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In The  
COURT OF APPEALS OF MARYLAND

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September Term, 2007

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No. 44

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DAVID TRAIL, *et al.*,

*Petitioners,*

v.

TERRAPIN RUN, LLC, *et al.*,

*Respondents.*

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On Writ of Certiorari to the Court of Special Appeals of Maryland

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BRIEF OF *AMICUS CURIAE*  
THE CHESAPEAKE BAY FOUNDATION, INC.

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## INTRODUCTION

*Amicus curiae*, the Chesapeake Bay Foundation, Inc. (CBF), hereby submits the following brief pursuant to Maryland Rules, Rule 8-511(b).

## STATEMENT OF THE CASE

On August 22, 2007, this Court granted Petitioners', David Trail, *et al.*, petition for Writ of Certiorari and the Maryland Department of Planning (MDP) and CBF's Motions to participate as *amici curiae* in the above-captioned case. Petitioners' are challenging a decision of the Maryland Court of Special Appeals, which held that the Board of Appeals of Allegany County did not err in granting a special exception upon finding that a proposed use was "in harmony with" the County's Comprehensive Plan (Plan). The Court of Special Appeals April 6, 2007, decision found that the Plan operates merely as a guide. In reaching this conclusion, the lower court held that the phrases "conforms to," "consistent with," and "is in harmony with" all have interchangeable meanings and, thus, comprehensive plan compliance is not required by law. Such a ruling casts aside years of legislative and regulatory effort to limit and reduce the adverse environmental and social impacts caused by unrestricted urban sprawl – the primary impediment to restoration of the Chesapeake Bay. Accordingly, this Court is asked to overturn the Court of Special Appeals' decision.

## QUESTION PRESENTED BY AMICUS CURIAE

- I. Will the Court of Special Appeals' Decision, allowing the granting of a special exception even when the proposed use does not conform to the jurisdiction's comprehensive plan, be allowed to stand, thus having an impermissible negative impact on the zoning and planning laws in Maryland and adverse impacts on the Chesapeake Bay?

## FACTUAL BACKGROUND AND STATEMENT OF THE FACTS

Petitioners-appellant's, David Trail, Jr., *et al.*, are a group of aggrieved residents and taxpayers of Allegany County. Defendant-appellee, Terrapin Run, LLC., *et al.*, applied to the Board of Appeals for Allegany County seeking a special exception to develop a 935 acre, 4,300 unit planned residential development in an area that is zoned "A" (agriculture, forestry and mining) and "C" (conservation). E.25. This proposed development is in a rural area next to the Green Ridge State Forest and adjacent to Scenic Route 40, a nationally designated scenic by-way, and it is wholly outside any planned development area. *Id.* Before the Appellee could destroy the decidedly rural nature of this land, it sought a special exception for the construction of a residential development, shopping center, and wastewater treatment plant. E.63. The Allegany County Board of Appeals approved the special exception holding that the proper standard to be applied was to determine if the proposed use was "in harmony" with the Plan. E.63.

The Circuit Court for Allegany County ruled that the Board had applied the wrong standard in determining whether the proposed use was “in harmony” with the Plan and instead should have determined whether the proposed use was “consistent with” the comprehensive plan. E. 22-23. The Circuit Court remanded the case back to the Board to apply this standard. E. 23. Appellants, David Trail, *et al.*, then appealed to the Court of Special Appeals arguing that the standard was not consistency but conformance with the comprehensive plan. Appellees, Terrapin Run, LLC, *et al.*, cross-appealed.

The Court of Special Appeals overturned the Circuit Court with instructions to affirm the decision of the Board of Appeals. The Court of Special Appeals reasoned that the comprehensive plan is merely a guide and that the standard used by the Board holding that a proposed use must be “in harmony” with the Plan is the correct standard. Petitioners-appellants then appealed that decision to this Court by filing a Petition for Writ of Certiorari on May 18, 2007.

