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In The  
Court of Appeals Of Maryland

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No. 35

September Term, 2007

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**ROBERT W. FOLEY, JR., et al.,**

*Appellants,*

v.

**K. HOVNANIAN AT KENT ISLAND, LLC,**

*Appellee.*

**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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Jon A. Mueller  
Amy E. McDonnell  
6 Herndon Avenue  
Annapolis, Maryland 21403  
(443) 482-2153

*Counsel for 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 June 13, 2007, this Court granted Petitioners’, Robert W. Foley, Jr., *et al*, Petition for Writ of Certiorari and CBF’s Motion to File an Amicus Curiae Brief in the above-captioned case. Petitioners are challenging four aspects of a ruling from the Maryland Court of Special Appeals overturning an injunction issued by the Circuit Court for Queen Anne’s County, regarding the amendment of the county’s critical area maps. The Court of Special Appeals’ decision, filed on March 23, 2007, essentially held that the act of re-drawing certain critical area land use boundaries was a ministerial act and the failure to accurately and timely redraw those boundaries could not be used to halt a development project – even if the redrawn boundaries prove that there was an error in the underlying decision to grant growth allocation. The Court of Special Appeals decision reversed in part, modified in part, and affirmed in part the trial court’s decision. If this Court affirms the Court of Special Appeals’ decision, grave harm will be done to the Chesapeake Bay and Maryland’s Critical Area Program.

## QUESTION PRESENTED BY AMICUS CURIAE

- I. Will the Court of Special Appeals Decision, allowing the approval and recordation of an official Critical Area map with mistakes, have a negative impact on the Critical Area program in Maryland and the Chesapeake Bay?

### FACTUAL BACKGROUND AND STATEMENT OF THE FACTS

Plaintiffs-appellees are the Queen Anne's Conservation Association, Inc., and Foley, *et al.*, residents and taxpayers of Queen Anne's County, directly affected by the map revisions that are the subject of this litigation. E. 165.

Defendant-appellant K. Hovnanian at Kent Island, LLC, is a developer proposing an "active adult, age restricted community" on Kent Island in Queen Anne's County, consisting of 1,350 residential units, an assisted living facility, and recreational uses on more than 560 acres known as Four Seasons at Kent Island. E. 45.

This appeal stems from an October 8, 2002, decision by the Queen Anne's County Commissioners adopting County Ordinance 01-01 which was enacted to revise Critical Area Overlay Maps 49 and 57 and repeal the prior versions. E. 71.

The Circuit Court for Queen Anne's County ruled that the County's critical area maps were void as they did not accurately delineate the growth allocation approval previously given by the Planning Commission, the Critical Area Commission, and the County Commissioners of Queen Anne's County. E. 174.

Defendant-appellant then appealed that decision to the Maryland Court of Special Appeals.

The Maryland Court of Special Appeals, held that the trial court had erred in enjoining acts dependent upon the map amendments until accurate maps had been supplied; that the growth allocations were effective without corrected critical area maps; that the errors on the maps do not render them void; that the pre-existing critical area maps remain in effect until accurately revised maps are supplied; and that the adoption of maps with delineation of the revised critical area designations was not a legislative function. Plaintiff-appellee then appealed that decision to this Court.

The CBF sought leave to file an amicus curiae brief because preservation and restoration of the Chesapeake Bay is its 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 and continues to fund and operate environmental 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 within the critical area.

The CBF has also been involved in various aspects of Maryland's Critical Area Act including its development and enactment by the General Assembly in 1984. Md. Natural Resources Code § 8-1801.

The Critical Area Act was predicated upon the following:

(a) Findings.- The General Assembly finds and declares that:

(1) The Chesapeake and the Atlantic Coastal Bays and their tributaries are natural resources of great significance to the State and the nation;

(2) The shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats;

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus it is necessary wherever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

(5) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

(6) Those portions of the Chesapeake and the Atlantic Coastal Bays and their tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor and along the Atlantic Coast;

(7) The quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake and the Atlantic Coastal Bays, and their tributaries;

*(8) The restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands, particularly in the buffer;*

*(9) The cumulative impact of current development and of each new development activity in the buffer is inimical to these purposes;*  
and

(10) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity in a consistent and uniform manner along shoreline areas of the Chesapeake and the Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

*Id.* (emphasis added). State and local regulations governing development in the Critical Area are controlled by these findings.

As the General Assembly found in 1984, development leads to increased impervious surfaces. These areas allow greater amounts of stormwater runoff to enter the Bay and its tributaries. Stormwater carries pollutants that harm water quality. This phenomenon is nowhere more apparent than on Kent Island in Queen Anne's County where the Four Seasons development is proposed. *See An*

*Evaluation of the Maryland Critical Area Program*, The Abell Foundation, December 2003 at pp. 3-4, Specific Findings and Recommendations, and Tables 8-11, pp. 43-49. [http://www.abell.org/pubsitems/env\\_critical.area\\_1203.pdf](http://www.abell.org/pubsitems/env_critical.area_1203.pdf).

Uniquely, of the four counties studied by the Abell Foundation, Queen Anne's County experienced the greatest increase of development in its Resource Conservation Areas over the last 20 years, the area at issue in this appeal.

Judicial decisions which undermine the findings and purposes of the Critical Area Act, allow increased development and consequent imperviousness within the critical area. Thus, such decisions harm the Bay and its tributaries. These decisions must be overturned if the Bay is ever to be restored and preserved. CBF believes that the Court of Special Appeals' decision in this matter is just such a decision. Below, we explain why the Court of Special Appeals' decision is contrary to the Critical Area Act, harmful to the Chesapeake Bay, and must be reversed.

## **ARGUMENT**

### **I. Geographically Redefining the Critical Area Maps of a County Without Accuracy Nullifies the Intent and Value of Both the County and State Critical Area Programs.**

In 1984, the Maryland General Assembly determined that all land within 1,000 feet of the mean high water line of tidal waters or the landward edge of tidal wetlands is "critical area". Md. Code Ann., Natural Resources Article, § 8-1801 *et*

*seq.* (2007). This determination was based upon the overwhelming evidence that great harm was being caused to our tidal waters and the Chesapeake Bay due to increased development and consequent increase in impervious surfaces. Md. Code Ann., Natural Resources Article, § 8-1801. Thus, the General Assembly determined that all counties with tidal waters would have to limit construction within their respective “critical areas” via implementation of a county critical area program that was consistent with the state program and approved by the Critical Area Commission. Md. Code Ann., Natural Resources Article, § 8-1809.

A key aspect of the program was the allotment of growth allocation acreage to each county, based on a percentage of its “Resource Conservation” land. The General Assembly believed that by limiting the amount of additional growth within the critical area, further harm to the Bay and tidal waters could be reduced. Md. Code Ann., Natural Resources Article, § 8-1808.1. Using growth allocation acres, counties could change the zoning designation of critical area lands from Resource Conservation or Limited Development to Intense Development after approval from the Critical Area Commission. *Id.* For the allotment aspect of the program to work, it is essential to accurately know how much critical area land is being converted to intensely developed land, and precisely where that land is located. However, without accurate maps, such a determination cannot be made. Thus, as the Petitioners allege is the case here, a county could seek and obtain

approximately 373 acres of growth allocation based upon inaccurate or non-existent drawings, but actually destroy and develop (a) more acres than allotted, or (b) sensitive land in a different area than was intended. Such a result may occur here and elsewhere if the Court of Special Appeals' decision is not overturned.

The Court of Special Appeals held that the creation of a revised critical area map to conform to growth allocation decisions of a county and the Critical Area Commission is a “ministerial task that does not void the previously validly-granted growth allocations.” Slip op. at 13. This holding presumes that the concept plan submitted by the developer and approved by the county and Commission – the basis for the award of growth allocation – was accurate and that the Commission’s decision was predicated upon valid information. Here, there is ample evidence that the plan upon which the county and the Commission based their decisions was not accurate as to the size and location of essential critical area features in and surrounding the development site – the developer and the County have twice been unable to produce accurate maps. Thus, as a factual matter, this holding is untenable.

Second, and perhaps more importantly from a critical area program perspective – state wide – the holding subverts some key aspects of the Critical Area Act. Without accurate critical area maps it is impossible, for example, to determine the size of the critical area to be impacted by development and,

consequently, how much growth allocation must be awarded. However, the Court of Special Appeals' decision permits such inaccuracy. Thus the decision, if upheld, will harm Queen Anne County's Critical Area program, other programs statewide, and undermine the Act itself.

A. The Critical Area Act Growth Allocation Program Must be Accurately Implemented to be Effective.

The Act establishes that each county is granted a "growth allocation" equal to 5% of the total resource conservation area ("RCA") in a local jurisdiction at the time of approval of the jurisdictions critical area program. Md. Natural Resources Article § 8-1808.1(b)(1). "New intensely developed or limited development areas to be located in the resource conservation area shall conform to all criteria of the Commission for intensely developed or limited development areas and shall be designated on the comprehensive zoning map submitted by the local jurisdiction as part of its application to the Commission for program approval..." *Id.* at (c)(4).

Thus, section 8-1808 creates a growth allocation "budget" for each county which may not be exceeded. COMAR § 27.01.02.06(A)(1). Each growth allocation application must calculate the area to be converted from RCA to an intensely developed area ("IDA"). This calculation is typically undertaken by the developer who submits for approval a concept plan ("map") of the proposed project and the area of land to be converted. The local jurisdiction's planning department reviews the application and concept plan and then either accepts or

rejects the application. If accepted, the concept plan “mapping” is usually adopted as presented by the developer. Then, the application is presented to the local jurisdiction’s elected officials for approval. If the plan is approved, the application and concept plan mapping are presented by the local jurisdiction to the Critical Area Commission for its approval. COMAR §§ 27.02.02.02 and 27.02.04.02. If the proposed development is considered “major,” the Commission then appoints a panel of Commissioners that holds a public hearing during which comments are received. *Id.* The panel holds a meeting or meetings to develop a recommendation to the full Commission. During those panel meetings, the Commission’s staff reviews the application and provides technical information to the panel. At the conclusion of those meetings, the panel makes a recommendation to the full Commission for approval, denial, or modification of the growth allocation request. If approved, the local jurisdiction must then amend its critical area maps to conform to the new designation. However, if the concept plan incorrectly identifies the amount of land to be converted to IDA or the location of certain critical area features, *e.g.*, hydric soils or wetlands, then the local jurisdiction’s and the Commission’s decision may be flawed as will the amended maps that attempt to conform to the erroneous decision.

