

Commission Meetings & Corresp.

July 1990

MSA-51832-72



JOHN C. NORTH, II
CHAIRMAN

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREAS COMMISSION

SARAH J. TAYLOR, PhD
EXECUTIVE DIRECTOR

WEST GARRETT PLACE, SUITE 320
275 WEST STREET
ANNAPOLIS, MARYLAND 21401
974-2418 or 974-2426

COMMISSIONERS

June 25, 1990

Thomas Osborne
Anne Arundel Co.

James E. Gutman
Anne Arundel Co.

Ronald Karasic
Baltimore City

Ronald Hickernell
Baltimore Co.

Albert W. Zahniser
Calvert Co.

Thomas Jarvis
Caroline Co.

Kathryn D. Langner
Cecil Co.

Samuel Y. Bowling
Charles Co.

G. Steele Phillips
Dorchester Co.

Victor K. Butanis
Harford Co.

Wallace D. Miller
Kent Co.

Parris Glendening
Prince George's Co.

Robert R. Price, Jr.
Queen Anne's Co.

J. Frank Raley, Jr.
St. Mary's Co.

Ronald D. Adkins
Somerset Co.

Shepard Krech, Jr.
Talbot Co.

William Corkran, Jr.
Talbot Co.

William J. Bostian
Wicomico Co.

Russell Blake
Worcester Co.

Dear Commission Member:

The July Meeting is scheduled for the 11th at the Rustic Inn in the Talbotowne Shopping Centre. Directions to the Restaurant are enclosed. There will be two Subcommittees meeting at the Restaurant from 10:30 to 11:30 a.m. They are the Project Evaluation and the Program Amendment Subcommittees. The MOU-MDOT and the Special Issues Subcommittees will not meet until August.

Enclosed for your review prior to the meeting are: 1) the Agenda; 2) the Minutes of the Meeting of June 6th; and 3) a proposed Resolution for the prohibition of surface drilling of oil and gas in the Chesapeake Bay Critical area as voted on at the June 6th Commission meeting.

May all of you have an enjoyable Fourth of July. I will see you on the 11th at the meeting.

Very truly yours,


John C. North, II
Chairman

JCN/jjd

Enclosures

CABINET MEMBERS

Wayne A. Cawley, Jr.
Agriculture

Robert Schoeplein
Employment and Economic Development

Robert Perciasepe
Environment

Ardath Cade
Housing and Community Development

Torrey C. Brown, M.D.
Natural Resources

Ronald Kreitner
Planning

Richard
The County

Judge Changes

AGENDA
CHESAPEAKE BAY CRITICAL AREA COMMISSION
Rustic Inn, Talbotown Shopping Center
Easton, Maryland

July 11, 1990

10:30 a.m. - 4:30 p.m.

MORNING MEETINGS

10:30 - 11:30 - Project Evaluation Subcommittee
Program Amendment Subcommittee

12:00 p.m. - Lunch

AFTERNOON MEETING

1:00 - 1:15 - Presentation of Certificates
Charles Davis
Lee Epstein
Constance Lieder
J. Frank Raley, Jr.
Ronald Karasic
Wallace Miller
Thomas Osborne

John C. North, II
Chairman

*NOW (3:45 - 4:00)
Clarification of
Oil/Gas Vote*

1:15 - 1:20 - Approval of the Minutes of
June 6, 1990

John C. North, II
Chairman

PROJECT EVALUATIONS

1:20 - 1:40 - MD 335 Bridge Repair over
Fishing Creek - MDOT/SHA
(Dorchester County)

Kathryn Langner, Ch./
Samuel Bowling, Ch./
Claudia Jones, Planner

1:40 - 1:55 - Modifications to Administration
Plaza - Chesapeake Bay Bridge
MDOT/SHA (Anne Arundel County)

Kathryn Langner, Ch./
Samuel Bowling, Ch./
Claudia Jones

1:55 - 2:15 - Commission Vote on Intervention and Appeals:

- 1) Hammock Pt. (Crisfield)
- 2) Sylvane Swimming Pool
(A.A. County)
- 3) Cambridge Golf Course

Tom Ventre
Anne Hairston

Tom Ventre

AMENDMENTS & PROGRAM APPROVALS

2:15 - 2:30 - Growth Allocation - RCA to
LDA, Vaughan Property
(Dorchester County)

Robert Schoeplein, Ch./
Tom Ventre, Natural
Resources Planner

2:30 - 2:45 - Growth Allocation - RCA to
LDA, Frey Property
(Dorchester County)

Robert Schoeplein, Ch./
Tom Ventre, Natural
Resources Planner

- | | | |
|-----------------|---|--|
| 2:45 - 3:00 - ✓ | Growth Allocation - RCA to LDA, Pallas Property (Dorchester County) | Robert Schoeplein, Ch./
Tom Ventre, Natural Resources Planner |
| 3:00 - 3:15 - ✓ | Growth Allocation - RCA to LDA, Vessey Property (Somerset County) | Robert Price, Ch./
Tom Ventre/Claudia Jones, Natural Resources Planners |
| 3:15 - 3:30 - ✓ | Growth Allocation - Reconsideration - McCauley Property (Dorchester County) | Robert Schoeplein, Ch./
Tom Ventre, Natural Resources Planner |
| 3:30 - 3:45 - ✓ | Somerset County Critical Area Program Approval | Robert Price, Ch./
Tom Ventre, Natural Resources Planner |

REGULATIONS

- | | | |
|--------------------------|---|--|
| 3:45 - 4:00 - | Clarification of vote - Oil and Gas Regulations | Liz Zucker, Science Advisor |
| 4:00 - 4:15 - | Discussion of Proposed Resolution for FY 91 Session of General Assembly on Prohibition of Surface Drilling | Liz Zucker, Science Advisor |
| 4:15 - 4:30 - | Old Business
New Business | John C. North, II
Chairman |

CANCELLED
Because DNR
not represented

1. " See Attachment

2. Colvert Co. Amendments
to select Panel
for Susan Barr

CHESAPEAKE BAY CRITICAL AREA COMMISSION

Minutes of Meeting Held
June 6, 1990

The Chesapeake Bay Critical Area Commission met at the Chesapeake Bay Critical Area Commission Office, 275 West Street, Annapolis, Maryland. The meeting was called to order by Chairman John C. North, II with the following Members in attendance:

Adkins, Ronald	Schoeplein, Robert
Blake, Russell W	of DEED
Bostian, William J.	Assistant Secretary Naylor
Bowling, Samuel Y.	of DOE
Butanis, Victor K.	Lawrence, Louise
Cade, Ardath	of Dept. of Agriculture
of DHCD	Kreitner, Ronald
Glendenning, Parris	of Md. Office of Planning
Phillips, G. Steele	Whitson, Michael J.
Williams, W. Roger	Langner, Kathryn D.
Corkran, William H. Jr.	Zahniser, Albert W.
Elbrich, Joseph J. Jr.	Jarvis, Thomas L.
Gutman, James E.	Krech, Dr. Shepard, Jr.
Hickernell, Ronald	

The Minutes of the Meeting of May 2, 1990 were read and approved as written.

Chairman North presented a Certificate of Recognition to Eran Feitelson who had worked with the Critical Area Commission studying various aspects of the Criteria and its impact on housing, the Critical Area Law and devoting such time to it as to prepare a doctoral dissertation incident to his obtaining a Ph.D. from John's Hopkins.

Dr. Sarah Taylor made mention that Eran had spent time looking at housing and housing preferences which generated an interim report which was sent to Commission members. She said that the final report was finished with the technical analysis and it would be printed and distributed. She stated that the study helped to answer questions of the Real Estate and Development interests and it would have a continuing influence.

Mr. Feitelsen said that he was glad for the opportunity to work on the report which was an innovative study, without precedence, and he was glad that he could be a part of it. He will be returning to Israel in July.

Chairman North asked Mr. James E. Gutman to report on the creation of the Port Deposit Maritime Zone, as Chairman of the Panel, or Ms. Anne Hairston, Critical Area Staff Planner.

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Ms. Hairston reported that the creation of a Maritime Zone Amendment to the Port Deposit Critical Area Program must be voted on by 7-30-90. She said that the Town of Port Deposit had submitted an amendment to their Zoning Ordinance adding a Maritime Zone, which is an amendment to the Critical Area Program. She said that the Maritime Zone language describes permitted uses in the new zone and requirements for development associated with those types of uses. Ms. Hairston said that the addition of the new zone is proposed within 17 acres of the Intensely Developed Area section of the Critical Area of Port Deposit and is really changing an underlying zone within the Town, which will still have to meet the IDA requirements. She said that the site is also a buffer exemption area, so it must follow the requirements of the Buffer Exemption Program outlined in the Port Deposit Critical Area Program, rather than maintaining a 100-foot minimum shoreline buffer. She cited the specific requirements of the Buffer Exemption Program.

Ms. Hairston said that an 800-slip marina is currently proposed for the site with no specific site plans for it yet. She described requirements for developing a marina in an Intensely Developed Area addressing issues such as: reducing pollutants in runoff from the site, and assessing the environmental impact of the proposed marina on water quality and aquatic resources such as fish spawning areas and shellfish beds.

Ms. Hairston stated that the Maritime Zone would also be subject to the water-dependent facility requirements. She said that new marinas are required to include pump-out facilities for boat sewage holding tanks. She reported that there are no Habitat Protection Areas on the immediate site, but some submerged aquatic vegetation beds were mapped downriver from the parcel.

Ms. Hairston stated that these requirements are not specifically mentioned in the new zoning language, but will be required for any new development or redevelopment through the overlay zone, already implemented in the Zoning Ordinance. She said that the site plan review requires consideration of all applicable federal, state, and local laws, as further conditions for a new Maritime Zone (no list or examples are given) and that the local procedure for site review is described, but the requirement to send in plans to the Critical Area Commission is not mentioned explicitly. She stated, however, the Zoning Inspector is required by state regulation to send in any site plans for development in the buffer, or plans that call for disturbing more than 15,000 square feet in an IDA, to the Commission in an IDA. She said that a public hearing was held on May 29, 1990. She said that the recommendation of the Critical Area Staff was to approve the request.

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A motion was made and seconded to adopt the Maritime Zone Amendment into the Port Deposit Critical Area Program. The vote was unanimously in favor.

Chairman North asked Ms. Kay Langner, Mr. Samuel Bowling and Ms. Claudia Jones to report on the National Guard Armory Expansion in Chestertown.

Ms. Jones explained the proposal to expand the Chestertown Armory by the State Military Department. She described as presently located on the site an existing armory building, a garage and some parking and a flood wall behind the facility. She said that they are proposing an additional building, new military parking at the rear and additional parking for private cars along one side of the existing building and a flood wall to the rear and sides of the facility. She said that the entire site is within the Critical Area and most is within the 100 year floodplain; the majority of the proposed building addition and the military parking are within the Buffer. She said that 7,769 square feet are impacted within the Buffer and that new impervious area within the Critical Area will be increased by a little over half an acre. Ms. Jones reported that no nontidal wetlands will be impacted and that tidal wetlands will be only minimally impacted by a stormwater outlet. She described the requirement of a 10% reduction in pollutant loadings from the site by the use of a detention chamber and to offset the encroachment into the buffer, the planting of 8,184 square feet in trees was proposed.

Ms. Jones reported that the reason given by the applicant of project need is to bring the Chestertown Armory into compliance with current criteria for Army National Guard facilities. She said that the Maryland Historical Trust determined that the addition would have to be moved to the back corner of the existing armory so as not to obscure the historical facade of the existing building as the initial proposal placed the addition out of the floodplain and the buffer. She said that the applicant has not documented reduction of impacts on the existing site after other alternatives, which were considered (including construction of a new facility outside of the floodplain), proved to be too expensive and "no action" was not acceptable from an operational viewpoint.

She reported that the staff recommended approval of the request with conditions as follow:

That alternatives to be considered to reduce development with the Buffer: 1) to include renewed dialogue with the MD Historical Trust on character of the existing building, yet, locating the addition out of the Buffer; 2) to consider a reduction in the amount or location of parking spaces - including utilization of

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parking sites across the road or elsewhere out of the Critical Area; and 3) submittal of any revised plans or additional documentation to the Commission for approval by the Subcommittee.

Mr. James Gutman asked about the facade of the building in keeping the windows because of the Maryland Historical Trust.

Lt. Bill Pulket, Army National Guard, stated that the windows are of historical significance because of the 1956 casement windows, the addition must not go in front of the windows since they are of historical significance.

Mr. Gutman said that windows from the '50's did not seem to him to be of historical significance.

Mr. Bowling said that he didn't believe the windows were crucial historically either.

Mr. Bowling made the motion to approve the proposal and it was seconded. The vote was carried 18 in favor with Mr. Gutman abstaining.

Chairman North introduced the next item of the Queenstown Harbour Golf Links which is a proposed golf course in Queen Anne's County.

Mr. Bill Corkran, Chairman of a Panel established to study the proposal, reported on the Panel's public hearing and deliberations. Other panel members were Ms. Kay Langner and Mr. John Griffin.

Mr. Corkran said that the panel conducted a public hearing in order to receive testimony on the issue of golf course development within the Resource Conservation Area in Queen Anne's County. The public hearing was conducted in two sessions, April 23rd and May 21st. Approximately 15 hours of testimony was received. Mr. Corkran summarized the Panel's recommendation as to whether the Criteria permits golf courses within the RCA. He said the determination of whether a proposed use is commercial must be weighed by its effect on water quality, habitat and the environmental impacts caused by people. He said the Panel recommend that a golf course was not inconsistent with the overall purposes of the RCA under the Criteria.

Mr. Corkran made a motion that the Commission adopt the Panel's report. The motion was seconded.

Mr. John Murray, representing the Washington Brick and Terra Cotta Company, developers of the golf course, summarized the project. He described the site as a working farm with

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approximately 400 acres in the Critical Area. The golf course would use approximately half of that 400 acres within the Critical Area. All new structures and impervious surfaces connected with the project will be located outside the Critical Area. There will be a 300 foot Buffer from tidal waters. It will be afforested to 50%. Most of the golf course will be on cleared fields. Best Management Practices will be employed, as well as an Integrated Pest Management program. Mr. Murray said he agreed with the Panel's reasoning regarding commercial uses in the RCA and that a golf course is not the type of project or activity which the Criteria intended to exclude from the RCA.

Mr. John C. Murphy then addressed the Commission. He represented the "Citizens for the Preservation of Queenstown Creek." He mentioned that he had filed a Memorandum of Law and a final argument with the Commission.

Mr. Murphy said that the Critical Area Law and regulations do not provide for hearings of this sort. He said his principal point on the merits involved the determination of appropriate uses in the RCA. A golf course, he said, is not part of the Criteria definition of the RCA. He further emphasized that 164 acres of agriculture is a protected use under the Criteria. He said the essence of the problem for his clients is the potential impact on the water quality of Queenstown Creek. Golf course development, he said, will attract boats to the area and perhaps other commercial uses will locate there also. He said Queenstown Creek is currently in a stressed condition; additional boat traffic will degrade the Creek further. He recommended that if the Commission approved this use, a condition be imposed to prevent water access to the property, even if a portion of the property later is placed in the LDA or IDA classification. He also recommended that archeological resources on the site be adequately protected.

Mr. Murray, representing the applicants, then spoke again. He said the maximum golf course capacity would be two people per acre in the Critical Area. The course will not be used at night or during the colder weather. Mr. Murray also said that the Criteria provide for some loss of agricultural land. He said there was no proposal to have golfers arrive at the course by boat. In addition, the applicants are willing to cooperate with the Maryland Historical Trust regarding protection of archeological resources. He said his clients could accept all but two of the Panel's recommendations without qualification. One recommendation that can be accepted concerns residential use of the golf course, except for the two existing dwellings. He also wishes to preserve the right to develop the property in the future if the golf course is discontinued. He made the same point about future use of the water-dependent facilities; that they should be able to use these

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later if the golf course is no longer in use.

