



# **Enforcement in Maryland's Critical Area: Perception and Practice**

University of Maryland Environmental Law Clinic

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## **Executive Summary**

Bob Gallagher, on behalf of the West/Rhode Riverkeeper and other Maryland Waterkeepers, asked the University of Maryland Environmental Law Clinic in the fall of 2005 to study the implementation and enforcement of the Maryland Critical Area Act. This report is a response to that request.

After reviewing numerous files at the Critical Area Commission, analyzing survey responses from a variety of individuals, governments and groups, and conducting interviews with certain stakeholders, the Clinic found that there are problems with both the way the law is written, as well as the way it is enforced. The Clinic's research found that violations of the Critical Area Act are occurring due to a need to improve enforcement efforts and a need to strengthen the Act. In addition, Marylanders need to better appreciate how each individual's actions impact the environment. Increased education will aid in the enforcement of, as well as in the understanding of the accomplishments and limitations of, the Critical Area Act.

This report does not provide recommendations on how to improve the text or enforcement of the Critical Area Act. We hope that this report can be a useful addition to the Critical Area Act debate, and aid in formulating solutions to enforcement problems. However, it was the Clinic's goal to provide a variety of data and its analysis, and to allow others to come to a conclusion on how to best resolve these issues. In addition, it is important to understand that each jurisdiction covered by the law faces its own unique issues. The Clinic attempted to summarize problems that often occur, but each jurisdiction will differ in some respect from the others.

## **Key Findings**

Below is a summary of the major findings of the report. The findings are broken down into three sections, depending on what issue the finding relates to. The sections are: The Purpose and Structure of the Critical Area Act; Enforcement and Implementation Concerns; and Views of the Critical Area Act.

### **The Purpose and Structure of the Critical Area Act**

- The Act is limited in its scope to regulating land within 1,000 feet of tidal waters and explicitly allows for development to occur in the Critical Area. It will not solve all of the Chesapeake Bay's environmental problems on its own.
- The text of the Critical Area Act does not create strong institutional enforcement mechanisms. While the Critical Area Commission can recommend what development should be approved or denied, only local jurisdictions have the authority to make decisions on what development to allow. The Commission's power to challenge local Critical Area decisions is limited and entirely discretionary.

- The State's role in the enforcement and implementation of the Act, through the Commission, is mostly advisory. Although the Commission's role increased in 2004, local jurisdictions are primarily responsible for enforcement and implementation, and rarely if ever ask for Commission assistance with enforcement.
- The granting of variances does not necessarily reflect a problem with enforcement, and a decrease in the number of approved variance applications does not necessarily reflect better enforcement of the law. Rather, decisions to grant or deny variances reflect the private property rights vs. environmental conservation policy choices of local officials. The law allows for most variance applications on grandfathered lots to be approved. To be sure, there are exceptions where the granting of a variance may reflect improper enforcement of the law, but this is generally not the case.

### Enforcement and Implementation Concerns

- In many cases, the various parties responsible for enforcing the Critical Area Act use their discretion to interpret the Act in ways that minimize impacts to private property owners, at the expense of stricter environmental standards. Examples of this include the Critical Area Commission's policy of approving most living space expansions on grandfathered lots, and Queen Anne County's minimal replanting requirements.
- Many enforcement problems stem from landowners who negligently, but not willfully violate the law. Major issues such as Little Dobbins Island occur much less frequently, but are much more widely reported.
- With the exception of Anne Arundel County, very few fines are issued for violations. Most jurisdictions are incapable of dealing with the costs of litigation that almost always accompanies the issuance of a fine. Many jurisdictions also feel that requiring mitigation is a more beneficial way of dealing with violators.
- Enforcement relies heavily on public participation and education. A greater understanding of the relationship between the actions of private landowners and the impacts on the Chesapeake Bay could reduce Critical Area Act violations.
- Local enforcement is almost entirely responsive, instead of proactive, allowing many Critical Area violations to go unnoticed. Local officials rely heavily on individual complaints to notify them that a site inspection is needed and that a Critical Area violation may have occurred.
- Local governments do not have sufficient resources to proactively seek out Critical Area violations. For example, none of the jurisdictions the Clinic surveyed own a boat from which they can view Critical Area violations, and according to the Critical Area Commission, most do not have enough inspectors to seek out and remedy all of the Critical Area violations.

- Site plans, permits, variances, and other applications are reviewed on a highly individualized, case-by-case basis. There is no analysis of the cumulative impacts associated with development that occurs in the Critical Area.
- Although some jurisdictions are more committed than others, the Clinic did not find any blatant disregard for the enforcement of the Act. Institutional limitations and limited resources affect the performance of many jurisdictions.
- Enforcement is often driven by the personalities and personal philosophies of decision-makers; some local officials are more apt to tip the scales in favor of property rights than conservation. The Act's standards are flexible enough that this can occur without the local jurisdiction technically violating the law.
- The Act is supposed to be implemented cooperatively, but oftentimes there is little to no cooperation between the levels of government. Frequently there is also friction on how to balance the dual purposes of the law.
- There are enormous differences in development pressures and activities amongst the jurisdictions covered by the Act, which results in widely differing types of Critical Area enforcement problems.

### Views of the Critical Area Act

- The public has as many varying perspectives of the Critical Area Act today as it did when the Act was first passed. However, it has now been forgotten that the law was intended as only a first step in addressing the relationship between development and the health of the Bay.
- When asked to state the purpose of the Critical Area Act, most stakeholders respond that its purpose is to minimize adverse impacts on water quality. However, the Act has an additional purpose of accommodating growth, which seems to have been forgotten. This lack of understanding of the dual purposes of the Act may be a factor in shaping the stakeholders' views of the enforcement of the Act.
- There are two different types of Critical Area Act enforcement problems that require very different solutions, and there is disagreement as to which is more important. Routine, small-scale violations threaten the Bay with death by a thousand cuts, but the much less frequently occurring, large-scale violations set terrible precedent and have a larger individual impact.
- There are conflicting views on how to deal with violators of the Act. Some think it is better to work with a violator to solve the problem rather than to impose fines, and others think heavy fines should always be imposed as a deterrent to violators. Some think requiring mitigation on-site is more beneficial than allowing a violator to pay fees-in-lieu of mitigation; others disagree and think some combination of the two is the best approach.

## **Section I: Introduction and Methodology**

### **Introduction**

The West/Rhode Riverkeeper, Inc., one of ten Maryland Waterkeepers who patrol area waters in order to identify and eliminate sources of illegal pollution, asked the University of Maryland Environmental Law Clinic (Clinic) on behalf of the Maryland Waterkeepers to analyze whether Maryland's Critical Area Act has been implemented and enforced in a manner consistent with the Act's intent and whether the Act itself is written in a way that will help preserve the Chesapeake Bay. The other Maryland Waterkeepers are: Anacostia Riverkeeper, Assateague Coastkeeper, Chester Riverkeeper, Lower Susquehanna Riverkeeper, Patapsco Riverkeeper, Patuxent Riverkeeper, Potomac Riverkeeper, Severn Riverkeeper, and South Riverkeeper.<sup>1</sup> Numerous issues associated with possible violations of the law have come to the attention of the Maryland Waterkeepers. Based on information obtained by the Waterkeepers, some of the possible violations in the Critical Area include: clearing of vegetation and/or trees; building structures without or beyond the scope of a permit; and dredging non-tidal wetlands. County officials were contacted by the Maryland Waterkeepers in response to these possible violations and they believed, in a number of cases, that insufficient action was taken. In one case, although a homeowner cleared vegetation in excess of his buffer management plan, the county failed to find that any violation occurred. These problems, along with numerous news stories regarding Critical Area violations, provided the impetus for the commission of this report.

We would be remiss if we did not acknowledge the Little Dobbins Island controversy that has kept Critical Area issues in the news for months and provided additional grounds for an in-depth look into the Act. The controversy involves a home builder who constructed a 6,000 square foot home on Little Island, in Anne Arundel County, without applying for any necessary environmental or construction permits. In addition to the house, he constructed a 71 foot gravel road built on coastal wetlands as part of a boat launch.<sup>2</sup> The homeowner obtained permits to perform minor renovations to the original home on the island, but instead demolished the house and built a much larger one in its place.<sup>3</sup> In addition to the home, a replica lighthouse, pool, and waterfront gazebo were built.<sup>4</sup> Such serious violations of the Act begged the questions: Are violations of the Critical Area Act occurring because of a lack of enforcement or because the law is too weak? Or are both factors contributing to these violations?

The Clinic would like to thank the following individuals, who made such a complete report possible. First, we would like to thank Ren Serey, Executive Director of the Critical Area Commission, for participating in a number of interviews and allowing

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<sup>1</sup> West/Rhode Riverkeeper, Inc. and other Maryland Waterkeepers are affiliated with the Waterkeeper Alliance. For more information, visit <http://www.westrhoderiverkeeper.org> or <http://www.waterkeeper.org>.

<sup>2</sup> Childs Walker, *Big Home Lacks Only One Thing: Permits*, BALT. SUN, Dec. 6, 2004, at 1B.

<sup>3</sup> Childs Walker, *Anne Arundel Officials File Suit Over Home Construction on Island*, BALT. SUN, May 18, 2005, at 1B.

<sup>4</sup> *Id.*

us to spend countless days reviewing files at the Commission. We would also like to thank Bob Cicconetti and the rest of the Critical Area Commission staff members for pulling files for us to review and assisting us in our file review. Also, we would like to thank all of the counties, local jurisdictions, state government officials, Circuit Riders, public interest advocates, and business interest representatives who took the time to complete our surveys or interview with us. We know how valuable your time is and we sincerely appreciate all of your assistance in furthering our research for this report.

## **Methodology**

In order to answer questions about Critical Area enforcement, the Clinic reviewed vast amounts of data from a number of sources. Data regarding variances, subdivisions, and site plans were reviewed along with the details of some local programs. By reviewing such data we hoped to get a sense of exactly what types of projects were proposed and approved for development in the Critical Area. Furthermore, we wanted to go beyond the basic statistics of how many projects were approved, and examine the reasons for the ultimate approval or disapproval of a project. The Clinic also conducted interviews with a number of stakeholders either in person or by telephone. These interviews provided us information on how different groups view the Act, as well as additional information regarding some local enforcement efforts. Data was reviewed and carefully analyzed in order to fully breakdown Maryland's Critical Area enforcement issues. The chart below summarizes the various phases of our research.

## Phases of Research

<b>Steps</b>	<b>Research Method</b>	<b>Purpose of Research</b>	<b>Report Component</b>
Step One	Research Critical Area Act and its Regulations; Interview Critical Area Commission Executive Director	Familiarize ourselves with the purpose and text of the Act and the role of the Commission and the local jurisdictions	Section II & Section III
Step Two	Distribute data and opinion surveys to government officials, environmental groups, developers, and other business interests	Compile data from as many jurisdictions as possible; evaluate varying explanations for problems with the Act	Section IV & Section V
Step Three	Review 2005 files on site plans, subdivisions, and variances from three counties at Critical Area Commission. Get additional data from the counties where necessary.	Examine data in-depth in order to determine exactly what development is occurring	Section IV & Section V
Step Four	Stakeholder Interviews	Provide additional analysis regarding various stakeholders' experiences with the Act and its implementation	Section IV & Section V
Step Five	Analyze Data	Explain the findings of the research	Section V

We began our research by familiarizing ourselves with the text of the Critical Area Act and its regulations. We also reviewed two reports examining other Critical Area Issues.<sup>5</sup> Thirdly, we reviewed a study conducted by the Joint Legislative Audit and Review Commission (JLARC) of the Virginia legislature analyzing how the

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<sup>5</sup> We began by reading a law review article that addressed various issues of land preservation in Maryland. Specifically the article discussed developmental and environmental pressures and also explored the role of the local governments and the courts in enforcing environmental restrictions. Gwenann Sezneck, *Effective Policies for Land Preservation: Zoning and Conservation Easements in Anne Arundel County, Maryland*, 23 VA. ENVTL. L.J. 479 (2005). The Clinic also read The Abell Foundation report, "An Evaluation of the Maryland Critical Area Program." The report "evaluates the extent to which Maryland's Critical Area program has met expectations created by the Critical Area Criteria with respect to the location, density and types of development on privately owned land in the Critical Area and the success of this aspect of the program in protecting forest and farmland from fragmentation and conversion to development." SAUNDERS C. HILLYER, AN EVALUATION OF THE MARYLAND CRITICAL AREA PROGRAM: EFFECTS ON CONSERVATION OF RESOURCE LANDS AND PATTERNS OF DEVELOPMENT 2 (The Abell Foundation 2003), at [http://abell.org/pubsitems/env\\_critical.area\\_1203.pdf](http://abell.org/pubsitems/env_critical.area_1203.pdf).

Chesapeake Bay Preservation Act has been implemented. The Chesapeake Bay Preservation Act is a Virginia law similar to the Critical Area Act and the Clinic used the JLARC study to help mold our research strategy for this report.<sup>6</sup> During this phase of our research we also spoke with the Executive Director of the Critical Area Commission, Ren Serey. We focused our initial interview with Mr. Serey on the organization of the Critical Area Commission, its authority, and the types of files that the Commission maintains.<sup>7</sup>

In step two, we distributed data and opinion surveys.<sup>8</sup> The data survey was distributed to 53 government officials whose jurisdictions are subject to Critical Area Act regulation.<sup>9</sup> Of the 53 surveys sent out, the Clinic received 16 responses—a 30 percent response rate—from counties and municipalities. This survey asked approximately five questions on each of the following: permits; variances; enforcement; and resources. When analyzing responses to the data surveys, the Clinic eliminated any questions it believed were unclear or that had likely been misunderstood by the respondents.

The opinion survey was distributed to four categories of stakeholders with specialized knowledge or experience with the Critical Area Act: (1) Public Interest Advocates, (2) State Government Officials, (3) Local Government Officials, and (4) Developers, Landowners and Other Stakeholders (Business Interests). To encourage thorough and candid responses, we assured the stakeholders that the report would not identify the direct source and that all responses would be identified by stakeholder category only. The opinion survey contained twenty questions with space for the recipient to provide additional comments.

The Clinic received 30 total responses to the opinion survey, including 14 from State and Local Government Officials, 8 from Business Interests, and 8 from Public Interest Advocates. Many recipients did not want, for various reasons, to participate in the opinion survey. The Critical Area Commission, through Senator Martin G. Madden, the Chairman of the Critical Area Commission, wrote a letter to the Clinic explaining the Commission's collective position instead of completing a survey. Some local government officials requested meetings with Clinic members to discuss the issues raised by the opinion survey because they felt that the opinion survey's questions did not provide adequate opportunity to explain their Critical Area program. Conversely, others declined participation.

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<sup>6</sup> Commonwealth of Virginia H.R. DOC. NO. 23 (2003), *available at*, <http://jlarc.state.va.us/Reports/Rpt281.pdf>.

<sup>7</sup> Telephone interview with Ren Serey, Executive Director, Critical Area Commission (Nov. 11, 2005).

<sup>8</sup> Both the data and the opinion surveys were mailed to recipients on December 3, 2005. The Clinic asked recipients to complete and return the surveys no later than January 4, 2006, and the Clinic also provided electronic Word versions of the surveys to recipients who requested them by e-mail. The Clinic continued to accept responses into April 2006 and called recipients to encourage participation.

<sup>9</sup> There are actually 61 different jurisdictions that fall within the Critical Area. However, several of these jurisdictions have been excluded from most of the program's requirements because of their extremely small size. In addition, at least two small jurisdictions jointly manage their Critical Area programs, making them a single jurisdiction for purposes of Critical Area management. Therefore, the 53 jurisdictions to which surveys were sent represent all of the jurisdictions which the Critical Area Commission supervises.

During step three, the Clinic reviewed files on site plans, variances, and permits on file with the Critical Area Commission. We received data from the Critical Area Commission database regarding the total number of variances, subdivisions, and site plans in each of the jurisdictions governed by the Act for the last three years. In-depth file review was performed for 2005 in three “focus” counties—Anne Arundel County, Queen Anne’s County, and St Mary’s County—selected for in-depth study by Bob Gallagher, the West / Rhode Riverkeeper.

For the three focus counties, the Clinic not only counted the total number of each type of file (i.e., site plans, variances and permits), but performed an in-depth review for each file. Along with other issues, each file was reviewed to determine what type of development was occurring (if any), in what section of the Critical Area the development was proposed, and what the Commission’s response was. Spreadsheets were made in order to organize and compare information from the file review.

In step four, the Clinic supplemented responses to the opinion survey by conducting several interviews. First, we attempted to conduct interviews with the counties that are focused on in the report and we interviewed two of those counties. Additionally, we interviewed two other counties in order to gain additional information regarding their local programs. Next, we interviewed four individuals who are representatives of public interest groups. We chose these individuals because it appeared from their survey responses that they had a strong understanding of the requirements of the Act. We also attempted to contact a number of businesses in order to further understand their concerns with the Act; however, they all declined to participate.

In Step V, we analyzed all of the data that we received from the survey responses, file review, and interviews. We also held several internal meetings in order to formulate conclusions from all of these data sources. The report was then drafted and several rounds of revisions were made.

## **Scope**

The report attempts to analyze the objectives of the Critical Area Act’s text and its implementation and enforcement. Given the fact that the law encompasses over sixty local programs, it was impossible for the Clinic to review and evaluate the rules and practices of all jurisdictions governed by the Act. For this reason, the Clinic attempted to gather information from all jurisdictions through data and opinion surveys and completed an in-depth file review and interview process for three focus counties: Anne Arundel; Queen Anne’s; and St. Mary’s. These counties were chosen by the West/Rhode Riverkeeper because they have diverse characteristics and currently face varying Critical Area problems. In addition, each of these counties has a Riverkeeper.

In brief, Anne Arundel County is located between Baltimore and Washington, DC. The County had a population of 489,656 in 2000<sup>10</sup> and has 534 miles of shoreline.<sup>11</sup> The land area of the County was 416 square miles in 2000.<sup>12</sup> Approximately 172 square miles of the County is water.<sup>13</sup> In that same year, Queen Anne's County had a population of 40,563 and 372 square miles of land area.<sup>14</sup> The County is located on the eastern shore of Maryland and has 138 square miles of water.<sup>15</sup> The population for St. Mary's County was 86,211 in 2000 and the County has 327 square miles of land area.<sup>16</sup> St. Mary's County is located southeast of Washington, DC. The total area of the County is 46.43% water, or 284 square miles.<sup>17</sup>

We also wanted to provide some information on the issues and resources that some of the smaller jurisdictions in the Critical Area have. For this reason, in Section III we discuss the local program of the Town of North East. In contrast to some of the Counties, this town has very little development occurring in the Critical Area and has very few resources available for use on Critical Area issues.