Here, the developer submitted E. 403 as the concept plan identifying the areas to be converted from RCA to IDA. This is the “map” used by the county and

the Critical Area Commission in reaching their respective decisions on the *amount* of growth allocation to be awarded and *where* intense development will be permitted. However, despite two attempts, the County has been unable to create amended critical area maps that conform to the Commission’s decision. This failing strongly indicates that there were inaccuracies in the original concept plan “mapping.” In fact an independent expert retained by the Circuit Court found there were errors in the maps as did a surveyor retained by the Protestants. Slip op. at 6-7. Moreover, the developer admitted there were errors in the maps. *Id.*

Engineers retained by CBF have examined the critical area “mapping” presented by Hovnanian to Queen Anne County and the basis of the Critical Area Commission’s award. The results of their examination conclude that areas of hydric soils and wetlands were improperly mapped. Exhibits A and B attached. Critical area boundaries are to be expanded to follow contiguous areas of hydric soils. COMAR § 27.01.09.01(C)(7). However, it does not appear that such areas were expanded, thus location of the buffer and the size of the area to be converted to IDA was not properly identified. Exhibit A. CBF’s engineers concluded that as much as an additional 180 acres should be included within the critical area buffer – an area in which new development is prohibited. COMAR § 27.01.09.01(C)(2). Moreover, wetland areas within the critical area were not properly delineated. Exhibit B.

Given the extent of these mapping inaccuracies, it is inappropriate to hold that the County and the Critical Area Commission approvals can support approval of the actual amount and location of growth allocation necessary. Presumably, these errors will be identified when accurate maps are generated; however, if the Court of Special Appeals' decision is upheld, these errors cannot be corrected and an accurate accounting of growth allocation cannot be made thereby damaging the County and State Critical Area programs and the Chesapeake Bay by permitting additional impervious surfaces in the critical area. Md. Code Natural Resources Article § 8-1801.

B. The Lower Court's Decision Ignores the Importance of Accurate Mapping.

Here, the Court of Special Appeals inexplicably held that such mapping problems do not undermine the decision of the county and the Commission to grant an award of growth allocation. However, such "mapping" problems absolutely undermine the integrity of the county and state critical area programs. For example, if errors in the concept plan on which the governmental decisions were made identify an amount of growth allocation for less acreage than the new development will use, then the local jurisdiction will receive a greater growth allocation "budget" than allowed by Md. Code Natural Resources Article § 8-1808.1. To illustrate the point, assume that the local jurisdiction has a remaining growth allocation budget of 300 acres of RCA. A developer proposes a concept

plan that identifies a growth allocation of 300 acres. However, there is an error in the concept plan “mapping” and the area of conversion is actually 310 acres. If the local jurisdiction and the Critical Area Commission approve the 300 acre award, then the local jurisdiction will have obtained an additional 10 acres of growth allocation. Thus, allowing a greater addition of impervious development than allowed by the General Assembly.

Further, it is unknown whether the local jurisdiction would have approved such an additional award of growth allocation and highly unlikely that the Commission would have given approval. It is clearly not the amount voted on by the governmental body appointed to make such decisions after public notice and comment. It is also unknown how citizens would have responded to such a request. Some who may have been in favor of the original request would not have favored what was actually needed.

This mapping error can be further compounded if subsequently a new development is proposed adjacent to the one described above. If in developing its concept plan the new developer identifies the 10 acre discrepancy, which mapping is to be followed and how is the error corrected? Is the original development allocation simply revised or remanded for a new decision by the county and the Commission? Can such an error be corrected if it is not identified until after the original development is completed? Must the Commission penalize the local

jurisdiction for exceeding its growth allocation budget? These are all issues unaddressed by the Court of Special Appeals' decision. These issues could have been addressed by simply staying the growth allocation decision and remanding the matter back to the county until accurate maps could be presented to the Critical Area Commission. Such a procedure was done here in April 2001. There is no reason it could not be done again.

This hypothetical is not out of the realm of possibility. The CBF has been involved in several recent matters that point out the necessity of accurate critical area mapping prior to approval of an award of growth allocation or variances to local critical area programs.

The Blackwater Resort development proposed for land annexed by the City of Cambridge, Maryland, is a prime example. There, the developer proposed a new development project all within RCA that would have consumed 313 acres of growth allocation. The City approved the award based upon the concept plan "mapping" provided by the developer. The City applied to the Critical Area Commission for approval of the growth allocation award based upon this "mapping." However, after the submission by CBF of engineering drawings identifying errors in the "mapping" and extensive review by the Critical Area Commission staff, the award was unanimously denied by the Commission. One of the key errors in the mapping was the failure to properly identify the extent of

hydric soils within the development site and thus, the failure to properly expand the critical area and buffer boundaries. Given the true size of the expanded buffer, the Commission believed that such an award of growth allocation was improper.

Similar problems have been identified in buffer map amendment and variance cases in Anne Arundel County. In the Little Island on the Magothy River matter, *In re DCW Dutchship Island, LLC*, engineers identified alteration of preexisting maps to reduce or eliminate areas of steep slopes and vegetation within the critical area buffer. In the Dobbins Island variance matter, *In re David Clickner*, it was determined that the extent and location of the buffer was improperly “mapped” due to a failure to expand the buffer due to steep slopes.

Each of these examples highlights the critical necessity of accurate mapping if proper development decisions are to be made at the local and state level. Here, the Court of Special Appeals failed to recognize the significance of the mapping error and issued a decision that essentially undermines the mapping requirements of the Critical Area Act. The court’s decision should therefore be overturned.

## **II. The Critical Area Programs of Both the County and the State Help to Regulate Development and 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 oysters, among other things, that help reverse the adverse water quality impacts caused by runoff from development. These programs involve the planting of underwater aquatic grasses and oyster reefs necessary for the healthy maintenance and replenishment of aquatic fish, plant and animal life destroyed in part by excessive runoff from development in the critical area.

If the Court of Special Appeals’ decision is upheld, increased development within the critical area may be allowed. Increased development leads to increased runoff. Thus, more development in the critical area injures if not essentially destroys the efficacy of these programs in Queen Anne’s County and other areas of the Bay and its tributaries because SAV and oyster beds cannot flourish in an environment where water quality standards cannot be maintained. However, increased development in the critical area harms more than just the programs themselves, but damages critical Bay resources.

## B. The Decision Harms Essential Bay Resources

Important Bay inhabitants whose presence is essential to Bay health are underwater grasses also known as SAV. Underwater grasses 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 nutrient and sediment pollution, partly due to an increase in runoff from 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 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.

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.

Oysters 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; and historically provided a valuable fishery in the Bay. Oysters are famous Bay residents, but their numbers 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 reduced amounts of underwater grass habitat and low summer levels of dissolved oxygen.

The oyster is a keystone species, meaning it is exceptionally important to the Chesapeake's ecosystem, and the decimation of oysters has contributed to the precarious state of the Bay's overall health. Like filters in a giant fish tank, oysters purify the Bay as they strain algae from the water for their food. Oyster reefs also provide habitat and food for scores of marine plants and animals.

For more than 100 years, Chesapeake Bay watermen have made their living harvesting oysters for resale to restaurants and seafood wholesale companies. Until the mid-1980s, oystering was the most valuable commercial fishery in the Bay. After the oyster stocks crashed, crabbing became the most lucrative fishery. Although today, crab stocks are also declining.

Oysters also have tremendous ecological value, which may be the most important benefit they provide. Oysters purify the Chesapeake Bay as they filter the water for their food. An adult oyster can filter as much as 60 gallons of water a day. Sediment and nutrients (chiefly nitrogen), due in part to an increase in runoff from impervious surfaces, cause problems in Bay waters. Oysters filter these pollutants by either consuming them or shape them into small packets, which are deposited on the bottom where they are not harmful. The oysters in the Bay could once filter a volume of water equal to that of the entire Bay (about 19 trillion gallons) in a week. Today, it would take the remaining Bay oysters more than a year.

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. Hundreds of animals 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.

The Court of Special Appeals decision holding that critical area maps are “ministerial” and not important may allow increased development within the critical area and the buffer. Increased impervious surface and lack of a natural

buffer will cause increased runoff of pollution. Such pollution will have an adverse effect, Bay-wide, on education and restoration programs as well as key Bay natural resources.

## **CONCLUSION**

The decisions of the County and the Critical Area Commission were premised on inaccurate concept plan “mapping.” The act of mapping the critical area is not ministerial but essential to the proper functioning of local and state Critical Area Programs. Decisions concerning development within the critical area must be based upon accurate mapping otherwise it is impossible to determine the proper allocation of growth areas and to determine the environmental impacts of land development. In this case, the Maryland Court of Special Appeals incorrectly found that the act of re-drawing critical area land use boundaries was a ministerial act and that the accuracy of the critical area maps was unimportant. *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 black ink, appearing to read "Jon A. Mueller", written over a horizontal line.

Jon A. Mueller

Amy E. McDonnell

*Counsel for Amicus Curiae*

*The Chesapeake Bay Foundation, Inc.*

The Chesapeake Bay Foundation, Inc.  
6 Herndon Avenue  
Annapolis, MD 21403  
(443) 482-2153

Dated: July 23, 2007

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

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## **CITATIONS AND TEXT OF PERTINENT STATUTES AND RULES**

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TITLE 27. CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS  
SUBTITLE 01. CRITERIA FOR LOCAL CRITICAL AREA PROGRAM DEVELOPMENT  
CHAPTER 02. DEVELOPMENT IN THE CRITICAL AREA

COMAR 27.01.02.05 (2006)

.05 Resource Conservation Areas.

