WRIGHT INVESTMENT GROUP V. MARYLAND DNR/CAC AND ANNE ARUNDEL COUNTY COMPLAINT FOR WRIT OF MANDAMUS, DELCLARATORY RELIEF, AND DAMAGES Case No. C-06-117695 (Circuit Court for Anne Arundel County)

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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.

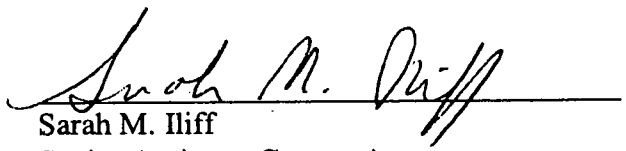
COUNTY ACTION

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.

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

Paul Cucuzella, Esq.
Marianne Dise, Esq.
Assistant Attorneys General
Maryland Department of Natural Resources
580 Taylor Avenue, c-4
Annapolis, Maryland 21401
Attorneys 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

Kathleen E. Byrne, Esq.
Hyatt & Weber, PA
200 Westgate Circle, Suite 500
Annapolis, Maryland 21401
Attorney for Petitioners James and Victoria Parkin

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

Eileen E. Powers, Esq.
Blumenthal, Delavan & Williams, Esq.
170 Jennifer Road, Suite 240
Annapolis, Maryland 21401
Attorney for Petitioner JWL Associates et al.

Sarah M. Iliff
Senior Assistant County Attorney

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

Paul J Cucuzzella Esq
Assistant Attorney General Dept. Of Natural Resources
580 Taylor Ave
Suite C4
Annapolis, MD 21401

dal
FOLD HERE

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AUG 9 2007
DNR - LEGAL DIVISION

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AUG 9 2007
DNR - LEGAL DIVISION

FILED
2007 AUG -6 P 1:28

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

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

CIVIL PRETRIAL ORDER

This Court having conducted a pretrial conference with counsel and the parties, in accordance with Md. Rule 2-504.2, it is this 1st day of August, 2007, by the Circuit Court for Anne Arundel County,

ORDERED that the parties shall comply with the following provisions :

Pursuant to the Civil Differentiated Case Management (DCM) Plan adopted by this Court as required by Md. Rule 16-202 ***only actions ready for trial will be assigned for trial and tried.***

The deadlines and dates set forth herein are firm dates and may only be changed to prevent manifest injustice by the parties or counsel with the prior approval of the Administrative Judge or his designee, the Civil DCM Judge. Counsel and/or the parties may not change any dates herein, by mutual consent or agreement. In the absence of a genuine emergency or other good cause, last minute continuances will not be granted.

All counsel are advised that in any dispute concerning whether counsel and/or the parties have complied with this Order, ***the Court will not be guided by any agreements made between counsel to modify this Order***, unless expressly approved by the Court. Failure to comply with the provisions of this Order may lead to the imposition of sanctions against the parties and/or their counsel, which may include dismissal, entry of default or monetary sanctions as may be appropriate.

This case must be concluded by the Case Time Standard Deadline which is: April 19 2008.

❒ **CASE SETTLED**

1. The parties have reached a full and final resolution of all issues in this case as a result of which trial is not necessary. The settlement terms are as follows:

❒ The parties reached an agreement which was placed on the record. The agreement, as placed on the record, is incorporated herein by reference as a final order subject to enforcement.

☐ Specific terms of agreement:

_____

_____

_____

_____

☐ All parties shall execute all releases or other documents necessary to conclude this case. A Line of Dismissal or Order of Satisfaction must be filed on or before _____, 20___. If a Line of Dismissal or Order of Satisfaction has not been filed as directed, this case shall be dismissed by the Court, sua sponte, and sanctions may be imposed.

☐ Open costs shall be paid by the _____.

☐ Settlement terms are satisfied. Clerk to close case forthwith.

☒CASE NOT SETTLED/NOT READY FOR TRIAL

2. After conducting a Pretrial Conference, this case is not ready for trial because:

☐ **Discovery** has not been concluded as required by the previous orders of the court. No further discovery shall be permitted, except the following: _____

_____

_____

_____

All remaining discovery shall be concluded on or before:_____20__. **De bene esse depositions,** if any, are not controlled by this deadline, but are subject to the provisions of Rule 2-412. The parties are expected to cooperate with each other to coordinate deposition dates.

☐ **ADR** has not been concluded as previously ordered. The parties are ordered to participate in the following ADR: _____

_____

ADR shall be concluded on or before: _____,20___.

☐ **Motions** are pending as follows: _____

_____.

A hearing on the motions is set for: _____,20___, at _____a.m./p.m., before Judge _____.

☐ **Amendments** to pleadings are necessary. Only the following amendments shall be permitted:

_____.

These amendments shall be filed on or before _____, 20_____.

☐ **Other** reasons:_____

_____

_____

No other discovery, amendments, or motions shall be permitted. A trial date will not be set in this case until all parties and counsel comply with this Order or the Court determines that, as a result of sanctions imposed, this case is ready for trial.

☐ A **follow-up Pretrial Settlement** Conference is scheduled before:

☐ **DCM Judge** or **designee**, or

☐ **Judge /Master**_____ on September 19 2007

at 9:00 a.m./~~p.m.~~

The attorneys who will try the case, all parties and insurance representatives *with full authority to settle the case,* shall be present and prepared to discuss, in good faith, settlement of all issues in this case. Time estimate _____

❒ **CASE READY FOR TRIAL**

3. The Court has determined that all discovery has been completed, all reasonable efforts to settle the matter have been exhausted, all necessary motions have been resolved and the case is ready for trial. **No other discovery, amendments, or motions shall be permitted** (other than Motions in Limine).

Trial on the merits:

This case is **SCHEDULED** for trial beginning on_____, 20___
at _____ a.m./p.m.. before❒ **Judge**_____❒ **any judge.**
It is estimated that trial shall last_____ ❒ day(s) ❒ week(s)
❒ **Jury Trial** Panel:_____; Alternates_____ ❒ **Court Trial**

This is a firm trial date. No continuances will be granted except to prevent manifest injustice, and in accordance with Md. Rule 2-508. Last minute continuances will not be granted absent extraordinary circumstances.

4. **Experts & Witnesses**

No party shall be permitted to call any expert at trial or any other witnesses except those designated in discovery.

5. **Documents and Exhibits**

The parties shall exchange copies of all documents and exhibits to be offered as evidence at trial (except impeachment evidence) no later than 30 days before trial. All exhibits shall be pre-marked by the parties (plaintiffs to use numbers and defendants to use letters). All such documents shall be deemed authentic, unless a party files objections to authenticity within 15 days thereafter. Other objections to the admissibility of the documents or exhibits are not deemed waived by the failure to object to authenticity.

All parties should familiarize themselves with the use of the Court's audio-visual equipment and must contact the Court at least two (2) days in advance of trial to make arrangements for such equipment to be available.

6. **Voir Dire, Jury Instructions & Verdict Sheet**

Counsel and/or the parties are directed to consult with each other and prepare for submission to the Court **joint** Voir Dire, Jury Instructions and a Verdict Sheet which are not the subject of any disagreement. Counsel may separately submit any disputed voir dire questions, instructions and/or verdict sheet for consideration by the trial judge. Whenever possible, the parties should utilize the latest edition of the Maryland Civil Pattern Jury Instructions (MPJI), published by MICPEL. It shall be sufficient to identify the requested instruction by MPJI number and title without including the full text. The aforementioned papers must be filed no later than twenty days prior to the trial date unless otherwise directed herein.

On the first day of trial, counsel should be prepared to provide the trial judge a diskette containing the Voir Dire, Jury Instructions and Verdict Sheet in WordPerfect or Word format so that modifications can be made, if necessary.

7. **Motions In Limine, and/or Pretrial Memoranda**

Any Motions In Limine or pretrial memoranda must be filed no later than twenty days prior to the trial date.

8. **Settlement**

The Court does not over-book trials; therefore, if a settlement is reached, the parties shall ***promptly*** file ***original*** settlement documents with the Clerk with a copy to the Civil DCM office. Unless such documents are filed at least seven (7) days prior to the trial date, all parties, counsel and representatives must appear on the trial date. Trial dates shall not be continued by consent pending the completion of a settlement. Trial dates may only be canceled or continued by the Civil DCM Judge.

9. **Request for Accommodation/Interpreter**

Please notify the Court Administrator (410)222-1404 as early as possible of any reasonable accommodation needed because of a disability or the need for an interpreter. Any other questions regarding this Order should be addressed to the Office of Civil Case Management (410) 222-1215.

10. **Any other matter** awaiting Judge Marck's decision

Recommended by:

Master in Chancery

Judge

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

CIVIL CLERK to mail copies / Copies distributed by chambers:

Attorney for Plaintiff

Attorney for Defendant

Attorney for

Attorney for

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	*	
	*	**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

Wright Investment Group v. Maryland DNR/CAC & AA Co. Complaint for Writ of Mandamus, Declaratory Relief, & Damages. Case No. C-06-117695 (Circuit Court for AA Co) Pleadings Index 2006-2007 MSA_S_1831_33 (1 of 5)

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP 21750 Deveron Cove Yorba Linda, CA 92607	*	
Plaintiff	*	
v.		Case No. C-06-117695
	*	
MARYLAND DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS 1804 West Street, Suite 100	*	
Defendant	*	
and	*	
ANNE ARUNDEL COUNTY Arundel Center 45 Calvert Street – Room 315 Annapolis, Maryland 21401	*	

* *

Pleadings Index

1.	10/20/06	Verified Complaint for Writ of Mandamus, Declaratory Relief and Damages; Writ of Summons
2.	11/01/06	Scheduling Order
3.	11/02/06	Affidavit of Service Upon Defendants
4.	11/22/06	Answer of Defendant; Defendant's Civil Non-Domestic Case Information
5.	11/28/06	Defendant Anne Arundel County's Motion to Dismiss and Response to CAC's Motion to Dismiss
6.	12/15/06	Line To Record
7.	12/15/2006	Plaintiff's Opposition to County's Motion to Dismiss
8.	12/18/06	Cross Complaint Against Defendant Anne Arundel County.
9.	12/21/06	Order dismissing CAC and Anne Arundel County
10.	1/16/07	Plaintiff's Motion To Reconsider Order of Dismissal

11.	1/23/07	Entry Of Appearance; DNR's Response To Motion To Reconsider
12.	1/19/07	Anne Arundel County's Motion To Dismiss Cross Claim
13.	1/24/07	Order to set for Complex Motions Hearinf
14.	1/25/07	Notice Of Hearing
15.	1/29/07	Scheduling Order
16.	2/2/07	Critical Area Commission's Opposition To Motion To Dismiss Cross Claim
17.	2/15/07	Consent Request To Reschedule Complex Motions Hearing
18.	2/20/07	Order denying Motion To Consolidate
19.	3/13/07	Motion For Postponement and Scheduling of Joint Hearing

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

RECEIVED
MAR 1 - 2007
DNR - LEGAL DIVISION

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

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

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

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

Paul J Cucuzzella Esq
Assistant Attorney General Dept. Of Natural Resources
580 Taylor Ave
Suite C4
Annapolis, MD 21401

cdw

FOLD HERE

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

JOSEPH P. GILL
Assistant Attorney General
Principal Counsel

STUART G. BUPPERT, II
SHAUN P.K. FENLON
RACHEL L. EISENHAUER
ROGER H. MEDOFF
SHARA MERVIS ALPERT
SAUNDRA K. CANEDO
PAUL J. CUCUZZELLA
Assistant Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
Department of Natural Resources

FAX NO.: 410-260-8364

WRITER'S DIRECT DIAL NO.

(410) 260-8352
pcucuzzella@dnr.state.md.us

February 15, 2007

Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
P.O. Box 71
Annapolis, Maryland 21401

Re: Wright Investment Group v. Maryland Department of Natural Resources, et al.
Case No. C-06-117695

Dear Clerk:

Enclosed for filing by defendant Maryland Department of Natural Resources in the above-referenced matter please find a Consent Request To Reschedule Complex Motions Hearing.

Thank you very much for your assistance.

Truly yours,

Paul J. Cucuzzella
Assistant Attorney General

Enclosure

cc: Benjamin S. Wechsler, Esq.
Sarah M. Iliff, Esq.

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	Case No.: C-06-117695
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

CONSENT REQUEST TO
RESCHEDULE COMPLEX MOTIONS HEARING

Defendant Department of Natural Resources ("DNR") and its Critical Area Commission for the Chesapeake and Atlantic Coastal Bay (the "Critical Area Commission"), by its attorneys, Douglas F. Gansler, Attorney General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, respectfully request that the complex motions hearing presently scheduled for March 26, 2007, be rescheduled at the convenience of the Court, and for cause state:

1. On February 13, 2007, counsel for DNR, Paul J. Cucuzzella, received a subpoena for jury duty from the Circuit Court of Maryland for Baltimore City. The subpoena directs Mr. Cucuzzella to appear for jury duty on the day of the scheduled hearing in this case: March 26, 2007. Co-counsel for DNR, Marianne E. Dise, is unavailable to appear at the hearing on March 26, 2007, due to a longstanding out-of-town engagement.

2. Both Benjamin S. Wechsler and Sarah H. Iliff, counsel for plaintiff Wright Investment Group and co-defendant Anne Arundel County, respectively, have consented to this Request.

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 defendant DNR

Dated: February 15, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February, 2007, a copies of the foregoing Consent Request To Reschedule Complex Motions Hearing were sent via U.S. Mailed, postage prepaid, to:

Benjamin S. Wechsler, Esq.
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
Attorney for Plaintiff

Sarah Iliff, Esq.
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401-7005
Attorney for Defendant Anne Arundel County

Paul J. Cucuzzella

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD
Deputy Attorney General

JOSEPH P. GILL
Assistant Attorney General
Principal Counsel

STUART G. BUPPERT, II
SHAUN P.K. FENLON
RACHEL L. EISENHAUER
ROGER H. MEDOFF
SHARA MERVIS ALPERT
SAUNDRA K. CANEDO
PAUL J. CUCUZZELLA
Assistant Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
Department of Natural Resources

Fax No. 410-260-8364

Writer's Direct Dial No. 410-260-8352
pcucuzzella@dnr.state.md.us

February 2, 2007

Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
P.O. Box 71
Annapolis, Maryland 21401

Re: Wright Investment Group v. Maryland Department of Natural Resources, et al.
Case No. C-06-117695

Dear Clerk:

Enclosed for filing by defendant Maryland Department of Natural Resources in the above-referenced matter please find Defendant Department Of Natural Resources's Opposition To Defendant Anne Arundel County's Motion To Dismiss Cross Claim and proposed Order.

Thank you very much for your assistance.

Truly yours,

Paul J. Cucuzzella
Assistant Attorney General

Enclosures

cc: Benjamin S. Wechsler, Esq.
Sarah M. Iliff, Esq.

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	Case No.: C-06-117695
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

DEFENDANT DEPARTMENT OF NATURAL RESOURCES' OPPOSITION TO DEFENDANT ANNE ARUNDEL COUNTY'S MOTION TO DISMISS CROSS CLAIM

Defendant Department of Natural Resources ("DNR") and its Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, Douglas F. Gansler, Attorney General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, hereby responds to Defendant Anne Arundel County, Maryland's Motion To Dismiss The Maryland Department Of Natural Resources Critical Are Commission Cross Claim Against Anne Arundel County (the "Motion to Dismiss Cross Claim").

Facts and Argument

Plaintiff seeks damages from DNR and the Critical Area Commission[1] for alleged

[1] The Critical Area Commission was created by the General Assembly in 1984 as part of DNR. *See* Nat. Res. Art. § 8-1803(a). As such, the Critical Area Commission has no legal identity separate or apart from DNR, and therefore lacks the legal capacity to be sued separately from DNR.

devaluation of real property consequent to, as Plaintiff sees is, delays by defendants Anne Arundel County and the Critical Area Commission in approving an amendment to Anne Arundel County's Critical Area map affecting 2.5 acres of Plaintiff's 15.4 acre property located between U.S. Route 50 and Whitehall Creek in Anne Arundel County. Complaint ¶¶1, 8, 27. Relevant to this matter, the Critical Area Law, Nat. Res. Art. (NR) § 8-1801 et seq., as enacted in 1984, established that "all land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and heads of tide" shall be included in the Critical Area, *id.* § 8-1807(a)(2), and directed each affected local government, including Anne Arundel County, to map its Critical Area and include such map in the locality's Critical Area Program, *id.* § 8-1808(c)(1). Once a locality's Program has been adopted as required by the Critical Area Commission, the Program, including the Program's map, can only be amended upon approval of the Commission. *Id.* § 8-1809(i). Anne Arundel County Critical Area Program – including its Program map – was adopted in 1988, and at which time Plaintiff's entire 15.4 acre property was mapped within the Critical Area. Complaint ¶9.

As alleged, on December 7, 2000, Plaintiff filed with Anne Arundel County an application for a Critical Area map amendment to remove a portion of its property from the designated Critical Area, and alleged that Anne Arundel County had mistakenly included the subject portion of the property in the Critical Area when it first developed its Critical Area map. Complaint ¶10. Over the course of the next five and one-half years, legal proceedings involving Plaintiff's map amendment application meandered from the County's Administrative Hearing Officer, to the County's Board of Appeals, to the Circuit Court for Anne Arundel County, and then eventually to the Court of Special Appeals. Complaint ¶¶ 11-14. In an unpublished Opinion dated August 31, 2004, the Court of Special Appeals determined that Anne Arundel County had indeed made a

mistake in its Critical Area map which affected 2.5 acres of Plaintiff's property, and directed Anne Arundel County to resolve the mistake. Complaint ¶14; *See Wright Investment Group v. Anne Arundel County*, Md. App. No. 02629, Sept. Term 2002 (August 31, 2004). Thereafter, the proceedings returned to the County's Board of Appeals, and, on June 8, 2006, the County finally transmitted a proposed map amendment regarding the 2.5 acres of Plaintiff's property to the Critical Area Commission for its requisite review. Complaint ¶¶15-16. There is no allegation that the Critical Area Commission's receipt of the proposed map amendment in June of 2006 was anything other than the first occasion that the Commission was asked to perform its statutory review the Plaintiff's map amendment application.

Following its receipt and acceptance in June 2006 of Plaitniff's proposed map amendment, the Critical Area Commission complied, in a timely manner, with the statutory procedures for reviewing and making decisions upon such amendments. As required by NR § 8-1809(o), review of Plaintiff's matter was appointed to a five-member panel of Critical Area Commissioners, which, on August 29, 2006, held a public hearing on the proposed amendment. Complaint ¶17. On September 6, 2006, the panel recommended to the full Critical Area Commission that it not approved the map amendment as proposed by Anne Arundel County, and, that same day, the Commission voted to deny the proposed amendment. Complaint ¶18. The Commission's action on September 6, 2006 of denying the proposed map amendment, was made well-within the 90 day period for the Commission to act as required by NR § 8-1809(o).

Of the nearly six years that Plaintiff effectively contends its application was stalled and should have been acted upon favorably, less than three of the months – June 2006 to September 2006 – did the application reside within the jurisdiction of the Critical Area Commission. For the

remainder of the nearly six years the application was pending before the County or the Courts. It is for this reason that, should the Court find any merit in Plaintiff's assertion – as baseless as it may seem – that either or both the County and the Critical Commission are liable to the Plaintiff for damages related to diminished property value attendant to any delay in the map amendment proceedings, such liability must be born by the County alone.

Conclusion

For reasons stated, Anne Arundel County's Motion To Dismiss Cross Claim should be denied.

Respectfully Submitted,

DOUGLAS F. GANSLER
ATTORNEY GENERAL

Paul J. Cucuzzella
Marianne E. Dise
580 Taylor Ave, C-4
Assistant Attorneys General
Maryland Department of Natural Resources
580 Taylor Avenue, C-4
Annapolis, Maryland 21401
(410) 260-8352
(410) 260-8364 (fax)
Attorneys for DNR

Dated: February 2, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February, 2007, a copies of the foregoing pleading were sent via U.S. Mailed, postage prepaid, to:

Benjamin S. Wechsler, Esq.
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
Attorney for Plaintiff

Sarah Iliff, Esq.
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401-7005
Attorney for Defendant Anne Arundel County

Paul J. Cucuzzella

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	Case No.: C-06-117695
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

ORDER

The Court, having considered Defendant Anne Arundel County, Maryland's Motion To Dismiss The Maryland Department Of Natural Resources Critical Area Commission Cross Claim Against Anne Arundel County (the "Motion To Dismiss Cross Claim"), and Defendant's Department of Natural Resources's opposition thereto, does, this ___ day of _____, 2007,

ORDER that the Motion To Dismiss Cross Claim is hereby DENIED.

_____
Judge

RECEIVED
FEB 5 2007
DNR - LEGAL DIVISION

Wright Investment Group Plaintiff	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
	*	ANNE ARUNDEL COUNTY
Critical Area Commission For The Chesapeake And A Defendant	*	CASE NO.: 02-C-06-117695 RP

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

SCHEDULING ORDER

In accordance with Md. Rule 2-504.1, it is this **29th day of JANUARY, 2007**, by the Circuit Court for Anne Arundel County,

ORDERED that the parties shall comply with the following provisions :

Each case shall be concluded in a timely and efficient manner pursuant to the Civil Differentiated Case Management (DCM) Plan adopted by this Court as required by Md. Rule 16-202, which provides that **only actions ready for trial will be assigned for trial and tried.**

The deadlines and dates set forth herein are firm dates and may not be changed by the parties or counsel without the prior approval of the Administrative Judge or his designee, the Civil DCM Judge. The Court will not grant a continuance of any event, including Pretrial Conferences, by consent or because discovery or ADR has not been concluded. In the absence of a genuine emergency or other good cause, last minute continuances will not be granted.

All counsel are advised that in any dispute concerning whether counsel has complied with this Order, **the Court will not be guided by any agreements made between counsel to modify this Order** unless expressly approved by the Court. Failure to comply with the provisions of this Order may lead to the imposition of sanctions on the parties and/or their counsel which may include dismissal, entry of default or monetary sanctions , as may be appropriate.

1. **Case Time Standard Deadline:04/19/08**. Case must be concluded by this date.

2. **Amendments:**

02/17/07 Deadline for any party seeking to add an additional party and/or amend a claim to file the appropriate pleading and serve the additional party.

3. **Discovery:**

01/18/07 Deadline for plaintiff(s) to disclose expert witnesses pursuant to Rule 2-402(f)(1).

02/17/07 Deadline for defendant(s) to disclose expert witnesses pursuant to Rule 2-402(f)(1).

03/19/07 Deadline for identification of rebuttal experts pursuant to Rule 2-402(f)(1).

06/02/07 Deadline for completion of all depositions, and other methods of oral and written discovery. (At least 30 days prior to date of Pretrial Conference).
Note: This deadline does not apply to **de bene esse depositions.**

Discovery procedures must be initiated sufficiently in advance of the discovery deadline to provide the opposing party time to comply in accordance with Md. Rules Title 2, Chapter 400 **and** to permit a resolution of any discovery dispute **within the deadline.** The existence of a discovery dispute as to any matter will not justify delay in completing any other discovery. **The filing of any dispositive motion or any motion for protective order, for sanctions or to compel discovery will not result in an extension of the discovery deadlines.**

4. **Dispositive Pretrial Motions:**

04/13/07 Deadline to file any motions for summary judgment or other dispositive motions. **Note:** This deadline shall not be affected by discovery being incomplete.

5. **Computer Generated Evidence:**
Any party intending to use computer-generated evidence shall give the notice required by Rule 2-504.3(b) at least 120 days prior to the scheduled Pretrial Conference.

6. Alternative Dispute Resolution :

30 days before Pretrial Conference: 07/02/07 Deadline to conclude court-ordered ADR.

The parties and counsel shall participate in the following Alternative Dispute Resolution
(A separate order to follow where appropriate):
[ ]Appointment of a Settlement Conference Officer (SCO); [ ]Appointment of a Mediator;
[ ]Retired Judge; [ ]Arbitration; [ ]Other; [ ] None
Details:

_____

_____

_____

7. **Pretrial and Settlement Conference:**

08/01/07 Date of Pretrial and Settlement Conference to be held before A Judge of the Court, at 11:30 AM
Time estimate:

A. **The attorneys who will actually try the case, all parties and insurance representatives with full authority to settle the case, shall be present at the Pretrial Conference, prepared to discuss, in good faith, settlement of all issues in this case,** unless excused by the DCM Judge or his designee. If any settlement terms must be approved by a claims supervisor, claims committee, government official, or other individual or individuals, that person or those persons with full authority **must** appear, in addition to the party or parties. All settlement discussions will be confidential and will not be admissible at trial. At the Pretrial Conference, each party and counsel must be prepared to discuss all aspects of the case including the matters set forth in Md. Rule 2-504.2(b).

B. Each party shall file a written statement addressing the matters listed in Md. 2-504.2(b) no later than five (5) days before the Pretrial Conference.

C. Counsel are required to discuss the issues in this case, including settlement, sufficiently in advance of the Pretrial Conference in order to ensure that the conference is meaningful.

D. If a settlement is reached, the parties shall promptly file **original** settlement documents with the Clerk with a copy to the DCM office. Unless such documents are filed and all open costs are paid at least seven (7) days prior to the scheduled Pretrial Conference date, all parties, counsel and representatives must attend the Pretrial Conference.

8. **Trial on the merits:**

[ ]COURT [ ]JURY
Trial shall be scheduled at the time of the Pretrial/Settlement Conference in accordance with Md. Rule 16-202 and the Civil DCM Plan adopted by this Court. This case will **not** be assigned a trial date unless **all** discovery is completed, **all** reasonable efforts at arriving at a settlement have been exhausted, **all** motions have been resolved and the case is ready to be tried.

9. **Motions in Limine:**

The deadline for filing motions in limine will be 20 days prior to the trial date which will be set at the Pretrial Conference. These motions will generally be determined by the trial judge. If exceptional circumstances require that a motion in limine be resolved in advance of trial, the moving party shall file the motion by the deadline for dispositive pretrial motions, and shall, **in a separate pleading,** request advance resolution of the motion stating with particularity the reason why an advance ruling is necessary.

10. **Request for Accommodation/Interpreter**

Please notify the Court Administrator (410-222-1404) as early as possible of any reasonable accommodation needed because of a disability or the need for an interpreter. Any other questions regarding this Order should be addressed to the Office of Civil Case Management (410) 222-1215.

11. **Other Matters:**

_____

_____

_____
Master in Chancery

Pamela L. North
JUDGE

Counsel acknowledge that they have received a copy of this Order and understand the deadlines set forth herein. Counsel and the parties also have been informed that this case must be concluded prior to the Case Management Deadline set forth herein. They have also been advised to review a copy of the Court's Civil Differentiated Case Management Plan which is available on the Court's web site at www.circuitcourt.org.

_____
Attorney for Plaintiff

_____
Attorney for Defendant

_____
Attorney for

_____
Attorney for

Civil Clerk to mail copies:

Paul J Cucuzzella, Esq, 580 Taylor Ave, Suite C4, Annapolis, (410)-260-8352 21401
Sarah H Iliff, , AA County Office Of Law, 2660 Riva Road, 4th Floor, Annapolis, (410)-222-7827 21401
David M Plott, , Linowes & Blocher, 145 Main St., Annapolis, (410)-268-0881 21401
Anne Arundel County
Critical Area Commission For The Chesapeake And Atlantic Coastal Bays

Office of the Director of Assignment
Circuit Court for Anne Arundel County
P.O. Box 2395
Court House, Church Circle
Annapolis, MD 21404-2395
410-222-1422 * www.circuitcourt.org

N O T I C E O F H E A R I N G / T R I A L

Case Number: 02-C-06-117695 RP

Case Title: Wright Investment Group Vs Critical Area Commission For The Chesapeake

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

RECEIVED
JAN 31 2007
DNR - LEGAL DIVISION

YOU ARE HEREBY NOTIFIED THAT THIS CASE IS SCHEDULED IN THE:

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY Annapolis, MD 21404-0071

PROCEEDING	DATE AND TIME
Complex Motions Hearing	03/26/07 01:30PM

Remarks:

NOTE

When you arrive at the courthouse, please check the docket display monitors throughout the building for your specific courtroom assignment. If any party wishes to reschedule this event date, you must contact all opposing parties and arrange a conference call with the Assignment Office (410-222-1422) within 15 calendar days of the date of this notice to set a new date. Every effort will be made to accommodate your request subject to this court's DCM Plan.

If a request to reschedule this event is more than 15 calendar days from the date of this notice, a postponement request must be filed in accordance with MD Rule 2-508 and addressed to ATTN: Civil Department, Clerk of the Court, Circuit Court for Anne Arundel County, P.O. Box 71, Annapolis, MD 21404.

Attorneys/parties shall notify the Assignment Office immediately when a scheduled event settles.

Please notify the Court Administrator (410-222-1404) as early as possible of any reasonable accommodation needed because of disability or if language interpretation is required.

Assignment Office
Phone: 410-222-1422

Date Issued: 01/25/07

CC: ~~Critical Area Commission For The Chesapeake And Atlantic Coastal Bays~~
~~Anne Arundel County~~
David M Plott
Sarah H Iliff

RECEIVED
JAN 30 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

RECEIVED
FEB 5 2007
DNR - LEGAL DIVISION

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

Date January 24, 2007 Case No. C-06-117695

Wright Investment Group v. DNR

The December 21, 2006 order dismissing the Critical Area Commission and Anne Arundel County is vacated as premature.

Clerk: Please set in DNR's Motion to Dismiss and AA County's Motion to Dismiss for a complex motion hearing before any judge.

Please send file to Civil DCM to determine if this case should be consolidated with C-06-117432.

FILED
2007 JAN 31 P 12: 35

Judge

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

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

Paul J Cucuzzella Esq
Assistant Attorney General Dept. Of Natural Resources
580 Taylor Ave
Suite C4
Annapolis, MD 21401

FOLD HERE

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT. GROUP	*	
Plaintiff	*	
v.	*	Case No. C-06-117695
THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et. al.	*	
Defendants	*	

* * * * * * *

RECEIVED
JAN 22 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

DEFENDANT ANNE ARUNDEL COUNTY, MARYLAND'S MOTION TO DISMISS THE MARYLAND DEPARTMENT OF NATURAL RESOUCES CRITICAL AREA COMMISSION CROSS CLAIM AGAINST ANNE ARUNDEL COUNTY

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

1. The cross claim fails to state a claim upon which relief may be granted, as is more fully set forth in the Memorandum of Law filed by Anne Arundel County in the above-captioned case.
2. On December 21, 2006, Anne Arundel County's Motion to Dismiss was granted by this Court and, as a result, Anne Arundel County is no longer a party to this case.
3. As set out more fully in Anne Arundel County's above-cited Memorandum of Law, the Wright property did not become eligible for remapping based on mistake until the Board of Appeals issued its Order in compliance with the directives of the Court of Special Appeals on September 21, 2005. Until that date, no remapping was possible,

or legal, either under Anne Arundel County law or under the laws of the State of Maryland. Based on its total misunderstanding of the legal process and the facts of this case, the Critical Area Commission has failed to state a cause of action for negligence, for damages, or for contribution.

WHEREFORE, Anne Arundel County requests that this Honorable Court dismiss the Cross-Claim filed by the Maryland Department of Natural Resources Critical Area Commission on December 18th, 2006.

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

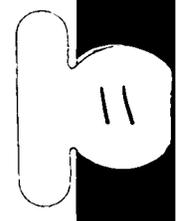
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of January, 2007, a copy of the foregoing motion to dismiss was mailed first class with postage prepaid to:

Paul Cucuzella, Esq., and Marianne Dise, Esq.
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street, Suite 100
Annapolis, Maryland 21401
Attorneys 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



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD
Deputy Attorney General

JOSEPH P. GILL
Assistant Attorney General
Principal Counsel

STUART G. BUPPERT, II
SHAUN P.K. FENLON
RACHEL L. EISENHAUER
ROGER H. MEDOFF
SHARA MERVIS ALPERT
SAUNDRA K. CANEDO
PAUL J. CUCUZZELLA
Assistant Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
Department of Natural Resources

Fax No. 410-260-8364

Writer's Direct Dial No. 410-260-8352
pcucuzzella@dnr.state.md.us

January 23, 2007

Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
P.O. Box 71
Annapolis, Maryland 21401

Re: Wright Investment Group v. Maryland Department of Natural Resources, et al.
Case No. C-06-117695

Dear Clerk:

Enclosed for filing in the above-referenced matter by defendant Maryland Department of Natural Resources please find (1) Notice Of Entry Of Appearance and (2) Response To Plaintiff's Motion To Reconsider Order Dismissing Critical Area Commission and Anne Arundel County. In accordance with Md. Code Ann., Cts. & Jud. Proc. § 7-202(b), the State is exempt from the filing fee normally associated with an entry of appearance.

Thank you very much for your assistance.

Truly yours,

Paul J. Cucuzzella
Assistant Attorney General

Enclosures

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	Case No.: C-06-117695
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

NOTICE OF ENTRY OF APPEARANCE

Defendant Department of Natural Resources ("DNR") and its Critical Area Commission for the Chesapeake and Atlantic Coastal Bay (the "Critical Area Commission"), by its attorneys, Douglas F. Gansler, Attorney General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, move pursuant to Rule 2-131 that the appearance of **Paul J. Cucuzzella, Assistant Attorney General, Office of the Attorney General, Department of Natural Resources, 580 Taylor Ave., C-4, Annapolis, Maryland 21401, (410) 260-8352**, be entered in this matter as attorney for DNR.

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 defendant DNR

Dated: January 23, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January, 2007, a copies of the foregoing Notice Of Entry Of Appearance were sent via U.S. Mailed, postage prepaid, to:

Benjamin S. Wechsler, Esq.
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
Attorney for Plaintiff

Sarah Iliff, Esq.
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401-7005
Attorney for Defendant Anne Arundel County

Paul J. Cucuzzella

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	Case No.: C-06-117695
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

DEFENDANT DEPARTMENT OF NATURAL RESOURCES' RESPONSE TO PLAINTIFF'S MOTION TO RECONSIDER ORDER DISMISSING CRITICAL AREA COMMISSION AND ANNE ARUNDEL COUNTY

Defendant Department of Natural Resources ("DNR") and its Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, Douglas F. Gansler, Attorney General, and Paul J. Cucuzzella and Marianne E. Dise, Assistant Attorneys General, states in response to Plaintiff's Motion To Reconsider Order Dismissing Critical Area Commission And Anne Arundel County (the "Motion for Reconsideration") that DNR does not oppose the Motion for Reconsideration. DNR respectfully requests that for cause set forth in the Motion for Reconsideration that the same be granted.

Respectfully Submitted,

DOUGLAS F. GANSLER
ATTORNEY GENERAL

Paul J. Cucuzzella

Marianne E. Dise
580 Taylor Ave, C-4
Assistant Attorneys General
Maryland Department of Natural Resources
580 Taylor Avenue, C-4
Annapolis, Maryland 21401
(410) 260-8352
(410) 260-8364 (fax)
Attorneys for DNR

Dated: January 23, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January, 2007, a copies of the foregoing pleading were sent via U.S. Mailed, postage prepaid, to:

Benjamin S. Wechsler, Esq.
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
Attorney for Plaintiff

Sarah Iliff, Esq.
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401-7005
Attorbney for Defendant Anne Arundel County

Paul J. Cucuzzella

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

Benjamin S. Wechsler
410.268.0881
bweshsler@linowes-law.com

January 16, 2007

The Honorable Paul A. Hackner
Circuit Court for Anne Arundel County
P.O. Box 2395
Annapolis, MD 21404-0071

Re: *Wright Investment Group v. Maryland Department of Natural Resources/Critical Area Commission for the Chesapeake and Atlantic Coastal Bays and Anne Arundel County*
Case No. C-06-117695

Dear Judge Hackner:

Attached please find a courtesy copy of Wright Investment Group's Motion to Reconsider the Court's Order of December 28, 2006, which dismissed both the Critical Area Commission and Anne Arundel County as defendants in Case No. C-06-117695. As explained in our moving papers, it appears that the Clerk's office misdocketed the Critical Area Commission's Motion to Dismiss in the wrong case (a motion that should have been filed in Case No. C-06-117432), and failed to docket Wright Investment Group's timely-filed Opposition to the County's Motion to Dismiss. Thus, it appeared that Wright failed to oppose either the Critical Area Commission's or the County's motion to dismiss.

I have discussed these clerical errors with counsel for both the Critical Area Commission and Anne Arundel County, and have copied them on this correspondence. Thank you for your reconsideration of this matter.

Very truly yours,

LINOWES AND BLOCHER LLP

Benjamin S. Wechsler

BSW:lbr
Enclosures
cc: Marianne Dise, Esq.
Sarah Iliff, Esq.

F:\Wallach\JUDICIAL MANDAMUS\Correspondence\Clerk-file Mot to Reconsider.doc

RECEIVED
JAN 19 2007
DNR - LEGAL DIVISION

rec'd in Judge Hackner's chambers 1/16/07
T. Smith

RECEIVED
JAN 17 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP

Plaintiff

v.

MD DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS

Defendant

And

ANNE ARUNDEL COUNTY

Defendant

CIVIL ACTION NO. C-06-117695

FILED
2007 JAN 16 P 2:21

PLAINTIFF'S MOTION TO RECONSIDER ORDER DISMISSING CRITICAL AREA COMMISSION AND ANNE ARUNDEL COUNTY

Plaintiff, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully requests that the Court reconsider its December 28, 2006 Order dismissing both the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") and Anne Arundel County from Civil Action No. C-06-117695. The basis for the dismissal was the mistaken belief that no response had been filed to either party's respective Motions to Dismiss. As set forth in detail below (a) it appears that the Critical Area Commission's Motion to Dismiss was docketed in the wrong case, and (b) Wright's Opposition to the County's Motion to Dismiss was not properly docketed in this case. Wright respectfully

requests a Court reconsider its December 28, 2006 Order, and issue an Order requesting that the Clerk correct the clerical errors.

THE CRITICAL AREA COMMISSION'S MISDOCKETED MOTION TO DISMISS

On October 6, 2006 Wright filed a Petition for Administrative Mandamus, Or In the Alternative for Judicial Review (the "Administrative Mandamus Action"). The Administrative Mandamus action requests relief from the Critical Area Commission and Anne Arundel County. The Clerk assigned the Administrative Mandamus Action case No. C-06-117432.

On October 19, 2006, Wright filed a separate Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages (the "Judicial Mandamus Action"). The Judicial Mandamus Action also requests relief from the Critical Area Commission and Anne Arundel County, and is based on similar proceedings.[1] The Clerk assigned Judicial Mandamus Action Civil Case No. C-06-117695.

On November 6, 2006 the Critical Area Commission filed a Motion to Dismiss. The moving papers did not contain a case number, but indicated that the motion was filed in order to "dismiss the Petition for Administrative Mandamus, or in the Alternative, for Judicial Review." The "Petition for Administrative Mandamus" had been assigned Case No. C-06-117432. The service copy of the Critical Area Commission's Motion to Dismiss did not contain a case number. An inspection of the Critical Area Commission's Motion to Dismiss was misdocketed in the Judicial Mandamas action, Civil Case No. C-06-117695.

---

[1] Wright has recently filed a Motion to Consolidate the Judicial Mandamus Action and the Administrative Mandamus Action.

On November 22, 2006 Wright filed its Opposition to the Critical Area Commission's Motion to Dismiss. Wright filed the Opposition in Case No. C-06-117432.

Examining the Dockets for both Case No. 06-117695 and Case No. 06-117432, it appears that the Critical Area Commission's Motion to Dismiss was misdocketed in the Judicial Mandamus Action (Case No. C-06-117695), and that Wright filed its opposition and request for hearing in the correct case (Case No. C-06-117432).

Based on this misdocketing, Wright respectfully requests that the Court reconsider its December 28, 2006 Order dismissing Case No. C-06-117695 as against the Critical Area Commission, and issue an Order requiring the Clerk to properly docket the Critical Area Commission's Motion to Dismiss in Case No. C-06-117432.

THE MISDOCKETED OPPOSITION TO ANNE ARUNDEL COUNTY'S MOTION TO DISMISS

In its December 28, 2006 Order, the Court also dismissed the County as a defendant in the Judicial Mandamus Action (Case No. C-06-117695), again for an ostensible failure of Wright to file an opposition to the Motion.

Anne Arundel County filed its Motion to Dismiss in the Judicial Mandamus Action on November 27, 2006. The Motion to Dismiss was properly docketed in Case No. C-06-117695.

On December 15, 2006 Wright filed and served the Plaintiff's Opposition to County's Motion to Dismiss. A filed-endorsed copy of the Opposition to County's Motion to Dismiss is attached as Exhibit A to the Affidavit of Verna L. Jones filed herewith.

An examination of the Court's Docket, however, reveals that Wright's Opposition to County's Motion to Dismiss was not docketed in Case No. C-06-117695. Rather, it appears that the properly-filed motion was never docketed by the Clerk, and thus it appears from the docket that the County's Motion to Dismiss was not opposed by Wright. An inspection of the Court's records reveals that a filed-endorsed copy of Wright's Opposition in fact is in the Clerk's file. Declaration of Verna L. Jones, ¶ 2.

Wright respectfully requests that the Court reconsider it Order Dismiss the County as a defendant in Case No. C-06-117695. Wright further requests that the Court issue an Order directing the Clerk to docket Wright's Opposition to the County's Motion to Dismiss.

CONCLUSION

Based on the foregoing, Wright respectfully requests that the Court:

1. Reconsider its December 28, 2006 Order dismissing the Critical Area Commission as a defendant, on the basis that the Critical Area Commission's Motion to Dismiss had been docketed in Case No. C-06-117695 when it should have been Docketed in Case No. C-06-117432.

2. Issue an Order directing the Clerk to re-docket the Critical Area Commission's Motion to Dismiss into Case No. C-06-117432.

3. Reconsider the December 28, 2006 Order dismissing Anne Arundel County as a defendant in Case No. C-06-117695, on the basis that the Clerk failed to properly docket Wright's Opposition to the County's Motion to Dismiss.

4. Issue an Order directing the Clerk to docket Wright's opposition to the County's Motion to Dismiss in Case No. C-06-117695.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury of the laws of the State of Maryland, that on this 16th day of January, 2007, a true and correct copy of the following:

1. Plaintiff's Motion to Reconsider Order Dismissing Critical Area Commission and Anne Arundel County,

2. [Proposed] Order, and

3. Affidavit of Verna L. Jones in Support of Plaintiff's Motion to Reconsider Order Dismissing Critical Area Commission and Anne Arundel County.

were 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

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IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP

Plaintiff

v.

MD DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS

Defendant

And

ANNE ARUNDEL COUNTY

Defendant

CIVIL ACTION
NO. C-06-117695

2007 JUL 16 P 2:21

AFFIDAVIT OF VERNA L. JONES IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER ORDER DISMISSING CRITICAL AREA COMMISSION AND ANNE ARUNDEL COUNTY

I, Verna L. Jones, am a Paralegal at the law firm of Linowes and Blocher LLP. I make this affidavit on my own personal knowledge, and am competent to offer the following testimony.

1. Attached hereto as Exhibit A is a filed-endorsed copy of "Plaintiff's Opposition to County's Motion to Dismiss" (the "Opposition") in Anne Arundel Circuit Court Civil Action No. C-06-117695. As reflected by the date stamp, I filed the Opposition and supporting paperwork

on December 15, 2006. The Certificate of Service affirms that these same documents were served by First Class Mail to counsel of record the same day.

2. On January 8, 2007 this office received by mail a copy of the Court's blue-line Order dismissing both Anne Arundel County and the Critical Area Commission as defendants on Case No. C-06-117695. On the direction of Mr. David Plott, attorney of record for the Plaintiff in this action, I inspected the electronic docket in Case No. C-06-117695, revealing that the Opposition had not been docketed in the Court's records. Thereafter, I inspected the Clerk's hard-copy file in this matter. The Opposition was located in the appropriate Circuit Court file, but did not appear to have been docketed.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge information and belief.

Date: January 16, 2007

Ms. Verna L. Jones

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

Plaintiff

v.

MD DEPARTMENT OF NATURAL RESOURCES/ 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-06-117695

2006 DEC 15 P 12:35

PLAINTIFF'S OPPOSITION TO COUNTY'S MOTION TO DISMISS

Plaintiff, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully requests that the Court deny Anne Arundel County's (the "County") Motion to Dismiss. As set forth more fully herein, the County's Motion to Dismiss must fail because; (1) Wright's Verified Complaint states a cause of action for mandamus because it seeks to compel the County to engage in a ministerial, non-discretionary act; (2) the County is an indispensable party that is required

EXHIBIT "A"

to be joined in the action in order to give Wright relief; and (3) even assuming that Wright's mandamus action were improper, the Verified Complaint states additional causes of action against the County on which relief should be granted.

RELEVANT FACTUAL BACKGROUND

The procedural history and relevant factual background of this matter is set forth at Paragraphs 8 through 19 of Plaintiff's Verified Complaint.

The facts relevant to withstand the County's Motion to Dismiss are straightforward. 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

Wright's 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 Court of Special Appeals' 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 Plaintiff

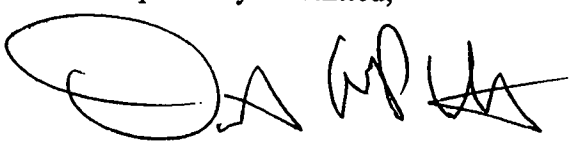
Maryland Rule 2-211 provides that a person "shall be joined as a party in the action if in the person's absence . . . complete relief cannot be accorded among those already parties." This proceeding has involved over six years of active litigation with the County. It is the County that is compelled by 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 Court of Special 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 Plaintiff relief.

In Any Event, the County Is Subject to Wright's Request for Declaratory Relief

The County urges dismissal on the basis that Wright allegedly has not stated a claim for mandamus relief. For the sake of argument, even if the County were correct, dismissal would be inappropriate. Wright's Verified Complaint pleads multiple causes of action, including Declaratory Relief. Specifically, Wright seeks a declaration that the County's Critical Area Map be amended to reflect the mapping mistake without seeking a formal map amendment from the Critical Area Commission. Wright's declaratory relief request is not subject to the County's Motion to Dismiss, and thus dismissal of the County as a party to this action is inappropriate.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury of the laws of the State of Maryland, that on this 15th day of December, 2006, a true and correct copy of the foregoing **PLAINTIFF'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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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY	)	
WRIGHT INVESTMENT GROUP	)	
Plaintiff	)	
v.	)	
MD DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS	)	**CIVIL ACTION NO. C-06-117695**
Defendant	)	
And	)	
ANNE ARUNDEL COUNTY	)	
Defendant	)	

[PROPOSED] ORDER

The Court, having considered Wright Investment Group's Motion to Reconsider, the Affidavit of Verna L. Jones, and the Court's files, together with any response thereto and argument presented at hearing, and having found that the Court's Order of December 28, 2006 dismissing the Critical Area Commission and Anne Arundel County was mistakenly issued, does this ___ day of _____, 2007,

ORDER that the Court's Order Dismissing the Critical Area Commission and Anne Arundel County dated December 28, 2006 hereby is vacated;

ORDER that the Clerk re-docket the Critical Area Commission's Motion to Dismiss filed on November 6, 2006 into Civil Case No. C-06-117432;

ORDER that the Clerk docket Wright Investment Group's Opposition to County's Motion to Dismiss, filed on December 11, 2006, into Civil Case No. C-06-117695;

The Honorable Judge Hackner

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

Date 12/21/06 Case No. C-06-117695

Wright Investment Group v. MD Dept of Natural Resources

Having considered the Motions to Dismiss filed on behalf of "The Critical Area Commission" and Anne Arundel County, there being no response thereto.

It is hereby ordered that the Complaint is dismissed as to the Critical Area Commission and as to Anne Arundel County.

The Case shall proceed only as to MD Dept. of Nat. Resources

12/28/06

Clerk
" Counsel

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

Judge

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

DONNA HILL STATON
DEPUTY ATTORNEY GENERAL

MAUREEN M. DOVE
DEPUTY ATTORNEY GENERAL

MARIANNE E. DISE
ASSISTANT ATTORNEY GENERAL
PRINCIPAL COUNSEL

SAUNDRA K. CANEDO
ASSISTANT ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.:

STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338

(410) 974-5338

(410) 260-3466

FILED
2006 DEC 18 P 3:46

December 18, 2006

HAND-DELIVERED

Mr. Robert P. Duckworth, Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Re: *Wright Investment, et al., v. Department of Natural Resources, et al,*
Case No C-06-117695

Dear Clerk:

Enclosed please find for filing in the above-referenced case the Defendant State of Maryland, Department of Natural Resources' Cross Complaint against Defendant Anne Arundel County. Thank you very much for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosure

cc: David M. Plott, Esquire
Benjamin S. Wechsler, Esquire
Sarah M. Iliff, Esquire

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT. et al., *

Plaintiffs, *

v. * **Case No. C-06-117695**

DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, *

Defendant/Cross Plaintiff

and

ANNE ARUNDEL COUNTY

*

Defendant/Cross-Defendant

*

*

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

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CROSS CLAIM AGAINST ANNE ARUNDEL COUNTY

Defendant/Cross-Plaintiff State of Maryland, Department of Natural Resources Critical Area Commission ("the State Defendant"), by its attorneys J. Joseph Curran, Jr., Attorney General, and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Maryland Rules 2-302 and 2-331 (b), hereby files this cross claim against Defendant/Cross-Defendant Anne Arundel County, and for cause states:

1. Plaintiff Wright Investment Group seeks damages for the alleged devaluation of Plaintiff's real property due to the State Defendant's not approving a proposed amendment to Anne Arundel County's ("the County") Critical Area maps to remove Plaintiff's property from the Critical Area.

2. The incident that allegedly gives rise to Plaintiff's claim for damages against the State Defendant occurred on September 6, 2006, when the DNR's Critical Area Commission voted to send back to Anne Arundel County, without approving, the County's proposal to change the County's Critical Area maps to remove the Plaintiff's property from the Critical Area. Plaintiff's Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages ("Complaint") ¶ 18.

3. Plaintiff first requested the map change by filing an application for critical area reclassification with Anne Arundel County on December 7, 2000. Complaint ¶ 10. During the ensuing five and one-half years, as alleged in the Complaint, ¶¶ 10-16, the map amendment request resided with the County and / or the courts, and not with the State Defendant.

4. The more than five-year delay in the County's processing Plaintiff's map change request was independent from and superseded any delay, if proven, that the State Defendant's consideration of the map amendment request caused to Plaintiff.

5. If liability is imposed upon the State Defendant for damages allegedly suffered by Wright Investment that are due to the acts or omission of Anne Arundel County, the State Defendant will then have a right of indemnification against Anne Arundel County.

6. Alternatively, if judgment is entered against the State Defendant for damages sustained by the Plaintiff, then the State – because of the negligent contributions of the County towards the damages allegedly suffered by the Plaintiff, – will have a right of contribution from Anne Arundel County.

WHEREFORE, the State of Maryland, Department of Natural Resources prays judgment:

A. That the failure of Anne Arundel County to process the Plaintiff's map change request in a timely manner for over five years was the independent and superseding

cause of any damages sustained by Wright Investment so that the State Defendant is not liable for any damages sustained by Plaintiff; or

B. By way of contribution from Anne Arundel County towards all sums, if any, for which the State Defendant might be adjudged to be liable to Plaintiff; or

C. By way of indemnification from Anne Arundel County for all sums, if any, for which the State Defendant might be adjudged to be liable to Plaintiff; and

D. For other and further relief as the nature of the cause may warrant.

Respectfully Submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Marianne E. Dise

Marianne E. Dise

Saundra K. Canedo/med

Saundra K. Canedo
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
(410) 974-5338 (fax)
Attorneys for State of Maryland, DNR, Critical Area Commission

Dated: December 18, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2006, I sent the foregoing Cross-Claim Against Anne Arundel County via First Class U.S. Mail to:

Sarah Iliff, Esquire
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401

Attorney for Defendant/Cross-Defendant Anne Arundel County

and to

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

Attorney for Plaintiff Wright Investment Group

Marianne E. Dise

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP 21750 Deveron Cove Yorba Linda, CA 92607	*	
Plaintiff	*	
v.		Case No. C-06-117695
	*	
MARYLAND DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS 1804 West Street, Suite 100	*	
Defendant	*	
and	*	
ANNE ARUNDEL COUNTY Arundel Center 45 Calvert Street – Room 315 Annapolis, Maryland 21401	*	

* *

Pleadings Index

1.	10/19/06	Letter From Benjamin Wechsler, Linowes and Blocher to Civil Clerk for Anne Arundel County.
2.	10/19/06	Civil non-Domestic Case Information Report
3.	10/20/06	Verified Complaint for Writ of Mandamus, Declaratory Relief and Damages
4.	10/20/06	Writ of Summons
5.	11/02/06	Affidavit of Service Upon Defendants
6.	11/22/06	Answer of Defendant with Defendant's Civil Non-Domestic Case Information
7.	11/28/06	Defendant's Motion to Dismiss and Response to CAC's Motion to Dismiss

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

December 15, 2006

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

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

Re: Wright Investment Group v. Critical Area Commission and Anne Arundel County

Dear Ms. Dise,

Please find enclosed copies of the Plaintiff's Opposition to County's Motion to Dismiss, Line to Record, Motion to Consolidate, and Memorandum of Law in Support of Petitioner Wright Investment Group's Motion to Consolidate.

Sincerely,

LINOWES AND BLOCHER LLP

Benjamin S. Wechsler, Esq.

/cdd
Enclosures

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RECEIVED
DEC 19 2006
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

Plaintiff

v.

MD DEPARTMENT OF NATURAL RESOURCES/ 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-06-117695

RECEIVED
DEC 19 2006
2006 DEC 15 P 2:35
FILED
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

PLAINTIFF'S OPPOSITION TO COUNTY'S MOTION TO DISMISS

Plaintiff, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully requests that the Court deny Anne Arundel County's (the "County") Motion to Dismiss. As set forth more fully herein, the County's Motion to Dismiss must fail because; (1) Wright's Verified Complaint states a cause of action for mandamus because it seeks to compel the County to engage in a ministerial, non-discretionary act; (2) the County is an indispensable party that is required

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

Plaintiff

v.

MD DEPARTMENT OF NATURAL RESOURCES/ 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-06-117695

FILED
2006 DEC 15 P 12:35
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

PLAINTIFF'S OPPOSITION TO COUNTY'S MOTION TO DISMISS

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to be joined in the action in order to give Wright relief; and (3) even assuming that Wright's mandamus action were improper, the Verified Complaint states additional causes of action against the County on which relief should be granted.

RELEVANT FACTUAL BACKGROUND

The procedural history and relevant factual background of this matter is set forth at Paragraphs 8 through 19 of Plaintiff's Verified Complaint.

The facts relevant to withstand the County's Motion to Dismiss are straightforward. 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

Wright's 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 Court of Special Appeals' 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 Plaintiff

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 Court of Special 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 Plaintiff relief.

In Any Event, the County Is Subject to Wright's Request for Declaratory Relief

The County urges dismissal on the basis that Wright allegedly has not stated a claim for mandamus relief. For the sake of argument, even if the County were correct, dismissal would be inappropriate. Wright's Verified Complaint pleads multiple causes of action, including Declaratory Relief. Specifically, Wright seeks a declaration that the County's Critical Area Map be amended to reflect the mapping mistake without seeking a formal map amendment from the Critical Area Commission. Wright's declaratory relief request is not subject to the County's Motion to Dismiss, and thus dismissal of the County as a party to this action is inappropriate.

Respectfully submitted,

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

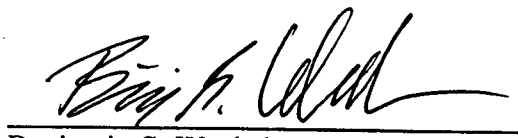
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury of the laws of the State of Maryland, that on this 15th day of December, 2006, a true and correct copy of the foregoing **PLAINTIFF'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.