The scope of the report is limited in a number of respects. The report focuses on the text of the Act itself and its implementation and enforcement. Several issues such as growth allocation, land annexation, and land reclassification are not focused on in the report. Additionally, the data in the report does not involve development in the Critical Area resulting from state and local agency programs. Such development is governed by a different set of regulations found in subtitle two of title 27 of the Code of Maryland Agency Regulations (COMAR). These regulations involve state or local agency action resulting in development of private or local lands,<sup>18</sup> and state development of state-owned lands.<sup>19</sup> The data in this report focuses on development by private landowners or commercial developers and the criteria set out to regulate such development. Throughout the report, we try to indicate the basis for our findings and offer possible explanations where our data is limited. Those explanations are not the only explanations, and given the variability of Critical Area issues and programs throughout Maryland, we acknowledge that findings may vary in the jurisdictions we did not focus on in our study. Our data and analysis is meant to provide a general insight into Critical Area issues and possible reasons why violations occur and how enforcement could be improved.

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<sup>10</sup> Wikipedia Encyclopedia, Anne Arundel County Maryland, (last visited Apr. 13, 2006)  
[http://en.wikipedia.org/wiki/Anne\\_Arundel\\_County%2C\\_Maryland](http://en.wikipedia.org/wiki/Anne_Arundel_County%2C_Maryland).

<sup>11</sup> Anne Arundel County, Doing Business in Anne Arundel County, (last visited Apr. 13, 2006)  
<http://www.co.anne-arundel.md.us/Majortopics/Business.cfm>.

<sup>12</sup> Wikipedia Encyclopedia, Anne Arundel County Maryland, (last visited Apr. 13, 2006)  
[http://en.wikipedia.org/wiki/Anne\\_Arundel\\_County%2C\\_Maryland](http://en.wikipedia.org/wiki/Anne_Arundel_County%2C_Maryland).

<sup>13</sup> [http://en.wikipedia.org/wiki/Anne\\_Arundel\\_County%2C\\_Maryland](http://en.wikipedia.org/wiki/Anne_Arundel_County%2C_Maryland). (last visited Apr. 13, 2006)

<sup>14</sup> Wikipedia Encyclopedia, Queen Anne's County Maryland, (last visited Apr. 13, 2006)  
[http://en.wikipedia.org/wiki/Queen\\_Anne%27s\\_County%2C\\_Maryland](http://en.wikipedia.org/wiki/Queen_Anne%27s_County%2C_Maryland).

<sup>15</sup> Wikipedia Encyclopedia, Queen Anne's County Maryland, (last visited Apr. 13, 2006)  
[http://en.wikipedia.org/wiki/Queen\\_Anne%27s\\_County%2C\\_Maryland](http://en.wikipedia.org/wiki/Queen_Anne%27s_County%2C_Maryland).

<sup>16</sup> [http://en.wikipedia.org/wiki/St.\\_Mary%27s\\_County%2C\\_Maryland](http://en.wikipedia.org/wiki/St._Mary%27s_County%2C_Maryland). (last visited Apr. 13, 2006)

<sup>17</sup> Wikipedia Encyclopedia, St. Mary's County Maryland,  
[http://en.wikipedia.org/wiki/St.\\_Mary%27s\\_County%2C\\_Maryland](http://en.wikipedia.org/wiki/St._Mary%27s_County%2C_Maryland). (last visited Apr. 13, 2006)

<sup>18</sup> MD. REGS. CODE tit. 27, § 02.02-.04 (2005).

<sup>19</sup> MD. REGS. CODE tit. 27, § 02.05 (2005).

## **Organization**

The report begins with an Executive Summary providing an overview of the reasons for and conclusions of this report. This section also lists the key findings of the report. Section I of the report provides additional information regarding why the Clinic was asked to write this report, as well as the methodology of our research and the scope and organization of the report. The Critical Area Act and its regulations are explained in Section II. Section III of the report reviews local programs. Sections IV and V of the report examine possible areas where the text of the Critical Area Act and its implementation are inconsistent with each other. Opinions from various stakeholders regarding their evaluation of how the law has been enforced are analyzed in this section. We review data of the types of development allowed in the Critical Area and evaluate possible explanations for these inconsistencies. A review of the findings of our research concludes the report.

## **Section II: Background and Basics of the Critical Area Act**

The Critical Area Act (CAA or Act) is officially titled the “Chesapeake and Atlantic Coastal Bays Critical Area Protection Program.”<sup>20</sup> The Act was passed in 1984 as part of the State’s efforts to restore the Chesapeake Bay. The law promotes the dual objectives of preserving and protecting the Bay while also encouraging responsible growth in areas that are already developed. The stated purpose of the Act is

(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.<sup>21</sup>

The Act applies to the “Critical Area,” which is all land within 1,000 feet of the mean high tide line.<sup>22</sup> Sixty-one Maryland jurisdictions contain lands within the Critical Area.<sup>23</sup>

### **Legislative History**

In 1983, the U.S. Environmental Protection Agency (EPA) released the results of a 7-year study of the Chesapeake Bay.<sup>24</sup> This study documented for the first time the tremendous environmental decline suffered by the Bay as a result of human pressures.<sup>25</sup> In reaction to the study’s findings, Maryland, Virginia, Pennsylvania and the District of Columbia entered into the Chesapeake Bay Agreement (Bay Agreement), an interstate compact to clean up the Bay.<sup>26</sup> Maryland’s 1984 Critical Area Act stemmed directly from the commitments made in the Bay Agreement.<sup>27</sup> The CAA, by controlling land use immediately adjacent to the Bay, was intended to minimize the effects of shoreline development on the Bay ecosystem.<sup>28</sup>

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<sup>20</sup> MD. CODE ANN., NAT. RES. II § 8-1801 *et seq.* (2005).

<sup>21</sup> MD. CODE ANN., NAT. RES. II § 8-1801(b) (2005).

<sup>22</sup> MD. CODE ANN., NAT. RES. II § 8-1807; *see also* Critical Area Commission, FAQs, *at* <http://www.dnr.state.md.us/criticalarea/faq.html> (Sept. 20, 2005).

<sup>23</sup> FAQs, *supra* note 22.

<sup>24</sup> Chesapeake Bay Foundation, Bay History *at* [http://www.cbf.org/site/PageServer?pagename=about\\_history](http://www.cbf.org/site/PageServer?pagename=about_history) (Sept. 19, 2005).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Development of the Critical Area Act began in 1983, before official adoption of the Bay Agreement.<sup>29</sup> Maryland Governor Harry Hughes, in anticipation of the Governors' Conference at which the Bay Agreement would be announced, formed a working group in the spring of 1983.<sup>30</sup> This working group, known as the Wye Group, consisted of several Maryland state department heads (from the Department of Natural Resources, Tidewater Administration, and the Department of Health and Mental Hygiene), two members of the governor's staff, and the Director of the University of Maryland Center for Environmental and Estuarine Studies.<sup>31</sup> It was the Wye Group that developed the first draft of the Critical Area Act.<sup>32</sup>

The first draft of the Critical Area Act was "in essence an anthology of the approaches taken in [other states]."<sup>33</sup> The Wye Group initially considered the idea of requiring state approval of county-wide land use plans, but this was immediately rejected as an "excessive intrusion on local authority."<sup>34</sup> As an alternative to direct land use regulation, the group also considered implementing comprehensive flood management, sediment control, storm water management, and water and sewer plans. This option was also rejected as excessively intruding on local authority.<sup>35</sup> As a result of these concerns over infringement on local authority, the final draft of the Act contained "no county-wide planning requirements of any sort."<sup>36</sup>

Instead, the Wye Group designed the Critical Area Act as "corridor legislation" – regulation limited to the areas immediately adjacent to the Bay and its tributaries. A major factor in this decision was that by limiting the area of regulation, Critical Area programs could be reviewed by a special Critical Area Commission, rather than the State Department of Planning.<sup>37</sup> Review by the Critical Area Commission was deemed preferable both because the Commission would be better able to focus on the specific problems of the Bay, and because it could be designed to include substantial provisions for local representation (which the State Department of Planning lacked).<sup>38</sup>

Concern over intrusion on local authority also spurred the Wye Group to reject a proposal to make the Critical Area Commission the permitting agency for all projects

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<sup>29</sup> J. KEVIN SULLIVAN, CHESAPEAKE BAY CRITICAL AREA COMM'N, A SUMMARY OF THE CHESAPEAKE BAY CRITICAL AREA COMMISSION'S CRITERIA AND PROGRAM DEVELOPMENT ACTIVITIES 1984-1988 6 (1989).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> George W. Liebmann, *The Chesapeake Bay Critical Area Act: The Evolution of a Statute*, DAILY RECORD (Baltimore), Apr. 20, 1985, at 2. George Liebmann was the lawyer who drafted the Critical Area Act on behalf of the Wye Group (Sullivan, *supra* note 29, at 7).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* The responsibilities of the Maryland Department of Planning are to "provide data, trend analysis, research assistance, and policy development and implementation support for local governments, communities, businesses, and organizations. The Department provides technical assistance, local program review and planning design services for Maryland's Counties and municipalities." Maryland Department of Planning, About MDP, at <http://www.mdp.state.md.us/mdpbio.htm> (Apr. 7, 2006).

<sup>38</sup> Liebman, *supra* note 33.

undertaken in the Critical Area. The group concluded that such a provision would “embroil the Commission in collisions with both local authorities and developers” and that commissions with similar permitting powers in other states had consistently overstepped their bounds.<sup>39</sup> In addition, giving the Commission permitting power would require that it have a massive staff, capable of processing thousands of permit applications every year.<sup>40</sup> As a result, the Wye Group designed the Commission with the twin goals of limiting conflict with local governments and developers and limiting staff size.

Once the draft bill was brought before the Maryland General Assembly, several more important changes were made. First, the legislature increased membership on the Critical Area Commission by ten members, to guarantee each affected county a representative.<sup>41</sup> This change reflects the legislature’s great emphasis on local input and control in the Critical Area program. Second, the legislature removed a provision requiring new development to be compatible with existing scenic qualities, as well as several other aesthetics-related provisions. These changes reflected the legislature’s general “hostility to purely aesthetic regulation.”<sup>42</sup> The Critical Area Act was passed, largely in its current form, in 1984.<sup>43</sup>

## **How the Critical Area Act Works**

### **Basic Provisions**

The Critical Area Act requires the cooperation of state and local governments to implement and enforce its requirements. The State of Maryland sets out general criteria and local jurisdictions then implement their own Critical Area laws, which must meet the state-mandated criteria. The Act subdivides land in the Critical Area into three classifications: intensely developed areas, limited development areas, and resource conservation areas.<sup>44</sup> There are a number of elements that the Act requires in local Critical Area laws. For example, each local jurisdiction must have a map designating the Critical Area in their local jurisdiction, a comprehensive zoning map for the Critical Area, and as necessary, new or amended provisions of the jurisdiction’s regulations pertaining to subdivisions, zoning, and grandfathering of development.<sup>45</sup> The Act also contains

provisions to limit the amount of land covered by buildings, roads, parking lots, or other impervious surfaces, and to require or encourage cluster development, where necessary or appropriate;<sup>46</sup> requirements for

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<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.*

<sup>43</sup> MD. CODE ANN., NAT. RES. II § 8-1801 History (2005).

<sup>44</sup> MD. CODE ANN., NAT. RES. II § 8-1802(a)(12) (2005).

<sup>45</sup> MD. CODE ANN., NAT. RES. II § 8-1808 (c)(1) (2005).

<sup>46</sup> MD. CODE ANN., NAT. RES. II § 8-1808 (c)(1)(v) (2005).

minimum setbacks for structures and septic fields along shorelines...;<sup>47</sup> and provisions for the establishment of buffer areas along shorelines within which agriculture will be permitted only if best management practices are used...”<sup>48</sup>

Local jurisdictions must also have provisions regarding the granting of variances<sup>49</sup> and the assessment of penalties.<sup>50</sup> The Act provides more detailed requirements for certain activities, such as construction of piers and timber harvesting.<sup>51</sup>

## The Critical Area Commission

The Critical Area Commission (Commission or CAC) was created by the Critical Area Act and is charged with assisting local jurisdictions in complying with the Act and ensuring that the Act’s requirements are properly enforced. The Commission is composed of twenty-nine voting members who are appointed by the Governor.<sup>52</sup> One member serves as the Chairman and is appointed with the advice and consent of the Senate.<sup>53</sup> Thirteen members must be residents and elected or appointed officials of local jurisdictions from a selected group of counties.<sup>54</sup> Eight of the appointed members of the Commission are to represent “diverse interests.”<sup>55</sup> The Secretaries, or their designees, of the following Departments are ex officio members: Department of Agriculture, Department of Business and Economic Development, Department of Housing and Community Development, Department of the Environment, Department of Transportation, Department of Natural Resources, and Department of Planning.<sup>56</sup> All members except for the Chairman and the ex officio members serve for a term of 4 years<sup>57</sup> and may not serve more than two terms.<sup>58</sup>

The Commission was first tasked with creating specific criteria for the development of local Critical Area programs.<sup>59</sup> The purposes of the criteria, which were first promulgated in 1985, are “directing, managing, and controlling development so that

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<sup>47</sup> MD. CODE ANN., NAT. RES. II § 8-1808 (c)(1)(vii) (2005).

<sup>48</sup> MD. CODE ANN., NAT. RES. II § 8-1808 (c)(1)(vi) (2005).

<sup>49</sup> MD. CODE ANN., NAT. RES. II § 8-1808 (c)(1)(xiii) (2005).

<sup>50</sup> MD. CODE ANN., NAT. RES. II § 8-1808 (c)(1)(xiv) (2005). This section provides that when assessing penalties under the Act a local jurisdiction may consider: the gravity of the violation; the amount of willfulness or negligence involved in the violation; and the environmental impact of the violation.

<sup>51</sup> MD. CODE ANN., NAT. RES. II §§ 8-1808.1 – 8-1801.9 (2005).

<sup>52</sup> MD. CODE ANN., NAT. RES. II § 8-1804(a)(1) (2005).

<sup>53</sup> MD. CODE ANN., NAT. RES. II § 8-1804(a)(1)(i) (2005).

<sup>54</sup> MD. CODE ANN., NAT. RES. II § 8-1804(a)(1)(ii) (2005). Members must be from the following counties: one from each of Baltimore City, Anne Arundel, Baltimore and Prince George’s counties; one from Harford or Cecil County; one from Kent or Queen Anne’s County; one from Caroline County; one from Talbot or Dorchester County; one from Wicomico or Somerset County; two from Calvert, Charles, or St. Mary’s County (both cannot be from the same county); and two from Worcester County, one who is a resident of the Chesapeake Bay Watershed and the other who is a resident of the Atlantic Coastal Bays watershed.

<sup>55</sup> MD. CODE ANN., NAT. RES. II § 8-1804(a)(1)(iii) (2005).

<sup>56</sup> MD. CODE ANN., NAT. RES. II § 8-1804(a)(1)(iv) (2005).

<sup>57</sup> MD. CODE ANN., NAT. RES. II § 8-1804(c)(1) (2005).

<sup>58</sup> MD. CODE ANN., NAT. RES. II § 8-1804(c)(5) (2005).

<sup>59</sup> MD. CODE ANN., NAT. RES. II § 8-1802 (2005).

the adverse impacts of growth in the Critical Area are minimized.”<sup>60</sup> The specifics of the implementation of these programs are discussed in Section III of this report. Local jurisdictions then created their own, individualized Critical Area programs, in accordance with the minimum elements required by the Act (outlined above) and the criteria issued by the CAC.<sup>61</sup> The CAC subsequently reviewed and approved local jurisdictions’ newly created Critical Area programs to ensure they met the CAC criteria. This phase of the CAC’s activities was completed in 1990.<sup>62</sup> Once the local Critical Area programs were approved and in place, the CAC’s role transitioned to one of an oversight agency. Today, the CAC periodically reviews the local Critical Area programs, and approves changes to the programs.<sup>63</sup> It also must give its approval for certain limited types of development projects, or changes in Critical Area designations.<sup>64</sup> It reviews all permits, subdivisions, and variance requests in the Critical Area, but does not have the power to determine whether these applications will be granted or denied.<sup>65</sup>

### Implementation by Local Jurisdictions

The primary responsibility for developing and implementing a Critical Area Program consistent with the Critical Area Act rests squarely with each local jurisdiction.<sup>66</sup> The Critical Area Commission retains, however, authority to review and comment on all activities relating to the Critical Area. The Act requires that each local program, in addition to being subject to approval and review by the Commission, includes

those elements which are necessary or appropriate to: (1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands; (2) To conserve fish, wildlife, and plant habitat; and (3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.<sup>67</sup>

Each local jurisdiction must develop and adopt a Critical Area Program consistent with these goals and the other standards set by the Act and relevant regulations. The programs

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<sup>60</sup> MD. REGS. CODE tit 27, § 01.02.01 (2005).

<sup>61</sup> MD. CODE ANN., NAT. RES. II § 8-1809 (2005).

<sup>62</sup> The CAC issued its Critical Area Criteria in 1985. MD. REGS. CODE tit. 27, § 01.01.01. It then spent the next 4 years reviewing local Critical Area programs for compliance with the CAA and the CAC Criteria. Critical Area Commission, About the Commission, *at* <http://www.dnr.state.md.us/criticalarea/aboutthecommission.html> (Mar. 12, 2006).

<sup>63</sup> MD. CODE ANN., NAT. RES. II § 8-1809 (2005).

<sup>64</sup> MD. CODE ANN., NAT. RES. II § 8-1811 (2005).

<sup>65</sup> MD. CODE ANN., NAT. RES. II § 8-1811 (2005).

<sup>66</sup> MD. CODE ANN., NAT. RES § 8-1808 (a)(1) (2005).