A. Resource conservation areas are those areas characterized by nature-dominated environments (that is, wetlands, forests, abandoned fields) and resource-utilization activities (that is, agriculture, forestry, fisheries activities, or aquaculture). These areas shall have at least one of the following features:

- (1) Density is less than one dwelling unit per 5 acres; or
- (2) Dominant land use is in agriculture, wetland, forest, barren land, surface water, or open space.

B. In developing their Critical Area programs, local jurisdictions shall follow these policies when addressing resource conservation areas:

- (1) Conserve, protect, and enhance the overall ecological values of the Critical Area, its biological productivity, and its diversity;
- (2) Provide adequate breeding, feeding, and wintering habitats for those wildlife populations that require the Chesapeake Bay, its tributaries, or coastal habitats in order to sustain populations of those species;
- (3) Conserve the land and water resource base that is necessary to maintain and support land uses such as agriculture, forestry, fisheries activities, and aquaculture; and
- (4) Conserve the existing developed woodlands and forests for the water quality benefits that they provide.

C. In developing their Critical Area programs, local jurisdictions shall use all of the following criteria for resource conservation areas:

- (1) Land use management practices shall be consistent with the policies and criteria for habitat protection areas in COMAR 27.01.09, the policies and criteria for agriculture in COMAR 27.01.06, and the policies and criteria on forestry in COMAR 27.01.05.
- (2) Agricultural and conservation easements shall be promoted in resource conservation areas.
- (3) Local jurisdictions are encouraged to develop tax or other incentive/disincentive programs to promote the continuation of agriculture, forestry, and natural habitats in resource conservation areas.
- (4) Land within the resource conservation area may be developed for residential uses at a density not to exceed one dwelling unit per 20 acres. Within this limit of overall density, minimum lot sizes may be determined by the local jurisdiction. Local jurisdictions are encouraged to consider such mechanisms as cluster development, transfer of development rights, maximum lot size provisions, and/or additional means to maintain the land area necessary to support the protective uses.
- (5) Existing industrial and commercial facilities, including those that directly support agriculture, forestry, aquaculture, or residential development not exceeding the density specified in C(4), above, shall be allowed in resource conservation areas. Additional land may not be zoned for industrial or commercial development, except as provided in Regulation .06, below.
- (6) Local jurisdictions shall develop a program to assure that the overall acreage of forest and woodland within their resource conservation areas does not decrease.
- (7) Development activity within the resource conservation area shall be consistent with the criteria for limited development areas in Regulation .04.
- (8) Nothing in this regulation shall limit the ability of a participant in the Agricultural Easement Program to convey real property impressed with such an easement to family members provided that no such conveyance will result in a density greater than 1 dwelling unit per 20 acres.

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TITLE 27. CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS

SUBTITLE 01. CRITERIA FOR LOCAL CRITICAL AREA PROGRAM DEVELOPMENT  
CHAPTER 02. DEVELOPMENT IN THE CRITICAL AREA

COMAR 27.01.02.06 (2006)

.06 Location and Extent of Future Intensely Developed and Limited Development Areas.

A. Intensely developed and limited development areas may be increased subject to these guidelines:

(1) The area of expansion of intensely developed or limited development areas, or both, may not exceed an area equal to 5 percent of the county's portion of the resource conservation area lands that are not tidal wetlands or federally owned;

(2) When planning future expansion of intensely developed and limited development areas, counties, in coordination with affected municipalities, shall establish a process to accommodate the growth needs of the municipalities.

B. When locating new intensely developed or limited development areas, local jurisdictions shall use these guidelines:

(1) New intensely developed areas should be located in limited development areas or adjacent to existing intensely developed areas;

(2) New limited development areas should be located adjacent to existing limited development areas or intensely developed areas;

(3) No more than one half of the allocated expansion may be located in resource conservation areas;

(4) New intensely developed areas and limited development areas should be located in order to minimize impacts to habitat protection areas as specified in COMAR 27.01.09 and in an area and in a manner that optimizes benefits to water quality;

(5) New intensely developed areas should be located where they minimize their impacts to the defined land uses of the resource conservation area;

(6) New intensely developed areas and limited development areas in the resource conservation area should be located at least 300 feet beyond the landward edge of tidal wetlands or tidal waters.

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SUBTITLE 01. CRITERIA FOR LOCAL CRITICAL AREA PROGRAM DEVELOPMENT  
CHAPTER 02. DEVELOPMENT IN THE CRITICAL AREA

COMAR 27.01.02.07 (2006)

.07 Grandfathering.

A. After program approval, local jurisdictions shall permit the continuation, but not necessarily the intensification or expansion, of any use in existence on the date of program approval, unless the use has been abandoned for more than 1 year or is otherwise restricted by existing local ordinances. If any existing use does not conform with the provisions of a local program, its intensification or expansion may be permitted only in accordance with the variance procedures outlined in COMAR 27.01.11.

B. Local jurisdictions shall establish grandfather provisions as part of their local Critical Area programs. Except as otherwise provided, local jurisdictions shall permit the types of land described in the following subsections to be developed in accordance with density requirements in effect prior to the adoption of the local Critical Area program notwithstanding the density provisions of this chapter. A local jurisdiction shall permit a single lot or parcel of land that was legally of record on the date of program approval to be developed with a single family dwelling, if a dwelling is not already placed there, notwithstanding that such development may be inconsistent with the density provisions of the approved local program.

(1) Any land on which development activity has progressed to the point of the pouring of foundation footings or the installation of structural members;

(2) Any legal parcel of land, not being part of a recorded or approved subdivision, that was recorded as of December 1, 1985, and land that was subdivided into recorded, legally buildable lots, where the subdivision received the local jurisdiction's final approval prior to June 1, 1984, provided that:

(a) The local jurisdiction develops, as part of its program, procedures to bring these lands into conformance with the local Critical Area program insofar as possible, including the consolidation or reconfiguration of lots not individually owned, and these procedures are approved by the Commission, or

(b) If any such land has received a building permit subsequent to December 1, 1985 but prior to local program approval, and is located in a resource conservation area, that land shall be counted by the local jurisdiction against the growth increment permitted in that area under COMAR 27.01.02.06, unless the Commission determines at the time of program approval that steps had been taken to conform the development to the criteria in this subtitle insofar as possible;

(3) Land that was subdivided into recorded, legally buildable lots, where the subdivision received the local jurisdiction's final approval between June 1, 1984 and December 1, 1985; and

(4) Land that was subdivided into recorded, legally buildable lots, where the subdivision received the local jurisdiction's final approval after December 1, 1985, provided that either development of any such land conforms to the criteria in this subtitle, or the area of the land is counted by the local jurisdiction against the growth increment permitted under Regulation .06.

C. For purposes of implementing this regulation, a local jurisdiction shall have determined, based on land uses and development in existence on December 1, 1985, which land areas fall within the three types of development areas described in this chapter. *LDA, LDA, RCA*

D. Nothing in this regulation may be interpreted as altering any requirements for development activities set out in COMAR 27.01.03 and 27.01.09 of this subtitle.

## Administrative History

Effective date: May 13, 1986 (12:24 Md. R. 2352)

COMAR 14.15 became effective upon the enactment of Resolution No. 37 (SJ 9), Acts of 1986.

COMAR 14.15.09 recodified to COMAR 27.01.09 in August, 1992

Regulation .02 repealed and new Regulation .02 adopted as an emergency provision effective October 1, 1993 (20:21 Md. R. 1651); emergency status expired April 1, 1994

Regulation .02 repealed and new Regulation .02 adopted as an emergency provision effective June 1, 1994 (21:13 Md. R. 1153); adopted permanently effective October 24, 1994 (21:21 Md. R. 1816)

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COASTAL BAYS

SUBTITLE 01. CRITERIA FOR LOCAL CRITICAL AREA PROGRAM DEVELOPMENT  
CHAPTER 09. HABITAT PROTECTION AREAS IN THE CRITICAL AREA

COMAR 27.01.09.01 (2006)

.01 Buffer.

A. Definition. "Buffer" means an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from man-made disturbances.

B. Policies. In developing their Critical Area programs, local jurisdictions shall use the following policies with regard to the Buffer:

(1) Provide for the removal or reduction of sediments, nutrients, and potentially harmful or toxic substances in runoff entering the Bay and its tributaries;

(2) Minimize the adverse effects of human activities on wetlands, shorelines, stream banks, tidal waters, and aquatic resources;

(3) Maintain an area of transitional habitat between aquatic and upland communities;

(4) Maintain the natural environment of streams; and

(5) Protect riparian wildlife habitat.

C. Criteria. In developing their Critical Area programs, local jurisdictions shall use all of the following criteria:

(1) Local jurisdictions shall establish a minimum 100-foot Buffer landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands. The Buffer is not required for agricultural drainage ditches if the adjacent agricultural land has in place best management practices as required in COMAR 27.01.06.

(2) New development activities, including structures, roads, parking areas and other impervious surfaces, mining and related facilities, or septic systems, may not be permitted in the Buffer, except for those necessarily associated with water-dependent facilities, as set forth in COMAR 27.01.03.

(3) The Buffer shall be maintained in natural vegetation, but may include planted vegetation where necessary to protect, stabilize, or enhance the shoreline.

