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DORIS POULSEN, CMC
Secretary of the Council

February 10, 1992

The Honorable Gunther Hirsch
Mayor, City of Havre de Grace
121 N. Union Avenue
Havre de Grace, Maryland 21078

Dear Mayor Hirsch:

The Chesapeake Bay Critical Area Commission will be holding its March 4, 1992 meeting in Havre de Grace at the Decoy Museum. Subcommittee meetings will be held in the morning starting at 10:30 a.m. followed by the general meeting around 1:00 p.m. Lunch will be served about 12 Noon.

The Commission would very much like to have you and the Council members attend lunch and be present for some special citations from Governor Schaefer. We would also like to have you extend some welcoming remarks before our formal 1:00 p.m. session. Introductions will also be made at that time.

Since the Commission Staff is trying to finalize their plans, please le me know if you and the Council members will attend.

Thank you for your kind consideration of this invitation. I will be looking forward to seeing you all on March 4th.

Best personal regards,

Sincerely,

Philip J. Barker
Councilman, District F

PJB:lc

cc: The Honorable Joseph Kochenderfer
The Honorable James C. Vancherie, Jr.
The Honorable Anna M. Long
The Honorable Philip Angelini
The Honorable John P. Correri, Jr.
The Honorable Rene Lambert
Ms. Peggy Mickler

AGENDA

Chesapeake Bay Critical Area Commission
Decoy Museum
Havre de Grace, Maryland
March 4, 1992

9:30 am – 12:00 pm	Program Amendments Subcommittee	
10:00 am – 11:00 am	MDOT - MOU Subcommittee	
11:00 am – 12:00 pm	Special Issues Subcommittee	
12:00 pm – 1:00 pm	Lunch and Awards of Recognition	
1:00 pm – 1:10 pm	Approval of Minutes of February VOTE	John C. North, II, Chairman

approved

PROJECT EVALUATION

1:10 pm – 1:20 pm	Choptank River Fishing Pier, Shore Erosion Control VOTE	Kay Langner, Chair Sam Bowling, Co-Chair Ren Serey, Planner
1:20 pm – 1:30 pm	Point Lookout State Park St. Mary's Co. Shore Erosion Control VOTE	Ren Serey, Planner

← appd as presented unanim.

require 2:1 mitigation elsewhere in the Park. & proj. mgr by staff.

PROGRAM AMENDMENTS & REFINEMENTS

1:30 pm – 1:45 pm	Queenstown Amendment Boundary Alteration VOTE	Rena Jennings, Intern
1:45 pm – 2:05 pm	Coulbourne's Cove Somerset Co. UPDATE	Bob Price, Jr. Chair Claudia Jones, Planner
2:05 pm – 2:25 pm	Brick Mill Landing Caroline Co. VOTE	Shep Krech, Chair Claudia Jones, Planner
2:25 pm – 2:40 pm	Town of Easton Refinement Londonderry Subdivision	Theresa Corless, Planner – concurrence met as a refinement.
2:40 pm – 2:45 pm	Town of Snow Hill Refinement Impervious Surface –	Theresa Corless, Planner – concurrence met as a refinement.
2:45 pm – 3:10 pm	Queen Anne's County Program - Proposed Changes – VOTE	Claudia Jones, Planner – another meeting suggested by J. Gutman – send a notice to the Co. giving 90 day time frame. Let the Planner come to the next meeting
3:10 pm – 3:30 pm	Anne Arundel County Program – Proposed Changes – Info Item	Anne Hairston, Planner Betsy Cooksey, Bill Wood Landing, Community Assoc.
3:30 pm – 3:45 pm	Calvert County Amendments - Info Item	Dawnn McCleary, Planner

set up a panel to address these

16-2 motion passed

Stuff to bring into consultant what needs to be done

Panel needed – in so far as reviews are concerned.

RECONSIDERATION

3:45 pm – 3:55 pm	Bachelor Point Marina Mapping Mistake Talbot Co. – VOTE	Joe Elbrich, Chair Pat Pudelkewicz, Planner

POLICY

3:55 pm – 4:15 pm	Structures Over Wetlands -VOTE	James Gutman, Chair Liz Zucker, Science Advisor Frank Dawson, Director Tidal Wetland Division
4:15 pm – 4:35 pm	Reconsideration – Update and Comment	Robert Price, Jr., Chair Sarah Taylor

approved based on condition that Corps have no problem with it.

LEGAL UPDATES

4:35 pm – 4:50 pm	Betterton Consent Decree Pier One Wharf at Handy Point – re-argue. Black Marsh – Motion to Dismiss	George Gay, Assist. Atty. Gen.
4:50 pm – 5:00 pm	Old Business New Business	John C. North, II, Chairman

* airports
* MDOT
* 50% cutting
* shore erosion

unanim 18-0 no action yet

app'd. unanim. w/ 2 options.

S. Boul
L Laurence
B. Price
M. Whitson
R Hetherell
L Dubet for Ron Young
S. Keech
C. Watson for P. Glendening
J. C. N. II
P. Barker.
J. Peck
J. Gutman
R- Williams
T. Jarvis
B- Corkran
J. L Hearn
S. Phillips
K. Langner
B. Bostian
B- Schaeffer

CHESAPEAKE BAY CRITICAL AREA COMMISSION
Minutes of Meeting Held
February 5, 1992
45 Calvert Street
Annapolis, MD 21401

The Chesapeake Bay Critical Area Commission met at the Commission Offices, 45 Calvert Street, Annapolis, Maryland. The meeting was called to order by Chairman John C. North, II with the following members in attendance:

William J. Bostian	Russell Blake
Samuel Y. Bowling	Parris Glendening
Joseph J. Elbrich, Jr.	Ronald Hickernell
James E. Gutman	Thomas L. Jarvis
Shepard Krech, Jr.	Kathryn D. Langner
Michael J. Whitson	Roger Williams
Louise Lawrence of MD Dept of Agriculture	Robert Schoeplein of DEED
	Jim Peck, DNR
Ronald Young of Maryland Office of Planning	

The Minutes of the meeting of January 8th, 1992 were read and a **motion was made by Commissioner Bostian, seconded and carried to amend them as follows:** On page four at the top of the page authorizing Judge North, Dr. Taylor and Counsel Gay to move ahead with working out a consent decree and with particular regard to Mr. Bostian's amendment to Mr. Bowling's original motion to be more complete and read as follows: **"to enter a consent decree with any changes along the lines as outlined in the discussion before the Commission of that day".**

Chairman North announced that he had received information by telephone and by mail a letter of resignation (attached to the Minutes) from Commissioner Tony Bruce. Chairman North read the letter.

Commissioner Bostian asked whether Chairman North would consider postponing the acceptance of Mr. Bruce's resignation.

Chairman North stated that he would temporarily delay the acceptance of Mr. Bruce's resignation.

Chairman North asked Ms. Claudia Jones to report on the request for **Refinement by Crisfield.**

Ms. Jones stated that the City of Crisfield has requested that the changes required by House Bill 323 be handled as a refinement. She said that HB 323 is reflective of HB 1060 which allows 25% impervious surfaces for a lot 1/2 acre or less to include lots zoned for residential purposes in addition to lots that are already in residential use. She said that Chairman North had determined them to be refinements.

The Commission supported the Chairman's decision.

Chairman North asked Ms. Liz Zucker to report on the **Mosquito Control Project by the Department of Agriculture in Somerset County.**

Ms. Zucker stated that a preliminary report on the project was mailed to the Commissioners. She briefed the Commission with an updated report disseminated to them which reads as follows: PROJECT: Maryland Department of Agriculture (MDA), Mosquito Control Projects, Somerset County

DISCUSSION: The Mosquito Control Section (MCS) of MDA, proposes to maintain 19,700 feet of existing ditches to control mosquitoes in nontidal wetlands in four locations within the Critical Area of Somerset County. All ditching will outlet to tidal sources as originally constructed. Material excavated from the ditches will be graded to a depth not exceeding 12 inches above ground level. Ditches will be approximately 30 inches wide and 24 to

30 inches deep.

Notable aspects of the project include:

- The Somerset Soil Conservation District has reviewed the project and required that excavated material be seeded with annual rye grass to stabilize soil and provide colonization of native plants.
- The Resource Conservation Division of the Department of Natural Resources has reviewed the project and found that the project will not affect Habitat Protection Areas (HPAs).
- The US Army Corps of Engineers and Maryland Department of the Environment are reviewing the proposal for a Section 404 and 401 permit, respectively.
- The State Nontidal Wetlands Division assisted CAC staff in reviewing the project.
- Because water management for mosquito control in nontidal wetlands is a new type of activity in an HPA, the MCS will provide the CAC with information on mosquito control efficacy, effects of ditching on surface water hydrology and changes in vegetation in adjacent wetlands, and possibly information on effects of the project on nontarget organisms.

Commissioner Sam Bowling made a motion to approve the proposal with conditions that copies of all State and federal permits be sent to the CAC, and all monitoring studies be completed and sent to the CAC as well.

Mr. Larry Duket, Office of State Planning, asked what time period is considered for the monitoring.

Ms. Zucker stated that baseline information would be gathered before beginning the ditching monitoring.

Dr. Cy Lesser said that mosquito production has been monitored for several years and this is the reason that this area has been sited for this particular type of project and that the evaluation will continue. He said that he anticipated that the vegetation monitoring would continue no longer than two years after work is complete. The evaluation of the non-target impact on the amphibians has not been decided because there is no expertise in his department to answer those questions and they would rely on guidance from the Non-Game Program of Natural Resources on the specific sampling techniques on how long a period and what time of year, etc. this type of sampling should be done.

Commission Counsel Gay asked whether the local jurisdictions had been consulted on these projects.

Ms. Zucker stated that they had been consulted and found them to be consistent.

The motion was seconded and carried unanimously.

Chairman North announced that Commissioner Glendening would be making a special presentation of a print of the State bird, the Baltimore Oriole, by John Mulligan, artist, to a senior former Commissioner, Ms. Ardath Cade.

Chairman North presented to Ms. Tera Harnish, former Commission receptionist, the Governor's Certificate of Recognition, as well as to Ms. Lisa Sprinkle and Mr. David Shirey, former interns with the Commission.

Chairman North asked Ms. Anne Hairston to report on the **Harford County Growth Allocation request for Bata Land Co. Riverside South 40 Residential property.**

Ms. Hairston disseminated a staff report to the Commission members which reads as follows: Harford County has granted 23 acres of growth allocation for the Riverside South 40 residential development, owned by Bata Land Co., Inc., and is requesting Commission approval of this action. This parcel is the third and last portion in the Critical Area of Bata Land Co.'s planned unit development which was approved in the mid-70's. The Harford County Critical Area Program requires that a project have the infrastructure available and be able to develop

within 2 years before they will grant growth allocation to the project. Because of this requirement, this portion of Bata Land Co.'s growth allocation has not been approved by the County until now.

The growth allocation request is for 23 acres to go from Resource Conservation Area (RCA) to Intensely Developed Area (IDA). The proposal is to develop the property with 265 to 270 townhouse and condominium units within the Critical Area. Most of the area proposed for development is currently agricultural. One acre of forest will be cleared for road access from Rt. 40, and it will be replaced on-site. One crossing of nontidal wetlands, adjacent to Rt. 40, is proposed. Any applicable mitigation will be required by the County's Program. The parcel is 121 acres, 111 acres of which are in the Critical Area. Of the 111 acres, 82 acres are uplands, with the remainder being tidal wetlands. There are no mapped Habitat Protection Areas, other than the Buffer and nontidal wetlands, on the property.

Development is proposed on 23 acres of the uplands. The growth allocation is adjacent to existing IDA, the old Bata Shoe Factory, and provides a minimum 300-foot Buffer to tidal waters, as specified in the Critical Area Criteria (COMAR 14.15.02.06.B). The area excluded from the growth allocation is 88 acres, which exceeds the 20-acre minimum required by the Commission's policy on deducting growth allocation. The 88 acres will have conservation easements placed to restrict any future development, and will be managed by the community association or will be deeded to a conservation organization (or similar entity) to ensure permanent protection. The set-aside includes the 300-foot buffer to tidal waters, and extends beyond the buffer areas for nontidal wetlands and tributary streams adjacent to the 300-foot buffer. The 23 acres proposed for growth allocation include the lot areas, storm-water management facilities, and areas disturbed for roads and utilities to the limits of disturbance. Required buffers to streams and nontidal wetlands are not included in the growth allocation request, but are encompassed within the 88-acre contiguous undisturbed set-aside.

A local public hearing was held November 5, 1991. The panel did not reach a conclusive recommendation before the December meeting, because they were divided on whether to accept the growth allocation deduction as proposed or to require a greater acreage deduction (e.g., including all buffers). The panel was concerned that the growth allocation deduction be consistent with the past actions of the Commission on previous growth allocations, and with the Commission's policy on deducting growth allocation. Harford County withdrew the application and resubmitted it on January 24, 1992 without changes. Since the application had not changed, a second public hearing was not required or held. At a subsequent panel meeting, information on deductions for previous growth allocations throughout the Critical Area was presented. The panel developed a recommendation for this application, with caveats that the decision was dependent on particular site characteristics such as adjacency to an expanse of tidal wetlands and not a precedent for not including buffers in growth allocation deductions. Additionally, the panel requested clarification of the methodology for deducting growth allocation, so that it could be consistently applied.

Commissioner Ron Hickernell made a motion to approve 23 acres of growth allocation to Riverside South 40 Residential Development owned by Bata Land Company. He added that this action should not be construed as a precedent excluding Buffer areas from growth allocation deductions but is due to the configuration of this property with its sensitive areas and extensive tidal wetlands.

Commissioner Sam Bowling seconded the motion with the note that the panel reached that conclusion reluctantly. After a lot of debate, it was believed that because of the two previous Bata decisions, they were bound to that recommendation. The motion was carried unanimously.

Chairman North asked Ms. Theresa Corless to report on the **Brittingham request for Growth Allocation in Worcester County.**

Ms. Corless stated that: The Brittinghams own a 7 acre parcel in the RCA. There currently exists on the property a concrete building with two commercial uses in it, and a two story frame house. The Brittinghams wish to renovate the interior of the concrete building to accommodate three commercial uses and add gas pumps and additional parking. They intend to remove the frame house to a portion of the property which is out of the Critical Area. The County has asked for 6 acres of Growth Allocation to change the Critical Area designation to LDA (the entirety of the parcel within the Critical Area). The parcel is adjacent to an IDA area that is on the other side of Parnell Creek. The Worcester County Soil Conservation District has approved a stormwater management plan for the site. She said that the panel recommended approval of the request.

Commissioner Bill Bostian made a motion to approve the granting of 6 acres of growth allocation, changing the Brittingham property to LDA with the condition that the Forest, Park and Wildlife Service or its successor in name, is satisfied that any concerns regarding Habitat Protection Areas have been fully addressed. Commissioner Shep Krech seconded the motion and it was carried unanimously.

Chairman North asked Ms. Liz Zucker to report on the **University of Maryland, (UM) Chesapeake Biological Laboratory, Fuel Storage Tank for Research Fleet Operations Building.**

Ms. Zucker told the Commission that it reviewed a request in October for renovation of the existing Fleet Operations Building at Solomons Island and it approved the renovations of the building but had very serious concerns about a gasoline storage tank that was proposed for that site. It was requested that the UOM return with more information on the fuel tank proposal and she disseminated the information to the members in a staff report as follows:

PROJECT: University of Maryland, Chesapeake Biological Laboratory, Fuel Storage Tank for Research Fleet Operations Building.

DISCUSSION: The University of Maryland (UM) has a research fleet operations building located at the tip of Solomon's Island, in Calvert County. The building is used for the staging and repair of scientific equipment, maintenance and minor repair of vessels, administration of fleet operations, and the collection and storage of research samples. At its meeting in October, the CAC approved renovations to the building. However, the plans also included an above-ground 4,000 gallon petroleum storage tank to provide fuel to the research vessels. The CAC requested that the UM provide more information on the location and need for the fuel tank before CAC approval for the tank could be granted.

Notable aspects of the project include:

The site is within an Intensely Developed Area (IDA) that is Buffer-exempt. It is completely impervious (i.e., covered by the existing building, paved parking and roads).

There are no Habitat Protection Areas that will be affected by the project as documented by the Maryland Forest, Park and Wildlife Service.

At the request of CAC staff, the fuel storage system project is currently under review by the Maryland Department of the Environment (MDE) Industrial Discharge Program. MDE has made preliminary comments on the storage tank and piping specifications.

Fuel for vessels is currently transported by underground pipe from an adjacent marina to the docking area. The new storage tank will be equipped with a secondary steel containment tank providing 110% volume capacity to prevent spillage.

Despite concerns expressed by CAC staff for the tank's proposed location

adjacent to the shoreline, UM feels that there is no other acceptable location for the tank.

STAFF RECOMMENDATIONS: If the CAC approves the tank, the approval should be with the conditions that all MDE permit comments (including location) be met and that copies of correspondence and permits be sent to the CAC.

Ms. Zucker added that the area is buffer exempt because, the existing area is completely paved, it is completely covered by impervious surface including the footprint of the building and paved parking. She said that normally, MDE does not regulate such a small type tank, however, under their Statute they do have the ability to review smaller tanks for permitting if there is a water quality issue. She said that the above-ground storage staff from the Industrial Discharge Program agreed to review the project for a permit under their program and the UM has been working with them on their proposal. Ms. Zucker stated that it is believed by the UM that there is no other location for the tank. Representatives from the University were available to answer any questions. She assured the Commission that the panel had made known their concerns about the safety of the tank.

Mr. John Coffey, Engineer with the University of Maryland Engineering and Architectural Services Division, in response to an inquiry of Commissioner Gutman explained the safety features of the above ground tank focusing on the fire safety design and standards. He added that the users are environmental people fostering protection of the Bay, on-site, and in operation seven days a week, seeking to avoid any problems.

Counsel Gay asked if the local jurisdictions had any problem with this project.

Ms. Zucker replied that the only comment they had was to meet the 10% pollutant loading reduction requirement for stormwater management, which has been addressed.

Commissioner Joe Elbrich asked if the existing line that runs from the marina to the fuel dispensing station would be removed or capped or discontinued in usage.

John Coffey replied that it would be taken up, otherwise it becomes a so called "pipebomb".

Mr. Bowling made a motion to approve the request for the fuel storage tank subject to their obtaining all the MDE permits needed. Copies of the correspondence pertaining to the permit are forwarded to the Critical Area Commission. The motion was seconded by Commissioner Langner.

Chairman North called the question. The motion carried with one abstention, Mr. Glendening.

Chairman North asked Ms. Zucker to report on a request by The University of Maryland, Chesapeake Biological Laboratory, Coastal Research and Environmental Geochemistry Center on Solomon's Island for a new environmental research building.

Ms. Zucker informed the Commission members of the request in a staff report disseminated to them as follows:

DISCUSSION: The University of Maryland, Chesapeake Biological Laboratory, Coastal Research and Environmental Geochemistry Center on Solomon's Island, is proposing to construct a new environmental research building at its Chesapeake Biological Laboratory (CBL) complex on Solomon's Island in Calvert County. The 19,000 square foot building will be located in an open area. The plans also include an underground tank for storage of heating fuel.

Notable aspects of the project include:

The site is within an Intensely Developed Area. It is located over 300 feet from the Patuxent River.

Pollutant loadings will be reduced by 10% using several infiltration trenches

to manage rooftop runoff from adjacent existing buildings. Stormwater plans will be reviewed by the Maryland Department of the Environment (MDE) for stormwater requirements.
There are no Habitat Protection Areas that will be affected by the project as documented by the Maryland Forest, Park and Wildlife Service.
The Underground Storage Tank Division of MDE is reviewing the plans for the proposed storage tanks.
Several trees may have to be removed during construction of the building.
STAFF RECOMMENDATION: Approval with the following conditions:
a) Stormwater plans are reviewed and approved by MDE and CAC staff;
b) Storage tanks are established according to MDE's specifications and a copy of all correspondence with MDE is provided to the CAC;
c) All trees that are removed must be replaced within the Critical Area of the CBL complex.

Mr. Bowling stated that the subcommittee had expressed a concern over the underground tank but there appeared to be no alternative to an underground tank after investigation.

Mr. Hickernell asked about the proximity of the tank to the Patuxent.
Ms. Zucker replied, 300 feet, more or less.
Mr. Elbrich asked if there had been soil borings for infiltration.
Ms. Zucker replied, yes.

Mr. Bowling made a motion to approve the request with the conditions:
a) Stormwater plans are reviewed and approved by MDE and CAC staff;
b) Storage tanks are established according to MDE's specifications and a copy of all correspondence with MDE is provided to the CAC;
c) All trees that are removed must be replaced within the Critical Area of the CBL complex.

The motion was seconded by Commissioner Tom Jarvis and carried with one abstention, Mr. Glendening.

Chairman North asked Ms. Zucker to report on the **Chemical Storage building at Horn Point.**

Ms. Zucker informed the Commission members in a staff report disseminated to them as follows:

PROJECT: University of Maryland, Horn Point Laboratory,
Chemical Storage Building

DISCUSSION: The University of Maryland (UM) is proposing to construct a new chemical storage building at the Horn Point Laboratory research complex in Dorchester County. The building will be 60 by 50 feet (3000 square feet) in area. Crushed stone paving and a concrete pad (3200 sq. ft.) will be used to provide vehicular access to the building. The facility will provide centralized storage of chemicals which are currently kept in various locations throughout the laboratory research complex.
Notable aspects of the project include:
The site is within a Limited Development Area (LDA). It is located more than 100 feet from a ditch that leads to Lakes Cove.
The building will be located in an open field. No trees will be removed to construct the project.
There are no Habitat Protection Areas that will be affected by the project as documented by the Maryland Forest, Park and Wildlife Service.
The total area of impervious surface on the site after development of the project will not exceed 15% of Horn Point's Critical Area.
The storage building will have an internal spill recovery system. It will have improved ventilation and greater security as compared to existing laboratory conditions.

Stormwater management requirements are under review by the Maryland Department of the Environment (MDE).

STAFF RECOMMENDATION: Approval with the conditions that the stormwater plan be reviewed and approved by MDE and CAC staff.

Mr. Bostian asked what kinds of chemicals would be stored.

Mr. Coffey replied that research chemicals (reagents) in relatively small quantities, shelf-life chemicals. He described the safety features of the building.

Commission Counsel Gay asked if this facility constitutes a solid or hazardous waste collection facility.

Mr. Coffey said, no sir, because it is not hazardous waste.

Ms. Zucker stated that she asked that question of MDE and there are no permitting requirements.

Counsel Gay concluded that MDE did not believe that it was a hazardous waste facility.

Mr. Bowling made a motion to approve the request subject to the conditions that the stormwater plan be reviewed and approved by MDE and CAC staff. The motion was seconded by Ms. Langner. The motion carried with one abstention, Mr. Glendening.

Chairman North asked Ms. Patricia Pudelkewicz to report on the proposed **Refinements for Calvert County.**

Ms. Pudelkewicz briefed the Commission members in a staff report as follows:

DISCUSSION: The Chairman of the Commission has determined that the following Calvert County amendment requests be viewed as refinements.

1. Calvert County proposes to add the following definition for "clearing": The removal or cutting of trees from any forest area or the removal or cutting of any vegetation from the Critical Area Buffer.
2. The County proposes to add the impervious surface language of HB 1060 and HB 323 to allow increases in impervious surfaces up to 25 percent in certain instances.
3. The County is clarifying language in its IDA criteria to indicate that the 10% criterion applies to new development. The revised language will read:

   "In case of new development, IF THESE TECHNOLOGIES DO NOT REDUCE POLLUTANT LOADINGS BY AT LEAST 10 PERCENT BELOW THE LEVEL OF POLLUTION ON THE SITE PRIOR TO REDEVELOPMENT, THEN, offsets as determined..."
   The current regulations do not appear to allow the 10% reduction in pollutants to be met if new development is proposed.
4. Administrative and editorial changes are proposed by the County. Administrative changes address the following issues:
   a. If a project occurs in the Critical Area, a form needs to be completed and the project reviewed for Critical Area consistency.
   b. Building and grading permits requiring reforestation and afforestation do not require interagency review.
   c. Reference to Division of Inspections and Permits is changed to Department of Planning and Zoning.

The Commission supported the Chairman's determination that these changes were refinements.

Chairman North asked Ms. Claudia Jones to report on the **Growth Allocation request for Coulbourn's Cove in Somerset County.**

Ms. Jones briefed the Commission in a staff report disseminated to them as follows: COMMISSION ACTION: For information only; Commission vote at March

meeting.

DESCRIPTION

The Somerset County Commissioner's have requested 16 acres of growth allocation for the project known as Coulbourn's Cove. The site is currently RCA. The majority of the site is farm field/prior converted wetlands.

The total acreage of the parcel is 68 acres, with 57 acres in the Critical Area. The applicant is proposing the creation of 20 lots ranging in size from 2 to 4.6 acres; 16 lots are entirely in the Critical Area, 2 lots are partially in and partially out.

The County's program requires that 1 acre of growth allocation be deducted for each detached single family site provided that the development pad is limited to no more than 20,000 square feet. The County is also to subtract all disturbed areas and areas not restricted from further development through restrictive covenants and not maintained in natural vegetation.

ISSUES

The development pad is not shown on the site plan. There is no indication that there are any restrictive covenants on the portion of the lots outside of the development pad. If there are not restrictions on the lots, then the entire lot needs to be counted against the County's growth allocation allotment.

The road and the pond area will be disturbed, however, they are not included in the amount of growth allocation to be deducted.

The lots that are partially in and partially out of the Critical Area need to have the dwelling and disturbance restricted to the portion of the lot outside of the Critical Area since they are not being counted against growth allocation at all. This may not be possible for lot number one.

The Somerset County Health Department is requiring a drainage system be developed before septics are approved. It needs to be determined if the forested portion of the site is a nontidal wetland. If this area is a wetland, any drainage systems need to be designed so that they will not impact this area. A hearing has been scheduled for Monday, February 24, 1992 in Princess Anne.

Mr. Bostian stated that under Critical Area nontidal wetlands "prior converted" doesn't mean anything.

Ms. Jones said, "right", that she was not questioning the prior converted portion but the forested portion. If it has hydric soils and hydric vegetation then it wouldn't be prior converted. They have not been farming the forested portion, at least according to the site plan.

Mr. Bostian asked if it just has what would normally be prior converted wetlands on site.

Ms. Jones said that she had not been to the site.

Mr. Bowling asked how they plan on counting only one acre of each of these sites without any set aside. He observed that there was no contiguous tract of land; every bit of land was divided into lots and if a person owns a lot they are probably going to fence the lot, and probably going to use the lot. He stated that it would be hard to tell a guy with 2 acres of land that he can't clear the back acre. He has got to live with the poison ivy and all that is back there and he did not believe that it was going to happen. Mr. Bowling thought that the Commission was looking at 68 acres of development or growth allocation.

Commissioner Shep Krech said that chances are that some of these lots will be nontidal wetlands.

Mr. Bowling said that since most of it is cleared field already the only chance of nontidal appears to be on lots 9,10,11.

Mr. Krech added lots 12 and 13 also.

Mr. Bowling said that the site was already agriculture land.

Several Commissioners added that it did not matter. If the development was not in the Critical Area it still may be in non-tidal wetlands.

Mr. Bowling said that it still looks like this should be 68 acres of growth allocation.

Ms. Jones said that she was not sure because of the way the local Program was written, however, it is not consistent with what the Commission has been doing recently.

Mr. Bostian stated that it isn't even consistent with their program.

Ms. Jones said that they should be showing restrictions and if they don't then the whole amount should be deducted and that at least the disturbance for the road and pond area should be deducted, even if they show restrictions for all the portions of the lots outside of the development pads.

Mr. Bowling said that we started off with a mandate from the Legislature not to develop any more shoreline then we got a 5% exception to it and now we are busily converting our 5% into 20 - 25%. We ought to draw the line somewhere or get the Law changed or something because this is not right.

Mr. Bostian said that no one was suggesting that this be passed.

Mr. Elbrich said that the issue of what is counted for growth allocation is being addressed by one of the staff committees as to what the policies and guidelines should be in applying growth allocation.

Mr. Hickernell asked when this Somerset growth allocation request would come before the Commission.

Ms. Jones said next month.

Mr. Hickernell said that would not be a good idea based on the fact that the Committee that he serves on is dealing with the issue of growth allocation and this particular site is right in the middle of that determination and to deal with this prior to the revised policy by the full Commission before the policy is revised would be unwise.

Ms. Jones stated that she was not sure whether there was a choice because it had been accepted and we have only 90 days to act upon it. But it may be possible to wait until the April meeting.

Mr. Bowling said that if the Commission tells them of the shortcomings of the application we can begin our 90 days over again.

Mr. Bostian said that could be done only if they resubmit the proposal.

Commissioner Williams asked if they could set a deadline of the May meeting so that the Committee will have something to bring before the Commission.

Mr. Gutman asked if a procedure could be developed whereby we adopt this with a significant number of conditions particularly as it deals with growth allocation.

Mr. Elbrich pointed out that the Commission had approved their program with their criteria for growth allocation.

Mr. Hickernell said that their program had been adopted by default with lack of the Commission's action.

Counsel Gay said that nevertheless the local program is still adopted and in operation. In the event that they do set aside certain areas of restrictive covenants, would the proposal be consistent with the program as written.

Ms. Jones said that for it to be consistent and for them to only deduct 16 acres of growth allocation, they would have to show the development envelope which could be no more than 20,000 square feet and the remainder of the property would have to be in natural vegetation. It does seem that this area for the road and its middle portions would have to be deducted.

Mr. Bostian said it would be included in the 16 acres if you are only taking 20,000 each of 16 lots.

Counsel Gay asked if they did that would it add up to 57 acres of growth

allocation or would it be something else.

Ms. Jones said that what they are deducting is on the chart in their program which says for single family residences with on-site sewer and well, you deduct one acre, but the condition for that is that you can only have a development pad of 20,000 square feet and the rest of the lot has to be in a conservation easement.

Counsel Gay asked if they did all of that and came up with an allocation deduction of something far less than 57 acres all in accordance with the local program, would that be inconsistent with the State criteria.

Ms. Jones said that she believed it would be because the areas that are left, even though they would be called Resource Conservation Areas, really would not be acting as RCA.

Mr. Elbrich asked if it would be inconsistent with the State criteria or the Commission's policies on growth allocation.

Ms. Jones said, I think both.

Mr. Bowling said that he did not see anything in the State Law that mandated "footprints".

Counsel Gay said that the Commission should recognize that it is not operating with tied hands in the event that there is an inconsistency between a local program and the State Criteria. There are avenues of redress available to the Commission. Mr. Gay stated that it has been this Commission's policy in the past to look at the local program as the guiding document. If an application for project approval is consistent with the local program but inconsistent with the State Criteria, the Commission has traditionally approved it. Consequently, it may be appropriate for the Commission to take some sort of action to change or stay the imact of an inconsistent local program until it is made consistent with the State Criteria.

Mr. Hickernell stated that the difficulty in this particular instance is that Somerset is the only jurisdiction that has a program that has never received an active endorsement of the Commission. It was approved by default, by the Commission's inaction and that has boded poorly for the Commission in the past. All of the Commission's efforts could well be restricted or destroyed by not working very carefully with the way growth allocation is allocated because we don't do a whole lot but what we do is to restrict growth in the Critical Area. And, if in fact, you so divide a parcel of land into what is and is not deducted, you then magnify the potential for growth dramatically and to the degree that you magnify the potential for growth you obviously reduce the effect of this whole program. It is a very fundamental question, the issue is always being begged by jurisdictions that come to us. The problem with Bata Shoe very simply said, is that we had a policy adopted by the Commission in '88, and that Bata Land was different from that policy. Decisions cannot be made piecemeal and be based upon variations of the local Program. They must be made cohesively with the thought in mind that this is one of the fundamental functions of this Commission under the functions of the Law.

Mr. Bowling said that in only one County, Cecil, did the Commission really review the idea of less than full lot development and approved that one, with the idea that it would be for a trial period of one year and we have extended that period of time since then. Every other one of these where we have footprinting problems is a foot dragging County who didn't come in until the last minute or did not come in at all but was dragged kicking and screaming through the door and we ended up taking plans in desperation without thorough consideration. But it is time that we did something about it, because counties are not treated equitably, some with growth plans and some without. We have different standards for different counties and that is not right, and we should

be consistent, straightforward and equitable.

Counsel Gay said that this Project will come before the Commission for a determination next month. This is the County in which the program was adopted by default. We are going to have to live with perhaps as many as four years of growth allocation proposals that come to this Commission that are inconsistent with the criteria. He asked when the program was approved.

Ms. Jones said she was not sure.

Mr. Tom Ventre said that July 1990 was the final action with regard to the Somerset County Program.

