petitions on which hearings are held should not be "demurrable" or frivolous. Judge Missouri agreed with Judge McAuliffe. The Reporter suggested that the language of former Rule 345, Demurrer, could be obtained. The Vice Chair suggested that parts of Rule 7-208 should be incorporated into Rule 7-402, including setting the date, rather than simply referring to sections (b) and (c) of Rule 7-208. Judge McAuliffe remarked that the Style Subcommittee could redraft the Rule.

Judge Missouri commented that to require a hearing in all cases is a waste of time. Referring back to the Title 7, Chapter 200 Rules, yet using the word "may" in section (f) may be confusing. Mr. Sykes responded that Rule 7-402 is not using the Title 7, Chapter 200 Rules as authority, just as a model. There is a distinction between the nature of the cases under Rule 7-402 compared to the Title 7, Chapter 200 Rules. The Reporter asked if the Committee agreed with the suggestion to retain the word "may" and incorporate the pertinent parts of Rule 7-208 into Rule 7-402. The Committee agreed by consensus to make these changes.

The Committee approved the Rule as amended.

Mr. Sykes presented Rule 7-403, Disposition, for the Committee's consideration.

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-403, as follows:

Rule 7-403. DISPOSITION

The court may issue an order denying the writ of mandamus, or may issue the writ (1) remanding the case for further proceedings, or (2) reversing or modifying the decision if any substantial right of the plaintiff may have been prejudiced because a finding, conclusion, or decision of the agency:

(A) is unconstitutional,

(B) exceeds the statutory authority or jurisdiction of the agency,

(C) results from an unlawful procedure,

(D) is affected by any error of law,

(E) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted,

(F) is arbitrary or capricious, or

(G) is an abuse of its discretion.

Source: This Rule is new.

Rule 7-403 was accompanied by the following Reporter's Note.

Rule 7-403 is patterned after Rule 7-209. The proposed Rule provides for the issuance of a writ of mandamus in place of the order issued pursuant to Rule 7-209. The language in subsections (A) through (F) is taken from the Administrative Procedure Act, State Government Article, §10-222 (h). The

> language of subsection (G) is taken from the concurring opinion by the Honorable Glenn T. Harrell, Jr. in the case MTA v. King, 369 Md. 274 (2002). The Subcommittee is in agreement with Judge Harrell that abuse of discretion should be added to the list of grounds for issuing the writ in judicial review of agency decisions.

Mr. Sykes explained that the list of grounds in Rule 7-403 is taken from the APA, except for the last ground in subsection (G), which is derived from a concurring opinion by the Honorable Glenn T. Harrell in *MTA v. King*, 369 Md. 274 (2002).

Judge McAuliffe inquired as to whether the litany of reasons in Rule 7-403 is consistent with the common law. Mr. Sykes answered that only subsection (D) does not reach constitutional dimensions -- it is an addition. Judge McAuliffe asked if the laundry list is different from the APA. Mr. Gohn replied that only subsection (G) is different. Judge McAuliffe pointed out that an appeal is being created on every ground that is available from the APA, and he asked why there has to be a separate procedure. Mr. Gohn responded that the constitutional and judicial tradition is to title the proceeding "mandamus." Judge McAuliffe observed that legislative bodies create a statutory right of appeal in some situations but not in others, and he questioned the extent of the non-statutory review created by the proposed new Rules. Mr. Gohn replied that the *Heaps* case provides that one gets a genuine review of his or her case regardless of whether the legislature has provided for an appeal.

There is no reason why non-statutory review should not get the benefit of the best practices drawn from the APA and the Title 7, Chapter 200 Rules. Mr. Gohn said that he was unaware of a case that provides that review pursuant to *Heaps* or *Bucktail v. Talbot County*, 352 Md. 530 (1999) is of a lesser magnitude than Title 7, Chapter 200 or APA review.

The Committee, by consensus, approved the Rule as presented.

study of the rule by the Court, and

The Court, having further studied the Rule, it is this 2nd day of June, 2005

ORDERED, by the Court of Appeals of Maryland, that the suspension of Maryland Rule 16-760 (d)(2) be, and it is hereby, lifted and Maryland Rule 16-760 (d)(2) shall be reinstated and take effect ninety (90) days from the date of this Order, and it is further

ORDERED, that a copy of this Order be published in the next issue of the *Maryland Register*.

ROBERT M. BELL

IRMA S. RAKER

ALAN M. WILNER

DALE R. CATHELL

GLENN T. HARRELL, JR.

LYNNE A. BATTAGLIA

CLAYTON GREENE, JR.

This Court's Standing Committee on Rules of Practice and Procedure having submitted its One Hundred Fifty-Fifth Report to the Court recommending adoption of proposed new Rules 1-326 (Proceedings Regarding Victims and Victims' Representatives), 2-605 (Offers of Judgment — Health Care Malpractice Claims), and 7-211 (Request for Impleader of the Subsequent Injury Fund); proposed new Title 7, Chapter 400 (Administrative Mandamus) and proposed new Title 15, Chapter 1100 (Coram Nobis); and proposed amendments to Rules 2-126, 2-202, 2-325, 2-332, 2-341, 2-506, 3-126, 3-202, 3-506, 4-231, 4-262, 4-263, 4-342, 4-343, 4-345, 4-406, 4-507, 4-508, 4-509, 4-510, 5-101, 5-706, 5-802.1, 5-803, 5-804, 5-902, 6-415, 7-208, 7-301, 8-204, 8-205, 8-207, 8-411, 8-412, 8-511, 8-604, 14-206, 14-503, 15-402, 15-701, 16-814, 17-101, 17-104, and 17-109 and Forms 4-504.1 and 4-508.1, all as set forth in that Report published in the Maryland Register, Vol. 32, Issue 20, pages 1616 - 1653 (September 30, 2005); and

This Court having considered at an open meeting, notice of which was posted as prescribed by law, all those proposed rules changes and making certain amendments to the proposed rules changes on its own motion, it is this 8th day of November, 2005,

ORDERED, by the Court of Appeals of Maryland, that new Title 7, Chapter 400 and new Rules 1-326, 2-605, and 7-211 be, and they are hereby, adopted in the form previously published; and it is further

ORDERED that new Title 15, Chapter 1200 (Coram Nobis) be, and it is hereby, adopted in the form attached to this Order; and it is further

ORDERED that the amendments to Rules 2-126, 2-325, 2-332, 2-341, 3-126, 4-231, 4-342, 4-345, 4-406, 4-508, 4-509, 4-510, 5-706, 5-802.1, 5-803, 5-804, 5-902, 6-415, 7-208, 7-301, 8-205, 8-207, 8-411, 8-412, 8-511, 14-206, 14-503, 15-402, 15-701, 16-814, 17-101, and 17-104 and Forms 4-504.1 and 4-508.1, be, and they are hereby, adopted in the form previously published; and it is further

ORDERED that amendments to Rules 2-202, 2-506, 3-202, 3-506, 4-343, 5-101, 8-204, 8-604, and 17-109 be, and they are hereby, adopted in the form attached to this Order; and it is further

ORDERED that the proposed amendments to Rule 4-507 be, and they are hereby, rejected; and it is further

ORDERED that action on proposed amendments to Rules 4-262 and 4-263 be, and it is hereby, deferred; and it is further

ORDERED that the rules changes hereby adopted by this Court shall govern the courts of this State and all parties and their attorneys in all actions and proceedings, and shall take effect and apply to all actions commenced on or after January 1, 2006, and insofar as practicable to all actions then pending; and it is further

ORDERED that a copy of this Order be published in the next issue of the *Maryland Register*.

ROBERT M. BELL

IRMA S. RAKER

ALAN M. WILNER

DALE R. CATHELL

GLENN T. HARRELL, JR.

LYNNE A. BATTAGLIA

CLAYTON GREENE, JR.

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Jonathan S. Rosenthal, Esq.
Hon. Albert J. Matricciani, Jr.
Albert "Buz" Winchester, III, Director, Legislative Relations
Jeff Welsh, Court Information Office
Jack L. B. Gohn, Esq.
Frank Broccolina, State Court Administrator
Michael C. Worsham, Esq.

The Chair convened the meeting. He asked if there were any additions or corrections to the Minutes of the Rules Committee meeting of November 15, 2002. There being none, the Vice Chair moved to approve the minutes as presented, the motion was seconded, and it passed unanimously.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 700 - MANDAMUS

AMEND Rule 15-701 to add a Committee note after section (a), as follows:

Rule 15-701. MANDAMUS

(a) Commencement of Action

Except as provided in Rules 7-401 et seq., an action for a writ of mandamus shall be commenced by the filing of a verified complaint, the form and contents of which shall comply with Rules 2-303 through 2-305. The plaintiff shall have the right to claim and prove damages, but a demand for general relief shall not be permitted.

Committee note: Code, Courts Article, §3-8B-02 provides: "An action for a writ of mandamus shall be tried by a jury on request of either party." This has been judicially interpreted to apply to fact questions. See Cicala v. Disability Review Board for Prince George's County, 288 Md. 254 (1980).

For review of quasi-judicial rulings of administrative agencies where judicial review is not authorized by statute, see Rule 7-401.

(b) Defendant's Response

The defendant may respond to the complaint as provided in Rule 2-322 or Rule 2-323. An answer shall be verified and shall fully and specifically set forth all defenses upon which the defendant intends to rely, but the defendant shall not assert any defense that the defendant might have relied upon in an answer to a previous complaint for mandamus by the same plaintiff for the same relief.

(c) Amendment

Amendment of pleadings shall be in accordance with Rule 2-341.

(d) Ex Parte Action on Complaint

(1) Upon Default by Defendant

If the defendant is in default for failure to ~~appear~~ respond, the court, on motion of the plaintiff, shall hear the complaint ex parte~~. The~~ , and the plaintiff ~~shall be required to introduce~~ must support the complaint by evidence ~~in support of the complaint~~. If the ~~court finds that the facts and law authorize the granting of the writ, it~~ law authorizes the issuance of the writ under the circumstances proved by the evidence, the court shall order the writ to issue without delay. Otherwise, the court shall dismiss the complaint.

(2) Upon Striking of Defendant's Answer

If ~~the court grants~~ a motion to strike an answer filed pursuant to Rule 2-322 (e) is granted, and the court does not permit the ~~filing of an~~ answer to be amended ~~answer~~, the court may ~~enter an~~ order ~~authorizing~~ the writ to issue without requiring the plaintiff to introduce evidence in support of the complaint.

(e) Writ of Mandamus

(1) Contents and ~~Time for~~ Compliance

The writ shall be peremptory in form and shall require the defendant to perform immediately the duty sought to be enforced~~. For~~ , unless for good cause shown~~, however,~~ the court ~~may~~ extends the time for compliance. ~~It shall not be necessary for the writ to~~ The writ need not recite the reasons for its issuance.

(2) Certificate of Compliance

Immediately after compliance, the defendant shall file a certificate stating that all the acts commanded by the writ have been fully performed.

(3) Enforcement

Upon application by the plaintiff, the court may proceed under Rule 2-648 against a party who disobeys the writ.

(f) Adequate Remedy at Law

The existence of an adequate remedy in damages does not preclude the issuance of the writ unless the defendant establishes that property exists from which damages can be recovered or files a sufficient bond to cover all damages and costs.

Source: This Rule is derived from former Rules BE40, BE41, BE43, BE44, BE45, and BE46.

Rule 15-701 was accompanied by the following Reporter's Note.

The Specific Remedies Subcommittee proposes changes to Rule 15-701, Mandamus, including a reference to proposed new Rules 7-401 et seq., and the addition of a Committee note to section (a) referring to the case of Cicala v. Disability Review Board, 288 Md. 254 (1980) to clarify when a jury trial is appropriate in mandamus cases. The Subcommittee is also proposing style changes to sections (d) and (e).

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 300 - CERTIORARI

AMEND Rule 7-301 to change the word "defendant" to "respondent," to add language to section (a) defining the word "party," to

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-401, as follows:

Rule 7-401. GENERAL PROVISIONS

(a) Applicability

The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency, where review is not authorized by statute or by local law.

Committee note: Where judicial review of an order or action of an administrative agency is authorized by statute, see Rule 7-201 et seq. For review of quasi-judicial actions other than those involving a review of an action by the District Court or an orphans' court, a writ of mandamus is the appropriate remedy.

(b) Definition

As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, Commissioner, official, or other unit of the State or of a political subdivision of the State.

Source: This Rule is new.

Rule 7-401 was accompanied by the following Reporter's Note.

Consistent with Jack L. B. Gohn's suggestions to improve the Mandamus Rules, the Subcommittee proposes creating a new set of Rules entitled "Administrative Mandamus" for review of quasi-judicial actions of

administrative agencies where review is not authorized by statute. Rule 7-401 is patterned after Rule 7-201 with the necessary distinctions. A Committee note explaining that mandamus is the appropriate remedy for review of quasi-judicial actions other than an action by the District Court or orphans' court has been added for clarity.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-402, as follows:

Rule 7-402. PROCEDURES

(a) Complaint and Response

An action for a writ of administrative mandamus shall be commenced by the filing of a complaint, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203. The response to the filing of the writ shall comply with the provisions of Rule 7-204.

(b) Stay

The filing of the writ does not stay the order or action of the administrative agency. The court may grant a stay pursuant to Rule 7-205.

Alternative A
(Subcommittee's Recommendation)

(c) Discovery

The court may permit discovery, in accordance with the provisions of Title 2, Chapter 400 that the court finds to be appropriate, but only in cases where the party challenging the agency action makes a strong showing of the existence of fraud or extreme circumstances which occurred outside the scope of the administrative record, and a remand to the agency is not a viable alternative.

Alternative B
(Recommendation of Jack L. B. Gohn, Esq.)

(c) Discovery

The court may within its discretion permit discovery in cases where there is a *prima facie* showing of the existence of an issue upon which any party may be unfairly prejudiced without discovery, including but not limited to: the nature and content of actions of the agency of which the plaintiff is not otherwise informed, the good faith of agency personnel, and the reasoning of agency decision-makers.

Committee note: The Committee recommends that judicial discretion to authorize discovery be specifically acknowledged because agency decision-makers whose actions are reviewed in an administrative mandamus proceeding may not have created a full and reviewable record. As in ordinary mandamus conducted pursuant to Rule 15-701, and depending on the nature of the allegations and of the extant agency record, a record sufficiently fair and complete to enable a court to rule on an administrative mandamus complaint may need to be established by facts best developed through discovery.

(d) Record and Memoranda

The record and memoranda shall be filed pursuant to Rules 7-206 and 7-207.

(e) Hearing

The court may hold a hearing pursuant to Rule 7-208.

Source: This Rule is new, except that subsection (c) codifies the decision in Montgomery County v. Stevens, 337 Md. 471 (1995).

Rule 7-402 was accompanied by the following Reporter's Note.

Rule 7-401 is designed to incorporate many of the procedures of Title 7, Chapter 200. The Subcommittee recommends adding a provision for discovery to be available only upon a showing of fraud or extreme circumstances which occurred outside the scope of the administrative record, and if a remand to the agency is not a viable alternative. This is consistent with the decision in Montgomery County v. Stevens, 337 Md. 471 (1995).

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-403, as follows:

Rule 7-403. DISPOSITION

The court may issue an order denying the writ of mandamus, or may issue the writ (1) remanding the case for further proceedings, or (2) reversing or modifying the decision if any substantial right of the plaintiff may have been prejudiced because a finding, conclusion, or decision of the agency:

(A) is unconstitutional,

(B) exceeds the statutory authority or jurisdiction of the agency,

(C) results from an unlawful procedure,

(D) is affected by any error of law,

(E) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted,

(F) is arbitrary or capricious, or

(G) is an abuse of its discretion.

Source: This Rule is new.

Rule 7-403 was accompanied by the following Reporter's Note.

Rule 7-403 is patterned after Rule 7-209. The proposed Rule provides for the issuance of a writ of mandamus in place of the order issued pursuant to Rule 7-209. The language in subsections (A) through (F) is taken from the Administrative Procedure Act, State Government Article, §10-222 (h). The language of subsection (G) is taken from the concurring opinion by the Honorable Glenn T. Harrell, Jr. in the case MTA v. King, 369 Md. 274 (2002). The Subcommittee is in agreement with Judge Harrell that abuse of discretion should be added to the list of grounds for issuing the writ in judicial review of agency decisions.

Directing the Committee's attention to Rule 15-701, Mr. Sykes said that section (a) is similar to the current Rule except for the reference to "Rules 7-401 et seq." The new Committee note explains that jury trials are available for cases involving fact questions. Although the statute, Code, Courts Article, §3-8B-02, provides that an action for a writ of mandamus is tried by a jury, the case of Cicala v. Disability Review Board for

Prince George's County, 288 Md. 254 (1980) holds that a jury may decide only questions of fact, not questions of law. Section (b) provides that the general Title 2 Rules for responses are applicable, except that the Subcommittee has retained the provision that an answer shall be verified. Because there is no record transmitted to the Court in which the mandamus action is filed, something more than a bald statement of counsel is necessary.

Mr. Sykes pointed out that section (d) provides that if the defendant defaults, the court may issue the writ of mandamus. If an answer is stricken because the defense is legally inadequate, the court may order the writ to issue, and the plaintiff does not have to introduce evidence in support of the complaint. The Vice Chair commented that if the defendant is in default for failure to appear, the plaintiff must prove his or her entitlement to the writ. Why is the result different when an answer is stricken? Mr. Sykes replied that ordinarily the answer is stricken with the right to amend; however, an answer invalid on its face does not contest the facts alleged. The Chair asked if a late filed answer is stricken. Mr. Sykes responded that the case would be over if the answer is filed too late, subject to appeal for abuse of discretion.

The Chair pointed out that the language in subsection (d)(1) which reads: "If the law authorizes the issuance of the writ under the circumstances proved by the evidence, the court shall order the writ to issue without delay" is not correct, because

the decision of the court is discretionary. He suggested that the provision could read as follows: "If the defendant is in default for failure to respond or if a motion to strike an answer filed pursuant to Rule 2-332 (e) is granted, and the court does not permit the answer to be amended, the court shall order the writ to issue without delay if the law so authorizes." The Chair explained that the Court of Special Appeals gets cases from inmates requesting a writ of mandamus to order the circuit court to decide the inmate's post conviction petition. The Chair said that he does not want to be forced to issue the writ; the decision whether to issue it should be discretionary. Mr. Sykes commented that mandamus is a right. If someone proves that he or she is entitled to the writ, why should the decision to issue it be discretionary?

Judge Heller asked why the language in the existing Rule which reads "If the court finds that the facts and law authorize the granting of the writ..." is proposed to be deleted. Language could be added to section (d) to follow the language of section (f) of Rule 2-613, Default Judgment, which provides: "If, in order to enable the court to enter judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings, or order references as appropriate...". The court would have the discretion to take evidence but would not be required to do so. The Vice Chair said that she agreed, but she

did not understand why the Rule would require a verified complaint and answer unless it is used for something. If evidence is to be presented in support of the complaint, verification need not be required. Judge Heller pointed out that if the words "must support" were removed from subsection (d)(1), that provision would be similar to Rule 2-613 (f). Mr. Zarnoch commented that the common law required verification. The statute may have intended that the common law be followed or may have intended to alter the common law. Mr. Sykes remarked that if the verification complaint is retained, there is no need to present evidence.

The Vice Chair said that she is currently working on the third edition of her book, Maryland Rules Commentary. One of the sections being revised pertains to injunctions and mandamus. The Honorable Paul V. Niemeyer, now a judge of the United States Court of Appeals for the Fourth Circuit, a co-author of the book, and formerly a member of the Rules Committee, wrote the section in the book on mandamus. He had commented that the Mandamus Rule is left over from a previous time. It does not permit a demand for general relief, and it requires a complaint and answer under oath, which is unnecessary.

Mr. Titus observed that he had never used a writ against an administrative agency when the agency's actions were being reviewed. The modern way to challenge the action of an agency when there is no statutory authority is through a declaratory judgment. He expressed the view that there need not be a

specific rule. The Chair noted that if the writ of mandamus is abolished, cases may be in limbo. A police officer who seeks a special disability pension from Baltimore City but is only given ordinary disability has no statutory remedy to appeal the decision and would file a petition for a writ of mandamus. Mr. Titus noted that the police officer could seek a declaratory judgment. Mr. Gohn responded that case law does not support this -- it provides for writs of mandamus or certiorari as a remedy.

Judge Kaplan remarked that mandamus is used for cases involving elections where someone on the ballot did not have the necessary qualifications. The way to obtain immediate action is to file for a writ of mandamus. The Chair added that this would also apply to someone who wants to be added to a ballot. Mr. Gohn pointed out that the cases involving a review of agency actions where statutory review is not provided show that declaratory judgment is not available as a remedy. The case of Bucktail v. Talbot County, 352 Md. 530 (1999) held that the appropriate remedies are mandamus and certiorari. The case involved a review of the action of the county council sitting as the zoning board. Mr. Zarnoch added that the statutes authorize mandamus.

Mr. Sykes commented that the first attempt to provide in the Rules that any relief that was heretofore available by mandamus or certiorari could be obtained by injunction did not get very far. The Vice Chair said that she was not sure why this would be unacceptable so many years later. The Chair asked if this relief

would be available through the issuance of an injunction. Mr. Gohn replied that this review might be able to be substituted for certiorari when the circuit court reviews final agency action and tests the jurisdiction of orphans' courts and the District Court. With administrative agencies, injunctive relief might be able to be substituted for cases involving executive actions, but if the action is quasi-judicial, the rules pertaining to relief would have to go into the Title 7, Chapter 200 Rules.

Mr. Titus commented that the term "quasi-judicial" is not definitive enough. An action by a zoning board is a legislative act, but in the case of Montgomery County v. Woodward & Lothrop, 280 Md. 686 (1977), the court held that in some cases, the agencies are resolving disputed adjudicative facts; in others, the agencies are resolving disputed legislative facts. How can this be organized in the Rules? The function of the agency is irrelevant -- the question is whether the agency is resolving disputed adjudicative facts. Mr. Gohn pointed out that Mr. Zarnoch had indicated that language could be borrowed from §1094.5 of the California Code of Civil Procedure to separate out administrative mandamus from traditional mandamus. Mr. Titus remarked that comprehensive zoning cases do not involve disputed adjudicative facts. Mr. Gohn agreed that those cases are quasi-legislative. The dividing line is whether the agency resolved legislative or adjudicative facts.

The Chair asked the Committee how this matter should proceed. The Vice Chair suggested that the matter should go back

to the Subcommittee for further study and that Mr. Titus should come to the Subcommittee meetings. Mr. Sykes inquired as to what direction the Subcommittee should follow regarding policy. Mr. Titus suggested that mandamus should be largely abolished. Judge Heller remarked that these cases do come up in Baltimore City, and she asked whether there would be supporting case law if the cases are handled by a declaratory judgment or injunctive relief. Mr. Titus responded that the standard of review is the same. Judge Heller noted that a wealth of case law defines the standard of review when administrative agency review, mandamus, or certiorari is sought. The Chair said that the Subcommittee will have to consider these issues. Subsection (a) of Code, Criminal Procedure Article, §7-102 (formerly Code, Article 27, §654A) lists all of the writs people can request in a post conviction proceeding for relief. Judge Heller commented that writs are still filed, and Judge Missouri added that he sees writs of *corum nobis*. Judge Heller noted that incarcerated defendants file writs of *habeas corpus*.

Mr. Zarnoch pointed out that several years ago, the Rules Committee considered the suggestion to replace mandamus with injunctive relief and rejected the idea. It would be useful to look at the minutes of the meetings where this was discussed. Mr. Titus remarked that the case of State Insurance Commissioner v. National Bureau of Casualty Underwriters, 248 Md. 292 (1967) held that the circuit court's review of a decision of an administrative agency to see whether the finding of facts by the

agency was supported by a preponderance of the evidence does not impose non-judicial duties on the court and does not conflict with the concept of separation of powers.

Judge Heller commented that she did not want to vote on this matter until she fully understood the implications. Mr. Sykes inquired about mandamus in the federal courts, and Mr. Zarnoch replied that the federal rules abolished the writ, but some language in federal cases brought it back. Judge Kaplan asked whether Mr. Titus had filed a writ of mandamus to allow Montgomery County into a case adjudicated by Judge Kaplan in which Mr. Titus had been counsel, and Mr. Titus answered that he had filed a motion for leave to intervene. He said that the case of Heaps v. Cobb, 185 Md. 372 (1945) held that there is an inherent right to judicial review, but it cannot interfere with any exercise of legislative prerogative within constitutional limits.

Mr. Gohn drew the Committee's attention to Table A in a handout he had distributed at the meeting. (See Appendix 1). He explained that mandamus and certiorari can be used in the same case, but they are inconsistent, and the procedures are hard to follow. They need simplification. Judge Missouri commented that Mr. Gohn's handouts are very helpful, but more information is needed. The Chair said that the Subcommittee can reconsider the matter, taking into consideration Judge Niemeyer's commentary and the minutes of the meetings at which this has already been discussed. Mr. Sykes pointed out that other aspects of mandamus

and certiorari need to be considered, such as the extent to which the Rules Committee would like discovery. The Subcommittee and Mr. Gohn are divergent as to this. Section (c) of proposed new Rule 7-402, Procedures, has two alternatives. The first is the Subcommittee's recommendation; the second is Mr. Gohn's recommended language. Mr. Titus said that he definitely preferred the first alternative. The Chair suggested that if the first alternative is used, a period should be placed after the word "appropriate," and the remainder of the language be deleted.

Mr. Gohn explained that he drafted Alternative B because of a case in which he had been involved. He had represented someone who had applied for a professional license and was turned down, because the applicant had neglected to mention that he had been previously convicted of a crime. The person reapplied, and the agency did not act on the second application. In filing an action for mandamus to discover why an agency would not tell an applicant of its decision, the following language in section (c) would be helpful: "...the nature and content of actions of the agency of which the plaintiff is not otherwise informed, the good faith of agency personnel, and the reasoning of agency decision-makers."

Mr. Titus commented that if Alternative B were used, it would overrule a large amount of case law. Mr. Gohn disagreed, explaining that there is Administrative Procedure Act ("APA") case law which is applicable. The Chair said that the discovery decisions can be left up to the court's discretion. Mr. Gohn

commented that the cases of Public Service Commission of Maryland v. Patuxent Valley Conservation League, 300 Md. 200 (1984) and Montgomery County v. Stevens, 337 Md. 471 (1995) leave open the possibility that the decision-maker's thought process could be considered. Mr. Titus reiterated that Alternative A is consistent with case law.

Judge Heller noted that mandamus provides an inherent right of review which is not available under the APA. Discovery would open up a new way of reviewing decisions of administrative agencies. Mr. Gohn responded that there is a good reason for this. The posture in the case is different than one brought under the APA, which involves a ruling on the record and the trappings of due process. These may be missing in mandamus. When there is a decision by a county official, there is no reviewable record or statement of reasons for the decision. Judge Heller remarked that the matter could be remanded back to the agency to set forth the reasons for its decision. The Chair stated that if discovery is built in with a *prima facie* showing, this would tie the judge's hands. Mr. Titus commented that if an agency will not make a decision, a writ of mandamus can be issued to force the agency to make a decision. If there is no file, the court can issue a preliminary injunction for the agency to give the court the necessary materials. Mr. Gohn noted that this is discovery.

The Chair stated that the Rule should provide only that the judge will decide what is appropriate, or else legal battles will

ensue as to what is a *prima facie* showing. The decision should be left in the judge's hands. The Chair said that he has confidence that circuit court judges will handle cases appropriately. Mr. Titus expressed the view that other than pursuant to an averment of fraud, there should be no inquiry into the agency's decision; otherwise the floodgates of litigation will be opened. The Vice Chair commented that discovery is appropriate under limited circumstances -- the Subcommittee needs to discuss what those circumstances are. The Chair observed that this is consistent with the actions of the Discovery Subcommittee, which is working on a Rule that allows the court discretion to limit or expand discovery. Mr. Sykes said that the Specific Remedies Subcommittee will do its best to address the Committee's concerns. Judge Missouri asked the Subcommittee to consider not building in more hearings than the courts already have. The proposed amendments to Rules 15-701 and 7-301 and proposed new Rules 7-401, 7-402, and 7-403 were remanded to the Specific Remedies Subcommittee.

The Chair thanked Mr. Gohn for all of his assistance.

Agenda Item 3. Consideration of a proposed amendment to Rule 8-305 (Certification of Questions of Law to the Court of Appeals)

Mr. Titus presented Rule 8-305 (a), Certification of Questions of Law to the Court of Appeals, for the Committee's consideration.

COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Conference Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland on October 15, 2004.

Members present:

Linda M. Schuett, Esq., Vice Chair

F. Vernon Boozer, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Hon. John F. McAuliffe
Robert R. Michael, Esq.
Hon. William D. Missouri
Hon. John L. Norton, III
Larry W. Shipley, Clerk
Twilah S. Shipley, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Professor John Lynch, University of Baltimore School of Law
Jack L. B. Gohn, Esq.

The Vice Chair convened the meeting. The Reporter announced that the Report of the Judicial Ethics Committee and 153rd Report of the Rules Committee will be heard by the Court of Appeals on November 8, 2004 at 2:00 p.m. She said that Mr. Maloney was a winner of a Leadership in Law Award, and that the Vice Chair had won the Fannie Lou Hamer Award, named for a civil rights activist. The Reporter also stated that the mother-in-law of

Cathy Cox, Administrative Assistant to the Rules Committee, had passed away, so Ms. Cox would not be present for the meeting.

Agenda Item 1. Consideration of proposed new Title 7, Chapter 400, Administrative Mandamus. New Rule 7-401 (General Provisions), New Rule 7-402 (Procedures), New Rule 7-403 (Disposition); Amendments to: Rule 7-301 (Certiorari in the Circuit Court) and Rule 15-701 (Mandamus)

Mr. Sykes, Chair of the Specific Remedies Subcommittee, told the Committee that the Office of the Attorney General had sent comments about the proposed new Administrative Mandamus Rules that were received this morning. A copy of the comments was distributed. (See Appendix 1). The problems with the current Certiorari and Mandamus Rules were set out in a July 2, 2001 memorandum by Jack L. B. Gohn, Esq., a copy of which is in the meeting materials for today. (See Appendix 2). Because there is an overlap between certiorari and mandamus, practitioners often file petitions for both, sometimes not knowing which one to file. Each remedy has procedures that are different and peculiar from procedures in ordinary litigation. There has been a great deal of dispute over discovery in these cases, both as to what kind is appropriate and when it is available. The Court of Appeals considered this issue in *Montgomery County v. Stevens*, 337 Md. 471 (1995). Discovery was one of the issues that caused the proposed Rules to be remanded to the Subcommittee.

Another question that arose was about damages in mandamus actions. It is difficult to know what acts are reviewable and

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Another question that arose was about damages in mandamus actions. It is difficult to know what acts are reviewable and

what remedy is appropriate. The Subcommittee suggests that certiorari review in the circuit courts be eliminated except for review of actions of the District Court and the Orphans' Court. Mandamus has been divided into two categories, administrative mandamus for review of a quasi-judicial order or action of an administrative agency and regular mandamus.

Mr. Sykes presented Rule 7-401, General Provisions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

ADD new Rule 7-401, as follows:

Rule 7-401. GENERAL PROVISIONS

(a) Applicability

The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not authorized by statute or by local law.

Committee note: Where judicial review of an order or action of an administrative agency is authorized by statute, see Rule 7-201 et seq. For review of quasi-judicial actions other than those involving a review of an action by the District Court or an orphans' court, a writ of mandamus is the appropriate remedy.

(b) Definition

As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, Commissioner, official, or other unit of the State or of a political subdivision of the State.

Committee note: This Rule does not apply to writs of mandamus in aid of appellate jurisdiction.

Source: This Rule is new.

Rule 7-401 was accompanied by the following Reporter's Note.

Consistent with Jack L. B. Gohn's suggestions to improve the Mandamus Rules, the Subcommittee proposes creating a new set of Rules entitled "Administrative Mandamus" for review of quasi-judicial actions of administrative agencies where review is not authorized by statute. Rule 7-401 is patterned after Rule 7-201 with the necessary distinctions. A Committee note explaining that mandamus is the appropriate remedy for review of quasi-judicial actions other than an action by the District Court or orphans' court has been added for clarity.

Mr. Sykes stressed that section (a) of Rule 7-401 applies only to actions for judicial review of a quasi-judicial order or action. In these cases, there will be a record and a hearing that can be reviewed. It is similar to ordinary appellate review by a circuit court. The Vice Chair asked whether there is a requirement of finality of the decision below. Mr. Sykes replied that for an action or order to be quasi-judicial, it must be final. Mr. Gohn added that the doctrine of exhaustion of administrative remedies applies. Mr. Brault remarked that mandamus involves ordering an entity to do something routine that

is not discretionary. Mandamus could be applicable to interlocutory non-appealable orders. Mr. Sykes said that some statutes have no provision for appeal of actions of administrative agencies. The only review available is by mandamus because of *Heaps v. Cobb*, 185 Md. 372 (1945), which provides that there must be a remedy for an unconstitutional action. Even though a statute does not provide for or forbid an appeal, appellate review cannot be foreclosed. Administrative mandamus is a substitute for an appeal where there is no statutory authority for an appeal.

Judge Kaplan commented that at-will employees who have been discharged from working for the State government use mandamus, since there is no appeal authorized for an at-will employee who has been wrongfully discharged. Mr. Sykes pointed out this would come under regular mandamus, which is applicable when there is no record. When an agency makes a final decision affecting the rights of parties, an appeal is effected by administrative mandamus if there is no statutory right of appeal.

Mr. Brault reiterated that nothing in the Rule requires that an order has to be final before a writ of mandamus is issued. The Vice Chair noted that the same issue arises in the Chapter 200 Rules of Title 7, Judicial Review of Administrative Agency Decisions. Rule 7-201, General Provisions, uses the same language as proposed Rule 7-401: "review of ... an order or action of an administrative agency ...". Judge Heller suggested

that a reference to the *Heaps* case be added to Rule 7-401. She asked about the comment from Susan Howe Baron, Esq., Assistant Attorney General, which stated that the proposed rules decimate the exclusion of the Parole Commission from the Administrative Procedure Act ("the APA"). Mr. Zarnoch answered that the Parole Commission is excluded from the APA, because the process of petitioning for parole is simplified. Ms. Baron is concerned that the entire record will need to be filed under the proposed Rules. Judge Heller responded that this is not correct. Most of the parole petitions were filed in the Circuit Court for Baltimore City up until eighteen months ago. About 90% of the inmates simply filled out a form. The Attorney General does not always file memoranda in these cases. Judge Heller suggested that memoranda be filed in these cases. Mr. Gohn noted that he did not believe that under administrative or regular mandamus, there would be the necessity to file the entire file. Ms. Baron may have been looking at the certiorari rule, which does not apply.

Judge McAuliffe pointed out a problem in the first Committee note. He suggested that a second sentence be added that would state: "This applies to judicial review not authorized by statute only where there is no other right of appeal provided by statute." Mr. Gohn commented that the language in the Committee note that reads "other than those involving a review of an action by the District Court or an orphans' court" is surplusage, since

these actions are judicial and not quasi-judicial. By consensus, the Committee agreed to delete the language. Mr. Sykes suggested that a reference to the case of *Heaps v. Cobb* should be added to the Committee note. The Committee agreed by consensus to this suggestion.

The Vice Chair questioned as to why adopting administrative mandamus Rules is necessary, instead of amending the current rules of judicial review. Mr. Gohn answered that the Subcommittee's thinking was that there is more of a problem with discovery where the review is not authorized by statute, and the form of action traditionally recognized by the Court of Appeals for non-statutory review is mandamus, which is the common nomenclature and separate from judicial review. The Vice Chair remarked that the proposed new Rules seem to incorporate many of the procedures from Title 7, Chapter 200 of the Rules. In her experience as the County Attorney for Anne Arundel County, suits are filed with no right of review, and they are called a variety of names, including a petition for declaratory relief. Her opinion is that the practice is more akin to judicial review.

Mr. Sykes noted that historically, the *Heaps* case uses certain terminology. Changes to this are sufficiently controversial. It may be necessary to change the nomenclature to eliminate the name of the traditional remedy.

Mr. Sykes drew the Committee's attention to section (b). The Vice Chair asked about the issue of finality to which Mr.

Brault had referred earlier in the discussion. Mr. Sykes responded that there is case law pertaining to exhaustion of administrative remedies. Mr. Gohn said that occasionally, there are situations recognized in case law where there is no finality before judicial review is obtained. If a requirement of finality is put into the Rules, this would not be consistent with the rare cases in which administrative finality is not required as evidenced in *Prince George's County v. Blumberg*, 288 Md. 275 (1980). The issue of finality should be left to case law. Judge McAuliffe suggested that the Committee note could refer to exhaustion of remedies. The Reporter suggested that the language could be to the effect that "ordinarily exhaustion of administrative remedies is required, but see *Prince George's County v. Blumberg*." Mr. Zarnoch suggested that *Holiday Spas v. Montgomery County Human Relations Commission*, 315 Md. 390 (1989), could also be cited in the Committee note. By consensus, the Committee agreed with these suggestions.

By consensus, the Committee approved the Rule as amended.

Mr. Sykes presented Rule 7-402, Procedures, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 7 - APPELLATE AND OTHER JUDICIAL REVIEW

IN CIRCUIT COURT

CHAPTER 400 - ADMINISTRATIVE MANDAMUS

FACSIMILE TRANSMITTAL

TO: Paul Cucuzzella FAX: _____

COMPANY: _____

FROM: Adriana Dise

DATE: _____ TIME: ___:___ a.m. p.m. NO. PAGES: 5

COMMENTS:

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

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

Limited Development Areas

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

(1) Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre;
(2) Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space;
(3) Areas meeting the conditions of Regulation A, but not B, under intensely developed areas; or
(4) Areas having public sewer or public water, or both.

Resource Conservation Areas

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

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

The first step in the process was to map all wetlands as Resource Conservation Areas. After this was completed, the remaining land was placed in one of the three categories (Intense, Limited, or Resource Conservation).

Platted subdivisions were given a classification based on the average density of houses in the subdivision, unless some lots were in wetlands which were classified as Resource Conservation. Average density was determined by placing a grid over an aerial photograph and counting houses. The grid was divided into acre cells at the scale of the photograph. The number of lots in the subdivision shown on the tax map was used as a check in determining density, since some of the houses

were difficult to see on the photograph. Dark roofed houses and houses nestled into the trees were particularly hard to see.

Subdivisions with four or more units to the acre, as well as subdivisions with three or more units to the acre with water and sewer service were classified as Intensely Developed Areas (IDA's) if they were at least 20 acres in size. They were also classified as IDA's if they were adjacent to land eligible for classification as an IDA and the total acreage was at least 20 acres. A portion of the 20 acres could be outside of the Critical Area. Land shown to have industrial, institutional, or commercial facilities on the aerial photograph were also mapped as IDA's if they met the 20 acre minimum requirement.

Land used for industrial, institutional, or commercial purposes that did not meet the 20 acre minimum requirement was classified as a LDA. Residential land with an average density of less than four units to the acre and greater than or equal to one unit per five acres was also classified as an LDA except as discussed above.

Land within 2,000 feet of an existing water or sewer line, as shown on the water and sewer maps, without any development, was also classified as an LDA (unless it was a wetland or public property); if sewer service was scheduled within the 6-10 year period (or earlier) in the County water and sewer plan, or water service was scheduled in the 11-20 year period (or earlier) in the County water and sewer plan. This land was determined to have water or sewer service, or both, since the developer would be required to connect and extend service from the existing line as a condition of development under existing County subdivision regulations (Article 26, Sections 3-305 and 3-312). Land that was developed at less than one dwelling unit per five acres and did not meet any of the above conditions was classified as Resource Conservation.

The 1000-foot Critical Area boundary was transferred from State Wetland Boundary Maps (scale 1" = 200') to County topographic maps (scale 1" = 1000'). The boundary was expanded when it was less than 1000 feet from tidal wetlands shown on the National Wetlands Inventory (NWI) maps prepared by the U.S. Fish and Wildlife Service or shown on aerial photographs. The four-foot contour was used as the cutoff for tidal wetlands when the NWI maps showed tidal wetlands extending further upstream.

Aerial photographs, water and sewer maps (1" = 3500') amended through 1986, and tax maps (1" = 1200') were used to classify land. Two sets of photographs were used: (1) color prints at a scale of 1" = 1000' taken in July and September 1985; (2) black and white prints at a scale of 1" = 800', taken in April, 1984.

The primary criterion for placing property within one of the three classifications (Intense, Limited or Resource Conservation) was land use existing on December 1, 1985. This date was approximated using the aerial photographs. The water and sewer maps were used to determine

properties served by water or sewer lines, or both, on December 1, 1985 and properties within 2000 feet of a water or sewer line on that date. The tax maps were used to define property and subdivision boundaries.

Revisions to the Maps

When the land use classification maps were made available to the public in December, 1986, many people disagreed with the designation placed on their property. A petition process was initiated in December, 1986, through a legal notice in the Annapolis Capital and the Maryland Gazette. A copy of the notice is available as an appendix to this document. Petitioners were asked to state why they felt the classification of their property was incorrect based on the definitions in the Criteria. A hearing was held in February, 1987, to inform the public about the County's Critical Area Program. The hearing also provided a forum for public comments on the draft program elements and draft maps. As of August, 1987, Anne Arundel County had received 112 petitions. The requests were reviewed and a revised set of land use classification maps were drafted. The maps adopted as working maps under Bill 90-86 will remain in effect until 1988 for projects now being reviewed. Revised maps will be in effect for new projects submitted after County Council approval of the Critical Area Program. The revised set of maps is being presented with this document to the Critical Area Commission for its approval and then to the County Council for adoption.

Most of the changes to the land use classification maps in September included shifts from Resource Conservation to Limited due to the availability of water or sewer service. The Criteria state that areas having public water or sewer qualify as Limited Development Areas. Existing County law, Article 26, Sections 3-305 and 3-312, requires that public water or sewer service must be extended to property in the "6-10 year sewer service area" and in the "11-20 year water service area" which is within 2,000 feet of an existing line. This is imposed upon an applicant for development as a condition of subdivision approval. Therefore, properties within these distances and timings are considered to have water or sewer service within the context of the definition of Limited Development Areas in the Criteria. Property beyond these distances and timings is not required to extend and construct utility lines and therefore is deemed not to have water or sewer and remains in the Resource Conservation designation. Wetlands and public property were left in the Resource Conservation category and wetlands originally mapped as Limited were placed in the Resource Conservation classification. In November, property that was changed to Limited Development in September that did not abut a water or sewer line, was reclassified to Resource Conservation.

As directed by the Chesapeake Bay Critical Area Commission Panel, Anne Arundel County made a further investigation of the land mapped Limited Development Areas (LDA's) due to the water and sewer criteria as stated above. The following criteria were used in this investigation:

1. Land that met the density requirement and met the water and sewer criteria remained LDA.

2. Land with approved subdivision activity with recorded platted lots remained LDA.

3. Land with environmentally sensitive features along perennial and tributary streams were reviewed and an approximately 300 feet buffer along these streams, including adjacent wetlands, went back to RCA. The few areas of Critical State Concern that were classified as LDA had increased portions going to RCA.

4. Land that involved citizens' requests for land use classification changes was reviewed and either remained LDA or went back to RCA.

As of November maps, Anne Arundel County still had 2829.38 acres that changed to LDA because of water and sewer.

2829	
-728	Land use/existing sewer and water service - stays LDA
2101	
-566	Subdivision activity - stays LDA
1535	
-673	Buffer protection - goes back RCA
862	Still in LDA strictly from water and sewer changes

These changes have resulted in proposed acreage computations as follows:

	Jan.	Sept.	Nov.	Current Proposed
RCA	23699	21163	22031	22807
LDA	17411	22453	21613	20929
IDA	5580	5229	5215	5133
TOTALS	46690	48846	48859	48869

Grandfathering

Section 14.15.02.07 of the Critical Area Criteria contain provisions for grandfathering development under certain conditions. These provisions have been administered in Anne Arundel County in the following manner. All development in the Critical Area approved after December 1, 1985, under a building permit for land that was not otherwise subject to compliance with the Critical Area Criteria has been exempted from the Criteria. Major subdivisions, minor subdivisions, rezonings, variances and special exceptions which were submitted before April 21, 1986 (the effective date of Bill 42-86) were

27.01.02.04

.04 Limited Development Areas.

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

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

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

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

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

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

(1) Maintain or, if possible, improve the quality of runoff and ground water entering the Chesapeake Bay and its tributaries;

(2) Maintain, to the extent practicable, existing areas of natural habitat; and

(3) Accommodate additional low or moderate intensity development if:

(a) This development conforms to the water quality and habitat protection criteria in §C, below, and

(b) The overall intensity of development within the limited development area is not increased beyond the level established in a particular area so as to change its prevailing character as identified by density and land use currently established in the area.

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

(1) For all development activities in the limited development areas, the jurisdiction shall require that the developer identify any environmental or natural feature described below, and shall meet all of the following standards of environmental protection:

(a) Criteria as provided for the habitat protection areas in COMAR 27.01.09, and those for the water-dependent facilities in COMAR 27.01.03.

(b) All roads, bridges, and utilities that must cross a habitat protection area shall be located, designed, constructed, and maintained so as to provide maximum erosion protection and minimize negative impacts to wildlife, aquatic life and their habitats and maintain hydrologic processes and water quality. Roads, bridges, or utilities may not be located in any habitat protection area unless no feasible alternative exists.

(c) All development activities that must cross or affect streams shall be designed to:

(i) Reduce increases in flood frequency and severity that are attributable to development;

(ii) Retain tree canopy so as to maintain stream water temperature within normal variation;

(iii) Provide a natural substrate for streambeds; and

(iv) Minimize adverse water quality and quantity impacts of stormwater.

(d) All development sites shall incorporate a wildlife corridor system that connects the largest undeveloped, or most vegetated tracts of land within and adjacent to the site in order to provide continuity of existing wildlife and plant habitats with offsite habitats. The wildlife corridor system may include habitat protection areas identified in COMAR 27.01.09. Local jurisdictions shall ensure the maintenance of the wildlife corridors by requiring the establishment of conservation easements, restrictive covenants, or similar

instruments through which the corridor is preserved by public or private groups, including homeowners associations, nature trusts, and other organizations.

(2) For the cutting or clearing of trees in forests and developed woodland areas which are associated with current or planned development activities in the limited development area, all jurisdictions shall:

(a) Require that the developer consider the recommendations of the Forestry Programs and the Fish, Heritage and Wildlife Administration of the Department of Natural Resources when planning development on forested lands;

(b) Provide regulations that development activities be designed and implemented to minimize destruction of woodland vegetation; and

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

(3) For the alteration of forest and developed woodland in the limited development area, the jurisdiction shall apply all of the following criteria:

(a) The total acreage in forest coverage within a jurisdiction in the Critical Area shall be maintained or, preferably, increased.