<sup>67</sup> MD. CODE ANN., NAT. RES § 8-1808 (b) (2005).

are, as appropriate and where necessary, written as local ordinances and given the force of law.<sup>68</sup>

Each local jurisdiction is responsible for implementing ordinances relating to its Critical Area program. Also, like other local ordinances, implementation is an intensely involved process that requires resources and technical expertise. Typically, local jurisdictions review and make decisions on subdivision plats, site plans, variance and permit applications, and other development proposals. Local jurisdictions also monitor development to ensure that all projects, whether deforestation or development projects, in the Critical Area have the appropriate permits or approved plans. They also designate areas suitable for water dependent facilities that must, by definition, be close to the water. Local jurisdictions can also, by following specific criteria, permit a change of land-use designation from a Resource Conservation Area (RCA) to either a Limited Development Area (LDA) or an Intensely Developed Area (IDA). Project approval is a significant power retained by local jurisdictions. For example, local jurisdictions reviewing variance applications have authority to determine whether the “unwarranted hardship” standard, as set out by the Critical Area Act, has been satisfied when reviewing a variance application. Other duties include forest and woodland protection, shore erosion control and habitat protection.<sup>69</sup> Even though local jurisdictions bear the primary responsibility for reviewing and making decisions regarding development activities in the Critical Area, the Critical Area Commission retains authority to review and comment on them, and in limited circumstances, must approve the activity.<sup>70</sup>

Larger jurisdictions, like Anne Arundel County, have entire divisions within their County governments with multiple planners, engineers and other staff that process, review, and monitor permit and variance applications. Smaller jurisdictions, such as municipalities like Saint Michael’s, rely on one of three Circuit Riders from the State Department of Planning to provide technical expertise necessary to review variances and other Critical Area related activities.<sup>71</sup>

### Growth Regulation: IDA, LDA, and RCA

Regulations promulgated by the Commission, under the Critical Area Act, establish specific guidelines for local jurisdictions to follow when organizing their local Critical Area programs. Although development is heavily regulated, it is still permitted in the Critical Area. As opposed to prohibiting development, the Critical Area Commission’s regulations “are proposed for directing, managing, and controlling

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<sup>68</sup> For example, the specific requirements of the Anne Arundel County Critical Area Program are codified in Title 8 of the Anne Arundel County Code Article 26 (Subdivision and Development) and Title 13 of Anne Arundel County Code Article 27 (Zoning).

<sup>69</sup> See MD. REGS. CODE tit. 27 § 01.05.03 (Forest and Woodland protection); MD. REGS. CODE tit. 27 § 02.04.03 (Shore erosion control); MD. REGS. CODE tit. 27 § 01.09.04 (Habitat Protection).

<sup>70</sup> The Critical Area Commission may review and comment on site plans, subdivision plats, permit and variance applications and other development activities. The Critical Area Commission must review and approve or disapprove a change in land-use designation.

<sup>71</sup> See *infra* Section III.

development so that the adverse impacts of growth in the Critical Area are minimized.”<sup>72</sup> The Commission recognizes three development areas within the Critical Area and establishes development criteria for each. The three development areas are: Intensely Developed Areas (IDA), Limited Development Areas (LDA), and Resource Conservation Areas (RCA). Development is subject to the least restrictions in the Intensely Developed Areas and the most restrictions in the Resource Conservation Areas. There are also criteria for specific land uses in the Critical Area that apply to land used for water dependent facilities,<sup>73</sup> agriculture,<sup>74</sup> surface mining,<sup>75</sup> natural parks,<sup>76</sup> habitat protection,<sup>77</sup> and forests and woodlands.<sup>78</sup>

Intensely Developed Areas are defined as “those areas where residential, commercial, institutional, and/or industrial, developed land uses predominate, and where relatively little natural habitat occurs.”<sup>79</sup> The criteria for Intensely Developed Areas are primarily concerned with ensuring that existing and new development does not impair water quality.<sup>80</sup> More restrictive criteria are established for development in Limited Development Areas. Limited Development Areas are “those which are currently developed in low or moderate intensity uses. They also contain areas of plant and animal habitats, and the quality of runoff from these areas has not been substantially altered or impaired.”<sup>81</sup> Development in these areas should maintain or improve the quality of runoff and groundwater,<sup>82</sup> maintain, if practicable, existing natural habitat,<sup>83</sup> and also accommodate low to moderate intensity development under certain conditions.<sup>84</sup>

Resource Conservation Areas are defined as “those areas characterized by nature-dominated environments and resource-utilization activities.”<sup>85</sup> In Resource Conservation Areas, local jurisdictions’ programs are to: “conserve, protect, and enhance the overall ecological values of the Critical Area, its biological productivity, and its diversity”<sup>86</sup> and “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.”<sup>87</sup> The programs should also conserve existing developed

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<sup>72</sup> MD. REGS. CODE tit. 27, § 01.02.01 (2005).

<sup>73</sup> MD. REGS. CODE tit. 27, § 01.03 (2005).

<sup>74</sup> MD. REGS. CODE tit. 27, § 01.06 (2005).

<sup>75</sup> MD. REGS. CODE tit. 27, § 01.07 (2005).

<sup>76</sup> MD. REGS. CODE tit. 27, § 01.08 (2005).

<sup>77</sup> MD. REGS. CODE tit. 27, § 01.09 (2005).

<sup>78</sup> MD. REGS. CODE tit. 27, § 01.05 (2005).

<sup>79</sup> MD. REGS. CODE tit. 27, § 01.02.03(A) (2005).

<sup>80</sup> MD. REGS. CODE tit. 27, § 01.02.03(D)(1), (3) (2005).

<sup>81</sup> MD. REGS. CODE tit. 27, § 01.02.04(A) (2005).

<sup>82</sup> MD. REGS. CODE tit. 27, § 01.02.04(B)(1) (2005).

<sup>83</sup> MD. REGS. CODE tit. 27, § 01.02.04(B)(2) (2005).

<sup>84</sup> MD. REGS. CODE tit. 27, § 01.02.04(B)(3) (2005).

<sup>85</sup> MD. REGS. CODE tit. 27, § 01.02.05(A) (2005).

<sup>86</sup> MD. REGS. CODE tit. 27, § 01.02.05(B)(1) (2005).

<sup>87</sup> MD. REGS. CODE tit. 27, § 01.02.05(B)(2) (2005).

woodlands and forests and the land and water resources necessary to support such land uses as agriculture, forestry, fisheries activities, and aquaculture.<sup>88</sup>

There are specific types of development and redevelopment that are generally prohibited from occurring in the Critical Area. Such development may be permitted in the intensely developed area of the Critical Area if the facility can prove that “there will be a net improvement in water quality to the adjacent body of water.”<sup>89</sup> However, these activities are generally prohibited “because of their intrinsic nature, or because of their potential for adversely affecting habitats or water quality.”<sup>90</sup> The types of activities that are not permitted are: nonmaritime heavy industry; excluding certain situations, transportation facilities and utility transmission facilities; or permanent sludge handling, storage, and disposal facilities, other than those associated with wastewater treatment facilities.<sup>91</sup> Local jurisdictions are free to expand the category of development that is prohibited in the Critical Area.<sup>92</sup> Certain other development or redevelopment activities may only be permitted in the Critical Area if “no environmentally acceptable alternative exists outside the Critical Area, and these development activities or facilities are needed in order to correct an existing water quality or wastewater management problem.”<sup>93</sup> This restriction applies to solid or hazardous waste collection or disposal facilities and sanitary landfills.<sup>94</sup>

## Grandfathering

The ability to control development in the Critical Area is limited by a so-called “grandfathering” provision, which allows jurisdictions to permit the continuation of a land use that was in existence at the time of program approval even though the use is inconsistent with the Critical Area program.<sup>95</sup> This provision, however, does not mandate that the jurisdiction allow the use to be intensified or expanded.<sup>96</sup> Local jurisdictions are required to establish their own grandfathering provisions in their Critical Area program. For certain types of land, local jurisdictions are required to permit development in accordance with density requirements in effect prior to the adoption of their Critical Area programs.<sup>97</sup>

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<sup>88</sup> MD. REGS. CODE tit. 27, § 01.02.05(B)(3-4) (2005).

<sup>89</sup> *Id.*

<sup>90</sup> MD. REGS. CODE tit. 27, § 01.02.02(F)(1) (2005).

<sup>91</sup> MD. REGS. CODE tit. 27, § 01.02.02(F)(1)(a)-(c) (2005).

<sup>92</sup> MD. REGS. CODE tit. 27, § 01.02.02(F)(2) (2005).

<sup>93</sup> MD. REGS. CODE tit. 27, § 01.02.02(G) (2005).

<sup>94</sup> MD. REGS. CODE tit. 27, § 01.02.02(G)(1)-(2) (2005).

<sup>95</sup> *See* MD. REGS. CODE tit. 27, § 01.02 (2005) (requiring local jurisdictions to establish grandfather provisions).

<sup>96</sup> MD. REGS. CODE tit. 27, § 01.02.07(A) (2005). Provisions of the regulations regarding grandfathering can be found in MD. CODE ANN., NAT. RES. II § 8-1808 (2005).

<sup>97</sup> MD. REGS. CODE tit. 27, § 01.02.07(B) (2005). This type of land includes but is not limited to “land that has progressed to the point of pouring of foundation footings or installation of structural members; land that was subdivided into recorded legally buildable lots, where the subdivision received the local jurisdictions final approval between June 1, 1984, and December 1, 1985”; and “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

## Variations

Local jurisdictions are also required to provide for the granting of variations where owing to special features of a site or other circumstances, local government implementation of this subtitle or a literal enforcement of provisions within the jurisdiction's Critical Area program would result in unwarranted hardship to an applicant. These variance provisions shall be designed in a manner consistent with the spirit and intent of this chapter and all local Critical Area elements.<sup>98</sup>

The regulations also establish minimum criteria that local jurisdictions' variance procedures must provide.

Local jurisdictions' variance procedures must ensure "findings are made... which demonstrate that special conditions or circumstances exist that are peculiar to the land or structure within the jurisdiction's Critical Area program, would result in unwarranted hardship"<sup>99</sup> and "that a literal interpretation of this subtitle or the local Critical Area program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area of the local jurisdiction."<sup>100</sup> Applications for a variance must be in writing and must be submitted to the local approving authority with a copy provided to the Commission.<sup>101</sup> Further, a variance cannot grant a special privilege to the applicant that is denied to others by the provisions in the subtitle of the regulations granting variations or by the provisions of the local jurisdiction's program.<sup>102</sup> A variance also cannot be granted if it is "based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition conforming, on any neighboring property."<sup>103</sup> Lastly, local jurisdictions' variance procedures must provide that "the granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's Critical Area, and that the granting of the variance will be in harmony with the general spirit and intent of the Critical Area law and the regulations adopted in [Criteria for Local Critical Area Program Development] this subtitle."<sup>104</sup>

Local jurisdictions are permitted to establish more restrictive procedures for the granting of variations. However, these jurisdictions must establish notification procedures to allow the Commission to review the findings made when variations are

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subdivided into recorded, legally buildable lots where the subdivision received the local jurisdiction's final approval prior to June 1, 1984" if certain conditions are met.

<sup>98</sup> MD. REGS. CODE tit. 27, § 01.11.01(A) (2005). The regulations regarding variations can be found in MD. CODE ANN., NAT. RES. II § 8-1808 (2005).

<sup>99</sup> MD. REGS. CODE tit. 27, § 01.11.01(A)(1) (2005).

<sup>100</sup> MD. REGS. CODE tit. 27, § 01.11.01(A)(2) (2005).

<sup>101</sup> MD. REGS. CODE tit. 27, § 01.11.01(A)(6) (2005).

<sup>102</sup> MD. REGS. CODE tit. 27, § 01.11.01(A)(3) (2005).

<sup>103</sup> MD. REGS. CODE tit. 27, § 01.11.01(A)(4) (2005).

<sup>104</sup> MD. REGS. CODE tit. 27, § 01.11.01(A)(5) (2005).

granted.<sup>105</sup> Any person, firm, corporation, or government agency is allowed to appeal a variance decision if they are adversely affected by the decision made. Decisions made by the local boards of appeals or local legislative bodies may be appealed to the state circuit court. The Chairman of the Commission is also allowed to appeal any decision even if the Chairman is not a party to the decision or is not aggrieved by it.<sup>106</sup>

### Growth Allocation<sup>107</sup>

As is noted above, the Critical Area is subdivided into three categories: Intensely Developed Areas (IDA), Limited Development Areas (LDA), and Resource Conservation Areas (RCA). Growth allocation is a process by which local jurisdictions can have some flexibility beyond these three development areas.<sup>108</sup> Upon application, local jurisdictions can reclassify, subject to Critical Area Commission approval, a finite number of acres from a lower to higher development designation.<sup>109</sup>

The reclassified acreage is “equal to 5 percent of the county's portion of the resource conservation area lands that are not tidal wetlands or federally owned.”<sup>110</sup> Reclassification is conducted at the county level in coordination with affected municipalities.<sup>111</sup> Regulations provide guidance to minimize encroachment on RCAs by LDAs and IDAs.<sup>112</sup> The regulations also specify that no more than one-half of the growth allocation is permitted within RCAs.<sup>113</sup>

### Enforcement

Section 8-1815 of the Act lays out the available enforcement processes. Individuals who violate local Critical Area laws are subject to prosecution by local authorities.<sup>114</sup> If local authorities are unable to enforce the law on their own, they may request assistance from the Commission or refer the issue to the state Attorney General.<sup>115</sup> Unlike many federal environmental laws, the Critical Area Act does not have a citizen suit provision allowing citizens to enforce the law when the local government fails to do so.

If a jurisdiction fails to enforce its own Critical Area laws, interested parties may bring that failure to the attention of the Critical Area Commission. If the Commission

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<sup>105</sup> MD. REGS. CODE tit. 27, § 01.11.01(B) (2005).

<sup>106</sup> MD. REGS. CODE tit. 27, § 01.11.01(C) (2005).

<sup>107</sup> For additional information concerning growth allocation and development densities see HILLYER, *supra* note 5. This report focuses on examining the type of new development that has occurred and where such development is located in the Critical Area. The report also analyzes whether forests and farmland are protected from conversion and fragmentation under the Act.

<sup>108</sup> CAC Website, at <http://www.dnr.state.md.us/criticalarea/faq.html#10> (Apr. 20, 2006).

<sup>109</sup> *Id.*

<sup>110</sup> MD. REGS. CODE tit. 27, § 01.02.06 (2005).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> MD. CODE ANN., NAT. RES. II § 8-1815(a)(1) (2005).

<sup>115</sup> MD. CODE ANN., NAT. RES. II § 8-1815(a)(2) (2005).

“has reason to believe that a local jurisdiction is failing to enforce” its Critical Area law with respect to a particular development, the Commission must serve notice on that jurisdiction.<sup>116</sup> If within 30 days the jurisdiction has not corrected the problem or punished the violation, the Commission may refer the case to the Attorney General.<sup>117</sup> In other words, the Commission has an obligation to notify the jurisdiction of its failure to enforce, but does not have an explicit legal obligation to pursue the case further.

The Chairman of the Critical Area Commission has standing and the authority to commence or intervene in any administrative, judicial, or other original proceeding or appeal in Maryland that involves a project approval in the Critical Area. The Chairman does not have to receive permission from the other Commission members before initiating such action; however he or she must send prompt notice to the other members. If at least thirteen members of the Commission disapprove of the Chairman’s action, the Chairman must withdraw the action within thirty-five days after sending notice.<sup>118</sup>

## **Limitations of the Critical Area Act**

When examining Critical Area Act enforcement, it is important to recognize that the reach and efficacy of the Act is limited in a variety of ways. First, as the stated purposes of the Act reflect, the Act was never intended to prohibit growth in the Critical Area, simply to minimize its effect on the Chesapeake Bay.<sup>119</sup> Second, the legislative history of the Act clearly shows that the legislature envisioned a law that provided not for iron-fisted control of land use by the State, but for a local-state partnership in which each affected jurisdiction had substantial input into the Critical Area program and could implement it in ways that suited its particular needs.<sup>120</sup> It is this emphasis on local control that generates many of the limitations of the Critical Area Act, described in detail below.

### Local Implementation

As is noted above, each jurisdiction covered by the Critical Area Act designs and implements its own Critical Area program in accordance with Criteria issued by the Critical Area Commission. The practical result is that, although there are common state-mandated standards and requirements, there are in fact 61 different Critical Area laws – one in each jurisdiction affected by the CAA. This diversity of regulations means that Critical Area program requirements are slightly different in every jurisdiction. For example, different jurisdictions’ definitions of a 1:1 mitigation ratio for replanting vary widely. The fact that Critical Area laws are locally implemented also means that they are locally administered and enforced, and thus administration and enforcement procedures differ from jurisdiction to jurisdiction.

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<sup>116</sup> MD. CODE ANN., NAT. RES. II § 8-1815(b) (2005).

<sup>117</sup> *Id.*

<sup>118</sup> MD. CODE ANN., NAT. RES. II § 8-1812(a) (2005).

<sup>119</sup> MD. CODE ANN., NAT. RES. II § 8-1801(b) (2005).

<sup>120</sup> *See supra* notes 24-43 and accompanying text.

## The Limited Role and Authority of the Commission

The Critical Area Commission has limited regulatory powers. The power to approve projects in the Critical Area is entirely retained by local jurisdictions. For example, local jurisdictions have authority to determine whether the “unwarranted hardship” standard, as set out by the Critical Area Act, has been satisfied when reviewing a variance application. Although the Critical Area Commission retains approval power over certain, limited types of projects,<sup>121</sup> it only has the power to review and comment on (not to approve or disapprove) site plans, subdivision plats, permit and variance applications and other common development activities.<sup>122</sup>

The principal regulatory powers of the Commission are to

review and approve State projects on State-owned land in the Critical Area; review and approve State or local agency actions resulting in major development on private lands or lands owned by local jurisdictions; and review and approve all changes to a jurisdiction's Critical Area Program, including changes to ordinances, regulations, and maps.<sup>123</sup>

The Commission periodically reviews the local Critical Area programs, and approves changes to the programs.<sup>124</sup> It also must give its approval for certain types of development projects, or changes in Critical Area designations.<sup>125</sup>

## Enforcement

The Critical Area Act provides for enforcement of its provisions by multiple levels of government, however, almost all of the enforcement authority is given to local governments. The Act does not mandate that the state government step in and enforce the law on behalf of local governments, nor does it contain a citizen suit provision to allow citizens to enforce the law. Although the Commission has a legal duty to report Critical Area violations to the localities, it has no duty to refer them to the state Attorney General, nor does the Attorney General have a legal duty under the Critical Area Act to pursue compliance.<sup>126</sup> The Commission through the Attorney General does have some discretion to take enforcement actions, but it has been hesitant to do so without being asked, because the primary enforcement authority is held by local jurisdictions. See Section V, Critical Area Commission and Attorney General, for further discussion.

If a locality fails to enforce its own Critical Area laws, and that failure is brought to the attention of the Commission, the Commission has an obligation to notify the jurisdiction of its failure to enforce, but does not have an explicit legal obligation to

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<sup>121</sup> MD. CODE ANN., NAT. RES. II § 8-1811 (2005).

<sup>122</sup> MD. CODE ANN., NAT. RES. II § 8-1811 (2005); MD. REGS. CODE tit. 27, § 03.01.03 (2005).

