

Maryland's Critical Area Protection Program: Variances and Enforcement in Selected Jurisdictions from 2012 to 2014

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Disclaimer:

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Executive Summary

The Chesapeake and Atlantic Coastal Bays Critical Area Protection Program seeks to protect the Bays and their tributaries by limiting development in shoreline areas. It restricts development within the critical area, which includes all of the land in the Bay watersheds within 1,000 feet of tidal influence. The Program prohibits disturbances in the critical area buffer, which is a minimum 100-foot strip of land that runs adjacent to all tidal waters, tidal wetlands, and tributary streams. The Critical Area Program requires collaboration between the state Critical Area Commission and local governments. The Critical Area Commission promulgates regulations and provides oversight, while local governments develop and implement critical area programs within their jurisdictions.

Local jurisdictions may grant a variance to the Critical Area Program's development restrictions if the applicant meets specific criteria laid out in the state and local programs. For example, an applicant for a variance must overcome a presumption that the development activity does not conform with the goals of the state and local critical area programs. The applicant must also demonstrate that, *inter alia*, a literal interpretation of the critical area requirements would result in an unwarranted hardship. The General Assembly and the appellate courts have struggled to define the unwarranted hardship standard through legislative amendments and judicial opinions. While the standard sets out a seemingly high bar—that without a variance the applicant would be denied reasonable and significant use of the entire property—courts have upheld variances for most residential development and development associated with the use and enjoyment of the property or nearby waterways.

This report analyzes variance requests in Anne Arundel County, Baltimore County, Kent County, Queen Anne's County, St. Mary's County, and Worcester County (collectively, the selected counties)¹ over a three-year period from 2012 to 2014. During that time, all of the selected counties granted the vast majority of the variance requests that they received, ranging from eighty-nine percent in Anne Arundel County and Worcester County, to 100 percent in Queen Anne's County and St. Mary's County. Applicants often requested variances for dwellings, dwelling additions, decks, patios, garages, and similar structures. Kent County differed from the other selected counties, as the majority of its variances involved septic systems. The selected counties varied in the extent to which their opinions applied the facts and evidence of any particular request to the variance criteria. Anne Arundel County usually addressed each individual factor, and provided an explanation as to why the applicant did or did not satisfy the requirement. Other counties did not provide as much analysis in explaining why or how an applicant met each of the variance criteria, and some counties often relied on conclusory statements to support their decisions on critical area variances.

The Critical Area Commission submits recommendation letters to local jurisdictions indicating its position on variance applications. In most cases, the Commission either states that it does or does not oppose the variance or only provides comments without expressly stating a position. The Commission tends to oppose variances that would result in the property exceeding

¹ The selected counties represent the diversity of local jurisdictions implementing the Critical Area Act. They include counties on both the eastern and western shores of the Chesapeake Bay, and reflect various levels of development.

lot coverage limits, variances that do not represent the minimum necessary to afford relief, and variances for pools. The selected counties varied in how often their decisions were consistent with the Commission's opposition to a variance. For example, the percentage of requests that Anne Arundel County granted decreased in circumstances where the Commission opposed the variance. In addition, Baltimore County, Kent County, and Queen Anne's County were fairly likely to issue decisions consistent with the Commission's recommendation when it opposed a variance. St. Mary's County and Worcester County, however, were less likely to issue decisions that were consistent with the Commission's opposition to variance requests.

This report also discusses critical area enforcement in the selected counties from 2012 to 2014. The selected counties varied greatly in terms of the amount of enforcement information available, the way the information was organized and maintained, and the time and resources necessary to provide the information to the Environmental Law Clinic. Due to those inconsistencies, the Clinic was unable to draw any significant conclusions within or among the counties regarding the effectiveness of critical area enforcement. It is clear, however, that critical area violations occurred in all of the selected counties. Anne Arundel County and St. Mary's County experienced a relatively high number of violations, whereas Kent County and Queen Anne's County reported a relatively low number of violations. Certain types of violations were common among several counties, including construction, grading, and clearing violations.

This report concludes with the following recommendations:

Variance Criteria

- The General Assembly, the Commission, and local jurisdictions should consider revising the variance process to focus on recognizing, minimizing, and mitigating impacts.
- The General Assembly should clarify the unwarranted hardship standard.
- The General Assembly should strengthen the self-created hardship factor.
- The General Assembly should adopt a requirement that a variance represents the minimum necessary to afford relief from the Critical Area Program's development restrictions.

Critical Area Commission

- Local jurisdictions should defer to the Commission when it opposes a variance.
- The Commission should promulgate regulations for lot coverage variances.
- The Commission should promulgate regulations that prohibit pools in the critical area buffer.

Existing Requirements

- Variance decisions should include a substantive analysis of each variance factor in the state and local critical area program.
- Local jurisdictions should submit a copy of all variance decisions to the Commission.

Transparency, Accountability, and Reporting

- The Critical Area Program would benefit from increased transparency
- The Critical Area Program would benefit from increased accountability and reporting, including uniform recordkeeping of inspection and enforcement information.
- The Commission should prepare annual reports on the implementation and enforcement of the Critical Area Program.

- Local jurisdictions should document circumstances in which potential applicants decide not to apply for a variance upon consultation with county staff.

Enforcement

- Local jurisdictions should be more proactive in enforcing their critical area programs, and ensure that penalties are substantial enough to deter critical area violations.

Education

- Education courses for local planning commissions and Boards of Appeals should cover case law and legislative history of the Critical Area Program, in addition to the currently required subjects.
- The Commission and local jurisdictions should better educate property owners about the Critical Area Program and its role in protecting the Chesapeake and Atlantic Coastal Bays.

The Appendix to this report is a Land Use Land Cover Analysis performed by Washington College's Geographic Information Systems ("GIS") Program using historical land data to show how land uses in the critical area changed between 1995 and 2015. The GIS report describes in detail the process by which the GIS Program categorized the land uses in the critical area of each county as either developed, agriculture, scrubland, forest, or wetland, and analyzed the changes in each land use category for each county in the 20 year period. The GIS report lists the change in percentage of each type of land use for each county and highlights a few notable changes. First, almost all counties experienced an increase in the percentage of developed land in the critical area, but the percentage of developed land in Queen Anne's and Worcester Counties increased the most. The GIS report also notes that no county showed an increase in the percentage of land used for agriculture. Finally, the GIS report explains that inferring the causes of land use changes in the critical area of each county was beyond the scope of the project, but suggests further study on that topic.

Washington College's GIS Program also developed an interactive web tool that is available with this report. The web tool allows users to view the locations of the variance applications in the selected counties from 2012 to 2014 as points on a map of Maryland, access additional information for each variance application, and see how land uses in the critical area of the selected counties changed from 1995 to 2015.

I. Introduction and Methodology

A. Background

The Chesapeake Bay is North America's largest estuary,² extending nearly 200 miles from the Susquehanna River in Havre de Grace, Maryland to the Atlantic Ocean in Virginia Beach, Virginia.³ The Bay's 64,000 square mile watershed includes portions of Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia.⁴ Approximately 2,700 different species of plants and animals call the Bay home, including migratory birds and ocean fish.⁵ Seafood harvested from the Bay, including crabs, oysters, clams, and eels, contributes to state and local economies.⁶ Over seventeen million people live in the watershed,⁷ many of whom rely on the Bay for employment, recreation, or both.⁸

By the early 1970s, it was becoming clear that the health of the Bay was in decline.⁹ Recognizing the Bay's vulnerability and seeking a viable solution, Maryland junior Senator Charles Mathias advocated for the Environmental Protection Agency ("EPA") to conduct a comprehensive environmental study.¹⁰ The ensuing study took EPA seven years to complete and cost nearly twenty-seven million dollars.¹¹ It confirmed that the Bay was suffering from excessive amounts of nutrients, toxic organic compounds, and metals, which were causing a significant decrease in plant and animal diversity.¹²

While EPA was conducting its study, Maryland and Virginia recognized that restoring and protecting the Bay would require a cooperative approach.¹³ The two states created the Chesapeake Bay Commission in 1980.¹⁴ The Commission's stated purpose was, among other things, to "assist [the states] in evaluating and responding to problems of mutual concern relating to the Chesapeake Bay[,] to promote intergovernmental cooperation[,] . . . [and] to provide . . . uniformity of legislative application. . . ."¹⁵

² Maryland.gov, *Maryland at a Glance: Chesapeake Bay* (2015), <http://msa.maryland.gov/msa/mdmanual/01glance/html/ches.html>.

³ *Chesapeake Bay Program, Facts & Figures*, <http://www.chesapeakebay.net/discover/bay101/facts> (last visited July 7, 2016).

⁴ *Id.*

⁵ Maryland.gov, *supra* note 2.

⁶ Maryland.gov, *supra* note 2.

⁷ Chesapeake Bay Program, *supra* note 3.

⁸ Maryland.gov, *supra* note 2.

⁹ See Jon A. Mueller, *Paved Intentions: Maryland's Critical Area Act*, 41-JUN. MD. B.J. 10, 11 (2008).

¹⁰ William Eichbaum, *The Chesapeake Bay: Major Research Program Leads to Innovative Implementation*, 14 ENVTL. L. REP. 10, 239 (1984).

¹¹ *Id.*

¹² *Id.* at 240.

¹³ Paul D. Barker, Jr., *The Chesapeake Bay Preservation Act: The Problem with State Land Regulation of Interstate Resources*, 31 WM. & MARY L. REV. 735, 744 (1990).

¹⁴ See *id.*; MD. CODE ANN., NAT. RES. § 8-301 (West 2016); VA. CODE ANN. § 30-240 (West 2016). These statutes were amended in 1985 to include Pennsylvania as a member of the tri-state commission.

¹⁵ MD. CODE ANN., NAT. RES. § 8-301.

In December of 1983, after EPA released the findings of its study, representatives from Maryland, Pennsylvania, Virginia, and the District of Columbia convened as part of the Chesapeake Bay Conference at George Mason University.¹⁶ On the final day of the conference, the states, the District of Columbia, and the EPA entered into the 1983 Chesapeake Bay Agreement.¹⁷ The 1983 Agreement recognized the need for a cooperative approach to “fully address the extent, complexity, and sources of pollutants entering the Bay.”¹⁸ In response to the 1983 Agreement, Maryland passed a series of legislative initiatives in 1984, aimed at halting the decline of the Bay.¹⁹ The Chesapeake Bay Critical Area Protection Program was the centerpiece of those legislative initiatives.²⁰

The Chesapeake and Atlantic Coastal Bays Critical Area Protection Program (“Critical Area Program” or “Program”) seeks to protect the 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.”²¹ The Program requires collaboration at different levels of government, with the State setting baseline criteria and local jurisdictions developing and implementing their own critical area programs.²² In enacting the critical area law, the Maryland General Assembly recognized the significant aesthetic, ecological, and economic value of the Bays, as well as the danger posed to sensitive shoreline areas by the cumulative impacts of human activity, population growth, and increased development.²³ The General Assembly specifically found that “[t]he restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands”²⁴ The passage of the law in 1984 marked the beginning of a partnership between the state and local jurisdictions intended to cultivate sustainable development while protecting Maryland’s natural resources.²⁵

B. Scope

Building on the Clinic’s 2006 report *Enforcement in Maryland’s Critical Area: Perception and Practice*,²⁶ this report analyzes how Maryland appellate courts and six local jurisdictions interpret and apply the variance provisions of the Critical Area Program. This report also examines how the six jurisdictions enforce their local programs.

¹⁶ Eichbaum, *supra* note 10, at 240.