Mr. Tom Deming then emphasized that the question before the Commission is one of interpretation of its Criteria. The issue is not one, he said, of approval of the golf course but is a decision for Queen Anne's County under the local Program. The Commission's recommendations contained in the Panel report are recommendations to the County.

Mr. Gutman said that it is important that the managers of the course have sufficient capability to carry out the recommendations. In response to other questions of Mr. Gutman, Mr. Murray said the course will contain 27 holes and possibly a short pitch and putt course and that public tournaments that would draw large crowds will not be held there. Mr. Gutman said he did not believe that development of a golf course was an appropriate way to address resource conservation issues. Habitat would not be adequately protected and species populations would be difficult to maintain. He said it was the Commission's responsibility to protect and conserve agriculture and that it was totally false that a golf course would provide superior environmental protection than would agriculture.

Mr. Skip Zahniser asked if accepting a golf course in this situation would set a precedent for all golf courses.

Mr. Deming responded that the decision here pertains only to Queen Anne's County, and that it could set a precedent only for Queen Anne's County.

Chairman North stated that he had received a letter from the Chesapeake Bay Foundation concerning golf course development in the RCA. The letter suggested that each golf course proposal should be judged on its own merits. The Foundation said that in certain circumstances golf courses could fit the Criteria definition of the RCA, and in others golf courses would not be proper.

Mr. Tom Deming said, in response to a question from Dr. Krech, the question before the Commission is only interpretation, and that the County is not requesting redesignation of any portion of the site to LDA. There is no Growth Allocation involved.

Mr. Samuel Bowling said that he was a member of the original panel which approved the County's Program. The provision on the program that required the Commission to interpret the Criteria regarding certain uses is unworkable. He said it needs to be changed. He also said that he has great concern about the impacts to the heron rookery located on the site; that construction should

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be a safe distance from that area and timed so as to cause as little impact as possible.

Mr. William Corkran said the panel was assured that wildlife protection would be an important part of the project.

Mr. Steele Phillips expressed concern over the loss of agricultural lands. He said there is a great danger in Maryland of losing the important agricultural base.

Mr. Joe Elbrich said that he shared Mr. Phillips' concern, but that the Criteria provide for residential development on agricultural land at a density of one dwelling per 20 acres. He said the law is contradictory in this regard.

Mr. Ronald Hickernell called the question and Mr. Corkran restated the motion: to adopt the report of the panel set forth in parts 1,2,3, & 4; and the recommendations set forth in parts 5,6, and 7.

Mr. Deming suggested the following language as responsive to Mr. Zahniser's request to address the issue of setting a precedent: "This interpretation is for the pending Washington Brick application only and should not be viewed by Queen Anne's County or others as precedent for future applications."

Mr. Corkran indicated that the proposed amendment to the motion was acceptable.

Mr. Bowling suggested that the recommendation contained in the staff report, distributed at the meeting, be incorporated into the motion.

Mr. Murray responded that his clients "wholeheartedly agreed with the recommendations and are more than willing to cooperate with the County as well as the Commission staff when we get to those kinds of details."

Responding to the issue of water access to the site, Mr. Murray said: "And insofar as the Panel's recommendation goes, it says, 'as long as this golf course exists, there shall be no public use of the water access to get to the golf course' - agreed". But, he said, it was inappropriate to restrict future use of the facility if circumstances change in the future.

Chairman North called the question: the vote was in favor of adopting the Panel's report as amended. There were two votes in opposition - Mr. Gutman and Dr. Krech.

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Chairman North asked if there was a motion that the vote on the McCauley property in Dorchester County made at the last meeting be reconsidered.

Ms. Kay Langner affirmed a motion to re-evaluate the McCauley property decision made at the last meeting. She said that since the last meeting there have been many hours of expert testimony on water quality and soil types and for this reason as well as the statement in the May minutes that there is no record to show that the Health Department has approved the sewer system. She said that she believed that it should have been up to the County to decide based on their expert investigation because the soils in each area are very different.

Mr. William Bostian seconded the motion and the vote was carried unanimously.

Chairman North recommended that the whole panel re-visit the site and that further discussion be deferred until the next meeting after the site visit.

Mr. Victor Butanis stated that he had been concerned about last month's action and the consequent implications of placing in jeopardy the use of growth allocation for the lower Eastern shore. He said that the Commission should not usurp the prerogative of local government authority because in so doing there could be resounding effects beyond this property.

Chairman North said that the decision to re-visit the site indicates the concern of a number of people and it will be reexamined with care and caution.

Mr. William Bostian stated that a panel meeting was scheduled for the following Monday in Dorchester County and that everyone could go down at that time for a site visit.

Chairman North appointed Mr. Bostian to arrange and organize the site visit with the individual panel members. He said that the issue would be discussed again at the next Commission meeting.

opposition - Mr. Gutman and Dr. Krech.

Chairman North asked Ms. Kay Langer, Mr. Sam Bowling and Ms. Elizabeth Zucker to report on the University of Maryland, Horn Point Laboratory, Seawater Pumping Station.

Ms. Elizabeth Zucker stated that the seawater project will be an upgrade of an existing seawater delivery system which draws water from the Choptank River for use by various aquatic research laboratories at the University's Horn Point facility in Cambridge.

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Ms. Zucker introduced Dr. John Coffee, Engineering and Architectural Services from the University of Maryland, who described the project from an engineering perspective.

Dr. Coffee said that Horn Point's function was that of a research institution for environmental estuarine studies which does quite a bit of research in the Choptank river. He said that the system they have now is inadequate because it does not have enough capacity now and any future expansion will put further demands on the already inadequate system. He also said there are problems with maintenance.

He stated that the proposed upgrade system consists of the installation of a concrete intake structure between an existing pier and a stone groin. A pumping structure will deliver seawater water at 4,500 gallons per minute through underground plastic piping to the different laboratories. He said that the channel bottom of the Choptank will be dredged to a depth of 8 feet below Mean Low Water to provide a free flow of water to the pump and the system will use existing as well as new piping, where needed. Dr. Coffee explained that a filtration structure (metal building) will be established for finfish and shellfish hatcheries. The project, he said, also includes bulkheading, stone revetment and reinforcement of an existing stone groin to stabilize the significantly eroding shoreline and protect structures.

He outlined the more notable aspects of the project which included:

- 2 buildings and most of the pipeline will be located in clear areas. If it is necessary to remove trees for the pipeline, all trees will be replaced in the 100-foot Buffer.
- Existing sediment ponds will be regraded and used to receive discharge water.
- Existing dredged material disposal sites will be regraded and used to receive newly dredged material. Previously dredged material will be spread and stabilized in sites outside of the Buffer.
- The net increase of impervious surface on Horn Point acreage will be negligible.
- The seawater pump is "water-dependent".
- All Corps of Engineers and DNR permits have been obtained for dredging and disposal, regrading of existing ponds and shoreline erosion structures. The project was determined to not have a significant impact on SAV, anadromous fish or shellfish.

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- There will be no adverse effects to HPAs.

He said that they are in the process of getting permits from Maryland DOE for sediment and shore erosion control during construction. The University has been given a waiver from MDE for stormwater management because there is very little impervious surface going in, although a formal letter has not been received.

The Commission Staff recommended approval of the request with the conditions of tree replacement and final review of sediment erosion control and stormwater management plans by MDE.

Mr. Richard Naylor asked about the quality of water discharge.

Mr. Coffee answered that the main purpose of the water on site is for research as a finfish and shellfish hatchery, and for studying SAV and it is bringing ambient Choptank river water to the hatchery so the scientists could study them under the same circumstances as in nature as nearly as possible without adding anything foreign, such as chemicals, to the water.

A motion was made and seconded to approve the University of Maryland Horn Point Laboratory Seawater Pumping System with the conditions recommended by the panel. The vote was unanimously in favor.

Chairman North asked Mrs. Susan Barr to give an update on Capt'n Billy's Restaurant in Charles County.

Mrs. Barr said that the issue before the Commission was one of enforcement and implementation of a local program. She said that there is pending through the County, although not issued to date, a building permit for a steamroom. She stated that the Planning Commission has recommended approval based on a determination of compliance of construction of a steamroom "insofar as possible" with the local Critical Area Program.

Ms. Barr said that the local review was not correct or proper in reference to this construction based on an "insofar as possible" determination because it is a grandfathered use. However, she said that grandfathered uses are subject to Habitat Protection and Water-Dependent Facilities requirements and this structure is not in compliance with those criteria and therefore a variance is required before a building permit can be issued in this case. She informed the Commission that a letter stating such has been signed and will be sent to the County Commissioners asking for clarification of the proper designation of the site, which the County maintains is a Limited Development Overlay Zone - Buffer Exemption Area.

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Ms. Barr said that our final maps, which included final revisions before local program approval and adoption, do not show the area being designated as a Buffer Exemption area. She said that it needs clarification and regardless of whether it is LDOZ or LDOZ Buffer Exemption area, the structure doesn't fully comply with the regulations under either designation. Therefore, permitting the construction would still require a variance. She stated that the Commission has not received a notice of a variance application, which the County is required to forward to the Commission. She described shore erosion control measures established on the site as consisting of telephone poles and rubble which are not acceptable in the Critical Area and have not been permitted by DNR, the Corps or other permitting agencies. The Shore Erosion Protection Program in the local Critical Area Program does not appear to have been followed.

Mr. Hickenell asked how the structure does not comply structurally vs procedurally.

Mrs. Barr replied that the SAV beds are declining in the restaurant area and no determination has been made as to what would be proper shore erosion control measures. As is required by the local Program, vegetative measures are to be used where they are determined to be effective.

Mr. Adkins asked if the structure was erected prior to the Critical Area Commission approval of the Charles County Program?

Ms. Barr said that since there was no building permit application submitted until recently, it is presumed to have been constructed since local Critical Area Program adoption. Aerial photographs indicate that the steamroom, and other additions, have been constructed since 1985.

Mr. Bowling suggested that it may be found out through the tax assessor when the structure was erected.

Mr. James Gutman asked what remedies are being sought in this situation.

Ms. Barr said that WRA is pursuing civil action.

Mr. Tom Deming stated that it was being contemplated.

Ms. Barr said that WRA would like to see the steamroom removed.

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Mr. Bowling asked if there was a problem in filling of wetlands.

Ms. Barr said that WRA had a 1971 aerial infrared photo that did not show any additional filling since but she had been to the site in the past year noticing dirt had been pushed around in the area of the Pope's Creek Natural Heritage Area, which is located to the east of Pope's Creek Road.

Mr. Deming stated that when a wetlands enforcement action is being taken, tidal wetlands, the Water Resources Administration of DNR and the Corps coordinate, and if one agency is taking action the other does not take duplicate action. Therefore, this discourse serves to bring the Commission current on the situation.

Chairman North asked Ms. Zucker to report on the Draft Oil and Gas Regulations for Promulgation.

Ms. Zucker asked for a vote to approve the regulations to initiate the Oil and Gas Regulations Draft into the Promulgation process. She said that if the Commission approved the Draft, the next step would be to have Tom Deming review the document for legal sufficiency. The Draft would then be sent to the AELR Committee for review. Ms. Zucker said that when the AELR review was finished, the regulations would be published in the Maryland Register to obtain public comment. She said that the Special Issues Subcommittee reviewed the regulations on the morning of June 6th, and were ready with their recommendations. She called for any comments.

Mr. Thomas Jarvis suggested that if the Legislature could be convinced to not lease areas in the Bay, the Commission could go with the existing law that says no drilling within a 1000 feet of unleased areas.

Ms. Zucker explained that Mr. Jarvis was referring to the regulations being devised by the Maryland Geological Survey which includes a 1000 foot setback from any leasing of public lands for oil and gas.

Mr. Ken Schwarz, of Maryland Geological Survey, said that the Board of Public Works is the agency that passes judgement on public leasing, not the legislature. He said, the fact is that if there were to be no leasing in the Chesapeake Bay or any of the water bodies surrounding it, there could not be any leasing in the Critical Area, unless granted by exception, passed by the Commission and a subsequent permit granted by Maryland Geological Survey in the Critical Area.

Mr. Gutman made a motion to accept the Draft Oil and Gas

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Regulations as drafted and to promulgate them into the Maryland Register.

Mr. Deming said as part of the promulgation process, regulations have to be reviewed and approved for legal sufficiency and signed by him. He said that it was his belief that the statute required the application process between Maryland Geological Survey and the Critical Area Commission to be a joint process. He said that the form of the Commission's Draft Regulations was premised on there being a separate application process to the Commission. He recommended that the Commission approve the Draft regulations as they are now and worry later about looking at a revised draft that may be different in form (although not in substance), or wait until all of the coordination and changes in form have been accomplished and then review the revised draft that will go to the Maryland Register.

Mr. Gutman stated that he believed that the Subcommittee thought that there was time later to make adjustments needed in the form of the draft, if the substance was adequate and appropriate, and that the Commission should go forward with the process to promulgate the Draft Regulations.

Mr. Hickernell said that he believed the document to be good and appropriate, refined with many good adjustments, and that he was supportive of the effort. However, he said to establish an industry or any infringement of the industry or oil and gas is a mistake because "oil and water don't mix". He further stated that oil and gas development is "the one issue" that can destroy the Bay. He said that all the damage already done to the Bay, historically, could be controlled but there would never be that possibility with oil and gas exploration. Mr. Hickernell warned the Commission members that they must ask the General Assembly to reconsider the position they have historically taken and to prohibit any and all gas and oil exploration in the Chesapeake Bay.

Chairman North asked Mr. Zahniser if he was about to second Jim's motion.

Mr. Zahniser said that he was rethinking it and would like to see the conversation go forward.

Mr. Gutman, for the purpose of further discussing the matter, asked for second to the motion.

Chairman North recognized two seconds to the motion, one being Kay Langner. Discussion continued.

Mr. Gutman agreed with Mr. Hickernell's comments. He said that it has been reported that the General Assembly did have the

Critical Area Commission
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opportunity to prohibit exploration and drilling in the Bay but it was not passed. However, the issue could be reintroduced. He said that he believed that the Commission was charged to develop regulations and he believed that the Commission should follow the intent of the Legislature to do their bidding. Mr. Gutman stated that he would certainly support a carefully drafted proposal that might accomplish what Mr. Hickernell has outlined. He said that he believed there has been a lot of effort put into the Draft and even though Mr. Hickernell's position may prevail, that the Commission should at least proceed.

Mr. Bowling said that he had mixed emotions. He said that he fully agreed with Mr. Hickernell on the idea that oil and water do not mix. But he believed that if major deposits can be found, the cleanliness that could be achieved in the environment by cleaning up the air would counteract the negative effects to the Bay.

A vote on the motion to initiate the promulgation process for the Draft Oil and Gas Regulations was taken, Dr. Krech abstained, Mr. Corkran abstained, Mr. Phillips abstained; Mr. Williams opposed; 15 were in favor.

Mr. Gutman asked if at the next meeting there could be an agenda item that would take up Mr. Hickernell's point of view.

Mr. Hickernell asked the Chair if: 1) there could be consideration on the next agenda of the resolution of the General Assembly and 2) ask for staff assistance in drafting the resolution prior to the next meeting.

Chairman North recognized the request, agreed and approved.

Mr. Parris Glendenning asked whether the Taylorsville Basin, which runs through Delaware and Virginia and crosses the Bay, a prime area for gas and oil, and if it is, shouldn't there be eventual use of the reservoir. He further inquired if drilling must be either in the Bay or close to the Bay in order to get oil or natural gas out of the Taylorsville Basin or could drilling take place anywhere in the entire basin. He asked if there was a research area and if that gas were found in the proximity and if reserves were big enough, could there be drilling in Charles County, for example, as part of the Basin. Or is the reserve so compact that it cannot be done without drilling in the Bay?

Mr. Gutman informed Mr. Glendenning that there was the method of slant drilling or directional drilling.

