

Commission Meetings & Corresp.

Oct 1986

MSA-51832-26

AGENDA

CHESAPEAKE BAY CRITICAL AREA COMMISSION MEETING

Horsehead Sanctuary
of the
Wildfowl Trust of North America
Grasonville, Maryland

October 8, 1986

2:30 p.m. - 6:00 p.m.

- | | | | |
|-------------|------------------------------------------------------------------------------------|---------------------------------------------------|----------------------------------|
| 2:30 - 2:45 | Approval of the Minutes
of September 3, 1986 | Solomon Liss
Chairman | <i>as corrected</i> |
| 2:45 - 3:15 | Presentation and Discussion
on the Urban Buffer Management
Grant Program | Deborah Hollmann
Urban Forestry
Coordinator | ✓ |
| 3:15 - 3:20 | Status of Local Contracts | Sarah Taylor | ✓ |
| 3:20 - 3:30 | Old Business
Economic Baseline Study Award | Ron Hickernell | ✓ |
| 3:30 - 3:40 | <i>Should vs. Shall</i>
New Business
Transfer of Development Rights
Paper | Lee Epstein | * Vote to approve
✓ Unanimous |
| 3:40 - 3:50 | <i>Ed Phlips</i>
Presentation on Horsehead
Sanctuary | Dr. William Sladen
Director | |
| 3:50 - 5:00 | Tour of the Sanctuary | Dr. Sladen | |
| 5:00 - 6:00 | Wine, Cheese, and Softdrinks | | |

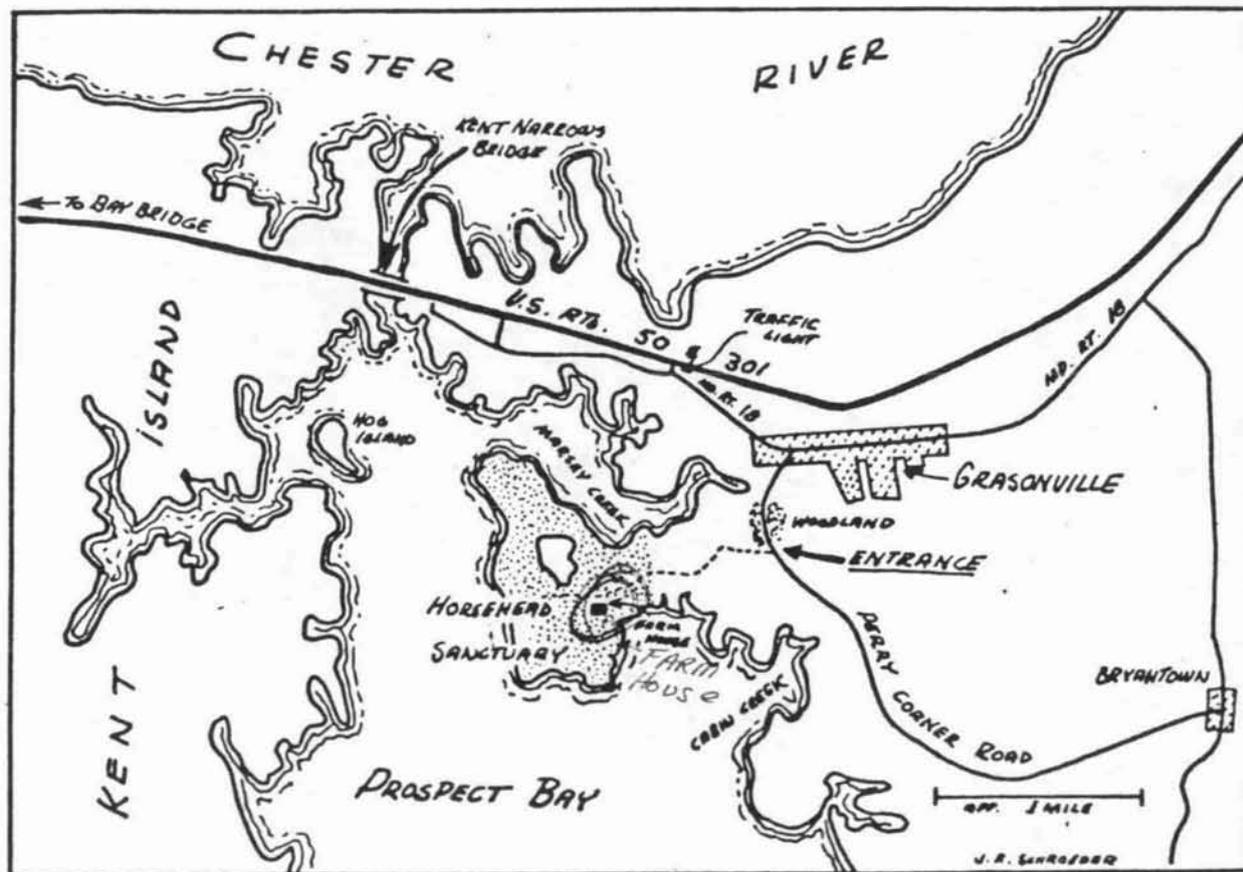
~~Econ Baseline~~

65,000	
30,000	Brendy
35,000	owd funds
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130,000	

* Scopes +
* Econ Baseline } Public Info

DIRECTIONS:

From Baltimore or Washington - Get on Route 50, go across the Chesapeake Bay Bridge (Preston Lane). Go approximately 5 miles, cross the Kent Narrows Bridge and at the first light (Holly's Restaurant on left) turn RIGHT. Turn LEFT on Route 18 (Stop sign after leaving Route 50). Turn RIGHT on Perry Corner Road (just past fire station). After approximately 3/4 mile, turn RIGHT at the Wildfowl Trust of North America sign. Follow the dirt road approximately 1 mile to the Wildfowl Trust's office (farmhouse).