(b) All forests that are allowed to be cleared or developed shall be replaced in the Critical Area on not less than an equal area basis.

(c) That no more than 20 percent of any forest or developed woodland may be removed from forest use, except as provided in §C(4), below. The remaining 80 percent shall be maintained through recorded, restrictive covenants or similar instruments.

(d) Developed woodland vegetation shall be conserved to the greatest extent practicable.

(4) For replacement of forest and developed woodland, if more than 20 percent is removed from forest use, the following formula shall apply: a developer may clear or develop more forest than otherwise permitted to be disturbed, if the total forest area removed from forest use is not increased by more than 50 percent of the area permitted to be disturbed in §C(3)(c), above, provided that the afforested area shall consist of 1.5 times the total surface acreage of the disturbed forest or developed woodland area, or both.

(5) In addition, local jurisdictions shall adhere to the following criteria for forest and woodland development:

(a) Local programs shall make provision for surety to be provided by owners or developers in an amount acceptable to the local jurisdiction and suitable to assure satisfactory replacement as required by §C(4), above;

(b) Grading permits shall be required before forest or developed woodland is cleared;

(c) Forests which have been cleared before obtaining a grading permit, or that exceed the maximum area allowed in §C(4) shall be replanted at three times the areal extent of the cleared forest;

(d) If the areal extent of the site limits the application of §C(3), (4), and (5)(c), above, alternative provisions or reforestation guidelines may be developed by the local jurisdiction, if they are consistent with the intent of COMAR 27.01.05, to conserve the forest and developed woodland resources of the Critical Area; alternative provisions may include fees-in-lieu provisions if the fee is adequate to ensure the restoration or establishment of an equivalent forest area;

(e) If no forest is established on proposed development sites, these sites shall be planted to provide a forest or developed woodland cover of at least 15 percent;

(f) All forests designated on development plans shall be maintained to the extent practicable, through conservation easements, restrictive covenants, or other protective instruments;

(g) The developer shall designate, subject to the approval of the local jurisdiction, a new forest area on a part of the site not forested; and

(h) The afforested area shall be maintained as forest cover through easements, restrictive covenants, or other protective instruments.

(6) Development on slopes greater than 15 percent, as measured before development, shall be prohibited unless the project is the only effective way to maintain or improve the stability of the slope and is consistent with the policies in §B of this regulation.

(7) For stormwater runoff, man-caused impervious areas shall be limited to 15 percent of the site.

(8) Local jurisdictions should allow for modifications in road standards to reduce potential impacts to the site and Critical Area resources, where the reduced standards do not significantly affect safety.

(9) To reduce the extent of impervious areas and maximize areas of natural vegetation, cluster development shall be considered when planning for future development.

(10) Development may be allowed on soils having development constraints if it includes mitigation measures that adequately address the identified constraints and that will not have significant adverse impacts on water quality or plant, fish, or wildlife habitat.

D. In developing their Critical Area programs, the local jurisdictions shall refer to all of the following complementary existing State laws and regulations:

(1) For soil erosion and sediment control (COMAR 26.09.01):

(a) In order to prevent soil erosion and sedimentation, a soil erosion and sedimentation control plan shall be required whenever a development within the Critical Area will involve any clearing, grading, transporting, or other form of disturbance to land by the movement of earth. This plan shall be consistent with the requirements of Natural Resources Article, §§8-1101—8-1108, and Environment Article, §§4-103—4-108 and 4-116, Annotated Code of Maryland, and local ordinances. Sediment control practices shall be appropriately designed to reduce adverse water quality impact.

(b) Jurisdictions shall require erosion control as the basis of sediment control plans within the Critical Area.

(2) For stormwater runoff (COMAR 26.09.02):

(a) Limitation on Stormwater Runoff. Development may not cause downstream property, watercourses, channels, or conduits to receive stormwater runoff at a higher volume or rate than would have resulted from a 10-year storm were the land in its predevelopment state.

(b) Storage Capacity. All stormwater storage facilities shall be designed with sufficient capacity to achieve water quality goals of this subtitle and to eliminate all runoff caused by the development in excess of that which would have come from the site if it were in its predevelopment state.

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

H

Briefs and Other Related Documents

Armstrong v. Mayor and City Council of BaltimoreMd.App.,2006.

Court of Special Appeals of Maryland.

Douglas M. ARMSTRONG et al.

v.

MAYOR AND CITY COUNCIL OF BALTIMORE.

No. 1704, Sept. Term, 2004.

Sept. 1, 2006.

Background: Residents filed petition seeking judicial review of city ordinance that granted permission for the establishment, maintenance, and operation of a parking lot to be used in connection with a proposed apartment building. Mayor and city council filed motion to dismiss. The Circuit Court, Baltimore City, M. Brooke Murdock, J., granted motion. Residents appealed. The Court of Special Appeals dismissed appeal. Residents petitioned for writ of certiorari. The Court of Appeals, 390 Md. 469, 889 A.2d 399, reversed and remanded to Court of Special Appeals for determination of whether the Circuit Court had jurisdiction to consider residents' petition for judicial review.

Holding: The Court of Special Appeals, James R. Eyler, J., held that city council's enactment of ordinance was a "zoning action," such that residents were entitled to statutory judicial review of ordinance; disapproving, *MBC Realty v. Mayor and City Council of Baltimore*, 160 Md.App. 376, 864 A.2d 218.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 414 ⚿741

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k741 k. In General. Most Cited Cases

Court of Special Appeals would consider on remand from Court of Appeals issue of whether residents were entitled to judicial review of city ordinance that granted permission for establishment of parking lot to be used in connection with proposed apartment building, under statute governing appeals, even if issue was moot, as issue was a matter of public importance, in that it enabled Court of Special Appeals to clarify what constituted a "zoning action" by the city council, so that all interested persons would know what procedural avenue for seeking judicial review was applicable in a given situation. West's Ann.Md.Code, Art. 66B, § 2.09(a)(1).

[2] Administrative Law and Procedure 15A ⚿657.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak657 Nature and Form of Remedy
15Ak657.1 k. In General. Most Cited Cases

Technically, a circuit court does not exercise "appellate" review of a decision by a local administrative or legislative body.

[3] Administrative Law and Procedure 15A ⚿651

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak651 k. In General. Most Cited Cases

Certiorari 73 ⚿21

73 Certiorari
73I Nature and Grounds
73k20 Acts and Proceedings of Public Officers and Boards and Municipalities
73k21 k. Judicial Nature of Proceedings in General. Most Cited Cases

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Injunction 212 ⚿74

212 Injunction
212II Subjects of Protection and Relief
212II(E) Public Officers and Entities
212k74 k. Officers and Official Acts Which May Be Restrained in General. Most Cited Cases

Mandamus 250 ⚿63

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k63 k. Officers Subject to Mandamus in General. Most Cited Cases

Municipal Corporations 268 ⚿104

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k104 k. Appeal from Decisions. Most Cited Cases
The basis for judicial review of a decision by a local administrative or legislative body acting in an adjudicatory or quasi-judicial capacity may be (1) a statute, or (2) common law or an equity writ, i.e., mandamus, injunction, certiorari, or declaratory judgment; in both instances, circuit court is exercising original and not appellate jurisdiction.

[4] Administrative Law and Procedure 15A ⚿656

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak654 Power of Legislature
15Ak656 k. Absence of Statutory Provision for Review. Most Cited Cases

Courts 106 ⚿206(7.2)

106 Courts
106VI Courts of Appellate Jurisdiction
106VI(A) Grounds of Jurisdiction in General
106k206 Original Jurisdiction in General
106k206(7.2) k. Maryland. Most Cited Cases
In the absence of a statutory basis for judicial review of administrative decisions by a local body, such decisions are reviewable, based on a court's inherent power, in an action invoking the original jurisdiction of the circuit court, through the writ of mandamus, by injunction, declaratory action, or by certiorari.

[5] Administrative Law and Procedure 15A ⚿797

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak797 k. Legislative Questions; Rule-Making. Most Cited Cases
A legislative or quasi-legislative decision, as distinguished from a quasi-judicial or administrative decision, is subject to court review by invoking the court's original jurisdiction; unlike ordinary statutory and nonstatutory judicial review of administrative decisions, legislative actions are subject to much more limited review.

[6] Municipal Corporations 268 ⚿104

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k104 k. Appeal from Decisions. Most Cited Cases
For purposes of determining whether a city council was acting in a quasi-judicial or administrative capacity, rather than a legislative one, which is necessary to determine whether the city council's action was subject to judicial review, "adjudicative facts" are facts about the parties and their activities, businesses, and properties, and they mostly answer questions of who did what, where, when, how, why, and with what motive or intent, while "legislative facts" do not usually concern the immediate parties, but are general facts which help the tribunal decide questions of law and policy and discretion; the difference essentially depends on

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whether the decision is to be made on individual or general grounds.

[7] Zoning and Planning 414 355

414 Zoning and Planning
414VII Administration in General
414k353 Powers, Duties, and Liabilities
414k355 k. Legislative, Judicial, or Quasi-Judicial Power. Most Cited Cases

Zoning and Planning 414 570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
For purposes of determining whether a zoning authority was acting in a quasi-judicial, or administrative capacity, rather than a legislative one, which is necessary to determine whether zoning authority's action was subject to judicial review, it is not determinative that a zoning authority's decision may dramatically affect an individual; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines whether the action is adjudicative or legislative in nature.

[8] Zoning and Planning 414 355

414 Zoning and Planning
414VII Administration in General
414k353 Powers, Duties, and Liabilities
414k355 k. Legislative, Judicial, or Quasi-Judicial Power. Most Cited Cases

Zoning and Planning 414 570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
For purposes of determining whether a zoning authority's action is subject to judicial review, a zoning authority acts in a legislative capacity when it engages in comprehensive, rather than piecemeal, rezoning proceedings because it does not consider and determine adjudicative facts concerning particular parties; the focus is not on a single piece of property, but on a considerable number of properties as they relate to each other and to the surrounding area.

[9] Zoning and Planning 414 355

414 Zoning and Planning
414VII Administration in General
414k353 Powers, Duties, and Liabilities
414k355 k. Legislative, Judicial, or Quasi-Judicial Power. Most Cited Cases

Zoning and Planning 414 570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
For purposes of determining whether a zoning authority's action is subject to judicial review, in piecemeal rezoning hearings, the zoning authority considers a single piece of property and must make factual determinations; therefore, piecemeal rezoning hearings are administrative in nature, even though the final action in granting or denying the reclassification is legislative in character.

[10] Zoning and Planning 414 570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
City council, in enacting ordinance granting permission for establishment, maintenance, and operation of parking lot to be used in connection with proposed apartment building, was acting in an administrative capacity, for purposes of determining whether statutory judicial review of ordinance was available to residents who challenged ordinance; hearing to consider ordinance was adjudicative in nature, focus of hearing was single piece of property and effect of its

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development on surrounding properties, and ordinance either granted a conditional use or, for practical purposes, should be treated as having granted a conditional use. West's Ann.Md.Code, Art. 66B, § 2.09(a)(1)(ii).

[11] Zoning and Planning 414 ⚿570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
A piecemeal zoning reclassification with respect to a specific property is a "zoning action" within meaning of statute permitting judicial review by circuit court for those aggrieved by a zoning action of the city council. West's Ann.Md.Code, Art. 66B, § 2.09(a)(1)(ii).

[12] Zoning and Planning 414 ⚿570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
Under statute permitting judicial review by circuit court for those aggrieved by a "zoning action" of the city council, the term "zoning action" includes reclassification by the city council, referring to piecemeal or spot zoning, and does not include comprehensive zoning or rezoning; "piecemeal and spot zoning" concern specific pieces of property, and such actions are ordinarily initiated by the property owner, while "comprehensive zoning," by contrast, covers a larger area and is normally initiated by the local government. West's Ann.Md.Code, Art. 66B, § 2.09(a)(1)(ii).

[13] Zoning and Planning 414 ⚿570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
A zoning text amendment is not a "zoning action," for purposes of statute permitting judicial review by circuit court for those aggrieved by a "zoning action" of the city council. West's Ann.Md.Code, Art. 66B, § 2.09(a)(1)(ii).

[14] Zoning and Planning 414 ⚿570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
Generally, a zoning reclassification of a specific property is an "administrative action," and comprehensive zoning or rezoning is a "legislative action," for purposes of determining whether a zoning authority's action is subject to judicial review.

[15] Zoning and Planning 414 ⚿570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
Ordinarily, the adoption of zoning text and a zoning text amendment is a "legislative action," for purposes of determining whether a zoning authority's action is subject to judicial review.

[16] Zoning and Planning 414 ⚿570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
City council's enactment of ordinance that granted permission for establishment, maintenance, and operation of parking lot to be used in connection with proposed apartment building was a "zoning action," under statute permitting judicial review by circuit court for those aggrieved by a "zoning action" of the city council, such that residents were entitled to statutory judicial review of ordinance, as enactment of ordinance constituted an administrative grant of a conditional use, or what was tantamount to a conditional use, applicable

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to a specific property; disapproving, *MBC Realty v. Mayor and City Council of Baltimore*, 160 Md.App. 376, 864 A.2d 218. West's Ann.Md.Code, Art. 66B, § 2.09(a)(1)(ii).

[17] Zoning and Planning 414 563.1

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k563 Nature and Form of Remedy
414k563.1 k. In General. Most Cited Cases
In assessing the nature of judicial review of a zoning authority's decision, it is important to consider the nature of the attack on the action in question; in other words, in a given situation, there may be both legislative and administrative acts by a legislative body, and what is being attacked may determine the nature of review.

****418** J. Carroll Holzer, Towson, for Appellants.
Sandra R. Gutman (Ralph S. Taylor, City Sol., on the brief), Baltimore, for Appellee.

Panel: JAMES R. EYLER, KENNEY, LAWRENCE F. RODOWSKY (Ret., specially assigned), JJ.
JAMES R. EYLER, Judge.
***660** We are asked to determine the meaning of "zoning action," as used in Maryland Code (1957, 2003 Repl.Vol.), Article 66B, § 2.09(a)(1), which provides for judicial review of "zoning action" by the City Council of Baltimore. We will use this as an opportunity to clarify our prior decision, interpreting the same language, in *MBC Realty v. Mayor and City Council of Baltimore*, 160 Md.App. 376, 864 A.2d 218 (2004).

Douglas M. Armstrong, an appellant, and several other owners of residential properties in Baltimore City,[FN1] filed in the Circuit Court for Baltimore City a petition for judicial review of an ordinance (hereinafter Ordinance 04-659), enacted by the Mayor and City Council, appellee. The petition was filed pursuant to Maryland Code, Article 66B, section 2.09, and Title 7, chapter 200 of the Maryland Rules. Ordinance 04-659 granted permission for the establishment, maintenance, and operation of a parking lot to be used in connection with a proposed apartment building at 2807 Cresmont Avenue.

FN1. The other appellants are Joan L. Floyd, Howard B. McElwain, Jorge A. Gonzalez, F. Ernesto Kellum, Glen D. Gaddy, Jeffrey Groden-Thomas, and Wendi Groden-Thomas.

***661** Appellants challenged Ordinance 04-659 on the grounds that (1) the City Council violated various provisions in the zoning code and in the subdivision regulations, and (2) Ordinance 04-659 constituted an unlawful taking of appellants' property.

Appellee filed a motion to dismiss, asserting there was no statutory right of judicial review in circuit court. The circuit court granted the motion. Appellants filed a motion to alter or amend judgment, which the circuit court denied.

Appellants appealed to this Court. Appellee moved to dismiss the appeal, contending that there was no statutory right of judicial review, and as a result, we had no jurisdiction to consider the appeal. In a prior unreported opinion, we granted appellee's motion to dismiss the appeal, and appellants petitioned for certiorari to the Court of Appeals. The Court of Appeals reversed and remanded the case to us to determine whether the circuit court had jurisdiction to consider the petition for judicial review. *See Armstrong v. Baltimore City*, 390 Md. 469, 475, 889 A.2d 399 (2006). We conclude that there was a right of judicial review in the circuit court and, thus, shall reverse and remand the case to the circuit court for further proceedings.

****419 Factual Background**

On November 12, 2002, the Department of Housing and Community Development issued a permit to Cresmont Properties, LLC (Cresmont),[FN2] the developer of a 26-unit apartment building at 2807 Cresmont Avenue, to construct the apartment building with 33 off-street parking spaces. Appellants appealed the

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issuance of this permit to the Board of Municipal and Zoning Appeals (the Board), contending that the project violated section 10-504(a) [FN3] of the Baltimore City Zoning Code (the Zoning Code). Appellants based their argument on the ***662** fact that the property was in the Charles Village/Remington parking lot district,[FN4] governed by Title 10, subtitle 5, and there was no parking lot ordinance authorizing the construction of the parking lot. The Board determined that because section 10-201 of the Zoning Code required " accessory" [FN5] off-street parking for all newly-erected structures, [FN6] Title 10, subtitle 5 did not apply, and a separate parking lot ordinance was not necessary.

FN2. Cresmont is not a party to this case.

FN3. Section 10-504(a) provides, "[N]o land may be used as a parking lot ... unless authorized by an ordinance of the Mayor and City Council."

FN4. The Zoning Code contains two parking lot districts. One district is located in the central business area, and the other is located in the Charles Village/Remington area.

FN5. "Accessory use" is defined as a use that "(1) serves and customarily is incidental and subordinate to the principal use or structure; (2) is subordinate in area, extent, or purpose to the principal use or structure; (3) contributes to the comfort, convenience, or necessity of occupants, business, or industry in the principal use or structure served; and (4) ... is located on the same lot as the principal use or structure served." Zoning Code section 1-102.

FN6. Section 10-201 provides in full, "For all newly-erected structures and all newly-established uses of land, accessory off-street parking facilities must be provided for that structure and use, as required by this title."

Appellants filed a petition for judicial review in circuit court, alleging that the Board erred in approving the issuance of the permit without requiring the enactment of a separate parking lot ordinance. On November 4, 2003, the circuit court ruled in favor of appellants, basing its determination on the fact that the Zoning Code did not expressly except accessory uses from the requirements of section 10-504(a). Therefore, the circuit court ruled that a parking lot ordinance was required before a City agency could issue a permit and ordered that the construction permit be revoked.[FN7]

FN7. Neither this Court nor the Court of Appeals has decided whether City Council approval, processed in the form of a conditional use, was required under the law as it existed at the time of the issuance of the first permit in this case but, for present purposes, we assume it was because the circuit court so ruled and that decision was binding on the parties.

Appellee noted an appeal to this Court, but this Court dismissed the appeal on jurisdictional grounds. *See* ***663***Mayor and City Council of Baltimore v. Armstrong*, No. 2096, Sept. Term 2003, 163 Md.App. 704, filed August 10, 2005.

Subsequently, Cresmont requested the City Council to approve a parking lot ordinance permitting 33 off-street parking spaces at the Cresmont Avenue property. Bill 03-1228, which provided for such accessory parking, was introduced in the City Council, and the Council approved it. On March 25, 2004, the Mayor signed the bill as Ordinance 04-659, effective 30 days later. Pursuant to the Ordinance, a new construction permit was issued to Cresmont. Ordinance 04-659 is the subject of this appeal.

****420** On December 2, 2004, in order to conform the City Code to prior practice,[FN8] the City Council approved Ordinance 04-855, amending the definition of "parking lot" in § 10-501 [FN9] of the Zoning Code to exclude accessory parking. As a result of the amendment, appellee asserts that it is no longer necessary, under section 10-504(a), that a parking lot ordinance be enacted to approve the construction of

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off-street accessory parking mandated by section 10-201.[FN10]

> FN8. The City Council explained in the Recitals to Ordinance 04-659, "By long-standing administrative practice by the City, required accessory parking uses do not require a Parking Lot Ordinance. Certain individuals are, however, contesting the practice in court. To expedite the development of the apartment building, the applicant requests that this Ordinance be granted."
>
> FN9. Section 10-501 now provides, "In this subtitle, 'parking lot' means land used for the non-accessory off-street parking of 3 or more motor vehicles, together with the adjoining and perimeter areas required by this subtitle or by any other law of Baltimore City." Prior to the amendment, the language was identical except that it did not contain the word "non-accessory."
>
> FN10. Appellants challenged Ordinance 04-855 in circuit court. The circuit court upheld the validity of the ordinance, and the appeal from that ruling is pending in this Court. *See Armstrong v. Mayor and City Council of Baltimore,* No. 2210, Sept. Term 2005.

On April 19, 2004, appellants filed a petition for judicial review of Ordinance 04-659 in circuit court, asserting that Maryland Code, Article 66B, section 2.09(a)(1) provided a statutory right of appeal because approval of Ordinance 04-***664** 659 constituted "zoning action" within the meaning of that section. Appellee filed a motion to dismiss, arguing that the appeal was erroneously brought under section 2.09 and Title 7, Chapter 200 of the Maryland Rules; there was no statutory authority for bringing the appeal; and the circuit court lacked subject matter jurisdiction to decide the appeal. After a hearing on the motion, by order dated August 13, 2004, the circuit court dismissed the petition. By order dated August 18, 2004, the circuit court also denied appellants' subsequent motion to alter or amend judgment.

On August 13, 2004, appellants appealed to this Court, and appellee filed a motion to dismiss the appeal, asserting that we too lacked subject matter jurisdiction. By order dated March 14, 2005, we dismissed the appeal.

On June 16, 2005, the Court of Appeals granted appellants' petition for certiorari, and on January 6, 2006, reversed and remanded the case to us for further proceedings. The Court of Appeals noted that section 2.09(e) of Article 66B of the Maryland Code provides for a right of appeal to this Court from any decision of the circuit court. *Armstrong,* 390 Md. at 475, 889 A.2d 399. The Court further explained,

It does not matter whether the Circuit Court did or did not have jurisdiction to entertain the judicial review action, whether it was right or wrong in its ruling. That is what the appeal is to resolve. So long as the Circuit Court entered a final or otherwise appealable judgment, which it did, an appeal will lie.

Id.

In this Court, appellants contend that Ordinance 04-659 was a conditional use authorization by the City Council, which constituted a "zoning action" subject to judicial review. Appellants argue that the conditional use authorization was an administrative, as distinguished from a legislative, act and the administrative grant of a conditional use is a "zoning action."

In response, appellee contends that, because of the subsequent enactment of Ordinance****421** 04-855, this case is moot and should be dismissed. Relying heavily on ***665***MBC Realty, LLC, supra,* appellee also contends that Ordinance 04-659 was not a conditional use authorization, and even if it were, conditional use authorizations are not subject to judicial review under section 2.09.

We conclude that the case is not moot and § 2.09 did provide a right of judicial review.

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Discussion

Mootness

Appellee argues that, because of the enactment of Ordinance 04-855, an ordinance approving a parking lot that is an accessory use is no longer required, and therefore, the issue of whether appellants are entitled to judicial review of Ordinance 04-659 is moot.

Appellee relies on *Lake Falls Ass'n v. Bd. of Zoning Appeals of Baltimore County*, 209 Md. 561, 121 A.2d 809 (1956), and *Grau v. Bd. of Zoning Appeals of Baltimore County*, 210 Md. 19, 122 A.2d 824 (1956). In both cases, the challenge was to a change in zoning classification with respect to a specific property. In both instances, the zoning classification under attack was again changed prior to a decision on appeal. In each case, the Court of Appeals concluded that the issue was moot.

[1] In *Lake Falls* and *Grau*, mootness was apparent because the zoning classifications were under attack, not an action taken pursuant to the classification, and the classification was changed prior to a decision on appeal. By the time the case was heard, the properties in question were no longer subject to that classification. In the case before us, the question of whether a parking lot ordinance is required for the Cresmont property may well be moot, but the effect of Ordinance 04-855 on the building permit process is not before us, and the record is insufficient for us to make that determination. That determination may be made on remand. Additionally, appellants filed a separate action attacking the validity of Ordinance 04-855. The circuit court upheld its validity, and that case is now pending in this Court. *See Armstrong v. ***666** Mayor and City Council of Baltimore*, No. 2210, Sept. Term 2005.

Regardless of the above, the issue before us is a matter of public importance which we can address even if the issue is moot. *See J.L. Matthews, Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 96-97, 792 A.2d 288 (2002). The issue enables us to clarify what constitutes "zoning action" by the City Council so that all interested persons will know what procedural avenue for seeking judicial review is applicable in a given situation. It also enables us to limit overly broad language in *MBC Realty*, our prior opinion.

Judicial review

General principles

[2] Technically, a circuit court does not exercise "appellate" review of a decision by a local administrative or legislative body. *Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 490-91, 693 A.2d 757 (1997); *Shell Oil Co. v. Supervisor of Assessments of Prince George's County*, 276 Md. 36, 43, 343 A.2d 521 (1975) ("[T]he exercise of appellate jurisdiction requires a prior action by some judicial authority, or the prior exercise of judicial power[.] ... [R]eview of the decision of an administrative agency is an exercise of original jurisdiction and not of appellate jurisdiction.").

[3] The basis for judicial review of a decision by a local administrative or legislative body acting in an adjudicatory or ****422** quasi-judicial capacity may be (1) a *statute* or (2) common law or an equity writ (mandamus, injunction, certiorari, or declaratory judgment). *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 500, 331 A.2d 55 (1975); *Lohss v. State*, 272 Md. 113, 116, 321 A.2d 534 (1974). We shall refer to adjudicatory or quasi-judicial actions as administrative actions.

In both instances referred to above, the circuit court is exercising original and not appellate jurisdiction. *Shell Oil*, 276 Md. at 43, 343 A.2d 521. Nevertheless, judicial review actions based on statute were regularly called "appeals" prior to the *Shell Oil* case. Moreover, even since the *Shell Oil* case, ***667** such actions have frequently been referred to as "appeals" in cases, statutes, and the Maryland Rules. *See Gisriel*, 345 Md. at 495, 693 A.2d 757. In 1993, the Court of Appeals adopted Title 7 of the Maryland Rules, which reflected the correct terminology and referred to statutory review of an act by an administrative agency as an action for

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judicial review. Rule 7-201. Despite the language of Title 7, actions for judicial review based on statute are still frequently called "appeals" or, sometimes, "administrative appeals."

[4] In the absence of a statutory basis for judicial review of administrative decisions by a local body, such decisions are reviewable, based on a court's inherent power, in an action invoking the original jurisdiction of the circuit court, through the writ of mandamus, by injunction, declaratory action, or by certiorari. *Gould*, 273 Md. at 500-04, 512, 331 A.2d 55; *see also Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 542, 723 A.2d 440 (1999); *Baltimore Imp. Car Serv. & Storage, Inc. v. Maryland Port Auth.*, 258 Md. 335, 342, 265 A.2d 866 (1970); *Hammond v. Love*, 187 Md. 138, 144, 49 A.2d 75 (1946); *Heaps v. Cobb*, 185 Md. 372, 378-79, 45 A.2d 73 (1945); *Hecht v. Crook*, 184 Md. 271, 280, 40 A.2d 673 (1945).

Based on *Gisriel* and *Bucktail*, it is clear that the *Gould* principle applies not only to the acts of administrative agencies but also extends to the acts of legislative bodies when the acts are administrative in nature. In *Gisriel*, the decision maker was the City Council of Ocean City, and in *Bucktail*, the decision maker was the County Council of Talbot County. In both instances, the *Gould* principles were applied.

There is little, if any, difference in the standard of review between statutory judicial review of an administrative action and a non-statutory review under *Gould* and its progeny. While the language is not always the same, the Court of Appeals has, on several occasions, stated that the substantial evidence or arbitrary or capricious test, usually associated with statutory judicial review of administrative actions, applies to non-statutory review of administrative actions. *See Bucktail*, 352 Md. at 550-52, 723 A.2d 440; ***668***Goodwich v. Nolan*, 343 Md. 130, 147, 680 A.2d 1040 (1996); *Silverman v. Maryland Deposit Ins. Fund Corp.*, 317 Md. 306, 325-26, 563 A.2d 402 (1989); *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel County*, 273 Md. 245, 255-56, 329 A.2d 18 (1974). In *Harvey v. Marshall*, 389 Md. 243, 295-304, 884 A.2d 1171 (2005), the Court of Appeals reviewed the two different lines of cases and concluded that the standard of review was essentially the same.

[5] A legislative or quasi-legislative decision, as distinguished from a quasi-judicial or administrative decision, is also subject to court review, by invoking the court's original jurisdiction. Unlike ordinary statutory and nonstatutory judicial review of administrative decisions, legislative actions are subject to much more limited review. ****423***County Council of Prince George's County v. Offen*, 334 Md. 499, 506-07, 639 A.2d 1070 (1994); *Dep't of Natural Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 221-24, 334 A.2d 514 (1975) (where a government body "is acting in a manner which may be considered legislative in nature ..., the judiciary's scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries").

Administrative versus legislative

[6][7] In light of these general principles, the first question we must resolve is whether, in enacting Ordinance 04-659, the City Council was acting in a quasi-judicial, or administrative capacity, rather than in a legislative one. "The difference between adjudicative and legislative facts is not easily drawn[.]" *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 711-12, 376 A.2d 483 (1977). Adjudicative facts are "facts about the parties and their activities, businesses and properties. They usually answer the questions 'of who did what, where, when, how, why, with what motive or intent [.]' " *Id.* at 712, 376 A.2d 483 (quoting Davis, Administrative Law Supplement, § 7.02 (1970)). On the other hand, "legislative facts 'do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.' " *Id.* (quoting Davis, *supra*, at ***669** section 7.02). The difference essentially depends on "whether the decision is to be made on individual or general grounds." *Id.*; *see also Bucktail*, 352 Md. at 545, 723 A.2d 440 ("This determination is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds."). Moreover, it is not determinative that a

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zoning authority's decision may dramatically affect an individual; rather, "it is the nature of the decision's fact-finding process, not the ultimate effect of the decision" that determines whether the action is adjudicative or legislative in nature. *Woodward & Lothrop*, 280 Md. at 712, 376 A.2d 483.

[8][9] The distinction between a legislative body acting administratively or legislatively has been discussed in the zoning context. For example, the legislative body acts in a legislative capacity when it engages in comprehensive, rather than piecemeal, rezoning proceedings because it does not consider and determine adjudicative facts concerning particular parties. *Id.* The focus is not on a single piece of property, but on a "considerable number of properties as they relate to each other and to the surrounding area." *Id.* at 713, 376 A.2d 483. By contrast, in piecemeal rezoning hearings, the zoning authority "considers a single piece of property and must make ... factual determination[s]." *Id.* at 712, 376 A.2d 483. Therefore, piecemeal rezoning hearings are administrative in nature, even though the final action in granting or denying the reclassification is legislative in character. *Bucktail*, 352 Md. at 545, 723 A.2d 440 (citing *Hyson v. Montgomery County Council*, 242 Md. 55, 64-65, 217 A.2d 578 (1966)).

In *Mayor and Council v. Woodmont Country Club*, 348 Md. 572, 705 A.2d 301 (1998), the issue before the Court of Appeals was whether there was a right of reasonable cross-examination at a hearing in which the City passed several ordinances, officially levying special assessments against a particular property in connection with construction of a road and water main.

The City argued Woodmont had no right of cross-examination because the hearings were legislative in nature. The Court ***670** found that, although the determination of whether to impose a special assessment and the manner of doing so are legislative determinations, the hearing process****424** itself was adjudicative in nature. *Woodmont*, 348 Md. at 584, 705 A.2d 301. The Court explained:

[T]he application of the mode of assessment to a particular piece of property to determine the specific amount to be assessed against that particular property is an adjudicative act. The proceeding to determine the amount of benefit to a specific piece of property is adjudicatory or quasi-judicial.... Thus, the determination of whether the Council is acting in a quasi-judicial or quasilegislative manner is dependent upon the nature of the particular act in which it is engaged. In a case such as this, where the Council was holding a hearing, receiving written and oral testimony, and considering evidence to determine the specific amount of special benefit to a particular piece of property, the Council at that point was acting in a quasi-judicial capacity, even if earlier actions in the process or the final act of passing an ordinance to levy a special assessment constitute legislative functions.

Id. at 584-85, 705 A.2d 301.

[10] In this case, similar to *Woodmont*, the hearing to consider Ordinance 04-659 was adjudicative in nature. During the hearing before the Land Use and Planning Committee of the City Council, various members of the community testified regarding the effect the building and parking lot had on their and nearby properties. Committee members asked Cresmont to testify as to the economic impact of improving the Cresmont property and allowing accessory parking. The focus of the hearing was on a single piece of property and the effect of its development on surrounding properties.

In addition, under section 10-504 of the Zoning Code, in determining whether to allow use of land as a parking lot, the Mayor and City Council may consider several factors: (1) the need for the parking lot; (2) the proposed appearance of the parking lot; and (3) possible aesthetic damage to the area ***671** surrounding the parking lot. § 10-504(b). These factors involve fact-intensive consideration of a specific property.

Moreover, we note that the Zoning Code is divided into zoning districts (sometimes referred to as Euclidean districts), and the property at issue is in a B-2 district. *See* Code Title 6 for description of business districts. The Code also has parking lot districts, however, which overlay the other districts. *See* Code § 10-501, et seq. Title 10 of the Zoning Code legislatively creates parking lot districts and gives the Council authority to approve parking lots within those districts. The Council is required to approve each parking lot and

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may impose conditions as part of any approval that may vary from property to property. The action is property-specific, and therefore, appears to be an administrative action.

While what is quasi-legislative and what is quasi-administrative is sometimes difficult to discern, in general, Title 16 of the Zoning Code reflects the distinction between legislative and administrative action. This section distinguishes between "legislative authorizations" and "zoning legislation." "Legislative authorization" means an ordinance that relates to a "specific property," and includes: (1) a change in the zoning classification of any property; (2) a conditional use; or (3) a Planned Unit Development. § 16-101(b). "Zoning legislation" means: (1) any legislative authorization and (2) any amendment to this article. § 16-101(c). Conditional uses are categorized in section 16-101 with zoning reclassifications and ordinances that relate to a specific property, as contrasted with text amendments. We are not suggesting that all "legislative authorizations" are administrative**425 acts and all "zoning legislation" are legislative acts. Generally, however, "legislative authorizations" have more characteristics of administrative, rather than legislative, acts, and "zoning legislation" has more characteristics of legislative, rather than administrative, acts.

Appellants argue that Ordinance 04-659 was the grant of a conditional use. Appellee argues that it was not a conditional use, primarily because it is referred to in the Zoning Code as a "parking lot ordinance," not a conditional use.

*672 With respect to that issue, we note that Title 10, subtitle 5 (parking lot districts) does not reference Titles 14 (conditional uses) or 16 (legislative authorizations and amendments). It merely requires compliance with any other requirements of the article. § 10-505. The City, however, treated Ordinance 04-659 as a conditional use, labeled it as such, and, more importantly, followed the procedures strictly reserved for conditional use bills under section 16-404 of the Zoning Code.

Ordinarily, after a bill proposing a legislative authorization receives a favorable vote of the City Council on second reading, the bill may not proceed to the third and final reading "until it has been placed on the third reading calendar as a hold-over item for at least 1 regular meeting of the City Council." § 16-404(b). Section 16-404(a) provides, however, that this hold-over requirement does not apply to conditional use bills. In this case, the second reading occurred on March 8, 2004, and the bill was approved as a result of the vote on its third reading on March 22, 2004. March 8 and March 22 were successive regular Council meetings, and therefore, the bill was not held over for one meeting, as would be required for a non-conditional use bill.

Thus, even though the Zoning Code refers to the grant of approval for a parking lot as a parking lot ordinance, it has the characteristics of a conditional use. The City Council, by legislative act, authorized parking lots, but retained the right to approve such lots on a property specific basis, apparently in order to be able to impose conditions as it deemed necessary. We conclude that Ordinance 04-659 either granted a conditional use or, for practical purposes, should be treated as having granted a conditional use. In any event, we conclude that the approval was administrative in nature.

Statutory versus non-statutory review

Having established that the City Council's action in approving Ordinance 04-659 was administrative in nature, we must address whether it is subject to judicial review, as a statutory action governed by Title 7, or a non-statutory action based on *673 the inherent power of the courts. Appellants have sought statutory judicial review.

The statutory basis for judicial review of action by the City Council appears in Article 66B, section 2.09(a)(1) of the Maryland Code. That section provides:
An appeal to the Circuit Court [for] Baltimore City may be filed jointly or severally by any person, taxpayer, or officer, department, board, or bureau of the City aggrieved by:
(i) A decision of the Board of Municipal and Zoning Appeals; or

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(ii) A zoning action by the City Council.

[11][12] It is clear under Maryland law that piecemeal zoning reclassifications with respect to specific properties are "zoning actions" within the meaning of section 2.09. As extensively discussed in **426*Bd. of County Comm'rs of Carroll County v. Stephans*, 286 Md. 384, 408 A.2d 1017 (1979),[FN11] and *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 160 Md.App. 376, 864 A.2d 218 (2004), the legislative history of section 2.09 reveals that "zoning action" includes "reclassification" by the City Council, referring to piecemeal or spot zoning, and does not include comprehensive zoning or rezoning. *See Stephans*, 286 Md. at 390-97, 408 A.2d 1017; *MBC Realty*, 160 Md.App. at 383-85, 864 A.2d 218. Piecemeal and spot zoning concern specific pieces of property, and such actions are ordinarily initiated by the property owner. *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 535, 814 A.2d 469 (2002). Comprehensive zoning, by contrast, covers a larger area and is normally initiated by the local government. *Id.*

> FN11. *Stephans* discusses Article 66B, section 4.08, rather than section 2.09. These sections, however, to the extent relevant here, are identical. *See MBC Realty*, 160 Md.App. at 385, 864 A.2d 218. Section 2.09 applies to Baltimore City and section 4.08 applies to non-charter counties. *Id.* at 382, 864 A.2d 218.

[13] Zoning text amendments are not "zoning actions." *See Stephans*, 286 Md. at 397, 408 A.2d 1017 ("Challenges in *674 the courts to the adoption of comprehensive plans, zoning texts, and zoning text amendments must come in proceedings other than administrative appeals."); *MBC Realty*, 160 Md.App. at 389, 864 A.2d 218.

[14][15] Generally, a zoning reclassification of a specific property is an administrative action, and comprehensive zoning or rezoning is a legislative action. Ordinarily, the adoption of zoning texts and zoning text amendments are legislative actions. *See Loh v. Town Plan & Zoning Comm'n*, 161 Conn. 32, 282 A.2d 894, 898 (1971); *Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 573-74 (Minn.2000); *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn.1983).

[16] We do not have to decide whether "zoning action" is synonymous with administrative action. The question we do have to decide, the final question before reaching a conclusion, is whether "zoning action" is limited to reclassifications. We conclude it is not, and "zoning action" includes an action by the City Council granting a conditional use or what is tantamount to a conditional use, utilizing an administrative type process, applicable to a specific property, when the thrust of the attack is directed at the use granted for the specific property. We have already concluded that Ordinance 04-659 falls within that category.

Legislative history, Stephans, and MBC Realty

In *Stephans*, the Court of Appeals determined that the Carroll County Commissioners' adoption of a comprehensive "mini" plan and text amendments were not "zoning actions" within the meaning of section 4.08. The Court did not have before it the question now before us, whether an administrative action as described above constitutes "zoning action." The Court reviewed the statutory history of Article 66B, sections 2.09 and 4.08, and we summarized that review in *MBC Realty*. 160 Md.App. at 382-85, 864 A.2d 218.

In the interest of completeness, we shall again briefly review that history. Article 66B was enacted in 1933. *675*Bd. of County Comm'rs of Cecil County v. Gaster*, 285 Md. 233, 239, 401 A.2d 666 (1979). It provided for judicial review only from decisions by a Board and only on writ of certiorari. *Stephans*, 286 Md. at 391, 408 A.2d 1017. In 1962, the statute was amended to provide for judicial review of **427 decisions by a Board, without the certiorari requirement. *Id.* at 392, 408 A.2d 1017. There was no corresponding right with respect to a decision by a local legislative body. With respect to those decisions, a party had to file an

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action invoking the original jurisdiction of a court. *MBC Realty*, 160 Md.App. at 383, 864 A.2d 218.

In 1970, sections 2.09 and 4.08 were amended to permit statutory judicial review of a "reclassification by the local legislative body," in addition to the already existing right to statutory review of a Board decision. *Stephans*, 286 Md. at 392, 408 A.2d 1017. The right of review was pursuant to chapter 1100, subtitle B of the Maryland Rules. *Id.* (forerunner to Title 7, chapter 200).

The 1970 amendments to Article 66B were extensive and were the result of recommendations made by the Maryland Planning and Zoning Law Study Commission (the Commission). The Commission was created by the legislature and submitted its final report in December, 1969 (the Report). According to the Report, the Commission was created because extensive development following World War II proved that the provisions in Article 66B were inadequate to cope with the resultant pressures.

The Report addressed the subjects of "planning," "reclassification," "special type controls," and the "Model Land Development Code" (the Model Code) [FN12] in separate sections. In general, the Commission recommended that (1) planning "be accorded its proper role in land use and development;" (2) with respect to reclassification, the "bench-made change-mistake rule" be clarified to allow for additional factors important to a change of land use; (3) as "special type controls," ***676** ordinances be adopted to encourage the use of planned unit development and to permit "conditional zoning;" and (4) charter counties review the Model Code and consider its adoption. With respect to "reclassification," the Commission described it as "[o]ne of the most troublesome areas of zoning [.]" Of particular interest is that the Commission observed that reclassifications were normally performed by a local legislative body, and there was no express right of "appeal" in Article 66B from such decisions. The Commission also noted, however, that the Court of Appeals had determined there was a right to judicial review of such decisions in any event, pursuant to its inherent power, and the "change-mistake rule" had been judicially developed in reviewing reclassifications.

FN12. The Model Code is described as having been prepared by Professor Jan Krasnowiecki of the University of Pennsylvania Law School as a possible alternative to article 66B.

Appendix A to the Report contained specific recommendations for amendments to Article 66B, with commentary. A note under the proposed amendment to section 2.08 referred to the note under section 4.08. The latter note stated:

This section is unchanged except for the inclusion of an appeal process from reclassification decisions of the local legislative body.

It can be argued that under the present system appeals from reclassification decisions may be launched in equity at any time. This has proven to be a detrimental factor to most persons concerned with such an action. The appeal process to be used, Chapter 1100, Subtitle B, Maryland Rules, requires noting of an appeal within thirty days and filing of the appeal within another ten days. This is ample time to bring an appeal for review[.] ...

In 1975, sections 2.09 and 4.08 were amended to substitute "zoning action" for "reclassification by the local legislative ***428** body." *Stephans*, 286 Md. at 393, 408 A.2d 1017. In addition, there were other amendments clarifying the right of appeal from circuit court decisions and permitting local jurisdictions to provide for appeals to circuit courts in addition to the appeal provided for in subsection (a). Those provisions are not relevant except that the Court, in *Stephans*, concluded that, because they were referenced in the titling and the ***677** change to "zoning actions" was not, the latter change was stylistic. *Id.* at 396, 408 A.2d 1017.

[17] We now turn our attention to *MBC Realty*. It is sometimes difficult to distinguish between an action that is quasi-legislative versus an action that is quasi-administrative in nature. In assessing the nature of judicial review, it is also important to consider the nature of the attack on the action in question. In other words, in a given situation, there may be both legislative and administrative acts by a legislative body,

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and what is being attacked may determine the nature of review. *See Cardon Investments v. Town of New Market*, 302 Md. 77, 485 A.2d 678 (1984).

If the action is legislative or quasi-legislative, it is not subject to ordinary judicial review, as previously stated. In *MBC*, the thrust of the attack was on text amendments that amended the applicable urban renewal plan and the Zoning Code to create a new conditional use. The actions were legislative in nature. The subsequent grant of a conditional use by the City Council was pursuant to the earlier legislative action and also contained conditions that affected more than one property. 160 Md.App. at 381, 864 A.2d 218. The issue in *MBC* was whether the Council's actions were subject to statutory judicial review. We concluded that the thrust of the attack was directed at legislative actions, and that the actions, considering them collectively, did not constitute "zoning action." There was a separate action pending, seeking non-statutory judicial review, in which the Council's actions were being legally challenged. We did not address the merits of the attack but simply stated that the merits could be pursued in that separate action.

In reaching our conclusion in *MBC*, rather than limiting our reference to conditional uses to the facts in that case, we used overly broad language, indicating that the grant of a conditional use could not constitute "zoning action" within the meaning of Article 66B. Generally, the grant of a conditional use applicable to a specific property is administrative and, when the attack is on that grant, as in this case, it constitutes ***678** "zoning action." To the extent it is inconsistent with this opinion, the language in *MBC Realty* is disapproved.

The conclusion we reach is consistent with the Commission's report in 1969, the subsequent amendments to Article 66B, the language "zoning action," and takes into account the development of the law relating to judicial review since the amendments to Article 66B. While the standard of review of an administrative action may be practically the same, whether statutory or non-statutory, we conclude that the certainty of timing requirements and the benefit of knowing the type of judicial review to seek are important aspects of judicial review. When uncertain, practitioners sometimes file two actions, one seeking statutory review and the other seeking non-statutory review, because if they file one action and are wrong, a court may not treat the action as if it had asserted the proper basis for review.

While there does not appear to be a prior reported opinion squarely on point, we note that the Court of Appeals, without addressing the issue, proceeded consistently with the result we reach in both ****429***Attman /Glazer P.B. Company v. Mayor and Aldermen of Annapolis*, 314 Md. 675, 552 A.2d 1277 (1989) (review of conditional use granted by City Council of Annapolis for construction of office building), and *Zellinger v. CRC Development Corp.*, 281 Md. 614, 380 A.2d 1064 (1977) (review of conditional use granted by City Council of Baltimore for establishment of housing for the elderly on specified property). In neither case was the issue of statutory versus non-statutory judicial review raised, however, and in addition, *Zellinger* was decided before *Stephans*. Additionally, we note that the Court, in *Gisriel*, suggested that section 4.08 which, for our purposes, is identical to section 2.09, is not limited to a change in zoning reclassification but could include other administrative actions. 345 Md. at 501 n. 16, 693 A.2d 757. It appears proper to characterize this statement as dicta, however.

For the a foregoing reasons, we conclude that appellants' action may proceed as a statutory judicial review action.

***679 JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.**

Md.App.,2006.
Armstrong v. Mayor and City Council of Baltimore
169 Md.App. 655, 906 A.2d 415

Briefs and Other Related Documents (Back to top)

- 2006 WL 1866263 (Appellate Brief) Appellants'

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Reply Brief and Appendix (May 26, 2006)

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Bucktail, LLC v. County Council of Talbot CountyMd.,1999.