¹⁷ *The 1983 Chesapeake Bay Agreement*, (Dec. 9, 1983), available at http://www.chesapeakebay.net/documents/1983_CB_Agreement2.pdf.

¹⁸ *Id.*

¹⁹ Gerald Winegrad, *The Critical Areas Legislation: A Necessary Step to Restore the Chesapeake Bay*, 17.1 U. BALT. L.F. 3, 3 (1986).

²⁰ J. KEVIN SULLIVAN, *Executive Summary to A SUMMARY OF THE CHESAPEAKE BAY CRITICAL AREA COMMISSION’S CRITERIA AND PROGRAM DEVELOPMENT ACTIVITIES: 1984-1988* (1989) <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/002000/002143/unrestricted/20063005e.pdf>; MD. CODE ANN., NAT. RES. §§ 8-1801–1817.

²¹ MD. CODE ANN., NAT. RES. § 8-1801(b). The Critical Area Program initially only applied to the Chesapeake Bay. It was expanded to include the Atlantic Coastal Bays in 2002. H.B. 301, 2002 Leg., 416th Sess. (Md. 2002).

²² MD. CODE ANN., NAT. RES. § 8-1801(b)(2).

²³ *Id.* § 8-1801(a).

²⁴ *Id.* § 8-1801(a)(8).

²⁵ *Id.* § 8-1801(a)(10), (b)(2).

²⁶ University of Maryland Environmental Law Clinic, *Enforcement in Maryland’s Critical Area: Perception and Practice* (2006), http://www.law.umaryland.edu/programs/environment/documents/final_critical_area_report.pdf.

1. Case Law & Legislative History

To understand how the Maryland appellate courts have interpreted and applied the variance provisions of the Critical Area Program, the Clinic analyzed reported decisions from the Court of Appeals and Court of Special Appeals since the enactment of the law in 1984. The Clinic also analyzed unreported appellate decisions that it considered pertinent to the report.²⁷ The legislative history of relevant amendments to the Critical Area Program is incorporated into the Clinic’s analysis of Maryland case law.

2. Critical Area Variances in the Selected Counties

The Clinic performed a detailed analysis of variance requests and decisions for the following counties: Anne Arundel County, Baltimore County, Kent County, Queen Anne’s County, St. Mary’s County, and Worcester County (collectively, “the selected counties”). The Clinic’s analysis was limited to a three-year period, from 2012 to 2014, as determined by the county’s initial decision on a variance request. The Clinic classified the types of variance requests into the following categories: Buffer/Expanded Buffer; Clearing; Habitat Protection Area; Lot Coverage; Modified Buffer; Steep Slopes; and Other.

The Clinic obtained the majority of the information for its analysis directly from the Critical Area Commission (“Commission”). The Clinic requested supplemental information from the selected counties as needed. Many variance applications, particularly in Anne Arundel County, required multiple types of critical area variances. For example, a variance application to construct a deck and a stairway down to the waterfront might require both a buffer variance and a steep slopes variance. In those circumstances, the Clinic considered each type of variance individually. In most cases, the Clinic did not consider an application to include more than one variance request where the variances requested were of the same type. The Clinic departed from that general rule in limited circumstances, such as where an application included a before-the-fact and an after-the-fact variance of the same type or variances of the same type for different parcels of land. Because many variance applications contained multiple requests, the total number of variances that the Clinic considered for the purposes of this report differs from the total number of variances that the Commission has on file, as shown in the table below.

Jurisdiction	Number of variances as provided by the Critical Area Commission	Number of variance requests as determined by the Clinic
Anne Arundel County	274	375
Baltimore County	32	35
Kent County	11	11
Queen Anne's County	15	10
St. Mary’s County	31	28
Worcester County	11	9

Table 1: Comparison of the number of variance applications on file with the Critical Area Commission and the number of variance requests as determined by the Clinic for the selected counties from 2012 to 2014.

²⁷ The Clinic excluded critical area cases that lacked a substantive discussion of the variance provisions.

The Clinic's totals also differ from the Commission's in part due to the applications that the Clinic excluded as outside the scope of this report. For example, the Clinic excluded zoning variances, variances that were decided by the local jurisdictions outside of the relevant time period, and variance requests that were withdrawn before the local authority issued a final decision. In the interest of completeness, the Clinic discusses withdrawn variance applications in each selected county to the extent possible. However, because of the limited documentation available from the counties, few conclusions could be drawn.

The Clinic considered the following categories of information in its analysis of variances in the selected counties: the county's decision (including on appeal, if applicable); the Critical Area Commission's recommendation; the type of critical area variance requested; the structure or activity for which the variance was requested; whether the property was grandfathered; the property's critical area land designation; and whether the property owner applied for the variance after-the-fact.

The Clinic briefly reviewed variance information for the same three-year time period from the remaining jurisdictions in Maryland that implement local critical area programs to determine state-wide trends in granting and denying variance applications.

3. Critical Area Enforcement in the Selected Counties

The Clinic submitted Public Information Act requests to the selected counties for critical area enforcement information from 2012 to 2014, including data on complaints, inspections, violations, and fines. The selected counties varied greatly in terms of the amount of enforcement information available, the way the information was organized and maintained, and the time and resources necessary to provide the information to the Environmental Law Clinic. Due to those inconsistencies, the Clinic was unable to draw any significant conclusions within or among the counties regarding the effectiveness of critical area enforcement. However, the Clinic summarized and analyzed the information that it received from the counties to the extent possible.

4. Selected County Surveys

The Clinic developed a survey to give the selected counties an opportunity to respond to the Clinic's data analysis and provide input into this report. Each survey included a brief summary of the data that the Clinic compiled on variances and enforcement in the relevant county. The surveys also included questions about how the counties handle variances and enforcement, and space for additional comments. All of the selected counties, except for St. Mary's County, responded to the Clinic's survey. The responses are summarized in Part IV.H. of this report.

C. Organization

Part I provides background information on the Critical Area Program and summarizes the scope of this report. Part II describes the current legal requirements of the Critical Area Program.

Part III evaluates how the variance provisions of the Critical Area Program have evolved through case law and legislative amendments. Part IV analyzes critical area variance requests and decisions from 2012 to 2014, focusing primarily on the selected counties. Part V provides an overview of critical area enforcement in the selected counties. Part VI presents recommendations based on the Clinic's findings. Part VII describes the Geographic Information Systems ("GIS") mapping component of this project.

II. The Critical Area Protection Program

The General Assembly enacted the Critical Area Program to foster sustainable development and protect water quality and natural habitats along Maryland's shorelines.²⁸ The critical area refers to "[a]ll waters of and lands under" the Chesapeake Bay, the Atlantic Coastal Bays, and their tributaries to the extent that they are affected by the tide, as well as all land and water within 1,000 feet of tidal influence.²⁹ A minimum 100-foot critical area buffer runs adjacent to all tidal waters, tidal wetlands, and tributary streams.³⁰

The Critical Area Commission, an independent body within the Department of Natural Resources,³¹ administers the Critical Area Program at the state level.³² It consists of twenty-nine voting members appointed by the Governor.³³ The term-limited members represent local jurisdictions, "diverse interests," and state agencies.³⁴ The Commission is responsible for promulgating regulations related to the critical area buffer, land use and development, habitat and species protection, development and implementation of local programs, and critical area mapping, among other things.³⁵

A. Land Designations and Limitations

Land Designations

Land within the critical area is classified into three categories based on the current level of development: intensely developed areas, limited development areas, and resource conservation areas.³⁶ Intensely developed areas consist of mostly developed land and relatively little natural habitat.³⁷ The statute and regulations encourage local jurisdictions to direct future intense development activities towards intensely developed areas.³⁸ Limited development areas are low or moderately developed areas that still contain "areas of natural plant and animal

²⁸ MD. CODE ANN., NAT. RES. § 8-1801.

²⁹ *Id.* § 8-1807(a), (b). Local jurisdictions may exclude certain locations from the critical area, including urban areas where a program would not be effective and areas that are separated from a waterway by wetlands that already serve the intended purpose of protecting water quality and conserving habitat. *Id.* § 8-1807(c).

³⁰ *Id.* § 8-1802(a)(4); MD. CODE REGS. 27.01.09.01.E(3) (2016).

³¹ Although the Commission falls under the Department of Natural Resources ("DNR"), the Secretary of DNR has no authority to "approve, alter, or amend the policies or programs of the Commission," "transfer, assign, or reassign statutory functions or activities to or from the Commission," or "adopt, approve, or revise regulations of the Commission." MD. CODE ANN., NAT. RES. § 8-1803(b). Additionally, DNR has limited authority to help local jurisdictions develop their programs. *Id.* § 8-1808.8(d).

³² *Id.* §§ 8-1801, 8-1803-1806.

³³ *Id.* § 8-1804(a)(1).

³⁴ *Id.*

³⁵ *Id.* § 8-1806(a), (b).

³⁶ *Id.* § 8-1802(a)(14); *see also* MD. CODE REGS. 27.01.02.02.A. Each land designation has specific criteria, including density requirements. MD. CODE ANN., NAT. RES. § 8-1802(a)(13), (15), (22).

³⁷ MD. CODE ANN., NAT. RES. § 8-1802(a)(13); *see also* MD. CODE REGS. 27.01.02.03.A. The housing density in intensely developed areas is four or more dwelling units per five acres. MD. CODE ANN., NAT. RES. § 8-1802(a)(13); *see also* MD. CODE REGS. 27.01.02.03.A.

³⁸ MD. CODE ANN., NAT. RES. § 8-1808(c)(2); MD. CODE REGS. 27.01.02.02.B.

habitat” and “[w]here the quality of runoff has not been substantially altered or impaired.”³⁹ While local jurisdictions should maintain or improve water quality and existing habitats in these areas, they may also allow low to moderate intensity development.⁴⁰ Resource conservation areas, however, are “[n]ature dominated environments”⁴¹ where development should be limited.⁴² Local jurisdictions should generally abide by the following policies in resource conservation areas: 1) “[c]onserve, protect, and enhance the overall ecological values of the Critical Area, its biological productivity, and its diversity”; 2) provide suitable habitats for wildlife species; 3) conserve resources necessary for certain land uses, such as agriculture and forestry; and 4) “[c]onserve the existing developed woodlands and forests for the water quality benefits they provide.”⁴³ Additionally, residential development within resource conservation areas is limited to one dwelling per twenty acres.⁴⁴

Local jurisdictions may apply to the Commission to designate new intensely developed areas and limited development areas within the critical area through the Program’s growth allocation process.⁴⁵ However, a local jurisdiction’s growth allocation is limited to five percent of the resource conservation area that existed when the Commission originally approved the jurisdiction’s local critical area program, excluding tidal wetlands and federal lands.⁴⁶

Buffer/Expanded Buffer

The Critical Area Program requires the establishment and maintenance of a minimum 100-foot buffer adjacent to all tidal waters, tidal wetlands, and tributary streams.⁴⁷ The buffer may be expanded beyond 100 feet in certain circumstances.⁴⁸ For example, a local jurisdiction must expand the buffer if it is “contiguous to a steep slope, a nontidal wetland . . . a hydric soil,

³⁹ MD. CODE ANN., NAT. RES. § 8-1802(a)(15)(i); *see also* MD. CODE REGS. 27.01.02.04.A. The housing density in limited development areas can “range from one dwelling unit per five acres up to four dwelling units per acre.” MD. CODE ANN., NAT. RES. § 8-1802(a)(15); *see also* MD. CODE REGS. 27.01.02.04.A.

⁴⁰ MD. CODE REGS. 27.01.02.04.B.