The CBF sought leave to file an *amicus curiae* brief on behalf of Petitioners-appellants because preservation and restoration of the Chesapeake Bay is CBF’s primary mission and an overarching concern of its members, which includes 94,300 Maryland residents. The CBF has been involved in such work since its inception in 1967. Much of that work has focused on the adverse impacts of development on the Chesapeake Bay. For example, CBF has, for some 20 years,



operated strong advocacy and education programs that promote conservation-oriented land use planning and zoning, and innovative stormwater management practices. CBF also has funded and continues to fund and operate extensive environmental educational and volunteer programs specifically designed to improve the water quality of the Bay and its tributaries. Some of these programs are designed to address the adverse impacts to water quality caused by excessive discharges of pollutants contributed, in part, by increased runoff from development.

The CBF has been involved in various aspects of Maryland's zoning and planning laws, including the development and enactment of the Maryland Economic Growth, Resource Protection, and Planning Act of 1992 (the Planning Act) by the General Assembly. Md. Code Ann., Art. 66B § 1.00, *et seq.*

The Planning Act was predicated upon the following visions:

- (1) Development is concentrated in suitable areas;
- (2) Sensitive areas are protected;
- (3) In rural areas, growth is directed to existing population centers and resource areas are protected;
- (4) Stewardship of the Chesapeake Bay and the land is a universal ethic;
- (5) Conservation of resources, including a reduction in resource consumption, is practiced; and
- (6) Funding mechanisms shall be addressed to achieve this policy.

Md. Code Ann., Art. 66B § 1.01. County and municipal comprehensive plans are to reflect these visions. The Planning Act also amended Md. Code Ann., Art. 66B, to require that comprehensive plans include a sensitive areas element and achieve environmentally sensitive development through flexible and innovative regulations. Md. Code Ann., Art. 66B, § 3.05.

County comprehensive plans are developed through the effort of the county's planning commission staff, citizen involvement, and other professional staff knowledgeable of land use issues. These comprehensive plans are not simply developed overnight by political appointees. In Allegany County, numerous steps were involved in developing its comprehensive plan, including the planning commission soliciting citizen views on how the county should move forward with development. E. 66. Ignoring their expertise, efforts, and citizen desires wastes significant human resources and puts the environment at risk.

As the General Assembly found in 1992, growth that does not consider potential environmental impacts leads to harmful environmental consequences and degradation of the Chesapeake Bay. Such growth leads to greater amounts of runoff entering the Bay and its tributaries. This runoff carries pollutants that harm the water quality and the aquatic life of the Bay. This scenario is occurring throughout the Bay watershed, particularly in Maryland, because of the increase in development in sensitive areas as well as the failure to direct growth to existing

population centers. In September 2007, the EPA Office of Inspector General conducted an evaluation of development in the Chesapeake Bay Watershed.<sup>1</sup> (EPA IG Report) This report noted that development converts natural landscape into roads, driveways, sidewalks, parking lots, rooftops, storm drains, and other impervious surfaces, causing a detrimental environmental impact.<sup>2</sup> While a natural landscape slows and absorbs precipitation, thereby releasing it to streams slowly, developed land will quickly channel water, nutrients, and sediment into local streams and rivers which erodes streambanks and pollutes the waterways.<sup>3</sup>

The General Assembly followed its 1992 legislation in 1997, with the Smart Growth and Neighborhood Conservation Act.<sup>4</sup> This law also emphasized the great need to protect sensitive natural and rural agricultural areas by focusing and channeling growth into areas that were planned for urban land uses.<sup>5</sup> The intent of this law was to enhance the State policy adopted by the Planning Act of 1992 and direct spending to “priority funding areas” so as to conserve taxpayer dollars and to

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<sup>1</sup> See, Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay, U.S. EPA, Office of the Inspector General, Report No. 2007-P-00031, September 10, 2007, available at: <http://www.epa.gov/oig/reports/2007/20070910-2007-P-00031.pdf>.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.*

<sup>4</sup> See, Md. Code Ann., State Finance and Procurement, § 5-7B-01, *et seq.*, and Md. Laws, 4335, Ch. 759 (1997), S.B. 389.