Mr. Bowling added that slant drilling was limited in depth.

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Mr. Schwarz said that the Taylorsville Basin was of sufficient thickness of sediments that possibly oil or gas can be generated, however there may not be oil or gas everywhere in the Basin. He said that it was just a prospective area. An oil company would want not to drill in the Critical Area first, because of the strict regulations. He said that private lands outside of the Critical Area would be a first choice as they are the areas that are the least expensive to drill for testing and because they present no environmental problems.

Mr. Glendening asked that if a company test drilled at many different sites on land and did not find any commercially profitable pockets of oil does that mean there was likely not to be any oil in the Bay.

Mr. Schwarz said that he believed that the best prospects for oil were definitely on shore, and 2 - 3 dry holes would convince a company there was no oil and they wouldn't want to drill again for 40 years.

Mr. Glendening asked what the likelihood was for industry wanting to drill in the Bay after a series of successful strikes on land.

Mr. Schwarz answered industry would most likely want to drill in the Bay, but not in the Critical Area.

Mr. Glendening reported that he knew of only one serious drilling effort which turned out to be dry.

Mr. Schwarz confirmed that, and said the drilling was in Northern Virginia. Although it was dry it revealed information as to the kinds of sediments in the Basin.

Mr. Glendening said that if industry was already drilling and coming up empty on land would they want to do exploratory drilling in the Bay.

Mr. Schwarz said that it is more expensive to drill in water and they can't drill in the Bay to begin with because it is prohibited.

Mr. Glendening stated that in conclusion, a "no drilling" in the Bay or Critical Area, as law passed by the legislature, (a modification of what now exists,) would make sense. Presumably, another decade would be spent in drilling in the different land areas and if at some future date it turned out that for energy needs and findings there was significant oil, the issue could be reexamined. But in the meantime, there would be no sense in having

Critical Area Commission
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even exploratory drilling in the Critical Area if it could be determined reasonably well outside the area whether or not there is any concentration of oil in the entire Taylorsville Basin.

Mr. Schwarz stated that was sort of what the Legislature hinted at but if an exclusion were intended, they would have said that in the legislation. He said that this would certainly bring out an "obstructionist" type of attitude. He stated that if in our domestic reserves there are not any areas which can be drilled, it only means that more oil will have to be imported and importing means more tankers and the tankers pose an environmental problem.

He stated that it has been determined that 85% of the spills are tanker spills. So prohibiting drilling in the likely spots in the Critical Area, which is only 1000' from the Bay, would only exacerbate the ultimate situation for the nation by having to depend more on foreign crude and the resultant accident prone situations with tankers. He said that he believed there was the need to have the option.

Mr. Glendening stated that if in the tri-state area where land drilling was permitted and there was nothing productive as a result in terms of technology and current market, why was the 1000' so crucial.

Mr. Schwarz said that the 1000' is not so crucial because companies would drill on private lands first and determine whether the basin was productive.

Mr. Gutman asked if there was a time frame for the oil companies to drill on an exploratory basis.

Mr. Schwarz said that the oil companies are interested in drilling as indicated by their telephone calls concerning the development of his regulations with respect to leasing private lands in the State. He said that they have a 10-year lease term for most of the acreage that has been leased (about 40,000 in Southern Maryland and the Eastern Shore). He said that about 4 -5 years of the lease term has passed. Every year the companies have to pay rentals on this acreage, which is a small expense compared to drilling a well. He said that it would take about 2 years time to see whether there was any oil from exploration.

Mr. Gutman asked if one failure would terminate an exploration.

Mr. Schwarz said no, one failure may not terminate exploration. It would depend on the company's budget and the circumstances of the exploration.

Critical Area Commission
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The vote on the resolution of the General Assembly carried unanimously.

Chairman North asked Mr. Tom Ventre to update the Commission on Somerset County.

Mr. Ventre said that negotiations in revising Somerset County's Program are coming to a conclusion. He said that the revision looks good so far with regard to the negotiation that went on between Commission Staff and County Staff in putting certain sections and certain matters in the Program which are now more aligned with the Commission's criteria. He said that it will be on the Agenda next month for a vote. He also said that the report will be sent out to the Commissioner's in next months mailing prior to the July meeting.

Mr. Gutman asked what was the deadline action date.

Mr. Ventre said that there was no deadline but it should be finished as soon as possible.

Dr. Sarah Taylor said that it is their Program and this is the part that the Commission agreed to work out the language when it approved their Program.

Mr. Adkins stated, for the record, that this is an amendment package, from the County, to its Program and already has been adopted and the Commission has been directed to treat it, through the Attorney General's office, as such.

Under Old Business

Dr. Sarah Taylor distributed a correction to the Commission members listing and a packet (put together by Tom Burke and Ellie Falk, of the Governor's office) on the Chesapeake Bay which lists current publications and slide shows and videos on the Chesapeake Bay.

Under New Business

Chairman North announced the opening of the Easton office of the Chesapeake Bay Critical Area Commission which is now available for panel meetings or conferences. He said that it is located at 31 A Creamery Lane, between Washington Street and Aurora Street.

Chairman North informed the Commission that unless there were

Critical Area Commission
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strong objections, the July meeting would be held on July 11 instead of the Holiday, the first Wednesday of the month, July 4th.

Ms. Peggy Mickler, Commission Secretary, announced the next meeting would be held at the Rustic Inn in the Talbottown Shopping Center in Easton, July 11, 1990.

There being no further business, the meeting was adjourned.

Ron Karasic, "Sol Liss's protegee," Baltimore City Solicitor

- Could always be depended upon to chair a panel meeting at the last minute.
- Represented Baltimore City well and was the most active.
- Left his mark, in fact, a replacement has not yet been found for him.

J. Frank Raley, Jr., former Senator for St. Mary's County

- Appreciated the way in which he worked with the divergent opinions in St. Mary's County to seek passage of the local Program.
- Represented the rural county perspective during Development Subcommittee deliberations when the criteria were being developed.
- Probably had the longest wait of any original Commission member for the local Program to be approved.

Constance Lieder, former Secretary of Department of State Planning

- Devised the Patuxent River Policy and Plan for land use and growth management, a forerunner of the Critical Area Program and from which several key concepts were borrowed, i.e., the Buffer.
- Original member of the Commission who shared her extensive knowledge of planning and growth issues during the development of the criteria.
- Contributed many hours not only to the development of the Law and the criteria but also to seeing that programs functioned well at the local level.

Tom Osborne, "The Wizard of Oz," former Anne Arundel County Planning and Zoning Director

- Always managed to challenge the Commission with the "test case" issue that needed to be resolved. Now you know why Lee Epstein managed to write so many memos.
- Always willing to share his experience with the Commission as to how local government would be impacted by policy or interpretation of the criteria.
- A fair-minded and creative-thinker. Always ready to resolve a problem.

Wallace D. Miller, Member Kent County Commissioners

- If something fishy is going on, Wally is usually in the middle of it as the State's hybrid Rockfish entrepreneur.
- Always spoke up for the Eastern Shore perspective, making sure that everyone was treated equally.
- We always knew where he stood on issues and policies as he was always up front with his position. Never backed away from controversial issues.

Lee Epstein, "our legal beagle," former Assistant Attorney General

- Legal "Mother Hen" for the Commission and its staff; keeping all of our toes out of hot water.
- Managed to always be able to give the Commission good, solid advice on various issues such as buffer exemption areas, TDR's, the role of the Chairman, etc. In fact, over 50 Advice of Counsel memos were written.
- We all miss you, and if you ever change your mind, the position is still empty.

Charlie Davis, former planner, but still under contract for the Commission

- Mr. Detail and innovator for the Commission who could turn 24-hour days into 40 hours worth of material.
- Thorough, diligent, unending dedication to the development of the criteria.
- Can identify a rare plant or endangered bird blindfolded. A field expert indeed. Lucky private sector.

GOVERNOR WILLIAM DONALD SCHAEFER

1990

CHESAPEAKE BAY AGENDA

REDUCING THE IMPACT OF
HIGHWAY CONSTRUCTION ON THE
CHESAPEAKE BAY WATERSHED

Item A

MARYLAND STATE HIGHWAY ADMINISTRATION

NON-POINT SEDIMENT CONTROL PROGRAM

The development, construction and maintenance of highways is not only critical to Maryland's economy, but is one of the most fundamental, and important, services the State provides to its citizens. Issues of safety, convenience and commerce depend on Maryland having a road transportation system second to none.

However, highway construction has the potential to negatively impact not only local streams, but major rivers and the Chesapeake Bay. Pollution, in the form of sediment and soil runoff, can enter Maryland's waterways if proper controls and care are not taken. It is the responsibility of the Maryland State Highway Administration, under regulations established by the Maryland Department of the Environment, to prevent this kind of damage from occurring.

PROGRAM GOALS

1. To prevent highway construction in Maryland from adversely impacting the Chesapeake Bay and its contributory watersheds.
2. To insure full compliance with all current Erosion and Sediment Control regulations as established by Maryland Department of the Environment.

PROBLEM

Although individual highway project sediment and erosion control plans are in 100% compliance with current MDE regulations, the actual control devices may not be completely effective and, at times, sediment enters waterways. There are two primary causes for this:

- During large, intense storm events, devices are overwhelmed beyond their designed containment capacity.
- Particular parts of a project may be temporarily out of compliance with the regulations.

SOLUTION

In order to meet the stated goals, the State Highway Administration will implement a four part program to improve the efforts of its contractors:

1. Implement additional controls in selected watersheds where additional levels of protection are needed.
2. Develop baseline data for all watersheds prior to construction to use as a benchmark for assessing SHA impact.
3. Implement clean up and mitigation of SHA impacts to effected watersheds.
4. Introduce a series of incentives and dis-incentives to SHA contractors to insure compliance.

IMPLEMENTATION

1. In certain watersheds, there is a need to exceed current regulations and/or practices. The degree and type of additional controls required will vary, depending on the watershed and type of resource that needs special protection. The State Highway Administration has implemented them in some watersheds where projects are already under way. It will however, expand these extra measures to additional streams where construction is about to begin.
2. In the past, thorough assessment of watersheds before, during and after construction has not been undertaken. A procedure to secure and compile all available data for watersheds impacted by major highway construction will be developed by SHA, in close cooperation with the state resource agencies. This assessment will be used to:
 - document the overall condition of the waterway prior to construction,
 - identify other sources of potential sediment loading, and
 - document the overall impact to the waterway as a result of construction activities of SHA and others.
3. The data developed under the watershed assessments will be used to develop a clean-up strategy, should it be discovered that SHA activities had an adverse impact on

a waterway. The State Highway Administration is committed to mitigate the impacts caused by its construction activities. It would also participate in joint efforts with the public and private sectors should it be found that negative impacts to a waterway were caused by several sources.

4. The State Highway Administration will develop a procedure that will place a penalty on contractors for less-than-satisfactory compliance with current regulations/controls, or the additional controls deemed necessary by SHA. With bi-weekly, or more frequent, inspections of job sites, those contractors found out of compliance will be assessed on a per-day, or portion-of-a-day, basis for their violations.

Concurrently, the State Highway Administration will institute a system of non-monetary awards to be made to contractors exhibiting initiative and cooperation in the effort to keep sediment and runoff out of Maryland's waterways. The spirit of "MARYLAND WITH PRIDE" will be incorporated into this program.

TIMETABLE

Maryland State Highway Administration is currently in the process of developing policy and regulations to implement this program. Final procedures will be published by April 1, 1990.

STAFF REPORT

July 11, 1990

Applicant: MD Department of Transportation

Project: MD 335 Bridge Replacement over Fishing Creek in Dorchester County

Recommendation: APPROVAL with conditions

Project Description:

The MD Department of Transportation proposes to replace an existing swing bridge that is in poor condition with a 22' wide fixed span bridge. At present, the 20' wide bridge is signalized, allowing one-way traffic down the center of the roadway. The proposed replacement structure is to be constructed to the west of the existing structure. On-site replacement was determined not to be feasible since the existing structure provides the only vehicular access to the mainland for both upper and middle Hooper Island.

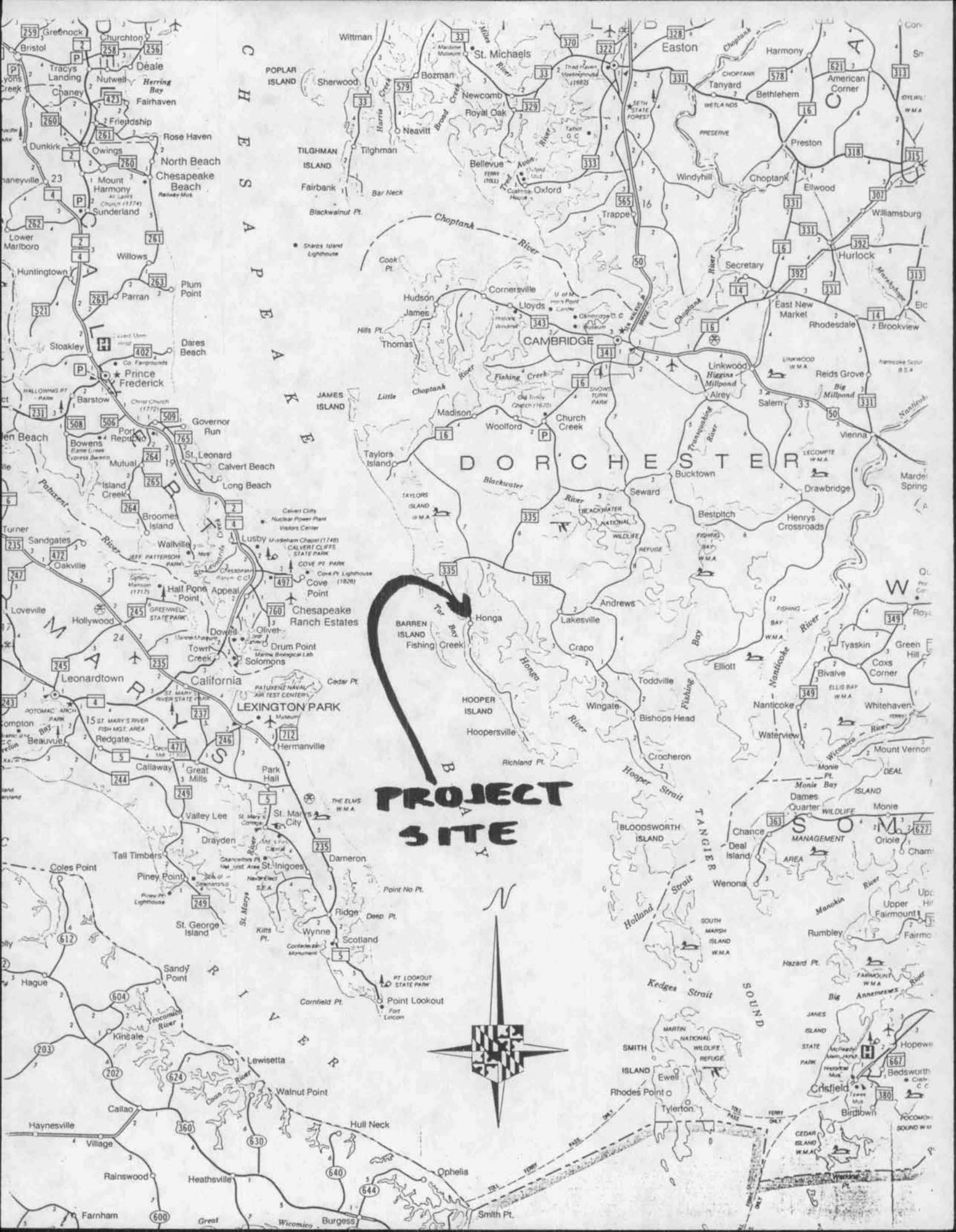
The total area of anticipated disturbance is approximately 2.13 acres and includes construction of the approach roadways, access driveway paving and bridge abutments. Proposed new roadway paving is equal to 19,000 square feet. The old roadway to be removed equals 16,000 square feet for a net gain in impervious surface of 3,000 square feet. The development associated with this project will involve .63 acres within a Limited Development Area and 15 acres in a Resource Conservation Area for a total disturbance of 2.13 acres. Of this, approximately .52 acres is tidal wetland.