CHESAPEAKE BAY CRITICAL AREA COMMISSION

Minutes of Meeting Held
September 3, 1986

The Chesapeake Bay Critical Area Commission met at the Department of Agriculture Building, in Annapolis, Maryland. The meeting was called to order by Chairman Solomon Liss with the following members in attendance:

J. Frank Raley, Jr.
Harry Stine
John Luthy, Jr.
Ann Sturgis Coates
Ronald Hickernell
William Eichbaum
William Bostian
Florence Beck Kurdle
James E. Gutman
John Griffin for
Torrey C. Brown

Shepard Krech, Jr.
Albert W. Zahniser
Thomas L. Jarvis
Robert S. Lynch
Barbara O'Neill
Constance Lieder
Parris N. Glendening
Ardath Cade
Lloyd Tyler, III
Samuel E. Turner
Mary Roe Walkup

The minutes of the July 23rd Commission meeting were approved.

Dr. J. Kevin Sullivan introduced Dereck Richerson of the Maryland Natural Heritage Program, and asked him to explain the status of the designation process for threatened and endangered species and species in need of conservation.

Mr. Richerson reported that MNHP had recently been transferred to the Forest, Parks, and Wildlife Service of the Department of Natural Resources. He also described the process by which the MNHP and FPWS are reviewing candidate animal and plant species for designation as threatened or endangered and animal species as candidates for designation as "in need of conservation". When the list has been finalized, it will be sent to Secretary Brown for proposed designation. This will be followed by review by the AELR Committee of the General Assembly and public comment. Final designation is expected in the Spring of 1987. In the meantime, Mr. Richerson will be preparing county-specific guidebooks containing maps and other information needed by local jurisdictions to identify and protect the habitats of these species.

Chairman Liss asked if the MNHP will make themselves available to the persons who wish to build in the Critical Area and are concerned about protecting habitat areas? Mr. Richerson answered affirmatively.

Chairman Liss then asked if MNHP would make a recommendation as to the action to take to protect individual habitats? Mr. Richerson said that that would be in the manual for each county.

Mr. Raley asked if the developer would receive help from MNHP? Mr. Richerson replied that they would if the area is MNHP designated habitat area. If not, then they would receive help from the counties.

Chairman Liss pointed out that the local jurisdictions have a right to oppose inclusion in the lists of any species at the public hearings held as part of the DNR designation process.

Ms. Coates asked when the hearings would take place. Mr. Richerson replied that this would occur after the proposed designation is issued by the Secretary of DNR.

Ms. Cade asked if each jurisdiction had received a proposed list? Mr. Richerson replied that he has made the list, but it will not become available until the Spring of '87.

Robert Lynch asked if all counties could receive the list sooner? John Griffin answered that the internal DNR timetable for completion is the end of 1986.

Chairman Liss asked if the counties could be notified at the same time that the AELR is notified and involved. Mr. Griffin answered that that would be possible.

Mr. Zahniser said that maps were necessary for the smaller jurisdictions. Mr. Lynch asked if all the manuals will be finished and released at the same time? Mr. Richerson answered affirmatively. Chairman Liss said that if any jurisdiction had questions, they should contact the Commission.

Lee Epstein was introduced to discuss the legal question of panel member participation. He said that there was no legal problem with Commission members from the local jurisdiction serving on a panel initially conducting the public hearing on that jurisdiction's program, but that the Commission should make a policy decision on the matter.

Chairman Liss said that any Commission member should be able to object or advocate any program whether or not they are from that jurisdiction.

Mr. Bostian pointed out that all counties can use Commission members as a resource and to remove them from the panels would deprive these counties of information sources. Mr. Gutman stated that it would not be fair to separate the County official who is a member of the Commission from those unattached to government. Ms. Kurdle pointed out that not all panels have

local officials on them.

Ms. Lieder asked whether the Commission or the staff were to present the review of the plans. Chairman Liss said that the recommendations may or may not come from the Commission members on the panel, but that the staff would always present its review.

Ms. Cade motioned that local representatives be allowed to sit on a panel of their jurisdiction. The motion was accepted unanimously.

Ms. Cade was then asked to report on the status of the State Regulations Subcommittee. She said that the Subcommittee had met three times and is presently focussing on Critical Area requirements for development on State-owned lands.

Marcus Pollock then reviewed the meeting for the Economic Baseline Study that was held earlier that day. He said that six of the panelists met for six hours reviewing eight proposals to the RFP. There remained three finalists from which to choose a contractor.

Chairman Liss said that the staff had been corresponding with several foundations to receive a grant for the study in case we need extra resources. He said that the staff will keep the Commission informed.

Mr. Krech asked what monies we were asking from the private foundations.

Chairman Liss answered \$100,000.

Mr. Hickernell pointed out that cost was a considerable factor in hiring a consultant.

Chairman Liss said that the staff had correspondence with Mr. Milleman of the University of Maryland Law School who had made an application to a foundation for funding for a group to assist jurisdictions in ordinance changes, incentive programs, etc. It would include his services and other faculty students. They would make themselves available to the local jurisdictions for program development.

Ms. Kurdle said that she could not agree with the concept of the proposed University program, since it was not well-defined.

Chairman Liss explained that their focus is to assist jurisdictions that do not have the resources of larger jurisdictions to comply with the regulations. One of their proposals is to do the research to have an accurate list of incentives to make the program effective.