Court of Appeals of Maryland.

BUCKTAIL, LLC

v.

The COUNTY COUNCIL OF TALBOT COUNTY et al.

No. 38, Sept. Term, 1998.

Jan. 27, 1999.

Developer petitioned for judicial review of county council's denial of its application for a growth allocation under the Chesapeake Bay Critical Area Protection Program. The Circuit Court, Talbot County, William S. Horne, J., upheld council's decision, developer appealed, and writ of certiorari was issued. The Court of Appeals, Rodowsky, J., held that: (1) council's decision was subject to judicial review; (2) substantial evidence standard of review applied; and (3) council's findings of fact were insufficient to permit judicial review, requiring remand for further findings.

Vacated and remanded.

West Headnotes

[1] Administrative Law and Procedure 15A 651

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak651 k. In General. Most Cited Cases

Rule governing petitions for judicial review does not grant a right of judicial review, and it is inapplicable where judicial review is not authorized by statute. Md.Rule 7-202.

[2] Zoning and Planning 414 570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases

County council's denial of developer's application for a growth allocation under the Chesapeake Bay Critical Area Protection Program was subject to judicial review pursuant to circuit court's original jurisdiction to review actions of administrative agencies, despite absence of provision in county charter or zoning ordinance for judicial review of a zoning reclassification by the council. Code, Natural Resources, § 8-1801 et seq.; Code, Courts and Judicial Proceedings, § 12-301.

[3] Zoning and Planning 414 708

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)4 Questions of Fact
414k708 k. Permissions, and Certificates. Most Cited Cases

Substantial evidence standard of review applied to judicial review of county council's denial of developer's application for a growth allocation under the Chesapeake Bay Critical Area Protection Program, absent provision in county zoning ordinance with respect to judicial review of piecemeal rezoning. Code, Natural Resources, § 8-1801 et seq.; Code 1957, Art. 25A, § 5(U).

[4] Zoning and Planning 414 561

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k561 k. Review in General. Most Cited Cases

The determination of whether a local zoning authority is acting in an adjudicative or legislative manner, for purposes of judicial review, is dependent upon the nature of the particular act in which it is engaged; this determination is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds.

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[5] Administrative Law and Procedure 15A ⚿763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, Unreasonable or Capricious Action; Illegality. Most Cited Cases

Administrative Law and Procedure 15A ⚿788

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak788 k. Determination Supported by Evidence in General. Most Cited Cases
Where statute or ordinance makes no provision for judicial review, an implied limitation upon an administrative board's authority is that its decisions be supported by facts and that they be not arbitrary, capricious or unreasonable.

[6] Zoning and Planning 414 ⚿439

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(C) Proceedings to Procure
414k436 Hearing and Determination
414k439 k. Findings, Conclusions, Minutes, or Records. Most Cited Cases

Zoning and Planning 414 ⚿726

414 Zoning and Planning
414X Judicial Review or Relief
414X(D) Determination
414k726 k. Remand. Most Cited Cases
County council's findings of fact in support of its denial of developer's application for a growth allocation under the Chesapeake Bay Critical Area Protection Program were insufficient to permit judicial review, requiring remand for further findings; county's planning staff and planning commission recommended approval of developer's project, and council merely made conclusory statements based on criteria set forth in its zoning ordinance for amendments to zoning maps, without pointing to facts supporting its contrary conclusion. Code, Natural Resources, § 8-1801 et seq.

[7] Zoning and Planning 414 ⚿361

414 Zoning and Planning
414VII Administration in General
414k358 Procedure
414k361 k. Findings and Record. Most Cited Cases
Findings of fact necessary for judicial review of zoning decision must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions.

****440*532** Richard A. DeTar (Miles & Stockbridge, P.C.), on brief, Easton, for appellant.
****441** Michael L. Pullen,David R. Thompson (Brynja M. Booth, Cowdrey, Thompson & Karsten, P.A.; John White, all on brief), Easton, for appellees.

Argued before BELL, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, RAKER, WILNER and CATHELL, JJ.
***533** RODOWSKY, Judge.
In this appeal a real estate developer contends that Talbot County (the County) erroneously denied its application for a growth allocation under the Chesapeake Bay Critical Area Protection Program. For the reasons set forth below we shall hold that there was procedural error that requires a remand to the Talbot County Council (the Council).

I

In 1984, the General Assembly enacted the Chesapeake Bay Critical Area Protection Program (the Program). Chapter 794 of the Acts of 1984, codified as amended in Maryland Code (1974, 1990 Repl.Vol., 1998 Cum.Supp.), §§ 8-1801 through 8-1817 of the Natural Resources Article (NR). The purposes of the Program are:
"(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

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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."

Id. § 8-1801(b). The Chesapeake Bay critical area generally consists of the Chesapeake Bay, its tributaries to the head of tide, all designated State and private wetlands, and all land and water areas within 1,000 feet beyond the landward boundaries of designated State or private wetlands and the heads of tides of the Chesapeake Bay and its tributaries. *Id.* § 8-1807(a).

The General Assembly created the Chesapeake Bay Critical Area Commission (the Commission) to promulgate regulations and to administer the Program. *Id.* §§ 8-1803 and 8-1806. Each county within the critical area has primary responsibility for developing and implementing a local critical area protection program pursuant to criteria established by the Commission ***534** and subject to review and approval by the Commission. *Id.* §§ 8-1808(a), (d), and 8-1809. Each local program must designate the local critical area (the Critical Area), include a comprehensive zoning map for the Critical Area, and, as necessary, enact new or amended provisions of the jurisdiction's subdivision regulations, comprehensive or master plan, zoning ordinances or regulations, and enforcement provisions. *Id.* § 8-1808(c).

In 1986, the Commission promulgated regulations establishing the criteria for development in the Critical Area. Md. Regs.Code tit. 27, §§ 01.02.01 through 01.02.07 (1992) (COMAR). These regulations recognize three types of development areas: Intensely Developed Areas (IDAs), Limited Development Areas (LDAs), and Resource Conservation Areas (RCAs). COMAR § 27.01.02.02A. Local jurisdictions are directed to identify each of these three types of areas within their jurisdiction. COMAR § 27.01.02.02E.

The developer in the case before us seeks to have its Critical Area property reclassified under the County's program from RCA to LDA.

LDAs are defined as
"those areas which are currently developed in low or moderate intensity uses. They also contain areas of natural plant and animal habitats, and the quality of runoff from these areas has not been substantially altered or impaired. These areas shall have at least one of the following features:
"(1) Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre;
"(2) Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space;
"(3) Areas meeting the conditions of [COMAR § 27.01.02].03A [defining IDAs], but not [COMAR § 27.01.02].03B [regarding****442** the concentration of IDA features], of this regulation;
***535** "(4) Areas having public sewer or public water, or both."

COMAR § 27.01.02.04A.

RCAs are defined as
"those areas characterized by nature-dominated environments (that is, wetlands, forests, abandoned fields) and resource-utilization activities (that is, agriculture, forestry, fisheries activities, or aquaculture). These areas shall have at least one of the following features:
"(1) Density is less than one dwelling unit per 5 acres; or
"(2) Dominant land use is in agriculture, wetland, forest, barren land, surface water, or open space."

COMAR § 27.01.02.05A.

In the County the Critical Area zones overlay the pre-existing zoning.

Under the State statute the amount of growth of IDAs and LDAs allowed in each county's critical area is known as "growth allocation." NR § 8-1802(a)(4) (" 'Growth allocation' means the number of acres of land in the Chesapeake Bay Critical Area that a local jurisdiction may use to create new intensely developed areas and new limited development areas."). Each jurisdiction's growth allocation is limited to five percent of its RCA. NR § 8-1808.1(b); *accord* COMAR § 27.01.02.06A(1).

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When locating new IDAs or LDAs local jurisdictions are mandated to follow six guidelines. They are
"(1) New intensely developed areas should be located in limited development areas or adjacent to existing intensely developed areas;
"(2) New limited development areas should be located adjacent to existing limited development areas or intensely developed areas;
"(3) No more than one half of the allocated expansion may be located in resource conservation areas;
"(4) New intensely developed areas and limited development areas should be located in order to minimize impacts to habitat protection areas as specified in COMAR 27.01.09 ***536** and in an area and in a manner that optimizes benefits to water quality;
"(5) New intensely developed areas should be located where they minimize their impacts to the defined land uses of the resource conservation area;
"(6) New intensely developed areas and limited development areas in the resource conservation area should be located at least 300 feet beyond the landward edge of tidal wetlands or tidal waters."

COMAR § 27.01.02.06B.

The County has some 600 miles of shoreline and approximately forty percent of the County is located within the Critical Area. Within this Critical Area, 51,000 acres are RCAs; thus, five percent or 2,554 acres are available for growth allocation. One-half of the 2,554 acres available for allocation has been set aside for growth in or around the towns of Easton, Oxford, and St. Michaels. In early 1997, when the County was considering the request for growth allocation involved in this case, 2,150 acres had not yet been allocated.

Growth allocation within the County is administered by the Council, pursuant to § 19.14(c)(1)(iv) of the Talbot County Zoning Ordinance (1991), as amended. [FN1] Under this subsection "a person with a committed financial, contractual, or proprietary interest" in property in the Critical Area can initiate a growth allocation district boundary amendment. § 19.14(c)(1)(iv)[a]. An application is filed in the County Planning Office, along with a proposed site plan or subdivision plat, or both, that meet the County's development design standards and site plan review requirements. § 19.14(c)(1)(iv)[b]; *see* §§ 19.10 (development design standards) and 19.12 (site plan review). The application "should make the maximum effort to meet the intent of the Critical Area policies and the applicable ***537** design standards" and, specifically, ****443** should conform to the nine directives set forth below:

> FN1. Unless otherwise indicated, all statutory references are to the Talbot County Zoning Ordinance (1991), as amended.

"[1] Create lots or parcels that maximize the opportunities for clustered development that protect habitat and agricultural resources;
"[2] Locate structures so as to minimize impact on habitat protection areas and agricultural areas;
"[3] Provide a minimally disturbed buffer along the shoreline;
"[4] Minimize soil erosion and runoff;
"[5] Maximize protection of eroding shorelines;
"[6] Have a minimal impact or cause an improvement to stormwater, floodplain and stream characteristics;
"[7] Minimize impacts on non-tidal wetlands;
"[8] Maximize protection of plant and wildlife habitats, particularly for threatened and endangered species, plant and wildlife common to the Chesapeake Bay Region, and anadromous fish propagation waters; and
"[9] Maximize protection of forests."

§ 19.14(c)(1)(iv)[b]. Recommendations of the Planning Officer and the Planning Commission are to be submitted to the Council within sixty days after the application is filed. § 19.14(c)(1)(iv)[c].

Whether the recommendations are to grant or to deny the application, the Council "shall introduce a bill (legislation) for the proposed amendment and hold a public hearing in order that interested parties and citizens shall have an opportunity to be heard." § 19.14(c)(1)(iv)[d]. The Council is required to keep "[a] complete record" of the public hearing, including "the vote of all members of the Council in deciding all questions relating to the proposed growth allocation district boundary amendment." § 19.14(c)(1)(iv)[e].

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Prior to voting on the growth allocation bill a majority of council members must make a site visit to the property "to inspect the physical features of the property and to determine the character of the surrounding area." § 19.14(c)(1)(iv)[f]. If the Council votes ***538** favorably on the growth allocation bill, the Council submits the application to the Commission "for approval as an amendment to the County's Critical Area Program." § 19.14(c)(1)(iv)[g]. No provision is made in the County Zoning Ordinance regarding the Council's rejection of a growth allocation bill. Prior to the Council's rejection of the growth allocation requested in this case the Council had never failed to enact a growth allocation bill for a project that met the requisite criteria.

The Council's power to make piecemeal reclassifications of properties within the boundaries of the Critical Area is governed under § 19.14(c)(1)(iv) ("Growth Allocation District Boundary Amendments in Critical Area"). Section 19.14(c)(1)(ii) addresses the Council's power to make "[a]mendments to the Official Zoning District Maps excepting properties within the boundaries of the Critical Area where growth allocation is requested." Unlike the growth allocation provisions, § 19.14(c)(1)(ii)[i] specifically provides:
"The fact that an application for a district boundary amendment complies with all the specific requirements and purposes set forth in this Ordinance shall not be deemed to create a presumption that the proposed district boundary amendment would in fact be compatible with surrounding land uses and is not, in itself, sufficient to require approval."

Further, § 19.14(c)(1)(ii)[k], unlike the growth allocation provisions, addresses the denial of a district boundary amendment by imposing a one year waiting period before reapplication.

II

The appellant, Bucktail, LLC (Bucktail), was formed in 1995 to acquire and develop a 93.59 acre tract in the County known as Dawson's Farm. This property is located about six-tenths of a mile west of the town of St. Michaels. A portion of the property, 20.83 acres, is located outside of the Critical Area and is zoned Town Residential.

The remaining 72.76 acres of Dawson's Farm are within the Critical Area and, by that program, are zoned RCA. By statute, development in RCAs is limited to one unit per twenty ***539** acres, thereby limiting development****444** of Bucktail's RCA parcel to three dwelling units. NR § 8-1808.1(d); *accord* § 19.3(a)(1)(ii)[a].

In August 1995, Bucktail applied for a growth allocation to reclassify by district boundary amendment the 72.76 acre parcel from RCA to LDA within the Critical Area, and to reclassify that parcel's underlying zoning from Rural Conservation (RC) (Critical Area only), § 19.3(a)(1)(ii), to Rural Residential (RR) (Critical Area only). § 19.3(a)(1)(iii). RR zoning and LDA zoning permit development of one dwelling unit per five acres. Thus, with a growth allotment, that is, a reclassification to LDA in the overlaid Critical Area zoning, together with a reclassification to RR in the underlying Euclidean zoning, Bucktail would be able to develop fourteen dwelling units on the Critical Area parcel.

In a memorandum to the Planning Commission, the planning staff opined that "[Bucktail's] application has met all mandatory submittal requirements." Within a week thereafter the Planning Commission recommended approval of Bucktail's application, subject to certain conditions that are not presently relevant. On January 28, 1997, Bills Nos. 640 and 641 were introduced into the Council.[FN2]

> FN2. Each bill would have effected the requested changes. The difference was that Bill No. 640 conditioned the changes upon the approval and recordation of a final plat within two years after approval of a preliminary plat.

Following a public hearing on the two bills, the Council voted four to one against Bill No. 641 on March 11, 1997. The Council made findings of fact. Those relevant to the issues here are the following:
"(5) The proposed District Boundary Amendment from

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RC Rural Conservation to RR Rural Residential is a Critical Areas Growth Allocation request and as such the Council must find that the request complies with the Critical Area Policies and applicable design standards set forth in Section 19.14(c)(iv) of the Zoning Code of Talbot County.

***540** "(6) The County Council finds 'upon the basis of the evidence of record' that the request for Critical Area Growth Allocation does not comply with all of the Critical Area Policies and applicable design standards as referenced in Section 19.14(c)(iv) of the Zoning Code of Talbot County.

"(7) The County Council finds that the Growth Allocation request is not consistent with the purposes and intent of the Talbot County Comprehensive Plan.

"(8) The County Council finds that the proposed change will not be compatible with existing and proposed development and land use in the surrounding area.

"(9) The County Council finds upon the basis of the evidence of record that there have been no population changes that would suggest this reclassification to be wise.

"(10) The County Council finds that the availability of public facilities and the present and proposed transportation patterns do not support the reclassification.

"(11) Five members of the Council inspected the site prior to voting.

"(12) In light of the above findings, the Bill requesting Critical Area Growth Allocation and reclassification of the property from RC Rural Conservation to RR Rural Residential will be denied."

Bill No. 640 was tabled.

Bucktail petitioned for judicial review. Neighboring property owners, appellees John W. Renner, Richard J. Conway, Robert Porter, and Sidney H. Dickson (collectively RCPD), intervened in support of the County's decision. The circuit court affirmed, ruling that there was substantial evidence to support the Council's denial of the requested growth allocation, based on the findings that the request did not comply with all of the § 19.14(c)(1)(iv) criteria and that the request was not consistent with the County comprehensive plan nor with existing and proposed development in the area. Further, the court disagreed with Bucktail's argument that once it met the § 19.14(c)(1)(iv) criteria the Council must approve the growth allocation request.

***541** Bucktail appealed to the Court of Special Appeals. On our own motion we issued a ****445** writ of certiorari prior to consideration of the matter by that court.

The appellees have moved to dismiss Bucktail's appeal because there is no statute authorizing review of the Council's action on a growth allocation application. If the matter is properly before us the parties join issue over the correct standard of review and over the application of the correct standard to the facts of this case. In addition Bucktail argues that the Council failed to render specific findings of facts as required by law.

III

[1] The appellees have moved to dismiss, contending that there is no statute making the Council's action judicially reviewable. Bucktail's petition for appeal to the circuit court recites that it is filed "pursuant to Maryland Rule 7-202." The cited rule, however, does not grant a right of judicial review, and it is inapplicable where judicial review is not authorized by statute. *Urbana Civic Ass'n, Inc. v. Urbana Mobile Village, Inc.*, 260 Md. 458, 462-63, 272 A.2d 628, 631 (1971).

[2] The Charter that the County adopted in 1974 provides for a county manager form of government. Charter of Talbot County, Maryland (1977), Art. III. All powers which may be exercised by the County are vested in the Council. Charter § 202. A board of appeals is created under § 501 of the Charter which may hear and decide matters including "Zoning matters, exclusive of rezoning." Charter § 502(1). The County Zoning Ordinance, effective June 22, 1991, contains a provision for an "appeal" by "[a]ny person aggrieved by any decision of the Board of Appeals" to the Circuit Court for Talbot County. § 19.14(d)(1). There is, however, no provision in the Charter or Zoning Ordinance for judicial review of a zoning

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reclassification by the Council, comprehensive or piecemeal, within or without the Critical Area.

***542** Bucktail's reply to appellees' dismissal argument is that its petition may be considered to invoke the original jurisdiction of the circuit court under the doctrine illustrated in *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 331 A.2d 55 (1975). *Gould* held that there is an inherent right to judicial review of actions by an administrative agency, despite the fact that in *Gould* the applicable statute expressly provided that there would be no judicial review, absent certain conditions which admittedly were not met in that case. *Id.* at 500-01, 512, 331 A.2d at 65, 71.

Recently, in *Gisriel v. Ocean City Board of Supervisors*, 345 Md. 477, 693 A.2d 757 (1997), *cert. denied*, 522 U.S. 1053, 118 S.Ct. 702, 139 L.Ed.2d 645 (1998), we applied the *Gould* principle. In *Gisriel*, an "appeal" had been taken, pursuant to the Ocean City Charter, to the Circuit Court for Worcester County to review a determination by the City Council of Ocean City which in turn reviewed voter eligibility determinations by the Ocean City Board of Supervisors of Elections. Answering an argument that there was no right of appeal from the circuit court in view of Maryland Code (1974, 1998 Repl.Vol.), § 12-302(a) of the Courts and Judicial Proceedings Article (CJ), we held that the complaint in the circuit court, in addition to invoking the judicial review jurisdiction of the circuit court, invoked its mandamus jurisdiction so that the right of appeal was conferred by CJ § 12-301. In this connection we said that

"where a particular action against an administrative agency was allegedly brought under a statutory judicial review provision, and did not purport to be a mandamus action, this Court has looked to the substance of the action, has held that it could be treated as a common law mandamus or certiorari action, and has exercised appellate jurisdiction."

Gisriel, 345 Md. at 500, 693 A.2d at 768. *See also Heaps v. Cobb*, 185 Md. 372, 380, 45 A.2d 73, 76 (1945) (reviewing administrative action in the absence of statutory provision for judicial review); *Hecht v. Crook*, 184 Md. 271, 280, 40 A.2d 673, 677 (1945) (same).

Accordingly, the motion to dismiss the appeal is denied.

***543** IV

[3] Bucktail contends that the standard for review of the Council's determinations is substantiality of the evidence, asserting that ****446** Bucktail's entitlement to a growth allocation is not even fairly debatable. The appellees' response is that the Council's action was legislative. Appellees' point is not that legislative action is beyond challenge in the courts, but that the applicable standard of review is more favorable to the Council than substantiality of the evidence. Appellees rely on the distinction made in *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 334 A.2d 514 (1975). *Linchester* involved the constitutionality, under the separation of powers doctrine, of a statute that permitted a *de novo* jury trial of the reasonableness of administrative action in granting or denying a permit to build in wetlands. There, discussing how, "even absent [legislative authority], the judiciary has an undeniable constitutionally-inherent power to review, within limits, the decisions of ... administrative agencies," *id.* at 223, 334 A.2d at 523, we said:

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

Id. at 224, 334 A.2d at 523. *Accord Gisriel*, 345 Md. at 490 n. 12, 693 A.2d at 763 n. 12 ("Legislative or quasi-legislative decisions of local legislative bodies or administrative agencies are, of course, not subject to ordinary judicial review; instead, they are subject to very limited review by the courts.").

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***544** A

Note 12 in *Gisriel* cited only one zoning case, *County Council v. Offen*, 334 Md. 499, 639 A.2d 1070 (1994). *Offen* was a challenge to comprehensive rezoning. It was "a limited review of an action of an administrative agency, specifically, the adoption of the [Sectional Map Amendment] by the District Council." *Id.* at 507, 639 A.2d at 1073. There we plainly said: "Our decisions have consistently recognized that appellate review of a comprehensive rezoning is limited in scope." *Id.*, 639 A.2d at 1074. Numerous decisions of this Court were cited in support of that statement. *Id.* at 507-08, 639 A.2d at 1074. Here, the action under review is not comprehensive rezoning.

Appellees RCPD also cite *Board of County Commissioners v. Levitt & Sons, Inc.*, 235 Md. 151, 200 A.2d 670 (1964), for the quotation that this Court has "repeatedly held that the action of zoning or reclassification of zoning is a function that is legislative in nature." *Id.* at 158, 200 A.2d at 674. Immediately following that quoted language we further said:
"However, this does not prevent the Council from making *administrative* findings of fact, drawing administrative inferences, and arriving at administrative conclusions and decisions, when hearing an application for rezoning, and the statute clearly anticipates such action."

Id. Thus, a rezoning procedure is not necessarily wholly legislative or wholly adjudicatory. Piecemeal rezoning involves adjudicatory procedures, including administrative fact-finding, that form the basis of the legislative decision whether to approve or deny a rezoning application. As this Court has explained in a piecemeal rezoning case,"[i]t is clear to us, from the general law elsewhere and our previous decisions, that the provisions set forth above make it improper and inaccurate to characterize the whole proceeding at the hearing held by the Council when considering an application for reclassification and its action of denying or granting reclassification as quasi-legislative in nature or quasi-judicial in nature. The above provisions, without ***545** question, required the members of the Council to resolve disputed questions of adjudicative facts (as contradistinguished from legislative facts or judicial *action*) concerning particular parties. And, when the Council was considering and determining****447** these adjudicative facts concerning particular parties, it necessarily was performing a quasi-judicial function, even though its final action, in granting or denying the reclassification which was required to be based upon its findings of adjudicative facts, was quasi-legislative in character."

Hyson v. Montgomery County Council, 242 Md. 55, 64-65, 217 A.2d 578, 584 (1966) (citations omitted).

[4] The determination of whether a local zoning authority is acting in an adjudicative or legislative manner "is dependent upon the nature of the particular act in which it is engaged." *Mayor of Rockville v. Woodmont Country Club*, 348 Md. 572, 585, 705 A.2d 301, 307 (1998). This determination is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds.
"The difference between adjudicative and legislative facts is not easily drawn; ... adjudicative facts are facts about the parties and their activities, businesses and properties. They usually answer the questions 'of who did what, where, when, how, why, with what motive or intent' while legislative facts 'do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.' The difference, broadly speaking, involves whether the decision is to be made on individual or general grounds. Simply because an individual has a protected interest does not entitle him to a trial-type hearing where the matter to be determined involves issues of legislative fact. That the effect of a zoning authority's decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, ***546** that determines the party's right to an adjudicatory hearing."

Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 711-12, 376 A.2d 483, 497 (1977) (citations omitted) (involving comprehensive rezoning), *cert. denied sub nom. Funger v. Montgomery County*, 434 U.S. 1067, 98 S.Ct. 1245, 55 L.Ed.2d 769 (1978).

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The issue in *Hyson*, 242 Md. 55, 217 A.2d 578, was whether in a piecemeal rezoning the Montgomery County Zoning Ordinance required cross-examination at the reclassification hearing. The ordinance provided for a public hearing at which oral and written testimony could be submitted and of which a complete stenographic record was to be made. *Id.* at 64, 217 A.2d at 584. The county council was required to make its decision based on the evidence of record and approval or disapproval was to be on the merits. *Id.* This Court concluded that the ordinance conferred adjudicative functions on the county council when determining the facts at the rezoning hearing and therefore a right of reasonable cross-examination was permitted. *Id.* at 67, 217 A.2d at 585.

The County seeks to distinguish *Hyson* by comparing the procedural provisions in the ordinance governing that Montgomery County reclassification to the County's Zoning Ordinance. Section 19.14(c)(1)(iv)[e] of the County's Zoning Ordinance requires that "[a] complete record shall be kept of the hearing including the vote of all members of the Council in deciding all questions relating to the proposed growth allocation district boundary amendment." In the instant matter, a full transcript of the public hearing was prepared. It included a forty-four page presentation by representatives of Bucktail and thirty-four pages of comments and questions from the audience. The record also includes numerous exhibits, including a memorandum and reports from the planning commission and its staff. The parties to the instant proceedings have indicated to us no unwillingness to proceed on the record that has been made, and there is no issue presented to us concerning any claimed right to cross-examination. Consequently, any difference between the procedure that took place in ***547** deciding this particular rezoning application and the procedure in *Hyson* does not require a conclusion that reclassification in the Critical Area is wholly legislative.

A recent case illustrates how adjudicative fact-finding functions can result in a legislative decision. In ****448***Mayor of Rockville v. Woodmont Country Club*, 348 Md. 572, 705 A.2d 301, this Court considered whether there is a right of reasonable cross-examination at a hearing concerning the levy of a special assessment against a particular property in connection with the construction of a road and water main. The municipality argued that the special assessment hearing was legislative, in the nature of a tax, and that such legislative action is presumed correct even if the legislative body acted without any supporting evidence at all. *Id.* at 583-84, 705 A.2d at 306.

We disagreed, ruling that the hearing was adjudicative in nature: "The City's argument, however, confuses the legislative aspects of the special assessment process with the adjudicatory aspects of that process." *Id.* at 584, 705 A.2d at 306. We explained that while the ultimate decision was legislative, the proceeding involved was adjudicative in nature:

"This Court has stated that the determination of *whether* to impose a special assessment and the *mode* of imposing a special assessment are legislative determinations. Nevertheless, the application of the mode of assessment to a particular piece of property to determine the specific amount to be assessed against that particular property is an adjudicative act. The proceeding to determine the amount of benefit to a specific piece of property is adjudicatory or quasi-judicial.

....

"... In a case such as this, where the Council was holding a hearing, receiving written and oral testimony, and considering evidence to determine the specific amount of special benefit to a particular piece of property, the Council at that point was acting in a quasi-judicial capacity, even if earlier actions in the process or the final act of passing an ordinance ***548** to levy a special assessment constitute legislative functions."

Id. at 584-85, 705 A.2d at 306-07 (citations omitted).

Similarly, in this case, while the Council's ultimate action in granting or denying a map amendment utilizing a growth allocation is legislative in nature, the process of applying the Zoning Ordinance standards to the particular facts of Bucktail's property requires adjudicative or administrative fact-finding.

B

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The case before us involves a chartered county which has determined not to confer on the board of appeals jurisdiction in piecemeal amendments of the zoning ordinance map, although such a conferral is permitted under the Express Powers Act, Maryland Code (1957, 1998 Repl.Vol.), Art. 25A, § 5(U). [FN3] As pointed out for the Court by Chief Judge Prescott in *Hyson:*

> FN3. No argument is made in this case that under Article 25A the power to make piecemeal amendments of the zoning map must be conferred on the Board of Appeals, either originally or on review of the action of an administrative officer or agency or of a county council sitting in an adjudicatory manner. See *United Parcel Serv., Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 587-91, 650 A.2d 226, 235-37 (1994); *Hope v. Baltimore County*, 288 Md. 656, 664-67, 421 A.2d 576, 580-82 (1980); *Klein v. Colonial Pipeline Co.*, 285 Md. 76, 81-83, 400 A.2d 768, 771-72 (1979).

"*It should be carefully noted and remembered that the holding in any zoning or rezoning case, here or elsewhere, cannot be accurately appraised without a knowledge and consideration of the constitutional and statutory provisions and the local laws and zoning regulations prevailing at the time of the decisions, below and here.*"
242 Md. at 62, 217 A.2d at 583. None of the decisions that have been cited to us or that we have cited, *supra,* deals with a piecemeal rezoning by the county council of a home rule county where there is no express statutory provision for judicial review.

***549** Under the Regional District Act there is judicial review of the final action of the Montgomery County District Council on any application for a map amendment, and that proceeding is exclusive. Md.Code (1957, 1997 Repl.Vol., 1998 Cum.Supp.), Art. 28, § 8-105(a), (b). There is no express standard of review for those proceedings. Statutory judicial review is also applicable to a final district council decision in Prince George's County. *Id.* § 8-106(e). In such ****449** proceedings from the Prince George's County District Council there is a statutory standard of review which permits reversal or modification if, *inter alia,* the findings or decision are "unsupported by competent, material and substantial evidence in view of the entire record as submitted" or are "arbitrary or capricious." *Id.* § 8-106(i)(5), (6).

Under the provisions of the Zoning Enabling Act applicable to Baltimore City there is statutory judicial review of "a zoning action by the local legislative body." Md.Code (1957, 1998 Repl.Vol.), Art. 66B, § 2.09(a). "Nothing in [that] subsection shall change the existing standards for review of any zoning action." *Id.* Section 4.08 of Article 66B is applicable to non-home rule counties and to municipalities. Section 4.08(a) provides for judicial review at the instance of any person aggrieved "by a zoning action by the local legislative body." That subsection similarly does not "change the existing standards for review of any zoning action." *Id.* By way of contrast, under Articles 25A and 25B, respectively dealing with home rule for chartered and for code counties, there are no express statutory provisions for judicial review of piecemeal rezoning, if that power is exercised by the county council or county commissioners.

Thus, the County's argument to us distills to the question of whether, by its silence in its zoning ordinance with respect to any judicial review at all, the County has limited judicial review of the denial of Bucktail's application to the question of whether that denial was within the power of the Council.

[5] Absent a statutory standard of judicial review of administrative action the standard is that set forth in ***550***Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 273 Md. 245, 329 A.2d 18 (1974), where we said:
"[I]t is clear in Maryland that even '[w]here [a] statute or ordinance makes no provision for judicial review, an implied limitation upon an administrative board's authority is that its decisions be supported by facts and that they be not arbitrary, capricious or unreasonable.' "

Id. at 255, 329 A.2d at 25 (quoting *Heaps v. Cobb*, 185

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Md. 372, 380, 45 A.2d 73, 76 (1945)). *See also* *State v. Board of Education*, 346 Md. 633, 647, 697 A.2d 1334, 1341 (1997) (In "disputes between an individual or private entity and a government agency over a right, entitlement, benefit, or license which the individual or private entity claims is due under the law, ... courts have the authority, under Article IV of the Maryland Constitution and Articles 8 and 19 of the Maryland Declaration of Rights, to insure that the right, benefit, entitlement, etc., is not illegally or arbitrarily denied by the government").

This standard of review has been used in deciding the validity of a piecemeal reclassification that was effected by a local legislative body under a statutory scheme that did not provide any judicial review. *See* *Ellicott v. Mayor of Baltimore*, 180 Md. 176, 23 A.2d 649 (1942). That case was an appeal from a judgment of a court of the Eighth Judicial Circuit that sustained, against a challenge by protesting neighbors, the validity of an ordinance of the Mayor and City Council of Baltimore that had reclassified an unimproved lot, 100 feet by 145 feet, from residential to commercial use and that sustained the action of the Baltimore City Board of Zoning Appeals in granting a special exception to use the then commercially zoned lot for a gasoline filling station. The appeal arose when the procedural distinction between law and equity was in full bloom. Distinguishing between the council's action and the board of appeals' action, the property owner argued that the validity of the ordinance could not be questioned on the statutory appeal from the board's action. The owner relied on many cases, cited at 180 Md. at 180, 23 A.2d at 651, for the proposition that the challenge to the validity of ***551** an ordinance must be by a bill in equity. This Court held that the issue of the ordinance's validity could be heard by the court in the law action involving the appeal from the board, essentially to avoid a multiplicity of actions. [FN4] *Id.* at 180-81, 23 A.2d at 651.

FN4. At the time of the decision in *Ellicott* the rule was that an administrative zoning agency could not decide challenges to the validity of the zoning ordinance, even as it applied to the property involved. That rule is no longer the law. *See Holiday Point Marina Partners v. Anne Arundel County*, 349 Md. 190, 199-200, 707 A.2d 829, 834 (1998) (citing cases). When it was decided, therefore, *Ellicott* presented a stronger argument for "legislative" classification of the council's action than would be the case today.

****450** On the merits of the challenge to the validity of the ordinance in *Ellicott*, this Court affirmed, essentially applying a substantial evidence or fairly debatable test. The Court said:

"The nearest filling stations are a half mile to the west and a mile to the east. That provision may possibly be regarded as sufficient for the traffic, but it seems to the court that this is not so clearly true that the action of the City authorities and the Board should be reversed judicially as arbitrary and capricious. We must assume, if it is possible to do so, that these officials exercised their judgment on its sufficiency, and we cannot say that they did not, and acted without good reason. There will doubtless be some reduction in value of the neighboring property from construction of the additional filling station, some detraction from the beauty and attractiveness of the region as it has existed, but if the change is one within the police power of the City, not arbitrary and capricious, that is a detriment which must be suffered."

Id. at 184, 23 A.2d at 653.

Also instructive, and more recent, is *Bellanca v. County Commissioners of Kent County*, 86 Md.App. 219, 586 A.2d 62, *cert. denied*, 323 Md. 33, 591 A.2d 249 (1991). Kent County is a code home rule county, and, consequently, its zoning power is conferred through the incorporation by reference of Article 25A, Section 5(U) and (X) into Article 25B, Section 13. In ***552** Kent County's initial, comprehensive zoning pursuant to the Program the appellants' property had been zoned RCA. Shortly thereafter the appellants sought a piecemeal reclassification to LDA which the County Commissioners of Kent County denied, after having been advised by the Commission that the requested map amendment should be denied. The circuit court sustained that action. The Court of Special Appeals, speaking through Judge Robert M. Bell, now Chief

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Judge of this Court, affirmed on the ground that there was no mistake in the original zoning within the meaning of NR § 8-1809(h)(2)(i). The opinion makes no mention of any statute either providing for judicial review or establishing the standard for review. Nevertheless, the court said: "Because the standard of review is whether there is any substantial evidence in the record to support the decision of the County Commissioners, our focus is on whether that decision is supported by the record." *Bellanca*, 86 Md.App. at 230 n. 10, 586 A.2d at 68 n. 10.

Consistently with *Ellicott* and *Bellanca*, with the judicial review statutes for rezoning in jurisdictions other than the County, and with the Maryland law involving constitutionally based judicial review of administrative adjudicatory fact-finding in contexts other than rezoning, we hold that the standard for review in the instant matter is the substantiality of the evidence.

V

[6] Logically, the next step in our analysis would be to determine if the facts found by the Council are supported by substantial evidence. The difficulty here, however, is that the Council's "findings" are insufficient to permit judicial review.

"The court's task on review is *not* to ' "substitute its judgment for the expertise of those persons who constitute the administrative agency[.]" ' A reviewing 'Court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.' A court's role is limited to determining if there is substantial ***553** evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law."

United Parcel Serv., Inc. v. People's Counsel for Baltimore County, 336 Md. 569, 576-77, 650 A.2d 226, 230 (1994) (citations omitted). *Accord Harford County v. Earl E. Preston, Jr., Inc.*, 322 Md. 493, 505, 588 A.2d 772, 778 (1991) ("[A] fundamental right of a party to a proceeding before an administrative agency [is] to be apprised of the facts relied upon by ****451** the agency in reaching its decision and to permit meaningful judicial review of those findings. In a judicial review of administrative action the court may only uphold the agency order if it is sustained by the agency's findings and for the reasons stated by the agency."); *United Steelworkers of America AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679, 472 A.2d 62, 69 (1984) (same).

In accordance with the above standard of judicial review, in order for the reviewing court to determine whether the Council's action was fairly debatable, findings of fact are required.

[7] Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions. *Turner v. Hammond*, 270 Md. 41, 55-56, 310 A.2d 543, 551 (1973) (local board of zoning appeals denied application for a special use exception by filling out a preprinted form; "[w]e think the 'reasons' given by the Board for denying the application suggest a rather cavalier attitude in respect of its duties and responsibilities. It made no findings of fact worthy of the name and we think citizens are entitled to something more than a boiler-plate resolution"); *Rodriguez v. Prince George's County*, 79 Md.App. 537, 550, 558 A.2d 742, 748 ("It is not permissible for the Council, or any administrative body, simply to parrot general statutory requirements or rest on broad conclusory statements."), *cert. denied*, 317 Md. 641, 566 A.2d 101 (1989); *Ocean Hideaway Condominium Ass'n v. Boardwalk Plaza Venture*, 68 Md.App. 650, 662, 515 A.2d 485, 490-91 (1986) ("Although the Ocean City Board [of ***554** Zoning Appeals] did not use a prepared printed form, the method it used and the content of its 'Findings of Fact' amount to a simple repetition of the nine statutory requirements and nothing more.").

Other judicial review cases have presented the issue of insufficient findings of fact by an administrative agency or local legislative body. In a case decided prior to *United Steelworkers, supra*, a Baltimore City board denied a city employee accidental disability retirement benefits. *Baker v. Board of Trustees*, 269 Md. 740, 741, 309 A.2d 768, 768 (1973). The circuit court, in

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effect, affirmed in a mandamus action. *Id.*, 309 A.2d at 769. The board had refused to apprise the employee of the reasons for its denial simply because no statute required the board to do so. *Id.* at 746-47, 309 A.2d at 771. In affirming on the basis that there was substantial evidence to sustain the decision, this Court stated that it would "remand, for appropriate findings of fact, any case which hereafter reaches us in the posture of this one." *Id.* at 747, 309 A.2d at 772. We explained that "[t]his is no more than a recognition of the fundamental right of a party to be apprised of the facts relied upon by the agency, and, even in the absence of a statutory provision, is frequently required by a court as an aid to judicial review." *Id.* (citation omitted).

In *Board of County Commissioners v. Ziegler*, 244 Md. 224, 223 A.2d 255 (1966), the Board of Commissioners of Prince George's County, sitting as a district council, denied an application for a special exception. *Id.* at 226, 223 A.2d at 256. The circuit court reversed. *Id.* On appeal, the problem was that, contrary to the requirements of the county zoning ordinance, the district council failed to make findings of fact in the record on which its decision was based. *Id.* at 228, 223 A.2d at 257. Remanding for such findings of fact, we explained:

"There are several reasons for requiring a more comprehensive record of what transpired in this case at the hearing before the district council. Aside from the rule that a zoning authority, in the absence of evidence to support its action, cannot apply its expertise in granting or refusing a zoning change or exception, it is clear that without a record ***555** of the facts on which the zoning authority acted or a statement of the reasons for its action, the reviewing court could not properly perform the duty it had of determining whether the action of the zoning authority was arbitrary or capricious. The rule is as applicable to a special exception as it is to a reclassification.

"Where, as seems to be the case here, the decision of the zoning authority is apparently contrary to the weight of the evidence****452** introduced on behalf of the applicants for the special exception, the zoning authority should have stated the reasons for its action and included them in the record. When this is not done, the record should be remanded for the purpose of having the deficiency supplied."

Id. at 228-29, 223 A.2d at 257-58 (citations omitted). *See also Harford County v. Earl E. Preston, Jr., Inc.*, 322 Md. at 505, 588 A.2d at 778 ("The [county council sitting as a board of appeals] made no attempt to reconcile the contradictory findings of fact by its hearing examiner in his two reports as to whether the adverse impacts upon the neighborhood of the [owners'] proposed special exception uses were beyond those inherently associated with such special exception uses irrespective of their location within the AG zone.").

In *Mossburg v. Montgomery County*, 329 Md. 494, 620 A.2d 886 (1993), we struck down a supermajority requirement for action by a board of appeals on the following rationale:

"Where there is a supermajority requirement, however, and where (as in the case at bar) a majority but not a supermajority of the Board of Appeals votes to grant an application, there will usually be no findings of fact or conclusions of law setting forth the basis for the agency's denial. Furthermore, the settled principle that an agency's decision will be judicially reviewed only on the grounds relied upon by the agency cannot be adhered to under such circumstances. In addition, while there may be in a particular case substantial evidence supporting the denial of an application on a certain ground, such ground may not have ***556** been the basis for the minority votes. In fact, the two minority members might not agree with each other."

Id. at 508, 620 A.2d at 893.

One leading commentator has articulated the rule in the manner set forth below:

" 'Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to *read* the record, *speculate* upon the portions which probably were believed by the board, *guess* at the conclusions drawn from credited portions, *construct a basis* for decision, and *try to determine* whether a decision thus

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arrived at should be sustained. In the process, the court is required to do much that is assigned to the board, and the latter becomes a relatively inefficient instrument for the construction of a record.' "

Gough v. Board of Zoning Appeals, 21 Md.App. 697, 702, 321 A.2d 315, 317-18 (1974) (emphasis court's) (quoting 3 R.M. Anderson, *American Law of Zoning* § 16.41, at 242 (1968)); *see also Ocean Hideaway Condominium Ass'n v. Boardwalk Plaza Venture*, 68 Md.App. at 662, 515 A.2d at 490 (same).

In the instant case, the Council made twelve "Findings of Fact." Findings one through four pertain to the procedural history and have not been set forth in Part II, *supra*. Findings five through twelve are set forth in Part II, *supra*. Finding five simply refers to § 19.14(c)(1)(iv) as controlling. Finding eleven states that the required site visit was made, and finding twelve states that, "[i]n light of the above findings," the application is denied. We are concerned here with findings six through ten.

Findings seven, eight, nine, and ten appear to be based on five criteria set forth in § 19.14(c)(1)(ii)[f] that are required to be considered for certain amendments to the zoning maps, as shown by the comparison set forth in the margin.[FN5]

FN5.

Council's Findings of Fact	§ 19.14(c)(1)(ii)[f]

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"In granting approval for an amendment to the Official Zoning Maps, the Council shall take into consideration findings of fact in each specific case, including but not limited to the following:

"(7) The County Council finds that the Growth Allocation request is not consistent with the purposes and intent of the Talbot County Comprehen-s ive Plan.

"[1] Consistency with the purposes and intent of the Talbot County Comprehensi ve Plan;

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"(8) The County Council finds that the proposed change will not be compatible with existing and proposed development and land use in the surrounding area.	"[2] Compatibility with existing and proposed development and land use in the surrounding area;
"(9) The County Council finds upon the basis of the evidence of record that there have been no population changes that would suggest this reclassification to be wise.	"[3] Availability of public facilities;
"(10) The County Council finds that the availability of public facilities and the present and proposed transportation patterns do not support the reclassification."	"[4] The effects on present and future transportation patterns; and

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> "[5] The effect on population change within the immediate area."

****453 *557** The introduction to subsection (ii) expressly states the scope of subsection (ii). It deals with "Amendments to the Official Zoning District Maps excepting properties within the boundaries of the Critical Area where growth allocation is requested." § 19.14(c)(1)(ii). In contrast, subsection (iv) deals with "Growth Allocation District Boundary Amendments in [the] Critical Area." Thus, the directly applicable criteria for Bucktail's requested rezoning are the nine criteria established by § 19.14(c)(1)(iv)[b], which are set forth in Part I, *supra.* In a case such as the instant one, if the developer can satisfy the criteria of subsection (iv) on a request for rezoning from one dwelling unit per twenty acres to one dwelling per five acres, the developer will have complied with the requirements for rezoning a property in the Critical Area from RCA to LDA. It would seem that reclassification under the underlying zoning from RC to RR would then follow, simply because there are no additional applicable requirements in the zoning ordinance. Thus, findings seven through ten appear to be irrelevant.

Finding six reads:
***558** "The County Council finds 'upon the basis of the evidence of record' that the request for Critical Area Growth Allocation does not comply with all of the Critical Area Policies and applicable design standards as referenced in Section 19.14(c)(iv) of the Zoning Code of Talbot County."

This finding does not advise Bucktail, in terms of the facts and circumstances of the record, in which aspect(s) Bucktail's application fails to comply with the Critical Area criteria or policies. Thus, finding six is deficient under the legal principles reviewed above.

In the alternative, we shall assume that the requirements of subsection (ii), as well as those of (iv), must be complied with to obtain the reclassifications at both levels of zoning that are requested here. Findings seven through ten, *see* note 5, *supra,* suffer from the same deficiency as does finding six. These findings fail to advise Bucktail, in terms of the facts and circumstances of the record, in which aspect(s) the application is deficient under subsection (ii).

Council findings six through ten are merely conclusory statements. Here, where the planning staff and the Planning Commission have recommended approval of Bucktail's project and found that it complies with all applicable requirements, it is not sufficient for the Council simply to express conclusions, without pointing to the facts found by the Council that form the basis for its contrary conclusion.

The appellees, by brief and at oral argument, have pointed to certain facts in the record that arguably might justify the denial of Bucktail's application, but these arguments cannot cure the deficiency. As this Court has stated: "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action...." *United Steelworkers,* 298 Md. at 679, 472 A.2d at 69 (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207, 216 (1962)).

Accordingly, the appropriate disposition in the instant matter is a remand.

559** *JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY VACATED. CASE REMANDED TO THAT COURT FOR REMAND TO THE COUNTY COUNCIL OF TALBOT COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEES, TALBOT COUNTY, MARYLAND, JOHN W. RENNER,* *****454 *RICHARD J. CONWAY, ROBERT PORTER, AND SIDNEY H. DICKSON.*

Md.,1999.
Bucktail, LLC v. County Council of Talbot County
352 Md. 530, 723 A.2d 440

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IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

MICHAEL A. DARAS,	*		
Petitioner,	*		
v.	*	Case Nos.:	C-06-118661 C-06-118663
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

JWL ASSOCIATED, et al.,	*		
Petitioners,	*		
v.	*	Case No.:	C-06-118672
CRITICAL AREA COMMISSION,	*		
Respondent.	*		

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

WRIGHT INVESTMENT GROUP,	*		
Petitioner,	*		
v.	*	Case No.:	C-06-117432
CRITICAL AREA COMMISSION, et al.,	*		
Respondents.	*		

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

REPLY TO OPPOSITIONS TO MOTIONS TO DISMISS

Respondent Critical Area Commission for the Chesapeake and Atlantic Coastal Bay (the "Critical Area Commission" or the "Commission"), by its attorneys, Douglas F. Gansler, Attorney

General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, hereby responds to the oppositions to the Motions to Dismiss filed in each of these cases.