Other environmental concerns include disturbance to the stream bottom during construction and removal of the piers. There is an oyster bar within 500 yards of the proposed construction. There is also submerged aquatic vegetation (SAV) within the shallow water areas of Fishing Creek. There does not, at the present, seem to be any SAV growing in the exact location where the new bridge is proposed. However, SAV (wideongrass) is growing on the opposite side of the existing bridge. A time-of-year restriction will be placed on any instream work to protect both the oyster bar and the SAV from impacts due to sedimentation by the Division of Tidal Wetlands.

The Highway Administration is proposing to mitigate for wetland losses by creating a tidal wetland of similar character. They are presently trying to locate a site in the vicinity of the impact that would be appropriate.

The staff recommends approval of the project with the condition that MDOT provide Commission staff with the opportunity to comment on the mitigation plans.

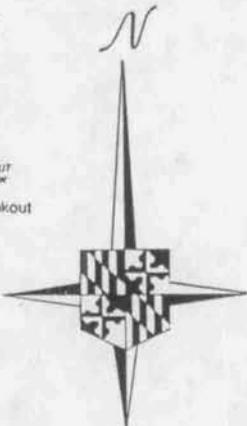
Contact person: Claudia Jones



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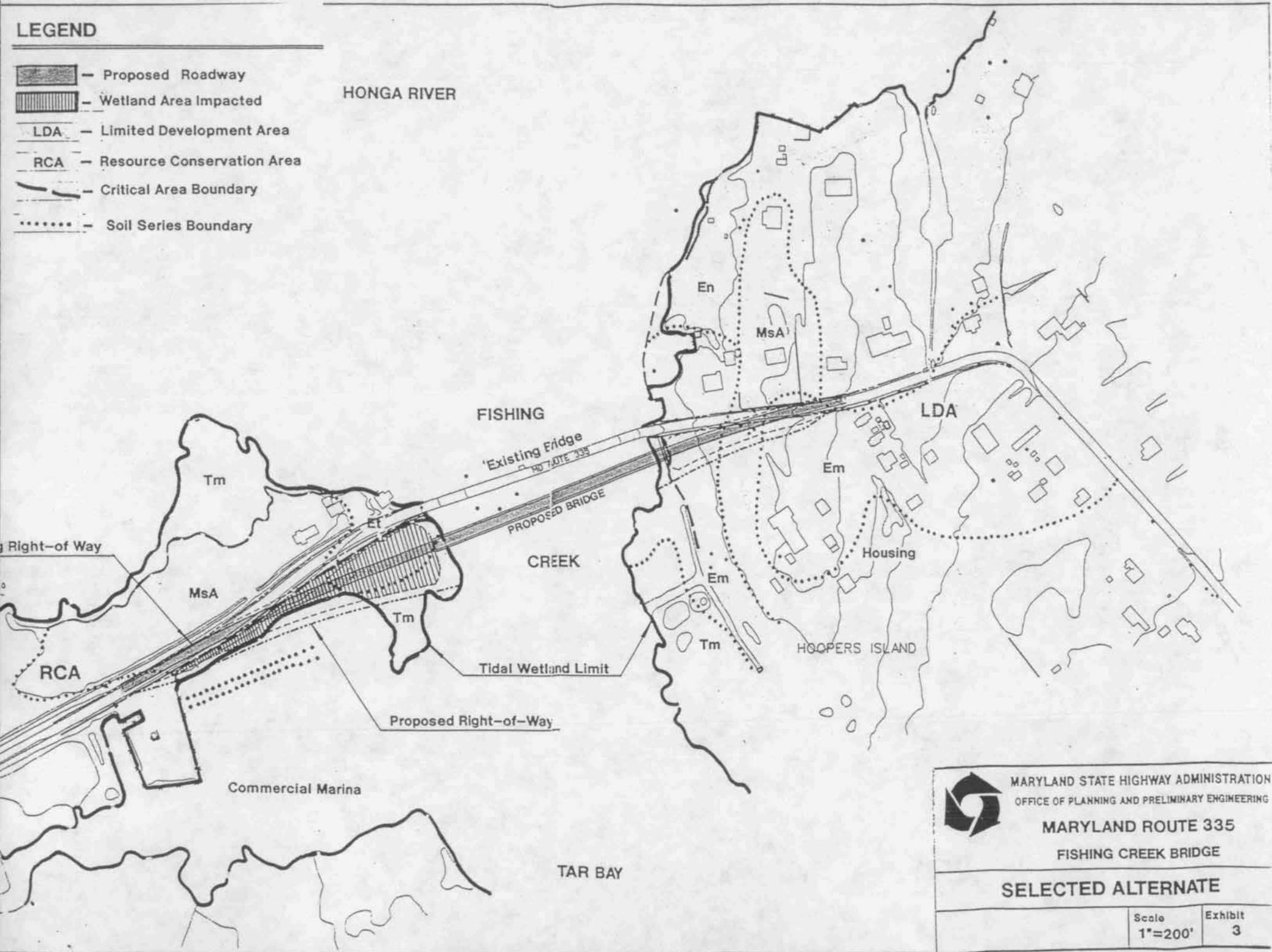
**PROJECT
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LEGEND

-  Proposed Roadway
-  Wetland Area Impacted
-  LDA - Limited Development Area
-  RCA - Resource Conservation Area
-  Critical Area Boundary
-  Soil Series Boundary





MARYLAND STATE HIGHWAY ADMINISTRATION
 OFFICE OF PLANNING AND PRELIMINARY ENGINEERING
MARYLAND ROUTE 335
FISHING CREEK BRIDGE

SELECTED ALTERNATE

Scale 1"=200'	Exhibit 3
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DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
CENTREVILLE, MARYLAND 21617
758-1255

July 6, 1990

Judge John C. North, II, Chairman
Chesapeake Bay Critical Areas Commission
275 West Street
Suite 320
Annapolis, Maryland 21401

RECEIVED

JUL 9 1990

DNR
CRITICAL AREA COMMISSION

Dear Judge North:

I have been asked by your staff to submit in writing a question concerning the Queenstown Golf Links project.

Four farm houses in excellent condition exist on the golf course site. I have marked them in yellow on the plan enclosed. Two of the four houses sit in the Critical Areas RCA.

Mr. Birney is donating the houses to the County to be used for low income housing. The County will move them to other sites. Two of the houses are currently lived in by the farm tenants. The Birneys would like to rebuild three of the houses to be moved. Two of the new houses will be for the farm tenants, and one will be for the grounds keeper for the golf course.

My question is whether the Critical Areas Commission has any objection to the construction of new houses to replace the old ones in the Critical Areas. The exact location of the new houses has not yet been determined.

If reconstruction of the houses in the Critical Areas is not possible, Mr. Birney may want to just renovate the existing houses for their tenants. This is allowed under the Queen Anne's County ordinances. In the meantime, I will continue working on relocating the houses for the County. I look forward to your reply.

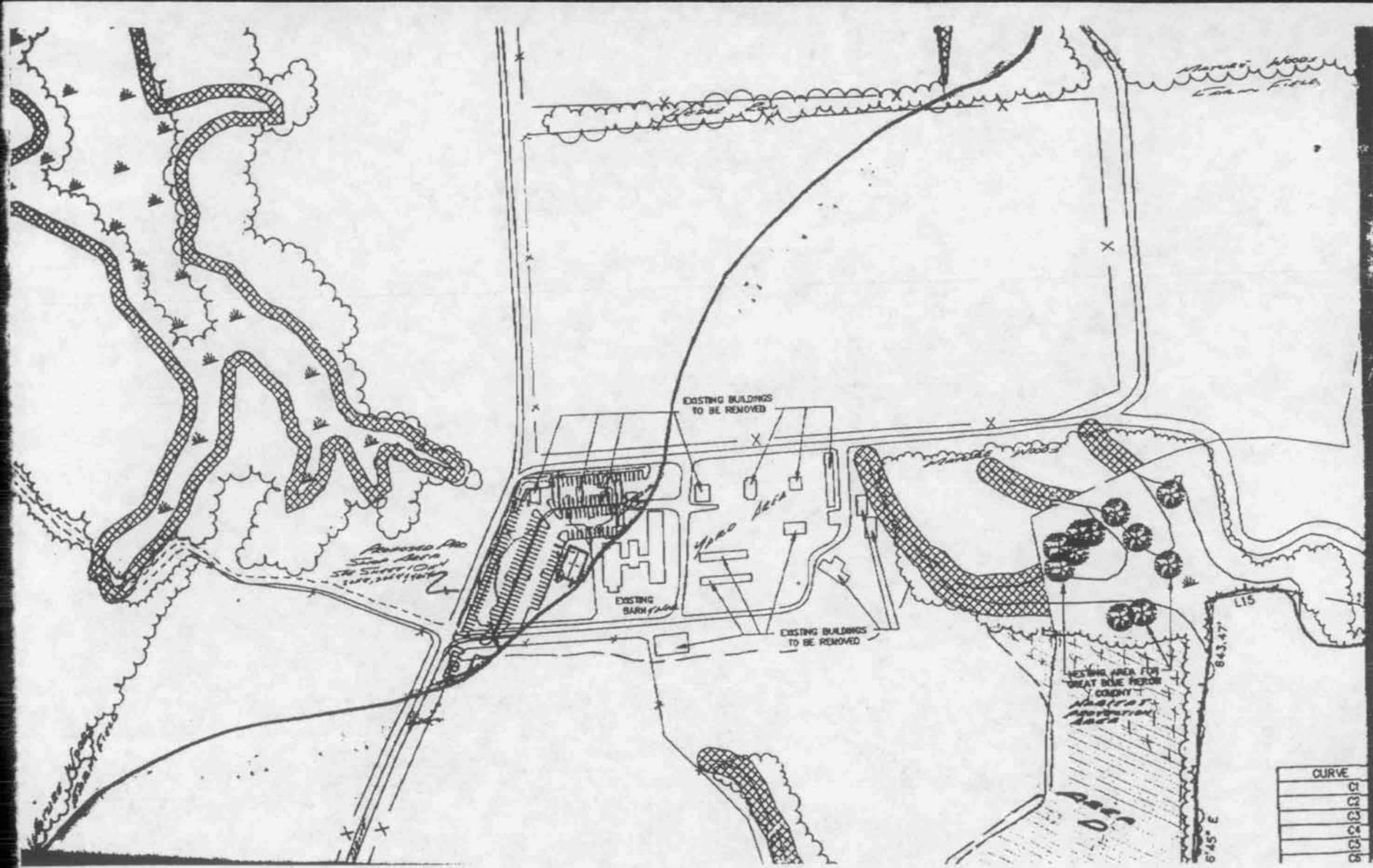
Sincerely,

Margaret Kaii
Deputy Director

MK:cm

CC: Joe Stevens
Robert Sallitt
Charlie Birney, Terra Cotta Brick Co.
Dr. Sarah Taylor
Tom Demming, Esquire
Ren Serey
Liz Zucker

Enc.



CURVE
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L15

STATE OF MARYLAND
CRITICAL AREA COMMISSION
WEST GARRETT PLACE, SUITE 320
275 WEST STREET
ANNAPOLIS, MD 21401
(301) 974-2426

TO: Judge John C. North, II

FROM: Tom Ventre

SUBJECT: Local Grant of Variance from Buffer
Requirements, Dorchester County

DATE: July 11, 1990

This office reviewed a request for a grant of variance from Buffer requirements in the Dorchester County Critical Area. The request applies to the expansion of an existing golf course, and the construction of tees and greens within the demarcated 100-foot Buffer.

We reviewed the documentation and the applicable sections of the Dorchester Program and ordinances.

In our opinion, a grant of variance could not be justified, primarily on the grounds that the Dorchester Program and ordinances state clearly and specifically that only water-dependent activities may be located in the Buffer. We informed the County of our conclusions in a letter dated June 21, 1990, sent via telefax.

At the Board of Appeals hearing on this variance request (June 21, 1990), the Board approved the request with no special conditions.

We believe that an appeal of this Board decision is warranted.

/jjd

STAFF REPORT

July 11, 1990

Applicant: Maryland Transportation Authority

Project: William Preston Lane Jr. Memorial Bridge-
U.S. 50/301 (Bay Bridge) Administration
Building, Weigh Station & Toll Plaza
Modifications

Recommendation: APPROVAL

Project Description:

The MD Transportation Authority proposes several projects in the vicinity of the toll plaza at the Chesapeake Bay Bridge. These include:

Toll Plaza Widening, Eastbound Road

The eastbound toll plaza is proposed to be widened to add two toll booths and approach lanes. The widening will taper from 0 feet to 34 feet and back to 0 feet over a length of 600 feet. The total area of new impervious surface will be .31 acres. Minor side slope and ditch regrading will also be required.

Weigh Stations, Eastbound & Westbound

Existing weigh stations will be reactivated on either side of Rt. 50/301. Scale houses covering 280 square feet and a sidewalk are proposed on each side creating 0.016 acres of new impervious surface.

Garage & Maintenance Building

A new garage and maintenance building are proposed to replace the existing building. The new building will be located approximately within the same foot print as the existing building. An expanded driveway area will create 0.03 acres of new impervious surface.

Stormwater Management

Vegetated filter strips have been proposed to treat runoff from 0.67 acres of impervious surface in the vicinity including 0.37 acres of new impervious surface. The two areas proposed for location of filter strips is now covered with short grass and has some minor erosion.

Filter strip area 1 is located on the eastbound side of the road. It is to be planted with a 20' wide strip of switch grass that is not to be mowed. A 30' wide native shrub strip is to be planted adjacent to the grass strip. These areas will be interspersed with

OVER

Staff Report
July 11, 1990
Page Two

native deciduous and coniferous trees.

Filter strip area 2 is located adjacent to the garage and maintenance building. The proposed grass filter strip is 5' wide and a proposed shrub strip is to be 10' wide.

Contact person: Claudia Jones

STATE OF MARYLAND
CRITICAL AREA COMMISSION
WEST GARRETT PLACE, SUITE 320
275 WEST STREET
ANNAPOLIS, MD 21401
(301) 974-2426

TO: Judge John C. North, II
Chairman

FROM: Tom Ventre

SUBJECT: Appeal of Local Grant of Variance,
Crisfield Critical Area

DATE: July 10, 1990

A recent decision to grant a variance from the COMAR regulations and local ordinances to a property in the Crisfield Critical Area warrants our attention. The salient facts of the matter, in chronological order, are these:

1. On April 25, 1990, the City of Crisfield submitted to this office for review, an application for a variance from local Buffer requirements on a privately-owned residential property (part of a recent subdivision) in the City's Critical Area. The submittal was pursuant to COMAR 14.20.01.03.D (Attachment 1).
2. After reviewing the documentation, Commission staff responded to the City via letter on May 14, 1990, stating its opinion that a grant of variance was not justified, as there were reasonable alternatives to the building sites originally indicated in the application, and furthermore, citing specific sections of the Crisfield Code in support of our opinion (Attachment 2).
3. The Crisfield Board of Zoning Appeals conducted a public hearing on the request for variance, and on a motion to grant, approved unanimously. The Board informed Commission staff of its action via letter and copy of minutes. There were no findings of fact presented (Attachment 3).

The regulations at COMAR 14.15.11.01 are incorporated in the Crisfield Code. One of the requirements is that, among other things, there be a finding of unwarranted hardship in order to justify a grant of variance. As there are, in our opinion, reasonable alternatives, a hardship does not seem to exist.