Counsel Gay asked if the Comprehensive Review was four years after that date. He said that the Commission has a long period of time between now and when this program will be reviewed under the Comprehensive Review, as long as 2 - 3 years. Perhaps the time has come to tell the local jurisdiction that its local program, with respect to growth allocation, is in conflict with the Criteria and that no further growth allocation approvals will take place in Somerset County until the growth allocation policy of that county is brought into line with the Criteria.

Mr. Bostian asked on what basis.

Counsel Gay said that on the basis provided in §1809 of the Law that says "when there is a clear mistake, omission or conflict between a local program and the State Criteria the Commission has the authority to send the local jurisdiction a letter advising it of the conflict, and after that occurs no project approval shall have any validity in the local jurisdiction if it occurs under the conflicting part of the program". This is a fundamental issue in front of the Commission in the next 4 - 5 years - growth allocation.

Mr. Elbrich asked if the Commission should send a notice out <u>after</u> it is agreed what the policy will be, then to notify all jurisdictions of the policies and guidelines informing them that if there are any inconsistencies, then those programs in all jurisdictions will be revised in accordance with those new policies.

Counsel Gay said that he believes that is dodging the bullet for a few months.

Mr. Elbrich said then if that is the case, perhaps there should not have been a vote on Bata Land today.

Mr. Ventre said that the Somerset County program reached a point in early 1989 where there were seven points to be negotiated between the Commission and Somerset County, subsequent to the Attorney General's Opinion on the issue of the standing of the proposed program. The seven issues were negotiated and six were resolved to mutual satisfaction. The seventh, growth allocation, was to no one's satisfaction. Subsequent to the panel acceptance of the compromise on the growth allocation issue in November 1989, the County went back and redrafted it's program and incorporated those things. In July of '90 the program was approved by default but that negotiations continued in good faith.

Counsel Gay said that based on the comments of Mr. Ventre and Mr. Elbrich, Somerset was a program in which approval never actually took place other than by Law (there was not an affirmative vote at the Commission to approve). It is different than the Harford situation and an ideal county in which we indicate that there is a conflict because the conflict has always existed and has never been resolved. All parties have known of the conflict and have known that it has never been resolved and it will come as no surprise to Somerset County to get notice in the mail.

Commissioner Russell Blake asked whether this could be an oversight where they are not showing the development pad or the covenants.

Ms. Jones said that is a possibility and this is a question that could be asked at the panel hearing.

Mr. Blake said that it would not be fair to assume that they are not complying with their program until that question is asked and the fact they have no representation on the Commission at this meeting.

Mr. Bowling said that assuming their program does not comply with the criteria then and he made a motion to advise Somerset County that they do not comply with the criteria and that they should correct their program. Mr. Hickernell seconded the motion.

Mr. Whitson stated that he thought it was premature to make that judgement.

Mr. Bostian agreed that it was premature.

Mr. Elbrich reminded the Commission that it was brought before them for information purposes and not for a vote.

Mr. Gutman said that he believed that Somerset County should be apprised promptly of the sense of the Commission.

Mr. Glendening asked if the clock is running.

Ms. Jones said, yes and that the Commission may have to take a vote in March. Ms. Jones added that this presentation was for information purposes only.

Mr. Glendening said that if the Commission does take action before the vote its stand is a little bit stronger. He said that he suggests a type of compromise motion wherein the Commission ought to send Somerset a letter and state what the reservations are and not say that we have done such and such. He said that the Commission should ask them to hold the plan on whatever formal action is appropriate on their part. He stated that since someone mentioned under the Attorney General's Opinion that the plan was adopted, the Commission ought to negotiate with Somerset using this approach to straighten things out and if it is not done then the Commission staff should fashion a letter that suggests it would trigger the rejection of all subsequent applications. He advised against wording this in the form of a motion.

Chairman North asked if Mr. Bowling would be inclined to withdraw his motion if a Committee were appointed to study and advise on this issue and of which he would be a member.

Mr. Bowling replied yes.

Mr. Whitson reminded the Commission that there already exists a Committee to study the growth allocation issue.

Chairman North clarified that the motioner and the seconder acquiesced to the withdrawal suggestion and the motion was withdrawn.

Mr. Bowling said that he believed it was very unfair for the staff to be sent out without guidance on this issue.

Mr. Glendening asked whether there could be formal communication with the jurisdiction in the interim.

Chairman North stated that in the past there had been some difficulty in receiving rapid communication and determination from Somerset and it is not known just how that would evolve.

Mr. Gutman asked for the portion of the Minutes dealing with this issue be made available to Somerset County as a way to inform them of what the Commission is dealing with.

Chairman North agreed with Mr. Gutman.

Mr. Gutman asked for some clarification of what needed to be done beyond that.

Mr. Elbrich asked if a panel had been established that would review this and if there would be a public hearing held.

Chairman North stated that a "special" panel had not been named but that a Somerset panel was already in force and it should be referred to them. The Chairman asked Mr. Bowling to sit on the panel if he was interested.

Mr. Bowling agreed to sit on the panel.

Chairman North appointed Tom Jarvis, Chair; Russell Blake, Bill Bostian, Shep Krech, Bob Price, Alternate Chair, and Sam Bowling to a panel with respect to growth allocation in Somerset County. Mr. Jarvis stated that he would be unable to serve on the panel on the date of hearing.

Mr. Bostian asked if it was absolutely clear that the date in question is July 1990 or is it possible that it could be the date that it was adopted by Law which would bring it several years in advance.

Mr. Ventre said that the date that it became effective by operation of Law was in '88.

Mr. Schoeplein volunteered to be on the Committee and Chairman North accepted.

Chairman North clarified that the panel has a double mission with respect to Somerset County's growth allocation and the project as well.

Chairman North asked Ms. Claudia Jones to report on **Caroline County's request for Growth Allocation.**

Ms. Jones **described for the Commission members the request. She disseminated a staff report which is as follows: Caroline County** Growth Allocation - **Brick Mill Landing**
COMMISSION ACTION: For information only
Commission vote at March meeting

DESCRIPTION

The Commissioners of Caroline County have requested 7 acres of growth allocation for the project known as Brick Mill Landing.
The parcel is 74.19 acres; 31 acres are in the Critical Area. The applicant is proposing to create four lots totalling seven acres. The applicant will place a conservation easement on 20 acres. This leaves a five acre residual parcel which is neither protected by easement nor counted against growth allocation. The property is across the street from the Choptank River, so the 100-foot buffer is not an issue in this situation. There is a small creek and associated nontidal wetlands on the property; however, these will be protected by the required buffers. Although, there are some endangered species in the vicinity, none have been found on the site.

ISSUES

The Caroline County Program specifies that the entire acreage of a parcel not in tidal wetlands shall be counted against growth allocation unless the following conditions are met:
1. A development envelope should be specified which includes individually owned lots, any required buffers, impervious surfaces, utilities, stormwater management measures, on-site sewage disposal measures, and any additional acreage needed to meet the development requirements of the criteria.
2. The remainder of the parcel, including any tidal wetlands, would not count against the County's growth allocation if it is contiguous, at least 20 acres in size, retains its natural features or resource utilization activities (agricultural, forestry, fisheries activities, or aquaculture), and is restricted from future subdivision and/or development through restrictive covenants, conservation easements, or other protective measures approved by the County and the Critical Area Commission.
-The five acre residual parcel is not being deducted from growth allocation.
-There are no restrictions proposed on the five acre residual parcel.
-The five acre residual parcel is not being proposed for any development at this time.
Preliminary staff recommendation is approval upon meeting one of the following conditions:

1 - Add the five acre residual parcel to the restricted area under easement, as required by the County's ordinance; or
2 - Deduct this five acre residual parcel from growth allocation.
A public hearing is scheduled for February 10, 1992 at 7pm in the Court House in Denton.

Mr. Bowling asked if there was any reason at all for not including the 5 acres.

Ms. Jones said that the County doesn't think they need to.

Mr. Bowling asked if it was all part of a larger tract.

Ms. Jones said that it was all owned by the same person.

Chairman North asked Mr. Glendening to speak to the **Update matter on the Policy for Reconsideration.**

Mr. Glendening said that there is a Draft Policy for Reconsideration (attached to minutes) which is very straightforward. Guidance is set forth so that what the rules did not say before, and what Roberts Rules of Order did not cover will be followed. He said that he believes that most of the reasonable expectations of what is likely to come up under reconsideration has been covered. The Draft Policy will be circulated before the next Commission meeting and perhaps adopted at that time.

Chairman North called on Ms. Liz Zucker to report on **Structures Over Wetlands.**

Ms. Zucker said that another Draft has been produced of a guidance paper on structures that are non-water dependent over tidal waters and tidal wetlands. The Special Issues Subcommittee has been working on that policy for the past few months. She said that the policy paper is being formulated in tandem with a bill that was going to be proposed by the Water Resources Administration to clarify DNR's language in their 1989 Structures Over Wetlands Law. Charles Wheeler and Bob Miller from Water Resources Administration met with the Subcommittee and reported that DNR has decided not to introduce a bill. WRA Counsel (Tom Deming) advised them to accomplish their goals through regulations. DNR is going to develop some regulations to address the permitting structures over tidal areas. As a result of DNR's decision, the Subcommittee discussed what it should be doing to address the situation and decided to go forward with a policy paper to discuss the Critical Area issues that go along with Structures over Tidal Waters and Tidal Wetlands. She said that Commission Counsel, George Gay would review the Policy Paper for its acceptability. She stated that DNR, WRA would be holding public hearings and Critical Area staff and panel would be attending the hearing for some insight into some of the issues. She said that Boathouses would not be addressed in the paper because that issue is an unclear one as to whether they are water-dependent and discussions on boathouses will continue with DNR. She said that it is hoped that a vote would be forthcoming on the policy paper next month.

Chairman North asked Ms. Zucker to update the Commission on **Non-tidal Wetlands.**

Ms. Zucker circulated two documents. She said that the first was a Draft Letter (attached to the minutes) that is proposed to go out to the local jurisdictions to guide them on delineation methodologies for identifying wetlands in the Critical Area; the second document - a memorandum from Counsel Gay to Ms. Zucker (attached to minutes) addresses some of the legal issues associated with the policy letter. The letter was developed in response to the fact that many of the staff had been receiving questions from planners, developers and attorneys as to what techniques should be used to delineate

wetlands in the Critical Area. She stated that the Federal Government decided to no longer use the 1989 Unified Manual and has substituted another wetland manual, the 1987 U.S. Army Corps of Engineers Manual to be used for delineating wetlands falling under Federal jurisdiction.

Ms. Zucker said that David Burke, from DNR's Non-tidal Wetlands Division with staff and the special Issues Subcommittee, explained the differences between the various methodologies that are now being used by the Federal Government, wetlands delineated according to the '89 Unified Manual vs the '87 Corp's Manual. After discussions with David Burke and the Army COE, it became clear that the '87 Corp's Manual does not always identify non-tidal wetlands in the Critical Area according to the definition in the Critical Area Law and Criteria. She stated that according to the memo of Commission Counsel to Ms. Zucker that if a methodology does not meet the Critical Area definition of wetlands, then it should not be used.

In conclusion, after discussing the issue with legal counsel, and technical experts, the Special Issues Subcommittee came to the realization that non-tidal wetlands are defined by the Criteria in a certain way and the best way to delineate them is to use certain methodologies. She said a letter should be sent to the jurisdictions as to how the wetlands should be delineated in the field in the Critical Area. She said that there may be legislative alternatives, such as changing the Critical Area Law and changing the definition. The Subcommittee did pursue some of these alterntives.
Dr. Taylor asked the legislators if they would consider such a bill and it has been recommended by two delegates that it was not appropriate to deal with wetland type of issues in this session, but more appropriately in summer study.

Mr. Bostian stated his opposition to the letter. He believes that it is helping to perpetuate a bad situation. He said that in his opinion the term "ingrained hydric soils" is where the trouble began, which as an aside does not cover "prior converted" wetland situations. He said that the letter does not address prior converted.

Commissioner Jim Peck reiterated that the only alternative to the letter is to change the Law otherwise, we have the local governments and developers out there with great confusion as to what applies in the Critical Area. Because there is such confusion at the Federal level, if we were to change to a new definition, we would not even know what should be at this time. So, in order to provide some kind of guidance to the local governments and the developers this letters just says that the Critical Area Commission will continue to apply its regulations and when it is all resolved at the Federal level we will look at changing it if necessary. It just gives guidance where there is none.

Mr. Gutman made a motion that the letter be sent and clearly state that this is an interim guidance with every intention of making a revision. At such time, we can go forward with legislation or with some other clarification. The motion was seconded by Mr. Peck. The motion carried with two abstentions, Mr. Elbrich and Mr. Bostian.

Chairman North asked Ms. Patricia Pudelkewicz to report on **Bachelor Point Marina Mapping Mistake in Talbot County.**

Ms. Pudelkewicz stated that last July the Critical Area Commission voted to deny the mapping mistake. Talbot County submitted additional information and in November the Commission voted to reconsider the matter. At that point, the 90 day time frame began for the review for the mapping mistake. In January a panel of Commission members met and held a public hearing and the record was open for two weeks. After that, there was to be a panel meeting to make a recommendation. Based on a number of panel members being out of State and 3

absent from the Commission meeting this date, there was no panel recommendation to make to the full Commission. **She said that Talbot County had proposed withdrawal of their request and to resubmit it so that there will be the benefit of a panel recommendation at the March meeting.**

Mr. Cowee stated that was the desire of the County.

Chairman North said that the matter was considered withdrawn so that the panel could give it due course.

Mr. Elbrich asked if another public hearing was necessary.

Ms. Pudelkewicz said that when the Harford County Bata Land request was withdrawn in December, another public hearing was not required because no additional information had been submitted. This case is exactly the same.

Chairman North asked if there is any additional information being submitted.

Ms. Pudelkewicz stated, no.

Chairman North determined that another hearing was not required.

Chairman North asked Counsel Gay to give **updates on legal issues.**

Mr. Gay reported no update on Black Marsh. He said that Chairman North, Patricia Pudelkewicz, Dr. Sarah Taylor and he had a meeting scheduled to continue the negotiations with respect to the Consent Decree, have had discussion with opposing Counsel and Principals of the Betterton project and the negotiation is ongoing. He said that Handy Point was argued in the Court of Special Appeals that morning and there is no indication when the Court will issue a decision on that matter. Mr. Gay said that in St. Mary's County there is litigation involving Mr. Burris who applied for a variance from the St. Mary's County Buffer provisions in order to build a pool in the Buffer. Mr. Burris was awarded the variance before the Critical Area noted its Appeal. During the appeal period, Mr. Burris built his pool. Counsel Gay said that this is obviously very problematic and he reminded the Commission members that he had sent them a letter outlining the situation there and the reasons for the Chairman's initiation of the Appeal.

OLD BUSINESS

There was no old business.

NEW BUSINESS

Dr. Sarah Taylor, Executive Director, said that there are three bills being introduced into legislation and they would be mailed for their review.

Chairman North appointed a panel to consider the Calvert County Amendments. He appointed Sam Bowling, Chair; Louise Lawrence; Mike Whitson and Bob Schoeplein.

There being no further business the meeting adjourned at 3:35 p.m.

3/4/92 approved unanimous 18-0

STAFF REPORT

February 25, 1992

Project: Choptank River Fishing Piers State Park Shoreline Stabilization

Applicant: Department of Natural Resources

Recommendation: APPROVAL

Discussion:

The Department of Natural Resources proposes to construct offshore stone breakwaters and a stone revetment for erosion control on the Talbot County side of the Choptank River Fishing Piers State Park. At its meeting in November, 1991, the Commission approved a revetment for shore erosion control on the Dorchester County side of the park. The Commission approved the park Master Plan at the September, 1991 meeting. Under terms of the Master Plan approval, the Commission must review specific development projects.

Three stone breakwaters will be constructed approximately 140 feet offshore from the existing revetment north of the Frederick Malkus (Route 50) Bridge. Approximately 500 feet of stone revetment will be placed along the shoreline of the Choptank River, extending north from the existing revetment. The Department will upgrade and replant the slope along this section.

The Department's Natural Heritage Division has reviewed the project for the presence of threatened and endangered species.

Four trees in the Buffer will be removed. Replacement of these trees and other mitigation for Buffer disturbance will be handled through afforestation approved in the park Master Plan.

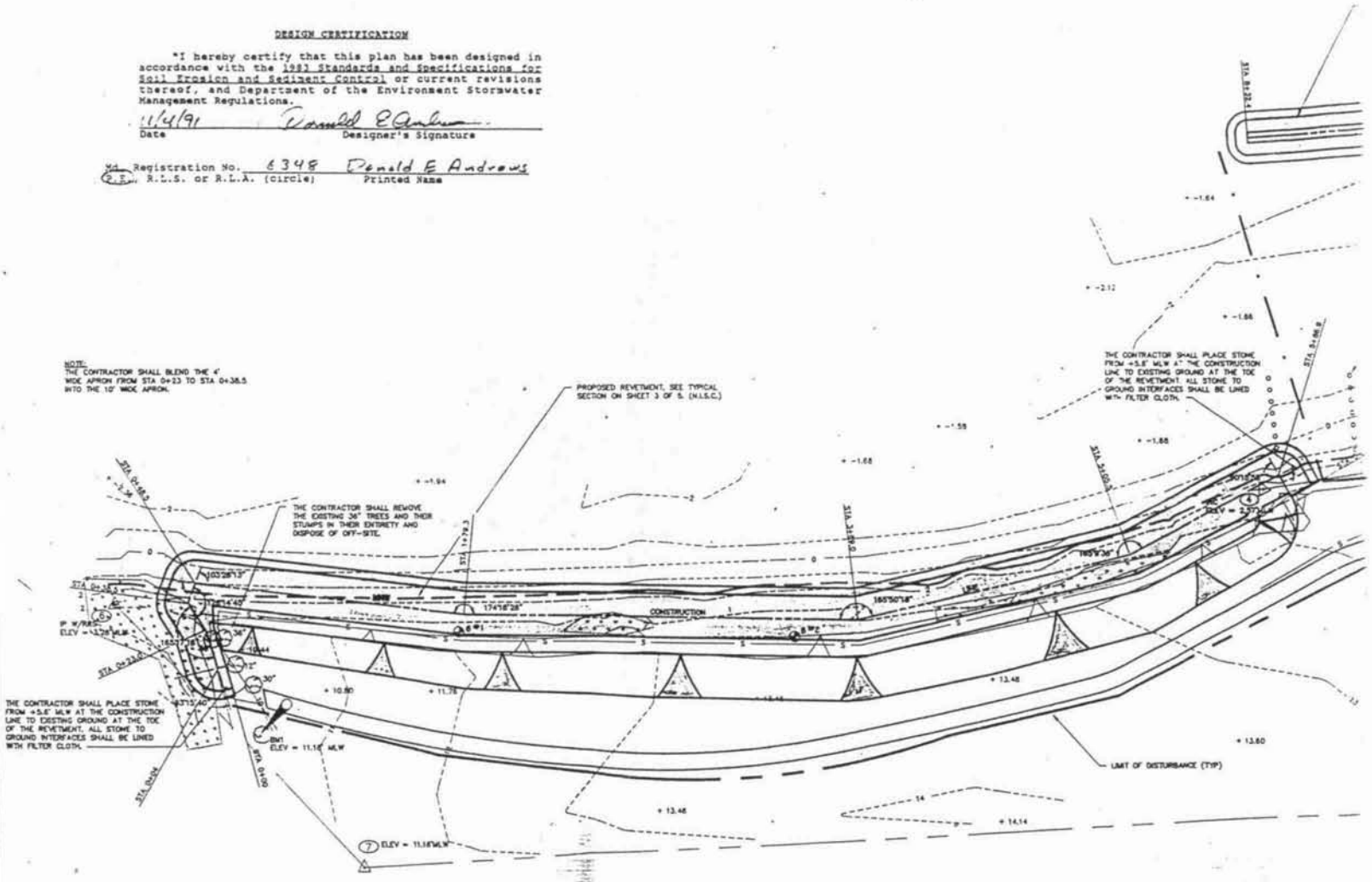
Staff contact: Ren Serey

DESIGN CERTIFICATION

"I hereby certify that this plan has been designed in accordance with the 1983 Standards and Specifications for Soil Erosion and Sediment Control or current revisions thereof, and Department of the Environment Stormwater Management Regulations."

11/4/91 — Donald E Andrews
Date — Designer's Signature

Md. P.E. Registration No. 6348 Donald E Andrews
R.L.S. or R.L.A. (circle) — Printed Name



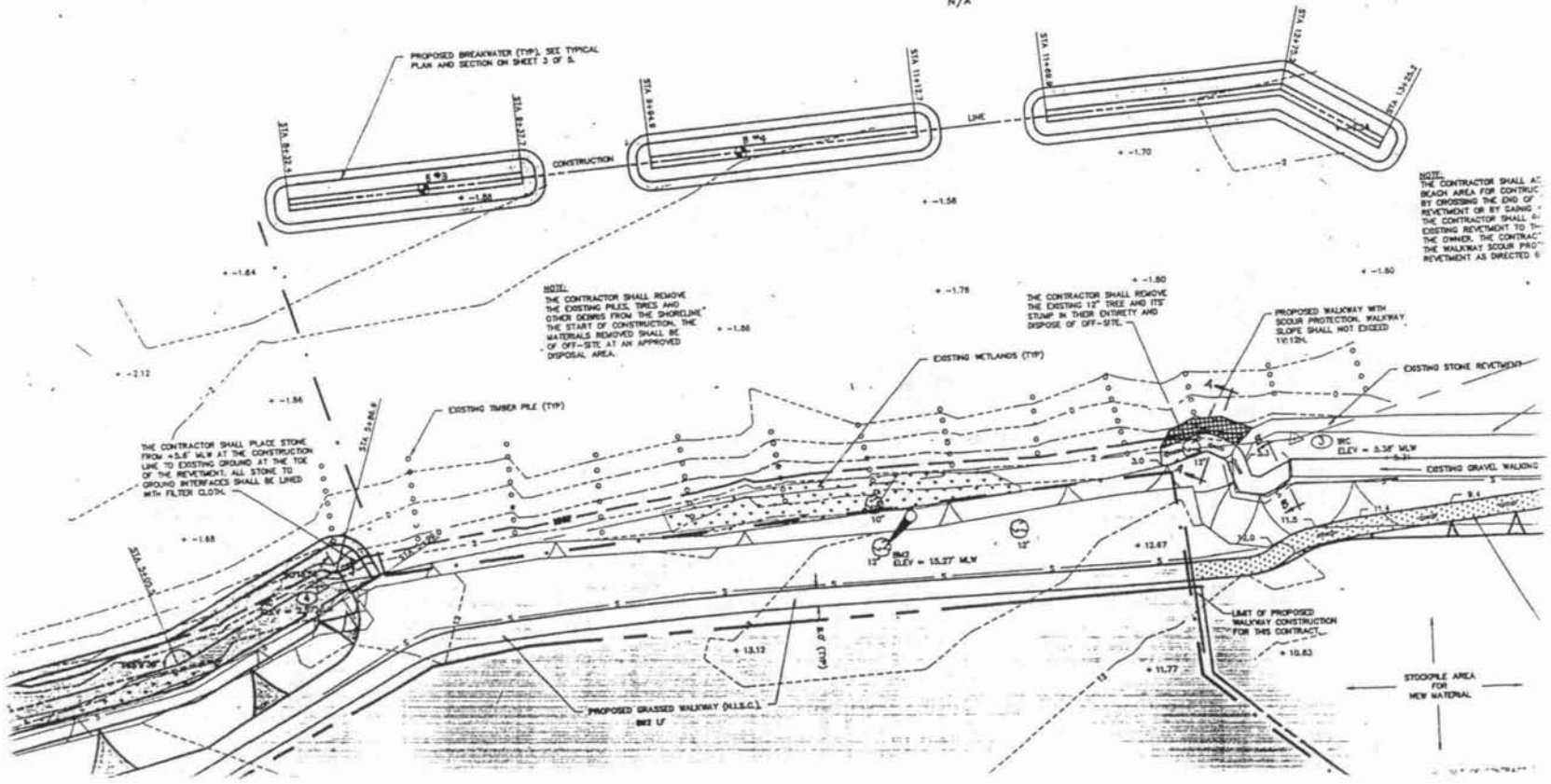
PLAN

SCALE: 1"=40'

EVETMENT.

CHOPTANK RIVER

N/A	———	CONSTRUCTION LINE
N/A		TRAVERSE LINE W/ POINT
N/A		BORING
N/A		BENCH MARK
N/A	— · —	LIMIT OF CONTRACT
N/A	— - —	LIMIT OF DISTURBANCE
N/A	(N.I.S.C.)	NOT IN STATE CONTRACT
N/A	—S—	SILT FENCE



appld. unanim 18-0 w/proviso that 2:1 mitigation be used as buffer mitigation consistent w/ St Mary's C.A.P. + monitored by staff

STAFF REPORT

February 26, 1992

Applicant: Department of Natural Resources

Project: Point Lookout State Park - Shoreline Stabilization

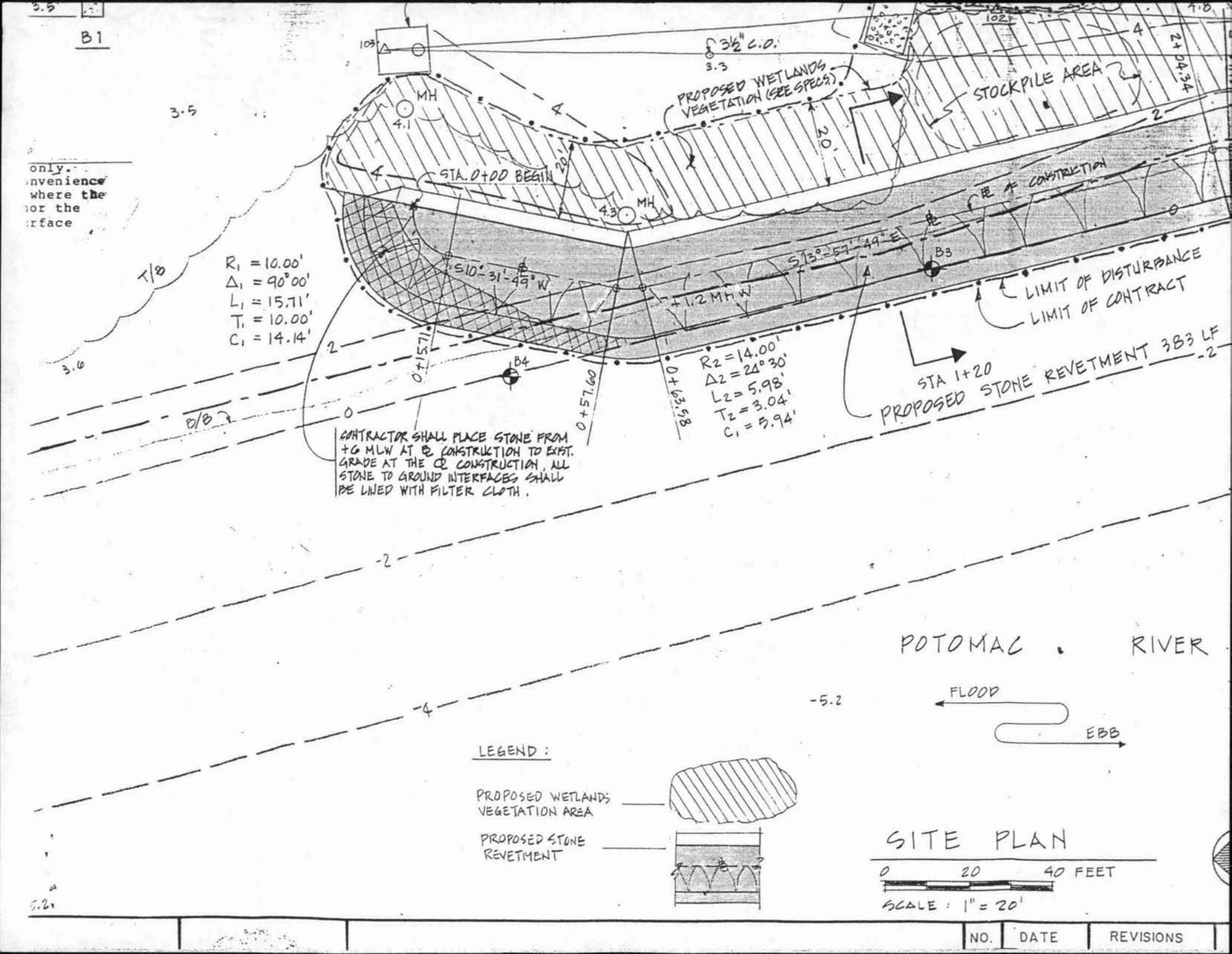
Recommendation: APPROVAL

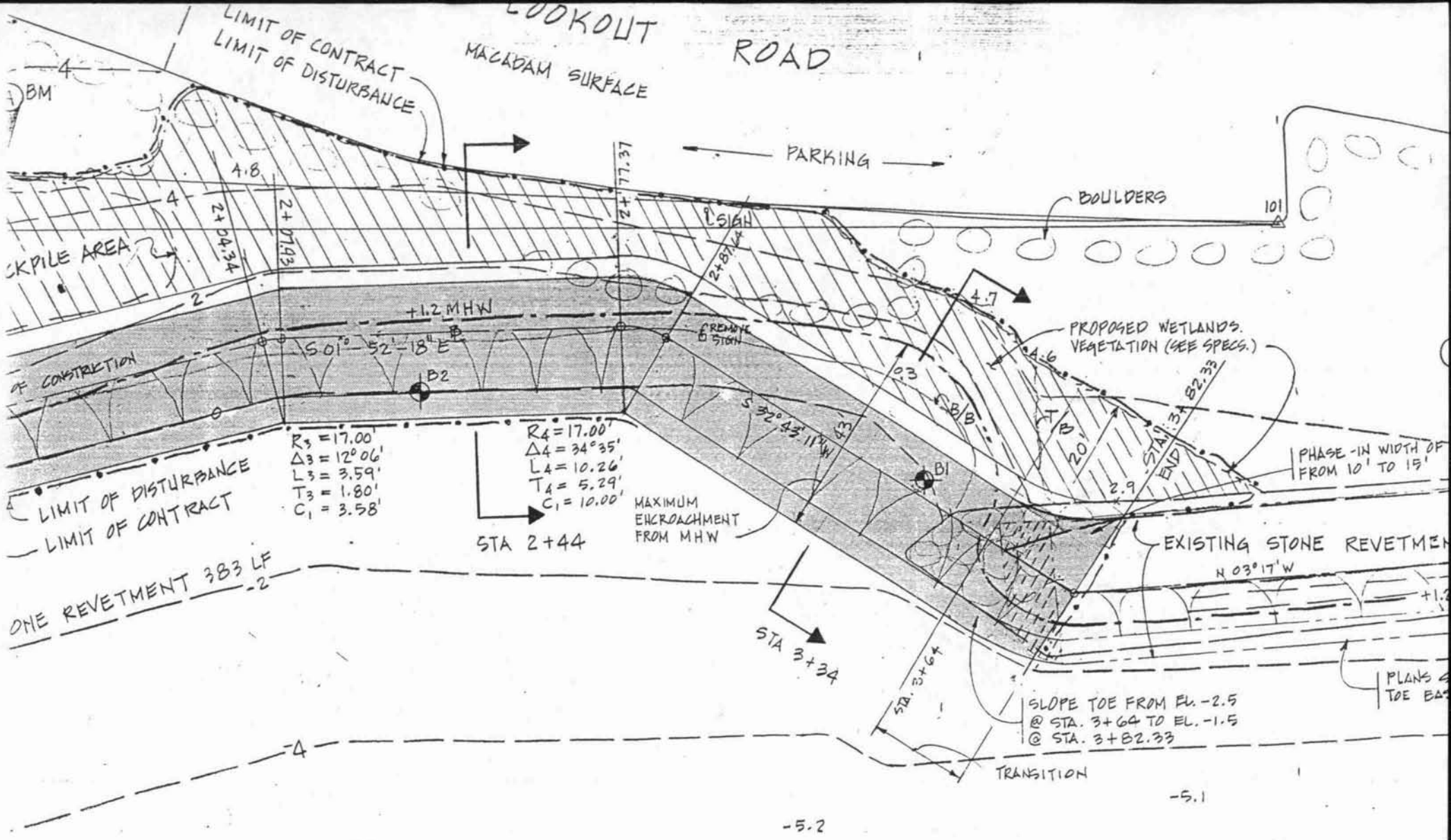
Discussion:

The Department of Natural Resources proposes to construct approximately 380 feet of stone revetment, for shore erosion control, along the Potomac River at Point Lookout State Park in St. Mary's County.