⁴¹ MD. CODE ANN., NAT. RES. § 8-1802(a)(22); *see also* MD. CODE REGS. 27.01.02.05.A. Resource conservation areas are areas where either of the following conditions exist: housing density is less than one dwelling unit per five acres or the dominant land use is agriculture, wetland, forest, barren land, surface water, or open space. MD. CODE ANN., NAT. RES. § 8-1802(a)(22); *see also* MD. CODE REGS. 27.01.02.05.A. Local jurisdictions may allow limited future residential development in resource conservations areas. MD. CODE REGS. 27.01.02.05.C.

⁴² MD. CODE REGS. 27.01.02.02.D.

⁴³ *Id.* at 27.01.02.05.B.

⁴⁴ *Id.* at 27.01.02.05.C.

⁴⁵ MD. CODE ANN., NAT. RES. § 8-1802(a)(11); *see also* MD. CODE REGS. 27.01.02.06.

⁴⁶ MD. CODE REGS. 27.01.02.06.A.

⁴⁷ MD. CODE ANN., NAT. RES. § 8-1802(a)(4); MD. CODE REGS. 27.01.09.01.E(3). A buffer is a “naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from manmade disturbances.” MD. CODE ANN., NAT. RES. § 8-1802(a)(4). The Critical Area Program regulations use the term to refer to an area that “is immediately landward from mean high water of tidal waters, the edge of each bank of a tributary stream, or the landward boundary of a tidal wetland” and that “[e]xists or may be established in natural vegetation to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance.” MD. CODE REGS. 27.01.01.01.B(8)(a).

⁴⁸ MD. CODE REGS. 27.01.09.01.E(3), (5)–(7).

or a highly erodible soil.”⁴⁹ Where steep slopes are present, the buffer expands “at a rate of 4 feet for every 1 percent of slope or to the top of the slope, whichever is greater.”⁵⁰

Local jurisdictions can only allow a disturbance in the buffer if it falls within certain categories outlined in the critical area regulations and it is accompanied by “mitigation performed in accordance with an approved buffer management plan”⁵¹ For example, a local jurisdiction may authorize a disturbance for development activities “[a]ssociated with a water-dependent facility”⁵² Water dependent facilities are structures related to activities that require a “location at or near the shoreline within the buffer”⁵³ Activities are water dependent if they “cannot exist outside the Buffer,” and are “dependent on the water by reason of the intrinsic nature [of their] operation.”⁵⁴ These facilities can include ports, marinas, and other boat docking structures, power plants, public beaches, and other public water-oriented recreation.⁵⁵ A disturbance in the buffer may also be authorized under a critical area variance.⁵⁶

Steep Slopes

The term “steep slopes” refers to “slopes of 15 percent or greater incline.”⁵⁷ Local jurisdictions cannot authorize development on steep slopes within limited development areas and resource conservation areas, “unless the project is the only effective way to maintain or improve the stability of the slope” and the development is otherwise consistent with the criteria for those land designations.⁵⁸

Lot Coverage

The term “lot coverage” refers to the amount of a property that is “[o]ccupied by a structure, accessory structure, parking area, driveway, walkway, or roadway” or “[c]overed with gravel, stone, shell, impermeable decking, a paver, permeable pavement, or any manmade material.”⁵⁹ Lot coverage includes the ground area covered by a stairway or impermeable deck, but narrow fences and mulch pathways, among other things, are exempt from the term.⁶⁰ The Critical Area Program limits lot coverage in the buffer to “the minimum amount necessary for

⁴⁹ *Id.* at 27.01.09.01.E(7).

⁵⁰ *Id.* at 27.01.09.01.E(7)(a). How to properly apply the terms of the statute to delineate the expanded buffer was the subject of dispute in at least one case. *See Chesapeake Bay Found. v. Clickner*, No. 1926-12, slip op. (Md. Ct. Spec. App. Feb. 20, 2014). However, the variance decisions and files reviewed by the Clinic did not provide any detail as to the basis for delineating the expanded buffer on any given property. Therefore, it is unclear from the Clinic’s analysis whether the local jurisdictions have been consistent in their application of the expanded buffer provision of the Critical Area Program.

⁵¹ *Id.* at 27.01.09.01.E.

⁵² *Id.* at 27.01.09.01.E(1)(a)(i).

⁵³ *Id.* at 27.01.03.01.A.

⁵⁴ *Id.* at 27.01.03.01.B.

⁵⁵ *Id.*

⁵⁶ *Id.* at 27.01.09.01.E(1)(a)(ii).

⁵⁷ *Id.* at 27.01.01.01.B(67).

⁵⁸ *Id.* at 27.01.02.04.C(5), .05.C(9) (stating that development within resources conservation areas “shall be consistent with the criteria for limited development areas . . .”).

⁵⁹ MD. CODE ANN., NAT. RES. § 8-1802(a)(17)(i) (West 2016).

⁶⁰ *Id.* § 8-1802(a)(17)(ii), (iii).

water-dependent facilities” without a variance.⁶¹ Otherwise, lot coverage in the critical area is generally limited to fifteen percent or twenty-five percent of a parcel of land.⁶²

Modified Buffer Areas

A modified buffer area refers to an area where a “pattern of residential, industrial, commercial, or recreational development existed in the 100-foot Buffer on December 1, 1985 in the Chesapeake Bay Critical Area or on June 1, 2002 in the Atlantic Coastal Bays Critical Area...”⁶³ It encompasses a number of terms used by local jurisdictions, including “buffer exemption area,” “buffer modification area,” and “buffer management area.”⁶⁴ Modified buffer areas are subject to different development requirements under local critical area programs.⁶⁵

Local jurisdictions can request modified development requirements in the buffer when they submit their local programs to the Commission for approval.⁶⁶ In doing so, they must demonstrate that the existing pattern of development in the area “prevents the buffer from fulfilling [its] functions.”⁶⁷ Development in modified buffer areas requires mitigation, and local jurisdictions may suggest other educational or programmatic methods for protecting water quality and habitats in those areas.⁶⁸

Clearing

The Critical Area Program includes several requirements related to clearing or cutting of trees and vegetation in the critical area. For example, cutting or clearing trees in the buffer is prohibited, except in certain circumstances.⁶⁹ Moreover, local jurisdictions should maintain or increase the acreage of forest and developed woodlands within its critical area.⁷⁰ Any forests or woodlands cleared in limited development areas or resource conservation areas must be replaced on an equivalent basis.⁷¹ If the clearing accounts for more than twenty percent of the forests or woodlands on a parcel, replacement must account for one and a half times the area cleared.⁷²

⁶¹ *Id.* § 8-1808.3(b). Lot coverage may exceed that amount in buffer exemption areas, waterfront revitalization areas, or waterfront industrial areas, as permitted by the local program. *Id.* Water-dependent facilities are “structures or works associated with industrial, maritime, recreational, educational, or fisheries activities that require location at or near the shoreline within the Buffer. . . .” MD. CODE REGS. 27.01.03.01. The definition includes “ports, the intake and outfall structures of power plants, water-use industries, marinas and other boat docking structures, public beaches and other public water-oriented recreation areas, and fisheries activities” but not “individual private piers.” *Id.*

⁶² MD. CODE ANN., NAT. RES. § 8-1808.3(d)(1).

⁶³ MD. CODE REGS. 27.01.01.01.B(39-2).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 27.01.09.01-8.

⁶⁷ *Id.* Some local programs also allow property owners to apply to have all or part of their property reclassified as a modified buffer area, if the property owner can establish that the property meets the eligibility requirements and that “there was an error or omission in the original maps.” *See e.g.* ANNE ARUNDEL COUNTY, MD., CODE §§ 18-13-301–304.

⁶⁸ MD. CODE REGS. 27.01.09.01-8.

⁶⁹ *Id.* at 27.01.09.01-7.A. (providing exceptions for commercial harvesting and clearcutting of certain species).

⁷⁰ *Id.* at 27.01.02.04.C(3)(a).

⁷¹ *Id.* at 27.01.02.04.C(3)(b).

⁷² *Id.* at 27.01.02.04.C(3)(c).

Clearing more than thirty percent of forests or developed woodlands on a parcel is prohibited unless the clearing is authorized by a variance or specific procedures adopted under local critical area program and approved by the Commission.⁷³

Habitat Protection Areas

Habitat protection areas include the buffer, as well as nontidal wetlands, habitats of endangered and threatened species and species in need of conservation, plant habitat, wildlife habitat, and anadromous fish propagation waters.⁷⁴ The Critical Area Program includes provisions to conserve and protect habitat protection areas.⁷⁵ For example, local jurisdictions must develop programs that protect endangered and threatened species, and species in need of conservation, as well as programs that protect plant and wildlife habitat, consistent with the policies and criteria laid out in the regulations.⁷⁶

B. Program Development

Program development and implementation is a cooperative process in which the Commission and the local jurisdictions share responsibility. The Commission establishes criteria for local critical area programs, reviews and approves program submissions, and oversees the implementation of the programs across the state.⁷⁷ The local jurisdictions are responsible for actually developing and implementing their own critical area programs that meet the state requirements.⁷⁸ Those local programs should protect water quality, conserve habitats, and include land use policies that accommodate growth while also addressing the environmental impacts of human activity.⁷⁹ Local programs must contain certain elements as required by the state, including a map designating the critical area and provisions related to project approvals, variances, and enforcement, among other things.⁸⁰

C. Variances

Requirements

Local jurisdictions may grant a variance to the critical area development restrictions under certain circumstances.⁸¹ However, the applicant for a variance must overcome a presumption that the development activity does not conform to the goals and requirements of the state and local critical area programs.⁸² When making a decision on a variance application, the local jurisdiction must make written findings as to whether the applicant overcame that

⁷³ *Id.* at 27.01.02.04.C(3)(d).

⁷⁴ *Id.* at 27.01.01.01.B(29-1); *see generally id.* at 27.01.09.

⁷⁵ MD. CODE ANN., NAT. RES. § 8-1806(b)(1)(xiii) (West 2016); *see generally* MD. CODE REGS. 27.01.09.

⁷⁶ MD. CODE REGS. 27.01.09.03(B)–(C), .04 (B)–(C).

⁷⁷ MD. CODE ANN., NAT. RES. § 8-1808.

⁷⁸ *Id.*

⁷⁹ *Id.* § 8-1808(a), (b).

⁸⁰ *Id.* § 8-1808(c)(1)(iii).

⁸¹ *Id.* § 8-1808(c)(1)(iii)(13).

⁸² *Id.* § 8-1808(d)(3)(ii); *see also* MD. CODE REGS. 27.01.12.04.A (2015).

presumption of nonconformance.⁸³ Additionally, the local jurisdiction’s findings must be based on “competent and substantial evidence.”⁸⁴

A local jurisdiction cannot grant a variance request unless the applicant demonstrates that all of the following criteria are met:

- (1) Due to special features of the site or special conditions or circumstances peculiar to the applicant’s land or structure, a literal enforcement of the local critical area program would result in an unwarranted hardship to the applicant;⁸⁵
- (2) A literal interpretation of the local Critical Area program would deprive the applicant of a use of land or a structure permitted to others in accordance with the provisions of the local Critical Area program;
- (3) The granting of the variance would not confer upon the applicant any special privilege that would be denied by the local Critical Area program to other lands or structures in accordance with the provisions of the local Critical Area program;
- (4) The variance request is not based upon conditions or circumstances that are the result of actions by the applicant;
- (5) The variance request does not arise from any conforming or nonconforming condition on any neighboring property;
- (6) The granting of the variance would not adversely affect water quality or adversely impact fish, wildlife, or plant habitat with the jurisdiction’s local Critical Area; and
- (7) The granting of the variance would be in harmony with the general spirit and intent of the Critical Area law, the [Critical Area] regulations..., and the local Critical Area program.⁸⁶

⁸³ MD. CODE ANN., NAT. RES. § 8-1808(d)(4)(ii).