This matter raises the important issue of reasonable flexibility and leeway in interpretation and application of the regulations at the local level on one hand, and the integrity and consistent application of the regulations on the other.

/jjd

Attachments

cc: Sarah Taylor

Description of the Sylvain Variance Appeal

ABH 7-11-90

Applicant: Mr. Ronald Sylvain

Address: 422 Carvel Beach Road
Baltimore, MD 21226
Anne Arundel County

Request: Installation of an in-ground swimming pool 56 feet from the water on an existing developed lot.

The existing house, including a covered porch, walkway, and gazebo, is entirely within the buffer, and the pool is proposed in the sideyard, even with the edge of the house (not closer to the water). Anne Arundel County law prohibits pools in the front yard, which is the water side of a waterfront lot, but the pool is proposed in the sideyard. The County does not intend to appeal the case. The lot is 0.536 acres. Enough land exists behind the buffer to place a swimming pool, although sewer and water lines and overhead power lines are in this area.

The hearing officer's summary cited reasons for granting the variance as being that the applicant had always planned a pool, would not have purchased the property if he knew that he could not have the pool, and had utility lines routed to avoid the proposed pool location. In 1986, a sketch plan was submitted and the County Office of Planning and Zoning indicated that it was acceptable to build a pool.

Two conditions were placed on the approval of the variance on May 30:

- 1) The applicant must undertake the actions to preserve water quality presented at the hearing; and
- 2) Because the impervious surface will exceed 15%, an area of the buffer equal to that disturbed for the pool must be revegetated in trees.

Proposed Local Program Amendment

FILE NO: DC-A 15

JURISDICTION: Dorchester County

TYPE: Growth Allocation/Land Reclassification for
a Residential Subdivision (Beagle Run/Vaughan)

ALLOCATION: 6.3 acres requested

RECLASSIFICATION: RCA to LDA

REASON: To allow residential development at higher
density than currently allowed

LOCAL STATUS: Subsequent to local public hearing, an award
of growth allocation was granted by the
Dorchester County Commission

DESCRIPTION: This is one of the 19 interim subdivisions.
The site is located on Town Point Road,
approximately 4.5 miles west of the Cambridge
City Limits. It is in a rural area of farms,
woodlots and scattered houses. There is other
residential development under way in the
vicinity.

The site is---or was until recently---a farm.
The upland site straddles the Critical Area
upland line demarcated from the waters of Smith
Cove, a tributary of the Little Choptank River.
Four lots are proposed. Two of these and a
corner of a third lie within the Critical Area.
Average size of the lots is 3.13 acres. There
are no forests or woodlands on the site,
although there is forest immediately adjacent
on the north and east sides. There are no
apparent HPAs: there is no Buffer (as the site
is not on the water); no nontidal wetlands; no
documented habitat.

Staff visited the site on June 1, 1990.

LOCAL PANEL

HEARING: June 11, 1990/7:30 p.m./Cambridge

CBCAC ACTION BY: July 19, 1990

PANEL

RECOMMENDATION: To approve.

STAFF: Tom Ventre

PROPOSED LOCAL PROGRAM AMENDMENT

FILE NO: DC-A 16

JURISDICTION: Dorchester County

TYPE: Growth Allocation/Land Reclassification for a Residential Subdivision (Frey/Sherman's Landing)

ALLOCATION: 30.58 acres requested

RECLASSIFICATION: RCA to LDA

REASON: To allow residential development at higher density than currently allowed

LOCAL STATUS: Approved by Dorchester County Commission, March 20, 1990

DESCRIPTION: This is one of Dorchester's 19 interim subdivisions. Critical Area assessment approved locally May, 1988. Four lots are proposed.

Formerly a farm, this site is situated directly on the Choptank River on the south shore at a bend upstream from Cambridge. In the vicinity are scattered houses, small farms and farm-estates.

The site is flat upland, cleared of all forest/woodland vegetation except for a ribbon of trees and shrubs. The river side of the triangular site is 1,350 feet long. There is a wetland along part of the river shoreline which turns inland along the southern edge of the property.

The site has been cleared of all woodlands, trees and shrubs, except for the ribbon of trees and shrubs noted above, and a double row of trees planted on both sides of the gravel driveway. The fields have reverted to wild grasses and weeds. The shoreline is undisturbed, except for the clearance of trees and shrubs, and a 200-foot section of timber bulkheading. The slope of the shoreline is very gradual; there is minimal erosion. Grasses

DUER

appear to be re-establishing themselves. There is no wooded Buffer. There are no nontidal wetlands or riparian forest/woodlands. There are no landside or upland habitat-protection areas.

There are structures on the site: an old house being renovated; several small sheds; a second, smaller house; a barn-garage.

SITE VISIT: Staff visited the site on Friday morning, June 1, 1990.

LOCAL PANEL HEARING: Monday, June 11, 1990/7:30 p.m./Cambridge

PANEL RECOMMENDATION: To approve.

STAFF: Tom Ventre

PROPOSED LOCAL PROGRAM AMENDMENT

FILE NO: DC-A 17

JURISDICTION: Dorchester County

TYPE: Growth Allocation/Land Reclassification
(Spiros Pallas)

ALLOCATION: 30.5 acres requested

RECLASSIFICATION: RCA to LDA

REASON: To allow residential density greater than
currently allowed

LOCAL STATUS: Interim subdivision; growth allocation approved
by Dorchester Commissioners, March 20, 1990

DESCRIPTION: This is one of the 19 interim subdivisions
in Dorchester County. Four residential lots
are proposed.

The site is an old farm. There are no forests or woodlands on the site. There is a forested area to the east. The site---and each of the four proposed lots---lies between the north side of Hooper Neck Road and the Little Choptank River. An agricultural drainage ditch is on the west property line.

There is a tidal marsh along most of the river shoreline. Topography is low and flat. There is some erosion/accretion, but it is highly localized. There are large shrubs and scattered trees along the wetland edge; otherwise the Buffer has no tree/shrub vegetation, having been cleared for farming. There are no habitat-protection area issues on the site: Buffer; nontidal wetlands; forest/woodland habitat.

There are structures on the site, but these are vacant and not in use: a two-story frame dwelling; a shed; a one-bay garage; at least two duck blinds.

The duck blinds appear derelict; nevertheless, their presence suggests a near-shore waterfowl staging/concentration area.

DUER

There are several small farms and tree farms in the vicinity. There are small communities of houses in the vicinity as well, but these are not adjacent to this site.

SITE VISIT: Staff visited the site on Friday, June 1, 1990.

LOCAL PANEL HEARING: Monday, June 11, 1990/7:30 p.m./Cambridge

PANEL RECOMMENDATION: To approve.

STAFF: Tom Ventre

PROPOSED LOCAL PROGRAM AMENDMENT

FILE NO: SO A-2

JURISDICTION: Somerset County

TYPE: Growth Allocation/Land Reclassification
for residential subdivision (Vessey/Megan's
Lots)

ALLOCATION: 20,000 sq. ft.

RECLASSIFICATION: RCA to LDA

REASON: To create two residential lots

LOCAL STATUS: Approved by County Commissioners subsequent to
public hearing, April 10, 1990

DESCRIPTION: The Vessey property is a large, active farm on
the south side of Maryland Route 667 (Rehobeth
Road) in southeastern Somerset County. The farm
lies on the north shore of the Pocomoke River,
where the River makes several bends, about five
miles downstream from Pocomoke City.

Directly across the River from the Vessey farm
to the south and southeast (in Worcester County)
is the Hickory Point Cypress Swamp, identified
by the Maryland Forest, park and Wildlife
Service as a Natural Heritage Area. The Natural
Heritage Areas Atlas describes it as "...one of
the best examples in the State of a Southern
Bald Cypress Swamp..." The Atlas shows a
forested tract on the Vessey property to be
within the identified Natural Heritage Area.

The specific site that is the subject of this
growth allocation/reclassification amendment
request is currently a farm field. It is flat
upland, cleared of all vegetation except for
what is planted. A windbreak of trees and
shrubs lies along the western side of the field,
from the River to the unpaved road along the
northern side of the site. An old wood tractor
shed is at the southwestern corner of the site;
it is overgrown and not in use. Adjacent to the
southeastern corner is a house of recent
construction, the residence of one of the Vessey
children who operates the farm.

(There are several buildings on the farm---
sheds, garages, chicken houses, at least two
mobile homes---but these are not close to this

DVER

site. The most notable building is a house built circa 1790 which is now the Vessey residence; it is a very good example of the late Georgian style.)

Along the River at the southern side of the site, the flat upland slopes down to the River. The entire slope is in a natural state, undisturbed and densely overgrown between the River and the top of the slope. Among the trees are very large, mature cypress.

Neither the degree nor ratio of the slope could be determined in the field. The USGS quadrangle map (Kingston, MD) which includes this area of Somerset indicates that the elevation at the top of the slope and the entire upland beyond is fifteen feet (15') above sea level. The entire slope may fall within the 100-foot tidewater Buffer demarcated from the River's edge; whether it does could not be determined in the field. Thus, there may be a question about where the Buffer line falls, and whether the Buffer should be expanded to include any portion of the slope that may lie beyond one hundred feet.

This is a rural area of farms, and features typical rural land-use patterns of houses along the roadways. To the west and southwest of the Vessey farm is the village of Rehobeth, which is classified as a Limited Development Area (LDA) by Somerset County.

Other than the Buffer question described above, there are no issues with this site.

SITE VISIT: Staff visited the site on Wednesday afternoon, June 13, 1990.

LOCAL PANEL
HEARING: Monday, July 9, 1990/7:00p.m./Princess Anne

CBCAC ACTION BY: August 11, 1990

PANEL
RECOMMENDATION: To approve.

STAFF: Tom Ventre
Claudia Jones

PROPOSED LOCAL PROGRAM AMENDMENT

FILE NO: SOA-3

JURISDICTION: Somerset County

TYPE: Text Changes to Local Program Document &
Ordinances

ALLOCATION: N/A

RECLASSIFICATION: N/A

REASON: To bring Program/Ordinances into compliance and
conformance with Regulations & Policies

LOCAL STATUS: These negotiated changes accepted and approved
by Somerset County Commissioners on April 10,
1990. Request to approve received May 9, 1990.

DESCRIPTION: The Chesapeake Bay Critical Area Commission and
Somerset County have sought to reconcile,
through negotiation at the technical staff
level, a number of inconsistencies that remained
between the Commission's established critical
area regulations, criteria and policy, and
wording in the County's Critical Area Protection
Program. These staff level discussions were
established as part of a parliamentary motion
of the Commission (made at its August 17, 1988
meeting) that gave tentative approval to the
balance of the County's program. The discussion
focussed on seven major issues: 1) delineation
of Limited Development Areas (LDA's); 2)
language style; 3) Buffer management; 4) forests
and developed woodlands; 5) agriculture; 6)
habitat protection programs; and 7) growth
allocation.

The staff discussions took place intermittently
throughout 1989, culminating in the meeting
between the Commission Chairman, this panel and
Somerset County staff on the issues of growth
allocation, specifically the manner of
calculating the area to be deducted from the
local growth-allocation reserve.

Since November, 1989, Somerset County has
redrafted its program to incorporate new
language, and to bring the overall local program
into closer compliance with regulatory
requirements. The County Commissioners formally
accepted and approved the changes in April,
1990.

OVER

LOCAL PANEL

HEARING: July 9, 1990

CBCAC ACTION BY: August 11, 1990

PANEL

RECOMMENDATION: To approve.

STAFF: Tom Ventre



DORCHESTER COUNTY HEALTH DEPARTMENT

TELEPHONE: (301) 228-3223
ENVIRONMENTAL HEALTH DIVISION
(301) 228-1167

751 WOODS ROAD
CAMBRIDGE, MD 21613

LEEROY G. JONES, M.D., M.P.H.
HEALTH OFFICER

May 23, 1990

RECEIVED

MAY 25 1990

Mr. Richard McCauley, Esq.
11317 Buckleberry Path
Columbia, Maryland 21044

DNR
CRITICAL AREA COMMISSION

Re: McCauley Subdivision Status
MBP: 38-10-30

Dear Mr. McCauley,

This letter is in response to a letter from Andrews, Miller & Associates, Inc. dated May 14, 1990. They have requested that I review the approval process for land evaluation situations, specifically as they relate to your site.

The Dorchester County Health Department is delegated the authority to review, disapprove, or approve Land Evaluation requests. This authority is delegated by the Maryland Department of the Environment (MDE). The COMAR regulations involved are 26.04.02 (land evaluation) and 26.04.03 (subdivision requirements). There are other regulations that may be applicable depending upon a specific request, for instance shared facility regulations. When the current COMAR 26.04.02 regulations were adopted they provided for each jurisdiction to promulgate a Groundwater Protection Report (GPR). The purposed of that report was to delineate areas of the county into sewage management areas. A GPR was prepared for Dorchester County and subsequently approved by the local County governing body and MDE. GPR requirements are incorporated in the review process along with the noted COMARs.

The Dorchester County GPR provides for four sewage management areas. Your site is located in the B1 area which allows groundwater penetration techniques to be considered. Elevated tile sand lined trenches and bermed infiltration ponds are two of those techniques.

Individual residential lot development is exempt from MDE groundwater discharge permit requirements. Shared facility developments are an exception. By agreement with MDE, groundwater discharge permits are required where a shared facility waste disposal system will serve five (5) or more lots. The local department at it's discretion may require a groundwater discharge permit for a shared facility with four (4) lots or less. We have not generally done so. In addition the department also requires a state construction permit for sewage effluent transmission lines where the shared facility will served five (5) or more lots. The construction permit is also required for four

McCauley
5/23/90

(4) or less lots when the sewage effluent lines are shared and do not use individual transmission lines.

Your subdivision proposal does not require a specific groundwater discharge permit nor a separate state construction permit issued by MDE. Any sewage disposal permit or construction permit issued by this department under the COMAR regulations is in fact a state permit to construct.

The land evaluation approval process is straightforward. The department requires a request to be filed. The site is reviewed and tested in the appropriate time of year using the applicable COMAR regulations and the GPR. If the site meets the requirements, it is approved. It may be platted and recorded at this point. Septic system and well permits will be issued upon request after the plat is recorded. It is not unusual for septic and well permits to be issued several years after plat recording. Obviously there are additional county agencies involved in the platting process dealing with other than sewage and water supply issues. A plat is not recorded until all requirements of those agencies are met. The local Planning and Zoning agency functions as the coordinator of this process.

The department may modify the process concerning sewage and water supply issues for site specific reasons. In your particular case, the department has approved the sewage reserve areas detailed on the preliminary plat submittal. Those approvals were based on the department's site evaluations and further evaluations and report by Earth Data Inc., a hydrogeologic firm. Due to site specific construction constraints identified and noted in those evaluations, the department has required that engineered sewage system plans be submitted for approval. The department will not grant final approval of your plat until those sewage system plans are submitted and approved by this department. The plans will be noted and referenced on your final approved plat.

At such time that the sewage system plans are approved and referenced on the plat, the department will notify the Planning and Zoning office that it is ready to sign the mylar. Assuming all other involved agencies are also ready to sign the mylar, the plat could then be recorded. The department would then countersign the building permits and issue water and sewage permits upon your request.

I hope this serves to clarify the department's involvement in the platting process. Should you have any questions regarding the process or status of this site, please feel free to contact me (301-228-1167).