<sup>5</sup> *Id.*

best preserve existing neighborhoods and Maryland's fields, farms, and open spaces.<sup>6</sup>

Judicial decisions, such as the one at issue, that undermine the findings and purposes of zoning and planning laws and the jurisdiction's own comprehensive plan, allow the very kind of increased development in sensitive areas that state law attempted to thwart. Thus, such decisions harm the Bay and its tributaries. These decisions must be overturned if urban sprawl is ever to be controlled and the Bay is ever to be restored and preserved. Below, CBF explains why the Court of Special Appeals' decision is contrary to the zoning and smart growth laws of Maryland, harmful to the Chesapeake Bay, and must be reversed.

## **ARGUMENT**

### **I. Conformance to Comprehensive Plans and Zoning Laws is Vital to Protecting the Chesapeake Bay.**

#### **A. Legislative Backdrop**

In 1980, the Chesapeake Bay Commission was established to help Bay states effectively manage and restore the Bay. The Chesapeake Bay Commission is a tri-state legislative assembly that represents Maryland, Pennsylvania, and Virginia. The Chesapeake Bay Commission worked to get member states as well as the District of Columbia and the United States Environmental Protection Agency (EPA) to sign an agreement to work together to address the extent and sources of

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<sup>6</sup> *Id.*

pollution entering the Bay. The first Chesapeake Bay Agreement was signed in 1983. In 1987, the second Chesapeake Bay Agreement was signed, again by representatives from the states of Maryland, Pennsylvania, Virginia, the District of Columbia, and the U.S. EPA on behalf of the United States. The 1987 Agreement, stating that there “is a clear correlation between population growth and associated development and environmental degradation in the Chesapeake Bay system,” set as one of the goals, to plan for and manage the adverse environmental effects of population growth and land development in the Bay watershed.<sup>7</sup> To that end, a panel of experts was commissioned to study the correlation between adverse environmental impacts and land development. Their report summarized six (6) “visions” and concluded that if unmanaged development and growth continued, serious damage would be done to the Bay.<sup>8</sup> The Maryland General Assembly used this study to help formulate the Planning Act of 1992.

The Planning Act of 1992 sought to re-define the way that the state and local jurisdictions dealt with zoning and planning issues. The Planning Act did many things to amend the zoning and planning statutes at the time and to create new requirements. The Planning Act reconstituted the State Economic Growth, Resource Protection and Planning Commission (the “Commission”) charging it

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<sup>7</sup> See, 1987 Chesapeake Bay Agreement, found at <http://www.chesapeakebay.net/pubs/199.pdf>.

<sup>8</sup> See, Population Growth and Development in the Chesapeake Bay Watershed to the Year 2020, December 1988, found at <http://www.chesapeakebay.net/pubs/522.pdf>.

with numerous tasks, including to ensure that local jurisdictions conformed to the Act and ensuring consistency in local zoning. The Planning Act also implemented the six visions, stated above, as the State Economic Growth, Resource Protection and Planning Policy. Md. Code Ann., State Finance and Procurement, § 5-7A-01 and Md. Code Ann., Art. 66B, § 1.01. The Planning Act mandated that all local jurisdictions, by July 1, 1997, ensure that the implementation of the provisions of their comprehensive plans complied with Md. Code Ann., Art. 66B, § 1.01 and 3.05(a)(4)(vii) and (ix). Md. Code Ann., Art. 66B, § 4.09. This provision mandated that local jurisdictions implemented zoning ordinances and regulations, planned development ordinances and regulations, subdivision ordinances and regulations, and other land use ordinances and regulations that were consistent with the comprehensive plan. *Id.* The Planning Act also made several amendments to Article 66B. Article 66B requires all local planning commissions to create and approve a comprehensive plan and recommend it for approval to the local legislative body. Md. Code Ann., Art. 66B § 3.05(a)(1). It further requires that the comprehensive plans include all the requirements of the visions set forth in section 1.01. Md. Code Ann., Art. 66B, § 3.05(b)(1)(i).

Allegany County has developed a comprehensive plan and enacted zoning ordinances consistent with the mandate of the General Assembly. Allegany County's comprehensive plan, last updated in 2002, directs public and private

actions and decisions to ensure the appropriate development of public and private property.<sup>9</sup> E. 65.

