

Martin O'Malley
Governor

Anthony G. Brown
Lt. Governor



Margaret G. McHale
Chair

Ren Serey
Executive Director

STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS

1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

August 20, 2008

Mr. Patrick Mitchell
Executive Director
Maryland Broadband Cooperative
212 W. Main Street, Suite 304
Salisbury, Maryland 21801

Re: Maryland Broadband – Critical Area Status

Dear Mr. Mitchell:

Thank you for the information today describing the Maryland Broadband project and your current work needs. As we have discussed, the Critical Area Commission will formally review the project at its regularly scheduled meeting on September 3, 2008. You have asked if, prior to that date, Maryland Broadband Cooperative, Inc. can continue with the small scale activities you described.

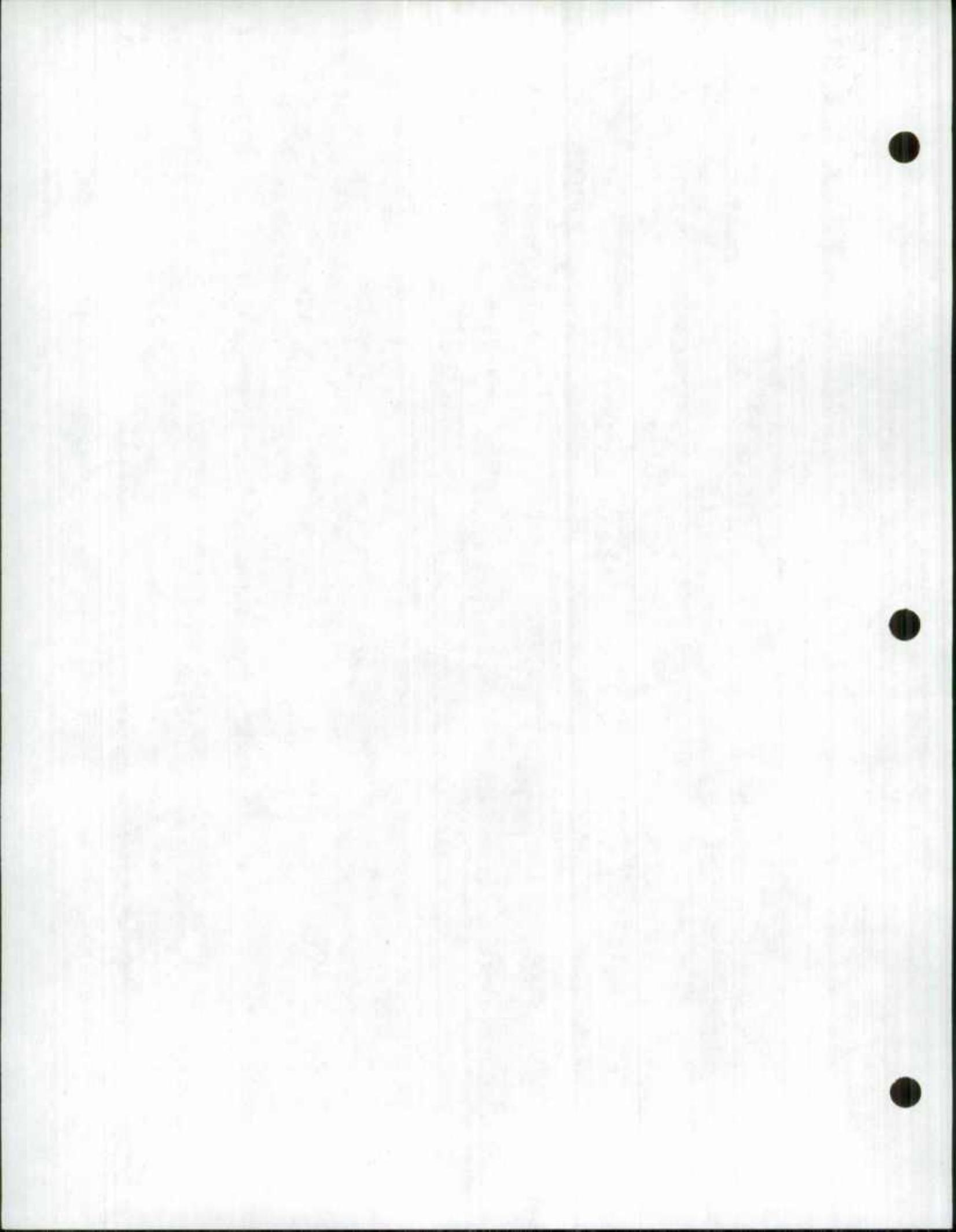
By this letter, you are authorized to proceed in the manner and to the extent set out today in your request.