F:\Wallach\JUDICIAL MANDAMUS\Pleadings\Opposition to County Motion to Dismiss.doc

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP 21750 Deveron Cove Yorba Linda, CA 92607 **Plaintiff** **v.** **MD DEPARTMENT OF NATURAL RESOURCES/ 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-06-117695**

2006 DEC 15 P 12:35

FILED

LINE TO RECORD

Wright Investment Group ("Wright"), by and through its undersigned counsel, David M. Plott and Linowes and Blocher LLP, hereby informs the Court that it has filed a

Motion to Consolidate this action into the action pending before the Court as Civil Case No. 06-117432. The Motion has been filed under Case No. 06-117432.

Respectfully submitted,

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on this 15th day of December, 2006, a true and correct copy of the foregoing **LINE TO RECORD** 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 M. Iliff, Esq.
Deputy County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401

Benjamin S. Wechsler, Esq.

F:\Wallach\JUDICIAL MANDAMUS\Pleadings\Judicial Mandamus - Line Re Motion to Consolidate.doc

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PETITION OF WRIGHT INVESTMENT. GROUP	*	
Plaintiff	*	
v.	*	Case No. C-06-117695
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.

Respectfully submitted,

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

RECEIVED
NOV 28 2006
CRITICAL AREA COMMISSION

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-06-117695
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

Anne Arundel County, Maryland, by its undersigned counsel, respectfully submits the following memorandum of law in support of its 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 Appeals. Both the Board of Appeals and, on appeal, the Circuit Court denied the request to

[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).

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. See Affidavit of Elinor Gawel, attached as Exhibit A.

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. (Exhibit A) 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. ANNE ARUNDEL COUNTY HAS FULLY COMPLIED WITH STATE AND COUNTY LAW.

The complaint fails to identify an action that the County is legally required to take. 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 27th 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

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

WRIGHT INVESTMENT GROUP	*	
	*	
Plaintiff	*	Case No. 02-C-06-117695 RP
v.	*	
MARYLANE DEPARTMENT OF NATURAL RESOURCES/CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, ***et al.***	*	
	*	
Defendants		

* * * * * * *

AFFIDAVIT OF ELINOR GAWEL

My name is Elinor Gawel. Today is November 21, 2006. I am over 18 years of age and am competent to testify. The following statements are made from my personal knowledge:

I am employed by Anne Arundel County, Maryland as an Environmental Planner in the County's Office of Environmental and Cultural Resources. As such, I am responsible for transmitting information from the County to the Critical Area Commission for the Chesapeake Bay.

On September 21, 2005, the County Board of Appeals revised its prior order as directed by the Maryland Court of Special Appeals and approved the request of Wright Investment Group to remove 2.5 acres of land from the Chesapeake Bay Critical Area. As required, Anne Arundel County prepared a critical area map showing the 2.5 acres as outside of the County's Chesapeake Bay Critical Area.

EXHIBIT

tabbies

A

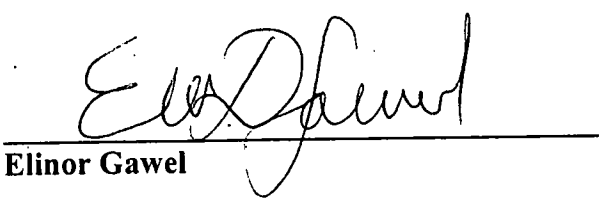
On March 3, 2006, I submitted a map and request for critical area map designation change to the Chairman of the Critical Area Commission and asked that the Wright changes be designated as program refinements. The Wright request was included in a package with two other map change requests.

On March 21, 2006, the Critical Area Commission, through its staff member, Lisa Hoerger, returned all three information packets with a request for additional information. The Wright Investments request was resubmitted on June 8, 2006 and on June 26, 2006 the Critical Area Commission accepted the request. On August 14, 2006, I received a letter from Ms. Hoerger informing me that the Commission had determined that the Wright request would be processed as a "program amendment" rather than as a "program refinement." Program amendments require a public hearing while refinements do not. The public hearing was held on Monday August 28, 2006.

On September 20, 2006, I received another letter from Ms. Hoerger informing me that the map change request was again being returned because the Commission had determined that the change should be made legislatively rather than by a piecemeal rezoning.

As a result of the Commission's action, Anne Arundel County has not been able to change its critical area maps.

I SOLEMNLY SWEAR AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE FOREGOING STATEMENTS ARE MADE FROM MY PERSONAL KNOWLEDGE AND ARE TRUE.



Elinor Gawel

ANNE ARUNDEL COUNTY
MARYLAND

Office of Law

Linda M. Schuett, County Attorney

County Executive Janet S. Owens

2660 Riva Road, 4th Floor
P.O. Box 6675
Annapolis, Maryland 21401
410-222-7888

Sarah M. Iliff
Senior Assistant County Attorney
Siliff@aacounty.org

November 28, 2006

Clerk
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Dear Clerk:

Enclosed please find the County's Case Information Report which inadvertently got separated from the County's Motion to Dismiss filed Monday, November 27, 2006. My apologies.

Sincerely,

Sarah M. Iliff
Senior Assistant County Attorney

SMI/ldw
Enclosure
cc: Marianne Dise, Esquire
David Plott, Esquire
Benjamin Wechsler, Esquire

RECEIVED
NOV 29 2006
CRITICAL AREA COMMISSION

Circuit Court for Anne Arundel County
City or County

CIVIL–NON-DOMESTIC CASE INFORMATION REPORT

Directions:

Plaintiff: *This Information Report must be completed and attached to the complaint filed with the Clerk of Court unless your case is exempted from the requirement by the Chief Judge of the Court of Appeals pursuant to Rule 2-111(a).* ***A copy must be included for each defendant to be served.***

Defendant: *You must file an Information Report as required by Rule 2-323(h).*

THIS INFORMATION REPORT CANNOT BE ACCEPTED AS AN ANSWER OR RESPONSE.

FORM FILED BY: ☐ PLAINTIFF ☒ DEFENDANT CASE NUMBER: C-06-117695 (Clerk to insert)

CASE NAME: Wright Investment Group (Plaintiff) v Maryland Department of Nat. Res (Defendant)

JURY DEMAND: ☐ Yes ☒ No Anticipated length of trial: 2 hours or ____ days

RELATED CASE PENDING? ☒ Yes ☐ No If yes, Case #(s), if known: 06-117432

Special Requirements? ☐ Interpreter/communication impairment Which language ____
(Attach Form 1-332 if Accommodation or Interpreter Needed) Which dialect ____
☐ ADA accommodation: ____

NATURE OF ACTION
(CHECK ONE BOX)

TORTS
- ☐ Motor Tort
- ☐ Premises Liability
- ☐ Assault & Battery
- ☐ Product Liability
- ☐ Professional Malpractice
- ☐ Wrongful Death
- ☐ Business & Commercial
- ☐ Libel & Slander
- ☐ False Arrest/Imprisonment
- ☐ Nuisance
- ☐ Toxic Torts
- ☐ Fraud
- ☐ Malicious Prosecution
- ☐ Lead Paint
- ☐ Asbestos
- ☐ Other ____

LABOR
- ☐ Workers' Comp.
- ☐ Wrongful Discharge
- ☐ EEO
- ☐ Other ____

CONTRACTS
- ☐ Insurance
- ☐ Confessed Judgment
- ☐ Other ____

REAL PROPERTY
- ☐ Judicial Sale
- ☐ Condemnation
- ☐ Landlord Tenant
- ☐ Other ____

OTHER
- ☐ Civil Rights
- ☐ Environmental
- ☐ ADA
- ☒ Other Mandamus

DAMAGES/RELIEF

A. TORTS
Actual Damages
- ☐ Under $7,500
- ☐ $7,500 - $50,000
- ☐ $50,000 - $100,000
- ☐ Over $100,000
- ☐ Medical Bills $ ____
- ☐ Property Damages $ ____
- ☐ Wage Loss $ ____

B. CONTRACTS
- ☐ Under $10,000
- ☐ $10,000 - $20,000
- ☐ Over $20,000

C. NONMONETARY
- ☐ Declaratory Judgment
- ☐ Injunction
- ☒ Other Mandamus

ALTERNATIVE DISPUTE RESOLUTION INFORMATION

Is this case appropriate for referral to an ADR process under Md. Rule 17-101? (Check all that apply)

A. Mediation ☐ Yes ☒ No
B. Arbitration ☐ Yes ☒ No
C. Settlement Conference ☐ Yes ☒ No
D. Neutral Evaluation ☐ Yes ☒ No

TRACK REQUEST

With the exception of Baltimore County and Baltimore City, please fill in the estimated ***LENGTH OF TRIAL. THIS CASE WILL THEN BE TRACKED ACCORDINGLY.***

- ☒ ½ day of trial or less
- ☐ 1 day of trial time
- ☐ 2 days of trial time
- ☐ 3 days of trial time
- ☐ More than 3 days of trial time

PLEASE SEE PAGE TWO OF THIS FORM FOR INSTRUCTIONS PERTAINING TO THE BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM AND ADDITIONAL INSTRUCTIONS IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY.

Date 11/21/06 *Signature* Sarah M. Duff

RECEIVED
NOV 28 2006
CRITICAL AREA COMMISSION

BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

For all jurisdictions, if Business and Technology track designation under Md. Rule 16-205 is requested, attach a duplicate copy of complaint and check one of the tracks below.

☐	☐
Expedited	**Standard**
Trial within 7 months of Defendant's response	Trial - 18 months of Defendant's response

☐ EMERGENCY RELIEF REQUESTED _____ _____

Signature *Date*

IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY PLEASE FILL OUT THE APPROPRIATE BOX BELOW.

CIRCUIT COURT FOR BALTIMORE CITY (check only one)

☐ Expedited	Trial 60 to 120 days from notice. Non-jury matters.
☐ Standard-Short	Trial seven months from Defendant's response. Includes torts with actual damages up to $7,500; contract claims up to $20,000; condemnations; injunctions and declaratory judgments.
☐ Standard-Medium	Trial 12 months from Defendant's response. Includes torts with actual damages over $7,500 and under $50,000, and contract claims over $20,000.
☐ Standard-Complex	Trial 18 months from Defendant's response. Includes complex cases requiring prolonged discovery with actual damages in excess of $50,000.
☐ Lead Paint	Fill in: Birthdate of youngest plaintiff _____.
☐ Asbestos	Events and deadlines set by individual judge.
☐ Protracted Cases	Complex cases designated by the Administrative Judge.

CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

To assist the Court in determining the appropriate Track for this case, check one of the boxes below. This information is <u>not</u> an admission and may not be used for any purpose other than Track Assignment.

☐ Liability is conceded.
☐ Liability is not conceded, but is not seriously in dispute.
☐ Liability is seriously in dispute.

CIRCUIT COURT FOR BALTIMORE COUNTY

☐ Expedited (Trial Date-90 days)	Attachment Before Judgment, Declaratory Judgment (Simple), Administrative Appeals, District Court Appeals and Jury Trial Prayers, Guardianship, Injunction, Mandamus.
☐ Standard (Trial Date-240 days)	Condemnation, Confessed Judgments (Vacated), Contract, Employment Related Cases, Fraud and Misrepresentation, Intentional Tort, Motor Tort, Other Personal Injury, Workers' Compensation Cases.
☐ Extended Standard (Trial Date-345 days)	Asbestos, Lender Liability, Professional Malpractice, Serious Motor Tort or Personal Injury Cases (medical expenses and wage loss of $100,000, expert and out-of-state witnesses (parties), and trial of five or more days), State Insolvency.
☐ Complex (Trial Date-450 days)	Class Actions, Designated Toxic Tort, Major Construction Contracts, Major Product Liabilities, Other Complex Cases.

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

DONNA HILL STATON
DEPUTY ATTORNEY GENERAL

MAUREEN M. DOVE
DEPUTY ATTORNEY GENERAL

MARIANNE E. DISE
ASSISTANT ATTORNEY GENERAL
PRINCIPAL COUNCIL

SAUNDRA K. CANEDO
ASSISTANT ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.:

STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338

November 22, 2006

HAND DELIVERED

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

Re: Wright Investment Group v. Department of Natural Resources, et al., Civil No. C-06-117695

Dear Clerk:

Enclosed for filing in the above-captioned case please find the Answer of Defendant Department of Natural Resources, along with Defendant's Civil Non-Domestic Case Information Report and a signed copy of the court's Scheduling Order.

Thank you for your assistance.

Very truly yours,

Marianne E. Dise
Commission Counsel

MED/jjd

Enclosure

cc: Martin G. Madden
Saundra K. Canedo, Esquire
David M. Plott, Esquire
Benjamin S. Wechsler, Esquire
Linda M. Schuett, Esquire

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP	*	
Plaintiff,	*	
v.	*	**Case No. C-06-117695**
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants	*	

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

ANSWER OF DEFENDANT DEPARTMENT OF NATURAL RESOURCES

Defendant Department of Natural Resources ("DNR") and its 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, pursuant to Maryland Rules 2-321, 2-323, and 15-701 hereby answers the Complaint for Writ of Mandamus, Declaratory Relief, and Damages, ("the Complaint") and states:

1. DNR denies the allegations of the last sentence of paragraph 1 of the Complaint. To the extent that the remainder of paragraph 1 of the Complaint contains allegations of facts, and not merely statements of the relief requested, or statements or conclusions of law to which no responses are required or provided, DNR admits the allegations.

2. Paragraph 2 of the Complaint contains no allegations of fact, only statements of the relief requested, and statements and conclusions of law, to which no responses are required or provided.

3. DNR lacks sufficient knowledge or information to either admit or deny the allegations

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contained in paragraph 3 of the Complaint.

4. DNR denies the allegations contained in paragraph 4 of the Complaint that the Critical Area Commission is "an administrative or an executive agency of the State of Maryland." The remaining allegations of paragraph 4 are statements or conclusions of law to which no responses are required or provided.

5. To the extent that paragraph 5 of the Complaint contains allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

6. Paragraphs 6 and 7 of the Complaint contains no allegations of fact, only statements and conclusions of law, to which no responses are required or provided.

7. DNR lacks sufficient knowledge or information to either admit or deny the allegations contained in paragraph 8 of the Complaint.

8. DNR denies the allegation contained in paragraph 9 of the Complaint that the "effect of the RCA classification was to significantly devalue the Property." As to the remaining allegations contained in paragraph 9, to the extent that the allegations are allegations of fact, and not merely statements or conclusions of law to which no responses are required or provided, DNR admits the allegations.

9. To the extent that paragraphs 10 through 13 of the Complaint contain allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

10. To the extent that paragraph 14 of the Complaint purports to explain the substance of the Court of Special Appeals' opinion, the opinion speaks for itself. To the extent that paragraph

14 of the Complaint contains allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

11. To the extent that paragraph 15 of the Complaint purports to explain the substance of the Board of Appeals' opinion, the opinion speaks for itself. To the extent that paragraph 15 of the Complaint contains allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

12. DNR lacks sufficient information or knowledge to either admit or deny the allegations contained in the first sentence of paragraph 16 of the Complaint. As to the remaining allegations of paragraph 16, to the extent that the allegations are allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

13. To the extent that the allegations contained in paragraph 17 of the Complaint are allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

14. To the extent that paragraph 18 of the Complaint purports to explain the substance of the Critical Area Commission's action, the Commission's written correspondence to the County speaks for itself. DNR denies the allegations contained in the last sentence of paragraph 18 that the Commission's action subjected the Property owners to "further delay and expense." To the extent that the remaining allegations contained in paragraph 18 of the Complaint contain allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

15. Paragraph 19 of the Complaint contains no allegations of fact, only statements and conclusions of law, to which no responses are required or provided.

16. Paragraph 20 of the Complaint contains no separate allegations of fact, and thus no response is required or provided. To the extent that a response may be required, DNR incorporates and re-states its responses to the allegations contained in paragraphs 1 through 19 of the Complaint as set forth herein.

17. Paragraph 21 of the Complaint contains no allegations of fact, only a statement of the relief requested, and statements or conclusions of law to which no responses are required or provided. DNR denies the allegation contained in paragraph 21 of the Complaint that its action is "illegal, arbitrary, capricious and unreasonable."

18. Paragraph 22 of the Complaint contains no allegations of fact, only a statement of the relief requested, and statements or conclusions of law to which no responses are required or provided.

19. Paragraph 23 of the Complaint contains no separate allegations of fact, and thus no response is required or provided. To the extent that a response may be required, DNR incorporates and re-states its responses to the allegations contained in Paragraphs 1 through 22 of the Complaint as set forth herein.

20. Paragraphs 24 and 25 of the Complaint contain no allegations of fact, only statements of the relief requested, and statements or conclusions of law to which no responses are required or provided.

21. Paragraph 26 of the Complaint contains no separate allegations of fact, and thus no response is required or provided. To the extent that a response may be required, DNR incorporates and re-states its responses to the allegations contained in Paragraphs 1 through 25 of the Complaint as set forth herein.

22. To the extent that Paragraph 27 of the Complaint contains allegations of facts and not merely statements of the relief requested or statements or conclusions of law to which no responses are required or provided, DNR denies the allegations.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.
2. The claim for damages is barred by governmental immunity.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Marianne E. Dise

Marianne E. Dise

Saundra K. Canedo/med

Saundra K. Canedo
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
Attorneys for Defendant Department of Natural Resources, Critical Area Commission

Dated: November 22, 2006

VERIFICATION

I solemnly affirm under the penalties of perjury that the contents of the foregoing Answer are true and correct to the best of my knowledge, information, and belief.

Ren Serey
Executive Director
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays

Dated: November 22, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of November, 2006, a copy of the foregoing Verified Answer to Complaint was sent via first-class U.S. mail, postage prepaid, to:

David M. Plott, Esquire and Benjamin S. Wechsler, Esquire, Linowes and Blocher, LLP, 145 Main Street, Annapolis, Maryland 21401, Attorneys for Plaintiff, and to Linda M. Schuett, Esquire, County Attorney for Anne Arundel County, Office of Law, 2660 Riva Road, Annapolis, Maryland, 21401.

Marianne E. Dise

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

RECEIVED
NOV _ 2 2006
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

WRIGHT INVESTMENT GROUP	*	
Plaintiff	*	
v.	*	
MARYLAND DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS	*	
Defendant	*	**Case No. 02-C-06-117695 RP**
and	*	
ANNE ARUNDEL COUNTY	*	
Defendant	*	

AFFIDAVIT OF SERVICE UPON DEFENDANTS: MARYLAND DEPARTMENT OF NATURAL RESOURCES/CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS AND ANNE ARUNDEL COUNTY

1. My name is Verna L. Jones. I am over eighteen (18) years of age, not a party to this action, and am competent to be a witness.

2. On Tuesday, October 24, 2006 at 10:20 a.m., I personally served Marianne Dise, Esq., Deputy Counsel, Department of Natural Resources/Critical Area Commission for the Chesapeake and Atlantic Coastal Bays with the original summons (attached), copies of a blank Civil-Non-Domestic Case Information Report, the Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages, and Plaintiff's Civil-Non-Domestic Case Information Report, at her office at the Tawes State Office Building, 580 Taylor Avenue, Annapolis, Maryland 21401.

3. Also on Tuesday, October 24, 2006, at 10:00 a.m., I served, through her agent, Linda M. Schuett, Esq., County Attorney, of Anne Arundel County, with the original summons (attached), copies of a blank Civil-Non-Domestic Case Information Report, the Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages, and Plaintiff's Civil-Non-

Domestic Case Information Report, at her office at 2660 Riva Road, Annapolis, Maryland 21401.

I SOLOMNLY DECLARE AND AFFIRM under the penalties of perjury that the foregoing facts are true, to the best of my knowledge, information, and belief.

Verna L. Jones, Paralegal
145 Main Street
Annapolis, MD 21401
410.268.0881

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 27th day of October, 2006, I mailed a copy of the foregoing Affidavit of Service Upon Defendants to:

Marianne Dise, Esq.
Deputy Counsel
Department of Natural Resources
1804 West Street
Annapolis, Maryland 21401, and

Linda M. Schuett, Esq.
County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401

Respectfully submitted,

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

F:\Wallach\Appeal\Pleadings\Affidavit of Service.doc

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
(410)-222-1420, TTY for Deaf: (410)-222-1429
Civil (410)222-1431

W R I T O F S U M M O N S

Case Number: 02-C-06-117695 RP

C I V I L

Wright Investment Group vs Critical Area Commission For The Chesapeake And

STATE OF MARYLAND, ANNE ARUNDEL COUNTY, TO WIT:

To: Critical Area Commission For The Chesapeake And Atlantic Coastal

1804 West Street
Annapolis, MD 21401

You are hereby summoned to file a written response by pleading or motion, within 30 days after service of this summons upon you, in this Court, to the attached Complaint filed by:

Wright Investment Group

WITNESS the Honorable Chief Judge of the Fifth Judicial Circuit of Maryland.

Date Issued: 10/20/06

Robert P. Duckworth
Clerk of the Circuit Court, per acs

To the person summoned:

FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGMENT BY DEFAULT TO THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

Personal attendance in court on the day named is NOT required.

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

Circuit Court for _____
City or County

CIVIL–NON-DOMESTIC CASE INFORMATION REPORT

Directions:

Plaintiff: *This Information Report must be completed and attached to the complaint filed with the Clerk of Court unless your case is exempted from the requirement by the Chief Judge of the Court of Appeals pursuant to Rule 2-111(a).* ***A copy must be included for each defendant to be served.***

Defendant: *You must file an Information Report as required by Rule 2-323(h).*

THIS INFORMATION REPORT CANNOT BE ACCEPTED AS AN ANSWER OR RESPONSE.

FORM FILED BY: ☐ PLAINTIFF ☐ DEFENDANT CASE NUMBER: C-06-117695 (Clerk to insert)

CASE NAME: _____ (Plaintiff) v _____ (Defendant)

JURY DEMAND: ☐ Yes ☐ No Anticipated length of trial: _____ hours or _____ days

RELATED CASE PENDING? ☐ Yes ☐ No If yes, Case #(s), if known: _____

Special Requirements? ☐ Interpreter/communication impairment Which language _____

(Attach Form 1-332 if Accommodation or Interpreter Needed) Which dialect _____

☐ ADA accommodation: _____

NATURE OF ACTION (CHECK ONE BOX)

TORTS
- ☐ Motor Tort
- ☐ Premises Liability
- ☐ Assault & Battery
- ☐ Product Liability
- ☐ Professional Malpractice
- ☐ Wrongful Death
- ☐ Business & Commercial
- ☐ Libel & Slander
- ☐ False Arrest/Imprisonment
- ☐ Nuisance
- ☐ Toxic Torts
- ☐ Fraud
- ☐ Malicious Prosecution
- ☐ Lead Paint
- ☐ Asbestos
- ☐ Other _____

LABOR
- ☐ Workers' Comp.
- ☐ Wrongful Discharge
- ☐ EEO
- ☐ Other _____

CONTRACTS
- ☐ Insurance
- ☐ Confessed Judgment
- ☐ Other _____

REAL PROPERTY
- ☐ Judicial Sale
- ☐ Condemnation
- ☐ Landlord Tenant
- ☐ Other _____

OTHER
- ☐ Civil Rights
- ☐ Environmental
- ☐ ADA
- ☐ Other _____

DAMAGES/RELIEF

A. TORTS

Actual Damages
- ☐ Under $7,500
- ☐ $7,500 - $50,000
- ☐ $50,000 - $100,000
- ☐ Over $100,000
- ☐ Medical Bills $ _____
- ☐ Property Damages $ _____
- ☐ Wage Loss $ _____

B. CONTRACTS
- ☐ Under $10,000
- ☐ $10,000 - $20,000
- ☐ Over $20,000

C. NONMONETARY
- ☐ Declaratory Judgment
- ☐ Injunction
- ☐ Other _____

ALTERNATIVE DISPUTE RESOLUTION INFORMATION

Is this case appropriate for referral to an ADR process under Md. Rule 17-101? (Check all that apply)

A. Mediation ☐ Yes ☐ No C. Settlement Conference ☐ Yes ☐ No

B. Arbitration ☐ Yes ☐ No D. Neutral Evaluation ☐ Yes ☐ No

TRACK REQUEST

With the exception of Baltimore County and Baltimore City, please fill in the estimated ***LENGTH OF TRIAL. THIS CASE WILL THEN BE TRACKED ACCORDINGLY.***

- ☐ ½ day of trial or less
- ☐ 1 day of trial time
- ☐ 2 days of trial time
- ☐ 3 days of trial time
- ☐ More than 3 days of trial time

PLEASE SEE PAGE TWO OF THIS FORM FOR INSTRUCTIONS PERTAINING TO THE BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM AND ADDITIONAL INSTRUCTIONS IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY.

Date _____ *Signature* _____

BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

For all jurisdictions, if Business and Technology track designation under Md. Rule 16-205 is requested, attach a duplicate copy of complaint and check one of the tracks below.

☐ **Expedited**	☐ **Standard**
Trial within 7 months of Defendant's response	Trial - 18 months of Defendant's response

☐ EMERGENCY RELIEF REQUESTED _____ _____

Signature *Date*

IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY PLEASE FILL OUT THE APPROPRIATE BOX BELOW.

CIRCUIT COURT FOR BALTIMORE CITY (check only one)

☐ Expedited	Trial 60 to 120 days from notice. Non-jury matters.
☐ Standard-Short	Trial seven months from Defendant's response. Includes torts with actual damages up to $7,500; contract claims up to $20,000; condemnations; injunctions and declaratory judgments.
☐ Standard-Medium	Trial 12 months from Defendant's response. Includes torts with actual damages over $7,500 and under $50,000, and contract claims over $20,000.
☐ Standard-Complex	Trial 18 months from Defendant's response. Includes complex cases requiring prolonged discovery with actual damages in excess of $50,000.
☐ Lead Paint	Fill in: Birthdate of youngest plaintiff _____.
☐ Asbestos	Events and deadlines set by individual judge.
☐ Protracted Cases	Complex cases designated by the Administrative Judge.

CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

To assist the Court in determining the appropriate Track for this case, check one of the boxes below. This information is not an admission and may not be used for any purpose other than Track Assignment.

☐ Liability is conceded.
☐ Liability is not conceded, but is not seriously in dispute.
☐ Liability is seriously in dispute.

CIRCUIT COURT FOR BALTIMORE COUNTY

☐ Expedited (Trial Date-90 days)	Attachment Before Judgment, Declaratory Judgment (Simple), Administrative Appeals, District Court Appeals and Jury Trial Prayers, Guardianship, Injunction, Mandamus.
☐ Standard (Trial Date-240 days)	Condemnation, Confessed Judgments (Vacated), Contract, Employment Related Cases, Fraud and Misrepresentation, Intentional Tort, Motor Tort, Other Personal Injury, Workers' Compensation Cases.
☐ Extended Standard (Trial Date-345 days)	Asbestos, Lender Liability, Professional Malpractice, Serious Motor Tort or Personal Injury Cases (medical expenses and wage loss of $100,000, expert and out-of-state witnesses (parties), and trial of five or more days), State Insolvency.
☐ Complex (Trial Date-450 days)	Class Actions, Designated Toxic Tort, Major Construction Contracts, Major Product Liabilities, Other Complex Cases.

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
(410)-222-1420, TTY for Deaf: (410)-222-1429
Civil (410)222-1431

W R I T O F S U M M O N S

Case Number: 02-C-06-117695 RP

C I V I L

Wright Investment Group vs Critical Area Commission For The Chesapeake And

STATE OF MARYLAND, ANNE ARUNDEL COUNTY, TO WIT:

To: Anne Arundel County - Arundel Center

45 Calvert Street
Room 315
Annapolis, MD 21401

You are hereby summoned to file a written response by pleading or motion, within 30 days after service of this summons upon you, in this Court, to the attached Complaint filed by:

Wright Investment Group

WITNESS the Honorable Chief Judge of the Fifth Judicial Circuit of Maryland.

Date Issued: 10/20/06

Robert P. Duckworth
Clerk of the Circuit Court, per acs

To the person summoned:

FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGMENT BY DEFAULT TO THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

Personal attendance in court on the day named is NOT required.

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

Circuit Court for _____
City or County

CIVIL–NON-DOMESTIC CASE INFORMATION REPORT

Directions:

Plaintiff: *This Information Report must be completed and attached to the complaint filed with the Clerk of Court unless your case is exempted from the requirement by the Chief Judge of the Court of Appeals pursuant to Rule 2-111(a).* ***A copy must be included for each defendant to be served.***

Defendant: *You must file an Information Report as required by Rule 2-323(h).*

THIS INFORMATION REPORT CANNOT BE ACCEPTED AS AN ANSWER OR RESPONSE.

FORM FILED BY: ☐ PLAINTIFF ☐ DEFENDANT CASE NUMBER: C-06-117695 (Clerk to insert)

CASE NAME: _____ (Plaintiff) v _____ (Defendant)

JURY DEMAND: ☐ Yes ☐ No Anticipated length of trial: _____ hours or _____ days

RELATED CASE PENDING? ☐ Yes ☐ No If yes, Case #(s), if known: _____

Special Requirements? ☐ Interpreter/communication impairment Which language _____

(Attach Form 1-332 if Accommodation or Interpreter Needed) Which dialect _____

☐ ADA accommodation: _____

NATURE OF ACTION
(CHECK ONE BOX)

TORTS
- ☐ Motor Tort
- ☐ Premises Liability
- ☐ Assault & Battery
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- ☐ Nuisance
- ☐ Toxic Torts
- ☐ Fraud
- ☐ Malicious Prosecution
- ☐ Lead Paint
- ☐ Asbestos
- ☐ Other

_____

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A. TORTS

Actual Damages
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- ☐ Declaratory Judgment
- ☐ Injunction
- ☐ Other _____

ALTERNATIVE DISPUTE RESOLUTION INFORMATION

Is this case appropriate for referral to an ADR process under Md. Rule 17-101? (Check all that apply)

A. Mediation ☐ Yes ☐ No
B. Arbitration ☐ Yes ☐ No
C. Settlement Conference ☐ Yes ☐ No
D. Neutral Evaluation ☐ Yes ☐ No

TRACK REQUEST

With the exception of Baltimore County and Baltimore City, please fill in the estimated ***LENGTH OF TRIAL. THIS CASE WILL THEN BE TRACKED ACCORDINGLY.***

- ☐ ½ day of trial or less
- ☐ 1 day of trial time
- ☐ 2 days of trial time
- ☐ 3 days of trial time
- ☐ More than 3 days of trial time

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Date _____ *Signature* _____

BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

For all jurisdictions, if Business and Technology track designation under Md. Rule 16-205 is requested, attach a duplicate copy of complaint and check one of the tracks below.

☐ **Expedited**	☐ **Standard**
Trial within 7 months of Defendant's response	Trial - 18 months of Defendant's response

☐ EMERGENCY RELIEF REQUESTED _____ _____

Signature *Date*

IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY PLEASE FILL OUT THE APPROPRIATE BOX BELOW.

CIRCUIT COURT FOR BALTIMORE CITY (check only one)

☐ Expedited	Trial 60 to 120 days from notice. Non-jury matters.
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☐ Standard-Medium	Trial 12 months from Defendant's response. Includes torts with actual damages over $7,500 and under $50,000, and contract claims over $20,000.
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☐ Lead Paint	Fill in: Birthdate of youngest plaintiff _____.
☐ Asbestos	Events and deadlines set by individual judge.
☐ Protracted Cases	Complex cases designated by the Administrative Judge.

CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

To assist the Court in determining the appropriate Track for this case, check one of the boxes below. This information is not an admission and may not be used for any purpose other than Track Assignment.

☐ Liability is conceded.
☐ Liability is not conceded, but is not seriously in dispute.
☐ Liability is seriously in dispute.

CIRCUIT COURT FOR BALTIMORE COUNTY

☐ Expedited (Trial Date-90 days)	Attachment Before Judgment, Declaratory Judgment (Simple), Administrative Appeals, District Court Appeals and Jury Trial Prayers, Guardianship, Injunction, Mandamus.
☐ Standard (Trial Date-240 days)	Condemnation, Confessed Judgments (Vacated), Contract, Employment Related Cases, Fraud and Misrepresentation, Intentional Tort, Motor Tort, Other Personal Injury, Workers' Compensation Cases.
☐ Extended Standard (Trial Date-345 days)	Asbestos, Lender Liability, Professional Malpractice, Serious Motor Tort or Personal Injury Cases (medical expenses and wage loss of $100,000, expert and out-of-state witnesses (parties), and trial of five or more days), State Insolvency.
☐ Complex (Trial Date-450 days)	Class Actions, Designated Toxic Tort, Major Construction Contracts, Major Product Liabilities, Other Complex Cases.

Wards

	*	IN THE
Wright Investment Group Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	ANNE ARUNDEL COUNTY
Critical Area Commission For The Chesapeake And A	*	CASE NO.: 02-C-06-117695 RP
Defendant		

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

06 NOV -9 PM 12:50

SCHEDULING ORDER

In accordance with Md. Rule 2-504.1, it is this **1st day of NOVEMBER, 2006**, by the Circuit Court for Anne Arundel County,

ORDERED that the parties shall comply with the following provisions :

Each case shall be concluded in a timely and efficient manner pursuant to the Civil Differentiated Case Management (DCM) Plan adopted by this Court as required by Md. Rule 16-202, which provides that **only actions ready for trial will be assigned for trial and tried.**

The deadlines and dates set forth herein are firm dates and may not be changed by the parties or counsel without the prior approval of the Administrative Judge or his designee, the Civil DCM Judge. The Court will not grant a continuance of any event, including Pretrial Conferences, by consent or because discovery or ADR has not been concluded. In the absence of a genuine emergency or other good cause, last minute continuances will not be granted.

All counsel are advised that in any dispute concerning whether counsel has complied with this Order, **the Court will not be guided by any agreements made between counsel to modify this Order** unless expressly approved by the Court. Failure to comply with the provisions of this Order may lead to the imposition of sanctions on the parties and/or their counsel which may include dismissal, entry of default or monetary sanctions , as may be appropriate.

1. Case Time Standard Deadline:04/19/08. Case must be concluded by this date.

2. **Amendments:**

02/17/07 Deadline for any party seeking to add an additional party and/or amend a claim to file the appropriate pleading and serve the additional party.

3. **Discovery:**

01/18/07 Deadline for plaintiff(s) to disclose expert witnesses pursuant to Rule 2-402(f)(1).

02/17/07 Deadline for defendant(s) to disclose expert witnesses pursuant to Rule 2-402(f)(1).

03/19/07 Deadline for identification of rebuttal experts pursuant to Rule 2-402(f)(1).

06/02/07 Deadline for completion of all depositions, and other methods of oral and written discovery. (At least 30 days prior to date of Pretrial Conference).
Note: This deadline does not apply to **de bene esse depositions.**

Discovery procedures must be initiated sufficiently in advance of the discovery deadline to provide the opposing party time to comply in accordance with **Md. Rules** Title 2, Chapter 400 **and** to permit a resolution of any discovery dispute **within the deadline.** The existence of a discovery dispute as to any matter will not justify delay in completing any other discovery. **The filing of any dispositive motion or any motion for protective order, for sanctions or to compel discovery will not result in an extension of the discovery deadlines.**

4. **Dispositive Pretrial Motions:**

04/13/07 Deadline to file any motions for summary judgment or other dispositive motions. **Note:** This deadline shall not be affected by discovery being incomplete.

5. **Computer Generated Evidence:**

Any party intending to use computer-generated evidence shall give the notice required by Rule 2-504.3(b) at least 120 days prior to the scheduled Pretrial Conference.

6. Alternative Dispute Resolution : N/A

30 days before Pretrial Conference: **07/02/07** Deadline to conclude court-ordered ADR.

The parties and counsel shall participate in the following Alternative Dispute Resolution
(A separate order to follow where appropriate):
[ ]Appointment of a Settlement Conference Officer (SCO); [ ]Appointment of a Mediator;
[ ]Retired Judge; [ ]Arbitration; [ ]Other; [ ] None
Details:

_____

_____

_____

7. **Pretrial and Settlement Conference:**

08/01/07 Date of Pretrial and Settlement Conference to be held before A Judge of the Court, at 11:30 AM
Time estimate:

A. **The attorneys who will actually try the case, all parties and insurance representatives with full authority to settle the case, shall be present at the Pretrial Conference, prepared to discuss, in good faith, settlement of all issues in this case,** unless excused by the DCM Judge or his designee. If any settlement terms must be approved by a claims supervisor, claims committee, government official, or other individual or individuals, that person or those persons with full authority **must** appear, in addition to the party or parties. All settlement discussions will be confidential and will not be admissible at trial. At the Pretrial Conference, each party and counsel must be prepared to discuss all aspects of the case including the matters set forth in Md. Rule 2-504.2(b).

B. Each party shall file a written statement addressing the matters listed in Md. 2-504.2(b) no later than five (5) days before the Pretrial Conference.

C. Counsel are required to discuss the issues in this case, including settlement, sufficiently in advance of the Pretrial Conference in order to ensure that the conference is meaningful.

D. If a settlement is reached, the parties shall promptly file **original** settlement documents with the Clerk with a copy to the DCM office. Unless such documents are filed and all open costs are paid at least seven (7) days prior to the scheduled Pretrial Conference date, all parties, counsel and representatives must attend the Pretrial Conference.

8. **Trial on the merits:**

[ ]COURT [ ]JURY
Trial shall be scheduled at the time of the Pretrial/Settlement Conference in accordance with Md. Rule 16-202 and the Civil DCM Plan adopted by this Court. This case will **not** be assigned a trial date unless **all** discovery is completed, **all** reasonable efforts at arriving at a settlement have been exhausted, **all** motions have been resolved and the case is ready to be tried.

9. **Motions in Limine:**

The deadline for filing motions in limine will be 20 days prior to the trial date which will be set at the Pretrial Conference. These motions will generally be determined by the trial judge. If exceptional circumstances require that a motion in limine be resolved in advance of trial, the moving party shall file the motion by the deadline for dispositive pretrial motions, and shall, **in a separate pleading,** request advance resolution of the motion stating with particularity the reason why an advance ruling is necessary.

10. **Request for Accommodation/Interpreter**

Please notify the Court Administrator (410-222-1404) as early as possible of any reasonable accommodation needed because of a disability or the need for an interpreter. Any other questions regarding this Order should be addressed to the Office of Civil Case Management (410) 222-1215.

11. **Other Matters:**

_____

_____

_____
Master in Chancery

Pamela L. North
JUDGE

Counsel acknowledge that they have received a copy of this Order and understand the deadlines set forth herein. Counsel and the parties also have been informed that this case must be concluded prior to the Case Management Deadline set forth herein. They have also been advised to review a copy of the Court's Civil Differentiated Case Management Plan which is available on the Court's web site at www.circuitcourt.org.

_____
Attorney for Plaintiff

_____
Attorney for Defendant

_____
Attorney for

_____
Attorney for

Civil Clerk to mail copies:

Critical Area Commission For The Chesapeake And Atlantic Coastal Bays
Anne Arundel County - Arundel Center
David M Plott,

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
(410)-222-1420, TTY for Deaf: (410)-222-1429
Civil (410)222-1431

W R I T O F S U M M O N S

Case Number: 02-C-06-117695 RP

C I V I L

Wright Investment Group vs Critical Area Commission For The Chesapeake And

STATE OF MARYLAND, ANNE ARUNDEL COUNTY, TO WIT:

To: Critical Area Commission For The Chesapeake And Atlantic Coastal

1804 West Street
Annapolis, MD 21401

You are hereby summoned to file a written response by pleading or motion, within 30 days after service of this summons upon you, in this Court, to the attached Complaint filed by:

Wright Investment Group

WITNESS the Honorable Chief Judge of the Fifth Judicial Circuit of Maryland.

Date Issued: 10/20/06

Robert P. Duckworth
Clerk of the Circuit Court, per acs

To the person summoned:

FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGMENT BY DEFAULT TO THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

Personal attendance in court on the day named is NOT required.

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

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

Served

October 19, 2006

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

Hand Delivered

Civil Clerk
Circuit Court for Anne Arundel County
P.O. Box 71
Annapolis, MD 21404-0071

Re: *Wright Investment Group v. Maryland Department of Natural Resources, et al.*
Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages

Dear Madam Clerk:

Enclosed for filing you will find the following:

1. Complaint and Civil Non-Domestic Case Information Report plus two (2) service copies;
2. Check payable to Clerk, Circuit Court for Anne Arundel County, in the amount of $115.00 representing the filing fee.

We will be serving the Defendants with the Complaint by private process. We request that you please call our office (410.268.0881) when the summonses are ready to be picked up.

Your assistance is appreciated.

Very truly yours,

LINOWES AND BLOCHER, LLP

Benjamin S. Wechsler

BSW:vlj

Enclosures
cc: Marianne Dise, Esq.
Sally M. Iliff, Esq.

F:\Wallach\Appeal\Petition Cover Letter.doc

WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

Plaintiff,

v.

MARYLAND DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street
Annapolis, Maryland 21401

Defendant

and

ANNE ARUNDEL COUNTY
Arundel Center
45 Calvert Street - Room 315
Annapolis, Maryland 21401

Defendant

IN THE CIRCUIT COURT

FOR

ANNE ARUNDEL COUNTY,

MARYLAND

Case No. C-06-117695

VERIFIED COMPLAINT FOR WRIT OF MANDAMUS, DECLARATORY RELIEF, AND DAMAGES

VERIFIED COMPLAINT FOR WRIT OF MANDAMUS, DECLARATORY RELIEF, AND DAMAGES

Wright Investment Group ("Wright"), by and through its undersigned counsel, hereby files this Verified Complaint for Writ of Mandamus and other causes against the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") and Anne Arundel County, Maryland ("the County") and states as follows:

1. Wright owns approximately 15.4 acres of property located between U.S. Route 50 and Whitehall Creek in Anne Arundel County (the "Property"). A two and one half acre portion of the Property (the "Non-Critical Area Portion") was determined, after five years of administrative and judicial proceedings, to be outside of the regulated Chesapeake Bay Critical Area. Despite the many years of proceedings, including a Court of Special Appeals decision establishing that the Non-Critical Area Portion was mistakenly included on the County Critical Area map, the Critical Area Commission and the County (collectively the "Defendants") have failed to remap the 2.5 acre Non-Critical Area Portion on the relevant official Critical Area maps. Defendants' actions have frustrated Wright's efforts to sell its Property and have effectively and significantly devalued Wright's Property.

2. Pursuant to Maryland Rule 15-701 *et seq.*, Wright prays for a Writ of Mandamus compelling Defendants to exercise their non-discretionary ministerial duty to amend and approve Anne Arundel County Critical Area Map No. 17 to remove the 2.5 acre Non-Critical Area Portion of the Property from the mapped Critical Area. Wright further and in the alternative prays for a Court Declaration that the County's Critical Area Map may be amended to reflect the mapping mistake without seeking a formal map amendment from the Critical Area Commission. Further and in the alternative Wright prays that the Critical Area Commission be estopped from remanding the matter to Anne Arundel County for further proceedings. Finally, Wright seeks an award of damages in an amount to be proved from the Critical Area Commission and the Department of Natural Resources for the devaluation of the Property caused by the Critical Area Commission's wrongful acts.

Parties

3. Wright is a California general partnership that owns the 15.4-acre Property in Anne Arundel County, Maryland. The Property currently is unimproved.

4. The Critical Area Commission for the Chesapeake and Atlantic Coastal Bays is an administrative or an executive agency of the State of Maryland established pursuant to MD. CODE ANN., NAT. RESOURCES. § 8-1801 *et seq.* (2000 Repl. Vol.), and organized under the auspices of the Maryland Department of Natural Resources.

5. Anne Arundel County, Maryland is a Charter County of the State of Maryland, organized under the Maryland Constitution and exercising land use powers authorized under Article 66B of the Maryland Code.

Venue

6. Venue is proper pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 6-201 because Wright is the owner of real property in Anne Arundel County, and because both the Critical Area Commission and the County maintain offices in and conduct business in Anne Arundel County.

Jurisdiction

7. Personal jurisdiction over each of the parties is proper pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 6-102 and 103. Subject matter jurisdiction is proper under MD. CODE ANN., CTS. & JUD. PROC. §§ 1-501, 3-401 *et seq*, and 3-8B-01,

Facts and Procedural History

8. Wright is a general partnership, owning approximately 15.4 acres of Property located between U.S. Route 50 and Whitehall Creek. At the time of purchase, there were no Critical Area restrictions on the Property.

9. 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 the Non-Critical Area Portion is located adjacent to Route 50, adjoins a McDonald's restaurant and is partially zoned C1 – Neighborhood Commercial District under the Anne Arundel County Zoning Code. The effect of the RCA classification was to significantly devalue the Property.

10. On December 7, 2000, Wright filed a Critical Area reclassification application with the County, seeking removal of the 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.

11. The County's Administrative Hearing Officer ("AHO") denied Wright's application after a hearing on March 27, 2001.

12. 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. 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.

13. On December 9, 2002 the Circuit Court for Anne Arundel County heard oral argument on the appeal. On December 26, 2002, Judge Caroom affirmed the County Board of Appeals decision, and 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.

14. The Court of Special Appeals heard oral argument on October 15, 2003. 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, and thereby had impermissibly expanded the mapped boundaries of the Critical Area to include the 2.5 acres of the Property at issue in this Complaint. Concluding that the County had mistakenly mapped the Non-Critical Area Portion, the Court of Special Appeals remanded to the Circuit Court. On December 2, 2004 the Circuit Court remanded the matter to the County Board of Appeals for further consideration.

15. The case came back before the Board of Appeals for further argument on April 7, 2005, and resulted in a revised memorandum of opinion dated September 21, 2005. 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."

16. Following the Board of Appeals September 21, 2005 Opinion, counsel to Wright requested that the County revise its Critical Area map. In 2006, the Anne Arundel County Office of Environmental and Cultural Resources prepared amended Anne Arundel County Critical Area Map No. 17, removing the 2.5 acre Non-Critical Area Portion from the Critical Area. The County submitted its revised Map to the

Critical Area Commission for approval as an amendment to the County Critical Area Program.

17. Upon receipt of the proposed Program Amendment from the County, the full Critical Area 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 Critical Area Commission, who also is the County Councilman 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 five years of administrative and judicial proceedings.

18. On September 6, 2006 the panel reconvened for further discussion and recommended to the full Critical Area Commission 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. The full Critical Area 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 the Property owners to further delay and expense.

19. Wright contends that after the Court of Special Appeals and Board of Appeals rulings, the Critical Area Commission lacked discretion to deny or defer approval of a properly submitted request for Program Amendment showing the removal of the 2.5-acre parcel from the Critical Area. The Commission has broad, statutory intervention authority pursuant to Natural Resources Code § 8-1812. If the Commission believed that the Wright application or any of the judicial or administrative decisions

made during the five years of proceedings was improper, it could have intervened. It did not.

REQUEST FOR WRIT OF MANDAMUS

20. Wright reincorporates and re-alleges the items contained in Paragraphs 1 through 19 as if fully set forth herein.

21. Wright respectfully requests that the Court issue a Writ of Mandamus compelling the Critical Area Commission's approval of the requested map amendment, while allowing both the Critical Area Commission and the County to continue the process of assessing map revisions for any other properties along Whitehall Creek. Wright contends that the failure to approve the requested map amendment is illegal, arbitrary, capricious and unreasonable.

22. Pursuant to Rule 15-701(a), Wright claims and intends to prove damages resulting from the Critical Area Commission's wrongful and unlawful, arbitrary, capricious and unreasonable failure to exercise its nondiscretionary duty to approve the requested map amendment.

REQUEST FOR DECLARATORY RELIEF

23. Wright reincorporates and re-alleges the items contained in Paragraphs 1 through 22 as if fully set forth herein.

24. In the alternative to issuing a Writ of Mandamus, Wright respectfully requests that the Court issue a Declaration that the County's Critical Area Map be amended to reflect the mapping mistake without seeking a formal map amendment from the Critical Area Commission. Wright contends that because the Court of Special Appeals has confirmed that the Non-Critical Area Portion of the Property was incorrectly

mapped *ab initio*, a Critical Area map amendment approved by the Critical Area Commission is not needed.

25. In the alternative to granting the relief requested in Paragraph 24, Wright respectfully asks the Court for a declaration that the Critical Area Commission is estopped from taking any action with regard to the County's request for map amendment outside of approval. To permit the Critical Area Commission to condition approval on further proceedings effectively circumvents the Court of Special Appeals decision establishing that the County had incorrectly mapped the Critical Area. Wright further contends that the Critical Area Commission's discretion was limited to either approving the County's request for map amendment as submitted, or in the alternative approving the County's requested map amendment and asking the County to remap other areas that may potentially be mistakenly included in the County's original Critical Area map for the Whitehall Creek area.

REQUEST FOR DAMAGES

26. Wright reincorporates and re-alleges the items contained in Paragraphs 1 through 25 as if fully set forth herein.

27. The Commission's wrongful and unlawful failure to approve the new map at its September 6, 2006 meeting has damaged Wright by devaluing the Property in an amount to be provided by expert testimony. Wright respectfully requests that the Court assess damages against the Critical Area Commission and the Maryland Department of Natural Resources according to proof.

Respectfully submitted,

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

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

VERIFICATION

I, Timothy Wallach, declare under the penalty of perjury of the State of Maryland that the each of the foregoing statements in support of the Writ of Mandamus is true and correct to the best of my knowledge, information and belief, and I further declare that I have authority to make this Verification on behalf of the Wright Investment Group.

Timothy Wallach

F:\Wallach\Appeal\Complaint for Judicial Mandamus.02.doc

Circuit Court for Anne Arundel County

City or County

CIVIL–NON-DOMESTIC CASE INFORMATION REPORT

Directions:

Plaintiff: *This Information Report must be completed and attached to the complaint filed with the Clerk of Court unless your case is exempted from the requirement by the Chief Judge of the Court of Appeals pursuant to Rule 2-111(a).* ***A copy must be included for each defendant to be served.***

Defendant: *You must file an Information Report as required by Rule 2-323(h).*

THIS INFORMATION REPORT CANNOT BE ACCEPTED AS AN ANSWER OR RESPONSE.

FORM FILED BY: ☑ PLAINTIFF ☐ DEFENDANT CASE NUMBER: C-06-117695 (Clerk to insert)

CASE NAME: Wright Investment Group (Plaintiff) v Dep't Nat. Resources, Anne Arundel County (Defendant)

JURY DEMAND: ☐ Yes ☑ No Anticipated length of trial: ____ hours or 1 days

RELATED CASE PENDING? ☑ Yes ☐ No If yes, Case #(s), if known: ____

Special Requirements? ☐ Interpreter/communication impairment Which language ____

(Attach Form 1-332 if Accommodation or Interpreter Needed) Which dialect ____

☐ ADA accommodation: ____

NATURE OF ACTION (CHECK ONE BOX)

TORTS
- ☐ Motor Tort
- ☐ Premises Liability
- ☐ Assault & Battery
- ☐ Product Liability
- ☐ Professional Malpractice
- ☐ Wrongful Death
- ☐ Business & Commercial
- ☐ Libel & Slander
- ☐ False Arrest/Imprisonment
- ☐ Nuisance
- ☐ Toxic Torts
- ☐ Fraud
- ☐ Malicious Prosecution
- ☐ Lead Paint
- ☐ Asbestos
- ☐ Other

LABOR
- ☐ Workers' Comp.
- ☐ Wrongful Discharge
- ☐ EEO
- ☐ Other

CONTRACTS
- ☐ Insurance
- ☐ Confessed Judgment
- ☐ Other

REAL PROPERTY
- ☐ Judicial Sale
- ☐ Condemnation
- ☐ Landlord Tenant
- ☑ Other Critical Area Law

OTHER
- ☐ Civil Rights
- ☑ Environmental
- ☐ ADA
- ☐ Other Administrative law

DAMAGES/RELIEF

A. TORTS
Actual Damages
- ☐ Under $7,500
- ☐ $7,500 - $50,000
- ☐ $50,000 - $100,000
- ☑ Over $100,000
- ☐ Medical Bills $____
- ☐ Property Damages $____
- ☐ Wage Loss $____

B. CONTRACTS
- ☐ Under $10,000
- ☐ $10,000 - $20,000
- ☐ Over $20,000

C. NONMONETARY
- ☑ Declaratory Judgment
- ☐ Injunction
- ☑ Other Writ of mandamus

ALTERNATIVE DISPUTE RESOLUTION INFORMATION

Is this case appropriate for referral to an ADR process under Md. Rule 17-101? (Check all that apply)

A. Mediation ☐ Yes ☐ No
B. Arbitration ☐ Yes ☑ No
C. Settlement Conference ☐ Yes ☐ No
D. Neutral Evaluation ☐ Yes ☐ No

TRACK REQUEST

With the exception of Baltimore County and Baltimore City, please fill in the estimated ***LENGTH OF TRIAL. THIS CASE WILL THEN BE TRACKED ACCORDINGLY.***

- ☐ ½ day of trial or less
- ☑ 1 day of trial time
- ☐ 2 days of trial time
- ☐ 3 days of trial time
- ☐ More than 3 days of trial time

PLEASE SEE PAGE TWO OF THIS FORM FOR INSTRUCTIONS PERTAINING TO THE BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM AND ADDITIONAL INSTRUCTIONS IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY.

Date Oct. 19, 2006 *Signature* [signature]

Circuit Court for _____
City or County

CIVIL–NON-DOMESTIC CASE INFORMATION REPORT

Directions:

Plaintiff: *This Information Report must be completed and attached to the complaint filed with the Clerk of Court unless your case is exempted from the requirement by the Chief Judge of the Court of Appeals pursuant to Rule 2-111(a).* ***A copy must be included for each defendant to be served.***

Defendant: *You must file an Information Report as required by Rule 2-323(h).*

THIS INFORMATION REPORT CANNOT BE ACCEPTED AS AN ANSWER OR RESPONSE.

FORM FILED BY: ☐ PLAINTIFF ☐ DEFENDANT CASE NUMBER: C-06-117695 (Clerk to insert)

CASE NAME: _____ (Plaintiff) v _____ (Defendant)

JURY DEMAND: ☐ Yes ☐ No Anticipated length of trial: _____ hours or _____ days

RELATED CASE PENDING? ☐ Yes ☐ No If yes, Case #(s), if known: _____

Special Requirements? ☐ Interpreter/communication impairment Which language _____

(Attach Form 1-332 if Accommodation or Interpreter Needed) Which dialect _____

☐ ADA accommodation: _____

NATURE OF ACTION (CHECK ONE BOX)

TORTS
- ☐ Motor Tort
- ☐ Premises Liability
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- ☐ Professional Malpractice
- ☐ Wrongful Death
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- ☐ Libel & Slander
- ☐ False Arrest/Imprisonment
- ☐ Nuisance
- ☐ Toxic Torts
- ☐ Fraud
- ☐ Malicious Prosecution
- ☐ Lead Paint
- ☐ Asbestos
- ☐ Other

_____

LABOR
- ☐ Workers' Comp.
- ☐ Wrongful Discharge
- ☐ EEO
- ☐ Other _____

CONTRACTS
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- ☐ Confessed Judgment
- ☐ Other _____

REAL PROPERTY
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- ☐ Condemnation
- ☐ Landlord Tenant
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OTHER
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- ☐ ADA
- ☐ Other _____

DAMAGES/RELIEF

A. TORTS

Actual Damages
- ☐ Under $7,500
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- ☐ Medical Bills $ _____
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B. CONTRACTS
- ☐ Under $10,000
- ☐ $10,000 - $20,000
- ☐ Over $20,000

C. NONMONETARY
- ☐ Declaratory Judgment
- ☐ Injunction
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ALTERNATIVE DISPUTE RESOLUTION INFORMATION

Is this case appropriate for referral to an ADR process under Md. Rule 17-101? (Check all that apply)

A. Mediation ☐ Yes ☐ No
B. Arbitration ☐ Yes ☐ No
C. Settlement Conference ☐ Yes ☐ No
D. Neutral Evaluation ☐ Yes ☐ No

TRACK REQUEST

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Date _____ *Signature* _____

BUSINESS AND TECHNOLOGY CASE MANAGEMENT PROGRAM

For all jurisdictions, if Business and Technology track designation under Md. Rule 16-205 is requested, attach a duplicate copy of complaint and check one of the tracks below.