Procedural Posture

These four cases arise from actions taken by the Critical Area Commission on three separate requests made by Anne Arundel County (the "County") to amend its Critical Area Map (the "Map") as a consequence of what the County alleged were mistakes that the County had made when it originally crafted the Map in 1987. Following enactment in 1984 of the Critical Area Law – Md. Code Ann., Nat. Res. ("NR") § 8-1801 *et. seq.* – all jurisdictions with land areas within the Chesapeake Bay Critical Area were required to map that jurisdiction's critical area[1], and have their respective maps approved by the Critical Area Commission. NR § 8-1808(c). Foreseeing the inevitability that diverse local jurisdictions would make geographic and other mistakes during the course of the mapping process, the General Assembly provided a procedure whereby, following approval by the Critical Area Commission of a local jurisdiction's critical area map, the local jurisdiction could, upon proof of mistake in the original map, propose to the Commission an amendment to that jurisdiction's map. NR § 8-1809(h).

Here, the three Map amendments requested by Anne Arundel County involved, respectively, property owned by: (1) Michael A. Daras, the petitioner in case numbers C-06-118661 and C-06-118663 (the "Daras Actions"); (2) JWL Associated and William and Mary Magenau, the petitioners in case number C-06-118673 (the "Magenau Action"); and (3) the Wright Investment Group, the

[1] The "critical area" includes of all land and water areas within 1,000 feet beyond the heads of tide of the waters of the Chesapeake Bay and its tributaries. NR § 8-1807(a).

petitioner in case number C-06-11743 (the "Wright Investment Action").[2] In each instance, the owners of the subject parcels requested that their respective property be reclassified from Resources Conservation Area (RCA), the most restrictive of the three critical area land classification, to Limited Development Area (LDA). As to each, the Commission received from the County a request pursuant to NR § 8-1809(h) for a map amendment, formed a Panel of Commission members to review the request and report to the full Commission as required by NR § 8-1809(o), and, in a timely manner, voted to return the proposed amendments to the County for further action. The Commission's action of the Wright Investment request occurred on September 6, 2006, and its actions on the Magenau request and the Daras request both occurred on November 1, 2006.

On October 6, 2006, Wright Investment filed the Wright Investment Action seeking administrative mandamus under Title 7, Chapter 400, of the Maryland Rules, and judicial review under Title 7, Chapter 200, of the Commission's decision regarding its property. On December 1, 2006, the Daras Actions were filed which, respectively, seek Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the Critical Area Commission's decision regarding Mr. Daras' property. On December 11, 2006, the Magenau Action was filed which, similarly, seeks Title 7, Chapter 400 administrative mandamus and Title 7, Chapter 200 judicial review of the decision on the Magenaus' property. In separate Motions on each case, the Critical Area Commission has sought dismissal of all four actions on grounds that the decisions of the Critical Area Commission denying each of the three proposed Map amendments are not subject to

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[2] A fifth case, civil number C-06-117695, was filed Wright Investment and seeks a writ of mandamus under Title 15, Chapter 700 of the Maryland Rule. The Critical Area Commission filed an Answer to that action and it is therefore not subject to any of the Commission's motions to dismiss.

administrative mandamus under Title 7, Chapter 400, or judicial review under Title 7, Chapter 200. Each petitioner has responded separately in opposition to the Commission's Motions. The Court has scheduled a joint hearing on all four Motions for April 30, 2007, because the four Motions present similar issues of law and fact. By this Memorandum, the Critical Area Commission replies to the common questions of law and fact addressed in each of the petitioners' oppositions to the Motions to Dismiss.

Law and Argument

A. The Circuit Court Lacks Jurisdiction Under Title 7, Chapter 200, and Title 7, Chapter 400, To Review The Critical Area Commission's Decisions.

As discussed in the memoranda in support of the Motions to Dismiss, the Circuit Court has jurisdiction under Title 7, Chapter 200, to review an action of an administrative agency only when judicial review of that action is separately authorized by statute. *See* Rule 7-201(a). While judicial review under Chapter 200 is specifically authorized for decisions of "contested case" proceedings conducted under the Maryland Administrative Procedure Act (MAPA), Md. Code, Ann, State Gov't § 10-201 *et. seq.*, the proceedings of the Critical Area Commission in reviewing local critical area program amendments, including map amendments, do not constitute contested case proceedings for purposes of MAPA. *North v. Kent Island Limited Partnership*, 106 Md.App. 92, 103 (1995) ("there is nothing in [NR] § 8-1809 that requires a contested case hearing"). Accordingly, since Commission proceedings are not contested case proceeding, and no provision of the Critical Area Law specifically authorizes Chapter 200 judicial review of Commission proceedings, the Circuit Court lacks jurisdiction under Chapter 200 to review the Commission's decisions. *Accord* Maganau Petitioners' Memorandum Of Law In Opposition To Motion To Dismiss Complaint/Petition

("Magenau Mem.") at 10 ("Title 8 of the Natural Resources Article does not expressly permit a right of appeal from an action of the Commission relating to critical area classifications"); Wright Investment Petitioner's Opposition To Motion To Dismiss ("Wright Investment Mem.") at 6 ("[a]s the Commission rightly points out . . . Title 8 of the Natural Resources Code . . . does not provide an explicit statutory right of review") .

Regarding the availability of Title 7, Chapter 400 administrative mandamus review, such review is only appropriate where the administrative action complained of was by nature "quasi-judicial," as opposed to quasi-legislative. *See* Rule 7-401(a) ("the Chapter governs action for judicial review of a quasi-judicial order or action of an administrative agency"). Chapter 400 review is therefore not available here because, as the Court of Special Appeals has held, the Critical Area Commission acts in a "quasi-legislative" capacity when it reviews local critical area programs and proposed program amendments, including critical area map amendments. *See North*, 106 Md.App. at 103 ("[t]he power of the Commission is to adopt regulations and criteria as well as conduct hearings in connections with 'policies, proposed programs, and proposed regulations or amendments to regulations'"), *citing* NR § 8-1806.[3]

Notwithstanding petitioners' assertions to the contrary, the Court's conclusion in *North* that the Commission acts in a quasi-legislative capacity when it reviews proposed program amendments is in accord with longstanding principals of administrative law. As the Court of Appeals stated in *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686 (1977), the distinction between

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[3] As the Court of Appeals recognized in *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530 (1999), the administrative process undertaken by a county in reviewing a proposed critical area map amendment for mistake is, contrary to the Critical Area Commission's role, a quasi-judicial function because the proceedings at the local level include "adjudicative or administrative fact-finding." *Id.* at 548.

whether an administrative agency acts in a judicial or legislative capacity is often "not easily drawn," and is determined based upon whether the agency considered either adjudicative or legislative facts and upon the nature of the function performed by the agency. *Id.* at 711-12. In determining that Montgomery County Council acts in a legislative capacity when it reviews comprehensive rezoning, versus an adjudicatory capacity when it reviews piecemeal rezoning, the Court stated that while piecemeal rezoning considers only a single piece of property to determine whether there has been a change in the physical character of the neighborhood or whether there had been a mistake in the original zoning – factual questions that are adversarial in nature and are resolved through trial-type procedures – comprehensive rezoning involved with a local map amendment proceeding is premised upon legislative determinations. *Id.* at 712. Reasoning that comprehensive rezoning involves legislative determinations, the Court noted that such zoning "takes into account future public need and purposes; whether [the rezoning] is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional need; and ultimately whether [the rezoning] bears the requisite relationship to the public health, safety and general welfare." *Id. See also Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 35 (2006) (piecemeal rezoning constitutes "zoning action" which is quasi-judicial, while comprehensive rezoning is not); *County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (recognizing the established administrative law principal that the process of comprehensive rezoning is quasi-legislative) (citations omitted).

Although only single parcels of property are involved in each of the three matters here, the nature and purposes of the Critical Area Commission's proceedings with respect to reviewing proposed critical area program maps and proposed map amendments are more in line with

comprehensive rezoning as was at issue in *Montgomery County v. Woodward & Lothrop*, than with piecemeal rezoning. *See Bucktail*, 351 Md. at 545 (the determination as to whether an administrative act regarding zoning is adjudicative or legislative "is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds").[4] As mandated within Critical Area Law, the Commission must review proposed program map amendments – including those predicated upon a mistake in the original mapping – to ensure compliance with all of the critical area statutory standards and regulatory criteria which, among other things, take into account public and environmental needs and purposes far beyond those directly affected by the individual parcels considered. *See* NR § 8-1809(o)(2) ("[t]he Commission shall determine if the proposed amendment is consistent with the purposes, policies, goals, and the provisions of this subtitle, and all criteria of the Commission"). In the instant cases, this included, at a minimum, review of the Map amendments to ensure compliance with the statutory goals and policies, and the Commission's criteria set forth at COMAR 27.01.02.04 regarding critical area lands designated LDA. *Id.* at 107.

Moreover, the Commission's procedure when it reviews a proposed map amendment is limited to receiving the request from the local jurisdiction, holding a public hearing, reviewing the request for compliance with the critical area standards and criteria, and acting upon the request within 90 days of receipt. *See* NR § 8-1809(o). Consistent with the Court's conclusion in *North*,

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[4] It is important to note, however, that while amendments to a locality's critical area map may share characteristics of zoning, such amendments are not zoning matters. *See Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md.App. 684, 693 (2002). A locality's zoning ordinance is separate and apart from its critical area program. *Id.* Moreover, the "[Critical Area] Commission does not act as a zoning body." *North*, 106 Md.App. at 103.

these statutory procedures do not contemplate nor accommodate trial-type proceedings; rather they are tantamount to the legislative proceedings and public hearings conducted by administrative agencies that propose and adopt regulations. *See, e.g.*, Md. Code Ann., State Gov't § 10-111. As the Court of Appeals stated in *Montgomery County v. Woodward & Lothrop*, that an administrative agency's "decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines [whether the proceedings are adjudicatory or legislative]." *Id.*, 280 Md. at 712.

Because the Circuit Court lacks jurisdiction under either Chapter 200 or Chapter 400 of Title 7 of the Maryland Rules, the Wright Invest Actions, the Daras Actions, and the Magenau Action should be dismiss for failure to properly invoke the jurisdiction of the Court, and for failure to allege a cause of action upon which relief can be granted.

B. Petitioners Fail To Raise Issues Of Fact As To Whether The Critical Area Commission Breached Its Lawful Authority.

In apparent recognition of the inadequacy of Title 7 of the Maryland Rules as a basis for judicial review of the decisions of the Critical Area Commission, each of the petitioners, in one form or another, turn to the "inherent right of the courts to review decisions of government agencies that affect individual property rights" as a basis for the Circuit Court's jurisdiction. *See* Magenau Mem. at 13 (citations omitted). *See also* Mr. Daras' Petitioner's Opposition To Motion To Dismiss Petition ("Daras Mem.") at 5-6; Wright Investment Mem. at 11-12. Where, as here, there is no basis for Title 7 judicial review of the decision of an administrative agency, judicial review by way of mandamus, injunction, declaratory action, or certiorari may be permitted within the original

jurisdiction of the Circuit Court as an adjunct of the Court's inherent authority. *See Armstrong v. Major and City Council of Baltimore*, 169 Md.App. 655, 667 (2006).

The standard of review applicable to any such proceeding under the Court's original jurisdiction is dependent upon the nature of the challenged administrative action. *Id.* at 668. If the administrative action complained of was by nature quasi-judicial, it is subject to review as is normally associated with Title 7, Chapter 200 statutory appeals of administrative actions: under the "substantial evidence or arbitrary and capacious test." *Id.* If, however, the administrative action complained of was by nature legislative, the review undertaken by the Circuit Count is narrow in scope and limited to an assessment of "whether the agency was acting within its legal boundaries." *Id., quoting Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 221-24 (1975). Indeed, quasi-legislative decisions of administrative agencies may only be invalidated by the judiciary if the decisions are found to be inconsistent with the letter and spirit of the law under which the agency operates. *See, e.g., County Council of Prince George's County v. Offen*, 334 Md. 499, 507 (1994) (quasi-legislative decisions of administrative bodies are not subject to ordinary judicial review, but very limited review by the courts); *Givner v. Commissioner of Health*, 207 Md. 184, 192 (1955) (it is not the function of the courts to "pass upon the wisdom" of the agency's legislative action, or to approve or disapprove it, if it does not exceed the agency's lawful authority).

While conceding the correctness of the decision in *North* that the Commission's statutory role in reviewing requests for map amendments is by nature quasi-legislative, the Magenau Petitioners argue that the Commission's review in this regard is quasi-legislative only in those instances where the Commission "correctly performs its statutory role." Magenau Mem. at 11 (emphasis omitted).

The Magenua Petitioners then assert that, in this instance, the Commission abrogated its statutory role by reviewing and challenging Anne Arundel County's findings of mistake, and therefore acted in a quasi-judicial capacity. *Id.* As such, the Magenau Petitoners assert that the decision is subject to review under Title 7, Chapter 400, *id.* at 13, which would include substantive review of the Commission's decision under the substantial evidence and arbitrary and capricious tests. *See* Rule 7-403(E)-(F). Mr. Daras appears to makes a similar argument. *See* Daras Mem. at 4-5 (stating that, consistent with *North*, the Commission's review under NR § 8-1809 "should be quasi-legislative," thus implying that the Commission's decision regarding Daras' map amendment request was something other than quasi-legislative) (emphasis in original).

This argument, however, belies the distinction in scope of review between quasi-legislative and quasi-judicial actions. As stated, quasi-legislative decisions are reviewed for the sole purpose of determining whether the administrative agency acted consistent with its lawful authority. If the Court, in reviewing an administrative decision which, as here, is by statute quasi-legislative, determines that the agency exceeded its lawful authority by venturing into the judicial, the matter must return be to the agency with instructions to reconsider the matter consistent with the agency's authority. *See North*, 106 Md.App. at 108 (having found that the Commission exceeded its authority under NR § 8-1809, the Court remanded the matter to the Commission to conduct proceedings consistent with the Court's opinion). Given the legislative prerogative of the administrative agency in such instances, the Court, through its review, may not address the substance of the matter. *Linchester Sand & Gravel*, 274 Md. at 224-25 (the judiciary's authority to review quasi-legislative actions does not include the authority for the judiciary to substitute "[it's] judgment for that of the agency"). Here, to the extent that petitioners seek orders from the Court directing

approvals of their respective Map amendment requests, petitioners would have the Court exceed the scope of review by impermissibly substituting the Court's judgment for that of the Commission's.

In any event, the record and allegations here fail to establish any issue of fact as to whether the Commission in reviewing the three Map amendment requests acted outside its lawful authority under NR § 8-1809(o) to ensure compliance with applicable critical area criteria.[5] Both the Magenau and Daras Map amendment requests alleged that the subject properties should have been reclassified as LDA because of the properties' respective proximity to public water and sewer services in place at the time of the original mapping. *See* Magenau Mem. at Exhibit C, Critical Area Commission Panel Report; Daras Mem. at Exhibit A, Critical Area Commission Panel Report. The Commission reviewed and considered the requests, and determined as to each that the information provided by the County was insufficient for the Commission to determine whether the standards regarding proximity to water and sewer were applied "consistently and systematically to all Critical Area maps throughout the County" when the maps were originally drawn. *Id.* The Commission then sent both

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[5] Each of the four initial pleadings filed by the respective petitioners fail to set forth with any degree of particularity the facts upon which the petitioners contend that the Commission breached its lawful authority. The substantive sparsity of these pleading might be sufficient if judicial review was proper under Title 7 – *see* Rules 7-202(c) and 7-402(a) – but is wholly insufficient for a civil action under the Court's general jurisdiction. *See* Rule 2-303(b) ("a pleading shall contain . . . such statements of fact as may be necessary to show the pleader's entitlement to relief"). As such, dismissals of each action under Rule 2-322(b) for failure to state claims is appropriate. Nonetheless, in their respective memoranda in opposition to the Motions to Dismiss, each petitioner sets forth allegations of fact, not included in their initial pleadings, that the petitioners rely upon in asserting that the Commission acted beyond its statutory authority. While this is clearly contrary to proper pleadings practice inasmuch as the Commission has filed motions to dismiss and not motions for summary judgment supported by affidavit, the Commission is willing to stipulate that the allegations of fact as contained in the respective memoranda should be considered by the Court for purposes of the Commission's Motions to Dismiss as if those allegations of fact were fully set forth in the petitioners' respective initial pleadings.

proposed Map amendments back to the County with a request that the County provide an explanation as to how the mapping rules were applied during the original mapping. *Id.* This explanation is necessary so that the Commission, in furtherance of its oversight role for all local critical area programs,[6] can adequately assess whether the County's alleged oversight was limited to the Magenau and Daras properties, or whether the standards were incorrectly applied County-wide. *Id.* In this regard, the actions by the Commission on Anne Arundel County's request to reclassify the Magenau and Daras properties were consistent with, and in furtherance of, the Commission's statutory mandate to ensure that local critical area maps are consistent with applicable critical area criteria. *See* COMAR 27.01.02.04A.(4) (establishing that one of the features that qualify an area as LDA is for the area have public sewer or public water). Furthermore, the Commission's decisions to send the requested Map amendments back to the County were clearly authorized as one of four permissible options under NR § 8-1809(o)(3), which includes as an option the "[r]eturn [by the Commission of] the proposed program amendment to the local jurisdiction with a list of the changes to be made."

Regarding the Commission's denial of the Wright Investment Map amendment request, the Wright Investment Petitioners similarly fail to establish an issue as to whether the Commission acted contrary to its lawful authority. Wright Investment minimally alleges that the Commission remanded its Map amendment request to the County "for a comprehensive remapping of the entire area." Wright Investment Mem. at 5-6. Wright Investment fails to provide any information as to

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[6] *See Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md.App. 684, 686-87 (2002) (the Critical Area Commission performs oversight of local critical area programs); *North*, 106 Md.App. at 96 (noting that the Critical Area Commission was created, in part, to provide State oversight of local critical area programs); *Bellanca v. County Commissioners of Kent County*, 86 Md.App. 219, 222 (1991) (same).

the context within which the Commission made its decision, and therefore provides no basis upon which the Court could conclude that the decision was contrary to the Commission's lawful authority. Wright Investment simply presumes that since the Commission's panel charged with reviewing the matter heard testimony during the statutorily mandated public hearing, these proceedings somehow impermissibly morphed from the quasi-legislative to the quasi-judicia. *Id.* at 10-11. As recognized in *North*, however, these statutory proceedings are by nature legislative and not judicial. *North*, 106 Md.App. at 103.

Conclusion

For the foregoing reasons, together with those set forth in the memoranda in support of the Motions to Dismiss, the Critical Area Commission's Motions to Dismiss each of the four cases should be granted.

Respectfully Submitted,

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Dated: April 4, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of April, 2007, copies of the foregoing Reply To Oppositions To Motions To Dismiss were sent via U.S. Mailed, postage prepaid, to:

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C

North v. Kent Island Ltd. PartnershipMd.App.,1995.
Court of Special Appeals of Maryland.
John C. NORTH, II, Chairman, et al.
v.
KENT ISLAND LIMITED PARTNERSHIP.
No. 1228, Sept. Term, 1994.

Aug. 31, 1995.

Property owner sought redesignation of portion of its property in the Chesapeake Bay Critical Area from limited development area (LDA) to intensely developed area (IDA) on the grounds of mistake in the original mapping. After county planning commission found there had been mistake and recommended map amendment, board of county commissioners submitted proposed amendment to the Chesapeake Bay Critical Area Commission ("Commission"), a Commission panel determined there had been no mistake, and the Commission denied the amendment. Property owner sought judicial review. The Circuit Court, Queen Anne's County, John W. Sause, Jr., J., reversed the Commission's denial of redesignation and remanded for a contested case hearing under the Maryland Administrative Procedure Act (MAPA). Parties appealed. The Court of Special Appeals, Fischer, J., held that: (1) role of the Commission is quasi-legislative and does not encompass contested case hearing, and (2) Commission has jurisdiction to examine proposed map amendment to determine if consistent with criteria for development, but not to reexamine whether there was mistake in the original zoning.

Reversed and remanded.

West Headnotes

[1] Administrative Law and Procedure 15A 472

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak469 Hearing
15Ak472 k. Elements and Essentials in General. Most Cited Cases
When proceeding before agency meets definition of "contested case" found within the Maryland Administrative Procedure Act (MAPA), the agency must provide trial type procedures. Code, State Government, § 10-201 (Repealed).

[2] Zoning and Planning 414 436.1

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(C) Proceedings to Procure
414k436 Hearing and Determination
414k436.1 k. In General. Most Cited Cases
There is nothing in statute governing approval and adoption of local critical area protection programs that requires use of contested case hearing to determine propriety of proposed map amendment. Code, Natural Resources, § 8-1809.

[3] Zoning and Planning 414 1

414 Zoning and Planning
414I In General
414k1 k. Nature in General. Most Cited Cases
Actual acts of zoning and rezoning are quasi-legislative functions.

[4] Zoning and Planning 414 13.5

414 Zoning and Planning
414I In General
414k13.5 k. Regional or Interstate Agencies. Most Cited Cases
Chesapeake Bay Critical Area Commission does not act as zoning body; its role is quasi-legislative and does not encompass "contested case hearings" provided under Maryland Administrative Procedure Act (MAPA). Code, Natural Resources, § 8-1809; Code State Government, § 10-201 (Repealed).

[5] Zoning and Planning 414 151

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414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k151 k. Power to Modify or Amend in General. Most Cited Cases
General Assembly did not wish to allow local jurisdictions to amend their local critical area protection programs at will. Code, Natural Resources, § 8-1809(h)(2)(i).

[6] Zoning and Planning 414 ⚿13.5

414 Zoning and Planning
414I In General
414k13.5 k. Regional or Interstate Agencies. Most Cited Cases
Role of the Chesapeake Bay Critical Area Commission is to examine proposed map amendment to determine whether consistent with criteria for development within critical area, not to reexamine whether there was actual mistake in the original mapping; the latter, quasi-judicial function lies with the local approving authority. Code, Natural Resources, § 8-1809(h)(2)(i), (j).

[7] Zoning and Planning 414 ⚿13.5

414 Zoning and Planning
414I In General
414k13.5 k. Regional or Interstate Agencies. Most Cited Cases
In establishing the Chesapeake Bay Critical Area Commission, General Assembly did not intend to create state level zoning board but, instead, to create oversight committee. Code, Natural Resources, § 8-1801(b)(2).

[8] Zoning and Planning 414 ⚿13.5

414 Zoning and Planning
414I In General
414k13.5 k. Regional or Interstate Agencies. Most Cited Cases
Chesapeake Bay Critical Area Commission has the right to intervene at any time in any proceeding concerning project approval in the Chesapeake Bay Critical Area. Code, Natural Resources, § 8-1812.

****35 *94** Thomas A. Deming, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., Marianne D. Mason and Judith F. Plymyer, Asst. Attys. Gen., on the brief), Annapolis, for appellants.
Warren K. Rich (William D. Evans, Jr. and Rich and Henderson, P.C., on the brief), Annapolis, for appellee.

Argued before FISCHER, CATHELL and HARRELL, JJ.
***95** FISCHER, Judge.
Appellant/Cross-Appellee, Chesapeake Bay Critical Area Commission ("Critical Area Commission" or the "Commission"), appeals from an order of the Circuit Court for Queen Anne's County directing it to hold a contested case hearing on the request of Appellee/Cross-Appellant, Kent Island Limited Partnership ("Pier One"), for a redesignation of a portion of its property in the critical area from limited development area (LDA) to intensely developed area (IDA), on the grounds of mistake in the original mapping.

The Critical Area Commission asks us to decide the following question:
I. Did the trial court err in finding that a determination of the Critical Area Commission under Nat.Res.Md.Ann.Code, § 8-1809 is subject to the contested case provisions of State Government Md.Ann.Code., § 10-205?

Pier One cross-appeals and asks us to address the following questions:II. Was the Panel's [of the Critical Area Commission] determination supported by substantial evidence?
III. Did the Circuit Court err in granting the motion to strike?
IV. (a). Did the Circuit Court err in not determining the extent of jurisdiction of the Chesapeake Bay Critical Area Commission with regard to individual case by case adjudication and the standard of review to be applied?
(b). Has there been an invalid delegation of legislative authority?

BACKGROUND

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In 1984, the Maryland General Assembly enacted Chapter 794, Laws of 1984, entitled the "Chesapeake Bay Critical Area Protection Program," which is codified in Md.Code (1974, 1990 Repl. Vol., 1994 Cum.Supp.), §§ 8-1801-1816 of the Natural ***96** Resources Article.[FN1] The purposes of the General Assembly were:

FN1. All references are to Md.Code (1974, 1990 Repl.Vol., 1994 Cum.Supp.), §§ 8-1801-1816 of the Natural Resources Article, unless otherwise noted.

****36** (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.

Section 8-1801(b).

In order to achieve these purposes, the General Assembly created the Chesapeake Bay Critical Area Commission. Each local jurisdiction [FN2] has the primary responsibility for developing and implementing a program [FN3], subject to review and approval by the Commission. Section 8-1808(a). The Commission was required to "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." Section 8-1808(d) [FN4].

FN2. "Local jurisdiction" means a county, or a municipal corporation with planning and zoning powers, in which any part of the Chesapeake Bay Critical Area, as defined in this subtitle, is located. § 8-1802(a)(7).

FN3. "Program" means the critical area protection program of a local jurisdiction and includes any amendments to the program. § 8-1802(a)(8).

FN4. § 8-1808(b) provides:
(b) *Goals of Program.*-A program shall consist of those elements which are necessary or appropriate:
(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;
(2) To conserve fish, wildlife, and plant habitat; and
(3) To establish land use policies for development in the Chesapeake Bay Critical Area 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.

***97** Section 8-1809 addresses the approval and adoption of the local critical area protection programs. Each local jurisdiction is required to advise the Commission whether it plans to "develop a critical area protection program to control the use and development of that part of the Chesapeake Bay Critical Area located within its territorial limits." Section 8-1809(a)(1). If the local jurisdiction chooses not to develop a program, the Commission is permitted to prepare and adopt a program for the critical area located in that local jurisdiction. Section 8-1809(b). If the local jurisdiction decides to develop a program, the local jurisdiction must prepare and submit the program to the Commission. Section 8-1809(c). Within 30 days after the program is submitted, the Commission is required to appoint a panel of five of its members to conduct a public hearing in the jurisdiction on the proposed program. Section 8-1809(d)(1). Within 90 days after the Commission receives a proposed program, the Commission shall approve the proposal or notify the local jurisdiction of any specific changes required for the proposal to be approved. If the Commission does neither, the program is deemed approved. Section 8-1809(d)(2). Each local jurisdiction is to review its

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entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every four years. Section 8-1809(g). In addition, local jurisdictions may propose program amendments [FN5] as often as necessary, but not more than four times per calendar year. Section 8-1809(h). "Except for program amendments or program refinements***98** developed during program review under subsection (g) of this section, a zoning map amendment may be granted by a local approving authority only on proof of a mistake in the ****37** existing zoning." Section 8-1809(h)(2)(i).[FN6] The Commission must approve any program amendments. Section 8-1809(i). Section 8-1809(j) provides that the Commission shall approve programs and program amendments that meet: "(1) The standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and (2) The criteria adopted by the Commission under § 8-1808 of this subtitle."

FN5. (9)(i) "Program amendment" means any change to an adopted program that the Commission determines will result in a use of land or water in the Chesapeake Bay Critical Area in a manner not provided for in the adoptive program.
(ii) "Program amendment" includes a change to a zoning map that is not consistent with the method for using the growth allocation contained in an adopted program.
§ 8-1802(a)(9).

FN6. This is distinguished from the general practice allowing a zoning amendment based on change of circumstances or mistake. *Stratakis v. Beauchamp*, 268 Md. 643, 652-653, 304 A.2d 244 (1973).

Pursuant to § 1808(d), the Commission promulgated regulations establishing the criteria for local critical area development. COMAR 27.01.02 (the "criteria").

The Commission recognizes three types of development areas: (1) Intensely Developed Areas; [FN7] (2) Limited Development Areas; [FN8] and (3) ***99** Resource Conservation Areas. [FN9] COMAR 27.01.02.02(A). Intense development is to be directed outside the Critical Area and future intense development is to be directed towards intensely developed areas. COMAR 27.01.02.02(B). Low intensity development is permitted in limited development areas, but subject to strict regulations. COMAR 27.01.02.02(C). In addition, development is to be limited in the resource conservation areas. COMAR 27.01.02.02(D). Each jurisdiction was to identify each of the three areas within its jurisdiction based on criteria and develop policies and programs to achieve the objectives proposed by the Commission. COMAR 27.01.02.02(E). The designation was made based on the land uses and development in existence on December 1, 1985. COMAR 27.01.02.07(C).

FN7. COMAR 27.01.02.03(A) provides:
Intensely developed areas are those areas where residential, commercial, institutional, and/or industrial, developed land uses predominate, and where relatively little natural habitat occurs. These areas shall have at least one of the following features:
(1) Housing density equal to or greater than four dwelling units per acre;
(2) Industrial, institutional, or commercial uses are concentrated in the area; or
(3) Public sewer and water collection and distribution systems are currently serving the area and housing density is greater than three dwelling units per acre.

FN8. COMAR 27.01.02.04 provides:
Limited development areas are those areas which are currently developed in low or moderate intensity uses. They also contain areas of natural plant and animal habitats, and the quality of runoff from these areas has not been substantially altered or impaired. These areas shall have at least one of the following features:
(1) Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre;
(2) Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space;
(3) Areas meeting the conditions of

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Regulation .03A, but not .03B, above;
(4) Areas having public sewer or public water, or both.

FN9. COMAR 27.01.02.05 provides:
Resource conservation areas are those areas characterized by nature-dominated environments (that is, wetlands, forests, abandoned fields) and resource-utilization activities (that is, agriculture, forestry, fisheries activities, or aquaculture). These areas shall have at least one of the following features:
(1) Density is less than one dwelling unit per 5 acres; or
(2) Dominant land use is in agriculture, wetland, forest, barren land, surface water, or open space.

The Commission placed a cap on the growth of intense development and limited development areas. COMAR 27.01.02.06A provides:
Intensely developed and limited developments areas may be increased subject to these guidelines:
(1) The area of expansion of intensely developed or limited development areas, or both, may not exceed an area equal to 5 percent of the county's portion of the resource conservation area lands that are not tidal wetlands or federally owned.
(2) When planning future expansion of intensely developed and limited development areas, counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities.

100** Growth allowed in each county's critical area under this provision is known as a county's "growth allocation." Section 8-1809(h)(2)(ii) provides:*38** The requirement in paragraph (2)(i) of this subsection that a zoning map amendment may be granted only on proof of a mistake does not apply to proposed changes to a zoning map that:
1. Are wholly consistent with the land classifications in the adopted program; or
2. Propose the use of a part of the remaining growth allocation in accordance with the adopted program.

The amount of growth allocation available to each local jurisdiction is five percent of the Resource Conservation Area. Redesignations based on mistake do not count against the county's growth allocation.

The Queen Anne's County critical area program was approved by the Critical Area Commission on June 29, 1988 and, as amended, on February 15, 1989. It was adopted as the comprehensive planning guide by the County Commissioners on March 15, 1989. It was designated as the Queen Anne's County Critical Area Protection Program (County Program).

FACTS

Pier One owns approximately 52 acres of property on Kent Island at the southeastern end of the Chesapeake Bay Bridge in Queen Anne's County. Approximately 50 acres of the 52 acre property are within the Chesapeake Bay Critical Area. The critical area is divided into 28.84 acres of Intensely Developed Area and 21.3 acres of Limited Development Area.[FN10] The property is improved with a marina and non-residential structures including a restaurant. In order to make modifications to the property, in September of 1990, ***101** Pier One petitioned Queen Anne's County to amend the classification of the 21.3 acres of Limited Development Area to Intensely Developed Area. There were two ways in which the County could have redesignated the parcel: (1) The County could have redesignated the parcel based on a mistake in the original mapping; or (2) The County could have redesignated the parcel based on the use of the County's growth allocation.

FN10. The intense development and limited development areas are overlay zones superimposed over existing zones. Overlay zones are used to place property simultaneously in two zones. The record does not indicate the zoning for the underlying areas.

Pier One petitioned Queen Anne's County Board of Commissioners ("County Commissioners") for a

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redesignation of a portion of its property in the critical area, from limited development area (LDA) to intensely developed area (IDA). Pier One based the petition on the fact that the LDA designation was a mistake within the contemplation of § 8-1809(h)(2). The County Commissioners referred the petition to the Queen Anne's County Planning Commission ("Planning Commission") for review. On January 10, 1991, the Planning Commission held a public hearing to determine if there was a mistake in the original mapping. Pier One presented testimony and exhibits. The Planning Commission concluded that a mistake had been made in the designation of the property and recommended in favor of the map amendment. The County Commissioners then submitted the redesignation as a proposed amendment to the Chesapeake Bay Critical Area Commission for approval as an amendment to the County's critical area program. The Critical Area Commission referred the amendment to a panel of five. On April 15, 1991, the panel of five held a public hearing with testimony and exhibits presented by Pier One, found no mistake in the mapping, and recommended against the amendment. Subsequently, there was a public meeting of the Critical Area Commission sitting as a whole. The panel chairman recommended that the Commission deny the petition. Pier One was not permitted to present any witnesses or testimony. The Critical Area Commission denied the amendment based on the panel report. As a result of the Commission's decision, the County Commissioners denied Pier One's petition for redesignation.

On July 5, 1991, Pier One requested, on substantive and procedural grounds, judicial review of the adverse rulings of ***102** the Critical Area Commission and the County Commissioners. The Critical Area Commission moved to dismiss the appeal and to strike the constitutional issues raised in Pier One's opposition****39** to the motion to dismiss. The circuit court granted the motion to strike the constitutional issues, denied the motion to dismiss, and reversed the Critical Area Commission's denial of redesignation. The circuit court remanded the case to the Critical Area Commission with instructions to hold a contested case hearing under the Maryland Administrative Procedure Act (MAPA). The circuit court agreed with Pier One's argument that LDA and IDA map designations are licenses issued by a state agency and therefore subject to the contested case hearing requirements of the MAPA. The circuit court did not address the substantive issues or the standard the Critical Area Commission should apply in reviewing the redesignation.

DISCUSSION

The Commission argues that the circuit court erred in two respects. The first is that a Critical Area Commission determination concerning a local map amendment is a quasi-legislative action, not a quasi-judicial action of a state agency issuing a license under the APA. Second, a contested case hearing is not required by § 8-1809 or any other section. Pier One argues that the Commission's denial of the proposed map amendment was a quasi-judicial act requiring the due process protections afforded by the MAPA. It avers that the Commission's role was to resolve the issue of whether there was a mistake in the original mapping of the LDA portion of the Pier One property, through a contested case hearing as defined by Maryland's Administrative Procedure Act, Md.Code (1984, 1993 Repl.Vol.), §§ 10-201 through 10-217 of the State Government Article.

[1] A "contested case" is defined by the MAPA as follows:
§ 10-201. Definitions.

* * * * * *
***103** (c) *Contested Case.*-"Contested case" means a proceeding before an agency to determine:
(1) a right, duty, statutory entitlement, or privilege of a person that is required by law to be determined only after an opportunity for an agency hearing; or
(2) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by law to be determined only after an opportunity for an agency hearing.

When a proceeding meets the definition of a "contested case" the agency must provide trial type procedures.

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The MAPA "itself does not grant a right to a hearing. The right must come from another source such as a statute, a regulation, or due process principles." *Sugarloaf v. Waste Disposal*, 323 Md. 641, 652, 594 A.2d 1115 (1991) (citations omitted).

[2][3][4] There is nothing in § 8-1809 that requires a contested case hearing. In addition, "[t]he test to determine whether an action is legislative or administrative is whether the action is one making new law, i.e., an enactment of general application prescribing a new plan or policy, or is one which merely looks to or facilitates the administration, execution or implementation of a law already in force." *Prince George's County v. Silverman*, 58 Md.App. 41, 50, 472 A.2d 104 (1984). The actual acts of zoning and rezoning are quasi-legislative functions. *Hyson v. Montgomery County*, 242 Md. 55, 63, 217 A.2d 578 (1966). The Commission itself does not act as a zoning body. The power of the Commission is to adopt regulations and criteria as well as conduct hearings in connection with "policies, proposed programs, and proposed regulations or amendments to regulations." § 8-1806. The role of the Commission is quasi-legislative and does not encompass a contested case hearing.

The Commission, therefore, contends that the only purpose of its proceedings was to determine whether the County's proposed local program amendment met certain standards set forth in § 8-1808(b)(1)-(3) and the criteria for local program development adopted by the Commission. The Commission argues that this determination is part of its oversight responsibility***104** under § 8-1801(b)(2), to assure that, in proposing mapping amendments based on mistake, all local jurisdictions act "in a consistent and uniform manner subject to State criteria and oversight."

****40** The initial question we must answer is who has jurisdiction to determine whether there was a mistake in the original mapping. Pier One argues that the Critical Area Commission resolved the disputed question of adjudicative fact as to whether the property was mistakenly designated LDA.

[5][6][7] It is clear that the General Assembly did not wish to allow local jurisdictions to amend their local programs at will. As a safeguard, § 8-1809(h)(2)(i) provides that "... a zoning map amendment may be granted by a local approving authority only on proof of mistake." In response, Queen Anne's County adopted § 7008 of the County Program. Section 7008(B) of the County Program provides:

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* based on the application of the Method for Delineating Land Use Management Classification contained in the Queen Anne's County Critical Area Program *and the amendment is approved by the Critical Area Commission.* (Emphasis added.)

County Program § 7012 describes the procedures for map amendments. All proposed amendments "shall be referred to the Planning Commission for investigation and recommendation." The Planning Commission is to hold a public hearing at which parties of interest and citizens shall have an opportunity ***105** to be heard. County Program § 7012(B). The Planning Commission is the body to decide initially whether there has been a mistake in the mapping. The Planning Commission is to forward its recommendations to the County Commissioners and request that the County Commissioners forward the application for map amendment to the Critical Area Commission. County Program § 7012(C). Once the Critical Area Commission approves the amendment pursuant to § 8-1809, "the County Commissioners shall hold a public hearing on the proposed amendments ... at which citizens in interest and citizens shall have an opportunity to be heard." County Program § 7012(C). The County Commissioners "shall not approve any amendment unless it finds that such amendment is consistent with the purposes contained in Section

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8-1800, et seq. of the Natural Resources Article of the Annotated Code of Maryland, in the Queen Anne's County Critical Area Program, the Comprehensive Plan and this Ordinance." County Program § 7012(D). The role of the Critical Area Commission is to examine the amendment to determine whether the amendment is consistent with the criteria. In contrast to § 8-1809(h)(2)(i), which requires the *local approving authority* to make a finding of mistake,[FN11] § 8-1809(j) provides a separate standard of review to be applied. Section 8-1809(j) provides:

> FN11. For a discussion on the standard used to determine whether there was a mistake in the existing zoning, *see* *Bellanca v. County Commissioners*, 86 Md.App. 219, 229-233, 586 A.2d 62, *cert. denied* 323 Md. 33, 591 A.2d 249 (1991).

(j) *Standards for approval by Commission.*-The Commission shall approve programs and program amendments that meet:
(1) The standards set forth in § 8-1808(b)(1) through (3) of this subtitle; and
(2) The criteria adopted by the Commission under § 8-1808 of this subtitle.

The standards set forth in § 8-1808(b)(1) through (b)(3) are the goals of the Critical Area Program:***106** (b) *Goals of program.*-A program shall consist of those elements which are necessary or appropriate:
(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances****41** 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.

It is not the role of the Commission to reexamine whether there was an actual mistake in the original zoning. To allow the Critical Area Commission to revisit the question of mistake would render meaningless the hearings before the Planning Commission and the County Commissioners. In addition, this would create a state level zoning board, which was not the intention of the General Assembly in establishing the Critical Area Commission. The Commission was designed to be an oversight committee. Section 8-1801(b)(2). The original drafting group considered forming the Commission as a permitting agency for all projects in the critical area. The drafting group concluded that such a role was undesirable because the Commission would become tangled in collisions with local agencies and developers over the specifics of particular projects. George W. Liebmann, *The Chesapeake Bay Critical Area Act: The Evolution of a Statute,* The Daily Record, April 20, 1985, at 1. The drafting group also considered constituting the Commission as an appeal board. Because this would impose substantial hearing burdens on the Commission and create a conflict between the Commission and local zoning boards, the group decided against such a provision. The drafting group also considered allowing an appeal directly to the Commission from the permit granting agency. The drafting group rejected this approach because it would either result in duplicative appeals or grant the Commission pendent jurisdiction to address issues which did not fall under its regulations. Because there was a need for the Commission ***107** to check upon local permit determinations involving zoning and subdivision, the group drafted a provision granting the Commission the right to intervene at any stage of administrative, judicial, or other original proceeding concerning project approvals. Section 8-1812.

In this case, once the Planning Commission determined that there was a mistake in the original zoning, the program amendment should have been referred to the Critical Area Commission to determine whether it met the criteria. The Commission has jurisdiction to examine the rezoning and determine whether the rezoning meets the established criteria. The sole issue before the Commission should have been whether the property satisfies the definition of IDA as set forth in the criteria. Instead, the Critical Area Commission undertook an independent review to determine whether there was a mistake in the rezoning. This action was

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outside the scope of its power. The Commission has jurisdiction as the final arbiter of program changes, but does not have jurisdiction to review piecemeal rezoning. The legislative charge to the Critical Area Commission does not include the quasi-judicial function of evaluating whether there was a mistake in the original mapping. If the Commission determines that the amendment complies with the criteria, then the County Commissioners may change the development area classification if it is satisfied that there was an original mistake. If the amendment does not comply with the criteria, then the petition for reclassification must be denied.[FN12]

> FN12. *See* *West Montgomery v. MNCPPC*, 309 Md. 183, 197, 522 A.2d 1328 (1987), where the Court of Appeals addressed another type of overlay zones-transfer of development rights (TDR). The Court noted that the hearing before the District Council "would involve the determination of legislative rather than adjudicative facts, and thus there would be no requirement for a trial type hearing."

[8] Once the County Commissioners decides either to grant or deny the amendment, either party may then appeal to the Circuit Court for Queen Anne's County. County Program § 7034. Even if the Commission determines that the amendment is consistent with the criteria, it still has standing ***108** to appeal the decision of the County Commissioners to grant the amendment. The Commission****42** has the right to intervene at any time. Section 8-1812 provides, in pertinent part:
(a) In general.-After the Commission has approved or adopted a program, 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.

* * * * * *

(c) Appeal authorized.-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.

See *North v. St. Mary's County*, 99 Md.App. 502, 507-08, 638 A.2d 1175, *cert. denied sub nom.* *Enoch v. North*, 336 Md. 224, 647 A.2d 444 (1994).

CONCLUSION

The circuit court should remand this case to the Critical Area Commission so that the Commission may review the amendment to determine whether it meets the criteria for IDA designation. If it does, then the County Commissioners may either grant or deny the petition depending on how it is persuaded on the issue of mistake. At this point, the circuit court may review the record to determine whether the decision of the County Commissioners is supported by substantial evidence. Because the circuit court has not yet addressed this issue, we shall refrain from addressing it on appeal.

Because we answer the appellant/cross-appellee's question in the affirmative and reverse the decision of the circuit court, we need not address the issues on cross-appeal.

JUDGMENT REVERSED.

REMANDED TO THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY WITH INSTRUCTIONS TO REMAND TO THE CRITICAL AREA COMMISSION FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

***109** COSTS TO BE PAID ONE-HALF BY APPELLANTS AND ONE-HALF BY APPELLEE.

Md.App.,1995.
North v. Kent Island Ltd. Partnership
106 Md.App. 92, 664 A.2d 34

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Montgomery County v. Woodward & Lothrop, Inc.,Md. 1977.

Court of Appeals of Maryland.
MONTGOMERY COUNTY, Maryland, et al.
v.
WOODWARD & LOTHROP, INC., et al.
No. 104.

July 15, 1977.

Action was brought by property owners challenging validity of amendment of zoning ordinance with respect to particular central business district. The Circuit Court for Montgomery County, H. Ralph Miller, J., entered decree holding amendatory ordinance invalid and an appeal was taken to the Court of Special Appeals. Certiorari was issued prior to decision in the cases. The Court of Appeals, Murphy, C. J., held that although the rezoning accomplished by sectional map amendment was comprehensive, it was not required that property owners be given right to cross-examine witnesses at the hearing before district council; (2) council's time limitation with respect to the affected property owners presenting testimony at hearing was reasonable; (3) ordinance did not illegally delegate zoning power to planning commission; (4) amendment affecting central business district zone did not violate uniformity requirements of zoning statute, and (5) there was no showing that property owners had been denied all reasonable use of properties.

Order of Circuit Court vacated, and case remanded for entry of order in conformity with opinion.

See also, Md., 376 A.2d 505.

West Headnotes

[1] Zoning and Planning 414 ⚿30

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k30 k. Comprehensive Plan. Most Cited Cases

Zoning and Planning 414 ⚿159

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k159 k. Comprehensive Plan. Most Cited Cases

Adopted sector plan relating to one of the five central business districts in Maryland-Washington regional district plainly constituted a detailed development plan for the specified central business district called for by the master plan whose need was recognized by general plan and although limited to a study of 78-acre planning area and its immediate environs it was a comprehensive land use plan; the 41-acre area rezoned by sectional map amendment did comprise a substantial area for purpose of determining whether rezoning was comprehensive. Code 1957, art. 66D, §§ 8-101(b), 8-102.

[2] Zoning and Planning 414 ⚿159

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k159 k. Comprehensive Plan. Most Cited Cases

What constitutes a substantial area for purpose of determining whether rezoning is comprehensive cannot be measured solely in terms of acreage covered by zoning plan; substantiality of existing or proposed land use within area, fact that area rezoned embraces an entire political subdivision, the population and intensity of development and whether plan purports to address common needs of particular district must all be taken into account, and test of substantial area for purpose of comprehensive zoning is a flexible one which depends on circumstances. Code 1957, art. 66D, §§ 8-101(b), 8-102.

