Committee Meetings and Corresp. Jan 1987 MSH-S1032-29

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CHESAPEAKE BAY CRITICAL AREA COMMISSION

AGENDA

Great Oak Landing
Chestertown, Maryland

January 6, 1987 — ~~1~~:00 - 6:00 p.m.

1:00 - 1:15	Approval of Minutes of December 16th	Solomon Liss, Chairman — ok. * Chap. copies 40 days. *
1:15 - 2:15	Presentation and Vote on Centreville Program — done	Charles Davis/ Panel/Consultants
2:15 -3:00	Growth Allocation Report	Robert Price/Subcommittee and Staff — 5 statement there is. 3 options
3:00 - 3:30	Presentation and Vote on Programs of Greensboro, St. Michaels, ~~and Pocomoke City~~ — done	Kevin Sullivan/ Charles Davis — both approved unan. 19-0
3:30 - 4:15	Presentation and Discussion of Elkton Programs	Robert Reed[Evans McKinney & 4 pieces of property 2-acre to follow them Annapolis Corp. — It is RCA. L growth Allot Co.
~~3:30 - 4:15~~ 4:15 - 4:45	Discussion of Attorney General's Opinion.	Solomon Liss, Chairman
4:45 - 5:15	Appointment of Subcommittee on Presence of Sewer and Water — Wed. Jan 13th 2 p.m. Ron Hick, Jim G, Ron K.	Sam Bowl, Tom Gsb, Bob Perciasepe, Sol Liss
~~4:15 - 4:45~~	Status of Programs and Vote on Necessity for Commission's Development of Programs Not Yet Received	Solomon Liss, Chairman
5:15 - 5:30		
~~4:45 - 5:00~~	Appointment of Chesapeake City Panel Hearing Scheduled January 18, 1988	Solomon Liss, Chairman — 1) Tom Jarvis 2) Kay Langrehr. 3) Wally Miller 4) Frank Raley 5) Jim Gut. ~~Shep~~
5:30 - 6:00		
~~5:00 - 5:30~~	Old Business New Business	

Next Meeting: January 20th, Department of Agriculture

* Bd of Public Works letter - Kevin
- Forest Guidance Paper.

CHESAPEAKE BAY CRITICAL AREA COMMISSION

Minutes of Meeting Held
December 16, 1987

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

Kathryn Langner	Shepard Krech, Jr.
Secretary Constance Lieder (DSP)	William Bostian
James E. Gutman	Albert Zahniser
G. Steele Phillips	Victor Butanis
Robert Perciasepe (D of E)	Russell Blake
Louise Lawrence for Secretary Cawley (D of A)	Ronald Karasic
J. Frank Raley, Jr.	Samuel Bowling
Thomas Jarvis	Ronald Adkins
Secretary Randall Evans (DEED)	Samuel Turner
Asst. Sec. Ardath Cade (DHCD)	Ronald Hickernell
	Thomas Osborne

The Minutes of December 2, 1987 were approved as written.

Chairman Solomon Liss asked Mr. Marcus Pollock to begin the introductions for the presentation of Harford County's local Program. Mr. Pollock introduced Mr. Meyer and Mr. Stoney Fraley of the Harford County Planning and Zoning Office. Mr. Meyer first disclosed that the County has 8,200 acres in the Critical Area, including several expansion areas extending beyond the 1,000' initial planning area. Six-thousand acres of which are classified as RCA, 1,250 acres as IDA, and 930 acres as LDA.

Mr. Meyer gave a brief overview of the Program elements, beginning with the Management Plan. The main approach throughout the preparation of the Program was to build on the County's existing natural resources overlay district (NRD), which already was acting to control and regulate development within 1,000 feet of tidal water areas. Mr. Meyer said that there was much public response and comment to the Program and that changes and alterations were made as a result.

Mr. Gutman asked if it was true that a portion classified as an RCA on private land was causing concern? Mr. Meyer answered that that was correct and the property referred to is the "Old Trails" property in Joppatown. He said that it is about a 30-acre parcel which is essentially, immediately adjacent to and surrounded by a fairly intense existing development in the Joppatown area. The Old Trails property was in the past, to be a part of the original development of the Joppatown area. In reviewing the land use designation, the County Council felt that given the particular characteristics of the area, the IDA designation was appropriate.