The site borders a narrow strip of land, 40-100 feet wide, between the river and Point Lookout Road. The site has eroded significantly over the last several years. The construction will disturb an area of marsh grass. This disturbance will be mitigated by planting a marsh area behind the revetment.

Staff Contact: Ren Serey


B1
3½" C.O.
3.3
PROPOSED WETLANDS VEGETATION (SEE SPECS.)
STOCKPILE AREA
MH
4.1
MH
4.3
STA. 0+00 BEGIN
20'
$R_1 = 10.00'$
$\Delta_1 = 90°00'$
$L_1 = 15.71'$
$T_1 = 10.00'$
$C_1 = 14.14'$
S10°-31'-49"W
S13°-57'-49"E
+1.2 MHW
B3
B4
LIMIT OF DISTURBANCE
LIMIT OF CONTRACT
0+15.71
0+57.60
0+63.58
$R_2 = 14.00'$
$\Delta_2 = 24°30'$
$L_2 = 5.98'$
$T_2 = 3.04'$
$C_1 = 5.94'$
STA 1+20
PROPOSED STONE REVETMENT 383 LF
CONTRACTOR SHALL PLACE STONE FROM +6 MLW AT ℄ CONSTRUCTION TO EXIST. GRADE AT THE ℄ CONSTRUCTION. ALL STONE TO GROUND INTERFACES SHALL BE LINED WITH FILTER CLOTH.
POTOMAC RIVER
FLOOD
EBB
LEGEND :
PROPOSED WETLANDS VEGETATION AREA
PROPOSED STONE REVETMENT
SITE PLAN
0 20 40 FEET
SCALE : 1" = 20'
NO.
DATE
REVISIONS



DESIGN CERTIFICATION

"I hereby certify that this plan has been designed in accordance with the 1983 Standards and Specifications for Soil Erosion and Sediment Control or current revisions thereof, and Department of the Environment Stormwater Management Regulations.

OWNER'S/DEVELOPER'S CERT

"I/We hereby certify that all cleari and/or development will be done pursuant responsible personnel involved in the have a certificate of attendance at a M Environment approved training program fo and erosion before beginning the project right of entry for periodic on-site Maryland, Department of the Environment,

1/21/92
Date

Owner/Deve

5560
Card No.

L. H. L
Printed N

approved
18-0

STAFF REPORT
February 24, 1992

Applicant: Queenstown

Project: Amendment to Queenstown Critical Area Program

Commission Action: Vote

Recommendation: Approval

Discussion: The Town Commissioners of Queenstown are proposing an amendment to the Critical Area jurisdictional boundaries. The Town originally requested and received the approval of the Commission to include all the area in the Town within the Critical Area jurisdiction. Because the Town has determined that certain regulations regarding impervious surface requirements can not be imposed on commercial development along the Route 301 corridor, the Town Planning Commission has recommended reduction of the definition of the Critical Area to only include land within the required 1000 foot boundary.

Staff Contact: Rena Jennings

Held hearing working on it No action

STAFF REPORT

March 4, 1992

JURISDICTION: **Somerset County**

PROJECT: Growth Allocation - **Coulbourn's Cove**

COMMISSION ACTION: Commission vote at March or April meeting

STAFF RECOMMENDATION: **APPROVAL with conditions**

PANEL RECOMMENDATION: **TO BE DETERMINED AFTER HEARING**

DESCRIPTION

The Somerset County Commissioners have requested 16 acres of growth allocation for the project known as Coulbourn's Cove. The site is currently RCA. The majority of the site is farm field/prior converted wetlands.

The total acreage of the parcel is 68 acres, with 57 acres in the Critical Area. The applicant is proposing the creation of 20 lots ranging in size from 2 acres to 4.6 acres; 16 lots are entirely in the Critical Area, 2 lots are partially in and partially out.

The majority of the site has been farmed. A sizable portion of this farmed area is mapped as hydric soils and has since been designated by the Soil Conservation Service as being Prior Converted. There is a forested area that covers portions of lots 9, 10 and 11. Sections of the forested area are also mapped as having hydric soils. There are at present two drainage ditches that go from the road to the southwest portion of the property (toward Coulbourn's Cove). The property owner is propsing to fill these ditches and create new ditches that run along the property lines between the lots. Creation of a new drainage system on the property is being required by the Somerset County Health Department before it will approve on-site septic systems.

The County's program requires that 1 acre of growth allocation be deducted for each detached single family site provided that the development pad is limited to no more than 20,000 square feet. The County Program also requires that the portion of the lot outside of the development pad be restricted from further development and maintained in natural vegetation.

ISSUES

1. The development pad is not shown on the site plan. There is no indication on the site plan that there are any restrictive

covenants on the portion of the lots outside of the development pad. The Somerset County Commissioners' Findings of Fact require that the development for the parcels in the Critical Area be limited to 20,000 square feet. However, the County's Finding on this point is incomplete. The County's requirement will only preclude the placement of structures, but would allow lawns and gardens, etc. This is not consistent with the County's definition of development pad as follows:

> Development Pad--The area of a lot, within a larger overall lot area that is devoted to structures and septic systems. In general, where a development pad is prescribed the remaining area of the lot must be maintained in natural vegetation. (Emphasis added)

2. The road and the pond will be a disturbed area (approximately 8.5 acres), that is not represented in the deduction for the single lots.

3. The lots that are partially in and partially out of the Critical Area need to have the dwelling and disturbance restricted to the portion of the lot outside of the Critical Area since they are not being counted against growth allocation at all. This may not be possible for lot number one.

4. The Somerset County Health Department is requiring a drainage system be developed before septics are approved. It needs to be determined if the forested portion of the site is a nontidal wetland. If this area is a nontidal wetland, then the required 25-foot buffer would have to be maintained as shown on the site plan. If this area is a wetland, any drainage systems need to be designed so they will not impact this area.

Staff Recommendation: Approval with the following conditions:

1. That the County be required to deduct the 8.5 acres that will be disturbed for the road and pond area.

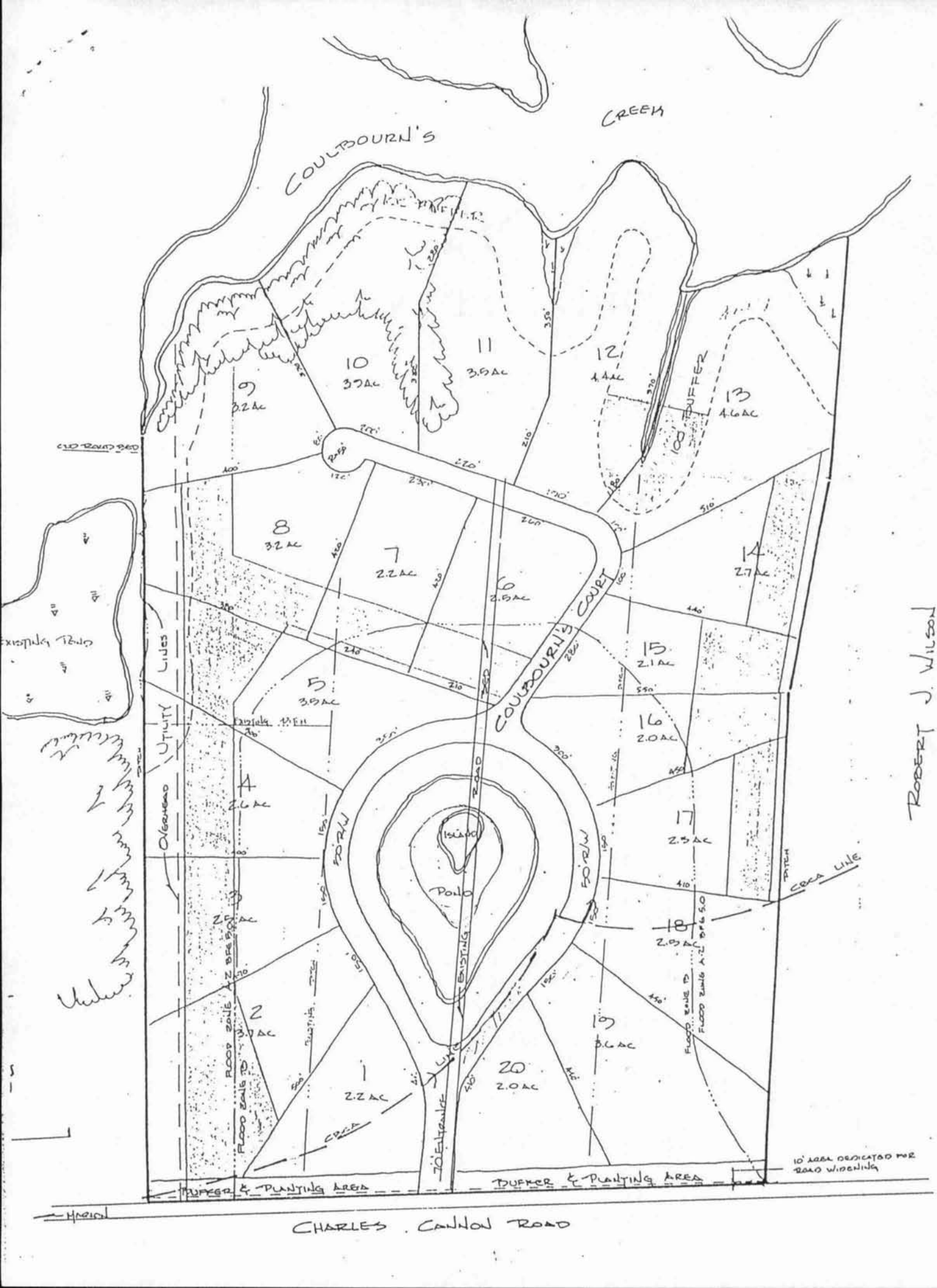
2. That two acres be deducted for the two lots that are partially in and partially out of the Critical Area or that restrictions be placed on these lots limiting development to the portion of the lot outside of the Critical Area.

3. That the County Commissioners amend their Findings of Fact to require that property owners maintain the portion of their property outside of the development pad in natural vegetation.

4. That any nontidal wetlands be designated on the site plan and a 25-foot buffer be placed around them.

Hearing: Monday, February 24, 1992 in Princess Anne.

STAFF CONTACT: Claudia Jones


COULTBOURN'S CREEK
COULTBOURN'S COURT
ROAD
EXISTING
Pond
50' R/W
50' R/W
OVERHEAD UTILITY LINES
EXISTING TREES
EXISTING TREES
CREEK LINE
CREEK LINE
FLOOD ZONE A
FLOOD ZONE A
FLOOD ZONE A
BUFFER & PLANTING AREA
BUFFER & PLANTING AREA
BUFFER
10' AREA DEDICATED FOR ROAD WIDENING
CHARLES CANNON ROAD
ROBERT J. WILSON
1 2.2 AC
2 3.7 AC
4 2.6 AC
5 3.9 AC
7 2.2 AC
8 3.2 AC
9 3.2 AC
10 3.7 AC
11 3.9 AC
12 1.4 AC
13 4.6 AC
14 2.7 AC
15 2.1 AC
16 2.0 AC
17 2.3 AC
18 2.03 AC
19 3.6 AC
20 2.0 AC

approved subject to 1 & 2 being met.
1) Include 5 acres in Growth Allocation.
2) includes as a residual parcel. Original project to 1 & 2 being met

PANEL REPORT

March 4, 1992

JURISDICTION: **Caroline County**

PROJECT: Growth Allocation - **Brick Mill Landing**

COMMISSION ACTION: **VOTE**

RECOMMENDATION: **APPROVAL with condition**

DESCRIPTION

The Commissioners of Caroline County have requested 7 acres of growth allocation for the project known as Brick Mill Landing. The parcel is 74.19 acres; 31 acres are in the Critical Area. The applicant is proposing to create four lots totalling seven acres. The applicant will place a conservation easement on 20 acres. This leaves a five acre residual parcel which is neither protected by easement nor counted against growth allocation.

The property is across the street from the Choptank River, so the 100-foot buffer is not an issue in this situation. There is a small creek and associated nontidal wetlands on the property; however, these will be protected by the required buffers. Although, there are some endangered species in the vicinity, none have been found on the site.

ISSUES

The Caroline County Program specifies that the entire acreage of a parcel not in tidal wetlands shall be counted against growth allocation unless the following conditions are met:

1. A development envelope should be specified which includes individually owned lots, any required buffers, impervious surfaces, utilities, stormwater management measures, on-site sewage disposal measures, and any additional acreage needed to meet the development requirements of the criteria.

2. The remainder of the parcel, including any tidal wetlands, would not count against the County's growth allocation if it is contiguous, at least 20 acres in size, retains its natural features or resource utilization activities (agricultural, forestry, fisheries activities, or aquaculture), and is restricted from future subdivision and/or development through restrictive covenants, conservation easements, or other protective measures approved by the County and the Critical Area Commission.

-The five acre residual parcel is not being deducted from growth allocation.

-There are no restrictions proposed on the five acre residual parcel.

-The five acre residual parcel is not being proposed for any development at this time.

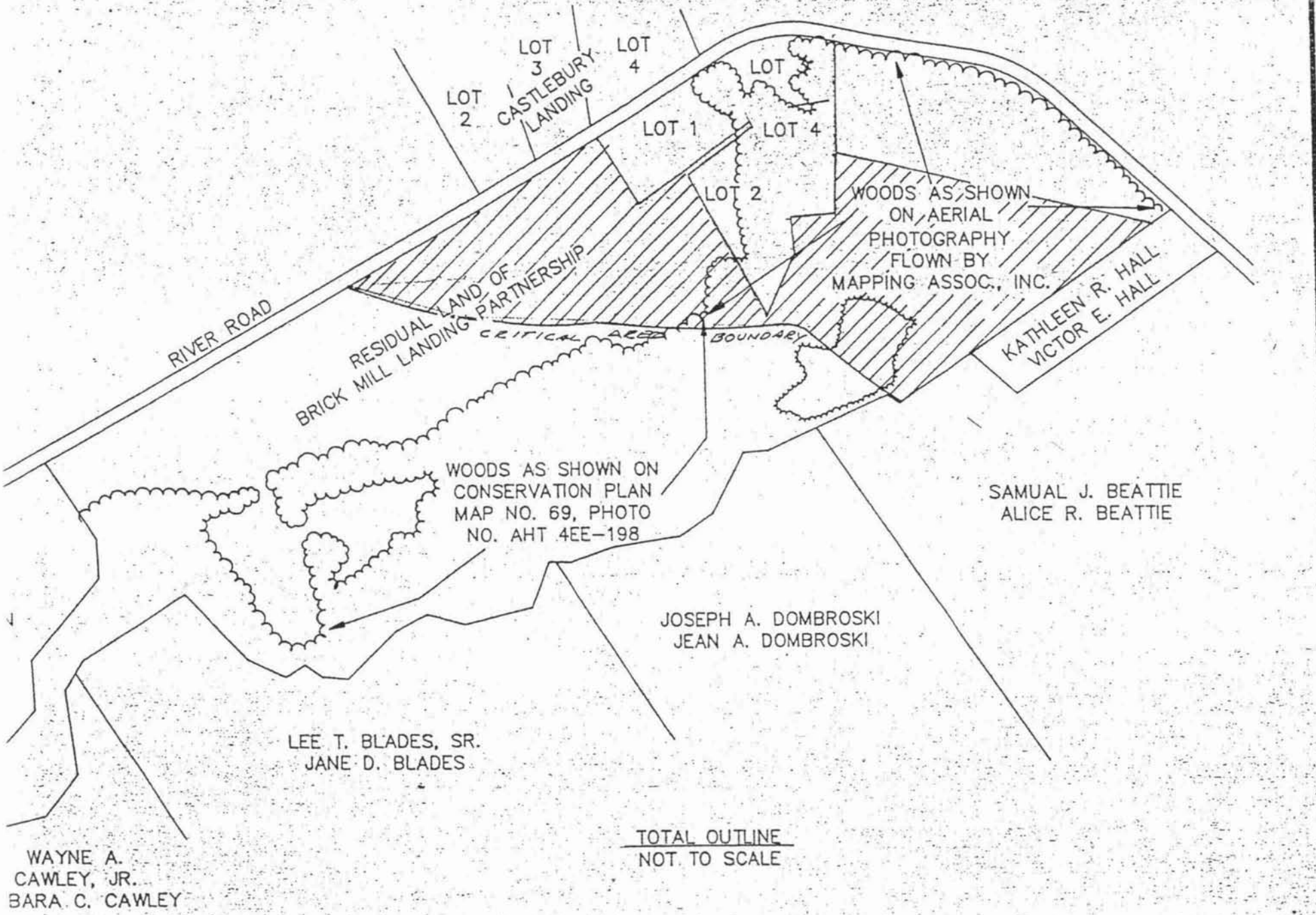
Panel recommendation is approval upon meeting one of the following conditions:

1 - Add the five acre residual parcel to the restricted area under easement, as required by the County's ordinance; or

2 - Deduct this five acre residual parcel from growth allocation.

A public hearing was held on February 10, 1992 in Denton.

Staff Contact: Claudia Jones



PLAT SHOWING

"BRICK MILL LANDING FARM"

STAFF REPORT

JURISDICTION: Easton

SUBJECT: Londonderry Growth Allocation - Refinement

STAFF CONTACT: Theresa Corless

The Town of Easton has requested 21.722 acres of Growth Allocation for a parcel in their designated Growth Area. They are requesting the entirety of the parcel in the Critical Area. This Growth Allocation has been deemed a refinement by Judge North, as the property is designated on Easton's Growth Areas Map as a potential area for Growth Allocation. The assignation of Growth Allocation via refinement for such a designated parcel is consistant with Easton's Critical Area Program.

Refinement supported by Commission. The S.D. described.

1) need to recd 100
2) need to check NT+T wetls.
3) C.A. line is needed as well
Are doing 1:5 to S.W. mgt.

Sarah, FYI
16-2 Bostian Ellerich

STAFF REPORT

February 26, 1992

Jurisdiction: Queen Anne's County

Subject: Program Amendments

DISCUSSION:

Over the past three years the Critical Area Commission has notified Queen Anne's County of several omissions and deficiencies in their Critical Area Program.

The issues include:

1) The County does not review building permits for Critical Area purposes. This means that the County does not review for Habitat Protection Areas, impervious surfaces and other requirements.

2) The County designates Buffer-exemption areas on a case-by-case basis without specific approval by the Critical Area Commission.

3) The grandfathering language of the County's Program requires that Habitat Protection Areas and development of water-dependent facilities meet the Criteria standards only insofar as possible. This is inconsistent with the Criteria.

Attached you will find correspondence between the Commission and the County regarding these issues. Under HB 1062, enacted by the General Assembly in 1990, the Commission is authorized to require changes to a local program when the Commission determines that a program contains deficiencies or has omitted certain provisions of the Criteria.

You are asked to read this material. At the Commission meeting on March 4, the Commission will discuss the issues raised in the correspondence and will consider appropriate action as authorized under HB 1062.

Staff contact: Claudia Jones

Attachment

CHRONOLOGY OF QUEEN ANNE'S COUNTY
SITE PERFORMANCE STANDARD AMENDMENTS

9/19/89	Letter to Joe Stevens from Bob Price	Points out discrepancies between Queen Anne's County's Critical Area Program, the County's Critical Area Ordinance and the State Critical Area Law regarding the 15% impervious surface limitations on grandfathered lots and in Limited Development Areas in general.
9 ~~10~~-26-89	Letter to Bob Price from Queen Anne's Co. Commissioners	Response to letter of 9-19-89. County Commissioners are aware that lots of record are required to meet the 15% impervious surface limitations. However, the County allows this to apply only "insofar as possible" to development of a single family lot of record.
9 ~~10~~-26-89	Letter to Bob Price from Joe Stevens, Queen Anne's County Planning Director	The standards for impervious surface limitations in the County were intended to apply "insofar as possible" when building or expanding a single family home on a lot of record. States that the language in the County's Program was reviewed by the Commission Staff prior to approval, and suggest that the Commission Staff review again.
12/29/89	Letter to Joe Stevens from Judge North	CAC expressed concern over enforcement of LDA criteria on grandfathered lots. Performance criteria not reviewed for building permits. County not in conformance with the Critical Area Law and Criteria. Request response within 10 days as to County's enforcement of 15% criteria on grandfathered lots.
1/24/90	Memo from Pat Pudelkewicz to Judge North	No response received from Queen Anne's County on issues in letter of 12/29/89
2/6/90	Letter to Pat Pudelkewicz from Bob Price	Lays out 3 issues 1. Site performance standards not applied to existing lots in LDA & RCA 2. Designation of Buffer exemption areas not consistent with criteria 3. Questions legality of adoption of Critical Area ordinance (procedural requirements of 66B not met)

2/13/90	Letter to Judge North from Joe Stevens	Wants to schedule meeting to discuss building permit review in LDA on grandfathered lots. Only Buffer criteria applied for building permits.
3/13/90	Letter to Joe Stevens from Pat Pudelkewicz	Confirming meeting of March 21, 1990
8/16/90	Letter to Joe Stevens from Judge North	Followup to meeting of March 21, 1990. Building review process must be set up immediately. All applicable criteria must apply to grandfathered lots. Habitat Protection Areas and water-dependent facilities <u>not</u> insofar as possible. Offer $15,000 additional grant money to implement review process. Immediate attention is necessary. Queen Anne's Program not in compliance with Critical Area Law until issues addressed.
8/22/90	Phone Log Margaret Kaii, Queen Anne's County, to Pat Pudelkewicz	County received letter of 8/16/90 from Judge North. Question what other jurisdictions are doing about building permit review. Queen Anne's County asked asked for an extension to end of month to get something together on how to handle this issue.
9/20/90	Memo from Pat Pudelkewicz to Judge North	Asking if Judge North Has received a response to 8/16/90 letter which requested a response by "end of month."
10/17/90	Sample letter to all jurisdictions	Explains the provisions of HB 1060 and HB 1062. There is no variance provision for the impervious surface limitations since it is Law.
1/4/91	Letter to Judge North from Joe Stevens	Status of Queen Anne's County adopting amendment of HB 1060 and 1062 into their Program. Would like to meet with respective staff and counsel. Would also like to discuss building permit review and the allowance of some institutional uses in the RCA to circumvent situations such as that which occurred over the Queenstown Harbor Golf links.
1/25/91		Meeting between Queen Anne's County staff and Critical Area Commission staff.

2/5/91	Letter to Judge North from Joe Stevens	Followup from meeting of January 25, 1991. Include proposed amendments to Queen Anne's County Critical Area ordinance regarding HB 1060 and the building permit review.
3/28/91	Letter to Joe Stevens from Judge North	Comments on proposed amendments of 2/5/91. Explain why the County prefers the term "gross site area" over the language of HB 1060 "parcel or lot." Site performance standards for building permits should apply to RCA as well as LDA. Delete "in-sofar as possible" from the protection of Habitat Protection Areas on grandfathered lots. Provide for fees-in-lieu for re-placement of trees for those situations where on-site replacement is not possible. A section on site performance standards for building permits in the IDA should also be prepared. County's amendment process is not correct. An amendment must have the support of the local jurisdiction as evidenced by it being submitted by the chief elected officials of the jurisdic-tion. A Queen Anne's County Program amendment is to be sent to the Commission after a Planning Commission recommendation only.
6/26/91	Letter to George Gay from Christopher Drummond, County Attorney	Concerned about the language "except as otherwise provided in this subsection for stormwater runoff" language of the statute. Doesn't want to include meaning-less language in the Queen Anne's County ordinance. Will be including changes for 6017.B (Buffer exemptions). Will propose that the Planning Commission may designate a Buffer exemption area where the existing buffer has more than 50% impervious sur-face and less than 20% vegetative cover or the buffer consists of inert fill that does not support vegetative growth <u>and</u> stormwater runoff from adjacent upland can be diverted. As soon as we hear from you on the "except as otherwise provided in this subsection for stormwater" runoff, will complete proposed amendments and for-ward to Commission staff for final review and comment.

7/16/91	Letter from George Gay to Christopher Drummond	The problematic clause "except as otherwise provided...for stormwater runoff" need not be included in the County ordinance. Appears that current buffer exemption practice is contrary to the terms and intent of Critical Area Criteria. The only appropriate amendment to 6017.B of the County ordinance is its complete deletion.
8/29/91	Letter to Dr. Sarah Taylor from Joe Stevens	Include proposed revisions to Queen Anne's County Program. Request that Critical Area Commission review the changes as refinements. Included are site performance standards for building permits for LDA and RCA. Language of HB 1060.
9/28/91	Letter to Joe Stevens from Judge North	Accept proposed revisions for processing. Determination will be made within 30 days as to it being handled as an amendment or refinement. Staff comments to follow.
10/9/91	Letter to Claudia Jones from Robert Price, Jr.	Re proposed amendments to Queen Anne's Program submitted 8/29/91. There is no reference to any hearing and/or action by anyone except the Planning Director. The Queen Anne's County ordinance requires a public hearing before the Planning Commission prior to the referral of the amendment to the County Commissioners and submission to the Commission.
10/29/91	Letter to Ren Serey from Joe Stevens	Request informal comments on draft language in Critical Area ordinance concerning density status of existing grandfathered lots. Queen Anne's County staff position is that this be handled as a refinement.
11/6/91	Letter to Joe Stevens from Judge North	Changes submitted on August 19, 1991 must be processed as an amendment. Question whether these amendments have been approved by the Queen Anne's County Planning Commission as required by the County. Ask the County to provide documentation that these amendments had been approved by the Planning Commission. Other issues that staff have asked for changes on include deletion of Buffer exemption section and County's amendment

		process not addressed. Preferable if all these changes could be made at the same time.
1/2/92	Letter to Joe Stevens from Claudia Jones	Comment on proposed changes to County Program regarding density requirements on grandfathered lots. Proposed changes consistent with Criteria. Additional requirements from grandfathering section of the Criteria need to be added to the County's Program. Protection of Habitat Protection Areas on grandfathered lots is not insofar as possible. Requirements of development activities for water-dependent facilities must be met on grandfathered lots.. Ask about status of previously submitted amendments concerning building permits.
1/23/92	Memo to Claudia Jones from Joe Stevens	Resubmittal of proposed amendments regarding building permits and HB 1060. Basically the same as those submitted to Commission staff on February 5, 1991.
2/3/92	Memo to Judge North from Claudia Jones	Ask Judge North about handling the proposed density changes to the Queen Anne's County Program as a refinement or amendment if they are submitted properly. Judge North determines that these changes can be handled as a refinement.

3/2/92
Joe Stevens submitted same proposals as of 1/23/92

Buffer Exemption
NPA's
water depend facil & grandfathering

George - focus on the Bd of Co. Commissioners

Motion - T. Jarvis
find the noting the violation of § 1809 NRA.
under § 1809 NRA.
Give them 30 days to be in compliance before the notice is given.

QACo prog cont cert elements and/or conditions shall
send a notific
to the Commiss
QACo. de failure
the notific + that
take effect will be
after 30 days
from date
as covered
unless the Co.
continue ev
submit their
an amendment to the
Program w.i. the
30 days
or accept
comm

LAW OFFICES
ROBERT R. PRICE, JR.
103 LAWYERS ROW
CENTREVILLE, MARYLAND 21617

ROBERT R. PRICE, JR.
ROBERT R. PRICE, III

TELEPHONE
(301) 758-1660

September 19, 1989

Mr. Joseph Stevens, Planning Director
County Annex Building
Centreville, Maryland 21617

Dear Joe,

In regard to the Max Sherman question regarding "impervious surface" in the Limited Development Area:

1) Natural Resource Article 8-1808 required in (c), 5, a local program to include provisions to limit the amount of land covered by buildings, roads, parking lots, or other impervious surfaces.

2) The Critical Area Commission in adopting the criteria for Limited Development Areas (LDA) at 14.15.02.04 (7) requires "For storm water runoff, man caused impervious areas shall be limited to 15 per cent of the site".

3) The Queen Anne's County Critical Area Program provides:

a) Section 1-15 in the LDA "Impervious Surfaces - Man caused impervious areas will be limited to 15 per cent of the Critical Area portion of the parcel of record as of the date of Commission approval of this program."

b) Section 1-23 - "Grandfathered Lots... Any development that occurs on grandfathered lots must comply is so far as possible with the requirements of the County's Critical Area Program."

On the first page of the Queen Anne's County Program is the statement "The Queen Anne's County Chesapeake Bay Critical Area Ordinance supplements existing land use regulations by imposing the standards and requirements recommended in the Queen Anne's County Critical Area Program and required by the Critical Area Criteria."

The Queen Anne's County Critical Area Ordinance by Section 1001, 1002 and 1003 recites its adoption to implement the Crtical Area criteria and the Queen Anne's

County Program - Section 1003, C, stating "This Ordinance has been drafted to conform with the provisions of the Program and great care has been taken to follow carefully the goals of the Program and to insure that the development rules, regulations and restrictions set forth herein will achieve the goals and objectives of the Program."

Under Section 1005 of the Ordinance titled "Interpretation" Section 2 in particular "prohibits any interpretation that lowers the protection afforded to the public and would be inconsistent with the goals and objectives of the Program and the requirements of Section 8-1801, et seq of the Natural Resources Article."

All of the above state, commission and county laws, regulations and criteria require a maximum of 15 percent "impervious surface" in the LDA. There are no exemptions either in the criteria or the County Programs.

The only caveat is that "grandfathered lots" must comply in so far as possible.

Mr. Sherman advises me you have referred him to Section 6006 of the Queen Anne's County Critical Area Ordinance as authority for the Planning Department's policy of not restricting impervious surface to 15 per cent the LDA where a building permit for residential use is issued.

I do not agree with your interpretation of Section 6006, however, in view of the criteria and the County Program it is obvious, if your interpretation is correct, the Ordinance is in direct conflict with the Program and must be amended to implement it.

I would also like to add that the property Max Sherman inquired about is in a Buffer Exemption Area and as set forth in Section 6018 D.1. is limited to a 25 per cent increase in impervious surface, as well as, shore set backs and offsets.

As we are all reciting and working for the same goals and objectives as set forth in the Program adopted by Queen Anne's County, it is unfortunate an ordinance

interpretation presumably would allow no site performance standards on residential structures in the LDA. A prompt clarification or amendment if appropriate would correct the Ordinance so as to implement the Program.

I do not represent Mr. Sherman in this matter and became involved in response to an inquiry as to critical area requirements.

These observations do not represent the views of the Critical Area Commission, but are mine personally. I suggest you consult the Commission staff if there are any further questions.

Sincerely yours,

Bob Price

Robert R. Price, Jr.

RRPJr:jc

cc Mr. Max C. Sherman, Jr.
Frances A. Ashley, County Commissioner
Robert D. Sallitt , County Administrator

Enclosure

DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
CENTREVILLE, MARYLAND 21617
758-1255

September 26, 1989

Robert R. Price, Jr., Esquire
103 Lawyer's Row
Centreville, Maryland 21617

Dear Mr. Price:

I would like to take this opportunity to respond to your September 19, 1989 letter. The letter challenges the County's authority to implement impervious cover limitations under the Queen Anne's County Chesapeake Bay Critical Area Ordinance.

Your most recent interpretation of the County Critical Area Ordinance surprises me. The County Critical Area Ordinance was written to require parcels located in the Limited Development Area and Resource Conservation Area to meet impervious cover limitations when proposing a subdivision, site plan, conditional use, special exception or variance. The standards were intended to apply "in so far as possible" when building or expanding a single family home on a lot of record.

As you pointed out in your letter, page I-23 of the Critical Areas Program states, "Any development that occurs on grandfathered lots must comply insofar as possible with the requirements of the County's Critical Area Program". The provision identified on page I-15 of the Critical Area Program, however, is in reference to new development involving site plan, subdivision, conditional use and variances. Only development on grandfathered lots which falls into one of these categories must comply with the 15% impervious cover limitation.

The language in the County Critical Area Ordinance was reviewed on numerous occasions by you and the Critical Area Commission staff prior to final approval. The review process was very time consuming and detailed. It was my understanding that after this review process was completed, the contents of the County Ordinance were considered consistent with the requirements of the Critical Area Law by the Commission.

If you are now finding standards in our local Ordinance that you believe are inconsistent with the Critical Area Criteria, perhaps the Critical Area Commission staff should again review the Queen Anne's County Critical Area Ordinance. The Critical Area Commission

has the option of recommending a comprehensive package of amendments to the County Commissioners.

If this is not a Critical Area Commission issue, but a personal disagreement with my interpretation of the County Critical Area Ordinance, you may appeal the decision to the Board of Appeals.