☐ **Expedited**	☐ **Standard**
Trial within 7 months of Defendant's response	Trial - 18 months of Defendant's response

☐ EMERGENCY RELIEF REQUESTED _____ _____

Signature *Date*

IF YOU ARE FILING YOUR COMPLAINT IN BALTIMORE COUNTY, BALTIMORE CITY, OR PRINCE GEORGE'S COUNTY PLEASE FILL OUT THE APPROPRIATE BOX BELOW.

CIRCUIT COURT FOR BALTIMORE CITY (check only one)

☐ Expedited	Trial 60 to 120 days from notice. Non-jury matters.
☐ Standard-Short	Trial seven months from Defendant's response. Includes torts with actual damages up to $7,500; contract claims up to $20,000; condemnations; injunctions and declaratory judgments.
☐ Standard-Medium	Trial 12 months from Defendant's response. Includes torts with actual damages over $7,500 and under $50,000, and contract claims over $20,000.
☐ Standard-Complex	Trial 18 months from Defendant's response. Includes complex cases requiring prolonged discovery with actual damages in excess of $50,000.
☐ Lead Paint	Fill in: Birthdate of youngest plaintiff _____.
☐ Asbestos	Events and deadlines set by individual judge.
☐ Protracted Cases	Complex cases designated by the Administrative Judge.

CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

To assist the Court in determining the appropriate Track for this case, check one of the boxes below. This information is not an admission and may not be used for any purpose other than Track Assignment.

☐ Liability is conceded.
☐ Liability is not conceded, but is not seriously in dispute.
☐ Liability is seriously in dispute.

CIRCUIT COURT FOR BALTIMORE COUNTY

☐ Expedited (Trial Date-90 days)	Attachment Before Judgment, Declaratory Judgment (Simple), Administrative Appeals, District Court Appeals and Jury Trial Prayers, Guardianship, Injunction, Mandamus.
☐ Standard (Trial Date-240 days)	Condemnation, Confessed Judgments (Vacated), Contract, Employment Related Cases, Fraud and Misrepresentation, Intentional Tort, Motor Tort, Other Personal Injury, Workers' Compensation Cases.
☐ Extended Standard (Trial Date-345 days)	Asbestos, Lender Liability, Professional Malpractice, Serious Motor Tort or Personal Injury Cases (medical expenses and wage loss of $100,000, expert and out-of-state witnesses (parties), and trial of five or more days), State Insolvency.
☐ Complex (Trial Date-450 days)	Class Actions, Designated Toxic Tort, Major Construction Contracts, Major Product Liabilities, Other Complex Cases.

MSA_S_1883_33
(3 of 5)

Pleadings

WRIGHT INVESTMENT GROUP V. MARYLAND
DNR/CAC AND ANNE ARUNDEL COUNTY
COMPLAINT FOR WRIT OF MANDAMUS,

Pleadings

WRIGHT INVESTMENT GROUP V. MARYLAND DNR/CAC AND ANNE ARUNDEL COUNTY COMPLAINT FOR WRIT OF MANDAMUS, DELCLARATORY RELIEF, AND DAMAGES Case No. C-06-117695 (Circuit Court for Anne Arundel County)

Pendaflex
Esselte
76520 40% P4

Circuit Court for Anne Arundel County
City or County

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CASE NAME: Wright Investment Group (Plaintiff) v Dep't Nat. Resources, Anne Arundel County (Defendant)

JURY DEMAND: ☐ Yes ☑ No Anticipated length of trial: ____ hours or 1 days

RELATED CASE PENDING? ☑ Yes ☐ No If yes, Case #(s), if known: ____

Special Requirements? ☐ Interpreter/communication impairment Which language ____
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Date Oct. 19, 2006 *Signature* [signature]

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

FOLD HERE

RECEIVED
JAN - 8 2007
CRITICAL AREA COMMISSION
Chesapeake and Coastal Bays

Date 12/21/06 Case No. C-06-117695

Wright Investment Corp v. MD Dept of Natural Resources

Having considered the Motions to Dismiss filed on behalf of "The Critical Area Commission" and Anne Arundel County, there being no response there to.

It is hereby ordered that the Complaint is dismissed as to the Critical Area Commission and as to Anne Arundel County.

The Case shall proceed only as to MD Dept. of Nat. Resources

12/28/06

clerk
cc all counsel

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

Judge

RECEIVED
JAN - 8 2007
CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

Working copy

WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

Plaintiff,

v.

MARYLAND DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS
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Defendant

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IN THE CIRCUIT COURT

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MARYLAND

Case No. C-06-117695

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2. Pursuant to Maryland Rule 15-701 *et seq.*, Wright prays for a Writ of Mandamus compelling Defendants to exercise their non-discretionary ministerial duty to amend and approve Anne Arundel County Critical Area Map No. 17 to remove the 2.5 acre Non-Critical Area Portion of the Property from the mapped Critical Area. Wright further and in the alternative prays for a Court Declaration that the County's Critical Area Map may be amended to reflect the mapping mistake without seeking a formal map amendment from the Critical Area Commission. Further and in the alternative Wright prays that the Critical Area Commission be estopped from remanding the matter to Anne Arundel County for further proceedings. Finally, Wright seeks an award of damages in an amount to be proved from the Critical Area Commission and the Department of Natural Resources for the devaluation of the Property caused by the Critical Area Commission's wrongful acts.

Parties

3. Wright is a California general partnership that owns the 15.4-acre Property in Anne Arundel County, Maryland. The Property currently is unimproved.

4. The Critical Area Commission for the Chesapeake and Atlantic Coastal Bays is an administrative or an executive agency of the State of Maryland established pursuant to MD. CODE ANN., NAT. RESOURCES. § 8-1801 *et seq.* (2000 Repl. Vol.), and organized under the auspices of the Maryland Department of Natural Resources.

5. Anne Arundel County, Maryland is a Charter County of the State of Maryland, organized under the Maryland Constitution and exercising land use powers authorized under Article 66B of the Maryland Code.

Venue

6. Venue is proper pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 6-201 because Wright is the owner of real property in Anne Arundel County, and because both the Critical Area Commission and the County maintain offices in and conduct business in Anne Arundel County.

Jurisdiction

7. Personal jurisdiction over each of the parties is proper pursuant to MD. CODE ANN., CTS. & JUD. PROC. § 6-102 and 103. Subject matter jurisdiction is proper under MD. CODE ANN., CTS. & JUD. PROC. §§ 1-501, 3-401 *et seq*, and 3-8B-01,

Facts and Procedural History

8. Wright is a general partnership, owning approximately 15.4 acres of Property located between U.S. Route 50 and Whitehall Creek. At the time of purchase, there were no Critical Area restrictions on the Property.

9. 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 the Non-Critical Area Portion is located adjacent to Route 50, adjoins a McDonald's restaurant and is partially zoned C1 – Neighborhood Commercial District under the Anne Arundel County Zoning Code. The effect of the RCA classification was to significantly devalue the Property.

10. On December 7, 2000, Wright filed a Critical Area reclassification application with the County, seeking removal of the 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.

11. The County's Administrative Hearing Officer ("AHO") denied Wright's application after a hearing on March 27, 2001.

12. 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. 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.

13. On December 9, 2002 the Circuit Court for Anne Arundel County heard oral argument on the appeal. On December 26, 2002, Judge Caroom affirmed the County Board of Appeals decision, and 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.

14. The Court of Special Appeals heard oral argument on October 15, 2003. 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, and thereby had impermissibly expanded the mapped boundaries of the Critical Area to include the 2.5 acres of the Property at issue in this Complaint. Concluding that the County had mistakenly mapped the Non-Critical Area Portion, the Court of Special Appeals remanded to the Circuit Court. On December 2, 2004 the Circuit Court remanded the matter to the County Board of Appeals for further consideration.

15. The case came back before the Board of Appeals for further argument on April 7, 2005, and resulted in a revised memorandum of opinion dated September 21, 2005. 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."

16. Following the Board of Appeals September 21, 2005 Opinion, counsel to Wright requested that the County revise its Critical Area map. In 2006, the Anne Arundel County Office of Environmental and Cultural Resources prepared amended Anne Arundel County Critical Area Map No. 17, removing the 2.5 acre Non-Critical Area Portion from the Critical Area. The County submitted its revised Map to the

Critical Area Commission for approval as an amendment to the County Critical Area Program.

17. Upon receipt of the proposed Program Amendment from the County, the full Critical Area 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 Critical Area Commission, who also is the County Councilman 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 five years of administrative and judicial proceedings.

18. On September 6, 2006 the panel reconvened for further discussion and recommended to the full Critical Area Commission 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. The full Critical Area 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 the Property owners to further delay and expense.

19. Wright contends that after the Court of Special Appeals and Board of Appeals rulings, the Critical Area Commission lacked discretion to deny or defer approval of a properly submitted request for Program Amendment showing the removal of the 2.5-acre parcel from the Critical Area. The Commission has broad, statutory intervention authority pursuant to Natural Resources Code § 8-1812. If the Commission believed that the Wright application or any of the judicial or administrative decisions

made during the five years of proceedings was improper, it could have intervened. It did not.

REQUEST FOR WRIT OF MANDAMUS

20. Wright reincorporates and re-alleges the items contained in Paragraphs 1 through 19 as if fully set forth herein.

21. Wright respectfully requests that the Court issue a Writ of Mandamus compelling the Critical Area Commission's approval of the requested map amendment, while allowing both the Critical Area Commission and the County to continue the process of assessing map revisions for any other properties along Whitehall Creek. Wright contends that the failure to approve the requested map amendment is illegal, arbitrary, capricious and unreasonable.

22. Pursuant to Rule 15-701(a), Wright claims and intends to prove damages resulting from the Critical Area Commission's wrongful and unlawful, arbitrary, capricious and unreasonable failure to exercise its nondiscretionary duty to approve the requested map amendment.

REQUEST FOR DECLARATORY RELIEF

23. Wright reincorporates and re-alleges the items contained in Paragraphs 1 through 22 as if fully set forth herein.

24. In the alternative to issuing a Writ of Mandamus, Wright respectfully requests that the Court issue a Declaration that the County's Critical Area Map be amended to reflect the mapping mistake without seeking a formal map amendment from the Critical Area Commission. Wright contends that because the Court of Special Appeals has confirmed that the Non-Critical Area Portion of the Property was incorrectly

mapped *ab initio*, a Critical Area map amendment approved by the Critical Area Commission is not needed.

25. In the alternative to granting the relief requested in Paragraph 24, Wright respectfully asks the Court for a declaration that the Critical Area Commission is estopped from taking any action with regard to the County's request for map amendment outside of approval. To permit the Critical Area Commission to condition approval on further proceedings effectively circumvents the Court of Special Appeals decision establishing that the County had incorrectly mapped the Critical Area. Wright further contends that the Critical Area Commission's discretion was limited to either approving the County's request for map amendment as submitted, or in the alternative approving the County's requested map amendment and asking the County to remap other areas that may potentially be mistakenly included in the County's original Critical Area map for the Whitehall Creek area.

REQUEST FOR DAMAGES

26. Wright reincorporates and re-alleges the items contained in Paragraphs 1 through 25 as if fully set forth herein.

27. The Commission's wrongful and unlawful failure to approve the new map at its September 6, 2006 meeting has damaged Wright by devaluing the Property in an amount to be provided by expert testimony. Wright respectfully requests that the Court assess damages against the Critical Area Commission and the Maryland Department of Natural Resources according to proof.

Respectfully submitted,

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

① NORMAL DECISIONM. — CME ✓
② ? ALL USE — CURRENT USE?
③ X-CLAIM AGAINST COUNTY

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

27. The Commission's wrongful and unlawful failure to approve the new map at its September 6, 2006 meeting has damaged Wright by devaluing the Property in an amount to be provided by expert testimony. Wright respectfully requests that the Court assess damages against the Critical Area Commission and the Maryland Department of Natural Resources according to proof.

Respectfully submitted,

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

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

VERIFICATION

I, Timothy Wallach, declare under the penalty of perjury of the State of Maryland that the each of the foregoing statements in support of the Writ of Mandamus is true and correct to the best of my knowledge, information and belief, and I further declare that I have authority to make this Verification on behalf of the Wright Investment Group.

Timothy Wallach

F:\Wallach\Appeal\Complaint for Judicial Mandamus.f2.doc

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

DONNA HILL STATON
DEPUTY ATTORNEY GENERAL

MAUREEN M. DOVE
DEPUTY ATTORNEY GENERAL

MARIANNE E. DISE
ASSISTANT ATTORNEY GENERAL
PRINCIPAL COUNSEL

SAUNDRA K. CANEDO
ASSISTANT ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.:

STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338

(410) 974-5338

(410) 260-3466

December 18, 2006

HAND-DELIVERED

Mr. Robert P. Duckworth, Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Re: *Wright Investment, et al., v. Department of Natural Resources, et al,*
Case No C-06-117695

Dear Clerk:

Enclosed please find for filing in the above-referenced case the Defendant State of Maryland, Department of Natural Resources' Cross Complaint against Defendant Anne Arundel County. Thank you very much for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosure

cc: David M. Plott, Esquire
Benjamin S. Wechsler, Esquire
Sarah M. Iliff, Esquire

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT. et al.,	*	
Plaintiffs,	*	
v.	*	**Case No. C-06-117695**
DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS,	*	
Defendant/Cross Plaintiff		
and		
ANNE ARUNDEL COUNTY	*	
Defendant/Cross-Defendant	*	
	*	

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

CROSS CLAIM AGAINST ANNE ARUNDEL COUNTY

Defendant/Cross-Plaintiff State of Maryland, Department of Natural Resources Critical Area Commission ("the State Defendant"), by its attorneys J. Joseph Curran, Jr., Attorney General, and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Maryland Rules 2-302 and 2-331 (b), hereby files this cross claim against Defendant/Cross-Defendant Anne Arundel County, and for cause states:

1. Plaintiff Wright Investment Group seeks damages for the alleged devaluation of Plaintiff's real property due to the State Defendant's not approving a proposed amendment to Anne Arundel County's ("the County") Critical Area maps to remove Plaintiff's property from the Critical Area.

2. The incident that allegedly gives rise to Plaintiff's claim for damages against the State Defendant occurred on September 6, 2006, when the DNR's Critical Area Commission voted to send back to Anne Arundel County, without approving, the County's proposal to change the County's Critical Area maps to remove the Plaintiff's property from the Critical Area. Plaintiff's Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages ("Complaint") ¶ 18.

3. Plaintiff first requested the map change by filing an application for critical area reclassification with Anne Arundel County on December 7, 2000. Complaint ¶ 10. During the ensuing five and one-half years, as alleged in the Complaint, ¶¶ 10-16, the map amendment request resided with the County and / or the courts, and not with the State Defendant.

4. The more than five-year delay in the County's processing Plaintiff's map change request was independent from and superseded any delay, if proven, that the State Defendant's consideration of the map amendment request caused to Plaintiff.

5. If liability is imposed upon the State Defendant for damages allegedly suffered by Wright Investment that are due to the acts or omission of Anne Arundel County, the State Defendant will then have a right of indemnification against Anne Arundel County.

6. Alternatively, if judgment is entered against the State Defendant for damages sustained by the Plaintiff, then the State – because of the negligent contributions of the County towards the damages allegedly suffered by the Plaintiff, – will have a right of contribution from Anne Arundel County.

WHEREFORE, the State of Maryland, Department of Natural Resources prays judgment:

A. That the failure of Anne Arundel County to process the Plaintiff's map change request in a timely manner for over five years was the independent and superseding

cause of any damages sustained by Wright Investment so that the State Defendant is not liable for any damages sustained by Plaintiff; or

B. By way of contribution from Anne Arundel County towards all sums, if any, for which the State Defendant might be adjudged to be liable to Plaintiff; or

C. By way of indemnification from Anne Arundel County for all sums, if any, for which the State Defendant might be adjudged to be liable to Plaintiff; and

D. For other and further relief as the nature of the cause may warrant.

Respectfully Submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Marianne E. Dise

Marianne E. Dise

Saundra K. Canedo/med

Saundra K. Canedo
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
(410) 974-5338 (fax)
Attorneys for State of Maryland, DNR, Critical Area Commission

Dated: December 18, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2006, I sent the foregoing Cross-Claim Against Anne Arundel County via First Class U.S. Mail to:

Sarah Iliff, Esquire
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401

Attorney for Defendant/Cross-Defendant Anne Arundel County

and to

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

Attorney for Plaintiff Wright Investment Group

Marianne E. Dise

Marianne E. Dise

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

DONNA HILL STATON
DEPUTY ATTORNEY GENERAL

MAUREEN M. DOVE
DEPUTY ATTORNEY GENERAL

MARIANNE E. DISE
ASSISTANT ATTORNEY GENERAL
PRINCIPAL COUNSEL

SAUNDRA K. CANEDO
ASSISTANT ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.:

STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338

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(410) 260-3466

December 18, 2006

HAND-DELIVERED

Mr. Robert P. Duckworth, Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Re: *Wright Investment, et al., v. Department of Natural Resources, et al,*
Case No C-06-117695

Dear Clerk:

Enclosed please find for filing in the above-referenced case the Defendant State of Maryland, Department of Natural Resources' Cross Complaint against Defendant Anne Arundel County. Thank you very much for your assistance.

Very truly yours,

Marianne E. Dise

Marianne E. Dise
Assistant Attorney General

Enclosure

cc: David M. Plott, Esquire
Benjamin S. Wechsler, Esquire
Sarah M. Iliff, Esquire

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT. et al., *

Plaintiffs, *

v. * **Case No. C-06-117695**

DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, *

Defendant/Cross Plaintiff

and

ANNE ARUNDEL COUNTY

*

Defendant/Cross-Defendant

*

*

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

CROSS CLAIM AGAINST ANNE ARUNDEL COUNTY

Defendant/Cross-Plaintiff State of Maryland, Department of Natural Resources Critical Area Commission ("the State Defendant"), by its attorneys J. Joseph Curran, Jr., Attorney General, and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Maryland Rules 2-302 and 2-331 (b), hereby files this cross claim against Defendant/Cross-Defendant Anne Arundel County, and for cause states:

1. Plaintiff Wright Investment Group seeks damages for the alleged devaluation of Plaintiff's real property due to the State Defendant's not approving a proposed amendment to Anne Arundel County's ("the County") Critical Area maps to remove Plaintiff's property from the Critical Area.

2. The incident that allegedly gives rise to Plaintiff's claim for damages against the State Defendant occurred on September 6, 2006, when the DNR's Critical Area Commission voted to send back to Anne Arundel County, without approving, the County's proposal to change the County's Critical Area maps to remove the Plaintiff's property from the Critical Area. Plaintiff's Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages ("Complaint") ¶ 18.

3. Plaintiff first requested the map change by filing an application for critical area reclassification with Anne Arundel County on December 7, 2000. Complaint ¶ 10. During the ensuing five and one-half years, as alleged in the Complaint, ¶¶ 10-16, the map amendment request resided with the County and / or the courts, and not with the State Defendant.

4. The more than five-year delay in the County's processing Plaintiff's map change request was independent from and superseded any delay, if proven, that the State Defendant's consideration of the map amendment request caused to Plaintiff.

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WHEREFORE, the State of Maryland, Department of Natural Resources prays judgment:

A. That the failure of Anne Arundel County to process the Plaintiff's map change request in a timely manner for over five years was the independent and superseding

cause of any damages sustained by Wright Investment so that the State Defendant is not liable for any damages sustained by Plaintiff; or

B. By way of contribution from Anne Arundel County towards all sums, if any, for which the State Defendant might be adjudged to be liable to Plaintiff; or

C. By way of indemnification from Anne Arundel County for all sums, if any, for which the State Defendant might be adjudged to be liable to Plaintiff; and

D. For other and further relief as the nature of the cause may warrant.

Respectfully Submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

Marianne E. Dise

Marianne E. Dise

Saundra K. Canedo/med

Saundra K. Canedo
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
(410) 974-5338 (fax)
Attorneys for State of Maryland, DNR, Critical Area Commission

Dated: December 18, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2006, I sent the foregoing Cross-Claim Against Anne Arundel County via First Class U.S. Mail to:

Sarah Iliff, Esquire
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road
Annapolis, Maryland 21401

Attorney for Defendant/Cross-Defendant Anne Arundel County

and to

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

Attorney for Plaintiff Wright Investment Group

Marianne E. Dise

Marianne E. Dise

IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP	*	
Plaintiff,	*	
v.	*	**Case No. C-06-117695**
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants	*	

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

ANSWER OF DEFENDANT DEPARTMENT OF NATURAL RESOURCES

Defendant Department of Natural Resources ("DNR") and its 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, pursuant to Maryland Rules 2-321, 2-323, and 15-701 hereby answers the Complaint for Writ of Mandamus, Declaratory Relief, and Damages, ("the Complaint") and states:

1. DNR denies the allegations of the last sentence of paragraph 1 of the Complaint. To the extent that the remainder of paragraph 1 of the Complaint contains allegations of facts, and not merely statements of the relief requested, or statements or conclusions of law to which no responses are required or provided, DNR admits the allegations.

2. Paragraph 2 of the Complaint contains no allegations of fact, only statements of the relief requested, and statements and conclusions of law, to which no responses are required or provided.

3. DNR lacks sufficient knowledge or information to either admit or deny the allegations

contained in paragraph 3 of the Complaint.

4. DNR denies the allegations contained in paragraph 4 of the Complaint that the Critical Area Commission is "an administrative or an executive agency of the State of Maryland." The remaining allegations of paragraph 4 are statements or conclusions of law to which no responses are required or provided.

5. To the extent that paragraph 5 of the Complaint contains allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

6. Paragraphs 6 and 7 of the Complaint contains no allegations of fact, only statements and conclusions of law, to which no responses are required or provided.

7. DNR lacks sufficient knowledge or information to either admit or deny the allegations contained in paragraph 8 of the Complaint.

8. DNR denies the allegation contained in paragraph 9 of the Complaint that the "effect of the RCA classification was to significantly devalue the Property." As to the remaining allegations contained in paragraph 9, to the extent that the allegations are allegations of fact, and not merely statements or conclusions of law to which no responses are required or provided, DNR admits the allegations.

9. To the extent that paragraphs 10 through 13 of the Complaint contain allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

10. To the extent that paragraph 14 of the Complaint purports to explain the substance of the Court of Special Appeals' opinion, the opinion speaks for itself. To the extent that paragraph

14 of the Complaint contains allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

11. To the extent that paragraph 15 of the Complaint purports to explain the substance of the Board of Appeals' opinion, the opinion speaks for itself. To the extent that paragraph 15 of the Complaint contains allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

12. DNR lacks sufficient information or knowledge to either admit or deny the allegations contained in the first sentence of paragraph 16 of the Complaint. As to the remaining allegations of paragraph 16, to the extent that the allegations are allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

13. To the extent that the allegations contained in paragraph 17 of the Complaint are allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

14. To the extent that paragraph 18 of the Complaint purports to explain the substance of the Critical Area Commission's action, the Commission's written correspondence to the County speaks for itself. DNR denies the allegations contained in the last sentence of paragraph 18 that the Commission's action subjected the Property owners to "further delay and expense." To the extent that the remaining allegations contained in paragraph 18 of the Complaint contain allegations of fact, and not merely statements or conclusion of law to which no responses are required or provided, DNR admits the allegations.

15. Paragraph 19 of the Complaint contains no allegations of fact, only statements and conclusions of law, to which no responses are required or provided.

16. Paragraph 20 of the Complaint contains no separate allegations of fact, and thus no response is required or provided. To the extent that a response may be required, DNR incorporates and re-states its responses to the allegations contained in paragraphs 1 through 19 of the Complaint as set forth herein.

17. Paragraph 21 of the Complaint contains no allegations of fact, only a statement of the relief requested, and statements or conclusions of law to which no responses are required or provided. DNR denies the allegation contained in paragraph 21 of the Complaint that its action is "illegal, arbitrary, capricious and unreasonable."

18. Paragraph 22 of the Complaint contains no allegations of fact, only a statement of the relief requested, and statements or conclusions of law to which no responses are required or provided.

19. Paragraph 23 of the Complaint contains no separate allegations of fact, and thus no response is required or provided. To the extent that a response may be required, DNR incorporates and re-states its responses to the allegations contained in Paragraphs 1 through 22 of the Complaint as set forth herein.

20. Paragraphs 24 and 25 of the Complaint contain no allegations of fact, only statements of the relief requested, and statements or conclusions of law to which no responses are required or provided.

21. Paragraph 26 of the Complaint contains no separate allegations of fact, and thus no response is required or provided. To the extent that a response may be required, DNR incorporates and re-states its responses to the allegations contained in Paragraphs 1 through 25 of the Complaint as set forth herein.

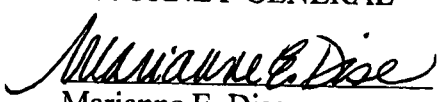
22. To the extent that Paragraph 27 of the Complaint contains allegations of facts and not merely statements of the relief requested or statements or conclusions of law to which no responses are required or provided, DNR denies the allegations.

AFFIRMATIVE DEFENSES

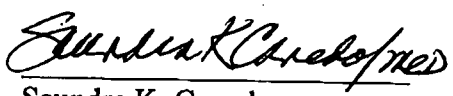
1. The Complaint fails to state a claim upon which relief can be granted.
2. The claim for damages is barred by governmental immunity.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL



Marianne E. Dise



Saundra K. Canedo
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
Attorneys for Defendant Department of Natural Resources, Critical Area Commission

Dated: November 22, 2006

VERIFICATION

I solemnly affirm under the penalties of perjury that the contents of the foregoing Answer are true and correct to the best of my knowledge, information, and belief.

Ren Serey
Executive Director
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays

Dated: November 22, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of November, 2006, a copy of the foregoing Verified Answer to Complaint was sent via first-class U.S. mail, postage prepaid, to:

David M. Plott, Esquire and Benjamin S. Wechsler, Esquire, Linowes and Blocher, LLP, 145 Main Street, Annapolis, Maryland 21401, Attorneys for Plaintiff, and to Linda M. Schuett, Esquire, County Attorney for Anne Arundel County, Office of Law, 2660 Riva Road, Annapolis, Maryland, 21401.

Marianne E. Dise

LINOWES | AND | BLOCHER LLP
ATTORNEYS AT LAW

Served

October 19, 2006

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

Hand Delivered

Civil Clerk
Circuit Court for Anne Arundel County
P.O. Box 71
Annapolis, MD 21404-0071

Re: *Wright Investment Group v. Maryland Department of Natural Resources, et al.*
Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages

Dear Madam Clerk:

Enclosed fo

1. nformation Report plus two (2)

2. nne Arundel County, in the
ee.

We will be se rivate process. We request
that you pleas nmonses are ready to be
picked up.

Your assistanc

Copies - don't need

Very truly yours,

LINOWES AND BLOCHER, LLP

Benjamin S. Wechsler

BSW:vlj

Enclosures
cc: Marianne Dise, Esq.
Sally M. Iliff, Esq.

F:\Wallach\Appeal\Petition Cover Letter.doc

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

Served

October 19, 2006

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

Hand Delivered

Civil Clerk
Circuit Court for Anne Arundel County
P.O. Box 71
Annapolis, MD 21404-0071

Re: *Wright Investment Group v. Maryland Department of Natural Resources, et al.*
Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages

Dear Madam Clerk:

Enclosed for filing you will find the following:

1. Complaint and Civil Non-Domestic Case Information Report plus two (2) service copies;
2. Check payable to Clerk, Circuit Court for Anne Arundel County, in the amount of $115.00 representing the filing fee.

We will be serving the Defendants with the Complaint by private process. We request that you please call our office (410.268.0881) when the summonses are ready to be picked up.

Your assistance is appreciated.

Very truly yours,

LINOWES AND BLOCHER, LLP

Benjamin S. Wechsler

BSW:vlj

Enclosures
cc: Marianne Dise, Esq.
Sally M. Iliff, Esq.

F:\Wallach\Appeal\Petition Cover Letter.doc

MSA_S_1831_33 (4 of 5)

Correspondence

WRIGHT INVESTMENT GROUP V. MARYLAND DNR/CAC AND ANNE ARUNDEL COUNTY COMPLAINT FOR WRIT OF MANDAMUS,

Correspondence

WRIGHT INVESTMENT GROUP V. MARYLAND DNR/CAC AND ANNE ARUNDEL COUNTY COMPLAINT FOR WRIT OF MANDAMUS, DELCLARATORY RELIEF, AND DAMAGES Case No. C-06-117695 (Circuit Court for Anne Arundel County)

Pendaflex
Esselte
76520 40% P4

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF NATURAL RESOURCES
580 Taylor Avenue, C-4
Annapolis, Maryland 21401
(410) 260-8352

PAUL J. CUCUZZELLA
Assistant Attorney General

3/1

per Erica @ Annapolis Office

4/30 @ 1:30 for motion hearing

410-222-1422

Cucuzzella, Paul

From: Cucuzzella, Paul
Sent: Tuesday, September 11, 2007 11:54 AM
To: 'Ben Wechsler'; Sarah M. Iliff (E-mail)
Cc: David M. Plott
Subject: RE: Dismissal -- Wright Investment Judicial Mandamus Action

Ben, looks fine to me. Please feel free to sign for me, but note the correct spelling of my last name: Cucuzzella. It's the burden I bare.

Paul

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Tuesday, September 11, 2007 11:41 AM
To: Cucuzzella, Paul; Sarah M. Iliff (E-mail)
Cc: David M. Plott
Subject: Dismissal -- Wright Investment Judicial Mandamus Action

Attached please find a stipulation for dismissal of the judicial mandamus action. I would like to get this on file tomorrow in order to give the Court sufficient advanced notice before our scheduled settlement conference next Tuesday. As Paul and I discussed, I don't believe that this order would be affected by Judge Manck's granting of the CAC's motion to dismiss, as the Order suggests that at the appropriate remedy would be a *Bucktail* type action under the Court's original jurisdiction. As such, I would prefer to see this dismissal be without prejudice in order to avoid confusion in the very unlikely situation where we would need to file another action in the future relating to this property's status vis-a-vis the Critical Area Law and the County's program. Please let me know whether you object to the stipulated dismissal, or alternatively execute and return the signature page to me via facsimile.

Benjamin S. Wechsler, Attorney
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410-268-0881
bwechsler@linowes-law.com
www.linowes-law.com

Internal Revenue Service Circular 230 Disclosure: As provided for in Treasury regulations, advice (if any) relating to federal taxes that is contained in this communication (including attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any plan or arrangement addressed herein.

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Cucuzzella, Paul

From: Ben Wechsler [bwechsler@linowes-law.com]

Sent: Tuesday, September 11, 2007 11:41 AM

To: Cucuzzella, Paul; Sarah M. Iliff (E-mail)

Cc: David M. Plott

Subject: Dismissal -- Wright Investment Judicial Mandamus Action

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY	)	
WRIGHT INVESTMENT GROUP	)	
Plaintiff	)	
v.	)	
MD DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS	)	**CIVIL ACTION NO. 06-117695**
Defendant	)	
And	)	
ANNE ARUNDEL COUNTY	)	
Defendant	)	

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

In consideration of the stipulation of the parties, as evidenced by the signatures of their respective attorneys, the Clerk will please mark the above-captioned case DISMISSED WITHOUT PREJUDICE BY STIPULATION OF THE PARTIES.

David M. Plott
Walter S.B. Childs
Benjamin S. Wechsler
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410.268.881

Marianne Dise
Paul Cuccuzella
Assistant Attorney General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street, Suite 100
Annapolis, Maryland 21401
410.260.3460

Sarah M. Iliff
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401
410.222.7888

Cucuzzella, Paul

From: Ben Wechsler [bwechsler@linowes-law.com]
Sent: Wednesday, August 01, 2007 2:59 PM
To: Cucuzzella, Paul; Sally Iliff; David M. Plott
Subject: RE: Wright Investments

Sally -- I'm so sorry about this. I assumed until this morning that from our previous conversation with Tim Sheridan, as well as our hearing before Judge Manck, that the pretrial conference had been taken off calendar. I called to confirm this morning and I was as surprised as Paul that the conference was still on calendar. I assumed (incorrectly) that all of us had thought it was off-calendar. In my haste I asked the assignment office to reschedule so that we could all get on the same page on case management issues without realizing that you were already there. Obviously, had I realized, I would have asked the assignment office to communicate the message to you.

Sally -- why don't you give me a call to discuss this matter and case management in general so we can avoid future confusion.

Ben

-----Original Message-----
From: Cucuzzella, Paul [mailto:PCucuzzella@dnr.state.md.us]
Sent: Wednesday, August 01, 2007 2:40 PM
To: Sally Iliff; David M. Plott
Cc: Ben Wechsler
Subject: RE: Wright Investments

Sally, in all honesty, I did not even have it on my calendar. If you recall during the motions hearing, I raised the issue of pending deadlines on the scheduling order with Judge Manck, to which, if I recall correctly, he effectively said to disregard the deadlines because the motion to dismiss was pending. Ben discovered the problem this morning and contacted the Clerk's office. Below is the text of an e-mail Ben sent to me this morning:

Paul --

I had assumed (incorrectly it turns out) that Tim Sheridan had taken all our dates from the scheduling order in the Judicial Mandamus action off-calendar. Out of an abundance of caution I called the Court this morning relating to the pretrial conference scheduled before Judge Lerner, and lo and behold we were still on-calendar for 11:30 this morning. Unable to reach you or Marianne, I had the assignments office re-schedule for September 18, 2007 at 9:00 a.m.

Please call me at your early convenience to discuss case management issues in this matter.
Benjamin S. Wechsler, Attorney
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410-268-0881
bwechsler@linowes-law.com
www.linowes-law.com

-----Original Message-----
From: Sally Iliff [mailto:siliff@aacounty.org]
Sent: Wednesday, August 01, 2007 2:03 PM
To: Cucuzzella, Paul; David M. Plott
Subject: Wright Investments

Cucuzzella, Paul

From: Cucuzzella, Paul
Sent: Wednesday, August 01, 2007 2:40 PM
To: 'Sally Iliff'; David M. Plott
Cc: 'Ben Wechsler'
Subject: RE: Wright Investments

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bwechsler@linowes-law.com
www.linowes-law.com

-----Original Message-----
From: Sally Iliff [mailto:siliff@aacounty.org]
Sent: Wednesday, August 01, 2007 2:03 PM
To: Cucuzzella, Paul; David M. Plott
Subject: Wright Investments

Did I miss the memo? I went to court this morning and waited and waited for someone to show up. Finally went in and talked to Judge Lerner who had just signed an order postponing until Sept 18. He was confused, too, about what was going on but said he presumed that we needed to wait for Judge Manck's decision. Sally

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Cucuzzella, Paul

From: Sally Iliff [siliff@aacounty.org]
Sent: Wednesday, August 01, 2007 2:03 PM
To: Cucuzzella, Paul; David M. Plott
Subject: Wright Investments

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Cucuzzella, Paul

From: Ben Wechsler [bwechsler@linowes-law.com]
Sent: Wednesday, August 01, 2007 12:32 PM
To: Cucuzzella, Paul
Cc: David M. Plott
Subject: Wright Investment -- PreTrial Conference

Paul --

I had assumed (incorrectly it turns out) that Tim Sheridan had taken all our dates from the scheduling order in the Judicial Mandamus action off-calendar. Out of an abundance of caution I called the Court this morning relating to the pretrial conference scheduled before Judge Lerner, and lo and behold we were still on-calendar for 11:30 this morning. Unable to reach you or Marianne, I had the assignments office re-schedule for September 18, 2007 at 9:00 a.m.

Please call me at your early convenience to discuss case management issues in this matter.

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OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF NATURAL RESOURCES
580 Taylor Avenue, C-4
Annapolis, Maryland 21401
(410) 260-8352

PAUL J. CUCUZZELLA
Assistant Attorney General

Nancy 410 222-1350
Buhn

410 222-1164

TRANSMISSION VERIFICATION REPORT

TIME : 03/08/2007 11:59
NAME : OAG NATURAL RESOURCE
FAX : 4102608364
TEL : 4102608365
SER.# : 000K5J271896

DATE,TIME	03/08 11:59
FAX NO./NAME	94102221164
DURATION	00:00:31
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM

OFFICE OF THE ATTORNEY GENERAL

For the
Department of Natural Resources
Tawes State Office Building, C4
580 Taylor Avenue
Annapolis, MD 21401
(410)260-8365

FACSIMILE COVER SHEET

DATE: 3/9/07

TO: Nancy Baker

PHONE NO: _____ FAX NO: 410 222-1164

FROM: Paul Cruzzella

PHONE NO: 410 260-8352 FAX NO: (410) 260-8364

SPECIAL INSTRUCTIONS: _____

OFFICE OF THE ATTORNEY GENERAL

For the
Department of Natural Resources
Tawes State Office Building, C4
580 Taylor Avenue
Annapolis, MD 21401
(410)260-8365

FACSIMILE COVER SHEET

DATE: 3/9/07

TO: Nancy Baker

PHONE NO: _____ FAX NO: 410 222-1164

FROM: Paul Cruzzella

PHONE NO: 410 260-8352 FAX NO: (410) 260-8364

SPECIAL INSTRUCTIONS: _____

TOTAL NUMBER OF PAGES 2 (Including this Page)

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IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP,	*	
Plaintiff,	*	
v.	*	Case No.: C-06-117695
MARYLAND DEPARTMENT OF NATURAL RESOURCES, CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, et al.,	*	
Defendants.	*	

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

ORDER

The Court, having considered the Consent Request To Reschedule Complex Motions Hearing and having determined that all parties are available for hearing on April 30, 2007 at 1:30 p.m., and having determined by Order dated February 20, 2007 that this case "shall travel" with Case No. C-2006-117432, does, this ___ day of _____, 2007,

ORDER that the Consent Request To Reschedule Complex Motions Hearing is hereby GRANTED; and

FURTHER ORDER that a complex motions hearing on this case, together with a motions hearing on Case No. C-2006-117432, shall be set for April 30, 2007 at 1:30 p.m.

_____
Judge

Cucuzzella, Paul

From: Dise, Marianne E.
Sent: Tuesday, March 20, 2007 10:44 AM
To: Cucuzzella, Paul
Cc: Serey, Ren
Subject: FW: Wright Investments

this is the bill to change the map for the Wright property.

-----Original Message-----
From: Sally Iliff [mailto:siliff@aacounty.org]
Sent: Tuesday, March 20, 2007 10:17 AM
To: Dise, Marianne E.; David M. Plott
Subject: Wright Investments

Per your question, Bill 22-07 was introduced last night.

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Cucuzzella, Paul

From: Dise, Marianne E.
Sent: Thursday, March 01, 2007 2:24 PM
To: Cucuzzella, Paul
Subject: Wright Investment

Fyi - maybe the case will go away..... Just talked to Lois Villamaire (head of AA P&Z) - map amendment for Wright Investment property is drafted and has been sent to County Council. Council has to enact it legislatively.

Cucuzzella, Paul

From: Cucuzzella, Paul
Sent: Thursday, March 01, 2007 9:43 AM
To: 'Ben Wechsler'; Sally Iliff
Cc: Dise, Marianne E.
Subject: RE: Wright Investment v. CAC, et al.

As discussed, the Assignments Office has given us April 30 at 1:30.

Paul

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Tuesday, February 27, 2007 4:25 PM
To: Cucuzzella, Paul; Sally Iliff
Cc: Dise, Marianne E.
Subject: RE: Wright Investment v. CAC, et al.

Any update on whether this hearing date has been changed?

-----Original Message-----
From: Cucuzzella, Paul [mailto:PCucuzzella@dnr.state.md.us]
Sent: Tuesday, February 13, 2007 12:12 PM
To: Sally Iliff; Ben Wechsler
Cc: Dise, Marianne E.
Subject: Wright Investment v. CAC, et al.

Ben/Sally, yesterday I received notice that on March 26 (the day of our motions hearing) I have, of all things, jury duty in Baltimore City (as a City resident, this is an all too frequent occurrence). I don't think it's worth asking to be excused simply because we have a motions hearing. I'm wondering if you both would consent to a request for postponement. If the postponement is denied, then I might have cause to be excused. Unfortunately, Marianne will be out of town on the 26th, so she's unavailable to fill in for me. Thanks.

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: Wednesday, February 14, 2007 10:26 AM
To: Cucuzzella, Paul
Subject: FW: Wright Investment

Paul, this is the map change for the Wright Investment property. The County has asked Ren/me to attend the Council's hearing, and we'll do that, to support the change.
Marianne

-----Original Message-----
From: Serey, Ren
Sent: Tuesday, February 13, 2007 4:41 PM
To: Dise, Marianne E.; Owens, Mary; Hoerger, Lisa
Subject: FW: Wright Investment

FYI

-----Original Message-----
From: Lois Villemaire [mailto:PZVILL42@aacounty.org]
Sent: Tuesday, February 13, 2007 3:54 PM
To: Serey, Ren
Subject: Wright Investment

Ren, The legislation to remap the CA around Whitehall Creek as directed by the CAC may be introduced to the Council on 2/20. If not, it will be 3/5. The Council work session will probably be the morning of 3/13.
Public hearing night depends on the date of introduction.

We have closed early today due to the weather and who knows what tomorrow will bring. I will be in touch.

Thanks,

Lois

Cucuzzella, Paul

From: Sally Iliff [siliff@aacounty.org]
Sent: Tuesday, February 13, 2007 12:18 PM
To: Cucuzzella, Paul; Ben Wechsler
Cc: Dise, Marianne E.
Subject: Re: Wright Investment v. CAC, et al.

Actually, that wouldn't make me too unhappy, I was planning to return ½ day early from a weekend trip. In truth, I'd rather stay. So I'm fine either way. Sally

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>>> "Cucuzzella, Paul" <PCucuzzella@dnr.state.md.us> 2/13/2007 12:11:45 PM >>>
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Cucuzzella, Paul

From: Ben Wechsler [bwechsler@linowes-law.com]
Sent: Wednesday, February 14, 2007 12:12 PM
To: Sally Iliff; Cucuzzella, Paul
Cc: Dise, Marianne E.; David M. Plott
Subject: RE: Wright Investment v. CAC, et al.

Paul -- As a fellow Baltimore City resident, you have my sympathy on this one. Can you get in touch with the assignment office and propose a few other dates, preferably as soon as possible after 3/26? My client is extremely reluctant to push out the hearing date by more than a week or two. While we certainly want to be cooperative, we ned to keep this matter moving.

Ben

> -----Original Message-----
> From: Sally Iliff [mailto:siliff@aacounty.org]
> Sent: Tuesday, February 13, 2007 12:18 PM
> To: Paul Cucuzzella; Ben Wechsler
> Cc: Marianne E. Dise
> Subject: Re: Wright Investment v. CAC, et al.
>
> Actually, that wouldn't make me too unhappy, I was planning to return ½ day early from a weekend trip. In truth, I'd rather stay. So I'm fine either way. Sally
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> >>> "Cucuzzella, Paul" <PCucuzzella@dnr.state.md.us> 2/13/2007 12:11:45 PM >>>
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Paul J. Cucuzzella

Assistant Attorney General

Maryland Department of Natural Resources

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Annapolis, Maryland 21401

(410) 260-8352

fax (410) 260-8364

pcucuzzella@dnr.state.md.us

Cucuzzella, Paul

From: Cucuzzella, Paul
Sent: Thursday, February 15, 2007 8:42 AM
To: 'Ben Wechsler'; Sally Iliff
Cc: Dise, Marianne E.; David M. Plott
Subject: RE: Wright Investment v. CAC, et al.

Thanks. I'm filing a consent request and will contact the assignment office for alternate dates.

Paul

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Wednesday, February 14, 2007 12:12 PM
To: Sally Iliff; Cucuzzella, Paul
Cc: Dise, Marianne E.; David M. Plott
Subject: RE: Wright Investment v. CAC, et al.

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> Paul J. Cucuzzella
>
> Assistant Attorney General
>
> Maryland Department of Natural Resources
>
> 580 Taylor Ave., C-4
>
> Annapolis, Maryland 21401

Cucuzzella, Paul

From: Ben Wechsler [bwechsler@linowes-law.com]
Sent: Thursday, February 15, 2007 9:21 AM
To: Cucuzzella, Paul
Subject: RE: Wright Investment v. CAC, et al.

Great. Thanks.

-----Original Message-----
From: Cucuzzella, Paul [mailto:PCucuzzella@dnr.state.md.us]
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To: Ben Wechsler; Sally Iliff
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Cc: Dise, Marianne E.; David M. Plott
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> Cc: Marianne E. Dise
> Subject: Re: Wright Investment v. CAC, et al.
>
> Actually, that wouldn't make me too unhappy, I was planning to return ½ day early from a weekend trip. In truth, I'd rather stay. So I'm fine either way. Sally
>
> CONFIDENTIALITY NOTICE: This e-mail contains confidential information protected by the attorney-client or work product privileges.
>
> >>> "Cucuzzella, Paul" <PCucuzzella@dnr.state.md.us> 2/13/2007 12:11:45 PM >>>
>
> Ben/Sally, yesterday I received notice that on March 26 (the day of our motions hearing) I have, of all things, jury duty in Baltimore City (as a City resident, this is an all too frequent occurrence). I don't think it's worth asking to be excused simply because we have a motions hearing. I'm wondering if you both would consent to a request for postponement. If the postponement is denied, then I might have cause to be excused. Unfortunately, Marianne will be out of town on the 26th, so she's unavailable to fill in for me. Thanks.

Cucuzzella, Paul

From: Cucuzzella, Paul

Sent: Tuesday, February 13, 2007 12:12 PM

To: 'Sally Iliff'; 'Ben Wechsler'

Cc: Dise, Marianne E.

Subject: Wright Investment v. CAC, et al.

Ben/Sally, yesterday I received notice that on March 26 (the day of our motions hearing) I have, of all things, jury duty in Baltimore City (as a City resident, this is an all too frequent occurrence). I don't think it's worth asking to be excused simply because we have a motions hearing. I'm wondering if you both would consent to a request for postponement. If the postponement is denied, then I might have cause to be excused. Unfortunately, Marianne will be out of town on the 26th, so she's unavailable to fill in for me. Thanks.

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: Cucuzzella, Paul
Sent: Monday, January 29, 2007 1:42 PM
To: 'Sally Iliff'
Subject: RE: Wright Inv. v. Critical Area Commission et al.

Got it. Thanks. This is the most confusing file that I think I've ever opened. For the life of me, I can't figure out why Ben filed two separate actions, instead of simply amending the first.

Paul

-----Original Message-----
From: Sally Iliff [mailto:siliff@aacounty.org]
Sent: Monday, January 29, 2007 1:22 PM
To: Cucuzzella, Paul
Subject: Re: Wright Inv. v. Critical Area Commission et al.

Paul: Rather than restate the prior objections, I was referencing the memorandum already filed in the case in chief. I suppose my cross referenence was clumsy and I should have sent the prior memo. You should have it in the file. If not, I'll send it on. My presumption is that the court will be consolidating this entire mess and my hope is that it will not be necessary to make repetitious arguments. Sally

CONFIDENTIALITY NOTICE: This e-mail contains confidential information protected by the attorney-client or work product privileges.

>>> "Cucuzzella, Paul" <PCucuzzella@dnr.state.md.us> 1/29/2007 1:04:34 PM >>>
Sally, I'm in receipt of your Motion to Dismiss the Cross Claim, but don't appear to have your Memorandum of Law that accompanies it. Could you please fax or e-mail a copy. Thanks.

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: Cucuzzella, Paul

Sent: Monday, January 29, 2007 1:05 PM

To: 'Sally Iliff'

Subject: Wright Inv. v. Critical Area Commission et al.

Sally, I'm in receipt of your Motion to Dismiss the Cross Claim, but don't appear to have your Memorandum of Law that accompanies it. Could you please fax or e-mail a copy. Thanks.

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: Cucuzzella, Paul
Sent: Tuesday, January 23, 2007 10:24 AM
To: 'Ben Wechsler'; Sarah M. Iliff (E-mail)
Subject: RE: Wright Investment Group

Works for me. Ben, I'm assuming that you'll initiate the call.

Paul

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Tuesday, January 23, 2007 10:24 AM
To: Cucuzzella, Paul; Sarah M. Iliff (E-mail)
Subject: Wright Investment Group

Can we schedule a conference call at 3:00 today to discuss case management issues in Wright Investment Group matters?

Benjamin S. Wechsler, Attorney
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410-268-0881
bwechsler@linowes-law.com
www.linowes-law.com

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Cucuzzella, Paul

From: Cucuzzella, Paul

Sent: Friday, January 19, 2007 2:11 PM

To: 'Ben Wechsler'

Subject: RE: Wright Investment -- Teleconference With Chambers

Ben, I know that CJ Bell has mandated deadlines for the Circuit Court to complete cases, but it continues to befuddle me as to why some courts (namely Anne Arundel) issue scheduling orders prior to the resolution of motions to dismiss (and, in this case, even prior to the *filing* of answers or motions to dismiss). At any rate, I agree with your thoughts and am available for a conference call pretty much any time Monday thru Wednesday. Thanks.

Paul

> -----Original Message-----
> **From:** Ben Wechsler [mailto:bwechsler@linowes-law.com]
> **Sent:** Friday, January 19, 2007 12:43 PM
> **To:** Cucuzzella, Paul
> **Subject:** RE: Wright Investment -- Teleconference With Chambers
>
> Attached are (1) The Court's Dismissal Order, and (2) the Scheduling Order in in Case No. 06-117695, which I have been referring to as the Judicial Mandamus proceeding.
>
> As you will see, there are upcoming deadlines in the the Judicial Mandamus action pertaining to expert witness disclosure. Selection of expert witnesses strikes me as premature. The County has a motion to dismiss pending in the Judicial Mandamus action, DNR/CAC has a cross-claim against the County in that same action, the Plaintiffs seek to consolidate the actions, and DNR/CAC has moved to dismiss the Administrative Mandamus action on procedural grounds.
>
> As I mentioned, my current (but evolving) thinking is that we should have the Court consider initial motions (the two motions to dismiss and the motion to consolidate) as soon as possible, and then ask the Court to consider an amended scheduling order that makes sense based on how the case is configured after the motions are heard.
>
> After you review, please let me know your availability for a conference call next week with Sally Iliff, the attorney representing Anne Arundel County.
>
> Respectfully,
>
> Benjamin S. Wechsler
>
> > -----Original Message-----
> > **From:** Ben Wechsler
> > **Sent:** Thursday, January 18, 2007 3:30 PM
> > **To:** 'Cucuzzella, Paul'
> > **Subject:** RE: Wright Investment -- Teleconference With Chambers
> >
> > Paul -- attached is a copy of our Motion to Reconsider we filed on Tuesday.
> >
> > > -----Original Message-----
> > > **From:** Cucuzzella, Paul [mailto:PCucuzzella@dnr.state.md.us]
> > > **Sent:** Thursday, January 18, 2007 3:08 PM
> > > **To:** Ben Wechsler
> > > **Subject:** RE: Wright Investment -- Teleconference With Chambers

Cucuzzella, Paul

From: Ben Wechsler [bwechsler@linowes-law.com]
Sent: Friday, January 19, 2007 12:43 PM
To: Cucuzzella, Paul
Subject: RE: Wright Investment -- Teleconference With Chambers

Attached are (1) The Court's Dismissal Order, and (2) the Scheduling Order in in Case No. 06-117695, which I have been referring to as the Judicial Mandamus proceeding.

As you will see, there are upcoming deadlines in the the Judicial Mandamus action pertaining to expert witness disclosure. Selection of expert witnesses strikes me as premature. The County has a motion to dismiss pending in the Judicial Mandamus action, DNR/CAC has a cross-claim against the County in that same action, the Plaintiffs seek to consolidate the actions, and DNR/CAC has moved to dismiss the Administrative Mandamus action on procedural grounds.

As I mentioned, my current (but evolving) thinking is that we should have the Court consider initial motions (the two motions to dismiss and the motion to consolidate) as soon as possible, and then ask the Court to consider an amended scheduling order that makes sense based on how the case is configured after the motions are heard.

After you review, please let me know your availability for a conference call next week with Sally Iliff, the attorney representing Anne Arundel County.

Respectfully,

Benjamin S. Wechsler

> -----Original Message-----
> **From:** Ben Wechsler
> **Sent:** Thursday, January 18, 2007 3:30 PM
> **To:** 'Cucuzzella, Paul'
> **Subject:** RE: Wright Investment -- Teleconference With Chambers
>
> Paul -- attached is a copy of our Motion to Reconsider we filed on Tuesday.
>
> > -----Original Message-----
> > **From:** Cucuzzella, Paul [mailto:PCucuzzella@dnr.state.md.us]
> > **Sent:** Thursday, January 18, 2007 3:08 PM
> > **To:** Ben Wechsler
> > **Subject:** RE: Wright Investment -- Teleconference With Chambers
> >
> > Ben, so you spelled my name wrong on the first attempt?...a common occurrence. I am not co-located with Marianne, so, if it's not too much trouble, please either fax or e-mail the motion. I can file a "me too" in response.
> >
> > 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: Ben Wechsler [bwechsler@linowes-law.com]
Sent: Thursday, January 18, 2007 3:30 PM
To: Cucuzzella, Paul
Subject: RE: Wright Investment -- Teleconference With Chambers

Paul -- attached is a copy of our Motion to Reconsider we filed on Tuesday.

-----Original Message-----
From: Cucuzzella, Paul [mailto:PCucuzzella@dnr.state.md.us]
Sent: Thursday, January 18, 2007 3:08 PM
To: Ben Wechsler
Subject: RE: Wright Investment -- Teleconference With Chambers

Ben, so you spelled my name wrong on the first attempt?...a common occurrence. I am not co-located with Marianne, so, if it's not too much trouble, please either fax or e-mail the motion. I can file a "me too" in response.

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

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Thursday, January 18, 2007 2:59 PM
To: Cucuzzella, Paul
Subject: FW: Wright Investment -- Teleconference With Chambers

-----Original Message-----
From: Ben Wechsler
Sent: Thursday, January 18, 2007 2:58 PM
To: 'Dise, Marianne E.'; 'Sally Iliff'; 'pucuzzella@dnr.state.md.us'
Cc: David M. Plott
Subject: RE: Wright Investment -- Teleconference With Chambers

Thanks Marianne.

Paul -- I will be in touch to discuss discovery/coordination issues.

-----Original Message-----
From: Dise, Marianne E. [mailto:MDise@dnr.state.md.us]
Sent: Thursday, January 18, 2007 2:52 PM
To: Ben Wechsler; Sally Iliff; pucuzzella@dnr.state.md.us
Cc: David M. Plott
Subject: RE: Wright Investment -- Teleconference With Chambers

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

Benjamin S. Wechsler
410.268.0881
bweshsler@linowes-law.com

January 16, 2007

The Honorable Paul A. Hackner
Circuit Court for Anne Arundel County
P.O. Box 2395
Annapolis, MD 21404-0071

Re: *Wright Investment Group v. Maryland Department of Natural Resources/Critical Area Commission for the Chesapeake and Atlantic Coastal Bays and Anne Arundel County*
Case No. C-06-117695

Dear Judge Hackner:

Attached please find a courtesy copy of Wright Investment Group's Motion to Reconsider the Court's Order of December 28, 2006, which dismissed both the Critical Area Commission and Anne Arundel County as defendants in Case No. C-06-117695. As explained in our moving papers, it appears that the Clerk's office misdocketed the Critical Area Commission's Motion to Dismiss in the wrong case (a motion that should have been filed in Case No. C-06-117432), and failed to docket Wright Investment Group's timely-filed Opposition to the County's Motion to Dismiss. Thus, it appeared that Wright failed to oppose either the Critical Area Commission's or the County's motion to dismiss.

I have discussed these clerical errors with counsel for both the Critical Area Commission and Anne Arundel County, and have copied them on this correspondence. Thank you for your reconsideration of this matter.