Mr. Gutman asked what the size and nature of current development in that area is? Mr. Meyer answered that the total area is about 50 acres in size and that the current status of the area is undeveloped at the present time.

Chairman Liss pointed out that the County Council had changed the classification of the property to IDA by a vote of 4 to 3, and that the property can be developed under the Growth Allotment; the only question being whether it is to be charged against or not charged against it.

Dr. Krech asked if the Planning Department had originally classified this area as RCA? Mr. Meyer answered affirmatively, based upon the Department's understanding of the specifics of the property not including availability of water and sewer. Dr. Krech asked what the rough elevation of the slopes were. Mr. Meyer answered that the slopes are right next to the water and not really steep.

Chairman Liss asked what the present status of the Program was? Marcus answered, in terms of the review process, that the draft staff notes have been submitted to the County, pointing out some of the deficiencies, etc. It is intended that a panel meeting be arranged to discuss these deficiencies. The County has been advised that the Program contains the necessary elements.

Chairman Liss said that the staff will continue to look at and discuss the Program with the County and will furnish information to the Panel who will make their report to the Commission.

Mr. Perciasepe said that it should be known that the Panel has held a hearing. Mr. Osborne said that the Panel had done an excellent job with the work sessions, etc., and it was evident that everyone understood the Plan.

Chairman Liss then asked Mr. Price to give a status report on the activities of the Growth Allocation Subcommittee. Mr. Price said that the Subcommittee has defined the problem and Dr. Sullivan has drafted several position papers. At this time, there is one paper that has been submitted to all of the Subcommittee members and hopefully, they will have some policy guidelines and comments by the next Commission meeting.

Chairman Liss reported that the Commission shall be receiving a formal answer from the Attorney General regarding the "having sewer or water" language, by next Commission Meeting.

Mr. Epstein said that an opinion by the Attorney General will hopefully be forthcoming by the end of this month, and read the memorandum of advice from he and Tom Deming to the Commission regarding the issue. He stated that the memorandum had the approval of the Attorney General who is preparing the opinion.

Chairman Liss reported that the hearings were scheduled for Calvert County, Anne Arundel County, Church Hill, Annapolis and Queenstown and Chairman Liss proceeded to choose the Panel members.

Mr. Pollock then introduced Mr. Zachary Krebeck of Redman/Johnston and Associates to present the Program for Havre de Grace.

Mr. Price asked what the offset amount was? Mr. Krebeck answered that the dollar amount is $1.25 per square foot. Mr. Price then asked if the City was asking for an exemption for all IDAs. Mr. Krebeck answered affirmatively.

Mr. Epstein asked if someone would be providing the Commission with the urban waterfront revitilization plan, and grading and sediment control ordinances to help justify asking for an ecemption. Mr. Krebeck said that that could be done.

Chairman Liss then acknowledged Mayor Donovan of Chesapeake Beach who introduced Ms. Susan Ballard of McCrone, Inc. Ms. Ballard presented the Program for Chespeake Beach. She said that the Town is relatively small, approximately two square miles. It is intensely developed and has been so for a number of years.

Dr. Krech asked how the peninsula area came to be designated as Limited Development when there are three endangered species present. Ms. Ballard answered that preliminary observation showed it as an IDA infill, however, it was felt that the acreage was too great. Because sewer was available adjacent to the property, Town and consultants felt that the designation should be LDA. Dr. Tyndall of the Natural Heritage Program had indicated that a portion of the panhandle had been disturbed; thus, the and that area was chosen to be mapped as LDA.

Chairman Liss requested further information concerning sewer capacity and other matter relating to the LDA designation, and Mayor Donovan said that he would provide it. He then asked for the Queen Anne's County to give their presentation. Mr. Charles Davis introduced Mr. Barry Perkel, Planning Director, and Mr. Joe Stevens, Deputy Director of the Planning Office. Mr. Perkel gave an overview of the preparation of the Program, and Mr. Anthony Redman of Redman/Johnston and Associates presented each phase of the Program's development.