If you have questions, or need additional information, please contact me at (410) 260-3462, or by email at rserey@dnr.state.md.us or Nick Kelly at (410) 260-3483 or nkelly@dnr.state.md.us

Sincerely,

A handwritten signature in cursive script that reads "Ren Serey".

Ren Serey
Executive Director



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June 20, 2008

Mr. Steve Dodd
Dorchester County Planning and Zoning
County Office Building
P.O. Box 307
Cambridge, Maryland 21613

Re: Local Case No. 116 – Wayne Markey

Dear Mr. Dodd:

I have enclosed the response to your request for a formal interpretation by our legal counsel regarding the issues of contiguous sensitive areas to the Buffer. In her memorandum dated June 9, 2008, Ms. Marianne Dise, Principal Counsel to the Critical Area Commission, has provided legal guidance regarding the expansion of the 100-foot Buffer. Please note that this memorandum reflects her view as Principal Counsel to the Critical Area Commission and is not a formal Opinion of the Attorney General.

I call your attention to Ms. Dise's guidance regarding the distinction between intra-family transfer lots and other residential lots created pursuant to the density provisions for the Resource Conservation Area (RCA). While the Commission would oppose a variance for a new lot created under the RCA density provisions, in the case you described, the variance would involve access to a new intra-family transfer lot. The Commission usually does not oppose access variances for this category of lots.

Please contact me should you have any further questions. Thank you for your inquiry on this matter.