Mr. Bositian said that these jurisdictions need all the help that they can get.

Ms. Walkup said that her jurisdiction has sought assistance from such groups upon occasion, and that sometimes it was helpful and sometimes not.

Chairman Liss said that the Commission has not involved itself in the process to date except to review and help clarify the University's Scope of Work.

Dr. Krech said that the Commission should consider the services of the University of Maryland.

Mr. Gutman said that the Commission should await the request by interested jurisdictions, and then have the Commission relay their wants.

Chairman Liss said that each jurisdiction could contact the University of Maryland. The Commission was asked by the Foundations whether their funds should be given to the University of Maryland. He suggested that the Commission should notify the University that it's proposal is acceptable to the Commission, but with reservations.

Chairman Liss then said that in regard to the Subcommittee for County/Municipality Relations, the Maryland Municipal League had chosen Eileen Fogarty and J. Evans McKinney and that the Maryland Association of Counties had chosen Maureen Lamb and Oscar A. Schulz as non-voting members to the Subcommittee. He asked when the Subcommittee could next meet? Ms. Walkup suggested after the elections on November 4th.

Chairman Liss then asked that the meeting be closed for five minutes to only Commission members. He then introduced the real estate article brought to the attention of the Commission and asked what in the future should the Commission do in the case of possibly misleading advertisements?

Ms. O'Neill suggested that the Commission respond to this particular advertisement.

Critical Area Commission

Minutes - 9/3/86
Page Five

Mr. Boston said that the Commission should make a distinction between those advertisements which incorrectly advertise in ignorance and those which are libelous.

Chairman Liss asked if the Commission should respond to the Real Estate Board?

Ms. Kurdle said that she had sent a letter to O'Connor, Piper-Flynn.

Chairman Liss suggested that the Commission staff should find the most current advertisement and he would decide whether the Commission should respond to them as well as to future advertisements. That approach was agreed to by the Commission members.

The next meeting was announced as being at Horsehead Sanctuary in Grasonville on October 8th at 2:30 p.m.

There being no further business, the meeting was then adjourned.



JUDGE SEYMOUR LISS
CHAIRMAN

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREAS COMMISSION
DEPARTMENT OF NATURAL RESOURCES
TAWES STATE OFFICE BUILDING
ANNAPOLIS, MARYLAND 21401
301-269-2418 or 269-2426

SARAH J. TAYLOR, PhD
EXECUTIVE DIRECTOR

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Calvert Co

September 16, 1986

Ms. Linda Nabb, Director of Planning
Dorchester County Planning and
Zoning Office
P.O. Box 307
Cambridge, Maryland 21613

Dear Ms. Nabb:

I wanted to respond to your letter of September 4 only after I received advice of counsel -- thus the delay in getting back to you. Because I am inclined to follow that advice (copy enclosed), I fear that we cannot sign the Grant Agreement amended by your new paragraph #13. As I believe Sarah Taylor and our Assistant Attorney General Lee Epstein made clear in their August 20 meeting with you -- and over which they believed general agreement had been reached -- the Commission simply is not empowered to execute an agreement that makes performance of the statutory obligation to develop a program in 1987 contingent on 1988 (or later) funding. We cannot purport to commit funds that are not ours to commit. Nor could we agree now to "pay all costs in accordance with" a two year Scope of Work.

Even if the Commission must complete a program in accordance with §8-1810, the Commission's ability to do so will be contingent on funds being appropriated by the General Assembly as available for that purpose. As the enclosed advice indicates, we cannot commit the General Assembly to such an appropriation. Moreover, if the Commission had to "take over" local program preparation, only then could it determine whether to

CABINET MEMBERS

- Torrey C. Brown, M.D.
Natural Resources
- Wayne A. Cawley, Jr.
Agriculture
- William Eichbaum
Health and Mental Hygiene
- Ardath Cade
Economic and Community Development
- Constance Lieder
Planning

Telephone: (301) 269-2418
TTY for Deaf - Annapolis - 269-2609 D.C. Metro - 565-0450

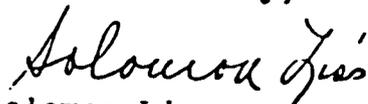
continue with the existing consultant and the existing Scope, or whether to design the remaining program development differently.

What we can do is make the changes agreed to concerning paragraph #12. Thus, if you later determine that it would be impossible to carry out the remaining program development tasks in FY 1988 because the General Assembly has not appropriated funds to assist you, the statute indicates that the Commission will develop the local program where the local government fails to do so. We of course recognize that statutory duty and are willing to exercise it, subject to the availability of funds noted previously.

I enclose a copy of the memorandum furnished the Commission by Lee Epstein and Tom Deming of the Attorney General's Office which indicates that we cannot legally agree to the inclusion of paragraph 13 in the Scope of Work agreement. You will note that the memorandum is filed with us as advice of counsel and not as an official Opinion of the Attorney General. If it would be helpful for us to submit the matter to the Attorney General for an official Opinion we will be pleased to do so. In the meantime, since funds in FY 1987 have been approved and are available for disbursement I certainly think we should be able to execute the Scope of Work agreement for Fiscal Year 1987.

I hope you understand the position the Commission is in; we have at least assented to most of the changes you had earlier suggested and agreed to with Dr. Taylor and Mr. Epstein. If we can all now move forward with the preparation of the local program, I trust that Dorchester County and the Commission will both have a product, and a process for the future, of which both can be proud.