Secretary Lieder asked if it was to be assumed that the County is using the 5% growth allocation amendment? Mr. Redman answered that the County will avail itself of this. Secretary Lieder said that that assumes that there is not enough LDA in the County to locate the growth into or next to. Mr. Redman answered that it was not politically feasible to locate growth in the LDA because it would mean adding additional development pressure to an area that is already stressed, as in Kent Island.

Mr. Zahniser said that with the spray irrigation system for sewage, it seems it is planned to spray onto the open space, but not count it against the growth quotient, even though it is being utilized to support those areas. Mr. Redman answered affirmatively, but not in the 300-foot buffer. If the area remains consitently an RCA, there would be no legitimate basis to subtract it from the growth allocation.

Mr. Bowling asked if the 300-foot buffer zone was to remain owned by the developer? Mr. Redman answered that the 300-foot buffer constraints are that half of it be wooded, that no more than 10% be used for walkways, and the rest remain in forest cover or some other kind of cover.

Mr. Gutman asked that in regard to the open-spaced area, including the buffer, would it remain titled to the farmer and/or the developer or homeowners Assoc.? And who would pay taxes on that? Mr. Redman answered the owner, whoever it would be.

Mr. Ed Phillips then introduced Mr. Thomas Moore, City Engineer for Cambridge, who has been guiding the Program through its various stages. Mr. Krebeck made the presentation for the Program. He said only a portion of the Critical Area is intended to be excluded. The area proposed to be excluded corresponds to the IDA. There are some outlying areas of the City which are found to be LDAs. The focus of the redevelopment area is Cambridge Creek area, comparable to the Inner Harbor area of Baltimore. Mr. Phillips stated that the City has not yet received staff comments, but will be doing so in the very near future.

It was asked whether the consultants would be including details of offsets comparable to that of the Baltimore City Program.

Dr. Sullivan asked on what basis does Cambridge propose an exclusion? Mr. Krebech answered on basis of the character of development in the immediate shoreline.

There being no further business, the meeting was adjourned.

December 28, 1987

Dear Commission Member:

Here are the directions for Great Oak Landing. We will be meeting at 1:00 p.m. If you have any questions, please telephone the Commission Office at 974-2426.

FROM WESTERN SHORE:

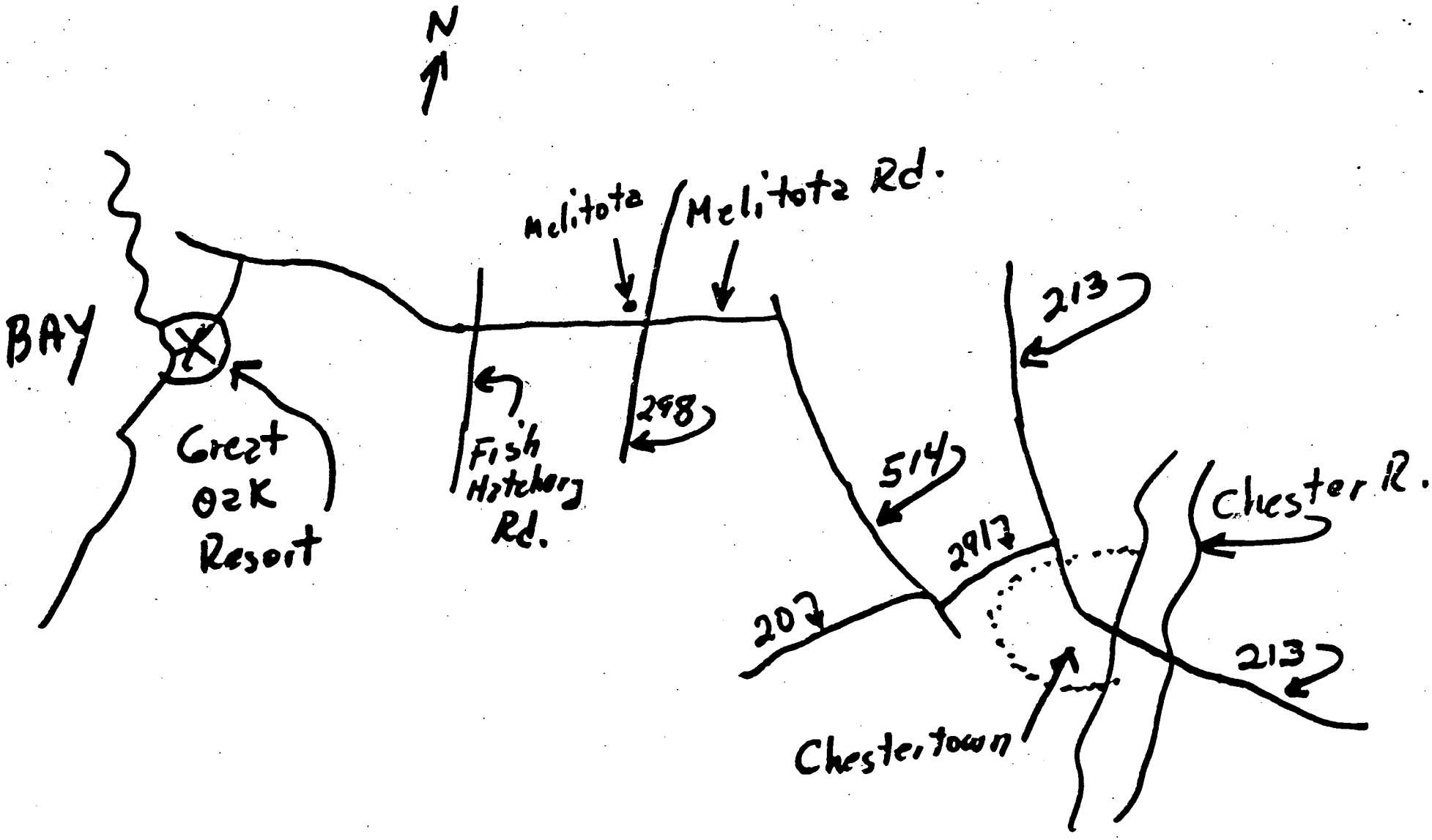
Take Rt. 50/301 across Bay Bridge. At 50/301 division, take 301 North; follow for about 15 miles to Price and turn left onto Rt. 405. Follow to Church Hill and signs for Rt. 213 North; take 213 through Chestertown to Rt 291; turn left and follow attached map.

FROM SOUTH:

Take Rt. 50 and turn right onto Rt. 213 at Wye Mills. Take Rt. 213 to Rt. 301 North; turn right and take 301 for about 9 miles to Rt. 405. Follow directions above.

FROM NORTH:

Take Rt. 213 to edge of Chestertown; turn right onto Rt. 291; follow map.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Chestertown

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WRITER'S DIRECT DIAL NO.
974-2251

January 5, 1988

The Honorable Solomon Liss
Chesapeake Bay Critical Areas Commission
Department of Natural Resources
Tawes State Office Building
Annapolis, Maryland 21401

Dear Judge Liss:

You have requested our opinion concerning the interpretation of the criteria for local program development adopted by the Chesapeake Bay Critical Area Commission. Specifically, you have asked us to define the degree of discretion afforded the Commission to interpret the criteria, as it determines under §8-1809 of the Natural Resources Article ("NR" Article) whether local programs meet the standards of the Critical Area Law and the criteria.

In your request, you specifically refer to three types of criteria about which you seek guidance. As you describe them, some of the criteria are "clear mandates" - for example, the development restriction in COMAR 14.15.02.05C(4). Others are "merely directory" - for example, the encouragement of incentive programs in COMAR 14.15.10.0IK. Finally, some criteria, though in one sense mandatory, are drafted seemingly so as to leave room for some further interpretation or elaboration - for example, the definitional standard relating to sewer or water service in COMAR 14.15.02.04A(4).