Sincerely,

Joseph A. Stevens
Planning Director

JAS:cm

CC: County Commissioners
Robert Sallitt
Christopher Drummond, Esquire
The Honorable Judge John C. North, II

THE COUNTY COMMISSIONERS
OF QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
CENTREVILLE, MARYLAND 21617
758-0322

FRANCES A. ASHLEY, PRESIDENT
WHEELER R. BAKER
WILLIAM V. RIGGS III

ROBERT D. SALLITT, ADMINISTRATOR
LYNDA H. PALMATARY, CLERK
PATRICK E. THOMPSON, ATTORNEY

September 26, 1989

Robert R. Price, Jr., Esquire
103 Lawyers Row
Centreville, Maryland 21617

Dear Mr. Price:

We would like to take this opportunity to clarify any confusion you have regarding our intent when adopting the County Critical Area Ordinance.

We are well aware that our Critical Area Ordinance requires lots of record to meet the 15% impervious cover limitation. This provision applies only "in so far as possible" to development of a single family lot of record. This provision was put into the local Critical Area Ordinance specifically to avoid an onslaught of variance requests to the County Board of Appeals. We have found this procedure to be equitable for the single family homeowner whose lot existed prior to the Critical Area Law. The local Critical Area Ordinance still limits or prohibits new impervious cover in the Buffer and Buffer Exempt Areas, as well as when subdivision, site plan, variance or conditional use approval is required.

If there are provisions in the Ordinance which are not consistent with the Critical Area Criteria, we will consider revising the Ordinance upon request from the Critical Area Commission.

We appreciate your assistance regarding this matter. However, your continual inference that we do not understand the implications of the Ordinance we adopted is not warranted. Queen Anne's County has worked long and hard to develop an implementable program which achieves both State and local objectives. The County will continue

to work as always with the Critical Area Commission in order to enhance the program.

Sincerely,

THE COUNTY COMMISSIONERS
OF QUEEN ANNE'S COUNTY

Frances A. Ashley

FRANCES A. ASHLEY, PRESIDENT

WHEELER R. BAKER

William V. Riggs, III

WILLIAM V. RIGGS, III

cc: Delegate R. Clayton Mitchell, Jr.
Delegate John M. Ashley, Jr.
Delegate Ronald A. Guns
The Honorable Judge John C. North, II
Mr. Max C. Sherman, Jr.

JOHN C. NORTH, II
CHAIRMAN

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREAS COMMISSION
WEST GARRETT PLACE, SUITE 320
275 WEST STREET
ANNAPOLIS, MARYLAND 21401
974-2418 or 974-2426

SARAH J. TAYLOR, PhD
EXECUTIVE DIRECTOR

wrong date → on mail 12/29

December ~~15~~, 1989

Mr. Joseph A. Stevens
Queen Anne's County Department
of Planning and Zoning
County Office Building
208 North Commerce Street
Centreville, MD 21617

Dear Mr. Stevens:

The question has arisen as to Queen Anne's County's enforcement of the 15 percent impervious surface limitation in existing residential areas in the Limited Development Area (LDA). Critical Area Law, Natural Resources Article §8-1808(5), requires each jurisdiction's Critical Area program to contain provisions to limit impervious surfaces. The Critical Area Criteria, COMAR 14.15.02.04, further defines this requirement in the LDA to limit impervious surfaces to 15 percent of the site. This requirement clearly refers to both existing residential development and vacant land in the LDA which will be developed in the future.

Upon inspection of the County's Critical Area Program we note that it states: "Any development that occurs on grandfathered lots must comply insofar as possible with the requirements of the County's Critical Area Program." We interpret this to mean that the 15 percent impervious coverage limitation is applied to grandfathered lots insofar as possible. However, we understand Queen Anne's County's position to be that unless a development or redevelopment requires a site plan, subdivision, variance, special exception or conditional use approval within the LDA, then there are no site performance standards imposed

with regard to the 15 percent impervious coverage limitation or other LDA performance standards. If this is the case, a large portion of the LDA in Queen Anne's County does not have performance standards applied; thus, the County would neither be in conformance with Critical Area Law and Criteria, nor its own adopted local program.

This issue needs to be resolved as soon as possible, as your County's action or inaction in this regard ultimately affects how other counties are viewing these important responsibilities. May I please hear from you within 10 days as to the County's policy toward enforcement of the 15 percent impervious surface limitation on grandfathered lots, especially with regard to existing residential neighborhoods.

Very truly yours,

John C. North, II

Judge John C. North, II
Chairman

JCN:msl

cc: Robert Price, Jr., Esq.

LAW OFFICES
ROBERT R. PRICE, JR.
103 LAWYERS ROW
CENTREVILLE, MARYLAND 21617

ROBERT R. PRICE, JR.
ROBERT R. PRICE, III

TELEPHONE
(301) 758-1660

February 6, 1990

Critical Areas Commission
Ms. Pat Padulkewicz
275 West Street
Suite 320
Annapolis, Maryland 21401

Dear Pat,

On June 29, 1988 the Commission approved Queen Anne's County Chesapeake Bay Critical Area Program.

Section IX of the Program set the ordinance changes required for Program Implementation.

Section 7307. Limited Development Areas - Section IX - A - 22 stated

"D. Development Standards

Development and re-development in these areas designated Limited Development shall be subject to the following standards.

1 thru 12"

Queen Anne's County after program approval decided not to adopt Section IX for Program Implementation by amending its existing zoning and subdivision ordinances. The County instead wrote a new ordinance titled "Chesapeake Bay Critical Area Ordinance".

The Chesapeake Bay Critical Area Ordinance was referred back to the Critical Area Commission for approval and after receiving approval, it was adopted by the County Commissioners along with the Program on March 15, 1989.

In the new Ordinance old Section 7307 regarding Limited Development was re-numbered and re-written, as follows:

"Section 6006 (page 28) Development Standards in Limited Development Areas.

D. Site Performance Standards

Development and re-development <u>requiring site plan, subdivision, variance, special exception or</u>

conditional use with the LDA development areas shall be subject to the following conditions and restrictions.

1 thru 12"

There are no other site performance standards for existing lots in the LDA (and the RCA by reference, Section 6007).

The effect of the amendment in the March 15th - adoption was to erase any site performance requirements for existing lots in the LDA or RCA unless they required site plan, etc. approval.

I do not know if this change was brought to the attention of Charley Davis when it was re-written. I worked with Charley on this program and know I was not aware of the change. This was another program that received a "rush" approval in February 1989, and where there was no written program available when approved. I was not present at the February meeting and later found out the program vote was not listed on the agenda. We spent a part of the March meeting trying to reconstruct what the Commission had approved and the above is apparently part of the result.

Under Article V - Grandfather provisions for lots of record - the program refers to density inconsistency for single family dwellings. Under B, 4 (a) there appears to be an attempt to enlarge on the density waiver as set forth in 5000-B by referring to "density, use and setback". I am not sure where the impervious statement in 4 (1) comes from, nor do I know what a "Note" is at the end of the section.

I think Joe Stevens has now changed his view as to existing lots being exempt from the impervious surface and other LDA criteria requirements. Perhaps the original approved language in Section 7307 will correct the situation.

In addition to the above, the Queen Anne's County Program has another conflict with the criteria. Section 6107 Buffer Exemptions authorizes the Planning Commission after notice to the Commission to grant Buffer Exemptions. It is my understanding to date that all requests for "Buffer Exemptions" to the Planning Commissions have been granted and the minutes reflect no proof as to a basis for any

specific findings.

I do not know if the Commission has been made aware of these Buffer exemptions as most of the files I have reviewed do not contain a Commission acknowledgement.

It is my understanding that Buffer Exemptions under the criteria had to conform to requests in the Program under the requirements of 14.15.09 (8).

This exemption procedure is going to present a problem, and I suggest it conform to the criteria and be the same as other counties.

Finally, Queen Anne's County has a county commissioner form of government and has only the legislative powers as delegated. The ordinance titled "Chesapeake Bay Critical Area Ordinance" does not purport to be adopted under the zoning authority of Article 66B and it was my understanding the procedural requirements of 66B were not referred to or complied with. It may be prudent for the Commission to obtain a statement from the County as to what authority the ordinance was adopted under. A review of this may save the County, and the Commission from some future problems.

We have talked about some of the above, and I thought you should have something in writing.

I will be away from the 10th through the 24th. Call me after that as to any questions or other information you may need.

Sincerely yours,

Robert R. Price, Jr.

RRPJr:tt

JOHN C. NORTH, II
CHAIRMAN

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREAS COMMISSION
WEST GARRETT PLACE, SUITE 320
275 WEST STREET
ANNAPOLIS, MARYLAND 21401
974-2418 or 974-2426

SARAH J. TAYLOR, PhD
EXECUTIVE DIRECTOR

August 16, 1990

Mr. Joseph A. Stevens
Queen Anne's County Department
of Planning and Zoning
County Office Building
208 North Commerce Street
Centreville, Maryland 21617

Dear Mr. Stevens:

This letter is a follow-up to our meeting of March 21, 1990, at which time you, Bob Sallitt, Ren Serey, Pat Pudelkewicz, and I discussed Queen Anne's County's implementation of its Critical Area Program. As you recall, this meeting was precipitated by my letter to you dated December 19, 1989, in which I expressed the Critical Area Commission's concern that a large portion of the Limited Development Area (LDA) in Queen Anne's County did not have performance standards applied, and thus was not in compliance with the Critical Area Law and Criteria. I also stated that the issue needed to be resolved as soon as possible, as the County's action or inaction in this regard ultimately affects how other counties view these important responsibilities. At the end of the meeting, I believe the Commission agreed to investigate other jurisdictions' application of the Critical Area criteria to building permits, and you agreed to pursue a citizen education program as well as consider other solutions.

Since that meeting, a number of cases have come to the forefront in Queen Anne's County which have highlighted the need for building permit review. The two cases of which I speak are Bryan Woods Subdivision and the Fulton case. In both instances, development was allowed to occur which should otherwise have been restricted.

In addition, the Program Amendments and Implementation Subcommittee of the Critical Area Commission has discussed Queen Anne's County's lack of building permit review for Critical Area issues on nonwaterfront lots. The members of this Subcommittee feel very strongly that review of building permits must reflect implementation of the Critical Area Law and Criteria. They also believe that while education measures are a good step in the right direction, in and of themselves they are not enough.

Ms. Pat Pudelkewicz has completed a survey of all counties in the Critical Area and has determined that nearly all review building permits with regard to compliance with Critical Area criteria. Various methods are used, ranging from review of all building permits by an environmental planner, to completion of a Critical Area checklist by a building permit applicant with follow-up review by a planner.

In order for Queen Anne's County properly to implement its Critical Area Program, a building permit review process must be initiated immediately. In addition, all applicable criteria must be applied to grandfathered lots. For some criteria, this will be "insofar as possible." However, for Habitat Protection Areas and water-dependent facilities, the criteria must apply completely. I recommend that you contact your neighboring counties, such as Kent or Talbot, or other counties such as Dorchester (which has a building permit checklist) or Wicomico (which has a Certificate of Compliance), to see how their processes are set up.

As a sign of our deep concern over this implementation issue, the Commission has offered Queen Anne's County an additional $15,000 in grant money to set up a more thorough review process. If the County would like to make use of this offer, I suggest that you submit an amendment to your FY'91 Critical Area Grant.

Your immediate attention to this matter is necessary. Please advise me of the progress the County is making by the end of the month. Until such time as this issue is addressed, the Queen Anne's County Critical Area Program shall be viewed as not being in compliance with Critical Area Law.

Very truly yours,

John C. North, II
Chairman

JCN,II\PP\pgm

cc: The Honorable Wheeler R. Baker
Mr. Robert Sallitt
Patrick Thompson, Esq.
Robert Price, Jr., Esq.
Thomas Deming, Esq.
Dr. Sarah Taylor

JUDGE JOHN C. NORTH, II
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EASTERN SHORE OFFICE
31 CREAMERY LANE
EASTON, MARYLAND 21601

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA COMMISSION

October 17, 1990

Mr. Jon Arason
Deputy Director
Planning and Zoning
160 Duke of Gloucester St.
Annapolis, Md. 21401

Dear Mr. Arason:

During the last session of the General Assembly, two bills were passed which amended the Critical Area Law and changed the criteria. Both bills were signed by Governor Schaefer on May 29, 1990, and they took effect on July 1, 1990. These changes are important for you to know about, as they will require a change to your Program (H.B. 1060) as well as a change to the process for approving program amendments submitted by your local officials to the Commission for consideration (H.B. 1062). Enclosed are copies of the bills as signed.

House Bill 1060 changes the impervious surface limit for lots in the Limited Development Area and Resource Conservation Area from 15% to 25% in three instances. They are:

1) For a parcel or a lot of 1/2 acre or less in size, that was in residential use on or before 12/1/85;

2) For a parcel or a lot of 1/4 acre or less in size, that was in non-residential use (i.e., commercial, industrial, institutional) on or before 12/1/85; and

3) For a lot of 1 acre or less in size, as part of a subdivision approved after 12/1/85; impervious surfaces of the lot may not exceed 25% and the total impervious surface of the entire subdivision may not exceed 15%.

For all other situations, the 15% impervious surface limitation remains.

It should be noted that since this change is reflected as a change in the Law, variances to the 15% or 25% limits, as appropriated, cannot be granted by the local government nor can lots be grandfathered.

House Bill 1062 is a bit more complicated. Its purpose is to

simplify the process for approving a change to a local program by establishing two categories of action: an amendment and a refinement. You are familiar with the amendment process which involves a local hearing, a hearing by five members of the Commission, and a follow-up adoption hearing by the local government on the amendment. The refinement process, newly created in the Bill, eliminates the Commission hearing in the local jurisdiction and shortens the time frame under which minor changes can be considered. To simplify the reading of the Bill, you will find enclosed a table describing the process for both actions. I hope this will be helpful to you.

Should you have any questions or require further information, please do not hesitate to call me or the Commission planner who works with your office.

Very truly yours,

John C. North, II
Chairman

JCN,II/pgm

Enclosures: Bill 1062
Bill 1060
Table of processes of actions

DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
CENTREVILLE, MARYLAND 21617
758-1255

February 5, 1991

The Honorable John C. North
Chesapeake Bay Critical Areas Commission
West Garrett Place, Suite 320
275 West Street
Annapolis, Maryland 21401

Dear Judge North:

In follow up to our meeting of January 25, 1991, we met with the County Commissioners of Queen Anne's County. They have directed us to propose the attached amendments to the Queen Anne's County Critical Areas Ordinance. I believe you will find they address the Critical Areas Commission and staff concerns regarding House Bill 1060 and your letter of August 6, 1990 regarding building permits.

We would appreciate your review and comments in the next few weeks so that a hearing may be scheduled. If there are any questions or concerns yet to be resolved please feel free to call. Your attention to this matter is greatly appreciated.

Sincerely,

Joseph A. Stevens
Director

JAS:mk

CC: Dr. Sarah Taylor
George Gay, Esquire
Pat Pudelkewicz
Christopher F. Drummond, Esquire

DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
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758-1255

PROPOSED AMENDMENTS TO THE QUEEN ANNE'S COUNTY

CRITICAL AREAS ORDINANCE

[ ] - deleted CAPS - new language

§6006 D. Site Performance Standards FOR PROJECT APPROVALS

Development and redevelopment requiring [site plan, subdivision, vaiance, special exception, or conditional use approval] PROJECT APPROVALS within the LDA [development areas] shall be subject to the following conditions and restrictions:

§6006 D. 8.

[8. Impervious surfaces shall be limited to 15 percent of the gross site area proposed for developments. However, impervious surfaces on any lot not exceeding (1) area in size in a subdivision approved after June 1, 1986 may be increased up to a maximum of twenty-five (25) percent.]

8. (A) EXCEPT AS PROVIDED HEREIN, IMPERVIOUS SURFACES SHALL BE LIMITED TO 15 PERCENT OF THE GROSS SITE AREA PROPOSED FOR DEVELOPMENT.

(B) IMPERVIOUS SURFACES MAY BE INCREASED TO NO MORE THAN 25 PERCENT OF THE GROSS SITE AREA:

(i) ON ANY LOT OF 1/2 ACRE OR LESS IN SIZE THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985,

(ii) ON ANY LOT 1/4 ACRE OR LESS IN SIZE THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985, OR

(iii) ON ANY LOT 1 ACRE OF LESS IN SIZE THAT IS PART OF A SUBDIVISION APPROVED AFTER DECEMBER 1, 1985, PROVIDED THE TOTAL OF IMPERVIOUS SURFACES IN THE ENTIRE SUBDIVISION MAY NOT EXCEED 15 PERCENT.

(C) THIS SECTION DOES NOT APPLY TO A TRAILER PARK THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985.

§6006 E. SITE PERFORMANCE STANDARDS FOR BUILDING PERMITS

DEVELOPMENT AND REDEVELOPMENT REQUIRING ONLY THE ISSUANCE OF A BUILDING PERMIT WITHIN THE LDA SHALL BE SUBJECT TO THE FOLLOWING CONDITIONS AND RESTRICTIONS:

1. ALL ENVIRONMENTAL AND NATURAL FEATURES ON THAT PORTION OF THE SITE WITHIN THE CRITICAL AREA SHALL BE IDENTIFIED BY REFERENCE TO THE RESOURCE PROTECTION MAPS MAINTAINED BY THE DEPARTMENT OF PLANNING AND ZONING. or any other information that should be brought to the attention of the county department

2. SITE DEVELOPMENT SHALL BE DESIGNED TO ASSURE THAT HABITAT PROTECTION AREAS ARE NOT ADVERSELY AFFECTED IN SO FAR AS POSSIBLE. ~~FOR OUT~~

3. DEVELOPMENT ACTIVITIES SHALL BE LOCATED AND DESIGNED TO MAINTAIN IN SO FAR AS POSSIBLE WILDLIFE AND PLANT HABITATS.

4. FORESTS AND DEVELOPED WOODLANDS SHALL BE PROTECTED IN ACCORDANCE WITH THE FOLLOWING:

   A. EXCEPT AS PROVIDED IN SECTION 6000 B.3, NO MORE THAN 25 PERCENT OF A FORESTED OR DEVELOPED WOODLAND AREA OF A SITE PROPOSED FOR DEVELOPMENT MAY BE REMOVED.

   B. WHEN PROPOSED DEVELOPMENT REQUIRES THE CUTTING OR CLEARING OF TREES, AREAS PROPOSED FOR CLEARING MUST BE IDENTIFIED ON THE PLAN ACCOMPANYING THE BUILDING PERMIT APPLICATION.

   C. CUTTING OR CLEARING OF TREES ASSOCIATED WITH DEVELOPMENT SHALL PROVIDE IN SO FAR AS POSSIBLE, REPLACEMENT TREES ON A ONE TO ONE BASIS ON THE SITE WITH A MINIMUM OF A FOUR TO SIX FOOT TALL TREE.

5. DEVELOPMENT ON SLOPES GREATER THAN 15 PERCENT SHALL BE PROHIBITED UNLESS SUCH DEVELOPMENT IS DEMONSTRATED TO BE THE ONLY EFFECTIVE WAY TO MAINTAIN OR IMPROVE SLOPE STABILITY.

6. (A) EXCEPT AS PROVIDED HEREIN, IMPERVIOUS SURFACES SHALL BE LIMITED TO 15 PERCENT OF THE GROSS SITE AREA PROPOSED FOR DEVELOPMENT.

   (B) IMPERVIOUS SURFACES MAY BE INCREASED TO NO MORE THAN 25 PERCENT OF THE GROSS SITE AREA:

   (i) ON ANY LOT OF 1/2 ACRE OR LESS IN SIZE THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985,

   (ii) ON ANY LOT 1/4 ACRE OR LESS IN SIZE THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985, OR

(iii) ON ANY LOT 1 ACRE OF LESS IN SIZE THAT IS PART OF A SUBDIVISION APPROVED AFTER DECEMBER 1, 1985, PROVIDED THE TOTAL OF IMPERVIOUS SURFACES IN THE ENTIRE SUBDIVISION MAY NOT EXCEED 15 PERCENT.

(C) THIS SECTION DOES NOT APPLY TO A TRAILER PARK THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985.

7. A MINIMUM OF TWENTY FIVE (25) FOOT BUFFER SHALL BE MAINTAINED AROUND NON-TIDAL WETLANDS.

JUDGE JOHN C. NORTH, II
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STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA COMMISSION

March 28, 1991

Mr. Joseph Stevens
Office of Plannning and Zoning
County Annex Building
Centreville, Maryland 21617

Dear Mr. Stevens:

We have reviewed the proposed amendments to Queen Anne's County's Critical Area Ordinance, and have the following comments:

§2002	Definition of Project Approval: The County states that both "development" and "redevelopment" are subject to site performance standards (as per §6006D). Since both terms are used, the definition for "Project Approval" should also include both terms. The definition should state, "The approval of development AND REDEVELOPMENT, other than development AND REDEVELOPMENT by a State..."
§6006D8A	Please use the language of the law: "Except as OTHERWISE provided IN THIS SUBSECTION FOR STORMWATER RUNOFF, MAN-MADE impervious surfaces ASSOCIATED WITH THE EXISTING USE ON THE PARCEL shall be..."
§6006D8A	We would like to see an explanation of why the County prefers the term "gross site area" over the language of HB 1060, "parcel or lot". Unless there is some significant reason which we would find acceptable, language of the law should be adopted.
§6006D8Bii	This citation should refer to lots in nonresidential use, not residential use as stated in your proposal.
§6006E	These site performance standards for building permits should apply to the RCA as well as the LDA.
§6006E1	We would recommend deleting"...by reference to the resource protection maps maintained by the Department of Planning and Zoning." While we recognize that these maps will be utilized, the

identification of natural features should not be limited to this source alone.

§6006E2 — Delete "insofar as possible". Protection of Habitat Protection Areas is not grandfathered; therefore, "insofar as possible" does not apply.

§6006E3 — Same as above.

§6006E3 — The County should add: "Development and redevelopment activities shall be located to avoid disturbance to Habitat Protection Areas. When no alternative exists and such activities must cross or be located in Habitat Protection Areas, the applicant shall minimize impacts to habitats and show that no feasible alternative location for such activity exists. Development and redevelopment shall be done in a manner that protects Habitat Protection Areas as defined in the Queen Anne's County Critical Area Program and as defined herein".

§6006E4A — Any clearing of forest or developed woodland on a site over 20% must be replaced at 1.5 times the area cleared. Either change (A) to 20%, or correct the replacement criteria in (C).

§6006E4C — There should be some opportunity, if replacement is not possible on-site, to replace the trees off-site or provide for a fee-in-lieu. Possible language for §6006E4(c) would be: "Cutting or clearing of trees associated with development shall provide replacement trees on a one to one basis on the site with a minimum of a four to six foot tall tree. If replacement on-site is not possible, then replacement should occur elsewhere within the Critical Area as proposed by the applicant and approved by the Planning Department."

§6006E5 — Based upon the recent decision of the Kent County Circuit Court in <u>In the Matter of the Application of the Wharf at Handy's Point, Inc. for Site Plan Approval</u>, Case No. CV 1652, the Commission suggests the following language: "Development on slopes greater than 15 percent shall be prohibited unless the slope is unstable and such development is demonstrated to be the only effective way to improve slope stability."

§6006E6A Same comment as for §6006D8A, above.

§6006E6Bii Same comment as for §6006D8Bii, above.

In addition to the proposal submitted, a section on Site Performance Standards for Building Permits in the IDA should also be prepared.

As a final comment, the Commission has noted that the Amendment Process described in Section 7012 of the Critical Area Ordinance is incorrect. An amendment must have the support of the local jurisdiction as evidenced by it being submitted by the chief elected official(s) of the local jurisdiction. Queen Anne's County's program lays out a process whereby an amendment is submitted to the Critical Area Commission after a Planning Commission recommendation, but prior to the County Commissioners taking a position. The County should expeditiously amend its program to reflect that, prior to submission of an amendment to the Critical Area Commission, the County Commissioners must take a formal position on an amendment, and the proposed amendment may only be submitted to the Commission based on a favorable vote of the County Commissioners. Since the public hearing for the proposed building permit review language has not been set yet, perhaps some revised language for the amendment review process could be done to take care of this at the same time.

The Queen Anne's County Critical Area Program will be in compliance with Critical Area Law and criteria with regard to site performance standards in the LDA, RCA and IDA if the changes described in this letter are incorporated into your Ordinance.

If you have any questions, or if you need to meet with us to discuss this further, please contact Claudia Jones.

Very truly yours,

John C. North, II
Chairman

JCN/PJP/jjd

cc: Dr. Sarah Taylor
George E. H. Gay, Esq.
Ms. Pat Pudelkewicz
Ms. Claudia Jones
Chris Drummond, Esq.
Ms. Margaret Kai

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June 26, 1991

George E.H. Gay, Esquire
Assistant Attorney General
Critical Areas Commission
12 State Office Building, C-4
580 Taylor Avenue
Annapolis, Maryland 21401

Re: Queen Anne's County Critical Area Program
Our File No.: 51398/44035

Dear George:

As you know, we have been in the process of revising the Queen Anne's County Critical Area Program and Ordinance over the past number of months in response to the Commission's concern about review of building permits in the LDA and the amendments to §8-1808.3 affecting impervious surfaces. We spoke last week concerning the "except as otherwise provided in this subsection for stormwater runoff" language of the amended statute. Our initial proposal for amendments to the Program and Ordinance to conform to the new impervious surface standards did not include that cryptic language. The Commission staff, in response to our proposal, indicated that we must include that language to track the amended version of §8-1808.3.

When we spoke last week, I asked you to explain the purpose of that language and why it would be necessary to include it in our Ordinance. Frankly, I am at a loss to explain its inclusion in §8-1808.3 and am reluctant to include meaningless language in Queen Anne's County's Critical Area Ordinance.

As we also discussed, we will be including proposed amendments to §6017.B of the Critical Area Ordinance to clear up the confusing use of the word "or" in that subsection. We will propose that the Planning Commission may designate a buffer exemption area where the existing buffer has more than 50% impervious surface and less than 20% vegetative cover or the buffer consists of inert fill that does not support vegetative growth and stormwater runoff from adjacent upland can be diverted. That clearly was the intent of the original Ordinance, though I do not believe that the language of §6017 supports that intent.

As soon as I have heard from you on the "except as otherwise provided in this subsection for stormwater runoff" problem, we will complete the proposed amendments and forward them to you and the Commission staff for final review and comments.

I look forward to hearing from you.

Very truly yours,

Christopher F. Drummond

CFD:ral
cc: Joseph Stevens
The Honorable John C. North

J. JOSEPH CURRAN, JR.
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STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF NATURAL RESOURCES
TAWES STATE OFFICE BUILDING
ANNAPOLIS, MARYLAND 21401
(301) 974- 2501

July 16, 1991

Christopher F. Drummond, Esquire
Blumenthal & Wayson, P.A.
120 W. Water Street
Centreville, Maryland 21617

RE: Proposed amendments to Queen Anne's County's Critical Area Ordinance

Dear Chris:

I write in response to your June 26, 1991 letter to me in which you discuss certain contemplated amendments to the Queen Anne's County Critical Area Ordinance ("County Ordinance"). As you know, Natural Resources Article §8-1808.3(c), Annotated Code of Maryland, requires that Queen Anne's County amend its County Ordinance on or before December 31, 1990 to "meet the provisions of [§8-1808.3]". Queen Anne's County did not meet the statutorily imposed deadline, but it is now taking steps in the proper direction.

In your letter you indicate that you are reluctant to include the first clause of §8-1808.3(d)(1) in the County Ordinance. Section 8-1808.3(d)(1) provides in full:

> Except as otherwise provided in this subsection for stormwater runoff, manmade impervious surfaces are limited to 15% of a parcel or lot.

You refer to the first clause of this paragraph as "meaningless". Upon review, it appears that this language was added to §8-1803.3 by Chapter 648 of the Laws of 1990 because at the time Chapter 648 was drafted, §8-1808.3(c) provided:

> For stormwater runoff, man-caused impervious areas shall be limited to 15% of a parcel to be developed. However, impervious surfaces on any lot not exceeding one acre in size in a subdivision approved after June 1, 1986 may be up to 25% of the lot.

However, it seems that when Chapter 648 was ultimately adopted by the General Assembly, then existing §8-1808.3(c), enacted into law by Chapter 604 of the Laws of 1986, was deleted while the reference to it in Chapter 648 was not. Thus, the problemmatic clause need not be included in the County Ordinance, and if the County Ordinance is otherwise amended in accordance with Judge North's March 28, 1991 letter to Mr. Joseph Stevens, it will "meet the provisions of [§8-1808.3(d)(1)]." Accordingly, I suggest that proposed County Ordinance Section 6006(d)(8)(a) read as follows:

> Except as provided in this paragraph herein, manmade impervious surfaces shall be limited to 15% of a parcel or lot.

You also discuss Section 6017.B of the County Ordinance in your letter. As I indicated to you in our most recent telephone conversation, it appears to me that Queen Anne's County's current buffer exemption practice is contrary to the terms and intent of the Critical Area Criteria. The only provision in the Criteria which relates to this practice is found at COMAR 14.15.09.08(c)(8). It provides:

> As part of the local Critical Area Program to be submitted to the Commission, local jurisdictions may request an exemption of certain portions of the Critical Area from the Buffer requirements where it can be sufficiently demonstrated that the existing pattern of residential, industrial, commercial, or recreational development in the Critical Area prevents the Buffer from fulfilling the functions stated in §B, above. If an exemption is requested, local jurisdictions shall propose other measures for achieving the water quality and habitat protection objectives of the policies. These measures may include, but are not limited to, public education and urban forestry programs.

This Criterion does not expressly or implicitly authorize an ongoing buffer exemption mechanism. In fact, there is no provision in the Criteria which permits buffer exemption after program adoption. Therefore, the only appropriate amendment to §6017.B of the County Ordinance is its complete deletion. The alternative suggested by you in your letter is inappropriate because it would authorize a practice which, like the County's current buffer exemption provision, conflicts with the Criteria.

Thank you for your attention to these matters. The Critical Area Commission looks forward to promptly receiving the County's proposed amendments.

Very truly yours,

George E. H. Gay
Assistant Attorney General

GEHG:cjw

cc: John C. North, II, Chairman
Ms. Claudia Jones
Mr. Joseph Stevens

bcc: Robert R. Price, Jr., Esquire, w/encl.

DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
CENTREVILLE, MARYLAND 21617
758-1255

August 29, 1991

Sarah J. Taylor, Executive Director
Chesapeake Bay Critical Area Commission
275 West St., Suite 320
Annapolis, Maryland 21401

Dear Dr. Taylor:

Enclosed is a copy of the revisions proposed to the Queen Anne's County Critical Area Ordinance. I believe all issues have been resolved. We, therefore, request that the Critical Area Commission review the changes as refinement to our local program.

Sincerely,

Joseph A. Stevens
Director

JAS:cm

Enc.

CC: George Gay, Esquire
Pat Pudelkewicz
Claudia Jones
Christopher F. Drummond, Esquire

DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
CENTREVILLE, MARYLAND 21617
758-1255

PROPOSED AMENDMENTS TO THE QUEEN ANNE'S COUNTY

CRITICAL AREAS ORDINANCE

[ ] - deleted CAPS - new language

§ 2002 - DEFINITIONS

70. Project Approvals - The approval of development AND REDEVELOPMENT, other than development AND REDEVELOPMENT by a State or local government agency, in the Chesapeake Bay Critical Area by the appropriate local approval authority. The term includes approval of subdivision plats and site plans; inclusion of areas within floating zones; issuance of variances, special exceptions, and conditional use permits. The term does not include building permits.

§6006 D. Site Performance Standards FOR PROJECT APPROVALS

Development and redevelopment requiring [site plan, subdivision, variance, special exception, or conditional use approval] PROJECT APPROVALS within the LDA [development areas] shall be subject to the following conditions and restrictions:

§6006 D. 8.

[8. Impervious surfaces shall be limited to 15 percent of the gross site area proposed for developments. However, impervious surfaces on any lot not exceeding (1) area in size in a subdivision approved after June 1, 1986 may be increased up to a maximum of twenty-five (25) percent.]

8. (A) EXCEPT AS PROVIDED HEREIN, MANMADE IMPERVIOUS SURFACES SHALL BE LIMITED TO 15 PERCENT OF THE GROSS SITE AREA PROPOSED FOR DEVELOPMENT OR REDEVELOPMENT.

(B) IMPERVIOUS SURFACES MAY BE INCREASED TO NO MORE THAN 25 PERCENT OF THE GROSS SITE AREA:

(i) ON ANY LOT OF 1/2 ACRE OR LESS IN SIZE THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985,

(ii) ON ANY LOT 1/4 ACRE OR LESS IN SIZE THAT WAS IN NON-

RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985, OR

(iii) ON ANY LOT 1 ACRE OF LESS IN SIZE THAT IS PART OF A SUBDIVISION APPROVED AFTER DECEMBER 1, 1985, PROVIDED THE TOTAL OF IMPERVIOUS SURFACES IN THE ENTIRE SUBDIVISION MAY NOT EXCEED 15 PERCENT.