The Plan also adopts the visions established in the Planning Act of 1992 and in doing so states:

This Visions, Goals, Objectives, and Policy framework shall be the County's principal source of Land Use, environment, and growth policy, and all other County plans shall be consistent with and supportive of that framework.

E. 73. Three of the more relevant provisions are the protection of sensitive areas, stewardship of the Chesapeake Bay and the land as a universal ethic. E. 73.

Furthermore, in rural areas like the one at issue, growth is directed to existing population centers and resource areas are protected. *Id.* Allegany County has also enacted zoning ordinances under the authority granted by Article 66B. The legislative purpose of zoning ordinances is to, *inter alia*, regulate land use to ensure uses are *consistent with* the comprehensive plan.<sup>10</sup>

While the Court of Special Appeals focused on the use of the term “guide” in the Plan when it held that the Elements of the Plan were not mandatory, nowhere does the lower court explain how the Board of Appeals used the Plan as a guide nor does the Board of Appeals in its opinion explain how it used the Plan in

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<sup>9</sup> See, Allegany County Comprehensive Plan, found at [http://gov.allconet.org/plan/docs/complan/Comprehensive%20Planning%20in%20Allegany%20County\\_ver%203.pdf](http://gov.allconet.org/plan/docs/complan/Comprehensive%20Planning%20in%20Allegany%20County_ver%203.pdf)

<sup>10</sup> See, Code of Allegany County, zoning, § 141-70, found at [http://gov.allconet.org/permits/laws/Zoning%20Regulations\\_Part%20IV\\_021010\\_public.pdf](http://gov.allconet.org/permits/laws/Zoning%20Regulations_Part%20IV_021010_public.pdf)

guiding its decision. Contrary to well settled law, the Board provided no findings of fact analyzing how the proposed development met any of the six visions.

*Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 553, 723 A.2d 440, 451(1999). Moreover the Board only examined one of the four Goals of the Plan. The guiding principles of a comprehensive plan serve no purpose if they are completely ignored.<sup>11</sup>

Further, the language of a comprehensive plan cannot be viewed in a vacuum. To determine the weight to be afforded terms within a comprehensive plan, one must consider the principles set forth in the enabling statute, Article 66B, including the definition of “special exception.”

#### B. Terrapin Run’s Special Exception

In this particular case, Terrapin Run applied for a special exception to the zoning ordinance to build a planned residential development in an area zoned for agriculture and conservation. The Allegany County zoning ordinance defines “special exception” as “a land use that is subject to Board of Appeals review and approval.” Code of Allegany County, § 141-71(A). However, the zoning enabling statute defines “special exception” as,

A grant of a specific use that would not be appropriate generally or without restriction and shall be based upon a finding that certain conditions governing special

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<sup>11</sup> Guide means “to direct, supervise, or influence usually to a particular end.” From the Merriam-Webster on-line dictionary. Found at: <http://www.merriam-webster.com/cgi-bin/dictionary>.



exceptions as detailed in the zoning ordinance exist, that *the use conforms to the plan and is compatible with the existing neighborhood.*

Md. Code Ann., Art. 66B, § 1.00(k), emphasis added.

Because local zoning authority is derived from the State, the Board of Appeals is not only bound by the County's zoning ordinances but also by the State enabling legislation. Therefore, the correct standard to apply is the "conforms to the plan and is compatible with the existing neighborhood" standard. Thus, the Board of Appeals and Court of Special Appeals failed to apply the correct standard of review.

In short, a proposed special exception must comply with the comprehensive plan. While some case law on this subject applies a traditional Maryland common law principle that comprehensive plans are only guides and therefore need not form the basis for zoning decisions, there is also case law that applies a stronger consistency or conformity standard. The Maryland Court of Special Appeals has held that the common law standard only applies when there is no statute to elevate that comprehensive plan into a true regulatory device. *See, Floyd v. Council of Prince George's County*, 55 Md. App. 246, 258-259 (1983). In fact, this Court has held that there are cases when there needs to be consistency between a comprehensive or master plan and local ordinances or regulations. *See, Board of County Commissioners of Cecil County v. Gerald Gaster, et al.*, 285 Md. 233

(1979) and *Wade S. Coffey v. Maryland-National Capital Park & Planning Commission*, 293 Md. 24 (1982).