For the reasons stated below, we conclude as follows:

OPINION OF THE ATTORNEY GENERAL

Cite as: 73 Opinions of the Attorney General ___ (1988)
[Opinion No. 88-001 (January 5, 1988)]

(1) Mandatory criteria, typically those using terms like "shall" or "may not," must be applied by the Commission as written and must be adhered to without variance by those to whom the criteria apply. COMAR 14.15.02.05C(4) is mandatory and must be applied according to its terms.

(2) Criteria written in directory terms - for example, using words like "should," or, as in COMAR 14.15.10.01K, "encourage" - reflect an intent to foster consideration of a matter. Accordingly, they should be construed to require that those preparing, submitting, or reviewing local programs at least considered the particular matter. However, the Commission should not disapprove a program solely because it does not include a program element of this kind.

(3) In applying criteria that admit of more than one reasonable construction - for example, COMAR 14.15.02.04A(4) - the Commission should consider how the particular program element in question relates to the Commission's underlying policy objective. While the Commission may not approve a local program element that is outside the scope of the pertinent criterion, taking into account the principles of interpretation described in this opinion, the Commission has broad discretion to determine that a proposed element is consistent with the intent underlying the criterion.

I

The Commission's Role in Adopting Criteria

In enacting the Chesapeake Bay Critical Area Law, the General Assembly made the following finding:

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

NR §8-1801(a)(9) (emphasis added). Accordingly, the stated purposes of the legislation were to:

> (1) Establish a Resource Protection Program for the Chesapeake Bay and its tributaries by fostering more sensitive

> development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats, and
>
> (2) Implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria and oversight.

NR §8-1801(b) (emphasis added).

The General Assembly also stated its intent that "each local jurisdiction shall have primary responsibility for developing and implementing a program, subject to review and approval by the Commission." NR §8-1808(a)(1). This "cooperative endeavor between the State and local governments ... is at the heart of the legislation." 72 Opinions of the Attorney General ___, ___ (1987) [Opinion No. 87-016, at 5]. Under the Act's scheme, each local jurisdiction in the Critical Area is given the opportunity to legislate a program to meet the goals of the Act.

The General Assembly directed in NR §8-1808(b) that local programs are to serve certain goals:

> A program shall consist of those elements which are necessary or appropriate to:
>
> (1) Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;
>
> (2) Conserve fish, wildlife, and plant habitat; and
>
> (3) Establish land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.

In NR §8-1808(c), the General Assembly set forth a list of elements that each program must have "at a minimum" to be "sufficient to meet the goals stated in subsection (b)."

The General Assembly also recognized that other program elements might be necessary to meet the goals of NR §8-1808(b) and that, to achieve consistency and uniformity, additional standards for the content of various program elements would have to be determined. Accordingly, the General Assembly established the Chesapeake Bay Critical Area Commission and empowered it to

fashion "criteria for program development and approval." NR §8-1808(d).

Under NR §8-1808(d), the Commission was to adopt criteria that are "necessary or appropriate to achieve the standards stated in subsection (b) of this section." NR §8-1808(d) required that the criteria be "promulgate[d] by regulation" and that the Commission hold extensive rounds of hearings both before developing and before adopting the criteria. NR §8-1806 also generally empowered the Commission "to adopt regulations and criteria" in accordance with the Administrative Procedure Act. In uncodified Section 3 of Chapter 794 of the Laws of Maryland 1984, the General Assembly reserved to itself authority "at the 1986 Session [to affirm] by joint resolution that the criteria are reasonable and acceptable to accomplish the goals of this subtitle."

The General Assembly, instead of legislating the criteria itself in the Critical Areas law, chose to follow the well-established practice of giving an administrative body the task of acquiring information and working out the details of statutory administration. See Department of Natural Resources v. Linchester, 274 Md. 211, 218, 334 A.2d 514 (1975). The resulting criteria, codified at COMAR 14.15.01 through 14.15.11, are legislative rules.

As a general proposition, legislative rules adopted by an administrative agency have the force of law, equal to that of a statute. Comptroller of the Treasury v. Rockhill, Inc., 205 Md. 226, 234, 107 A.2d 93 (1954). They are binding not only on the affected public but also on the adopting agency. Hopkins v. Maryland Inmate Grievance Comm'n, 40 Md. App. 329, 335, 391 A.2d 1213 (1978).