⁸⁴ *Id.*

⁸⁵ An unwarranted hardship exists when, “without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.” *Id.* § 8-1808(d)(1); MD. CODE REGS. 27.01.12.01; *see also infra* Part III.

⁸⁶ MD. CODE REGS. 27.01.12.04.B; *see also* MD. CODE ANN., NAT. RES. § 8-1808(d)(5)(i)–(iii) (prohibiting variances unless the following circumstances exist: “(i) Due to special features of a site, or special conditions or circumstances peculiar to the applicant’s land or structure, a literal enforcement of the critical area program would result in unwarranted hardship to the applicant; (ii) The local jurisdiction finds that the applicant has satisfied each one of the variance provisions; and (iii) Without the variance, the applicant would be deprived of a use of land or a structure permitted to others in accordance with the provisions of the critical area program.”); *id.* § 8-1808(d)(3)(iii) (requiring that the local jurisdiction take into consideration whether the applicant caused the circumstances that resulted in the need for a variance); *id.* § 8-1813(a), (b) (requiring that local jurisdictions make specific findings that the “proposed development will minimize adverse impacts on water quality” and that “[t]he applicant has identified

Local jurisdictions must provide the Commission with copies of all variance applications, and they can only process an application upon notification of the Commission's receipt.⁸⁷ Local jurisdictions must also provide the Commission with copies of all decisions on variance applications.⁸⁸

Grandfathering

Local jurisdictions may permit the continuation of a land use that was in existence when its critical area program was approved, even if the use is inconsistent with the local program.⁸⁹ However, any intensification or expansion of grandfathered nonconforming uses must be in accordance with the state Critical Area Program's variance provisions.⁹⁰

Local jurisdictions must incorporate grandfathering into their critical area programs.⁹¹ Grandfathering allows development on certain types of land consistent with pre-existing requirements.⁹² For example, a property owner should be allowed to construct a single family home on a grandfathered lot that does not already contain a dwelling, even if the construction would be otherwise prohibited under the critical area density requirements.⁹³

After-the-Fact Variances

If otherwise prohibited development activity occurs without a variance, a local jurisdiction can take one of two actions: order the removal of the activity resulting in the violation, or grant a variance after-the-fact.⁹⁴ Before a local jurisdiction grants an after-the-fact variance, it must issue a notice of violation and an administrative or civil penalty for the prohibited development activity.⁹⁵ Additionally, the applicant must pay any and all penalties, prepare a restoration or mitigation plan approved by the local jurisdiction, and perform abatement measures according to the approved plan.⁹⁶ The area affected by the violation must be restored regardless of whether the jurisdiction ultimately grants or denies the after-the-fact variance.⁹⁷

fish, wildlife, and plant habitat which may be adversely affected by the proposed development and has designed the development so as to protect those identified habitats”).

⁸⁷ MD. CODE ANN., NAT. RES. § 8-1811(b); MD. CODE REGS. 27.03.01.04.

⁸⁸ MD. CODE ANN., NAT. RES. § 8-1808(d)(6)(i).

⁸⁹ MD. CODE REGS. 27.01.02.07.A.

⁹⁰ *Id.*

⁹¹ *Id.* at 27.01.02.07.B.

⁹² *Id.*

⁹³ *Id.* Grandfathered lots are still subject to the other requirements of the critical area program. *See id.* at 27.01.02.07.D.

⁹⁴ *Id.* at 27.01.12.06.

⁹⁵ *Id.* at 27.01.12.06.A.

⁹⁶ *Id.* at 27.01.12.06.B.

⁹⁷ *Id.* at 27.01.12.06.B–C.

Appeals

Any person who meets the federal requirements for standing may “[p]articipate as a party in an administrative proceeding at a board of appeals” regarding a variance and file a petition for judicial review of the board’s decision, even if that person did not participate in the prior administrative proceeding.⁹⁸ Persons or government agencies “aggrieved or adversely affected” by a decision on a variance may appeal the decision to the county circuit court.⁹⁹ The Chairman of the Commission may also appeal any decision, regardless of his or her involvement in the administrative proceedings.¹⁰⁰ Local jurisdictions cannot issue a permit for an activity that is the subject of a variance application until the thirty-day window to file an appeal expires.¹⁰¹

D. Enforcement

Local jurisdictions, the Commission, and the Attorney General have varying enforcement authority under the Critical Area Program.¹⁰² Local authorities may “enter a property in order to identify or verify a suspected violation, restrain a development activity, or issue a citation ...”¹⁰³ If the local authorities uncover a violation, they are required to take enforcement action.¹⁰⁴ Additionally, they “shall require appropriate restoration and mitigation as necessary to offset adverse impacts to the critical area resulting from the violation.”¹⁰⁵ Critical area violations can also result in a fine of up to \$10,000 or up to ninety days imprisonment.¹⁰⁶ When determining the amount of a fine, local jurisdictions must consider the gravity of the violation, whether the violation was willful or negligent, the environmental impact of the violation, and the cost of restoration.¹⁰⁷ Local authorities can also request assistance from the Commission in enforcement actions or request that the Commission refer an action to the Attorney General.¹⁰⁸

⁹⁸ MD. CODE ANN., NAT. RES. § 8-1808(d)(2)(iii) (West 2016); MD. CODE REGS. 27.01.12.07.A. The Maryland General Assembly adopted the federal requirements for standing and eliminated the requirement for a person to have participated in the administrative proceeding for variances in 2009. *See* 2009 Maryland Laws Ch. 651 (H.B. 1569). “[T]o satisfy standing in an environmental action, a plaintiff must show that ‘(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision.’” *Patuxent Riverkeeper v. Md. Dep’t of Env’t*, 422 Md. 294, 300 (2011) (citations omitted); *see also* MD. CODE ANN., NAT. RES. § 8-1808(d)(2)(ii); MD. CODE REGS 27.01.12.03 (stating that a person with federal standing also has “standing to participate as a party in a local administrative proceeding.”).

⁹⁹ MD. CODE REGS. 27.01.12.07.B(1). An aggrieved person is generally understood to be someone whose “personal or property rights were adversely affected by the decision.” *See Patuxent Riverkeeper*, 422 Md. at 298 (citations omitted).

¹⁰⁰ MD. CODE REGS. 27.01.12.07.B(2).

¹⁰¹ *Id.* at 27.01.12.07.C.

¹⁰² *See generally* MD. CODE ANN., NAT. RES. § 8-1815.

¹⁰³ *Id.* § 8-1815(a)(1).

¹⁰⁴ *Id.* § 8-1815(a)(1)(iii).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 8-1815(a)(2).

¹⁰⁷ *Id.* § 8-1808(c)(2).

¹⁰⁸ *Id.* § 8-1815(a)(3).

The Chairman of the Commission can serve notice on local authorities whenever he or she believes that a jurisdiction is failing to enforce its program in any given case.¹⁰⁹ If the local jurisdiction fails to take action within thirty days, the Chairman can refer the case to the Attorney General.¹¹⁰

Upon referral from a local jurisdiction or the Commission, the Attorney General can pursue any alleged violation, so long as the local authorities would have been authorized to do so.¹¹¹ The Attorney General may also pursue injunctions and compel restoration in circumstances where a violation “threatens to immediately and irreparably degrade the quality of tidal waters or fish, wildlife, or plant habitat.”¹¹² Any action commenced by the Commission, Attorney General, or local authorities carries a three-year statute of limitations, which starts to run when the Commission or the local authorities “knew or reasonably should have known of the violation.”¹¹³

¹⁰⁹ *Id.* § 8-1815(b).

¹¹⁰ *Id.*

¹¹¹ *Id.* § 8-1815(c).

¹¹² *Id.* § 8-1815(e).

¹¹³ *Id.* § 8-1815(a)(2)(ii).

III. Case Law & Legislative Amendments

Since the enactment of the Critical Area Program, several cases involving the interpretation and application of the variance criteria have come before Maryland's appellate courts. In response to some of those court cases, the General Assembly amended the variance criteria to clarify its intent or correct misinterpretations of the statute. This section discusses how the variance criteria have evolved over time as a result of those decisions and legislative amendments. First, Maryland's appellate courts defined the unwarranted hardship standard as "the denial of reasonable and significant use of the property."¹¹⁴ Second, the courts and the General Assembly attempted to determine the meaning of "reasonable and significant use" in the context of the unwarranted hardship standard. Third, the courts and the General Assembly have attempted to clarify the role and responsibilities of local jurisdictions in the variance process. Finally, this section concludes by discussing two recent decisions in which Maryland appellate courts upheld Anne Arundel County's decisions to grant variances for extensive development projects located almost entirely within the critical area buffer.

A. **Defining Unwarranted Hardship as a Denial of Reasonable and Significant Use**

The Critical Area Program as enacted in 1984 did not include the unwarranted hardship standard.¹¹⁵ Rather, in order to grant a variance, local jurisdictions simply had to find that the proposed development minimized impacts on water quality and was designed to protect any at-risk fish, wildlife, and plant habitat.¹¹⁶ Critical area regulations adopted in 1985 included the term unwarranted hardship, but lacked a definition.¹¹⁷ As a result, the appellate courts attempted to define the unwarranted hardship standard in a series of cases during the 1990s.

In *North v. St. Mary's County*, the Court of Special Appeals held that the St. Mary's County Board of Appeals' decision to grant a variance for a gazebo in the critical area buffer was not supported by substantial evidence.¹¹⁸ In that case, decided in 1994, the property owner wanted to construct the gazebo "to have a place to contemplate, read and enjoy the view."¹¹⁹ However, the property already consisted of a house and several features that provided unobstructed views of Cuckold Creek, including exterior decks, a walkway down to the creek, and a pier that extended over the water.¹²⁰

The Court of Special Appeals focused on two variance criteria: whether the land consisted of special features and whether the unwarranted hardship standard was satisfied.¹²¹ The property owner argued that, in terms of special features, "his land was unique because he had not

¹¹⁴ *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 282 (1999).

¹¹⁵ *Assateague Coastal Trust, Inc. v. Schwalbach*, No. 59-2015, slip op. at 16 (Md. May 23, 2016) (citing Chapter 794, Laws of Maryland 1984).

¹¹⁶ See 1984 Md. Laws 3744, 3764–65 (codified as amended at MD. CODE ANN., NAT. RES. § 8-1813).

¹¹⁷ See 2013 Md. Reg. 310089 (Feb. 22, 2013) (repealing existing MD. CODE REGS. 27.01.12.01, and adding MD. CODE REGS. 27.01.12.01–.07, including a definition for "unwarranted hardship" at MD. CODE REGS. 27.01.12.01).

¹¹⁸ *North v. St. Mary's County*, 99 Md. App. 502, 520 (Ct. Spec. App. 1994).

¹¹⁹ *Id.* at 505.

¹²⁰ *Id.* at 505–06, 517.