McCauley
5/23/90

Sincerely,

Stacy A. Beauchamp Jr., RS

Stacy A. Beauchamp Jr., RS
Director
Environmental Health Division

cc: Steve Dodd, Planning and Zoning Office
Greg Moore, Andrews, Miller & Assocs., Inc.
✓ Tom Ventry, State Critical Area Commission



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McCauley
5/23/90

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McCauley
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McCauley
5/23/90

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Stacy A. Beauchamp Jr., RS

Stacy A. Beauchamp Jr., RS
Director
Environmental Health Division

cc: Steve Dodd, Planning and Zoning Office
Greg Moore, Andrews, Miller & Assocs., Inc.
✓ Tom Ventry, State Critical Area Commission

FAX COVER SHEET

DATE: 7/6/90

TO: Judge John C. North, II FAX NUMBER: 974-5338
Critical Areas Commission

LOCATION: Annapolis, Md

FROM: Bob Schaeplin

LOCATION: Office of Research
State of Maryland
Department of Economic and
Employment Development
Redwood Towers
217 E. Redwood Street
Baltimore, MD 21202

FAX NUMBER: (301) 333-8298

CONFIRM NUMBER: (301) 333-6947

MESSAGE: This is a draft. Please
review and call me if you have
any comments. This memo will
be distributed at our next
committee meeting Wednesday

THIS IS THE FIRST OF 4 PAGES.

DRAFT

TO: The Honorable John C. North, II
Chairman

FROM: Robert N. Schoeplein
Chair, Dorchester County Panel

DATE: July 6, 1990

SUBJECT: Reconsideration of the McCauley Property Decision

The Dorchester County Panel on a re-visitation to the McCauley property and in consultation with county officials and professionals at the site recommends:

the Commission approve Dorchester County Program Amendment number 13, identified as the McCauley property.

The McCauley property in southern Dorchester County was revisited on the afternoon of June 11, 1990 by the following persons:

Commissioners, Dorchester County Panel:

Robert N. Schoeplein
Shepard Krech, Jr.
Samuel Y. Bowling
William J. Bostian
Robert Price
Ron Kreitner

and Commissioners:

Kay Langner
James E. Gutman
G. Steele Phillips

Commission staff:

Tom Ventre
Claudia Jones
Liz Zucker

plus

Wayne Asplen, MD. Dept. of the Environment
Stacy A. Beauchamp, Dorchester Co. Health Dept.
Gene Skinner, Soil Conservation Service
Gregg Moore, Andrews Miller & Associates

7-6-90

Messrs. Price and

Kreitner are members

of the Dorchester Panel,

but were not present at

the June 11th field visit.

DRAFT

The Honorable John C. North, II
Page 2

The Dorchester County Panel previously had voiced several questions regarding the McCauley property. The turning issue is that of water quality with specific regard to sewage effluent.

The elevations of the proposed McCauley subdivision are reported at the April 23, 1990 panel hearing as "from 1.2(feet) to three and a half (feet) in the middle. Anywhere between there all over the property."

The subdivision map identified for the 4 proposed lots two proposed 10,000 square feet Sewage Reserve Areas (S.R.A.) and one existing 20,000 square feet shared SRA. The National Oceanic and Atmospheric Administration (NOAA) confirmed that portions or the entirety of the land in question can be covered by exceptionally high tides, six or more times each year as indicated by annual data.

The panel at the April 23, 1990 hearing expressed some concern that an in-ground sewage treatment system would work under the circumstances of a high water table, low land elevation and exposure to storm effects. Mr. Moore (Andrews, Miller and Assoc.) did indicate, "Sewage disposals to be by underground trench systems that have been approved by the Dorchester County Health Department and they're basically shown on this plan." The panel had no item on record from the Dorchester County Health Department or the Maryland Department of the Environment to indicate that a sewage system had been reviewed and approved, however.

The panel recommended on May 2, 1990 that the Commission do not approve the McCauley growth allocation request.

The Commission then received an information copy of a May 23, 1990 letter from Stacy Beauchamp, Jr. of the Dorchester County Health Department to Mr. Richard McCauley. That letter discussed in some detail the State and Dorchester County approval process for sewage effluent. Mr. Beauchamp notes regarding his Department response to a request for land evaluation approval, "The site is reviewed and tested in the appropriate time of the year using the applicable COMAR regulations and the GPR. If the site meets the requirements, it is approved. It may be platted and recorded at this point, septic system and well permits will be issued upon request after the plat is recorded.

DRAFT

The Honorable John C. North, II
Page 3

It is not unusual for septic and well permits to be issued several years after plat recording."

The Dorchester County Health Department following the above procedure had approved prior to April 23, 1990 the sewage reserve areas detailed on the preliminary plat submittal.

Mr. Beauchamp's May 23 letter further notes, "Due to site specific construction constraints identified and noted in those evaluations, the (Dorchester County Health Department) department has required that engineered sewage system plans be submitted for approval. The department will not grant final approval of your plat until these sewage system plans are submitted and approved by this department."

The unique construction of such a septic system that can be expected to be covered in part or in entirety by Bay waters on occasions of exceptionally high tides was explained and illustrated to Commissioners on the June 11, 1990 site visit to the McCauley property. The type of system is described as an "elevated tile, sand-lined trench system." This trench system is covered by 6 inches to 8 inches of clay cap. A septic system vent pipe is installed through the clay cap and rises about 3 feet above the level of the surface. In this fashion there is no commingling of effluent and waters at times when the septic system can be exceptionally high tides.

The engineering details for such a sewage system must be submitted to and approved by the Dorchester County Health Department some time in the future before final approval of the plat is granted.

Dorchester County Panel at this time accepts the detailed explanations by Mr. Beauchamp and others regarding this type of septic system construction under such circumstances of the McCauley property. All other alterations of the property by Mr. McCauley were completed under permit and prior to any dates that might now prohibit such activities.

The Dorchester County Panel recommends approval of the McCauley property.

RICHARD G. McCauley
11317 Buckleberry Path
Columbia, Maryland 21044

May 17, 1990

The Honorable John C. North II
Critical Area Commission, Chairman
West Garrett Place - Suite 320
275 West Street
Annapolis, Maryland 21401

RE: Dorchester County Growth Allocation
McCauley Inter-family Subdivision
Ragged Point Road, Cambridge

Dear Judge North:

This letter is written to the Commission to request reconsideration of action taken at its last meeting in not approving Dorchester County's approved growth allocation for a proposed subdivision (the "Subdivision") of the above-referenced property (the "Property") owned by Richard G. and Jane V. McCauley (the "Owners").

This request for reconsideration is made because it is believed that certain of the documentary evidence and testimony presented at an initial local subpanel hearing held in Cambridge either was not subsequently presented or its substance otherwise was not fully communicated to or was not fully understood by the full Commission. It would appear that this may have occurred because of mistaken understandings of the status of the Subdivision and the Property and the various governmental reviews and approvals which previously had taken place relating to them.

RECEIVED

MAY 21 1990

DNR
CRITICAL AREA COMMISSION

I. Procedural Posture

The Subdivision under review is part of a submission by Dorchester County of 19 interim subdivisions which were filed with the County Office of Planning and Zoning (but did not receive final subdivision approval) before the effective date of the Dorchester County Chesapeake Bay Critical Area Protection Program (the "Dorchester Program"). As part of the text of the Dorchester Program approved by the Commission by way of amendment to the Dorchester Program in December of 1988, the Commission expressly agreed with Dorchester County that it could reserve growth allocation for the developable acres included in these interim subdivisions (thereby reducing the County's total amount of available growth allocation acreage allotment by a like number of acres), subject to subsequent individual review by the Commission for compliance with and amendment to the Dorchester Program. See, Dorchester Program, Vol. I, Chapter IV at p. 39.

Prior to full Commission review on May 2, 1990 in Annapolis, an initial local hearing was held in Cambridge on April 23, 1990. The local hearing was conducted by three members of a Commission subpanel. As indicated by Commission staff, the subpanel members and certain staff members had toured part (but not all) of the Property and, Commission staff has advised, had taken certain soil samples. At the hearing, the subpanel received testimony by Mr. Stephen Dodd, Director of Planning and Zoning for Dorchester County, as well as a representative of the

Owners, Mr. Gregory Moore of the consulting engineering firm of Andrews, Miller & Associates of Cambridge. This engineering and planning firm has performed the engineering, surveying and permitting work for the Owners over the course of the subdivision process. This process formally began in August of 1988 when the Subdivision Plat, as modified to date (copy enclosed), was filed requesting approval of a four-lot inter-family subdivision, which, after the Dorchester Program subsequently became effective, was located in an area to be designated as a Resource Conservation Area.

II. Background

The Property consists of some 26+ areas, with a cottage located on it. This cottage was built in the 1970's and was part of the Property when the current Owners purchased it in the fall of 1987. The cottage is built on stilts and is located relatively near to a bulkheaded adjoining cove. It was subsequently improved by the Owners in its original location pursuant to building permits issued prior to the effective date of the Dorchester Program. Roads were constructed on the Property complying with all applicable State and local law, also pursuant to permits issued before the effective date of the Dorchester Program.

Both the cottage and the Property are used by the Owners, their children and grandchildren as a weekend and vacation retreat. The proposed inter-family subdivision is

intended to restrict ownership of the Property to the immediate family of the Owners who will continue to use the Property as a vacation retreat. The purpose of subdividing the Property is to enable the Owners to transfer a lot to each of their children; whether any of them will ever build a vacation cottage on the Property is highly uncertain.

At the Cambridge hearing, the subpanel was concerned that the cottage was newly located and built in its current location after adoption of the Dorchester Program. This was not accurate as the cottage had been in its current location for many years.

The Property contains both wetlands and uplands (non-wetlands), and, of its 26+ acres, some 10.3 acres are within the growth allocation development envelope, located in compliance with all required buffer areas under the State Critical Areas program and implementing laws. The areas which are wetlands, comprising some 13 - 15 acres, are designated by lines drawn on the Subdivision Plat, pursuant to both U. S. Corps of Engineers determinations and the set-back buffers established under State wetlands maps and delineations (see Notes 4 and 5 on Subdivision Plat).

At the Cambridge hearing, the subpanel was concerned that there were wetlands on the Property (which is accurate) but that there might be future building within wetlands or buffer areas (not accurate); that apparently the U. S. Corps had

declined jurisdiction over the wetlands on the Property (not accurate); that location of on-site sewer facilities would damage water quality standards (not accurate); that the State Health Department had not approved the proposed sewer facilities (not accurate); and that Dorchester County, in approving the Property as part of its County growth allocation under the Dorchester Plan, was required to establish a 300 foot wetlands set-back when designating growth allocation Limited Development Areas within a Resource Conservation Area (not accurate).

Through discussions with Commission staff and its counsel, it is understood that these concerns formed the basis for the Commission's actions on May 2nd. A discussion of each follows:

III. Discussion of Commissions Concerns

1. Wetlands Determinations.

(a) The Property under review contains wetlands as well as upland land which is not wetlands. The Subdivision Plat contains a surveyed line (see Note 5) showing where, in 1988, the U. S. Army Corps of Engineers located wetlands as part of a two-day thorough inspection of the Property. Pursuant to a request made by the Owners in November, 1989, the U. S. Corps, by letter dated March 14, 1990, (copy attached) expressly reaffirmed their previously designated wetlands line showing the limits of, wetlands and non-wetlands. In addition, the Subdivision Plat locates a set back line (see Note 4) required to meet buffer

requirements under the State and local Critical Areas Programs. The document which the Corps referred to in its letter is the Subdivision Plat as originally filed with Dorchester County dated August 18, 1988.

(b) The U. S. Corps of Engineers did not decline jurisdiction over the Property -- only over the non-wetlands portion (as they would be required to do under applicable federal regulations). Indeed, the Corps, which at all times relevant to the events outlined here had jurisdiction and responsibility for designating and permitting both tidal and non-tidal wetlands, expressly reaffirmed their prior determination that part of the Property, as shown by the line denoted by Note 5, was wetlands but that land beyond that designated line was not wetlands (hence not subject to their regulatory tidal and non-tidal wetlands jurisdiction under Section 404 of the Clean Water Act).

(c) No development could now or in the future occur in any wetlands area or within the applicable buffer zones on the Property, as any such development would have to comply compliance with the Critical Area Program or applicable local law implementing the Dorchester Program.

(d) Questions from Commissioners were raised at the local hearing concerning the presence of hydric soils on the Property which they ascertained were present when they toured the Property before the hearing. As the Commission is aware, a major portion of the land mass area of Dorchester County has hydric

soils, and some but not all of the soil on the Property is hydric. This is clearly shown on State wetlands and soils maps, was so indicated on the map of the Property and its soils included as part of the Critical Area Assessment filing made by the Owners with the County in the ordinary course of subdivision processing, and these were supplemented by more definitive wetlands delineations made by the U. S. Corps. However, the presence of hydric soils on this Property does not mean that all areas having hydric soil are necessarily "non-tidal wetlands." Indeed the predominant presence of hydric soil is only one of the three required elements specified under the non-tidal wetlands definition adopted by the Commission in the Dorchester Program (predominance of hydric soil; prevalence of hydrophytic vegetation; and hydrology and inundation), all of which must be simultaneously present in order to be designated as "non-tidal wetlands." See, Dorchester Program, Vol. I, Chapter III, at pages 16 and 22 (copy enclosed); and see, Volume II, Appendix A, Dorchester County Subdivision Regulations S.155-47a., reiterating and incorporating this definition.

Determinations of whether land is or is not "non-tidal wetlands" are difficult at best, and should be made by trained wetlands experts only after close inspection and testing. Certainly the Critical Areas law does not contemplate that these kinds of decisions be made by the Commission or its staff by de novo, on-site reviews of a County's determinations in

administering its approved Critical Areas Program. Rather the applicable provisions of the Dorchester Program require that Dorchester County make these determinations by reference to State and Critical Areas maps; and if these maps are not to be determinative, the text of the Dorchester Program indicates that then they should be made by new information provided by "qualified experts from the private sector" or "appropriate agency personnel." In this instance, State tidal and non-tidal wetlands map information relating to the Property had been filed with the County as part of the Property's Critical Area Assessment and were supplemented by detailed determinations that had been previously made and then were reaffirmed in April of 1990 by the U. S. Corps of Engineers, an appropriate agency in making wetlands determinations and historically one of the principal agencies having expertise in making non-tidal wetlands determinations.

(e) The Owners were advised by Commission staff after the May 2nd hearing that, on the day of the local hearing, certain soil samples were taken at unspecified places on the Property and that parts of the Property (but not all of it) were toured. None of the results of those soil samples or related findings were introduced at the local hearing, nor was there testimony as to the extent or lines of demarcation of any wetlands delineations around the 26± acre Property, nor was there any testimony as to the qualifications of the testing personnel.

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It would be inappropriate to deny growth allocation here on the basis of a Commission concern regarding the presence of "non-tidal wetlands" for several reasons:

(1) If they are to be relied upon by the Commission, fairness should require that Dorchester County and the Owners be afforded an opportunity to review any samples or other findings to assure that the three-pronged definitional test of non-tidal wetlands was met, to review the accuracy of these tests and to verify the extent, if any, of their applicability to the specific areas designated by the U. S. Corps as non-wetlands as shown on the Subdivision Plat; and

(2) Not all of the Property was reviewed (including, for example, the north end) and hence any generalized determination as to non-tidal or other wetlands necessarily would be incomplete and inappropriate when applied to the entire Property;

(3) As a matter of orderly administration of the Critical Areas Program, a practice of individual property testing by the Commission would inject the Commission into the County's area of responsibility under the approved Dorchester Program, and would form the basis for an inappropriate and unworkable precedent for other Maryland counties in their relationship to the Commission in administering approved critical area programs.