The General Assembly's intent that the criteria be binding could hardly have been more clearly expressed. First, the General Assembly required unusually elaborate procedures for the criteria's adoption. See NR §8-1808(d). Second, the General Assembly reserved to itself authority to approve the criteria. As we noted last year:

> In light of this review requirement, we believe that the General Assembly did not intend to authorize the Commission to amend the criteria at will. One essential purpose of the legislative veto mechanism was to place the General Assembly's imprimatur on the criteria if - as, in fact, happened - the General Assembly concluded "that the criteria are reasonable and acceptable to accomplish the goals of" the legislation. This mechanism for seeking legislative consensus about the criteria would be largely defeated if the Commission were empowered to make wholesale changes in the newly approved criteria.

Opinion No. 87-016, at 4.

As the Commission developed the criteria, necessarily it made difficult judgments on specific matters left open by the statute. The job of the Commission was to listen to the public; develop relevant facts; finely balance rights, costs, harms, and benefits; and derive "necessary or appropriate" criteria - all within the statutory framework handed down by the General Assembly. The Commission often had to choose one among a range of reasonable alternatives without absolute standards to guide it. For example, the judgment that housing density in the Resource Conservation Area should average one dwelling unit per 20 acres (COMAR 14.15.02.05C(4)), rather than one per 50 or one per 15, rests upon an empirical basis. But, in the final analysis, the decision to say "this far and no more" was simply a reasoned judgment call.

II

The Commission's Review of Local Programs

To further its goal of achieving consistency and uniformity among the local programs, the General Assembly gave the Commission a supervisory role over local programs. Under NR §8-1809, local programs may not be enacted by local jurisdictions unless they have been approved by the Commission. The General Assembly set the following prerequisites for approval in NR §8-1809(i):

> The Commission shall approve programs and amendments that meet:
>
> (1) The standards set forth in §8-1808(b)(1) through (3) of this subtitle; and
>
> (2) The criteria adopted by the Commission under §8-1808 of this subtitle.

The operative word in the legislative description of the Commission's approval process is "meet." We infer from the context of the Critical Area law that the General Assembly intended "meet" to mean conformity with the criteria, for this usage furthers the overall goal of consistency and uniformity. Webster's New International Dictionary 1529 (2d ed. 1953) defines "meet" in this sense to mean "to come up to; to conform to; ... to equal; match ...."

Criteria expressed in clear and mandatory terms leave no doubt as to what a local program must do to "meet" them; other criteria leave room for alternatives. As to the latter, the issue is the degree of variance permitted. In some instances, the Commission expressly solicited a range of proposals. In other instances, the Commission chose wording that is more ambiguous but that at least potentially might be met by more than one proposal.

In interpreting the scope of the criteria, the Commission may rely upon the knowledge that its members and staff have about the background of the criteria. However, the Commission's inquiry must focus on the scope of the criteria as adopted, even if the Commission, with hindsight, would now prefer their scope to be different. In reaching its decisions under NR §8-1809(i), the Commission does not have authority to interpret the criteria to be either broader or narrower than they presently are. It must give effect to the criteria as adopted and as approved by the General Assembly. "The Commission is without authority to effect significant changes in the substance of the criteria." Opinion No. 87-016, at 5.

The Commission should interpret the criteria in accordance with accepted principles of statutory construction. "Our holdings relative to the interpretation of statutes are equally applicable to the interpretation of rules." Maryland Port Admin. v. Brawner Contracting Co., 303 Md. 44, 60, 492 A.2d 281 (1985).

As is true of statutes, rules have "some object, goal, or purpose"; the task of construction is to discern that purpose and carry it out sensibly. Kaczorowski v. City of Balto., 309 Md. 505, 513, 525 A.2d 628 (1987). "Of course, in our efforts to discover purpose, aim, or policy we look at the words of the statute ..., because what the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal." Id. Indeed, "sometimes the language in question will be so clearly consistent with apparent purpose (and not productive of any absurd result) that further research will be unnecessary." 309 Md. at 515. At other times, the meaning of the text must be informed by context. Id.