[3] Zoning and Planning 414 ⚿675

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414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k675 k. Modification or Amendment; Rezoning. Most Cited Cases
Record in action attacking validity of rezoning by sectional map amendment relating to all properties within particular central business district showed that the rezoning was comprehensive one which bore a substantial relationship to the public health, comfort, safety, convenience, morals and general welfare and, as such, enjoyed a strong presumption of validity.

[4] Zoning and Planning 414 ⚷4

414 Zoning and Planning
414I In General
414k4 k. Zoning Power in General. Most Cited Cases
(Formerly 414k2)

Zoning and Planning 414 ⚷609

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k608 Arbitrary, Capricious, or Unreasonable Action
414k609 k. Regulations. Most Cited Cases

Zoning and Planning 414 ⚷614.1

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)1 In General
414k614 Wisdom, Judgment or Opinion
414k614.1 k. In General. Most Cited Cases
(Formerly 414k614)
Zoning is a legislative function, and court's review of acts of zoning authority is restricted to determining only whether the zoning action was arbitrary, discriminatory or illegal; court may not substitute its judgment for that of zoning authority if its decision is based on substantial evidence and issue is fairly debatable.

[5] Zoning and Planning 414 ⚷684

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions
414k680 Burden of Showing Grounds for Review
414k684 k. Amendment or Rezoning. Most Cited Cases
It was not necessary, in order to uphold rezoning, to show by specific evidence that the rezoning benefitted all citizens of county.

[6] Zoning and Planning 414 ⚷159

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k159 k. Comprehensive Plan. Most Cited Cases
Merely because a few changes may have been made in a comprehensive rezoning plan by an amendment does not change its character or alter the nature of plan as comprehensive.

[7] Zoning and Planning 414 ⚷194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)
To be inferred from statutory right to public hearing on zoning map amendment application is right to fair hearing in all respects, including privilege of introducing evidence and duty of deciding in accordance with evidence.

[8] Constitutional Law 92 ⚷318(1)

92 Constitutional Law
92XII Due Process of Law

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92k318 Administrative Proceedings
92k318(1) k. In General. Most Cited Cases
Judicial or trial type hearing is not requirement of procedural due process where an administrative agency does not act in a quasi-judicial capacity and facts to be determined are legislative rather than adjudicative in nature.

[9] Administrative Law and Procedure 15A 472

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak469 Hearing
15Ak472 k. Elements and Essentials in General. Most Cited Cases
Broadly speaking, the difference between legislative and adjudicative facts, for purpose of determining type of hearing before administrative agency, is, whether decision is to be made on individual or general grounds, and simply because individual has protected interest does not entitle him to a trial type hearing where matter to be determined involves issues of legislative fact; it is nature of decision's fact-finding process and not ultimate effect of decision that determines party's right to an adjudicatory hearing.

[10] Zoning and Planning 414 194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)
Piecemeal rezoning hearings contemplate an adversary or trial type procedure to resolve adjudicative facts, but where council is considering comprehensive rezoning by sectional map amendment process, its focus is not on a single piece of property but a considerable number of properties as they relate to each other and to the surrounding area and these are not adjudicative determinations affecting one property owned by one person and procedure is fundamentally legislative and does not require judicial trial type hearing.

[11] Zoning and Planning 414 194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)
There was no constitutional or other right arising from Montgomery County zoning ordinances to cross-examine witnesses at sectional map amendment involving comprehensive rezoning. Code 1957, art. 66D, §§ 8-101(b), 8-102; U.S.C.A.Const. Amend. 14.

[12] Zoning and Planning 414 194.1

414 Zoning and Planning
414III Modification or Amendment
414III(B) Manner of Modifying or Amending
414k194 Notice and Hearing
414k194.1 k. In General. Most Cited Cases
(Formerly 414k194)
Thirty-seven individual property owners involved in comprehensive rezoning by sectional map amendment process were not deprived of any constitutional or other right by action of council in limiting each property owner to eight minutes oral presentation with right to submit written material and exhibits without restrictions and to rebut any evidence offered in record without regard to the time limit.

[13] Zoning and Planning 414 13

414 Zoning and Planning
414I In General
414k13 k. Who May Exercise Power. Most Cited Cases
Executing policy of zoning ordinance is an administrative function that may be properly delegated to administrative boards or officials under specified procedural guidelines.

[14] Zoning and Planning 414 42

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General

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414k42 k. Standards Governing Conduct of Administrative Officials. Most Cited Cases
Action of district council in adopting a sector plan and sectional map amendment creating new central business district zone under the optional method of development of those zoned, which required approval of planning board on compliance with specified developments standards and after detailed site plan review, was not an illegal delegation of zoning authority to planning commission, since standards set forth in zoning ordinance to govern exercise of delegated powers were sufficiently clear to prevent arbitrary interpretation and discriminatory application. U.S.C.A.Const. Amend. 14.

[15] Zoning and Planning 414 ⚷33

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k33 k. Propriety of Classification and Uniformity of Operation in General. Most Cited Cases
Purpose of uniformity requirement of statute requiring that all zoning regulations be uniform for each class or kind of building throughout any district or zone is to give notice to property owners that there shall be no improper classification and invidious distinctions, and discriminations in applying uniformity requirement are impermissible. Code 1957, art. 66D, § 8-102.

[16] Zoning and Planning 414 ⚷33

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k33 k. Propriety of Classification and Uniformity of Operation in General. Most Cited Cases
Uniformity requirement does not prohibit classification within district so long as it is reasonable and based on public policy to be served; focus is upon terminology of ordinance rather than upon its application. Code 1957, art. 66D, § 8-102.

[17] Zoning and Planning 414 ⚷33

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k33 k. Propriety of Classification and Uniformity of Operation in General. Most Cited Cases
There was no violation of uniformity provision of zoning statute by requiring that a certain portion of the floor area ratio be designated for parking in particular central business district which was not in a parking lot district, but not imposing same requirement in another central business district, located in the same district but also located in a special parking lot district. Code 1957, art. 66D, § 8-102.

[18] Zoning and Planning 414 ⚷156

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k156 k. Uniformity and Discrimination. Most Cited Cases
There was no violation of uniformity provision of zoning statute in the rezoning requirement relating to central business district that properties must have a minimum of 22,000 square feet to qualify for optional method of development, since regulations applied uniformly to all parcels of less than 22,000 square feet as well to those in excess of that area. Code 1957, art. 66D, § 8-102.

[19] Zoning and Planning 414 ⚷156

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k156 k. Uniformity and Discrimination. Most Cited Cases
Zoning amendment, dealing with central business district, providing that structures for which building permits had been issued since 1959 were not nonconforming while specifying that structures for which building permits had been issued prior to 1959 and which became nonconforming upon reclassification should not be subject to amendments for seven years did not violate uniformity provision of zoning statute, since the difference in treatment was not arbitrary and affected alike all property similarly situated. Code 1957, art. 66D, § 8-102.

[20] Zoning and Planning 414 ⚷653

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414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)2 Additional Proofs and Trial De Novo
414k652 Amendment or Rezoning, Sufficiency of Evidence
414k653 k. Reasonableness. Most Cited Cases
There was no showing in record challenging the zoning amendment, applicable to central business districts and significantly decreasing permissible densities, to support claim that there had been a confiscatory exercise of zoning police power by depriving property owners of beneficial use of their properties.

[21] Zoning and Planning 414 653

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)2 Additional Proofs and Trial De Novo
414k652 Amendment or Rezoning, Sufficiency of Evidence
414k653 k. Reasonableness. Most Cited Cases
Claim that 3.5-acre tract rezoned within central business district for single family detached residential purposes could not be put to any reasonable use even though property lay between two parcels zoned for multiple-family high rise residential was not substantiated, since there was no indication in record that the 3.5-acre parcel could not be used for construction of single-family homes.

[22] Zoning and Planning 414 160

414 Zoning and Planning
414III Modification or Amendment
414III(A) In General
414k160 k. Contracts for Amendments; Conditions. Most Cited Cases
Utilization in zoning amendment affecting central business district of optional method of development within the central business district zone was within the zoning powers granted to district counsel, and use of method did not constitute any form of invalid conditional zoning proscribed by zoning ordinance, contrary to claim of property owners that the amendment constituted illegal use of floating zones.

****485 *688** Richard E. Frederick, Asst. County Atty., Rockville (Richard S. McKernon, County Atty., Rockville, on the brief), for Montgomery County, Maryland.
Roger W. Titus, Rockville, for Citizens Coordinating Committee on Friendship Heights, Inc. et al.
***689** William S. Green, Washington, D.C. (Pierson, Ball & Dowd and Richard M. Singer, Washington, D.C., on the brief), for Sp. Taxing Dist. of Friendship Heights and the Hills and the Friendship Heights Village Council.
Norman M. Glasgow, Washington, D.C. (John F. McCabe, Jr., Washington, D.C., on the brief), for Morton Funger et al.
Stephen Z. Kaufman, Silver Spring (Joseph P. Blocher, Silver Spring, on the brief), for Sidney S. Zlotnick et al., Homer S. Gudelsky, Trustee and The Marina Apartments, Inc.
****486** David N. Webster, Washington, D.C. (Paul R. Connolly, Washington, D.C., on the brief), for Milton A. Barlow et al.
Howard J. Thomas, Silver Spring, Charles R. Donnenfeld, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., on brief, for Woodward & Lothrop, Inc. et al.
George H. Beuchert, Jr., Washington, D.C., on brief, for The Chevy Chase Land Co. of Montgomery County, Md.
William M. Canby, Rockville, on brief, for Gevco Company, Inc. et al.
Prince George's County, Maryland by James C. Chapin, County Atty., Michael O. Connaughton, Deputy County Atty., and Steven M. Gilbert, Assoc. County Atty., Upper Marlboro, on the brief, for amicus curiae.

Argued before MURPHY, C. J., and SINGLEY, SMITH, DIGGES, LEVINE and ORTH, JJ.
MURPHY, Chief Judge.
These appeals draw into question the validity of a rezoning by sectional map amendment of all properties within the Central Business District of Friendship

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Heights, Montgomery County, Maryland.

The Regional District Act, Maryland Code (1957, 1976 Cum.Supp.) Art. 66D, s 8-101(b) grants zoning power to the Montgomery County Council, sitting as a District Council (the Council) for that portion of the Maryland-Washington Regional District lying within the county, to regulate by ordinance, inter alia (1) the location, height, bulk, and size of buildings, (2) the size of lots and other open spaces, (3) the density and distribution of population, and (4) the location and uses of buildings and ***690** land.[FN1] In the exercise of this power, the Council is authorized to divide the Regional District within the county "into districts and zones of whatever number, shape or area it may determine." Art. 66D, s 8-102. The zoning powers vested in the Council have been implemented by enactment of the Montgomery County zoning ordinance (the zoning ordinance), Montgomery County Code (1972), ch. 59, ss 59-1 through 59-209. In addition to the text provisions of the zoning ordinance, the adopted zoning map for that portion of the Regional District located in Montgomery County is expressly made a part of the ordinance by s 59-33. Section 59-205 authorizes amendments to the text of the zoning ordinance. Section 59-195 authorizes amendments to the zoning map; it provides that an application for amendment of the zoning map may be in the form of:

> FN1. The Regional District encompasses, with minor exceptions, all land in Prince George's and Montgomery Counties. See New Carrollton v. Belsinger Signs, 266 Md. 229, 292 A.2d 648 (1972).

"(a) A local (piecemeal) amendment covering a single tract, all portions of which are proposed to be classified in the same zone; or all portions of which are proposed to be classified in one of two alternative zones.
"(b) A sectional plan amendment covering a section of the Maryland-Washington Regional District, portions of which may be proposed to be classified in different zones.
"(c) A district plan amendment covering the entire Maryland-Washington Regional District within the county."

Section 59-196 provides that proposals for a sectional or district plan map amendment may be made only by the Maryland-National Capital Park and Planning Commission (the Planning Commission) or by the Council.

(1)

The Central Business District (CBD) of Friendship Heights is one of five such districts in Montgomery County ***691** authorized by s 59-50(b)(1) of the Montgomery County Code (1972). It encompasses the entire political subdivision known as the Special Taxing Districts of Friendship Heights and The Hills. [FN2] Located on the boundary line between the county and the District of Columbia,****487** it is bordered by Wisconsin and Western Avenues and lies generally north of the District of Columbia, west of the Village of Chevy Chase, and south of the Town of Somerset. The Friendship Heights CBD is compact and intensely developed; within its borders is a mixture of residential, office, and commercial development consisting of a number of high-rise, high-density apartment houses and hotels, office buildings, retail shopping centers, including several department stores, and some single family residences. It has been aptly described as an urban crossroad, a business center both local and regional in scope, with buildings of "Manhattan-like" proportions. It is a major transportation center in the county and a rapid rail (Metro) transit station is scheduled for construction at the intersection of Wisconsin and Western Avenues by late 1980. The Friendship Heights CBD is virtually surrounded by single family residential neighborhoods located immediately outside of its eastern, western and northern boundaries. Population in 1972 within the CBD was almost 3,000 persons. Prior to May 28, 1974, the Friendship Heights CBD was comprised of a land area totalling 62 acres. Existing zoning within the CBD at that time was primarily high density commercial, C-2 (General commercial), with some R-CBD (Multi-family, residential). No floor area ratio (FAR) limits were imposed by this zoning, which allowed a maximum height of 110 feet with provision for additional floors, upon compliance with certain conditions, up to 143 feet.

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FN2. Montgomery County Code (1972), ch. 66, s 66-1. See also Friendship Heights v. Funger, 265 Md. 339, 289 A.2d 329 (1972).

On May 28, 1974, the Council amended the text of s 59-50(b)(1) of the zoning ordinance by reducing the size of the Friendship Heights CBD to 37.51 acres and realigning its boundaries. Thereafter, on July 16, 1974, the Council adopted Resolution 7-1849 granting Sectional Map ***692** Amendment Application F-947 to the zoning ordinance, which implemented an adopted "Sector Plan" for the Friendship Heights CBD. The sectional map amendment rezoned a total of 41.01 acres of land, comprising all property within the revised CBD and a 3.50-acre parcel of land immediately outside its boundaries. It assigned new zoning classifications to all properties within the CBD which regulated the height, area and use of permissible development and thereby sharply reduced the densities and floor areas that could be built.

Ten aggrieved property owners whose properties had been downzoned by the sectional map amendment appealed to the Circuit Court for Montgomery County, as authorized by Maryland Code, Art. 66D, s 8-105. The issues being similar, the cases were consolidated for hearing and oral argument extended over a four-day period. On July 15, 1976, Judge H. Ralph Miller, in a thorough and studious memorandum opinion and order, reversed the Council's resolution granting the sectional map amendment on the ground that the procedural rights of the property owners to cross-examine witnesses at the sectional map amendment hearings before the Council, and to be afforded sufficient time to present evidence at those hearings, had been violated. Appeals were filed from this judgment to the Court of Special Appeals by Montgomery County, the Citizens Coordinating Committee of Friendship Heights, the Special Taxing Districts of Friendship Heights and The Hills, and the Friendship Heights Village Council, all parties to the proceedings below (hereinafter the appellants). The property owners (hereinafter the appellees) filed cross-appeals, contending that the lower court erred in concluding (1) that the sectional map amendment constituted comprehensive, rather than local or piecemeal, rezoning; (2) that the Council and the Planning Commission had acted within their statutory authority in adopting the Sector Plan for the Friendship Heights CBD upon which the sectional map amendment was based; and (3) that the sectional map amendment did not constitute either conditional zoning, a "confiscation" of property, or a violation of the uniformity requirements of ***693** the zoning ordinance. We granted certiorari prior to decision in the cases by the Court of Special Appeals. See Maryland Code (1974) Courts and Judicial Proceedings Article s 12-201.

****488** (2)

The appeals have spawned a massive 12-volume record extract totalling almost 5,000 pages. Briefs filed by the parties collectively exceed 365 pages. A review of matters underlying adoption of the Sector Plan for the Friendship Heights CBD, upon which the sectional map amendment is based, is essential to a proper understanding of the issues raised by the parties.

Maryland Code, Art. 66D, s 7-108 authorizes the Planning Commission, with the approval of the Montgomery County Council, to adopt both a General Plan for the physical development of the Regional District and a local Master Plan for each planning area in the county. Pursuant to this authority, a General Plan was adopted on January 22, 1964 for Montgomery and Prince George's Counties entitled "On Wedges and Corridors." It called for high density urban development along major transportation corridors in Montgomery County and preservation of the areas between the corridors (the wedge area) for low density development, buffers, parks and recreational areas. It envisioned the creation of five central business districts in Montgomery County, one to be located in Friendship Heights the urbanized base of the northwest corridor in the county. The General Plan recognized that existing commercial zones were inadequate, particularly for complex business centers and it warned against too intensive development within urban areas. It noted that the presence or absence of utilities can determine where urban growth will occur and observed that excessive development could aggravate strained street systems and water and sewerage resources. The General Plan

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characterized itself as a "dynamic instrument rather than a finished product"; it stated that while its goals and major patterns were firm, "its details must evolve and develop." It called for the development of local area plans in ***694** Montgomery County, noting that such plans "will be of utmost importance in preparing sectional zoning map amendments which will form the basis for properly controlling the sequence of development, as well as for solving local land use, transportation and public service problems." It also noted a need for "specific project plans" to deal with "(s)pecific small-scale problems . . . such as revitalizing a business district . . . (which will) require very detailed project planning."

In conformity with the recommendation of the General Plan, a local Master Plan for the 22-square-mile Bethesda-Chevy Chase Planning Area (the B-CC Master Plan), of which Friendship Heights was a part, was adopted in 1970. It projected considerable growth for Friendship Heights, both in the Maryland and District of Columbia portions, and indicated that such growth would likely intensify with the anticipated opening of a rapid rail (Metro) transit station in Friendship Heights. The B-CC Master Plan recommended that allowance be made for the orderly expansion of the Friendship Heights CBD, consistent with the need for open space; that parking requirements be diminished in the CBD; and that surrounding single family residential neighborhoods be protected. It also called for more detailed study of proposed land use and facilities within the CBD, and recommended that a "detailed development plan" be prepared for the entire Friendship Heights area, including both the Maryland and District of Columbia portions. Finally, it called for the creation of new commercial zones to assure the adequate development of CBDs in the county.

On June 22, 1971, the Montgomery County Council enacted Resolution 7-270 creating a Citizens Advisory Committee (the Blue Ribbon Committee) "To Study Zoning In Central Business Districts And Transit Station Areas" throughout the county. The resolution recited that "patterns of development are changing in high density areas of the county and in areas which will be affected by the advent of a rapid rail system"; the resolution expressed a need to develop new zones and revise existing zones in order to ***695** encourage the development of mixed use and relatively high density centers of residential, commercial and office activities in the CBDs while at the same ****489** time protecting existing residential neighborhoods from the impact of such development. Shortly after the creation of the Blue Ribbon Committee, the Planning Commission appointed an Advisory Committee for the specific purpose of assisting it in preparing a detailed development plan for Friendship Heights as recommended by the 1970 B-CC Master Plan.

The Blue Ribbon Committee recommended to the Council that three new and more restrictive zoning categories be adopted for CBDs in the county CBD-1, CBD-2, and CBD-3, each containing a standard and optional method of development. The Committee recommended that these zones replace all others then authorized within the CBD, and that detailed, short-range (6-to-10-year) plans, to be known as "Sector Plans," be adopted as amendments to the applicable Master Plans for CBDs in each planning district in the county.[FN3]

FN3. In its report, the Committee recommended, and the Council adopted, an amendment to the zoning ordinance, which defined the term "Sector Plan" as follows: "Comprehensive plan for a portion of a master plan area, showing in detail such planning features as type, density and intensity of land uses, pedestrian traffic features, public facilities (parking structures, public open space, rapid transit station, community service provisions and the like), and relationship of the various uses planned to transportation, services and amenities within the area of the sector plan and, where appropriate, to other areas. The sector plan may include maps, graphics and text, and is designed as the sector plan for the area which it encompasses. It may be adopted either as a part of a new area master plan or as an amendment to an existing master plan." See County Code (1972, 1975 Cum.Supp.) s 59-1.

The Planning Commission, with the assistance of the Advisory Committee, prepared a "Preliminary Sector Plan for the Central Business District of Friendship

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Heights" in December of 1972. Centered on the proposed Friendship Heights rapid transit station, it encompassed the entire geographic area of the CBD, and included the "immediate environs" of Friendship Heights, a total of approximately 78 acres; it also took into consideration matters relating to the ***696** Town of Somerset and Chevy Chase Village, adjacent to the CBD. The Preliminary Sector Plan purported to be an amendment to the B-CC Master Plan, refining and implementing the policy objectives outlined in that plan, viz., (1) to provide for the orderly development of the CBD "at a scale which can be tolerably balanced against the constraints imposed by a seriously limited feeder road system," (2) to utilize new zoning tools to accomplish that end, (3) to preserve and protect the residential neighborhoods adjacent to the CBD, and (4) to undertake public improvement programs and enact zoning changes required to support the proposed planning objectives. The Preliminary Sector Plan stated that the amount of development within the CBD must be related to the ability of the existing feeder road system to serve the CBD; it noted, however, that these roads could not be significantly improved except at unacceptable financial and environmental costs. It concluded that traffic on feeder roads was a primary constraint on the amount of development that was feasible in Friendship Heights. It said that if development within the CBD were to occur at the scale and intensity permitted by existing zoning the feeder road system would become impacted to an intolerable degree. The Preliminary Sector Plan also referred to environmental and other constraints upon development within the CBD. It, therefore, recommended a substantial reduction in the amount and intensity of development within the CBD, adoption of the more restrictive CBD zoning categories recommended by the Blue Ribbon Committee, and a reduction in the size of the CBD itself.

Public hearings were held on the preliminary Sector Plan before the Montgomery County Planning Board (the Planning Board) of the Planning Commission for five days in February and March of 1973. Almost 100 witnesses appeared and a transcript of over 1,300 pages was assembled, together with a large amount of documentary material.

****490** On September 4, 1973, the Council adopted the new and more restrictive CBD zones (standard and optional method ***697** of development) recommended by the Blue Ribbon Committee.[FN4] Thereafter, in October of 1973, the Planning Board, having studied the record made at the public hearings on the Preliminary Sector Plan, adopted a Final Draft Sector Plan, which it transmitted to the Council. Public hearings were held by the Council over a three-day period in February of 1974 on the proposal to adopt the Plan, together with a proposed text amendment to s 59-50(b)(1) of the zoning ordinance to reduce the size and realign the boundaries of the Friendship Heights CBD. A total of 76 witnesses appeared at these hearings and a transcript of over 550 pages was amassed. Numerous written documents were received into the record, as well as the entire record of the five public hearings held on the Preliminary Sector Plan.

FN4. Montgomery County Code (1972, 1975 Cum.Supp.), ch. 59, ss 59-51.3, .4, and .5; ss 59-31.2 and .3 (optional method of development).

At the public hearings before the Planning Board and the Council on the Preliminary and Final Draft Sector Plans, considerable evidence, both testimonial and documentary, was adduced relating to traffic constraints upon development within the Friendship Heights area. There was testimony that the amount of traffic generated by various existing developments in Friendship Heights caused hopeless congestion of the feeder road system. There was also contrary testimony that the feeder road system was not congested and could accommodate higher amounts of traffic. There was evidence relating to a severe air pollution problem in Friendship Heights, generated in part by automobile exhaust pollutants from the high volume automobile traffic. There was evidence that the sewerage system serving Friendship Heights was operating in excess of safe capacity and as a consequence raw sewage was being discharged into the Potomac River. There was evidence that there was almost a total lack of open space or green area within the CBD and that the scale and intensity of development in such a small area caused traffic congestion, inadequate parking,

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aggravating noise, and visual pollution.

The Council held five work sessions in early 1974 on the Final Draft Sector Plan, approving it, with modifications, ***698** together with the text amendment to s 59-50(b)(1) of the zoning ordinance, on May 28, 1974.[FN5] In adopting the Sector Plan (the Adopted Sector Plan), the Council accepted the recommendations made in the Preliminary Sector Plan as to the existence and effect of traffic and environmental constraints on the amount of development which was feasible within the Friendship Heights CBD. With respect to traffic constraints upon development in Friendship Heights, the Adopted Sector Plan determined that Metro would serve Friendship Heights by late 1980 and that under the minimum acceptable traffic constraints at peak hours (so-called service level D), there would be a maximum of approximately 11,000 development-induced trips (evening peak hour vehicular trips originating in or destined to both the District of Columbia and Maryland portions of Friendship Heights) over and above through traffic trips and those trips to and from the proposed Metro station.

FN5. The Planning Commission adopted the approved Sector Plan on June 12, 1974.

To implement the zoning recommendations contained in the Adopted Sector Plan, Sectional Map Amendment Application F-947 was filed on June 4, 1974 and a public hearing was scheduled for July 8 and 13, 1974. The Council advised all property owners within the CBD a week prior to the hearing that time limitations would be imposed for the presentation of oral testimony eight minutes for property owners, six minutes for the Special Taxing Districts, and less for civic associations and individuals. The Council also announced that it would not allow cross-examination of speakers, although it would at the conclusion of all testimony provide time for rebuttal by any previous speaker wishing to challenge or correct prior statements or material. Timely objection to this procedure was ****491** made by the appellees. Twenty-five witnesses testified at these hearings and the entire record of the public hearings on the Preliminary and Final Draft Sector Plan was made a part of the record. After holding a final work session, the Council adopted Resolution No. 7-1849 on July 16, 1974, granting the sectional map amendment.

***699** As required by s 59-208 of the County Code (1972), the Council filed an opinion "setting forth its conclusions and reasons" for granting the sectional map amendment. After noting that the map amendment was filed to implement the Adopted Sector Plan, and that that Plan was the detailed development plan for the Friendship Heights CBD recommended by the B-CC Master Plan, the Council said:

"In the February 27, 1974 worksession, the County Council, after a careful study of the voluminous evidence, accepted the traffic capacity figures and trip generation rates as a basis for proceeding on the Sector Plan; i. e., an overall modal split of 20%,[FN6] generation factors of 1.5 trips/1,000 square feet of office space, 3.6 trips/1,000 square feet of retail space, and 0.7 trips/residential dwelling unit, and the traffic capacity limitation of 11,000 p. m. peak hour development-induced trips. The County Council found the above-mentioned figures reasonable with regard to the use and traffic capacity for the subject area and that there is substantial technical and experimental bases for the estimation that there should be 11,000 locally generated peak hour trips.

FN6. A 20% modal split, in traffic planning parlance, means that 20% of all trips being made to, from, and through Friendship Heights will be by modes of transportation other than automobile, with 80% of the trips being by automobile.

"The County Council in dealing with the issues of density and land use found it appropriate to analyze land use questions as they relate to both density and use, and then to translate them into considerations dealing with the recommended land use designations. The Council, in applying the new CBD zones to certain parcels in the study area, examined the question of the development limits that would be applicable within the Friendship Heights Central Business District. The

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Council has concluded that, given the traffic capacity figures and trip generation rates, the land use designations ***700** which appear in the adopted and approved Friendship Heights Sector Plan will allow development to occur that will not overload the existing transportation system and other public facilities.

"The Council in limiting the number of new trips to be generated in Friendship Heights has recognized that the air quality of the area should be preserved at pollutant levels below federal and state air quality ceilings. Although future regulation concerning air quality may preclude some development, it was concluded that the constraints placed upon traffic will result in the stabilization of the air quality in the Friendship Heights area.

"In designating CBD zones to areas within the Friendship Heights Central Business District, the Council has recognized that the CBD zones were designated to assure that future development will provide more green space, setbacks, and human amenities than have characterized Friendship Heights development in the past. The existing development within the Friendship Heights Sector Plan Area comprises 1,028,000 square feet of office use, 437,000 square feet of retail use, 230 motel units, and 2,999 residential dwelling units. These uses include several large office buildings, several department stores including Woodward and Lothrop and Sak's Fifth Avenue, and a number of apartment and condominium buildings. In order to assure that the scale of development in the future will result in a quality of life that would be appropriate for areas such as Friendship Heights, the approved and adopted Sector Plan allows for an additional 555,000 square feet of office use, 375,000 square feet of retail use, 1,648 residential dwelling units, and a projected total population in the Sector Plan Area of 6,000 persons.

****492** "The County Council further recognized that the ***701** Friendship Heights Sector Plan Area is surrounded by a single family residential areas and that these neighborhoods must be protected and buffered from the development occurring in the central business district. In approving the Sector Plan for the Friendship Heights Central Business District, the County Council felt that the land uses designated in the Sector Plan would not adversely impact the lifestyles and quality of life found in the nearby neighborhoods and yet would provide those person desiring a more urbanized setting the opportunity to live in an area such as the Friendship Heights Central Business District."

". . . The County Council finds from this evidence (of record) that it would be in the public interest, and serve to protect the public health, safety and welfare that Sectional Plan Amendment F-947 should be granted."

(3)

In reversing the Council's resolution granting the sectional map amendment, the lower court held that the Council's refusal to permit cross-examination at the sectional map amendment hearings, or to afford property owners sufficient time to present evidence, violated ss 59-204 and 59-207 of the County Code, as construed in Hyson v. Montgomery County, 242 Md. 55, 217 A.2d 578 (1966), without regard to whether the rezoning was local (piecemeal) or comprehensive.

Appellants contend that the principles enunciated in Hyson relating to the right of cross-examination apply only to local map amendment hearings involving a piecemeal rezoning and not to a sectional map amendment proceeding filed by the Council which effectuates a comprehensive rezoning. They also argue that the lower court was in error in holding that the appellees were not afforded adequate time to present evidence at the sectional map amendment hearings before the Council. They maintain that since the ***702** lower court found that the rezoning was comprehensive and otherwise lawful, its action in reversing the Council's resolution was improper. The appellees claim that Judge Miller correctly held that they were denied their right of cross-examination and sufficient time to submit evidence into the record at the sectional map amendment hearings. They contend that Judge Miller was also correct in holding that ss 59-204 and 59-207 of the County Code, as construed in Hyson, applied to comprehensive as well as piecemeal rezoning. They argue, however, that he was wrong in concluding that the rezoning in this case was comprehensive. Whether the rezoning was comprehensive and valid is thus a threshold issue in the case to which we initially turn our attention.

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(4)

The parties agree that under our cases,[FN7] so succinctly synthesized by the Court of Special Appeals in Grooms v. LaVale Zoning Board, 27 Md.App. 266, 277, 340 A.2d 385 (1975), a comprehensive zoning plan is one which applies to or covers a substantial or wide geographical area. The zoning plan must be well thought out, the product of careful consideration and extensive study, and based upon considerations concerning the common needs of the particular area. It must be designed to control and direct the use of land and buildings according to present and planned future conditions, to accomplish as far as possible the most appropriate uses of land consistent with the public interest and the safeguarding of the interests of the individual property owners. Other characteristics of comprehensiveness may be found in the fact that the plan zones all, or substantially all, of a political ****493** subdivision, that it regulates all uses, or that it covers all of the usual factors of land utilization: height, area and use.

FN7. Nottingham Village v. Baltimore County, 266 Md. 339, 354-55, 292 A.2d 680, 688 (1972); Scull v. Coleman, 251 Md. 6, 10-11, 246 A.2d 223, 225 (1968); Trustees v. Baltimore County, 221 Md. 550, 561, 158 A.2d 637, 642 (1960); Hewitt v. Baltimore County, 220 Md. 48, 151 A.2d 144 (1959); Huff v. Bd. of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Anne Arundel County v. Ward, 186 Md. 330, 46 A.2d 684 (1946).

***703** Appellees contend that to constitute valid comprehensive rezoning, the proposed changes must be related to land use planning and overall zoning policies for an entire planning area, here the 22-square-mile B-CC planning area of which Friendship Heights is but a small part. They contend that zoning through sectional map amendment in Montgomery County has always been based exclusively upon an approved General Plan or local Master Plan, but that the Adopted Sector Plan for the Friendship Heights CBD, and the sectional map amendment which implements it, represent a drastic departure from the recommendations of these basic planning documents, both of which call for intensification of development and expansion of the Friendship Heights area. Appellees claim that because the Adopted Sector Plan has no comprehensive land use planning basis, it cannot constitute a valid amendment to the General Plan or the B-CC Master Plan. It is nothing more, they say, than a detailed study of individual parcels of land within the CBD considered in isolation from the relevant planning area and consequently the sectional map amendment in reality is but a parcel-by-parcel local piecemeal rezoning which must be judged by the "change-mistake" rule.[FN8]

FN8. Under the "change-mistake" rule, to sustain a piecemeal zoning change, there must be produced strong evidence of mistake in the original zoning or else evidence of a change in conditions resulting in a substantial change in the character of the neighborhood. Rockville v. Henley, 268 Md. 469, 302 A.2d 45 (1973); Clayman v. Prince George's County, 266 Md. 409, 292 A.2d 689 (1972); Heller v. Prince George's County, 264 Md. 410, 286 A.2d 772 (1972). The rule has no application in comprehensive rezoning cases. Scull v. Coleman, supra.

[1] We think the Adopted Sector Plan, upon which the sectional map amendment was based, plainly constitutes the detailed development plan for the Friendship Heights CBD called for by the B-CC Master Plan, the need for which was also recognized in the General Plan. We view the Adopted Sector Plan as a valid amendment to these planning documents and therefore find no merit in the suggestion that because the Adopted Sector Plan does not include the entire B-CC planning area, the sectional map amendment lacks a comprehensive land use planning basis. There is no ***704** requirement that the area covered by a sectional map amendment coincide with the area of the relevant Master Plan; it need only apply to a "section of the Maryland-Washington Regional District" (s 59-195 of the zoning ordinance). Nor is there any requirement, absent a statute, that the map amendment must adhere to the recommendations of the General or Master Plan.

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Such land use planning documents represent only a basic scheme generally outlining planning and zoning objectives in an extensive area, and are in no sense a final plan; they are continually subject to modification in the light of actual land use development and serve as a guide rather than a strait jacket. Nottingham Village v. Balto. County, supra, 266 Md. at 354, 292 A.2d 680. See also Pattey v. Board of County Comm'rs, 271 Md. 352, 317 A.2d 142 (1974); Iverson v. Zoning Board, 22 Md.App. 265, 322 A.2d 569 (1974). Moreover, contrary to appellees' suggestion, the Adopted Sector Plan is by no means fundamentally inconsistent with either the General Plan or the B-CC Master Plan; it represented but a specific modification of the planning and zoning objectives broadly outlined in those documents based on existing land use facts.

[2] While the Adopted Sector Plan was limited to a study of a 78-acre planning area and its immediate environs, and did not cover a wide geographical area in the county, we think the 41-acre area rezoned by the sectional map amendment does comprise, in the particular circumstances of this case, a "substantial" area for purposes of determining whether the rezoning was comprehensive. What is a "substantial" area in this context cannot be measured solely in terms of the acreage covered by the zoning plan, but rather may take into account the ****494** substantiality of existing and proposed land use within the area, the fact that the area rezoned embraces an entire political subdivision, population, intensity of development, and whether the plan purports to address the common needs of a particular district. Nottingham Village v. Baltimore County, supra; Scull v. Coleman, supra; Anne Arundel County v. Ward, supra.[FN9] In other words, the test of ***705** a "substantial" area for purposes of comprehensive zoning is a flexible one and depends on the circumstances. In Border v. Grooms, 267 Md. 100, 109, 297 A.2d 81, 85 (1972), a piecemeal zoning case involving a determination of whether there had been a change in the "neighborhood," we recognized that "the concept of a neighborhood is a flexible one and will vary according to the geographical location involved, it being axiomatic that in a rural or semi-rural area the 'neighborhood' will be larger and more fluid than in a city or suburban area." By analogy, the rationale of that case is applicable here in regard to our determination of whether a sectional map amendment, which purports to be a comprehensive rezoning, applies to or covers a "substantial" geographical area.

> FN9. Anne Arundel County v. Ward, supra, involved an original zoning. Our predecessors there held that the requirement for comprehensiveness was met "if due consideration is given to the common needs of a particular district." 186 Md. at 340, 46 A.2d at 688. In his oft-cited article in 68 Harv.L.Rev. 1154, 1161 (1955) entitled "In accordance with a Comprehensive Plan," Professor Charles M. Haar expressed the view that under the holding of the Ward case, "a governmental unit could select any relatively small segment of its land for regulation, so long as that regulation was coherent and rationally supportable in reference to the district involved."

As previously indicated, the Friendship Heights CBD is one of five such districts in Montgomery County, encompassing within its well-defined borders an intensely developed political subdivision with a population projected to increase to 6,000 persons under the development plan outlined in the Adopted Sector Plan. Although a rezoning of 41 acres in a rural setting would not likely be considered "substantial," the rezoning of that amount of land in Friendship Heights by sectional map amendment which regulates all uses of properties within the CBD indeed covers a "substantial" area within the contemplation of our cases. We therefore agree with the lower court that the geographic requirement for comprehensive rezoning has been satisfied.

All other requisite indicia of comprehensiveness are also present. Underlying adoption of the sectional map amendment was a well thought out, carefully considered and extensively studied (for over three years) plan, correlated to the common needs of the Friendship Heights are. There was massive participation in the planning process by property owners, citizens, governmental officials, ***706** developers, expert witnesses, and civic and community associations. The

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plan took into account, as a primary constraint, severe limitations on the street system, and also inadequacies of sewerage transmission and disposal, the effects of air pollution and other environmental constraints. As heretofore indicated, the requirement for a comprehensive plan is met "if due consideration is given to the common needs of a particular district," Anne Arundel County v. Ward, supra, 186 Md. at 340, 46 A.2d at 688, and we think the sectional map amendment in this case plainly meets that criterion.

[3][4] We think the record in this case fully supports the lower court's holding that the rezoning was designed to control and direct the use of land and buildings according to present and planned future conditions, so as to accomplish the most appropriate uses of land, consistent with the public interest and the safeguarding of the interests of the individual property owners. No useful purpose would be served by a detailed or extended discussion of the volumes of evidence before the Council relating to traffic and environmental constraints upon the scale of permissible development in the Friendship Heights area. Suffice it to say that the record convincingly demonstrates that the rezoning was comprehensive and bore a substantial relationship to the public ****495** health, comfort, safety, convenience, morals and general welfare; as such it enjoys a strong presumption of validity. See County Council v. District Land, 274 Md. 691, 337 A.2d 712 (1975); Montgomery County Council v. Leizman, 268 Md. 621, 303 A.2d 374 (1973); Norbeck v. Montgomery County, 254 Md. 59, 254 A.2d 700 (1969). Zoning is, of course, a legislative function and our review of the acts of the zoning authority is restricted and narrow in scope. We decide only whether the zoning action was arbitrary, discriminatory or illegal; we do not substitute our judgment for that of the zoning authority if its decision is supported by substantial evidence and the issue is fairly debatable. Ark Readi-Mix v. Smith, 251 Md. 1, 246 A.2d 220 (1968); Trustees v. Baltimore County, supra. Appellees have not overcome the presumption that the rezoning was valid and ***707** bore the necessary relationship to the general public interest and welfare.

In concluding that the sectional map amendment constituted comprehensive rezoning, we note the presence of other cardinal characteristics of comprehensiveness, i. e., all property within the CBD was rezoned by regulating all uses and covering all of the usual factors of land utilization height, area and use. In addition, the area rezoned encompassed an entire political subdivision of the county.

[5][6] The record does not support appellees' suggestion that the rezoning constituted a political decision to satisfy some property owners at the expense of others. Nor is it necessary to show by specific evidence, as appellees argue, that the rezoning benefits all of the citizens of the county. Norbeck v. Montgomery County, supra; Anne Arundel County v. Ward, supra. Finally, appellees' argument that the rezoning was not comprehensive because only 24 of the 41 acres affected were actually downzoned is equally without merit. That few changes may have been made in a comprehensive rezoning plan does not change its character or alter its nature. See Scull v. Coleman, supra, 251 Md. at 11-12, 246 A.2d 223.

(5)

We think the lower court was wrong in holding that even though the rezoning was comprehensive, Hyson v. Montgomery County, supra, mandated that the appellee property owners be afforded a right to cross-examine witnesses at the sectional map amendment hearings before the Council.

Unlike the present case, Hyson involved a single lot piecemeal rezoning. The basic question before the Court was whether the Montgomery County zoning ordinance required that cross-examination be permitted at the hearing on the application for reclassification. It was contended that since the Council was acting in a quasi-judicial capacity, it was required to conduct a "trial-type" hearing, at which parties were entitled as a matter of right to cross-examine witnesses.

The provisions of the zoning ordinance involved in Hyson, ***708** now ss 59-204 and 59-207 of the County Code (1972) (the same sections as are involved in the present case), provide for a public hearing in connection with an application for an amendment of the zoning map. Section 59-204 affords any interested

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person "the right to submit oral or written testimony or documentary evidence into the record at the hearing"; it also provides that "a complete stenographic report . . . and a typewritten transcript thereof" shall be made; that the transcript, the application for the amendment, the zoning map, and all exhibits shall be considered as parts of the record; and that "evidence (offered at the hearing) which is immaterial, irrelevant, or unduly repetitious may be excluded." Section 59-207 provides that the Council shall determine the merits of the application "on the basis of the evidence of record."

It was in "the light of these provisions" of the zoning ordinance that the Court in Hyson said that it was required to "determine . . . the type of public hearing which the Council was required to afford, and the nature of the functions exercised by the Council at such hearing . . . ." 242 Md. at 64, 217 A.2d at 584. While the Court recognized that the actual act of zoning****496** and rezoning was legislative or quasi-legislative in nature, it said that it was "inaccurate to characterize the whole proceeding at the hearing held by the Council when considering an application for reclassification and its action of denying or granting reclassification as quasi-legislative in nature or quasi-judicial in nature." Id. Referring to ss 59-204 and 59-207 of the zoning ordinance, the Court said that there provisions "required the . . . Council to resolve disputed questions of adjudicative facts (as contradistinguished from legislative facts or judicial action) concerning particular parties." Id. "Adjudicative facts" were recognized by the Court, citing 1 Davis, Administrative Law Treatise, s 7.02 (1958) (hereinafter cited as Treatise), as "roughly" the kind of facts that go to a jury in a jury case. The Court said:
"(W)hen the Council was considering and determining these adjudicative facts concerning particular parties, it necessarily was performing a ***709** quasi-judicial function, even though its final action, in granting or denying the reclassification which was required to be based upon its findings of adjudicative facts, was quasi-legislative in character." 242 Md. at 65, 217 A.2d at 584.

The Court concluded that ss 59-204 and 59-207 of the zoning ordinance conferred quasi-judicial functions upon the Council in making its determination of the facts at the piecemeal rezoning hearing and that a reasonable right of cross-examination must be allowed. It said at 67, 217 A.2d at 585:
"The authorities seem to be in accord that when an administrative board or agency is required to hold a public hearing and to decide disputed adjudicative facts based upon evidence produced and a record made, that a reasonable right of cross-examination must be allowed the parties. Professor Davis, op. cit., s 7.05, states the proposition in this manner: 'When the adjudicative facts are in dispute, our legal tradition is that the party affected is entitled not only to rebut or explain the evidence against him but also to "confront his accusers " and to cross-examine them.' We have no intention of attempting to promulgate a comprehensive rule respecting the type or the amount of cross-examination that the Council must provide at hearings on applications for reclassification. The rationale of the cases and authorities is that reasonable cross-examination, which is required for a full and true disclosure of the facts, having due regard to the circumstances of each particular case, the nature of the proceedings, and the character of the rights which may be affected by it must be permitted; and that is as far as we are required to go at this time." (Footnote omitted.)

The lower court in the present case rejected the argument that Hyson applied only to piecemeal rezoning hearings. It said that the Council performed a quasi-judicial function in ***710** developing the record and it could make no distinction between procedures to be followed at local and sectional map amendment hearings because the requirement that the determination be made on the basis of the evidence of record, and upon the merits, applied equally to both types of map amendment hearings. The lower court concluded that there was no significant distinction between the type of facts or parties involved in the piecemeal rezoning in Hyson and those involved in the instant case. It said that the Council's decision in each case was based upon the same type of facts, i. e., both were "adjudicatory in character." The lower court concluded that the due process clause of the Fourteenth Amendment did not mandate the result which it reached, but rather that the right to cross-examine was based "purely" upon the

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provisions of the zoning ordinance, as construed in Hyson. The court ultimately narrowed its holding; it said that cross-examination need not be extended to the parties in all comprehensive rezoning hearings but "where comprehensive rezoning is effected by a sectional map amendment which adopts a sector plan and consequently rezones property within a CBD, the District Council must afford to the parties, upon request, a reasonable opportunity for cross-examination."

****497** [7] Properly to be inferred from a statutory right to a public hearing on a zoning map amendment application is a right to a fair hearing in all respects, including the privilege of introducing evidence and the duty of deciding in accordance with the evidence. Ford v. Baltimore County, 268 Md. 172, 300 A.2d 204 (1973); Heath V. M. & C. C. of Baltimore, 187 Md. 296, 49 A.2d 799 (1946). There is, of course, no literal requirement in ss 59-204 or 59-209 that a right of cross-examination must be afforded to interested persons at map amendment hearings. Hyson implies the existence of that right in piecemeal rezoning cases. It views the right as one of fundamental importance in such cases, which exists either as a requirement of due process or by reason of the right to a public hearing itself, because the facts to be determined are deemed adjudicative and the Council's function as quasi-judicial in nature. We have reaffirmed the ***711** rationale of Hyson in later zoning cases, none of which, however, involved comprehensive rezoning.[FN10] The result reached in Hyson was premised largely on the distinction drawn between adjudicative and legislative facts by Professor Davis in his Treatise, but our reliance on that work may have been unwarranted. Indeed, Professor Davis has criticized our holding in Hyson, suggesting that even in piecemeal rezoning hearings no adjudicative facts are involved. He said in the 1970 Supplement to his Treatise :

> FN10. See Birckhead v. Board of County Comm'rs, 260 Md. 594, 273 A.2d 133 (1971); Bayer v. Siskind, 247 Md. 116, 230 A.2d 316 (1967); Town of Somerset v. Board, 245 Md. 52, 225 A.2d 294 (1966); Gorin v. Board of County Comm'rs, 244 Md. 106, 223 A.2d 237 (1966). See also Annot., 27 A.L.R.3d 1304 (Right to Cross-Examination of Witnesses in Hearings before Administrative Zoning Authorities) (1969).

"The (Hyson) court quoted from s 7.05 of the Treatise that cross-examination should be allowed when adjudicative facts are in dispute, but it did not demonstrate that adjudicative facts were in dispute. A concurring judge persuasively argued that cross-examination was unnecessary because what the Council was doing was rezoning of four acres, a legislative function. The concurring judge objected to the court's requirement of cross-examination, 'Professor Davis to the contrary notwithstanding,' but he cited no Davis position to the contrary. Nor could he, for that position is that opportunity for cross-examination should be required if but only if adjudicative facts are in dispute."
Davis, Administrative Law Supplement, s 7.04, at 323 (1970).