<sup>123</sup> MD. REGS. CODE tit. 27, § 03.01.03 (2005).

<sup>124</sup> MD. REGS. CODE tit. 27, § 03.01.03 (2005).

<sup>125</sup> MD. CODE ANN., NAT. RES. II § 8-1811 (2005).

<sup>126</sup> MD. CODE ANN., NAT. RES. II, § 8-1815 (2005).

pursue the case further. If the Commission does decide to pursue the case further, it cannot prosecute the case itself, but instead refers the case to the state Attorney General. The Attorney General then “may invoke any sanction or remedy available to local authorities.”<sup>127</sup> However, the Attorney General has complete discretion to decide whether to pursue the case. Therefore, if the locality cannot enforce the law, or chooses not to enforce the law, there is no way for citizens to ensure that the violation will be prosecuted.

In addition, the regulations promulgated under the Critical Area Act do not contain specific provisions by which the Act should be enforced.<sup>128</sup> Rather the regulations give a great deal of deference to local jurisdictions. For example, local jurisdictions are given the authority to grant variances where a literal enforcement of provisions would result in an unwarranted hardship<sup>129</sup> and local jurisdictions have the authority to develop and implement local agricultural protection plans.<sup>130</sup> In addition, localities are given authority to preclude development activities that they consider detrimental but are not otherwise prohibited under the Critical Area Act.<sup>131</sup> Given the broad authority given to local jurisdictions under the regulations, it is impossible to paint a comprehensive picture of the enforcement mechanisms of the Critical Area Act solely through examination of the underlying regulations.

## Grandfathering

Generally speaking, grandfathered lots are properties of record that predate the Critical Area program. This status provides two significant rights. First, a home may be built on a grandfathered lot even if it would otherwise be prohibited under the Critical Area program.<sup>132</sup> Second, although development on grandfathered lots is required to comply with the Critical Area program “insofar as possible”<sup>133</sup> the grandfathered status allows the owner to apply for and receive a variance permitting development. The significance of the grandfathering provisions cannot be overstated.

Two scenarios illustrate the significance of the grandfathering provisions. The owner of an undeveloped lot on the Bay platted in 1980 is entitled to build a home on the lot, even if that home would impinge on the Buffer<sup>134</sup> or other Critical Area requirements. The property owner will have to apply for a variance but their request will likely be granted because of the lot’s status as grandfathered. A more common example is where the owner of a grandfathered lot wants to add a deck to her house where the deck will extend into the Buffer. Although the Critical Area Act does not mandate that the deck be

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<sup>127</sup> MD. CODE ANN., NAT. RES. II § 8-1815(c) (2005).

<sup>128</sup> MD. REGS. CODE tit. 27, §§ .01.01 *et seq.* (2005).

<sup>129</sup> MD. REGS. CODE tit. 27, § 01.11.01 (2005).

<sup>130</sup> MD. REGS. CODE tit. 27, § 01.06.03 (2005).

<sup>131</sup> MD. REGS. CODE tit. 27, § 01.02.02 (2005).

<sup>132</sup> MD. REGS. CODE tit. 27, § 01.02.07(B) (2005).

<sup>133</sup> MD. REGS. CODE tit. 27, § 01.02.07(B)(2)(a) (2005).

<sup>134</sup> The Buffer is “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.” MD. CODE ANN., NAT. RES. II § 8-1802(a)(4) (2005).

approved,<sup>135</sup> because of the way the Critical Area Commission and local jurisdictions interpret the grandfathering provisions of the law, the deck will most likely be approved. For further discussion on this point, *see* Section V, Inconsistencies in Project Approval.

## Variations

The provision in the Critical Area Act providing for variances can create loopholes and inconsistencies with the implementation of the Act. Counties not only have different standards for granting variances, but different procedures for granting them as well. From jurisdiction to jurisdiction the granting of variances is inconsistent and sometimes at odds with the purpose of the intent of the Act. Specific examples of the problems with the variance provision are discussed in Section IV of the report.

The standard for the granting of variances requires that the landowner experience an “unwarranted hardship.”<sup>136</sup> However, this standard was clarified twice by the General Assembly after a number of court cases only required that a landowner satisfy a lesser standard. In *White v. North*<sup>137</sup> and other cases the Maryland Court of Appeals defined the “unwarranted hardship” standard with a denial of “reasonable and significant use.”<sup>138</sup> The *Belvoir Farms Homeowners Association v. North*<sup>139</sup> case similarly misinterpreted the standard. In 2002, the General Assembly attempted to clarify the meaning of the hardship standard; however their efforts were disregarded by the courts in the *Lewis v. Department of Natural Resources*<sup>140</sup> case. This 2003 decision again equated the “unwarranted hardship” standard with the denial of reasonable and significant use of the property.<sup>141</sup> This misinterpretation again provoked a legislative response. In 2004 the General Assembly defined the “unwarranted hardship” standard as requiring “a deprivation of the reasonable use of the entire property which is equivalent to an unnecessary or unreasonable hardship.”<sup>142</sup> They also required that “in considering an application for a variance, a local jurisdiction shall presume that the specific development activity in the critical area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle and the requirements of the local jurisdiction’s program.”<sup>143</sup> All applicants have the burden of proof to overcome this presumption.<sup>144</sup>

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<sup>135</sup> The Critical Area Criteria state “local jurisdictions shall permit the continuation, but not necessarily the intensification or expansion, of any use in existence on the date of program approval.” MD. REGS. CODE tit. 27, § 01.02.07(A) (2005).

<sup>136</sup> MD. REGS. CODE tit. 27, § 01.11.01(A)(1) (2005).

<sup>137</sup> *White v. North*, 356 Md. 31 (1999).

<sup>138</sup> *Id.* at 46.

<sup>139</sup> *Belvoir Farms Homeowners Ass'n v. North*, 355 Md. 259 (1999).

<sup>140</sup> *Lewis v. Dep't of Natural Res.*, 377 Md. 382 (2003).

<sup>141</sup> *Id.* at 413.

<sup>142</sup> MD HB 1009 (2004).

<sup>143</sup> MD. CODE ANN., NAT. RES. II § 8-1808(d)(2) (2005). The Subtitle referenced in this quotation from the Code refers to the Subtitle of the Act which regulates the development of local programs.

<sup>144</sup> MD. CODE ANN., NAT. RES. II § 8-1808(d)(3) (2005).

## **Section III: Institutionalization of the Critical Area Act**

Sixty-one local governments, in cooperation with the Critical Area Commission, administer local Critical Area programs. These governments range from small rural towns to large urban counties with vast resources. Each government's Critical Area program is reviewed and approved by the Critical Area Commission every six years to ensure uniformity and consistency with the State's requirements.<sup>145</sup> Nevertheless, the Act's requirements are flexible enough to allow differences in structure, organization, and program requirements from one jurisdiction to another. The differences in local jurisdictions' programs manifest themselves in many different ways and may affect many different aspects of Critical Area programs, including enforcement. Therefore, even though many Critical Area criteria are objective and specific, the flexibility created by the Act may contribute to discrepancies, or perceived discrepancies, in the Act's enforcement.

Section III will first describe the structure and resources of the responsible agencies, offices, and departments of two of the sixty-one local governments to illustrate challenges faced by large and small jurisdictions. The discussion includes a description of the Circuit Rider program utilized by smaller jurisdictions. Then, Section III will compare specific criteria in three local Critical Area programs to demonstrate varied approaches to complying with the Critical Area requirements.

### **Institutional Structure and Organization of Local Programs**

#### **Anne Arundel County**

Anne Arundel County, located on the Western Shore of the Chesapeake Bay, is responsible for approximately 500 miles of tidal shoreline and 49,942 acres of Critical Area.<sup>146</sup> According to the 2000 Census, Anne Arundel County's population is 489,656.<sup>147</sup> Much of its shoreline is heavily populated because of development that predated the Critical Area program. Anne Arundel County's Critical Area program is administered by several offices and departments within its government. The Land Use and Environment Office formulates, communicates, and executes the County's land use and environmental policies, including the Critical Area program. A division of that office, the Office of Environmental and Cultural Resources ("OECR"), has a mission "to manage, protect, and restore [the County's] natural, historic and cultural resources through development and application of sound resource policies, principles, and practices."<sup>148</sup> The OECR's staff works closely with other agencies to provide guidance and oversight on Critical Area related issues. In addition to the Land Use and Environment Office, the Land Use Core Group, comprised of the Departments of

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<sup>145</sup> MD. CODE ANN., NAT. RES. II § 8-1809(g) (2005).

<sup>146</sup> HILLYER, *supra* note 5, at 40.

<sup>147</sup> 2000 Census at <http://quickfacts.census.gov/qfd/states/24/24003.html> (Apr. 15, 2006).

<sup>148</sup> <http://www.aacounty.org/LandUse/OECR/index.cfm> (last visited Mar. 23, 2006).

Inspections & Permits, Planning & Zoning, and Public Works, regulates and reviews all land use and growth decisions, including Critical Area issues. According to County officials, there are 28 full-time staff members, including supervisors, inspectors, and Environmental Review teams that are responsible for reviewing and inspecting all Critical Area development activities, including Buffer and Vegetative Management Plans and potential violations of the law. In addition, the County also has two attorneys from the County Attorney's Office responsible for prosecuting Critical Area Act violations.

Together this team reviews roughly 2,400 building permits, 1,569 Vegetative Management Plans and 704 Buffer Management Plans per year. The County has also provided an Environmental Hotline to facilitate reports of potential violations 24 hours a day. In 2005, this hotline received 1,234 complaints.<sup>149</sup> All complaints are investigated but not all complaints result in violations.<sup>150</sup> The Office of Administrative Hearings adjudicates all variance applications. Finally, the County's website summarizes and describes both the State's and the County's Critical Area programs including instructions on how to apply for a permit or a variance.<sup>151</sup> Because the Critical Area program is closely tied to land use and zoning regulations and requires technical expertise about grading, stormwater runoff, forestry and vegetation management, many different departments within Anne Arundel's government work together to review and approve development and other projects that may affect the Critical Area.

### Town of North East, Maryland

The Town of North East, Maryland lies at the other end of the spectrum. It is a small town located on the North East River. According to the 2000 Census, North East's population was 2733. 255.5 acres of North East's 995 acres are located within the Critical Area.<sup>152</sup> Activity in North East's Critical Area is minimal. According to statistics provided by the Critical Area Commission, North East reviewed two Site Plans and one Subdivision, and issued one Consistency Report in 2005. Although North East has a Planning and Zoning Department, it is small. One Planning and Zoning Assistant is responsible for all planning and zoning. Because of its size, North East relies on a Circuit Rider from the Maryland Department of Planning to assist in administering its Critical Area program.

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<sup>149</sup> Telephone interview with Jon Peacock, Inspections and Permits, Anne Arundel County (Mar. 31, 2006). The hotline handles complaints for potential environmental violations including, but not limited to, potential Critical Area violations.

<sup>150</sup> *Id.*

<sup>151</sup> See <http://www.aacounty.org/LandUse/OECCR/CriticalAreas.cfm> (summarizing Anne Arundel's Critical Area program) (last visited April 6, 2006); <http://www.aacounty.org/PlanZone/Zoning/ZoningVariance.cfm> (detailing the variance application process) (Apr. 6, 2006).

<sup>152</sup> North East Comprehensive Plan 50 (2004), at [http://www.rja-ltd.com/images/May\\_3\\_2004\\_PLAN.pdf](http://www.rja-ltd.com/images/May_3_2004_PLAN.pdf) (Apr. 6, 2006).

## The Chesapeake Bay Critical Area Circuit Rider Program

When the Critical Area Act was passed, many municipalities had few or no staff to implement the program. To address this issue, the Critical Area Commission formed a unique partnership with the Maryland Department of Planning (MDP). This partnership, memorialized by a Memorandum of Understanding (MOU), gave rise to the Chesapeake Bay Critical Area Circuit Rider technical assistance program.<sup>153</sup> Under the program, MDP Planners, called Circuit Riders, work with several municipalities and perform almost all of the Critical Area-related duties for those municipalities. Twenty-four municipalities currently rely on three MDP Circuit Riders<sup>154</sup> to assist in the implementation of their Critical Area programs.<sup>155</sup> Circuit Riders function much like an additional staff member within the municipalities' governments even though they are full-time State employees. Circuit Riders, however, lack authority to enforce municipal Critical Area-related ordinances because they are not municipal staff. Instead, they make recommendations with respect to all Critical Area-related development, including potential violations. The municipalities themselves are then responsible for any subsequent enforcement actions.

This comparison of Anne Arundel County and the Town of North East demonstrates the differences between the institutional organization of the responsible agencies, departments, and offices involved in Critical Area Act implementation and enforcement. The Critical Area program is, however, not the only program the agencies, departments, and offices administer.<sup>156</sup> Their additional responsibilities likely affect the resources available to implement and enforce the Critical Area criteria.<sup>157</sup>

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<sup>153</sup> Letter from Tracey Gordy, Regional Planner and Circuit Rider, MDP, to Shirley Massenburg, Administrator, Critical Area Commission, DNR (Apr. 21, 2005) (on file with the Clinic); Telephone interview with Patricia Goucher, Director of Local Planning, MDP (Feb. 15, 2006)

<sup>154</sup> The current Circuit Riders are Roby Hurley, Mary Ann Skilling, and Tracey Greene Gordon. Tracey Gordon told the Clinic in a March 31, 2006 telephone interview that a fourth Circuit Rider would be hired in the near future.

<sup>155</sup> At least one Circuit Rider uses a Memorandum of Understanding similar to the MOU between the Critical Area Commission and MDP with every municipality in her jurisdiction to detail the types of services that will be provided to the municipality and the procedures utilized to provide those services. Telephone interview with Tracey Gordy, Regional Planner and Circuit Rider (Mar. 31, 2006). The Circuit Riders' duties include, but are not limited to: reviewing and commenting on proposed development projects and plans, building permit applications, subdivision plats and site plans in the Critical Area; recommending development approval conditions, requirements, and specifications; assisting developers, property owners, and realtors in understanding and meeting program requirements and standards; assisting the municipality in monitoring projects for compliance with development approval conditions, requirements, and specifications; assisting municipal staff in evaluating and recommending corrective measures, in coordination with Critical Area staff planners, for property owners in violation of the municipality's Critical Area Program or Ordinance. *See* Letter from Tracey Gordy, Regional Planner and Circuit Rider, to the Mayor of Vienna, Md., (Oct. 31, 2005) (on file with the Clinic). According to Ms. Gordy, this is the standard MOU letter sent to every municipality under her jurisdiction. It is important to note that although the agreement is helpful, it is not required by law. Telephone Interview with Tracey Gordy, *supra* note 155.

<sup>156</sup> For example, local governments also administer extensive State mandated sediment control and stormwater management programs. *See* MD. CODE ANN., ENVT. §§ 4-101 – 4-116 (mandating a local sediment control program); MD. CODE ANN., ENVT. §§ 4-201 – 4-215 (mandating a local storm water

## Variations in Local Program Requirements: A Comparison of Three Counties

As noted above, every jurisdiction subject to the Critical Area Act is responsible for implementing the Act in its own particular way. Each local program must meet the Criteria<sup>158</sup> issued by the Critical Area Commission, but these Criteria provide room for local variations.<sup>159</sup> For any given rule under the Critical Area Act, there is a multitude of ways a local jurisdiction may meet that rule. Although the Commission provides a “Model Ordinance” on which local jurisdictions may base their programs,<sup>160</sup> ultimately the standards used are up to the locality. As a result, Critical Area regulations in one jurisdiction may be stricter or looser than those in another jurisdiction. For example, a person who clears one acre of land in Queen Anne’s County is required to plant fewer trees as mitigation than a person who clears an equal amount of land in St. Mary’s County.<sup>161</sup> As long as the looser jurisdiction’s regulations meet the standards set by the Critical Area Act and its Criteria, and are approved by the Critical Area Commission, they are legitimate despite the fact the Critical Area protections they provide are less than they could be.

These differences may easily be interpreted as poor enforcement by the county with looser regulations. In reality, however, as long as both jurisdictions hold landowners to the requirements of the local program (whatever they may be), both jurisdictions are enforcing the Critical Area law. A better way of looking at these differences is to see them as a reflection of local jurisdictions’ political will with regards to the Critical Area. Jurisdictions that have more political will to protect the Critical Area write and interpret regulations with stricter requirements, and those with less political will to protect the Critical Area write looser regulations or interpret regulations more flexibly. Although both are legal, they result in differing levels of protection for the Critical Area.

According to the Critical Area Commission, two common areas where local program requirements diverge are impervious surface limits and replanting standards.<sup>162</sup> Impervious surface limits are designed to limit pollution-carrying stormwater runoff, and replanting standards are the requirements used to replace vegetation removed as a result of development. To illustrate the differences among local Critical Area program

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management program). Local planning departments must also address local planning and zoning issues in addition to Critical Area-related planning.

<sup>157</sup> See Sections IV and V, *infra*, for a discussion on available resources for Critical Area program implementation and enforcement.

<sup>158</sup> MD. REGS. CODE tit. 27, § 01.01.01 (2005).

<sup>159</sup> In fact, according to Ren Serey, Executive Director of the Critical Area Commission, the fact that local jurisdictions would have flexibility in their Critical Area programs was one of the Critical Area Act’s great selling points when it was being considered by the state legislature. Telephone interview with Ren Serey, *supra* note 7. See also the discussion of the Act’s legislative history, *supra* Section II.

<sup>160</sup> A copy of the Commission’s Model Ordinance is available from the Commission and is on file with the Clinic.

<sup>161</sup> See discussion of mitigation requirements, Section III, Comparison of Mitigation Requirements, *infra*.

<sup>162</sup> Telephone interview with Ren Serey, *supra* note 7.

requirements, the discussion below compares impervious surface limits and mitigation standards as defined in the Critical Area Act itself, and as implemented in this study's three focus counties: Anne Arundel, Queen Anne's, and St. Mary's.

### Comparison of Impervious Surface Requirements

The Critical Area Criteria provide the general rule that impervious surfaces<sup>163</sup> may cover no more than 15 percent of most sites or lots, and no more than 25 percent of a grandfathered lot of less than ½ acre.<sup>164</sup> However, the Critical Area Commission and the focus counties all provide exceptions to this rule. While their rules are similar, there are distinct differences. For example, for grandfathered lots less than ½ acre, St. Mary's applies the basic 25 percent limit prescribed in the Act, while Queen Anne's narrows the scope as applied to non-residential grandfathered lots. Meanwhile, Anne Arundel's code does not contain the 25 percent limitation at all, instead moving directly to the rolling impervious surface limits described in the Critical Area Commission's Model Ordinance. The chart below summarizes the impervious surface standards for each of the three focus counties, as well as the standard suggested in the Commission's Model Ordinance.