The General Assembly, noting the problems with unmanaged, unplanned growth, and the inconsistencies within the cases, decided in 1992 to pass the Planning Act to remedy this possible interpretive problem. In doing so, the General Assembly was directly addressing the issue of consistency. Other states have dealt with the consistency issue in terms of zoning and planning as well. In Oregon, for instance, comprehensive plans, approved by the state, are mandatory by all local jurisdictions and local ordinances must be consistent with the comprehensive plan. ORS § 197.005(2). Oregon case law, which has used the consistency requirement longer than any other jurisdiction, shows that the issue of consistency is not new. In both *Fasano, et al. v. Board of County Commissioners of Washington County, et al.*, 507 P.2d 23 (Or. 1973) and *Roseta, et al. v. County of Washington, et al.*, 458 P.2d 405 (Or. 1969), the Supreme Court of Oregon held that zoning decisions must be consistent with land use elements of the comprehensive plans.

In the case at hand, the issues of consistency and conformity are very clear. Not only is statutory law unambiguous that local ordinances and regulations must be “consistent with” the comprehensive plan, Md. Code Ann., Art. 66B, § 4.09, but under the statutory definition of “special exception,” the use must *conform* to the

comprehensive plan. Md. Code Ann., Art. 66B, § 1.00(k) emphasis added. Based upon statutory interpretation as well as past case law, the special exception can only be granted if it “conforms to” the comprehensive plan.<sup>12</sup> In this case, the special exception does not conform to the Allegany County Plan. The challenged Court of Special Appeals’ decision allowing the exception defeats consistency between long-standing state policy and local planning and between good planning and zoning - thus, repudiating the stated purposes of the Planning Act.

Finally, the lower court’s arbitrary decision holding that a variety of terms describing quite different relationships between a comprehensive plan and zoning are all virtually identical, defies both logic and the rules of statutory construction. *State Dep’t. of Assessments and Taxation v. The Maryland-National Capital Park and Planning Commission*, 348 Md. 2, 15 (1997) (holding that the language of a statute is to be given its plain and natural meaning). Courts have reasoned that in the rules of statutory construction, state legislatures and local legislative bodies are deemed to use their words carefully, and therefore the legislative body’s intention must be given effect. *Miller v. Miller*, 142 Md. App. 239, 251 (2002) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782 (1984). When the language is clear and free from ambiguity, there is generally no need to look beyond the statute to determine the Legislature’s

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<sup>12</sup> See, *Gaster*, 285 Md. 233 (1979) and *Coffey*, 293 Md. 24 (1982).

intent. *Board of Trustees v. Kielczewski*, 77 Md. App. 581, 587 (1989). At the same time, words and phrases should be given their natural and ordinary meaning, unless statutes or case law have provided their own definitions. *State Dep't of Assessments and Taxation*, 348 Md. at 15. In deciding a term's natural and ordinary meaning, courts will often look to a dictionary. *Id.* Looking at the natural and ordinary meaning of the word "conform" one finds the meaning to be "similar" or "identical."<sup>13</sup> When state law calls for *conformity*, especially regarding the relationship between special exception and comprehensive plans, *conformity* is precisely what is sought – not any of the lesser terms of art.

## **II. Conformance with the Comprehensive Plan Helps to Regulate Development and Ultimately Improve the Health of the Chesapeake Bay.**

### **A. If Upheld the Decision Will Harm Important Bay Related Programs**

The Court of Special Appeals decision, if allowed to stand, will negatively affect water quality and aquatic life in the Chesapeake Bay. This decision would specifically affect local, private, and state programs designed to restore and protect the Chesapeake Bay.