Very truly yours,

LINOWES AND BLOCHER LLP

Benjamin S. Wechsler

BSW:lbr
Enclosures
cc: Marianne Dise, Esq.
Sarah Iliff, Esq.

rec'd in Judge Hackner's chambers 1/16/07
T. Smith

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY	)	
WRIGHT INVESTMENT GROUP	)	
Plaintiff	)	
v.	)	
MD DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS	)	**CIVIL ACTION NO. C-06-117695**
Defendant	)	
And	)	
ANNE ARUNDEL COUNTY	)	
Defendant	)	

PLAINTIFF'S MOTION TO RECONSIDER ORDER DISMISSING CRITICAL AREA COMMISSION AND ANNE ARUNDEL COUNTY

Plaintiff, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully requests that the Court reconsider its December 28, 2006 Order dismissing both the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission") and Anne Arundel County from Civil Action No. C-06-117695. The basis for the dismissal was the mistaken belief that no response had been filed to either party's respective Motions to Dismiss. As set forth in detail below (a) it appears that the Critical Area Commission's Motion to Dismiss was docketed in the wrong case, and (b) Wright's Opposition to the County's Motion to Dismiss was not properly docketed in this case. Wright respectfully

requests a Court reconsider its December 28, 2006 Order, and issue an Order requesting that the Clerk correct the clerical errors.

THE CRITICAL AREA COMMISSION'S MISDOCKETED MOTION TO DISMISS

On October 6, 2006 Wright filed a Petition for Administrative Mandamus, Or In the Alternative for Judicial Review (the "Administrative Mandamus Action"). The Administrative Mandamus action requests relief from the Critical Area Commission and Anne Arundel County. The Clerk assigned the Administrative Mandamus Action case No. C-06-117432.

On October 19, 2006, Wright filed a separate Verified Complaint for Writ of Mandamus, Declaratory Relief, and Damages (the "Judicial Mandamus Action"). The Judicial Mandamus Action also requests relief from the Critical Area Commission and Anne Arundel County, and is based on similar proceedings.[1] The Clerk assigned Judicial Mandamus Action Civil Case No. C-06-117695.

On November 6, 2006 the Critical Area Commission filed a Motion to Dismiss. The moving papers did not contain a case number, but indicated that the motion was filed in order to "dismiss the Petition for Administrative Mandamus, or in the Alternative, for Judicial Review." The "Petition for Administrative Mandamus" had been assigned Case No. C-06-117432. The service copy of the Critical Area Commission's Motion to Dismiss did not contain a case number. An inspection of the Critical Area Commission's Motion to Dismiss was misdocketed in the Judicial Mandamas action, Civil Case No. C-06-117695.

[1] Wright has recently filed a Motion to Consolidate the Judicial Mandamus Action and the Administrative Mandamus Action.

On November 22, 2006 Wright filed its Opposition to the Critical Area Commission's Motion to Dismiss. Wright filed the Opposition in Case No. C-06-117432.

Examining the Dockets for both Case No. 06-117695 and Case No. 06-117432, it appears that the Critical Area Commission's Motion to Dismiss was misdocketed in the Judicial Mandamus Action (Case No. C-06-117695), and that Wright filed its opposition and request for hearing in the correct case (Case No. C-06-117432).

Based on this misdocketing, Wright respectfully requests that the Court reconsider its December 28, 2006 Order dismissing Case No. C-06-117695 as against the Critical Area Commission, and issue an Order requiring the Clerk to properly docket the Critical Area Commission's Motion to Dismiss in Case No. C-06-117432.

THE MISDOCKETED OPPOSITION TO ANNE ARUNDEL COUNTY'S MOTION TO DISMISS

In its December 28, 2006 Order, the Court also dismissed the County as a defendant in the Judicial Mandamus Action (Case No. C-06-117695), again for an ostensible failure of Wright to file an opposition to the Motion.

Anne Arundel County filed its Motion to Dismiss in the Judicial Mandamus Action on November 27, 2006. The Motion to Dismiss was properly docketed in Case No. C-06-117695.

On December 15, 2006 Wright filed and served the Plaintiff's Opposition to County's Motion to Dismiss. A filed-endorsed copy of the Opposition to County's Motion to Dismiss is attached as Exhibit A to the Affidavit of Verna L. Jones filed herewith.

An examination of the Court's Docket, however, reveals that Wright's Opposition to County's Motion to Dismiss was not docketed in Case No. C-06-117695. Rather, it appears that the properly-filed motion was never docketed by the Clerk, and thus it appears from the docket that the County's Motion to Dismiss was not opposed by Wright. An inspection of the Court's records reveals that a filed-endorsed copy of Wright's Opposition in fact is in the Clerk's file. Declaration of Verna L. Jones, ¶ 2.

Wright respectfully requests that the Court reconsider it Order Dismiss the County as a defendant in Case No. C-06-117695. Wright further requests that the Court issue an Order directing the Clerk to docket Wright's Opposition to the County's Motion to Dismiss.

CONCLUSION

Based on the foregoing, Wright respectfully requests that the Court:

1. Reconsider its December 28, 2006 Order dismissing the Critical Area Commission as a defendant, on the basis that the Critical Area Commission's Motion to Dismiss had been docketed in Case No. C-06-117695 when it should have been Docketed in Case No. C-06-117432.

2. Issue an Order directing the Clerk to re-docket the Critical Area Commission's Motion to Dismiss into Case No. C-06-117432.

3. Reconsider the December 28, 2006 Order dismissing Anne Arundel County as a defendant in Case No. C-06-117695, on the basis that the Clerk failed to properly docket Wright's Opposition to the County's Motion to Dismiss.

4. Issue an Order directing the Clerk to docket Wright's opposition to the County's Motion to Dismiss in Case No. C-06-117695.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury of the laws of the State of Maryland, that on this 16th day of January, 2007, a true and correct copy of the following:

1. Plaintiff's Motion to Reconsider Order Dismissing Critical Area Commission and Anne Arundel County,

2. [Proposed] Order, and

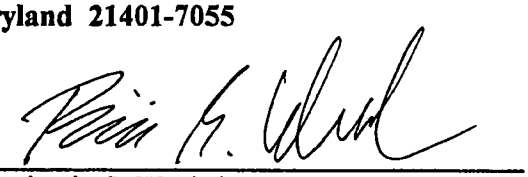
3. Affidavit of Verna L. Jones in Support of Plaintiff's Motion to Reconsider Order Dismissing Critical Area Commission and Anne Arundel County.

were 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

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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY	)	
WRIGHT INVESTMENT GROUP	)	
Plaintiff	)	
v.	)	
MD DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS	)	**CIVIL ACTION NO. C-06-117695**
Defendant	)	
And	)	
ANNE ARUNDEL COUNTY	)	
Defendant	)	

AFFIDAVIT OF VERNA L. JONES IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER ORDER DISMISSING CRITICAL AREA COMMISSION AND ANNE ARUNDEL COUNTY

I, Verna L. Jones, am a Paralegal at the law firm of Linowes and Blocher LLP . I make this affidavit on my own personal knowledge, and am competent to offer the following testimony.

1. Attached hereto as Exhibit A is a filed-endorsed copy of "Plaintiff's Opposition to County's Motion to Dismiss" (the "Opposition") in Anne Arundel Circuit Court Civil Action No. C-06-117695. As reflected by the date stamp, I filed the Opposition and supporting paperwork

on December 15, 2006. The Certificate of Service affirms that these same documents were served by First Class Mail to counsel of record the same day.

2. On January 8, 2007 this office received by mail a copy of the Court's blue-line Order dismissing both Anne Arundel County and the Critical Area Commission as defendants on Case No. C-06-117695. On the direction of Mr. David Plott, attorney of record for the Plaintiff in this action, I inspected the electronic docket in Case No. C-06-117695, revealing that the Opposition had not been docketed in the Court's records. Thereafter, I inspected the Clerk's hard-copy file in this matter. The Opposition was located in the appropriate Circuit Court file, but did not appear to have been docketed.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge information and belief.

Date: January 16, 2007

Ms. Verna L. Jones

F:\Wallach\JUDICIAL MANDAMUS\Pleadings\Affidavit-VLJ.doc

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP
21750 Deveron Cove
Yorba Linda, CA 92607

Plaintiff

v.

MD DEPARTMENT OF NATURAL RESOURCES/ 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-06-117695

Filed
2006 DEC 15 P 12:35

PLAINTIFF'S OPPOSITION TO COUNTY'S MOTION TO DISMISS

Plaintiff, Wright Investment Group ("Wright"), by and through its attorneys, David M. Plott and Linowes and Blocher LLP, respectfully requests that the Court deny Anne Arundel County's (the "County") Motion to Dismiss. As set forth more fully herein, the County's Motion to Dismiss must fail because; (1) Wright's Verified Complaint states a cause of action for mandamus because it seeks to compel the County to engage in a ministerial, non-discretionary act; (2) the County is an indispensable party that is required

EXHIBIT "A"

to be joined in the action in order to give Wright relief; and (3) even assuming that Wright's mandamus action were improper, the Verified Complaint states additional causes of action against the County on which relief should be granted.

RELEVANT FACTUAL BACKGROUND

The procedural history and relevant factual background of this matter is set forth at Paragraphs 8 through 19 of Plaintiff's Verified Complaint.

The facts relevant to withstand the County's Motion to Dismiss are straightforward. 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

Wright's 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 Court of Special Appeals' 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 Plaintiff

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 Court of Special 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 Plaintiff relief.

In Any Event, the County Is Subject to Wright's Request for Declaratory Relief

The County urges dismissal on the basis that Wright allegedly has not stated a claim for mandamus relief. For the sake of argument, even if the County were correct, dismissal would be inappropriate. Wright's Verified Complaint pleads multiple causes of action, including Declaratory Relief. Specifically, Wright seeks a declaration that the County's Critical Area Map be amended to reflect the mapping mistake without seeking a formal map amendment from the Critical Area Commission. Wright's declaratory relief request is not subject to the County's Motion to Dismiss, and thus dismissal of the County as a party to this action is inappropriate.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury of the laws of the State of Maryland, that on this 15th day of December, 2006, a true and correct copy of the foregoing **PLAINTIFF'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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IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY	)	
WRIGHT INVESTMENT GROUP	)	
Plaintiff	)	
v.	)	
MD DEPARTMENT OF NATURAL RESOURCES/ CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS	)	**CIVIL ACTION NO. C-06-117695**
Defendant	)	
And	)	
ANNE ARUNDEL COUNTY	)	
Defendant	)	

[PROPOSED] ORDER

The Court, having considered Wright Investment Group's Motion to Reconsider, the Affidavit of Verna L. Jones, and the Court's files, together with any response thereto and argument presented at hearing, and having found that the Court's Order of December 28, 2006 dismissing the Critical Area Commission and Anne Arundel County was mistakenly issued, does this ___ day of _____, 2007,

ORDER that the Court's Order Dismissing the Critical Area Commission and Anne Arundel County dated December 28, 2006 hereby is vacated;

ORDER that the Clerk re-docket the Critical Area Commission's Motion to Dismiss filed on November 6, 2006 into Civil Case No. C-06-117432;

ORDER that the Clerk docket Wright Investment Group's Opposition to County's Motion to Dismiss, filed on December 11, 2006, into Civil Case No. C-06-117695;

_____

The Honorable Judge Hackner

F:\Wallach\JUDICIAL MANDAMUS\Pleadings\Order-Mot to Reconsider.doc

Cucuzzella, Paul

From: Cucuzzella, Paul
Sent: Thursday, January 18, 2007 3:08 PM
To: 'Ben Wechsler'
Subject: RE: Wright Investment -- Teleconference With Chambers

Ben, so you spelled my name wrong on the first attempt?...a common occurrence. I am not co-located with Marianne, so, if it's not too much trouble, please either fax or e-mail the motion. I can file a "me too" in response.

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

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Thursday, January 18, 2007 2:59 PM
To: Cucuzzella, Paul
Subject: FW: Wright Investment -- Teleconference With Chambers

-----Original Message-----
From: Ben Wechsler
Sent: Thursday, January 18, 2007 2:58 PM
To: 'Dise, Marianne E.'; 'Sally Iliff'; 'pucuzzella@dnr.state.md.us'
Cc: David M. Plott
Subject: RE: Wright Investment -- Teleconference With Chambers

Thanks Marianne.

Paul -- I will be in touch to discuss discovery/coordination issues.

-----Original Message-----
From: Dise, Marianne E. [mailto:MDise@dnr.state.md.us]
Sent: Thursday, January 18, 2007 2:52 PM
To: Ben Wechsler; Sally Iliff; pucuzzella@dnr.state.md.us
Cc: David M. Plott
Subject: RE: Wright Investment -- Teleconference With Chambers

Hi Ben, I received the motion. I have no objection. My colleague, Paul Cucuzzella, will be working on the Wright cases, so please include him on any future emails - pcucuzzella@dnr.state.md.us- and phone calls - 410-260-8352. Thanks, Marianne Dise

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]

Cucuzzella, Paul

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> **Sent:** Thursday, January 18, 2007 2:52 PM
> **To:** Ben Wechsler; Sally Iliff; pucuzzella@dnr.state.md.us
> **Cc:** David M. Plott
> **Subject:** RE: Wright Investment -- Teleconference With Chambers
>
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>
> > -----Original Message-----
> > **From:** Ben Wechsler [mailto:bwechsler@linowes-law.com]
> > **Sent:** Tuesday, January 16, 2007 11:45 AM
> > **To:** Sally Iliff; Dise, Marianne E.
> > **Cc:** David M. Plott
> > **Subject:** RE: Wright Investment -- Teleconference With Chambers
> >
> > You should receive service copies of our Motion to Reconsider in tomorrow's mail. A courtesy copy of the filing will be hand-delivered to Judge Hackner's chambers today.
> >
> > > -----Original Message-----
> > > **From:** Sally Iliff [mailto:siliff@aacounty.org]
> > > **Sent:** Tuesday, January 09, 2007 10:38 AM
> > > **To:** Marianne Dise (E-mail); Ben Wechsler
> > > **Cc:** David M. Plott
> > > **Subject:** Re: Wright Investment -- Teleconference With Chambers
> > >
> > > I do not object to your contact with the clerk but if the judge becomes involved I believe that all parties should be a part of the teleconference.
> > >
> > > CONFIDENTIALITY NOTICE: This e-mail contains confidential information protected by

the attorney-client or work product privileges.

>>> "Ben Wechsler" <bwechsler@linowes-law.com> 1/9/2007 10:29:41 AM >>>
Yesterday we received the Court's Order of Dismissal of Case No. C-06-117695, stating that there has been no response to the Critical Area Commission's Motion to Dismiss. I have confirmed with the Court that our opposition in fact was filed, but not docketed by the Clerk's office. I presume neither of you objects if I contact Judge Hackner's clerk to seek the Court's counsel on how to address this administrative mistake? Let me know if you would to participate in this call, or alternatively whether I may represent that you have consented to my ex parte contact with chambers regarding this matter.

Benjamin S. Wechsler, Attorney
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410-268-0881
bwechsler@linowes-law.com
www.linowes-law.com

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Dise, Marianne E.

From: Ben Wechsler [bwechsler@linowes-law.com]
Sent: Wednesday, January 10, 2007 2:54 PM
To: Dise, Marianne E.
Subject: RE: Wright Investment -- Teleconference With Chambers

It's really too bad, but not surprising given the similarity of the captions.

Can you check whether the clerk will refile your Motion to Dismiss in the right action?

-----Original Message-----
From: Dise, Marianne E. [mailto:MDise@dnr.state.md.us]
Sent: Wednesday, January 10, 2007 2:20 PM
To: Ben Wechsler
Subject: RE: Wright Investment -- Teleconference With Chambers

Ben, Thanks for keeping track of the numerous clerical errors in this case! I have had problems with the AA clerk's office in the past and the problems seem to be getting more frequent. Marianne

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Wednesday, January 10, 2007 11:53 AM
To: Dise, Marianne E.; Sally Iliff
Cc: David M. Plott
Subject: RE: Wright Investment -- Teleconference With Chambers

Marianne -- it appears to me that the Court has mis-docketed your 11/06 Motion to Dismiss. It should have been filed in the Administrative Mandamus/Judicial Review action, but was mis-docketed in the Judicial Mandamus/Declaratory Relief Action. The misdocketing is understandable, as the motion was filed before a case number had been assigned. Our opposition to the motion was property filed and docketed in the Administrative Mandamus case. I'll be trying to explain all this to the Court, and wanted to put you on notice of the Court's error in filing your motion.

Separately, it appears the Court also failed to enter onto the docket our Opposition to AA County's Motion to Dismiss in the judicial mandamus/dec relief action.

-----Original Message-----
From: Dise, Marianne E. [mailto:MDise@dnr.state.md.us]
Sent: Wednesday, January 10, 2007 9:14 AM
To: Ben Wechsler; Sally Iliff
Cc: David M. Plott
Subject: RE: Wright Investment -- Teleconference With Chambers

No objection from me.

-----Original Message-----
From: Ben Wechsler [mailto:bwechsler@linowes-law.com]
Sent: Tuesday, January 09, 2007 3:11 PM

To: Sally Iliff; Dise, Marianne E.
Cc: David M. Plott
Subject: RE: Wright Investment -- Teleconference With Chambers

Thanks. Any objection Marianne? I intend to call Judge Hackner's clerk tomorrow morning.

From: Sally Iliff [mailto:siliff@aacounty.org]
Sent: Tue 1/9/2007 10:37 AM
To: Marianne Dise (E-mail); Ben Wechsler
Cc: David M. Plott
Subject: Re: Wright Investment -- Teleconference With Chambers

I do not object to your contact with the clerk but if the judge becomes involved I believe that all parties should be a part of the teleconference.

CONFIDENTIALITY NOTICE: This e-mail contains confidential information protected by the attorney-client or work product privileges.

>>> "Ben Wechsler" <bwechsler@linowes-law.com> 1/9/2007 10:29:41 AM >>>

Yesterday we received the Court's Order of Dismissal of Case No. C-06-117695, stating that there has been no response to the Critical Area Commission's Motion to Dismiss. I have confirmed with the Court that our opposition in fact was filed, but not docketed by the Clerk's office. I presume neither of you objects if I contact Judge Hackner's clerk to seek the Court's counsel on how to address this administrative mistake? Let me know if you would to participate in this call, or alternatively whether I may represent that you have consented to my ex parte contact with chambers regarding this matter.

Benjamin S. Wechsler, Attorney
Linowes and Blocher LLP
145 Main Street
Annapolis, Maryland 21401
410-268-0881
bwechsler@linowes-law.com
www.linowes-law.com

Internal Revenue Service Circular 230 Disclosure: As provided for in Treasury regulations, advice (if any) relating to federal taxes that is contained in this communication (including attachments) is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any plan or arrangement addressed herein.

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responsibility is accepted by the sender for any loss or damage arising in any way in the event that such a virus or defect exists. Thank you.

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
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

RECEIVED

SEP 20 2006

DNR - LEGAL DIVISION

September 20, 2006

Ms. Elinor Gawel
Anne Arundel County
Office of Environmental and Cultural Resources
2664 Riva Road, MS 6301
Annapolis, Maryland 21401

Re: Critical Area Boundary Line Change
Wright Investment Group, LLC

Dear Ms. Gawel:

At its meeting on September 6, 2006, the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays unanimously voted to send back the request by the County for a Critical Area Boundary Line Change with changes to be made. The decision of the full Commission included the following:

The proposed program amendment shall be returned to the County, and because the County did not use an acceptable mapping methodology, the following changes shall be made:

1. The County shall revise the map to show a Critical Area boundary that is consistent with the law and Criteria for mapping. They 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 of the headwaters of Whitehall Creek.

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

3. Within a reasonable amount of time, the revised maps shall be submitted to the Critical Area Commission for review and approval.

Please contact our office to discuss the County's projected timeframe for completion of the map changes requested above.

Thank you for your assistance and cooperation in the review of this project by the Critical Area Commission. Please contact me at (410) 260-3478 if you have any questions.

Sincerely,

Lisa A. Hoerger
Natural Resource Planner

cc: Mr. David Plott, Esquire
Ms. Marianne Mason, Assistant Attorney General

Critical Area Commission

STAFF REPORT
August 2, 2006

APPLICANT:	Anne Arundel County
PROPOSAL:	Refinement - Critical Area Boundary Line Change Wright Property
COMMISSION ACTION:	Pending
STAFF RECOMMENDATION:	Pending
STAFF:	Lisa Hoerger
APPLICABLE LAW/ REGULATIONS:	Natural Resources Article §8-1802 (a)(17) Program Refinements

DISCUSSION:

The Anne Arundel 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 Whitehall 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 of Appeals decided this matter on remand from an unreported decision of the Maryland Court of Special Appeals, *Wright Investment Group v. Anne Arundel County,* No. 02629 Sept. Term, 2003, filed August 31, 2004. In that case, the Court found that the County's map, which had been approved by the County Council and the Critical Area Commission, was "incorrectly drawn in regard to Wright's property, based on the County's erroneous interpretation of its mapping criteria." *Wright Investment Group v. Anne Arundel County,* at 58.

In accordance with the Court's decision, the Board of Appeals reconsidered the matter in 2005, and found that based on the County's mapping rules and the requirements of the County Code, a portion of Wright's property had been mistakenly included in the County's 1,000 Critical Area boundary. The Board stated that, "once the Court determined that the subject property was improperly included in the County's Critical Area delineation, the decision is patently obvious." *Wright Investment Group,* No. BA 48-01-C, On Remand Before the Anne Arundel Board of Appeals, Revised Mem. Op. Sept. 21, 2005, at 2.

In preparing the County's original Critical Area Maps, 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 upstream of the four-foot contour. In those cases the County used the four-foot topographic contour line and measured the 1,000-foot boundary from that contour line. However, in this case the 1972 wetlands extended beyond the NWI Map wetlands; therefore, the 1972 State Tidal Wetlands Map would have applied, rather than the alternative method the County used for mapping the 1,000-foot Critical Area boundary.

While it is clear that the 2.5 acre part of Wright's property at issue in the case does not lie in the Critical Area because it was not properly mapped, the methodology the County chose to correct the Critical Area boundary line on this parcel (see attached map) is problematic. The County chose merely to "declassify" from the Critical Area the relevant part of the property. That is, the County removed the property from the Critical Area, leaving other neighboring (and perhaps similarly situated) properties still within the Critical Area. The County basically created a "hole" in the Critical Area by drawing the line around this property. This is inherently inconsistent with the way the Critical Area overlay is defined and implemented. Moreover, this approach could appear to be a form of spot zoning and it does not promote effective and consistent application of the Critical Area regulations.

The Court of Special Appeals' decision held that the County had wrongly mapped a portion of the Wright property *because the County incorrectly applied its own mapping criteria.* The rationale of the Court decision portends that multiple properties in the area could likely be affected by the same mis-application of the County's mapping standards. Thus, the proper way to correct this error is to re-draw the Critical Area boundary, not merely on one property, but in the affected area. In order to properly effect a boundary line change on the Wright property in a manner consistent with the mapping standards in the Law and Criteria, the relevant County map(s) should be corrected to use the methodology set forth by the Court. Although the County Code in Article 3, Title 1, Subtitle 2, section 3-1-201 delegates to the Board of Appeals the authority 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.

In the 2006 legislative session, the General Assembly amended the Natural Resources Article concerning program refinements in §8-1809 (p) (3) (iii) to clarify the actions that the Commission could take when reviewing program amendments and refinements. The amended language allows the a program refinement to be approved, denied, approved with conditions, or returned to the local jurisdiction with a list of changes to be made. At this time, the Chairman, Commission staff, and counsel are reviewing additional information regarding the County's Critical Area mapping in order to determine the most appropriate course of action on the County's request for approval of the Wright boundary line change. Additional information will be provided at the Commission meeting.

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 15, 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 involves 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 made the decision to declassify the site on remand from the Court of Special Appeals. Because the appellate court had held that the County incorrectly applied its mapping criteria with regard to this property, the Board applied the holding of the Court and 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-foot Critical Area boundary. By way of explanation, the mapping rules of Anne Arundel County provided that the 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 the Wright property, 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.

While the Board of Appeals settled the issue of the status of the Wright property, the Court of Special Appeals decision on which the Board's decision is based raises questions regarding the County's application of its mapping rules to other similar properties in the area. 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

Attachment

Critical Area Commission

PANEL REPORT
Addendum
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:	Send Back with Changes to be Made
COMMISSION ACTION:	Vote
STAFF:	Lisa Hoerger
APPLICABLE LAW/ REGULATIONS:	Natural Resources Article §8-1809 (o) Program Amendments

DISCUSSION:

On Monday, August 28, 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.

The Anne Arundel County Board of Appeals made the decision to declassify the site on remand from the Maryland Court of Special Appeals (Wright Investment Group v. Anne Arundel County, Maryland; Unreported Opinion Issued August 31, 2004). Because the appellate court had held that the County incorrectly applied its mapping criteria with regard to this property, the Board applied the holding of the Court and found that based on the County's mapping rules and the requirements of the County Code, a portion of this property was mistakenly included within the County's Critical Area boundary.

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. The Panel acknowledges that the property in question has been incorrectly mapped. However, they do not agree that the method proposed by the County to correct the

mapping mistake is consistent with the mapping standards that should be used to properly revise the map.
The Panel believes that in correcting 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 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 and separated 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 on the appropriate map 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 to implement a County process called a "declassification." The County proposes the "removal" of the Wright Investment Property from the Critical Area in a manner that is similar to an exclusion. The Panel notes that the State Critical area law does not address the exclusion of individual properties in the manner proposed by the County, nor does the Panel believe that this property qualifies for exclusion under the standards in the State law. The Critical Area law and Criteria do not include the concept of "declassification." The County has not proffered, and the Panel does not know of, 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 Critical Area, while all of the surrounding properties remained within the Critical Area.

Section 8-1808 (c) of the law requires as an essential element of a local Critical Area Program a "map designating the Critical Area in a local jurisdiction." The Panel believes that the Critical Area maps should be consistent and easily discernible by the public.

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 mapping "declassification" proposed by the County for the Wright Investment Property results in a map that does not clearly "designate" the "Critical Area." The County's proposal does not appear to facilitate a consistent and uniform approach to regulating development activity, especially when it is likely that similar corrections may be warranted on neighboring properties (as noted by the Court of Special Appeals), and perhaps in other portions of the Critical Area. If the County continues to amend its Critical Area maps by identifying single 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.

The 2006 General Assembly emphasized the Commission's role in considering and deciding on proposed program amendments in Natural Resources Article §8-1809(o):

> The Commission shall determine if the proposed amendment is consistent with the purposes, policies, goals, and the provisions of the law and all of the Commission's criteria.

The Panel believes that the map amendment:

- Is inconsistent with the mapping provisions in the law,
- Does not reflect an acceptable mapping methodology, and
- Does not promote the implementation of the Critical Area regulations in a consistent and uniform manner.

Therefore, pursuant to Natural Resources Article §8-1809 (o), the Panel recommends the following to the full Commission:

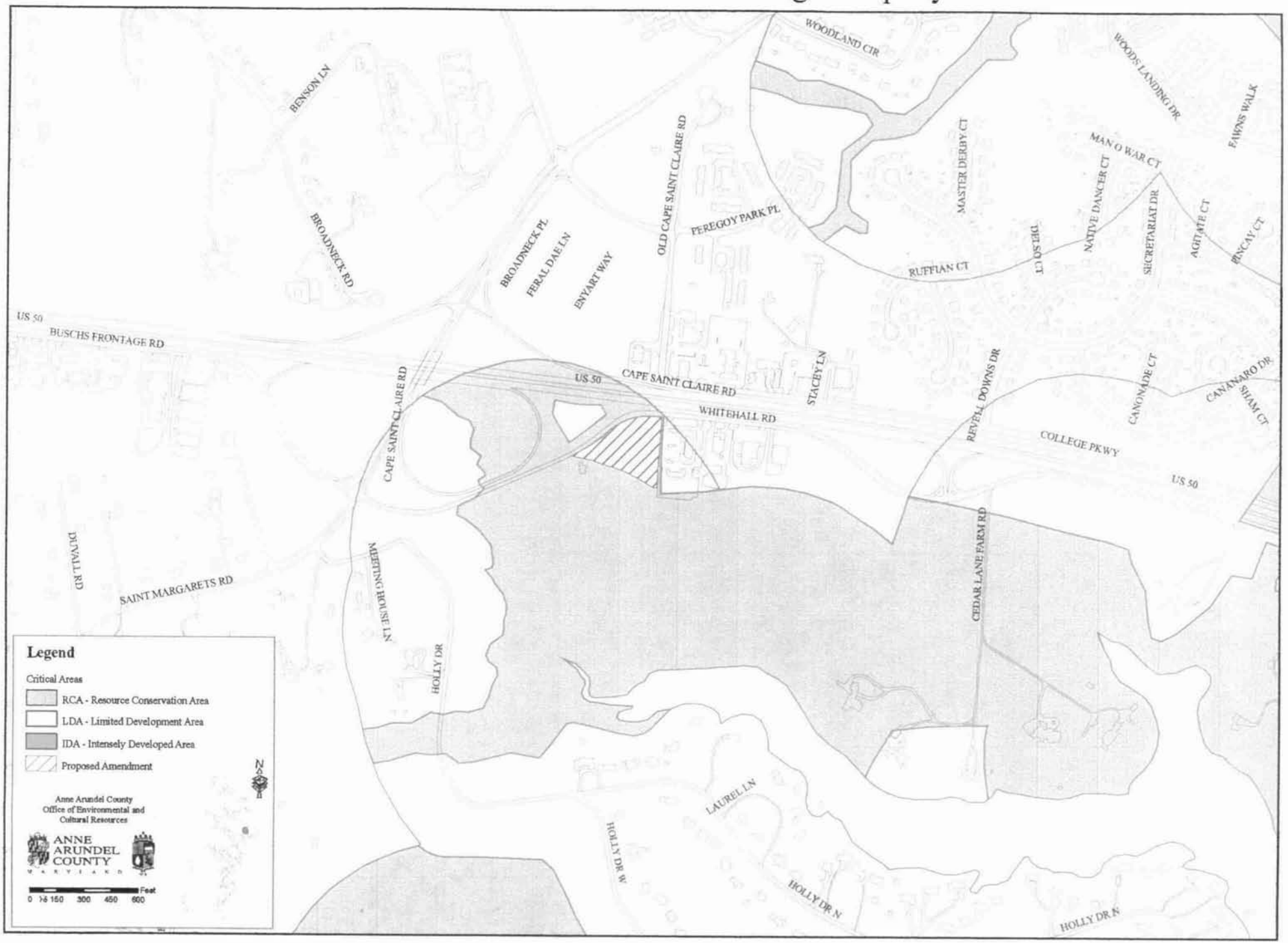
The proposed program amendment shall be returned to the County, and because the County did not use an acceptable mapping methodology, the following changes shall be made:

1. **The County shall revise the map to show a Critical Area boundary that is consistent with the law and Criteria for mapping. They 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 of the headwaters of Whitehall Creek.**

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

3. **Within a reasonable amount of time, the revised maps shall be submitted to the Critical Area Commission for review and approval.**

Amendment 2000-0468-C: Wright Property



USA_S_1831_33 (5 of 5)

Background Information

WRIGHT INVESTMENT GROUP V. MARYLAND DNR/CAC AND ANNE ARUNDEL COUNTY
COMPLAINT FOR WRIT OF MANDAMUS,

Background Information

WRIGHT INVESTMENT GROUP V. MARYLAND DNR/CAC AND ANNE ARUNDEL COUNTY COMPLAINT FOR WRIT OF MANDAMUS, DELCLARATORY RELIEF, AND DAMAGES Case No. C-06-117695 (Circuit Court for Anne Arundel County)

Pendaflex
Esselte

76520 40% P4

STATE OF MARYLAND
CRITICAL AREA COMMISSION
FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS
1804 West Street, Suite 100
Annapolis, Maryland 21401
(410) 260-3460

FACSIMILE TRANSMITTAL

TO: Paul Cuccuzzella FAX: 260-8364

COMPANY: PHONE:

FROM: Marianne Dise PHONE: 410 260 3466

DATE: 7/10/2007 NO. of PAGES: 6
(including cover)

COMMENTS: FYI

Critical Area Commission

STAFF REPORT
July 11, 2007

APPLICANT:	Anne Arundel County
PROPOSAL:	Amendment - Critical Area Boundary Line Change, Wright Investment Group, LLC
COMMISSION ACTION:	Concurrence with Chair's Determination
STAFF RECOMMENDATION:	Approval
STAFF:	Mary Owens
APPLICABLE LAW/ REGULATIONS:	Natural Resources Article §8-1809 (o) Program Amendments

DISCUSSION:

Last fall the Critical Area Commission reviewed a request by Anne Arundel County to "declassify" (remove from the Critical Area) 2.5 acres of land, located on the south side of White Hall Road, approximately 1,000 feet east of St. Margarets Road. The property is identified as Parcel 225 on Tax Map 40, Block 23, and it has a Critical Area designation of Resource Conservation Area (RCA), and has C1- Local Commercial District, RLD and OS – Open Space zoning.

The County made the decision to declassify the site on remand from the Court of Special Appeals. The appellate court held that the County incorrectly applied its mapping criteria with regard to this property, and subsequently the Board applied the holding of the Court and found that based on the County's mapping rules and the requirements of the County Code, a portion of this property was mistakenly included within the County's Critical Area boundary.

The original mapping rules of Anne Arundel County include provisions that allowed the County to extend the Critical Area boundary line drawn from the 1972 State Tidal Wetlands maps beyond 1,000 feet when the National Wetlands Inventory (NWI) maps showed that wetlands extended further. In those cases, the County used the four-foot topographic contour line and measured the 1,000-foot boundary from there. On the Wright property, the 1972 wetlands extended beyond the NWI map wetlands; therefore, the 1972 State Tidal Wetlands Map applies, rather than the alternative method the County used for mapping the 1,000-foot Critical Area boundary.

While the Board of Appeals' action based on the Court of Special Appeals decision settled the issue of the status of the Wright property, 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 and to create a "hole" in the Critical Area overlay. Based on the Court of Special Appeals decision it was clear that the property was not within the Critical Area as defined by law; however, the Commission determined that the methodology used by the County to correct the map was inherently inconsistent with the way the Critical Area overlay is defined and implemented through local land use regulations. The County's methodology did not clearly "designate" the Critical Area, nor did it appear to facilitate a consistent and uniform approach to regulating development activity, especially when it is likely that similar corrections could be warranted on neighboring properties and perhaps in other portions of the Critical Area. The Commission believed that if the County continued to amend its Critical Area maps by identifying single properties within the Critical Area boundary to which the Critical Area regulations would not apply, it would become nearly impossible to effectively and efficiently implement the County's Critical Area Program.

The Commission determined that the map amendment:

- Was inconsistent with the mapping provisions in the law,
- Did not reflect an acceptable mapping methodology, and
- Did not promote the implementation of the Critical Area regulations in a consistent and uniform manner

Because the County did not use an acceptable mapping methodology, the Commission voted to return the map amendment to the County with the following changes to be made:

1. The County shall revise the map to show a Critical Area boundary that is consistent with the law and Criteria for mapping. They shall identify the edge of tidal wetlands based on the 1972 Tidal Wetland Maps and properly draw the Critical Area boundary line 1,000 feet from the edge of tidal wetlands in the area of the headwaters of Whitehall Creek.

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

3. Within a reasonable amount of time, the revised maps shall be submitted to the Critical Area Commission for review and approval.

On May 23, 2007, Anne Arundel County submitted a revised Critical Area Map for the area of the headwaters of Whitehall Creek. The 1,000 Critical Area boundary was redrawn from the edge of tidal wetlands as depicted on the 1972 Tidal Wetlands Maps. The effect of this correction to the Critical Area boundary is to remove 22.95 acres of land from the Critical Area, of which 13.17 acres is RCA and 9.78 acres is LDA. The Critical Area Map amendment was passed by the County Council on May 7, 2007 as Bill No. 22-07.

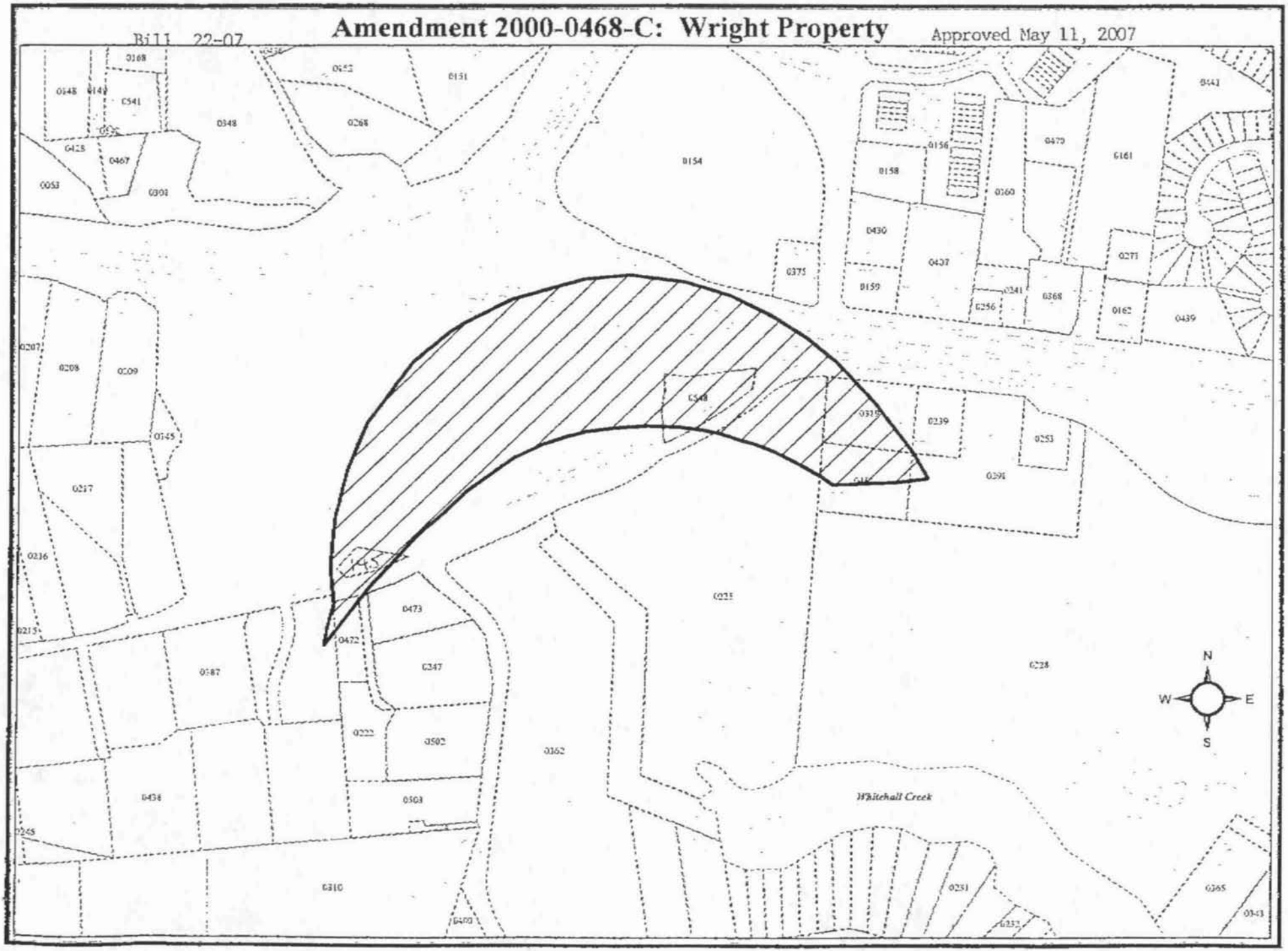
Staff believes that the County has properly responded to the Commission's direction for specific changes, and that the proposed map change is consistent with the County's adopted program.

Chair McHale has determined that this matter may be handled as a refinement to the County's Program and is seeking the Commission's concurrence and recommendations.

Amendment 2000-0468-C: Wright Property

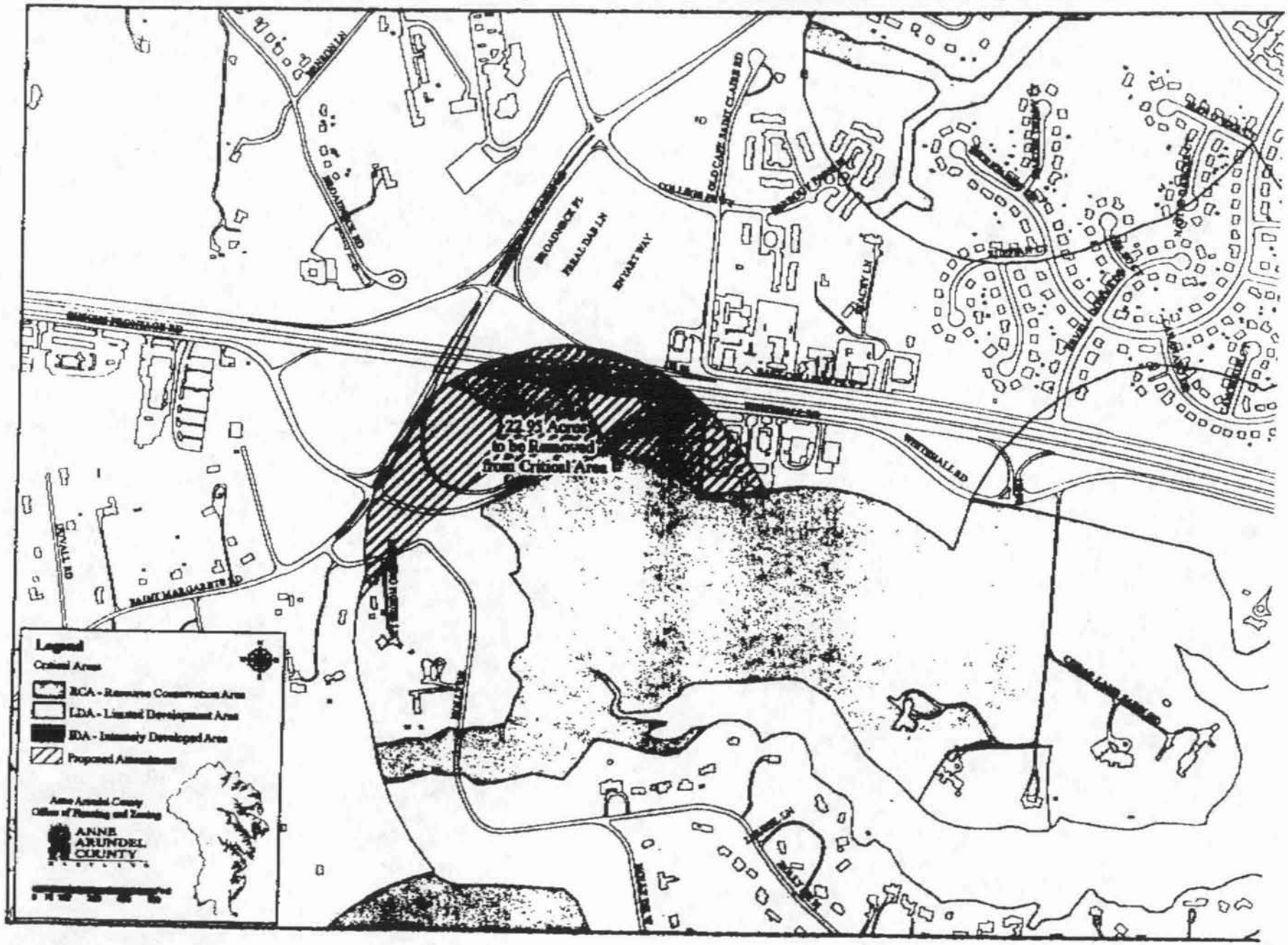
Bill 22-07

Approved May 11, 2007



Bill No. 22-07
Exhibit 1

Critical Area Map Amendment - Broadneck - March 19, 2007



447 Mass. 720, 857 N.E.2d 451

Wright Investments

Supreme Judicial Court of Massachusetts, Middlesex.
John M. GIOVANELLA
v.
CONSERVATION COMMISSION OF ASHLAND.
Argued Sept. 5, 2006.
Decided Nov. 28, 2006.

Background: Owner of two contiguous lots, one of which contained a wetland, brought action challenging decision of municipal conservation commission denying his request for allowance to construct house on the lot containing a wetland, and alternatively, seeking damages for a regulatory taking under the Fifth Amendment to the United States Constitution. The Superior Court, Middlesex County, S. Jane Haggerty and Bonnie H. MacLeod, JJ., entered summary judgment in favor of commission. Property owner appealed.

Holdings: The Supreme Judicial Court, Spina, J., held that:
(1) regulatory taking claim was ripe for review;
(2) extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel for purposes of regulatory takings analysis;
(3) owner failed to overcome presumption that contiguous commonly-owned lots were the relevant parcel for purposes of takings claim; and
(4) application of wetlands protection bylaw did not result in regulatory taking.

Affirmed.

West Headnotes

[1] KeyCite Notes

⇦148 Eminent Domain
⇦148IV Remedies of Owners of Property; Inverse Condemnation
⇦148k277 k. Conditions Precedent to Action; Ripeness. Most Cited Cases

A regulatory takings case becomes ripe for adjudication only after two requirements are satisfied: first, an owner must allow the responsible government entity to reach a final decision regarding the application of the regulation to the property at issue, and second, an owner must exhaust available State remedies before seeking relief under Federal law. U.S.C.A. Const.Amend. 5.

[2] KeyCite Notes

⇦148 Eminent Domain
⇦148IV Remedies of Owners of Property; Inverse Condemnation
⇦148k277 k. Conditions Precedent to Action; Ripeness. Most Cited Cases

Property owner's regulatory takings case, arising out of application of a wetlands protection bylaw to prohibit owner's construction of house on property that contained a wetland, was ripe for review; commission reached a final decision in rejecting owner's plan, and owner exhausted available State remedies by appealing to the Department of Environmental Protection and seeking reconsideration of the proposal. U.S.C.A. Const.Amend. 5; M.G.L.A. c. 131, § 40.

[3] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

Regulation that causes an owner to lose all economically beneficial use of a piece of property is a taking per se. U.S.C.A. Const.Amend. 5.

[4] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

To determine the extent of the unit of property to be scrutinized under a regulatory takings analysis, courts look to those factors that identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment. U.S.C.A. Const.Amend. 5.

[5] KeyCite Notes

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k294 Evidence
148k295 k. Presumptions and Burden of Proof. Most Cited Cases

The extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel for purposes of regulatory takings analysis, as common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property; presumption in favor of contiguity may be overcome to either increase or decrease the size of the parcel by the application of additional factors. U.S.C.A. Const.Amend. 5.

[6] KeyCite Notes

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k294 Evidence
148k295 k. Presumptions and Burden of Proof. Most Cited Cases

Property owner's treatment of certain property as a distinct economic unit is the most significant factor to consider in overcoming the presumption that contiguous commonly-owned property is the relevant parcel for purposes of regulatory takings analysis. U.S.C.A. Const.Amend. 5.

[7] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

An owner's intended use is an important factor when deciding whether a portion of contiguous commonly-owned property should be protected as a distinct unit under the takings clause. U.S.C.A. Const.Amend. 5.

[8] KeyCite Notes

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k294 Evidence
148k295 k. Presumptions and Burden of Proof. Most Cited Cases

Owner of two contiguous lots, one of which contained a wetland, failed to overcome presumption that contiguous commonly-owned property was the relevant parcel for purposes of regulatory takings claim arising out of application of a wetlands protection bylaw to prohibit owner's construction of house on one of the two lots; lots were purchased at the same time as part of one transaction, lots were not separately financed, lots were not separated by a road, and owner failed to show he treated lots as separate economic units. U.S.C.A. Const.Amend. 5.

[9] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

The economic viability of land does not define its boundaries for purposes of the takings clause. U.S.C.A. Const.Amend. 5.

[10] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(4) Zoning and Permits
148k2.10(6) k. Particular Cases. Most Cited Cases

Trial court considering property owner's regulatory takings claim erred in determining that property owner did not have reasonable investment-backed expectation of building home on 17,490 square foot lot due to existence of zoning law limiting new home construction to 30,000 square foot lots, where a person in owner's situation could reasonably rely on his ability to build on the undersized lot based on its similarity to the surrounding lots on which homes had already been built, or based on the availability of special permits for preexisting nonconforming lots. U.S.C.A. Const.Amend. 5.

[11] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power

148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.27 Environmental Protection
148k2.27(2) k. Wetlands and Coastal Protection. Most Cited Cases

Application of a wetlands protection bylaw to prohibit property owner's construction of a house on one of two contiguous lots did not constitute a regulatory taking under the Fifth Amendment to the United States Constitution; although owner could not build house on lot containing a wetland, owner built home on second lot and sold it for more than he paid to purchase both lots, owner did not invest any money that relied on the separate development of lot containing wetland, bylaw resulted in decrease of only twenty-nine per cent of value of the two lots, and limitation on use was not like a physical invasion and did not unfairly single out owner. U.S.C.A. Const.Amend. 5.

[12] KeyCite Notes

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases

A takings claim is not defeated simply on account of an owner's lack of a personal financial investment. U.S.C.A. Const.Amend. 5.

***452** J. David Breemer, Sacramento, CA, for the plaintiff.
Joseph M. Hamilton, Worcester, for the defendant.
Michael E. Malamut & Martin J. Newhouse, Boston, for New England Legal ***453** Foundation, amicus curiae, submitted a brief.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, & CORDY, JJ.

SPINA, J.
***721** This appeal asks us to define the "relevant parcel" in a regulatory takings analysis. The plaintiff, John M. Giovanella, owned two contiguous lots in Ashland. One of the lots contained a house. Giovanella sought an order of conditions from the defendant, the conservation commission of Ashland (commission), that would allow him to build a house on the other lot. The commission denied his request because construction of the house would intrude into the twenty-five foot buffer zone around a wetland on the lot, in violation of a local bylaw. Giovanella filed suit in the Superior Court, seeking annulment of the commission's decision and, alternatively, damages for what he alleges on appeal was a regulatory taking under the Fifth Amendment to the United States Constitution.[FN1] On Giovanella's motion for summary judgment, the judge concluded that Giovanella failed to show that the decision of the commission was arbitrary or capricious. That portion of the judgment has not been appealed. The judge also ruled that the relevant parcel for purposes of the takings analysis was the entire parcel that Giovanella purchased, and not just the lot he sought to develop. The judge concluded that Giovanella had not shown sufficient economic harm as a result of the commission's decision, and had not shown a reasonable investment-backed expectation that he would be able to develop the lot in question. Based on these conclusions, a second judge granted the commission's subsequent motion for summary judgment. Giovanella appealed the ruling. We granted Giovanella's application for direct appellate review, and we now affirm.[FN2]

FN1. The plaintiff, John M. Giovanella, does not argue that the application of the bylaw resulted in a taking under art. 10 of the Massachusetts Declaration of Rights. We analyze his claim only under the Fifth Amendment to the United States Constitution.

FN2. We acknowledge the amicus curiae brief submitted by the New England Legal Foundation.

1. *Background.* On March 31, 1999, Giovanella purchased ***722** land in the town of Ashland (town) for $130,000. The property, which consisted of 34,589 square feet of land, had a small wetland in the northwest corner, and a single family residence on the southern portion. Between three and six months after buying the property, he learned that a previous owner had divided the property into two lots of nearly equal area. The lots were assessed separately for tax purposes, and had different addresses. The house was situated on lot 2, and the wetland on lot 1. When he learned the property had been divided, he decided to build a new house on lot 1, into which he planned to move.

In December, 1999, nine months after Giovanella purchased the property, the town adopted a wetlands protection bylaw. The bylaw prohibited all work or disturbance within twenty-five feet of any wetland area "unless the applicant provides information and evidence deemed satisfactory by the [c]ommission that the work to be performed sufficiently protects or enhances wetland interests." The wetland in the northwest corner of lot 1 was protected by this bylaw.

Sometime before March 21, 2000, Giovanella applied to the zoning board of appeals of Ashland (board) for a variance that would allow him to build a house on ***454** lot 1, an undersized lot. The board determined that the lot was grandfathered, and issued a special permit to build, subject to certain conditions, including a request that Giovanella obtain an order of conditions from the commission to ensure that all requirements of the wetlands protection bylaw would be satisfied. Giovanella does not appeal the special permit and its attendant conditions.

He proceeded to file with the commission a notice of intent to build a house on lot 1. The commission held hearings on April 9, 2001, to discuss the impact of construction on the wetlands buffer zone within lot 1. Robert Gemma, Giovanella's civil engineer, appeared at the hearing to discuss the plans he had prepared for construction of a house on the lot. Construction would encroach on the buffer zone temporarily, although it would not encroach on the wetland itself. The completed house would not encroach on the buffer zone. Gemma told the commission that he could not move construction any further from the buffer zone, and that to deny the plan he presented would deny use of the whole property. On April 23, 2001, in response ***723** to the commission's concerns with the plan, Gemma presented a second plan that incorporated mitigation measures designed to counteract any damage done to the wetlands during construction. On May 7, 2001, citing concerns with pollution and loss of wildlife habitat resulting from the disturbance during construction, the commission denied Giovanella's application for an order of conditions.

On June 19, 2002, more than one year after the commission had rejected his application for an order of conditions, Giovanella sold lot 2 for $319,900. While lot 2 was on the market, at least one person expressed interest in buying both lots 1 and 2 together. Nevertheless, Giovanella decided to sell lot 2 separately in the hopes of some day being able to build on lot 1. After the sale of lot 2, Giovanella hired an appraiser who concluded that by itself, lot 1 had no value.[FN3]

> FN3. Giovanella's appraiser determined that lot 1 might have had some value to an abutter were it not for the tax liability that the town imposed. The tax liability was based on the town assessor's determination that lot 1 was developable. Of course, the town may not continue to tax lot 1 as developable land while simultaneously denying any opportunity to build on it. The appraiser concluded that should lot 1 be reassessed as an undevelopable lot, it would have a value of between $3,000 and $8,000 to an abutter.

[1] [2] 2. *Ripeness.* It is necessary to begin with a discussion of ripeness. A regulatory takings case becomes ripe for adjudication only after two requirements are satisfied. First, an owner must allow the responsible government entity to reach "a final decision regarding the application of the regulation to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Second, an owner must exhaust available State remedies before seeking relief under Federal law. *Id.* at 194, 105 S.Ct. 3108. We conclude that the commission did reach a final decision regarding Giovanella's land. During the proceedings in front of the commission, Gemma followed his initial plan with a revised plan that

attempted to satisfy the commission's requirements. He also told the commission that the house could not be moved any further from the buffer zone. After the commission rejected Gemma's second plan, and after Gemma explained that the plans provided the only possible use of the property, the commission had an opportunity "to exercise [its] full discretion" as a land-use ***724** authority. See ****455** *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). It used that discretion to reject Giovanella's plan.

We also conclude that Giovanella has exhausted his available State remedies. He followed the commission's rejection with an appeal to the Department of Environmental Protection and he sent a letter to the chairman of the commission seeking reconsideration of the proposal. There were no other administrative remedies provided for in the wetlands protection bylaw or in the State wetlands protection act that authorized the bylaw. See G.L. c. 131, § 40. Some Federal courts have required litigants to pursue an "inverse condemnation" proceeding under State law before considering State remedies exhausted. See *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 93 (1st Cir.), cert. denied, 540 U.S. 1090, 124 S.Ct. 962, 157 L.Ed.2d 795 (2003); *Gilbert v. Cambridge*, 932 F.2d 51, 65 (1st Cir.), cert. denied, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991). In this case, an inverse condemnation claim would take the same form as the claim with which we are presented here. We see no reason to require Giovanella to make his claims first under the heading of "inverse condemnation" before considering the identical claim under the heading "regulatory taking."

3. *Regulatory takings law.* The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." This protection is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

Giovanella argues that the burdens placed on his land by the town's wetlands protection bylaw are so onerous as to require compensation under the takings clause. The United States Supreme Court has recognized this form of "regulatory takings" claim since its 1922 decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), in which Justice Holmes laid out his "storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), quoting *Pennsylvania Coal Co. v. Mahon, supra* at 415, 43 S.Ct. 158.