Some criteria direct local jurisdictions to include certain elements in their programs or specify the content of those individual elements. As discussed in more detail in Part III below, the mandatory language in these criteria denotes an unambiguous intent. When a criterion is so worded, there is no room for a local jurisdiction to fashion, or for the Commission to approve, a program element different than that which the criterion mandates.

Many of the criteria, while mandating that a type of program element be included, leave room for a variety of proposals by

local jurisdictions about the specific content of that program element. In those instances, the Commission determined that the goal of consistency and uniformity could be reached by requiring each jurisdiction to address the program element but permitting the details to vary from program to program. The General Assembly, by approving the Commission's criteria as "reasonable and acceptable to accomplish the goals of this subtitle," accepted the Commission's judgment.[1]

The Commission faces two difficult interpretive questions regarding the criteria: first, determining whether a particular criterion admits of only one or of differing program elements; and second, if differing program elements are permissible, determining which of the possible alternatives nevertheless fall so short of the criterion's objective as to fail to "meet" the criterion. As to both questions, although "an agency is best able to discern its intent in promulgating a regulation," Maryland Commission on Human Relations v. Bethlehem Steel, 295 Md. 586, 593, 457 A.2d 1146 (1983), the Commission may not in effect amend the criteria through its application of them.

With these principles as background, we turn to the particular criteria cited in your letter.

III

Required Program Elements

COMAR 14.15.02.05C(4) begins as follows: "Land within the Resource Conservation Area may be developed for residential uses as a density not to exceed one dwelling unit per 20 acres." In your letter, your suggest that this "one-in-twenty" density requirement for the Resource Conservation Area is expressed in terms that do not admit of alternative program proposals.

We agree. "In [the Maryland 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

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[1] By stating its goals of consistency and uniformity, the General Assembly did not mean that every property owner in all local jurisdictions must be treated identically. Zoning requirements vary from jurisdiction to jurisdiction, so that property owners similarly situated in different jurisdictions may be treated differently. By basing the State's Critical Area Law on local legislative powers, and by approving criteria that contemplate differing program elements, the General Assembly intended that citizens in the several jurisdictions might, by local option, continue to be regulated in differing fashion under many of the criteria.

prohibition". Article 1, §26. The phrasing of COMAR 14.15.02.05C(4)C(4) is of "like import" to the phrase "may not."

Addressing the most common indicator of mandatory intent, the word "shall", the Court of Appeals wrote:

> The question of whether a statutory provision using the word "shall" is mandatory or directory "turns upon the intention of the Legislature as gathered from the nature of the subject matter and the purposes to be accomplished ... [T]he word 'shall' is not treated as signifying a mandatory intent if the context in which it is used indicates otherwise ... [M]ere words do not control. The whole surroundings, the purposes of the enactment, the ends to be accomplished, the consequences that may result ... must all be considered in determining whether particular words shall have a mandatory or a directory effect ascribed to them."

Resetar v. State Bd. of Education, 284 Md. 537, 547-48, 399 A.2d 225 (1979) (citations omitted).

From their context, from what we can discern of their "legislative history," and from the benefit of our previous exploration of a quite similar question (Opinion No. 86-053, October 6, 1986 (unpublished)), we conclude that when the Commission's criteria use words of mandate like "shall" or "may not," the criteria impose flat requirements. COMAR 14.15.02.05C(4) and comparably worded criteria cannot be met by anything other than unvarying compliance with the terms of the requirement.

IV

Discretionary Program Elements

Under COMAR 14.15.10.01K, local jurisdictions "are encouraged to establish a program that provides tax benefits and consider other financial incentives" aimed at promoting voluntary development restriction. While each individual criterion must be separately assessed, we generally believe that the Commission's use of words like "should," "encourage," or other equivalent constructions connotes a matter that is directory rather than mandatory.

As we noted in Opinion No. 86-053, at 4:

> The drafters relied upon materials that treat "should" as directory and that are designed to assist drafters of legislative documents in Maryland ... Moreover, the Commission, in the course of considering the criteria and before it adopted them was similarly advised by its counsel of the effects 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 effect elsewhere in the same in the same regulations.