The CBF and numerous other organizations, both private and governmental, spend thousands of hours and millions of dollars each year on programs designed to educate people about and restore submerged aquatic vegetation (SAV) and

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<sup>13</sup> From the Merriam-Webster on-line dictionary. Found at: <http://www.merriam-webster.com/cgi-bin/dictionary>.

oysters, forested stream buffers, and well-managed farmland and forestland, all of which help reverse the adverse water quality impacts caused by rainwater runoff from decades of poorly planned development. These programs involve the planting of underwater aquatic grasses, oyster reefs and stream-side forested areas, all necessary for the healthy maintenance and replenishment of aquatic fish, plant and animal life destroyed in part by excessive runoff from development in sensitive areas. The CBF and other local organizations have trained citizen volunteers to map or “ground truth” SAV beds identified from historical records and aerial photography in conjunction with the Virginia Institute of Marine Science (VIMS) which conducts an annual survey of grass beds throughout the Chesapeake Bay and its tidal tributaries. The CBF also spends large amounts of time and resources to educate students and teachers throughout the watershed. Since 2005, CBF has run numerous programs in Allegany County, Maryland training almost thirty (30) teachers and over 500 students. These programs involve one-day or multi-day field trips including kayaking and/or canoeing on the Bay and its tributaries. The goal of these programs is to provide teachers and students with hands-on experiences on the Bay to expand their knowledge of the Bay and its issues and use that knowledge in their classrooms and local communities to improve the water quality of the Bay. The CBF has also spent time and resources working on stream restoration projects in Allegany County. These stream

restoration projects include streambank restoration and buffer restoration, such as planting trees and shrubs, in order to keep the streambeds and streambanks from eroding. Specifically, CBF has designed a stream restoration project in conjunction with the Allegany County Soil Conservation District. This project included the removal of a house in order to restore the natural flow of a stream. These stream restoration projects also help to improve water quality throughout the Bay watershed.

If the Court of Special Appeals' decision is upheld, increased development in these sensitive areas can be allowed, counter to the local comprehensive plan and express state policies. Increased development leads to increased runoff which leads to the introduction of more nitrogen, phosphorous and sediment pollution to streams and rivers that feed the Bay. In addition, this development will lead to a significant new discharge of these pollutants via a sewage treatment plant. These pollutants destroy the efficacy of buffer restoration efforts and injure if not destroy SAV and oyster plantings. Thus, more development in sensitive areas injures if not essentially destroys the efficacy of CBF's and other similar programs in Allegany County and other areas of the Bay. Unfortunately, increased development in sensitive areas harms more than just the programs themselves, but damages critical Bay resources.

## B. The Decision Harms Essential Bay Resources

Developed lands represent nine (9) percent of the watershed's land area yet runoff from these lands contributes eleven (11) percent of the total nitrogen and sixteen (16) percent of the total phosphorous loads to the Bay.<sup>14</sup> Recently, the rate of population growth in the Bay region has accelerated to the point where there is concern about whether the watershed can sustain not only the human population but also all of the Bay's living resources.<sup>15</sup> The EPA IG Report noted that "new development is increasing nutrient and sediment loads at rates faster than restoration efforts are reducing them."<sup>16</sup> In fact, estimates are that by 2020 nearly 18 million people will live within the Bay region.<sup>17</sup> Because of this population increase, more homes will need to be constructed. Contrary to Maryland's Planning Act and Smart Growth Act development often occurs away from existing infrastructure. This type of development or urban sprawl – discouraged by both the 1992 and 1997 state growth laws and policies - means that people will live further from their jobs and shopping and will be forced to drive further and more often. It is estimated that between 1990 and 2020 the population in the region will

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<sup>14</sup> See, Population Growth and Development Trends in the Chesapeake Bay Watershed, May 23, 2007, The Chesapeake Bay Program, found at [http://www.chesapeakebay.net/pubs/calendar/PSC\\_05-23-07\\_Handout\\_22\\_8570.pdf](http://www.chesapeakebay.net/pubs/calendar/PSC_05-23-07_Handout_22_8570.pdf).

<sup>15</sup> From The Chesapeake Bay Program's website, <http://www.chesapeakebay.net/land.htm>.

<sup>16</sup> See, EPA IG Report, note 1, *supra*, at pg. 8.