Yours sincerely,



Solomon Liss,
Chairman

SL/jtd

Enclosure

STEPHEN H. SACHS
ATTORNEY GENERAL
ELEANOR M. CAREY
DEPUTY ATTORNEY GENERAL
DENNIS M. SWEENEY
DEPUTY ATTORNEY GENERAL
CHARLES O. MONK, II
DEPUTY ATTORNEY GENERAL



THOMAS A. DEMING
ASSISTANT ATTORNEY GENERAL
COUNSEL TO SECRETARY

M. BRENT HARE
JUDITH C. FINN
MARIANNE D. MASON
PAMELA D. ANDERSEN
HOWARD P. NICHOLSON
LEE R. EPSTEIN
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ELIZABETH MACMENEZ
ASSISTANT
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STATE OF MARYLAND
OFFICE OF
THE ATTORNEY GENERAL
DEPARTMENT OF NATURAL RESOURCES
TAWES STATE OFFICE BUILDING
ANNAPOLIS, MARYLAND 21401
(301) 269-2501

September 16 1986

M E M O R A N D U M

TO: Judge Solomon Liss, Chairman,
Chesapeake Bay Critical Areas Commission

FROM: Lee R. Epstein, Assistant Attorney General

SUBJECT: Dorchester County's Grant Agreement Changes

Several weeks ago, your staff received a letter from Linda Nabb, Director of Planning for Dorchester County, which contained her suggested changes to the Grant-in-Aid agreement form. Ms. Nabb sought changes in four paragraphs, the most significant being paragraph 12, and further sought to add a paragraph concerning termination of the agreement by the County should adequate funding not be provided in FY 1988. At the time, your staff asked this office to review the proposals from a legal perspective.

In general, we did not see significant problems with changing Grant paragraphs 2 and 4 to reflect Dorchester's concerns, although we did redraft those paragraphs slightly from Ms. Nabb's original version. On the other hand, both Tom Deming and I were seriously concerned with the suggestion for an altered paragraph 12 and a new paragraph 13. We conveyed these concerns to you and to your staff orally, and I would like to reflect them below. I also conveyed our concerns to Ms. Nabb and the planners from four other jurisdictions on Wednesday, August 20, in a meeting in Cambridge attended by Sarah Taylor and me. By the conclusion of that meeting, there seemed to have been agreement reached on the content of proposed changes, and I offered to draft these and convey them to Ms. Nabb. Basically, it was agreed to change paragraphs 2 and 4, as suggested, and to combine proposed 12 and 13 into a single paragraph which would reflect two ideas: (1) precise language from the statute concerning when the Commission would do a local program and not including any "termination" of the 1987 Grant-in-Aid outside of this statutory framework; and (2) the fact that should the Commission take on the preparation of a local program at any time, it would reimburse the local jurisdiction for grant-eligible work done to date, and it would not charge the local jurisdiction any costs

for completing or undertaking local program development in the local jurisdiction's stead.

These changes were made and conveyed to Ms. Nabb, and on September 4, your staff received Dorchester's latest version of the Grant agreement. While there are some minor problems with slight changes the draft contains throughout, our major problem is that, once again -- although we seemed to have agreed otherwise -- the County's version contains a paragraph 13 that this Office thinks is unacceptable. The new #13 once again gives the Grantee the right to terminate this agreement if it is not "fully fund[ed]" in "Fiscal 88 and later years". Further, in the event of the County's election to terminate, the Commission would become liable for "all costs in accordance with the attached ... Scope of Work ...".

As you know, we do not believe the Critical Areas statute makes the preparation of local programs contingent upon certain funding levels being achieved. While we recognize that Natural Resources Article, §8-1808(a)(2), Annotated Code of Maryland states that the "Governor shall include in the budget a sum ... to be used for grants to reimburse local jurisdictions for the reasonable costs of developing a program", the law makes absolutely no direct connection between this section and §8-1809, which sets out how and when local programs are to be adopted. There is no contingency created anywhere in this law between local receipt of "adequate" State funds and the promulgation of local programs. §8-1808 merely states that the Governor should make provision in his budget for this assistance. The General Assembly has not therein directed itself to provide such funds, and it, of course, can accept, modify, or reject the Governor's budgets as it sees fit. While I would not think that the Commission expects local jurisdictions to be able to complete their programs without State-level assistance, it is clear that the law makes no such absolute connection. If a jurisdiction does not feel it will be adequately funded, or fears for funding in any out-year, it may merely opt not to do a local program at the outset, and the Commission must undertake that task.

There is, in any case, an even more fundamental reason why an Agreement with the new paragraph 13 may not, in our opinion, be signed by the Commission. The Maryland Constitution, at Article III, Section 32 stands, among other things, for the proposition that a state officer or unit may not, in a current commitment, obligate the Governor to budget or the General Assembly to appropriate future funds. That is essentially what paragraph 13 does -- or at least it purports to have the Commission agree that if future funds are not forthcoming, the County may terminate the present Agreement. Simply put, the Commission has no authority to execute a funding Agreement with a contingency built into it concerning FY 1988 (and later) monies; the Commission is not empowered to make, guarantee, or commit to future funding by the General Assembly. (A similar principle, also derived from the same Constitutional origin but applicable

to State contracts for construction and management, can be found in the State Finance and Procurement Article §7-237(b), Annotated Code of Maryland.)