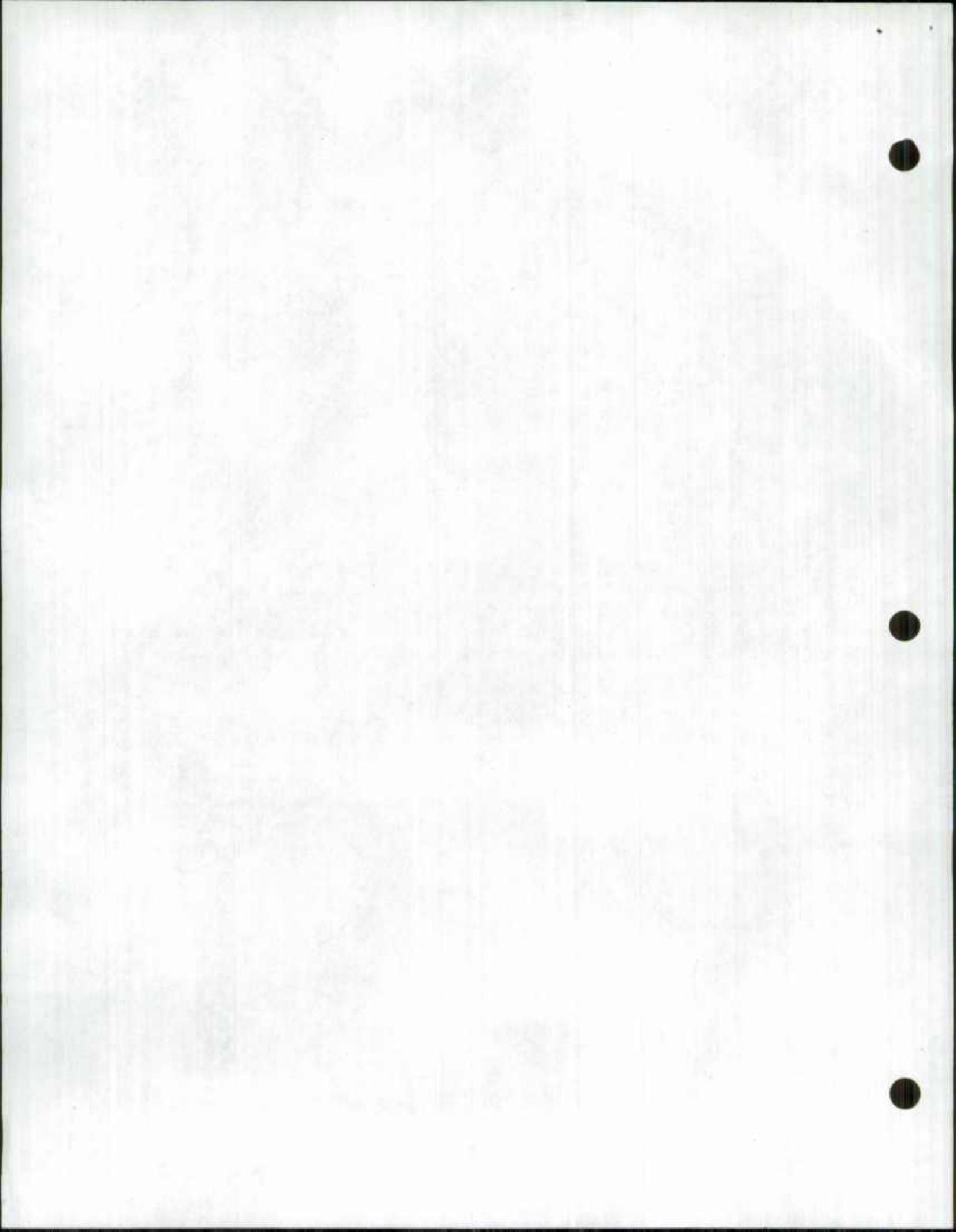
Sincerely,

A handwritten signature in cursive script, appearing to read "Ren Serey".

Ren Serey
Executive Director

Enclosure

Cc: DC 367-07



OFFICE OF THE ATTORNEY GENERAL
for the
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
1804 West Street, Suite 100
Annapolis, Maryland 21401
(410) 260-3466
(410) 974-5338 (Fax)

June 9, 2008

MEMORANDUM

TO: Ren Serey
Executive Director, Critical Area Commission

FROM: Marianne E. Dise
Principal Counsel

RE: Inquiry from Dorchester County Planning & Zoning Office

This Memorandum responds to your request for advice about a letter dated May 13, 2008 from Steve M. Dodd, Director of the Dorchester County Planning & Zoning Office. On behalf of the Dorchester County Planning Commission, Mr. Dodd asked you to obtain an "official, legal interpretation" of certain language in Dorchester County's Critical Area program. Specifically, Mr. Dodd requested this Office's interpretation of comments in a letter dated April 22, 2008 from Julie Roberts, a Natural Resources Planner with the Critical Area Commission. Ms. Roberts' letter addressed a proposed three lot intra-family subdivision of property in Dorchester County owned by Wayne Markey (local case P&Z # 1116). Ms. Roberts identified an area on the Markey property which requires an expansion of the minimum 100-foot Critical Area Buffer, due to the existence of non-tidal wetlands which are contiguous to the 100-foot Buffer. Ms. Roberts then commented that, due to the required expansion of the Buffer, "variances must be obtained for the disturbance associated with the proposed driveways on Lots 1 and 2." Finally, she noted that the Critical Area Commission would not oppose variances for access to these intra-family transfer lots.

Mr. Dodd explained the County's view that because the nontidal wetlands are not adjacent to the tidal wetlands, the nontidal wetlands are not considered a Habitat Protection Area and are therefore not regulated under the Dorchester County Critical Area Program. Mr. Dodd also stated that only grandfathered lots and parcels are eligible for variances. Apparently, it is Dorchester County's policy not to consider variance applications for intra-family transfer lots.

At your request, I have reviewed Mr. Dodd's letter, Ms. Roberts' letter, and the pertinent language of COMAR and of the Dorchester County Critical Area program. While this

Memorandum is advice of counsel only, and not a formal opinion of the Attorney General, it does express my view as to the matters discussed in Mr. Dodd's and Ms. Roberts' letters.

Expansion of the 100-foot Buffer: Ms. Roberts quoted COMAR 27.01.09C (7), which provides that "local jurisdictions shall expand the Buffer beyond 100 feet to include contiguous sensitive areas, such as steep slopes, hydric soils, or highly erodible soils, whose development or disturbance may impact streams, wetlands, or other aquatic environments." This requirement for expansion of the 100-foot Buffer pertains to all listed "contiguous sensitive areas." That is, where a listed sensitive area is contiguous to ("neighboring, adjoining")¹ the 100-foot Buffer, then the Buffer must be expanded to include the contiguous sensitive area. This is so, even if the listed contiguous sensitive area is separated from tidal waters or tidal wetlands by man-made features. As long as the listed contiguous sensitive area is contiguous to the 100-foot Buffer, then the Buffer must be expanded. Dorchester County's Program language confirms this interpretation. "Dorchester County has determined that the tidewater **buffer will be a minimum of 100 feet wide** landward from the mean high water line oftidal wetlands. **The buffer will be expanded beyond 100 feet to include contiguous, sensitive areas of nontidal wetlands....**" Dorchester County Critical Area Program at 41. In my view, Ms. Roberts has accurately stated the requirement for expansion of the Buffer in this case.