<sup>17</sup> *Id.*

grow by 43 percent and the number of vehicles will grow by 69 percent.<sup>18</sup> Motor vehicle emissions account for up to one-third of the nitrogen air pollution emitted in the Bay watershed.

Moreover, to accommodate this growth in population and vehicular travel, more roads will need to be built. More roads will mean an increase in stormwater runoff that washes the air pollution from skies to streams, rivers and the Bay. More houses will mean a reduction in the amount of land that is available to filter rainwater and runoff. The type of development proposed here, 935 acres in sensitive land currently zoned for agriculture and conservation, will contribute to this type of sprawl and have negative impacts on the Chesapeake Bay. It is this pattern of urban sprawl and unmanaged growth that is one of the top threats to the Bay's recovery.

Urban and suburban development contributes the greatest amount of nitrogen and phosphorus pollution to local waterways and the Bay per acre.<sup>19</sup> Forests are the best resources to provide a natural filter for rainwater and runoff. The loss of forests to development has meant an increase in stormwater runoff into the Bay and its tributaries. According to the US Forest Service, we are losing

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<sup>18</sup> See Debunking Sprawl Myths: What We Really Want in Our Communities, The Chesapeake Bay Foundation, found at [http://www.cbf.org/site/PageServer?pagename=exp\\_sub\\_resources\\_factsheets\\_sprawlmyths](http://www.cbf.org/site/PageServer?pagename=exp_sub_resources_factsheets_sprawlmyths).

<sup>19</sup> See A Guide to Preserving Agricultural Lands in the Bay Region: Keeping Stewards on the Land, The Chesapeake Bay Foundation, July 2006, found at: [http://www.cbf.org/site/DocServer/CBFPreservingFarmland\\_Final.pdf?docID=5943](http://www.cbf.org/site/DocServer/CBFPreservingFarmland_Final.pdf?docID=5943).



forests in the Chesapeake Bay watershed at a rate of about 100 acres per day, or 36,000 acres per year.<sup>20</sup> Trees, due to their wide root systems, hold 14-16 times more runoff than a mowed lawn.<sup>21</sup> Most importantly, streamside forests are essential to the protection and enhancement of water resources. These forests serve as buffers and filter out sediment and pollutants from the rainwater and other runoff, thus serving as a key component to clean water.<sup>22</sup>

As noted previously, important Bay ecological components whose presence is essential to Bay health are underwater grasses, also known as SAV. Underwater grasses in the Bay's tributaries filter polluted runoff, provide food for waterfowl, and offer shelter for blue crabs. Juvenile rockfish, speckled trout, and other aquatic life also depend upon grasses for habitat. The growth of underwater grasses depends on good water quality thus, they are one of the best barometers of Bay and tributary health. Decreases in water quality due to nitrogen, phosphorous, and sediment pollution, partly due to an increase in runoff from sprawling growth's impervious surfaces, have caused a drastic decline in underwater grasses Bay-wide. Although some areas have recovered, today only about 20 percent of the historic acreage remains. The CBF and numerous local organizations have offered

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<sup>20</sup> See The State of Chesapeake Forests, The Conservation Fund for the U.S. Forest Service (September 2006).

<sup>21</sup> See Bay-Friendly Landscaping, The Chesapeake Bay Foundation, found at: [http://www.cbf.org/site/PageServer?pagename=action\\_outdoors\\_landscaping\\_filters\\_forests](http://www.cbf.org/site/PageServer?pagename=action_outdoors_landscaping_filters_forests).

<sup>22</sup> See Riparian Forest Buffers, Maryland Department of Natural Resources, found at: <http://www.dnr.state.md.us/forests/publications/buffers.html>.

a variety of programs aimed at increasing underwater grasses within the Bay and its tributaries. The CBF and these other private and governmental groups work with citizens and conservation organizations interested in targeting local waterways by growing grasses, collecting seed, and planting grasses.