***725** Identifying when a regulation has gone "too far" is a fact sensitive inquiry. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123-124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The Supreme Court has explained that there is no "set formula" for when compensation should be made, but that the determination rests on "the particular circumstances" in each case after "an essentially ad hoc, factual inquir[y]." See *Penn Cent. Transp. Co. v. City of N.Y., supra* at 124, 98 S.Ct. 2646. In *Penn Cent. Transp. Co. v. City of N.Y., supra*, the Court provided three factors to guide this inquiry: the extent to which the regulation interferes with the owner's distinct investment-backed expectations; the economic impact of the regulation; and the character of the government action. These three factors have served as the principle guidelines for regulatory takings claims. *Lingle v. Chevron U.S.A. Inc., supra* at 539, 125 S.Ct. 2074. They are designed to measure the "severity of the burden that government imposes upon private property rights." *Id.* at 539, 125 S.Ct. 2074.

****456** [3] In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the Court established a limited exception to the use of the *Penn Central* factors in the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" (emphasis in original). A regulation that causes an owner to lose all economically beneficial use of a piece of property is a taking per se. *Id.* at 1019, 112 S.Ct. 2886. The *Lucas* categorical rule is limited to those "relatively rare situations" in which the regulation causes an owner to "sacrifice *all* economically beneficial uses" (emphasis in original). *Id.* at 1018, 1019, 112 S.Ct.

2886. The Court has said that the *Lucas* rule would not apply even if "the diminution in value were 95% instead of 100%." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra* at 330, 122 S.Ct. 1465.

In order to measure the economic impact of a regulation under either the *Lucas* or *Penn Central* decisions, we must first define the unit of property on which that impact is to be measured. We then compare the value of that property before and after the alleged taking. The heart of both tests becomes defining the unit of property at issue, often called the "relevant parcel." When a court considers a large piece of land of which ***726** only a small portion has lost value due to regulation, it is less likely to conclude that a taking has occurred. If a court considers a smaller parcel of land, most of which has been affected by a regulation, then the economic impact is more likely to appear large enough to constitute a taking.

This has come to be known as the "denominator problem," and it has proved to be a hard problem to solve. The denominator problem has become an even more critical issue since the creation of the *Lucas* categorical rule. If a landowner is able to define the "relevant parcel" as only that part of land rendered valueless due to regulation, then the owner is automatically entitled to compensation for the value of that land. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181-1182 (Fed.Cir.1994) (severing twelve and one-half affected acres from larger 250-acre parcel and finding categorical taking). At the same time, the benefits of an easily applied, bright-line rule are lost because the *Lucas* categorical rule "does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas v. South Carolina Coastal Council, supra* at 1016, 112 S.Ct. 2886 n. 7.

The Supreme Court has provided only minimal guidance for resolving the denominator problem. It has stressed that we are to use the "parcel as a whole" for a takings analysis. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra* at 327, 122 S.Ct. 1465; *Penn Cent. Transp. Co. v. City of N.Y., supra* at 130-131, 98 S.Ct. 2646. Repeated admonitions to use the "parcel as whole," however, do little to define the contours of that whole parcel in any particular case.

[4] 4. *Defining the denominator.* Definition of the relevant parcel, like the rest of the regulatory takings law, is a fact sensitive inquiry. See *Loveladies Harbor, Inc. v. United States, supra* at 1181 ("Our precedent displays a flexible approach, designed to account for factual nuances"); *Ciampitti v. United States*, 22 Cl.Ct. 310, 318 (1991) (listing factors contributing to defining relevant parcel); *K & K Constr., Inc. v. Department of Natural Resources*, 456 Mich. 570, 580, 575 N.W.2d 531, cert. denied, 525 U.S. 819, 119 S.Ct. 60, 142 L.Ed.2d 47 (1998) ("Determining the size of the denominator parcel is inherently a factual inquiry"). To determine the extent of the unit of property to be scrutinized ****457** under a regulatory takings ***727** analysis, courts look to those factors that "identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment." *Ciampitti v. United States, supra* at 319.

The intuitive starting point for determining the boundary of the property under a takings clause analysis is to consider as one unit all contiguous property held by the same owner at the time the taking occurred. See, e.g., *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed.Cir.), cert. denied, 528 U.S. 951, 120 S.Ct. 373, 145 L.Ed.2d 291 (1999) (declining to sever contiguous parcels, one submerged and another above ground); *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 372 (9th Cir.1981) (considering contiguous parcels one unit unless landowner met burden showing that development plans for each would be zoned differently); *Ciampitti v. United States, supra* at 320 (combining noncontiguous property in relevant parcel where intervening linking lots also owned by same developer); *K & K Constr., Inc. v. Department of Natural Resources, supra* at 581, 575 N.W.2d 531 ("contiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis"); *Bevan v. Brandon Township*, 438 Mich. 385, 395-396, 475 N.W.2d 37, amended 439 Mich. 1202, 475 N.W.2d 37 (1991), cert. denied, 502 U.S. 1060, 112 S.Ct. 941, 117 L.Ed.2d 111 (1992) (considering contiguous lots under common ownership "as a whole" for takings analysis); *Zealy v. Waukesha*, 201 Wis.2d 365, 380, 548 N.W.2d 528 (1996) (declaring relevant parcel "clearly identified" as 10.4 contiguous acres owned by plaintiff).

Following this logic, courts often begin by treating noncontiguous parcels or contiguous parcels with separate owners as separate units. See, e.g., *Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 762-763, 831 N.E.2d 865 (2005) (beginning analysis with individual lot before suggesting inclusion of noncontiguous property); *Lopes v. Peabody*, 417 Mass. 299, 300-301, 629 N.E.2d 1312 (1994) (considering one lot in takings analysis but not noncontiguous parcels purchased at same time); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381, aff'd on rehearing, 231 F.3d 1354 (Fed.Cir.2000) (severing fifty acres from larger 261-acre parcel across road in part because property was physically remote); *Coeur D'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310, 320 (2006) (severing two parcels separated by road and separately owned).

***728** Courts have considered a wide array of other factors beyond contiguous commonly-owned parcels, including: whether the property is divided by a road, see *Palm Beach Isles Assocs. v. United States, supra* at 1381 (describing property on either side of road as physically remote); *Coeur D'Alene v. Simpson, supra* at 323 (finding presence of road not determinative, but "one factor to consider"); whether property was acquired at the same time, see *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass.App.Ct. 681, 689, 673 N.E.2d 61 (1996) (treating as one unit all lots purchased within same subdivision on same date); *Ciampitti v. United States, supra* at 318-319 (finding noncontiguous property acquired on same date to be one parcel); whether the purchase and financing of parcels were linked, see *Forest Props., Inc. v. United States, supra* at 1365 (treating two parcels as one unit in part because option to purchase lake-bottom land could be exercised only by owner of adjacent uplands); *Ciampitti v. United States, supra* at 319, 320 (treating two noncontiguous parcels as one in part because "inextricably linked in terms of purchase and financing"); the timing of development, see ***458** *Palm Beach Isles Assocs. v. United States, supra* at 1381 (severing contiguous property where development was temporally remote from larger parcel); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed.Cir.1994) (excluding contiguous land developed and sold before enactment of regulation); whether the land is put to the same use or different uses, see *id.* at 1181-1182 (severing conservation land from land intended for residential development); whether the owner intended to or actually did use the property as one economic unit, see *Norman v. United States*, 429 F.3d 1081, 1091 (Fed.Cir.2005) (including property because "appellants themselves regarded the 2,280-acre parcel as a single economic unit"); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed.Cir.2004), cert. denied, 543 U.S. 1188, 125 S.Ct. 1406, 161 L.Ed.2d 191 (2005) (combining contiguous leases even though purchased at different times when part of "one unified mining plan"); *Forest Props., Inc. v. United States, supra* at 1365 (considering two parcels as one unit when treated as "single integrated project ··· comprising the two tracts"); *K & K Constr., Inc. v. Department of Natural Resources*, 456 Mich. 570, 582, 575 N.W.2d 531, cert. denied, ***729** 525 U.S. 819, 119 S.Ct. 60, 142 L.Ed.2d 47 (1998) (combining parcels in part because owners "forged a connection between parcels ··· through the proposed development scheme and permit applications"); and the treatment of the property under State law, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n. 7, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (proposing solution to denominator problem according to "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land"); *Coeur D'Alene v. Simpson, supra* at 323 (considering separated or unified tax treatment by town when severing).

[5] We conclude that the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel. Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property. In addition to identifying the unit of property "as realistically and fairly as possible," *Ciampitti v. United States*, 22 Cl.Ct. 310, 319 (1991), contiguity is also the most easily measured of the many factors courts have used for this inquiry.

Even so, definition of the relevant parcel is a fact sensitive inquiry, and we do not propose a bright-line rule here. This presumption in favor of contiguity may be overcome to either increase or decrease the size of the parcel by the application of additional factors, including those described above. For example, a relevant parcel might be increased to include noncontiguous land used for a single unified economic purpose, as in the case of one business that uses several noncontiguous buildings scattered throughout a city block. See *Gove v. Zoning Bd. of Appeals of Chatham*, 444 Mass. 754, 762-763,

831 N.E.2d 865 & n. 15 (2005) (suggesting inclusion in relevant parcel of all property previously owned by one family and used as seaside resort). Similarly, a parcel might be severed from contiguous land where an owner proposes truly different uses for separate portions, or shows that the property is treated as separate, distinct economic units. See *Loveladies Harbor, Inc. v. United States, supra* at 1181 (severing land intended for residential development from conservation land promised to State).

[6] [7] An owner's treatment of property as a distinct economic unit is the most significant factor to consider in overcoming the presumption in favor of contiguous ***459** property. Occasionally, ***730** evidence of use as an economic unit involves ongoing established uses. More often, though, courts are presented with an owner's assertion that the intended use was to divide property into separate economic units. Concern that the introduction of such subjective factors would "increase the difficulty of an already complex inquiry" has led at least one jurisdiction to reject the use of any factor that relies on the owner's intended use rather than the owner's actual use. See *Zealy v. Waukesha*, 201 Wis.2d 365, 377-378, 548 N.W.2d 528 (1996). Nevertheless, we consider an owner's intended use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L.Rev. 1165, 1232 (1967) (proposing denominator defined by property "identified by the owner" as unit).

Treatment of the property under State or local law is a relevant factor, but one with limited weight. Our reliance on contiguous property minimizes the significance of lot lines in defining the boundaries of the denominator. Separate addresses or tax treatment as separate lots similarly carries little weight. Treatment under State law may play a larger role in cases of "conceptual severance," where individual uses of land are identified and protected under State law, and an owner attempts to recover compensation for the loss of the use based on that protection.[FN4] See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (noting that background principles of State nuisance law permit States to proscribe particular uses without compensation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (severing interest in coal in part because recognized as separate estate under State law). But see *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (declining to sever interest in coal based merely on ***731** "legalistic distinction[ ]" of State recognition of "support estate"); *Seiber v. United States*, 364 F.3d 1356, 1369 (Fed.Cir.), cert. denied, 543 U.S. 873, 125 S.Ct. 113, 160 L.Ed.2d 122 (2004) (declining to use State law to define relevant parcel of timberland when owners argued State law protects property interest in individual trees). We are not here faced with such an argument, so we do not consider the treatment of Giovanella's property under State law to be of particular significance.

> FN4. To allow separate regulatory treatment under State law to sever contiguous property would isolate only the regulated property in nearly all instances, thus practically ensuring compensation for every regulatory imposition. The United States Supreme Court has rejected that approach, noting that "defining the property interest taken in terms of the very regulation being challenged is circular." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

While few courts explicitly employ this presumption in favor of contiguous commonly-owned property, we believe that the analysis used by many courts follows this pattern. Instead of a continued attempt at balancing undifferentiated factors, or a bright-line rule, we consider it a fair and practical approach to emphasize the importance of contiguous commonly-owned property.

5. *Giovanella's claim.* (a) *The denominator.* A judge in the Superior Court denied Giovanella's motion for summary judgment and concluded that the commission's denial was not a taking. Summary judgment was later granted in favor of the ***460** commission based on the earlier decision denying Giovanella's motion. In that opinion, the judge used a relevant parcel that included both lot 1 and lot 2, and considered Giovanella's claims under both the multifactor *Penn Central* analysis, see *Penn*

Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 123-124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), and the *Lucas* categorical rule, see *Lucas v. South Carolina Coastal Council, supra* at 1017, 112 S.Ct. 2886. With respect to the *Lucas* categorical rule, the judge concluded that Giovanella had not lost all economically beneficial use of his land because he had sold lot 2 for a profit. Under the *Penn Central* analysis, the judge concluded that any adverse economic impact on lot 1 was in part the result of Giovanella's poor business decision to sell lots 1 and 2 separately.

When reviewing the grant of summary judgment to the commission we ask whether, when viewed in the light most favorable to Giovanella, the evidence presented would permit a finding that a taking has occurred. If not, the commission is entitled to a judgment as a matter of law. See *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120, 571 N.E.2d 357 (1991), citing Mass. R. Civ. P. 56(c), 365 Mass. 824 (1974).

[8] ***732** We begin our denominator inquiry with the presumption that Giovanella's two contiguous lots are one unit of property for purposes of the takings analysis. We next look to additional factors to determine whether there is sufficient evidence to overcome this presumption. These factors are designed to identify the property on which the impact of the regulation is to be measured. Giovanella does not make a facial challenge to the bylaw, but he challenges it as it was applied to his land. These factors should therefore be examined with respect to the time of the bylaw's impact, when the commission rejected his request for an order of conditions.

[9] Giovanella argues that we should sever lot 1 from lot 2 because lot 1 has economically viable uses, and because he had no common development scheme connecting the two. The economic viability of land does not define its boundaries for purposes of the takings clause. Neither are two contiguous units of property severed merely because of the absence of a common development scheme. In order to overcome the presumption that lots 1 and 2 should be treated together as one unit, Giovanella must present some affirmative evidence of his separate treatment of the two lots.

In considering each of the factors in turn, we conclude that Giovanella has presented insufficient evidence to sever the two parcels. They were purchased at the same time, for a lump sum, as part of one transaction. There is no evidence that they were separately financed. The separate addresses, tax treatment, and lot lines are of minimal significance, and by themselves do not provide enough evidence of his separate treatment of the contiguous lots. They are not separated by a road. Both lots are intended for single family residential use. Finally, and most importantly, he has not shown that he planned to or actually did treat them as separate economic units. Property intended for residential development by a single owner has been considered as one economic unit, and we see no reason to depart from that treatment here. See *Zanghi v. Board of Appeals of Bedford*, 61 Mass.App.Ct. 82, 85-86, 807 N.E.2d 221 (2004); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone*, 41 Mass.App.Ct. 681, 689, 673 N.E.2d 61 (1996).

There may be circumstances in which neighboring lots should ***733** be considered separately under the takings clause, as ****461** when an owner can show separate business plans or financing for the two lots, or when they are developed for substantially different uses. In this case, Giovanella has provided no evidence showing that he treated his lots as two distinct economic units. He has only pointed to the absence of evidence showing that he treated them as one unit. It is not the commission's burden to show that the lots were treated as one unit under a "common development scheme." Rather, it is Giovanella's burden to show that he intended to, or actually did, treat them separately. Because he failed to produce evidence sufficient to show that they should be severed, we treat the two lots as one.

(b) *Multifactor* Penn Central *analysis.* It is clear, and Giovanella does not contest, that considering lots 1 and 2 together forecloses any compensation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). He was able to sell lot 2 for $319,900, an amount which is clearly more than a "token interest." See *Palazzolo v. Rhode Island*, 533 U.S. 606, 631, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). Because the land was not rendered economically

valueless, there can be no categorical taking. We proceed to his second argument that, even if the relevant parcel includes lots 1 and 2, the judge erred in the application of the *Penn Central* factors. We consider each of the three factors in turn.

[10] The judge concluded that the bylaw did not interfere with Giovanella's reasonable investment-backed expectations because he could have had no expectation of building on an undersized lot. This was error. The town's zoning laws did limit new home construction to 30,000 square foot lots, but Giovanella's neighborhood was made up primarily of lots no bigger than lot 1 (17,490 square feet). A person in Giovanella's situation may well have relied on his ability to build on lot 1 based on its similarity to the surrounding lots on which homes had already been built, or based on the availability of special permits for preexisting nonconforming lots.

[11] [12] Nevertheless, the wetlands protection bylaw did not impermissibly interfere with Giovanella's reasonable investment-backed expectations. The only financial investment he made in the property was the $130,000 he paid for both lots. This amount was more than recovered when he sold lot 2, after the order of ***734** conditions was denied, for $319,900. Although the judge erred in holding that Giovanella *could not* have relied on his ability to build on an undersized lot, it appears that he *did not* rely on his ability to build on lot 1 because he did not invest any money that relied on the separate development of lot 1. A takings claim is not defeated "simply on account of [an owner's] lack of a personal financial investment." *Gove v. Zoning Bd. of Appeals of Chatham,* 444 Mass. 754, 766, 831 N.E.2d 865 (2005) (finding no interference with reasonable investment-backed expectations where owner's lack of investment in inherited property implied no reasonable expectation of ability to develop). But Giovanella's failure to show any substantial personal financial investment in the development of lot 1 "emphasizes [his] inability to demonstrate that [he] ever had any *reasonable* expectation" of building a house on that lot (emphasis in original). See *Gove v. Zoning Bd. of Appeals of Chatham, supra.*

When lots 1 and 2 are treated as one parcel, it becomes clear that the economic impact of the wetlands protection bylaw did not rise to the level of a taking. To evaluate the economic impact of the bylaw, we compare the value of Giovanella's land before and after the application for an order of conditions was denied. Before ****462** the denial, the town assessed lot 1 as a developable lot worth $132,800. Giovanella has presented no evidence of the separate value of lot 2 before the denial. However, even assuming that the sale of lot 2 in 2002 for $319,900 accurately reflects the value of that lot in 1999, and the combined predenial value of the lots was $452,700, the action of the commission did not constitute a taking. With the value of lot 1 reduced to zero after the denial, the value of the entire property was reduced to $319,900. The economic impact of the action of the commission resulted in a decrease in the value of Giovanella's property from $452,700 to $319,900, a decrease of twenty-nine per cent. This decrease is not significant enough to rise to the level of a taking. See *Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1348 (Fed.Cir.2004), cert. denied, 543 U.S. 1188, 125 S.Ct. 1406, 161 L.Ed.2d 191 (2005) (finding no taking after decreases in value of seventy-eight per cent and ninety-two per cent on two combined lots); *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1178 (Fed.Cir.1994) (finding categorical taking after ninety-nine per cent ***735** diminution in value, from $2,658,000 to $12,500); *Ciampitti v. United States,* 22 Cl.Ct. 310, 320 & n. 5 (1991) (finding no taking after decrease in value of twenty-six per cent, from $19 million to $14 million).

Finally, the character of the government action does not support the conclusion that application of the bylaw was a taking. The most straightforward analysis, and the one the judge applied, is whether the character of the government action is like a physical invasion. See *Leonard v. Brimfield,* 423 Mass. 152, 156, 666 N.E.2d 1300, cert. denied, 519 U.S. 1028, 117 S.Ct. 582, 136 L.Ed.2d 513 (1996); *Zanghi v. Board of Appeals of Bedford,* 61 Mass.App.Ct. 82, 90, 807 N.E.2d 221 (2004); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone,* 41 Mass.App.Ct. 681, 695, 673 N.E.2d 61 (1996). The Supreme Court also has considered whether a regulation unfairly singles out the owner. See *Eastern Enters. v. Apfel,* 524 U.S. 498, 537, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). Other courts have looked at whether the government regulation is limited to mitigating harms or nuisances.

Such regulations typically do not require compensation. *Gove v. Zoning Bd. of Appeals of Chatham, supra* at 767, 831 N.E.2d 865 (noting that regulations that mitigate harm do not typically require compensation); *Appolo Fuels, Inc. v. United States, supra* at 1351 (finding no taking where government action was "designed to protect health and safety"). Of course, many government actions that do extend beyond nuisance or harm prevention do not result in a taking. The character of government action is less likely to result in a taking when it is limited to nuisance prevention, but this factor provides no guidance for analyzing regulations that extend beyond nuisance prevention. See *Forest Props., Inc. v. United States,* 177 F.3d 1360, 1366 (Fed.Cir.), cert. denied, 528 U.S. 951, 120 S.Ct. 373, 145 L.Ed.2d 291 (1999) (finding character of government action had no impact where action was not limited to preventing nuisance).

No matter how the character of the commission's action is analyzed, application of the bylaw to Giovanella's land was not a taking. The limitations imposed by the town's wetlands protection bylaw are not like a physical invasion, nor does the bylaw unfairly single out Giovanella. Even if the bylaw extends beyond preventing harms or nuisance, the character of the commission's denial would have no impact on the case. Giovanella has failed to demonstrate any reasonable reliance on his ability ***736** to build a home on lot 1, or to show sufficient economic losses resulting from the denial of his application. As a ****463** result, neither justice nor fairness entitle him to compensation for the impositions of the bylaw.

Judgment affirmed.

Mass.,2006.
Giovanella v. Conservation Com'n of Ashland
447 Mass. 720, 857 N.E.2d 451

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43-01

RE: An Appeal For A Critical Area Reclassification	*	**BEFORE THE**
	*	
	*	**COUNTY BOARD OF APPEALS**
	*	
	*	**OF ANNE ARUNDEL COUNTY**
WRIGHT INVESTMENT GROUP	*	**CASE NO. BA 48-01C (2000-0468-C)**
Petitioner	*	**Hearing Date: 8/30 & 10/02/2001 4/7/2005 (legal argument)**
	*	

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CRITICAL AREA COMMISSION

REVISED MEMORANDUM OF OPINION

Summary of Pleading

This case is again before this Board pursuant to an Order for Remand from the Circuit Court for Anne Arundel County (Case No. C-2002-79983) consistent with a decision of the Court of Special Appeals (Sept. Term 2002, No. 02629). This case began as an appeal from a decision of the Administrative Hearing Officer; taken from the denial of a Critical Area Reclassification to remove 2.5 acres of land from the Chesapeake Bay Critical Area. The property is located 1,000 feet south of Whitehall Road, 1,000 feet east of St. Margaret's Road, Annapolis.

Summary of Evidence

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusions

The Board is reconsidering this matter on remand from the Court of Special Appeals. Accordingly, we will dispense with our usual discussion of evidentiary testimony and proceed directly to addressing the specific issue at hand; has the Petitioner satisfactorily demonstrated that it meets the criteria for a Critical Area Reclassification, as described by Anne Arundel County Code (the 'Code'), Article 3, Section 2-106(a).

As the Court determined, the Petitioner's assertion that the County's Critical Area map was incorrectly drawn ultimately proved accurate. In what we can only assume was a burst of conservationist enthusiasm, the County 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. Having surmounted the threshold matter to the satisfaction of the Court of Special Appeals, we now direct our attention to the next criteria the Petitioners must meet.

Here, once the Court determined that the subject property was improperly included in the County's Critical Area delineation, the decision is patently obvious. As the property is not within the Critical Area, it need not comply with, or conform to, either State or County Critical Area mapping criteria. In fact, it does not. This requirement is simply not applicable.

We next must resolve whether the reclassification conforms to 'environmental goals and standards of the General Development Plan'. Here, the Board looked to the property's underlying zoning. Its C-1 zoning classification is not the subject of any modification request and is not the result of a piecemeal re-zoning action. It is part and parcel of the General Development Plan and can, therefore, reasonably be said to comport with its goals and standards.

We now must determine whether there is 'compatibility between the uses of the property as reclassified and surrounding land uses'. As that portion of the property that had been mistakenly included in the Critical Area is zoned C-1, fronts along US Route 50 and is bounded by commercial uses, it would be a rational presumption that its permitted uses are both compatible and consistent with surrounding uses. Further, the Board is persuaded the nearly 80% of the property that remains under Critical Area protection both 'promote the health, safety and welfare of present and future residents of the County and...effective land use management'.

Finally, our analysis must consider whether the Petitioner advised the Critical Area Commission, in writing, at least thirty days prior to any hearing on a Critical Area reclassification. The Petitioner also must ensure that the Commission receives a copy of the

reclassification application in the same time frame. As we noted in our initial opinion, the record clearly documents that the Petitioner met this requirement.

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion, it is this 21st day of September, 2005, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioner's request for a Critical Area Reclassification to remove 2.5 acres of land from the Chesapeake Bay Critical Area is hereby GRANTED.

Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

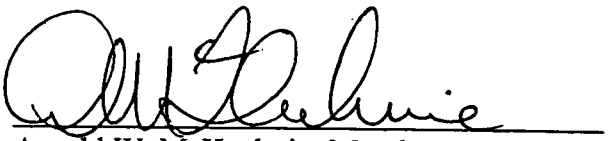
If this case is not appealed, exhibits must be claimed within 60 days of the date of the expiration of the appeals period; otherwise, they will be discarded.

Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Mary M. Leavell, Clerk.

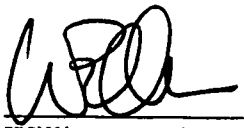
Michael Topper, Vice Chairman

John W. Boring, Member

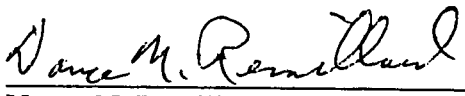
Ray J. Jicka, Member



Arnold W. McKechnie, Member



William Moulden, Member



Vance N. Remillard, Member

DISSENT

In my original concurring opinion of this case, I found the Board lacked jurisdiction to remove this property from the Chesapeake Bay Critical Area. The statute makes clear that the Board has the ability only to reclassify within the 3 Critical Area classifications – Resource Conservation Area ("RCA"), Limited Development Area ("LDA") and Intensely Developed Area ("IDA").

The Court of Special Appeals, however, in its decision relied on "a catch all provision of Article 25A of the State Annotated Code and Natural Resource Art. Section 8-1809 that allows the Board to exercise "adjudication" functions in this County. Lacking a specific legislative remedy to allow the Board to remove property from within the Critical Area designation creates a conundrum, in that; no criteria exist for the Board to permit the removal. The Board in its majority finding on the remand clearly established this fact. Although the Court on page 60 of its opinion required the Board to consider the remaining reclassification criteria in Article 3, Section 2-106. The Board correctly finds no criteria exist for declassifying property from the Critical Area, thus makes no findings. Section 2-106 establishes criteria only to move property within the three Critical Area designations. As a result, the Board (although directed by the Court) made no finding as to the remaining criteria of the Code Section. Consequently, either the Court is wrong in its remand or the Board is wrong in not making the required findings.

I note that the Court was incorrect in its conclusion on page 13 that the "Board of Appeals removed the neighboring Enyardt property from the Critical Area based on a mapping error." The Enyardt decision was made by the Administrative Hearing Officer and never appealed to this Board. If this assumption regarding the Enyardt decision was the basis for the Court's determination granting jurisdiction over reclassifications to the Board of Appeals, the Court was incorrect.

In any event, I will follow the Court's direction, and make findings as to Article 3, Section 2-106. My findings are consistent with the earlier findings of the Board as part of the original decision of this case. I note briefly, however, that:

The General Development Plan ("GDP") provides for the protection of the Chesapeake Bay and its tributaries as an important part of planning within the County. This property is adjacent to and literally at the head of Whitehall Creek, a tributary to the Chesapeake Bay that has been significantly impacted by development in the past. This property has significant environmental constraints including tidal waters, steep slopes and vegetation. If the property is developed, impervious surface will increase and forest cover will decrease. I find that removing a property from the Critical Area that is subject to so many environmental constraints is not in keeping with the goals and standards of the General Development Plan.

The permission to construct an intense commercial use on the portion of the property proposed for reclassification will negatively impact the health, safety and welfare of the residents of the County and will not serve to promote effective environmental land use management. The property is impacted by tidal wetlands, steep slopes, is heavily vegetated and drains into Whitehall Creek. This property will be more protected if it remains within the Critical Area.

I recognize that the chance of this opinion being examined by the Court is remote. The Protestants are likely out of money or resolve to appeal the Board's majority opinion. The County Office of Law, although arguing in opposition to the Petitioner's case, is not likely to file an appeal. However, I feel that an erroneous conclusion of the Court Of Special Appeals regarding Enyardt and/or a misinterpretation by the majority of this Board regarding the required findings as to Section 2-106, will result in unjust damage to the citizens of the State of Maryland and our environment.

Anthony V. Lamartina, Chairman

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FACSIMILE TRANSMITTAL SHEET

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FROM: David M. Plott

DATE: June 12, 2006

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By: Overnight Service ☐ U.S. Postal Service ☐ Other ____

Comments/Instructions:

Lisa: Please find attached the Circuit Court Opinion and Order in the above referenced case. Judge Caroom's Decision was overruled by the Court of Special Appeals. I understand from Elinor that you have copies of the two Board of Appeals Decisions and the Court of Special Appeals Decision. Please advise if you need any additional material in order to place this matter on the Commission's July 5th Agenda.

Thank you – David

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

WRIGHT INVESTMENT GROUP	*	
	*	
Petitioner	*	
	*	
v.	*	Case No: C-2002-79983AA
	*	
ANNE ARUNDEL COUNTY	*	
BOARD OF APPEALS, et al.	*	
	*	
Respondent	*	

****

OPINION AND ORDER

This administrative appeal was called for oral arguments on December 9, 2002. Present in Court were: David M. Plott, Esq. on behalf of Petitioner, Sarah M. Iliff, Esq. on behalf of Respondent Anne Arundel County and Harry C. Blumenthal, Esq. on behalf of Respondent Amberlay Community Association. Upon consideration of the parties' memoranda, the record, and oral arguments, this Court issues the following opinion and order.

Facts

The Wright Investment Group ("Petitioner"), a general partnership, owns approximately 15.4 acres of property located between U.S. Route 50 and Whitehall Creek (the "property"). At the time of purchase, the property was principally zoned Residential Agricultural ("RA") with the portion of the property closest to Route 50 zoned Community Retail District ("C1B"). The remainder of the property was zoned Open Space ("OS"). There were no Chesapeake Bay Critical Area restrictions imposed on the property at the time of purchase. In 1988, with the adoption of Bill No. 49-88 approving Anne Arundel County's Chesapeake Bay Critical Area program, the property was placed in the Chesapeake Bay Critical Area and designated Resource Conservation Area ("RCA").

On December 7, 2000, Petitioner filed a Critical Area reclassification, applying to remove 2.5 acres of the property from the Critical Area based on an error in the mapping of the Critical Area. The County's Administrative Hearing Officer ("AHO") denied Petitioner's application after a hearing on March 27, 200. Petitioner appealed this denial to the Anne Arundel County Board of Appeals (the "Board") on May 18, 2001; the Board heard the matter de novo on August 30 and October 2, 2001. Petitioner's application again was denied by the Board's Order of April 17, 2002. Petitioner appealed the Board's decision to this Court.

Issues

Petitioner argues that: (1) the Board's denial of Petitioner's reclassification application is based upon an error of law; (2) the Board's denial of Petitioner's application was arbitrary and capricious in light of the reclassification of the adjacent Enyart property and was not supported

by substantial evidence; and 3) the Board's denial of Petitioner's application constitutes a taking of private property for public use without just compensation in violation of the 5th and 14th Amendments of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights.

Discussion

1. Was the Board's decision based upon error of law?

Petitioner filed an application for the reclassification of 2.5 acres of their property from the Chesapeake Bay Critical Area based on an alleged mistake in the County's critical area map.

Under Anne Arundel Code, Article 3, §2-106, to permit a reclassification, the Board must make 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 reclassification 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;
> (5) the applicant has notified the Chesapeake Bay Critical Area Commission of the proposed critical area reclassification in writing at least thirty (30) days before any hearing.

Petitioner argues that, under the County's mapping criteria, the subject property should not have been included in the critical area[1]. The mapping criteria states:

> 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 that 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

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[1] Amberly Community Association, Inc., was represented before the Board and, on appeal, in the Circuit Court, pressing the argument that the Board of Appeals has the jurisdiction to "reclassify" but lacked the jurisdictional power completely to remove a property from the critical areas. Instead, it is suggested that such power implicitly is reserved to the County Council for a legislative revision of the map. Both Petitioner and the County disagreed with this argument, noting that it is not based on any precedent and that common practice has recognized that mapping "mistakes" may be corrected as discussed herein. This Court finds that the authorities cited herein would permit removal of a property mistakenly mapped, but that Amberly's argument is moot in light of the rulings by the Board and by this Court herein.

used as the cutoff for tidal wetlands when the NWI maps showed tidal wetlands extending further upstream.

Anne Arundel County Council Bill #49-88.

Petitioner contends that, under the above criteria, the state critical area line was the starting point for the county critical area and that the 1000 foot line should be measured from the wetlands which are shown on the state wetlands map. Transcript ("T") 10-2-01, p.28). According to Petitioner, measuring from this point places the property outside of the critical area.

Pam Miley, a planner with the Zoning Division of the County's Office of Planning and Zoning, testified that in mapping the County's critical area, the four foot contour was used as a cut-off for tidal wetlands when the 1983 U.S. Fish and Wildlife maps showed the tidal wetlands extended further upstream. The County argues that using this criteria, measuring 1000 feet from the four foot contour, Petitioner's property falls within the Chesapeake Bay Critical area. (T. 10-2-01, p. 93). Eric See, a qualified expert in the fields of environmental planning, wetlands mapping, and critical areas mapping and planning T. 10-2-01, p. 17 testified on behalf of Petitioner. He stated that the NWI maps did not have tidal wetlands mapped upstream of the state boundary and therefore, the four foot contour should not have been plotted. Id. at 63.

Petitioner and the County use different starting points in mapping the property. Utilizing Petitioner's starting point, the state critical area line, the property falls outside of the critical area. Using the County's starting point, the four-foot contour, the property is within the critical area. Both sides presented testimony as to why their respective starting points should be used.

The heart of this dispute was presented, during the testimony of the County planner Ms. Miley, when she was asked to explain why the disputed property "conforms to the map criteria." She stated:

> Utilizing the three sets of maps [that is, the State Wetlands boundary map, the National Wetlands Inventory (NWI) map and the County topographic map],we met [sic] the property measuring 1,000 feet from the four foot contour, as show on the applicant's site plan. Measuring 1,000 feet from that point, this property is within the Chesapeake Bay critical area. T.100.

On cross-examination, Ms. Miley acknowledged that a measurement of *Petitioner's* map showed that the property may be beyond the 1,000 foot line, but she added that Petitioner's map might by inaccurate and "off" in its scale. T.113. To the contrary, Ms. Miley's other testimony indicated that she personally had reviewed the County's official maps, that she had conferred with other staff members, and that she conferred with the Executive Director of the Critical Areas Commission Executive Director; based on this review, she had determined that there was no mistake on the original County maps and that the subject property properly was within the Critical Areas. Cf., T.95-100, 109, 113-115.

Petitioner argues that the mapping criteria of Bill #49-88 should have prevented the

County from utilizing the four-foot contour line in the absence of tidal wetlands shown beyond the original State Wetland's map. However, the clear implication of Ms. Miley's testimony was that such tidal influence did extend somewhat beyond the State line, using the more accurate satellite photos of the NWI inventory.[2] T.114-115. Because such remote mapping could not be perfectly precise, the County's mapping criteria clearly were intended to extend to the next four-foot contour line beyond the last possible tidal wetland area, so as to give effect to the public policy of providing greater environmental protection. [3]

Further, In *Bellanca, et ux. v. Cty. Comm. Of Kent Co.*, 86 Md. App. 219 (1991), the Court stated that "the County Commissioners could approve appellants application only if the evidence produced by appellants in support of their amendment application was not only compelling, but was 'strong evidence" that the classification was a mistake which was both 'basic and actual' and made 'at the time the property was zoned.'" Id. at 230. In the present case, Petitioner's evidence is not compelling and does not prove that a mistake exists in the county's map. As this Court has found that Petitioner failed to satisfy the first requirement of reclassification criteria, this Court will not consider the remaining criteria.

In *Angelini v. Harford County, Maryland*, 144 Md. App. 369 (2002), the Court said "there is only one burden of persuasion, and it points in only one direction.... The tribunal that needs to be persuaded may always conclude, 'We have heard what the applicant had to say and we have heard nothing to the contrary, but we are still unpersuaded." Id. at 377. In the present

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[2] While technically not relevant to what the satellite photos showed in the 1980s, the Board also received testimony from a local environmentalist and from two neighbors that the subject property clearly was within 1,000 feet of tidal wetlands in 2001. This evidence might have been considered some attenuated corroboration of Pam Miley's testimony as to the satellite photos showing tidal wetlands previously located on the subject property.

[3] The County also argues, assuming arguendo that there is a conflict between the map as adopted and the mapping criteria, that Anne Arundel County Code, §1A-112 states:

> Unless otherwise provided by federal or State law, whenever a provision of this title or any element of the County critical area program and any other provision of law, including but not limited to, the Maryland Chesapeake Critical Area Protection Program, impose contradictory requirements covering the same subject matter, the provision that is more protective of the environment or imposes higher standards of environmental protection or enhancement shall govern.

Thus, the County suggests the Court should apply the above statute to the present case, so that even if it were determined that there is a discrepancy between the county's mapping criteria and the map itself, the map would prevail because it is more protective of the environment.

Because this Court does not find that a discrepancy was proved between the map as adopted and the mapping criteria, the question is moot.

case, Petitioner argues that "it is uncontested that the Reclassification Property lies outside of the initial Critical area" and that "the Board's finding is contrary to all of the evidence presented." (Petitioner's Memorandum of Law, p. 13).

The Board was not required to rule in favor of Petitioner simply because Petitioner's evidence was not rebutted by the same type of evidence (i.e., a map). The Board was unpersuaded by Petitioner's evidence of the alleged "mistake" and, therefore, ruled that Petitioner 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 Petitioner's application was proper.

2. Was the Board's decision arbitrary and capricious in light of the *Enyart* reclassification?

Petitioner contends that the County's denial of Petitioner's application constitutes an impermissible change of mind from its earlier approval of the Enyart application. (Petitioner's Memorandum of Law, p. 23). The impermissible change of mind doctrine prohibits administrative agencies from arriving at opposite conclusions on substantially the same set of facts and the same law. *See Lambert v. Seabold,* et al., 246 Md. 562 (1967).

However, this doctrine does not apply in cases involving a different fact finder with a different set of facts. *See Montgomery County v. Supervisor of Assessments of Montgomery County*, 275 Md. 58 (1975); *Schultze v. Montgomery County Planning Board* et al., 230 Md. 76 (1962).

Here, the *Enyart* matter was decided by a zoning administrative hearing officer. Petitioner seeks to bind the Board of Appeals, which is not part of the same agency and, therefore, is a different factfinder. Morever, because the Board is at a higher level of administrative appeal, it would frustrate the entire purpose of the appeal system if a party could use decisions on a lower lever in effect to estop the Appeal Board from making any different findings. For these reasons, the undersigned finds that the impermissible change of mind doctrine does not apply to the present case.

Petitioner also asserts that the Board's denial of Petitioner's application is arbitrary and capricious, as well as a denial of due process and equal protection. However, each of these additional assertions of constitutional infirmity appears based on the impermissible change of mind argument related to the prior *Enyart* matter, which already has been discussed above. Having reviewed the record herein in its entirety, the undersigned is persuaded that the Board's decision was based on substantial evidence and that it otherwise has satisfied constitutional standards.

3. Does the Board's denial of Petitioner's application constitute an impermissible taking?

In *Nolland v. California Coastal Commission*, 483 U.S. 825, 834 (1987), the Court stated that it has long recognized that land-use regulation does not affect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. Id.

In the present case, Petitioner's complete parcel of land totals approximately 15.4 acres.

The reclassification property comprises only 2.5 acres of the property. Here, the record makes clear that Petitioner has not been denied all economic and beneficial use of the property as there is some commercial use remaining on the 2.5 acres and residential uses exist for the remaining portion of the parcel. (Petitioner testified that a cell-tower would be a permitted commercial use. T.8/30/01, p.64.

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 in shoreline areas. T. 10-2-02, p. 94. Ms. Miley testified that removal of the property from the Critical Area would allow the property to have more impervious surface; this would increase runoff and decrease water quality, negatively impacting Whitehall Creek and the Chesapeake Bay. T. 10-2-02, p. 94. Therefore, this Court finds that the State had a legitimate reason in placing Petitioner's property in the Critical Area.

For both reasons, this Court finds that no impermissible "taking" has occurred.

Under these circumstances, it is

ORDERED, this 26th day of December, 2002, by the Circuit Court for Anne Arundel County that the decision of the County Board of Appeals is affirmed and Petitioner's application for reclassification is hereby DENIED.

Philip T. Caroom, Judge

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
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

June 12, 2006

Ms. Elinor Gawel
Anne Arundel County
Office of Environmental and Cultural Resources
2664 Riva Road, MS 6301
Annapolis, Maryland 21401

Re: Wright Investment Group - 2000-0468-C, BA 48-01C

Dear Ms. Gawel:

Thank you for responding to my last letter requesting additional information concerning the above-referenced declassification request for Commission review and approval. It appears all relevant materials were submitted with the exception of the Circuit Court decision and the Court of Special Appeals decision; therefore, this office cannot consider the County's request a complete submittal, and is unable to accept this package for processing without the following information until we receive those two remaining items.

As stated in our previous letter, when the items listed above are provided, please forward them with a formal request for processing the declassification application. Once this office accepts the submittal as a complete package for processing, the Chairman will have 30 days to make an amendment or refinement determination. If you have any questions, please telephone me at (410) 260-3478.

Sincerely,

Lisa A. Hoerger
Natural Resources Planner

cc: Mr. Joseph Rutter, Planning and Zoning Officer
Ms. Suzanne Schappert, Planning and Zoning
Mr. David Plott, Esquire

app

FINDING AND RECOMMENDATION
OFFICE OF PLANNING AND ZONING
ANNE ARUNDEL COUNTY, MARYLAND

APPLICANT: Wright Investment Group

ASSESSMENT DISTRICT: Third

CASE NUMBER: 2000-0468-C

COUNCILMANIC DISTRICT: Fifth

HEARING DATE: March 27, 2001

PREPARED BY: Charlene L. Morgan
Planner

REQUEST

The petitioners are seeking a critical area reclassification to remove 2.5 acres of land from the Chesapeake Bay Critical Area in the vicinity of Route 50 and Whitehall Road.

LOCATION AND DESCRIPTION OF SITE

The subject acreage is a part of a 15.367 acre parcel shown on Tax Map 40, Block 23, Parcel 225. It is located on the south side of Whitehall Road, approximately 1,000 feet east of Saint Margarets Road. The area to be reclassified is zoned C1 - Local Commercial District and RLD - Residential Low Density. The remainder of the parcel is zoned RLD and OS - Open Space zoning. The site is in the Critical Area, designated Resource Conservation Area (RCA). Whitehall Creek lies to the south of the subject site.

RECLASSIFICATION STANDARDS

Per Section 11-102.3(c), Critical area reclassifications shall be granted or denied in accordance with compatibility with 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 applicants have notified the Chesapeake Bay Critical Area Commission of the proposed

-2001-

critical area classification in writing and with a copy of the application at least 30 days prior to any hearing.

FINDINGS

The standards established for the Critical Area reclassification are designed to address a change from one designation to another. This reclassification request is unusual in that it seeks to delete an area of land from the Critical Area.

The Chesapeake Bay Critical Area consists of the land area within 1000 feet of tidal waters or wetlands. The issue in this case is the exact location of the Critical Area limit. The applicant maintains that the 1000 foot line should be drawn from wetlands as shown on the State Wetlands Maps which would exclude the subject 2.5 acres. The line as adopted extended the limit several hundred feet to the north, based on the distance from the four-foot contour. The line as it now exists places the entire property within the Critical Area (RCA) limit.

Aerial photography was used by the State and the County to create the Critical Area Maps. The State determined the tidal wetlands based on associated plant communities, while the County determined them based on the four-foot contour.

The subject property is across the road from the Enyart property which was granted a Critical Area Reclassification to remove a portion of that property from the Chesapeake Bay Critical Area. The granting of case #1995-0382-C was based on the location of the same wetland at issue in this case. The applicant's consultant determined the location of the tidal wetlands based on a field inspection and contends that the tidal wetlands corresponds more closely to the State Maps and that the current location of the Critical Area limit is incorrect due to a mapping mistake.

The Chesapeake Bay Critical Area Commission offers no objection to the reclassification to remove the subject 2.5 acres based on the fact that this property is affected by the same drafting error as the previous case. The Commission must review a formal map amendment in order for the County map to be revised.

Based on the above, this office has 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 as shown on the site plan submitted with the variance application, subject to the following:

1. The applicant shall contact Ms. Lisa Hoerger of the Commission to officially change the County Critical Area Map.

Judge Jo' C. North, II
Chairman

Ren Serey
Executive Director

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA COMMISSION

1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338

February 8, 2001

Mr. Kevin Dooley
Anne Arundel County Office of Planning & Zoning
2664 Riva Road, MS 6301
Annapolis, Maryland 21401

RE: Reclassification Case No. 2000-0468-C, Wright Investment Group

Dear Mr. Dooley:

Thank you for providing information on the above referenced request for Critical Area reclassification. 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 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. (The previous map amendment was specific to the Enyart property only.) Commission staff is available to assist the County and/or the applicant as needed. The contact person for the map amendment is Ms. Lisa Hoerger and she may be reached at (410) 260-3478.

Thank you for the opportunity to comment. Please include this letter in the file and submit it as part of the record for this reclassification request. Also, please notify the Commission in writing of the decision made in this case.

Sincerely,

LeeAnne Chandler

LeeAnne Chandler
Natural Resources Planner

cc: David M. Plott, Esq.
Ms. Elinor Gawel
Ms. Lisa Hoerger

ANNE ARUNDEL CO.
RECEIVED
FEB 15 2001
PLANNING & CODE ENFORCEMENT

FINDING AND RECOMMENDATION
OFFICE OF PLANNING AND ZONING
ANNE ARUNDEL COUNTY, MARYLAND

APPLICANT:	Wright Investment Group	**ASSESSMENT DISTRICT:**	Third
CASE NUMBER:	BA 48-01C (2000-0468-C)	**COUNCILMANIC DISTRICT:**	Third
HEARING DATE:	August 30, 2001	**PREPARED BY:**	Patricia A. Miley Planner

REQUEST

The applicant is seeking a Critical Area Reclassification to remove 2.5 acres from the Chesapeake Bay Critical Area.

LOCATION AND DESCRIPTION OF SITE

The subject property, in its entirety, consists of 15.367 acres. The applicant is, however, only seeking to remove 2.5 acres of the total acreage from the Critical Area. The property is located on the south side of Whitehall Road, approximately 1,000 feet east of St. Margarets Road. It is identified in Block 23 as Parcel 225 on Tax Map 40.

The property also has multiple zoning classifications. The 2.5 acres for which the reclassification is being requested is zoned C1-Local Commercial District and RLD- Residential Low Density. The remainder of the parcel is zoned both RLD- Residential Low Density and OS-Open Space. The property has been as such since the adoption of comprehensive rezoning for the Southern Third Assessment District on February 13, 1989.

This is a waterfront parcel which is located in the Chesapeake Bay Critical Area and is classified as Resource Conservation Area.

RECLASSIFICATION STANDARDS

Section 11-102.3 (c) of the Anne Arundel County Zoning Ordinance states that the 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 reclassification 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 applicants have notified the Chesapeake Bay Critical Area Commission of the proposed Critical Area classification in writing and with a copy of the application at least 30 days prior to any hearing.

FINDINGS

The Chesapeake Bay Critical Area consists of that land area within 1,000 feet of the edge of tidal or from the landward edge of the adjacent tidal wetlands and the lands under them. The issue in this case is the exact location of the limits of the Critical Area.

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 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.

the Environmental Services Section of this Office reviewed this application and could not support the request. They pointed out that the Anne Arundel County Critical Area Program document states, "The purpose of the Anne Arundel County Critical Area Program is to minimize adverse impacts on water quality, conserve plant, fish and wildlife habitat, and to establish land use policies which accommodate growth while requiring more sensitive development activity in shoreline areas." If this property is declassified as Critical Area it will be permitted to have more impervious surface than permitted in the Critical Area. Increased impervious surface increases runoff and decreases water quality. Protection for wildlife will not be at the same strict standards for the Critical Area. A replacement of forest cover will not be required at the same minimum of an equal area replaced for that area removed. A lower standard

is applied outside the Critical Area. This lower standard would allow for an increased loss of plant and wildlife habitat.

The standards 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 map of this property. The mapping standards used for this property are the same standards which have been consistently utilized throughout the Anne Arundel County. They are standards approved and promulgated by both the Anne Arundel County Council and the Chesapeake Bay Critical Area Commission. It is the Opinion of this Office that there was no mistake in the mapping of the subject property. Further, since the mapping of the site was accurate, the proposed reclassification would not conform to State or County mapping criteria.

RECOMMENDATION

Based upon the standards set forth in Section 11-102.3 (c) under which a Critical Area Reclassification may be granted, this Office would recommend that the applicant's request to remove 2.5 acres from the Critical Area be **denied.**

MEMORANDUM
OFFICE OF PLANNING AND ZONING
ENVIRONMENTAL SERVICES

To: Pam Miley

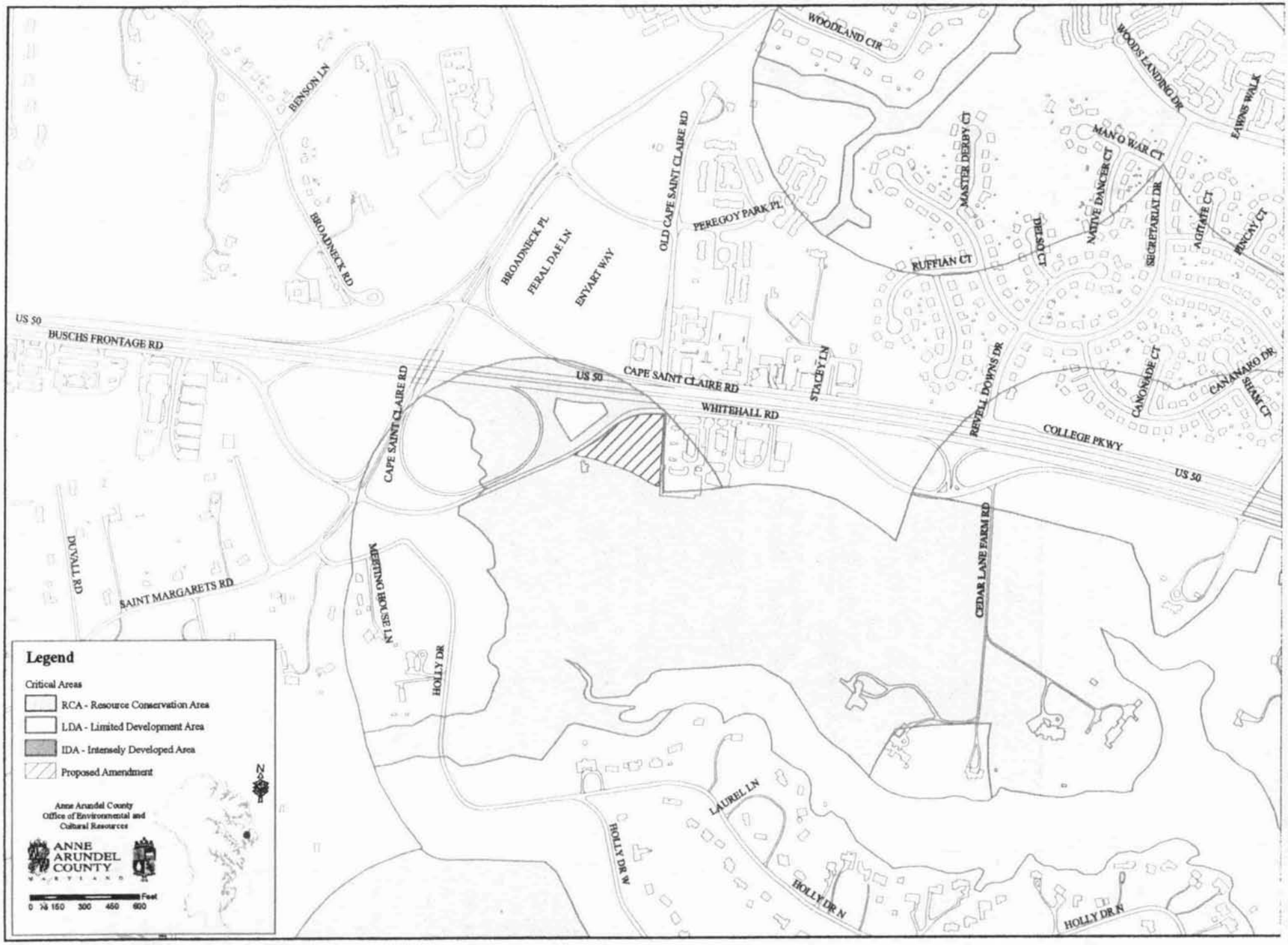
From: Elinor Gawel, Environmental Planner

Re: Wright Investment Group BA 48-01C (2000-0468-c)

The Anne Arundel County Critical Area Program document states, "The purpose of the Anne Arundel County Critical Area Program is to minimize adverse impacts on water quality, conserve plant, fish and wildlife habitat, and to establish land use policies which accommodate growth while requiring more sensitive development activity in shoreline areas." If this property is declassified as Critical Area it will be permitted to have more impervious surface than permitted in the Critical Area. Increased impervious surface increases runoff and decreases water quality. Protection for wildlife will not be at the same strict standards for the Critical Area. A replacement of forest cover will not be required at the same minimum of an equal area replaced for that area removed. A lower standard is applied outside the Critical Area. This lower standard would allow for an increased loss of plant and wildlife habitat.

wright10/02/01

Amendment 2000-0468-C: Wright Property



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
1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

March 21, 2006

Ms. Elinor Gawel
Anne Arundel County
Office of Environmental and Cultural Resources
2664 Riva Road, MS 6301
Annapolis, Maryland 21401

Re: Wright Investment Group
2000-0468-C, BA 48-01C

Dear Ms. Gawel:

Thank you for forwarding the above-referenced declassification request for Commission review and approval. We understand this declassification case was previously reviewed by the Anne Arundel County Board of Appeals, the Anne Arundel County Circuit Court and the Maryland Court of Special Appeals; therefore, this office cannot consider the County's request a complete submittal, and is unable to accept this package for processing without the following information:

1. In addition to the most recent Anne Arundel County Board of Appeals decision, all previous written decisions from the Board, the Circuit Court and the Court of Special Appeals.

2. The Planning and Zoning Office's staff report that was submitted to the Anne Arundel County Board of Appeals for the original hearing and when the case was on remand to the Board of Appeals.

3. A site plan that more clearly illustrates the location of the original 1,000-foot boundary line, and the changed 1,000 foot boundary line, not only on this property, but for the entire Critical Area Map sheet # 17, since the updated map showing the location of the 1000-foot boundary is what the Commission is reviewing.

Did we get this?

4. Any other information that was available since 1985 that the County believes is relevant to the case (i.e. maps, mapping methodogy).

When those items listed above are available, please forward them to this office with a formal request for processing the declassification application. Once this office accepts the submittal as a complete package for processing, the Chairman will have 30 days to make an amendment or refinement determination. If you have any questions, please telephone me at (410) 260-3478.

Sincerely,

Lisa A. Hoerger
Natural Resources Planner

cc: Mr. Joseph Rutter, Planning and Zoning Officer
Ms. Suzanne Schappert, Planning and Zoning
Mr. David Plott, Esquire

Critical Area Commission

PANEL REPORT
Addendum
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

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.

The Anne Arundel County Board of Appeals made the decision to declassify the site on remand from the Maryland Court of Special Appeals (Wright Investment Group v. Anne Arundel County, Maryland; Unreported Opinion Issued August 31, 2004). Because the appellate court had held that the County incorrectly applied its mapping criteria with regard to this property, the Board applied the holding of the Court and found that based on the County's mapping rules and the requirements of the County Code, a portion of this property was mistakenly included within the County's Critical Area boundary.

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. The Panel agrees that the property in question has been incorrectly mapped. However, they do not agree that the method proposed by the County to correct the mapping mistake is consistent with the mapping standards that should be used to properly revise the map.