We would note that, given these inherent problems with paragraph 13, a "quick fix" to the language is not a likely prospect:

(1) The law does not, at §8-1809, empower the Commission to permit local (here, County) termination of a stated intent to perform local program development, per se; on the other hand, it does provide, at §8-1810, that if the local jurisdiction elects not to undertake program development, or if it fails to submit a program or to obtain Commission approval of a proposed program, the Commission must prepare the program for that jurisdiction, and the local jurisdiction must then implement and enforce that program. This language, as was agreed in our meeting on August 20, is specifically reflected in the altered paragraph 12. The only contingency in the law is that contained in §8-1810: if a County elects not to or fails to perform, the Commission shall do so. In that instance, of course, Grant funding would be terminated by the Commission.

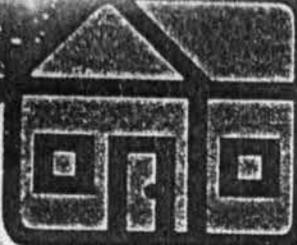
(2) As noted above, the Commission may not make or imply a connection to FY 88 (and beyond) General Funds.

(3) "This agreement" is for FY 1987 only. The Commission should not allow termination of a 1987 Agreement if 1988 or later funds are somehow thought to be inadequate.

(4) It would not be appropriate for the Commission to agree to "pay all costs ..." for the nearly two year Scope of Work if the Grantee elects to terminate; what if the Commission decided on a different Scope of Work and/or a different consultant to complete the program development?

For the reasons herein noted, we cannot recommend that the Commission sign the Agreement in its current form with paragraph 13 left in place. Please note that this memorandum constitutes advice of counsel and is not an Opinion of the Attorney General.

LRE/jtd

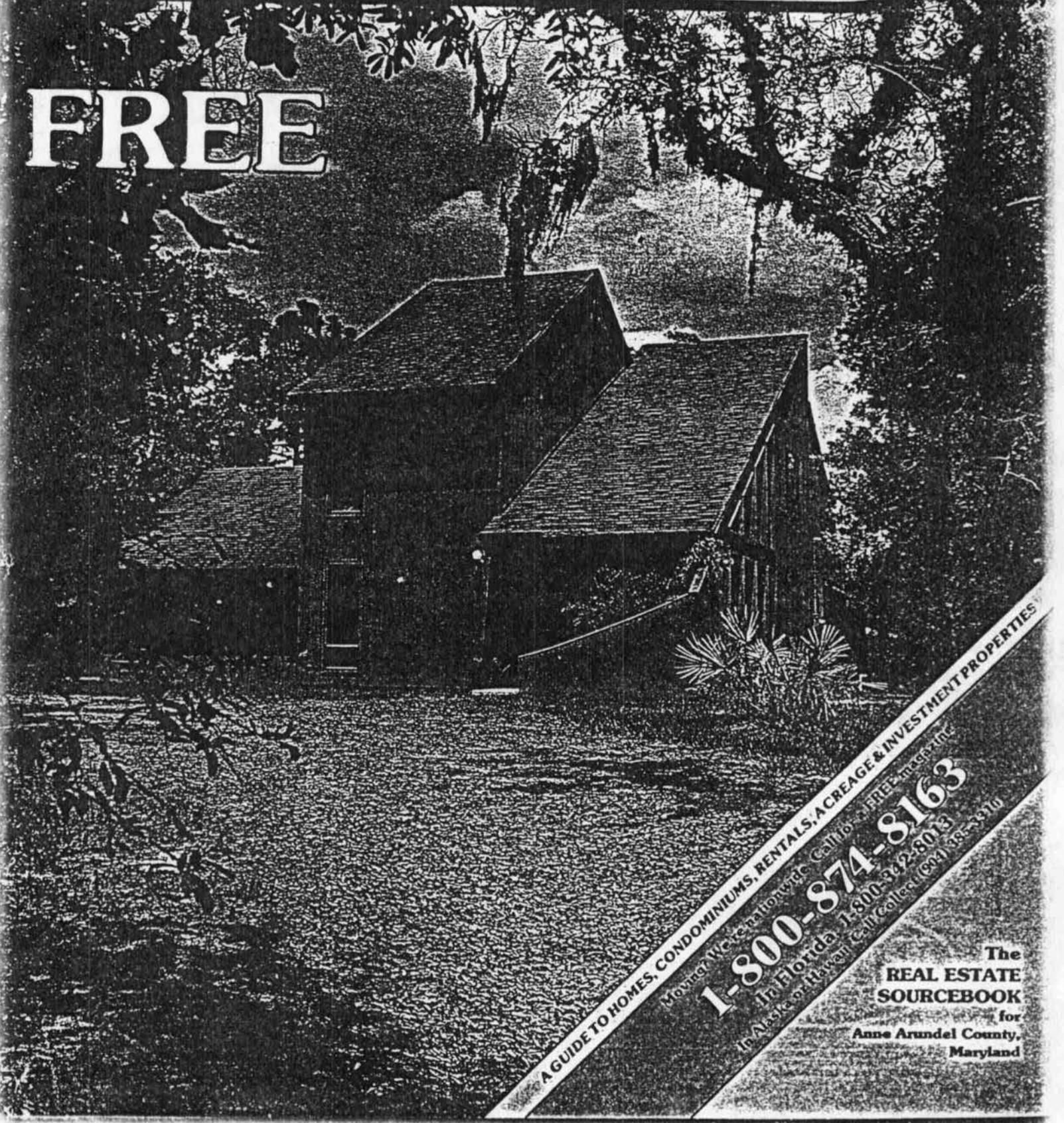


HOMES

& LAND OF ANNE ARUNDEL COUNTY

Including Annapolis, Severna Park, Odenton, Crofton, Edgewater, Pasadena, Glen Burnie/Volume X Number 4