Oysters also play a key role in the health of the Chesapeake Bay. Native oysters are important for the bay both ecologically and economically. Oysters filter large amounts of algae and sediment and oyster reefs provide essential fish habitat; oyster reefs are among the best fish habitats in the Chesapeake Bay as the hard surfaces of oyster shells and the nooks between the shells provide places where small marine animals live which in turn attracts larger fish species. Numerous species use oyster reefs: grass shrimp, amphipods, bryozoans, anemones, barnacles, oyster drills, hooked mussels, mud crabs, and red beard sponge to name a few. Many of these serve as food for larger animals including striped bass, weakfish, black drum, croakers, and blue crabs. Additionally, an adult oyster can filter 60 gallons of water each day.

Oysters have also historically provided a valuable fishery in the Bay, but their numbers today are alarmingly low. From the 1950s to the 1970s, the average annual oyster catch was about 25 million pounds per year. Today, the Bay's oyster population is a mere two percent of its historic level, due in part to the stress of nutrient-polluted waters, low summer levels of dissolved oxygen, and their burial

under a deluge of silt and sediment coming in part from urbanized areas' stormwater runoff.

While the Terrapin Run development is proposed for Allegany County and not on land that fronts the Chesapeake Bay, it remains detrimental to the Bay for several reasons. First, this development is in a sensitive natural area and the development as a whole will have adverse effects on the local environment whose streams (including the very modest Terrapin Run itself) are naturally connected to the Potomac River and thus to the Bay . Second, this development would include a wastewater treatment plant that will discharge into Terrapin Run. That discharge would be up to 750,000 gallons a day and would include nitrogen and phosphorous pollution. Terrapin Run flows into the Potomac River which is a major tributary to the Bay. Thus, pollution from this development would definitely make its way into the Bay and cause further damage to the Bay and its ecosystems by adding more nitrogen, phosphorous and sediment to an already overtaxed system.

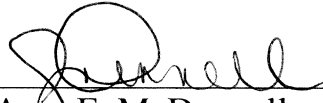
Finally, if the Court of Appeals' decision is upheld and development is permitted to go forward, in spite of the fact that it does not conform to the county's comprehensive plan, such precedent will have a substantial negative impact on residential and commercial growth and planning throughout Maryland. Rest assured, given the numbers of people moving in to Maryland each year, new development will be proposed that will not conform to local comprehensive plans.

Without the authority of a comprehensive plan directing how such growth should occur, the haphazard destructive growth practices of the past will continue.

## CONCLUSION

The decisions of the County Board of Appeals and the Court of Special Appeals were based on an inaccurate interpretation of zoning and planning laws. Local land use powers are derived and devolved from the state. The act of developing comprehensive plans and the standards to which such plans and their required implementing ordinances are to be held, are both mandated by the State. Therefore those enabling statutes' standards for consistency of local zoning ordinances with comprehensive plans' objectives, especially as respects the protection of sensitive areas, must be honored. Additionally, the conformity of special exceptions to comprehensive plans, as required in the state's enabling statute, must be assured. Decisions on local zoning and planning must be based on the requirements of the state enabling statutes and on the standards contained within their implementing ordinances. In this case, the Maryland Court of Special Appeals incorrectly found that comprehensive plans are merely guides and that the county did not have to ensure that the special exception conformed to its comprehensive plan. *Amicus curiae*, the Chesapeake Bay Foundation, Inc., respectfully requests that this Court reverse the decision of the Maryland Court of Special Appeals.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "J. Mueller", is written over a horizontal line.

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Jon A. Mueller

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Dated: October 9, 2007

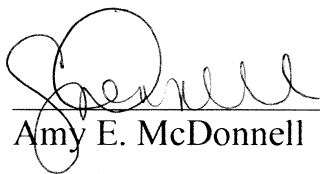
## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on October 9, 2007, two  
(2) copies of the foregoing Amicus Brief of the Chesapeake Bay Foundation  
were sent by mail, postage prepaid, to:

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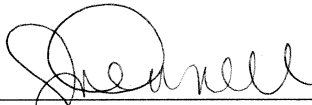


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# **STATEMENT OF FONT TYPE USED AND TYPE SIZE**

Pursuant to Maryland Rules 8-112 and 8-504(a)(8), this brief has been prepared using Times New Roman, 14 pt. type.



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