However, a directory provision may not simply be ignored:

> "[T]he differences between mandatory and directory, or between prohibitory and permissive, represent a continuum involving matter of degree instead of separate, mutually exclusive characteristics. It has been said, for example, that because a statute has been classified for some purposes as directory does not mean that for all purposes 'it can be ignored at will.'"

In re James, S., 286 Md. 702, 707, 410 A.2d 586 (1980), quoting 1A Sutherland, Statutory Construction §25.04 (4th ed. 1972). Thus, a local government's program development process should entail some consideration of the matter contained in a directory provision, even if the program does not carry the provision into effect.

In the criterion you have cited as an example, COMAR 14.15.10.0IK, the Commission directs local governments to consider inclusion of the recommended elements (tax and financial incentives, an easement purchase program, and so forth) in local programs. However, given the directory nature of this criterion, the absence of such elements should not, in and of itself, cause the Commission to reject a program.

V

Other Interpretive Issues

Your last specific example, COMAR 14.15.02.04A(4), reflects a mandatory criterion that nevertheless requires interpretation. The subsection establishes the definition of Limited Development

Areas, one feature of which is "[a]reas having public sewer or public water, or both."

The defining characteristics of Limited Development Areas are mandatory: "These areas shall have at least one of the following features ...." Therefore, the Commission does not have the discretion to approve a local program that classifies an area as a Limited Development Area if that classification is not consistent with the defining characteristics.

However, the criterion in question, COMAR 14.15.02.04A(4), is itself not formulated with specificity. Inevitably, the Commission must apply its informed discretion, on a case-by-case basis, in deciding whether particular areas are ones "having public sewer or public water, or both."

Though the Commission's discretion in this regard is broad, it is not limitless. The term "having public sewer or public water" would lose all content if the area in question were not in reasonable proximity to existing sewer or water lines - ones that are "in the ground."[2] The limitation imposed by this criterion on the exercise of the Commission's discretion is that sewer and water service to an area cannot be solely a matter of planning or otherwise wholly speculative.

If the area is reasonably close to existing lines but is not currently hooked into the lines, the Commission is free to assess all pertinent circumstances to determine the reasonable likelihood of future service. That is, the Commission may assess such factors as the capacity of the existing lines and related facilities (e.g., a sewage treatment plant), the timing of projected service under a local sewer and water plan, and the likelihood of the plan's accomplishment. In making these judgments, the Commission has broad discretion to apply its expertise to the interpretation of its regulation. If the Commission concludes that a given proposal achieves the object that the Commission sought to accomplish through this criterion, then it should conclude that the proposal "meets" the criterion.

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[2] This conclusion was previously set out in a memorandum to you from Assistant Attorney General Lee R. Epstein (May 22, 1987). The Commission evidently did not contemplate that sewer or water systems necessarily be hooked up. Another criterion, describing Intensely Developed Areas, refers to areas where "[p]ublic sewer and water ... systems are currently serving the areas ...." COMAR 14.15.02.03A(3).

VI

Conclusion

In summary, it is our opinion that:

(1) Mandatory criteria, typically those using terms like "shall" or "may not," must be applied by the Commission as written and must be adhered to without variance by those to whom the criteria apply. COMAR 14.15.02.05C(4) is mandatory and must be applied according to its terms.

(2) Criteria written in directory terms - for example, using words like "should," or, as in COMAR 14.15.10.01K, "encourage" - reflect an intent to foster consideration of a matter. Accordingly, they should be construed to require that those preparing, submitting, or reviewing local programs at least considered the particular matter. However, the Commission should not disapprove a program solely because it does not include a program element of this kind.

(3) In applying criteria that admit of more than one reasonable construction - for example, COMAR 14.15.02.04A(4) - the Commission should consider how the particular program element in question relates to the Commission's underlying policy objective. While the Commission may not approve a local program element that is outside the scope of the pertinent criterion, taking into account the principles of interpretation described in this opinion, the Commission has broad discretion to determine that a proposed element is consistent with the intent underlying the criterion.

Very truly yours,

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