[8][9] We recognized in Chevy Chase Village v. Board, 249 Md. 334, 239 A.2d 740 (1968), that a "judicial" or "trial-type" hearing is not a requirement of procedural due process where an administrative agency does not act in a quasi-judicial capacity and the facts to be determined are "legislative" rather than adjudicative in nature. See also Albert v. Pub. Serv. Commission, 209 Md. 27, 120 A.2d 346 (1956). The difference between adjudicative and legislative ***712** facts is not easily drawn; Professor Davis says that adjudicative facts are facts about the parties and their activities, businesses and properties. They usually answer the questions "of who did what, where, when, how, why, with what motive or intent" while legislative facts "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." Davis, Treatise, s 7.02. The difference, broadly speaking, involves whether the decision is to be made on individual or general grounds. Davis, Treatise, s 7.04. Simply because an individual has a protected interest does not entitle him to a trial-type hearing where the matter to be determined involves issues of legislative fact. Davis, Administrative Law of the Seventies, ss 7.00-1 7.00-11

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(1976). That the effect of a zoning authority's decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines the party's right to an adjudicatory hearing. ****498**Powelton Civic Home Own. Ass'n v. Department of H. & U. Dev., 284 F.Supp. 809, 830 (E.D.Pa.1968). [FN11]

> FN11. The court there said (p. 829) that where the decisions to be made by the administrative agency require factual findings on the particular status of a particular individual an adjudicatory hearing may be necessary; but where the decisions rest on more general findings requiring analysis and evaluation of factors not uniquely related to any specific individual, no such hearing would be required.

[10][11] The appellants contend, and we agree, that in comprehensive rezoning proceedings the Council does not consider and determine adjudicative facts concerning particular parties within the contemplation of our decision in Hyson. A real distinction exists between piecemeal and comprehensive rezoning hearings; it lies in the nature of the basic function being performed by the zoning authority in each case. In a local map amendment proceeding in Montgomery County, the zoning authority considers a single piece of property and must make a factual determination, based on evidence of record, as to whether there has been a change in the physical character of the neighborhood where ***713** the property is located or a mistake was made in the original zoning. Piecemeal rezoning hearings, therefore, contemplate an adversary or trial-type procedure to resolve adjudicative facts. A different determinative standard applies where the Council is considering a comprehensive rezoning by the sectional map amendment process; there its focus is not on a single piece of property, but rather on a considerable number of properties as they relate to each other and to the surrounding area. The Council in that instance considers whether the comprehensive rezoning takes into account future public needs and purposes; whether it is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional needs; and ultimately whether it bears the requisite relationship to the public health, safety and general welfare. As appellants correctly point out, these are not adjudicative determinations affecting one property owned by one person, but instead are classically legislative determinations designed to affect local and regional needs and all property owners within the planning area. The procedure is fundamentally legislative and no significant quasi-judicial function is involved. That the Council determined the zoning for each specific property owned by the various appellees and considered the impact of traffic and environmental constraints upon the scale of permissible development within the CBD does not alter the basic fact that the issues for determination were legislative, not adjudicative, and did not require a judicial or trial-type hearing. See South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974) (en banc); [FN12] Fasano v. Board of County Com'rs of Washington Cty., 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash.2d 292, 502 P.2d 327 (1972). Accordingly, we hold that there was no constitutional or other right arising from ss 59-204 and 59-207 to cross-examine witnesses at the sectional map amendment hearings involved in this case. Indeed, in its most recent pronouncement on the subject, the Supreme Court has indicated that it would not constitute a deprivation of ***714** procedural due process if no hearing was permitted either in a piecemeal or comprehensive rezoning action. See Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). See also Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915); San Diego Bldg. Contr. Ass'n v. City Coun. of San Diego, 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570 (1974), appeal dismissed, 427 U.S. 901, 96 S.Ct. 3184, 49 L.Ed.2d 1195 (1976).

> FN12. Rev'g 482 F.2d 389 (5th Cir. 1973), cert. denied, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974).

(6)

The lower court also relied upon Hyson in holding that

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the Council's resolution granting the sectional map amendment required reversal because the appellee property owners were afforded only eight minutes each to testify at the sectional map amendment hearings. It said that Hyson:

****499** "makes it clear that where a legislative body must make its decision on 'evidence of record', and that record making requires an adjudicatory fact finding process, the legislative body must comply with due process requirements. The District Council's action in announcing a time limitation and, in effect, denying the appellants a fair opportunity to participate in the record making process by presenting direct evidence or rebuttal testimony after cross-examination directly contravenes the holding of Hyson, supra. That is not to say that fair limitations cannot be made as to repetitious or irrelevant testimony, but as the matter stands the District Council's action in announcing the eight minute time limitation was arbitrary and capricious and requires a reversal of this rezoning."

In Hyson, our predecessors said that zoning authorities have discretion "to regulate, reasonably, the length of time afforded parties to present their evidence" and that "(w)hether constitutional or statutory requirements, or the elements of fair play and impartiality have been violated in this regard should also be decided on a case to case basis." ***715** 242 Md. at 69-70, 217 A.2d at 587. We think the lower court erred as a matter of law in concluding, in the circumstances of this case, that the eight-minute time limitation was arbitrary and capricious.

The appellee property owners were accorded the most time to present evidence at the hearing, i. e., eight minutes each, or almost five hours collectively for the 37 individual property owners involved. Pooling of time was permitted in order to make joint presentations, if desired, and each property owner was afforded the right to submit written material and exhibits without restriction. Each property owner was permitted to rebut any evidence offered into the record without regard to the eight-minute time limit. The Council advised all property owners a week in advance of the hearing as to the time limits that would be imposed. Two days were consumed by the Council in conducting the hearings and massive amounts of evidence previously submitted during the sector plan hearings were incorporated into the record, much of which presented the views espoused by and on behalf of the appellee property owners.

[12] Wash. County Taxpayers Ass'n v. Board, 269 Md. 454, 306 A.2d 539 (1973), involved a public hearing before a county Planning Commission on a proposed comprehensive plan at which a three-minute time limit was imposed on each speaker. We there noted the necessity for imposing reasonable time limitations upon speakers at public hearings involving widespread public interest. We found the three-minute time restriction there imposed, when coupled with the right to submit supplemental written statements, to have been reasonable in the circumstances and not to have impaired the validity of the hearing. To similar effect, see Freeland v. Orange County, 273 N.C. 452, 160 S.E.2d 282 (1968). See also Reed v. California Coastal Zone Conservation Com., 55 Cal.App.3d 889, 127 Cal.Rptr. 786 (1975).

We think the appellee property owners were not deprived of any constitutional or other right arising under s 59-204 of the zoning ordinance by reason of the imposition of the challenged time constraint. What the Council did in the ***716** circumstances of this case, everything considered, was both reasonable and fair and in substantial compliance with the legislative mandate. Particularly when considered in conjunction with the opportunity afforded the property owners to submit evidence into the record to supplement their oral presentations, the eight-minute limitation did not compromise their right effectively to make their views known to the Council.

(7)

The appellees next contend that the Council's action in adopting the Sector Plan and the sectional map amendment was unlawful because in creating the new CBD zones it violated the provisions of Maryland Code, Art. 66D, s 8-101 by illegally delegating its zoning power "(to determine) the density and distribution of population," vis-****500** a-vis, the

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optional method of development of the CBD zones, to the Montgomery County Planning Board of the Planning Commission.[FN13]

FN13. The members of the Planning Commission appointed by the Montgomery County Council constitute the Montgomery County Planning Board. Art. 66D, s 7-111.

As heretofore indicated, the CBD zones are authorized by ss 59-51.3, .4, and .5 of the County Code (1975 Cum.Supp.); they provide for a standard and an optional method of development. The zones were intended to encourage residential and commercial development at densities supportable by existing and proposed public facilities which would be compatible with the surrounding areas. A property with a CBD zoning classification may, under the provisions of the zoning ordinance, be developed as a matter of right in accordance with the standard method of development, or if it contains a minimum of 22,000 square feet, the owner may apply for the optional method of development which permits more intense development but provides for open spaces and other facilities and amenities. See, e. g., s 59-51.3(a). Unlike the standard method, the optional method of development requires approval of the Planning Board upon compliance with specified development standards and after detailed site ***717** plan review. The property owner is required to file a detailed application with the Planning Board under s 59-31.2 of the zoning ordinance for the optional method of development and submit a site plan and other detailed information. A public hearing is mandated and the Planning Board, in order to approve an application, must find that it meets certain designated requirements enumerated in s 59-31.2(e)(1) and (2) and that the detailed site plan complies with specified factors contained in s 59-31.3.

The optional method of development is not, as appellees suggest, a separate and distinct zone over which the Planning Board exercises exclusive control contrary to the Regional District Act. It is, as its designation implies, an optional method for developing property located in a CBD zone which has been legislatively predetermined to be compatible with uses within the zone; it may be utilized or not, at the option of the property owner. The Planning Board does not determine the density and distribution of population. The Council in its legislative capacity enacted the CBD zones with predetermined maximum allowable densities and it delegated to the Planning Board the administrative function of determining, pursuant to carefully drawn procedural guidelines, including site plan review, the actual appropriate density for a specific property up to legislatively specified maximum densities. See, e. g., s 59-51.3(f)(1)b.

[13][14] Executing the policy of a zoning ordinance is an administrative function that may be properly delegated to administrative boards or officials under specified procedural guidelines. 8 McQuillin, Municipal Corporations s 25.35 et seq. (3rd ed. rev. 1976); Baltimore County v. Mo. Realty, 219 Md. 155, 148 A.2d 424 (1959); Huff v. Bd. of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Pressman v. Barnes, 209 Md. 544, 121 A.2d 816 (1956). We see no illegal delegation of zoning powers to the Planning Board in this case. [FN14] Nor is ***718** there merit in the appellees' argument that the standards and guidelines contained in s 59-31.2 of the zoning ordinance to govern the exercise of the delegated powers are not sufficiently clear to prevent arbitrary interpretation and discriminatory application, or to assure an applicant approval under the optional method of development, given the meeting of certain minimum conditions. Compare Pr. George's County v. M & B Constr. Co., 267 Md. 338, 297 A.2d 683 (1972);****501**Knudsen v. Montgomery County, 241 Md. 436, 217 A.2d 97 (1966); Beall v. Montgomery County, 240 Md. 77, 212 A.2d 751 (1965); Costello v. Sieling, 223 Md. 24, 161 A.2d 824 (1960); Rockshire Civic Ass'n v. Rockville, 32 Md.App. 22, 358 A.2d 570, cert. denied, -- Md. -- (1976); Marathon Oil Co. v. Township of Plymouth, 25 Mich.App. 399, 181 N.W.2d 668 (1970); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968).

FN14. Section 59-31.2(e)(4) was declared invalid by the lower court on the ground that it constituted an improper delegation of the zoning power to the Planning Board. That

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subsection provided that "The fact that an application complies with all of the specific requirements and purposes of the applicable zone shall not be deemed to create a presumption that the application shall be approved." The lower court held that the provision was severable and no appeal was taken from that determination; we do not pass on the question.

(8)

[15][16] Appellees next contend that the CBD zones violate the uniformity requirements of Maryland Code, Art. 66D, s 8-102, which provide that "all (zoning) regulations shall be uniform for each class or kind of building throughout any district or zone, but the regulations in one district or zone may differ from those in another district or zone." They argue that they are denied uniformity of treatment in four particulars, viz:
"1. As compared to property owners in other CBD's within the same zoning district, the permitted FAR (floor area ratio) is limited under the new CBD zones so that parking accommodations in excess of fifty percent (50%) of stated requirements are computed as part of the building FAR. On the other hand, in Bethesda (another Central Business District within the same planning district), property owners are allowed to meet the parking requirements, and at the same time, utilize fully the maximum FAR.
***719** "2. As applied, the CBD zones do not provide uniformity of treatment for properties similarly situated . . . (because) only those properties of 22,000 square feet or more are eligible for the 'Optional Method of Development' (which allows a density of 2 to 2.5 times that of the standard method of development).
"3. (T)he CBD zones fail to assure there will be no discrimination . . . (because) the Planning Board in both the 'Optional Method of Development' application process (s 59-31.2) and 'Site Plan Review' (s 59-31.3) has complete authority to dictate and specify to an applicant that his development will be approved only if it conforms to the use and density recommendations set forth in the adopted Sector Plan.
"4. The non-conforming use provisions of the CBD zones, ss 59-51.3(g), 59-51.4(g) and 59-51.5(g) impose substantial and severe hardships upon many property owners in that sound buildings constructed prior to 1959 (e. g., Woodward and Lothrop on parcel 2) are treated as non-conforming uses, while buildings constructed after 1959 are given a grace period from the effect of the ordinance for seven (7) years."

The uniformity provision contained in Art. 66D, s 8-102 was derived from s 2 of the Standard State Zoning Enabling Act, as to which it was said in 1 Anderson, American Law of Zoning s 5.22 (2d ed. 1976), that the purpose of the provision was mainly a political rather than a legal one, i. e., to give notice to property owners that there shall be no improper discriminations. See Dupont Circle Cit. Ass'n v. Dist. of Col. Zoning Com'n, 355 A.2d 550 (D.C.App.), cert. denied, 429 U.S. 966, 97 S.Ct. 396, 50 L.Ed.2d 334 (1976); Orinda Homeowners Committee v. Board of Supervisors, 11 Cal.App.3d 768, 90 Cal.Rptr. 88 (1970). We have also recognized that invidious distinctions and discriminations in applying the uniformity requirement are impermissible. ***720**City of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 91, 299 A.2d 828 (1973); Marathon Builders, Inc. v. Polinger, 263 Md. 410, 422, 283 A.2d 617 (1971); Cassel v. City of Baltimore, 195 Md. 348, 354, 73 A.2d 486 (1950). The uniformity requirement does not prohibit classification within a district, so long as it is reasonable and based upon the public policy to be served. Quinton v. Edison Park Development Corp., 59 N.J. 571, 285 A.2d 5 (1971); Schmidt v. Board of Adjustment of City of Newark, 9 N.J. 405, 88 A.2d 607 (1952); Dupont Circle, etc., supra. The focus is upon the terminology of the ordinance, rather than upon its application. Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319 (1939), appeal dismissed, 309 U.S. 633, 60 S.Ct. 719, 84 L.Ed. 990 (1940). See ****502**Richmark Realty v. Whittlif, 226 Md. 273, 173 A.2d 196 (1961); City of Baltimore v. Byrd, 191 Md. 632, 62 A.2d 588 (1948).

[17] Applying these principles, the lower court found no violation of the uniformity provision in the requirement that a certain portion of the FAR be designated for parking in the Friendship Heights CBD but not in the Bethesda CBD located in the same district. Bethesda, unlike Friendship Heights, is located

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in a special parking lot district. See County Code (1972), Ch. 60. Section 59-1 of the County Code, which defines the term "gross floor area," provides:
"... Parking for either retail or office uses provided in the amount of fifty percent or less than that required by section 59-79 shall not be computed as part of the gross floor area (an element of FAR); however, parking for such uses provided in excess of fifty percent of the stated requirements of this chapter shall be counted as part of the gross floor area. ..."

Section 59-79 delineates the requirements for off-street parking for designated uses including retail and office uses, while s 59-66(a) provides that the off-street parking requirements of s 59-79 shall not apply within parking lot districts. Since the appellees' properties are not located in a parking lot district, they must provide off-street parking, 50 percent of the area of which is computed as part of their ***721** gross floor area, thus reducing the amount of area usable for retail or office purposes. That properties located in parking lot districts are not so restricted does not in itself violate the uniformity requirements of s 8-102 of Art. 66D. Those properties must either pay a parking lot district tax or provide their own off-street parking in which event they are subject to the provisions of s 59-1 of the County Code. As a consequence, all property uses which do not rely on county operated parking facilities have their gross floor area calculated in the same manner, while all property uses located within parking lot districts which do not rely on county operated facilities have their gross floor area calculated in the same manner.

[18] Nor do we find a lack of uniformity in the requirement that properties must have a minimum of 22,000 square feet to qualify for the optional method of development. The zoning regulations apply uniformly to all parcels less than 22,000 square feet as well as those in excess of that area. The Council determined that the optional method of development would not be suitable for parcels less than 22,000 square feet,[FN15] and the lower court held, and we agree, that the legislative purpose of encouraging land assembly to permit cohesive development and to assure open spaces and other amenities provides a reasonable basis for the classification.

FN15. The Adopted Sector Plan indicates the rationale and purpose for the area requirement. It is there stated:
"Fragmentation of land holdings has been a major obstacle to attractive and coordinated development of the CBD's. In order to encourage land assembly that will permit more cohesive development and assure provision of open space, pedestrian walks, and other amenities, the new system permits property owners who meet a minimum acreage requirement (22,000 square feet) to elect to use an alternative optional method of development. The optional method allows the developer somewhat higher density than can be achieved under the standard methods but only if provisions for open space and other facilities and amenities specified by the sector plan are included."

The lower court considered the appellees' third claim of violation of the uniformity requirement to be premature. It said:
"(Appellees) challenge uniformity based upon the Planning Board's authority to allocate different ***722** F.A.R.'s to different parcels within the Friendship Heights CBD. . . . (T)his challenge is premature because none of the (appellees) have yet applied for the optional method of development. Until it can be established that the Planning Board has allocated different F.A.R.'s to different parcels in violation of the uniformity requirement there is no issue upon which the Court can rule."

We agree with the lower court.

With respect to the provisions of the new CBD zones pertaining to nonconforming ****503** structures, s 59-51.3(g) (CBD-1, by way of example) provides:
"Any buildings, structures, or uses for which a building permit was issued after December 31, 1958, shall not be regarded as a nonconforming use in that they may be continued, structurally altered, or repaired, or enlarged in conformance with the requirements of this zone so long as they remain an otherwise lawful use as previously allowed.
"Any buildings, structures or uses which become nonconforming upon reclassification of property to this CBD zone shall not be subject to the provisions of

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sections 59-187, 59-188 and 59-189 for a period of seven years thereafter."

Sections 59-187 and 59-188 deal, respectively, with structural alterations, and change and abandonment of nonconforming uses, while s 59-189 concerns reconstruction of damaged or destroyed buildings.

[19] While noting that pre-1959 uses are differentiated from post-1959 uses, the lower court found no lack of uniformity in the nonconforming use provisions of the CBD zoning categories. We agree. The Council's purpose, as appellants point out, was to alleviate the impact of its newly created CBD zones by providing that buildings for which building permits were issued after December 31, 1958, are not nonconforming. As to buildings for which permits were issued prior to January 1, 1959, the Council provided that ***723** buildings, structures or uses which become nonconforming upon reclassification to a CBD zone shall not be subject to the provisions of ss 59-187, 59-188, and 59-189 for a period of seven years. This difference in treatment is neither arbitrary nor invidiously discriminatory, but affects alike all properties similarly situated.

(9)

Appellees contend that the provisions of the zoning ordinance relating to the optional method of development of the CBD zones represent a confiscatory exercise of the police power. Although recognizing that the optional method is not mandatory, they nevertheless argue that its use unconstitutionally requires the dedication of public amenities like open-air plazas, quasi-public recreational facilities, community parks and illegal buffer zones. They claim that the CBD zones were superficially designed to have a purported standard method of development in order to satisfy the requirements of the "reasonable use" test prescribed in Rockville v. Stone, 271 Md. 655, 319 A.2d 536 (1974), when in actuality so many limitations were imposed on that method of development that no use could ever be made of it. As a result, they say that they are frustrated in the use of their property unless they apply for and submit to the exactions and limitations required for development under the optional method. In effect, therefore, the argument is that the CBD zones deny them all reasonable use of their properties and are, therefore, illegally confiscatory.

[20] We agree with the lower court that the appellees made no showing that they had been denied all reasonable use of their properties under the new CBD zoning classifications. There is nothing in the record before us to demonstrate that the challenged zoning deprives the appellees of all beneficial use of their properties or that the restrictions imposed were such that the properties could not be used for any purpose. Rockville v. Stone, supra; Montgomery County Council v. Kacur, 253 Md. 220, 252 A.2d 832 (1969); Baltimore City v. Borinsky, 239 Md. 611, 212 A.2d 508 (1965); Norbeck Village ***724** v. Montgomery County, supra. As in Stone, there is nothing in the record to show that the soil or topographical conditions make it unfeasible to construct any type of building in compliance with the use requirements of the CBD zones. The record before us reveals only that permissible densities of appellees' properties have been significantly decreased; that showing is, of course, insufficient to demonstrate a confiscatory exercise of the zoning police power in Maryland.

[21] With respect to the so-called Bergdoll tract, it is argued that the 3.5 acres of this property, which was rezoned by the sectional map amendment to an R-60 classification****504** (one family, detached residential), cannot be put to any reasonable use. Since this property lies between two parcels zoned R-H (multiple family, high-rise planned residential), it is argued that it was zoned R-60 "for the sole illegal purpose of creating a buffer area and precluding its use for any other purpose" a violation of the principles espoused in Spaid v. Board of County Comm'rs, 259 Md. 369, 269 A.2d 797 (1970).

We recognized in Spaid that there may be lawful as well as unlawful buffer zones; that there may be a transitional zone of less intensive use properly placed between a residential use district and a district permitting commercial or more intensive use as long as the transitional use does not deprive the property owner of all reasonable use of his property. No valid claim of

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deprivation of all reasonable use can be made with respect to the Bergdoll property. There is no indication in the record that the 3.5 acres could not be used for the construction of single family homes. Moreover, as the appellants point out, the owners of the Bergdoll tract, which comprises a total of 18.19 acres, could develop a substantial portion of it high-rise with R-60 residential on the northern portion closest to like R-60 development; or it could be developed PD-44, as recommended by the Adopted Sector Plan, at a density higher than was permitted by the R-H zoning in effect prior to adoption of the sectional map amendment.

(10)

***725** Appellees' final argument is placed under the heading of "Illegal use of Floating Zones." While they do not challenge the validity of the floating zone concept as a proper and lawful zoning tool, it is generally argued that the Council "has acted in excess of its zoning power by enactment of the CBD ordinance." Appellees repeat their earlier argument that the CBD zones leave only a residuum of permissible development as a matter of right, and they claim that any significant development must be sought under the optional method of development through approval of the Planning Board. As a result, appellees maintain that this system of zoning is an unlawful departure from the standard Euclidean method of zoning in that the scale of development is not determined on a comprehensive, cohesive basis but rather by a series of ad hoc planning decisions. They see this as a form of conditional zoning, unlawful in Montgomery County, as involving the imposition of zoning conditions via the use of floating zones.[FN16] We think the argument, although not lacking in esoteric qualities, is groundless as a matter of law.

FN16. A floating zone is a special detailed use district of undetermined location, a district in which the proposed kind, location, size, and form of structures must be preapproved, and which, like a special exception use, is legislatively predeemed compatible with the areas in which it may thereafter be located on a particular application, provided specified standards are gratified and actual incompatibility is not revealed. Chatham Corp. v. Beltram, 243 Md. 138, 220 A.2d 589 (1966).

[22] As heretofore indicated, the floating zone aspect of the CBD zones revolves around the optional method of development a method which combines a legislative predetermination of compatible uses with detailed standards to guide its application. The CBD zones are Euclidean zones with the optional method of development "built" into the zones; that method is not itself a floating zone or a special exception, although it may have some of their characteristics. As appellants indicate, the optional method provides greater assurance of compatibility and certainty of uses than do most floating zones since it has been legislatively predetermined to be compatible only with those ***726** uses within the particular CBD zone. We think the utilization of the optional method of development within the CBD zones was well within the zoning powers granted to the Council; it does not constitute any form of invalid conditional zoning proscribed by the zoning ordinance and our decision in Mont. County v. Nat'l Capital Realty, 267 Md. 364, 297 A.2d 675 (1972). Compare Swarthmore Co. v. Kaestner, 258 Md. 517, 266 A.2d 341 (1970); Huff v. Bd. of Zoning Appeals, supra.

****505** ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSING RESOLUTION 7-1849 OF THE MONTGOMERY COUNTY COUNCIL VACATED; CASE REMANDED FOR THE ENTRY OF AN ORDER IN CONFORMITY WITH THIS OPINION; COSTS TO BE PAID BY THE PARTIES IDENTIFIED IN THE OPINION AS THE APPELLEE PROPERTY OWNERS.

Md. 1977.
Montgomery County v. Woodward & Lothrop, Inc.
280 Md. 686, 376 A.2d 483

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C
Department of Natural Resources v. Linchester Sand & Gravel Corp.,Md. 1975.
Court of Appeals of Maryland.
DEPARTMENT OF NATURAL RESOURCES
v.
LINCHESTER SAND AND GRAVEL CORPORATION.
No. 80.

March 19, 1975.

Landowner's application for permit for dredging and filling activities on private wetlands was denied by the Secretary of the Department of Natural Resources and the denial affirmed by Department board of review, and landowner appealed. The Circuit Court, Somerset County, E. McMaster Duer, C.J., entered judgment for landowner, and Department appealed. The Court of Appeals, Digges, J., held that statutory provision providing for de novo trial on appeal from determination of Department of Natural Resources on application for permit under wetlands statute was unconstitutional.

Judgment of Circuit Court vacated and case remanded.
West Headnotes
[1] Constitutional Law 92 ⚿48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
Enactments of legislature are presumed to be constitutionally valid and such presumption prevails until it appears that enactment under consideration is invalid or obnoxious to expressed terms of Constitution or to necessary implication afforded by, or flowing from, such express provisions.

[2] Constitutional Law 92 ⚿62(1)

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k59 Delegation of Powers
92k62 To Executive
92k62(1) k. In General. Most Cited Cases
(Formerly 15Ak204)
Legislation which has to provide for large number of special cases of varied facts, or for unforeseeable conditions present or future, must be supplemented by action of administrative officers with power to adapt and vary rule as special cases come before them, one by one.

[3] Constitutional Law 92 ⚿50

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k50 k. Nature and Scope in General. Most Cited Cases
Although some mingling, blending and overlapping of legislative, executive and judicial functions is permissible within administrative agencies, such constitutional "elasticity" cannot be stretched to point where, in effect, there no longer exists separation of governmental power since Constitution does not permit merger of three branches of state government nor does it make any one of three departments subordinate to other, when exercising trust committed to it. Const. Declaration of Rights, art. 8.

[4] Constitutional Law 92 ⚿50

92 Constitutional Law
92III Distribution of Governmental Powers and Functions

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92III(A) Legislative Powers and Delegation Thereof
92k50 k. Nature and Scope in General. Most Cited Cases
When legislature confers, by enactment, powers upon one of other branches of government which are beyond those permitted under Constitution or any of three branches of government takes unto itself powers denied to it or those strictly within sovereignty of another branch, courts must step in and declare such encroachments to be constitutionally prohibited. Const. Declaration of Rights, art. 8.

[5] Administrative Law and Procedure 15A 305

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak305 k. Statutory Basis and Limitation. Most Cited Cases
Primary function of administrative agencies, which are created in order to perform activities which legislature deems desirable and necessary to forward health, safety, welfare and morals of citizens, is to advance will and weal of people as ordained by their representatives, the legislature.

[6] Administrative Law and Procedure 15A 106

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak103 Status and Character
15Ak106 k. Legislative. Most Cited Cases

Administrative Law and Procedure 15A 107

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak103 Status and Character
15Ak107 k. Judicial in General. Most Cited Cases
Dual role which administrative agencies play in performing some activities which are legislative in nature and in making factual determinations is constitutionally permissible. Const. Declaration of Rights, art. 8.

[7] Constitutional Law 92 79

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(C) Executive Powers and Functions
92k78 Encroachment on Judiciary
92k79 k. In General. Most Cited Cases
(Formerly 15Ak235.1, 15Ak235)
Authority of administrative agencies to make factual determinations and thus adjudicate is not the same and is distinguishable from the exercise of judicial powers which is constitutionally exclusively reserved to designated courts. Const. art. 4, § 1.

[8] Administrative Law and Procedure 15A 107

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak103 Status and Character
15Ak107 k. Judicial in General. Most Cited Cases
(Formerly 15Ak235.1, 15Ak235)
While administrative agencies, in proper performance of duties which legislature permissibly delegates to them, may use discretion to formulate policy, promulgate rules and adjudicate in order to determine specific questions of fact, they, nevertheless, in doing so are performing nonjudicial functions. Const. Declaration of Rights, art. 8; Const. art. 4, § 1.

[9] Administrative Law and Procedure 15A 760

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak760 k. Wisdom, Judgment or Opinion. Most Cited Cases
Role of courts in regard to administrative agency adjudicating in order to determine specific questions of fact is to see that such administrative responsibilities were properly empowered to agency and have been performed within confines of traditional standards of

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procedural and substantive fair play; court's review cannot be substitution of court's judgment for that of agency.

[10] Administrative Law and Procedure 15A ⚷656

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak654 Power of Legislature
15Ak656 k. Absence of Statutory Provision for Review. Most Cited Cases
In order to determine whether administrative agency's adjudication in order to determine specific questions of fact have been performed within confines of traditional standards of procedural and substantive fair play, courts may be provided with specific authorization to do so by legislature through statutory provision, but even absent such authority, judiciary has undeniable constitutionally inherent power to review, within limits, decisions of these administrative agencies. Const. Declaration of Rights, art. 8; Const. art. 4, § 1.

[11] Administrative Law and Procedure 15A ⚷797

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak797 k. Legislative Questions; Rule-Making. Most Cited Cases
Where administrative agency is acting in manner which may be considered legislative in nature or quasi legislative, judiciary's scope of review of that particular action is limited to assessing whether agency was acting within its legal boundaries.

[12] Administrative Law and Procedure 15A ⚷763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, Unreasonable or Capricious Action; Illegality. Most Cited Cases
When administrative agency is acting in fact-finding or quasi-judicial capacity court's review of appealed conclusions is to determine whether contested decision was rendered in illegal, arbitrary, capricious, oppressive or fraudulent manner.

[13] Administrative Law and Procedure 15A ⚷5

15A Administrative Law and Procedure
15AI In General
15Ak4 Constitutional and Statutory Provisions in General
15Ak5 k. Agencies and Proceedings Affected. Most Cited Cases
Administrative Procedure Act is designed to apply to all state agencies except those expressly excluded. Code 1957, art. 41, §§ 244-256.

[14] Administrative Law and Procedure 15A ⚷651

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak651 k. In General. Most Cited Cases
However court's scope of review of administrative agency's decision is defined, such definition has equal application to judicial review of agency's decision whether there is absent statutory provision for review, or whether statute specifically grants courts the right of review.

[15] Administrative Law and Procedure 15A ⚷763

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak763 k. Arbitrary, Unreasonable or Capricious Action; Illegality. Most Cited Cases
In regard to court's oversight of decisions of administrative agencies, which, while often functioning as fact-finding bodies, perform essentially nonjudicial duties, court's inquiry is almost always limited to finding whether there was illegality or unreasonableness in action and when such inquiry is finished, judicial scrutiny ends.

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[16] Workers' Compensation 413 ⚿1939.1

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.1 k. In General; Questions of Law or Fact. Most Cited Cases
(Formerly 413k1939)
Although judicial scrutiny of administrative agency's decision is generally limited to finding whether there was illegality or unreasonableness in agency's action, where agency, such as Workmen's Compensation Commission, has basic function so essentially judicial that it can be considered to be supplanting what might have been court function, although in constitutional sense, agency's activity is legislative in nature because it is part of police power as contradistinguished from regular judiciary powers of state, such agency's activities are subject to considerably more expansive judicial review.

[17] Environmental Law 149E ⚿128

149E Environmental Law
149EIV Water, Wetlands, and Waterfront Conservation
149Ek128 k. Wetlands. Most Cited Cases
(Formerly 199k25.5(6), 199k25.5 Health and Environment)
Whether, under wetlands statute, a particular parcel of land comes within statutory wetlands designation and, if so, whether it must remain in its then existing natural state for ecological, aesthetic, environmental and recreational reasons are decisions to be made pursuant to state's police power and thus activities of Department of Natural Resources, in making determination in particular case, must be exercised within guidelines and standards prescribed by Legislature. Code, Natural Resources, § 9-101 et seq.

[18] Environmental Law 149E ⚿681

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek681 k. Water, Wetlands, and Waterfront Conservation. Most Cited Cases
(Formerly 199k25.5(6), 199k25.5 Health and Environment)
In determining whether particular parcel of land comes within statutory wetlands designation, Department of Natural Resources' activities, which consist of gathering and sifting evidence directed both at present and future repercussions of granting or denying permit in specific case so as to take into account needs of public in general, can be reviewed by judiciary only under "arbitrary and capricious" type of scrutiny. Code, Natural Resources, § 9-101 et seq.

[19] Environmental Law 149E ⚿681

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek681 k. Water, Wetlands, and Waterfront Conservation. Most Cited Cases
(Formerly 199k25.5(6), 199k25.5 Health and Environment)
Where Department of Natural Resources denied landowner's application for permit under wetlands statute for dredging and filling activities on private wetlands, on appeal, circuit court was constitutionally limited to assessment of whether such determination was based on evidence sufficiently substantial so that permit denial was not "arbitrary and capricious," despite provision of wetlands statute providing for de novo trial free of Administrative Procedure Act with right to elect jury trial and with no right of removal. Code, Natural Resources, §§ 9-101 et seq., 9-308(b); Const. Declaration of Rights, art. 8.

[20] Environmental Law 149E ⚿116

149E Environmental Law
149EIV Water, Wetlands, and Waterfront Conservation
149Ek113 Constitutional Provisions, Statutes, and Ordinances

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149Ek116 k. Validity. Most Cited Cases
(Formerly 199k21 Health and Environment)
Statutory provision, providing for de novo trial free of Administrative Procedure Act with right to elect jury trial and with no right of removal on appeal from determination of Department of Natural Resources concerning application for permit under wetlands statute, was unconstitutional. Code, Natural Resources, §§ 9-101 et seq., 9-308(b); Const. Declaration of Rights, art. 8.

[21] Statutes 361 ⚷64(2)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases
Fact that statutory provision, providing for de novo trial free of Administrative Procedure Act with right to elect jury trial and with no right of removal on appeal from determination by Department of Natural Resources on application for permit under wetlands statute, was unconstitutional did not affect validity of remaining portions of wetlands statute. Code 1957, art. 1, § 23; Code, Natural Resources, §§ 9-101 et seq., 9-308(b).

[22] Environmental Law 149E ⚷698

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek694 Determination, Judgment, and Relief
149Ek698 k. Remand to Administrative Agency. Most Cited Cases
(Formerly 199k25.15(12), 199k25.15(1), 199k25.5 Health and Environment)
Where statutory provision, under which circuit court held trial de novo on appeal from determination of Department of Natural Resources denying landowner's application for permit under wetlands statute, was unconstitutional and record upon which Secretary of the Department of Natural Resources and Department review board based their decisions was not before Court of Appeals, case was remanded for purpose of review by circuit court limited to assessment whether Department determination was based on evidence sufficiently substantial so that permit denial was not "arbitrary and capricious." Code, Natural Resources, §§ 9-101 et seq., 9-308(b).

[23] Environmental Law 149E ⚷698

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek694 Determination, Judgment, and Relief
149Ek698 k. Remand to Administrative Agency. Most Cited Cases
(Formerly 199k25.5(6), 199k25.5 Health and Environment)
Despite landowner's contention that further proceedings concerning Department of Natural Resources' denial of landowner's application for permit under wetlands statute for dredging and filling activities on private wetlands were moot since area had already been dredged and filled to significant degree, remand for such proceedings was appropriate where, assuming permit denial was ultimately sustained, restoration to extent reasonably possible could be required. Code, Natural Resources, §§ 9-101 et seq., 9-501(d).

***212** Warren K. Rich, Asst. Atty. Gen., Annapolis (Francis B. Burch, Atty. Gen. and Henry R. Lord, Deputy Atty. Gen., Baltimore, on the brief), for appellant.
Thomas S. Simpkins, Princess Anne (Thomas J. Spain, Princess Anne, on the brief), for appellee.

Argued before MURPHY, C. J. SINGLEY, SMITH, DIGGES, LEVINE, ELDRIDGE and O'DONNELL, JJ.
DIGGES, Judge.
Maryland's recently enacted 'wetlands statute,' marshalled by the General Assembly to protect those vast acres of ecologically, economically, aesthetically and recreationally valuable terraqueous areas having completely, partially or periodically submerged bottoms, which are the habitats of innumerable variations of aquatic life, is the legal quagmire through which was must wade in order to resolve this dispute.[FN1] Although the basic legal question requires considerable analysis, the facts of this case are not muddled.

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FN1. At the time this litigation was instituted the 'wetlands statute' was set forth in the Maryland Code (1957, 1970 Repl.Vol.), Art. 66C, ss 718-731. It has been recodified and now appears in the Maryland Code (1974), Title 9 of the Natural Resources Article. The citations in this opinion will reflect the 1974 codification. For historical background and general discussion of this legislation see Comment, Maryland Wetlands: The Legal Quagmire, 30 Md.L.Rev. 240 (1970).

***213** Approximately four years ago Linchester Sand and Gravel Corporation, the appellee, purchased five acres of land, located in Somerset County and bounded on two sides by the Wicomico River and its tributary, the Dames Quarter Creek, so that the owner of that corporation, William C. Sharpley, could build two summer homes on the property-one for himself and one for his son. Approximately half of this purchase is composed of wetlands, since it becomes inundated by spring tides.[FN2] As a consequence, Sharpley, apparently unaware of the necessity of obtaining beforehand a permit as required by Maryland Code (1974), s 9-306(a) of the Natural Resources Article, set about the task of altering the wetlands portion of the property to make it more suitable for home construction and access to the beach. To accomplish this Sharpley began to dredge the marsh and use the borrow obtained as fill for a man-made dune. In the process of doing this he created a cut into his private wetland which resulted in the despoliation of a considerable portion of both his and the adjoining public marsh. The appellant, the Department of Natural Resources, describes the destructive nature of Sharpley's activities by asserting that:

FN2. A spring tide is one which is greater than average, occurring at or shortly after the new or full moon when the tidal actions of sun and moon are nearly in the same aligned direction.

It is conceded that the land which is the subject of this litigation is private wetlands as compared to state wetlands. These terms are defined in s 9-101 of the Natural Resources Article, as follows:

'(j) 'Private wetlands' means any land not considered 'state wetland' bordering on or lying beneath tidal waters, which is subject to regular or periodic tidal action and supports aquatic growth. This includes wetlands, transferred by the state by a valid grant, lease, patent, or grant confirmed by Article 5 of the Declaration of Rights of the Constitution, to the extent of the interest transferred.

'(m) 'State wetlands' means any land under the navigable waters of the state below the mean high tide, affected by the regular rise and fall of the tide. Wetlands of this category which have been transferred by the state by valid grant, lease, patent or grant confirmed by Article 5 of the Declaration of Rights of the Constitution shall be considered 'private wetland' to the extent of the interest transferred.'

***214** 'The effect of the unauthorized flacement of fill on the march area destroyed ****518** an area 40 feet by approximately 150 feet of tidal State wetlands. The larger impact, however, of this fill was to prevent the flooding of the marshland by blocking off the marsh and thereby allow water to become impounded within the marsh, cutting off the free flow of water thereupon. Part of the marsh therefore has already died with the probable enlargement of a mosquito problem.'

When these dredging and filling activities came to the attention of the department it issued a 'cease and desist order' which commanded the landowner to terminate this topographical alteration until he obtained a proper permit as is required by s 9-306. In an effort to comply with this mandate, Sharpley submitted his application, which, following departmental study, was denied by the Secretary of the Department of Natural Resources on April 10, 1973. Undeterred by what he considered to be an unreasonable action by the Secretary, Sharpley appealed to the department's board of review as is permitted by s 9-307. However, his hopes to obtain the permit through this source were also dashed when, on October 1, 1973, the board affirmed the Secretary's decision.

Having been rebuffed in his efforts to obtain a permit through these administrative processes, Sharpley then turned to the judicial branch of this State's government for relief by appealing the departmental denial of his

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permit to the Circuit Court for Somerset County (Duer, C. J.), where he sought a de novo trial by jury under the provisions of s 9-308. That section of the 'wetlands statute' states:
'(a) Appeal procedure; time limitation.-Any party to the appeal to the board of review pursuant to s 9-307 may appeal to the circuit court for the county in which the land is located within 30 days after the decision of the board of review.
(b) Appeal not subject to Administrative Procedure Act; de novo trial; election of jury trial; ***215** no right of removal.-The appeal is not subject to the provisions of the Administrative Procedure Act. The court shall hear the case de novo. Either party may elect a jury trial. There is no right of removal.
(c) Court may set aside or modify decision if unreasonable exercise of police power.-If the court finds that the decision of the board of review appealed from is an unreasonable exercise of police power, it may set aside or modify the determination.'

At the jury trial which followed this request, Judge Duer, while deciding as a matter of law that 'reasonable preservation of a natural resource is a valid exercise of police powers,' nevertheless, permitted the jury to determine the ultimate question of whether the permit in this case should be granted. Aside from informing the jury of its general duties and upon whom the burden of proof rests, the court's instructions consisted almost exclusively of a verbatim reading of the following excerpted language from s 9-306(b) and (c) and s 9-102 of the 'wetlands statute':'Now, it says this: 'In granting, denying, or limiting any permit, the secretary,' meaning the secretary of the Board of Natural Resources, 'or his duly designated hearing officer shall consider the effect of the proposed work with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, economic benefits, the protection of life and property from flood, hurricane and other natural disasters, and the public policy set forth in this subtitle. In granting a permit, the secretary may limit or impose conditions or limitations designed to carry out the public policy set forth in this subtitle. Upon receipt of an application for a permit pursuant to this section, the secretary or his designee,' meaning one that he would designate to act for him in his stead, 'shall hold a public hearing on the matter within 60 days after receipt of the application.****519** A decision ***216** shall be made by the secretary within 30 days after the hearing. Failure to act in conformance with either of these requirements shall constitute automatic approval of the application for permit as stated.'
'Now, ladies and gentlemen, in the start of the Wetlands Acts, this is Declaration of Public Policy, 'It is declared that in many areas of the State, much of the wetlands have been lost or despoiled by unregulated dredging, dumping, filling, and like activities, and that the remaining wetlands of this State are in jeopardy of being lost or despoiled by these and other activities; that such loss or despoliation will adversely affect, if not entirely eliminate, the value of such wetlands as a source of nutrients to finfish, crustacea and shellfish of significant economic value; that such loss or despoliation will destroy such wetlands as habitats for plants and animals of significant economic value and will eliminate or substantially reduce marine commerce, recreation, and aesthetic enjoyment; and that such loss or despoliation will, in most cases, disturb the natural ability of tidal wetlands to reduce flood damage and adversely affect the public health and welfare; that such loss or despoliation will substantially reduce the capacity of such wetlands to absorb silt and will thus result in increased silting of channels and harbor areas to the detriment of free navigation. Therefore, it is declared to be the public policy of this State, taking into account varying ecological, economic, developmental, recreational and aesthetic values, to preserve the wetlands and to prevent the despoliation and destruction thereof. "[FN3]

FN3. Sharpley's counsel informed the trial judge that he took no exception to any of the court's instructions.

***217** The jury answered the following issue which the court submitted to it-'After weighing the facts, considering the testimony and applying the law as given to you by the court, should the requested permit be granted or denied?'-by responding, 'Granted.' Accordingly, judgment was entered in favor of the appellee.

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After Sharpley's trial court victory, the Department of Natural Resources appealed to this Court, asserting that this type of extensive and nullifying judicial de novo review, under s 9-308(b), is not permitted by the Maryland Constitution because 'the judicial branch of government may not usurp the province of the administrative prerogative.' We agree with the appellant, and, therefore, will reverse the judgment entered in the circuit court.[FN4]

FN4. The appellant also raised the following four issues:
'The court below erred in excluding a question on voir dire directed to a specific cause for disqualification-the ownership of wetlands.
'Appellee has not sustained his burden of showing that the decision appealed from was an unreasonable exercise of the police power.
'The scope of de novo review in this case is limited by statute ((s 9-308(c))) to the determination of whether the action of the administrative body reflected a proper exercise of police power.
'Use of the terms 'significant' or 'substantial' in the context of this case both through admission of evidence and instructions to the jury was erroneous.'
However, because of the manner of our disposition of the constitutional issue, it becomes unnecessary for us to reach these additional issues.

Taken literally the language of s 9-308(b) seems to sustain the conclusion reached by the circuit court that a landowner who is not content with the Department of Natural Resources' conclusion concerning his use of his own wetlands can appeal to the judicial branch of government and in doing so have the slate cleansed to the extent that the court, or the jury if opted for, can completely substitute its own judgment for that of the administrative agency without regard to that agency's prior determination. The appellant does not argue that the words should be given a meaning at variance with this; instead,****520** it contends that such a scope of judicial review, built into the 'wetlands statute,' is ***218** unconstitutional, as being 'a usurpation of the traditional division of powers between the legislative and judicial branches' of this State's government.

[1] In assessing the constitutionality of an act of the General Assembly we are mindful of the fact that enactments of the Legislature are presumed to be constitutionally valid and that this presumption prevails until it appears that the enactment under consideration is invalid or obnoxious to the expressed terms of the Constitution or to the necessary implication afforded by, or flowing from, such expressed provisions. Md. Bd. of Pharmacy v. Sav-A-Lot, 270 Md. 103, 106-07, 311 A.2d 242 (1973); Salisbury Beauty Schools v. St. Bd., 268 Md. 32, 48-49, 300 A.2d 367 (1973).

That aspect of the Constitution which is spotlighted by this case is the fundamental doctrine of separation of powers, a principle expressly or impliedly recognized in the basic law of every state in this nation. This doctrine has long been a cornerstone of this State's concept of government and finds forthright expression in Article 8 of the Declaration of Rights contained in the Constitution of Maryland in these words:
'That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.'

Although Maryland's statement of the separation of powers is 'a more concrete barrier than any which the Supreme Court has had to hurdle under the Federal Constitution,' R. Oppenheimer, Administrative Law in Maryland, 2 Md.L.Rev. 185, 188 (1938), the right of the Legislature to delegate powers to administrative agencies has been recognized in this State for more than 125 years. Harrison v. Mayor & C. C. of Balt., 1 Gill 264 (1843).