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<sup>163</sup> Generally, an impervious surface is any constructed surface, whether a rooftop, driveway, road, or parking lot, made from impenetrable materials like asphalt, concrete, brick or stone.

<sup>164</sup> MD. REGS. CODE tit. 27, § 01.02.04(C)(7) (2005).

IMPERVIOUS SURFACE LIMITS

<p><b>Impervious Surface Limit provided in the state Critical Area Act:</b> No more than 15% on most sites or lots, and no more than 25% of a grandfathered lot of less than 1/2 acre. [MD. REGS. CODE tit. 27, § 01.02.04(C)(7) (2005)]</p>				
	<p><b>Critical Area Commission Model Ordinance*</b> §1-107(c)(7)</p>	<p><b>Anne Arundel County</b> §17-8-402</p>	<p><b>Queen Anne’s County</b> §14-138(d)(8)</p>	<p><b>St. Mary’s County</b> §41.5.3(i)</p>
<b>Basic Rule</b>	No more than 15%	No more than 15%	No more than 15%	No more than 15%
<b>Grandfathered Lot &lt;1/2 acre</b>	No more than 25%	[no special rule – automatically defaults to rules listed below under “Additional Exceptions”]	Grandfathered <i>residential</i> lots <1/2 acre, and grandfathered <i>non-residential</i> lots <1/4 acre: No more than 25%	No more than 25%
<b>Subdivision lot, &lt;1 acre</b>	Individual lot w/in a subdivision: 25%  Total for the entire subdivision as a whole: 15%	Individual lot w/in a subdivision: 25%  Total for the entire subdivision as a whole: 15%	Individual lot w/in a subdivision: 25%  Total for the entire subdivision as a whole: 15%	Individual lot w/in a subdivision: 25%  Total for the entire subdivision as a whole: 15%
<b>Additional Exceptions</b> (do not require a variance)	<i>Applies when:</i> (1) lot is a grandfathered lot <1 acre, OR subdivision lot <1 acre, AND (2) Planning Director finds that new impervious surfaces	<i>Applies when:</i> (1) lot is a grandfathered lot <1 acre, AND (2) (a) new impervious surfaces have been minimized, and (b) adverse water quality	[No additional exceptions. Must apply for a variance to exceed above-listed standards]	<i>Applies when:</i> (1) lot is a grandfathered lot <1 acre, AND (2) Planning Director finds that: (a) new impervious surfaces have been minimized, and (b) adverse water quality

	<p>have been minimized.</p> <p><i>Special limits by lot size:</i></p> <ul style="list-style-type: none"> <li>○ 0 – 8,000 square feet (SF): 25% of Parcel + 500 SF</li> <li>○ 8,001 – 21,780: 31.25% of Parcel</li> <li>○ 21,780 – 36,300: 5,445 SF</li> <li>○ 36,301 – 43,560 SF: 15% of Parcel</li> </ul>	<p>impacts have been minimized using Best Management Practices (BMPs) or site design considerations, and (c) on-site mitigation or fee-in-lieu has been performed.</p> <p><i>Special limits by lot size:</i></p> <ul style="list-style-type: none"> <li>○ 0 – 8,000 square feet (SF): 25% of Parcel + 500 SF</li> <li>○ 8,001 – 21,780: 31.25% of Parcel</li> <li>○ 21,780 – 36,300: 5,445 SF</li> <li>○ 36,301 – 43,560 SF: 15% of Parcel</li> </ul>		<p>impacts have been minimized using Best Management Practices (BMPs) or site design considerations, and (c) on-site mitigation or fee-in-lieu has been performed.</p> <p><i>Special limits by lot size:</i></p> <ul style="list-style-type: none"> <li>○ 0 – 8,000 square feet (SF): 25% of Parcel + 500 SF</li> <li>○ 8,001 – 21,780: 31.25% of Parcel</li> <li>○ 21,780 – 36,300: 5,445 SF</li> <li>○ 36,301 – 43,560 SF: 15% of Parcel</li> </ul>
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\* The Critical Area Commission provides a “Model Ordinance” as an example for jurisdictions to use when writing their own Critical Area regulations. It is not mandatory for jurisdictions to use its language in their regulations.

Note also that the Commission’s Model Ordinance, as well as both Anne Arundel and St. Mary’s County ordinances, contain rules that allow owners of some small grandfathered lots to almost automatically (and without a variance) exceed the general 15 and 25% impervious surface limits. Queen Anne’s County, on the other hand, requires all landowners seeking increased impervious surface coverage to obtain a variance.

## Comparison of Replanting Requirements

The Critical Area Criteria provide minimum replanting requirements for forest clearing within the Critical Area, and for any clearing in the 100-foot buffer.<sup>165</sup> Replanting may also be required as mitigation for a variety of other construction activity, including as a condition of variances.<sup>166</sup> When local programs require replanting, it may be done on a tree-for-tree basis, or an area-for-area basis.<sup>167</sup> Tree-for-tree mitigation means that the number of trees required as mitigation directly correlates to the number of trees removed. Area-for-area mitigation means the number of trees required as mitigation correlates to the square footage of the area that was cleared. For example, 1:1 mitigation means that a landowner who clears 1 acre of land must replant 1 acre of land. In most cases, mitigation is done on an area-for-area basis.

With area-for-area mitigation, individual jurisdictions are able to define how many trees or shrubs a landowner must plant per acre to satisfy the area-for-area requirement.<sup>168</sup> As a result, the number, size, and types of trees required as mitigation vary from jurisdiction to jurisdiction, even if the area-for-area mitigation standard is the same.

Both Queen Anne's and St. Mary's Counties define minimum replanting standards in terms of both the type and amount of replanting required in their local ordinances.<sup>169</sup> Anne Arundel County's local ordinance defines the type of replanting required, but the number of plants required is decided as a matter of informal policy, rather than written rule.<sup>170</sup>

Because the mitigation standard in each county is written differently, it is difficult to directly compare the language of the ordinances. However, a comparison of the minimum number of trees that a landowner could plant as mitigation for one acre of clearing under each county's standards is illustrative. As the table below shows, a person who clears 1 acre of land in Queen Anne's County is required to plant 36 percent fewer trees as mitigation than a person who clears 1 acre of land in St. Mary's County. And a person who clears 1 acre of land in St. Mary's County is required to plant 73 percent fewer trees as mitigation than a person who clears 1 acre of land in Anne Arundel County.

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<sup>165</sup> MD. REGS. CODE tit. 27, §01.02.04(C)(3) (2005).

<sup>166</sup> MD. REGS. CODE tit. 27, §01.11.01 (2005).

<sup>167</sup> Interview with Ren Serey, Executive Director, Critical Area Commission (Apr. 6, 2006).

<sup>168</sup> Neither the Critical Area Criteria nor the Critical Area Commission's Model Ordinance specifies a minimum number of trees per acre that will satisfy mitigation requirements. The Model Ordinance simply says that local jurisdictions should have a policy of ensuring replanting with a diversified plant community and native vegetation. Model Ordinance Section 1-117(e).

<sup>169</sup> See QUEEN ANNE'S COUNTY, MD., CODE § 14-154; ST. MARY'S COUNTY, MD., CODE § 72.3.5.

<sup>170</sup> ANNE ARUNDEL COUNTY, MD., CODE §17-8-602(h) lists the minimum size of trees to be planted, but does not specify how many trees per acre are required. According to the county staffer responsible for Buffer Management Plans, the County normally requires approximately 400 trees per acre, but that is an informal policy. Telephone conversation with Jim Johnson, Environmental Scientist, Anne Arundel County (Apr. 19, 2006).

REPLANTING STANDARDS

	<b>Queen Anne's County</b>	<b>St. Mary's County</b>	<b>Anne Arundel County*</b>
Minimum number of trees per acre that will meet county mitigation requirements (on an area-for-area basis)	70 trees (4 to 6 feet tall)	109 trees (6 feet tall / 1.5 inch caliper)  OR 66 trees (6 feet tall / 1.5 inch caliper) <i>AND</i> 86 shrubs (3 gallon size)	400 trees (4 feet tall / 1.5 inch caliper)  OR 108 trees (4 feet tall / 1.5 inch caliper) <i>AND</i> 326 shrubs

\*Note: Anne Arundel County's minimum replanting requirements are not formalized in the County's ordinance. The standards listed are those cited by a County employee as the usual requirement. There is no legal minimum standard in the County.

Sources:

- Queen Anne's County: QUEEN ANNE'S COUNTY, MD., CODE § 14-154; Telephone conversation with Steve Cohoon, County Planner, Queen Anne's County (Apr. 17, 2006).
- St. Mary's County: ST. MARY'S COUNTY, MD., CODE § 72.3.5; E-mail from Sue Veith, County Planner, St. Mary's County, to Anne Merwin, Student Attorney, University of Maryland Environmental Law Clinic (Apr. 17, 2006).
- Anne Arundel County: ANNE ARUNDEL COUNTY, MD., CODE §17-8-602(h); Telephone conversation with Jim Johnson, Environmental Scientist, Anne Arundel County (Apr. 19, 2006).

## **Section IV: Implementation of the Critical Area Act**

This section of the report provides a statistical analysis of development that occurs in the Critical Area, and an analysis of the views and opinions of groups who deal most frequently with the Act: government officials, environmental organizations, and developers. The first subsection is an analysis of development projects that were reviewed by the Critical Area Commission and local jurisdictions. The second subsection looks at a variety of enforcement issues, including the resources jurisdictions have available for enforcement. The data used in these subsections is a compilation of data from the review of files at the Critical Area Commission and from data surveys that were sent to the various groups outlined above.<sup>171</sup> The third subsection is an analysis of how the Critical Area Act and its enforcement are perceived by different groups. The data used in this subsection comes from interviews and opinion surveys that were sent to various groups.

The first two subsections present the results of a data survey the Clinic sent to 53 jurisdictions that have land in the Critical Area,<sup>172</sup> as well as data collected via file review at the Critical Area Commission and at three specially-selected “focus” counties. Of the 53 surveys sent out, we received 16 responses from Counties and other local jurisdictions. The survey asked for data regarding the locality’s Critical Area permits and variances, enforcement of Critical Area laws, and funding and staffing resources. Additional information was collected using database queries and in-depth review of files at the Critical Area Commission. This review included noting particular facts for each permit, variance, and site plan application in order to allow the Clinic to analyze the data and formulate conclusions regarding the Act’s implementation. Projects as large as strip malls and as small as decks and sheds were reviewed as part of this file review. The Clinic’s file review at the Commission was verified and supplemented by file review at the three focus counties, when necessary. Although this report provides detailed data only for the focus counties, the Clinic sought to include at least some data for all jurisdictions governed by the Critical Area Act. Unfortunately, 37 jurisdictions did not respond to the survey, therefore we relied on information from the Critical Area Commission for these jurisdictions.

The third subsection reviews the results of an opinion survey the Clinic sent to government officials, environmental organizations, and developers. The groups were asked to state what they believed to be the purpose and goals of the Act. They were also asked whether they believed the Act’s goals have been achieved and how they would improve the Act. The opinion survey’s underlying purpose was to gather information that

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<sup>171</sup> Data from the surveys, file review by the student attorneys, and data counts by Critical Area Commission staff were compared when available. Data from all three sources was approximately the same, with an occasional difference of up to three files. The fact that each jurisdiction has its own filing system may account for the small variances in counts.

<sup>172</sup> There are actually 61 different jurisdictions that fall within the Critical Area. However, several of these jurisdictions have been excluded from most of the program’s requirements because of their extremely small size. In addition, at least two small jurisdictions jointly manage their Critical Area programs, making them a single jurisdiction for purposes of Critical Area management. Therefore, the 53 jurisdictions to which surveys were sent represent all of the jurisdictions which the Critical Area Commission supervises.

would assist the Clinic in evaluating whether the Act has been enforced as intended, as well as gauging opinions regarding whether the Act has been enforced as intended. There was a low response rate from all groups of stakeholders that were asked to participate in the opinion survey; however, we did receive several surveys from members of each group allowing us to get a sense of the varying views and opinions of each group.

## Project Review and Approval in the Critical Area

The data used in this and the next subsection comes from a variety of sources. As is noted above, some of the data comes from survey responses submitted to the Clinic by 16 different jurisdictions. Additional data is drawn from file review at the Critical Area Commission. The 2005 files for three “focus” counties—Anne Arundel, Queen Anne’s, and St. Mary’s—were carefully reviewed for permits, subdivisions, and variances.<sup>173</sup> In addition, the Clinic counted the number of projects, by type, that were reviewed by the Commission in 2003, 2004, and 2005 for all jurisdictions subject to the Act’s regulations in order to be able to evaluate some basic data for all of the jurisdictions.

### Permits

The following chart represents responses from the data survey distributed by the Clinic. The first section of the survey asked jurisdictions about the permitting procedures that they follow when issuing building permits. Specifically, government officials were asked whether they issue permits to applicants who have unresolved Critical Area enforcement issues.

<b>Does your locality issue permits to applicants who have unresolved Critical Area enforcement issues?</b>	<b>Yes</b>	<b>No</b>
	3	13

Source: Data survey responses

Most jurisdictions that responded to the data survey stated that they do not issue permits to applicants who have unresolved Critical Area enforcement issues. Kent County, Harford County, and Charles County will issue permits to such applicants. The reasons for this are unclear, although it is possible their answers were based on a misunderstanding of the question.

A small percentage of jurisdictions that responded to the survey have special permitting procedures or permit follow-up procedures for applicants with a history of Critical Area violations. Kent County, Talbot County, Sharptown, and Baltimore City have such procedures. Talbot County documents such repeat violators and re-inspects those sites, and also uses Geographic Information Systems (GIS) and other photo documentation. Baltimore City keeps a log of Critical Area law specific violations and sends Critical Area Inspection Reports to the Critical Area Commission.

<sup>173</sup> For an explanation of how and why the Clinic chose the three focus counties, please see Section II, Methodology, *supra*.

Every county that responded to the data survey stated that they do grant permits for construction in the Critical Area even if that construction was begun (or for that matter completed) without a permit. This issue of “retroactive” permitting is often raised as an example of poor Critical Area enforcement. While the construction authorized by specific retroactive permits may well be worthy of critique, it is unfair to say that retroactive permitting in and of itself reflects poor enforcement because the jurisdiction may be required by law to grant such a permit. See Section V, Weaknesses in the Law, *infra*, for further explanation.

The chart below represents site plans that were reviewed by the Critical Area Commission in the three focus counties. The Commission does not review general building permit applications. Those permits are solely reviewed by local jurisdictions. However, site plans are a subsection of building permits, in that site plans are prepared for large scale building projects such as strip malls. As a result, site plan applications were reviewed as a proxy for general building permits.

<b>Commission Recommendation</b>	<b>Anne Arundel County (2005)</b>	<b>Queen Anne’s County (2005)</b>	<b>St Mary’s County (2005)</b>
Approve	1 (14%)	10 (67%)	0 (0%)
Deny	1 (14%)	1 (7%)	0 (0%)
No Final Recommendation*	5 (71%)	4 (26%)	4 (100%)

Source: review of Critical Area Commission files

\*This includes instances where the Commission either requested more information, or had not yet made a recommendation at the time the Clinic reviewed the files.

In 2005, the Commission approved only one (14 percent) of the seven site plans in Anne Arundel County, but approved 10 (67 percent) of the 15 site plans in Queen Anne’s County. All four site plan applicants of St Mary’s County were asked to submit more information before the Commission would suggest whether the project should be approved. The reasons for these varying approval rates are unclear, although it seems likely that it stems at least partly from the fact that Anne Arundel has much less undeveloped land than Queen Anne’s, meaning that developers are more likely to develop marginal or environmentally sensitive lots.

The number of site plan applications received by the Commission varies from jurisdiction to jurisdiction. The following chart illustrates the number of site plan applications received by the Commission during each of the past three years.

Jurisdiction	Total Number of Site Plan Applications		
	2003	2004	2005
Anne Arundel County	6	3	9
Annapolis	9	2	3
Baltimore City	21	26	13
Baltimore County	1	5	12
Calvert County	2	1	1
Chesapeake Beach	4	2	3
Cecil County	4	3	1
Crisfield	1	2	1
Caroline County	0	0	0
Charles County	9	14	17
Chestertown	2	0	2
Centreville	1	0	0
Chesapeake City	0	1	0
Dorchester County	3	3	1
Elkton	1	4	0
Greensboro	0	1	0
Harford County	3	1	3
Havre de Grace	0	5	0
Indian Head	0	4	0
Kent County	0	1	0
Leonardtown	1	2	2
North Beach	0	0	2
North East	0	1	2
Ocean City	30	84	60
Princess Anne	2	1	1
Port Deposit	1	2	0
Prince George's County	0	0	0
Queen Anne's County	7	11	16
Rock Hall	1	1	0
Salisbury	2	1	3
St. Mary's County	11	10	4
Snow Hill	4	1	0
Somerset County	1	2	1
St. Michaels	1	0	0
Talbot County	13	20	10
Vienna	1	0	0
Worcester Coastal	5	3	3
Wicomico County	1	4	1
Worcester County	0	0	2
Other*	0	0	0

Source: Critical Area Commission database

\*Jurisdictions listed as Other: A number of jurisdictions subject to Critical Area Act regulation have very little land in the Critical Area and/or have very little development in the Critical Area. Jurisdictions encompassed in the 'Other' category are: Betterton, Church Hill, Charlestown, Cambridge, Denton, Easton, Federalsburg, Highland Beach, Millington, Perryville, Queen Anne, Queenstown, Secretary, and Sharptown.

## Subdivisions

Subdivision files were also reviewed at the Critical Area Commission for the three focus counties. These files encompass both the subdivision of land by private land owners and the subdivision of lots by larger commercial developers when developing large plats of land. Subdivision applications include not only dividing a parcel of land into two parcels of land, but also combining two or more parcels of land into one parcel or more.

Subdivisions make up a relatively small portion of the Critical Area issues faced by the three focus counties. The following chart provides the data for the number of subdivision applications reviewed by the three counties in 2005 according to data at the Critical Area Commission.

	<b>Anne Arundel County</b>	<b>Queen Anne's County</b>	<b>St. Mary's County</b>
<b>Total Number of Subdivision Applications (2005)</b>	10	29	26
<b>Number Recommended for Approval by the Commission</b>	8 (80%)	26 (90%)	18 (69%)

Source: review of Critical Area Commission files

A majority of the subdivision applications were approved by the Commission. All of the projects that were not approved were asked by the Commission to provide more information, and were not officially recommended for denial. It should be noted again that the Commission cannot deny these projects, but can only provide advice to the counties on whether they believe that the county should approve or deny the project.