2. On-site Sewer Facilities.

(a) The Subdivision Plat designates several Reserved Areas for on-site sewer facilities. These have been located in non-wetlands areas in compliance with the Critical Areas Program set-back buffer requirements. The Owners and their engineers, Andrews, Miller & Associates, have worked closely with the State Department of Health in assuring that the Property properly utilizes on-site sewer facilities, meeting all State and local water quality standards. In this connection, detailed testing of the Property, subsurface water levels, soil conditions and conductivity were performed by soils experts as required by the State Health Department. After reviewing these test results, the State Health Department (Cambridge office) gave preliminary approval, and Dorchester County, in administering its responsibilities under the approved Dorchester Program, approved the Subdivision for growth allocation. ? authority

(b) Under the approved Dorchester Program, growth allocation reviews and approval are required to be held by Dorchester County and by the Critical Areas Commission before the final subdivision plat is recorded. See, Dorchester Program, Vol. II, Appendix B., S-140-51E(2). Under Dorchester County subdivision regulations, formal execution by the State Health Department of the final subdivision plat will not occur until after final plat review and approval, just before the final plat is recorded. Hence, an interim subdivision plat, such as the

Subdivision being reviewed in this case, necessarily will not have this final State Health Department signature on the plat when reviewed by the Commission for growth allocation approval. As previously indicated, however, to have moved to the growth allocation approval stage, the State Health Department was required to have reviewed and given preliminary approval of the adequacy of water quality standards, location and sewer design.

(c) It should be noted that a number of on-site sewer facilities have been located and previously constructed, as well as several approved for future construction, on a number of lots adjoining the Property having the same water table and soil conditions within the applicable Resource Conservation District as approved by the State Health Department. There are no out-of-the-ordinary water quality issues presented here that would not be presented in any subdivision approval for a 20+ acre lot in this RCA district (which concededly would not be the subject of Commission review). The only difference here is the size of the lot on which the sewer facility would be located; in both cases, whether the lots in question were 20 or 5 acres in size, they would have to meet the same water quality standards. Indeed, all water quality standards as contemplated by the Critical Area Program will be met on the Property, as they will be for all future on-site sewer facilities which will be approved in the ordinary course in the surrounding RCA district under the normal administration of the Dorchester Program.

3. Growth Allocation Criteria Relating to Designation
by Dorchester County of Limited Development Areas within Resource
Conservation Areas in the County.

(a) Commission regulation, COMAR Section 14.15.06B, contains several guidelines which it specifies local jurisdictions should use in locating Limited Development Areas. Mr. Dodd, Director of Planning and Zoning for Dorchester County, testified on the record at the April 23, 1990 local hearing held in Cambridge that the County in fact considered these guidelines in approving each of the 19 interim subdivisions included in its growth allocation but did not require adherence to the 300 foot setback guideline set forth in Subsection B(6). In this connection, it should be noted that Subsection B(6) of Section 14.15.06, relating to locating Limited Development Areas at least 300 feet beyond the landward edge of wetlands, is not a mandatory requirement. In fact, the substance of this Subsection was not included among the planning criteria set forth in the Dorchester Program which the Critical Area Commission approved. See, Dorchester Program, Vol. I, Chapter IV.B.3. Distribution of Permitted Growth Allocation, at page 37. Further, staff of the Commission and Mr. Dodd apparently concur that Subsection B(6) is a discretionary criteria and the wording of that provision bears this out ("...should locate"). Moreover, Mr. Dodd has advised that other Dorchester County interim subdivisions and approved growth allocation plats for other subdivisions have previously

been approved both by Dorchester County and the Critical Area Commission as amendments to the Dorchester Program where, in accordance with the Dorchester Program, LDA subdivisions were located within RCA districts and the 300 foot setback guideline was not required. This determination is entirely permissible under the Dorchester Program as part of the exercise of the County's authorized discretion in locating development areas for growth allocation purposes.

(b) The Owners have been advised by Mr. Dodd that, in compliance with the Dorchester Program, the Subdivision was approved by the County pursuant to the discretionary authority provided to it under the Dorchester Program to locate an LDA within a RCA; that he so testified at the local hearing; and that he has confirmed this in his communications with the Commission.

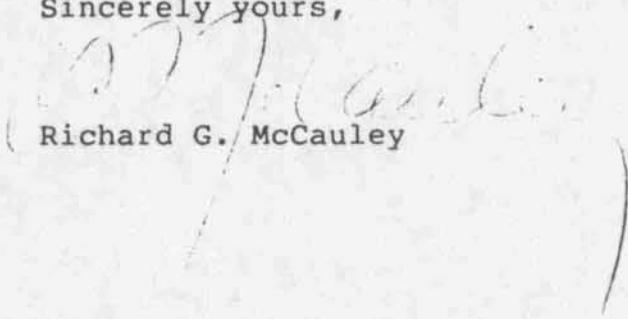
For the reasons outlined above, we believe that as a matter of fairness and to preserve the orderly administration of the Dorchester Program and other critical area programs for other Maryland counties, the Commission should reconsider its action in not approving Dorchester County's approval of this Property for growth allocation. The Owners are very sensitive to the requirements of the Critical Area Program and have taken extensive steps to provide for and obtain all necessary approvals to comply with the Program and adhere to water quality standards in compliance with all applicable requirements. While the concerns of the Program are taken very seriously, it does not

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The Honorable John C. North II

appear that there are any highly unusual Critical Area issues present here. Moreover the Owners have been advised by the County Office of Planning and Zoning that other subdivisions, having the very same kind of RCA location and wetlands characteristics, have previously been approved by Dorchester County and the Commission for growth allocation amendments to the Dorchester Program.

We therefore request that the Commission reconsider and approve Dorchester County's growth allocation approval of the Subdivision. Mr. Dodd, on behalf of Dorchester County, has requested a meeting with the Commission, its staff and counsel, and me in order to discuss the matters outlined in this letter. I would in all events be very pleased to answer any questions which you or the Commission staff may have before this meeting.

Sincerely yours,


Richard G. McCauley

RGM:mct
Enclosures

cc: Thomas A. Deming, Esq.
Counsel
Critical Areas Commission
Mr. Steve Dodd, AICP
Director, Office of Planning and Zoning
Dorchester County
• Mr. Thomas H. Ventre
Natural Resources Planner
Critical Areas Commission

C. RESOURCE AREAS

Various natural features and resources were required to be mapped in conjunction with development of the Critical Area Protection Program. These Resource Areas include wetlands, streams, forests, agricultural lands, mineral resources, soils with development constraints, and plant and wildlife habitat.

The Critical Area Criteria, together with guidance papers when available, were consulted for resource definitions and mapping guidelines. A thorough literature and data search was conducted to identify sources of information concerning each of the resources, and a series of draft mylar overlays and/or color-coded resource maps were prepared using existing resource information and limited field verification.

These graphics were then drafted into a series of four mylar overlays for each of the 114 tax maps covering the Critical Area, showing the location of each of the resources listed above (table 2). The mapping is at a scale of 1 inch equals 600 feet to correspond to the scale of the existing tax maps. Sample maps are provided as maps 4-7.

1. Wetlands

Dorchester County has extensive tidal and nontidal wetlands within the Critical Area. Tidal wetlands are regularly or periodically inundated by the tide, and are covered by specific types of vegetation. The state of Maryland, under Title 9 of the Natural Resources Article, Annotated Code of Maryland, regulates certain tidal wetlands whose boundaries are shown on the state wetland maps.

Nontidal wetlands may be generally described as those lands, excluding tidal wetlands regulated under Title 9, that have a predominance of hydric soils and that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.*

Nontidal wetlands do not include cropland or areas dominated by existing gravel and borrow pits, farm ponds, and other existing man-made bodies of water whose purpose is to impound water for water supply, recreation, agriculture, or waterfowl habitat purposes.

* All of the following specific conditions must be met in order for an area to be classified as a nontidal wetland:

1. Hydrology (high groundwater, flooding, or ponding), which can be identified in temporarily or seasonally flooded wetlands that do not have standing water for most of the year by some of the following hydrologic indicators: dark stain water marks on tree bark or other objects; black water stained leaves on the soil surface; ice scars on woody vegetation; buttressed tree trunks; and adventitious roots (a root system developed above ground level).
2. A prevalence of hydrophytic vegetation--that is, the percentage coverage of obligate and facultative wet plants exceeds the percentage coverage of facultative upland and upland plants, as determined visually and/or by transects. The Maryland Department of Natural Resources, with the cooperation of the U.S. Fish and Wildlife Service, has developed a publication entitled Vascular Plant Species Occurring in Maryland Wetlands (Dawson and Burke, 1985) which contains the list and definitions for hydrophytic vegetation and its four major categories (obligate, facultative wet, facultative, and facultative upland).
3. A predominance of hydric soils, as defined by the U.S. Department of Agriculture, Soil Conservation Service. In general, a hydric soil is defined as a soil that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions (lacking oxygen), thereby influencing the soil properties that favor the growth and regeneration of hydrophytic (water-loving) vegetation.

For the tidal and nontidal wetlands resource maps, composite maps were made on mylar, using the state wetland maps to map the tidal wetlands and information from National Wetlands Inventory (NWI) maps to map certain categories of tidal and nontidal palustrine wetlands (table 3). The NWI maps were enlarged to the 600 scale by the Shako process, which minimizes distortion, and correlated to the tax maps.

State wetland boundaries were identified first, and palustrine tidal and nontidal forested, scrub/shrub, and emergent wetlands outside of those boundaries were then drawn. Selected field verification, or groundtruthing, was used where information was not complete. Tidal wetlands as shown on the state maps were designated on the wetlands overlay as "W1", additional tidal wetlands as shown on the NWI maps as "W2", and nontidal wetlands as "W3".

Nontidal wetland boundaries may be changed by the Dorchester County Planning and Zoning Office upon presentation of sufficient evidence that an error has been made or new information provided. On-site surveys, by a qualified expert from the private sector or appropriate agency personnel, should delineate wetlands using the criteria described above.

Tributary streams were also mapped as required. Tributary streams are defined as those shown on the U.S. Geological Survey 7.5-minute-series topographic maps. Since those were the base maps for the NWI series, the streams already shown on the tax maps were compared to those on the NWI maps. Streams not found on the tax maps were drawn on the wetlands overlay, using standard notation for perennial and intermittent streams.

2. Forest and Agricultural Resources

Forest and agricultural resources are an important part of the Dorchester County Critical Area. Nearly all of the land is either in forest or agricultural use, except for tidal wetlands and a few small subdivisions and towns.

Four types of forest resources were categorized and mapped. They are shown on an overlay as "F1" (hardwood), "F2" (pine), "F3" (mixed hardwood/pine), and "F4" (developed woodlands). All forests greater than 1 acre in size were mapped.

RICHARD G. McCauley
11317 Buckleberry Path
Columbia, Maryland 21044

May 17, 1990

The Honorable John C. North II
Critical Area Commission, Chairman
West Garrett Place - Suite 320
275 West Street
Annapolis, Maryland 21401

RE: Dorchester County Growth Allocation
McCauley Inter-family Subdivision
Ragged Point Road, Cambridge

Dear Judge North:

This letter is written to the Commission to request reconsideration of action taken at its last meeting in not approving Dorchester County's approved growth allocation for a proposed subdivision (the "Subdivision") of the above-referenced property (the "Property") owned by Richard G. and Jane V. McCauley (the "Owners").

This request for reconsideration is made because it is believed that certain of the documentary evidence and testimony presented at an initial local subpanel hearing held in Cambridge either was not subsequently presented or its substance otherwise was not fully communicated to or was not fully understood by the full Commission. It would appear that this may have occurred because of mistaken understandings of the status of the Subdivision and the Property and the various governmental reviews and approvals which previously had taken place relating to them.

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CRITICAL AREA COMMISSION

I. Procedural Posture

The Subdivision under review is part of a submission by Dorchester County of 19 interim subdivisions which were filed with the County Office of Planning and Zoning (but did not receive final subdivision approval) before the effective date of the Dorchester County Chesapeake Bay Critical Area Protection Program (the "Dorchester Program"). As part of the text of the Dorchester Program approved by the Commission by way of amendment to the Dorchester Program in December of 1988, the Commission expressly agreed with Dorchester County that it could reserve growth allocation for the developable acres included in these interim subdivisions (thereby reducing the County's total amount of available growth allocation acreage allotment by a like number of acres), subject to subsequent individual review by the Commission for compliance with and amendment to the Dorchester Program. See, Dorchester Program, Vol. I, Chapter IV at p. 39.

Prior to full Commission review on May 2, 1990 in Annapolis, an initial local hearing was held in Cambridge on April 23, 1990. The local hearing was conducted by three members of a Commission subpanel. As indicated by Commission staff, the subpanel members and certain staff members had toured part (but not all) of the Property and, Commission staff has advised, had taken certain soil samples. At the hearing, the subpanel received testimony by Mr. Stephen Dodd, Director of Planning and Zoning for Dorchester County, as well as a representative of the

Owners, Mr. Gregory Moore of the consulting engineering firm of Andrews, Miller & Associates of Cambridge. This engineering and planning firm has performed the engineering, surveying and permitting work for the Owners over the course of the subdivision process. This process formally began in August of 1988 when the Subdivision Plat, as modified to date (copy enclosed), was filed requesting approval of a four-lot inter-family subdivision, which, after the Dorchester Program subsequently became effective, was located in an area to be designated as a Resource Conservation Area.

II. Background

The Property consists of some 26+ areas, with a cottage located on it. This cottage was built in the 1970's and was part of the Property when the current Owners purchased it in the fall of 1987. The cottage is built on stilts and is located relatively near to a bulkheaded adjoining cove. It was subsequently improved by the Owners in its original location pursuant to building permits issued prior to the effective date of the Dorchester Program. Roads were constructed on the Property complying with all applicable State and local law, also pursuant to permits issued before the effective date of the Dorchester Program.

Both the cottage and the Property are used by the Owners, their children and grandchildren as a weekend and vacation retreat. The proposed inter-family subdivision is

intended to restrict ownership of the Property to the immediate family of the Owners who will continue to use the Property as a vacation retreat. The purpose of subdividing the Property is to enable the Owners to transfer a lot to each of their children; whether any of them will ever build a vacation cottage on the Property is highly uncertain.

At the Cambridge hearing, the subpanel was concerned that the cottage was newly located and built in its current location after adoption of the Dorchester Program. This was not accurate as the cottage had been in its current location for many years.

The Property contains both wetlands and uplands (non-wetlands), and, of its 26+ acres, some 10.3 acres are within the growth allocation development envelope, located in compliance with all required buffer areas under the State Critical Areas program and implementing laws. The areas which are wetlands, comprising some 13 - 15 acres, are designated by lines drawn on the Subdivision Plat, pursuant to both U. S. Corps of Engineers determinations and the set-back buffers established under State wetlands maps and delineations (see Notes 4 and 5 on Subdivision Plat).

At the Cambridge hearing, the subpanel was concerned that there were wetlands on the Property (which is accurate) but that there might be future building within wetlands or buffer areas (not accurate); that apparently the U. S. Corps had

declined jurisdiction over the wetlands on the Property (not accurate); that location of on-site sewer facilities would damage water quality standards (not accurate); that the State Health Department had not approved the proposed sewer facilities (not accurate); and that Dorchester County, in approving the Property as part of its County growth allocation under the Dorchester Plan, was required to establish a 300 foot wetlands set-back when designating growth allocation Limited Development Areas within a Resource Conservation Area (not accurate).

Through discussions with Commission staff and its counsel, it is understood that these concerns formed the basis for the Commission's actions on May 2nd. A discussion of each follows:

III. Discussion of Commissions Concerns

1. Wetlands Determinations.

(a) The Property under review contains wetlands as well as upland land which is not wetlands. The Subdivision Plat contains a surveyed line (see Note 5) showing where, in 1988, the U. S. Army Corps of Engineers located wetlands as part of a two-day thorough inspection of the Property. Pursuant to a request made by the Owners in November, 1989, the U. S. Corps, by letter dated March 14, 1990, (copy attached) expressly reaffirmed their previously designated wetlands line showing the limits of wetlands and non-wetlands. In addition, the Subdivision Plat locates a set back line (see Note 4) required to meet buffer

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(c) No development could now or in the future occur in any wetlands area or within the applicable buffer zones on the Property, as any such development would have to comply compliance with the Critical Area Program or applicable local law implementing the Dorchester Program.