(4) Agricultural activities are permitted in the Buffer, if, as a minimum best management practice, a 25-foot vegetated filter strip measured landward from the mean high water line of tidal waters or tributary streams (excluding drainage ditches), or from the edge of tidal wetlands, whichever is further inland, is established, and further provided that:

(a) The filter strip shall be composed of either trees with a dense ground cover, or a thick sod of grass, and shall be so managed as to provide water quality benefits and habitat protection consistent with the policies stated in § B, above; noxious weeds, including Johnson grass, Canada thistle, and multiflora rose, which occur in the filter strip, may be controlled by authorized means;

(b) The filter strip shall be expanded by a distance of 4 feet for every 1 percent of slope, for slopes greater than 6 percent;

(c) The 25-foot vegetated filter strip shall be maintained until such time as the landowner is implementing, under an approved soil conservation and water quality plan, a program of best management practices for the specific purposes of improving water quality and protecting plant and wildlife habitat; and provided that the portion of the soil conservation and water quality plan being implemented achieves the water quality and habitat protection objectives of the 25-foot vegetated filter strip;

(d) The best management practices shall include a requirement for the implementation of a grassland and manure management program, where appropriate, and that the feeding or watering of livestock may not be permitted within 50 feet of the mean high water line of tidal water and tributary streams, or from the edge of tidal wetlands, whichever is further inland;

(e) Clearing of existing natural vegetation in the Buffer is not allowed; and

(f) Farming activities, including the grazing of livestock, do not disturb stream banks, tidal shorelines, or other habitat protection areas as described in this chapter.

\* (5) The Buffer shall be managed to achieve or enhance the functions stated in § B(1)--(5), above. Cutting or clearing of trees within the Buffer shall be prohibited except that:

(a) Commercial harvesting of trees by selection or by the clearcutting of loblolly pine and tulip poplar may be permitted to within 50 feet of the landward edge of the mean high water line of tidal waters and perennial tributary streams, or the edge of tidal wetlands, provided that this cutting does

not occur in the habitat protection areas described in COMAR 27.01.09.02, .03, .04, and .05 and that the cutting is conducted pursuant to the requirements of COMAR 27.01.05 and in conformance with a buffer management plan prepared by a registered, professional forester and approved by the Forestry Programs and the Fish, Heritage and Wildlife Administration of the Department of Natural Resources. The plan shall be required for all commercial harvests within the Buffer, regardless of the size of the area to be cut, and shall contain the following minimum requirements:

- (i) That disturbance to stream banks and shorelines shall be avoided;
  - (ii) That the area disturbed or cut shall be replanted or allowed to regenerate in a manner that assures the availability of cover and breeding sites for wildlife, and reestablishes the wildlife corridor function of the Buffer; and
  - (iii) That the cutting does not involve the creation of logging roads and skid trails within the Buffer.
- (b) Commercial harvesting of trees, by any method, may be permitted to the edge of intermittent streams provided that the cutting is conducted pursuant to the requirements of § C(5)(a), above.
- (c) Cutting of trees or removal of natural vegetation may be permitted where necessary to provide access to private piers, or to install or construct a shore erosion protection device or measure, or a water-dependent facility, providing the device, measure, or facility has received all necessary State and federal permits.
- (d) Individual trees may be cut for personal use providing that this cutting does not impair the water quality or existing habitat value or other functions of the Buffer as set forth in the policies of this chapter, and provided that the trees are replaced on an equal basis for each tree cut.
- (e) Individual trees may be removed which are in danger of falling and causing damage to dwellings or other structures, or which are in danger of falling and thereby causing the blockage of streams, or resulting in accelerated shore erosion.
- (f) Horticultural practices may be used to maintain the health of individual trees.
- (g) Other cutting techniques may be undertaken within the Buffer and under the advice and guidance of the Departments of Agriculture and Natural Resources, if necessary to preserve the forest from extensive pest or disease infestation or threat from fire.
- (6) Where agricultural use of lands within the area of the Buffer ceases and the lands are proposed to be converted to other uses, the Buffer shall be established. In establishing the Buffer, management measures shall be undertaken to provide forest vegetation that assures the Buffer functions set forth in the policies of this chapter.
- (7) 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. In the case of contiguous slopes of 15 percent or greater, the Buffer shall be expanded 4 feet for every 1 percent of slope, or to the top of the slope, whichever is greater in extent.
- (8) 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

COMAR 27.01.09.01

functions stated in § B of this regulation. 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.

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COMAR 27.01.09.02 (2006)

.02 Nontidal Wetlands.

The provisions of COMAR 08.05.04 apply to nontidal wetlands in the Critical Area. A person conducting a regulated activity within nontidal wetlands in the Critical Area shall obtain a permit from the Department of Natural Resources. Nothing in this regulation may be interpreted as altering any requirements for development activities set out in this subtitle.

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COMAR 27.01.09.03 (2006)

.03 Threatened and Endangered Species and Species in Need of Conservation.

COMAR 27.02.02.01

## COMAR 27.02.02.01 (2006)

## .01 Definition.

"Local significance" means development of a minor scale which:

- A. Causes environmental or economic consequences that are largely confined to the immediate area of the parcel of land on which the development is located;
- B. Does not substantially affect the Critical Area program of the local jurisdiction; and
- C. Is not considered by the Commission as major development as defined in COMAR 27.02.04.

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CHAPTER 02. STATE AND LOCAL AGENCY ACTIONS RESULTING IN DEVELOPMENT  
OF LOCAL SIGNIFICANCE ON PRIVATE LANDS OR LANDS OWNED BY LOCAL  
JURISDICTIONS

## COMAR 27.02.02.02 (2006)

## .02 Criteria.

A. Development of local significance on private land or lands owned by local jurisdictions, which is caused by State or local agency actions, shall be consistent with the provisions and requirements of the Critical Area program of the local jurisdiction within which the development is proposed.

B. Before initiating or approving these actions, the State or local agency shall obtain certification from the appropriate agency within the local jurisdiction that the actions are consistent with the local Critical Area program. A description of the proposed development and the request for local certification shall be submitted to the Commission.

C. If the Commission determines that the proposed development is major development as defined in COMAR 27.02.04, then the Commission will review, and may give approval to, the projects according to the provisions of that chapter. The Commission shall notify a local jurisdiction within 15 days of receipt of the request for local certification if it determines that the project is a major development.

COMAR 27.02.02.02

D. Copies of the local jurisdiction's approval or denial of certification shall be filed with the Commission.

E. If a local jurisdiction denies certification, then the proposed development may not occur. However, State agencies may appeal denials to the Commission according to the procedures set forth in COMAR 27.02.08.

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CHAPTER 03. GENERAL APPROVAL OF STATE AND LOCAL AGENCY PROGRAMS WHICH RESULT IN DEVELOPMENT OF LOCAL SIGNIFICANCE ON PRIVATE LANDS OR LANDS OWNED BY LOCAL JURISDICTIONS

COMAR 27.02.03 (2006)

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Authority: Natural Resources Article, § 8-1814,  
Annotated Code of Maryland

**Administrative History**

Effective date: June 11, 1988 (15:7 Md. R. 852)

COMAR 14.19.01 recodified to COMAR 27.01.01 in August, 1992

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"Major development" means development of a scale that may cause State-wide, regional, or inter-jurisdictional, environmental or economic effects in the Critical Area, or which may cause substantial impacts on the Critical Area program of a local jurisdiction. This development includes, but is not limited to, airports, power plants, wastewater treatment plants, highways, regional utility transmission facilities, prisons, hospitals, public housing projects, public beaches, and intensely developed park and recreation facilities.

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DEVELOPMENT ON PRIVATE LANDS OR LANDS OWNED BY LOCAL JURISDICTIONS

COMAR 27.02.04.02 (2006)

.02 Criteria.

A. New major development which is caused by State or local agency actions shall, to the extent practical, be located outside the Critical Area.

B. If the siting of this development in the Critical Area is unavoidable because of water dependency or other locational requirements that cannot be satisfied outside the Critical Area, the State or local agency responsible for the development, or the agency proposing a capital project, or the private sponsor, shall seek approval for the development from the Commission.

C. In seeking approval, the agency or the private sponsor shall submit the following information to the Commission:

(1) Findings, supported by adequate documentation, showing the extent to which the project or development is consistent with the provisions and requirements of the Critical Area program of the local jurisdiction within which it is located; and

(2) An evaluation of the effects of the project on the Critical Area program of the local jurisdiction, or jurisdictions, within which it is located, including any effects on the jurisdiction's growth allocation as described in COMAR 27.01.02.06.

COMAR 27.02.04.02

D. Upon receipt of a request for approval, the Commission shall seek comments on the proposed development from the affected local jurisdictions and from the general public.

E. The Commission shall approve, deny, or request modifications to, the proposed development based on an assessment of the effects of the development on the criteria described in COMAR 27.01, and on the approved local Critical Area program which may be affected by the development. Appeal of the Commission's decision may be made according to the procedures set forth in COMAR 27.02.08.

F. Commission approval of development in an area that is designated as a resource conservation area by the local jurisdiction does not have the effect of diminishing the acreage of resource conservation area within that jurisdiction or diminishing the acreage of growth allocation as described in COMAR 27.01.02.06.

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CHAPTER 05. STATE AGENCY ACTIONS RESULTING IN DEVELOPMENT ON STATE-  
OWNED LANDS

COMAR 27.02.05 (2006)

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Authority: Natural Resources Article, § § 8-1806 and 8-1814,  
Annotated Code of Maryland

## Administrative History

Effective date: June 11, 1988 (15:7 Md. R. 852)

COMAR 14.19.05 recodified to COMAR 27.02.05 in August, 1992

Regulation .10 repealed and new Regulation .10 adopted as an emergency provision effective October 1, 1993 (20:21 Md. R. 1652); emergency status expired April 1, 1994

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\*\*\* CURRENT THROUGH THE 2005 REGULAR SESSION AND CHAPTERS 1 THROUGH 17  
OF THE 2006 REGULAR SESSION \*\*\*  
\*\*\* ANNOTATIONS ARE CURRENT THROUGH FEBRUARY 7, 2006 \*\*\*

NATURAL RESOURCES  
TITLE 8: WATERS  
SUBTITLE 18. CHESAPEAKE AND ATLANTIC COASTAL BAYS CRITICAL AREA  
PROTECTION PROGRAM

**GO TO MARYLAND STATUTES ARCHIVE DIRECTORY**

Md. NATURAL RESOURCES Code Ann. § 8-1801 (2006)

§ 8-1801. Declaration of public policy

(a) Findings. -- The General Assembly finds and declares that:

(1) The Chesapeake and the Atlantic Coastal Bays and their tributaries are natural resources of great significance to the State and the nation;

(2) The shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats;

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) Human activity is harmful in these shoreline areas, where the new development of non-water-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus it is necessary whenever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

(5) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

(6) Those portions of the Chesapeake and the Atlantic Coastal Bays and their tributaries within Maryland are particularly stressed by the continuing population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor and along the Atlantic Coast;

(7) The quality of life for the citizens of Maryland is enhanced through the restoration of the quality and productivity of the waters of the Chesapeake and the Atlantic Coastal Bays, and their tributaries;

(8) The restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands, particularly in the buffer;

(9) The cumulative impact of current development and of each new development activity in the buffer is inimical to these purposes; and

(10) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity in a consistent and uniform manner along shoreline areas of the Chesapeake and the Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

(b) Purpose. -- It is the purpose of the General Assembly in enacting this subtitle:

(1) To establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and

(2) To implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria and oversight.