In each of the three focus counties, approximately 12 percent of the subdivisions were intrafamily transfers. In Queen Anne's County approximately 10 percent of the subdivisions were for commercial development, whereas in St Mary's County 58 percent of the subdivisions were for commercial development. 40 percent of the subdivisions in Anne Arundel County were for commercial developers.

The chart below shows the Critical Area designation of the land affected by each subdivision application. The majority of subdivision applications in Anne Arundel County are focused in the Limited Development Area (LDA), while Queen Anne's and St. Mary's Counties are experiencing substantial subdivision pressure in the Resource Conservation Area (RCA).

<b>Critical Area Designation of Land to be Subdivided</b>	<b>Anne Arundel County (2005)</b>	<b>Queen Anne's County (2005)</b>	<b>St Mary's County (2005)</b>
RCA	10%	38%	35%
LDA	60%	59%	8%
IDA	10%	3%	4%
Both RCA & LDA	10%	0%	0%
Unknown*	10%	0%	53%

Source: review of Critical Area Commission files

\* Unknown means that the Critical Area designation of the land to be subdivided was not clear from the subdivision application or other materials contained in the Critical Area Commission's files.

## Variations

One of the most debated topics related to the Critical Area Act is the granting of variances, and whether such variances are being granted congruently with the Act's intent. Data was obtained from the Commission file database, review of files at the Commission, data survey responses, and when necessary in the focus counties, file review at county offices. As can be seen in the following table, some jurisdictions have very few variance applications, while others have a substantial number of variances to review every year.

Jurisdiction	Total Number of Variance Applications		
	2003	2004	2005
Anne Arundel County	311	311	175
Annapolis	8	4	3
Baltimore City	5	1	1
Baltimore County	18	26	32
Betterton	0	0	1
Calvert County	41	45	42
Chesapeake Beach	5	0	0
Cecil County	4	7	9
Crisfield	2	0	1
Cambridge	0	1	0
Caroline County	3	5	5
Charles County	2	4	2
Dorchester County	22	19	18
Greensboro	0	1	0
Highland Beach	1	0	0
Harford County	0	3	2
Indian Head	1	0	0
Kent County	16	12	8
Leonardtwn	1	1	2
North East	2	1	0
Ocean City	1	1	0
Oxford	0	2	0
Princess Anne	2	1	0
Port Deposit	0	1	0
Prince George's County	1	2	3
Queen Anne's County	22	28	11
Queenstown	1	0	0
Salisbury	1	0	0
Secretary	0	2	0
St. Mary's County	13	42	63
Snow Hill	1	3	0
Somerset County	12	4	13
St. Michaels	1	0	1
Talbot County	33	41	24
Vienna	0	1	1
Worcester Coastal	1	8	6
Wicomico County	5	2	1
Worcester County	0	2	0
Other*	0	0	0

Source: Critical Area Commission database

\*Jurisdictions listed as Other: A number of jurisdictions subject to Critical Area Act regulation have very little land in the Critical Area and/or have very little development in the Critical Area. Jurisdictions encompassed in the 'Other' category are: Church Hill, Charlestown, Chestertown, Centreville, Chesapeake, Denton, Easton, Elkton, Federalsburg, Havre de Grace, Millington, North Beach, Perryville, Queen Anne, Rock Hall, and Sharptown.

For the focus counties, the next chart demonstrates the number of variances applied for in 2005, whether the Commission thought that the variance should be approved by the county, and whether the county ultimately approved or denied the variance. It should again be noted that the Commission's rejection or approval is not binding on the local authorities but is guidance on how the local authorities should rule on the application.

	<b>Total # of Critical Area Variance Applications (2005)*</b>	<b>Critical Area Commission Recommendation**</b>	<b>Ultimate Decision by County***</b>
<b>Anne Arundel County</b>	175 <i>**Files actually reviewed by the Clinic: 171</i>	Approve: 118 (67%) Deny: 13 (7%) Part approve/Part deny: 2 (1%) Needs more info: 10 (6%) No comment: 27 (15%)	Approve: 135 (77%) Deny: 10 (6%) Part approve / Part deny: 8 (5%) No decision yet on record: 16 (9%)
<b>Queen Anne's County</b>	11 <i>**Files actually reviewed by the Clinic: 9</i>	Approve: 6 (55%) Deny: 1 (9%) Needs more info: 1 (9%) No comment: 1(9%)	Approve: 10 (91%) Deny: 1 (9%) Unknown: 0 (0%)
<b>St. Mary's County†</b>	63 <i>**Files actually reviewed by the Clinic: 62</i> [FY2005: 41]	Approve: 48 (76%) Deny: 4 (6%) Part approve/Part deny: 5 (8%) Needs more info: 2 (3%)	<i>Decisions for calendar year 2005 variance applications not available.</i>  [FY2005: Approve: 35 (85%) Deny: 3 (7%) Part approve / Part Deny: 3 (7%)]

Sources:

\*Critical Area Commission database

\*\*Review of Critical Area Commission files. Numbers and percentages do not add up to 100% of total because some of the variance files the Commission has on record for 2005 were not available for us to review. Missing numbers/percentages represent the files we were unable to review plus any files where the Commission's recommendation was not determinable. The exact cause of the missing files is unclear, but it's likely that they were either in use by Commission staff during our file review, or had been incorrectly filed.

\*\*\* Anne Arundel: review of Critical Area Commission files – percentages do not add up to 100% for the same reason identified above; Queen Anne's: files provided by county staff; St. Mary's: FY data provided by county staff.

†St. Mary's County maintains their Critical Area records by fiscal year (FY). As a result, it is very difficult to gather information by calendar year. We have provided calendar year data when it is available; when only fiscal year data is available, we provide that data in brackets.

Variance applications are made for a variety of developments and a variety of reasons. For example, almost any building that occurs on a lot that is properly grandfathered must apply for a variance. Most variance applications are for grandfathered lots. It is the local jurisdictions' duty to investigate and inform the Commission as to whether a lot is properly grandfathered; therefore, the Commission generally assumes that the lot is grandfathered unless the local jurisdiction informs them

otherwise.<sup>174</sup> According to the Commission, in many cases they would not approve the variance if the lot was not grandfathered. In addition, all development in the 100 foot buffer requires a variance.

In Anne Arundel County in 2005, 43 percent of the variance applications the Clinic reviewed were for construction in the 100 foot buffer. 37 percent of variances in St Mary’s and 33 percent of the variances in Queen Anne’s Counties were for construction in the buffer. Other common variance requests were for steep slope, expanded buffer, and forest clearing variances. In Anne Arundel, 29 percent of the variance applications the Clinic reviewed requested steep slope variances, and 17 percent requested expanded buffer variances. In St. Mary’s, 40 percent of the variance applications requested expanded buffer variances, and 34 percent requested forest clearing variances.

The following chart, based on the Clinic’s review of files at the Critical Area Commission, shows the type of development for which each applicant in the focus counties sought a variance for in 2005. Dwellings and additions were by far the most prominent type of construction requiring a variance in Anne Arundel and St. Mary’s Counties. According to Ren Serey, Executive Director of the Critical Area Commission, it is generally the Commission’s policy not to oppose variances to accommodate living space construction and/or additions on grandfathered lots.<sup>175</sup> This policy is not mandated by the Critical Area Act, but is within the discretion of the Commission. See Section V for further discussion.

<b>Type of Development</b>	<b>Anne Arundel County</b>	<b>Queen Anne’s County</b>	<b>St Mary’s County</b>
Dwelling	70	0	33
Garage	17	2	3
Addition	34	3	11
Pool	1	1	0
Gazebo	1	0	0
Deck	23	0	7
Barn	0	0	0
Patio	2	0	0
Shed	2	1	4
Other	23	2	3

Source: review of Critical Area Commission files

<sup>174</sup> If the Commission believes that a lot may not be properly grandfathered, it will do some limited investigation and request that the local jurisdiction verify the lot’s grandfathered status. However, according to Ren Serey, the Commission does not have the resources to investigate the grandfathering status of every application, nor does there appear to be a need for the Commission to verify the local jurisdiction’s grandfathering information in every case. Interview with Ren Serey, Executive Director, Critical Area Commission, in Annapolis, Md. (Jan. 19, 2006).

<sup>175</sup> Telephone interview with Ren Serey, *supra* note 7.

Many variance applications contain requests for more than one variance. For example, a single variance application could request variances to the 100-foot buffer, impervious surfaces, and steep slope requirements all at the same time. As the table below shows, more than half of the variance applications the Clinic reviewed in Anne Arundel and St. Mary’s Counties requested two or more variances. The reasons for this “multiple variance” phenomenon are unclear. However, it seems likely that it results from construction on small, older lots that were created without taking into consideration the environmental limitations that would be considered when creating a lot today.

	<b>Number of applications that request 1 variance (2005)</b>	<b>Number of applications that request 2 variances (2005)</b>	<b>Number of applications that request 3 or more variances (2005)</b>	<b>Number of applications w/ undetermined number of variance requests</b>
<b>Anne Arundel County</b>	83	70	17	1
<b>Queen Anne’s County</b>	9	0	0	0
<b>St. Mary’s County</b>	28	25	5	4

Source: review of Critical Area Commission files

Note: As is noted above, the Clinic was unable to review all of the variance files the Commission had on record, although it did review the vast majority of them. These numbers reflect only the files the Clinic was able to review.

Like the issue of retroactive permitting, the issue of retroactive variances is often raised as a critique of Critical Area enforcement. This critique may not be valid for the same reasons cited in the Permits subsection, *supra*, and further described in Section V, *infra*. As the chart below shows, retroactive variances represent a small but not minimal percent of the variance applications reviewed by the Clinic.

	<b>Anne Arundel County</b>	<b>Queen Anne’s County</b>	<b>St. Mary’s County</b>
<b>Variations Sought after Violation Occurred (2005)</b>	18 (11%)	1 (11%)	11 (18%)

Source: review of Critical Area Commission files

Note: As is noted above, the Clinic was unable to review all of the variance files the Commission had on record, although it did review the vast majority of them. These numbers reflect only the files the Clinic was able to review.

As the above data demonstrates, jurisdictions regulated by the Act experience a wide variety of growth in development in the Critical Area, and often to varying degrees. Due to these differences in development and the varying strengths of the local programs, enforcement issues will often vary amongst them.

## Critical Area Enforcement and Enforcement Resources

### Enforcement

The number of Critical Area law violations that jurisdictions reported varies widely, and is largely dependent on the size of the jurisdiction and the amount of land it has in the Critical Area. For example, all of the municipalities that responded to the survey reported between one and five reported violations per year for the last three years, with most years having zero violations. Counties that identified the number of reported violations reported anywhere from zero (Charles County in 2003) to 445 (Anne Arundel in 2005). St. Mary's and Talbot Counties had the next largest number of annual violations, with 163 (St. Mary's County, fiscal year 2003) and 67 (Talbot County, 2005) respectively. It appears that the vast majority of these violations are committed by first-time offenders. 60 percent of survey respondents said "few to none" of the violations are committed by repeat offenders, and 20 percent said only "some" of the violations were committed by repeat offenders.<sup>176</sup> It is not clear, however, if responding jurisdictions actually track repeat offenders, or if their responses were based solely on anecdotal information. In addition to the size of the jurisdiction and the amount of land in the Critical Area, other factors that may contribute to differences in numbers of reported violations include: differing development pressures, more vigilant Critical Area watchdogs, better tracking of reported violations in some jurisdictions than others, and differing levels of homeowner knowledge about Critical Area requirements.

Most jurisdictions do not appear to track violations in a way that enables them to specifically identify trends in violations. The survey asked respondents to sort violations into certain categories. Smaller jurisdictions were able to identify types of violations, while larger jurisdictions simply listed total violations. This may be because smaller jurisdictions had so few violations, they could simply look in the file to determine what type of violation had occurred.

The penalties imposed for Critical Area violations also vary widely amongst jurisdictions. Sharptown reported a minimum penalty of \$50, while St. Mary's County reported a minimum penalty of \$500 per day. Maximum civil penalties were as low as \$250 per day (Sharptown), and as high as \$10,000 (Anne Arundel County, Charles County, Kent County, and Talbot County) and \$1,000 per day (St. Mary's County and Town of Denton). Several jurisdictions (including Anne Arundel) also had criminal penalties, one of up to 90 days in prison (Town of Easton) and another of up to 1 year in prison (City of Baltimore). The Critical Area Commission's Model Ordinance authorizes a fine not exceeding \$10,000, but does not specify if fines should be assessed on a daily or per-violation basis.

About one quarter of the survey respondents either could not or did not identify the total number of penalties imposed over the last three years. Those jurisdictions that were able to provide numbers of penalties almost universally stated that they had

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<sup>176</sup> The remaining 20 percent of the respondents did not answer this question.

imposed no penalties. Anne Arundel County was the exception, reporting 69 civil penalties and 2 criminal penalties in 2005. In three instances, counties reported imposing a \$10,000 fine on a Critical Area Act violator (Anne Arundel, Kent County, and Talbot County). The next largest fine identified by the respondents was \$5,000 (Anne Arundel County). Possible reasons for the small number of fines imposed are discussed in Section V, Analysis of Critical Area Act Enforcement, *infra*.

Every survey respondent claimed that their jurisdiction regularly follows up on Critical Area violations and enforcement actions to ensure that problems have been remedied. Jurisdictions that specified their follow-up methodology said they use site visits to ensure compliance. One jurisdiction said the site visit was performed on a scheduled day. Another said the site visits were “periodic” and “at-will” (i.e. surprise inspections). The Clinic was unable to independently verify if follow-up inspections to ensure compliance and mitigation were actually completed on a regular basis.

In 2004, the Critical Area Act was changed to give the Critical Area Commission the authority to enforce local Critical Area laws. Jurisdictions were of mixed opinions as to whether this change has helped improve their enforcement programs. 31 percent said it had helped, one because “we know if we need the State to step in, we can request assistance” and another because “this will give us backup that we may not have had politically.” 56 percent said it had not helped. One said this was because there has been “no change in enforcement” as a result, and another said it had actually caused problems because some property owners call the Commission before the local government, resulting in inconsistent answers and delays in enforcement. The remainder did not answer, possibly because as one individual who spoke to the Clinic but did not fill out a survey said, “It has neither helped nor hindered. We’ve seen no change.”

### Enforcement Resources

Jurisdictions that responded to the data survey are split almost evenly as to whether they have enough funding resources to adequately administer their Critical Area programs, but a majority of jurisdictions say they have an adequate number of staff to administer the program.

	<b>Does your jurisdiction have adequate funding resources to administer the Critical Area program?</b>	<b>Is your jurisdiction appropriately staffed to perform the functions necessary to implement and enforce the Critical Area Act?</b>
<b>Yes</b>	7 (44%)	10 (63%)
<b>No, not enough funding (Q1) or staff (Q2)</b>	7 (44%)	4 (25%)
<b>No answer</b>	2 (13%)	2 (13%)

Source: Data survey responses

On the funding question, respondents who said they did not have enough funding tended to cite decreasing state grant funds<sup>177</sup> and tight local budgets. Two respondents who said they did have enough funding, however, gave very different reasons for their answers. St. Mary's County said it has enough funding to meet the minimum requirements of the Critical Area program, and any new funds would likely be used for a program other than the Critical Area program, because the Critical Area already uses up so much of the planning department's resources. Baltimore City, on the other hand, says it has sufficient funding because it has committed "substantial" funding of its own beyond the state-sponsored grant funding.

On the staffing question, several of the small municipalities that answered "yes" simply said they did not have enough violations to make staffing resources an issue. Participants in the Circuit Rider program cited the importance of their Circuit Rider to ensuring compliance in their jurisdiction.<sup>178</sup> It is possible that other jurisdictions answered "yes" to the staffing question simply because they believed answering "no" would make their program look bad. One county representative specifically told the Clinic that he answered "yes" because he felt the question asked him to "rate" his county's performance, and he was not willing to give his county less than "two thumbs up." In contrast, St. Mary's County said that they did not have enough staff, and that additional staffing would allow them to do better site review during the initial permitting process, and would allow for pre-construction conferences with planners present, not just inspectors.

As would be expected, the number of staff that perform Critical Area program functions varies according to the size of the jurisdiction. The small municipalities that responded to the survey generally have between 1 and 2 full time staff that spend between 1 and 8 hours a week working on Critical Area issues. Baltimore City and all of the counties that responded have anywhere between 6 and 25 staff who deal with Critical Area issues. However, the staffing strategy appears to differ among jurisdictions. For example, Harford County reported having one specific planner who is responsible for Critical Area issues, and spends 30 – 100 percent of his time on those issues. Queen Anne's County, on the other hand, does not have a particular Critical Area point person. Instead, each of their planners is responsible for knowing and enforcing the program, with no single planner spending most of their time on Critical Area issues.

Survey respondents reported having anywhere between 0 and 16 inspectors who have Critical Area program responsibilities, with most having between 0 and 4. The counties that reported do not necessarily have more inspectors available than the municipalities that reported. For example, the towns of Greensboro and Denton both reported having 2 inspectors with Critical Area responsibilities, while Charles and Kent counties only reported having 1 inspector with Critical Area responsibilities. With regards to the focus counties, St. Mary's has 4 Critical Area inspectors, Anne Arundel has 16, and Queen Anne's has 2. Anne Arundel is the only jurisdiction that said they

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<sup>177</sup> Most Critical Area grants are distributed by the Critical Area Commission, which receives money from the National Oceanic and Atmospheric Administration for that purpose.

<sup>178</sup> Section III of this Report describes the Circuit Rider Program.

have inspectors (2) dedicated solely to Critical Area violations. Although as noted above, most jurisdictions do not believe they are short staffed, Ren Serey (Executive Director of the Critical Area Commission) believes 10-12 inspectors are needed in every major jurisdiction to properly enforce the Critical Area laws.<sup>179</sup> Only 38 percent of the respondents had inspectors available on the weekends, when anecdotal evidence suggests that a great number of violations occur.<sup>180</sup> Among the three focus counties, only St. Mary's does not have inspectors available on the weekend.

Number of inspectors with Critical Area responsibilities, per jurisdiction	Number of jurisdictions that have inspectors available on the weekends
0-16 (most respondents: 0-4)	6 (38%)

Source: Data survey responses

## Views and Opinions about the Critical Area Act

The opinion survey described in Section I asked Public Interest Advocates, State Government Officials, Local Government Officials, and Business Interests to describe, in their opinion, the purpose of the Critical Area Act. This subsection analyses the 30 opinion survey responses received by the Clinic.<sup>181</sup> The first part describes responses concerning the purpose of the Critical Area Act. The second summarizes the opinions expressed with respect to implementation and enforcement of the Act. This subsection concludes with an analysis of the trends that appeared from the responses to the opinion survey.