(d) Questions from Commissioners were raised at the local hearing concerning the presence of hydric soils on the Property which they ascertained were present when they toured the Property before the hearing. As the Commission is aware, a major portion of the land mass area of Dorchester County has hydric

soils, and some but not all of the soil on the Property is hydric. This is clearly shown on State wetlands and soils maps, was so indicated on the map of the Property and its soils included as part of the Critical Area Assessment filing made by the Owners with the County in the ordinary course of subdivision processing, and these were supplemented by more definitive wetlands delineations made by the U. S. Corps. However, the presence of hydric soils on this Property does not mean that all areas having hydric soil are necessarily "non-tidal wetlands." Indeed the predominant presence of hydric soil is only one of the three required elements specified under the non-tidal wetlands definition adopted by the Commission in the Dorchester Program (predominance of hydric soil; prevalence of hydrophytic vegetation; and hydrology and inundation), all of which must be simultaneously present in order to be designated as "non-tidal wetlands." See, Dorchester Program, Vol. I, Chapter III, at pages 16 and 22 (copy enclosed); and see, Volume II, Appendix A, Dorchester County Subdivision Regulations S.155-47a., reiterating and incorporating this definition.

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administering its approved Critical Areas Program. Rather the applicable provisions of the Dorchester Program require that Dorchester County make these determinations by reference to State and Critical Areas maps; and if these maps are not to be determinative, the text of the Dorchester Program indicates that then they should be made by new information provided by "qualified experts from the private sector" or "appropriate agency personnel." In this instance, State tidal and non-tidal wetlands map information relating to the Property had been filed with the County as part of the Property's Critical Area Assessment and were supplemented by detailed determinations that had been previously made and then were reaffirmed in April of 1990 by the U. S. Corps of Engineers, an appropriate agency in making wetlands determinations and historically one of the principal agencies having expertise in making non-tidal wetlands determinations.

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(2) Not all of the Property was reviewed (including, for example, the north end) and hence any generalized determination as to non-tidal or other wetlands necessarily would be incomplete and inappropriate when applied to the entire Property;

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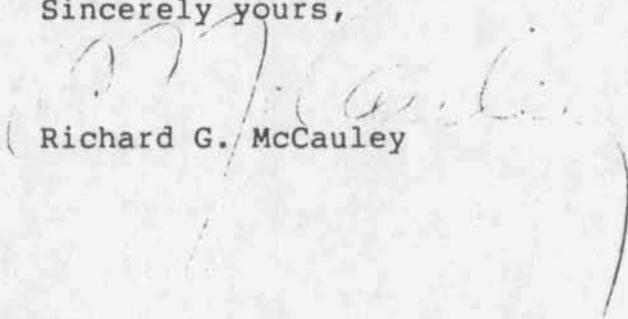
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Sincerely yours,


Richard G. McCauley

RGM:mct
Enclosures

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Counsel
Critical Areas Commission
Mr. Steve Dodd, AICP
Director, Office of Planning and Zoning
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Nontidal wetlands do not include cropland or areas dominated by existing gravel and borrow pits, farm ponds, and other existing man-made bodies of water whose purpose is to impound water for water supply, recreation, agriculture, or waterfowl habitat purposes.

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RICHARD G. McCauley
11317 Buckleberry Path
Columbia, Maryland 21044

May 17, 1990

The Honorable John C. North II
Critical Area Commission, Chairman
West Garrett Place - Suite 320
275 West Street
Annapolis, Maryland 21401

RE: Dorchester County Growth Allocation
McCauley Inter-family Subdivision
Ragged Point Road, Cambridge

Dear Judge North:

This letter is written to the Commission to request reconsideration of action taken at its last meeting in not approving Dorchester County's approved growth allocation for a proposed subdivision (the "Subdivision") of the above-referenced property (the "Property") owned by Richard G. and Jane V. McCauley (the "Owners").

This request for reconsideration is made because it is believed that certain of the documentary evidence and testimony presented at an initial local subpanel hearing held in Cambridge either was not subsequently presented or its substance otherwise was not fully communicated to or was not fully understood by the full Commission. It would appear that this may have occurred because of mistaken understandings of the status of the Subdivision and the Property and the various governmental reviews and approvals which previously had taken place relating to them.

RECEIVED

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DNR
CRITICAL AREA COMMISSION

I. Procedural Posture

The Subdivision under review is part of a submission by Dorchester County of 19 interim subdivisions which were filed with the County Office of Planning and Zoning (but did not receive final subdivision approval) before the effective date of the Dorchester County Chesapeake Bay Critical Area Protection Program (the "Dorchester Program"). As part of the text of the Dorchester Program approved by the Commission by way of amendment to the Dorchester Program in December of 1988, the Commission expressly agreed with Dorchester County that it could reserve growth allocation for the developable acres included in these interim subdivisions (thereby reducing the County's total amount of available growth allocation acreage allotment by a like number of acres), subject to subsequent individual review by the Commission for compliance with and amendment to the Dorchester Program. See, Dorchester Program, Vol. I, Chapter IV at p. 39.

Prior to full Commission review on May 2, 1990 in Annapolis, an initial local hearing was held in Cambridge on April 23, 1990. The local hearing was conducted by three members of a Commission subpanel. As indicated by Commission staff, the subpanel members and certain staff members had toured part (but not all) of the Property and, Commission staff has advised, had taken certain soil samples. At the hearing, the subpanel received testimony by Mr. Stephen Dodd, Director of Planning and Zoning for Dorchester County, as well as a representative of the

Owners, Mr. Gregory Moore of the consulting engineering firm of Andrews, Miller & Associates of Cambridge. This engineering and planning firm has performed the engineering, surveying and permitting work for the Owners over the course of the subdivision process. This process formally began in August of 1988 when the Subdivision Plat, as modified to date (copy enclosed), was filed requesting approval of a four-lot inter-family subdivision, which, after the Dorchester Program subsequently became effective, was located in an area to be designated as a Resource Conservation Area.

II. Background

The Property consists of some 26+ areas, with a cottage located on it. This cottage was built in the 1970's and was part of the Property when the current Owners purchased it in the fall of 1987. The cottage is built on stilts and is located relatively near to a bulkheaded adjoining cove. It was subsequently improved by the Owners in its original location pursuant to building permits issued prior to the effective date of the Dorchester Program. Roads were constructed on the Property complying with all applicable State and local law, also pursuant to permits issued before the effective date of the Dorchester Program.

Both the cottage and the Property are used by the Owners, their children and grandchildren as a weekend and vacation retreat. The proposed inter-family subdivision is

intended to restrict ownership of the Property to the immediate family of the Owners who will continue to use the Property as a vacation retreat. The purpose of subdividing the Property is to enable the Owners to transfer a lot to each of their children; whether any of them will ever build a vacation cottage on the Property is highly uncertain.

At the Cambridge hearing, the subpanel was concerned that the cottage was newly located and built in its current location after adoption of the Dorchester Program. This was not accurate as the cottage had been in its current location for many years.

The Property contains both wetlands and uplands (non-wetlands), and, of its 26+ acres, some 10.3 acres are within the growth allocation development envelope, located in compliance with all required buffer areas under the State Critical Areas program and implementing laws. The areas which are wetlands, comprising some 13 - 15 acres, are designated by lines drawn on the Subdivision Plat, pursuant to both U. S. Corps of Engineers determinations and the set-back buffers established under State wetlands maps and delineations (see Notes 4 and 5 on Subdivision Plat).

At the Cambridge hearing, the subpanel was concerned that there were wetlands on the Property (which is accurate) but that there might be future building within wetlands or buffer areas (not accurate); that apparently the U. S. Corps had

declined jurisdiction over the wetlands on the Property (not accurate); that location of on-site sewer facilities would damage water quality standards (not accurate); that the State Health Department had not approved the proposed sewer facilities (not accurate); and that Dorchester County, in approving the Property as part of its County growth allocation under the Dorchester Plan, was required to establish a 300 foot wetlands set-back when designating growth allocation Limited Development Areas within a Resource Conservation Area (not accurate).

Through discussions with Commission staff and its counsel, it is understood that these concerns formed the basis for the Commission's actions on May 2nd. A discussion of each follows:

III. Discussion of Commissions Concerns

1. Wetlands Determinations.

(a) The Property under review contains wetlands as well as upland land which is not wetlands. The Subdivision Plat contains a surveyed line (see Note 5) showing where, in 1988, the U. S. Army Corps of Engineers located wetlands as part of a two-day thorough inspection of the Property. Pursuant to a request made by the Owners in November, 1989, the U. S. Corps, by letter dated March 14, 1990, (copy attached) expressly reaffirmed their previously designated wetlands line showing the limits of wetlands and non-wetlands. In addition, the Subdivision Plat locates a set back line (see Note 4) required to meet buffer

requirements under the State and local Critical Areas Programs. The document which the Corps referred to in its letter is the Subdivision Plat as originally filed with Dorchester County dated August 18, 1988.

(b) The U. S. Corps of Engineers did not decline jurisdiction over the Property -- only over the non-wetlands portion (as they would be required to do under applicable federal regulations). Indeed, the Corps, which at all times relevant to the events outlined here had jurisdiction and responsibility for designating and permitting both tidal and non-tidal wetlands, expressly reaffirmed their prior determination that part of the Property, as shown by the line denoted by Note 5, was wetlands but that land beyond that designated line was not wetlands (hence not subject to their regulatory tidal and non-tidal wetlands jurisdiction under Section 404 of the Clean Water Act).

(c) No development could now or in the future occur in any wetlands area or within the applicable buffer zones on the Property, as any such development would have to comply with the Critical Area Program or applicable local law implementing the Dorchester Program.

(d) Questions from Commissioners were raised at the local hearing concerning the presence of hydric soils on the Property which they ascertained were present when they toured the Property before the hearing. As the Commission is aware, a major portion of the land mass area of Dorchester County has hydric

soils, and some but not all of the soil on the Property is hydric. This is clearly shown on State wetlands and soils maps, was so indicated on the map of the Property and its soils included as part of the Critical Area Assessment filing made by the Owners with the County in the ordinary course of subdivision processing, and these were supplemented by more definitive wetlands delineations made by the U. S. Corps. However, the presence of hydric soils on this Property does not mean that all areas having hydric soil are necessarily "non-tidal wetlands." Indeed the predominant presence of hydric soil is only one of the three required elements specified under the non-tidal wetlands definition adopted by the Commission in the Dorchester Program (predominance of hydric soil; prevalence of hydrophytic vegetation; and hydrology and inundation), all of which must be simultaneously present in order to be designated as "non-tidal wetlands." See, Dorchester Program, Vol. I, Chapter III, at pages 16 and 22 (copy enclosed); and see, Volume II, Appendix A, Dorchester County Subdivision Regulations S.155-47a., reiterating and incorporating this definition.

Determinations of whether land is or is not "non-tidal wetlands" are difficult at best, and should be made by trained wetlands experts only after close inspection and testing. Certainly the Critical Areas law does not contemplate that these kinds of decisions be made by the Commission or its staff by de novo, on-site reviews of a County's determinations in

administering its approved Critical Areas Program. Rather the applicable provisions of the Dorchester Program require that Dorchester County make these determinations by reference to State and Critical Areas maps; and if these maps are not to be determinative, the text of the Dorchester Program indicates that then they should be made by new information provided by "qualified experts from the private sector" or "appropriate agency personnel." In this instance, State tidal and non-tidal wetlands map information relating to the Property had been filed with the County as part of the Property's Critical Area Assessment and were supplemented by detailed determinations that had been previously made and then were reaffirmed in April of 1990 by the U. S. Corps of Engineers, an appropriate agency in making wetlands determinations and historically one of the principal agencies having expertise in making non-tidal wetlands determinations.

(e) The Owners were advised by Commission staff after the May 2nd hearing that, on the day of the local hearing, certain soil samples were taken at unspecified places on the Property and that parts of the Property (but not all of it) were toured. None of the results of those soil samples or related findings were introduced at the local hearing, nor was there testimony as to the extent or lines of demarcation of any wetlands delineations around the 26± acre Property, nor was there any testimony as to the qualifications of the testing personnel.

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It would be inappropriate to deny growth allocation here on the basis of a Commission concern regarding the presence of "non-tidal wetlands" for several reasons:

(1) If they are to be relied upon by the Commission, fairness should require that Dorchester County and the Owners be afforded an opportunity to review any samples or other findings to assure that the three-pronged definitional test of non-tidal wetlands was met, to review the accuracy of these tests and to verify the extent, if any, of their applicability to the specific areas designated by the U. S. Corps as non-wetlands as shown on the Subdivision Plat; and

(2) Not all of the Property was reviewed (including, for example, the north end) and hence any generalized determination as to non-tidal or other wetlands necessarily would be incomplete and inappropriate when applied to the entire Property;

(3) As a matter of orderly administration of the Critical Areas Program, a practice of individual property testing by the Commission would inject the Commission into the County's area of responsibility under the approved Dorchester Program, and would form the basis for an inappropriate and unworkable precedent for other Maryland counties in their relationship to the Commission in administering approved critical area programs.

2. On-site Sewer Facilities.

(a) The Subdivision Plat designates several Reserved Areas for on-site sewer facilities. These have been located in non-wetlands areas in compliance with the Critical Areas Program set-back buffer requirements. The Owners and their engineers, Andrews, Miller & Associates, have worked closely with the State Department of Health in assuring that the Property properly utilizes on-site sewer facilities, meeting all State and local water quality standards. In this connection, detailed testing of the Property, subsurface water levels, soil conditions and conductivity were performed by soils experts as required by the State Health Department. After reviewing these test results, the State Health Department (Cambridge office) gave preliminary approval, and Dorchester County, in administering its responsibilities under the approved Dorchester Program, approved the Subdivision for growth allocation.

?
authority

(b) Under the approved Dorchester Program, growth allocation reviews and approval are required to be held by Dorchester County and by the Critical Areas Commission before the final subdivision plat is recorded. See, Dorchester Program, Vol. II, Appendix B., S-140-51E(2). Under Dorchester County subdivision regulations, formal execution by the State Health Department of the final subdivision plat will not occur until after final plat review and approval, just before the final plat is recorded. Hence, an interim subdivision plat, such as the

Subdivision being reviewed in this case, necessarily will not have this final State Health Department signature on the plat when reviewed by the Commission for growth allocation approval. As previously indicated, however, to have moved to the growth allocation approval stage, the State Health Department was required to have reviewed and given preliminary approval of the adequacy of water quality standards, location and sewer design.

(c) It should be noted that a number of on-site sewer facilities have been located and previously constructed, as well as several approved for future construction, on a number of lots adjoining the Property having the same water table and soil conditions within the applicable Resource Conservation District as approved by the State Health Department. There are no out-of-the-ordinary water quality issues presented here that would not be presented in any subdivision approval for a 20+ acre lot in this RCA district (which concededly would not be the subject of Commission review). The only difference here is the size of the lot on which the sewer facility would be located; in both cases, whether the lots in question were 20 or 5 acres in size, they would have to meet the same water quality standards. Indeed, all water quality standards as contemplated by the Critical Area Program will be met on the Property, as they will be for all future on-site sewer facilities which will be approved in the ordinary course in the surrounding RCA district under the normal administration of the Dorchester Program.

3. Growth Allocation Criteria Relating to Designation
by Dorchester County of Limited Development Areas within Resource
Conservation Areas in the County.

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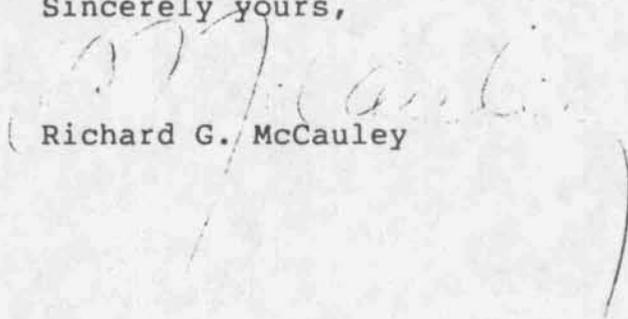
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