**HISTORY:** 1984, ch. 794; 1990, ch. 6, § 2; 1991, ch. 55, § 1; 2002, chs. 431, 432, 433; 2004, chs. 25, 526.

**NOTES:**

**EFFECT OF AMENDMENTS.** --Chapters 431 and 432, Acts 2002, both effective June 1, 2002, made identical changes. Each reenacted this section without change.

Chapter 433, Acts 2002, effective June 1, 2002, substituted "and the Atlantic Coastal Bays and their" for "Bay and its" throughout the section; and inserted "and along the Atlantic Coast" at the end of (a) (5).

Chapter 25, Acts 2004, approved April 13, 2004, and effective from date of enactment, reenacted (a) without change; and substituted "and Atlantic Coastal Bays" for "Bay" in the subtitle heading preceding the section.

Chapter 526, Acts 2004, effective June 1, 2004, inserted present (a)(4) and redesignated the remaining subsections accordingly; added "particularly in the buffer" at the end of (a)(8); and inserted "and of each new development activity in the buffer" in (a)(9).

**EDITOR'S NOTE.** --Section 2, chs. 431 and 432, Acts 2002, provides that "this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any variance application for which a petition for judicial review of a decision to grant or deny a variance under a local critical area program was filed before June 1, 2002."

Section 2, ch. 433, Acts 2002, provides that:

"(a)(1) Except as provided in subsection (b) of this section, this Act may not be construed to apply to the initial development of a planned unit development, as defined in § 5-1601 of the Natural Resources Article, and including a residential planned community:

(i) for which the following are issued prior to June 1, 2002:

1. a valid Step III approval in accordance with the current Worcester County Zoning and Subdivision Control Ordinance; and

2. at least 3 of the following State permits:

A. groundwater discharge or surface water discharge;

B. nontidal wetlands;

C. water quality certification; and

D. water appropriation; and

(ii) which is subdivided into recorded and legally buildable lots.

(2) The growth allocation for Worcester County's Atlantic Coastal Bays resource conservation area shall be reduced by an amount equal to the total acreage exempted under this subsection that is or would be located in a resource conservation area multiplied by 25%.

(b)(1) Except as provided in paragraph (2) of this subsection, if a planned unit development described in subsection (a) of this section includes an inland marina built after April 8, 2002:

(i) at least 85% of the dwelling units in the planned unit development shall comply with the buffer requirements in COMAR 27.01.09.01; and

(ii) no dwelling unit may have a buffer of less than 50 feet from existing or proposed tidal waters, tidal wetlands, or tributary streams.

(2) Paragraph (1) of this subsection may not apply to those dwelling units immediately adjacent to tidal waters in an inland marina built after April 8, 2002."

Section 3, ch. 433, Acts 2002, provides that "for the purpose of making improvements, this Act may not be construed to apply to a property:

"(1) that, as of January 1, 2002, has received a valid special exception for fairground or racetrack use in an agricultural district; and

(2) is used consistently with that special exception."

Section 4, ch. 433, Acts 2002, provides that "this Act may not be construed to apply to the initial development of the undeveloped property in Ocean City, Maryland, known locally as 'Holland's Island,' in accordance with the final site plan approval received on March 27, 2002."

Section 5, ch. 433, Acts 2002, provides that "Starting at a point in Worcester County at the intersection of Gum Point Road and the Wilkerson-Steen property line, proceeding north to the Caffi-Steen line, following on to the Park-Steen line, on to the Chamberlain-Steen line, to the Parsons-Steen line, to the Wyatt-Steen line, at which point the line turns east on the Wyatt-Steen line, turning north at the Wyatt-Steen boundary line to the Ocean Pines Association-Steen southern boundary line with Ocean Pines, then turning east along the Ocean Pines-Steen line to the northern stream and ditch at Mud Creek, then follows the stream and ditch to Gum Point Road, then along Gum Point Road to the starting point."

Section 6, ch. 433, Acts 2002, provides that:

"(1) Section 5 of this Act shall take effect only if, on or before July 1, 2003:

(i) the property described under Section 5 of this Act has been acquired by the Young Men's Christian Association; and

(ii) three of the four following State permits are issued to the YMCA:

1. groundwater discharge or surface water discharge;

2. nontidal wetlands;
3. water quality certification; and
4. water appropriation; and

(2) If the events described under paragraph (1) of this section do not occur on or before July 1, 2003, with no further action required by the General Assembly, Section 5 of this Act shall be abrogated and of no further force and effect after July 1, 2003.

(3) If the events described under paragraph (1) of this section occur, the property remains subject to the growth allocation provisions of the Critical Area law and regulations."

Section 4, ch. 25, Acts 2004, provides that "the provisions of this Act are intended solely to correct technical errors in the law and there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this Act."

**BILL REVIEW LETTER.** --Chapter 526, Acts 2004 (House Bill 1009 and Senate Bill 694) was approved for constitutionality and legal sufficiency as the denial of a variance under the standards specified in the bill would not amount to an unconstitutional taking in violation of the United States Constitution. (Letter of the Attorney General dated March 8, 2004.)

**MARYLAND LAW REVIEW.** --For article, "Protecting Coastal and Estuarine Resources--Confronting the Gulf Between the Promise and Product of Environmental Regulation," see 47 Md. L. Rev. 341 (1988).

For article, "Coastal Seas Governance: An International Project for Management Policy on Threatened Coastal Seas," see 47 Md. L. Rev. 481 (1988).

For article, "Nontidal Wetlands Protection in Maryland and Virginia," see 51 Md. L. Rev. 105 (1992).

**UNIVERSITY OF BALTIMORE LAW REVIEW.** --For article, "The Chesapeake Bay Critical Area Commission Regulations: Process of Enactment and Effect on Private Property Interests," see 16 U. Balt. L. Rev. 54 (1986).

For article, "Maryland's Growing Pains: The Need for State Regulation," see 16 U. Balt. L. Rev. 201 (1987).

**UNIVERSITY OF BALTIMORE LAW FORUM.** --For discussion of the need for and future under the Critical Areas Legislation, see 17, No. 1 U. Balt. Law Forum 3 (1986).

For article, "The Fifth Amendment's Takings Clause: New Twists to an Evolving Doctrine," see 18.2 U. Balt. Law Forum 22 (1988).

**ILLUSTRATIVE CASES** --Motion for reconsideration of the vacation of a denial of a critical bay area variance permit by the State Department of Natural Resources, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays was denied because the Commission failed to provide evidence to contradict the variance applicant's supporting evidence, and the Commission's misuse of the legislature's findings that the cumulative impact of development harmed the bay area was not a substitute for adducing evidence that the variance proposal might have had a particularly immediate and adverse impact on water quality and natural habitats. *Lewis v. Dep't of Natural Res.*, 377 Md. 382, 833 A.2d 563 (2003).

*Overturned  
by law*

APPLIED IN *Cox v. Prince George's County*, 86 Md. App. 179, 586 A.2d 43 (1991).

QUOTED IN *People's Counsel v. Maryland Marine Mfg. Co.*, 316 Md. 491, 560 A.2d 32 (1989); *Bellanca v. County Comm'rs*, 86 Md. App. 219, 586 A.2d 62, cert. denied, 323 Md. 33, 591 A.2d 249 (1991); *Wharf at Handy's Point, Inc. v. Department of Natural Resources*, 92 Md. App. 659, 610 A.2d 314 (1992); *North v. Kent Island Ltd. Partnership*, 106 Md. App. 92, 664 A.2d 34 (1995); *Bucktail, LLC v. County Council*, 352 Md. 530, 723 A.2d 440 (1999).

STATED IN *Meredith v. Talbot County*, 80 Md. App. 174, 560 A.2d 599 (1989); *Citrano v. North*, 123 Md. App. 234, 717 A.2d 960 (1998).

CITED IN *Millison v. Wilzack*, 77 Md. App. 676, 551 A.2d 899, cert. denied, 315 Md. 307, 554 A.2d 393 (1989); *Belvoir Farms Homeowners Ass'n v. North*, 355 Md. 259, 734 A.2d 227 (1999); *White v. North*, 356 Md. 31, 736 A.2d 1072 (1999); *Kent Island Defense League, LLC v. Queen Anne's County Bd. of Elections*, 145 Md. App. 684, 806 A.2d 341 (2002), cert. denied, 371 Md. 615, 810 A.2d 962 (2002); *Lewis v. Dep't of Natural Res.*, 377 Md. 382, 833 A.2d 563 (2003).

#### NOTES APPLICABLE TO ENTIRE ARTICLE

EDITOR'S NOTE. --Many of the cases appearing in the notes to this article were decided under former statutes. These earlier cases have been retained under pertinent sections of this article where it is thought that such cases will be of value in interpreting the present statutes.

2 of 28 DOCUMENTS

Annotated Code of Maryland  
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\*\*\* CURRENT THROUGH THE 2005 REGULAR SESSION AND CHAPTERS 1 THROUGH 17  
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\*\*\* ANNOTATIONS ARE CURRENT THROUGH FEBRUARY 7, 2006 \*\*\*

NATURAL RESOURCES  
TITLE 8. WATERS  
SUBTITLE 18. CHESAPEAKE AND ATLANTIC COASTAL BAYS CRITICAL AREA  
PROTECTION PROGRAM

**GO TO MARYLAND STATUTES ARCHIVE DIRECTORY**

Md. NATURAL RESOURCES Code Ann. § 8-1802 (2006)

§ 8-1802. Definitions; parties subject to obligation imposed by subtitle

(a) Definitions. --

(1) In this subtitle the following words have the meanings indicated.