### Purposes of the Act: Actual and Perceived

Even though the stakeholder groups' responses are similar, subtle differences illustrate potential sources of controversy surrounding the Critical Area Act. This portion of the report will first cite specific language from the Act to identify its purposes. Then, this section will list select, representative responses from each category of recipients. Finally, this section will compare and contrast the responses to the Act's stated purpose.

#### *The Critical Area Act's Stated Purpose*

The purposes of the Critical Area Act are:

- (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

<sup>179</sup> Telephone interview with Ren Serey, *supra* note 7.

<sup>180</sup> Several of the Maryland Waterkeepers, who commissioned this study and who routinely patrol the shoreline on weekends, indicated to the Clinic that they believe many Critical Area violations occur on the weekends, when landowners think the risk of inspection is low.

<sup>181</sup> For details on the survey methodology and responses, see Part I, Methodology, *supra*.

(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.<sup>182</sup>

The Act also identifies three specific goals for local programs that help in interpreting the Act's stated purposes. These goals are:

(1) To minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

(2) To conserve fish, wildlife, and plant habitat; and

(3) To establish land use policies for development in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts.<sup>183</sup>

Read together, these sections of the Act seem to create a dual purpose. The dual purpose is to [1] protect the Chesapeake Bay and [2] accommodate growth.

#### *Perception of the Critical Area Act's Purpose*

Public Interest Advocates focused their comments about the Act's purpose on the first and second goals of the local programs as explained above—namely, to minimize adverse impacts on water quality and to conserve habitat. For example, one Public Interest Advocate opined that “[t]he purpose of the Critical Area Act is to move development and other human activity away from tidal waters, so that natural habitats can be protected, and filtering actions can protect waters from pollutants, alterations to hydrology, and other impacts.” Another Public Interest Advocate responded that the purpose of the Act is “to protect water quality and tidal shoreline habitats.” Finally, a third Public Interest Advocate stated that “[n]otwithstanding statutory language and formal legislative history, the purpose [of the Critical Area Act] was/is to lessen development-related impacts on Chesapeake Bay (and Coastal Bays) by regulating ‘critical’ areas nearest the shoreline.”

Local Government Officials also focused their comments about the Act's purpose on the first and second goals of the local programs. In fact, many of their comments summarized the two goals listed in Section 8-1808(b) of the Act. For example, one Local Government Official stated that the purpose of the Act is “[t]o protect, enhance water quality and health, plant/animal habitat, of tidal waters and adjacent shoreline areas of

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<sup>182</sup> MD. CODE ANN., NAT. RES. II § 8-1801(b) (2005).

<sup>183</sup> MD. CODE ANN., NAT. RES. II § 8-1808(b) (2005).

Chesapeake Bay and tributaries.” Similarly, another Local Government Official opined that the purpose of the Act is “[t]o improve overall water quality of the Chesapeake bay & its tributaries and to preserve as much natural habitat as possible within 1000 feet of tidal water with particular emphasis on the Buffer.” Finally, a third Local Government Official identified the purpose of the Act as “protect[ing], to the extent possible, the integrity of shoreline areas relative to wetlands, certain habitats, etc.”

A State Government Official’s response cited the Critical Area Act to identify its purpose. It is important to note that the response also cited the goals of local programs as listed in Section 8-1808(b) of the Act to supplement its purposes.

Representatives of Business Interests provided the widest array of responses. For example, one participant opined that the purpose is “[t]o stem the decline of the Chesapeake Bay” and “[t]o restore the Chesapeake Bay.” Similarly, another participant stated that the Act intended “[t]o protect the valuable natural resource that is our Chesapeake Bay so that it may continue to be one of the worlds richest estuarine ecosystems providing recreation and commerce for future generations, through programs designed to improve water quality and protect wildlife habitat.” Conversely, a third participant stated that the Act’s purpose is to “regulate development within 1000 feet of mean high water.” Another participant cited Section 8-1801 of the Act to identify its purposes. Finally, one participant opined that

the intent was, and still is, an admirable one in helping to keep the Bay cleaner. Unfortunately the spirit has been lost to a large extent along the way. The C[ritical] A[rea] Commission has become a bureaucratic beast of its own. It is also my opinion that much of Critical Area law is difficult to apply fairly to urban environment. The CA agenda of removing IDA Buffer exemptions is much less beneficial than in creating new ideas and partnerships to focus on the ultimate goal of a cleaner Bay.

#### *Analysis of Perceptions of the Critical Area Act’s Purpose*

The overwhelming majority of opinion survey participants, whether State or Local Government Officials, Public Interest Advocates, or Business Interests, identified protecting the Chesapeake Bay as the Act’s purpose. Despite the apparent congruity, there are subtle differences that illustrate, at least in part, conflicting viewpoints with respect to the Critical Area Act and its enforcement.

Public Interest Advocates and Local Government Officials seemed to focus their responses on the first and second goals of local programs as listed in Section 8-1808(b) of the Act. These goals focus on protecting the Chesapeake Bay. Similarly, Business Interests generally identified protecting the Chesapeake Bay as the purpose of the Act. A State Government Official, a few Business Interests, and a single Local Government

Official<sup>184</sup> addressed, directly or indirectly, the third goal listed in Section 8-1808(b)—to establish land use policies that accommodate growth. Of the respondents that addressed the third goal most merely cited the Act.

The third goal specifically requires “land use policies for development which ... accommodate growth” and acknowledges the possibility that human activity in the Critical Area “can create adverse environmental impacts.”<sup>185</sup> Only a single Local Government Official recognized this limitation by stating, without explanation, that the purpose of the Act is “to protect, to the extent possible, the integrity of shoreline areas relative to wetlands, certain habitats, etc.” Overall, few opinion survey participants cited “accommodating growth” as a purpose of the Act. A possible explanation for this is few participants believe “accommodating growth” should be a purpose for the Act. This belief, that the Act should not accommodate growth and only should protect the Chesapeake Bay, is likely a source of controversy with respect to the Critical Area Act.

### Opinions on Implementation and Enforcement of the Act

The respondents were nearly evenly divided with respect to their satisfaction regarding enforcement under the Act. Approximately half were satisfied and nearly half were dissatisfied. There were, however, stark differences according to the type of respondent. None of the public interest respondents were satisfied with enforcement while approximately two-thirds of the commercial and government responses indicated satisfaction.

The responses concerning whether the Act achieves its purpose reflect the differing opinions as to what that purpose is. Public Interest Groups, all of whom characterized the purpose of the Act as protecting environmental resources, voiced the most dissatisfaction. Conversely, Business Interests and Government Officials indicated that the purpose of the Act was at least somewhat achieved.

The general outlook on enforcement of the Act was more skeptical than that of the implementation of the Act. Most of the respondents voiced an opinion as to whether the requirements of the Act are adequately enforced. Half of those responses indicated that the Act is inadequately enforced. This response rate is largely explained by the fact that nearly two-thirds of the respondents, irrespective of whether they come from government, business, or a public interest group, feel that there are not enough inspectors and inspections to enforce the Act.

The opinion survey also asked questions regarding the adequacy of fines and penalties. The results of these questions varied greatly. This is largely because the policies on fines and penalties vary widely from jurisdiction to jurisdiction. For example, one county stated that face-to-face communication with violators to bring them into

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<sup>184</sup> This report finds it unusual that more Local Government Officials did not cite the third goal of local programs to define the purpose of the Act. A possible explanation is that accommodating growth is not popular.

<sup>185</sup> MD. CODE ANN., NAT. RES. II § 8-1808(b)(3) (2005).

compliance is preferred over the issuance of a fine. Therefore, many of the respondents found it difficult to assess whether the *number* of fines issued is adequate. With respect to the *amount* of fines, over one quarter of the respondents did not have the knowledge to comment. Of those who did, a majority felt that the level of fines is adequate. Several respondents voiced approval at the trend of increasing the level of fine. However, a significant percentage, nearly one quarter of the respondents, felt that the penalties were inadequate to deter future violations. One Public Interest respondent stated that “builders, contractors, and citizens know they can get away with violations.”

## Summary

There seems to be a disconnect between the opinion survey respondents’ views of the policies behind the Critical Area Act and its enforcement. There is overwhelming support for the Act and its intent, but the respondents identify a variety of problems. Much of this is attributed by the respondents to the fact that there are loopholes in the Act and there are inadequate resources at the local levels for adequate enforcement.

It is also clear that views of the Act vary widely according to the type of respondent. Generally, it appears as though respondents in public interest were much more critical of implementation and enforcement than were commercial and government interests. To a certain extent, this is expected because it is unrealistic to expect government entities to be critical of their own implementation and enforcement of a law. Additionally, one expects commercial interests to be less critical because voicing criticisms might encumber them with more regulation. This is illustrative of the problems all environmental laws face with respect to balancing the interests of various stakeholders.

## **Section V: Analysis of Critical Area Act Enforcement**

Section IV describes most of the major evidence the Clinic collected during its investigation of Critical Area Act enforcement, and begins to explore the meaning of this evidence. Data, opinions, and case studies such as those presented in Section IV are invaluable tools in helping us to understand the complexities of development and enforcement in the Critical Area because they provide us with a detailed view of what's happening on the ground. In contrast, in Section V, we step back and look at some of the larger issues that may be driving the evidence presented in Section IV. Section V takes a more holistic look at Critical Area enforcement, and is based on both our quantitative research and qualitative conversations with stakeholders.

### **Weaknesses in the Law**

One of the major concerns raised with regard to the Critical Area Act is that it has too many loopholes. As Section II explains, the Critical Area Act was designed to be a highly flexible law that could be adapted to a multitude of jurisdictions' individual needs, and that would not unduly burden existing landowners' ability to develop their property. As a result, several provisions allow development to occur without being subject to the Act's most stringent requirements. This subsection explores those weaknesses in the law, both real and perceived.

### **Retroactive Permits and Variances**

The practice of granting permits and variances after-the-fact (retroactively) has often been cited as evidence of poor Critical Area enforcement. To the casual observer, it seems that when a landowner builds without the required permit or variance, and then is granted that permit or variance after the fact, it is allowing the landowner to build what he would otherwise not have been able to build. This impression is understandable, but it is not necessarily correct.

As is noted in Section IV, every jurisdiction that responded to the Clinic's data survey is willing to grant retroactive permits and variances. The reason jurisdictions grant retroactive variances is because they do not believe they have the authority to deny variances that otherwise would have been granted had they been applied for prior to construction.<sup>186</sup> The Critical Area Act is silent on the question. The Maryland courts have never directly addressed applicants' right to apply for a retroactive variance. Instead, they have operated under the assumption that the applicants have that right, and simply analyzed whether the applicant meets the standard variance requirements in order to determine whether the variance should be granted or denied.<sup>187</sup> The courts thus far

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<sup>186</sup> Interview with Spurge Eismeier, Director of Inspections and Permits, Anne Arundel County Md., and Anne Arundel County Critical Area Staff, in Annapolis, Md. (Jan. 25, 2006).

<sup>187</sup> See generally *Ad.+Soil, Inc. v. Queen Anne's County*, 307 Md. 307, 513 A.2d 893 (1986) (reviewing a variance application, made after the fact, where the applicant had built into a setback); *Cromwell v. Ward*, 102 Md. App. 691 (1995) (reviewing an after the fact application for a variance to legalize an already constructed building).

have only ordered that a structure be torn down if it fails to satisfy the variance standards set forth in the Critical Area law.

Therefore, the real concern is not retroactive permits and variances in and of themselves. Instead the concern should be landowners using the retroactive variance process to an unfair advantage. The retroactive variance process may provide unfair advantages to the landowner for several reasons. First, it is time consuming and costly for a jurisdiction to force the structure to be torn down, and anecdotal evidence indicates that judges tend to be disinclined to force a tear-down. This problem is discussed in more detail below, under “Role of the Courts.” Second, the retroactive variance process allows the landowner to avoid the informal, pre-permitting exchange whereby local officials and the Critical Area Commission request modifications to the project that would protect the environment.

Third, there is the inchoate, but very real, influence an existing structure may have on a Hearing Examiner’s retroactive variance decision. As is noted below in the subsection on variance standards, the standard used to judge what construction is allowable on grandfathered lots is highly subjective. A Hearing Examiner reviewing an application for a retroactive variance may be inclined to use discretion to allow the existing structure to remain even if the Examiner would not have otherwise allowed it to be built, because it is always a more difficult decision to demand a tear-down than it is to deny an application to build. This not only advantages the landowner applying for the retroactive variance, but also encourages other landowners to build nonconforming structures without permits in hopes of getting more favorable treatment in a retroactive approval process. Finally, the local jurisdiction might choose to not force an applicant who receives a retroactive permit or variance to pay the fine that otherwise would be assessed for failure to obtain the required permits or variance prior to construction.

### Grandfathering Provision

By far the largest loophole in the Critical Area Act is the grandfathering provision.<sup>188</sup> As is described in detail in Section II, *supra*, development on grandfathered lots (generally, lots created before 1985) is only required to comply with the Critical Area Act “insofar as possible.”<sup>189</sup> As a result, almost all development applications on grandfathered lots are approved.<sup>190</sup>

The grandfathering provision creates a gigantic loophole for several reasons. First, it is not limited in scope to just a few properties. An enormous number of currently existing waterside properties are grandfathered. Although no one can identify exactly how many properties are grandfathered, in 2005 alone the Critical Area Commission reviewed 424 variance applications,<sup>191</sup> almost all of which were presumed to be on

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<sup>188</sup> The grandfathering provisions are enumerated in MD. REGS. CODE tit. 27, §01.02 *et. seq.* (2005).

<sup>189</sup> MD. REGS. CODE tit. 27, § 01.02.07(B)(2)(a) (2005).

<sup>190</sup> See Section IV, Project Review and Approval in the Critical Area, Variances, *supra*.

<sup>191</sup> Source: Critical Area Commission database query (Feb. 2006).

grandfathered lots.<sup>192</sup> Second, the grandfathering clause contains no sunset provision—i.e., there is no point at which the normal Critical Area regulations become applicable to this large number of grandfathered lots. They retain their privileged status indefinitely. Lastly, almost all development requests on grandfathered lots go through a relaxed variance review process, as opposed to a standard Critical Area permitting process. As is described below in the subsection on variance standards, variances are reviewed under a “hardship” standard. The hardship standard is based in large part on what other property owners in the vicinity have built on their properties. Thus, if a neighbor has a 1,000 square foot deck located in the 100 foot buffer, it may be determined that not allowing the property owner on an adjacent grandfathered lot to build a similar deck would be an unreasonable hardship. See the variance discussion, *infra*, for more details.

### Annexation and Reclassification

Reclassification of land in the Critical Area from one land use designation to another (for example, changing land from RCA to LDA) is authorized in Section 8-1809(h)(2)(i) of the Critical Area Act<sup>193</sup> which says that land may be reclassified “on proof of a mistake in the existing zoning.”<sup>194</sup> The “existing zoning” is based on the land use in existence at the time the Critical Area Act program was adopted by the local jurisdiction. However, there is no sunset provision or other language in the state statute to limit the time period in which a landowner could allege a mistake and petition for reclassification. Thus, a landowner in 2006 could petition for reclassification, alleging that when his property was zoned in 1986, it was actually in use as LDA but was mistakenly zoned RCA instead. Since the courts have not yet imposed a doctrine of laches or a statute of limitations that would preclude such a late-coming claim, the landowners have the right to present their case, and they may be able to change a Critical Area classification based on an alleged zoning mistake that happened 20 years ago.

### Lack of Authority of the Critical Area Commission

Although many people look to the Critical Area Commission when the issue of Critical Area enforcement is raised, in reality the Commission has very little power to enforce the law for which it is a steward. The Commission is an almost solely advisory body, with very few of the powers a state agency typically holds.

First, as is noted in Section II, its decision-making powers are limited to approving local Critical Area programs, and granting or denying approval of certain very limited types of development projects in the Critical Area.<sup>195</sup> Otherwise, the Commission is able only to review and make recommendations on development applications.<sup>196</sup> Local jurisdictions retain full authority to either grant or deny almost all Critical Area

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<sup>192</sup> Sources: review of Critical Area Commission 2005 variance files for three focus counties; Telephone interview with Ren Serey, *supra* note 7.

<sup>193</sup> MD. CODE ANN., NAT. RES. II § 8-1809(h)(2)(i) (2005).

<sup>194</sup> MD. CODE ANN., NAT. RES. II § 8-1809(h)(2)(i) (2005).

<sup>195</sup> MD. CODE ANN., NAT. RES. II §§ 8-1809, 8-1811 (2005).

<sup>196</sup> MD. CODE ANN., NAT. RES. II § 8-1811 (2005).

development applications, with virtually no meaningful oversight. Second, the Commission does not have the power to pass its own regulations.<sup>197</sup> Instead, any regulations it proposes must be passed by the Maryland General Assembly. Although the Commission's Executive Director cites this as an advantage because it puts the weight of the entire legislature behind Commission regulations,<sup>198</sup> one environmental group cites it as a major disadvantage because it makes the Commission regulations highly inflexible and makes it harder for the Commission to respond to problems by issuing new regulations.<sup>199</sup> Finally, whatever powers of appeal and enforcement the Commission has are limited, and of dubious usefulness. Although the Commission has standing to appeal development decisions made by local governments, it very rarely uses this standing.<sup>200</sup> In addition, although the Commission was recently authorized to assist local governments with Critical Area enforcement cases, relatively few of the jurisdictions that responded to the Clinic's data survey said this was helpful (see Section IV, Enforcement Resources), and the Commission has yet to receive a request for assistance.<sup>201</sup>

## Problems with Enforcement

In addition to inherent weaknesses with the text of the Act, certain enforcement measures could be improved so as to provide greater protection to Maryland Critical Areas. In addition to a lack of adequate resources in the local jurisdictions and proper enforcement from the courts, there is also a failure on the part of Maryland citizens to appreciate the connection between their actions and the health of the Chesapeake Bay. In addition, inconsistent interpretations of the law on the part of state and local governments have created unpredictability in the enforcement of the Critical Area Act.

### Variances

There is often confusion regarding the approval of a variance. As noted in the findings of our file review, most of the variances that are granted are for grandfathered lots. Although grandfathered lots and non-grandfathered lots are reviewed under the same standards in the law, in practice grandfathered lots are reviewed in such a fashion that makes such applications much more likely to be approved. The Act states "in considering an application for a variance, a local jurisdiction shall presume that the specific development activity in the critical area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction's program."<sup>202</sup> When the law is applied however, there is almost a presumption in favor of granting a variance for a grandfathered lot, whereas an applicant seeking for a non-grandfathered lot has the burden of proving that he meets the

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<sup>197</sup> MD. CODE ANN., NAT. RES. II § 8-1806(a)(1) (2005).