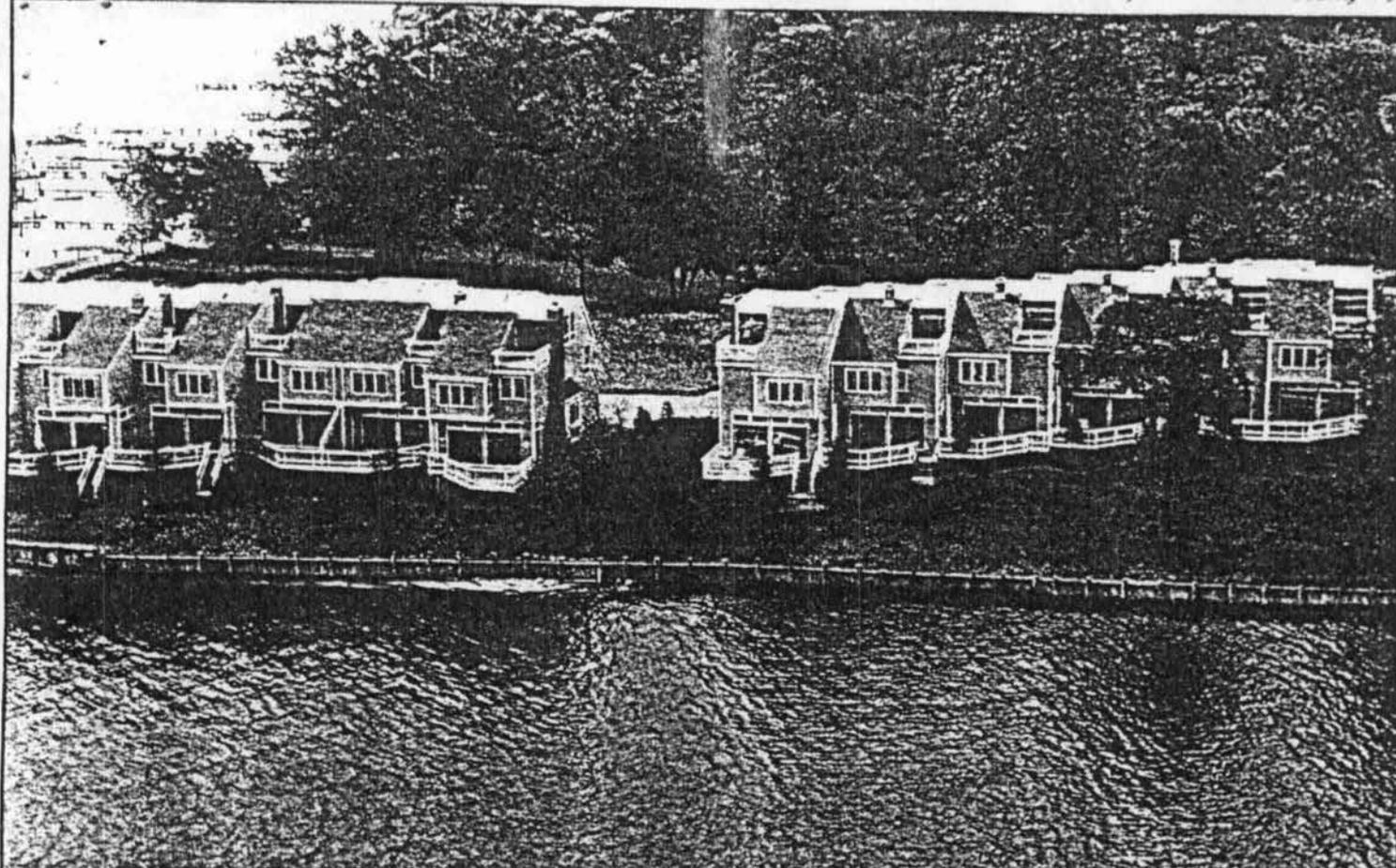
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New waterfront homes like these may soon be impossible to buy ...at any price.

Located just 10 minutes from downtown Annapolis and 30 minutes from the Capital Beltway, the new Moorings-on-the-Magothy consists of a limited number of distinctively-designed and masterfully-crafted waterfront and water view townhomes... with a private beach and open passage to the Chesapeake Bay. Striking to look at, easy to live in, buying one of these spectacular homes—priced from \$180,000—is a timely investment right now. Because the

Chesapeake Bay Critical Areas legislation relating to waterfront development may soon make it impossible to buy new waterfront homes near Annapolis... at any price.



524 Moorings Circle, Arnold, MD 21012

Developed by: CPM Development Corporation Hunt Valley, Maryland

Sales by: O'Connor Piper & Flynn, (301) 544-3324

Sales Center Open Daily, Noon 'til 5:00 PM



From Annapolis: Rt. 2 North (Ritchie Highway) to College Parkway. Right on College Parkway to Jones Station Rd., make left and continue to Mago Vista Road. Left and continue straight to development.

From Washington: Rt. 50 East to Rt. 2 North (Ritchie Highway) Rt. 2 to College Parkway, make right and continue to Jones Station Rd., make left and continue to Mago Vista Road. Left and continue straight to development.

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What a trooper

Red Cross Blood Services Technician Connie Schmidt takes a donation from 1st Sgt. Michael Panos at the state police barrack in Annapolis. In response to news of a blood shortage in the area, troopers organized a donation drive Monday.

Photo by Bob Gilbert

CAC hits developer's tactics

By LORRAINE AHEARN
Staff Writer

A government panel will rebuke the developer of a waterfront condominium complex for advertising the firm's Magothy River homes as the last chance to buy waterfront before Chesapeake Bay Critical Areas laws take effect.