(2) "Atlantic Coastal Bays" means the Assawoman, Isle of Wight, Sinepuxent, Newport, and Chincoteague Bays.

(3) "Atlantic Coastal Bays Critical Area" means the initial planning area identified under § 8-1807 of this subtitle.

(4) "Buffer" means an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from man-made disturbances.

(5) "Chesapeake Bay Critical Area" means the initial planning area identified under § 8-1807 of this subtitle.

(6) "Commission" means the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays established in this subtitle.

(7) "Critical Area" means the Chesapeake Bay Critical Area and the Atlantic Coastal Bays Critical Area.

(8) "Development" means any activity that materially affects the condition or use of dry land, land under water, or any structure.

(9) (i) "Dwelling unit" means a single unit providing complete, independent living facilities for at least one person, including permanent provisions for sanitation, cooking, eating, sleeping, and other activities routinely associated with daily life.

(ii) "Dwelling unit" includes a living quarters for a domestic or other employee or tenant, an in-law or accessory apartment, a guest house, or a caretaker residence.

(10) "Growth allocation" means the number of acres of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area that a local jurisdiction may use to create new intensely developed areas and new limited development areas.

(11) "Includes" means includes or including by way of illustration and not by way of limitation.

(12) "Land classification" means the designation of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in accordance with the criteria adopted by the Commission as an intensely developed area or district, a limited development area or district, or a resource conservation area or district.

(13) "Local jurisdiction" means a county, or a municipal corporation with planning and zoning powers, in which any part of the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area, as defined in this subtitle, is located.

(14) (i) "Program" means the critical area protection program of a local jurisdiction.

(ii) "Program" includes any amendments to the program.

UNIVERSITY OF BALTIMORE LAW FORUM. --For discussion of the need for and future under the Critical Areas Legislation, see 17, No. 1 U. Balt. Law Forum 3 (1986).

For article, "The Fifth Amendment's Takings Clause: New Twists to an Evolving Doctrine," see 18.2 U. Balt. Law Forum 22 (1988).

POWER OF COMMISSION TO AMEND PROGRAM DEVELOPMENT CRITERIA. --The Commission does not have authority to adopt amendments to its program development criteria that would change their substance significantly. However, it does have authority to adopt amendments that would not effect a significant substantive change. 72 Op. Att'y Gen. 14 (1987).

POWER OF GENERAL ASSEMBLY TO AMEND CRITERIA. --The General Assembly has authority to amend the criteria of the Chesapeake Bay Critical Area Commission, just as it may amend the regulations of any agency. However, to do so, it must enact a statute. 72 Op. Att'y Gen. 14 (1987).

BOARD OF ZONING APPEALS WAS REQUIRED TO APPLY COUNTY CRITERIA IN VARIANCE APPLICATION. --Pursuant to subsection (a)(1), the Wicimo County, Md., Code § § 125-35 and -36 criteria were to be applied by the county board of zoning appeals in determining whether a property owner who was seeking to construct a hunting camp on his land, most of which was within the Critical Area Buffer, was entitled to a variance based on finding that it was a reasonable and significant use of the land and whether denial would impose an unwarranted hardship on him; the board's denial of his application was reversed as arbitrary and capricious where it was not based on empirical data, did not refute the owner's experts' studies and reports, was based on the erroneously applied unconstitutional takings standard, erroneously concluded that it was due to a self-imposed hardship by the owner and that it would pose a cumulative negative impact, and did not consider and make findings as to each of the criteria set out in § 125-36. *Lewis v. Dep't of Natural Res.*, 377 Md. 382, 833 A.2d 563 (2003).

QUOTED IN *Bellanca v. County Comm'rs*, 86 Md. App. 219, 586 A.2d 62, cert. denied, 323 Md. 33, 591 A.2d 249 (1991); *North v. Kent Island Ltd. Partnership*, 106 Md. App. 92, 664 A.2d 34 (1995); *Lewis v. Dep't of Natural Res.*, 377 Md. 382, 833 A.2d 563 (2003).

STATED IN *Citrano v. North*, 123 Md. App. 234, 717 A.2d 960 (1998); *Bucktail, LLC v. County Council*, 352 Md. 530, 723 A.2d 440 (1999).

CITED IN *Cox v. Prince George's County*, 86 Md. App. 179, 586 A.2d 43 (1991); *Wharf at Handy's Point, Inc. v. Department of Natural Resources*, 92 Md. App. 659, 610 A.2d 314 (1992); *Kent Island Defense League, LLC v. Queen Anne's County Bd. of Elections*, 145 Md. App. 684, 806 A.2d 341 (2002), cert. denied, 371 Md. 615, 810 A.2d 962 (2002).

USER NOTE: For more generally applicable notes, see notes under the first section of this part, subtitle, title, division or article.

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NATURAL RESOURCES  
TITLE 8. WATERS  
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PROTECTION PROGRAM

**GO TO MARYLAND STATUTES ARCHIVE DIRECTORY**

Md. NATURAL RESOURCES Code Ann. § 8-1808.1 (2006)

§ 8-1808.1. Growth allocation in resource conservation areas

(a) Legislative intent. -- This section is intended to establish conditions for development in the Chesapeake Bay Critical Area and the Atlantic Coastal Bays Critical Area in addition to those established in criteria of the Commission. However, in the event of any inconsistency between the criteria and the provisions of this section, this section shall control.

(b) Calculation of growth allocation. -- The growth allocation for a local jurisdiction shall be calculated based on 5 percent of the total resource conservation area in a local jurisdiction:

(1) In the Chesapeake Bay Critical Area at the time of the original approval of the local jurisdiction's program by the Commission, not including tidal wetlands or land owned by the federal government; or

(2) In the Atlantic Coastal Bays Critical Area at the time of the original approval of the local jurisdiction's program by the Commission, not including tidal wetlands or land owned by the federal government.

(c) Guidelines for locating new intensely developed or limited development areas. -- When locating new intensely developed or limited development areas, local jurisdictions shall use the following guidelines:

(1) New intensely developed areas should be located in limited development areas or adjacent to existing intensely developed areas;

(2) New limited development areas should be located adjacent to existing limited development areas or intensely developed areas;

(3) Except as provided in paragraph (5) of this subsection, no more than one-half of the expansion allocated in the criteria of the Commission may be located in resource conservation areas;

(4) New intensely developed or limited development areas to be located in the resource conservation area shall conform to all criteria of the Commission for intensely developed or limited development areas and shall be designated on the comprehensive zoning map submitted by the local jurisdiction as part of its application to the Commission for program approval or at a later date in compliance with § 8-1809(g) of this subtitle; and

(5) In Calvert, Caroline, Cecil, Charles, Dorchester, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester counties, if the county is unable to utilize a portion of the growth allocated to the county in paragraphs (1) and (2) of this subsection within or adjacent to existing intensely developed or limited development areas as demonstrated in the local plan approved by the Commission, then that portion of the allocated expansion which cannot be so located may be located in the resource conservation area in addition to the expansion allocated in paragraph (3) of this subsection. A developer shall be required to cluster any development in an area of expansion authorized under this paragraph.

(d) Growth allocation for jurisdiction subject to both critical area programs. --

(1) Subject to the conditions under paragraphs (2) and (3) of this subsection, if a jurisdiction has within its territorial limits an area that is subject to the Chesapeake Bay Critical Area program and an area that is subject to the Atlantic Coastal Bays Critical Area program, the growth allocation for that jurisdiction may be utilized within either critical area, as the jurisdiction's local program considers appropriate.

(2) A local jurisdiction's program may not utilize the growth allocation from another critical area unless the growth allocation remaining in either critical area is insufficient to allow approval of a growth allocation proposal associated with a program amendment for which the local program seeks Commission approval.

(3) A local jurisdiction's program may not transfer more than 150 acres of growth allocation to another critical area.

(e) Calculation of 1-in-20 acre density of development. --

(1) Except as authorized under paragraph (2) of this subsection, in calculating the 1-in-20 acre density of development that is permitted on a parcel located within the resource conservation area, a local jurisdiction:

(i) Shall count each dwelling unit; and

(ii) May permit the area of any private wetlands located on the property to be included, under the following conditions:

1. The density of development on the upland portion of the parcel may not exceed 1 dwelling unit per 8 acres; and

2. The area of private wetlands shall be estimated on the basis of vegetative information as designated on the State wetlands maps.

(2) (i) Within a resource conservation area, a local jurisdiction may consider one additional dwelling unit per lot or parcel as part of a primary dwelling unit for the purpose of the density calculation under this subsection if the additional dwelling unit:

1. A. Is located within the primary dwelling unit or its entire perimeter is within 100 feet of the primary dwelling unit;

B. Does not exceed 900 square feet in total enclosed area; and

C. Is served by the same sewage disposal system as the primary dwelling unit; or

2. A. Is located within the primary dwelling unit;

B. By its construction, does not increase the amount of impervious surface already attributed to the primary dwelling unit; and

C. Is served by the same sewage disposal system as the primary dwelling unit.

(ii) The provisions of this paragraph may not be construed to require a local jurisdiction to consider an additional dwelling unit as part of a primary dwelling unit for the purpose of the density calculation under this subsection.

(iii) An additional dwelling unit meeting all the criteria under subparagraph (i) of this paragraph that is separate from the primary dwelling unit may not be subdivided or conveyed separately from the primary dwelling unit.

(3) (i) Each local jurisdiction shall:

1. Maintain records of all building permits issued under this subsection for additional dwelling units considered part of a primary dwelling unit; and

2. Provide this information on a quarterly basis to the Commission.

(ii) Beginning on November 1, 2004 and annually thereafter, the Commission shall report, subject to § 2-1246 of the State Government Article, to the Senate Education, Health, and Environmental Affairs Committee, the House Environmental Matters Committee, and the Joint Committee on the Chesapeake and Atlantic Coastal Bays Critical Area regarding the construction of additional dwelling units considered part of a primary dwelling unit under this subsection.