(C) THIS SECTION DOES NOT APPLY TO A TRAILER PARK THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985.

§6006 E. SITE PERFORMANCE STANDARDS FOR BUILDING PERMITS

DEVELOPMENT AND REDEVELOPMENT REQUIRING ONLY THE ISSUANCE OF A BUILDING PERMIT WITHIN THE LDA SHALL BE SUBJECT TO THE FOLLOWING CONDITIONS AND RESTRICTIONS:

1. ALL ENVIRONMENTAL AND NATURAL FEATURES ON THAT PORTION OF THE SITE WITHIN THE CRITICAL AREA SHALL BE IDENTIFIED BY REFERENCE TO THE RESOURCE PROTECTION MAPS MAINTAINED BY THE DEPARTMENT OF PLANNING AND ZONING.

2. DEVELOPMENT AND REDEVELOPMENT ACTIVITIES SHALL BE LOCATED TO AVOID DISTURBANCE TO HABITAT PROTECTION AREAS. WHEN NO ALTERNATIVE EXISTS AND SUCH ACTIVITIES MUST CROSS OR BE LOCATED IN HABITAT PROTECTION AREAS, THE APPLICANT SHALL MINIMIZE IMPACTS TO HABITATS AND SHOW THAT NO REASONABLY FEASIBLE ALTERNATIVE LOCATION FOR SUCH ACTIVITY EXISTS.

3. FORESTS AND DEVELOPED WOODLANDS SHALL BE PROTECTED IN ACCORDANCE WITH THE FOLLOWING:

   A. EXCEPT AS PROVIDED IN SECTION 6000 B.3, NO MORE THAN 2[5]0 PERCENT OF A FORESTED OR DEVELOPED WOODLAND AREA OF A SITE PROPOSED FOR DEVELOPMENT OR REDEVELOPMENT MAY BE REMOVED.

   B. WHEN PROPOSED DEVELOPMENT OR REDEVELOPMENT REQUIRES THE CUTTING OR CLEARING OF TREES, AREAS PROPOSED FOR CLEARING MUST BE IDENTIFIED ON THE PLAN ACCOMPANYING THE BUILDING PERMIT APPLICATION.

   C. CUTTING OR CLEARING OF TREES ASSOCIATED WITH DEVELOPMENT OR REDEVELOPMENT SHALL PROVIDE, IN SO FAR AS POSSIBLE, REPLACEMENT TREES ON A ONE TO ONE BASIS ON THE SITE WITH A MINIMUM OF A FOUR TO SIX FOOT TALL TREE. IF REPLACEMENT ON-SITE IS NOT POSSIBLE, THEN REPLACEMENT SHOULD OCCUR ELSEWHERE WITHIN THE CRITICAL AREA AS PROPOSED BY THE APPLICANT AND APPROVED BY THE QUEEN ANNE'S COUNTY DEPARTMENT OF PLANNING AND ZONING.

4. DEVELOPMENT ON SLOPES GREATER THAN 15 PERCENT SHALL BE PROHIBITED UNLESS THE SLOPE IS UNSTABLE AND SUCH DEVELOPMENT IS DEMONSTRATED TO BE THE ONLY EFFECTIVE WAY TO MAINTAIN OR IMPROVE SLOPE STABILITY.

5. (A) EXCEPT AS PROVIDED HEREIN, IMPERVIOUS SURFACES SHALL BE LIMITED TO 15 PERCENT OF THE GROSS SITE AREA PROPOSED FOR DEVELOPMENT OR REDEVELOPMENT.

(B) IMPERVIOUS SURFACES MAY BE INCREASED TO NO MORE THAN 25 PERCENT OF THE GROSS SITE AREA:

(i) ON ANY LOT OF 1/2 ACRE OR LESS IN SIZE THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985,

(ii) ON ANY LOT 1/4 ACRE OR LESS IN SIZE THAT WAS IN NONRESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985, OR

(iii) ON ANY LOT 1 ACRE OF LESS IN SIZE THAT IS PART OF A SUBDIVISION APPROVED AFTER DECEMBER 1, 1985, PROVIDED THE TOTAL OF IMPERVIOUS SURFACES IN THE ENTIRE SUBDIVISION MAY NOT EXCEED 15 PERCENT.

(C) THIS SECTION DOES NOT APPLY TO A TRAILER PARK THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985.

6. A MINIMUM OF TWENTY FIVE (25) FOOT BUFFER SHALL BE MAINTAINED AROUND NON-TIDAL WETLANDS.

§6007 E. SITE PERFORMANCE STANDARDS FOR BUILDING PERMITS

DEVELOPMENT AND REDEVELOPMENT REQUIRING ONLY THE ISSUANCE OF A BUILDING PERMIT WITHIN THE RCA SHALL BE SUBJECT TO THE FOLLOWING CONDITIONS AND RESTRICTIONS:

1. ALL ENVIRONMENTAL AND NATURAL FEATURES ON THAT PORTION OF THE SITE WITHIN THE CRITICAL AREA SHALL BE IDENTIFIED BY REFERENCE TO THE RESOURCE PROTECTION MAPS MAINTAINED BY THE DEPARTMENT OF PLANNING AND ZONING.

2. DEVELOPMENT AND REDEVELOPMENT ACTIVITIES SHALL BE LOCATED TO AVOID DISTURBANCE TO HABITAT PROTECTION AREAS. WHEN NO ALTERNATIVE EXISTS AND SUCH ACTIVITIES MUST CROSS OR BE LOCATED IN HABITAT PROTECTION AREAS, THE APPLICANT SHALL MINIMIZE IMPACTS TO HABITATS AND SHOW THAT NO REASONABLY FEASIBLE ALTERNATIVE LOCATION FOR SUCH ACTIVITY EXISTS.

3. FORESTS AND DEVELOPED WOODLANDS SHALL BE PROTECTED IN ACCORDANCE WITH THE FOLLOWING:

A. EXCEPT AS PROVIDED IN SECTION 6000 B.3, NO MORE THAN 2[5]0 PERCENT OF A FORESTED OR DEVELOPED WOODLAND AREA OF A SITE PROPOSED FOR DEVELOPMENT OR REDEVELOPMENT MAY BE REMOVED.

B. WHEN PROPOSED DEVELOPMENT OR REDEVELOPMENT REQUIRES THE CUTTING OR CLEARING OF TREES, AREAS PROPOSED FOR CLEARING MUST BE IDENTIFIED ON THE PLAN ACCOMPANYING THE BUILDING PERMIT APPLICATION.

C. CUTTING OR CLEARING OF TREES ASSOCIATED WITH DEVELOPMENT OR REDEVELOPMENT SHALL PROVIDE IN SO FAR AS POSSIBLE, REPLACEMENT TREES ON A ONE TO ONE BASIS ON THE SITE WITH A MINIMUM OF A FOUR TO SIX FOOT TALL TREE. IF REPLACEMENT ON-SITE IS NOT POSSIBLE, THEN REPLACEMENT SHOULD OCCUR ELSEWHERE WITHIN THE CRITICAL AREA AS PROPOSED BY THE APPLICANT AND APPROVED BY THE QUEEN ANNE'S COUNTY DEPARTMENT OF PLANNING AND ZONING.

4. DEVELOPMENT ON SLOPES GREATER THAN 15 PERCENT SHALL BE PROHIBITED UNLESS THE SLOPE IS UNSTABLE AND SUCH DEVELOPMENT IS DEMONSTRATED TO BE THE ONLY EFFECTIVE WAY TO MAINTAIN OR IMPROVE SLOPE STABILITY.

5. (A) EXCEPT AS PROVIDED HEREIN, IMPERVIOUS SURFACES SHALL BE LIMITED TO 15 PERCENT OF THE GROSS SITE AREA PROPOSED FOR DEVELOPMENT OR REDEVELOPMENT.

(B) IMPERVIOUS SURFACES MAY BE INCREASED TO NO MORE THAN 25 PERCENT OF THE GROSS SITE AREA:

(i) ON ANY LOT OF 1/2 ACRE OR LESS IN SIZE THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985,

(ii) ON ANY LOT 1/4 ACRE OR LESS IN SIZE THAT WAS IN NONRESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985, OR

(iii) ON ANY LOT 1 ACRE OF LESS IN SIZE THAT IS PART OF A SUBDIVISION APPROVED AFTER DECEMBER 1, 1985, PROVIDED THE TOTAL OF IMPERVIOUS SURFACES IN THE ENTIRE SUBDIVISION MAY NOT EXCEED 15 PERCENT.

(C) THIS SECTION DOES NOT APPLY TO A TRAILER PARK THAT WAS IN RESIDENTIAL USE ON OR BEFORE DECEMBER 1, 1985.

6. A MINIMUM OF TWENTY FIVE (25) FOOT BUFFER SHALL BE MAINTAINED AROUND NON-TIDAL WETLANDS.

§7012 A.

Text or map amendments may be initiated by resolution of the County Commissioners or by a petition of the property owner filed with the County Commissioners. All petitions filed by property owners for map amendments shall be accompanied by the information required in Section [9011] **9060** of the Queen Anne's County Zoning Ordinance and a fee prescribed by the County Commissioners.

LAW OFFICES
ROBERT R. PRICE, JR.
103 LAWYERS ROW
CENTREVILLE, MARYLAND 21617

ROBERT R. PRICE, JR.
ROBERT R. PRICE, III

TELEPHONE
(301) 758-1660
FACSIMILE
(301) 758-1665

October 9, 1991

Ms. Claudia Jones
Chesapeake Bay Critical Area Commission
275 West St., Suite 320
Annapolis, MD 21402

Re: Queen Anne's County

Dear Claudia,

Under the original Section 8-1809(g) proposed amendments to a Program "shall be submitted to and acted on by the Commission in the same manner as the original program." This required a public hearing at the local jurisdiction prior to submission.

Under 8-1809 as amended in 1990, Section (g) was repealed and there does not appear to be any requirement as to "amendments" meeting any procedural requirements before submission.

I do not know whether this is intentional or not.

In the proposed amendment to the Queen Anne's program submitted by Joe Stevens on August 29, 1991, there is not any reference to any hearing and/or any action by anyone except the Planning Director.

While the Commission does not appear to require a public hearing prior to submission of the amendment, Section 7012 of the Queen Anne's Chesapeake Bay Critical Area Program Ordinance does require a public hearing before the Planning Commission prior to referral of the amendment to the County Commissioners and submission to the Commission.

I do not know if the above local procedure has been followed or whether Joe Stevens just forwarded the amendment to you without any hearing.

This should be clarified before any action is taken on the proposed amendment.

I would suggest you go over the public hearing requirements now proposed by Section 8-1809 with George Gay as it may be our previous procedure for submission of amendments is no longer required unless the local program requires it. This would mean to me that we are going to receive future amendments from all sources and without any public input or government action prior to submission.

If I am not clear on this, give me a call.

Sincerely yours,

Robert R. Price, Jr.

RRPJr/mbb

DEPARTMENT OF PLANNING AND ZONING
QUEEN ANNE'S COUNTY
COUNTY OFFICE BUILDING
208 N. COMMERCE STREET
CENTREVILLE, MARYLAND 21617
758-1255

October 29, 1991

Mr. Ren Serey, Chief
Project Evaluation Division
Chesapeake Bay Critical Area Commission
275 West Street, Suite 320
Annapolis, Maryland 21401

RE: Potential Critical Areas Amendment

Dear Ren:

Enclosed please find for your informal comments draft language intended to clarify ambiguous language in the Critical Areas Ordinance concerning grandfathering status of existing lots. It is staff's position that this clarification be considered as a refinement to the Critical Areas Ordinance.

Should you have any questions regarding this matter, please do not hesitate to contact me at this Office.

Sincerely,

Joe

Joseph A. Stevens
Director

JAS:cm

CC: George Gay, Esquire
Julius W. Lichter, Esquire
Christopher F. Drummond, Esquire

POTENTIAL AMENDMENT

Critical Areas Ordinance - Section 5000 - Grandfathering existing uses, parcels or land and subdivided lots.

C. Notwithstanding contrary density requirements of this Ordinance, land subdivided into lots of record prior to December 1, 1985 may be developed for any permitted residential use at a density not exceeding the following:

1. The number of existing lots in the subdivision; or
2. Density requirements of the Zoning Ordinance, whichever is less.

JUDGE JOHN C. NORTH, II
CHAIRMAN
410-822-9047 OR 410-974-2418
410-820-5093 FAX

ARAH J. TAYLOR, PhD.
EXECUTIVE DIRECTOR
410-974-2418/26
410-974-5338 FAX

WESTERN SHORE OFFICE
275 WEST STREET, SUITE 320
ANNAPOLIS, MARYLAND 21401

EASTERN SHORE OFFICE
31 CREAMERY LANE
EASTON, MARYLAND 21601

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA COMMISSION

November 6, 1991

Mr. Joseph Stevens
Planning Director
County Office Building
208 North Commerce Street
Centreville, MD 21617

Dear Mr. Stevens:

I am writing you concerning the proposed changes to the Queen Anne's County Critical Area Program which were submitted to us on August 19, 1991.

Since I wrote you on September 18, 1991, I have made a determination that the changes need to be processed as an amendment. Even though the changes are being made at our request, the changes are a substantial alteration to the County program.

It is not clear from your letter whether these amendments have been approved by the Queen Anne's County Planning Commission as required by the County's Critical Area Program. (Section 7012.B - Amendment Procedures) If this action has been taken, please forward the resolution or minutes noting the action as soon as possible so that we may proceed with out review. If this action has not been taken, then please follow the process in your Program prior to resubmitting these amendments.

There are two other changes to the County's program that staff of the Critical Area Commission have requested that the County make. These are the sections of the County's program allowing ongoing buffer exemptions (Section 6017.B) and the section of the County's program that sets out the amendment process (Section 7012).

First, regarding buffer exemptions, our attorney, George Gay, wrote to Christopher Drummond on July 16, 1991 requesting that this section of the County's program be deleted. The Critical Area Criteria does not authorize an ongoing process for buffer exemptions. Therefore, this section of your program conflicts with the Criteria.

Second, the Commission has made the County aware that the amendment process set out in Section 7012 of the Critical Area Ordinance is not correct. An amendment needs to have the support of the local jurisdiction as evidenced by it being submitted by the elected officials of the local jurisdiction. The Queen Anne's County process allows the County to submit an amendment to the Critical Area Commission after a Planning Commission recommendation but prior to the County Commissioners taking a position. The process should require that the County Commissioners take a final position of support on an amendment prior to submission to the Critical Area Commission.

It would be preferable if all of these changes could be made at the same time. If the County does not address these issues, then the Commission may have to take further action. We are anxious to resolve these longstanding issues and request your immediate attention to these matters.

If you have any questions, please contact Claudia Jones.

Very truly yours,

John C. North, II
Chairman

JCN:msl

JUDGE JOHN C. NORTH, II
CHAIRMAN
410-822-9047 OR 410-974-2418
410-820-5093 FAX

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WESTERN SHORE OFFICE
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ANNAPOLIS, MARYLAND 21401

EASTERN SHORE OFFICE
31 CREAMERY LANE
EASTON, MARYLAND 21601

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA COMMISSION

January 2, 1992

Mr. Joe Stevens
Planning Director
Dept. of Planning & Zoning
208 N. Commerce Street
Centreville, MD 21617

Re: Potential Critical Area
Grandfathering Amendments

Dear Mr. Stevens:

I am responding to your request for informal comments on a proposed amendment regarding density requirements on grandfathered lots. The staff does not have a problem with the proposed amendment since it is not contrary to the Critical Area Criteria.

There are, however, requirements from the grandfathering section of the Criteria that are not now included in the Queen Anne's County Program but need to be. These are as follows:

> Nothing in this regulation may be interpreted as altering any requirements for development activities set out in COMAR 14.15.03 (Water-Dependent Facilities) and 14.15.09 (Habitat Protection Areas). COMAR 14.15.07.D.

It would be preferable if these were added to your Program at the same time.

What is the status of the previous amendments submitted by Queen Anne's County? Please do not hesitate to call if you have any questions.

Sincerely,

Claudia Jones
Natural Resources Planner

CJ:msl

STAFF REPORT
Critical Area Commission Meeting
March 4, 1992

ISSUE: Discussion of changes in the Anne Arundel County Critical Area Program

COMMISSION ACTION NEEDED: For information only

DISCUSSION: The Critical Area Commission approved the Anne Arundel County program in May, 1988 as complete and sufficient. However, experience with implementation of the regulations has revealed some problems, deficiencies, or interpretations that do not appear to meet the intended goals of the Critical Area Law and regulations. Discussions and correspondence between staffs have been occurring since late spring of 1989 with Anne Arundel County with regards to certain changes in the County's program. The presentation today is not meant to present the culmination of those discussions, but rather to inform the Commission of existing situations and to provide an opportunity to give guidance to Commission staff as to the most appropriate approach to take in continuing discussions and taking actions. There are some far-reaching policies involved in these issues, and it was felt that the Commission should be given an opportunity to discuss and guide staff efforts. It should also give the Commission a solid background in the problems and issues when action on proposed changes occurs in the future.

In May, 1989, Mr. Tom Osborne, then the director of the Anne Arundel County Office of Planning and Zoning, wrote a letter to Judge North indicating that the County intended to make some program changes, particularly in reference to variance provisions, language commonly misread or misinterpreted, and procedures for awarding growth allocation and map changes on the basis of mistake, in response to requests to address these issues. In July, 1989, Ren Serey, Chief of the Commission's Project Evaluation Division, requested Mr. Osborne to address discrepancies in the language or interpretation of grandfathering provisions. The procedures for growth allocation and mapping mistakes were developed by the County, submitted as a program amendment, and approved by the Commission. Other changes such as the variance language and grandfathering language which have been discussed as problems have not been presented as amendments.

The County's 4-year review of their Critical Area Program is due on October 22, 1992. Commission staff has completed a review of the County Program, and identified a comprehensive list of issues which are expected to be addressed at the time of Comprehensive Review. Preliminary discussions on those suggested changes started with a meeting last September with County staff. Since then, the County has sent a letter identifying where they consider that changes are needed and where the existing language

is thought sufficient. There are several issues which Commission staff considers to be of particular importance to address, whether through the 4-year review or otherwise: (1) Critical Area review for all permits in the Critical Area, (2) exemption of subdivisions placed on the wastewater treatment allocation waiting list, (3) grandfathering, and (4) environmental factors information for water-dependent facilities. Explanation of these issues follows.

(1) Currently, Critical Area review for building permits is required only on riparian property (County Council Bill 49-88, Section 2). Critical Area review is required for all subdivisions, variances, and special exceptions within the Critical Area, but for building permits, only riparian properties are specified. The lack of application of Critical Area regulations to building permits for all but waterfront lots means that a substantial portion of the Critical Area is omitted from program requirements. The distinction between waterfront and waterview (non-riparian) lots has proved particularly troublesome because of the close proximity of some "waterview" lots to tidal waters. The presence of a strip of community property only a few feet wide on the tax maps, which may in actuality be long eroded, has exempted certain landowners from Critical Area requirements, and resulted in inequitable application of Buffer regulations.

(2) Section 3 of County Council Bill 49-88, the County's Critical Area Bill, exempts certain subdivisions from the requirements of the bill based on their presence on the wastewater treatment allocation waiting list. Such exemption was clearly not provided for within the Critical Area Law or Criteria. Developments under common ownership should be reconfigured to comply with the Critical Area Criteria, per COMAR 14.15.02.07. The approval of the Woods Landing Subdivision, Section II, has illustrated the potential impact of this provision. While the County has worked to have the subdivision comply with the Critical Area criteria insofar as possible, and has required fees-in-lieu for forest clearing and avoidance of wetlands, the 100-foot buffer has not been required, and only a 50-foot buffer is being provided. Both lots and townhouse units are proposed within the 100-foot buffer. Woods Landing is mapped LDA, and consequently has substantial development potential; however, this development potential is lower than that proposed by the preliminary plat approved by the County prior to the adoption of the Critical Area Program. There are 12 other subdivisions on the wastewater treatment allocation waiting list on the Broadneck Peninsula alone; Critical Area designations are mostly LDA or IDA.

(3) The Anne Arundel County ordinances do not contain language to implement the intended scope of grandfathering in COMAR 14.15.02.07. Of particular importance is the omission of the last paragraph of the section, which states that nothing in

the grandfathering section may be interpreted as altering any requirements for development activities set out in COMAR 14.15.03, and 14.15.09, i.e., the Water-dependent Facilities requirements and the Habitat Protection Area requirements, which include the 100-foot Buffer. On lots existing as of December 1, 1985, Anne Arundel County ordinances require compliance with Critical Area regulations insofar as possible. Implementation of this clause allows structures in the buffer, nontidal wetlands, or other Habitat Protection Areas without a variance on waterfront lots less than 200 feet deep.

Inclusion of the intended scope of grandfathering is crucial to the appropriate functioning of the program. The Criteria provide flexibility for development on legal lots existing as of December 1, 1985, with the exception of Water-dependent Facilities and Habitat Protection Areas. For areas where the buffer is already predominantly developed, and cannot feasibly fulfill the specified functions of the Buffer, Buffer Exemption Areas and an associated mitigation policy/regulations may be established. Other deviations from these sections must be provided for by the other avenue for site-specific considerations, the variance procedure, which includes specific standards for allowing an exception. Currently, this is not occurring in Anne Arundel County. Administrative variances could be considered, but all of the variance standards from COMAR 14.15.11 must be applied and the Critical Area Commission staff should have an opportunity to review projects which propose development in the buffer, as is required by COMAR 14.20, the regulations on notification of project applications.

(4) Another omission is the lack of ordinance language requiring the environmental factors listed in COMAR 14.15.03.04 for certain water-dependent facilities (i.e., adequate flushing, minimizing impacts on submerged aquatic vegetation, shellfish beds, etc,). These environmental factors are contained in the W-2 zone language, but are not specified in the language for the maritime zones or any other zone that could support a community marina or other regulated water-dependent facility. Some information is required for special exceptions [Zoning 12-1-3(d)], and marine service facilities have a general requirement for appraisal of environmental impact [Zoning 12-230(b)(3)], but the environmental factors required by COMAR 14.15 are not specified. Requirements for information on the eight environmental factors should be placed so that they are applicable to every water-dependent facility, including expansions, other than individual private piers. These environmental factors are listed in the Critical Area Program document, which is incorporated in its entirety by reference in Bill 49-88. However, the ordinance language asks for the specific factors in some situations, and only for general "environmental impact" in others, which results in the required Critical Area information being submitted only where specifically

listed (or requested by the Commission). A landowner searching for submittal requirements is not clearly presented with the requirement for information, and this has been reflected in the lack of this information in some water-dependent facilities project expansions accepted by the County and sent to the Commission for review. The omission of the particular requirements results in implementation of COMAR 14.15.03 in conflict with the intent of the Criteria.

The Anne Arundel County Critical Area Program was approved by the Critical Area Commission May 18, 1988 and it became effective in August 22, 1988. Since then, various situations have arisen which appear contrary to the State Critical Area Criteria, but these situations have not been pursued through the legal avenues open to the Commission because of certain deficiencies or omissions in the County Ordinances, on which legal action would be based.

The Commission does have the authority to request changes in a local jurisdiction's program, and to have those changes presented as program amendments within 90 days. This authority is granted by Natural Resources Article §8-1809(L), as it was amended by HB1062, in circumstances where the Commission discovers a clear mistake, omission, or conflict with the Critical Area Law or Criteria. This clause grants considerable authority to the Commission, which makes it all the more important to use it wisely and with carefully considered deliberation.

STAFF CONTACT: Anne Hairston

ENVIRONMENTAL EFFECTS OF BROADNECK PENINSULA SUBDIVISIONS NOT MEETING THE FULL CRITICAL AREAS CRITERIA

Woods Landing II is proposed for a 31 acre site located on the southern reaches of the Little Magothy River, near Cape St. Claire in Anne Arundel County. The subdivision would consist of 161 townhouses. Woods Landing II was initially reviewed by Anne Arundel County officials prior to the passage of the Maryland Critical Areas Act. A sewer moratorium prevented the project from breaking ground. The moratorium was lifted in the late 1980's. The County adopted a policy for applying the critical areas criteria "in-so-far as possible" to Woods Landing II and a number of other subdivision on the Broadneck peninsula.

In the case of Woods Landing II, the "in-so-far as possible" policy will permit an imperviousness of 25%, removal of 80% (approximately 20 acres) of a mature forest, and a buffer which extends a mere 50-feet from the high-tide line. The critical areas criteria requires an imperviousness of no more than 15%, no more than 20% forest removal (5 acres), and a 100-foot buffer.

The subdivision, as proposed, will release more than 200 pounds of nutrients per year into the Little Magothy River. If the project meet the full critical areas requirements, then the nutrient loading would be cut by 60% to 88 pounds per year.

The soils on the Woods Landing II site are highly erodible. The present erosion rate on the 31 acre site averages 2.5 tons per year. The erosion rate will increase to 521 tons per year during the construction phase. Full compliance with the critical area requirements would cut the erosion rate to 114 tons per year - an 80% reduction.

The tract contains valuable wildlife habitat. There is evidence of pileated woodpeckers and other Forest Interior Dwelling birds utilizing the tract. A mountain laurel present on the site has been nominated as the new State Champion. Unfortunately the laurel is located outside of the 50-foot buffer proposed by the applicant and is not shown on site development plans.

A listing developed by the Anne Arundel County Office of Planning & Zoning, entitled "Broadneck Major/Minor Subdivisions," indicates that Woods Landing II is one of 28 projects qualifying for the "in-so-far as possible" policy. All totaled 270-acres of proposed development may not be required to meet the full critical areas requirements on the Broadneck peninsula. These subdivisions would result in additional 875 housing units within the critical area.

Using Woods Landing II as a guide, application of the "in-so-far as possible" policy to the 28 Broadneck subdivisions may result in the release of 1,840 pounds of

nutrients to the Chesapeake Bay and tributaries. If all 28 projects met the full critical areas criteria, then the nutrient impact might be reduced by 60% to 740 pounds per year.

The erosion rate resulting from the "in-so-far as possible" policy may be as high as 4,500 tons per year when the 28 projects are under construction. Compliance with the critical areas criteria could cut the erosion rate to 990 tons per year. And compliance might also save as many as 162 acres of forest. Each acre of this forest presently contributes 300,000 gallons per year of high quality inflow to the Chesapeake.

This analysis was prepared by Community & Environmental Defense Services (410/329-8194) at the request of the Woods Landing Homeowner's Association.

STAFF SUMMARY
INFORMATION REPORT
MARCH 4, 1992

JURISDICTION: Calvert County

AMENDMENT: Package of 24 propose amendments to Calvert County's Critical Area Program

DISCUSSION: There are several issues within Calvert County's Critical Area Program Amendment. The proposed amendments involve changes to Calvert County's Zoning Ordinances that includes: a Buffer Management Program, a Forest Management Program with revisions to Critical Area Criteria regarding Habitat Protection Areas (HPA's), Buffer Exemption Areas, Growth Allocation, and others. Map amendments include a revision of the Critical Area Boundary Line, designation of HPA's, a growth allocation, with a mapping mistake.

CATA 91-8 Eagle Nesting Site Protection Measures:

County proposes:

Text and zoning ordinance changes throughout section with minor word changes in the threatened ad endangered species section. Example of changes are: limits of the Protection Zone, allowance of selective cutting, no timber cutting, land clearing or building, road and trail construction, etc.

Note: Making minor word changes to text and zoning ordinance.

CATA 91-9 & 91-10 - State Listed Species and Locally Significant Habitat:

County proposes:

-Text additions which includes State Listed Species sites and locally significant habitats.

Note: County never adopted the State Listed Species sites and Locally significant habitats with its Critical Area Program.

CATA 91-12 Anadromous Fish Propagation Areas:

Issue: Adding "Fresh Creek" to Calvert County's list of Anadromous Fish Propagation Areas. The sources used to designate "Fresh Creek" were through a survey and inventory of anadromous fish spawning areas Completion Report for the Chester River drainage, West Chesapeake Bay drainage, DNR. ect.

CATA 91-13 Use of LDA Criteria for Residential IDA Lots:

County proposes:

-To add to the Zoning Ordinances, new subsection stating the use of LDA criteria for residential IDA lots.

Issue: The County's proposal for single family residential development on residential lots located in IDA may be allowed to apply either to IDA or LDA criteria though not a mixed of the two. LDA has more restrictions according to the County, and more appropriately addresses single family residential development. State criteria do not provide for an option of which development criteria to apply.

CATA 91-4 Clustering within LDA and LDA-3 Areas:

County proposes:

-To add in Zoning Ordinance, a new paragraph to the last sentence of the second paragraph. The County proposed that when LDA and LDA-3 areas are adjacent, LDA clustering may be clustered into the LDA-3 if certain conditions are met.

Issue: The County is adding a new paragraph that will deal with clustering within LDA and LDA-3 Areas. Present regulations don't allow clustering in LDA-3 or LDA. This proposal will allow clustering.

CATA 91-11 - Growth Allocation:

County proposes:

-To add (in text), 5% growth allocation (GA) date chart. The GA date chart to be added, will give the distribution and balance of Growth Allocation in the critical area and ,

-Delete a section in Zoning Ordinance and replacing with new growth allocation language. Growth Allocation shall only be used for commercial or industrial projects except where a mistake in the original designation of residential land can be demonstrated.

Issue: The County is using their own interpretation on how to use growth allocation. Staff will further investigate the County's interpretation.

CATA 91-2 LDA and RCA Forest Clearing Regulation:

Issue: County discovered that 5,000 square feet of forest cover is not enough. County proposes 6,000 square feet of forest cover to be removed. Also, the County is replacing new section call "Forest Management Program" in the text section of the program.

Also, County has proposed to replace in the text, their County's Forest Maintenance Program which includes regulations concerning: afforestation, reforestation, and fees-in-lieu and fines relating to clearing areas outside of the buffer. The elements of the Forest Maintenance Program include: Application and permit process, planting bond, planting criteria, fees-in-lieu, fines, etc.

CATA 91-15 - Replanting Program:

County proposes:

-To add in text a "Replanting Program" which will use fees-in-lieu funds. This section will add to the Forest Maintenance Program.

Issue: The County's "Replanting Program" will use fees-in-lieu funds.

CATA 91-7 - Critical Area Buffer (Extending Buffer):

County proposes:

-To add in Zoning Ordinance, how to Extended Buffer is to be measured and sets an upper limit of 300 feet.

Issue: The County feels that adding the Extended New Buffer language helps to clarify how the extended buffer is to be measured and sets an upper limit of 300 feet. The County will measure the percentage of slope by starting at a point beyond 100 feet from mean high tide, perpendicular to slope and for 30 feet along the slope, etc. Staff will further investigate this proposal and its implication.

CATA 91-1 - Buffer Management Program

County proposes:

-To add in text, new paragraph on Structural Shore Erosion Control Devices as well as revise section for "Buffer Management Program" which established guidelines and procedures for alterations and cutting in the buffer. The above Buffer Management Program proposed is ~~areas of~~ forestry, residential, commercial, and industrial (e.g. as permit cutting, planting bond, fees-in-lieu, and fines) areas.

Issue: The Shore Erosion Control Division within DNR, has requested that the areas immediately behind structural shore erosion control devices not be planted to avoid structural damage to the device from the growth of root systems.

CATA 91-16 - Buffer Exemption Areas:

County proposes:

-To add a new section in Zoning Ordinance under "Buffer Exemption Areas." It proposes that all lots and parcels zoned R-1 as of 12\13\88 and in an LDA are buffer exempt provided they meet the following requirements which will be stated in the panel recommendations.

Issue: The purpose of this new section, is to reduce the number of variances brought before the Board of Appeals. The County wants to use similar language of what is being used in St. Mary's County Buffer Exemption Areas. Staff will further investigate St. Mary's proposal and its implication.

****MAP AMENDMENTS CONCERNING HABITAT PROTECTION AREAS**

CATA 91-5 Eagle Nesting Sites

- Eagle Nesting Site revisions are being propose by deleting: inactive areas, areas out of Critical Area and adding new nesting sites in some areas (See maps).

CATA 91-8 Waterfowl Staging and Concentration Areas:

- Addition of Waterfowl Staging and Concentration Areas as new Habitat Protection Areas is being proposed. (See map)

CATA 91-10 Natural Heritage Area Revision:

- Adjusting Critical Area line to the North of the Southern Boundary of Camp Roosevelt Cliffs Natural Heritage Area base on DNA recommendation. (See map)

** Note: All done in conjunction with DNA's approval.

*****CRITICAL AREA 1991 MAP AMENDMENTS**

CAMA 91-1 Plum Point, Neeld Property:

- Mapping Mistake- 7.15 acres in Critical Area, has R-1 zoning existing critical area designation LDA-3 to proposed critical area designation LDA (See map).