The Panel believes that in correcting 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 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 and separated 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 on the appropriate map 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 to implement a County process called a "declassification." The County proposes the "removal" of the Wright Investment Property from the Critical Area in a manner that is similar to an exclusion. The Panel notes that the State Critical area law does not address the exclusion of individual properties in the manner proposed by the County, nor does the Panel believe that this property qualifies for exclusion under the standards in the State law. The Critical Area law and Criteria do not include the concept of "declassification." The County has not proffered, and the Panel does not know of, 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 Critical Area, while all of the surrounding properties remained within the Critical Area. Section 8-1808 (c) of the law requires as an essential element of a local Critical Area Program a "map designating the Critical Area in a local jurisdiction."

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 mapping "declassification" proposed by the County for the Wright Investment Property results in a map that does not clearly "designate" the "Critical Area." The County's proposal does not appear to facilitate a consistent and uniform approach to regulating development activity, especially when it is likely that similar corrections may be warranted on neighboring properties (as noted by the Court of Special Appeals), and perhaps in other portions of the Critical Area. If the County continues to amend its Critical Area maps by identifying single 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 County's proposal depicts a map revision that the Panel believes is inconsistent with the mapping provisions in the law, and does not promote 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

PANEL REPORT
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: Pending Public Hearing and Panel Meeting

COMMISSION ACTION: Vote

STAFF: Lisa Hoerger

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

DISCUSSION:

The Anne Arundel 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 made the decision to declassify the site on remand from the Court of Special Appeals. Because the appellate court had held that the County incorrectly applied its mapping criteria with regard to this property, the Board applied the holding of the Court and found that based on the County's mapping rules and the requirements of the County Code, a portion of this property was mistakenly included within the County's Critical Area boundary.

By way of explanation, the mapping rules of Anne Arundel County provided for the County to extend the Critical Area line that was drawn from the 1972 State Tidal Wetlands maps when the National Wetlands Inventory (NWI) maps showed that 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, on the Wright property, 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. Below is the mapping rule as it appears in the Anne Arundel County Critical Area Program Document:

> The 1,000-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 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.

While the Board of Appeals settled the issue of the status of the Wright property, the Court of Special Appeals decision on which the Board's decision is based raises questions regarding the County's application of its mapping rules to other similar properties in the area. 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.

The panel will hold its public hearing on Monday, August 28, 2006. Subsequent to the hearing the panel will meet and formulate a recommendation to the full Commission concerning this amendment request. I have provided the language added by the General Assembly in the 2006 legislative session concerning the handling of program amendments by the Commission. According to the Natural Resources Article §8-1809 (o):

(2) The Commission shall determine if the proposed amendment is consistent with the purposes, policies, goals, and the provision of this subtitle, and all criteria of the Commission.

(3) In accordance with the Commission's determination in paragraph (2) of this subsection, the Commission shall:

(I) Approve the proposed program amendment and notify the local jurisdiction;
(II) Deny the proposed program amendment;
(III) Approve the proposed program amendment subject to one or more conditions; or
(IV) Return the proposed program amendment to the local jurisdiction with a list of the changes to be made.

(4) If the Commission approves a proposed program amendment subject to one or more conditions under item (3)(III) of this subsection, the local jurisdiction shall notify the Commission within 60 days of its intent to adopt the conditions.

Wright Investment Group v. AA County, CSA 8/31/2004 Unreported

Issue: (p. 7)
The Mapping Process that placed Wright's property in the Critical Area in 1988 Classified RCA

County mapping standards – see p. 47 fn 10.
Facts: County referred to several maps. - NWI maps from 82 or 83 and state tidal wetlands maps from 1972 and county topo maps from 83. See pg. 20.

State measured CA from tidal wetlands as depicted on St Wetlands maps.
County generally did the same, **except when the teidal wetlands extended above the four-foot contour on the county's topo map. Then, county measured from the intersection of the 4-ft contour and the tidal wetlands as shown on the NWI map. Court says that Wright's property is not in State CA line, but is in county CA . *** 350-400 ft difference.**

Wright began the reclassification process in 2000, seeking to remove the 2.5 actres from the CA. CAC letter stated no objection because Wright affected by similar drafting error as neighboring property (Enyart). See pg. 26 - looks like mapped wetland on NWI maps was nontidal, and was mistakenly identified as tidal. Thus the error.
Enyart (1995) same drafting error - letters from Lisa and Lee Anne. - p. 28.

County testified that it used the 4 ft contour line when the 1983 maps (more recent) showed tidal wetlands extended further upstream. This standard approved by CAC - placed entire Wright property in CA. 1972 state map used as 'baseline' but then augmented by other maps. - p. 31-32
AABOA rejected Wright's appeal - found that County proposed its own map, approved by CAC, and followed its mapping standard consistently. P. 38.
Cir. Ct affirmed BZA in 2002.

CSA interpreted what the county did as an "expansion" of the Critical Area and said that the county did not ask permission to expand. P. 58. Approval of map by Cty Council and CAC does not resolve Q of whether they approved a map that was incorrectly drawn based on county's erroneous interp of its own mapping criteria. County may expand CA IF state's CA boundary is less than 1000 ft from tidal wetlands as shown on NWI map.p. 59. Here, tidal wetlands did not extend further upstream and use of 4' contour not triggered.

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

[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-

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[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

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[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.

In the Circuit Court for Worcester County
Case No. 23-C-03-000298

IN THE COURT OF APPEALS
OF MARYLAND

No. 10

September Term, 2006

EUGENIA M. NEIFERT, ET AL.

v.

DEPARTMENT OF THE ENVIRONMENT, ET AL.

Bell, C.J.
Raker
Wilner
Cathell
Harrell
Battaglia
Greene,

JJ.

Opinion by Raker, J.

Filed: November 14, 2006

Eugenia M. Neifert, Melvin D. Krolczyk, and Teresa A. Krolczyk, appellants, own four lots in the Cape Isle of Wight subdivision in Worcester County. Appellants have been denied sewer service and wetland fill permits and therefore are unable to develop their lots. We must decide whether the Maryland Department of the Environment violated appellants' equal protection rights by denying sewer service and whether the denial of sewer and wetland fill permits constitutes an unconstitutional taking. We shall hold that the denial of sewer service under the 1992 Policy satisfies rational basis review under equal protection analysis and that appellants did not suffer an unconstitutional taking.

I.

Appellants own four contiguous lots within the Cape Isle of Wight subdivision in Worcester County. Eugenia M. Neifert owns in fee simple lots 9, 10, and 11 and Melvin D. Krolczyk and Teresa A. Krolczyk own in fee simple Lot 8. Eugenia Neifert acquired her lots by gift from her mother in 1975; her parents acquired title to the lots in 1962. The Krolczyks purchased their lot in 1974. The deed to each lot contains a restriction requiring that any "[s]eptic tanks, sewage disposal systems and drinking water facilities shall conform to all requirements established by the Maryland State Department of Health and the Worcester County Maryland Health authorities." Each of appellants' lots also abut Marlowe Road, a dedicated but unimproved 40-foot wide street.

The Cape Isle of Wight subdivision was established in the early 1950's and is comprised of land created by excavating canals in a tidal marsh and sidecasting the excavated

material on both sides to cover the marsh and create uplands. Cape Isle of Wight contains 625 lots and, as of 1972, approximately 128 homes existed in the subdivision. Each of these homes used a septic system that was approved based on percolation tests that could be completed at any time throughout the year.[1]

In the mid-1970's, a sewage disposal problem developed in the West Ocean City area of Worcester County, Maryland.[2] *See Department of Environment v. Showell*, 316 Md. 259, 558 A.2d 391 (1989). Approximately half of the septic systems actively used in the area failed.[3] *Id.* at 260, 558 A.2d at 391. Untreated sewage leaked into drinking water supplies and created a public health hazard. *Id.* Worcester County responded to the situation by requiring that lots pass a seasonal percolation test conducted during January through April, the wettest months of the year and when the water table was at its highest.[4] As a result,

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[1] A percolation test is used to determine if the soil will absorb and drain water adequately enough to install and use a domestic sewage-disposal system. The testing procedure, generally speaking, involves digging several holes, filling them with water, and measuring the rate at which the water-level decreases.

[2] Several cases have discussed the septic system failures in West Ocean City. *See Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782 (4th Cir. 1988); *Department of Environment v. Showell*, 316 Md. 259, 558 A.2d 391 (1989); *Shanty Town Assocs. Ltd. P'ship v. Dep't of Env't*, 92 Md. App. 103, 607 A.2d 66 (1992).

[3] The difficulties presented by a high groundwater table and poorly drained soils were exacerbated by the fact that more people were residing in the area year-round as opposed to just the summer months.

[4] Seasonal testing was required under Regulation 10.03.27, Governing the Installation of Private Water Supply and Sewage Disposal Systems and Directive Policy GS-6 ("GS-6 Policy").

eighty to ninety percent of new applications for septic permits in West Ocean City were denied. *Id.* In the Cape Isle of Wight subdivision, approximately 150 lot owners requested septic tank permits from 1976-1979 and 148 of those requests were denied because the lots were unable to pass the seasonal percolation testing. Appellants' lots were among those denied on-site septic system permits in 1979 and they did not appeal this decision.[5]

A central sewage collection system was proposed for the West Ocean City area to allow for the development of new homes and businesses. Each of appellants' four lots are located in the sewer system district. The considerable expense associated with the project required the County to seek additional funding from the State of Maryland and the U.S. Environmental Protection Agency (EPA). EPA's 1983 Final Environmental Impact Statement (EIS) concluded that EPA could only provide a construction grant if certain restrictions were met. EPA's funds were conditioned on the system not providing sewer service to any parcel of land within any wetlands, as defined by the U.S. Fish and Wildlife Service, or to any parcel of land within the 100 year floodplain if it was platted as a building lot after May 31, 1977.[6] EPA also required the Worcester County Sanitary Commission

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[5] The Worcester County Department of Public Health informed Melvin Krolcyzk on June 12, 1979 that Lot 8 was not buildable under Regulation 10.03.27, Governing the Installation of Private Water Supply and Sewage Disposal Systems and Directive Policy GS-6. The Worcester County Department of Public Health informed Eugenia Neifert on October 25, 1979 that Lots 9, 10 and 11 were not buildable under the GS-6 Policy.

[6] Executive Orders require federal agencies to evaluate the effects of their actions on floodplains and wetlands. Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1977); Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 24, 1977). The Environmental Protection (continued...)

("Sanitary Commission") to submit maps that clearly delineated all non-service areas. The Maryland Department of Health and Mental Hygiene (DHMH) and the Sanitary Commission formalized their commitment to these restrictions in a Consent Order on June 28, 1983.[7] The total sewer system cost was funded by the EPA (75%), the State of Maryland (12.5%), and Worcester County (12.5%).

The Worcester County Sanitary Commission hired the engineering firm of George, Miles & Buhr to create a set of maps ("1984 Maps") identifying non-service areas, *i.e.* those parcels that fell within wetlands as defined by the Fish and Wildlife Service or were located in the 100-year floodplain and were platted after 1977. The 1983 EIS maps were not relied upon because lot lines were not visible. Instead, George, Miles & Buhr created the 1984 Maps by enlarging National Wetland Inventory maps developed by the Fish and Wildlife Service from large-scale aerial photography and superimposing them onto a map of the sewer service area. The 1984 Maps provided approximate wetland delineations and were used as general guidance in granting sewer service.[8]

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[6](...continued)
Agency is required to comply with these Executive Orders. 40 C.F.R. § 6.302 (2006).

Appellants' lots are located in the 100-year floodplain and were platted prior to 1977 so their lots are not precluded from eligibility for sewer service based on the floodplain restriction set forth by EPA.

[7] The regulatory functions and responsibilities of the Department of Health and Mental Hygiene related to this case eventually were transferred to the Department of Environment. *See* 1987 Md. Laws, Chap. 306 (establishing the Department of Environment).

[8] Wetland delineations outline the borders around wetland areas.

According to the 1984 Maps, lots 8, 9, and 10 and much of the portions of Marlowe Road adjacent to the lots contained wetlands.[9] Appellants applied to Dr. Donald Harting, the Health Officer of Worcester County, for sewer connections in 1985 and their request was denied.[10] Dr. Harting's September 10, 1985 letter denied sewer system access because "the southerly portion of Marlowe Road and lots 8, 9, 10, and 11 were classified as wetlands . . . [A]ll lots which are classified as wetlands are prohibited from connecting to the sewerage system."

Appellants requested a review of Dr. Harting's decision by Richard B. Sellars, Jr., Director of the Water Management Administration at DHMH. Director Sellars affirmed Dr. Harting's decision to deny service because the Consent Order prohibited service for any lots within wetlands as defined by the Fish and Wildlife Service. Appellants appealed to the DHMH's Office of Hearings. On December 23, 1986, Arthur E. Cohen, a DHMH hearing examiner, affirmed Dr. Harting's decision to deny sewer service to Lots 9 and 10, but reversed the decision with regard to Lots 8 and 11. The Final Decision Maker, Timmerman T. Daugherty, issued a Final Decision and Order on July 16, 1990 affirming Dr. Harting's

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[9] Lots 8 and 10 had small portions of wetlands, lot 9 was approximately 20-25% wetlands, and lot 11 was entirely upland. Almost all of Marlowe Road adjacent to lots 8, 9, and 10 was within wetlands.

[10] The Consent Order established a permit system for obtaining sewer service where lot owners applied to the Worcester County Health Officer for a permit. Lot owners could then appeal to the Director of the Water Management Administration of the Department of Health and obtain further review pursuant to the Maryland Administrative Procedure Act.

denial of sewer service to all of appellants' lots.[11]

Appellants sought judicial review in the Circuit Court for Worcester County. On July 16, 1991, the Circuit Court held that it was not error to base a wetland determination upon additional evidence which conflicts with the 1984 Maps as the maps were not binding and held that Dr. Harting's decision to deny sewer service to appellants was not supported by substantial evidence. The Circuit Court remanded the case for the County to re-consider whether appellants' lots qualified as wetlands. Appellants held the sewer service appeal in abeyance while they pursued wetland permits and did not readdress the sewer service proceedings until 1998.

By 1986, the Sanitary Commission was concerned that the 1984 Maps did not accurately show nontidal wetlands. At a meeting on February 7, 1986, representatives from the Worcester County Sanitary District, the Department of Natural Resources and the U.S. Army Corps of Engineers ("Corps of Engineers") met to identify lots, not then mapped as wetlands, that needed on-site investigations to determine accurate wetland delineations for a set of revised maps ("1986 Maps").[12] Appellants' lots were included in the list for on-site investigation. Appellants' lots had also been inspected in April of 1985 by individuals from the Corps of Engineers, the Department of Natural Resources, and the Worcester County

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[11] The Final Decision Maker of the Secretary of the Department of the Environment, as opposed to the DHMH, determined this case. *See supra* note 7.

[12] Formally, the 1986 Maps are labeled as the 1984 Maps with amended revisions.

Health Department.[13] As a result of these visits and investigations, appellants' lots on the 1986 Maps were reclassified as containing 60-100% mapped wetlands.[14] The County continued to use the 1986 Maps as guidance, but sewer service was denied to any property mapped as a wetland or any property defined as a wetland under the applicable Fish and Wildlife Service delineation. Thus, up until 1992, any property within wetlands was denied sewer service, whether mapped or not.[15]

In 1991, the Maryland Department of the Environment ("Department") became aware that many lot owners who had invested in the purchase of lots in reliance on the wetland guidance maps felt that their investment-backed expectations were frustrated by the

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[13] This investigation was initiated by the owner of lot 7 in order to determine his eligibility for sewer service. While evaluating the lot 7 property, it was determined by the experts from the Corps of Engineers, the Department of Natural Resources, and the Worcester County Health Department that the southerly portion of Marlowe Road and lots 8, 9, 10, and 11 were wetlands. An on-site visit was completed by the same agencies on September 26, 1985. Additionally, on July 14, 1986, Robert Zepp of the U.S. Fish and Wildlife Service made a site visit of appellants' properties.

[14] Lot 8 is depicted as 90% wetlands, lot 9 is 100% wetlands, lot 10 is approximately 75% wetlands, and lot 11 is approximately 60% wetlands. All of Marlowe Road adjacent to lots 8, 9, 10, and 11 is designated as wetlands.

[15] Specifically, between 1984 and 1992, sewer service was denied to (1) lots that contained mapped wetlands, as field-verified, and (2) lots that were not mapped as wetlands but that turned out to contain wetlands after a wetland delineation. However, the County would grant sewer service to a lot partially within wetlands if the owner could demonstrate that the lot satisfied the structures test, meaning that all buildings and ancillary structures would be constructed within the upland portions of the lots.

application of new wetland delineation methodologies.[16] As a result, the Department requested that EPA reconsider the Consent Order's prohibition of sewer service for lots within wetlands in light of the recent implementation of the Corps of Engineers' "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" ("1989 Federal Manual"). Interior lots were classified as wetlands even though they were identified on the guidance maps as entirely non-wetland as a result of the application of the 1989 Federal Manual in West Ocean City.[17] In response, the Department, after consulting with the Worcester County Sanitary Commission, proposed a change in how the Consent Order would be implemented. The Department wrote EPA on November 20, 1991, seeking its concurrence with the proposed policy change. In its letter, the Department summarized the difficulties the 1989

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[16] Worcester County and Maryland Department of Environment were prompted to propose a change to the interpretation of the Consent Order when an entire block of interior lots in Section C of the Cape Isle of Wight subdivision, which had been issued building permits and were not close to the wetland line on the guidance maps, were defined as wetlands under the Corps of Engineers' "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" and, as a result, denied sewer service.

[17] The presence of non-mapped wetlands was always grounds for sewer service denial, but use of the 1989 Federal Manual by the Corps of Engineers resulted in identification of more wetlands during the building construction permit process. Prior to 1989, the definition of wetlands used by the Corps of Engineers required a positive wetland indicator be present for each parameter (vegetation, soils and hydrology) while the Fish and Wildlife Service required only a positive indicator for any one of the three parameters. *See* U.S. ARMY CORPS OF ENGINEERS ENVIRONMENTAL LABORATORY, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL, Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS (1987). As the Corps of Engineers was more likely to identify wetlands under the 1989 Federal Manual, sewer service to the building would be denied because the structure was located in a wetland, regardless of how that wetland was defined and even if the lot owner had secured a construction permit under the 1989 Federal Manual.

Federal Manual had caused as follows:

> "Cases have arisen of late where lot owners relied on the maps of record and determined that sewer service was available. They then arranged financing, only to find that they were precluded from proceeding with construction due to the discovery of wetlands on the property. The discovery would come as a result of the later use of a more stringent definition of the term wetlands. At that point the lot owner would attempt to work with the proper wetlands regulatory authorities to gain approval to construct the proposed building. The problem is, however, that if the lot owner was successful in securing a permit from the Corps of Engineers to construct a building, sewer service to that building would be denied under the premise that service to a structure in a wetland, no matter how or when that wetland came to be defined, is prohibited under the terms of the Consent Order."

While field verifications of the guidance maps in 1985 and 1986 adjusted the wetland boundaries of lots already reflected on the 1984 maps as containing wetlands, implementation of the 1989 Federal Manual resulted in large blocks of interior lots – those not close to mapped wetland lines – being defined as wetlands. The Department realized that individuals who had purchased lots in reliance on the maps found that they were no longer able to build on their lots because, based on the delineation methods in the 1989 Federal Manual, their lots were now categorized as wetlands.

As more lots became ineligible for sewer service, the Department also became concerned about the County's ability to retire the debt it had assumed in order to finance its share of the project. The Department proposed what it believed to be a "reasonable solution" to the problem that would not "contraven[e] the purpose or intent of the consent order or

grant condition."[18] The Department explained as follows:

> "Our proposal is to allow the wetlands delineation procedures that existed at the time of the signing of the Consent Order to be utilized for the purpose of determining a lot's ability to receive sewer service. If post-Consent Order wetland delineations are conducted using current delineation procedures, which presumably result in a larger expanse of land defined as wetlands, then the matter falls outside of the scope of the Consent Order. Resolution of the matter would lie between the lot owner and the Corps of Engineers. If the final outcome is the issuance of a wetlands construction permit and construction does not infringe upon the wetland areas defined under the procedures that existed as of 1983, then sewer service would be allowed."

In 1992, EPA responded to the Department by expressing its adoption of the Department's proposal in two separate letters, one to the Corps of Engineers and one to the Department. EPA stated in its letter to the Corps of Engineers as follows:

> "Specifically, we have interpreted the implication of wetland delineation methodology changes since 1983 and the impact of these changes on sewer hook up eligibility . . .
>
> "[W]e interpret the restrictions of the 1983 EIS to apply to only those wetland areas originally identified in the 1983 EIS. Those areas outside of the 1983 delineation but within current jurisdictional wetland boundaries will be eligible for hook up provided they receive a Section 404 permit, a 401 Water Quality Certification, a State Non-Tidal Wetlands permit or other authorization and all other required State and local permits."

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[18] Under 40 C.F.R. § 35.965, EPA's Regional Administrator may impose sanctions if the Administrator determines that a grantee has not complied with the terms of a grant for construction of a sewer system. Sanctions authorized by 40 C.F.R. § 35.965 include termination of the grant, suspension of work, or a determination that the grantee is ineligible for future Federal assistance.

Under this 1992 Policy, parcels lacking mapped wetlands on the 1986 maps were granted sewer service if they obtained all necessary wetland fill permits.[19] At least 26 lots have obtained the proper fill permits and were granted sewer service under the 1992 Policy; each of these lots contained "unmapped" wetlands ("List of 26").[20] Conversely, lots with mapped wetlands were ineligible for sewer service according to the 1992 Policy unless all buildings and ancillary structures could be located on uplands, *i.e.* meet the structures test. No sewer service has been granted to a mapped wetland lot. Appellants' lots contain mapped wetlands under the delineation methodology in place as of 1983.[21]

In 1992, appellants filed a joint application with the Department of Natural Resources to fill the nontidal wetlands delineated on their four lots and the adjacent Marlowe Road.[22] The Department of Natural Resources denied appellants' applications in February 1993,

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[19] The 1983 delineation referred to in the EPA policy letter dated March 24, 1992 refers to all wetland guidance maps that were developed in response to the Consent Order, *i.e.* the 1983, 1984 and 1996 Maps.

[20] The actual number of lots may be as low as 25 because of a duplicate lot listing or more than 50, according to the testimony of Richard L. Wells, Director of Environmental Programs. We use "List of 26" because this is the number of lots listed in an exhibit as non-mapped lots that are, on the ground, actual in fact wetlands and received sewer service under the 1992 Policy. The Circuit Court utilized the number 25 because it was thought that one lot was listed in duplicate on the List of 26.

[21] Lots 8, 9, and 10 and Marlowe Road contained mapped wetlands on the 1984 Maps. Lots 8, 9, 10, and 11 and Marlowe Road contained mapped wetlands on the 1986 Maps.

[22] As of July 1, 1995, the regulatory functions and responsibilities of The Department of Natural Resources's Water Resources Administration were transferred to the Maryland Department of the Environment's Water Management Administration. 1995 Md. Laws, Chap. 488.

finding that the economic benefits did not outweigh the ecological costs and that appellants had not demonstrated that the project was necessary to meet a demonstrated public need.[23]

Appellants sought administrative and judicial review. Appellants filed for a contested case hearing with the independent Maryland Office of Administrative Hearings. Administrative Law Judge Joan C. Ross held a hearing and issued a Recommended Decision on August 15, 1994 that affirmed the Department of Natural Resources's denial of the permit application. On April 21, 1995, Robert D. Miller, the Director of the Department of Natural Resources's Water Resources Administration, filed a Final Decision and Order also affirming the denial. Appellants sought judicial review in the Circuit Court for Worcester County. In April 1997, the Circuit Court for Worcester County held that the denial of a fill permit was not supported by substantial evidence and was arbitrary, capricious and erroneous as a matter of law because the Department of Natural Resources had not properly evaluated the economic and ecological value of the nontidal wetlands. The Court remanded the case to the Department of the Environment for a new hearing.

In August 1997, appellants filed additional wetland permits with the Department of the Environment. Following a public hearing on the permit applications, the Department denied this second request for permits on October 13, 1998 because of the high value of the

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[23] During these proceedings, the Nontidal Wetlands Protection Act was moved from the Natural Resources Article to the Environment Article in the Maryland Code. Regulations on the subject of nontidal wetlands were moved from COMAR Article 8 to COMAR Article 26. The Department of Natural Resources was required to evaluate the economic and ecological value of nontidal wetlands under COMAR 08.05.04.05 (D)(2)(d), currently COMAR 26.23.02.04 (D)(2)(d).

wetland functions and the lack of a demonstrated public need for their proposed project. Appellants filed for a contested case hearing with the Office of Administrative Hearings. Administrative Law Judge Geraldine A. Klauber filed a Recommended Order on January 6, 2000 affirming the Department's denial of the permit because the record reflected that the Department performed its statutory duty in reviewing the wetland fill permit applications. The Department's Final Decision Maker, A. Katherine Hart, filed a Final Decision and Order on May 9, 2001 affirming the decision to deny appellants' fill permits. Appellants did not seek judicial review.

In 1998, appellants reinitiated their application for sewer service under the 1992 Policy. Richard L. Wells, the Worcester County Environmental Programs Administrator, denied sewer service to appellants in November 1998. Appellants filed for a contested case hearing. At the hearing, appellants argued that the Department was interpreting EPA's 1992 Policy improperly and arbitrarily and that the Department's interpretation denied them due process. Administrative Law Judge Louis N. Hurwitz concluded that the Department did not act in an arbitrary and capricious manner in applying the 1992 Policy to appellants' lots and affirmed the denial of service on February 10, 2000. The Department's Final Decision Maker, A. Katherine Hart, affirmed the denial of sewer service on November 16, 2001. Appellants did not seek judicial review.

Appellants filed the present suit in the Circuit Court of Worcester County on April 3, 2003. Appellants sought damages and attorneys fees from the Department and, pursuant to

42 U.S.C. § 1983, from the officials responsible for the permit denials claiming the denial of equal protection and an unconstitutional taking under both the United States and Maryland Constitutions. The parties filed cross-motions for summary judgment and the Department filed a motion *in limine*, arguing that appellants were precluded from re-litigating the issue of whether their four lots were similarly situated with other wetland lots that had obtained sewer service under the 1992 Policy because they had litigated the same issue in the earlier contested case hearing. The Circuit Court held a hearing on the motions on April 18, 2005 and granted summary judgment in the Department's favor on all counts, ruling that the denial of wetland fill permits and sewer hookups did not constitute a taking or violate appellants' equal protection rights.

Appellants noted a timely appeal to the Court of Special Appeals. We granted certiorari on our own initiative prior to decision by that court. *Neifert v. Department of Environment*, 393 Md. 160, 900 A.2d 206 (2006).

II.

Before this court, appellants argue that the Department's denial of sewer service under the 1992 Policy denies them equal protection of the law under the Equal Protection Clause of the United States Constitution and Article 24 of the Maryland Declaration of Rights because there is no rational basis for providing service to non-mapped wetlands lots and

denying service to mapped wetlands lots.[24] Appellants assert also that the denial of sewer service and wetland fill permits has rendered their lots undevelopable and constitutes an unconstitutional taking of property without just compensation under the Fifth Amendment of the U.S. Constitution and Article III, § 40 of the Maryland Constitution.

The Department of the Environment responds that appellants' equal protection claim fails because their mapped wetland lots are not similarly situated to the non-mapped wetland lots that were provided sewer service, an issue appellants are collaterally estopped from contesting, and that the 1992 Policy is rationally related to the Department's concerns about fairness, fiscal integrity, and ecological soundness. The Department asserts that appellants' lots were undevelopable as of 1979 and that appellants have no constitutionally protected right to sewer access. Consequently, the Department contends, there was no unconstitutional taking associated with the denial of sewer service.

III.

The standards for review of a trial court's grant of summary judgment are well-established. We review *de novo* the Circuit Court's grant of summary judgment. *Livesay v. Baltimore*, 384 Md. 1, 9, 862 A.2d 33, 38 (2004). In reviewing a grant of summary judgment, we independently review the record to determine whether the parties properly

[24] All of the lots are contained on a recorded plat. The use of non-mapped and mapped lots refers to whether a lot was delineated as wetlands on a map of a particular agency as of a relevant time.

generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *Id.* at 9-10, 862 A.2d at 38. We review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party. *Id.* at 10, 862 A.2d at 38. In the present case, both parties filed motions for summary judgment, there is no dispute of material fact, and the only questions before us relate to the application of equal protection and takings law.

IV.

We address first whether the Department of the Environment violated appellants' equal protection rights by denying sewer service under the 1992 Policy. Appellants contend that the 1992 Policy, as applied, violates the Equal Protection Clause of the United States Constitution and Article 24 of the Maryland Declaration of Rights.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and directs that all persons similarly situated be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Article 24 of the Maryland Declaration of Rights states "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Although Article 24 does not contain an express equal protection

clause, this Court has held that the concept of equal protection is embodied within the Article. *Frankel v. Bd. of Regents*, 361 Md. 298, 312-13, 761 A.2d 324, 332 (2000) (quoting *Renko v. McLean*, 346 Md. 464, 482, 697 A.2d 468, 477 (1997)). United States Supreme Court cases applying the Equal Protection Clause of the Fourteenth Amendment are binding on this Court when applying that clause and are persuasive when applying Article 24 of the Declaration of Rights. *Id.*

Appellants are not members of a suspect class and a fundamental right is not at issue; therefore, our standard of review is the traditional and deferential rational basis analysis. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (reiterating that any classification by race, alienage, or national origin is suspect and must be evaluated under a strict scrutiny standard); *Broadwater v. State,* 306 Md. 597, 603, 510 A.2d 583, 586 (1986) (stating that general rule of sustaining a statutory classification if it is rationally related to a legitimate state interest gives way when a statute classifies by race, alienage or national origin (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254)); *see Attorney General of Maryland v. Waldron*, 289 Md. 683, 706, 426 A.2d 929, 942 (1981) (documenting fundamental rights or interests guaranteed by the federal constitution). Under rational basis review, a legislative classification is sustained if the classification is rationally related to a legitimate state interest.[25] *See City of Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254; *Ehrlich v. Perez ex rel.*

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[25] The majority of rational basis cases have involved judicial review of legislative (continued...)

Perez, ___ A.2d ___, 2006 WL 2882834, at *11 (2006). There is a strong presumption of constitutional validity when social or economic legislation is at issue. *See City of Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254; *Lamers Dairy, Inc. v. U.S. Dept. of Agric.*, 379 F.3d 466, 473 (7th Cir. 2004) (applying deference to agency established classification); *Piscatelli v. Board of Liquor License Comm'rs*, 378 Md. 623, 643, 837 A.2d 931, 943 (2003). In reviewing legislation, we have stated as follows:

> "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification····· This standard of review is a paradigm of judicial restraint."

Maryland Aggregates Ass'n v. State, 337 Md. 658, 673, 655 A.2d 886, 893 (1995) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993)).

The rational basis test requires appellants to prove that (1) the government treated

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[25](...continued)
decisions, but the same basic standard of review applies to judicial review of administrative decisions. *Nordlinger v. Hahn*, 505 U.S. 1, 15-16 & n.8, 112 S.Ct. 2326, 2334-35 & n.8, 120 L.Ed.2d 1 (1992) (explaining that rational basis review applies to administrative decisions and that the standard of review is no different from the one applied to legislative classifications); *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352, 38 S.Ct. 495, 495, 62 L.Ed. 1154 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

them differently than it treated others similarly situated, and (2) the disparate treatment did not bear a rational relationship to a legitimate interest. *Lawrence v. Texas,* 539 U.S. 558, 579, 123 S.Ct. 2472, 2484, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring) (noting that the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike" (quoting *City of Cleburne v. Cleburn Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985))); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074, 145 L.Ed.2d 1060 (2000); *Broadwater,* 306 Md. at 602, 510 A.2d at 585 (1986) (quoting *City of Cleburne v. Cleburn Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)).

V.

We turn to appellees' argument that appellants are collaterally estopped from re-litigating the finding in the earlier contested case that their lots are similarly situated to the non-mapped wetlands lots in the West Ocean City area that obtained sewer service. The Circuit Court held that appellants are not collaterally estopped from arguing that their lots are similarly situated. We agree.

An administrative agency's decision is given preclusive effect based on three factors: (1) whether the agency was acting in a quasi-judicial capacity, (2) whether the issue presented to the circuit court was actually litigated before the agency, and (3) whether resolution of the issue was necessary to the agency's decision. *Batson v. Shiflett*, 325 Md.

684, 701, 602 A.2d 1191, 1200 (1992). The Department's final decision maker acted in a quasi-judicial capacity when she issued a Final Decision and Order on November 16, 2001 that affirmed Administrative Law Judge (ALJ) Hurwitz's recommendation to deny sewer service to Lots 8, 9, 10, and 11. The similarly situated issue was addressed in each parties' briefs in connection with appellants' due process claim. Resolution of the issue, however, was not necessary to the agency's decision. The ALJ and the Department's final decision-maker could have denied appellants' due process claims without addressing the similarly situated issue because appellants were given full procedural due process and did not have a valid substantive due process claim. *La Chance v. Erikson*, 522 U.S. 262, 266, 118 S.Ct. 753, 756, 139 L.Ed.2d 695 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286-87 (4th Cir. 1998) (affirming that access to government provided sewer service is not a constitutionally protected right under Virginia law); *Blue Cross v. Franklin Sq. Hosp.*, 277 Md. 93, 101, 352 A.2d 798, 804 (1976) ("Generally, due process requires that a party to a proceeding is entitled to both notice and an opportunity to be heard on the issues to be decided in a case.).

Moreover, our review of ALJ Hurwitz's Recommended Order on Remand indicates that the contested case focused primarily on whether lots 8, 9, 10, and 11 were *eligible* for sewer service and was not concerned with how the Department implemented the Consent Order for similarly situated lots that received sewer service. Although the Department's

Final Decision Maker concluded that, "the lots were not treated differently than similarly situated lots in the West Ocean City area," it is not apparent from the record how this decision was made. The Department's Final Decision Maker's conclusion was based on the determination by ALJ Hurwitz that the delineation procedures in place at the time of the Consent Order were properly applied to lots 8, 9, 10, 11; ALJ Hurwitz did not directly address whether the Department and the County properly applied the appropriate wetlands delineation procedures under the Consent Order to similarly situated lots. In fact, ALJ Hurwitz stated, "[e]ven if [the Department] has implemented the Consent Order in an arbitrary and capricious manner regarding other lots, its treatment of those lots have no bearing upon the sewer service eligibility of *Appellants'* lots." We hold that appellants are not collaterally estopped from asserting that their lots are similarly situated to the non-mapped wetlands lots that obtained sewer service under the 1992 Policy.

VI.

Appellants' properly raised the similarly situated issue and we now determine it on the merits. We hold that appellants' lots are not similarly situated to those lots that have received sewer service under the 1992 Policy. Appellants' lots contain mapped wetlands and are not similarly situated to non-mapped wetland lots that received sewer connections. In fact, appellants concede that their lots constitute mapped wetlands; they concede also that the County has applied the distinction consistently between mapped and non-mapped wetland

lots to determine sewer service eligibility under the 1992 Policy. Lots 8, 9, and 10 contained a small area of mapped wetlands on the 1984 Maps and on the 1986 Maps (the revised 1984 Maps) each lot was 60-100% mapped wetlands. The List of 26 lots do not contain mapped wetlands on either of the Consent Order maps. The 1992 Policy distinguishes between mapped and non-mapped wetlands. Based on this distinction, appellants' mapped lots are not similarly situated to non-mapped lots on the List of 26.

VII.

The distinction between mapped and non-mapped wetlands as used in the 1992 Policy bears a rational relationship to several legitimate state interests. The distinction is rationally related to the State's legitimate interest in addressing the unfairness created by changing definitions of wetlands and ensuring the fiscal integrity of the sewer system while adhering to the environmental restrictions set forth in the Consent Order conditioning EPA's grant. By conditioning sewer service eligibility on the wetland guidance maps and the wetland delineation methodologies in place as of 1983, the 1992 Policy addresses fairness concerns by restoring property owners' expectations; expectations that were established when they purchased lots in reliance on the maps and then eliminated when they were "caught up in the implementation of new wetland delineation methodologies." As the State argues, the restoration of property owners' expectations in turn addresses the Department's concerns about the solvency of the sewer system because the number of lots over which to spread the

cost of the system is maintained. Furthermore, in applying the service prohibition of the Consent Order to all of the lots reflected on the EPA mandated wetland guidance maps, the 1992 Policy ensures that federal funding of the sewer system does not result in the destruction of wetlands that were known to exist at the time the Consent Order was effectuated.

The record reveals the Department's concern with fairness. The Department received letters from Jeff Mumford and Matt Engle in September 1991 appealing the Department's determination on a July 29, 1991 field visit that their formerly buildable lots in West Ocean City were wetlands. Mr. Engle asserts that he believed the lots were totally buildable when purchased in August of 1991. Mr. Mumford's letter indicates that he paid the annual front foot assessment on his lots since it was imposed.[26] The Department received an additional letter in January 1992 from Lal Keswani's attorney. The letter stated that Mr. Keswani purchased his lot on November 21, 1989 after ensuring that it was eligible for sewer service under the Consent Order. Subsequently, Mr. Keswani was denied sewer service because of the identification of wetlands on his parcel. Each of these individuals relied upon the Consent Order maps to their detriment and their cases demonstrate that the Department had a rational basis for seeking EPA assistance to address the unfairness created by the changing

[26] A sewer system often charges an annual front foot assessment to repay the cost of construction.

definitions of wetlands.[27]

These letters demonstrate that the Department and County proposed the mapped/non-mapped distinction to address issues associated with the implementation of the Corps of Engineers' 1989 Federal Manual. Specifically, the Administrator of the Capital Projects Program at the Department, Angelo Bianca, wrote a letter to EPA on November 20, 1991 to address issues of fairness and adherence to environmental restrictions.[28] Mr. Bianca noted that use of the 1989 Federal Manual was "unfair to lot owners who rely on the maps to square away the issue of sewer service" and that "a reasonable solution" was "to allow the wetlands delineation procedures that existed at the time of the signing of the Consent Order to be utilized for the purpose of determining a lot's ability to receive sewer service."

The Department's fairness concern is supported also by the confusion and criticism associated with implementation of the 1989 Federal Manual. The 1989 Federal Manual provided a uniform method for wetland delineations by the EPA, the Corps of Engineers, the Soil Conservation Service, and the Fish and Wildlife Service, but it was criticized for increasing the Corps of Engineers' scope of regulatory jurisdiction under the Clean Water Act beyond historical limits. *See* Michael C. Blumm, *The Clinton Wetlands Plan: No Net*

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[27] Appellants assert that the maps were not recorded in any public office, but the Consent Order requires that the map showing boundaries of the wetlands identified by Fish and Wildlife Service and the 100-year foodplain "shall be available for public inspection." The letters from individuals also indicate that the maps were accessible to prospective property owners and other parties.

[28] *See* facts *supra* Part I for full text of the letter.

Gain In Wetlands Protection, 9 J. Land Use & Envtl. L. 203, 208 (1994); Michael S. Nagy, *The Definition of "Wetlands" Under Section 404 of the Clean Water Act: Past, Present, and Future*, 3 U. Balt. J. Envtl. L. 92, 94-96 (1993) (noting companies', farmers', and builders' dislike of the Manual because it was too strict). In response to the criticism, the Corps of Engineers and EPA developed and published for public comment on August 14, 1991 proposed revisions to the 1989 Federal Manual.[29] 56 Fed. Reg. 40,446-01 (Aug. 14, 1991). On August 17, 1991, federal legislation was enacted that precluded the Corps of Engineers from relying on the 1989 Federal Manual. *See* Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510, 518 (1991). As a result, the Corps of Engineers returned to using the 1987 Manual, though it was not until January 1993 that EPA abandoned its attempt to incorporate revisions to the 1989 Federal Manual and that both the Corps of Engineers and EPA agreed to adopt the 1987 Manual for purposes related to the Clean Water Act. *See* Nagy, 3 U. Balt. J. Envtl. L. at 95, 97. Thus, even after August 1991, there was little certainty regarding the standards for wetland delineations until January 1993.

In light of this historical context and the letters from concerned West Ocean City residents, we are persuaded that the Department's desire to adopt the 1992 Policy was rationally related to a legitimate state interest in avoiding unfairness to those property owners who were impacted by the introduction of the 1989 Federal Manual and its resulting wetland

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[29] Over 100,000 comments were submitted during the 210 day extended public comment period. 58 Fed. Reg. 4,995-01 (Jan. 19, 1993).

determinations. EPA articulated that fairness was an interest when it announced its approval of the 1992 Policy to the Baltimore District of the Corps of Engineers, "[w]e base our findings on one of fairness to local long range planning efforts." The 1992 Policy clarified for all property owners that the wetland delineation procedures in effect were those that existed at the time of the Consent Order and, in doing so, achieved a legitimate state interest.

The 1992 Policy was also rationally adopted with a legitimate interest in protecting the fiscal integrity of the sewer system. The Department and Worcester County each provided 12.5% of the funding for the sewer system, a value of approximately 2.3 million dollars. On July 15, 1991, the Director of the Department's Water Management Administration, J.L. Hearn, wrote to the Corps of Engineers expressing his concern with the financial status of the sewer system:

> "[T]here was an agreement reached between NRDC, EPA, MDE and the Sanitary Commission that allows sewer service to be provided in the 100 year floodplain to lots platted prior to June 1, 1977 and lots containing wetlands, provided there is enough upland area on which to situate a house and its supporting facilities. Had it not been for these two allowances on service, the number of connections to the sewer system would have been limited to existing homeowners and 500-year floodplain development. These two groups alone could not have borne the entire local cost of the sewer system, and the decision would likely have been made in the planning stage not to go forward with the sewer project. Had this indeed been the decision, and [sic] the failing septic system problem there would continue to exist today.
>
> "In configuring the layout of the West Ocean City sewer system, the service allowances and the information known at the time relative to floodplain and wetlands boundaries were taken into

> consideration. This was done by preparing drawings identifying environmentally sensitive areas. Thus, the planned sewer infrastructure and the later EPA grant were built upon a unique set of assumptions and conditions that carry considerable weight in deciding the fate of sewer service in the area. As such, I believe every effort should be made to permit sewer service to platted lots as originally planned. The financial integrity and the physical integrity of the system depend on this happening."

Appellants assert that there is no competent evidence demonstrating any existing or potential fiscal problem that was alleviated by the adoption of the 1992 Policy. We disagree. The letter by J.L. Hearn of the Department to EPA presents a conceivable state of facts that could provide a rational basis for the classification. *See Maryland Aggregates Ass'n*, 337 Md. at 674, 655 A.2d at 894. Even though the Worcester County Sewer District's district engineer and person responsible for all fiscal matters stated that, "[t]he District never had or foresaw any problem regarding its bond payments," it is undisputed that the Department had concerns about the fiscal integrity of the system.[30] Angelo Bianca, Administrator of Capital Projects Program at the Department, stated in his affidavit:

> "My concern arose of out my own experience . . . that the ability of the locality to pay off even a small share of projects costs – typically no more than 12.5% – is a concern that runs through every project the Maryland Department of Environment funds.

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[30] The affidavit of Norman Connell, the WCSD's district engineer and the person responsible for all fiscal affairs also stated:

> "At no time, however, did the rejection or potential for rejection of sewer service to lots fronting on an originally installed sewer line (as to which the WCSD would have assessed and been collecting an annual front-foot charge) cause any fiscal problem or concern that such rejections might impair the District's ability to pay back its bond indebtedness."

> . . . I was concerned about the situation and felt that, if something was not done to correct for the application of the 1989 [M]anual, the Sanitary Commission may well begin to experience problems with the fiscal integrity of the system."

Mr. Bianca's comments and the letter from the Department to EPA demonstrate that the Department was worried about the impact of the implementation of the 1989 Federal Manual and the resulting denial of sewer service to unmapped lots. The Department's adoption of the 1992 Policy was rationally related to the Department's legitimate concern for the financial success of the sewer system.

Furthermore, the 1992 Policy is rationally related to the Department and the County's interest in adhering to the grant conditions imposed in the Consent Order which protect against development within the 100-year floodplain and wetlands as then defined. Richard L. Wells, the Worcester County Director of Environmental Programs, is responsible for implementing the Consent Order and his first affidavit submitted in the Circuit Court case stated as follows:

> "During the first few years of implementing the Consent Order, the system worked well. Although on-site delineations resulted in the discovery of some wetlands outside of those reflected on the wetland guidance maps, it was rare for a lot reflected as entirely upland on the guidance maps to be identified as wetlands through an on-site delineation."

The Department and the County had an obligation to satisfy EPA's grant conditions and it is rational and in no way arbitrary that the Department sought a return to a familiar policy, especially since the previous policy had implemented and satisfied EPA's requirements to

ensure protection of floodplain and wetland areas. *See Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 656-57, 458 A.2d 758, 789-90 (1983) (stating that "a statutory classification enjoys a strong presumption of constitutionality" and the party attacking it must show by clear and convincing evidence that "it does not rest upon any rational basis, but is essentially arbitrary").

EPA, in response to the Department's request for the 1992 Policy, emphasized that the terms of the Consent Order gave the agency the right to restrict access to any lot within wetlands.[31] EPA went on to acknowledge that, "[w]e do, nevertheless, have an obligation to be reasonable in the exercise of the grant condition. Minor construction activity which affects jurisdictional wetlands outside of those mapped . . . should not be constrained by [the restriction to not allow service to wetland areas]." EPA allowed this revised policy because the Corps of Engineers considers "avoidance and mitigation of wetland impacts" when determining whether or not to grant a building construction permit.[32] The Department recognized that the ecological commitments assumed in the Consent Order could not be waived and proposed a policy that maintained the general effect of the Consent Order.

The Department is not required to choose the fairest or best means of advancing its

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[31] EPA's February 27, 1992 letter reiterated that the requirement that service not be granted to areas within wetlands "does not restrict us to the wetlands designation shown on the maps if they do not coincide with jurisdictional wetland areas."

[32] The building construction permit process is governed by the Clean Water Act's Section 404 program, which regulates the discharge of dredged or fill material into the navigable waters. *See* 33 U.S.C. § 1342.

goals. *See Piscatelli*, 378 Md. at 644, 837 A.2d at 943 ("Further, a classification having some reasonable basis need not be made with mathematical nicety and may result in some inequality. If any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed.") (quoting *Whiting-Turner Contract. Co. v. Coupard,* 304 Md. 340, 352, 499 A.2d 178, 185 (1985)). The 1992 Policy, and its reliance on mapped wetlands, is justified as a means to achieve the goals of fairness, fiscal integrity, and protection of ecological areas. Appellants can assert that the goals could be achieved through other means (*e.g.*, granting all pre-June 1, 1977 platted lots sewer service), but it is not this Court's role to determine the wisdom, fairness, or logic of the Department's line-drawing. *See Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 2100-01, 124 L.Ed.2d 211 (1993)); *Harden v. Mass Transit Admin.*, 277 Md. 399, 414, 354 A.2d 817, 825 (1976) (quoting *Allied American v. Comm'r.*, 219 Md. 607, 624, 150 A.2d 421, 432 (1959)); *Hornbeck*, 295 Md. at 658, 458 A.2d at 790.

We hold that there is a rational relationship between the implementation of the 1992 Policy and the Department and Worcester County's desire to ensure fairness, fiscal integrity, and ecological protection of the sewer system service. We hold also that appellants have not demonstrated that they are similarly situated to the List of 26. Thus, appellants' equal protection claim fails.

VIII.

We turn to the issue of whether the Department's denial of sewer service and wetland fill permits constitute an unconstitutional taking. Appellants' argument is that the Department's failure to give them sewer service and fill permits constitutes a taking of their property.

The Circuit Court, J. Eschenburg, found that no taking had occurred on the following grounds: (1) the sewer service and fill permit were not a taking because the lots were already undevelopable as of 1979 when they did not pass seasonal percolation testing, (2) prohibition of a nuisance does not constitute a taking and therefore denial of an on-site septic system on appellants' lots was proper, (3) the titles to appellants' lots required that the lots meet State and local septic regulations, (4) appellants never regained the right to develop their lots because the EPA grant that funded the sewer system prohibited service to lots in wetlands and under the 1992 Policy appellants' lots remain ineligible for sewer service, and (5) access to sewer service is not a constitutionally protected property interest. We agree with the conclusion of the Circuit Court and with all of the supporting grounds.

We briefly review federal takings law. It is axiomatic that private property may not be taken for public use without just compensation.[33] U.S. Const. Amend. V.[34] The Takings

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[33] As stated in *Green Party v. Board of Elections,* 377 Md. 127, 166, 832 A.2d 214, 237 (2003), the Fifth and Fourteenth Amendments to the United States Constitution and Article III, § 40, of the Maryland Constitution have the same meaning and effect, and "it is well established that 'the decisions of the Supreme Court are practically direct authorities'" for both provisions (quoting *Bureau of Mines v. George's Creek*, 272 Md. 143, 156, 321 (continued...)

Clause of the Fifth Amendment to the United States Constitution does not prohibit regulation of property, but if a regulation goes too far, it will be recognized as a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922); *Belvoir Farms v. North*, 355 Md. 259, 281-82, 734 A.2d 227, 240 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct 2886, 2893, 120 L.Ed. 2d 798 (1992)). Whether a particular regulation constitutes a taking depends on the particular circumstances of each case. It has been recognized that most regulatory takings cases should be resolved by balancing the public and private interests at stake, considering three primary factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); *District Intown Properties Ltd. P'ship v. District of Columbia,* 198 F.3d 874, 879 (D.C.Cir. 1999); *Dodd v. Hood River County*, 136 F.3d 1219, 1228-29 (9th Cir.1998).

A property owner who is denied all economically beneficial or productive use of his

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[33](...continued)
A.2d 748, 755 (1974)). *See also Allied American v. Comm'r*, 219 Md. 607, 616, 150 A.2d 421, 426-427 (1959).

[34] The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use, without just compensation." Article III, § 40 of the Constitution of Maryland states, "[t]he General Assembly shall enact no Law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation."

or her land in the name of the public at large has likely suffered a taking, unless the regulation prohibits a common law nuisance. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-30, 112 S.Ct. 2886, 2897-2901,120 L.Ed.2d 798 (1992). Causation is a necessary element to establishing a valid takings claim.[35] *See Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659. The proximate cause requirement was addressed in *Penn Central* when the Supreme Court discussed the difficulty in developing a set formula for determining when "economic injuries *caused* by public action" require compensation because whether "losses *proximately caused* by" government regulation merit compensation largely depends "upon the particular circumstances" of the case. *Id.* (emphasis added). The "decisions of the Supreme Court are practically direct authorities" for the Fifth and Fourteenth Amendments to the United States Constitution and Article III, § 40, of the Maryland Constitution and we acknowledge that, as discussed in *Penn Central*, proximate cause is a necessary element to establishing a valid takings claim. *Bureau of Mines v. George's Creek*, 272 Md. 143, 156, 321 A.2d 748, 755 (1974); *Allied American v. Comm'r*, 219 Md. 607, 616, 150 A.2d 421, 426-427 (1959).

Appellants have not demonstrated that the denial of their permits under the 1992 Policy was a proximate cause of their lots being undevelopable. In fact, it was the

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[35] There has been little discussion of a causation requirement in federal takings cases. As the Ninth Circuit explained in *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 783 (9th Cir. 2000), *aff'd,* 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002), "this is due to nothing more than the fact that, in most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged taking."

implementation of seasonal septic system testing that caused appellants' lots to be undevelopable, not the denial of fill permits or a sewer connection. Worcester County used seasonal testing starting in 1972; it was required by the State in 1976 through the GS-6 Policy, and appellants' lots failed seasonal testing in 1979. Appellants concede that the denial of an on-site septic system under the GS-6 Policy rendered their lots undevelopable until the possibility of sewer came to fruition and that they did not appeal this decision.[36]

Moreover, although the septic denials rendered appellants' lots undevelopable, the denials did not constitute a taking because they fall within the takings "nuisance exception" recognized by the Supreme Court in *Lucas*. Nuisances that are recognized at common law and prohibit all economically beneficial use of land do not constitute a taking. *See Lucas,* 505 U.S. at 1028-29, 112 S.Ct. at 2900. As stated by the Supreme Court in *Lucas*:

> "We believe similar treatment must be accorded confiscatory regulations, *i.e.,* regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."

Id. See also Roeser v. Anne Arundel, 368 Md. 294, 318, 793 A.2d 545, 560 (2002).

Judge Cathell, then a Judge of the Court of Special Appeals and now a member of this

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[36] Appellants' lots are deed restricted to residential use.

Court, applied the nuisance exception in *Erb v. Department of Environment*, 110 Md. App. 246, 676 A.2d 1017 (1996). The court found that the denial of an on-site septic system does not constitute a taking where permitting the system would allow for the maintenance of a nuisance. *Id.* at 264-65, 676 A.2d at 1026-27. Writing for a unanimous panel, Judge Cathell explained as follows:

> "The regulatory scheme set up by the [Maryland Department of the Environment] does no more than could be accomplished under the nuisance laws of this State. Even if MDE's regulatory scheme – a scheme designed to prevent appellant from creating a nuisance on his property – were to leave his property economically barren, no compensation would be due because the State has a right – and, indeed, an obligation – to regulate against the creation of nuisances.
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> *****
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> "Appellant's property has not been taken for public use; rather, his development of it has been restricted to prevent public harm. In general, a property owner must use his property so as not to injure others, and a state is allowed to promulgate regulations that achieve this result. Along the same lines, a property owner generally has the constitutional right to make any use of his property he desires, so long as he does not endanger or threaten the health and safety of the general public. Were appellant allowed to install a septic system, given the expert testimony that, in all likelihood, the system would fail, it would constitute a threat to public health. The State may prohibit such use, and the fact that MDE's regulations prevent appellant from enjoying his property in the manner he would like does not render the agency's actions a taking for which compensation is due. There is no right, and there has never been any, incidental to the use of private property to create, conduct, or permit a nuisance thereon. A regulation prohibiting a nuisance is not, and cannot be, the taking or interference with a right incident to the use of private property. A right to maintain a nuisance does not exist in the

first instance."

Id. at 264-66, 676 A.2d at 1026-28 (citations omitted).

On-site septic systems failed in the West Ocean City area and, in particular, in the Cape Isle of Wight subdivision, and resulted in the contamination of drinking wells and creation of a public health hazard. *See Showell*, 316 Md. at 260, 558 A.2d at 391. The operation of an on-site septic system on appellants' lots most likely would have contributed to the contamination problem and constituted a nuisance. That contamination of drinking wells or the spread of other sewerage contaminants generally would constitute a nuisance and thus not be permissible. *See Lucas*, 505 U.S. at 1030, 112 S.Ct. at 2901; *Erb*, 110 Md. App. at 265, 676 A.2d at 1027. Thus, no taking occurred when the State denied appellants' permits for on-site septic systems in 1979.

Moreover, the express condition in appellants' deeds requires that any sewer system for the lots conform to State health requirements. The restriction is set forth in the deed as follows:

> "No privy or other outside toilet facility shall be constructed or maintained on any lot. Septic tanks, sewage disposal systems and drinking water facilities shall conform to all requirements established by the Maryland State Department of Health and the Worcester County Maryland Health authorities."

Upon receipt or purchase of lots 8, 9, 10, and 11, appellants were subject to State imposed restrictions on their land ownership, as set forth in their title. The Department's denial of sewer service and the resulting deprivation of the lots' economically beneficial use was

justified and did not constitute a taking because the proscribed use interests were not part of appellants' title to begin with and because of the State's background nuisance principles. *See Lucas*, 505 U.S. at 1027, 112 S.Ct. at 2899; *Erb,* 110 Md. App. at 266, 676 A.2d 1027-28.

Appellants' lots have remained undevelopable since 1979 and remain undevelopable, despite construction of the sewer system and implementation of the 1992 Policy. Appellants assert that the 1992 Policy rendered their lots developable and thus a taking resulted when they were denied sewer permits under that Policy.[37] In their earlier contested case hearing, Administrative Law Judge Louis N. Hurwitz concluded that "under the 1992 policy Appellants' lots 8, 9, 10, and 11 remain ineligible for sewer service." The Department's final decision maker, A. Katherine Hart, agreed and ruled on November 16, 2001 as follows:

> "The Proposed Decision correctly concluded that, as the Lots have been properly determined to be wetlands under the Consent Order, the 1992 EPA policy change did not apply, and the Lots remained ineligible for service. I find that this determination of ALJ Hurwitz is supported by the preponderance of the evidence in the record."