¹²¹ *Id.* at 512, 516–17.

already built on the point of land and the other property owners had.”¹²² In terms of unwarranted hardship, the property owner claimed that being unable to enjoy the scenic view from that point of land “would be a deprivation of the rights of the property owner.”¹²³ Notably, the St. Mary’s County Department of Planning and Zoning took the position that the property owner had not satisfied either criterion.¹²⁴ Regardless, the Board of Appeals granted the variance, and the Circuit Court affirmed the Board’s decision.¹²⁵ The Chairman of the Critical Area Commission appealed the Circuit Court’s decision to the Court of Special Appeals.¹²⁶

The Court of Special Appeals concluded that the evidence regarding special features and unwarranted hardship was “non-existent.”¹²⁷ First, the Court clarified that the special features in the zoning context referred to specific dimensions, physical conditions, or topographical features of the property, not how the structures and uses of the property compare to neighboring lots.¹²⁸ Second, the Court clarified that “it is a denial of *reasonable* use that creates an unwarranted hardship. If reasonable use exists, generally an unwarranted hardship would not. In [this] case, extensive reasonable use is already being made of the property.”¹²⁹ The Court was referring to the fact that the property consisted of over four acres, a dwelling, and several outdoor features that provided expansive views of the water.¹³⁰ The Court specifically rejected the notion that depriving the property owner of a gazebo in those circumstances constituted an unwarranted hardship:

A desire to have a gazebo of approximately 234 square feet in which to contemplate at a particular spot when that gazebo is not permitted at that location is not evidence of an unwarranted hardship. This is especially true when [the property owner] has an additional 178,361 square feet of property in which to contemplate, much of which is outside the buffer or already in place in the creek or near the creek.¹³¹

The Court of Special Appeals made several other significant points regarding critical area variances. First, a zoning variance is presumed to conflict with the applicable ordinance and the applicant must overcome that presumption.¹³² Second, the applicant bears the burden of meeting all of the variance requirements by substantial evidence.¹³³ Finally, “reasonable use” extends to the entire property, not just the portion of the property where the proposed development would be located.¹³⁴

¹²² *Id.* at 515.

¹²³ *Id.* at 506.

¹²⁴ *Id.* at 506, 516.

¹²⁵ *Id.* at 504.

¹²⁶ *Id.*

¹²⁷ *Id.* at 519–20.

¹²⁸ *Id.* at 514–15.

¹²⁹ *Id.* at 517–18 (emphasis in original).

¹³⁰ *Id.* at 517.

¹³¹ *Id.* at 519.

¹³² *Id.* at 510.

¹³³ *Id.* at 512–13.

¹³⁴ *Id.* at 517.

Then, in *Citrano v. North*, the Court of Special Appeals held that the Anne Arundel County Board of Appeals' decision to deny an after-the-fact variance for a deck was supported by substantial evidence.¹³⁵ In that case, decided in 1998, the property owners constructed a deck on steep slopes in the critical area buffer and then retroactively applied for the necessary variances.¹³⁶ The property owners wanted the deck to "provide them with a view of the water to the west so that they [could] watch sunsets."¹³⁷ The lot was already developed with a house and other improvements, including a second floor deck.¹³⁸ The Anne Arundel County Office of Administrative Hearings and the Board of Appeals denied the variances, and the Circuit Court affirmed the Board's decision.¹³⁹

The Court of Special Appeals focused on the Board's application of the unwarranted hardship standard.¹⁴⁰ The relevant Anne Arundel County Code section provided that a critical area variance may be granted if several factors are met, including "due to the features of a site or other circumstances other than financial considerations, strict implementation of the County's critical area program would result in an unwarranted hardship."¹⁴¹ The property owners argued that "an unwarranted hardship exists because they are unable to have a free-standing deck in their front yard."¹⁴² While the Board determined that special features might exist on the property (the property was narrow and contained steep slopes), it rejected the notion that not having a deck to view sunsets constituted an unwarranted hardship.¹⁴³ The Board relied on the Court of Special Appeals opinion in *North v. St. Mary's County* in concluding that the lot "is developed, and like the property in St. Mary's County, a reasonable use of property exists."¹⁴⁴ In affirming the Board's decision, the trial court adopted the standard that "[a]n unwarranted hardship exists if reasonable use of the entire property would be denied."¹⁴⁵

In *Belvoir Farms v. North*, the Court of Appeals expressly defined the unwarranted hardship standard as "equivalent to the denial of reasonable and significant use of the property."¹⁴⁶ In that case, decided in 1999, a community developer constructed a private 200-foot pier on a community-owned space.¹⁴⁷ The homeowners association subsequently applied for a variance to construct and operate more boat slips than allowed on the pier.¹⁴⁸ The Anne Arundel Board of Appeals granted the variance based on a lesser "practical difficulties" standard, which the Court determined had no current application to critical area variances.¹⁴⁹ The Court of

¹³⁵ *Citrano v. North*, 123 Md. App. 234, 242 (Ct. Spec. App. 1998).

¹³⁶ *Id.* at 237.

¹³⁷ *Id.* at 240.

¹³⁸ *Id.*

¹³⁹ *Id.* at 238.

¹⁴⁰ *Id.* at 240–42.

¹⁴¹ *Id.* at 239.

¹⁴² *Id.* at 240.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 241.

¹⁴⁵ *Id.* (citing *North v. St. Mary's County*, 99 Md. App. 502, 517 (Ct. Spec. App. 1994)).

¹⁴⁶ *Belvoir Farms Homeowners Ass'n, Inc. v. North*, 355 Md. 259, 282 (1999).

¹⁴⁷ *Id.* at 263.

¹⁴⁸ *Id.* at 263–64.

¹⁴⁹ *Id.* at 265–66. In its opinion, the Board stated that "the unique physical conditions inherent in this lot and the exceptional circumstances involving protection of the environment, make the granting of a variance necessary in order to avoid practical difficulties and to enable the [property owner] to develop this property," and that "a strict

Appeals noted that the appropriate standard, denial of reasonable and significant use, is “less restrictive than the unconstitutional taking standard.”¹⁵⁰ The Court ultimately remanded the case to the Board of Appeals for additional hearings under the appropriate standard.¹⁵¹

The Court also noted that whether a property owner satisfies the unwarranted hardship standard is a question of fact best left to the expertise of the Anne Arundel Board of Appeals.¹⁵² As noted in another case, courts review local jurisdictions’ factual determinations under the very deferential “fairly debatable” standard.¹⁵³ Under that standard, “[a]s long as evidence exists before the agency that would make its factual determination as to reasonableness and significance fairly debatable, its determination ordinarily should be upheld.”¹⁵⁴ An administrative agency’s decision is fairly debatable and worthy of deference if it is supported by substantial evidence.¹⁵⁵

In *White v. North*, also decided in 1999, the Court of Appeals reiterated the unwarranted hardship standard as defined in *Belvoir Farms*.¹⁵⁶ There, the property owners applied for a variance to construct a pool, deck, and patio in the expanded critical area buffer.¹⁵⁷ The Anne Arundel County Office of Administrative Hearings and Board of Appeals came to different conclusions, first denying and then granting the variance, respectively.¹⁵⁸ The Circuit Court reversed the Board of Appeals’ decision to grant the variance, and the Court of Special Appeals affirmed the Circuit Court’s decision.¹⁵⁹

The Court of Appeals ultimately vacated the Court of Special Appeals’ decision and remanded the case to the Anne Arundel County Board of Appeals for consideration in light of the unwarranted hardship standard articulated in *Belvoir*.¹⁶⁰ The Court reiterated that the proper unwarranted hardship standard is not practical difficulty or denial of all economic use, but rather denial of a reasonable and significant use.¹⁶¹ Additionally, the Court of Appeals concluded that the other variance factors, such as special privilege and adverse impacts, merely inform the unwarranted hardship factor, which the Court characterized as the “essential determination.”¹⁶² Finally, the Court of Appeals stated that the individual variance factors should be “considered in

application of the law would create practical difficulties in permitting the subdivision to obtain reasonable use of the waterfront property.” *Id.*

¹⁵⁰ *Id.* at 281–82. A government regulation that deprives an owner “of all economically beneficial use” of their property is a taking. *Id.* at 282 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)). The standard for an unconstitutional taking “exists independent of variance standards.” *Id.* at 281–82. Because the unwarranted hardship standard is less restrictive, an applicant need not show an unconstitutional taking in order to prove that an unwarranted hardship exists. *Id.*

¹⁵¹ *Id.* at 282–83.

¹⁵² *Id.* at 282.

¹⁵³ *White v. North*, 356 Md. 31, 44, 50 (1999).

¹⁵⁴ *Id.* at 50.

¹⁵⁵ *Id.* at 44.

¹⁵⁶ *Id.* at 48.

¹⁵⁷ *Id.* at 39. A portion of the property was in the expanded buffer due to man-made steep slopes that existed on the property after excavation and construction of a dwelling. *Id.* at 38–40.

¹⁵⁸ *Id.* at 39–40.

¹⁵⁹ *Id.* at 43.

¹⁶⁰ *Id.* at 52.

¹⁶¹ *Id.* at 46, 49.

¹⁶² *Id.* at 50–51.

the context of the entire variance ordinance, to the end that, when interpreted as a whole, either they are or are not *generally* met.”¹⁶³

The Court of Special Appeals’ decisions in *North v. St. Mary’s County* and *Citrano v. North* show that in the past, Maryland’s intermediate appellate court had a stringent interpretation of the unwarranted hardship standard. The Court of Appeals then expressly defined unwarranted hardship as the denial of reasonable and significant use, and made that factor the central determination. Over the next several years, however, the Court of Appeals and the General Assembly had differing opinions about how to interpret and apply the critical area variance provisions.

B. Defining Reasonable and Significant Use

In *Belvoir*, the Court of Appeals defined an unwarranted hardship as “the denial of reasonable and significant use of the property.”¹⁶⁴ After *Belvoir*, Maryland courts had to determine the meaning of “reasonable and significant use.” During this period, both the appellate courts and Maryland’s General Assembly weighed in on what an applicant must demonstrate to obtain a critical area variance.

In *Mastandrea v. North*, the Court of Appeals provided some leeway in determining what constitutes reasonable and significant use by allowing local jurisdictions to consider a portion of the property in question, rather than the entire parcel.¹⁶⁵ In that case, decided in 2000, the property owners installed a path connecting their house to a pier and a path along Glebe Creek.¹⁶⁶ Because portions of the paths were within the 100-foot critical area buffer, the property owners applied for an after-the-fact variance.¹⁶⁷ The applicants believed that they should receive a variance to accommodate a family member’s disability.¹⁶⁸ The Critical Area Commission opposed the variance request, and recommended that the property owners remove the portions of the pathways in the buffer except for a direct path from the house to the pier.¹⁶⁹ The Talbot County Board of Appeals granted the variances for both pathways.¹⁷⁰ The Circuit Court subsequently determined that the path from the house to the pier was a water dependent structure

¹⁶³ *Id.* at 50 (emphasis in original).

¹⁶⁴ *Belvoir Farms Homeowners Ass’n, Inc. v. North*, 355 Md. 259, 282 (1999).

¹⁶⁵ *Mastandrea v. North*, 361 Md. 107, 136 (2000).

¹⁶⁶ *Id.* at 112.

¹⁶⁷ *Id.* at 113.

¹⁶⁸ *Id.* at 115–16. The property owners’ daughter was confined to a motorized wheelchair, and the paths allowed her to enjoy the waterfront. *Id.* at 112–13, 115–16. The Talbot County Council enacted Bill No. 741 on November 23, 1999, requiring reasonable accommodations for persons with disabilities in zoning actions, including variances. *Id.* at 121 (citing TALBOT COUNTY, MD., ZONING ORDINANCE, § 19.14(b)(7)). The Court held that because the Board’s decision properly considered the relevant disability, it was consistent with the intent of Bill No. 741 and Title II of the Americans with Disabilities Act. *Id.* at 128–29. As a result, the Court did not reach the issue of which law controls. *Id.* at 128–130. The General Assembly enacted H.B. 1323, 2000 Leg., 414th Sess. (Md. 2000), which took effect July 1, 2000 and requires zoning authorities to make reasonable accommodations to avoid discrimination on the basis of a disability.