Note: A LDA-3 means zoned rural with minimun lot size 3 acres. LDA means housing density from 1 unit per 5 acres up to 4 units per acre.

CAMA 91-3 Olivert Road and Joy Road:

- Out of the 9.65 acres, 8.50 acres are in the critical area, R-1 zoning with existing critical area designation of LDA to a proposed RCA.

CAMA 91-4 Grascock Property, Solomons:

- Out of 14.2 acres, all 14.2 acres are in the critical area where Growth Allocation is being required. Existing critical area designation of LDA to IDA is being proposed. Will be deducting the entire parcel.

CAMA 91-5 Eagle Nesting Site Revision:

- See CAMA 91-5 under proposed mapping changes to Habitat Protection Areas.

CAMA 91-8 Waterfowl Staging and Concentration Areas:

- Same as CAMA 91-8 under proposed mapping changes to Habitat Protection Areas.

CAMA 91-9 New Residential Buffer Exemption Areas

-The County wants to add new residential buffer exemption areas for all lots and parcels.

CAMA 91-10 Natural Heritage Area Revisions:

- See CAMA 91-10 under proposed mapping changes to Habitat Protection Areas.

*** Note: Analysis of the propose map amendments will be further evaluated in the panel recommendations.

Prepared By: Dawnn McCleary

PANEL REPORT

JURISDICTION: Talbot County

ISSUE: Bachelor Point Marina Mapping Mistake - Reconsideration

SUMMARY: Talbot County has requested a portion (13.6 acres) of the Bachelor Point Marina parcel (Tax Map 53, Parcel 86, approximately 27 acres) be remapped from RCA to LDA by virtue of mistake.

- The standards for approval for amendments are set forth in State Law (§ 8-1809) and State criteria.
- Critical Area mapping designations shall be based on land uses and development in existence on December 1, 1985 (COMAR 14.15.02.07C).
- Land use of parcel in question on December 1, 1985:
  - John Todd Boatworks - marina basin/slips, 2 buildings
  - land use predominantly barren land and wetlands; extensive wetlands
  - no sewer or water
- Talbot County based mapping mistake on events which occurred after December 1, 1985 (adjoining subdivision approved in 1986/87, water and sewer agreement with Oxford in 1987, Planning Commission designation in 1986).
- Based on Critical Area Law and criteria, parcel correctly mapped as Resource Conservation, and did not meet LDA criteria on December 1, 1985.

HISTORY: County originally proposed mapping mistake to the Critical Area Commission in April 1991. CAC denied mapping mistake in July 1991 stating that parcel met RCA criteria. County submitted additional information in August 1991. CAC voted to reconsider this issue at its November 1991 meeting. A public hearing was held on January 16, 1992.

DISCUSSION: The Critical Area Law and criteria set forth the standards by which the Critical Area was mapped, and state that these maps may only be changed by proof of mistake (or growth allocation). The Law and criteria pertinent to mapping and zoning map amendments are on the attached sheet.

The Law (§ 8-1809j) directs that amendments must meet the goals of the Program as set forth in § 8-1808(b) and meet the Critical Area criteria. Designation of this parcel as LDA did not meet the goals of the Critical Area Program in that an LDA classification results in increased development activity and increased numbers, movement and activities of people in the area which would create an adverse environmental impact on a parcel of land dominated by wetlands and open/barren land.

The criteria set forth the mapping rules for RCAs, LDAs, and IDAs, and state that Critical Area mapping designations shall be based on land uses and development in existence on December 1, 1985. The parcel in question did not meet any of the LDA criteria as set forth in COMAR 14.15.02.04 (attached) on December 1, 1985.

Per COMAR 14.15.02.04A, LDAs shall have at least one of the following features:

1. Housing density ranging from one dwelling unit per 5 acres up to four dwelling units per acre.

   Housing density in this area did not meet this criterion as of December 1, 1985. The County contends the land use density for this area met a density of 1 dwelling unit per 5 acres; however, this density was derived using a proposed subdivision and undeveloped grandfathered lots. It was not based solely on existing dwelling units as required by COMAR 14.15.02.07. (Exhibit 5 of Public Hearing Record; p. 44 of Public Hearing Transcript.)

2. Areas not dominated by agriculture, wetland, forest, barren land, surface water, or open space.

   On December 1, 1985, the area was dominated by barren land and extensive wetlands. (Aerial photo, 1985; letter from Gina Zawitoski to Chairman North dated January 30, 1992.)

3. Areas meeting the standards for IDAs, but less than 20 acres.

   Area did not have IDA characteristics.

4. Areas having public sewer or public water, or both.

   This parcel was not served by public water or sewer on December 1, 1985. (Exhibit 2 and 5 of Public Hearing Record; p. 44 of Public Hearing Transcript.)

   The parcel in question met the RCA criteria as set forth in COMAR 14.15.02.05 (attached). The density in the area as of December 1, 1985 was less than one dwelling unit per 5 acres, and the dominant land use was wetlands and barren land.

   The County's declaration of a mapping mistake was based on approvals and determinations made in 1986 and 1987, subsequent to the December 1, 1985 date set forth in the Critical Area criteria. The Talbot County policies which guided the classification of lands within the Critical Area and the mapping criteria for LDAs as set forth in its Critical Area Program (attached) are consistent with the Critical Area Law and criteria. The only criterion unique to Talbot County's Program is LDA criterion #3 which states "Areas were designated as LDA by Planning Commission". This criterion was preceded by the following two criteria:

   1) the areas were not dominated by agriculture, wetlands, forest, barren land, surface water or open space; and

   2) that the areas had public water or sewer or both.

   All three criteria are inclusive, joined by the conjunction "and" rather than "or". The County demonstrated that the Planning Commission looked upon this area as being LDA in 1986; however, this was only one of three criteria which had to be met. Therefore, even under the Talbot County Critical Area Program, this property did not meet the standards for LDA designation.

PANEL RECOMMENDATION: The Panel recommends denial of the requested Program amendment for the following reasons:

1) Sufficient evidence was not produced to show that the land use of the parcel in question on December 1, 1985, was other than RCA; and

2) Based on the evidence presented, the requested Program amendment is not consistent with Critical Area Law and criteria.

The Panel also recommends that Talbot County and Tred Avon River Limited Partnership consider growth allocation for any intensification of use on the parcel.

STAFF CONTACT: Pat Pudelkewicz

PIPER & MARBURY

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March 4, 1992

WM. ROGER TRUITT
DIRECT DIAL NUMBER
301-576-2380

VIA HAND DELIVERY AND U.S. MAIL

Chesapeake Bay Critical Areas Commission
45 Calvert Street
Annapolis, Maryland 21401

Re: Bachelor Point Marina
Talbot County

Dear Sirs:

This letter is submitted on behalf of Tred Avon River Limited Partnership ("the Partnership") in response to the Panel Report that is being presented today to the Chesapeake Bay Critical Areas Commission ("CAC") in connection with the CAC's reconsideration of its July 10, 1991 decision to deny Talbot County's ("the County") proposed correction of a mapping mistake for the above-referenced parcel.

Without waiving or diminishing the importance of other evidence and arguments placed in the record for this proceeding, this rebuttal will focus upon three crucial errors extant in the Panel Report. Recognition of any one of these three mistakes in the Panel Report will require the CAC to acknowledge the County's inadvertent mapping error and to confirm the correct designation (LC) for the subject parcel under the Talbot County Critical Area Zoning Ordinance.

1. The Panel Report Misconstrues the Talbot County Critical Area Plan Mapping Criteria

The Talbot County Critical Areas Plan, which was approved by the CAC in 1989, includes as an independent basis for designating a Limited Development Area ("LDA") those "[a]reas [that] were designated as LDA by Planning Commission hearing."

While the Panel Report characterizes this provision as a "criterion unique to Talbot County's Program", it determined that two other mapping guidelines listed in the County's Plan (i.e., (1) Areas [that] were not dominated by agriculture, wetlands, forest, barren land, surface water or open space; and (2) Areas had public water or sewer system or both) must also be met in order for the property to qualify for LDA designation. Significantly, the Talbot County Plan does not identify these three features as cumulative or conjunctive criteria. Rather it merely identifies them as additional "characteristics" which were used independently to map LDA designations. Moreover, two of the guidelines are virtually identical to two independent features of LDA classification under the CAC's own regulations. Compare COMAR 14.15.02.04 A(2),(4).

According to the testimony of the County's Planning Officer, the County viewed those areas designated as LDA by the Talbot County Planning Commission as an independent basis for LDA designation in the County's Plan because the Planning Commission had taken action pursuant to the Interim Critical Areas Criteria on numerous properties, including the Bachelor Point Marina parcel, prior to the County's comprehensive mapping of critical areas. See January 16, 1992 Public Hearing Transcript ("Tr.") at 5. As a result, approximately 20 other properties were reviewed by the Planning Commission during the three-year period between adoption of the CAC criteria and the County's Plan, and all were designated and mapped as LDA with the exception of the mistake made on the Bachelor's Point parcel. Id. There has been no attempt by the County or the CAC to require these other properties to meet all of the LDA mapping guidelines.

The Panel Report's construction of the three characteristics in the Talbot County Plan as cumulative would render the County's Plan inconsistent with the same criteria in COMAR 14.15.02.04A, which requires that an area satisfy only one criterion in order to qualify for LDA designation. The Panel's novel interpretation in this case would require the County's Plan to be applied more stringently than the CAC's regulations, a result that is not supported by either the express provisions of the County's Plan or the testimony of present and former County planning officials. See Tr. at 5, 45-46. In construing the County's Plan, the CAC should defer to the reasonable interpretations given by these two County officials rather than accept the unsupported and illogical construction presented in the Panel Report.

2. The Parcel in Question Is Not Dominated by Barren Land and Extensive Wetlands

The Panel Report finds that the 13.2 acre parcel in question fails to satisfy the LDA criteria set forth in COMAR 14.15.02.04A(2) because "[o]n December 1, 1985, the area was dominated by barren land and extensive wetlands." In support, the Panel refers to a 1985 aerial photograph and a January 30, 1992 letter from this firm. The January 30 letter, which is attached as Exhibit A, provided a site map illustrating that only 5.85 acres of the existing parcel consisted of wetlands, while 7.33 acres were considered uplands. There is no indication in the January 30 letter that any portion of the parcel should be considered "barren land" as that term is defined in COMAR 14.15.01B(6) ("unmanaged land having sparse vegetation"). In fact, most of the upland area is covered by buildings, parking lots, boat storage areas and grassy areas which are regularly mowed. Similarly, there is no quantitative evidence in the record that the parcel in question was "dominated" by wetlands or barren areas in 1985 when it consisted of 15.7 commercially-zoned acres.

The unsubstantiated and unquantified findings of the Panel concerning predominant landforms cannot be relied upon by the CAC for purposes of this proceeding. The evidence submitted on behalf of the Partnership demonstrates that less than half of the parcel's acreage falls within the landforms described in COMAR 14.15.02.04A(2).

3. The Bachelor Point Marina Was an Area Having Public Sewer or Water on December 1, 1985

The Panel Report summarily concludes that the "parcel was not served by public water or sewer on December 1, 1985" while citing to the public hearing transcript and to exhibits placed in the record on behalf of the Partnership at the public hearing (emphasis added). In fact, these exhibits and testimony confirm that public water and sewer services were extended to the new buildings on the property in 1987-88. The Panel Report, without further investigation or discussion, apparently concludes that this later service is dispositive with regard to whether the LDA criterion in COMAR 10.15.02.04 B(4) for "[a]reas having public sewer or public water" was satisfied on December 1, 1985.

The Panel's narrow construction of this criterion is inconsistent with the Attorney General's January 5, 1988 Opinion (Exhibit B) which provides in pertinent part that "[i]f the area is reasonably close to existing lines but is not currently hooked into the lines, the Commission is free to

assess all pertinent circumstances to determine the reasonable likelihood of future service." 73 Op. Att'y Gen. 57, 66. That opinion goes on to list a number of factors which should be assessed in order to determine the likelihood that public water and sewer service is available to the "area" in question.

In this case, the Panel established December 1, 1985 as the critical date of inquiry and then failed to investigate whether there was a reasonable likelihood that public water or sewer service was available to the area which includes the Bachelor Point Marina on that date. Had it followed the requirements of the attached Attorney General's Opinion, it would have found that both public water and sewer lines from the Town of Oxford were within 70 feet of the Bachelor Point property on December 1, 1985. See Exhibit C. On November 8, 1985, the Talbot County Health Officer recommended that a portion of the 138,000 gallons per day of available capacity in the Town of Oxford Wastewater System be allocated to the Bachelor Point project. See Exhibit D. Moreover, the draft January, 1983 Talbot County Comprehensive Water and Sewerage Plan stated that the "Oxford Area Sewerage System" included a system that was then treating 110,000 gallons per day and had a designed capacity of 208,000 gallons per day. See Exhibit E. Referring to Figure No. 22, which includes the Bachelor Point area, the Water and Sewerage Plan stated that the excess capacity would be sufficient for future growth in the Oxford Area. Id.

Therefore, on December 1, 1985, public sewer and water lines were adjacent to the property, sewer capacity was available for serving the entire Bachelor Point area, and this area was projected for service in the County's Water and Sewerage Plan. On April 1, 1987, the Partnership entered into a sewer agreement with the Town of Oxford and public water and sewer services were extended to the property shortly thereafter, confirming its earlier proximity and availability.

* * * * *

In conclusion, the Panel Report misconstrues the LDA mapping guidelines in the County's Critical Areas Plan and fails to focus upon key features of the parcel in question which support its earlier LDA designation by the County. For these and other reasons presented on behalf of the Partnership

during this proceeding, the Panel Report's recommendation should not be followed. The Commission must recognize and correct the mapping mistake which has been clearly demonstrated in this case.

Very truly yours,

Wm. Roger Truitt

WRT/kss

cc: George Gay, Esquire
Ms. Pat Pudelkewicz
Mr. Henry Neff
Mr. Daniel Cowee

PIPER & MARBURY

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WRITER'S DIRECT NUMBER

410-576-1792

January 30, 1992

VIA FACSIMILE AND BY MAIL
Chesapeake Bay Critical Areas Commission
275 West Steet, Suite 320
Annapolis, Maryland 21401

Re: Bachelor Point

Ladies and Gentlemen:

On August 28, 1991, we submitted, on behalf of Tred Avon River Limited Partnership, a request that the Commission reconsider its decision denying Talbot County's proposal to correct a mistake in mapping the zoning of Bachelor Point. A request for reconsideration was previously filed by the County on August 16, 1991. The Commission acted favorably on these requests at its October 2, 1991 meeting. A panel hearing was held on Thursday, January 16, 1991 in Easton. Testimony and exhibits demonstrating that the Talbot County Planning Commission designated Bachelor Point a LDA in 1986 were presented by Henry Neff, Deborah Renshaw (the former County planner), Daniel Cowee (County Planning Officer) and the undersigned. There was no adverse testimony. We are informed that no one has submitted contradictory evidence.

Members of the panel and the Commission's Program Implementation Chief, Pat Pudelkewicz, asked a number of questions of the witnesses regarding the size and boundaries of the parcels at Bachelor Point. We have enclosed a site map which illustrates the boundaries and former zoning

designations. The C-1 parcel consists of just over 13 acres, with 5.85 acres in wetlands and 7.33 acres in uplands. In keeping with the goals of the Critical Areas Program, development is prohibited in the 12 acre wildlife sanctuary the Partnership created in the adjacent former A-1 parcel as illustrated on the map.

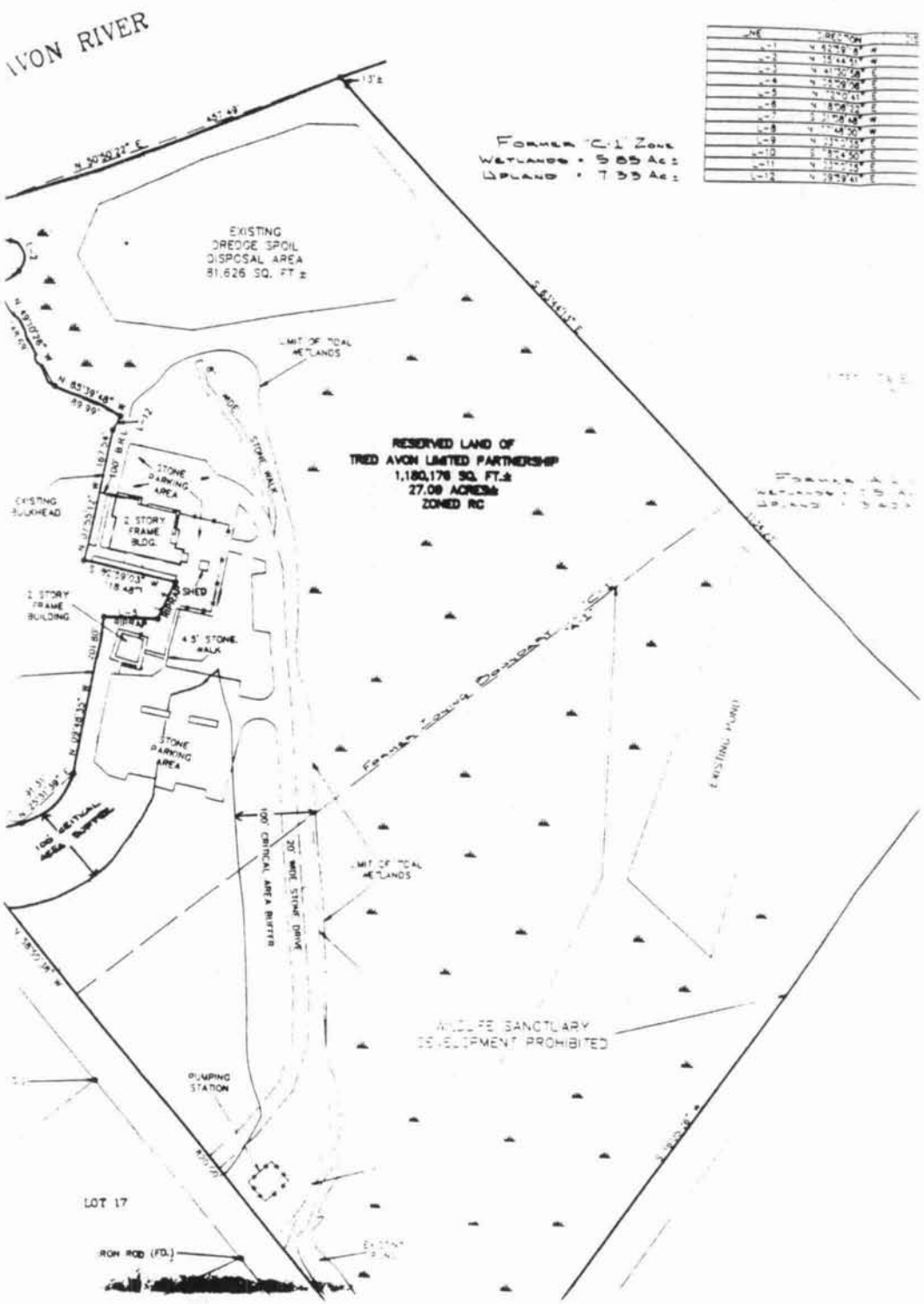
We hope that this supplemental information answers any questions the Commission has regarding this matter. We understand that the Commission will consider this matter at its February 5, 1992 meeting. We respectfully request that Mr. Henry Neff and the undersigned be allowed to make brief presentations to the Commission in response to issues that may arise during the course of that meeting.

Very truly yours,

Gina M. Zawitoski

Gina M. Zawitoski

Enclosure
cc: Henry Neff



Rauch, Walls and Lane, Inc.

Engineers • Design Planning • Surveyors

EASTON • CENTREVILLE
MARYLAND

SHEET NO. 1 OF 1

TIDAL WETLANDS OF THE LAND OF
TRED AVON RIVER LIMITED PARTNERSHIP
THIRD ELECTION DISTRICT
TALBOT COUNTY, MARYLAND

CHESAPEAKE BAY CRITICAL AREA COMMISSION

PROGRAM DEVELOPMENT CRITERIA—SCOPE OF COMMISSION'S DISCRETION TO INTERPRET CRITERIA.

January 5, 1988

The Honorable Solomon Liss
Chesapeake Bay Critical Area Commission

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

In your request, you specifically refer to three types of criteria about which you seek guidance. As you describe them, some of the criteria are "clear mandates" — for example, the development restriction in COMAR 14.15.02.05C(4). Others are "merely directory" — for example, the encouragement of incentive programs in COMAR 14.15.10.01K. Finally, some criteria, though in one sense mandatory, are drafted seemingly so as to leave room for some further interpretation or elaboration — for example, the definitional standard relating to sewer or water service in COMAR 14.15.02.04A(4).

For the reasons stated below, we conclude as follows:

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

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

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

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

V

Other Interpretive Issues

Your last specific example, COMAR 14.15.02.04A(4), reflects a mandatory criterion that nevertheless requires interpretation. The subsection establishes the definition of Limited Development Areas, one feature of which is "[a]reas having public sewer or public water, or both."

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

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

Though the Commission's discretion in this regard is broad, it is not limitless. The term "*having* public sewer or public water" would lose all content if the area in question were not in reasonable proximity to existing sewer or water lines — ones that are "in the ground."[2]

---

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

The limitation imposed by this criterion on the exercise of the Commission's discretion is that sewer and water service to an area cannot be *solely* a matter of planning or otherwise wholly speculative.

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

VI

Conclusion

In summary, it is our opinion that:

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

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

3. In applying criteria that admit of more than one reasonable construction — for example, COMAR 14.15.02.04A(4) — the Commission should consider how the particular program element in question relates to the Commission's underlying policy objective. While the Commission may not approve a local program element that is outside the scope of the pertinent criterion, taking into account the

principles of interpretation described in this opinion, the Commission has broad discretion to determine that a proposed element is consistent with the intent underlying the criterion.

J. JOSEPH CURRAN, JR., *Attorney General*

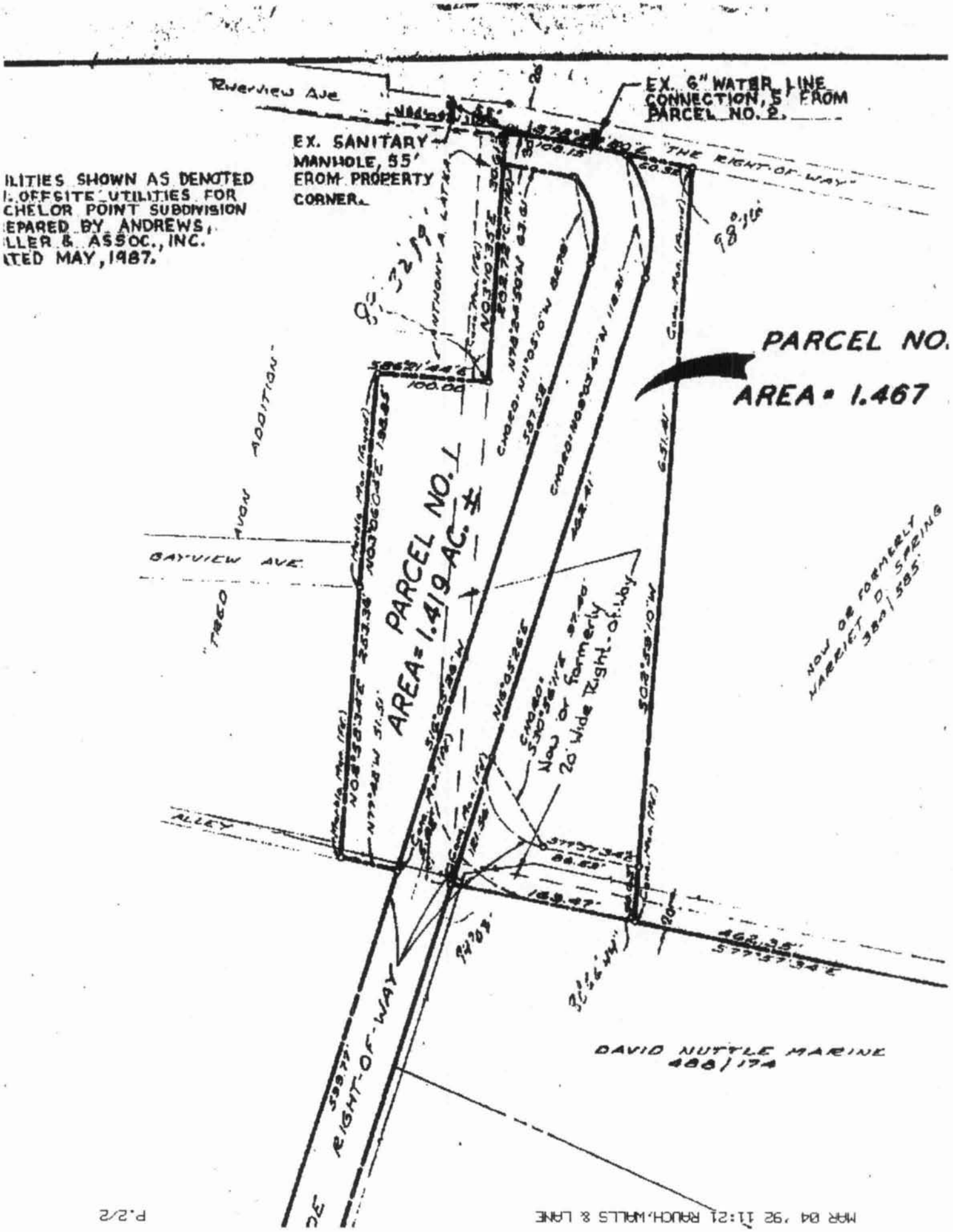
THOMAS A. DEMING, *Assistant Attorney General*

LEE R. EPSTEIN, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions & Advice

Karen

C



TALBOT COUNTY HEALTH DEPARTMENT

100 SOUTH HANSON STREET

P.O. BOX 480

EASTON, MARYLAND 21601

822-2292

November 8, 1985

Mr. Douglas Abbott, Jr.
Town Engineer
Town Office
Oxford, Md. 21654

Dear Mr. Abbott:

I have been asked by Mr. Charles Benson of the Tred Avon River Partnership to comment on the wastewater disposal plans for Bachelor Point. According to a letter I received in May of this year from Mr. Richard Sellars of the Water Management Administration, the Oxford wastewater system had .138 million gallons per day available for additional flow. If this flow has not been committed, I would prefer to see the town system used for the Bachelor Point project. I feel this is environmentally preferable to individual septic systems.

If I can assist in any way in this matter, please contact me at 822-2292.

Sincerely,

Eugene H. Guthrie, M.D.
Health Officer

200 gpd per day

EHG:blb

E

TALBOT COUNTY, MARYLAND

DRAFT OF THE 1983 UPDATE OF THE

COMPREHENSIVE WATER AND SEWERAGE PLAN

JANUARY 1983

Oxford Area - Refer to Figure No. 22, Oxford Area Sewerage System Plan. Oxford is presently served by a secondary treatment system. This is a three (3) stage waste stabilization lagoon system with diffused air which currently treats 110,000 gallons per day. This newly improved system with total surface area of the lagoons at three (3) acres has a design capacity of 208,000 gallons per day and will be sufficient for Oxford's future growth. Chlorine for disinfection and dechlorination by induction of Sulfur Dioxide are provided prior to discharge to Town Creek. The three existing pumping stations are also adequate and the addition of generator backup for all stations is helpful.

Sanitary District No. 2 - St. Michaels, Martingham Area - Refer to Figure No. 23, Talbot County Region II - Martingham Area Sewerage System Plan.

This service area boundaries of Sanitary District No. 2 have been established and include the Town of St. Michaels, Rio Vista and Bentley Hay. The district study area extends to and includes Newcomb, Cedar Grove, Royal Oak, and Royal Acres to the southeast and extends to the Martingham Public Service Commission Area to the northwest. The Miles River is the northern boundary with Edge Creek and the headwater of Broad Creek forming the southern boundary. Refer to Figure No. 28 for the limits of Sanitary District No. 2.

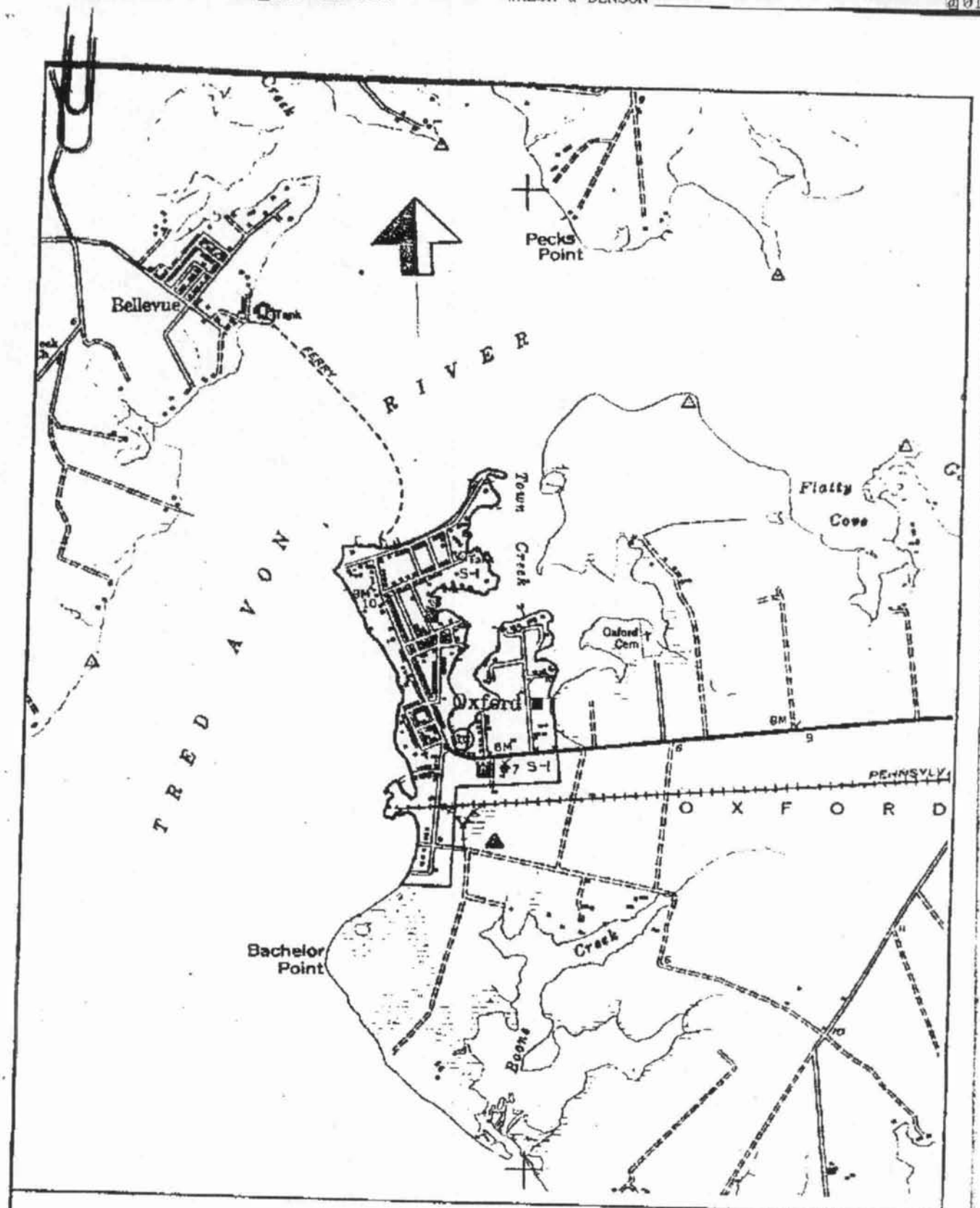
The Wastewater Treatment Facilities for Region II is owned and operated by Talbot County. The 0.5 mgd facility is located on a 32 acre parcel of land as shown in Figure No. 23. The treatment facility incudes two (2) primary clarifiers, RBC treatment, two (2) secondary clarifiers, continuous backwash sand filters, chlorination, dechlorination (SO_2) and post aeration. The sludge is aerobically digested and dried in four (4) -95'x25' drying beds. Inground facilities, pumps, pipes, etc are designed to accommodate expansion of the plant to 1.0 mgd.

The Royal Oak Newcomb Area has been studied as a Step I Facility Planning Area. The selected alternative (most cost effective) is a gravity and pressure collection system with pumping to the Region II Wastewater Treatment Facilities. However due to the expected very high annual user costs which would be incurred by this selected alternative, the recommendations of the Facility Plan have not been followed and application for Federal and State Step II Design monies have not been made. The Talbot County Health Department has since placed this area under a sewer moratorium and has temporarily halted all new building construction. Therefore all existing failing individual septic systems will be corrected on a house-to-house basis.