(4) The provisions of this subsection:

(i) Apply to density calculations only; and

(ii) May not be construed to authorize a local jurisdiction to grant a variance, unless the variance is granted in accordance with the requirements of § 8-1808(d) of this subtitle.

**HISTORY:** 1986, ch. 602; 1990, ch. 6, § 2; ch. 649, § § 1, 2; 1991, ch. 55, § 1; 2002, ch. 433; 2004, ch. 546.

**NOTES:**

**EFFECT OF AMENDMENTS.** --Chapter 433, Acts 2002, effective June 1, 2002, inserted "and the Atlantic Coastal Bays Critical Area" in (a); substituted "in a local" for "in the local" in the introductory language of (b); in present (b) (1), added "in the Chesapeake Bay Critical Area" to the beginning, and added "or" to the end; added (b) (2); and inserted present (d) and redesignated former (d) as present (e).

Chapter 546, Acts 2004, effective June 1, 2004, rewrote (e).

\*\*\* CURRENT THROUGH THE 2005 REGULAR SESSION AND CHAPTERS 1 THROUGH 17  
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NATURAL RESOURCES  
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PROTECTION PROGRAM

GO TO MARYLAND STATUTES ARCHIVE DIRECTORY

Md. NATURAL RESOURCES Code Ann. § 8-1809 (2006)

§ 8-1809. Approval and adoption of program

(a) Statements of intent. --

(1) Within 45 days after the criteria adopted by the Commission under § 8-1808 of this subtitle become effective, each local jurisdiction shall submit to the Commission a written statement of its intent either:

(i) To develop a critical area protection program to control the use and development of that part of the Chesapeake Bay Critical Area located within its territorial limits; or

(ii) Not to develop such a program.

(2) On or before July 15, 2002, each local jurisdiction in the Atlantic Coastal Bays Critical Area shall submit to the Commission a written statement of its intent either:

(i) To develop a critical area protection program to control the use and development of that part of the Atlantic Coastal Bays Critical Area located within its territorial limits; or

(ii) Not to develop such a program.

(b) Commission may adopt program. -- If a local jurisdiction states the local jurisdiction's intent not to develop a program or fails to submit a timely statement of intent, the Commission shall prepare and adopt a program for the part of the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in that local jurisdiction.

(c) Submission of locally developed program. --

(1) If a local jurisdiction states the local jurisdiction's intent to develop a Chesapeake Bay Critical Area program, the local jurisdiction shall prepare a proposed program and submit the program to the Commission within 270 days after the effective date of the criteria adopted under § 8-1808 of this subtitle. However, if the local jurisdiction submits evidence satisfactory to the Commission that the local jurisdiction is making reasonable progress in the development of a program, the Commission may extend this period for up to an additional 180 days. Before submission of a program to the Commission within the time allowed by this subsection, a local jurisdiction shall

hold at least 1 public hearing on the proposed program, for which 2 weeks notice shall be published in a newspaper of general circulation in the local jurisdiction.

(2) If a local jurisdiction states the local jurisdiction's intent to develop an Atlantic Coastal Bays Critical Area program, the local jurisdiction shall prepare a proposed program meeting the requirements of the criteria adopted under § 8-1808 of this subtitle and submit the program to the Commission on or before January 1, 2003. However, if the local jurisdiction submits evidence satisfactory to the Commission that the local jurisdiction is making reasonable progress in the development of a program, the Commission may extend this period for up to an additional 30 days. Before submission of a program to the Commission within the time allowed by this subsection, a local jurisdiction shall hold at least 1 public hearing on the proposed program, for which 2 weeks' notice shall be published in a newspaper of general circulation in the local jurisdiction.

(d) Public hearing; approval by Commission. --

(1) Within 30 days after a program is submitted, the Commission shall appoint a panel of 5 of its members to conduct, in the affected jurisdiction, a public hearing on the proposed program.

(2) (i) Within 90 days after the Commission receives a proposed Chesapeake Bay Critical Area program from a local jurisdiction, the Commission shall approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither, the proposal shall be deemed approved.

(ii) Within 60 days after the Commission receives a proposed Atlantic Coastal Bays Critical Area program from a local jurisdiction, the Commission shall approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither, the proposal shall be deemed approved.

(3) A changed proposal shall be submitted to the Commission in the same manner as the original proposal, within 40 days after the Commission's notice. Unless the Commission approves a changed proposal or disapproves a changed proposal and states in writing the reasons for the Commission's disapproval within 40 days, the changed proposal shall be deemed approved.

(e) Adoption of program. -- Within 90 days after the Commission approves a proposed Chesapeake Bay Critical Area program or a proposed Atlantic Coastal Bays Critical Area program, the local jurisdiction shall hold hearings and adopt the program in accordance with legislative procedures for enacting ordinances. If the governing body of the local jurisdiction wishes to change any part of the approved proposal before adoption, the governing body shall submit the proposed change to the Commission for approval. Unless the Commission approves the change or disapproves the change and states in writing the reasons for the Commission's disapproval within 30 days after the Commission receives the change, the change shall be deemed approved. A changed part may not be adopted until the changed part is approved by the Commission.

(f) Programs effective within 760 days. --

(1) Within 760 days after criteria adopted by the Commission become effective, there shall be in effect throughout the Chesapeake Bay Critical Area programs approved or adopted by the Commission.

(2) On or before September 29, 2003, there shall be in effect throughout the Atlantic Coastal Bays Critical Area programs approved or adopted by the Commission.

(g) Review and proposed amendment of entire program. -- Each local jurisdiction shall review its entire program and propose any necessary amendments to its entire program, including local zoning maps, at least every 6 years. Each local jurisdiction shall send in writing to the Commission, within 60 days after the completion of its review, the following information:

- (1) A statement certifying that the required review has been accomplished;
- (2) Any necessary requests for program amendments, program refinements, or other matters that the local jurisdiction wishes the Commission to consider;
- (3) An updated resource inventory; and
- (4) A statement quantifying acreages within each land classification, the growth allocation used, and the growth allocation remaining.

(h) Proposed program amendments and refinements. --

(1) As often as necessary but not more than 4 times per calendar year, each local jurisdiction may propose program amendments and program refinements to its adopted program.

(2) (i) Except for program amendments or program refinements developed during program review under subsection (g) of this section, a zoning map amendment may be granted by a local approving authority only on proof of a mistake in the existing zoning.

(ii) The requirement in paragraph (2) (i) of this subsection that a zoning map amendment may be granted only on proof of a mistake does not apply to proposed changes to a zoning map that:

1. Are wholly consistent with the land classifications in the adopted program; or
2. Propose the use of a part of the remaining growth allocation in accordance with the adopted program.

(i) Program not to be amended without approval of Commission. -- A program may not be amended except with the approval of the Commission.

(j) Standards for approval by Commission. -- The Commission shall approve programs and program amendments that meet:

- (1) The standards set forth in § 8-1808 (b) (1) through (3) of this subtitle; and
- (2) The criteria adopted by the Commission under § 8-1808 of this subtitle.

(k) Program to be available for public inspection. -- Copies of each approved program, as the program is amended or refined from time to time, shall be maintained by the local jurisdiction and the Commission in a form available for public inspection.

(l) Correction of clear mistakes, omissions, or conflicts with criteria or laws. --

(1) If the Commission determines that an adopted program contains a clear mistake, omission, or conflict with the criteria or law, the Commission may:

- (i) Notify the local jurisdiction of the specific deficiency; and
- (ii) Request that the jurisdiction submit a proposed program amendment or program refinement to correct the deficiency.

(2) Within 90 days after being notified of any deficiency under paragraph (1) of this subsection, the local jurisdiction shall submit to the Commission, as program amendments or program refinements, any proposed changes that are necessary to correct those deficiencies.

(3) Local project approvals granted under a part of a program that the Commission has determined to be deficient shall be null and void after notice of the deficiency.

(m) Regulations. --

(1) The Commission may adopt regulations that prescribe the procedures and information requirements for program amendments and program refinements.

(2) In the absence of regulations under paragraph (1) of this subsection, a local jurisdiction may propose changes to adopted programs. Within 10 working days of receiving a proposal under this paragraph, the Commission shall:

(i) Mail a notification to the local jurisdiction that the proposal has been accepted for processing; or

(ii) Return the proposal as incomplete.

(n) Specification of change as amendment or refinement. -- A local jurisdiction may specify whether it intends a proposed change to be a program amendment or program refinement. However, the Commission shall treat a proposed change as a program amendment unless the chairman determines that the proposed change is a program refinement.

(o) Adoption of proposed amendment. --

(1) For proposed program amendments, a Commission panel shall hold a public hearing in the local jurisdiction, and the Commission shall act on the proposed program amendment within 90 days of the Commission's acceptance of the proposal. If action by the Commission is not taken within 90 days, the proposed program amendment is deemed approved.

(2) The local jurisdiction shall incorporate the approved program amendment into the adopted program within 120 days of receiving notice from the Commission that the program amendment has been approved.

(p) Adoption of proposed refinement. --

(1) Proposed program refinements shall be determined as provided in this subsection.

(2) (i) Within 30 days of the Commission's acceptance of a proposal to change an adopted program, the chairman, on behalf of the Commission, may determine that the proposed change is a program refinement. Immediately upon making a determination under this paragraph, the chairman shall notify the Commission of that determination.

(ii) If a proposed change that was specifically submitted as a program refinement is not acted on by the chairman within the 30-day period, the Commission shall notify the appropriate local jurisdiction that the proposed change has been deemed to be a program amendment.

(3) (i) The Commission may vote to override the chairman's determination only at the first Commission meeting where a quorum is present following the chairman's determination.