[2] As a result of the fact that delegation by the Legislature of some of its own power is permissible, there has been a devolution of a great variety of nonjudicial responsibilities and functions to administrative agencies, which, after being ***219** provided with general rules and standards to guide them, are given 'the task of acquiring information, working out the details, and applying these rules and standards to specific cases.' Tighe v. Osborne, 150 Md. 452, 463, 133 A. 465, 469 (1926). Though expressed in a dissenting opinion, we believe to be

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correct what Chief Judge Bond succinctly pointed out exactly fifty years ago in Goldman v. Crowther, 147 Md. 282, 320-22, 128 A. 50, 64 (1925):
'Legislation which has to provide for a large number of special cases of varied facts, or for unforeseeable conditions present or future, must be supplemented by the action of administrative officers with power to adapt and vary the rule as the special cases come before them, one by one. If this were not permissible, then the legislative branch of the government could not deal with some of the needs of the country or of the community at all, for it can be done in no other way. . . . Senator Elihu Root, who speaks with the authority of a most profound understanding of our institutions and of the law, said to the American Bar Association in 1916: 'As any community passes from simple to complex conditions, the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the State Public Service Commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervisory offices and agencies are ****521** familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the ***220** fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.''

These remarks were indeed prophetic, as, over the many years since they were spoken, administrative agencies have prospered and multiplied prolifically.

In response to the practical needs of government, not only has there been an extensive introduction of these administrative agencies in this State, as is true in most if not all of our sister states, but in addition, as a consequence of this need, there has occurred within these agencies some mingling, blending and overlapping of the legislative, executive and judicial functions. We believe this to be permissible, within limits, as the separation of powers concept may constitutionally encompass a sensible degree of elasticity and should not be applied with doctrinaire rigor.

[3][4] However, this constitutional 'elasticity' cannot be stretched to a point where, in effect, there no longer exists a separation of governmental power, as the Maryland Constitution does not permit a merger of the three branches of our State government, nor does it 'make any one of the three departments subordinate to the other, when exercising the trust committed to it.' Painter v. Mattfeldt, 119 Md. 466, 472, 87 A. 413, 416 (1913). When the Legislature confers, by enactment, powers upon one of the other branches of government which are beyond those permitted under the Constitution, or any of the three branches of government takes unto itself powers denied to it or those strictly within the sovereignty of another branch, the courts of this State must step in and declare such encroachments to be constitutionally prohibited, not because the court is a 'Triton among minnows' or predominates in dignity, but because, as Chief Justice Marshall, in ***221** Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), in speaking of the federal constitutional system-though just as applicable to our State system-avowed:
'It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
'So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
'If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the

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legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.' Id. at 177-78.

When faced with the responsibility of juxtaposing a statute which provides for judicial review of administrative agencies with the separation of powers doctrine as it is enshrined in the Maryland Constitution, it is clear that the analysis involves contrasting the relative role of the administrative agency process with that of the judiciary. We note initially that both the agencies and the courts are governmental ministries created to promote public purposes, and in this sense they are collaborative instrumentalities, rather than rivals or ****522** competitors, in the paramount task of safeguarding the interests of our citizens. However, the agencies and the courts each have their own, separate, constitutionally-erected fortress of power and responsibility in the relationship each has to the activities delegated by the Legislature to administrative agencies.

***222** [5][6][7] The primary function of administrative agencies is to advance the will and weal of the people as ordained by their representatives-the Legislature. These agencies are created in order to perform activities which the Legislature deems desirable and necessary to forward the health, safety, welfare and morals of the citizens of this State. While these agencies at times perform some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties, they in addition take on a judicial coloring in that frequently, within the exercise of their power, they are called upon to make factual determinations and thus adjudicate, and it is in that sense that they are also recurrently considered to be acting in a quasi-judicial capacity. This dual role which administrative agencies play has long been accepted in this State as being constitutionally permissible. Zeitschel v. Bd. of Ed. of Carroll Co., Md., 332 A.2d 906 (1975) (No. 89, September Term, 1974, decided March 3, 1975); County Council v. Investors Funding, 270 Md. 403, 312 A.2d 225 (1973); Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945); Hecht v. Crook, 184 Md. 271, 40 A.2d 673 (1945). However, this authority is not the same and, therefore, is distinguishable from the exercising of the 'judicial powers' of this State, which power by Section 1, Article IV of the Maryland Constitution is reserved exclusively to designated courts in these explicit words:
'The Judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal, as shall be provided by law by the General Assembly, Circuit Courts, Orphans' Courts, such Courts for the City of Baltimore, as are hereinafter provided for, and a District Court . . ..'

This distinction between an administrative agency's fact-finding function and the exercise of the State's judicial power by courts under the Constitution was definitively pointed out by Chief Judge Sloan when, in speaking for this Court in Dal Maso v. County Commrs., 182 Md. 200, 205, 34 A.2d 464, 466 (1943), he said:'There is some confusion as to the nature and ***223** character of these administrative boards, and there are many opinions and taxt writers who refer to them as quasi-judicial. They do hear facts and, based on them, make decisions, but those decisions are not judgments or decrees. If their findings, resolutions, or orders are resisted or ignored, they must call on the courts to enforce them. Administrative boards and officials are arms and instrumentalities of the Legislature, and are not judicial at all; they belong to and derive all their authority from the legislative branch under our from of government. In this State, all judicial authority is only such as is provided for by Article 4 of the Maryland Constitution, and it has been decided that only judicial functions can be exercised which find their authority in that Article . . ., and that no court not coming within its provisions can be established in this State.'

See also Heaps v. Cobb, supra; Woelfel v. State, 177 Md. 494, 501, 9 A.2d 826 (1939); Hagerstown v. Dechert, 32 Md. 369 (1870).

[8][9][10][11][12][13][14][15] While administrative agencies, in the proper performance of duties which the Legislature permissibly delegates to them, may use discretion to formulate policy, promulgate rules and adjudicate in order to determine specific questions of fact, they, nevertheless, in doing so are performing nonjudicial functions; on the other hand, the role of the courts in regard to these administrative agency

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functions is to see that these responsibilities were properly empowered to the agency and have been ****523** performed within the confines of the traditional standards of procedural and substantive fair play. In order to perform this essential duty, the courts may be provided with specific authorization to do so by the Legislature through statutory provision, but, even absent such authority, the judiciary has an undeniable constitutionally-inherent power to review, within limits, the decisions of these administrative agencies. Balto. Import Car v. Md. Port Auth., 258 Md. 335, 265 A.2d 866 (1970); ***224** Insurance Comm'r v. Nat'l Bureau, 248 Md. 292, 236 A.2d 282 (1967); Johnstown Coal & Coke Co. v. Dishong, 198 Md. 467, 84 A.2d 847 (1951); Heath v. M. & C. C. of Baltimore, 187 Md. 296, 304-05, 49 A.2d 799 (1946). This power of review, whether authorized by statute or assumed inherently, cannot be a substitution of the court's judgment for that of the agency. In those instances where an administrative agency is acting in a manner which may be considered legislative in nature (quasi-legislative), the judiciary's scope of review of that particular action is limited to assessing whether the agency was acting within its legal boundaries (not an issue here); furthermore, when an agency is acting in a fact-finding capacity (quasi-judicial) the courts review the appealed conclusions by determining whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner. Storch v. Zoning Bd. of Howard Co., 267 Md. 476, 487 (including footnote 2), 298 A.2d 8 (1972); Crown Central v. City of Baltimore, 258 Md. 82, 89, 265 A.2d 192 (1970); M. & C. C. of Balto. v. Biermann, 187 Md. 514, 523, 50 A.2d 804 (1947); see also Balto. Import Car v. Md. Port Auth., 258 Md. 335, 342, 265 A.2d 866 (1970). This latter type of review has been consistently and just recently sustained by this Court in appeals from various types of administrative agencies, including, e.g., District Council in zoning cases, Northampton v. Pr. George's Co., 273 Md. 93, 327 A.2d 774 (1974); Tax Court in property assessment cases, Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18 (1974); and Public Service Commission in ratemaking cases, Public Serv. Comm'n of Md. v. Balt. Gas & Elec. Co., 273 Md. 357, 329 A.2d 691 (1974). This latter type of review has been characterized in varying ways, but as Chief Judge Hammond noted for this Court in Insurance Comm'r v. Nat'l Bureau, 248 Md. 292, 236 A.2d 282 (1967): [FN5]

> FN5. It is at least partly due to these various descriptions of the same standard of review that the Administrative Procedure Act Maryland Code (1957, 1971 Repl.Vol.) Art. 41, ss 244-256, was developed. It is designed to apply to all State agencies except those expressly excluded, Kaufman v. Taxicab Bureau, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S.Ct. 95, 15 L.Ed. 88 (1965).

***225** 'Whichever of the recognized tests the court uses-(whether it be the arbitrary, capricious, unreasonable or illegal standard (Balto. Import Car v. Md. Port Auth., supra, 258 Md. at 342, 265 A.2d 192), or the tests of) substantiality of the evidence on the record as a whole, clearly erroneous, fairly debatable or against the weight or preponderance of the evidence on the entire record-its appraisal or evaluation must be of the agency's fact-finding results and not an independent original estimate of or decision on the evidence. The required process is difficult to precisely articulate but it is plain that it requires restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions under any of the tests, all of which are similar. There are differences but they are slight and under any of the standards the judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. This need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.' Id. at 309-10, 236 A.2d at 291 (emphasis added).

With whatever terminology this scope or review is defined, it has equal application ****524** to the judicial review of an agency's decision whether there is absent statutory provision for review, Balto. Import Car v. Md. Port Auth., supra at 342, or whether a statute specifically grants the courts a right of review. However, just as the administrative agency has constitutional limitations to its power vis-a-vis the courts, so do the courts have constitutional restrictions

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limiting their oversight of agency decisions. This follows from the fact that the judiciary is constitutionally 'without authority to interfere with any (proper) exercise of the legislative prerogative . . . or with the lawful exercise of administrative authority or discretion.' Heaps v. Cobb, supra, 185 Md. at 379, 45 A.2d at 76. This limitation is articulated in Insurance Comm'r v. Nat'l Bureau, supra, 248 Md. at 310, 236 A.2d at 392, where it is said:

***226** 'We hold that a court in reviewing legislative actions or decisions of an administrative agency may apply the weight of the evidence test to the factual findings of the agency, without exercising nonjudicial functions, provided it does not itself make independent findings of fact or substitute its judgment for that of the agency.' (emphasis added).

This same proposition finds support in Professor Davis' treatise, where he says, 'The basic proposition that a constitutional court should not be required to perform nonjudicial functions is probably beyond challenge.' 4 Davis, Administrative Law Treatise, s 29.10 (1958). Because courts cannot be required to exercise nonjudicial duties it has been held by this Court that it is beyond the power of the Legislature to require the judiciary to: approve accounts of county officers before payment, Robey v. Prince George's County, 92 Md. 150, 48 A. 48 (1900); perform duties tantamount to a board of review in assessing property for tax purposes, Baltimore City v. Bonaparte, 93 Md. 156, 48 A. 735 (1901); appoint a board of visitors to supervise the county jail, Beasley v. Ridout, 94 Md. 641, 52 A. 61 (1902); provide for referendum concerning issuance of liquor licenses, Board of Supervisors v. Todd, 97 Md. 247, 54 A. 963 (1903); issue licenses permitting pari-mutuel betting on horse races, Close v. Southern Md. Agr. Asso., 134 Md. 629, 108 A. 209 (1919); and issue liquor licenses, Cromwell v. Jackson, 188 Md. 8, 52 A.2d 79 (1947). Thus, in regard to administrative agencies, which, while often functioning as fact-finding bodies, perform essentially nonjudicial duties, a Maryland court's 'inquiry is (almost always) limited to finding whether there was illegality or unreasonableness in the . . . action-when that inquiry is finished, judicial scrutiny ends . . ..' Balto. Gas Co. v. McQuaid, 220 Md. 373, 382, 152 A.2d 825, 830 (1959).

[16] However, it is recognized that in very rare instances there can be created administrative agencies whose functions are subject, as authorized by the Legislature, to a broader scope ***227** of judicial review. This type of agency is a hybrid in that its basic function is so essentially judicial that it can be considered to be supplanting what might have been a court function, albeit in a constitutional sense its activity is legislative in nature because it is 'part of the police power, as contradistinguished from the regular judiciary powers of the State.' Solvuca v. Ryan & Reilly Co., 131 Md. 265, 283, 101 A. 710, 715 (1917). This was pointed out in Dorman v. Mayor & C. C. of Balto., 187 Md. 678, 51 A.2d 658 (1947), where Judge Markell, speaking for this Court, said

'Beyond the minimum inherent judicial power of review of administrative action, the extent of judicial review in particular classes of cases depends upon the legislature. Such review may extend to trial de novo, on the law and the facts, as in workmen's compensation cases.' Id. at 688, 51 A.2d at 663 (emphasis added).

Indeed, the Workmen's Compensation Commission is a perfect, and may be at ****525** present the singular, example of Judge Markell's 'particular classes of cases.' It falls into this category, at least in part, because its activities are in substitution for traditional common law rights and procedures while at the same time it functions to establish a remedy otherwise the subject of a tort action. See Branch v. Indemnity Ins. Co., 156 Md. 482, 485-86, 144 A. 696 (1929); Mattare v. Cunningham, 148 Md. 309, 314, 129 A. 654 (1925); 4 Davis, Administrative Law Treatise, s 29.10 (1958). As a result, this agency's activities have been subject to a considerably more expansive type of judicial review which has been unchallenged for more than half a century.

[17][18] The agency now before us, the Department of Natural Resources, does not present a twilight situation such as does the Workmen's Compensation Commission. It is clear that whether, under Title 9 of the Natural Resources Article, a particular parcel of land comes within the statutory wetlands designation and, if so, whether it must remain in its then existing natural state for ecological, aesthetic, ***228** environmental and recreational reasons are decisions to

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be made pursuant to the State's police power. Consequently, departmental activities must be exercised within the guidelines and standards prescribed by the Legislature; thus circumscribed, when granting or denying a permit in a specific case, the Secretary and the board of review gather and sift evidence which is directed both at present and future repercussions so as to take into account the needs of the public in general. In this regard the decisions and the activities of this agency are not dissimilar from those of zoning councils, the tax court, or the Public Service Commission, all of whose actions we determined can be reviewed by the judiciary only under an 'arbitrary and capricious' type of scrutiny. Northampton v. Pr. George's Co.; Dickinson-Tidewater, Inc. v. Supervisor of Assess.; Public Serv. Comm'n of Md. v. Balt. Gas & Elec. Co., all supra.

[19] It was not competent, therefore, for the court to empanel a jury and then in effect instruct it to convert itself into an administrative body with authority, as if original, to grant or deny a permit and in doing so determine whether there was or potentially could be a deleterious effect, as contemplated by the 'wetlands statute,' if Sharpley dredged and filled as he desired. This the Maryland Constitution, which divides the powers of government into three separate branches, neither to usurp the authority of the other, steps forth and forbids. On appeal, s 9-308(b) notwithstanding, the circuit court is constitutionally limited to an assessment of whether that determination was based on evidence sufficiently substantial so that the permit denial was not 'arbitrary and capricious.' In this connection, we cannot refrain from observing that a practice which would permit judges or jurors to substitute, on a de novo basis, their discretion for that of the department's experts, would place this State in the intolerable situation of having as many wetland decision-makers as there are circuit court judges and juries empaneled for this purpose. If this were to be the case, the result would be a destruction of the effectiveness of the department in conserving, for the general public good, ***229** the valuable wetlands of this State, and reduce this agency's power, in this field, as a practical matter, to a nullity.

[20][21] We, accordingly, hold that the entire subparagraph (b) of section 9-308 of the Natural Resources Article, which in substance provides for a de novo trial free of the Administrative Procedure Act, with the right of electing to have a jury trial and with no right of removal, is void as being unconstitutional. [FN6] The finding that this provision is void in no way affects the ****526** validity of the remaining portions of the statute. See the general 'severability of provisions of statutes' enactment, set out in Code (1957, 1968 Repl.Vol., 1974 Cum. Supp.), Art. 1, s 23.

> FN6. It would seem that s 9-305(b), providing for an appeal, in the identical language of s 9-308(b), from the administrative rules and regulations decisions by the Secretary and review board, likewise would be constitutionally invalid for the same reason.

[22][23] Since the record upon which the Secretary and the review board based their decisions is not before us, and may well not have been before the circuit court, we will vacate that court's judgment and remand this case for the purpose of a review by the circuit court limited in scope as is indicated by this opinion. In directing further proceedings we necessarily reject the appellee's contention that, since the property which is the subject of this litigation has already been dredged and filled to a significant degree, this dispute is now moot, because, assuming the department's permit denial is ultimately sustained, restoration to the extent reasonably possible can be required under s 9-501(d), if the requirements of that section are met, or perhaps otherwise.

Judgment of the Circuit Court for Somerset County vacated. Case remanded for further proceedings to be conducted in accordance with this opinion. Costs to be paid by the appellee.

Md. 1975.
Department of Natural Resources v. Linchester Sand & Gravel Corp.
274 Md. 211, 334 A.2d 514

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H

Briefs and Other Related Documents
Maryland Overpak Corp. v. Mayor And City Council Of BaltimoreMd.,2006.

Court of Appeals of Maryland.
MARYLAND OVERPAK CORPORATION
v.
MAYOR AND CITY COUNCIL OF BALTIMORE.
No. 76, Sept. Term, 2005.

Oct. 16, 2006.

Background: Adjoining landowners sought review of city's amendment of a previously approved planned unit development (PUD). The Circuit Court, Baltimore City, Michael W. Pierson, J., dismissed for lack of jurisdiction. Landowners appealed.

Holdings: Upon issuing a writ of certiorari, the Court of Appeals, Harrell, J., held that:

(1) city council's approval of amendment to PUD constituted quasi-judicial action, and

(2) council's amendment approval constituted a judicially reviewable zoning action.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 414 ⚿355

414 Zoning and Planning
414VII Administration in General
414k353 Powers, Duties, and Liabilities
414k355 k. Legislative, Judicial, or Quasi-Judicial Power. Most Cited Cases
The outcome of the analysis of whether a given action by city regarding zoning is quasi-judicial in nature is guided by two criteria: (1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property; and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence.

[2] Administrative Law and Procedure 15A ⚿108

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak103 Status and Character
15Ak108 k. Quasi-Judicial. Most Cited Cases
The principal characteristic of a quasi-judicial proceeding is that of fact-finding by the undertaking body, even if the relevant facts are undisputed.

[3] Administrative Law and Procedure 15A ⚿108

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak103 Status and Character
15Ak108 k. Quasi-Judicial. Most Cited Cases
A determination of whether a particular governmental body is conducting a quasi-judicial inquiry must address the nature of the particular act in which the body is engaged.

[4] Zoning and Planning 414 ⚿355

414 Zoning and Planning
414VII Administration in General
414k353 Powers, Duties, and Liabilities
414k355 k. Legislative, Judicial, or Quasi-Judicial Power. Most Cited Cases
Proceedings or acts that scrutinize individual parcels or assemblages for the consideration of property-specific proposed uses, at the owner's or developer's initiative, ordinarily suggest a quasi-judicial process or act.

[5] Zoning and Planning 414 ⚿359

414 Zoning and Planning
414VII Administration in General
414k358 Procedure
414k359 k. Notice, Hearing, and Evidence. Most Cited Cases

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Zoning and Planning 414 ⚷360

414 Zoning and Planning
414VII Administration in General
414k358 Procedure
414k360 k. Determination in General. Most Cited Cases
The fact-finding process for piecemeal land use and zoning matters usually entails at least the holding of a hearing, the receipt of factual and opinion testimony and forms of documentary evidence, and a particularized conclusion as to the development proposal for the parcel in question.

[6] Zoning and Planning 414 ⚷471.5

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(D) Effect of Determination; Revocation
414k468 Revocation or Modification
414k471.5 k. Maps, Plats, or Plans. Most Cited Cases

Zoning and Planning 414 ⚷570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
City council's amendment of a previously approved planned unit development (PUD) constituted quasi-judicial action rather than legislative action, as was required for a judicially reviewable zoning action, where the amendment dealt with a specific property and its unique circumstances, and findings of fact were made based on reports from governmental agencies and departments and a public hearing. West's Ann.Md.Code, Art. 66B, § 2.09(a)(1)(ii).

[7] Statutes 361 ⚷176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases

Statutes 361 ⚷190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
A court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application.

[8] Statutes 361 ⚷206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases
Statutory text should be read so that no word, clause, sentence, or phrase is rendered superfluous or nugatory.

[9] Statutes 361 ⚷205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases

Statutes 361 ⚷208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases
The plain language of a provision is not interpreted in isolation; rather, courts analyze the statutory scheme as a whole and attempt to harmonize provisions dealing

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with the same subject so that each may be given effect.

[10] Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases
If statutory language is unambiguous when construed according to its ordinary and everyday meaning, then a court gives effect to the statute as it is written.

[11] Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

Statutes 361 ⚿212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.7 k. Other Matters. Most Cited Cases
If there is no ambiguity in statutory language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends; a court does not need to resort to the various, and sometimes inconsistent, external rules of construction, for the Legislature is presumed to have meant what it said and said what it meant.

[12] Zoning and Planning 414 ⚿1

414 Zoning and Planning
414I In General
414k1 k. Nature in General. Most Cited Cases
In general terms, the term "zoning" is used to describe the process of setting aside disconnected tracts of land varying in shape and dimensions, and dedicating them to particular uses designed in some degree to serve the interests of the whole territory affected by the plan.

[13] Zoning and Planning 414 ⚿1

414 Zoning and Planning
414I In General
414k1 k. Nature in General. Most Cited Cases
"Zoning action" as used in statute regarding judicial review of such action is as any act by the mayor and city council that: (1) decides the use of a specific parcel or assemblage of parcels of land; (2) was initiated by an individual application by a property owner or its representative; (3) was based on fact-finding adduced through governmental agency analysis of the proposal and through a public hearing; and (4) either creates or modifies substantively the governing zoning classification or defines the permissible uses, building and lot sizes, population density, topographical and physical features, and other characteristics of a specific parcel or assemblage of parcels of land by exercising some discretionary judgment after the consideration of the unique circumstances of the affected parcels and buildings. West's Ann.Md.Code, Art. 66B, § 2.09.

[14] Zoning and Planning 414 ⚿355

414 Zoning and Planning
414VII Administration in General
414k353 Powers, Duties, and Liabilities
414k355 k. Legislative, Judicial, or Quasi-Judicial Power. Most Cited Cases
In order to have a judicially reviewable zoning action, there must be a determination that the process observed by the governmental body in affecting an alleged zoning action was quasi-judicial in nature, rather than legislative; a quasi-judicial proceeding in the zoning context is found where, at a minimum, there is a fact-finding process that entails the holding of a hearing, the receipt of factual and opinion testimony and/or forms of documentary evidence, and a particularized conclusion, based upon delineated statutory standards, for the unique development proposal for the specific parcel or assemblage of land in question. West's Ann.Md.Code, Art. 66B, § 2.09.

[15] Zoning and Planning 414 ⚿570

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414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
If the governmental act in question involves a quasi-judicial process and the city council exercises its discretion in deciding the permissible uses and other characteristics of a specific parcel or assemblage of land upon a deliberation of the unique circumstances of the affected land and its surrounding environs, a judicially reviewable zoning action is the result. West's Ann.Md.Code, Art. 66B, § 2.09.

[16] Zoning and Planning 414 ⚷570

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k570 k. Decisions Reviewable. Most Cited Cases
City council's approval of amendment to planned unit development (PUD) that increased the number of residential dwelling units and modified the uses and buildings permitted and their locations and size amounted to a zoning action, and thus, landowners were entitled to seek judicial review of the adoption of the amendment. West's Ann.Md.Code, Art. 66B, § 2.09.

John C. Murphy, Baltimore, MD, for appellant.
Sandra R. Gutman, Chief Sol. (Ralph S. Tyler, III, City Sol., and Adam Levine, Asst. City Sol., Baltimore City Dept. of Law, Baltimore, MD); Herbert Better (P. Andrew Torrez of Zuckerman Spaeder, L.L.P., Baltimore, MD), all on same brief, for appellee.

Argued before BELL, C.J., WILNER, CATHELL, HARRELL, BATTAGLIA, GREENE and JOHN C. ELDRIDGE (retired, specially assigned), JJ.
HARRELL, Judge.
***20** This case requires us to explore once again what constitutes a "zoning action," as that term is used in Md.Code (1951, 2003 Repl.Vol., 2005 Suppl.), Art. 66B, § 2.09(a)(1)(ii),[FN1] taken by the ***21** Mayor and City Council of Baltimore. A "zoning action" is subject to judicial review by the ****238** Circuit Court for Baltimore City and, if further review is sought in timely fashion, by the Court of Special Appeals of Maryland.[FN2] Judicial review proceeds as directed by Title 7, Chapter 200 of the Maryland Rules.[FN3] If the action taken in the present case is determined not to be a "zoning action," we alternatively are asked to consider whether other modalities of legal process are available for judicial scrutiny of the action taken in this case.

FN1. Art. 66B. Land Use
[Zoning in Baltimore City]
§ 2.09. Appeals to courts.
(a) *Who may appeal; procedure.*-(1) An appeal to the Circuit Court of Baltimore City may be filed jointly or severally by any person, taxpayer, or officer, department, board, or bureau of the City aggrieved by:
* * *
(ii) A zoning action by the City Council.

FN2. Art. 66B, § 2.09(e).

FN3. Art. 66B, § 2.09(a)(2).

Engaging in this inquiry, we do not write on an entirely clean appellate slate. *See, e.g., Armstrong v. Baltimore City*, 390 Md. 469, 889 A.2d 399 (2006) (*Armstrong II*) (holding that the Court of Special Appeals possessed jurisdiction to consider an appeal from the Circuit Court's dismissal of a petition for judicial review, filed under Art. 66B, § 2.09, complaining about an ordinance permitting an accessory parking lot in Baltimore); *Wesley Chapel Bluemount Ass'n v. Baltimore County*, 347 Md. 125, 699 A.2d 434 (1997) (reviewing the holding of *Stephans II, infra,* in determining the scope of "any other zoning matter" under Md.Code (1974, 1995 Repl.Vol.), State Gov't Art. § 10-503(b)); *Bd. of County Comm'rs of Carroll County v. Stephans*, 286 Md. 384, 408 A.2d 1017 (1979) (*Stephans II*) (holding that the legislative history of § 2.09 contemplates that a "zoning action" means "zoning reclassification" and not legislative-type actions), *rev'g*, 41 Md.App. 494, 397 A.2d 289 (*Stephans I*); *Armstrong v. Mayor & City Council of Baltimore*, 169 Md.App. 655, 906 A.2d 415 (2006) (*Armstrong III*) (2006) (holding that a

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parking lot ordinance ***22** qualified as a conditional use or its equivalent such that its issuance was a quasi-judicial act subject to judicial review under § 2.09 and disapproving contrary language in *MBC Realty, infra*); *Cremins v. County Comm'rs of Washington County*, 164 Md.App. 426, 883 A.2d 966 (2005) (holding that a planned unit development granted in Washington County under its zoning regulations amounts to a "zoning reclassification" for purposes of judicial review under Art. 66B, § 4.08, the companion section to § 2.09 for non-charter counties); *MBC Realty, LLC v. Mayor & City Council of Baltimore*, 160 Md.App. 376, 864 A.2d 218 (2004) (holding that local ordinance permitting specific conditional uses and making text amendments to zoning ordinance were not "zoning actions" under § 2.09); *Gregory v. Bd. of County Comm'rs of Frederick County*, 89 Md.App. 635, 599 A.2d 469 (1991) (holding that a piecemeal zoning action is appealable under § 4.08, but adoption of an amendment to county's comprehensive water and sewage plan was not a "zoning action"). These decisions are instructive in that they delineate general analytical contours for determining whether a governmental action concerning a type of land use decision amounts to a "zoning action" and thus is eligible for judicial review in accordance with Title 7, Chapter 200 of the Maryland Rules. These precedents, however, leave some portion of *tabula rasa* open on the narrow question presented by this case, given the somewhat unique character of zoning processes in Baltimore City and the particular facts of the controversy before us. We must decide here whether an amendment of a previously approved planned unit development ("PUD") [FN4] granted to Canton Crossing, ***23** LLC, by the Mayor****239** and City Council, via City Ordinance 04-873, amounted to a "zoning action" under Md.Code, Art. 66B, § 2.09(a)(1)(ii), thus bestowing upon the Circuit Court for Baltimore City jurisdiction to consider on their merits neighboring landowners' petitions for judicial review of that amendment approval.

FN4. A PUD is a relatively modern zoning concept created to provide a degree of flexibility in uses and design not available under strict Euclidian zoning. Essentially, a PUD, when approved by a governmental body, grants a variety of uses within a development that would otherwise not be permitted under the pre-existing or, in the case of Baltimore City's zoning regulations, underlying Euclidian zoning of the pertinent parcel or assemblage of land. A distinguishing feature of PUDs is the incorporation of a form of site planning requirement at its inception and/or in the latter stages of the overall approval process, if that process is multi-tiered. For a more extensive discussion of PUDs, see *Rouse-Fairwood Dev. Ltd. P'ship v. Supervisor of Assessments for Prince George's County*, 138 Md.App. 589, 623-24, 773 A.2d 535, 555-56 (2001).

I.

The operative facts in this case are largely undisputed. On 21 June 2001, the City Council passed, and the Mayor signed into law, Ordinance 01-192 granting Appellee, Canton Crossing, LLC, *inter alia,* an industrial PUD and approving a development plan for a 67 and one-half acre [FN5] parcel of land in the Canton area of Baltimore City. The property previously was placed solely within a Euclidian [FN6] M-3 Industrial District, which is "designed for industrial, manufacturing, and related activities generally known and described as 'heavy industry.' " Baltimore, Md., Zoning Code § 7-401. A PUD was necessary to accommodate the various residential and commercial uses, ***24** not permitted ordinarily in the M-3 zone, proposed in Canton Crossing's development plan.[FN7]

FN5. For reasons not apparent on the record, Ordinance 01-192 refers to the parcel as "consisting of 51.25 acres, more or less," while Ordinance 04-873, the enactment at issue in the present controversy, notes that the parcel "consist[s] of 67.52 acres, more or less." Because the latest amendment to the PUD is the subject of consideration here and the parties have referred in their briefs to the parcel as being approximately 67 acres in size, we shall use this figure.

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FN6. The term "Euclidian," when used in a land use context, derives from the case *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), where it was first elucidated. The Court of Special Appeals, in *Rouse-Fairwood*, explained this concept: "Generally, by means of Euclidean zoning, a municipality divides an area geographically into particular use districts, specifying certain uses for each district. 'Each district or zone is dedicated to a particular purpose, either residential, commercial, or industrial,' and the 'zones appear on the municipality's official zoning map.' " 138 Md.App. at 623-24, 773 A.2d at 555-56 (quoting 5 Ziegler, Rathkopf's: The Law of Zoning and Planning (4th ed. rev. 1994), §§ 63.01, at 63-1-2).

FN7. Ordinance 01-192 alluded to an array of uses in the development plan including: "offices, retail, hotel, residences, marina, warehouse/storage, and public space."

The PUD, thereafter, was amended by City ordinances on three subsequent occasions as a result of changes in the development plan initiated by Canton Crossing. The first amendment occurred on 1 July 2002, via Ordinance 02-369, permitting Canton Crossing to "increase parking and square footage use on each parcel [designated for development within the 67 acres encompassed by the development plan], to increase the size of the proposed hotel, and to change the location of certain proposed structures." The second amendment, approved on 22 December 2003 by Ordinance 03-641, allowed an "increase [in] the number of hotel rooms permitted, to change the location of certain proposed structures, and to modify the uses permitted and off-street parking requirements." The last amendment, the one at issue in this case, approved by Ordinance 04-873 on 2 December 2004, authorized an "increase [in] the number of residential dwelling units permitted and [a] modif[ication] [of] the ****240** uses and buildings permitted and their locations and size." [FN8]

FN8. Canton Crossing stated, specifically, that it "sought to increase the number of residential dwelling units from 100 to 504; to decrease the amount of office space from 1.7 million to 1.5 million square feet; to decrease the amount of retail space from 450,000 to 150,000 square feet; and to increase the amount of restaurant space from 50,000 to 120,000 square feet."

It was upon the approval of this last amendment that Appellant here, Maryland Overpak Corporation, filed on 28 December 2004 in the Circuit Court for Baltimore City its petition for judicial review. The petition alleged that Maryland Overpak was aggrieved by the PUD amendment approval because it interfered with Appellant's leasehold interest in and use of Danville Avenue as a staging area for its operations.[FN9] ***25** Within two weeks of Maryland Overpak filing its petition, two other landowners adjoining the PUD, South Highland Avenue LLC and Canton Railroad Company, joined Appellant in praying for judicial review of Ordinance 04-873. Neither of these latter entities, however, are parties to the present appeal.

FN9. Maryland Overpak apparently engages in the packing and shipping overseas of industrial equipment, primarily by ocean freighters.

The development plan filed by Canton Crossing in the present amendment application shows the entirety of Danville Avenue along the southern periphery of the site conceptually as a tree-lined avenue that serves, and is part of, the PUD. This is depicted on Exhibit B-1 (the development plan) of Ordinance 04-873. Exhibit B-2 (the existing conditions plat) of the same ordinance contains the phrase "not part of this PUD" in parentheses for a major portion of Danville Avenue from its intersection with South Haven Street, as it abuts the subject property of the PUD. A small portion of Danville Avenue, along which Maryland Overpak's property apparently abuts on its south side, is depicted as being included in the PUD. Counsel for Appellant, when asked by the Court at oral argument, could not

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> say who owned the street bed of either the included or excluded portions of Danville Avenue. Nonetheless, we proceed, *arguendo,* with the understanding that Appellant asserts a colorable interest in at least the included portion.

Maryland Overpak and the other abutting land owners believed that the City's action in approving the amendment to the PUD encroached on their interest in the roadway. Specifically, Maryland Overpak and South Highland Avenue LLC each pled in their one paragraph petitions that they maintain a leasehold interest in Danville Avenue as well as in property abutting the PUD which would be adversely affected by the approved PUD. Canton Railroad Company, for its part, averred in its petition that it "owns and operates" Danville Avenue and that the ordinance constituted a violation of the Railroad's procedural and substantive due process rights, as well as interstate commerce clause principles.

The City Council filed a Motion to Dismiss Appeal and Request for Hearing, which was joined by Canton Crossing, LLC. Both argued that judicial review of the latest amendment to the PUD, under Art. 66B, § 2.09, was not proper and that the Circuit Court lacked jurisdiction over the case. After a hearing on the motion, the Circuit Court dismissed the petitions on 16 March 2005. The motions judge relied on ***26** *MBC Realty* in reasoning that the PUD granted to Canton Crossing did not qualify as a "zoning action" under Art. 66B, § 2.09(a)(1)(ii) because it did not amount to a reclassification of the zoning district of the subject property. Maryland Overpak filed a timely appeal in the Court of Special Appeals. We, acting on our initiative, issued a *writ of certiorari* before the intermediate appellate court could consider the matter. 389 Md. 398, 885 A.2d 823 (2005).

****241** II.

Baltimore City is governed by a unique procedure and body of law in many respects regarding its zoning procedures. The potential for uniqueness is facilitated not merely because of the statutory grant under Art. 66B, *Boitnott v. Mayor & City Council of Baltimore,* 356 Md. 226, 238-39, 738 A.2d 881, 888 (1999) ("[A]rt. 66B, § 2.01(a) provides the general authority for the Mayor and City Council of Baltimore to adopt zoning regulations as necessary ...."), but also because of the general principle that zoning is an exercise of governmental authority that generally falls squarely within the province of the political subdivisions of the State. *Superior Outdoor Signs, Inc. v. Eller Media Co.,* 150 Md.App. 479, 494, 822 A.2d 478, 506 (2003) (citing Art. 23A, § 2(b)(36)(ii)) ("It is fundamental that zoning concerns the regulation of land use; and it is the policy of this State that such regulation will occur at the local level."); *see also Mayor & Council of Rockville v. Rylyns Enters., Inc.,* 372 Md. 514, 542, 814 A.2d 469, 486 (2002).[FN10]

> FN10. There are, however, a few instances where regional or Statewide considerations have inspired the Legislature to broaden, directly or indirectly, the purely local considerations and processes inherent in most land use decisions, e.g., the Chesapeake Bay Critical Area Protection Program scheme (Md.Code (1974, Repl. Vol. 2000), Natural Resources §§ 8-1801 to 8-1817) and the requirements for comprehensive water and sewerage plans (Md.Code (1974, Repl. Vol. 1996), Environment §§ 9-501 to 9-521).

Each jurisdiction in the State owes its zoning authority to delegations found in various provisions of the Maryland Code. We observed in *Rylyns* that

***27** [t]racing the entire panoply of related enabling statutes in Maryland is a tad complex. The provisions empowering municipal corporations in Maryland are contained in Maryland Code (1957, 1998 Repl.Vol.), Article 23A, and with regard to home rule powers specifically, Art. 23A, § 9. Similar provisions detailing the powers for non-charter counties are found in Maryland Code (1957, 1998 Repl.Vol., 2002 Supp.), Article 25. Further complicating the matter, the authority of the counties of Montgomery and Prince George's are controlled by Maryland Code (1957, 1998 Repl.Vol., 2002 Supp.), Article 28. The land use provisions of Maryland Code (1957, 1998 Repl.Vol.,

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2002 Supp.), Article 66B pertain primarily to Art. 23A municipalities and Art. 25 non-charter counties, although certain provisions apply to Maryland Code (1957, 1998 Repl.Vol.), Art. 25A charter counties, as well as to Montgomery and Prince George's Counties, Art. 66B, §§ 1.02 and 7.03, and also to the City of Baltimore, Art. 66B, §§ 2.01-2.13 and 14.02.

372 Md. at 528, 814 A.2d at 476-77. Of course, in this case we are concerned only with Article 66B, which provides for judicial review of "zoning actions" taken by the Mayor and City Council of Baltimore. Md.Code, Art. 66B, § 2.09(a)(1)(ii).

A.

Baltimore City, in Title 9 of the Baltimore City Zoning Code, has developed a scheme for evaluating, approving, and administering PUDs. The process of obtaining a PUD is initiated by a mandatory conference between the developer and the Planning Commission to discuss the scope and nature of the PUD. Baltimore, Md., Zoning Code § 9-105(a). The developer is required to create a detailed development plan, *id.* § 9-105(b), which must include, at a minimum: a map indicating accurate boundary lines and the project area in relation to surrounding properties; the placement of roadways and parking facilities;****242** the use, size, and location of existing and proposed buildings and landscaping; architectural drawings of proposed structures; the location of existing and proposed sewer and water facilities; the existing storm drainage***28** pattern along with proposed drainage system; the location of recreation and open spaces; statistical data on size, density, and proposed number of residential units; a copy of property owners' association documents and protective covenants; and a detailed time schedule for start and completion of the PUD. *Id.* § 9-107. The application is then submitted to the Council in the form of a proposed ordinance (a bill, in legislative vernacular) for approval of the development plan. *Id.* § 9-106.

Once a bill proposing a PUD has been submitted to the Council, it must be reviewed by the Board of Municipal and Zoning Appeals, the Planning Commission, and any other agencies deemed relevant by the President of the City Council. *Id.* §§ 9-111, 16-301. These reviewing entities apply a multitude of governing standards that essentially ensure that the proposed PUD will conform with the surrounding area in terms of contemplated development; topography; value of surrounding areas; availability of light, air, open space, and street access; and risks of public and health hazards. *Id.* § 9-112. If the Council is satisfied with the development plan and reports from the reviewing agencies, it may approve the PUD in the form of an ordinance. *Id.* § 9-113. Upon approval, the approved PUD is designated on official zoning maps "for informational and reference purposes" and a copy of the development plan is kept on file by the Zoning Administrator. *Id.* § 9-116. Frequently, the approval expressed in the ordinance contains conditions.

The PUD designation, acting as an overlay for a specific parcel or assemblage of properties, is placed on top of the underlying zone or zones, in the present case a Euclidian zone. The underlying zone remains and is retained on the official Zoning Map for the City even after the PUD is approved. With the exception of minor changes to the interior features of buildings and the time schedule of completing the PUD, *id.* § 9-118(c), (d), amendments to an approved PUD are achieved only through an application process as in the case of a new PUD application. *Id.* § 9-118(a). Because the development plan and its authorizing ordinance serve as a binding agreement ***29** between the developer and the City for the development of the affected property, *id.* § 9-117, deviation from that plan or the requirements of Title 9 may result in revocation of the PUD.[FN11] *Id.* § 9-119(a).

> FN11. Where cancellation of the PUD is sought, the developer must be given 15 days notice to answer to the City's Zoning Administrator for the noncompliance. The Zoning Administrator may, if no satisfactory explanation is given, order the PUD to be cancelled. *Id.* § 9-119(b), (c).

There exist additional standards for Industrial PUDs, such as the one at issue *sub judice.* The first set of

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standards concern the effects of: noise; vibration; smoke and particulate matter; toxic matter; odorous matter; and glare. *Id.* §§ 9-216; 12-102. There are also additional sections of Title 9 governing the permissible uses and acreage required for Industrial PUDs. *Id.* § 9-501 *et seq.* Notably, an Industrial PUD may carry out the uses permitted in the underlying zoning district, as well as whatever conditional uses that are designated for that district as specified in the development plan. *Id.* § 9-502. The provisions of Title 3, which set out the generally applicable zoning rules for use ****243** and bulk, also govern Industrial PUDs. *Id.* § 9-501.

B.

Just as Baltimore City has a distinct scheme for PUDs, it so too has one for conditional uses,[FN12] a concept that deserves a proper introduction. The conditional use, which is not to be confused with conditional zoning, *see Rylyns*, 372 Md. 514, 541 n. 16, 814 A.2d 469, 485 n. 16, is a zoning mechanism which provides a greater degree of flexibility to land owners and developers who wish to utilize their property in ways that ***30** ordinarily and inherently would conflict with the zoning district in which their property is placed. *See Rylyns*, 372 Md. at 541-43, 814 A.2d at 485-86. The universe of allowable conditional uses for a given zoning district is designated by the legislative body at the time it establishes in the text of the zoning regulations the various zoning classifications and uses permitted in that zoning district. *Rylyns*, 372 Md. at 541, 814 A.2d at 485. If a land owner wishes to establish a conditional use he, she, or it must petition the relevant local governmental body, which, in turn, makes a determination of the acceptability of the proposed use, weighing, among other things, its putative unique adverse effects on the surrounding community and zoning district. *Mossburg v. Montgomery County*, 107 Md.App. 1, 5-6, 666 A.2d 1253, 1257 (1995).

> FN12. As we have noted in previous decisions, a "conditional use" has an alias by which it is sometimes known elsewhere in Maryland, a "special exception," although the two terms are largely synonymous. *Rylyns*, 372 Md. at 541 n. 16, 814 A.2d at 485 n. 16.
>
> While there may be a highly-nuanced distinction between the two terms, see *Lucas v. People's Counsel for Baltimore County*, 147 Md.App. 209, 227 n. 20, 807 A.2d 1176, 1186 n. 20 (2002), we shall use the term "conditional use" here as encompassing both concepts.

The regulations governing the consideration of conditional uses in Baltimore City is found in Title 14 of the Baltimore City Zoning Code. The Zoning Code provides that the Mayor and City Council may approve a request for a conditional use by ordinance and, additionally, may impose conditions on its approval. §§ 14-102, 103. Bills that would create conditional uses by ordinance must satisfy the requirements of Title 16. *Id.* §§ 14-208; 16-101(b)(2). These requirements mandate that the conditional use applicant present to the City Council and the public a statement of intent with respect to the property, which must be posted on the property in question in a specified manner and for a specified time. *Id.* §§ 16-202, 203. The bill is then referred to the Board of Municipal and Zoning Appeals and the Planning Commission and also may be referred to other relevant agencies. *Id.* § 16-301. Following a bill's second reading, it is subject to a public hearing before the committee to which the bill was originally referred with 15 days prior notice thereof. *Id.* §§ 16-401, 402.

The intersecting standards and characteristics of conditional uses and PUDs in the Baltimore City zoning regulations informs the conclusion that, by analogy, a PUD partakes more of the characteristics of a conditional use than any other zoning construct or mechanism recognized in Baltimore City. One particularly telling similarity is that PUDs in the City are ***31** first evaluated under the very same "governing standards" applied to conditional uses. Only after that are additional criteria considered. *Id.* § 9-112(a). Also, the zoning regulations state that changes to a PUD seeking a use that is designated already by regulation as a possible conditional use for the underlying zoning district does not require a new application, but are reviewed under a more deferential

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process. *Id.* § 9-**244 118(b). A similar provision elsewhere in Title 9 of the zoning regulations provides that an Industrial PUD may carry out the uses permitted in the underlying industrial district classification, as well as whatever conditional uses are designated for that district. *Id.* § 9-502. Although the Baltimore City zoning regulations undeniably set PUDs and conditional uses apart as distinct branches of the land use array, *see id.* tits. 9, 14, the regulations consistently employ the conditional use as a means of both understanding and administering the PUD.

Also, as we have discussed previously, PUD proposals arise as a result of an individual owner or developer petitioning the City to provide for uses not yet permitted "as of right" in the underlying district. *Id.* § 9-105. The hallmarks examined for their approval generally are compatibility with a Master Plan, conformance to regulatory criteria, and an examination of potential deleterious effects vís-a-vís adjacent property and uses. Proposed conditional uses call for a similar analysis, but are designated by the text of the zoning regulations, and require an individual to seek permission to use his or her parcel in accord with a particular conditional use. *Rylyns*, 372 Md. at 541, 814 A.2d at 485. A PUD allows for additional uses on a property not provided for by the permitted or conditional uses designated in that underlying district, but which are adjudged, on a case-by-case basis, not to be incompatible or deleterious at a given location and within the contemplation generally of the applicable Master Plan (or other planning document) and the general purposes of the underlying zone, much like a conditional use.

***32** III.

Implicit in the grant of authority to jurisdictions in the State to adopt their own particular zoning regulations consistent with that statutory grant is the reality that each jurisdiction likely will vary, to some degree, one from another, in its zoning regulations. Nonetheless, no matter how a local regulation is couched, an act constituting a "zoning action" for those jurisdictions governed by Art. 66B is subject to judicial review. Until the Court of Special Appeals filed its recent opinion in *Armstrong III*, the prevailing rule was that *only* zoning reclassifications constituted "zoning actions" under § 2.09(a)(1)(ii). *Compare Armstrong III*, 169 Md.App. at 674, 677-78, 906 A.2d at 426, 428 ("[T]he final question before reaching a conclusion, is whether 'zoning action' is limited to reclassifications. We conclude it is not ...."), *with MBC Realty*, 160 Md.App. at 387, 389, 864 A.2d at 224, 225 (including reclassifications within "zoning action," but excluding comprehensive zonings, comprehensive rezonings, text amendments to zoning ordinances, and conditional uses). Because, as previously discussed, conditional uses and PUDs in Baltimore share strong ties, we consider the reasoning and holding in *Armstrong III* before proceeding with our analysis in the present case.