Accusing agents for Moorings on the Magothy homes of making "dire and misleading" statements in order to sell the units, the Chesapeake Bay Critical Areas Commission yesterday sent agents for CPM Development Corp. a strongly worded request that the ads be revised.

The print ads appeared in Washington and Baltimore publications this summer.

They bill the \$180,000-to-\$400,000 townhouses as a "timely investment right now. Because the Chesapeake Bay Critical Areas legislation relating to waterfront development may soon make it impossible to buy new waterfront homes near Annapolis . . . at any price."

Arguing that the advertising theme could create a wrong-headed land rush for waterfront homes, CAC Chairman Judge Solomon Liss complained to the sales

Wants waterfront home ads redone

agent, O'Connor Piper & Flynn. "It's an attempt to mislead the public," said county planning director F. Beck Kurdle, who complained to the firm when the ads first appeared in June.

"What they're trying to say is, 'You better buy while you can.' It's a hysteria kind of thing."

Representatives for CPM could not be reached for comment about the advertising campaign, which was devised by a Baltimore ad agency. Yet Maryland Board of Realtors President Hammond S. Carr said there was nothing unethical about the ad as long as it is true.

"It depends on how you read it," Carr said.

Mrs. Kurdle said she objected to a claim that new laws "may soon make waterfront mean 1,000 feet back from the water."

She explained that there will be restrictions within that 1,000 feet, but that building would still be allowed close to the water. A letter from the CAC also pointed

out that the critical areas plan being formulated by Anne Arundel County would allow for hundreds of acres of waterfront for clustered rowhouses pictured in the ads.

The CAC letter expressed fear that exaggerated claims "could produce hasty and unconsidered real estate market activity."

But the rush for waterfront is already on, Carr argued. He cited a vacant 2-acre lot on the north bank of the Severn River that is being offered at \$350,000, twice what it might have fetched five years ago.

The critical areas laws passed at about the same time that interest rates went down, noted O'Connor Piper & Flynn agent Wendy Asper.

"The market's been going crazy," she said. "I think (the law) will make the waterfront property prices go up."

She said there are 18 Moorings units built, eight under construction and 14 still to be built.

Copies of the CAC letter also went to two professional real estate associations. But Mrs. Kurdle said the CAC decided at this point not to notify the Real Estate Commission, which enforces ethics.

BG&E: Shrink nuclear safety zone

By PAT RIVIERE
Staff Writer

Despite calls for more stringent controls at power plants, Baltimore Gas & Electric Co. officials want to reduce the Calvert Cliffs Nuclear Plant emergency planning zone from 16 to two miles.

zens," the coalition wrote in a letter dated Aug. 28.

The coalition hand-delivered a May 24 letter to Hughes asking the governor to address 10 nuclear power issues — including the BG&E request.

The coalition's May letter further asked that the evacuation area for Calvert Cliffs be increased.

"The accident at Chernobyl resulted in the evacuation of citizens in an 18-mile zone around the plant," the coalition wrote. "The U.S. State Department rec-

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Metzger said BG&
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JACK SCHWARTZ

Chief Counsel
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WRITER'S DIRECT DIAL NO.
576-6344

October 6, 1986

The Honorable Solomon Liss
Chairman
Chesapeake Bay Critical Areas Commission
Tawes State Office Building
Annapolis, Maryland 21401

Dear Judge Liss:

You have requested our opinion on whether certain provisions in the regulations of the Chesapeake Bay Critical Areas Commission are to be construed as mandatory or directory. Specifically, you ask whether the words "shall" and "should", as used in these provisions, are mandatory or directory.

For the reasons given below, we conclude that the provision using the word "shall" is mandatory. Provisions using the word "should" are directory.¹

¹ "A provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, [is directory], as opposed to an imperative or mandatory provision, which must be followed." Black's Law Dictionary 415 (rev. 5th ed. 1979). See also 1A Sutherland, Statutory Construction §25.03, at 441 (4th ed. 1985).

OPINION OF THE ATTORNEY GENERAL

Cite as: Opinion No. 86-053 (October 6, 1986) (unpublished)

I

Background

Your question results from a disagreement over the construction of COMAR 14.15.02.06B, the following portion of the Commission's criteria for critical areas:

"When locating new Intensely Developed or Limited Development Areas, local jurisdictions shall use these guidelines:

(1) New Intensely Developed Areas should be located in Limited Development Areas or adjacent to existing Intensely Developed Areas;

(2) New Limited Developed Areas should be located adjacent to existing Limited Development Areas or Intensely Developed Areas;

(3) No more than one half of the allocated expansion may be located in Resource Conservation Areas;

(4) New Intensely Developed Areas and Limited Development Areas should be located in order to minimize impacts to Habitat protection Areas as specified in COMAR 14.15.09 and in an area and in a manner that optimizes benefits to water quality;

(5) New Intensely Developed Areas should be located where they minimize their impacts to the defined land uses of the Resource Conservation Area;

(6) New Intensely Developed Areas and the Limited Development Areas in the Resource Conservation Area should be located at least 300 feet beyond the landward edge of tidal wetlands or tidal waters". (Emphasis added).

You have been advised by your counsel that the use of "shall" in the introductory phrase of this provision means that local jurisdictions are required to use the six specified guidelines. But, your counsel continued, the use of "should" in each of the guidelines (except the third) means that these guidelines, through reflecting the Commission's strong recommendations, are not themselves mandatory. However, members of the General Assembly have been advised by their counsel that all six of these guidelines are mandatory.