Variance for an Intra-Family Lot: Ms. Roberts stated that the Commission "would not oppose" a variance for driveways for proposed Lots 1 and 2. This position reflects a policy interpretation that recognizes the provision made by the General Assembly for creation of intra-family transfer lots. See Code, NR II, §8-1808.2. The Commission would not actively *support* variances for these intra-family lots. Rather, the Commission would likely request that, if the County grants variances, that the variances be the minimum necessary to afford relief, and that appropriate mitigation be required. Of course, Dorchester County is free to interpret its Critical Area program in a manner that is stricter than the State's interpretation, and accordingly, to decline to support a variance request for a new intra-family lot.

This Memorandum reflects my view as Principal Counsel to the Critical Area Commission, and it is not a formal Opinion of the Attorney General. Please contact me if I may be of further assistance.

¹Black's Law Dictionary (4th Ed.)

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June 20, 2008

Mr. Bernard J. Thien
2613 Hoopers-Island Road
Fishing Creek, MD 21634

Re: Refund of Surety for Planting Plan Maintenance and Management Agreement

Dear Mr. Thien,

Thank you for your recent letter regarding a refund of the \$1200 surety collected by Dorchester County on March 7, 2003. Your letter indicates that you planted 1,000 loblolly pine seedlings in fulfillment of a mitigation requirement created by unpermitted development activity within the 100-foot Buffer, a violation of the County and State Critical Area Program. It is my understanding that this violation was originally documented by Karen Houtman of Dorchester County. You state that within six weeks of planting, the loblolly seedlings died due to tidal influence and poor soil (blue clay) quality. You also indicate that you called the County to alert them and never heard back. It appears that no further action was taken on your part or on the County's part to resolve this issue.

The five-year protection agreement that was signed by you and Steve Dodd of Dorchester County on March 7, 2003 is a binding agreement that ensures that each of the conditions is met prior to refunding the applicant's deposit. In the event that the agreement is not fulfilled, the surety is intended to be kept by the County and used to establish plantings elsewhere in the County. The agreement that you signed specifically states that:

- (8) The Owner shall assume responsibility of all tree care subsequent to planting for a period of 5 years; and
- (9) Planting survival at the end of two growing seasons must be equal to or exceed 75% of original planting or replanting back to the original plan must occur within one year.

Neither of these conditions have been met and therefore, the surety cannot be returned. The burden is on the Owner to fulfill the obligations of the signed contract.

Mr. Thien
Page 2 of 2
June 20, 2008

That being said, this office offers the following considerations which you may wish to discuss with the County in an attempt to remedy this situation. First, you may forfeit your \$1,200 surety and the County will use that money to perform the plantings in a suitable area elsewhere in the County. In this case, you would be required to let the marsh regenerate naturally and your obligation to the County for the original violation will be fulfilled. The second option is to attempt another planting with different species, better suited to your specific soil and landscape conditions. It is apparent that without extensive soil remediation in the planting area, non-salt tolerant species will not thrive in the Buffer.

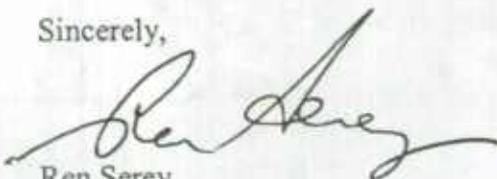
Should you elect to try an additional planting, you should work with the County to develop a Buffer Management Plan for this area. Equally, you might consider whether there are other areas on the property that would be more appropriate for the mitigation. If the County deems that this is the only area on site where the plantings are appropriate, in addition to the Planning and Zoning Office, it may be helpful for their staff to have a soils scientist evaluate the plantings plan for species survivability. I have consulted with the Commission's Science Advisor and she has suggested that the following species may introduce organics into the soil, improve aeration of the soil, and also provide a more friendly (cooler) micro-climate for other species to return.

- *Andropogon gerardi* Big Bluestem (Zones 2-7)
- *Andropogon scoparius* Little bluestem
- *Panicum virgatum* Switch Grass (Zones 5-9)
- *Sorghastrum nutans* Indian Grass, Wood Grass (Zones 5-8)
- *Spartina pectinata* Prairie Cord Grass (Zones 4-7)

It could be expected that if a healthy vegetative cover of these species is provided, the site would naturally regenerate over time. In the interim, it may be necessary to actively manage the area to avoid infestation of invasive plant species. This management would need to occur in conjunction with the County and through an approved Buffer Management Plan. Equally, should you opt to replant using different species, the surety will be held until two years of survival are demonstrated.

In order to expedite a timely resolution of the situation we recommend that you work closely with the County to explore the options described. Commission staff would be happy to assist in the review of an alternative planting plan if you wish to pursue this option. Please contact Julie Roberts should you have any further questions at 410-260-3476.

Sincerely,



Ren Serey
Executive Director

Cc: Mike Bonsteel, Dorchester County Planning and Zoning Department