A.

In *Armstrong III*, the Court of Special Appeals retreated from its broad holding in *MBC Realty* that a conditional use granted in Baltimore City was not a zoning reclassification, and thus not a "zoning action" eligible for judicial review under § 2.09. 169 Md.App. at 677-78, 906 A.2d at 428. The court also modified its approach to ascertaining the scope of review under § 2.09,[FN13] by first inquiring as to whether ****245** the governmental action in question was legislative or quasi-judicial***33** [FN14] in nature. 169 Md.App. at 666-73, 906 A.2d at 422-25. The intermediate appellate court noted that legislative actions are subjected to a more limited review by the courts than are quasi-judicial actions, 169 Md.App. at 666, 906 A.2d at 422 (citing *Dep't of Natural Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 224, 334 A.2d 514, 523 (1975) (indicating that the scope of review regarding legislative actions is whether the body was acting within its legal authority)), thus leaving only quasi-judicial actions subject to § 2.09 review. *See* 169 Md.App. at 666, 906 A.2d at 422 ("[T]he first question we must resolve is whether ... the City Council was acting in a quasi-judicial, or administrative capacity, rather than in a legislative one."); *see also Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 490 n. 12, 693 A.2d 757, 763 n. 12 (1997) ("Legislative or quasi-legislative decisions of local legislative bodies or administrative agencies are,

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

> FN13. Statutory judicial review must be authorized expressly by some form of legislative action, such as a statute or ordinance. *Armstrong II*, 390 Md. at 474, 889 A.2d at 402.
>
> FN14. In the interests of clarity and consistency, we use the term "quasi-judicial" in lieu of a synonym: administrative adjudication.

[1] The outcome of the analysis of whether a given act is quasi-judicial in nature is guided by two criteria: (1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property, 169 Md.App. at 666-69, 906 A.2d at 422-23; and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence. 169 Md.App. at 668-71, 906 A.2d at 423-24. The *Armstrong III* court emphasized the fact-finding process as the most weighty criterion, *id.* at 668-69, 906 A.2d at 423 (quoting *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 712, 376 A.2d 483, 497 (1977)).

The *Armstrong III* court also relied on our discussion in *Mayor and Council of Rockville v. Woodmont Country Club* regarding the Rockville City Council's quasi-judicial process in considering the amount to be levied for a special assessment, 348 Md. 572, 585, 705 A.2d 301, 307 (1998), in concluding that ***34** the parking lot ordinance at issue in *Armstrong III* was also the product of quasi-judicial processes. 169 Md.App. at 668-71, 906 A.2d at 423-24. In *Woodmont Country Club*, the City of Rockville had constructed a planned road named Wooten Parkway, together with a water main. 348 Md. at 576, 705 A.2d at 303. The country club, along whose property part of the road and water main project ran, challenged the benefit assessment amount to be levied against it by the City for the construction project and requested on three occasions, all to no avail, that the City produce for cross-examination the appraisers who had generated the figures used by the City in determining the amount. *Woodmont Country Club*, 348 Md. at 579, 705 A.2d at 304. At the hearing before the City Council for the proposed assessments, Woodmont presented its own witnesses: a traffic consultant, a land planner, and a land appraiser; all who disputed the City's assessment. *Woodmont Country Club*, 348 Md. at 580, 705 A.2d at 304. Subsequent to the hearing, the City Attorney had its appraisers evaluate the appraisal offered by Woodmont at the hearing and sent correspondence to the City in defense of the assessment proposed by the City. *Id.* With the City's permission, Woodmont responded to the new information presented by the City Attorney. *Id.* Despite the country club'sefforts,****246** the assessments were levied as proposed. Woodmont ultimately appealed to the Court of Special Appeals, which reversed the trial court on the rationale that Woodmont was entitled to an opportunity to cross-examine the City appraisers. *Woodmont Country Club*, 348 Md. at 580-81, 705 A.2d at 304-05. In affirming the intermediate appellate court's judgment, we found that, because the City Council had "*h [eld] a hearing, receiv[ed] written and oral testimony, and consider[ed] evidence to determine the specific amount of special benefit to a particular piece of property*" being assessed by the City, the Council had, in those acts, performed in a quasi-judicial capacity, thereby entitling Woodmont to an opportunity for cross-examination. *Woodmont Country Club*, 348 Md. at 585, 582, 705 A.2d at 307, 305 (emphasis added).

***35** The *Armstrong III* court drew a favorable comparison between the fact-finding process in *Woodmont Country Club* and that which occurred in the hearing before the Land Use and Planning Committee of the Baltimore City Council in the conditional use case. 169 Md.App. at 670, 906 A.2d at 424. The court found that the testimony of several concerned community members, the questions of several Committee members directed to the developer regarding the parking lot's economic impact, and the Council's consideration of several "fact-intensive," site-specific factors distinguished the proceedings as quasi-judicial in nature, similar to those in *Woodmont Country Club*. *Id.*

Once the proceeding was determined to be

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quasi-judicial in nature, the court looked next to whether the action or decision complained of was a "zoning action" as that term is used in § 2.09. In this inquiry, the court examined precisely what decision or act by the governmental entity is the subject of the petition for judicial review. *Id.* at 677-78, 906 A.2d at 428. This step was necessary, in the court's view, to distinguish between cases where the thrust of the attack is directed at a legislative act not fitting within the term of "zoning action" and cases where the thrust of the attack is directed at a quasi-judicial act imputing a "zoning action." *Id.* Thus, *Armstrong III* concluded that a piecemeal application, initiated by the property owner for a specific conditional use for a specific property, is a "zoning action," while zoning text amendments or comprehensive rezonings initiated by government are not. *Id.* at 673-74, 906 A.2d at 425-26.

B.

The approach taken in *Armstrong III* reflects an analysis recognized in our zoning law precedent. In *Stephans II*, we opined that the word "action" in the phrase "zoning action" was meant to be understood more in the sense of an adversarial proceeding involving a controversy between two or more parties, rather than a legislative action such as a comprehensive zoning plan or a text amendment to a zoning ordinance or regulation. 286 Md. at 390, 408 A.2d at 1019. The essential ***36** point of this observation may be understood to distinguish an act by a legislative body that focuses on an individual property or assemblage of properties requiring particularized findings as to the circumstances of that property (or assemblage of properties) from acts that primarily have broader, community-wide implications which encompass considerations affecting an entire planning area or zoning district. Thus, when a legislative body considers a comprehensive area zoning or rezoning, the focus of its deliberations is not on a single parcel of land in a district or planning area, but rather on the entire district or area because it is the characteristics of the entire district that will inform the ****247** body's ultimate decision. By the same token, when a governmental body or agency undertakes the consideration of a proposal for a conditional use or a PUD, the body or agency necessarily concentrates its review and analysis on the parcel in question and the consequences of the proposed use of that parcel relative to the area more immediately surrounding the subject property.

In this way, the potentially "adversarial" type proceeding alluded to in *Stephans II* partakes of the characteristics previously discussed as indicative of a quasi-judicial, fact-finding process: the reception and weighing of facts to arrive at a conclusion, expressed as findings required by regulatory criteria, as to a specific land use proposal, initiated by the property owner or its representative, for a specific property or assemblage of properties.[FN15] The appellation of "quasi-judicial,"***37** however, when assigned to governmental processes and acts, is not talismanic for declaration of a "zoning action," obviating the need for further inquiry into whether the act in question is eligible for statutory judicial review. Rather, it simply denotes certain processes involved in an "action" as understood in Art. 66B, § 2.09(a)(1)(ii).

FN15. An individualized, quasi-judicial proceeding may be "adversarial" in the sense that members of the surrounding community, as well as advisory governmental departments, are most likely to, and do, dispute the fitness for approval of these individualized land use proposals, usually in terms of how the proposal will affect adversely the use, value, and enjoyment of their land. *See, e.g., Armstrong II*, 390 Md. at 470, 889 A.2d at 400 (discussing a dispute between neighbor residents and a developer seeking a parking lot ordinance); *Sugarloaf Citizens Ass'n v. Dep't of the Env't*, 344 Md. 271, 297-99, 686 A.2d 605, 618-20 (1996) (cataloguing cases where adjoining land owners properly have been aggrieved, and holding specifically that a farm owner whose property was located approximately 2,000 feet from a proposed incinerator had standing to contest the permit to operate the incinerator); *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 150 Md.App. 479, 500-01, 822 A.2d 478, 490-91 (2003)

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> (involving an complaint raised by one billboard company that a zoning act was giving a competitor with land abutting theirs a competitive advantage that harmed their business).

[2][3][4] Although many relevant appellate cases refer to quasi-judicial decisions derived from pure administrative agencies, *see* Consumer Prot. Div. v. Morgan, 387 Md. 125, 160, 874 A.2d 919, 939 (2005), fundamentally legislative bodies, such as the Baltimore City Council, similarly may act in a quasi-judicial capacity. Prince George's County v. Beretta U.S.A. Corp., 358 Md. 166, 175, 747 A.2d 647, 652 (2000). The principal characteristic of a quasi-judicial proceeding is that of fact-finding by the undertaking body, even if the relevant facts are undisputed. Bucktail, LLC v. County Council of Talbot County, 352 Md. 530, 543, 723 A.2d 440, 446 (1999); Bd. of License Comm'rs for Prince George's County v. Global Express Money Orders, Inc., 168 Md.App. 339, 345, 896 A.2d 432, 435 (2006). A determination of whether a particular governmental body is conducting a quasi-judicial inquiry must address "the nature of the particular act in which [the body] is engaged." Woodmont Country Club, 348 Md. at 585, 705 A.2d at 307. In the land use and zoning context, the essential questions to be asked are: what property or properties are being examined, for what reason, and at whose behest? As we have previously noted, proceedings or acts that scrutinize individual parcels or assemblages for the consideration of property-specific proposed uses, at the owner's or developer's initiative, ordinarily suggest a quasi-judicial process or act.

The case law of this State provides many exemplars of what have been found ****248** to be quasi-judicial proceedings. In general terms, we have said that quasi-judicial proceedings and acts are carried out largely by the exercise of discretion by a ***38** governmental body. City of Bowie v. Prince George's County, 384 Md. 413, 440, 863 A.2d 976, 991 (2004). That discretion is exercised through the holding of hearings by the body, Union Investors, Inc. v. Montgomery County, 244 Md. 585, 588, 224 A.2d 453, 454 (1966), which then is tasked with "rendering findings of fact and making conclusions of law...." Chestnut Real Estate P'ship v. Huber, 148 Md.App. 190, 199, 811 A.2d 389, 394 (2002). The mode of fact-finding and particular formalities observed in the process can vary depending on the nature of the matter being considered by the hearing body. *See* Hyson v. Montgomery County Council, 242 Md. 55, 67, 217 A.2d 578, 586 (1966) (holding that at least some right to cross-examination exists in Montgomery County zoning reclassification public hearings). *But see* Woodward & Lothrop, Inc., 280 Md. at 713, 376 A.2d at 498 (holding that no right to cross-examination exists for sectional map amendments involving comprehensive rezoning in Montgomery County, a legislative in nature process). *See also* Gorin v. Board of Co. Comm'rs for Anne Arundel County, 244 Md. 106, 110, 223 A.2d 237, 239 (1966) ("While proceedings before an administrative board are informal and the strict rules of evidence do not apply, when the board is functioning in an adversary proceeding, the fundamentals applicable to the decision of adjudicative facts by any tribunal must be preserved.").

[5] We note that the fact-finding process for piecemeal land use and zoning matters usually entails at least the holding of a hearing, the receipt of factual and opinion testimony and forms of documentary evidence, and a particularized conclusion as to the development proposal for the parcel in question. *See* Woodmont Country Club, 348 Md. at 585, 705 A.2d at 307; *see also* Maryland-National Capital Park and Planning Comm'n. v. Friendship Heights, 57 Md.App. 69, 82, 468 A.2d 1353,1359 (1984) ("Where ... the administrative tribunal is under a duty to consider evidence and apply law to the facts as found, thereby exercising some discretion, the function is quasi-judicial."). It is primarily the emphasis that the hearing places on a particular property and the unique considerations of its proposed development that tender to ***39** render it quasi-judicial in nature. This emphasis is only natural. "Zoning matters ... depend upon the unique facts and circumstances of a particular location and must be analyzed individually." Red Roof Inns, Inc. v. People's Counsel for Baltimore County, 96 Md.App. 219, 227-28, 624 A.2d 1281, 1285 (1993).

In Woodmont Country Club, we referred on multiple occasions to the focusing of a proceeding on an

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individualized parcel of land as important in finding that the process was a quasi-judicial one. 348 Md. 572, 583-84, 705 A.2d 301, 306. The *Woodmont Country Club* Court also noted its opinion in *Hyson*, where we found that the Montgomery County Council, in "considering and determining [ ] adjudicative facts concerning particular parties [in a zoning reclassification matter], [ ] necessarily was performing a quasi-judicial function, even though its final action, in granting or denying the reclassification which was required to be based upon its findings of adjudicative facts, was quasi-legislative in character." 242 Md. at 65, 217 A.2d at 584, *cited in Woodmont Country Club*, 348 Md. at 584, 705 A.2d at 306-07. We later clarified in *Bucktail* that it is not a hearing's mere focus on one parcel that is dispositive of its quasi-judicial nature, but rather that the matter taken up at the hearing is disposed of based on the unique ****249** characteristics that inhere to that parcel when considering the proposed use. 352 Md. at 545, 723 A.2d at 447 ("This determination is not based on whether the zoning decision adversely affects an individual piece of property, but whether the decision itself is made on *individual or general grounds*.") (emphasis added).

Yet another of our cases demonstrates the relationship between an individualized determination and a quasi-judicial process or act. *Mossburg v. Montgomery County*, decided in 1993, involved a petition for a special exception (conditional use) to build a solid waste transfer station in Montgomery County. The County Board of Appeals denied the application for the exception after a hearing at which extensive testimony was offered by concerned citizens opposed to it. 329 Md. at 496-98, 620 A.2d at 887-88. We held, in part, that the Board ***40** of Appeals's proceeding was quasi-judicial in the sense that it evaluated "[a]n application for a special exception involv[ing] a particular applicant's request for administrative authorization to engage in a *specific activity at a specific location*." *Mossburg*, 329 Md. at 506, 620 A.2d at 892 (emphasis added).

It is only by looking to the particular circumstances of an affected parcel and its immediate environs that a body can make the necessary findings and conclusions called for by statute, ordinance, or regulation. These site-specific findings of fact are necessary not only to inform properly the interested parties of the grounds for the body's decision, *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 64, 806 A.2d 662, 676 (2002) (citing *Blue Bird Cab Co. v. Md. Dep't of Employment Sec.*, 251 Md. 458, 466, 248 A.2d 331, 335 (1968)) (noting that "a fundamental requirement of the due process of law in a quasi-judicial proceeding is the right of the parties to be apprised of the facts relied upon by the tribunal in its decision."), but also to provide a basis upon which judicial review may be rendered. *Pattey v. Bd. of County Comm'rs for Worcester County*, 271 Md. 352, 359-60, 317 A.2d 142, 146 (1974) (restraining judicial review of a legislative body's zoning decision to the record); *Bd. of County Comm'rs for Prince George's County v. Ziegler*, 244 Md. 224, 229, 223 A.2d 255, 257 (1966) ("[I]t is clear that without a record of the facts on which the zoning authority acted or a statement of the reasons for its action, the reviewing court could not properly perform the duty it had of determining whether the action of the zoning authority was arbitrary or capricious.").

C.

[6] The Baltimore City Council's consideration of the PUD amendment proposal advanced by Canton Crossing, which later became the subject of Ordinance 04-873, was evaluated on both individual and general grounds. It is clear from the record that the Council's decisions to grant both Canton Crossing's original request to designate its 67 and one-half acre plot of land as an Industrial PUD and each of the three subsequent substantive amendments to the approved PUD ***41** were made upon grounds focused on a development plan for that plot of land only, and thus was considered on an individualized basis. This property alone was singled out for proposed amendment of its zoning, rather than the entire zoning district or planning area in which it is located. This individualized action was precisely the kind of change, focusing on the particulars involved with a specific property and its unique circumstances, contemplated by our previous cases as quasi-judicial in nature. *See Bucktail*, 352 Md. at 545, 723 A.2d at 447; *Woodmont Country Club*, 348 Md. at 583-84, 705 A.2d at 306; ****250***Mossburg*, 329 Md. at 506, 620

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A.2d at 892; *Hyson*, 242 Md. at 65, 217 A.2d at 584.

We turn to the quality of the proceeding employed to examine the PUD amendment proposal. The Maryland Code and the Baltimore City Zoning Code both set forth a requirement that some form of hearing be held in conjunction with zoning acts carried out by the City Council. Md.Code, Art. 66B, §§ 2.05(d), 2.04(b) (providing for public hearings designed to grant "parties in interest and citizens [ ] an opportunity to be heard."); Baltimore, Md., Zoning Code §§ 16-402(a)(1); 16-101(d) [FN16] (mandating that a committee of the Council considering a bill that would change the zoning classification of a property, create a conditional use, or grant a PUD permit interested parties and the public an "opportunity to be heard").

> FN16. There appears to be a typographical error in the ordering of the subsections of § 16-101. This error, created by the addition of a new subsection (c) in the past year, has produced two subsections designated as (c). The second (c), which should be a(d), is the subsection to which we refer here.

Both codes also require certain findings of fact be made and governing standards be applied to those facts. The Maryland Code generally requires the Council [FN17] to make findings of fact regarding the zoning proposal that include: population changes, availability of public facilities, present and future ***42** transportation patterns, compatibility with existing and proposed development for the area, the recommendations of the Planning Commission and the Board of Municipal and Zoning Appeals, and the relation of the act to the City's plan. Md.Code Art. 66B, § 2.05(a)(2). The Baltimore City Zoning Code is much more specific in the findings and criteria applicable to the grant of a PUD proposal. In addition to the standards set for the grant of a conditional use, Baltimore, Md., Zoning Code § 14-205(a) (listing 14 separate criteria), a PUD is subject to scrutiny on ten additional points of consideration respecting the physical features of the land, health and safety of residents, as well as use and bulk regulations.[FN18] The council ***43 **251** bill that called for the amendment of Canton Crossing's development plan was subject to analysis in reports by the City Solicitor, Board of Municipal and Zoning Appeals, Planning Commission, Department of Housing and Community Development, Department of Public Works, Fire Department, Parking Authority Board, and Transportation Department, which served as the source for many of the conditions attached ultimately to approval of the amendment. Following that, the Land Use and Planning Committee of the City Council scheduled and held a duly advertised public hearing on the bill on 3 November 2004, which was reported as favorable with amendments by the Committee. At that audio-taped hearing, the Committee heard testimony from the developer and members of the public regarding a number of topics concerning the PUD and its putative effects on the community. The Hearing Notes indicate that the focus of the hearing was on the potential problems of increased noise, traffic, encroachment into the industrial district, and obstruction of water views from a nearby park. Canton Crossing and the City also apparently agreed to negotiate the massing for a cruise ship terminal should one be approved by the State.

> FN17. The Council has the option, by virtue of § 2.06(a) of Art. 66B, to appoint a hearing examiner to fulfill this fact-finding role.

> FN18. § 9-112. Governing standards
> In reviewing the proposal, the agencies to which a bill is referred must consider:
> * * *
> (b) in addition, whether:
> (i) the plans for the Planned Unit Development are in general conformance with:
> (A) all elements of the Master Plan; and
> (B) the character and nature of existing and contemplated development in the vicinity of the proposed Planned Unit Development;
> (ii) the Planned Unit Development will preserve unusual topographic or natural features of the land;
> (iii) the design of the Planned Unit Development will best utilize and be compatible with the topography of the land;

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(iv) the physical characteristics of the Planned Unit Development will adversely affect:
(A) future development or the value of undeveloped neighboring areas; or
(B) the use, maintenance, or value of neighboring areas already developed;
(v) with respect to availability of light, air, open space, and street access, the Planned Unit Development will secure for its residents and neighboring residents substantially the same benefits as would be provided by application of the basic district regulations;
(vi) with respect to fire, health hazards, and other dangers, the Planned Unit Development will secure for its residents and neighboring residents substantially the same protection as would be provided by application of the basic district regulations; and
(vii) the Planned Unit Development will permit design features that would not be possible by application of the basic district regulations.
(b) *Use regulations.*
The uses that would be allowed under this title but not under the basic regulations governing the underlying district in which they are located:
(1) must be necessary or desirable for and appropriate to the primary purpose of the Planned Unit Development; and
(2) may not be of a nature, or so located, as to adversely affect the surrounding neighborhood.
(c) *Bulk regulations.*
The application of bulk regulations under this title, which are expressed in terms of overall density for the entire Planned Unit Development rather than on a lot-by-lot basis, should result in overall development that is no less beneficial to the residents than would be obtained by application of the basic regulations for the underlying district.

It should also be noted that concurrent with this hearing and referral process, the Council examined, and ultimately approved, the development plan, which is required to address thirteen separate considerations affecting the site of the proposed PUD or any substantive amendment to an approved PUD. Baltimore, Md., Zoning Code §§ 9-107, 9-110; *see also supra* at 28-29, 909 A.2d at 242. The gravamen of these ***44** standards and the inquiry surrounding them is a detailed and thorough examination of the unique circumstances of a specific PUD proposal for a specific parcel, including the potential for adverse impacts on adjacent properties. This process of receiving evidence and creating a record upon which the City Council then must rely in deciding the ultimate question of whether the development plan, or amended plan, should be granted is quite analogous to the quasi-judicial processes analyzed in *Woodmont Country Club* and *Mossburg.* In both of those cases, as was done here, findings of fact were made based on reports from governmental agencies and departments and a public hearing, wherefrom the final governmental decision-maker drew its findings as to the pending matter affecting a particular piece of property. *City of Bowie,* 384 Md. at 440, 863 A.2d at 991. We are satisfied that the process for the approval of PUDs, and substantive amendments thereto, in Baltimore City is of sufficient quasi-judicial character, rather than legislative in nature, to examine the ultimate question of whether the Council's approval of the PUD amendment embodied by Ordinance 04-873 qualifies as a "zoning action" and therefore is subject to a petition for judicial review.

IV.

To understand the scope of § 2.09(a)(1)(ii) and its key phrase "zoning ****252** action,"we remind ourselves of what was said in *Stephans II.* The crucial legislative history of § 2.09 and *Stephans II* are well explicated in *MBC Realty:*
Article 66B was enacted in 1933. The statute provided for judicial review only from decisions by a Board and then only on writ of certiorari. *Board of County Commissioners of Carroll County v. Stephans,* 286 Md. 384, 391, 408 A.2d 1017 (1979). In 1962, the statute was amended to provide for judicial review of a decision by a Board, without the certiorari requirement. *Id.* at 392, 408 A.2d 1017.
Consequently, after the 1962 amendment, there was a

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statutory right of judicial review, as an administrative appeal, from a decision by a Board. There was no such right with respect to a decision by the local legislative body. ***45** With respect to decisions by a legislative body, a party had to file an action invoking the general jurisdiction of a court, arguing whatever theories were available under separation of powers principles, essentially that the legislation was unconstitutional or ultra vires. "The test of invalidity of a zoning ordinance is whether it is arbitrary, unreasonable and discriminatory, and has no substantial relation to the public health, safety, morals, or general welfare."

In 1970, §§ 2.09 and 4.08 [FN19] were amended to permit an administrative appeal from "a reclassification by the local legislative body," in addition to an administrative appeal from a decision by a Board. *Stephans*, 286 Md. at 392, 408 A.2d 1017. The right of review was pursuant to chapter 1100, subtitle B of the Maryland Rules. *Id.* (forerunner to title 7, chapter 200). The amendment was recommended by the Maryland Planning and Zoning Law Study Commission. The Commission explained,

> FN19. Section 4.08 applies to appeals in non-charter counties and municipalities, while section 2.09 applies to appeals in Baltimore City. *Bucktail*, 352 Md. at 549, 723 A.2d at 449; *Cmte. for Responsible Dev. on 25th Street v. Mayor and City Council of Baltimore*, 137 Md.App. 60, 81-82, 767 A.2d 906, 917 (2001).

This section is unchanged except for the inclusion of an appeal process from reclassification decisions of the local legislative body. It can be argued that under the present system appeals from reclassification decisions may be launched in equity at any time. This has proven to be a detrimental factor to most persons concerned with such an action. The appeal process to be used, Chapter 1100, Subtitle B, Maryland Rules, requires noting of an appeal within thirty days and filing of the appeal within another ten days. This is ample time to bring an appeal for review (*i.e.* if a person is aggrieved by a decision it is incumbent upon him to react within a reasonable period of time).

Id. at 393, 408 A.2d 1017.

In 1975, the statute was amended and, in relevant part, in sections 2.09 and 4.08, substituted "zoning action" for "reclassification***46** by the local legislative body." *Id.* The Court of Appeals, after reviewing the legislative history of the judicial review provisions in section 4.08 and relying specifically on language in the title to the amendment, concluded that the change to "zoning action" was stylistic and not substantive. *Id.* at 397, 408 A.2d 1017.

In *Stephans*, the County Commissioners of Carroll County approved the following matters as recommended by the Carroll County Planning and Zoning Commission: (1) adopted a comprehensive "mini" plan for the Freedom area of ****253** Carroll County; (2) added a new section to the county zoning ordinance providing for a "R-40,000 Residence District[;]" (3) changed the standards for approval of subdivisions; (4) provided for schools and colleges as a principal permitted use in a conservation zone; (5) specified that department stores be a permitted use in a local business district; and (6) comprehensively rezoned the Freedom area. *Stephans*, 286 Md. at 386, 408 A.2d 1017.

Landowners objected to the actions and sought judicial review pursuant to the provisions of section 4.08. The Court held that neither the adoption of the plan nor the amendment of the zoning text was a "zoning action." The Court stated that "zoning action" in section 4.08 meant " 'a reclassification by the local legislative body,' referring to piecemeal or 'spot' zoning, not to comprehensive zoning or rezoning." *Id.* The Court further explained that "[c]hallenges in the courts to the adoption of comprehensive plans, zoning texts, and zoning text amendments must come in proceedings other than administrative appeals." *Id.*

As we have observed previously, to the extent relevant here, sections 2.09 and 4.08 are the same. Consequently, the holding in *Stephans* applies to section 2.09, as well as section 4.08.

160 Md.App. 376, 383-85, 864 A.2d 218, 222-23 (certain citations omitted).

In *MBC Realty*, the Court of Special Appeals was confronted with determining the propriety of a petition for judicial ***47** review, filed under § 2.09, in response

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to the passage of three ordinances by the Baltimore City Council which, taken together, allowed for the placement of new billboards, as conditional uses subject to certain express conditions, on the exterior of the 1st Mariner Arena in downtown Baltimore. 160 Md.App. at 381, 864 A.2d at 221. The intermediate appellate court affirmed the Circuit Court's dismissal of the petition on the rationale that the granting of the conditional use was not a "zoning action." *MBC Realty*, 160 Md.App. at 380, 864 A.2d at 220. In addition, the court held that the two ordinances that preceded the ordinance granting the actual conditional use for the signs on the Arena were text amendments to the zoning regulations, ineligible under *Stephans II* for judicial review as zoning actions. *MBC Realty*, 160 Md.App. at 389, 864 A.2d at 225. Whether, in light of its new analytical approach advanced in *Armstrong III*, the Court of Special Appeals would reach the same result today as it did in *MBC Realty*, at least as to the ordinance granting the specific conditional use, seems doubtful.

[7][8][9][10][11] A closer review of the legislative history behind § 2.09 than was undertaken in *Stephans II*, a disciplined application of the principles of statutory construction, and certain relevant policy considerations counsel us to gainsay here *Stephans II's* narrow interpretation of the phrase "zoning action." We start, as our well-established rules of statutory construction direct us, with the plain language of the statute where the "ordinary, popular understanding of the English language dictates interpretation of its terminology." *Kushell v. Dep't of Natural Res.*, 385 Md. 563, 576, 870 A.2d 186, 193 (2005) (citing *Deville v. State*, 383 Md. 217, 223, 858 A.2d 484, 487 (2004)). Our construction of that language is guided also by a number of other established canons of interpretation: "[a] court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application." Statutory text " 'should be ****254** read so that no ***48** word, clause, sentence or phrase is rendered superfluous or nugatory.' " The plain language of a provision is not interpreted in isolation. Rather, we analyze the statutory scheme as a whole and attempt to harmonize provisions dealing with the same subject so that each may be given effect. If statutory language is unambiguous when construed according to its ordinary and everyday meaning, then we give effect to the statute as it is written. "If there is no ambiguity in that language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends; we do not need to resort to the various, and sometimes inconsistent, external rules of construction, for 'the Legislature is presumed to have meant what it said and said what it meant.' "

Kushell, 385 Md. at 576-77, 870 A.2d at 194 (internal citations omitted).

[12] The meaning of the word "zoning," as discussed in *Stephans II*, as far as it went, retains some vitality today. In general terms, the term "zoning" is "used to describe the process of setting aside disconnected tracts of land varying in shape and dimensions, and dedicating them to particular uses designed in some degree to serve the interests of the whole territory affected by the plan." *Stephans II*, 286 Md. at 388-89, 408 A.2d at 1019 (quoting *Applestein v. Osborne*, 156 Md. 40, 51, 143 A. 666, 671 (1928)). In as much as the types of zoning mechanisms principally relied on in 1979 and earlier to effect land development were largely Euclidean in nature, that this understanding prevailed at that time is understandable. Our decision in *Rylyns*, however, provides a somewhat more inclusive explanation of the nature of zoning, taking into account more modern and flexible types of zoning tools, and which distinguishes the more short-term regulation of land from the forward-looking concept known as planning:

Zoning, in theory, is the process whereby the comprehensive plan is put into effect. The local legislative body that makes zoning decisions divides districts within the locality ***49** into zones, and the legislative body defines, *inter alia*, the height, building size, lot size, population density, location, and use of buildings that are permissible in the particular zone.

372 Md. at 529-30 & n. 5, 814 A.2d at 477-78 & n. 5.

The more difficult inquiry is divining the meaning of "action" as it is used in § 2.09(a)(1)(ii). As previously

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discussed, the *Stephans II* Court viewed this term in its "legal sense" as indicative of an adversarial proceeding wherein opposing parties settle a controversy in some form of tribunal. 286 Md. at 390, 408 A.2d at 1019. We suggest here that such a conception of "action" is too cramped. The plain meaning of the term should be considered in its ordinary, popular understanding in the English language, rather than in a strictly "legal sense." *Id.* As such, we view "action" in a slightly broader sense than *Stephans II* did; one that embodies a less technical meaning tied exclusively to legal jargon. One respected dictionary extant at the time the General Assembly amended § 2.09(a)(1)(ii) to replace "reclassification" with "zoning action," first defines "action" as a "deliberative or authorized procedure." Webster's Third New International Dictionary 21 (1966). It, and another dictionary contemporaneous with the adoption of the statute in question,[FN20] then ****255** provide more generic definitions which allude to action as the act of doing something or performing a deed. *Id.* ("[A] thing done; deed"); Black's Law Dictionary 26 (5th ed. 1979) ("[C]onduct; behavior; something done; the condition of acting ..."). More recent dictionaries have concurred in this more general understanding of the word "action." *See, e.g.,* Black's Law Dictionary 21 (8th ed. 1999) ("[T]he process of doing something; conduct or behavior; an act or thing done; act...."); The Compact Oxford English Dictionary 15 (2d ed. 1991) ("[A] ***50** doing; performance"); Webster's New Universal Unabridged Dictionary 20 (2d ed. 1983) ("[T]he doing of something; ... an act or thing done").

FN20. We have pointed out that when courts find it prudent, in defining terms in the quest for understanding of statutory intent, to resort to dictionaries, it is advisable to make reference first to those dictionaries that were contemporaneous at the time the statutory language at issue was created. *Harvey v. Marshall,* 389 Md. 243, 260, n. 11, 884 A.2d 1171, 1181 n. 11 (2005).

[13] Taken together, these more commonly held understandings of the constituent parts of the phrase "zoning action" point to a meaning that has a broader sense than merely a "reclassification." Instead, we view "zoning action" in § 2.09 as any act by the Mayor and City Council that (1) decides the use of a specific parcel or assemblage of parcels of land, (2) was initiated by an individual application by a property owner or its representative, (3) was based on fact-finding (from a record containing evidence, usually both pro and *con*) adduced through governmental agency analysis of the proposal and through a public hearing, and (4) either creates or modifies substantively the governing zoning classification or defines the permissible uses, building and lot sizes, population density, topographical and physical features, and other characteristics of a specific parcel or assemblage of parcels of land by exercising some discretionary judgment after the consideration of the unique circumstances of the affected parcels and buildings.[FN21] This framework further explains why amendments to the text of zoning regulations, comprehensive zonings, and other acts that are legislative in nature do not qualify for judicial review under § 2.09.

FN21. This definition is very similar to that crafted by the Court of Special Appeals in *Stephans I*:

> [G]iving the particular words involved here 'zoning action' their natural and ordinary signification, the Legislature intended the phrase to encompass any act or deed of the local legislative body that controls or directs the use of land and buildings by dividing the governmental area into use districts according to present and planned future conditions. We find no ambiguity or obscurity in this language and therefore need not look elsewhere to ascertain the intent of the Legislature.

41 Md.App. 494, 500, 397 A.2d 289, 292 (1979) (citation omitted), *rev'd,* 286 Md. 384, 408 A.2d 1017. The intermediate appellate court later referred to this conception of the term "zoning action" as a valid one and construed the term as primarily dealing with use regulation, focusing on specific properties. *Gregory,* 89 Md.App. at 639-41 599 A.2d at 471-72.

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***51** B.

Because of the more commonly held understanding of the term "zoning action" adopted in this opinion, we must re-visit the conclusion reached by the *Stephans II* Court that the General Assembly's change of the language of § 2.09 from "reclassification" to "zoning action" was merely stylistic. 286 Md. at 396, 408 A.2d at 1022-23. The *Stephans II* Court inferred from the fact that the two main purposes of the 1975 enactment delineated in the title of the act arguably did not mention or concern the change from "reclassification" to "zoning action" that the change in language must have been one of the purely ****256** stylistic changes alluded to generally in the title. *Id.*

Modern cases look beyond the facial statements in Revisor's notes or inferential reasoning concluding that changes in statutory language were merely stylistic. Those cases apply plain meaning analysis to determine if the change, nonetheless, effected a clearly substantive change. *Md. Div. of Labor and Indus. v. Triangle Gen'l Contractors*, 366 Md. 407, 419-20, 784 A.2d 534, 541 (2001) (holding the addition of certain language to be substantive despite numerous legislative references to changes occurring in a re-codification as being purely stylistic); *Abramson v. Montgomery County*, 328 Md. 721, 737, 616 A.2d 894, 901-02 (1992) (finding that, contrary to the Revisor's note, the substitution of "person" for "party" worked a substantive change in determining whether a governmental entity is considered a "person" for purposes of the exhaustion of administrative remedies requirement for an appeal to Tax Court); *In re Taylor*, 312 Md. 58, 68-70, 537 A.2d 1179, 1184-85 (1988) (concluding that the deletion of certain language from the tools-of-the-trade bankruptcy exemption statute, although as a result of a recodification, must have been substantive although such changes during recodification are presumed to be stylistic); *Bd. of Supervisors of Elections of Baltimore City v. Weiss*, 217 Md. 133, 138, 141 A.2d 734, 737 (1958) (finding a substantive change in language because the law was under five years of study and could not reasonably have unintended changes); *see also* ***52***Mid-Atlantic Power Supply Ass'n v. Public Serv. Comm'n of Md.*, 361 Md. 196, 760 A.2d 1087 (2000). Thus, even if we were to accept the "logical inference" made by the *Stephans II* Court that the change from "reclassification" to "zoning action," in fact, was intended facially as a stylistic change, the inquiry does not end if the change in fact or law worked a substantive change. Thus, our application of the plain meaning rule here resolves differently than *Stephans II* the meaning of "zoning action." *Arundel Corp. v. Marie*, 383 Md. 489, 502, 860 A.2d 886, 894 (2004) ("If there is no ambiguity in that language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends; we do not need to resort to the various, and sometimes inconsistent, external rules of construction, for 'the Legislature is presumed to have meant what it said and said what it meant.' " (quoting *Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002))); *Triangle Gen'l Contractors*, 366 Md. at 423, 784 A.2d at 543 ("When a statute's language is clear and unambiguous, however, we need look no further for some hidden legislative intent." (quoting *Abramson*, 328 Md. at 736, 616 A.2d at 901)); *Tidewater/Havre de Grace, Inc. v. Mayor & City Council of Havre de Grace*, 337 Md. 338, 344, 653 A.2d 468, 472 (1995) ("It is well-settled that when the meaning of a statute-its legislative intent-is at issue, the court's inquiry begins with the words of the statute, and ordinarily, also ends there."). Our reading of "zoning action" does not produce any absurdities or defeat the purpose of the 1975 statute. *See Tidewater/Havre de Grace, Inc.*, 337 Md. at 345, 653 A.2d at 472. Rather, it gives effect to the law by providing judicial review of specific reclassifications, which was the case prior to the language change, in addition to other acts by the City Council affecting the zoning of individual parcels of property. Moreover, the grant of authority in the 1975 law to the City Council to "provide for appeal to the Baltimore City Court of any matter arising under the planning and zoning laws of the City of ****257** Baltimore," [FN22] is not rendered mere surplusage by our broader ***53** reading of "zoning action." *Moore v. State*, 388 Md. 446, 453, 879 A.2d 1111, 1115 (2005).

FN22. Laws of Maryland of 1975, ch. 267, § 3 (codified as Art. 66B, § 2.09(f)).

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C.

[14][15] To summarize, the pertinent criteria for determining whether a particular action by the Mayor and City Council is a "zoning action" are: first, there must be a determination that the process observed by the governmental body in affecting an alleged zoning action was quasi-judicial in nature, rather than legislative. A quasi-judicial proceeding in the zoning context is found where, at a minimum, there is a fact-finding process that entails the holding of a hearing, the receipt of factual and opinion testimony and/or forms of documentary evidence, and a particularized conclusion, based upon delineated statutory standards, for the unique development proposal for the specific parcel or assemblage of land in question. Second, if the governmental act in question involves a quasi-judicial process, the inquiry moves to the question of whether it qualifies as a "zoning action." Where the City Council exercises its discretion in deciding the permissible uses and other characteristics of a specific parcel or assemblage of land upon a deliberation of the unique circumstances of the affected land and its surrounding environs, a "zoning action" is the result.

[16] In the case at hand, Ordinance 04-873 was enacted as the result of a quasi-judicial process. It approved the "increase [of] the number of residential dwelling units permitted and [modified] the uses and buildings permitted and their locations and size." *See op., supra* at 24, 909 A.2d at 239-40. The prevailing purpose of the Ordinance, then, was to define the permissible uses, if not also to modify to some degree the zoning classification, of the specific parcel. The amendment sought by the property owner proposed "to increase the number of residential dwelling units from 100 to 504; to decrease the amount of office space from 1.7 million to 1.5 million square feet; to decrease the amount of retail space from 450,000 to 150,000 square feet; and to increase the ***54** amount of restaurant space from 50,000 to 120,000 square feet." *Id.* & n. 8. The City Council's deliberative consideration, after receiving evidence at a required hearing, and approval of these specific uses for this specific parcel after making required statutory findings falls within the realm of a "zoning action." We, therefore, hold that Maryland Overpak was entitled to seek judicial review of the adoption of Ordinance 04-873 as a "zoning action" under § 2.09(a)(1)(ii).

V.

Because our holding is that Ordinance 04-873 granting an amendment to a PUD qualifies as a "zoning action" capable of judicial scrutiny in a petition for judicial review process, we need not consider Appellant's argument that its proceeding brought in the Circuit Court was proper if viewed as a legal modality of judicial process other than a petition for judicial review.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

Md.,2006.
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395 Md. 16, 909 A.2d 235

Briefs and Other Related Documents (Back to top)

• 2006 WL 638397 (Appellate Brief) Reply Brief of Appellant (Feb. 14, 2006) Original Image of this Document with Appendix (PDF)

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27.01.02.04

.04 Limited Development Areas.

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

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

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

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

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

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

(1) Maintain or, if possible, improve the quality of runoff and ground water entering the Chesapeake Bay and its tributaries;

(2) Maintain, to the extent practicable, existing areas of natural habitat; and

(3) Accommodate additional low or moderate intensity development if:

(a) This development conforms to the water quality and habitat protection criteria in §C, below, and

(b) The overall intensity of development within the limited development area is not increased beyond the level established in a particular area so as to change its prevailing character as identified by density and land use currently established in the area.

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

(1) For all development activities in the limited development areas, the jurisdiction shall require that the developer identify any environmental or natural feature described below, and shall meet all of the following standards of environmental protection:

(a) Criteria as provided for the habitat protection areas in COMAR 27.01.09, and those for the water-dependent facilities in COMAR 27.01.03.

(b) All roads, bridges, and utilities that must cross a habitat protection area shall be located, designed, constructed, and maintained so as to provide maximum erosion protection and minimize negative impacts to wildlife, aquatic life and their habitats and maintain hydrologic processes and water quality. Roads, bridges, or utilities may not be located in any habitat protection area unless no feasible alternative exists.

(c) All development activities that must cross or affect streams shall be designed to:

(i) Reduce increases in flood frequency and severity that are attributable to development;

(ii) Retain tree canopy so as to maintain stream water temperature within normal variation;

(iii) Provide a natural substrate for streambeds; and

(iv) Minimize adverse water quality and quantity impacts of stormwater.

(d) All development sites shall incorporate a wildlife corridor system that connects the largest undeveloped, or most vegetated tracts of land within and adjacent to the site in order to provide continuity of existing wildlife and plant habitats with offsite habitats. The wildlife corridor system may include habitat protection areas identified in COMAR 27.01.09. Local jurisdictions shall ensure the maintenance of the wildlife corridors by requiring the establishment of conservation easements, restrictive covenants, or similar

instruments through which the corridor is preserved by public or private groups, including homeowners associations, nature trusts, and other organizations.

(2) For the cutting or clearing of trees in forests and developed woodland areas which are associated with current or planned development activities in the limited development area, all jurisdictions shall:

(a) Require that the developer consider the recommendations of the Forestry Programs and the Fish, Heritage and Wildlife Administration of the Department of Natural Resources when planning development on forested lands;

(b) Provide regulations that development activities be designed and implemented to minimize destruction of woodland vegetation; and

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

(3) For the alteration of forest and developed woodland in the limited development area, the jurisdiction shall apply all of the following criteria:

(a) The total acreage in forest coverage within a jurisdiction in the Critical Area shall be maintained or, preferably, increased.

(b) All forests that are allowed to be cleared or developed shall be replaced in the Critical Area on not less than an equal area basis.

(c) That no more than 20 percent of any forest or developed woodland may be removed from forest use, except as provided in §C(4), below. The remaining 80 percent shall be maintained through recorded, restrictive covenants or similar instruments.

(d) Developed woodland vegetation shall be conserved to the greatest extent practicable.

(4) For replacement of forest and developed woodland, if more than 20 percent is removed from forest use, the following formula shall apply: a developer may clear or develop more forest than otherwise permitted to be disturbed, if the total forest area removed from forest use is not increased by more than 50 percent of the area permitted to be disturbed in §C(3)(c), above, provided that the afforested area shall consist of 1.5 times the total surface acreage of the disturbed forest or developed woodland area, or both.

(5) In addition, local jurisdictions shall adhere to the following criteria for forest and woodland development:

(a) Local programs shall make provision for surety to be provided by owners or developers in an amount acceptable to the local jurisdiction and suitable to assure satisfactory replacement as required by §C(4), above;

(b) Grading permits shall be required before forest or developed woodland is cleared;

(c) Forests which have been cleared before obtaining a grading permit, or that exceed the maximum area allowed in §C(4) shall be replanted at three times the areal extent of the cleared forest;

(d) If the areal extent of the site limits the application of §C(3), (4), and (5)(c), above, alternative provisions or reforestation guidelines may be developed by the local jurisdiction, if they are consistent with the intent of COMAR 27.01.05, to conserve the forest and developed woodland resources of the Critical Area; alternative provisions may include fees-in-lieu provisions if the fee is adequate to ensure the restoration or establishment of an equivalent forest area;

(e) If no forest is established on proposed development sites, these sites shall be planted to provide a forest or developed woodland cover of at least 15 percent;

(f) All forests designated on development plans shall be maintained to the extent practicable, through conservation easements, restrictive covenants, or other protective instruments;

(g) The developer shall designate, subject to the approval of the local jurisdiction, a new forest area on a part of the site not forested; and

(h) The afforested area shall be maintained as forest cover through easements, restrictive covenants, or other protective instruments.

(6) Development on slopes greater than 15 percent, as measured before development, shall be prohibited unless the project is the only effective way to maintain or improve the stability of the slope and is consistent with the policies in §B of this regulation.

(7) For stormwater runoff, man-caused impervious areas shall be limited to 15 percent of the site.

(8) Local jurisdictions should allow for modifications in road standards to reduce potential impacts to the site and Critical Area resources, where the reduced standards do not significantly affect safety.

(9) To reduce the extent of impervious areas and maximize areas of natural vegetation, cluster development shall be considered when planning for future development.

(10) Development may be allowed on soils having development constraints if it includes mitigation measures that adequately address the identified constraints and that will not have significant adverse impacts on water quality or plant, fish, or wildlife habitat.

D. In developing their Critical Area programs, the local jurisdictions shall refer to all of the following complementary existing State laws and regulations:

(1) For soil erosion and sediment control (COMAR 26.09.01):

(a) In order to prevent soil erosion and sedimentation, a soil erosion and sedimentation control plan shall be required whenever a development within the Critical Area will involve any clearing, grading, transporting, or other form of disturbance to land by the movement of earth. This plan shall be consistent with the requirements of Natural Resources Article, §§8-1101—8-1108, and Environment Article, §§4-103—4-108 and 4-116, Annotated Code of Maryland, and local ordinances. Sediment control practices shall be appropriately designed to reduce adverse water quality impact.

(b) Jurisdictions shall require erosion control as the basis of sediment control plans within the Critical Area.

(2) For stormwater runoff (COMAR 26.09.02):

(a) Limitation on Stormwater Runoff. Development may not cause downstream property, watercourses, channels, or conduits to receive stormwater runoff at a higher volume or rate than would have resulted from a 10-year storm were the land in its predevelopment state.

(b) Storage Capacity. All stormwater storage facilities shall be designed with sufficient capacity to achieve water quality goals of this subtitle and to eliminate all runoff caused by the development in excess of that which would have come from the site if it were in its predevelopment state.

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