¹⁶⁹ *Mastandrea*, 361 Md. at 117.

¹⁷⁰ *Id.* at 118.

that did not require a variance.¹⁷¹ However, the Circuit Court denied the variance for the pathway along Glebe Creek.¹⁷²

The Court of Appeals held that the Talbot County Board of Appeals decision to grant the variance for the path along Glebe Creek was supported by substantial evidence.¹⁷³ The Board appropriately considered all of the variance factors and granted the application as a reasonable accommodation.¹⁷⁴ With regard to the unwarranted hardship standard, the Court reiterated the definition articulated in *Belvoir*, of whether a property owner would be denied “reasonable and significant use.”¹⁷⁵ Additionally, as explained in *White*, the Court reiterated that the unwarranted hardship analysis is the central inquiry, and that the other variance factors merely “provid[e] guidance” for that analysis.¹⁷⁶ Finally, the Court determined that the Board of Appeals did not have to consider reasonable and significant use of the entire parcel:

The Board in this case, therefore, did not have to consider whether denying the variance would have denied the [property owners] a reasonable and significant use of the “entire” lot. Rather, the Board was required to (and did) consider whether the property owners, in light of their daughter’s disability, would be denied reasonable and significant use of the waterfront of their property without the access that the path provided. There is substantial evidence in the record establishing that, without the path, a person in a wheelchair could not enjoy the waterfront portion of the property.¹⁷⁷

In addition to reiterating the Court’s previous holdings in *Belvior* and *White*, the holding in *Mastandrea* gave local jurisdictions additional flexibility by allowing them to evaluate reasonable and significant use based on a portion of the property, rather than the entire lot.

In 2002, the General Assembly made several changes to the Critical Area Program intended to overrule certain aspects of the previous court decisions regarding variances.¹⁷⁸ Specifically, the General Assembly clarified that local jurisdictions cannot grant a critical area variance unless “due to the special features of a site, or special conditions or circumstances peculiar to the applicant’s land or structure, a literal enforcement . . . would result in an unwarranted hardship to the applicant.”¹⁷⁹ Local jurisdictions must “consider the reasonable use of the *entire parcel or lot* for which the variance is requested” and find that “the applicant has satisfied *each one* of the variance provisions.”¹⁸⁰

¹⁷¹ *Id.* at 120.

¹⁷² *Id.*

¹⁷³ *Id.* at 142–43. The Court of Appeals granted certiorari before the Court of Special Appeals heard the case to address the issue of whether provisions of the Americans with Disabilities Act apply to county zoning ordinances and specifically to critical area variances. *Id.* at 112.

¹⁷⁴ *Id.* at 142–43.

¹⁷⁵ *Id.* at 136.

¹⁷⁶ *Id.* at 135.

¹⁷⁷ *Id.* at 136.

¹⁷⁸ See H.B. 301, 2002 Leg., 416th Sess. (Md. 2002); H.B. 528, 2002 Leg., 416th Sess. (Md. 2002); S.B. 326, 2002 Leg., 416th Sess. (Md. 2002).

¹⁷⁹ H.B. 528, at 6; S.B. 326, at 6.

¹⁸⁰ H.B. 528, at 6 (emphasis added); S.B. 326, at 6 (emphasis added).

Despite the 2002 amendments, in *Lewis v. Department of Natural Resources*, the Court of Appeals returned to the unwarranted hardship standard as articulated in prior cases.¹⁸¹ In *Lewis*, decided in 2003, the property owner constructed a six-building hunting camp on Phillips Island, a five acre island located almost entirely in the critical area buffer.¹⁸² The property owner ultimately applied for an after-the-fact variance for two of the buildings located in the buffer.¹⁸³ The Board denied the variance request, concluding that even without a variance, the property owner “will continue to enjoy reasonable and significant use of the Island and the property. . . .”¹⁸⁴ The Board noted that the property owner could locate a structure on the portion of Phillips Island outside the buffer.¹⁸⁵ Moreover, the island already contained multiple blinds and had been used for hunting in the past.¹⁸⁶

The Court of Appeals concluded that the Board erred in its application of the unwarranted hardship standard:

In respect to variances in buffer areas, the correct standard is not whether the property owner retains a reasonable and significant use for the property outside the buffer, but whether he or she is being denied a reasonable use of property within the buffer. The facts used by the Board in finding that no unwarranted hardship existed were discussed in the context of whether [the property owner] could still have a viable, reasonable and productive use of his entire property without the variance. The Board’s reliance on facts suggesting alternative uses and possible construction outside of the Buffer is akin to asking whether denying petitioner’s variance request will result in denying him “all economically beneficial or productive use of the land.” *i.e.*, the unconstitutional takings standard.¹⁸⁷

Overlooking the 2002 amendments, the Court relied on its previous decisions in *Mastandrea* and *White* for the propositions that reasonable and significant use does not apply to the entire property and that the unwarranted hardship factor is the central determination.¹⁸⁸ The Court also addressed the self-created hardship factor, and determined that it referred to the nature of the island itself, not whether the property owner began construction without permits.¹⁸⁹

¹⁸¹ *Lewis v. Dep’t of Natural Res.*, 377 Md. 382, 413 (2003).

¹⁸² *Id.* at 395–96.

¹⁸³ *Id.* at 396.

¹⁸⁴ *Id.* at 418–19 (emphasis omitted).

¹⁸⁵ *Id.* at 419.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 419–22.

¹⁸⁹ *Id.* at 422. The Court’s holding in *Lewis* regarding the self-created hardship standard is also consistent with its opinion in *Richard Roeser Prof’l Builder, Inc. v. Anne Arundel County*. 368 Md. 294, 307 (2002). In that case, the Court held that purchasing land in the critical area buffer does not amount to a self-created hardship. *Id.* (stating that purchasing land with knowledge of zoning restrictions does not preclude the possibility of receiving a variance.).

In the Court’s view, the property owner would need a variance to build any camp on the island, and whether he commenced development without the proper approvals was irrelevant.¹⁹⁰

Judge Wilner, joined by Judges Battaglia and Raker, dissented to the majority opinion in *Lewis*.¹⁹¹ The dissenting opinion stated that, “[i]n striking down the Board’s determination in this case, the Court ignores those legislative findings, misconstrues and misapplies the regulations and local laws adopted pursuant to the statute, and seriously undermines this vital legislative program.”¹⁹² Moreover, the majority essentially ignored verbal and written testimony from the Critical Area Commission.¹⁹³ The Commission made its view clear in a letter stating that, “[u]nder no circumstances would development of the subject property be permitted as the applicant has already done.”¹⁹⁴ Justice Wilner concludes his dissent with a warning:

In its inexplicable effort to allow property owners . . . to do whatever they wish on environmentally sensitive property, without regard to legal constraints or public policy, the Court throws established principles of administrative law to the wind, misconstrues the relevant statutes and regulations, and views the evidence not in a light most favorable to the agency, but in a light most favorable to the losing applicant. It is not only wrong in this case but sets a most unfortunate precedent.¹⁹⁵

The Court of Appeals’ decision in *Lewis* prompted additional legislative amendments to the Critical Area Program in 2004. In enacting the amendments, the General Assembly made its intent clear: to “overrule the *Lewis* decision and re-establish critical area variance standards, particularly the historic understanding of unwarranted hardship, that existed until weakened by the Court of Appeals”¹⁹⁶ The 2004 amendments defined the unwarranted hardship standard as follows: “without a variance, an applicant would be denied reasonable and significant use of the *entire* parcel or lot for which the variance is requested.”¹⁹⁷ The amendments also established the presumption of non-conformance, the applicant’s burden to overcome that presumption, and the local jurisdiction’s duty to make written findings, “based on competent and substantial evidence” about whether the property owner overcame the presumption.¹⁹⁸ Finally, the amendments addressed the self-created hardship factor by allowing (but not requiring) local jurisdictions to consider whether “the variance request is based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed. . . .”¹⁹⁹

¹⁹⁰ *Lewis*, 377 Md. at 424–25.

¹⁹¹ *Id.* at 438–56 (Wilner, J., Dissenting).

¹⁹² *Id.* at 439 (Wilner, J., Dissenting).

¹⁹³ *Id.* at 445 (Wilner, J., Dissenting).

¹⁹⁴ *Id.* (Wilner, J., Dissenting) (citing to a Letter from Anne Chandler, Critical Area Commission, to Wicomico County Board of Zoning Appeals).

¹⁹⁵ *Id.* at 455–56 (Wilner, J., Dissenting).

¹⁹⁶ H.B. 1009, 2004 Leg., 418th Sess., at 3 (Md. 2004).

¹⁹⁷ H.B. 1009, at 9 (emphasis added).

¹⁹⁸ H.B. 1009, at 9–10.

¹⁹⁹ H.B. 1009, at 9.

By 2004, it was apparent that the General Assembly and the courts had divergent views of the Critical Area Program and its requirements. Moreover, the majority and dissenting opinions in *Lewis* indicated that the Court of Appeals was internally divided over the Critical Area Program. In the years that followed, the General Assembly and the courts attempted to clarify various elements of the Program, including the variance criteria and the extent to which local jurisdictions must support their decisions on variances.

C. Clarifying the Variance Criteria and the Responsibilities of Local Jurisdictions

In 2008, the General Assembly strengthened the Critical Area Program's variance provisions once again by imposing additional requirements on local jurisdictions.²⁰⁰ First, the 2008 amendments required local jurisdictions to consider whether "the variance request is based on conditions or circumstances that are the result of actions by the applicant."²⁰¹ Second, the General Assembly required local jurisdictions to send a copy of variance decisions to the Commission within ten days.²⁰² Third, the 2008 amendments established additional requirements for after-the-fact variances.²⁰³ The amendments specifically state that "development activity commenced without a required permit, approval, variance or special exception is a violation of [the Program]."²⁰⁴ Pursuant to the amendments, a local jurisdiction cannot consider a variance application for development that occurred in violation of the Critical Area Program until the violation is resolved.²⁰⁵

During this time period, the appellate courts also addressed the extent to which local jurisdictions must support their conclusions regarding the variance criteria. In *Becker v. Anne Arundel County*, the Court of Special Appeals instructed local jurisdictions to substantiate their decisions to some degree.²⁰⁶ In that case, decided in 2007, the property owners applied for two critical area variances to build a house on a lot that was almost entirely within the critical area buffer.²⁰⁷ The property owners owned two adjacent lots, one of which was already improved with a dwelling.²⁰⁸ However, the property owners wanted to build a home that was more accessible due to a medical condition.²⁰⁹ When the Board inquired as to why the existing house was insufficient, one of the property owners stated that in addition to the medical condition, they did not like the house.²¹⁰ The Anne Arundel County Board of Appeals denied the variance requests, noting that "[t]he current Critical Area variance criteria are very strict," that each of the individual variance criteria must be met, and that the unwarranted hardship standard applies to

²⁰⁰ H.B. 1253, 2008 Leg., 425th Sess. (Md. 2008).

²⁰¹ H.B. 1253, at 24. However, the General Assembly omitted the language that would have required local jurisdictions to consider whether the applicant commenced construction prior to applying for a variance. H.B. 1253, at 24.

²⁰² H.B. 1253, at 25.

²⁰³ H.B. 1253, at 25–26.

²⁰⁴ H.B. 1253, at 25.

²⁰⁵ H.B. 1253, at 25–26.

²⁰⁶ *Becker v. Anne Arundel County*, 174 Md. App. 114, 145–46 (Ct. Spec. App. 2007).

²⁰⁷ *Id.* at 121–22.

²⁰⁸ *Id.* at 120.