Appellants did not seek judicial review of this decision and instead filed the case *sub judice*.

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[37] We agree with the Circuit Court's finding that appellants previously litigated their eligibility for sewer service under the 1992 Policy. As discussed *supra* Part V, an administrative agency's decision is given preclusive effect if the agency was acting in a quasi-judicial capacity, the issue currently presented was actually litigated before the agency, and resolution of the issue was necessary to the agency's decision. *Batson v. Shiflett*, 325 Md. 684, 701, 602 A.2d 1191, 1200 (1992). Each of these elements was met in the contested case hearing regarding the eligibility of sewer service under the 1992 Policy. In contrast, resolution of the contention that appellants were barred by collateral estoppel from arguing that their lots were similarly situated, *supra* Part V, does not merit preclusion because the issue was not necessary to the agency's decision in the contested case.

Thus, no taking resulted from the denial of sewer or wetland fill permits because the lots were already undevelopable as of 1979 and remained so even after implementation of the 1992 Policy.

Appellants' takings claim fails also because they have not demonstrated that access to sewer service is an interest that qualifies for protection as "property" under the United States or Maryland Constitution. *See Lucas*, 505 U.S. at 1031, 112 S.Ct. at 2901-02; *Front Royal*, 135 F.3d at 286-87 (4th Cir. 1998) (determining that failure to confer the benefit of sewer service is not a taking because there is no constitutional right to government provided sewer service under Virginia law). In order to make a successful claim under the Takings Clause, appellants must establish first that they possess a constitutionally protected property interest. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01, 104 S.Ct. 2862, 2871-72, 81 L.Ed.2d 815 (1984) (determining whether health, safety, and environmental data submitted to EPA is protected property under Fifth Amendment's Takings Clause); *Washlefske v. Winston*, 60 F.Supp. 2d 534, 538 (E.D. Va 1999), *aff'd,* 234 F.3d 179 (4th Cir. 2000) (noting that appellant must demonstrate a protected property interest before the court proceeds to the question of whether the use or regulation of that property constitutes a taking).

property interest must be demonstrated

Appellants have not demonstrated that the denial of sewer service has interfered with interests "that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes." *See Penn Central*, 438 U.S. at 124-

25, 98 S.Ct. at 2659. In fact, appellants recognize that they do not have any Constitutional right to sewer service. Appellants' reply brief asserts, "[a]ppellants' right to receive sewer service is not a right created or established by either the United States or Maryland Constitution." We agree. Appellants also fail to demonstrate a property interest established by "existing rules or understandings that stem from an independent source such as state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164, 118 S. Ct. 1925, 1930, 141 L.Ed.2d 174 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)). Appellants' deeds contain a restriction requiring that any sewage disposal system conform to State and County requirements and they have no right to maintain a nuisance. Worcester County decided to provide a government benefit in developing a sewer system for West Ocean City, but access to the system was limited to the terms of the Consent Order. Failure to provide a benefit does not constitute a taking.

Finally, we address briefly whether the denial of wetland fill permits constitutes a taking. Appellants' lots are deed restricted to residential use. Without sewer service, it is not possible for appellants to build on their lots. As we discussed, *supra*, appellants lost the right to develop their lots when their lots failed seasonal testing in 1979. Appellants have not regained the right to sewer access. The denial of wetland fill permits does not constitute a taking because even with fill permits, appellants' lots are undevelopable under traditional common law nuisance principles. We hold that the denial of permits in 2001 did not constitute an unconstitutional taking because appellants lack a constitutionally protected right

to sewer service and the right to develop their lots was absent already from their bundle of rights as of 1979.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

C

Court of Special Appeals of Maryland.
John M. ERB
v.
MARYLAND DEPARTMENT OF the ENVIRONMENT.
No. 1245, Sept. Term, 1995.

May 30, 1996.

Landowner challenged denial of permit for septic system needed to build on property and sued Maryland Department of Environment (MDE). The Circuit Court for Calvert County, Clagett, J., affirmed the MDE's decision. Landowner appealed. The Court of Special Appeals, Cathell, J., held that: (1) agency's decision was supported by substantial evidence; (2) landowner received due process; (3) regulation of sewage disposal was within state's police powers; (4) property was not taken; (5) sewage regulatory scheme regulated against creation of nuisances; (6) agency's decision was based on unique characteristics of property and was not arbitrary or capricious; (7) any error in exclusion of evidence not in agency record was harmless; and (8) owner was not entitled to jury trial.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure ⚿763
15Ak763 Most Cited Cases
On review of administrative agency's decision, Court of Special Appeals must determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious.

[2] Administrative Law and Procedure ⚿784.1
15Ak784.1 Most Cited Cases
Court of Special Appeals' review of an agency's factual findings entails only an appraisal and evaluation of the agency's fact finding and not independent decision on the evidence.

[3] Administrative Law and Procedure ⚿791
15Ak791 Most Cited Cases
Court of Special Appeals' review of agency's factual findings seeks to find substantiality of the evidence, that is, a reviewing court shall apply the "substantial evidence" test to the final decisions of an administrative agency; in this context, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

[4] Administrative Law and Procedure ⚿760
15Ak760 Most Cited Cases

[4] Administrative Law and Procedure ⚿784.1
15Ak784.1 Most Cited Cases
When reviewing agency's fact finding, the Court of Special Appeals may not substitute its judgment for that of the agency under any circumstance.

[5] Administrative Law and Procedure ⚿796
15Ak796 Most Cited Cases
On review of agency decision, when reviewing issues of law the court's review is expansive and court may substitute its judgment for that of the agency.

[6] Administrative Law and Procedure ⚿749
15Ak749 Most Cited Cases
When reviewing an agency's determination, Court of Special Appeals is obligated to view agency's decision in light most favorable to the agency.

[7] Administrative Law and Procedure ⚿749
15Ak749 Most Cited Cases
On judicial review of an agency's determination, agency's decisions are prima facie correct and carry with them a presumption of validity.

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[8] Environmental Law 195
149Ek195 Most Cited Cases
(Formerly 199k25.7(13.1) Health and Environment)
There was substantial evidence from which administrative law judge (ALJ) could reasonably conclude that agency's decision to deny landowner's permit to install septic system was proper where expert testimony was that, based on characteristics of property, septic system would fail and was unsuitable; under regulations, property slope exceeded maximum allowable and natural drainage swale was too close to proposed site. Md.Regs. Code title 26, §§ 04.02.04I, 04.02.04J(3).

[9] Environmental Law 387
149Ek387 Most Cited Cases
(Formerly 199k25.15(5.1) Health and Environment)

[9] Environmental Law 389
149Ek389 Most Cited Cases
(Formerly 199k25.15(5.1) Health and Environment)
On challenge of denial of permit for septic system based in part on perceived county health department's practice of liberally granting variances to same regulatory requirements to neighboring properties, evidence of department's practices was both probative and relevant, even if landowner did not show that natural characteristics of other properties were identical to his own; however, challenge failed where substantial evidence supported finding that other properties, while having some similar natural characteristics, had space available that was suitable for system and that landowner's property lacked.

[10] Environmental Law 195
149Ek195 Most Cited Cases
(Formerly 199k25.7(13.1) Health and Environment)
Permit application for installation of septic system was not denied as a result of discriminatory or arbitrary agency action as substantial evidence was that application was denied due to unique attributes of landowner's property; the other similar properties pointed to by landowner that were granted variances for systems had space available in level areas and away from drainage swales that made them suitable for installation of septic system, and landowner's property lacked those characteristics.

[11] Environmental Law 176
149Ek176 Most Cited Cases
(Formerly 199k25.7(7) Health and Environment)
Sewage disposal is properly regulated by state through state's broad police powers to further the public safety, health, and welfare.

[12] Constitutional Law 278.1
92k278.1 Most Cited Cases

[12] Environmental Law 220
149Ek220 Most Cited Cases
(Formerly 199k25.7(14) Health and Environment)
Applicant for septic system permit received due process where he had full adversarial hearing before administrative law judge (ALJ) and had right to be represented by counsel, where he was afforded opportunity to present evidence and witnesses on his own behalf and to cross-examine opposing witnesses, and where he appealed to state court; fact that the matter did not go as he would have liked did not amount to a denial of due process. U.S.C.A. Const.Amend. 14.

[13] Eminent Domain 3
148k3 Most Cited Cases
The takings clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article III, § 40 of the Maryland Constitution have the same meaning and effect, and the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities for both provisions. U.S.C.A. Const.Amends. 5, 14; Const. Art. 3, § 40.

[14] Eminent Domain 2.18
148k2.18 Most Cited Cases
(Formerly 148k2(1.2))
Landowner, who was denied permit for septic system needed to build house, did not have property taken within meaning of Federal and State Constitutions where landowner did not show that he was denied all economically beneficial uses of

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property and where alternate means of sewage disposal might be available. U.S.C.A. Const.Amends. 5, 14; Const. Art. 3, § 40.

[15] Eminent Domain ⚿2.18
148k2.18 Most Cited Cases
(Formerly 148k2(1.2))
For Court of Special Appeals to ascertain whether landowner's property was taken by denial of permit for septic system, it first had to determine that the sewage regulatory scheme either did not substantially advance legitimate state interests or denied owner of all economically viable use of his land; even if owner did establish no viable economic use, he was only entitled to compensation if the denial was under a regulatory scheme that did more than duplicate result that could have been achieved under state's law of private nuisance. U.S.C.A. Const.Amends. 5, 14; Const. Art. 3, § 40.

[16] Eminent Domain ⚿2.18
148k2.18 Most Cited Cases
(Formerly 148k2(1.1))

[16] Eminent Domain ⚿2.27(1)
148k2.27(1) Most Cited Cases
(Formerly 148k2(1.1))

[16] Environmental Law ⚿176
149Ek176 Most Cited Cases
(Formerly 199k25.7(2) Health and Environment)
Regulatory scheme set up by Maryland Department of Environment (MDE) to regulate sewage disposal systems does no more than could be accomplished under the nuisance laws of state; thus, even if scheme were to leave property economically barren, no compensation would be due owner as state has right and obligation to regulate against creation of nuisances.

[17] Eminent Domain ⚿2.10(3)
148k2.10(3) Most Cited Cases
(Formerly 148k2(1.1))
State's regulation of potential nuisances does not constitute an unconstitutional taking, even if no present economically viable use of property remains, as to prevent by regulation that which is forbidden in the first instance under laws relating to the use of private property is not a taking; properties exist that are unbuildable, whether or not regulated, due to legitimate health and/or nuisance concerns, and for state to prohibit by regulation that which is prohibited is not an unconstitutional taking. U.S.C.A. Const.Amends. 5, 14; Const. Art. 3, § 40.

[18] Nuisance ⚿59
279k59 Most Cited Cases

[18] States ⚿4.4(2)
360k4.4(2) Most Cited Cases
In general, a property owner must use his property so as not to injure others, and a state is allowed to promulgate regulations that achieve this result.

[19] Constitutional Law ⚿87
92k87 Most Cited Cases
Property owner generally has the constitutional right to make any use of his property he desires, so long as he does not endanger or threaten the health and safety of the general public.

[20] Eminent Domain ⚿2.18
148k2.18 Most Cited Cases
(Formerly 148k2(1.2))
Denial of septic system permit to landowner was not a taking for which compensation was due given expert testimony that, were owner allowed to install system, in all likelihood system would fail and would constitute a threat to public health; state may prohibit such use, and fact that Maryland Department of Environment's (MDE) regulations prevented owner from enjoying his property in the manner he wanted did not render agency's actions a taking. U.S.C.A. Const.Amends. 5, 14; Const. Art. 3, § 40.

[21] Nuisance ⚿59
279k59 Most Cited Cases

[21] Nuisance ⚿60
279k60 Most Cited Cases
There is no right, and there has never been any, incidental to the use of private property to create, conduct, or permit a nuisance thereon, and a regulation prohibiting a nuisance is not, and cannot

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be, the taking or interference with a right incident to the use of private property as right to maintain nuisance does not exist in first instance. U.S.C.A. Const.Amends. 5, 14; Const. Art. 3, § 40.

[22] Administrative Law and Procedure 676
15Ak676 Most Cited Cases
Generally, the scope of a court's review of agency action under the Administrative Procedure Act is confined to the record made before the administrative agency.

[23] Administrative Law and Procedure 676
15Ak676 Most Cited Cases
Narrow exception to general rule that court's review of agency action is confined to record made before administrative agency is limited to evidence of alleged procedural irregularities at the agency level; party may offer testimony to the circuit court on alleged irregularities in procedure before the presiding officer that do not appear on the record.

[24] Administrative Law and Procedure 764.1
15Ak764.1 Most Cited Cases

[24] Environmental Law 690
149Ek690 Most Cited Cases
(Formerly 199k25.15(11) Health and Environment)
Any error in court's refusal to hear evidence beyond administrative record when
reviewing agency's denial of septic system permit was harmless where record contained the evidence owner presented to administrative law judge (ALJ) on variances granted to neighboring landowners and any new evidence on variances would have been cumulative, and especially where record contained substantial evidence that it was property's unique characteristics that were contrary to safe operation of on-site septic system that caused Maryland Department of Environment (MDE) to deny the permit.

[25] Jury 17(1)
230k17(1) Most Cited Cases
When a circuit court sits for the purpose of reviewing decision of an administrative agency under state Administrative Procedure Act, there is no right to a jury trial. Code, State Government, § 10-222(g).

[26] Jury 17(1)
230k17(1) Most Cited Cases

[26] Jury 25(2)
230k25(2) Most Cited Cases
Even if party who challenged agency's denial of septic system permit had right to jury trial, which he did not, he waived that right where he did not make demand for a jury trial to the circuit court. Md.Rule 2-325(d).
****1020 *251** John M. Erb, Edgewater, pro se.

***252** Neile S. Friedman, Assistant Attorney General (J. Joseph Curran, Jr., Attorney General and Nancy W. Young, Assistant Attorney General, on the brief), Baltimore, for Appellee.

Argued before CATHELL, DAVIS and MURPHY, JJ.

CATHELL, Judge.

John M. Erb, appellant, owns three adjoining lots of land in Calvert County. His application for a permit to construct a new on-site sewage disposal system, a septic system, as part of his plans to build a house on the property, was denied by the Maryland Department of the Environment (MDE), appellee. That decision was affirmed by the ****1021** Circuit Court for Calvert County (Clagett, J., presiding). Appellant, appearing *in propria persona,* appeals therefrom. We rephrase the questions he raises:

1. Is the agency's decision supported by substantial evidence or based upon an error of law?
2. Did the State deprive appellant of his property without due process of law, in that appellant's application was denied while certain variances have been granted to owners of neighboring parcels?
3. Did the State take appellant's property without providing him with just compensation?
4. Did the circuit court err in refusing to allow

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appellant to introduce new evidence?
5. Did the circuit court err in denying appellant a trial by jury?

Perceiving no reversible error, we shall affirm the judgment of the circuit court.

Factual and Procedural Background

Appellant has owned the undeveloped property in question since 1982, and it has been held by various members of his family since the 1920s. Combined, the lots total 6,000 square feet in area, approximately one-seventh of an acre. The lots are located on a steep slope; the grade is, on average, thirty-***253** three percent or greater. The only portion of the property that is not on such a steep slope contains a natural drainage swale.

As we have stated, appellant, desiring to build a house on the property, applied to the Calvert County Health Department (CCHD) for a permit to construct an on-site septic system. An evaluation of appellant's property was performed, and, in an attempt to accommodate appellant, certain regulatory requirements pertaining to the minimum size for lots were waived. *See* Code of Maryland Regulations (COMAR) 26.04.02.02B(1). Nonetheless, the CCHD, finding that the placement of a septic system on appellant's property could not be accomplished within the remaining regulatory guidelines, due to the natural characteristics of the property, and that such a system could pose a serious threat to public health and lead to the pollution of the waters of this State, denied his application.

An administrative hearing was held on June 3, 1993, before an Administrative Law Judge (ALJ). Among the evidence presented was the testimony of three experts: William Haygood, a licensed sanitarian in charge of the CCHD water and sewer programs; Jay Prager, the head of the Innovative and Alternative On-Site Sewage Disposal Program for MDE; and David Edwards, a senior civil design engineer, testifying on appellant's behalf.

Edwards presented a plan to regrade appellant's property to decrease the slope to twenty-five percent, the regulatory maximum for installation of a septic system, COMAR 26.04.02.04I, divert water runoff, install retaining walls, if necessary, and fill the drainage swale so as to create an area large enough for the location of the septic system. Edwards conceded, however, that even with these modifications appellant's property would still not meet all of the applicable requirements.

Haygood testified that, based upon his inspections of the property, a septic system placed thereon would fail because of the nature of the property. Of specific concern were the size ***254** of the lots, the topography, and the presence of the natural drainage swale. See COMAR 26.04.02.04F, 26.04.02.04I, 26.04.02.04J. Haygood stated that the placement of septic systems in ground with a grade of greater than twenty-five percent is avoided because of "the possibility of sewage erupting from the side of the slope and draining into another area." Additionally, he testified that the placement of a septic system in or near a drainage swale decreases the effectiveness of the system and is, therefore, not permitted. *See* COMAR 26.04.02.04J.

Prager's testimony was consistent with Haygood's in respect to the unsuitability of appellant's property for a septic system. Prager did not, however, testify about the potential for use of an innovative and alternative sewage system--other types of sewage disposal systems that will function properly in areas that are inappropriate for conventional ****1022** septic systems--on appellant's property.

The ALJ, in his Proposed Decision, concluded that appellant had failed to meet his burden of showing "that the septic system he proposes to install on his Calvert County property will comply with pertinent State Environmental statutes and regulations." See COMAR 26.01.02.28B(1). Specifically, the ALJ found that appellant's lots are located on an incline with an average grade of thirty-three percent and that appellant's property also contains a natural drainage swale, which fills with water following a moderate rainstorm. From the expert testimony, the ALJ concluded that the consequences of placing a septic system within twenty-five feet of such a

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steep slope is that sewage is likely to erupt out of the side of the slope and that the placement of a system within twenty-five feet of a drainage swale, even if it were filled in as suggested by Edwards, could result in an overflow to the surface, resulting in impermissible pollution of the waters of the State, see Md.Code (1987, 1993 Repl.Vol.), § 9-319 of the Environment Article (EN); COMAR 26.04.02.02E, as well as being a potential serious health hazard, *see* EN § 9-223.

***255** Upon the filing of appellant's written exceptions, a hearing was held before a Final Decision Maker, a designee of the Secretary of the MDE. In his Final Decision and Order, the Final Decision Maker denied appellant's exceptions and affirmed the ALJ's decision. Appellant then challenged the MDE's decision before the Circuit Court for Calvert County. There, he filed a Motion For Leave To Amend Complaint, in which he sought to present arguments and evidence regarding the potential use of innovative and alternative on-site sewage system disposal technologies on his property. Holding that because the case was an appeal from an administrative agency and that the court may not consider matters outside the administrative record, the circuit court denied appellant's motion. The court went on to affirm the MDE's decision, finding that its decision was supported by competent, material, and substantial evidence and that the decision was not affected by any error of law.

The Agency Decision

[1] Judicial review of this administrative agency's decision is authorized by Maryland Code (1984, 1995 Repl.Vol.), § 10-222 of the State Government Article (SG). Under subsection (h), when exercising such review, the court may:

(1) remand the case for further proceedings;
(2) affirm the final decision; or
(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
(i) is unconstitutional;
(ii) exceeds the statutory authority or jurisdiction of the final decision maker;
(iii) results from an unlawful procedure;
(iv) is affected by any other error of law;
(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
(vi) is arbitrary or capricious.

In general,

> ***256** [a] court's role is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.

United Parcel Serv., Inc. v. People's Counsel, 336 Md. 569, 577, 650 A.2d 226 (1994); *Ward v. Department of Pub. Safety & Correctional Servs.,* 339 Md. 343, 347, 663 A.2d 66 (1995). We must determine in each case whether the agency's decision is "in accordance with the law or whether it is arbitrary, illegal, and capricious." *Moseman v. County Council,* 99 Md.App. 258, 262, 636 A.2d 499, *cert. denied,* 335 Md. 229, 643 A.2d 383 (1994); *Curry v. Department of Pub. Safety & Correctional Servs.,* 102 Md.App. 620, 626-27, 651 A.2d 390 (1994), *cert. denied,* 338 Md. 252, 657 A.2d 1182 (1995).

[2][3][4][5] Our review of the agency's factual findings entails only an appraisal and evaluation of the agency's fact-finding and not an independent decision on the evidence. ****1023** *Anderson v. Department of Pub. Safety & Correctional Servs.,* 330 Md. 187, 212, 623 A.2d 198 (1993). This examination seeks to find the substantiality of the evidence. "That is to say, a reviewing court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency...." *Baltimore Lutheran High Sch. Ass'n v. Employment Sec. Admin.,* 302 Md. 649, 662, 490 A.2d 701 (1985); *Anderson,* 330 Md. at 212, 623 A.2d 198; *Bulluck v. Pelham Wood Apts.,* 283 Md. 505, 511-13, 390 A.2d 1119 (1978); *Moseman,* 99 Md.App. at 262, 636 A.2d 499. In this context, " '[s]ubstantial evidence,' as the test for reviewing factual findings of administrative agencies, has been defined as 'such relevant evidence as a reasonable mind might

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accept as adequate to support a conclusion [.]' " *Bulluck,* 283 Md. at 512, 390 A.2d 1119 (quoting *Snowden v. Mayor of Baltimore,* 224 Md. 443, 448, 168 A.2d 390 (1961)). In terms of fact-finding, we must emphasize that under no circumstances may we substitute our judgment for that of the agency. *Anderson,* 330 Md. at 212, 623 A.2d 198. On the other hand, "[w]hen reviewing issues of law, ... the court's review is expansive ***257** and it may substitute its judgment for that of the agency." *Curry,* 102 Md.App. at 627, 651 A.2d 390; *Columbia Rd. Citizens' Ass'n v. Montgomery County,* 98 Md.App. 695, 698, 635 A.2d 30 (1994).

[6][7] We are also obligated to view "the agency's decision in the light most favorable to the agency," since its decisions are *prima facie* correct and carry with them the presumption of validity. *Anderson,* 330 Md. at 213, 623 A.2d 198; *Bulluck,* 283 Md. at 513, 390 A.2d 1119. Finally, our review of an administrative agency's decision differs from our review of the decisions of the trial courts.

> In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

United Steelworkers of America v. Bethlehem Steel Corp., 298 Md. 665, 679, 472 A.2d 62 (1984) ; *United Parcel,* 336 Md. at 577, 650 A.2d 226.

Pursuant to its authority under EN §§ 9-252 and 9-510, MDE has promulgated numerous regulations governing the disposal of sewage and sewage disposal systems. Several of these are applicable to the case *sub judice:* COMAR 26.04.02.02E states: "A person may not dispose of sewage, body, or industrial wastes in any manner which may cause pollution of the ground surface, the waters of the State, or create a nuisance."; COMAR 26.04.02.02T prohibits sewage from being "disposed of in any manner that will cause contamination of potable water supply systems, and waters of the State, or create a nuisance."; COMAR 26.04.02.02B(2) states: "If, in the opinion of the [MDE], the lot cannot provide for a safe and adequate ... on-site waste disposal system, a permit shall be denied."; COMAR 26.04.02.04I forbids the location of an on-site disposal system "on slopes in excess of 25 percent."; ***258** and COMAR 26.04.02.04J(3) requires a separation of at least twenty-five feet between an on-site disposal system and a drainage swale.

[8] Drawing from the expert testimony, photographic evidence, and other evidence presented, the ALJ made the following findings of fact: the average grade of appellant's lots is thirty-three percent; the only portion of the property that is not on such a steep slope contains a natural drainage swale; even if the property were to be regraded, there is a high probability that a septic system on appellant's lots would fail; the installation of a "septic system on the steep grade could result in effluent and storm water collecting together [that] ... could cause it to erupt from the sides of [the] incline, resulting in the pollution of the surface"; and "[i]nstalling the septic system in the area where the natural swale runs ... could also allow surface water to collect in the septic system trench ... that would eventually ... overflow to the surface." In sum, the ALJ found as fact that the natural characteristics of appellant's property precluded the safe installation ****1024** of the proposed septic system within the regulatory guidelines. Given the regulatory framework and the expert testimony adduced at the hearing, we hold that there was substantial evidence from which the ALJ could reasonably conclude that the agency's decision to deny appellant his permit was proper.

[9] Before the ALJ, appellant provided evidence of several nearby properties that contained either excessive grades, drainage swales, or both, in an attempt to show, in part, that the agency freely granted variances and, therefore, should not have denied his application. The Assistant Attorney General who appeared before the ALJ on behalf of MDE repeatedly objected to this evidence on relevancy grounds, stating that appellant had not shown that the natural characteristics of these other properties were *identical* to his own. The ALJ took

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MDE's objections under advisement and allowed appellant to present his evidence, evidence which, we believe, is relevant to appellant's case. To the extent that appellant may have been challenging the denial of his permit application in ***259** light of what he perceived to be CCHD's practice of liberally granting variances to the same regulatory requirements, evidence of the agency's practices is both probative and relevant. *See, e.g., Ad + Soil, Inc. v. County Comm'rs,* 307 Md. 307, 320-22, 513 A.2d 893 (1986). Be that as it may, the ALJ found as fact that, while these other properties did contain natural characteristics similar to those of appellant, the other "lots ha[d] space available in level areas and in areas that were not located near a drainage swale that were suitable to install a septic system." There was substantial evidence to support this finding.

Due Process

[10] As mentioned above, before the ALJ, appellant presented extensive evidence regarding variances that had been granted to neighboring landowners whose properties have similar natural characteristics. In part, we believe, appellant presented this evidence in an attempt to show that the agency discriminated against him. As we have previously set forth, we hold that the record contains substantial evidence that appellant's application was denied due to the unique attributes of his property. [FN1] Correlatively, we hold that appellant's permit application was not denied as a result of discriminatory or arbitrary agency action.

FN1. This is *not* a zoning variance case.

Faced with an allegation that an administrative agency had discriminated against a permit applicant, the Court of Appeals stated, in *Howard Sports Daily, Inc. v. Public Serv. Comm'n,* 179 Md. 355, 358-59, 18 A.2d 210 (1941):

> Unquestionably, if a law is applied and administered by public authority "with an evil eye and an unequal hand" so as to make unjust discrimination between persons in similar circumstances, material to their rights, such denial of equal justice is within the prohibition of the Constitution. *But in considering the application of the constitutional safeguard, due regard must be given to the principle that the State* ****260*** *may regulate and restrict the freedom of the individual to act whenever such regulation or restraint is essential to the protection of the public safety, health or morals.* Chief Justice Taft thus defined "due process" as guaranteed by the Fourteenth Amendment: "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." *Truax v. Corrigan,* 257 U.S. 312, 332, 42 S.Ct. 124, 129 [66 L.Ed. 254 (1921)].
>
> ... Whether a complainant has been deprived of due process of law ... by action of an administrative body depends upon whether it acted contrary to the statutes and rules and with arbitrary discrimination.... The State has the undoubted right to enact legislation in the legitimate exercise of its police power. The sovereignty ****1025** of the State would be a mockery if it lacked the power to compel its citizens to respect its laws.... When the cry of "property rights" is raised in an effort to circumvent the provisions of a law designed to promote and protect the public interest, equity will not aid the attempt by affording the extraordinary remedy of injunction. [Some citations omitted, emphasis added.]

Accord *Bruce v. Director, Dep't of Chesapeake Bay Affairs,* 261 Md. 585, 600-01, 276 A.2d 200 (1971).

[11] That this State has broad police powers that it may use to further the public safety, health, and welfare cannot be questioned, and the regulation of sewage disposal is but one of the many areas properly regulated through this power. *Millison v. Secretary of Health & Mental Hygiene,* 32 Md.App. 165, 170-72, 359 A.2d 247, *cert. denied,* 278 Md. 728 (1976); *see also Robert T. Foley Co. v. Washington Suburban Sanitary Comm'n,* 283 Md.

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140, 148-50, 389 A.2d 350 (1978). "In the exercise of the police power the State may lawfully impose such burdens and restraints on private rights as may be ***261** reasonably necessary and proper to secure the general welfare." *Montgomery County v. Fields Rd. Corp.*, 282 Md. 575, 583, 386 A.2d 344 (1978) . Pursuant to its statutory authority, MDE has promulgated numerous regulations governing the disposal of sewage and sewage disposal systems in order to further the public health and safety. When, based upon the agency's expertise, deviation from these regulations may be accomplished without compromising the public health and safety, MDE may, in its discretion, issue a permit. In appellant's case, however, notwithstanding appellant's charge that he is the victim of discrimination, he has not shown that the agency acted in a discriminatory manner. Rather, the record illustrates how the agency attempted to accommodate appellant but ultimately was unable to do so and maintain adequate health safeguards. The decision to deny a permit to appellant was one within MDE's discretion, and, in the case at bar, it has not been shown that it abused that discretion.

[12] In terms of due process, before the ALJ, appellant had a full adversarial hearing. Although he waived the right, appellant was entitled to be represented by counsel. He was afforded the opportunity to present evidence and witnesses on his own behalf and to cross-examine opposing witnesses. When the matter did not go as planned, appellant utilized his right of appeal to the courts of this State. Not only has appellant not been deprived of his property without due process of law, appellant has received an abundance of process. That the matter has not gone as appellant would have liked does not amount to a denial of the process that is due. *See Maryland Aggregates Ass'n v. State,* 337 Md. 658, 686-88, 655 A.2d 886 (1995); *Maryland State Police v. Zeigler,* 330 Md. 540, 559, 625 A.2d 914 (1993) ("Procedural due process, guaranteed to persons in the State by Article 24 of the Maryland Declaration of Rights, requires that administrative agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them."); *Department of Human Resources v. Thompson,* 103 Md.App. 175, 197, 652 A.2d 1183 (1995) (holding ALJ's decision to preclude consideration of complainant's challenge ***262** to agency's findings infringed upon complainant's right to due process). *See generally* 1 Am.Jur.2d Administrative Law §§ 148-57 (1962).

Taking Without Just Compensation

[13][14] Citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), appellant contends that, if the State does not grant him his permit, it should provide him with just compensation for his property. We hold that appellant's property has not been taken within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution and Article III, § 40 of the Maryland Constitution. [FN2]

> FN2. These provisions have the same meaning and effect, and "the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities" for both provisions. *Bureau of Mines v. George's Creek Coal & Land Co.,* 272 Md. 143, 156, 321 A.2d 748 (1974); *Allied American Mut. Fire. Ins. Co. v. Comm'r of Motor Vehicles,* 219 Md. 607, 616, 150 A.2d 421 (1959).

****1026** The facts of *Lucas* are as follows: In 1986, Lucas purchased two beachfront lots, intending to build single-family houses on them. Prior to construction, the South Carolina legislature enacted the Beachfront Management Act, which effectively barred Lucas from erecting any permanent structures on the property. Thereafter, he filed suit against the state agency charged with administering the Act. Lucas conceded that the Act was a lawful exercise of the state's police power; nevertheless, he argued that the construction ban deprived him of all economically beneficial use of his property and, therefore, constituted a taking under the Fifth and Fourteenth Amendments. The Supreme Court, in a comprehensive review of its Fifth Amendment Takings Clause jurisprudence, identified "two discrete categories of regulatory action [that are] compensable without case-specific inquiry into the

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public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015, 112 S.Ct. at 2893. The first encompasses regulations that bring about an actual physical invasion of the property. This aspect is not implicated in the case *sub judice.*

The ***263** second concerns situations in which regulations deny a property owner of "all economically beneficial or productive use of land." *Id.; see also Offen v. County Council,* 96 Md.App. 526, 551-52, 625 A.2d 424 (1993) (discussing *Lucas*), *aff'd. in part, rev'd in part,* 334 Md. 499, 639 A.2d 1070 (1994).

[15] It is with this second class that we are concerned, and, in order for us to ascertain whether appellant's property has been taken, we must first determine that MDE's regulatory scheme either "does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land." *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (emphasis added); *Lucas*, 505 U.S. at 1016-18, 112 S.Ct. at 2894. Even if appellant were to establish no viable economic use, he is only entitled to compensation for his property if he has been denied *all* the economically beneficial use thereof under a regulatory scheme that does "*more than duplicate the result that could have been achieved ... under the State's law of private nuisance* ." *Lucas*, 505 U.S. at 1029, 112 S.Ct. at 2900 (emphasis added); *Hebron Sav. Bank v. City of Salisbury,* 259 Md. 294, 300- 01, 269 A.2d 597 (1970); *Offen*, 96 Md.App. at 553-55, 625 A.2d 424 . See also *Raynor v. Maryland Dept. of Health & Mental Hygiene,* 110 Md.App. 165, 676 A.2d 978 (1996), intended to be filed concurrently herewith] where we decline to find a taking where a ferret is destroyed in order to be tested for rabies and our more extensive discussion of *Lucas in* ***Steel v. Cape Corp.*****, 110 Md.App. 406, 677 A.2d 634 (1996)** [No. 1541, 1995 Term, also intended to be filed concurrently herewith], in which we find an unconstitutional taking resulting from a statutory scheme permissible under the police power but which results in no viable economic use of the property and which *does not involve traditional nuisance abatement.*

We first note that, while the inability to build on the property at the present time may greatly diminish its current value, appellant has not presented sufficient evidence to establish that he has been denied all economically beneficial uses of ***264** the property. The record is sparse in regard to the other uses or remaining utility of the property in question, and, moreover, it is possible, as we mention, ***infra,*** that appellant will be able to utilize alternate means of sewage disposal. [FN3]

> FN3. We were advised at oral argument that one alternative method has been rejected.

[16] Further, and more important, as discussed above, the power to regulate sewage disposal systems rests within the police power of this State. The regulatory scheme set up by MDE does no more than could be accomplished under the nuisance laws of this State. *Cf. Washington Suburban Sanitary Comm'n v. CAE-Link Corp.,* 330 Md. 115, 622 A.2d 745 (1993), *cert. denied,* 510 U.S. 907, 114 S.Ct. 288, 126 L.Ed.2d 238 (1994). Even if MDE's regulatory scheme-- a scheme designed to prevent appellant from creating a nuisance on his property--were to leave his property economically barren, no compensation would be due because the State has a right--and, indeed, an obligation--to regulate against the creation of ****1027** nuisances. This principle was clearly set forth by the Supreme Court in *Lucas:*

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.... It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* [260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922)].... ... A law or decree with such an effect must, in

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> other words, do no more than duplicate the result that could have been achieved in the courts ... under the State's law of ***265** private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally....

Lucas, 505 U.S. at 1027-29, 112 S.Ct. at 2899-2901 (some citations omitted, footnotes omitted). *See also Goldblatt v. Town of Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (limitation on dredging and pit excavating); *Miller v. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (removal of infectious trees); *Hadacheck v. Sebastian,* 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (prohibition against the production of bricks); *Reinman v. City of Little Rock,* 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915) (horse stable prohibitions); *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (prohibition of the manufacture of alcoholic beverages); and see Justice Brandeis's dissent in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

[17] The creation of sewage disposal systems that are, or may be, detrimental to public health may constitute nuisances and be subject to abatement under the law of private nuisance. This power to abate nuisances is independent of, though not inconsistent with, the regulatory power of the states, when they adopt regulatory practices to prevent the creation of such nuisances. The regulation of potential nuisances, alone, does not constitute an unconstitutional taking, even if no present economically viable use remains. To prevent by regulation that which is forbidden in the first instance under the laws relating to the use of private property is not a taking. Lucas makes that clear. Simply stated, there exist properties that are unbuildable, whether or not regulated, due to legitimate health and/or nuisance concerns. To prohibit by regulation that which is, in any event, prohibited is not an unconstitutional taking.

[18][19][20][21] In the instant case, MDE's regulations serve to proscribe a nuisance from coming into existence on appellant's property. The power to regulate in this area is one facet of the State's power to regulate in order to protect the public ***266** health and safety. Appellant's property has not been taken for public use; rather, his development of it has been restricted to prevent public harm. In general, a property owner must use his property so as not to injure others, and a state is allowed to promulgate regulations that achieve this result. Along the same lines, a property owner generally has the constitutional right to make any use of his property he desires, so long as he does not endanger or threaten the health and safety of the general public. Were appellant allowed to install a septic system, given the expert testimony that, in all likelihood, the system would fail, it would constitute a threat to public health. The State may prohibit such use, and the fact that MDE's regulations prevent appellant from enjoying his property in the manner he would like does not render the agency's actions a taking for which compensation is due. *See Bureau of Mines v. George's Creek Coal & Land Co.,* 272 Md. 143, 165, 321 A.2d 748 (1974); *see also Hebron Sav. Bank,* 259 Md. at 300-01, 269 A.2d 597. There is no right, and there has never been any, incidental to the use of private property to create, conduct, or permit a nuisance thereon. A regulation prohibiting a nuisance is not, and cannot be, the taking or ****1028** interference with a right incident to the use of private property. A right to maintain a nuisance does not exist in the first instance.

Presentation of New Evidence

On April 7, 1995, appellant filed in the circuit court a Motion for Leave to Amend Complaint. Through it, he sought to present additional evidence in respect to neighboring sites that had been granted variances from regulatory requirements and information on innovative and alternative sewage systems that he believed would work on his property. His motion was denied.

[22] Generally, the scope of a court's review of agency action under the Administrative Procedure Act is confined to the record made before the administrative agency. *United Parcel, supra,* 336 Md. at 577, 650 A.2d 226; ***267***Consumer Protection Div. Office of the Attorney Gen. v. Consumer Publishing Co.,* 304 Md. 731, 749, 501 A.2d 48 (1985); *Warner v. Town of Ocean City,* 81

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Md.App. 176, 193-94, 567 A.2d 160 (1989). The presentation of new evidence to the circuit court is inconsistent with the narrow scope of judicial review of agency decisions. Were new evidence to be allowed before the circuit court and the court permitted to take that evidence into consideration when rendering its decision, the circuit court would no longer be focusing its attention upon the proper considerations. Rather, a party would, in most cases, be presenting this new evidence to detract from that evidence upon which the agency based its decision, and, therefore, the court would not be focusing upon whether the record itself contains substantial evidence to support the agency's decision.

[23] There exists a narrow exception to this rule, and it is limited to evidence of alleged procedural irregularities at the agency level: "A party may offer testimony [to the circuit court] on alleged irregularities in procedure before the presiding officer that do not appear on the record." SG § 10-222(g)(2); *Ad + Soil, supra,* 307 Md. at 320-22, 513 A.2d 893; *Consumer Protection Div.,* 304 Md. at 750, 501 A.2d 48. To the extent that appellant was offering the evidence of subsequent variances granted to neighboring landowners in an attempt to show that the agency was acting in an arbitrary or inconsistent manner--*i.e.,* granting variances to certain landowners while denying them to appellant--that evidence *might* be admissible before the court. *Ad + Soil,* 307 Md. at 320-22, 513 A.2d 893; *Aspen Hill Venture v. Montgomery County Council,* 265 Md. 303, 316-17, 289 A.2d 303 (1972) . "[E]vidence of subsequent inconsistent decisions of the same [administrative] body [is] highly reliable and probative" because it directly relates to the possible "arbitrary, capricious, or discriminatory quality" of the administrative body's actions. *Ad + Soil,* 307 Md. at 321, 513 A.2d 893. "[S]uch evidence [is] admissible before the reviewing court as an exception to the general rule restricting judicial review to evidence in the administrative record." *Id.*

***268** [24] In the case *sub judice,* however, any error was harmless, in that the record contained the evidence appellant had presented to the ALJ on variances granted to neighboring landowners and any new evidence presented for the first time before the circuit court would merely have been cumulative. More important, as discussed, the record contained substantial evidence to the effect that it was the inordinate confluence of factors contrary to the safe operation of an on-site septic system that caused MDE to deny the permit in appellant's case--a confluence of factors not extant in respect to the permits granted the neighbors--and that the decision to deny appellant his permit was not the result of an arbitrary, inconsistent, or discriminatory agency action.

As for the evidence on innovative and alternative systems, notwithstanding the subsequent rejection of one of appellant's proposed alternative systems, those materials and proposals have not yet been ruled upon by CCHD and MDE. Appellant's new proposals are independent of and dissimilar from his regrading proposal. Because appellant did not present evidence of such systems before the ALJ, MDE could not review the proposals at that time in order to determine if they could safely treat and dispose of the sewage attendant to appellant's residence on the property. "[A] person may not obtain ****1029** judicial review of a matter when he or she failed to properly raise the matter before the administrative agency." *Heft v. Maryland Racing Comm'n,* 323 Md. 257, 273-74, 592 A.2d 1110 (1991); *see* Md. Rule 7-208(c). Thus, the circuit court properly declined to review proposals that had yet to be ruled upon by the agency.

Jury Trial

[25][26] Appellant desired a trial by jury before the circuit court; he was not, however, afforded one. Simply stated, when a circuit court sits for the purpose of reviewing the decision of an administrative agency under the State Administrative Procedure Act, there is no right to a jury trial. Section 10-222(g) of the State Government Article flatly proscribes such a procedure: "The court shall conduct a proceeding ***269** under this section without a jury." *See County Council v. Investors Funding Corp.,* 270 Md. 403, 437 n. 12, 312 A.2d 225 (1973) ("That no provision is made for a de novo trial on appeal from

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the final action of [an administrative agency] does not constitute a deprivation of the right to a jury trial ...."); *see also Maryland Aggregates, supra,* 337 Md. at 680, 655 A.2d 886; *Esslinger v. Baltimore City,* 95 Md.App. 607, 624, 622 A.2d 774, *cert. denied,* 331 Md. 479, 628 A.2d 1066 (1993). In any event, our review of the record has failed to disclose that appellant made any demand for a jury trial to the circuit court. Thus, even if appellant had had a right to a jury trial, it was waived. Md. Rule 2-325(d).

Conclusion

In closing, we note, as Judge Clagett so correctly pointed out, this decision does not permanently foreclose appellant's right to build upon his property. Appellant is entitled to obtain further proposals for the design and construction of disposal systems and to submit them to the CCHD for consideration.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

110 Md.App. 246, 676 A.2d 1017

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111 Md.App. 1, 677 A.2d 634
(Cite as: 111 Md.App. 1, 677 A.2d 634)

C

Steel v. Cape Corp.Md.App.,1996.
Court of Special Appeals of Maryland.
Robin S. STEEL et al.
v.
CAPE CORPORATION.
No. 1541, Sept. Term, 1995.

June 4, 1996.

Applicant sought review of decision of county board of appeals denying its request to rezone private property from open space to residential classification. The Circuit Court, Anne Arundel County, Bruce C. Williams, J., reversed board's decision. Objectors appealed. The Court of Special Appeals, Cathell, J., held that denial of rezoning application based on inadequacy of school facilities resulted in unconstitutional regulatory taking.

Affirmed.

West Headnotes

[1] Eminent Domain 148 ⚿2.1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.1 k. In General. Most Cited Cases
(Formerly 148k2(1))
In undertaking regulatory takings analysis, first step focuses upon appropriateness of regulation itself. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain 148 ⚿2.10(6)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(4) Zoning and Permits
148k2.10(6) k. Particular Cases. Most Cited Cases
(Formerly 148k2(1.2))
Temporary character of ordinance on adequacy of school facilities, combined with zoning ordinance on open space classification, did not insulate statutory scheme from rezoning applicant's constitutional takings claim. U.S.C.A. Const.Amend. 5.

[3] Zoning and Planning 414 ⚿489

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k489 k. Grounds for Grant or Denial in General. Most Cited Cases
Mistaken zoning classification does not justify grant of variance; it permits rezoning.

[4] Eminent Domain 148 ⚿2.10(6)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(4) Zoning and Permits
148k2.10(6) k. Particular Cases. Most Cited Cases
(Formerly 148k2(1.2))
Hearing officer's purported grant of residential low density zoning classification upon denial of request for residential classification was improper and did not preclude applicant from asserting claim that the continued classification of private property as open space constituted regulatory taking. U.S.C.A. Const.Amend. 5.

[5] Eminent Domain 148 ⚿2.10(6)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power

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148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(4) Zoning and Permits
148k2.10(6) k. Particular Cases. Most Cited Cases
(Formerly 148k2(1.2))
No reasonable economical use could be made of four noncontiguous tracts of property abutting on property that had been denied residential zoning classification so as to preclude applicant's takings claim; though tracts had residential classification, application of setback requirements to largest tract resulted in less than reasonable buildable width, and remaining parcels were smaller and may have had even smaller buildable areas when setback and access requirements were factored in. U.S.C.A. Const.Amend. 5.

[6] Eminent Domain 148 ⚿2.10(6)

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k2 What Constitutes a Taking; Police and Other Powers Distinguished
148k2.10 Zoning, Planning, or Land Use; Building Codes
148k2.10(4) Zoning and Permits
148k2.10(6) k. Particular Cases. Most Cited Cases
(Formerly 148k2(1.2))
County board of appeals' denial of application for rezoning from open space to residential classification, based on inadequacy of school facilities, resulted in unconstitutional regulatory taking of applicant's private property which had been mistakenly downsized to open space classification without applicant's knowledge when community association wrongfully asserted ownership interest in property; open space classification, which permitted general recreational uses that preserved environment, provided no economically viable use of property, as classification was not generally intended for privately owned property. U.S.C.A. Const.Amend. 5.

****635*2** Richard A. DeTar (Miles & Stockbridge, P.A., on the brief), Easton, for Appellants.
Harry C. Blumenthal (Sager A. Williams, Jr. and Blumenthal & Delavan, P.A., on the brief), Annapolis, for Appellee.

Argued before BLOOM and CATHELL, JJ., and JAMES S. GETTY, J. (retired), Specially Assigned.
CATHELL, Judge.
Robin S. Steel and other owners of property in Cape St. Claire appeal from a judgment of the Circuit Court for Anne Arundel County (Williams, J., presiding) that reversed the decision of the Anne Arundel County Board of Appeals (the Board), remanded the matter to the Board, and ordered the Board to grant a request to rezone the subject property owned by Cape Corporation, appellee, from OS (Open Space) [FN1] to R5 (Residential).

FN1. Appellants inform us in their brief that property zoned OS (Open Space) " permits no development."

Appellants pose two issues for our consideration:
1. Whether the Board of Appeals'[s] finding that the OS zoning within the Cape Corporation's Lot constitutes a mistake left the Board with no discretion and required it to grant the Cape Corporation's rezoning application without regard to issues concerning public health, safety and welfare such as the inadequacy of public schools, etc.[ ]
2. Even assuming that the Board of Appeals correctly exercised its discretion in denying the Cape Corporation's rezoning application based upon circumstances relating to the public welfare, must its decision be reversed because the decision results in an unconstitutional taking of the Cape Corporation's property[.]

Initially, we note that it is apparent that neither appellee nor the trial court (and certainly not appellants or the Board) took the position that, once a zoning mistake was found,[FN2] the Board lacked discretion regarding whether it had to grant the rezoning based purely upon that mistake. From our reading ***4** of the entire record, all parties and

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determinative entities recognized that the finding of mistake merely opened the door to a *consideration* of rezoning-*i.e.*, that the finding of mistake did not *mandate* rezoning. See *White v. Spring*, 109 Md.App. 692, 675 A.2d 1023 (1996). Consequently, we do not perceive that a resolution of appellants' first issue is necessary for our resolution of the case. Moreover, the trial judge, perceiving no issue in respect to the allegations of mistake and the Board's discretion to rezone, explicitly limited his ruling to the second issue. [FN3]

FN2. No one on appeal questions the findings in respect to mistake. *See White v. Spring*, 109 Md.App. 692, 675 A.2d 1023 (1996); *People's Counsel v. Beachwood I Ltd. Partnership*, 107 Md.App. 627, 670 A.2d 484 (1995).

FN3. The trial judge's discussion of mistake and the agency's resulting discretion to rezone displayed an accurate understanding of the law.

The Relevant Facts

From our review of the proceedings before the hearing examiner, the Board, and the trial court, we perceive that the site in question was first rezoned from CR (Cottage Residential), permitting up to 7.2 residential units per acre, to OS (Open Space), apparently permitting no residential units, about 1971. [FN4] At that time, the Cape St. Claire Improvement Association's lease for the subject property had just expired. In the 1971 Anne Arundel County Comprehensive Rezoning, the Association, nevertheless, asserted that it had an ownership interest therein and, unknown to the property's owner, appellee here, requested that the property be rezoned to OS. Thereafter, still unknown to appellee, the County, apparently believing the Association to be the owner of the subject property, rezoned it as requested. It was not until 1978 that appellee learned that its property had been downzoned at the request of an entity improperly asserting an **636 ownership interest in the property. [FN5] Appellee was allegedly informed that the *5 property would be rezoned R5, effectively curing the 1973 mistake, in a 1987 comprehensive rezoning, but this was not done.

FN4. We shall address the small portion of the tract now zoned R5, *infra*. Neither party contends that OS zoning permits the construction of residential housing units.

FN5. George Baker, the president of Cape Corporation, testified that, after 1971, the corporation was negotiating with the Association for the sale of the property. When those negotiations were not successful, the corporation put the property up for sale in 1978. Mr. Baker stated:
[A]nd a contract was submitted by a builder on one of the lots, and about two days [later] ... a W. Calvin Gray, called me and said "Say, Mr. Baker, we've been told that that property is zoned open space," and I said "That can't be, it's always been zoned residential."

In the 1990s (perhaps beginning in the late 1980s), appellee entered into negotiations, and, ultimately, litigation, in respect to verifying its ownership of the subject property. The dispute was resolved in appellee's favor in 1993, when this Court rendered an opinion affirming appellee's ownership of the property. Appellee then initiated the rezoning request that resulted in the circuit court decision now on appeal. We have capsulized the early history of the property in order to demonstrate how it was inappropriately downzoned initially to an open space classification. As we shall indicate, an OS (Open Space) classification was obviously intended for public property or private property whose owners seek to preserve their property's open space characteristics.

Article 28 of the Anne Arundel County Code (1967) [FN6] specifies:

FN6. Any statutory references shall hereinafter be to the Anne Arundel County Code (1967), unless otherwise indicated.

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§ 6-204. Land included.
Open Space Districts shall include:
(1) lands in the natural drainage system, including wetlands, marshlands, swamplands, and lands in the floodplain;
(2) private and public land used or proposed to be used for passive or active subdivision recreation, community recreation, or regional recreation; and
(3) lands designated as structural open space in the General Development Plan or detail plan of open space.
§ 6-205. Permitted uses.
(a) The following uses are permitted as permitted uses in Open Space Districts subject to the approval, where applicable,***6** of the State Department of Natural Resources, the Soil Conservation Service, the Department of Public Works, the Department of Utilities, the Health Department, and the Department of Recreation and Parks:
(1) alcoholic beverage uses as ancillary to permitted uses in accordance with the provisions of § 10-118 of this article;
(2) conservation uses, practices, and structures for the maintenance of the natural environment;
(3) existing residential uses;
(4) farming or nurseries, including truck gardening, grazing of livestock, and other similar activities if:
(i) the use does not change the stability of the land; and
(ii) with the exception of grazing, the use is not located in the natural drainage system;[FN7]

FN7. Part of the subject property is alleged to be in a flood plain or drainage system.

(5) nonresidential structures, including barns, stables, and kennels, for the sheltering, breeding, boarding, hiring, or selling of an animal and for storage of crops raised on the premises, provided that the use is not permitted in the natural drainage system;
(6) nonprofit camps, including dormitories, cabins, and structures for administrative, maintenance, and custodial activities of the camp, if the structures are not located in the natural drainage system;
(7) public beaches;
(8) rights-of-way or easements to provide for access to inaccessible areas;[[[[[[[FN8]

FN8. At oral argument, appellant argued that the right to have easements on the property should be considered a viable economic use or, at least, an enhancement of whatever other uses to which this property could be put. We fail to see how easements, standing alone, are part of the equation, unless they are used to connect viable economical uses, which in this case are not permitted, or can, in some fashion, be used to generate revenue. We decline to speculate further.

****637 *7** (9) structures for administrative and custodial uses of the principal use of the site, if:
(i) building coverage, including parking, does not exceed 20% of the site; and
(ii) the structures are not located in the natural drainage system;
(10) temporary structures for boating, swimming, fishing, hunting, golf courses, ice skating, nature study, picnic areas, play areas, stables, and stands for the sale of products raised on the premises;
(11) permanent structures on land for hunting, golf courses, ice skating, nature study, picnic areas, play areas, and stables, if the structures are not located in the natural drainage system;
(11A) piers and ramps; and
(12) other recreational and conservation structures consistent with the objectives of an Open Space District in conjunction with the uses listed in this section.
(b) In an Open Space District, a recreational pier is permitted as a conditional use subject to the conditions of § 2-204(b)(3B) of this article.
§ 6-206. Special exceptions.
In an Open Space District, public utilities and public utility uses are permitted as special exceptions.
§ 6-207. Setback requirements.
A use or structure other than a pier, conservation use, passive recreational use, or beach in an Open Space District may not be located:
(1) less than 50 feet from any lot line; or

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(2) less than 75 feet from any street right-of-way.

Section 6-202(a) states that the purpose of OS zoning is to preserve open spaces for recreational purposes, to protect persons and property from flooding and water pollution, and "to protect the County against costs if development ... is not compatible with the natural environment." The purpose section of the statute provides further that " OS-Open Space ***8** Districts are intended to guide, define, and protect development, communities, land uses, and environmental study areas through proper location of open space areas." Art. 28, § 6-202(b).

It is clear that OS zoning was not intended, nor does it encompass any viable residential uses in the district, unless they were grandfathered, i.e., already existing. In the present case, we have found no indication in the record that residential structures are currently on the site.

The trial judge described the uses permitted in OS zones:
The permitted uses of an OS-open space district are general recreational uses which preserve and protect the natural environment. *See* Anne Arundel County Code [Art. 28,] § 6-202, 6-205. Permitted uses on Appellant's 3.12 acre parcel would include: conservation uses and structures for the maintenance of the natural environment; farming or nurseries; nonresidential structures, including barns, stables, and kennels; nonprofit camps; temporary structures for boating, swimming, fishing, hunting, golf courses, ice skating, nature study, picnic areas, play areas, etc.; and other recreational and conservation structures. [Art. 28,] § 6-205.

The parties do not challenge that description. Moreover, there was evidence that OS zones were intended to be imposed upon either publicly controlled property or private property, at the request of the owners of that property.

Gary T. Westholm, an expert in planning, land use, and appraisal, testified before the Board that OS zoning was intended for governmentally or community-owned land. The Board of Appeals noted that, according to Mr. Westholm, this property does not meet the definition for land in OS; this is private, not public land. The property does not comply with OS zoning which is for recreational uses, to handle flooding, and to protect the county against cost.

In its memorandum opinion, the Board discussed the witnesses called on behalf of Anne Arundel County. It noted ***9** that Kevin Dooley, a zoning analyst for the County, presented testimony:
****638** He believes the open space zoning is a mistake. He explained the comprehensive rezoning process. The property had OS zoning designation throughout and there were no profiles. Open space zoning is for environmentally sensitive or recreational property. There are some sensitive areas on the property, but the portion that is the subject of the rezoning is level with no environmental effects. This is property in private ownership, and was not ever set aside for recreational purposes for the community. Therefore, it is a mistake. The General Development Plan (GDP) indicates natural features designation and low to medium density. R5 is consistent with low to medium density.

Mr. Dooley further testified:[T]he 1986 general development plan shows this area being in close proximity to both the natural features designation and also the low-to-medium residential designation... . R5 zoning is consistent with the low to medium density residential designation.
....
... [I]n addressing the issue of the compatibility of the surrounding land uses this area of Cape St. Clair[e] and the area immediately surrounding this site is zoned R5 and the R5 zoning and single-family development would be consistent with the surrounding land uses.
... So the R5 would be consistent with the critical areas designation....
....
... [A]ll the other standards [other than the adequacy of school facilities standard] to justify R5 zoning can be met in this case. That will be the county's position.