II

"Shall"

The word "shall" ordinarily signifies a command or requirement. See, e.g., Maryland Medical Service, Inc., v. Carver, 238 Md. 466, 479 (1965). Nevertheless, the term "shall" is not always mandatory. It is "'not treated as signifying a mandatory intent if the context in which it is used indicates otherwise.'" Resetar v. State Bd. of Educ., 284 Md. 537, 547 (1979) (quoting Blumenthal v. Clerk of Circuit Court, 278 Md. 398, 408 (1976)).

However, there is nothing in the context of COMAR 14.15.02.06B to suggest that "shall" is intended to be merely directory. Thus, use of the guidelines in COMAR 14.15.02.06B by local jurisdictions is mandatory.

III

"Should"

Far more than "shall," the meaning of "should" varies with the context. One can find cases in which "should," used in a regulation, was held to be mandatory. For example: "When regulations provide that certain things should be done and they specify the manner of doing so, it necessarily means that that is the proper way to do them and failure to meet the requirements thereunder is certainly not the proper way to carry them out and constitutes a violation thereof." Fegan v. Lykes Brothers S.S. Co., 3 So.2d 632, 635 (La. 1941). See also Town of Edgewater v. Liebhardt, 76 P. 366, 367 (Col. 1904); Foresi v. Hudson Coal Co., 161 A. 910, 912 (Pa. Super. 1932).

On the other hand, more recent cases tend to regard "should" as directory, not mandatory. See Cuevas v. Superior Court of Stanislaus County, 130 Cal. Rep. 238, 239 (Ct. App. 1976) ("The word 'should' is used in a regular, persuasive sense, as a recommendation, not as a mandate."); University of South Fla. v. Tucker, 374 So.2d 16, 17 (Fla. App. 1979) ("Use of the word 'should' indicates to us that the procedure ... is discretionary rather than mandatory in nature."). See also Black's Law Dictionary 1237 (rev. 5th ed. 1979).

In the context of COMAR 14.15.02.06B, we believe that "should" is directory. The drafters relied upon materials that treat "should" as directory and that are designed to assist drafters of legislative documents in Maryland. See Style Manual of the Commission to Revise the Annotated Code of Maryland and the Maryland Revisor of Statutes 67-68 (December 1, 1983) ("Use 'shall' to state a requirement or duty."); Division of State Documents Regulations Manual 110 (1980) ("'Should' [is] not [a] ter[m] of obligation."). Moreover, the Commission, in the course of considering the criteria and before it adopted them, was similarly advised by its counsel of the effect of "should."

The intention to make the guidelines in which "should" is used directory only is made manifest by the regulation's contrasting use of "shall" and "should." Had the drafters intended a mandatory effect in the guidelines, presumably they would have used the same word - "shall" - that they in fact used to achieve a mandatory result elsewhere in the same regulations.² See Cuevas v. Superior Court of Stanislaus County, 130 Cal. Rep. at 239 ("Other subdivisions of the section contain words which are clearly mandatory and which could have been used in [the provision in question] had that been the intent of the Legislature."). Cf. In re Richard E., 579 P.2d 495, 498 (Cal. 1978), appeal dismissed, 439 U.S. 1060 (1979) ("When the Legislature has, as here, used both 'shall' and 'may' in close proximity in a particular context, we may fairly infer [that] the Legislature intended mandatory and discretionary meanings, respectively.").

Thus, we are confident that this construction of "should" in the guidelines comports not only with customary usage but, most importantly, with the Commission's intent. If we are mistaken about that intent, the Commission may propose that the wording in question be changed. And, of course, the underlying policy decision - the basic choice between mandatory and directory criteria - can itself be revisited by the Commission, if the directory provisions are failing to achieve the desired environmental results.

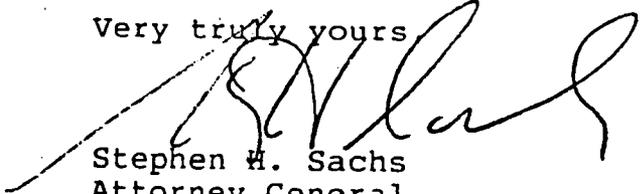
² The drafters also manifested their awareness of forms of mandatory construction in COMAR 14.15.02.06B(3): "No more than one half of the allocated expansion may be located in Resource Conservation Areas." The phrase "[n]o more than . . . may be" is a mandatory prohibition. Article 1, §26 of the Maryland Code ("In this Code and any rule, regulation, or directive adopted under it, the phrase 'may not' or phrases of like import have a mandatory negative effect and establish a prohibition.").

IV

Conclusion

In summary, it is our opinion that the word "shall" in the first clause of COMAR 14.15.02.06B means that local jurisdictions are required to use the guidelines set out in the six separately numbered paragraphs of the provision. However, the use of the word "should" in all except one of these guidelines means that the guidelines are directory only (except for the third, which is mandatory).

Very truly yours



Stephen H. Sachs
Attorney General



Jack Schwartz
Chief Counsel
Opinions & Advice



*Commiss
Subcommittee
State
Local
Recap*

JUDGE SOLOMON LISS
CHAIRMAN

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MEMORANDUM

TO: State Regulations Subcommittee

FROM: J. Kevin Sullivan

DATE: October 31, 1986

SUBJ: Next Subcommittee Meeting

The next State Regulations Subcommittee meeting will be held on November 5, 1986, at 2:00 p.m. in the Conference Room at the Department of Agriculture Building, 50 Harry S. Truman Parkway, Annapolis, Maryland.

/jjd

CABINET MEMBERS

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