²⁰⁹ *Id.* at 122–23.

²¹⁰ *Id.*

the entire lot.²¹¹ The Board emphasized the property owner's failure to prove that the variances were "the minimum variance necessary to afford relief to the applicant."²¹² The Circuit Court affirmed the Board's decision.²¹³

The Court of Special Appeals reversed the Circuit Court's decision upon finding no support for the Board's conclusions as to whether the property owners satisfied the variance factors.²¹⁴ Moreover, the Board did not even reach a conclusion as to whether special features on site would result in an unwarranted hardship.²¹⁵ The Court of Special Appeals took particular issue with the Board's determination that the variance was not the minimum necessary to provide relief, stating that "[t]he question . . . must be considered, however, in the context of the purpose of the proposed construction, recognizing that appellants are entitled to build some type of reasonable structure."²¹⁶ The Board made no determinations as to why that factor was not met.²¹⁷

Significantly, the Court of Special Appeals indicated that the local decision-makers cannot simply state that they are, or are not, convinced that property owners have satisfied the variance criteria.²¹⁸ Rather, the decision-maker must provide some explanation:

A statement by the Board that it is not persuaded that the minimum necessary standard has been met is not a statement as to why it has not been met, with reference to the evidence . . . The Board has the obligation to determine compliance, but the result is not discretionary; the result flows from the determination. Thus, whether it grants or denies the requested variance, the Board has an obligation to explain its decision.²¹⁹

In *Critical Area Commission for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, the Court of Appeals returned to the evidentiary requirements established in *Becker*.²²⁰ In *Moreland*, decided in 2011, the property owner wanted to build single-family homes on two parcels of land in the critical area.²²¹ The houses and associated structures required buffer and clearing variances.²²² The Anne Arundel Office of Administrative Hearings and the Board of Appeals denied the variance requests.²²³ The Board primarily took issue with the adverse impacts of the development from increasing impervious surfaces and clearing vegetation.²²⁴ In its opinion, the Board referenced the square footage of the new impervious surface, the reduced vegetative cover, the environmentally sensitive nature of the buffer, and the testimony of several people,

²¹¹ *Id.* at 123–25.

²¹² *Id.* at 125.

²¹³ *Id.* at 120.

²¹⁴ *Id.* at 143, 146.

²¹⁵ *Id.* at 143.

²¹⁶ *Id.* at 144.

²¹⁷ *Id.*

²¹⁸ *Id.* at 145–46.

²¹⁹ *Id.*

²²⁰ *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111 (2011).

²²¹ *Id.* at 119.

²²² *Id.* at 119–20.

²²³ *Id.* at 114.

²²⁴ *Id.* at 124.

including a long-time resident that the Board accepted as an environmental expert, the South Riverkeeper, and neighboring property owners.²²⁵ The property owner sought judicial review, arguing that the Board's opinion suffered from the same deficiencies identified by the Court in *Becker*.²²⁶ The Circuit Court reversed and the Court of Special Appeals affirmed the Circuit Court's decision.²²⁷ Both the Circuit Court and the Court of Special Appeals relied on *Becker* in reaching their conclusions.²²⁸

The Court of Appeals found that the Board's decision was supported by substantial evidence and that the Board's decision should be affirmed.²²⁹ In contrast with *Becker*, where the Board "failed to articulate any evidence supporting its adverse findings," the Board's decision in *Moreland* "contained clear adverse findings, as well as summaries of substantial evidence supporting those findings."²³⁰ Moreover, the Board's decision allowed for meaningful judicial review:

When the Board of Appeals merely states conclusions, without pointing to the evidentiary bases for those conclusions, such findings are not amenable to meaningful judicial review and a remand is warranted. . . . In contrast. . . when the Board of Appeals refers to evidence in the record in support of its findings, meaningful judicial review is possible. . . .[I]n its determination that the *Moreland* variances should be denied, the Board explicitly summarized evidence presented by several witnesses supporting its conclusions, albeit in a separate section, enabling meaningful judicial review.²³¹

In *Assateague Coastal Trust v. Schwalbach*, decided in 2016, the Court of Appeals revisited the unwarranted hardship standard and considered the extent to which local jurisdictions have to make express findings regarding the presumption of nonconformance.²³² In that case, the property owner applied for a variance to a Worcester County critical area requirement that limits new piers to 100 feet in length.²³³ The property owner claimed that he needed a 180-foot pier across a private tidal marsh in order to exercise his riparian rights as a waterfront property owner.²³⁴ The Worcester County Board of Zoning Appeals granted the variance request.²³⁵ The Circuit Court and the Court of Special Appeals upheld the Board's decision.²³⁶

²²⁵ *Id.* at 124–28.

²²⁶ *Id.* at 123. The Board denied the variance application at issue in *Moreland* shortly after it denied the application at issue in *Becker*, but before the Court of Appeals' decision in *Becker*.

²²⁷ *Id.* at 120.

²²⁸ *Id.*

²²⁹ *Id.* at 135.

²³⁰ *Id.* at 128.

²³¹ *Id.* at 134.

²³² *Assateague Coastal Trust, Inc. v. Schwalbach*, No. 59-2015, slip op. at 14, 32 (Md. May 23, 2016).

²³³ *Id.* at 1.

²³⁴ *Id.* at 1, 7.

²³⁵ *Id.* at 1.

²³⁶ *Id.* at 2.

The Court of Appeals agreed with the lower courts and upheld the Board's decision to grant the variance.²³⁷ According to the Court, the unwarranted hardship standard does not require the applicant to show a denial of "all reasonable and significant use" of the property, but rather denial of "a reasonable and significant use throughout the entire property."²³⁸ The Court of Appeals ultimately determined that:

in order to establish an unwarranted hardship, the applicant has the burden of demonstrating that, without a variance, the applicant would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance.²³⁹

After articulating this standard, the Court went on to find that substantial evidence supported the Board's conclusion on unwarranted hardship.²⁴⁰ In particular, the Court identified the property owner's ability to exercise his riparian rights (i.e., access the water) as a significant and reasonable use of the property.²⁴¹ The Court also found that substantial evidence supported the Board's conclusion that the variance would not have adverse environmental impacts.²⁴² The Court pointed to approvals from the Maryland Department of the Environment and the U.S. Army Corps of Engineers, as well as testimony from an environmental consultant and the written recommendation from the Board's staff.²⁴³ Finally, the Court held that the Board's written decision finding that the applicant has satisfied all variance standards was sufficient to conclude that the applicant also overcame the presumption of nonconformance.²⁴⁴

Given the history of back and forth between the courts and the General Assembly, it is unclear whether the most recent definition of unwarranted hardship articulated in *Assateague Coastal Trust v. Schwalbach* will stand. Moreover, exactly what constitutes "a reasonable and significant use" that "cannot be accomplished elsewhere on the property" remains to be seen. It is clear, however, that the way in which local jurisdictions and the courts have interpreted the variance criteria in the past can allow significant development in the critical area. Two recently decided cases, *Chesapeake Bay Foundation v. Clickner* and *Chesapeake Bay Foundation v. DCW Dutchship Island, LLC*, upheld variances for the construction of large residences and related structures on islands located almost entirely within the critical area buffer.²⁴⁵

²³⁷ *Id.*

²³⁸ *Id.* (emphasis in original). *See also id.* at 14–15.

²³⁹ *Id.* at 28.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 28–29.

²⁴² *Id.* at 30.

²⁴³ *Id.* at 29–32.

²⁴⁴ *Id.* at 34.

²⁴⁵ *Chesapeake Bay Found. v. Clickner*, No. 1926-12, slip op. (Md. Ct. Spec. App. Feb. 20, 2014); *Chesapeake Bay Found. v. DCW Dutchship Island, LLC*, 439 Md. 588 (2014).

D. In Focus: Dobbins Island and Little Island

In *Chesapeake Bay Foundation v. Clickner*, decided in 2014, the property owners applied for critical area variances to construct several structures within the buffer, including a driveway, turnaround area, stormwater management system, septic system, and a well on Dobbins Island in the Magothy River.²⁴⁶ The majority of the seven-acre island is located in the expanded critical area buffer due to steep slopes.²⁴⁷ The property owners planned to construct a house on a portion of the island that they contended was outside of the buffer.²⁴⁸ The Anne Arundel County Office of Administrative Hearings and the Board of Appeals granted the variances, and the Circuit Court affirmed the Board's decision.²⁴⁹

In an unreported opinion, the Court of Special Appeals found that the Board's determinations regarding five challenged variance factors were supported by substantial evidence.²⁵⁰ First, the Court concluded that substantial evidence supported the Board's finding that the variance requests were "the minimum necessary to afford [the property owners] relief."²⁵¹ As in *Becker*, the Court stated that the minimum relief factor "must be considered . . . in the context of the purpose of the proposed construction, recognizing that appellants are entitled to build some type of reasonable structure."²⁵² In this case, the evidence before the Board indicated that the property owners had reduced the impacts of the construction, that the proposed structures were comparable to neighboring properties, and that the variances were necessary in order to build a house on the property.²⁵³

The Court also determined that substantial evidence, namely testimony from multiple witnesses, supported the Board's finding that the variances would not have an adverse environmental impact.²⁵⁴ Moreover, the Court found that substantial evidence supported the Board's finding that an unwarranted hardship existed because, without the variances, the property owners would be unable to build a house on the property, thus denying them a reasonable and significant use.²⁵⁵ The Court deferred to the Board's conclusion that the island's unique topographical features and a strict implementation of the Critical Area Program would deprive the property owners of rights commonly enjoyed by other similarly situated properties.²⁵⁶ In the Court's view, substantial evidence also supported the Board's finding that

²⁴⁶ *Clickner*, No. 1926-12 at 1, 8.

²⁴⁷ *Id.* at 7 & n.7.

²⁴⁸ *Id.* at 8. The property owners originally applied for variances to build a house in the buffer. *Id.* at 7. However, the Office of Administrative Hearings denied the variance because the property owners failed to demonstrate that a variance for a 5,000 square foot home was the "minimum necessary to afford relief." *Id.* The property owners subsequently moved the proposed dwelling, and argued that the new location was outside of the buffer and the expanded buffer. *Id.* at 8. In subsequent proceedings the Anne Arundel County Board of Appeals excluded evidence that conflicted with the property owners' delineation of the expanded buffer and refused to consider the issue. *Id.* at 28–32.

²⁴⁹ *Id.* at 1.

²⁵⁰ *Id.* at 37–48.

²⁵¹ *Id.* at 39.

²⁵² *Id.* at 38 (citing *Becker v. Anne Arundel County*, 174 Md. App. 114, 144 (Ct. Spec. App. 2007)).

²⁵³ *Id.* at 38–39.

²⁵⁴ *Id.* at 42.

²⁵⁵ *Id.* at 44–45.