<sup>198</sup> Telephone interview with Ren Serey, *supra* note 7.

<sup>199</sup> Name of the commenter has been withheld, in accordance with the Clinic's policy of allowing persons responding to the opinion survey to remain anonymous.

<sup>200</sup> Telephone interview with Ren Serey, *supra* note 7.

<sup>201</sup> *Id.*

<sup>202</sup> MD. CODE ANN., NAT. RES. II § 8-1808(d)(2)(i) (2005).

requirements of the unwarranted hardship standard is satisfied.<sup>203</sup> This is thought to be compatible with the purpose of the Critical Area Act, however there is disagreement about whether such practice should be continued.

One idea that is often discussed is the fact that there are no sunset provisions in the Critical Area Act regarding the granting of variances. Some feel that landowners should only be allowed to apply for a variance for a specified amount of time, after which no variances will be granted under the law. However, there is also a concern that such a provision would amount to an unconstitutional taking of private property requiring the government to compensate the landowner for the denial of the right to develop on his/her property.<sup>204</sup>

### Inconsistencies in Project Approval

The Critical Area Commission reviews and comments on applications for variances, and although their opinion is not binding on the County or local jurisdiction, their review does provide a standard process for all applicants. The Critical Area Commission has a general policy against approving accessory structures in the buffer. According to a letter received by the Clinic from Senator Madden, “Most variances on grandfathered lots are approved in some fashion. Buffer variances that are regularly denied involve requests for accessory structures...”<sup>205</sup> However, the Commission reviews certain types of accessory structures differently than others.

For example, a close look at projects in St. Mary’s County demonstrates that substantially similar projects were recommended for approval by the Commission on certain occasions and recommended for denial on others. One applicant applied for an after-the-fact variance to build a shed in the 100-foot Buffer. The Commission suggested that the project not be approved because they reasoned that the inability of the applicant to build the shed did not deny him reasonable and significant use of his property.<sup>206</sup> The Commission suggested that another applicant be prohibited from building a shed in the extended buffer.<sup>207</sup> However, two other applicants were approved by the Commission to build decks in the 100-foot buffer.<sup>208</sup>

Although there may seem to be little difference between these types of structures, the Commission has a policy of treating them differently. For a grandfathered lot, a house, addition, or any other structure that is ‘part of a dwelling’ will generally be approved for a variance. The rule that the Commission follows is that “a reasonable expansion of a dwelling is allowed.” Additions to a home and decks fall into this category. The Commission may make suggestions to move the structure or to make the structure smaller, but in most cases they will not oppose such a variance. The reason for

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<sup>203</sup> *Id.*

<sup>204</sup> Interview with Ren Serey, *supra* note 167.

<sup>205</sup> Letter from Senator Martin Madden, Chairman Critical Area Commission, to University of Maryland Environmental Law Clinic (Feb. 6, 2006) (on file with the Clinic).

<sup>206</sup> Commission file SM 427-05.

<sup>207</sup> Commission file SM 600-05.

<sup>208</sup> Commission files SM 415-05; SM 736-05.

this policy is that they believe that if they opposed every application for a variance in the buffer, the Critical Area Act would be amended to allow such practices. The Commission also believes, as currently written, the Act does not intend to prohibit such additions and believes that a denial of such projects could be found to be a violation of the takings clause of the United States Constitution.<sup>209</sup> However, this interpretation is not mandated by the law, and it is arguable that some of the projects protected by the Commission's distinction do not satisfy the hardship standard used to judge variance applications.

### Follow-up Procedures

Another issue that has weakened enforcement efforts is the lack of follow-up procedures and the inability of jurisdictions to inform new land owners about past Critical Area issues. For example, certain applicants are granted a variance with the condition that no other variances will be granted for that property. If that applicant appeals a denial of a second variance, for example, and goes to the Board of Appeals, the Board would be unaware of that limitation. An opponent of the applicant could make the Board aware of such limitation, but only if an interested member of the public is aware of such application, is knowledgeable about the variance history of the applicant's property and is willing to oppose the applicant.

Some Critical Area violations occur in order to increase the property value of the land. For example, oftentimes property owners will clear their shoreline just before selling their home in order to improve the view and increase the value. This means that even if the property owner is cited, the house has usually been sold before mitigation can be enforced. As a result, many violations may go unpunished and without mitigation. Anne Arundel County's response has been to attach the mitigation requirements to the property title in the local land records, thus providing notice to the buyer that the mitigation must be performed. The County will also notify the seller's realtor of the outstanding mitigation requirements. These steps help to ensure that mitigation will be provided when a violation of the law occurs. However, this is not a standard practice for every cited property and the County does not take any affirmative steps to determine if a cited property is being sold.<sup>210</sup> Other jurisdictions may have this practice in place. However, enforcement efforts could be improved if more jurisdictions took proactive steps to find out if cited properties are for sale and in violation of the law.

### Role of the Courts

Court interpretations of the Critical Area Act's requirements have caused chaos in the enforcement of the Act. As noted above, the variance standard was clarified twice by the General Assembly after a line of cases misinterpreted the Act and required only that a landowner prove that he was denied reasonable and significant use of his property.<sup>211</sup>

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<sup>209</sup> Interview with Ren Serey, *supra* note 167.

<sup>210</sup> Interview with Spurge Eismeier, *supra* note 186.

<sup>211</sup> See *supra* notes 136-144 and accompanying text (describing three Maryland Court of Appeals opinions that caused the Maryland General Assembly to rewrite provisions of the Critical Area Act).

However, this is not the only way in which the courts have affected the enforcement of the Act.

Many applicants that are charged with violating the Act decide that they want their day in court, to which they are entitled, before they pay their fine. In Anne Arundel County, approximately 85 percent of all civil citations issued for Critical Area violations end up in court. This adds to the administrative workload of the County and takes inspectors, who usually must attend the court proceedings to serve as witnesses, out of the field for hours at a time until their case is heard. Furthermore, at least one county asserted that the violator is almost never forced to pay the full amount of the fine that the County asks for.<sup>212</sup> This creates an incentive for violators to demand their day in court and further strain the budget and staff of the Counties. Although in recent years the courts have been more willing to rule for stricter punishments on Critical Area Act violators, there is still a perverse incentive for violators to go to court only to reduce the fine that they will have to pay.

### Lack of Resources

From money to manpower, state and local Critical Area programs often do not have enough resources to properly enforce the law. As with many state programs, there is a question of whether the Critical Area program is properly funded. Funding is especially an issue in the case of the enforcement of the Critical Area Act because it requires all of the local jurisdictions that are charged with enforcing the law to have enough staff and funding. A similar issue is the availability of such staff. St. Mary's County admitted that they have no staff available during the weekends to deal with possible Critical Area violations. Overall, only 38 percent of jurisdictions that responded to the Clinic's data survey had Critical Area inspectors available on the weekends. Therefore, when Critical Area violations do occur on the weekends, they may only be caught once it is too late.

The Commission also stated that their staff should be out in the field more than they are currently able.<sup>213</sup> Two or three more staff members could solve this problem, but funding is an issue. Also, the Commission believes that ten to twelve inspectors are needed in each major jurisdiction in order to be able to respond to possible violations quickly and ensure that more violations are caught,<sup>214</sup> while most jurisdictions that responded to the Clinic's survey only had four or less inspectors.

Also, the Clinic is unaware of any jurisdiction that has a boat to investigate possible Critical Area violations. This is a huge issue because a number of violations occur at the very edge of the water and are next to impossible to notice without a boat.

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<sup>212</sup> Interview with Spurge Eismeier, *supra* note 186.

<sup>213</sup> Normally there are nine technical staff at the Critical Area Commission: six natural resources planners, two supervisors, and one science advisor. As of November 2005, three of the six natural resource planner positions were vacant. According to Ren Serey, this staff shortage exacerbates the lack of time the already time-crunched Commission staff is able to spend in the field. Telephone interview with Ren Serey, *supra* note 7.

<sup>214</sup> Telephone interview with Ren Serey, *supra* note 7.

The Maryland Riverkeepers assist the local governments in patrolling the waters and alerting the local governments to possible violations; however, more boats need to be patrolling the waters. Anne Arundel County videotapes their entire shoreline every few years to use as evidence of violations once they are reported, but the evidence is not always clear and may be outdated, and the tapes are not used for searching out violations. All of these factors exacerbate other enforcement problems preventing proper implementation of the Act.

## Public Education

An invaluable component to the proper enforcement and success of the Critical Area Act is an educated public. According to government officials, at least half of the violators of the Act are unaware that they are breaking the law.<sup>215</sup> There are also those individuals that know that they are violating the law and do not care and are willing to pay the fine. Both groups may be less likely to violate the requirements of the Critical Area Act if they better understood the correlation between their actions and the health of the Chesapeake Bay.

Schools and non-profit organizations are a start to increasing awareness of this relationship. However, both government officials and environmental groups stated the need for an increase in educational efforts. Fewer violations will not only free up resources to enforce the Act against other violators but will also reduce the impacts on the Bay. It is therefore essential for Maryland citizens to understand, respect, and follow the requirements of the Act for it to be properly enforced and to achieve its purpose.

Several counties specifically stated that in-person education is a key way to prevent Critical Area violations by those persons that come to them with a proposed development project. These counties use pre-construction conferences to promote compliance by ensuring that the landowner is aware of Critical Area requirements, and by establishing a working relationship with the landowner. In a pre-construction conference, the landowner, local planners, and inspectors get together to discuss the proposed development and how it can comply with the Critical Area laws. Queen Anne's County cites its policy of making every planning department employee, from the very first employee a landowner meets, responsible for informing permit applicants of their Critical Area responsibilities as one reason it does not have as many variance applications as other counties.<sup>216</sup> St. Mary's County, in its response to the Clinic's data survey, said that it currently does not have enough resources to include planners in its pre-construction conferences (limited planning staff means it can only afford to include inspectors), but that being able to do so would improve their Critical Area program.

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<sup>215</sup> *Id.*

<sup>216</sup> Interview with Queen Anne's County planning staff, in Centreville, Md. (Mar. 23, 2006).

## Critical Area Commission and Attorney General

It is true that the authority of the Commission is limited by the Act. However, the Commission has been reluctant to use some of its powers against local jurisdictions who are not properly enforcing the Act. The Commission, at the beginning stages of the implementation of the Act, attempted to work with counties when the Commission felt that the Act was not being properly enforced in a certain jurisdiction. However, more recently, after several egregious violations took place, the Commission has been more willing to force local jurisdictions to change the way in which they are implementing the Act. Two years ago, the Commission for the first time served notice on Anne Arundel County for improperly enforcing the requirements of the Act. Indian Head and Queen Anne's County have received similar notices in the past year and a half. In the future, a greater willingness on the part of the Commission may be required in order to assist local jurisdictions who often lack proper resources, and who may feel pressure to put development interests before the requirements of the Critical Area Act.

As the above section demonstrates the Critical Area Act faces many obstacles to being properly enforced. Both the law itself and enforcement efforts could be improved. In order to ensure that the Act's requirements are enforced to the fullest extent, all of these issues must be addressed.

## **Problems with Expectations of the Critical Area Program**

Since the Critical Area Act was first introduced as a bill until today, groups have been sharply divided about what Marylanders should expect from the Act. The Critical Area Act was once touted as a significant step toward saving the Chesapeake Bay, but many early critics alleged the Act did not do enough to save and restore the Bay. The Clinic found that many of the major issues and controversies surrounding the Critical Area Act, especially with respect to the expected results, still exist today.

The purposes and goals of the Critical Area Act and local Critical Area programs are clearly stated in the Act. The purposes are to establish a protection program for the Chesapeake and Atlantic Coastal Bays by fostering more sensitive development activity and to implement the program on a cooperative basis between the State and affected local governments.<sup>217</sup> The goals of local programs are to minimize adverse impacts on water quality, to conserve habitat, and to establish land use policies for development that accommodates growth.<sup>218</sup> Despite the balance the Act's language identifies, various groups—including environmental groups and advocates, businesses, and government officials, focus on different aspects of the Act.<sup>219</sup> Their focus, in large part, reflects their expectations of the Critical Area Act.

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<sup>217</sup> MD. CODE ANN., NAT. RES. II § 8-1801(b) (2005).

<sup>218</sup> MD. CODE ANN., NAT. RES. II § 8-1808(b) (2005).

<sup>219</sup> See *supra* notes 182-185 and accompanying text (describing responses to the opinion survey about the purpose of the Critical Area Act).

The environmental groups' expectations of the Critical Area Act are, perhaps, best summarized in *Bay Country*, a book by Tom Horton. Mr. Horton observed that

[t]he state has passed a law designating a thousand-foot strip around the edges of the bay and its tributaries as a Critical Area. It is complex, and its regulations fill a small book, *but the heart of the law says that in all the remaining undeveloped areas of the shorefront, where we do not yet have severe environmental problems, we are going to dramatically restrict human activities, to try to insure that we never do have problems to solve there.* It is a very, very controversial piece of legislation, and the next decade will undoubtedly see many attempts to repeal or chip away at the concept. However, many people are convinced it is a concept that must be expanded to the whole state, not just left to protect a thin fringe nearest the water, while progress as usual builds to the bursting point behind it.<sup>220</sup>

The Clinic found that this expectation, that human activity in the Critical Area and especially in the 100 foot buffer would be dramatically restricted or even prohibited, is still prevalent and that it potentially fuels much of the current criticism about the Critical Area Act and its enforcement.

Saunders Hillyer has written extensively about Maryland's Critical Area program and specifically addressed the divergent expectations for the Critical Area Act. His 1988 article titled "The Maryland Critical Area Program: Time to De-Mythologize and Move Forward," summarized the high expectations held by supporters and opponents of the Act and made several observations and predictions about the future of the Critical Area program. He stated that opponents of the Critical Area program believed "that the criteria would prohibit all development in a thousand foot buffer around the Bay, a misconception that persists to this day."<sup>221</sup> Mr. Hillyer observed that, despite the expectations, the Critical Area program provided "for far more development in the Critical Area than either its supporters or opponents were likely to have foreseen."<sup>222</sup> In his conclusion, Mr. Hillyer opined that

[t]he Critical Area Program has emerged as a solid, moderate beginning of the long term campaign to restore the Bay. It displays in embryonic form the fundamental elements of a successful Bay restoration program by providing for economic development, but only development that respects the watershed's ecological limitations, particularly the extraordinary sensitivity of the edge where land and water meet. If anything, public support for protecting the watershed is a full step ahead of this moderate beginning, perhaps far ahead. As the true character of the Critical Area Program becomes more clearly perceived, including both its limitations and accomplishments, and as the mythology that heralded its birth

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<sup>220</sup> TOM HORTON, *BAY COUNTRY* 94 (1989) (emphasis added).

<sup>221</sup> Saunders C. Hillyer, *The Maryland Critical Area Program: Time to De-Mythologize and Move Forward*, *MARYLAND POLICY STUDIES*, 24 (August 1988).

<sup>222</sup> *Id.* at 25.

dissipates, the time may soon come to take the next step. At the risk of over-speculation, it appears justified to anticipate that the people of Maryland will demand to tighten up some of the omissions and loopholes in the existing criteria ... and to extend to other parts of the Chesapeake Bay watershed the effort to reconcile land development with the imperative to restore the Bay.<sup>223</sup>

The Clinic has found that many of Mr. Hillyer's observations, made almost a decade ago, are still true today. Expectations about what the Act accomplishes and what the Act should accomplish still vary widely.

In recent months and years, several violations of the Critical Area Act and several large development projects have caught the eye and ire of various public interest advocacy groups, the news media, and the public leading to fierce criticism about the Critical Area Act and its enforcement. One particularly controversial recent Critical Area Act violation—Little Dobbins Island—illustrates growing tension between critics and government officials responsible for implementing and enforcing the Act. In fact, a Washington Post Staff Writer wrote that environmental groups “see Little [Dobbins] Island as the ultimate test of the government’s resolve to fight the developers and wealthy landowners who continually test [the Critical Area Act].”<sup>224</sup> The Clinic does not condone the actions by Daryl Wagner, the property owner. Despite Mr. Wagner’s actions—razing a home and building a new larger home and adding a pool, deck, gazebo and lighthouse without a permit or variance—the current Critical Area law does protect certain property interests.

For example, under the current law, regulations, and ordinances, a property owner may raze an existing home and build a new home over the extant footprint. And although the Critical Area Act is silent on the issue, as it is currently interpreted, a property owner will be issued a permit or variance even after construction begins so long as the permit or variance would have been granted had it been properly applied for prior to construction. Therefore, in the case of Little Dobbins Island, it is not true that that the owner will be prohibited from having any structure on the island, nor is it true that he is allowed to keep everything that he built.

Although many of the underlying expectations for the Critical Area Act are illustrated by Little Dobbins Island it is not typical of Critical Area violations. Despite examples like Little Dobbins Island, the Critical Area program has made significant strides at “fostering more sensitive development,” minimizing adverse impacts on water quality, conserving habitat, and establishing land use policies that accommodate growth. As Mr. Hillyer predicted, the Critical Area program has been carefully observed and scrutinized for over two decades and its limitations and accomplishments are clearly documented. Reconciling expectations and the Act’s limitations will be impossible without amending its language.

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<sup>223</sup> *Id.* at 33.

<sup>224</sup> Daniel de Vise, *One Man Is an Island*, WASHINGTON POST, February 25, 2006, at B01.

## **Section VI: Conclusion**

The study was able to come to a number of conclusions regarding the purpose and views of the Critical Area Act, as well as conclusions regarding implementation and enforcement concerns. Some of the major findings of the report include: that the Act was intended as a first step in addressing development issues and that most people do not understand that the law was intended to preserve the environment and promote development. The text of the Critical Area Act also does not provide for the anticipated strong institutional enforcement of its provisions and explicitly allows for development to occur in the Critical Area. Furthermore, the development that is permitted is not analyzed to determine what the cumulative impacts have been, but instead projects are reviewed on a case by case basis. Furthermore, there are great differences between development pressures among the jurisdictions, which create unique Critical Area issues for each jurisdiction.

The Clinic's research found that violations of the Critical Area Act are occurring due to a need to improve enforcement efforts and a need to strengthen the Act. Additionally, Marylanders need to appreciate how each individual's actions impact the environment. Increased education will also aid in the understanding of the accomplishments and limitations of the Critical Area Act. Although this report does not make any specific recommendations we hope that it can aid in the formulation of improvements in the Critical Area Act and its enforcement.