Martingham Estates is served by a stabilization lagoon system. Treated effluent is chlorinated prior to spray irrigation onto the golf course. The design capacity of the lagoon system is 56,000 gallons per day with a present average daily flow of 43,000 gallons per day. Based on projected population growth by 1990, the system must be upgraded to meet the expected flow. Operators of the facility are currently investigating connection to the Region II System and upgrading treatment in order to discharge to Miles River. Routine lateral extensions are also anticipated upon growth.

Trappe Area - Refer to Figure No. 24, Trappe Area Sewerage System Plan. The treatment system consist of a three cell waste stabilization facility with chlorination prior to discharge into a tributary of La Trappe Creek. The average daily sewage flow rate is 77,000 gallons per day with design capacity of the plant at 114,600 gallons per day. The recently constructed facility also has capacity for a dechlorination unit as the need arises.

Extension to Lover Lane subdivision with an estimated construction cost of $150,000 is the only planned future work.



TALBOT COUNTY COMPREHENSIVE
WATER AND SEWERAGE PLAN

OXFORD AREA

SEWERAGE SYSTEM PLAN

Frederick Ward Associates, Inc. Consulting Engineers
CENTURY BUILDING • BEL AIR, MARYLAND 21014

SCALE: 1"=2000'

FIGURE NO. 22

I. MY ROLE - HENRY NEFF

SHORTLY AFTER BACHELOR POINT WAS PURCHASED IN 1984, I WAS GIVEN THE JOB OF TAKING THE PROJECT THROUGH THE APPROVAL AND CONSTRUCTION PROCESS. I AM THE OWNER'S REPRESENTATIVE.

II. THE APPROVAL PROCESS

1. APRIL 9, 1986 - THE PROJECT RECEIVED AN LDA DESIGNATION AND SKETCH PLAN APPROVAL FROM THE TALBOT COUNTY PLANNING AND ZONING COMMISSION. THIS HAS BEEN VERIFIED BY THE MINUTES OF THE MEETING AND IS ON RECORD IN EARLIER TESTIMONY.

2. AUGUST 25, 1986 - WITH THE POSITIVE RECOMMENDATION OF THE PLANNING AND ZONING COMMISSION, THE TALBOT COUNTY BOARD OF APPEALS GRANTED THE C-1 PORTION OF THE PROPERTY APPROVAL TO EXPAND THE EXISTING MARINA TO WHAT IT IS TODAY.

ON PAGE 6 OF THE MINUTES IT STATES:
"UNDER THE CRITICAL AREA CRITERIA, THIS IS A LIMITED DEVELOPMENT AREA".

THE APPEALS BOARD UNDER COMAR 14.15.03.06 ALLOWED A 6,000 SQUARE FOOT BOAT REPAIR/OFFICE/SAIL LOFT/ BATH BUILDING TO BE BUILT 20 FEET FROM THE WATER. IT ALSO ALLOWED AN ADDITIONAL 2,000 SQUARE FOOT BATH/OFFICE/LAUNDRY BUILDING TO BE CONSTRUCTED WITHIN 20 FEET OF MHW. AND, LASTLY, IT APPROVED THE CONSTRUCTION OF A 144 SQUARE FOOT PAINT SHED

AND A 144 SQUARE FOOT SINGLE BATH FACILITY WITHIN 50 FEET OF MHW. THIS "IN THE BUFFER" CONSTRUCTION IS ONLY ALLOWED TO OCCUR IN LDA'S. THIS FACT IS OF RECORD.

3. JANUARY 14, 1987 - BECAUSE OF SOME PUBLIC COMMENT, THE PLANNING COMMISSION FOCUSED IN AGAIN ON THE RESIDENTIAL SIDE AND GRANTED SKETCH PLAN APPROVAL. IN THE MINUTES OF THE MEETING, IT WAS STATED:

"BACHELOR POINT SUBDIVISION WAS PRESENTED TO THE COMMISSION FOR SKETCH PLAN APPROVAL WITH AN LDA JUSTIFICATION RECEIVED AT A PRIOR DATE".

SO, ON THE COUNTY LEVEL DURING THE APPROVAL PROCESS, IT WAS QUITE CLEAR TO ALL CONCERNED THAT THE PROJECT WAS AN LDA.

THE TOWN OF OXFORD ENTERED INTO A SEWER AND WATER EXTENSION AGREEMENT ON APRIL 1, 1987 AND PROJECT CONSTRUCTION BEGAN IN THE SUMMER OF 1987.

WHEN THE PLANNING AND ZONING OFFICE ISSUED, IN EARLY 1989, A DRAFT OF THE TALBOT COUNTY CRITICAL AREA ZONING ORDINANCE, IT INCLUDED A TABLE 1 ENTITLED: "NEW ZONING DESIGNATIONS WITHIN CRITICAL AREA" WHICH STATED THAT COMMERICAL C-1 ZONING OF LESS THAN 20 ACRES IN A LDA SHALL CONVERT TO LIMITED COMMERCIAL L.C.

THIS STATEMENT WAS SO CLEAR THAT I DID NOT FOLLOW THE MAPPING OF BACHELOR POINT AND IN LATE 1989 WHEN DAN COWEE SHOWED THE NEW ZONING MAPS TO ME WITH BACHELOR POINT BEING ZONED R.C., I EXPLAINED TO HIM THAT I THOUGHT IT WAS A MISTAKE.

ON DECEMBER 6, 1989, I APPEARED BEFORE THE TALBOT COUNTY PLANNING AND ZONING COMMISSION TO EXPLAIN THE MISTAKE. THE COMMISSION AGREED AND RECOMMENDED TO THE TALBOT COUNTY COUNCIL THAT IT BE CORRECTED TO L.C. THE COUNTY COUNCIL AGREED AND SUBMITTED A MAPPING AMENDMENT TO THE CRITICAL AREA COMMISSION WHO HAS YET TO AGREE.

III. THE APPEAL PROCESS

THE MOST TROUBLING THING ABOUT THIS SITUATION IS THAT THE CRITICAL AREA COMMISSION IS NOT WORKING IN CONCERT WITH THE COUNTY ON THIS ISSUE. THE PROPERTY OWNERS HAVE RELIED HEAVILY ON THE COMMERCIAL ZONING AND SUBSEQUENT LDA DESIGNATION IN ORDER TO FIRST PURCHASE THE PROPERTY AND, SECONDLY, TO DEVELOP THE PROPERTY UNDER THE DICTATES OF AN LDA. EVERYONE INVOLVED TRULY BELIEVED AND STILL MAINTAINS THAT ALL APPROVALS WERE CONSISTENT WITH THE CRITICAL AREA LAW.

FROM THE PANEL HEARING AND SUBSEQUENT RECOMMENDATION, IT IS QUITE CLEAR THAT THE CRITICAL AREA COMMISSION WISHES TO TURN BACK THE CLOCK TO DECEMBER 1, 1985 AND IGNORE THE FACT THAN AN ADDITIONAL 48 SLIPS WERE

CONSTRUCTED, THE BASIN WAS EXPANDED BY 1.4 ACRES (THEREBY SPREADING SEVERAL THOUSAND YARDS OF BOTH DRY AND WET DREDGE MATERIAL ON THE SITE), 8,400 SQUARE FEET OF BUILDINGS AND 107 PARKING SPACES WERE CONSTRUCTED WITHIN THE BUFFER; AND, LASTLY, WATER AND SEWER WAS EXTENDED.

IN RETROSPECT, THE OBJECTIVE OF THE PANEL HEARING WAS A TOTAL MISUNDERSTANDING ON OUR PART.

WE FOCUSED IN ON THE APPROVAL PROCESS WITH THE COUNTY AND JUST TOUCHED ON WHAT WAS EXISTING ON THE PROPERTY AS OF DECEMBER 1, 1985.

I BELIEVE THAT THE RECORD HAS PROVEN, IRREFUTABLY THAT WE ARE DESIGNATED AN LDA.

IV. <u>WHAT EXISTED ON DECEMBER 1, 1985</u>

AS OF DECEMBER 1, 1985, THE C-1 SECTION OF THE PROPERTY WAS ACTUALLY LARGER THAN IT IS TODAY. (SEE SITE PLAN)

IT CONSISTED OF THE 1.4 ACRES OF THE BASIN WHICH HAS BEEN EXCAVATED PLUS THE LAND ON THE SOUTHSIDE OF THE BASIN WHICH EQUALS AN ADDITIONAL 1.1 ACRES. TOTAL SIZE WAS 15.7 ACRES.

IMPROVEMENTS IN PLACE WERE 2 LONG PIERS WITH 55 SLIPS, ACCESS ROADS, PARKING AREAS, TODD BOATWORKS MAIN BUILDING, AN OFFICE, BATH HOUSE, A WELL HOUSE, AND SMALL STORAGE BUILDING.

THE NORTH SIDE OF THE BASIN WAS AN EXISTING SPOIL SITE WHICH WAS USED AGAIN AS A HYDRAULIC SITE IN 1987.

(SEE SITE PLAN)

V. WAS THE SUBJECT AN RCA ON DECEMBER 1, 1985.

I DON'T THINK IT WAS FOR THE FOLLOWING REASONS:

BY DEFINITION RCA "SHALL HAVE AT LEAST ONE OF THE FOLLOWING FEATURES":

(1) DENSITY IS LESS THAN ONE DWELLING UNIT PER 5 ACRES; OR

REPLY: THIS OBVIOUSLY DOES NOT APPLY AS THE PROPERTY IS COMMERCIAL.

(2) DOMINANT LAND USE IS IN AGRICULTURE, WETLAND, FOREST, BARREN LAND, SURFACE WATER OR OPEN SPACE.

REPLY: AGRICULTURE-THE PROPERTY HAS NOT BEEN FARMED FOR DECADES.

WETLANDS-OF THE ENTIRE 15.7 ACRES, APPROXIMATELY 5.8 ACRES ARE MARSH. SINCE THEY ARE NOT EVEN 50% OF THE AREA, ARE WETLANDS A DOMINANT USE?

FOREST-THE SUBJECT HAS NO ACREAGE IN FOREST ONLY A FRINGE OF BUSHES ALONG THE MARSH.

BARREN LAND-BY DEFINITION: "BARREN LAND MEANS UNMANAGED LAND HAVING SPARSE VEGETATION." THE COMMERCIAL ACTIVITY IS CENTERED AROUND THE BASIN WHICH IS APPROPRIATE FOR A MARINA. THE RESIDUAL FASTLAND CONSISTED OF MOWED FIELDS EARMARKED FOR EXPANSION. THE SPOIL SITE

HAS BEEN PART OF THE ONGOING CONSTRUCTION OF THE BASIN SINCE THE EARLY 1960'S. IN THIS CASE, BARREN LAND DOES NOT APPLY.

SURFACE WATER-THIS IS NOT APPLICABLE AS THE 4.85 ACRE BASIN IS NOT PART OF THE C-1 ACREAGE. THE SMALL CANAL THAT FEEDS THE PONDS ON ADJACENT PROPERTIES IS NOT DOMINANT.

OPEN SPACE-"MEANS LAND AND WATER AREAS RETAINED IN AN ESSENTIALLY UNDEVELOPED STATE". IF "OPEN SPACE" WERE TO BE CONSTRUCTED AND APPLIED THROUGHOUT THE COUNTY, (NOT THE TOWNS), I SUBMIT THAT ALL LDA'S WOULD, IN FACT, BE RCA BECAUSE ON ANY GIVEN PARCEL OF LAND, THE SQUARE FOOTAGE OF OPEN SPACE EXCEEDS THE SQUARE FOOTAGE OF CONSTRUCTED SPACE. OPEN SPACE MUST BE INTENDED TO MEAN OFFICIALLY DEDICATED OPEN SPACE PURSUANT TO LOCAL LAND USE AND ZONING REQUIREMENTS.

SO, IN REVIEWING THE RCA DEFINITION, IT IS QUITE CLEAR THAT THE 15.7 ACRE PROPERTY WAS NOT DOMINATED BY:

AGRICULTURE	-	O ACRES
OR		
WETLANDS	-	5.8 ACRES
OR		
FOREST	-	O ACRES
OR		
BARREN LAND	-	O ACRES
OR		
SURFACE WATER	-	A MINIMAL AMOUNT CONSISTING OF A TIDAL DITCH
OR		
OPEN SPACE	-	O ACRES

THE PANEL RECOMMENDATION REALLY APPEARS TO BE AN UNSUPPORTED OPINION RATHER THAN A STATEMENT OF FACT AND, CONSEQUENTLY, IS SUBJECT TO ARGUMENT.

CONSIDERING THE LDA DEFINITION AS PER COMAR 14.15.02:

.04 LIMITED DEVELOPMENT AREAS.

A. LIMITED DEVELOPMENT AREAS ARE THOSE AREAS WHICH ARE CURRENTLY DEVELOPED IN LOW OR MODERATE INTENSITY USES. THEY ALSO CONTAIN AREAS OF NATURAL PLANT AND ANIMAL HABITATS, AND THE QUALITY OF RUNOFF FROM THESE AREAS HAS NOT BEEN SUBSTANTIALLY ALTERED OR IMPAIRED. THESE AREAS SHALL HAVE AT LEAST ONE OF THE FOLLOWING FEATURES:

(1) HOUSING DENSITY RANGING FROM ONE DWELLING UNIT PER 5 ACRES UP TO FOUR DWELLING UNITS PER ACRE;
(2) AREAS NOT DOMINATED BY AGRICULTURE, WETLAND, FOREST, BARREN LAND, SURFACE WATER, OR OPEN SPACE;
(3) AREAS MEETING THE CONDITIONS OF REGULATION .03A, BUT NOT .03B, ABOVE;
(4) AREAS HAVING PUBLIC SEWER OR PUBLIC WATER, OR BOTH.

REPLY A: THE EXISTING (DECEMBER 1, 1985) BOAT YARD WITH 55 SLIPS, BUILDINGS AND OTHER IMPROVEMENTS ARE CONSISTENT WITH THE DEFINITION "LIMITED

DEVELOPMENT AREAS ARE THOSE AREAS WHICH ARE CURRENTLY DEVELOPED IN LOW OR MODERATE INTENSITY USES."

1. COMMON SENSE DICTATES THAT THE DWELLING UNIT DENSITY ISSUE DOES NOT APPLY BECAUSE THE PROPERTY IS COMMERCIAL.
2. "AREAS WERE NOT DOMINATED BY AGRICULTURE, WETLANDS, FOREST, BARREN LAND, SURFACE WATER, OR OPEN SPACE" - AS SHOWN EARLIER WITH THE RCA DEFINITION, TECHNICALLY THE SUBJECT C-1 PROPERTY DOES COMPLY WITH THIS CRITERION.
3. N/A AS IT DEALS WITH IDA'S.
4. "AREAS HAVING PUBLIC SEWER OR PUBLIC WATER, OR BOTH"-WHEN BACHELOR POINT WAS PURCHASED IN 1984. THE PROPERTY INCLUDED THE PRIVATE ROAD WHICH ABUTS THE TOWN OF OXFORD. THEREFORE, ALTHOUGH IT WAS NOT PHYSICALLY ON THE PROPERTY, SEWER AND WATER WERE AVAILABLE WITHIN 70 FEET OF THE PROPERTY AND DISCUSSIONS ABOUT EXTENDING SEWER AND WATER HAD ALREADY COMMENCED AS OF OCTOBER 31, 1985. (SEE ATTACHED LETTER)

REGARDING THE PANEL REPORT'S DISCUSSION SECTION WHICH CITES THE POLICIES OF THE COUNTY'S CRITICAL AREA PLAN: IT IS INCONSISTENT FOR THE PANEL TO CITE THIS PLAN TO THEIR BENEFIT BECAUSE IT WAS DRAFTED IN MAY, 1989. WHEN BACHELOR POINT WAS GOING THROUGH THE APPROVAL PROCESS, THE COUNTY WAS STRICTLY WORKING UNDER THE 1984 CRITICAL AREA LAW AS DRAFTED.

TO CITE THE COUNTY'S PLAN ACTUALLY WORKS TO OUR BENEFIT BECAUSE THE COUNTY KNEW THEY HAD APPROVED LDA'S ONLY AFTER 1985 AND THAT IS WHY THEY INCLUDED THEM IN THE PLAN. BACHELOR POINT IS ONE OF THEM.

FURTHER, THE AND VERSUS OR ISSUE CITED BY THE PANEL IS IMMATERIAL AS IT ALSO WAS WRITTEN AFTER THE FACT. EVEN SO, I BELIEVE THAT THE PANEL'S INTERPRETATION IS WRONG IN THAT THE COUNTY PLAN'S 3 CRITERIA WERE TO BE USED INDIVIDUALLY AS GUIDELINES.

I APPEAL TO THE CRITICAL AREA COMMISSION TO USE COMMON SENSE IN VOTING ON THIS MAPPING MISTAKE. BACHELOR POINT MORE CLOSELY FIT THE LDA DEFINITION IN 1985 AND EXACTLY FITS IT AS OF 1988.

IS IT LOGICAL TO MAP THE PROPERTY BASED ON DECEMBER 1, 1985 AS RCA (WHICH I HAVE DEMONSTRATED IS QUESTIONABLE) WHEN DURING 1986-89 THE COUNTY APPROVED IT AS LDA AND ALLOWED IT TO BE DEVELOPED AS SUCH?

WHEN THE COUNTY HAS ADMITTED IT MADE A MAPPING MISTAKE, IS IT LEGAL FOR THE C.A.C. TO "AFTER THE FACT" TAKE AWAY THE L.D.A.?

IT IS OF CONCERN THAT NEITHER THE STAFF NOR THE PANEL UNDERSTAND THE BOUNDARIES OF THE C-1 SECTION AND THAT, IN FACT, THEY MIGHT BE INCLUDING THE WILDLIFE SANCTUARY AS PART OF THE SUBJECT. HAVE THE PANEL MEMBERS AND MEMBERS PHYSICALLY INSPECTED THE PROPERTY? (SEE PHOTO)

IS THERE ANY JUSTIFICATION FOR CONTINUING UNDER THE ILLUSION THAT THE PROPERTY IS AN RCA WHEN, IN FACT, IT FULLY MEETS THE LDA DEFINITION? PLEASE LOOK AT THE PICTURE AND THE SITE PLAN. DOES THIS LOOK LIKE FARMLAND WITH LITTLE HUMAN CONTACT? I THINK NOT. IT LOOKS LIKE AN LDA OF LESS THAN 20 ACRES WHICH AS EVERYONE ON THE COUNTY LEVEL AGREES IS ZONED L.C.

P&Z Copy

COUNTY COUNCIL

OF

TALBOT COUNTY, MARYLAND

1985 Legislative Session, Legislative Day No. January 22, 1985

Bill No. 211

Introduced by: The County Council

A BILL TO REPEAL AND RE-ENACT ZONING MAP NUMBER 53 WITH AMENDMENT CHANGING THE CLASSIFICATION OF AND DOWN-ZONING A PORTION OF PARCEL NO. 86 FROM THE C-1 ZONE TO THE A-1 ZONE.

By the Council January 22, 1985

Introduced, read first time, ordered posted, and public hearing scheduled on Tues, Feb. 12, 1985, at 3:00, pm. in the Council Hearing Room, Court House, Easton, Maryland.

By order, Mary Foster

Secretary

A BILL TO REPEAL AND RE-ENACT ZONING MAP NUMBER 53 WITH AMENDMENT CHANGING THE CLASSIFICATION OF AND DOWN-ZONING A PORTION OF PARCEL NO. 86 FROM THE C-1 ZONE TO THE A-1 ZONE.

SECTION ONE: Be it enacted by the County Council for Talbot County Maryland, that Zoning Map No. 53 of the Talbot County Zoning Ordinance be and the same hereby is repealed.

SECTION TWO: Be it further enacted that Map No. 53 be and the same hereby is re-enacted with amendment as shown on the attached copy changing and down-zoning a portion of Parcel No. 86 from the C-1 Zone to the A-1 Zone, as shown on said map.

SECTION TWO: BE IT FURTHER ENACTED that this Bill shall take effect sixty (60) days from the date of its passage.

PUBLIC HEARING

Having been posted and Notice of Time and place of hearing and Title of Bill having been published according to Charter, a public hearing was held on February 12, 1985 and concluded on February 12, 1985

_____, Secretary

BY THE COUNCIL

Read the third time.

Passed: February 26, 1985

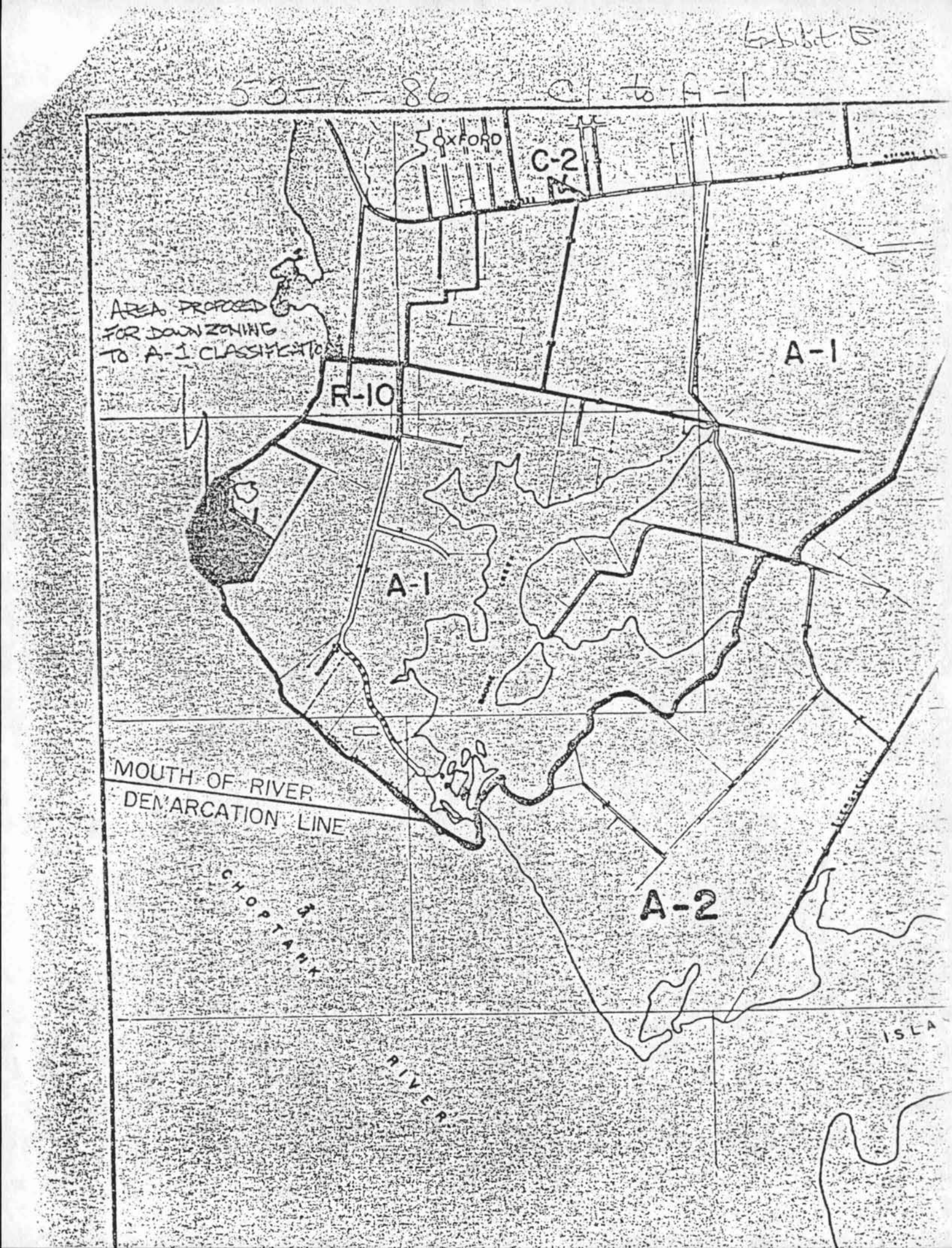
By Order _____

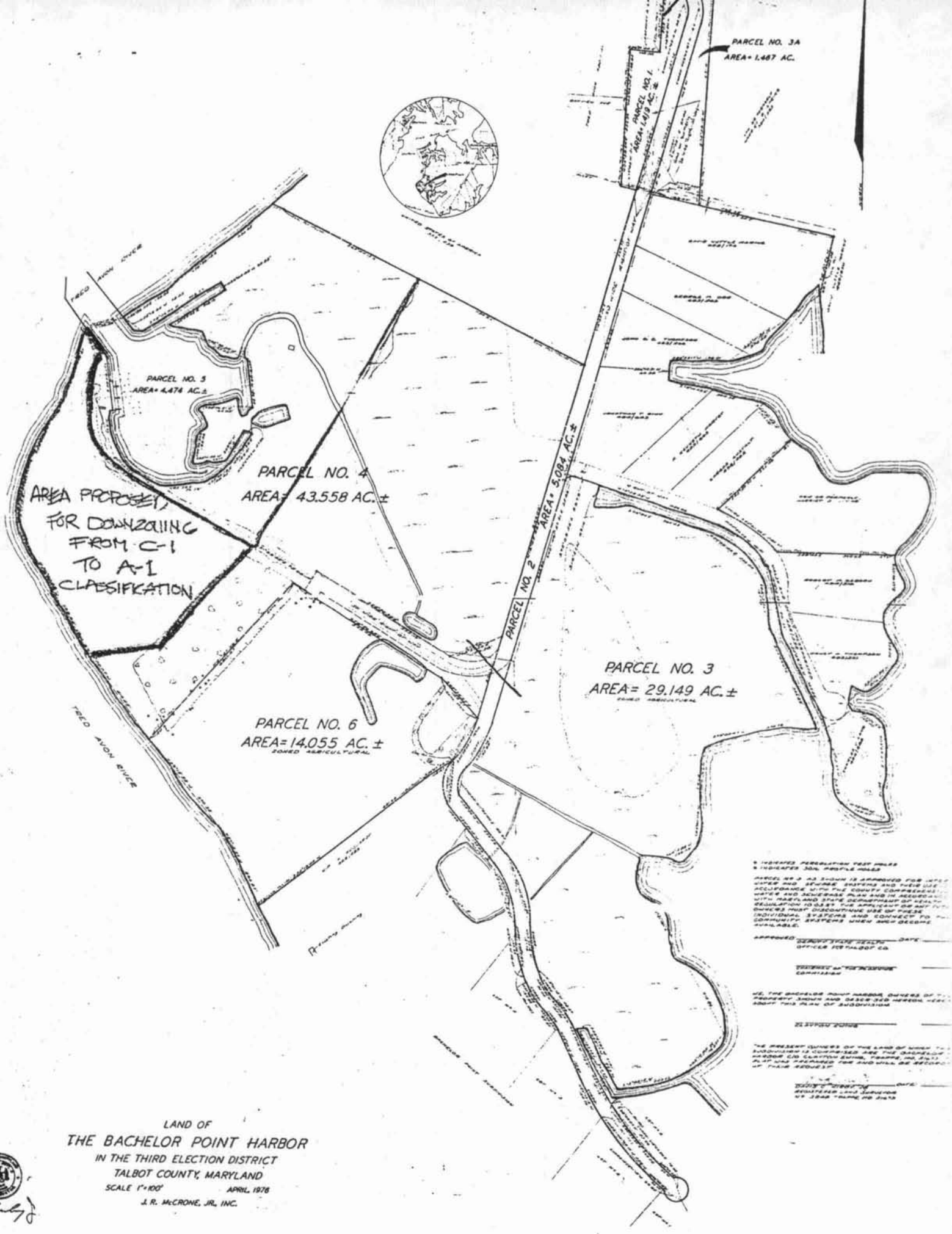
7I

Andrew - aye
Clem - aye
Bradley - aye
Mielke - aye

Exhibit B

53-7-86 C to A-1





LAND OF
THE BACHELOR POINT HARBOR
IN THE THIRD ELECTION DISTRICT
TALBOT COUNTY, MARYLAND
SCALE 1" = 100' APRIL, 1978
J. R. McCRONE, JR., INC.

TALBOT COUNTY HEALTH DEPARTMENT
100 SOUTH HANSON STREET
P.O. BOX 480
EASTON, MARYLAND 21601
822-2292

November 8, 1985

Mr. Douglas Abbott, Jr.
Town Engineer
Town Office
Oxford, Md. 21654

Dear Mr. Abbott:

I have been asked by Mr. Charles Benson of the Tred Avon River Partnership to comment on the wastewater disposal plans for Bachelor Point. According to a letter I received in May of this year from Mr. Richard Sellars of the Water Management Administration, the Oxford wastewater system had .138 million gallons per day available for additional flow. If this flow has not been committed, I would prefer to see the town system used for the Bachelor Point project. I feel this is environmentally preferable to individual septic systems.

If I can assist in any way in this matter, please contact me at 822-2292.

Sincerely,

Eugene H. Guthrie, M.D.
Health Officer

EHG:blb

200 gal per day

CHARLES F. BENSON
PRESTON W. TAYLOR
MARK C. EWING
HENRY GIBBONS-NEFF
MICHAEL R. SHARP
CARLYLE R BRADY
RICHARD B. FIRTH
D. F. SHOWELL, III

WALSH & BENSON
INCORPORATED
REAL ESTATE
DOVER & HARRISON STREETS
EASTON, MARYLAND 21601

PHONE 822-1415
(AREA CODE 301)
TELEX 87414 LANDESTN

October 31, 1985

Dr. Eugene H. Guthrie
Talbot County Health Department
100 S. Hanson Street
Easton, MD 21601

Dear Gene:

Thank you for taking the time to look at the possible alternative waste water disposal plans for Bachelor Point.

Your opinion, obviously, supports utilization of the lagoon system in Oxford by any future residential or commercial use at the Bachelor Point Yacht Basin as the preferable alternative.

In order to accommodate this environmentally preferable approach, a short note to Douglas Abbott, Jr., the Town Engineer, would be appreciated.

We plan to begin construction of a new entrance road to the property and any possible sewer lines will be under the roadway. I should not want to have to go back at some future date and dig up the road.

I am told that if the use of the municipal system, in the viewpoint of your office, is preferable to septic and individual wells, they would discuss with me the possibility of buying the service.

Thank you for your attention and counsel.

Sincerely,

Charles F. Benson
Tred Avon River Limited
Partnership

CFB:slf

Readvertise
Conditional approval

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

RALPH S. TYLER, III
DEPUTY ATTORNEYS GENERAL

THOMAS A. DEMING
ASSISTANT ATTORNEY GENERAL
COUNSEL TO SECRETARY

MARIANNE D. MASON
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SEAN COLEMAN
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MEREDITH E. GIBBS
GEORGE E.H. GAY
OLGA M. BRUNING
EILEEN E. POWERS
ASSISTANT
ATTORNEYS GENERAL

STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF NATURAL RESOURCES
TAWES STATE OFFICE BUILDING
ANNAPOLIS, MARYLAND 21401
(301) 974- 2501

February 24, 1992

MEMORANDUM

TO: Elizabeth Zucker
Scientific Advisor

FROM: George E. H. Gay
Assistant Attorney General

RE: Draft Guidance Paper Structures on Piers

Thank you for your memorandum dated February 19, 1992 which I received today. You have asked for my written comments on or before March 2, 1992. I will do my best to accommodate your deadline; however, due to my pre-existing work schedule, I may not get to this matter by then.

GEHG:cjw

cc: James Peck
Sarah J. Taylor, Ph.D.

move to approve the paper w/ condition that legal services be completed w.o. signoff albert

17-0 approved.

Sarah — I highlighted paragraphs that have been changed to emphasize structures on Piers "law.

CHESAPEAKE BAY CRITICAL AREA COMMISSION
275 West Street, Suite 320
Annapolis, Maryland 21401

MEMORANDUM

February 19, 1992

TO: George Gay

FROM: Liz Zucker
Members of the Special Issues Subcommittee

SUBJ: Draft Guidance Paper on "Structures on Piers"

I am sending you the latest draft of a guidance paper to be sent by the Critical Area Commission (CAC) to local jurisdictions regarding the construction of structures over tidal waters and tidal wetlands. As you know the Special Issues Subcommittee has been discussing this issue over the past few months. The Subcommittee would like to have a full Commission vote on the paper at the monthly meeting on March 4, 1992. We graciously request that you review and comment on the draft, so that any legal concerns can be discussed at the March meeting. We would appreciate your written comments by March 2, 1992.