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Other County agencies were of a like mind. The Anne Arundel Soil Conservation District " recommend[ed] approval of requests herein." The Office of the Fire Marshall had "no objection to granting the requested zoning reclassification requests." Both the Anne Arundel County Health Department***10** and the Department of Recreation and Parks declined to comment on the proposed rezoning. The Board then noted that "the critical area commission did not oppose rezoning" of the subject property to R5, and commented, "Outside of the school issue, all the requirements can be met" in order for the property to be rezoned. The Board then further discussed the requirements of the statute relating to rezonings:

Since the property does not have natural features which prohibit development except in the steep slope area and the property is not held by the public, only the portion containing steep slopes should have been zoned open space. However, it is equally without dispute that this Board cannot make an affirmative finding that the public facilities are adequate. The testimony from the school personnel indicated that both the elementary and the middle school are currently over capacity and that situation is projected to continue as shown on Protestants' exhibit # 4. Since this Board is convinced of the need for the schools to have adequate capacity before any rezoning to allow the building of more homes and further over crowding of the schools, it must deny the rezoning request.

It is clear, therefore, that the Board denied the requested rezoning because of the provisions of the Anne Arundel County Code relating to the adequacy of its schools.[FN9] Article 3, § 2-105(a)(3) (1985), provides that property cannot be rezoned ***11** unless the applicant establishes that "schools ... adequate to serve the uses allowed by the new zoning classification, ... are either in existence or ****639** programmed for construction." The adequacy of schools specifically is governed by Article 26, § 2-416 (1985):

> FN9. The sections relating to rezoning discuss the necessity for adequacy of facilities generally and refer to the statute that defines a public facility. Although it is not entirely clear from the extracts and briefs, we believe that the statute, Article 26, constitutes the subdivision legislation of Anne Arundel County, and, thus, while certainly related, is not a part of the zoning regulations. If that is so, and we believe it to be so, the language of the zoning statute, Article 28, referring to the need for adequacy of public facilities, was considered below to incorporate by reference the provisions of Article 26 in the rezoning process. The parties do not challenge this procedure. Appellee, referring to Article 26, notes in its brief, without objection, that "the Board applied the following provisions ... [of Article 26]."
>
> Because no objection is made, we need not further address this matter. We shall sometimes refer to this statutory scheme as the Adequacy of School Facilities Ordinance.

(b) Within two years following approval of a final subdivision plat, elementary and secondary schools in the service area of the proposed subdivision shall be adequate to accommodate the school population projected to be generated from the proposed subdivision.

(c) Elementary and secondary schools in the service area of the proposed subdivision shall be considered adequate if:

(1) the school population projected to be generated from the proposed subdivision may be enrolled at schools located in the service area at which the enrollment does not exceed the State Interagency Committee school capacity guidelines as specified in the administrative procedures guide of the public school construction program; or

(2) the County Board of Education determines that the enrollment of the additional students expected to be generated from the proposed subdivision would not be detrimental to the quality of the curriculum and programs being offered at the schools, at schools in which the enrollment exceeds the State Interagency Committee school capacity guidelines.

(d) In determining whether schools exceed the State Interagency Committee school capacity guidelines, consideration shall be given to existing school

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population, school population projected to be generated from other subdivisions for which final plats have been approved, and all other children reasonably expected by the County Board of Education to enroll in the schools.

The Board, in applying these standards to reject the rezoning, accepted the testimony of certain school officials and officers of parents' organizations. Lawrence Ripley, the student planning director for the Anne Arundel County Board of Education, presented a letter he had written on November 16, ***12** 1993, to the Office of Planning and Code Enforcement that projected that, if R5 zoning were granted for the subject property, it would cause seven new enrollments in the various schools in the service area. He opined that school facilities "will be inadequate to handle the number of students projected." Mr. Ripley presented another letter that he had written to the same office on June 5, 1994, in respect to the appeal to the circuit court, in which he reiterated that the schools were then over capacity, although he discussed the impending construction of a new school. Even with the new school, Mr. Ripley opined, elementary school capacity would still be a problem. In his June 5, 1994 letter, he considered that, based on the requirements of the Adequacy of Facilities Ordinance,[[[[[[FN10] no approval can be recommended until the school population projected to be generated from the proposed subdivision can be accommodated.

> FN10. Mr. Ripley's statement as to the Adequacy of Facilities Ordinance apparently is a reference to Article 26, § 2-416 of the subdivision ordinance, incorporated by reference, in Article 28, the zoning ordinance.

At the present time ... the earliest any consideration for approval of this development would be approximately School Year 2000.

During this process, the staff, i.e., the Anne Arundel County Department of Planning and Code Enforcement, basically noted that the subject property complied with all other requirements and gave as its recommendation, "[t]he Department ... would have no objection to the granting of this [rezoning] request provided the petitioner can satisfactorily address the issue of the adequacy of public schools." Consequently, it is apparent that the Board of Appeals denied appellee's request for rezoning based upon the provisions of the statutes relating to the adequacy of schools. The proceedings before the administrative entities and the Board gradually narrowed in focus until, by the time of its decision, the Board predicated its determination upon the adequacy of school facilities, its comments as to potential density problems ***13** notwithstanding. It is also clear that the County's ordinances, as written, compelled that finding. The Board, therefore, acted correctly in applying the adequate***640** school facilities requirements of the ordinances to deny the application. The only question that remains is that question upon which the trial court based its decision: Did the interplay between the rezoning requirements as to adequacy of public facilities resulting from what school administrators termed the Adequacy of Facilities Ordinance result in an unconstitutional taking of property?

Resolution

We first note that the factual situation presented by this case is indeed unusual. Generally, there would not be a request to upzone the types of properties that are contemplated to be in OS zones, because they are contemplated to be properties owned by public entities or community associations that have requested that zoning classification to preserve the environmental and recreational aspects of their properties. The statute defines "Community recreation" as "recreation facilities used primarily by people living in large geographical areas of the County." Art. 28, § 6-201(b). "Subdivision recreation" is defined as "facilities or land used primarily by residents living in a recorded subdivision." *Id.* § 6-201(f). The situation in the case *sub judice* is different. An entity, i.e., a community association, by wrongfully contending that it was the owner of property it desired to

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preserve as a "Subdivision recreation" area for " passive ... recreation," caused the property to be downzoned to OS in order to accomplish that purpose without the knowledge of the true owner. Thus, it is clear that the prior downzoning was a mistake. Neither party to the appeal is now contending that it was not a mistake, and that issue is only indirectly before us.

Consequently, it can be said that the rezoning provisions of Article 28, incorporating by reference provisions of Article 26 regarding the adequacy of schools and other facilities, contemplated that properties in private ownership that are proposed for upzoning would be in zoning classifications other than OS ***14** and, thus, already in a classification that permits viable economical uses; the upzoning requests would be for an increase in economic viability, i.e., an intensification of existing residential uses that in and of themselves, in a constitutional taking scenario, are already economically viable. In almost all instances, therefore, the denial of the upzoning, due to the inadequacy of school facilities, would not result in the subject property remaining in a status that had no viable economic use. Under those contemplated circumstances, the provisions in respect to school facilities, while creating a *de facto* moratorium as to upzoning in the Cape St. Claire area,[FN11] would not have resulted in the loss of all economically viable uses for the period at issue-in the case *sub judice,* not earlier than the year 2000 (a six-year period), because the properties would have retained existing economically viable uses. In the case at bar, however, it is alleged that the combination of the ordinances effectively foreclosed all economically viable uses of the subject property because it was mistakenly put in a classification not meant for privately owned property of this character-a classification, it is argued, that does not permit viable economical uses. The trial judge agreed with the applicant, appellee here, and based his decision solely upon the constitutional issue. As we have stated, we shall review only the correctness of Judge Williams's decision.[FN12]

FN11. The parties treat the Cape St. Claire area as that area, *i.e.,* the service area, analyzed for school impact purposes. Kevin Dooley, the zoning analyst for the County's Department of Planning and Code Enforcement, described the neighborhood: "[I]t centers along Cape St. Clair[e] road and extends as far east as the Little Magothy River, as far south as the intersection with College Parkway, as far west as the Cape St. Clair[e] elementary school and as far north as its intersection with Mountain Top Drive." The extent of the service area or of the neighborhood, though perhaps relevant in other cases, does not affect our determinations in the case *sub judice.*

FN12. There apparently were one or more other parcels owned by appellee that had also been improperly zoned OS. The circuit court similarly found the refusal to rezone those parcels to be confiscatory in nature and directed the agency to grant R5 zoning, which it did. Appellants, in the case sub judice, apparently assert some different facts here, i.e., the strips that appellants contend already permit residential use indicate preexisting viable economical use. We address these strips later.

****641 *15** The Law

[1] In undertaking a regulatory takings analysis, the first step focuses upon the appropriateness of the regulation itself. In *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the United States Supreme Court noted, "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not ' den[y] an owner economically viable use of his land. ' " *Id.* at 834, 107 S.Ct. at 3147 (citation omitted, bracketed material in original). Under *Nollan,* the regulatory prohibition must further the end " advanced as the justification for the prohibition." *Id.* at 837, 107 S.Ct. at 3148. The Court described this requirement as the "essential nexus." *Id.*

In 1984, three years prior to the decision in *Nollan,*

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the Maryland Court of Appeals adopted the same standard, although it gave it a different name. *Howard County v. JJM, Inc.,* 301 Md. 256, 482 A.2d 908 (1984), was a case involving, ultimately, whether the County's exaction from a developer of land for a highway was proper. The exaction occurred when the zoning regulations required the developer to "reserve" from developing land in the path of a proposed future county or state highway. In *JJM, Inc.,* the land to be reserved was a right of way for the proposed highway that "cut a wide swath through the proposed development." *Id.* at 259, 482 A.2d 908. The reservation requirement was challenged as an unconstitutional taking of property without just compensation. After distinguishing a dedication, "the conveyance of ... land ... to the public," from a reservation, a restriction on "the right ... to use the land for anything but the restrictive purpose," 301 Md. at 270, 482 A.2d 908, the Court of Appeals discussed whether the statute there at issue furthered the end that was proffered as justification for the statute in the first place, i.e., ***16** the first step analysis of the appropriateness of the statute.[FN13] The Court, describing the reservation requirement as an exaction, noted:

> FN13. See *Howard County v. JJM, Inc.,* 301 Md. 256, 482 A.2d 908 (1984), for a comprehensive treatment of reservation, exaction, and first step analysis.

We bear in mind in this case the "fine line" distinction observed by Justice Holmes for the Court in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922): " The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon,* 260 U.S. at 415, 43 S.Ct. at 160. *Cf. Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926) ("The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.").
301 Md. at 281, 482 A.2d 908. The Court of Appeals then held "that in order to exact from a developer a setting aside of land for highway purposes there must be a reasonable nexus between the exaction and the proposed subdivision." *Id.* at 282, 482 A.2d 908. This position, much earlier stated by the Court of Appeals as Maryland law in *JJM, Inc.,* became the law of the land generally when *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304, was decided by the Supreme Court, on June 24, 1994, in a five to four decision.

The *Dolan* Court examined the differing approaches utilized by the various states in determining whether the degree of exactions demanded by a permit condition bore the required relationship to the projected impact. In particular, the Court discussed (1) the generalized relationship test, finding it too lax to protect property rights, and (2) the specific and uniquely attributable test, stating that it imposed too much of a burden upon government before finding the application of the ordinance then before it unconstitutional. 512 U.S. at ----, 114 S.Ct. at 2318-19. In doing so, the Supreme Court ***17** adopted the test-although it called it the rough proportionality test-which had been adopted by our Court of Appeals as the reasonable nexus or reasonable relationship test ten years earlier in *JJM, Inc.*[FN14]

> FN14. See Paul A. Tiburzi & Kurt J. Fischer, *From Nollan to Dolan: the Supreme Court Continues to Define the Takings Clause,* Land Use Inst. (1994).

****642** In the case *sub judice,* the statutory scheme satisfies the reasonable relationship test. The regulation itself involves a regulatory area that may be a reasonable application of the police power. Accordingly, our review moves to the second step of the takings analysis: Does the statutory scheme, as applied to the subject property, effectively prohibit all reasonable, i.e., viable, economical uses of that property? [FN15]

> FN15. We do not address the prohibition of nuisances through the regulatory power as there is no claim, nor could there be a

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logical claim, that residential uses, in and of themselves, are noxious. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), and compare our recent case *Erb v. Maryland Dept. of the Env't,* 110 Md.App. 246, 676 A.2d 1017 (1996).

We opined at some length, in *Offen v. County Council,* 96 Md.App. 526, 625 A.2d 424 (1993), *rev'd in part on other grounds,* 334 Md. 499, 639 A.2d 1070 (1994), on the then trilogy of major Supreme Court land-use decisions: *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (*First English Church*); *Nollan v. California Coastal Comm'n, supra,* and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). [FN16] We concluded that, for purposes of *Offen,* those cases had not created new law, but had restated the law and, at best, had expressed the ***18** Supreme Court's position rejecting statutory provisions *further* impinging upon a property owner's rights. 96 Md.App. at 544-55, 625 A.2d 424. The trilogy, especially *Lucas,* in essence said, "No more." The Supreme Court, as we view it, stopped the trend toward the diminution of private property rights through regulatory schemes based upon perceived environmental concerns.[FN17] *See Florida Rock Indus., Inc. v. United States,* 791 F.2d 893, 900-03 (Fed.Cir.1986), *cert. denied,* 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987); *Collis v. City of Bloomington,* 310 Minn. 5, 246 N.W.2d 19, 26 (1976); *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 804-06 (Tex.1984); *Call v. City of West Jordan,* 606 P.2d 217 (Utah 1979); *Jordan v. Village of Menomonee Falls,* 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed.2d 3 (1966); *see also* ***19***J.E.D. Assocs. v. Town of Atkinson,* 121 N.H. 581, 432 A.2d 12, 14 (1981), *overruled in part by Auburn v. McEvoy,* 131 N.H. 383, 553 A.2d 317 (1988); ****643***Jenad, Inc. v. Village of Scarsdale,* 18 N.Y.2d 78, 271 N.Y.S.2d 955, 956-57, 218 N.E.2d 673, 674-75 (1966). *Compare Pioneer Trust & Sav. Bank v. Village of Mount Prospect,* 22 Ill.2d 375, 176 N.E.2d 799, 802 (1961) , in which a developer was required to provide school facilities. The court there noted that the need for a new elementary school was not completely attributable to the developer's project. The Illinois Supreme Court noted, " [T]he school problem which allegedly exists here is one which the subdivider should not be obliged to pay the total cost of remedying." 176 N.E.2d at 802.

FN16. Professor Robert M. Washburn, in his article, *Land Use Control, The Individual and Society,* 52 Md. Law Rev. 162 (1993), discusses a "1987 trilogy" of cases, namely, *Nollan, First English Church,* and *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). *Keystone* has not survived with the same force and effect as *Nollan* and *First English Church.* One writer described it as a "low quality" decision. *See* Richard A. Epstein, *Takings: Descent and Resurrection,* 1987 Sup.Ct. Rev. 1, 5-23. Upon the filing of *Lucas* in 1992, it, in the view of many, supplanted *Keystone* in the trilogy.

FN17. We acknowledge Judge Williams's learned and well-reasoned comments upon the nature of takings law as impacted by the trilogy of Supreme Court cases we have described. We note that students of the issue and these cases, as Judge Williams obviously is, may differ as to the extent of the impact of the cases. One, of course, must be cautious when adopting the thoughts of those who labor, abstractly, in the field, such as pure academics. Academics are more likely to transform hopes into fact merely by stating them as such. In essence, *Lucas* was the Roberto Duran, "No mas, no mas," of land-use cases.
The Supreme Court has added to the *First English Church, Nollan,* and *Lucas* trilogy what many view as the most important of its modern land-use cases, *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), which addresses "

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> improper exactions." *Dolan* does that which Professor Roland K. Best, author of *New Constitutional Standards For Land Use Regulation: Portents of Nollan and First Lutheran Church,* Inst. on Planning, Zoning, & Eminent Domain ch. 6 (1988), and apparently the learned trial judge here, perceived to have occurred in the prior trilogy of cases.
>
> Interestingly, Robert C. Wilcox, Administrative Hearing Officer in the case *sub judice,* in March of 1994, prior to the *Dolan v. City of Tigard* opinion, when commenting on the OS classification of this privately-owned property, stated:
>
> The subject property is privately owned. Absent an agreement to the contrary, we doubt if government could compel a private property owner to use that property for community recreational purposes without compensating the property owner... . It would, therefore, be unreasonable to require the property to maintain OS zoning under the circumstances here presented.
>
> *Dolan* removes most, and perhaps all, of the doubt.

For purposes of the case *sub judice, First English Church* is an important part of the Supreme Court's trilogy of land-use cases, as it relates to the moratorium aspect of the statutory scheme here addressed. In that case, the church had, for some time, owned land in a California creek basin, which it operated as a retreat and campground, *i.e.,* those types of activities often associated with churches. In 1978, a flood destroyed the church's buildings in the creek basin. Responding to the flood, Los Angeles County adopted an "interim ordinance," that provided, in relevant part:

A person shall not construct, reconstruct, ... any building ... any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area ....

482 U.S. at 307, 107 S.Ct. at 2381 (quoting County of Los Angeles Ordinance No. 11,855 (1979)). The church filed suit, claiming, in part, that the ordinance "denies [appellants] all use" of the property, and sought damages for the taking. The trial court, citing a California case, *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), found that the church's case could not be maintained as a case for damages unless there had been a prior declaratory judgment or mandamus action declaring the statute unconstitutional.***20** *See* 482 U.S. at 308-09, 107 S.Ct. at 2382. Because the case was based upon a regulatory taking and sought damages, the California court declined to entertain the taking issue. On appeal, the United States Supreme Court noted that the church was asking it to void the California court's holding that **temporary regulatory takings** do not require compensation. [FN18] The Supreme Court noted:

> FN18. Under the California case of *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds,* 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), no compensation was required for a **temporary regulatory taking**. we note that, prior to *First English Church,* it was, in some legal quarters, believed that temporary moratoria of all uses had not generally involved takings issues. In *S.E.W. Friel v. Triangle Oil Co.,* 76 Md. App. 96, 543 A.2d 863 (1988), we noted that factual distinctions might make *First English Church* 's prohibition against temporary takings inapplicable in cases involving normal delays in the building process, but we did not there decide the issue of *First English Church*'s impact upon temporary moratoria. We merely held that temporary suspension of land use during *normal* decision-making might not constitute an unconstitutional taking. The moratorium in the case *sub judice* was perceived to be for at least six years. It is unlikely that the Supreme Court, especially in light of *Nollan, Lucas,* and *Dolan,* would consider a six-year moratorium to be a normal part of the application review process. Moreover, our decision in *S.E.W.,* in light of the subsequent Supreme

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> Court cases mentioned, might, if properly presented, be subject to reconsideration.
> In that regard, we note, especially in relation to the adequacy of facilities issue, what the Supreme Court said in *Dolan:*
> Cities have long engaged in the commendable task of land use planning....
> The city's goals ... are laudable, but there are outer limits to how this may be done. " A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."
> 512 U.S. at ----, 114 S.Ct. at 2322 (citation omitted).
> In *Lucas,* the Supreme Court discussed *First English Church,* and specifically stated, "See generally *First English* ... (holding that temporary deprivations of use are compensable under the Takings Clause.)" 505 U.S. at 1011-12, 112 S.Ct. at 2891.

Appellant's [First English Church] complaint alleged that [the ordinance] "... denies [it] all use of Lutherglen," [the retreat and camp] and sought damages for this deprivation.... [T]he claims were deemed irrelevant solely because of the California court's decision in *Agins* that ****644** damages***21** are unavailable to redress a "**temporary**" **regulatory taking**....[FN19]

> FN19. The period involved in the instant case is six years-when school facilities might be sufficient. *First English Church* does not state how long the "interim" period of the ordinance passed in 1979 was intended to be. It, however, was replaced by a permanent ordinance in 1981, some two years later and six years before the Supreme Court's opinion was rendered.

... We now turn to the question whether the Just Compensation Clause requires the government to pay for "**temporary**" **regulatory takings**.
482 U.S. at 311-13, 107 S.Ct. at 2384-85 (footnotes omitted). After a discussion of its prior cases, primarily those relating to the appropriation of private property by the United States in World War II, the Court answered its question:
The[ ] cases reflect the fact that "temporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation .... It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ... Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause ... requires that the government pay the landowner for the value of the use of the land during this period.

Id. at 318, 107 S.Ct. at 2388 (citations omitted).

[2] Thus, the (more or less) temporary character of the Anne Arundel County Code's Adequacy of Facilities Ordinance, combined with the zoning ordinance, does not insulate the statutory scheme from constitutional takings analysis. We, as did Judge Williams, must therefore determine whether the statutory scheme denied appellants all economically viable uses of the subject property. *See Nollan, supra; Lucas supra.* We first address certain of the Supreme Court's holdings and statements in *Lucas.*

***22** The Supreme Court in *Lucas* noted that, under the Beachfront Management Act, the South Carolina statute there at issue, "construction of occupiable improvements was flatly prohibited seaward of a line." 505 U.S. at 1009, 112 S.Ct. at 2889. That line was landward of Lucas's property. The statutory scheme at issue in the case *sub judice,* as it applies to appellee's property, results in a prohibition of construction of any *"occupiable "* improvements on the subject tract. Lucas argued at the trial level that, even if the statute were a legitimate exercise of the police power, the complete extinguishment of his right to build on his property entitled him to compensation. The trial court agreed. The South Carolina Supreme Court reversed, opining that, when a property regulation is designed "to prevent serious public harm," no

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compensation was required. 304 S.C. 376, 404 S.E.2d 895, 899 (1991). The United States Supreme Court noted, in *Lucas,* that the state appellate court dissenters had opined that that which the state court majority asserted were akin to nuisances were not in fact nuisances as the term is commonly used, and, thus, the statutory scheme could not, according to the state court dissenters, " fairly be compared to nuisance abatement." 505 U.S. at 1009-11, 112 S.Ct. at 2890. The *Lucas* majority noted the potentiality for improper appropriation of a land owner's property when states attempt to address perceived public problems statutorily:

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use-typically, as here, by requiring land to be left substantially in its natural state-carry with them heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Id. at 1018, 112 S.Ct. at 2894-95. Much the same can be said about the statutory scheme in the case at bar *as applied to property in the OS classification.* The Supreme Court continued with a statement that appears, to us, to be particularly cogent in the case *sub judice:****23** We think, in short, that there are good reasons for our frequently expressed belief ****645** that when an owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. at 1019, 112 S.Ct. at 2895 (footnote omitted).

While a strong argument can be made that the statutory scheme here at issue, *i.e.,* the combination of the Adequacy of Facilities Ordinance and the zoning article, is for the common good, that argument, if resolved favorably to the County, does not, under *Lucas,* resolve the matter. Even if it were for the common good, it still may cause an unconstitutional taking if it, as it does in the case *sub judice,* results in the loss of all viable economic uses. While a situation where such adequacy of facility statutes slow growth might be constitutionally permissible,[FN20] it is not constitutionally permissible where the type of growth reduction occurs at the expense of a property owner's loss of viable economic use of his property. In the unique circumstances of the instant case, that is what resulted.

FN20. We do not decide that issue here.

It is also necessary to point out that the regulatory scheme here evidenced does not involve nuisance abatement. The *Lucas* Court addressed at length that very issue, by discussing the South Carolina appellate court's reasoning in respect to that court's efforts to portray the South Carolina statute as a nuisance abatement measure by its notation that the statute was necessary to "prevent a great public harm." The Supreme Court then noted the South Carolina's court positions that the purposes of the statute brought the case within the ambit of *Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887), the nuisance abatement case, and its progeny, *i.e.,* the line of cases including *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Miller v. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928); ***24** *Hadacheck v. Sebastian,* 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915). The *Lucas* Court acknowledged that many of its opinions had suggested that " 'harmful or noxious' uses of property could be proscribed by government regulation without the requirement of compensation. " 505 U.S. at 1022, 112 S.Ct. at 2897. The Court stated:

One could say that imposing a servitude on Lucas's land is necessary in order to prevent his or it from " harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" or an ecological preserve....

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that " prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes

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self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" -which require compensation-from regulatory deprivations that do *not* require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.

Id. at 1024-26, 112 S.Ct. at 2898-99 (citations and footnotes omitted).In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become a part of our constitutional culture.
... We believe similar treatment must be accorded confiscatory regulations, *i.e.,* regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere the title itself, in the restrictions that background principles of the State's law of property and ***25** nuisance already place upon ****646** land ownership. A law ... must ... do no more than duplicate the result [achievable] ... under the State's law of private nuisance, or ... under its ... power to abate [public] nuisances....

Id. at 1028-29, 112 S.Ct. at 2900 (citations and footnotes omitted). With the holding of *Lucas* and the trilogy of cases we have discussed in mind, we now analyze the case at bar. We first note appellants' argument that, when the Board dismissed the appeal, the property then became classified as RLD (Residential Low Density), which permitted some economically viable use. We hold that the property was never, and is not now, classified RLD. Before discussing the County's statutory requirements, we shall note some similarity to South Carolina's ripeness argument in *Lucas.*

[3] The *Lucas* Court, in respect to a special act passed after the litigation had commenced, noted that the South Carolina Coastal Council contended that that statute could be used by Lucas to apply for a special permit. The Supreme Court responded:

Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent....
In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe.

Id. at 1012, 112 S.Ct. at 2891. Commenting upon the argument of one of the dissenters that Lucas should have dismissed his action or, at least, that it should not have proceeded until he had exhausted the new special permit procedure, the majority noted, "[S]uch a submission would have been pointless, as ... no building permit would have been issued ..., application or no application." *Id.* at 1012 n.3, 112 S.Ct. at 2891 n.3. In the case *sub judice,* at the time appellee applied for rezoning of the subject property, it could not have ***26** been successful in applying for a building permit under an RLD classification, because the subject property was not then classified RLD. Thus, prior to appellee's application, it could not have applied for the uses permitted in that classification. Moreover, as we state elsewhere, the only special exception permitted was for the operation of public utilities. Appellee is not a public utility. Additionally, for reasons we hereafter note, a mistaken zoning classification does not justify the grant of a variance; it permits a rezoning.

[4] Applications for rezoning, pursuant to Article 28, § 11-104, must specify the proposed zoning classification and must be, pursuant to § 11-103, made by the County or by a person who has at least a ten percent ownership interest in the property sought to be rezoned. The only application before the hearing officer was that filed by appellee and the only proposed classification was R5. The hearing officer was not an owner of the property and there was no proper application before him for RLD. He had the authority to grant or deny that particular application, not some other application not made. We hold that to grant rezoning to a classification not applied for was improper. Moreover, in light of his comments, we hold that

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the hearing examiner/administrator, when he denied appellee's request for rezoning and purported to grant to appellee an unsought for RLD classification, was attempting to create the new rezoning equivalent of the South Carolina new " special permit" procedure adopted by that state to thwart the constitutional takings resolution. As did the Supreme Court, we do not think it would accord "with sound process" to permit governmental entities, when faced with zoning-generated takings claims, after the issue is met, to grant something not requested in order to be able thereafter to avoid takings consequences, arising out of the statutes as they existed at the time of application. As did the Supreme Court of *Nollan v. California Coastal Comm'n,* 483 U.S. at 841, 107 S.Ct. at 3150, we " view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."

***27** The Administrative Hearing Officer, when considering the only application before him, ****647** appellee's request for R5 zoning, found that the appellee "has no *reasonable* use of the subject property in its current OS zoning classification." That finding was not appealed to the Board. The hearing officer continued and stated, "[I]t is my opinion that the applicant has the constitutional right to a zoning classification which will afford the subject property some reasonable use." The hearing officer then stated that the taking "dilemma" could not be resolved by granting that which was sought. That was clearly error. Nevertheless, rather than, at that point, granting the application or denying it outright, the hearing officer attempted to insulate the County from "taking" problems by granting something not requested, which could be used to argue that reasonable use thereafter existed. Of course, at the hearing officer's implied suggestion, the argument was then made to the circuit court, and then to us. The circuit court based its ruling upon the application presented, not one not made. So do we.

The only action available to the hearing officer, under the relevant circumstances of the present case, was to grant or deny the use requested, and he denied it. That denial (and not some unauthorized grant) was the entire case before the Board. When it dismissed the appeal, appellee's request for rezoning was denied and the property, at that point, remained classified OS. [FN21] We further note, without deciding, that the attempt to grant an RLD classification, might itself be, as appellee suggests, open to attack by appellants, protestants, or others who would have had standing to protest the RLD classification, because notice requirements might not have ***28** been met for that reclassification.[FN22] RLD zoning permits uses not permitted in R5 that the residents of the surrounding R5 area might find offensive, such as animal husbandry (settling basins for swine excrement can be recognized "by nose" from miles away), dairy farms, furfarming (mink farms are notoriously odorous), private camps (nudist camps?), to name but a few. We have not been made aware, either in written or oral argument, of any provision in the County Code that provides that each higher classification includes all permitted uses in all lower classifications. In some zoning ordinances, the first permitted use in each classification is all the permitted uses in the next lower classification. That language does not appear in the respective classification sections furnished us by the parties. Thus, those opposing an RLD classification, who were not present below or here, might already have had their rights to be heard as to an RLD classification impermissibly compromised.

FN21. Our case of *County Council v. Brandywine,* 109 Md.App. 599, 675 A.2d 585 (1996) was **not** a takings case. Moreover, it involved the presumption that a special exception is a type of permitted use; the special exception there granted was the exception applied for; and it resulted in the appeal being dismissed under a time limitation statute when no decisions or findings were made. That situation is inapposite to the case *sub judice.*

FN22. We have not found in the extract the original application or the notices that might have been made. Neither party asserts that RLD rezoning was sought nor

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that a notice as to RLD was made.

We next address appellants' argument that, because ".41 developable acres ... are already zoned R-5," there remain economically viable uses by appellee of its property. We note that appellants argue that the trial court did not, in its "legal analysis," consider "whether there is reasonable economic use available [as] it did not address the significance of the .41 acres which are already zoned R-5." The issue was presented to the trial court for its consideration. It found no viable economic uses remaining. Thus, it addressed the issue by resolving it. We suppose appellants' argument is that the trial court should have expressed yard calculations or computations in respect to the four slivers of R-5 property. We do not believe that the trial court is required to express its findings with that degree of specificity. While we are not required to do so either, we shall attempt to see if the trial judge's findings are supportable-based upon the record before him-and before us.

****648 *29** Appellants, in their brief often refer to the .41 acres in the singular, as if it were one contiguous parcel, when in fact the .41 acres consists of four noncontiguous parcels that, according to the site plan submitted with the rezoning application, are situate as follows: (1) an abutting strip on the north boundary; (2) and (3) two noncontiguous strips abutting on the southwest boundary; and (4) one elongated strip abutting on the southeast boundary.[FN23] Appellee, in its brief, "extrapolates" from the drawings in evidence the size of the four parcels. We have considered those figures and have compared them with the exhibits in evidence in the record. They appear to be essentially accurate. Moreover, we have made our own independent review of the largest parcel's ability to support a reasonable residential structure. [FN24]

FN23. See diagram "A" that we have reduced from the actual exhibit before the Court. The four areas are indicated by the round circles with the notation "EX. R5 ZONE ON-SITE" with arrows to the parcels. One such circle has arrows to two parcels.

FN24. We have shown that parcel as diagram "B". It is also taken from the exhibit in the record. Diagrams "A" and " B" should be reviewed together.

We address the largest parcel of presently zoned R5 property-that adjacent to the fire station and abutting on Cape St. Claire Road. If a dwelling is sited on that parcel so that its front or rear yards abut the fire station's property, it would have to have a minimum of a twenty-foot setback (rear yard) or twenty-five foot (front yard) or both forty-five feet. In that instance, the side yard would abut on Cape St. Claire Road and it would have to be at least thirty-five feet from that roadway. We have examined the actual full-size plat available to the trial judge and, using the scale on that plat-one inch equals forty feet-have been able to make some approximate measurements. At a point thirty-five to forty feet from Cape St. Claire Road, the lot is approximately fifty feet wide. At that point, a twenty-foot setback from the lot line abutting on the fire station is required. That would leave, at most, a thirty-foot buildable width prior to figuring in the other setbacks. Even if no front yard setback were calculated, that ***30** would leave only a twenty-five to thirty-foot wide parcel remaining for building at that specific point-but the lot drastically narrows. In respect to a structure whose side yard is on Cape St. Claire Road, from the point where the northwestern wall of the structure would be, southeastward along the longer aspect of the lot the width of that parcel quickly narrows. About twenty feet further southeasterly, the lot is approximately forty feet wide. Thus, at that point, after subtracting the twenty-foot rear setbacks, there is a twenty-foot building area. Consequently, a twenty-foot long building that might be approximately twenty-five to thirty feet wide on the Cape St. Claire Road side would have to be about twenty feet wide at a point twenty feet into the building. A forty-foot long building could only be about ten to fifteen feet wide at its southeasterly wall. At sixty feet from the Cape St. Claire Road setback line, no structure is permitted. If such a structure required a front *and* rear setback (which we do not decide) from the OS property, the

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buildable area would be limited to approximately five feet at the most on the Cape St. Claire Road side.

If the structure were to front or rear on Cape St. Claire Road, it would still have to be thirty-five feet from that road, where the parcel, as we have noted, is approximately fifty feet wide. Side yards totaling twenty feet would be required. Thus, at that point, the Cape St. Claire Road front wall of the structure could be perhaps thirty feet wide. The narrowing of the parcel as it proceeds southeasterly would cause the narrowing of such a structure as well. More important, the rear yard of twenty feet (or a front yard of twenty-five feet) would further limit the structure's southeastern extent. That wall would have to be at least twenty feet from the property line that would be curving into, and in front of, the structure. The combination of side yard setbacks and the curving lot line would further constrict the structure.

****649** When the cases discuss viable economic use, they mean reasonable use. The trial judge apparently did not find that such use of this particular tract was viable. We cannot say ***31** that he was wrong, because, based upon our review, we do not perceive that such a strained concept of use is reasonable.

It appears from the plat that, when applying the setback requirements to that largest piece, less than a reasonable buildable width results.[FN25] The remaining three parcels are smaller and may have an even smaller buildable areas when setback and access requirements are factored in.

> FN25. We presume that it is possible to build structures in the shape of a pie slice. We do not, however, perceive that it is reasonable to require that they be so constructed.

[5] Upon our review of the four separate parcels of R5-zoned property abutting on the edges of the subject property, we hold that, under the Anne Arundel County Code's zoning regulations, no reasonable economical use can be made of the four noncontiguous tracts. We note that the Administrative Hearing Officer, at the initial stage of this application process, made the exact same finding-a finding never appealed by appellants. We now direct our attention to the effect of the Adequacy of Facilities Ordinance, *i.e.,* Article 26, § 2-416, on the property zoned OS.

We reiterate that, from our examination of the record, as contained in the extract, it is our view that the County's Adequacy of Facilities Ordinance, as incorporated into the Code's zoning regulation, Art. 28, did not contemplate that its enforcement would leave privately owned property unusable for viable economical uses. As we see it and as we have indicated, the ordinance was intended to apply when the owner of property already being used, or available to be used, for residential purposes, sought to increase the degree of residential use-usually by the subdivision process. The statutes' effect might not, under those circumstances, amount to an unconstitutional regulatory taking, because there might remain a viable economic residential use of the property, even if the upzoning were denied as a result of the inadequacy of school facilities. Hence, in many cases, the scheme might be insulated from constitutional attack. In the instant case, however, ***32** an aberration that occurred as a result of the Association's improper assertion of ownership resulted in the mistaken OS zoning of the subject site. We must therefore examine the uses described to us, as being permitted in an OS zone, in order to determine whether they leave viable economic uses to private property owners. In doing so, we are acutely aware that, when the OS classification was created, it was not designed to be imposed upon private property, but upon public property or community (community associations') property.

Earlier, we reiterated the uses stated in Article 28 and Judge Williams's opinion. As we previously noted, neither party has challenged Judge Williams's findings in that regard. The uses that Judge Williams stated were permissible in the OS zone were general recreational uses that preserve the natural environment, conservation uses, structures for the maintenance of the natural

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environment, farming, or nurseries, nonresidential structures including barns, stables, and kennels, nonprofit camps, and temporary structures for boating, swimming, fishing, hunting, golf courses, ice skating, nature study, picnics, play areas, and the like. Additionally, the hearing officer, Robert Wilcox, as pertinent here, opined that it could be used for a "public beach," "rights of ways," "piers and ramps," and "alcoholic beverage uses as ancillary to permitted uses." As noted earlier, appellants concede that an OS classification " permits no development."

As we have indicated, the uses permitted in OS-zoned districts do not include any viable economic uses-nor were they, as proposed, intended to include viable economical commercial or residential uses, except as accessories to an already existing residential use. There is no existing residential use in the instant case. Additionally, as we have indicated elsewhere, the classification was not generally intended for privately owned property in the first instance, unless that ****650** property was community property, intended to be reserved by that community for recreational purposes.

The instant property is neither public nor community property. It is purely private property, irrespective of the wishes ***33** of neighboring property owners. Even the special exception provisions contained in the OS classification are limited to a consideration of public utility structures and uses. Simply stated, the OS classification was not intended to be imposed upon the property at issue in the first instance. The current desires of a plebescite of neighboring owners cannot alter the intended purposes of the classification.

[6] Moreover, the area sought to be rezoned was just over three acres in size and was located at the entrance to a development. In fact, it is virtually surrounded by the development that itself apparently contains thousands of lots and units zoned R5-the classification sought by appellee. Across the street, on the only side not surrounded by the development, is a shopping center. Within the general boundaries of the developed area is a fire station that appears to abut on the subject property. Access to the property is restricted. We hold that none of the uses permitted in the OS classification afford to appellee any viable economic use of the subject property that would avoid the impermissible taking of appellee's property without just compensation. In summary, the statutory scheme, which may or may not be constitutional when applied to the types of property to which the zoning classification was intended to apply, permits, in this specific classification aberration, no economically viable use. It is an unconstitutional regulatory taking.[FN26]

FN26. We have acknowledged the survival of the *Mugler v. Kansas* line of cases (as indicated in *Lucas*) in respect to nuisance regulation. There is no indication in the record that the requested rezoning in the case *sub judice* involves nuisance principles.

As early as 1950, the Court of Appeals opined, in *Hoffman v. Mayor of Baltimore,* 197 Md. 294, 307, 79 A.2d 367 (1951), involving a less egregious factual situation than the present case, in respect to the existence of a buffer zone between commercial and residential uses, that
the only tangible reason given in support of the board's minority veto is the establishment of a " buffer" to protect ***34** the residences on Maude Avenue. This is no more lawful in original zoning than in re-zoning.

The Court noted, referring to *Chayt v. Maryland Jockey Club,* 179 Md. 390, 395, 18 A.2d 856 (1941) :Property owners in a Residential district cannot create a "no man's land" at the border of their own district by forbidding one property owner in an adjoining district from making any use at all of his property, or any use for which it is "peculiarly suitable"....

197 Md. at 301, 79 A.2d 367.

In the case at bar, Judge Williams opined:
A lack in public school facilities is the primary reason recited by the Board for its denial. While the provision of public facilities is a legitimate concern of the County, the burden of providing

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adequate schools is disproportionately placed upon Cape Corporation when residential use is denied to them while being granted to its neighbors. Most of Cape St. Claire is zoned R5-residential. In effect, the County is mandating a restrictive use on Cape Corporations' property so as to afford neighboring Cape St. Claire residents more enjoyment in their exploitation of the forbidden R5-residential use. The County at-large must bear the burden of providing adequate schools, not the Cape Corporation. See *First English Church*, 482 U.S. 304, 318-319 [, 107 S.Ct. 2378, 2387-88, 96 L.Ed.2d 250] (1987). Denial of Appellant's rezoning request on the basis of public school inadequacy constitutes an unconstitutional taking.

....

... While the County's school criteria fulfills a legitimate State objective, the Board has placed a disproportionate burden upon the Cape Corporation in meeting the objective by failing to pay just compensation. For this reason alone, the Board's ****651** denial is unconstitutional. *See Nollan v. California Coastal Comm'n,* 483 U.S. 825 [, 107 S.Ct. 3141, 97 L.Ed.2d 677] (1987) (holding that where a public easement is found to "substantially advance" a "legitimate state interest",***35** the State's power of eminent domain must be exercised and just compensation paid). [Footnote omitted.]

Under the circumstances of the instant case, we agree with Judge Williams's conclusion. When the statutory scheme here present, *i.e.,* the Adequacy of Facilities Ordinance combined with the rezoning requirements of the Code's zoning regulations, is used to deny upzoning from a zoning classification that, as applied to a specific property, permits no viable economical uses of the property, the scheme, as applied to that specific property, constitutes an impermissible regulatory taking, *i.e.,* an unconstitutional taking that requires just compensation. As applied to the subject property now zoned OS, the denial based, as it was, solely upon inadequate school facilities was arbitrary and illegal, *i.e.,* unconstitutional. We shall affirm Judge Williams's findings.

Judge Williams did not, and we shall not, extensively address the Board's afterthought musings upon what future problems appellee might have complying with critical area regulations if the rezoning were granted. The Board's *dictum* that a density of five units might not be compatible is just that-*dictum*. The Board's determination was based solely upon the inadequacy of school facilities. Moreover, the Critical Area Commission had no objections to the rezoning. We noted, in *North v. St. Mary's County,* 99 Md. App. 502, 507, 638 A.2d 1175, *cert. denied,* 336 Md. 224, 647 A.2d 444 (1994), that the Critical Area Commission's involvement in local zoning matters was grounded in Maryland Code (1990 Repl. Vol.), § 8-1812(a) of the Natural Resources Article, which confers upon the chairman of the Commission standing to appeal zoning decisions. In the case *sub judice,* not only has Chairman North, and thus the Commission, not appealed Judge Williams's decision, it, at the administrative level, by letter, did not object to the rezoning. We do not address the critical area aspects of the application further because, as the trial court opined, the Board did not base its denial upon the ***36** critical area regulations. Moreover, the actual uses appellee makes, or attempts to make, may yet involve critical area review. If that review raises questions of constitutionality, it may then be subject to judicial review. That issue was not sufficiently raised below, and we shall not raise it here. Md. Rule 8-131(a). We note, as we did in *Offen* and subsequent cases, that the critical area statutory framework was carefully crafted to sustain constitutional attack by reason of its provisions providing, at least as stated, relief. It remains to be seen whether the critical area statutes are being applied in a constitutional manner. That issue, however, is best left for a different case.

We would be remiss if we did not note that our holding, *i.e.,* that the statutory scheme, *as applied in the instant case, where the existing zoning is OS,* is unconstitutional, is limited to the instant case. We hold that, when applied as it was here, to OS-zoned private property with no existing residential uses, it is unconstitutional. In other cases involving other classifications, existing uses, or other circumstances, the same statutory scheme may or may not be constitutional. We perceive that, if the present zoning of a subject property is other than OS and permits some viable residential or

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reasonable commercial use, the statutory scheme as applied to those types of properties may withstand " takings" scrutiny.

In the present case, it does not.

We conclude by noting what the Supreme Court said in *Dolan:*
We see no reason why the Takings Clause of the Fifth Amendment, as much a part of ****652** the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

512 U.S. at ----, 114 S.Ct. at 2320.

***37** JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANTS.[FN27]

FN27. Appellants argue that appellee has not exhausted administrative remedies, *i.e.,* sought a permit or special exception. A property owner is not required, under exhaustion theories, to apply for a permit that is prohibited. Additionally, appellee's option to apply for a special exception is limited to an application to operate a public utility or to apply for a permit that he cannot get. In respect to variance law, the only thing unique about this property is its zoning classification. The evidence indicates that, but for that classification, it would be buildable. Neither the courts of this State, nor, as far as we know, the courts of other states, have held that a mistaken zoning classification satisfies the first prong *analysis* of the variance process. For obvious reasons, the problems caused by mistaken zoning classification are intended to be addressed by correcting the classification-not the obtention of variances from it based upon the mistake.
A property owner is not required to exhaust futility in order to respond to an exhaustion of remedies argument. In any event, the inadequacy of school facilities statute would prohibit the issuance of any permits, exceptions, or variances. (We note, additionally, that the granting of variances are rarely upheld.) *See Cromwell v. Ward,* 102 Md.App. 691, 651 A.2d 424 (1995).

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111 Md.App. 1, 677 A.2d 634
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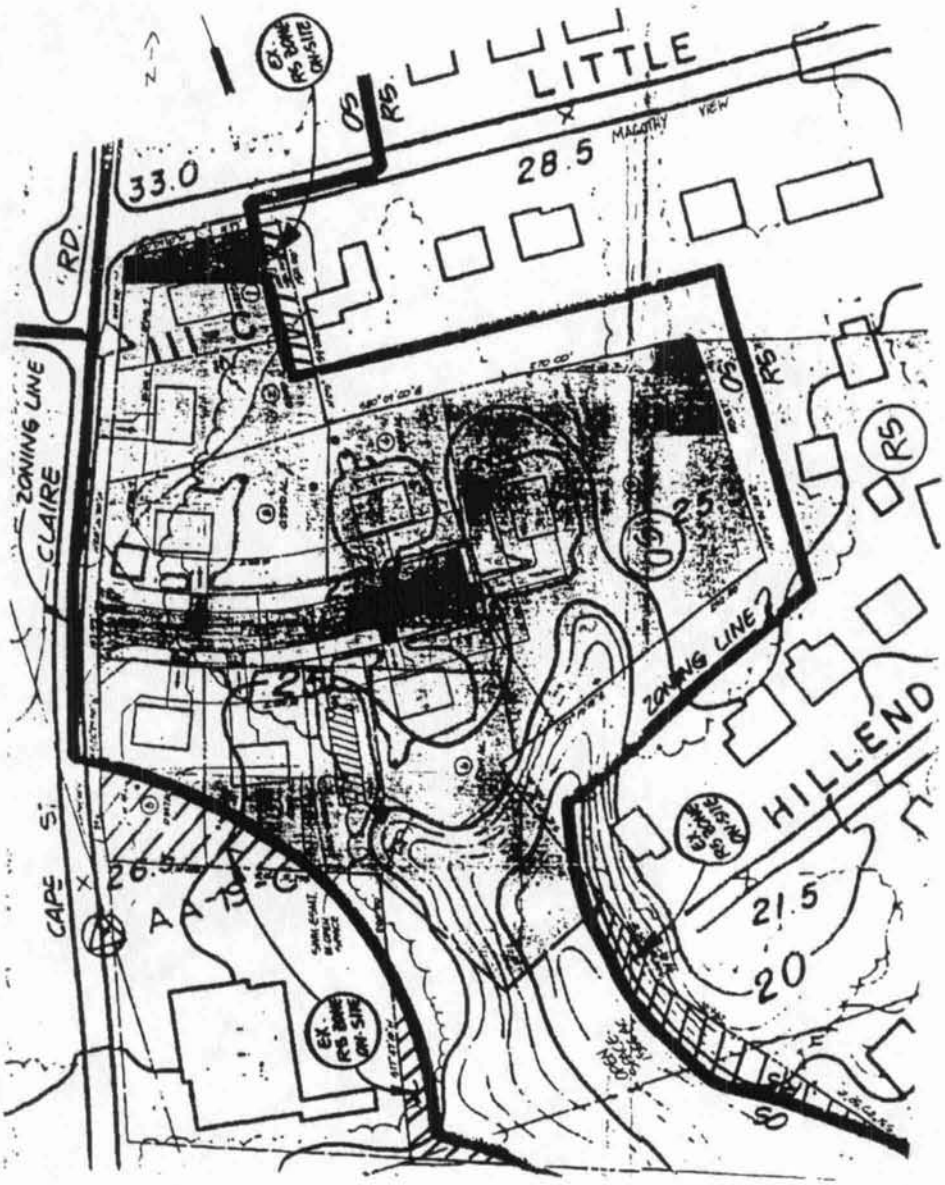

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111 Md.App. 1, 677 A.2d 634
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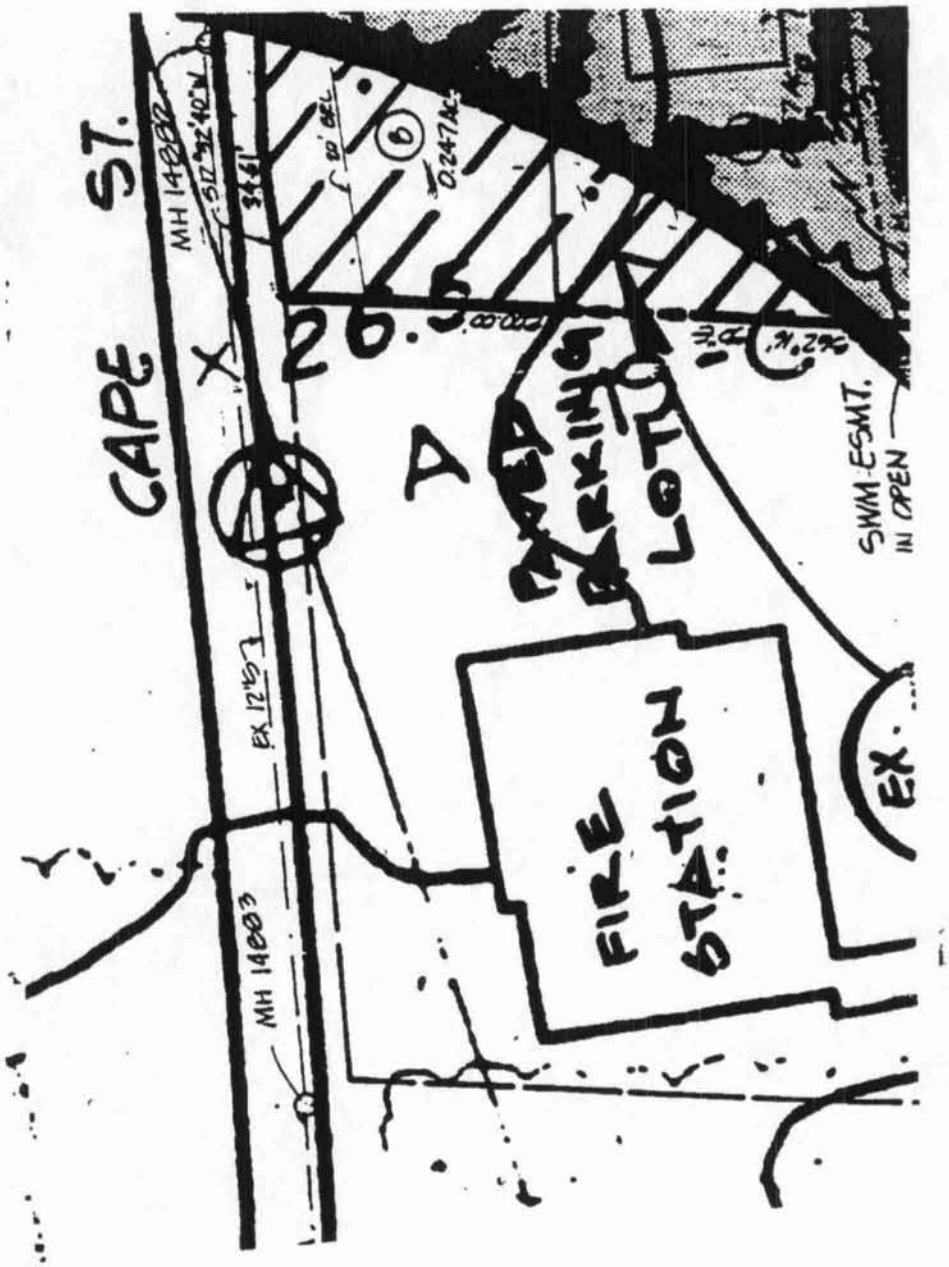

Md.App.,1996.
Steel v. Cape Corp.

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111 Md.App. 1, 677 A.2d 634
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Anaglian v. Hartford

In arguing more broadly that she thereby satisfied her "burden of proof," the appellant disingenuously blurs the critical and rudimentary distinction between a burden of production and a burden of persuasion. To satisfy the burden of production is not remotely to satisfy the burden of persuasion. To have produced enough of a case to permit the Board to extend the B-3 zoning boundary was not the end of the appellant's persuasion process, but only its beginning. Until the burden of production is a successful *fait accompli,* an effort at persuasion does not even begin.

In this case, the existing B-3 zoning boundary was the *status quo.* The appellant undertook to persuade the Board to alter that *status quo.* It was the appellant who thereby became the proponent of the proposition on the table for debate, and it was the appellant, therefore, to whom was allocated the burden of persuasion. In this case, the Board was simply not persuaded. The requested extension that would have altered the *status quo* was accordingly denied.

Perhaps disingenuously, the appellant seems to be operating on the assumption that the allocation of the burden of persuasion is turned in the opposite direction. As if we had stepped with Lewis Carroll *Through the Looking Glass,* everything in ***377** the appellant's world is in reverse. The Board of Appeals is chided by the appellant for not having been adequately persuaded **NOT** to grant the extension. The opponents of the extension are chided by the appellant for having failed to produce "substantial evidence" to support the denial.

****31** It is never the case that the Board must be either 1) persuaded by the appellant to act or 2) persuaded by the opponents not to act. What would happen, in so Manichean a world, if the Board were not persuaded by either side? There is only one burden of persuasion, and it points in only one direction. As a tactical matter, of course, neighbors and other interested parties will probably mount a stronger case in opposition if they actually show up and present evidence. In abstract theory, however, they are not required to do so in order to prevail. They are not required to present any evidence at all, let alone substantial evidence. They are not even required to show up in order to prevail. Even if they had a change of heart and endorsed the request for a change, it could still fall of its own weight. The tribunal that needs to be persuaded may always conclude, "We have heard what the applicant had to say and we have heard nothing to the contrary, but we are still unpersuaded."

[7] Generally speaking, property owners are not entitled to zoning changes automatically just because nobody opposes them. In *Pollard's Towing, Inc. v. Berman's,* 137 Md.App. 277, 289-90, 768 A.2d 131 (2001), this Court spoke of the diametric difference between **persuasion** and **non-persuasion:**

In this case, all that was required was that the Board be *not persuaded* that there was a need for additional towing services. To the extent its finding was weightier than that, the incremental weight was surplusage. *Far less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something.* In *Starke v. Starke,* 134 Md.App. 663, 761 A.2d 355 (2000), we discussed that distinction between persuasion and non-persuasion:

***378** [I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded. Actually, *to be persuaded of something requires a requisite degree of certainty on the part of the fact finder* (the use of a particular burden of persuasion) *based on legally adequate evidentiary support* (the satisfaction of a particular burden of production by the proponent). There are with reasonable frequency reversible errors in those regards. *Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.*

(Emphasis supplied).

[8] When an administrative agency such as the County Board of Appeals takes an affirmative

action, there is required the predicate of substantial evidence to support such an action. When, by contrast, the agency is not persuaded to do anything and, as a result, take no action, there is no such predicate required. An honest doubt is all it takes.

[9] The real world and the mirror world are absolute opposites of each other. There is a subtle, but critical, difference between 1) being **PERSUADED NOT TO DO** something and 2) being **NOT PERSUADED TO DO** something. The difference is far from trivial. The former requires some measure of persuasion; the latter requires none. The former carries with it a burden of production; the latter does not. The former shifts the allocation of both burdens of proof from the proponent to the opponent. The appellant would hold the Board of Appeals to the ***32** former standard. We will hold the Board of Appeals only to the latter standard.

"May" Means "May or May Not"

[10] The Board of Appeals concluded that the appellant's satisfaction of her burden of production, the minimal threshold requirement for a change even to be considered, did not *ipso* ***379** *facto* create in the appellant an automatic entitlement to such a change.

That the sole fact that a parcel is split zoned prior to the adoption of the zoning Code in 1982 *does not constitute an entitlement* to moving the zoning district(s) by up to 100 feet.

(Emphasis supplied).