(ii) If the chairman's determination is overridden, the proposed change is deemed a program amendment, which shall be decided by the Commission in accordance with the procedures for pro-

gram amendments provided in this section, except that the Commission shall act on the program amendment within 60 days after a vote to override the chairman.

(iii) If the chairman's determination is not overridden, within 10 working days after the opportunity to override the chairman's decision under item (i) of this paragraph, the chairman, on behalf of the Commission, shall:

1. Approve the proposed program refinement and notify the local jurisdiction;
2. Deny the program refinement; or
3. Send the proposed program refinement back to the local jurisdiction with a list of specific changes to be made.

(iv) Within 10 working days of receiving a changed program refinement changed in accordance with item (iii) 3 of this paragraph, the chairman shall approve or deny the program refinement.

(4) A local jurisdiction shall incorporate an approved program refinement into its adopted program within 120 days of receiving notice from the chairman that the program refinement has been approved.

(q) Combination of amendments or refinements for approval of project. -- As necessary, a local jurisdiction may combine any or all proposed program amendments or program refinements required for a specific project approval into a single request to the Commission for program amendment, program refinement, or both. Approval by the Commission of a program amendment, program refinement, or both does not affect the Commission's authority to receive notice of or intervene in a project approval that was not specifically approved by the Commission as part of its approval of a program amendment or program refinement.

(r) Adoption of amended criteria. -- Within 6 months after the adoption of amended criteria, a local jurisdiction shall send to the Commission:

(1) Proposed program amendments or program refinements that address the amended criteria;  
or

(2) A statement describing how the adopted program conforms to the amended criteria and certifying that the adopted program is consistent with the amended criteria.

(s) Regulations concerning use of growth allocation. -- If the Commission adopts a regulation concerning the use of the growth allocation, any use of the growth allocation must be in accordance with that regulation for the change to be considered a program refinement.

**HISTORY:** 1984, ch. 794; 1986, ch. 601; 1987, ch. 11, § 1; 1990, ch. 6, § 2; ch. 649, § 2; 1993, ch. 5, § 1; 2002, chs. 431, 432, 433.

**NOTES:**

**EFFECT OF AMENDMENTS.** -- Chapters 431 and 432, Acts 2002, both effective June 1, 2002, made identical changes. Each, in the introductory language of (g), substituted "every 6 years" for "every 4 years beginning with the 4-year anniversary of the date that the program became effective and every 4 years after that date," and substituted "the completion of its review" for "each 4-year anniversary."

Chapter 433, Acts 2002, effective June 1, 2002, added present (a) (2); inserted "or Atlantic Coastal Bays Critical Area" in (b); inserted "Chesapeake Bay Critical Area" in present (c) (1), present (d) (2) (i), and (e); added present (c) (2), (d) (2) (ii), and (f) (2); and inserted "or a proposed Atlantic Coastal Bays Critical Area Program" in (e).

EDITOR'S NOTE. --Section 2, chs. 431 and 432, Acts 2002, provides that "this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any variance application for which a petition for judicial review of a decision to grant or deny a variance under a local critical area program was filed before the effective date of this Act."

UNIVERSITY OF BALTIMORE LAW FORUM. --For discussion of the need for and future under the Critical Areas Legislation, see 17, No. 1 U. Balt. Law Forum 3 (1986).

For article, "The Fifth Amendment's Takings Clause: New Twists to an Evolving Doctrine," see 18.2 U. Balt. Law Forum 22 (1988).

LEGISLATIVE INTENT REGARDING CRITERIA. --The process set up in subsections (a), (c), (f), and (i) of this section reflects the General Assembly's intent that the criteria, once implemented, are not to be changed in ways that would vitiate the efforts of local governments to develop complying programs. 72 Op. Att'y Gen. 14 (1987).

POWER OF COMMISSION TO AMEND PROGRAM DEVELOPMENT CRITERIA. --The Commission does not have authority to adopt amendments to its program development criteria that would change their substance significantly. However, it does have authority to adopt amendments that would not effect a significant substantive change. 72 Op. Att'y Gen. 14 (1987).

POWER OF GENERAL ASSEMBLY TO AMEND CRITERIA. --The General Assembly has authority to amend the criteria of the Chesapeake Bay Critical Area Commission, just as it may amend the regulations of any agency. However, to do so, it must enact a statute. 72 Op. Att'y Gen. 14 (1987).

PROGRAM APPROVAL GUIDELINES. --In determining whether local programs meet the standards of this subtitle and the criteria established by the Commission thereunder, the Commission should follow these guidelines: (1) Mandatory criteria must be applied by the Commission as written and must be adhered to without variance by those to whom the criteria apply; (2) criteria written in directory terms should be construed to require that those preparing, submitting, or reviewing local programs at least consider the particular matter but absence of such a matter should not be the sole cause of disapproval; and (3) criteria that admit of more than one reasonable construction should be considered as to 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, the Commission has broad discretion to determine that a proposed element is consistent with the intent underlying the criterion. 73 Op. Att'y Gen. 57 (1988).

APPROVAL OF PROGRAM BY OPERATION OF LAW. --Because a county's proposed program was found to be complete and yet was not acted upon within 90 days of its receipt, that program

## CERTIFICATE OF SERVICE

I hereby certify that in accordance with Maryland Rules, Rule 8-502(c), twenty copies of this Brief of *Amicus Curiae* The Chesapeake Bay Foundation, Inc., were filed with the Clerk of this Court, and that two copies of this brief were mailed, postage-prepaid, to counsels for the Appellee, Appellant and other *Amicus Curiae* at the address listed below, on this 23rd day of July, 2007:

John H. Zink, III  
Venable LLP  
210 Allegheny Avenue  
P.O. Box 5517  
Towson, MD 21285-5517

C. Daniel Saunders  
Christina Harding Landskroener  
P.O. Box 158  
Chestertown, MD 21620

Thomas A. Deming  
506 Sunwood Lane  
Annapolis, MD 21409



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Jon Mueller

## **APPENDIX**

Exhibits A and B to the Appendix attached hereto are not part of the record on appeal as they were generated by amicus curiae who was not a party to the Circuit Court action or the appeal below. They are submitted as support for the statements of *amicus curiae* in its brief.

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Exhibit A Hovnanian's Hydric Soils map

Exhibit B Hovnanian's DNR Tidal and Non-Tidal Wetlands map



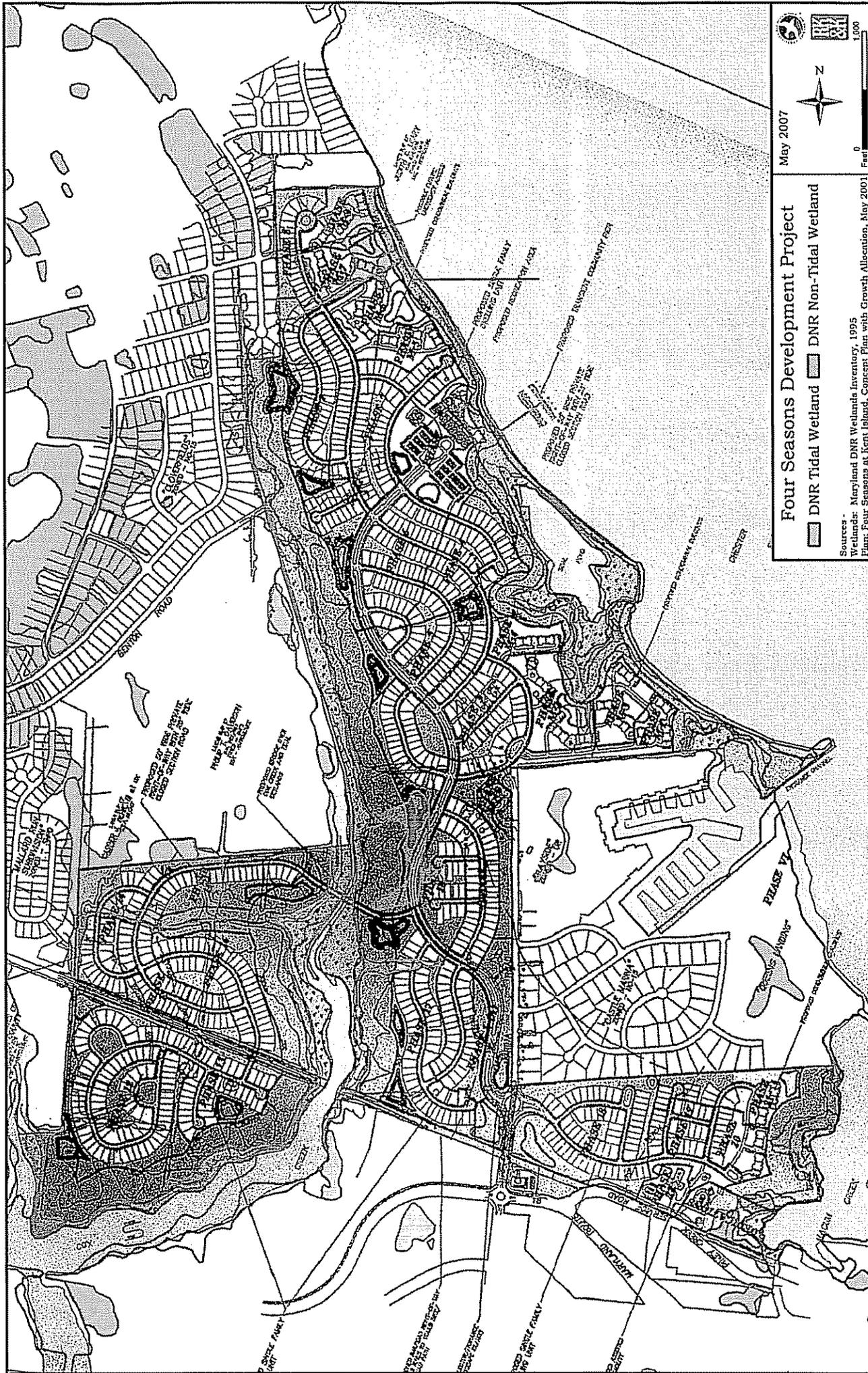


EXHIBIT B