We ask that you consider an additional question regarding the "Structures on Piers" Law (copy appended). Subsection (e) of the Law prohibits local jurisdictions from issuing a building permit for structures that are not water-dependent on a pier over tidal wetlands. What if a local jurisdiction does not require a building permit for certain structures? Will the Department of Natural Resources regulations cover such "gaps" sufficiently for Critical Area purposes or should the CAC require the local jurisdictions to issue building permits under the Critical Area "Structures on Piers" Law?

Thank you for your efforts in this matter.

cc: Mr. Jim Peck
Dr. Sarah Taylor

DRAFT

February 18, 1992

Re: A Draft Guidance Letter to the Local Jurisdictions on Development Requirements for Structures Over Tidal Waters and Tidal Wetlands

Dear Local Jurisdiction:

Recently, there has been a significant increase in the number of structures that are not water-dependent being constructed over and in tidal waters and tidal wetlands of the Chesapeake Bay Critical Area. Particularly in the rapidly developing jurisdictions, a proliferation of structures such as storage buildings, gazebos, and dwellings has been established on piers or pilings in tidal wetlands, waterward of the Critical Area Buffer. Because these structures are not water-dependent and may have direct as well as cumulative adverse impacts on the water quality and aquatic habitat of the Chesapeake Bay system, the appended document has been developed to clarify the Critical Area Commission's regulatory background on this issue. In particular, the information can be used to interpret Natural Resources Article, Section 8-1808.4 which was adopted by the General Assembly in 1989. A copy of the Law is attached for your reference.

We hope that this information will assist you in the implementation of your local Critical Area Program. Please contact me or Dr. Taylor if you have any comments or questions regarding this matter.

Very truly yours,

John C. North, II
Chairman

JCN/jjd

Enclosure

DRAFT

DRAFT

CHESAPEAKE BAY CRITICAL AREA COMMISSION (CAC)
GUIDANCE ON
STRUCTURES OVER TIDAL WETLANDS AND TIDAL WATERS

Must discuss the Law

I. Background

Under the 1986 Critical Area criteria, water-dependent facilities are defined as:

"Those structures or works associated with industrial, maritime, recreational, educational or fisheries activities that require location at or near the shoreline within the Buffer...

An activity is water-dependent if it cannot exist outside of the Buffer and is dependent on the water by reason of the intrinsic nature of its operation." (COMAR 14.15.03.01).

The definition clearly characterizes water-dependent facilities in terms of the minimum 100-foot shoreline Buffer of the Critical Area. The definition does not as clearly define water-dependent facilities in terms of their location in tidal waters and tidal wetlands. Furthermore, the criteria specifically prohibit disturbance to the Buffer from structures that are not water-dependent, yet a parallel restriction for tidal waters and wetlands waterward of the Buffer was not clearly outlined in the 1986 Critical Area regulations.

In 1989, the Maryland General Assembly adopted Natural Resources Article, § 8-1808.4, entitled "Structures on Piers". Subsection (e) of the Law specifically prohibits local jurisdictions from issuing a building permit for the construction of a structure that is not water-dependent on a pier located in State or private tidal wetlands in the Critical Area.

There is one notable exception to the "Structures on Piers" legislation. Dwellings and other structures that are not water-dependent may be permitted on existing piers in State or private wetlands within Intensely Developed Areas (IDAs). However, the pier must have been in existence as of December 1, 1985 and must appear on a Department of Natural Resources (DNR) aerial photograph dated 1985. In these cases, pier expansion is limited by criteria outlined under the legislation. Other than this exception, the 1989 legislation clearly specifies that new structures that are not water-dependent are not to be permitted in tidal areas, waterward of the Buffer in the Critical Area.

DRAFT

II. Impacts From Structures That Are Not Water-Dependent

A number of direct as well as cumulative environmental impacts can occur from the establishment of structures over wetlands and open water. Initially, construction activities (e.g., pile driving, use of heavy equipment) can destroy or disturb wetland and benthic (bottom) plant and animal communities. Once structures are erected, shading will eliminate certain wetland and submerged communities or will result in a change in species composition.

When structures are impervious, the volume and velocity of stormwater runoff will increase, creating greater potential for erosion of wetlands and shallow water habitat. Also, pollutants such as nutrients and hydrocarbons collect and concentrate on structures as a result of human activities or from atmospheric deposition. During a storm event, these pollutants will be flushed into the water or wetlands without the filtering benefits of "buffer" vegetation and soils.

While the environmental impacts of a single structure may be minimal, the cumulative effects from a number of structures placed along a reach of shoreline can be significant. Pollutant loadings can increase to a point where water quality is severely degraded. A number of structures located in a confined waterbody can reduce flushing and circulation, also resulting in a decline in water quality. As a result of cumulative impacts, entire communities of wetland and benthic organisms may be adversely affected or even eliminated from an area.

III. Development Requirements for Structures in Tidal Areas

The development requirements for the construction of structures over tidal wetlands, tidal waters and their Buffers are outlined below:

A. The construction of water-dependent structures is permitted in tidal waters, tidal wetlands, and their Buffers.

   Certain types of structures are obviously water-dependent. They are necessary to provide access to the water and their intrinsic nature requires their location in, on, over or under the Buffer, tidal wetlands and tidal waters. Examples of water-dependent structures include piers, docks, moorings and swimming platforms (not associated with pools). Because they are water-dependent, the Critical Area criteria permit

the construction of these types of structures in the Buffer as well as within wetlands and open water. The CAC in conjunction with the local jurisdictions will continue to implement the criteria and ensure that impacts to water quality and habitat from water-dependent structures are minimized.

B. Structures that are not water-dependent may not be constructed within tidal waters, tidal wetlands and their Buffers.

A number of structures clearly are not water-dependent because they do not require location along the shoreline or within tidal wetlands and waters. Examples of structures that are not water-dependent include but are not limited to:

1. Dwellings

2. Restaurants, shops and other types of commercial buildings

3. Gazebos, decks, recreational areas

4. Sheds or storage buildings

5. Parking

6. Sanitary facilities

NOTE: Dwellings and other structures that are not water-dependent may be permitted on existing piers in State or private wetlands within Intensely Developed Areas (IDA) as outlined under Natural Resources Article § 8-1808.4. "Structures on Piers" passed by the General Assembly in 1989. Under this legislation, a pier had to be in existence as of December 1, 1985 and must appear on a Department of Natural Resources (DNR) aerial photograph dated 1985. Pier expansion is limited by criteria outlined under the legislation.

Because of impacts on water quality and natural habitat, the Critical Area criteria specify that the construction of structures that are not water-dependent is not permitted in the Buffer. Furthermore, the 1989 "Structures on Piers" statute mandates that structures that are not water-dependent shall not be constructed over tidal waters and wetlands, located waterward of the Critical Area Buffer.

C. Certain structures and activities may be evaluated on a case-by case basis to determine if their location in tidal waters, wetlands and tributary streams and Buffers will be permitted.

Some structures are not obviously water-dependent and may have to be evaluated on a case-by-case basis as to whether they should be permitted in the Buffer or in tidal waters and wetlands. Certain structures and activities associated with aquaculture facilities are examples of "questionable" structures and will be examined individually with regard to proposed use and potential impacts on water quality and natural habitat.

§ 8-1808.3. Impervious surfaces limitation.

(a) *Applicability of section.* — This section applies notwithstanding:

(1) Any other provision of this subtitle; or

(2) Any criteria or guideline of the Commission adopted under this subtitle.

(b) *Priority of section.* — This section controls over any other requirement concerning impervious surfaces limitations in the critical area.

(c) *Stormwater runoff.* — For stormwater runoff, man-caused impervious areas shall be limited to 15% of a parcel to be developed. However, impervious surfaces on any lot not exceeding 1 acre in size in a subdivision approved after June 1, 1986 may be up to 25% of the lot. (1986, ch. 604; 1990, ch. 6, § 2.)

Effect of amendment. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "%" for "percent" in the first and second sentences of (c).

Editor's note. — Chapter 604, Acts 1986, designated this section as § 8-1808.1, but since ch. 602, Acts 1986, had previously enacted present § 8-1808.1 and ch. 603 had previously enacted the section designated as § 8-1808.2, the section enacted by ch. 604 has been designated as § 8-1808.3 herein.

§ 8-1808.4. Structures on piers.

(a) *Applicability of section to Prince George's County.* — This section does not apply to any project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area in Prince George's County.

(b) *"Pier" defined.* — (1) In this section, "pier" means any pier, wharf, dock, walkway, bulkhead, breakwater, piles, or other similar structure.

(2) "Pier" does not include any structure on pilings or stilts that was originally constructed beyond the landward boundaries of State or private wetlands.

(c) *Applicability of section generally.* — This section applies notwithstanding:

(1) Any other provision of this subtitle; and

(2) Any criteria or regulation adopted by the Commission under this subtitle.

(d) *Preemption of other requirements.* — This section preempts any other requirement concerning piers in the Critical Area.

(e) *Building permits.* — (1) Except as provided in paragraphs (2), (3), and (4) of this subsection, a local jurisdiction may not issue a building permit for any project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area.

(2) This section does not prohibit or restrict a local jurisdiction from issuing a building permit for a project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area that was issued a permit by the Secretary on or before January 1, 1989.

(3) A local jurisdiction may issue a building permit for a project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area if:

(i) The project is constructed on a pier in existence as of December 1, 1985 that can be verified by a Department of Natural Resources aerial photograph dated 1985, accompanied by a map of the area;

(ii) The project does not require an expansion of the pier greater than 25% of the area of piers or dry docks removed on the same property; however, additional expansion may be allowed in the amount of 10% of the water coverage eliminated by removing complete piers from the same or other properties. If the horizontal surface area of a pier to be removed is not intact but the remaining pilings identify its previous size, that area may be used in determining the additional expansion permitted. The project expansion based on water coverage eliminated can be considered only if all nonfunctional piers on the property are removed except for the project pier. The total expansion may not exceed 35% of the original size of the piers and dry docks removed;

(iii) The project is approved by local planning and zoning authorities; and

(iv) The project is located in an intensely developed area, as designated in programs adopted or approved by the Critical Areas Commission under this subtitle.

(4) A local jurisdication may issue a building permit for the repair of an existing dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area.

(5) Except for projects under paragraph (2) of this subsection, and in addition to all other provisions of this section, all projects involving the construction of a dwelling unit or other nonwater dependent facility on a pier located on State or private wetlands within the Critical Area may not be issued a building permit unless:

(i) The applicant demonstrates that the construction and operation of the project will not have a long term adverse effect on the water quality of the adjacent body of water in accordance with standards established by the local jurisdiction's critical areas program;

(ii) The applicant is required to improve the water quality of existing stormwater runoff from the project site into adjoining waters in accordance with standards established by the local jurisdiction's critical areas program; and

(iii) The applicant demonstrates that any sewer lines or other utility lines extended for the pier will not adversely affect the water quality of adjoining waters in accordance with standards established by the local jursidiction's critical areas program. (1989, ch. 794; 1990, ch. 6, § 2.)

Effect of amendment. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "nonwater" for "non-water" throughout (a) and (e); in (e) (2), substituted "this section does not" for "nothing in this section shall"; and in (e) (3) (ii), substituted "%" for "percent" three times, and substituted "the total expansion may not exceed" for "in no case shall the total expansion exceed" in the last sentence.

Editor's note. — Section 2, ch. 794, Acts 1989, provides that the act shall take effect July 1, 1989.

CHESAPEAKE BAY CRITICAL AREA COMMISSION
45 Calvert Street, 2nd Floor
Annapolis, Maryland 21401

February 20, 1992

MEMORANDUM

TO: Critical Area Commission

FROM: Liz Zucker

SUBJ: Structures on Piers Guidance Paper

I am sending you the latest draft of the guidance paper to be sent to local jurisdictions discussing "Structures on Piers". The paper has been revised to emphasize Natural Resources Article § 8-1808.4 (copy appended), an 1989 amendment to the Critical Area Law which parallels the Department of Natural Resources "structures" statute. The Special Issues Subcommitte hopes that a full Commission vote on the paper can be taken at the meeting on March 4, 1992.

Hope to see you in Havre de Grace.

/jjd

Attachments

DRAFT

February 18, 1992

Re: A Draft Guidance Letter to the Local Jurisdictions on Development Requirements for Structures Over Tidal Waters and Tidal Wetlands

Dear Local Jurisdiction:

Recently, there has been a significant increase in the number of structures that are not water-dependent being constructed over and in tidal waters and tidal wetlands of the Chesapeake Bay Critical Area. Particularly in the rapidly developing jurisdictions, a proliferation of structures such as storage buildings, gazebos, and dwellings has been established on piers or pilings in tidal wetlands, waterward of the Critical Area Buffer. Because these structures are not water-dependent and may have direct as well as cumulative adverse impacts on the water quality and aquatic habitat of the Chesapeake Bay system, the appended document has been developed to clarify the Critical Area Commission's regulatory background on this issue. In particular, the information can be used to interpret Natural Resources Article, Section 8-1808.4 which was adopted by the General Assembly in 1989. A copy of the Law is attached for your reference.

We hope that this information will assist you in the implementation of your local Critical Area Program. Please contact me or Dr. Taylor if you have any comments or questions regarding this matter.

Very truly yours,

John C. North, II
Chairman

JCN/jjd

Enclosure

DRAFT

DRAFT

CHESAPEAKE BAY CRITICAL AREA COMMISSION (CAC)
GUIDANCE ON
STRUCTURES OVER TIDAL WETLANDS AND TIDAL WATERS

I. Background

Under the 1986 Critical Area criteria, water-dependent facilities are defined as:

"Those structures or works associated with industrial, maritime, recreational, educational or fisheries activities that require location at or near the shoreline within the Buffer...

An activity is water-dependent if it cannot exist outside of the Buffer and is dependent on the water by reason of the intrinsic nature of its operation." (COMAR 14.15.03.01).

The definition clearly characterizes water-dependent facilities in terms of the minimum 100-foot shoreline Buffer of the Critical Area. The definition does not as clearly define water-dependent facilities in terms of their location in tidal waters and tidal wetlands. Furthermore, the criteria specifically prohibit disturbance to the Buffer from structures that are not water-dependent, yet a parallel restriction for tidal waters and wetlands waterward of the Buffer was not clearly outlined in the 1986 Critical Area regulations.

In 1989, the Maryland General Assembly adopted Natural Resources Article, § 8-1808.4, entitled "Structures on Piers". Subsection (e) of the Law specifically prohibits local jurisdictions from issuing a building permit for the construction of a structure that is not water-dependent on a pier located in State or private tidal wetlands in the Critical Area.

There is one notable exception to the "Structures on Piers" legislation. Dwellings and other structures that are not water-dependent may be permitted on existing piers in State or private wetlands within Intensely Developed Areas (IDAs). However, the pier must have been in existence as of December 1, 1985 and must appear on a Department of Natural Resources (DNR) aerial photograph dated 1985. In these cases, pier expansion is limited by criteria outlined under the legislation. Other than this exception, the 1989 legislation clearly specifies that new structures that are not water-dependent are not to be permitted in tidal areas, waterward of the Buffer in the Critical Area.

DRAFT

the construction of these types of structures in the Buffer as well as within wetlands and open water. The CAC in conjunction with the local jurisdictions will continue to implement the criteria and ensure that impacts to water quality and habitat from water-dependent structures are minimized.

B. Structures that are not water-dependent may not be constructed within tidal waters, tidal wetlands and their Buffers.

A number of structures clearly are not water-dependent because they do not require location along the shoreline or within tidal wetlands and waters. Examples of structures that are not water-dependent include but are not limited to:

1. Dwellings
2. Restaurants, shops and other types of commercial buildings
3. Gazebos, decks, recreational areas
4. Sheds or storage buildings
5. Parking
6. Sanitary facilities

NOTE: Dwellings and other structures that are not water-dependent may be permitted on existing piers in State or private wetlands within Intensely Developed Areas (IDA) as outlined under Natural Resources Article § 8-1808.4. "Structures on Piers" passed by the General Assembly in 1989. Under this legislation, a pier had to be in existence as of December 1, 1985 and must appear on a Department of Natural Resources (DNR) aerial photograph dated 1985. Pier expansion is limited by criteria outlined under the legislation.

Because of impacts on water quality and natural habitat, the Critical Area criteria specify that the construction of structures that are not water-dependent is not permitted in the Buffer. Furthermore, the 1989 "Structures on Piers" statute mandates that structures that are not water-dependent shall not be constructed over tidal waters and wetlands, located waterward of the Critical Area Buffer.

§ 8-1808.3. Impervious surfaces limitation.

(a) *Applicability of section.* — This section applies notwithstanding:

(1) Any other provision of this subtitle; or

(2) Any criteria or guideline of the Commission adopted under this subtitle.

(b) *Priority of section.* — This section controls over any other requirement concerning impervious surfaces limitations in the critical area.

(c) *Stormwater runoff.* — For stormwater runoff, man-caused impervious areas shall be limited to 15% of a parcel to be developed. However, impervious surfaces on any lot not exceeding 1 acre in size in a subdivision approved after June 1, 1986 may be up to 25% of the lot. (1986, ch. 604; 1990, ch. 6, § 2.)

Effect of amendment. — The 1990 amendment, approved Feb. 16, 1990, and effective from date of passage, substituted "%" for "percent" in the first and second sentences of (c).

Editor's note. — Chapter 604, Acts 1986, designated this section as § 8-1808.1, but since ch. 602, Acts 1986, had previously enacted present § 8-1808.1 and ch. 603 had previously enacted the section designated as § 8-1808.2, the section enacted by ch. 604 has been designated as § 8-1808.3 herein.

§ 8-1808.4. Structures on piers.

(a) *Applicability of section to Prince George's County.* — This section does not apply to any project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area in Prince George's County.

(b) *"Pier" defined.* — (1) In this section, "pier" means any pier, wharf, dock, walkway, bulkhead, breakwater, piles, or other similar structure.

(2) "Pier" does not include any structure on pilings or stilts that was originally constructed beyond the landward boundaries of State or private wetlands.

(c) *Applicability of section generally.* — This section applies notwithstanding:

(1) Any other provision of this subtitle; and

(2) Any criteria or regulation adopted by the Commission under this subtitle.

(d) *Preemption of other requirements.* — This section preempts any other requirement concerning piers in the Critical Area.

(e) *Building permits.* — (1) Except as provided in paragraphs (2), (3), and (4) of this subsection, a local jurisdiction may not issue a building permit for any project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area.

(2) This section does not prohibit or restrict a local jurisdiction from issuing a building permit for a project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area that was issued a permit by the Secretary on or before January 1, 1989.

(3) A local jurisdiction may issue a building permit for a project involving the construction of a dwelling unit or other nonwater dependent structure on a pier located on State or private wetlands within the Critical Area if:

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

JUDSON P. GARRETT, JR.
RALPH S. TYLER, III
DEPUTY ATTORNEYS GENERAL

THOMAS A. DEMING
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SEAN COLEMAN
SHARON B. BENZIL
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OLGA M. BRUNING
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ATTORNEYS GENERAL

STATE OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF NATURAL RESOURCES
TAWES STATE OFFICE BUILDING
ANNAPOLIS, MARYLAND 21401
(301) 974-2501

December 6, 1991

MEMORANDUM

TO: Ad Hoc Subcommittee on Reconsideration

FROM: George E. H. Gay
Assistant Attorney General

RE: Reconsideration

Two requests for reconsideration were addressed by the Commission at its November meeting. Thereafter, Chairman North established this Ad Hoc Subcommittee to review the Commission's reconsideration process. The Subcommittee is scheduled to meet on December 10, 1991. This brief discussion is submitted to you as background information for the upcoming meeting.

OVERVIEW

Ideally, the Commission's Bylaws dictate the process by which the Commission acts at its regular meetings. They provide in pertinent part:

> Roberts Rules of Order, current edition, shall govern the meetings and hearings of the Commission and to all other cases to which they are applicable and in which they are not inconsistent with the by-laws and rules of procedure.

Looking to Roberts on the issue of reconsideration, it provides at page 156:

> This motion is peculiar in that the making of the motion has a higher rank than its consideration, and for a certain time prevents anything being done as the result of the vote

> it is proposed to reconsider. It can be made only on the day the vote to be reconsidered was taken, or on the next succeeding day, a legal holiday or a recess not being counted as a day. It must be made by one who voted with the prevailing side. Any member may second it. (Emphasis added)

Unfortunately, Roberts does not comprehensively address the question of reconsideration. Its provisions appear appropriate for the typical case. But, what about the atypical case where justice demands that the Commission take another look at the matter sometime after the meeting at which it rendered the decision in question. In such cases, Roberts seems too restrictive.

POWER TO RECONSIDER

Generally, administrative agencies such as the Commission have the power, comparable to courts, to reconsider their prior actions. However, this power can be limited or extinguished by statute. 73A C.J.S. Public Administration Law and Procedure, §161(a). The Critical Area law contains no such restriction. As noted earlier, the restriction in Roberts appears to apply to only the typical case. Therefore, it seems appropriate to assume that the Commission has some authority to reconsider its decisions in limited circumstances.[1]

SCOPE OF RECONSIDERATION

Two public policy concerns impact the scope of the Commission's reconsideration powers. On the one hand, it is important that agency decisions be final. It is inappropriate to allow a matter to linger in the regulatory process. As noted in Zoning Appeals Board v. McKinney, 174 Md. 551 at 566:

> Otherwise there would be no finality to the proceeding; the result would be subject to change at the whim of members or due to the effect of influence exerted upon them, or other undesirable elements tending to uncertainty and impermanence.

On the other hand, there is a strong need for an agency to render a correct decision. In Maryland, the Courts have blended these policies into a general rule that "the power to reconsider is not an arbitrary one and its exercise should be granted only when there

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[1] The Commission has granted reconsideration on a varying basis over the years.

is justification and good cause." Id.[2] This rule could be applied by the Commission.

JUSTIFICATION AND GOOD CAUSE

So, what is "justification" and "good cause"? Clearly, these elements must be based upon specific facts that can be set forth in the record and which are susceptible to review on appeal. McKinney, Supra, at 564 provides:

> It may be conceded without discussion that the Board has the right to correct errors in its decisions caused by fraud, surprise, mistake or inadvertence, which any agency exercising judicial functions must have, to adequately perform its duties.

C.J.S., Supra, provides: "An agency has the power to vacate its own orders on the ground of fraud, mistake, illegality, or misconception of the facts." 2 Am. Jur. 2d Administrative Law §524 provides:

> Regardless of whether a determination is or is not deemed to be quasi-judicial, and even though the court may otherwise take the view denying the existence of power in administrative agencies to reconsider or modify their determinations, the courts hold or recognize that administrative agencies may reconsider and modify their determinations or correct errors on the ground of fraud or imposition, illegality, irregularity in vital matters, mistake, misconception of facts, erroneous conclusion of law, surprise, or inadvertence.

These justification/good cause factors are essentially the same as those which apply to reconsideration by the Courts in Maryland. Rules 2-535(b) and (c) provide:

> (b) Fraud, Mistake, Irregularity. - On Motion of any party filed at any time, the court may exercise revisory power and control over the judgment in cause of fraud, mistake, or irregularity.

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[2] Attached for your consideration is a copy of a December 3, 1991 memorandum on this issue by Mary Goldie Stubbs.

> (c) Newly-Discovered Evidence. - On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.

Based upon this background, several procedural guidelines seem appropriate for the Commission when it considers a request for reconsideration. First, in accordance with Roberts, a request for reconsideration which does not include allegations of one or more of the Rule 2-535 justification/good cause factors must be made and ruled upon at the same meeting that the Commission ruled on the underlying issue. If not, the request is untimely and should be summarily denied by the Commission. If such a request is timely made, it should be resolved by the Commission as described in Roberts. Second, in accordance with Roberts' reference to the rules of procedure but in an effort to satisfy the two public policy concerns discussed previously, a request for reconsideration which includes allegations of one or more of the Rule 2-535 justification/good cause factors should be made within 30 days of the Commission's underlying decision. If not, it is untimely and should not be considered by the Commission. If such a request is timely made, it should be granted only upon clear and convincing proof that the Commission's prior decision was based, substantially, upon fraud, mistake, irregularity or if substantial new evidence is discovered after a Commission decision which, upon due diligence, could not have been discovered prior to the Commission's decision. Of course, all requests for reconsideration based upon one or more of the Rule 2-535 justification/good cause factors should be in writing to the Chairman.

#2

#3

do not agree commission has to rule w is good

THE FACTORS

Now that we know what the justification/good cause factors are, what do they mean? How do we apply them? Fraud is quite narrow. It means "an act of deliberate deception designed to secure something by taking unfair advantage of someone." Hughes v. Beltway Homes, Inc., 276 Md. 382 at 386. An example of this would be the Commission's review of a proposed amendment that was based upon intentional misrepresentation by the applicant. Mistake is also very narrow. As noted by the Maryland Courts, the term "mistake" in the reconsideration context does not mean a unilateral mistake of judgment on the part of one of the parties. Rather, it means a "jurisdictional mistake" Hamilos v. Hamilos, 52 Md. App. 488 at 497 (1982). Thus, for Commission purposes, the question in the reconsideration context is: did the Commission have the authority to review the question in the first place. If not, a mistake sufficient to justify reconsideration exists. An example

of "mistake" by the Commission would be a decision by it concerning property located outside the Critical Area. Irregularity is also quite narrow. Irregularity in the contemplation of reconsideration means an irregularity in administrative process or procedure. Weitz v. MacKenzie, 273 Md. 628 (1975). An example of this for Commission purposes would be failure to hold a panel hearing in the jurisdiction impacted by a proposed amendment. Finally, there is the Newly Discovered Evidence factor. Recall that this factor is also very narrow. It includes only newly discovered evidence that could not have been discovered by due diligence in time to be presented to the Commission at the meeting during which it made the underlying decision. No example here is necessary. This is self-explanatory.

PROCESS

For reconsideration requests made during the meeting at which the underlying decision was made, Roberts could be followed. However, for reconsideration requests based upon the existence of one of the Rule 2-535 justification/good cause factors, it would be appropriate to apply the following process. First, the Commission staff should present a procedural history concerning each request to the Commission. Second, the Applicant jurisdiction should be given a brief opportunity to meet its burden of establishing clear and convincing evidence that one of the Rule 2-535 justification/ good cause factors exists. Third, members of the public may be allowed to speak briefly. Finally, the Commission should discuss the request and vote on a motion to either grant or deny the request. It is essential that the Chairman insure that the Commission discussion focuses on the justification/good cause factors and not the substance of the original application. If a motion to deny the request is approved, that is the end of the matter. However, if a motion to grant the request is approved, the original application should be submitted to a Panel for a hearing and, thereafter, in accordance with applicable procedures for amendments, considered by the Commission.

IMPLEMENTATION

The Commission could establish a reconsideration process in a number of ways. First, it could publish a policy paper on the issue and distribute this paper to all interested parties. Second, it could promulgate a regulation on the point in accordance with the Maryland Administrative Procedures Act. Third, it could publish a broad brush set of regulations describing the processes followed by the Commission on a wide range of topics including reconsideration.

I hope that you find this information helpful. Please do not hesitate to contact me if you have questions about it.

GEHG:cjw

Enclosure (as stated)

cc: The Honorable John C. North, II, w/encl.
Mr. Ren Serey, w/encl.
Ms. Patricia Pudelkewicz, w/encl.
Sarah J. Taylor, Ph.D., w/encl.
Ms. Carolyn Watson, w/encl. (via facsimile)

Standing Committee
Broad Base Set of
Regs.
6. Allocation
Reconsid
Comp. Reviews
Program Amendments

* 8 1809 m+s

Maryland Department Of Natural Resources

Forest, Park and Wildlife Service
Tawes State Office Building
Annapolis, Maryland 21401

William Donald Schaefer
Governor

Torrey C. Brown, M.D.
Secretary

Donald E. MacLauchlan
Assistant Secretary

MEMORANDUM

TO: George Gay, Assistant Attorney General
FROM: Mary Goldie Stubbs, Legal Assistant
DATE: December 3, 1991

SUBJECT: Whether the Chesapeake Bay Critical Area Commission has the authority to consider a Motion for Reconsideration of its decision.

I have reviewed Corpus Juris Secundum, Public Administrative Law and Procedure, to gather information and find cases which speak to the matter of whether a quasi-judicial board has the authority to reconsider its determinations absent express statutory language which describes this right to reconsider an "order".

As you indicate in your draft memo to the Commission dated November 5, 1991, there is language in §161(a) which cites cases to support that administrative agencies have discretionary power to reconsider their decisions. However, I would point out that the only Maryland case cited in the footnotes speaks to narrow circumstances under which an administrative board may reconsider its decision and those circumstances are:

(a) fraud;

(b) surprise;

(c) mistake; or

(d) inadvertence.

I will offer language on this point from County Commissioners for Prince George's County, 282 A. 2nd, 136, 263 Md. 94, certiorari denied 92 S. Ct. 1791, 406 U.S. 923, 32 L.Ed. 2nd 1241 [case attached]:

> There is no statute or ordinance which gives the Board of Appeals the power of reconsideration or of rehearing. The common law rule in regard to the power of an administrative body acting in a quasi-judicial capacity is therefore applicable. Our predecessors in

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> Zoning Appeals Board v. McKinney, 174 Mc. 551, 562-566, 199 A. 540, 546-547 (1938) indicated that in that type of situation, the administrative body has the right to reconsider a decision if an error has been caused by fraud, surprise, mistake or inadvertence. We cited McKinney with approval in Kay Construction Co. v. County Council for Montgomery County, 227 Md. 479, 177 A. 2nd 694 (1962) in Schultze v. Montgomery County Planning Board, 230 Md. 76, 185 A. 2nd 502 (1962); and in Gaywood Community Ass'n v. Metropolitan Transit Authority, 246 Md. 93, 227 A.2nd 735 (1967). In Kay, Schultze, and Gaywood, we pointed out that a mere change of mind, without any intervening change in conditions or other different factors, did not amount to "fraud, mistake, surprise or inadvertence," justifying a rehearing or reconsideration. In the present case, there was no newly discovered evidence and the evidence produced was cumulative as we have observed. Indeed, there was no allegation in the Petition for Rehearing that the prior decision had resulted from "fraud, mistake, surprise or inadvertence" and the burden of so alleging and proving is upon the person seeking the rehearing or reconsideration. The Board of Appeals sought to indicate that the prior decision was made as a result of "inadvertency," but it clearly was not. There was simply no existing element of the rule and no reconsideration or rehearing could be lawfully held by the Board of Appeals as the lower court properly ruled.

Under 161(b) Discretion of Administrative Body, it states generally that the granting of a rehearing is appropriately a question that is addressed to the discretion of an administrative board, not something which is a right of an aggrieved party. Again, I would point out that Maryland law is footnoted under language which qualifies the right to review. Schultze v. Montgomery County Planning Board, 230 Md. 76, 185 A. 2nd 502 (1962) [case attached] states:

> Applying the McKinney test to the facts of the case before us, it seems rather clear that while the reversal from the original disapproval to approval of the preliminary plan was based on the existence of mistake or inadvertence, i.e. ignorance of information

> later supplied by an assistant engineer that there had been resubdivisions in the same block in which is located the property under consideration, the disapproval of the final plan amounted to a mere change of mind on the part of the board as it is apparent from the record that it was not founded upon fraud, surprise, mistake or inadvertence, or indeed upon any new or different factual situation. Although reason and authority lead to the conclusion that when such facts are present, an administrative body acting in a quasi-judicial capacity has the right to correct errors in its decisions, even in the absence of provisions for reconsideration, the power of such a board is not one which may be exercised arbitrarily, but only where there is justification and good cause. In their absence here, we hold that the action of the board in disapproving the final plan was an abuse of its power and void.

If the granting of a Motion for Reconsideration is within the discretion of an administrative body, what constitutes abuse of discretion? An act which is "...unwarranted in law or without justification in fact" where the "...penalty is so clearly disproportionate to the offense and completely inequitable in light of the surrounding circumstances as to be shocking to the sense of fairness.." CJS Public Administrative Law and Procedure, §223, Discretion of Administrative Agency.

As a safeguard against an allegation of abuse of discretion I would offer that very specific language can be described which would give notice of what are grounds for reconsideration of a finding of the Commission and that these procedural guidelines should have the weight of regulation. This would provide an opportunity for public comment initially and guard against allegations that an action of the Commission was "...illegal, arbitrary, discriminatory", ..."unreasonable..", and "a procedural violation..", CJS Public Administrative Law and Procedure, §223, Discretion of Administrative Agency, all of which are grounds for appeal. CJS Public Administrative Law and Procedure, §223, Discretion of Administrative Agency.

Most importantly, a procedural regulation which describes circumstances under which the Commission may entertain a Motion for Reconsideration, when it is necessary to file such a motion, and when the time has passed to raise such an issue, would not muddy that most important determination, when the decision of the Commission is final and ripe for appeal.

Thank you for giving me the opportunity to review this matter.