²⁵⁶ *Id.*

the need for a variance was not self-created, but rather a consequence of the “location and topography of the island.”²⁵⁷ Finally, the Court concluded that substantial evidence supported the Board’s finding that the property owners would not be granted a special privilege, as the variances would simply allow the property owners to construct a home on the property.²⁵⁸

In *Chesapeake Bay Foundation v. DCW Dutchship Island, LLC*, also decided in 2014, the property owner razed an existing house on Little Island in the Magothy River.²⁵⁹ Without the necessary approvals, the property owner constructed a new house, two sheds, a gazebo, a boat ramp, a driveway, sidewalks, a pool, and a deck.²⁶⁰ When Anne Arundel County discovered the violations three years later, the property owner applied for after-the-fact variances.²⁶¹ The Office of Administrative Hearings granted some variances and denied others.²⁶² The property owner appealed the variances that were denied, while the Commission and two environmental organizations appealed the variances that were granted with modifications.²⁶³ Of the variances that were appealed, the Board of Appeals granted three modified variances with conditions.²⁶⁴ The variances allowed the property owner to construct a residence, septic system, and a well in the buffer, install a septic system and related facilities in steep slopes, and construct a boat ramp/driveway in the buffer.²⁶⁵

While the Court of Appeals ultimately remanded the case due to an issue with the boat ramp, it determined that substantial evidence would support the Board’s findings with regard to several of the variance factors.²⁶⁶ First, the Court determined that substantial evidence supported the Board’s finding of unwarranted hardship because it found that without the variance the property owner would be unable to build a dwelling.²⁶⁷ Moreover, in the Court’s view, substantial evidence supported the Board’s conclusion that the need for the variance did not result from any condition created by the property owners, but from the critical area requirements and the unique topography of the island.²⁶⁸ According to the Court, the property owner’s failure

²⁵⁷ *Id.* at 45–46.

²⁵⁸ *Id.* at 47–48.

²⁵⁹ *Chesapeake Bay Found. v. DCW Dutchship Island, LLC*, 439 Md. 588, 592 (2014).

²⁶⁰ *Id.* (citing *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145, 151–52 (2010)).

²⁶¹ *Id.* (citing *McHale*, 415 Md. at 151–52).

²⁶² *Id.* at 593 (citing *McHale*, 415 Md. at 151–52).

²⁶³ *Id.* (citing *McHale*, 415 Md. at 151–52).

²⁶⁴ *Id.* at 593, 615–16.

²⁶⁵ *Id.* at 615–16 (citing *DCW Dutchship Island, LLC*, Case Nos. 2004-0590-V & 2004-0591-V, slip op. at 42–43 (Anne Arundel County. Bd. App. Jan. 3, 2007)).

²⁶⁶ *Id.* at 618–32. The Court of Appeals found that the Board failed to explain why it allowed an increase in impervious surface for the boat ramp. *Id.* at 631–32. In a concurring opinion, Judge Watts argued that the boat ramp/driveway causing the 320 square feet excess lot coverage qualified as a water-dependent facility and therefore did not require a critical area variance. *Id.* at 638 (Watts, J., concurring). In a supplemental opinion issued on December 15, 2014, the County Board of Appeals adopted Judge Watt’s view and determined that the boat ramp was a water-dependent facility. *DCW Dutchship Island, LLC*, Case Nos. 2004-0590-V & 2004-0591-V, slip op. (Anne Arundel County. Bd. App. Dec. 15, 2014) (supplemental memorandum of opinion).

²⁶⁷ *DCW Dutchship Island, LLC*, 439 Md. at 619.

²⁶⁸ *Id.* at 624–27. The petitioners in the case argued that the need for the variance was entirely self-created, because the property owner could have built a new dwelling on the same footprint as the previous dwelling and the location of the new dwelling was based on the property owner’s unlawful grading and excavation. *Id.* at 620–21. However, the Board concluded that the location of the previous dwelling was unstable and that a new location was necessary to build a replacement dwelling. *Id.* at 624.

to obtain the necessary variances prior to construction was irrelevant to the self-created hardship criterion.²⁶⁹ The Court found no error with the Board's determination that after-the-fact variances are evaluated the same as before-the-fact variances.²⁷⁰

Additionally, in discussing whether the requested variances were the minimum necessary to afford the property owner relief, the Court recognized that the Board modified the variance.²⁷¹ The Board required the property owner to remove several structures, including the pool, gazebo, sidewalks, patio, and accessory structures in order to comply with the total amount of existing impervious surface on Little Island.²⁷² Accordingly, the Court found that it was reasonable for the Board to allot the total impervious surface area from pre-existing structures to account for the new, larger residence.²⁷³ Relying on testimony from experts and area residents, the Court also determined that substantial evidence supported the Board's conclusion that the development would not have any adverse environmental impacts.²⁷⁴ Finally, the Court found that there was substantial evidence to support the Board's conclusion that variances comported with the purpose and spirit of the Critical Area Program.²⁷⁵ The petitioners argued that granting the variances would be contrary to the Program because the development would destroy habitat and harm water quality.²⁷⁶ However, the Court viewed the stormwater systems, replanting, and buffer management plan as evidence demonstrating a lack of adverse environmental effects.²⁷⁷

E. Summary

When interpreting and applying the variance criteria, the appellate courts should look to the statutory language and legislative intent of the Critical Area Program.²⁷⁸ However, the case law and legislative history demonstrate that the courts and the General Assembly sometimes have divergent views of the variance criteria. Prior to 1999, the Maryland Court of Special Appeals interpreted the variance criteria, specifically the unwarranted hardship standard as prohibiting certain types of development in the critical area—for example, gazebos and decks on already developed lots. However, in a series of cases decided in 1999 and 2000, the Court of Appeals allowed similar types of development, suggesting a more lenient interpretation of the unwarranted hardship standard.

²⁶⁹ *Id.* at 625.

²⁷⁰ *Id.* at 626.

²⁷¹ *Id.* at 631.

²⁷² *Id.* at 631. Despite the decisions of the Board and the Court, the property owner has not removed the structures. *See* Email from Gregory Swain, Anne Arundel County Law Office to Amanda Van Houten, Chesapeake Bay Foundation (Sept. 21, 2016); Letter from Jon Mueller, Chesapeake Bay Foundation to Brian Frosh, Attorney General of Maryland (Nov. 19, 2015).

²⁷³ *Id.*

²⁷⁴ *Id.* at 634–35.

²⁷⁵ *Id.* at 636–37.

²⁷⁶ *Id.* at 635–36.

²⁷⁷ *Id.* at 636.

²⁷⁸ “The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the [General Assembly].” *Montgomery County v. Phillips*, 445 Md. 55, 62 (2015) (citing *Stoddard v. State*, 395 Md. 653, 661–63 (2006)). Statutory interpretation begins with the plain language of the statute. *Id.* (citing *Stoddard*, 395 Md. at 661–63.). If the plain language is unambiguous, “the inquiry into legislative as to ends” and courts apply the statute as written. *Id.* (citing *Stoddard*, 395 Md. at 661–63.). However, if the plain language is ambiguous, courts consider other indicia of legislative intent, including the legislative history and the purpose of the law. *Id.* at 62–63 (citing *Stoddard*, 395 Md. at 661–63.).

For several years, the appellate courts and General Assembly went back and forth on the interpretation and application of the unwarranted hardship standard. The Court of Appeals saw the unwarranted hardship as the central determination, meaning that an applicant could generally, rather than specifically, meet the other variance factors. The courts also applied the unwarranted hardship standard to a portion of the property, rather than the entire lot. In response to those decisions, the General Assembly expressly defined the unwarranted hardship standard in the context of the entire parcel and required applicants to meet each individual variance factor.

Under the law as it stands, an applicant must satisfy all of the variance criteria. The applicant faces a presumption of nonconformance, and bears the burden of overcoming that presumption. The local jurisdiction must make written findings, “based on competent and substantial evidence,”²⁷⁹ as to whether the property owner overcame that presumption. In so doing, the local jurisdictions must reference some evidentiary support for its determinations. However, the Court of Appeals held in *Assateague Coastal Trust v. Schwalbach* that written findings indicating the applicant satisfied each variance factor are sufficient to conclude that the applicant overcame the presumption of nonconformance.²⁸⁰

The General Assembly and the courts have both defined the unwarranted hardship standard. According to the statute, an unwarranted hardship exists when, “without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.”²⁸¹ In *Assateague Coastal Trust v. Schwalbach*, the Court of Appeals defined the unwarranted hardship standard to mean that without a variance, the applicant would be denied a reasonable and significant use that cannot be accomplished elsewhere on the property.²⁸²

There is no bright line rule as to exactly what constitutes an unwarranted hardship, but it lies somewhere between the lesser practical difficulties standard and the greater unconstitutional taking standard. Courts will generally defer to local jurisdictions, viewing the inquiry into unwarranted hardship as a question of fact best addressed by the expertise of the local decision-making body. In reviewing a local jurisdiction’s determination, courts take into account the physical characteristics and topographic features of the land. In addition, courts must consider an applicant’s disability, where applicable, in determining whether the owner would be denied reasonable and significant use of the property.

The local jurisdiction must consider whether the need for the variance resulted from the actions of the property owner—in other words, whether the hardship was self-created. A self-created hardship does not exist simply because someone purchased property in the critical area.²⁸³ A self-created hardship may not even exist if someone undertakes development activity in violation of the Critical Area Program, and then needs to obtain a variance after-the-fact. For example, in *Chesapeake Bay Foundation v. DCW Dutchship Island, LLC*, the Court of Appeals

²⁷⁹ MD. CODE ANN., NAT. RES. § 8-1808(d)(4)(ii).

²⁸⁰ *Assateague Coastal Trust, Inc. v. Schwalbach*, No. 59-2015, slip op. at 33–34 (Md. May 23, 2016).

²⁸¹ MD. CODE ANN., NAT. RES. § 8-1808(d)(1); MD. CODE REGS. 27.01.12.01.

²⁸² *Schwalbach*, No. 59-2015, slip op. at 27–28.

²⁸³ *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 368 Md. 294, 319 (2002).

stated that after-the-fact variances should be evaluated in the same way as before-the-fact variances.²⁸⁴ Under that rationale, it is unclear what effect, if any, the applicant's actions in commencing development have on the self-created hardship factor.

Some jurisdictions, including Anne Arundel County, require an applicant to show that the variance represents the minimum necessary to provide relief. When analyzing that factor, the local decision-maker should consider that an applicant is entitled to build a reasonable structure. The term "reasonable" is not defined by the statute or regulations leaving the term open to interpretation. In addition, courts have considered whether the applicant has reduced the impacts from the structure and whether the structure is comparable to neighboring properties.

Although variances are reviewed under a standard that is highly deferential to local decision-makers, the appellate courts have a significant impact on the interpretation and application of the variance criteria, particularly the unwarranted hardship standard. The Court of Appeals' most recent definition of unwarranted hardship articulated in *Assateague Coastal Trust v. Schwalbach* asks whether a reasonable and significant use could be accomplished elsewhere on the property. The legislative history of the Critical Area Program suggests that if the General Assembly disagrees with the Court's definition, it will attempt to amend the statute to clarify its intent. In the absence of bright line rules, questions regarding the critical area variance provisions will continue to come before local boards of appeals, the courts and the General Assembly.

²⁸⁴ Chesapeake Bay Found. v. DCW Dutchship Island, LLC, 439 Md. 588, 626 (2014).

IV. Critical Area Variance Requests in the Selected Counties

This section analyzes critical area variance requests and decisions in Anne Arundel County, Baltimore County, Kent County, Queen Anne’s County, St. Mary’s County, and Worcester County (collectively, “the selected counties”) from 2012 to 2014. Part IV.A summarizes the recommendations that the Critical Area Commission provided to local jurisdictions on variance requests. Parts IV.B through IV.G provide a detailed overview of critical area variances in each of the selected counties. This overview includes a description of the county’s variance process and a discussion of variance requests in the county from 2012 to 2014. Part IV.H discusses the survey responses from the selected counties. Part IV.I provides a brief overview of variance requests in non-selected counties from 2012 to 2014. Finally, Part IV.J summarizes the Clinic’s findings regarding variance requests.

In total, the Clinic reviewed 468 variance requests in the selected counties from 2012 to 2014. During that time, Anne Arundel County had 375 requests, Baltimore County had thirty-five requests, Kent County had eleven requests, Queen Anne’s County had ten requests, St. Mary’s County had twenty-eight requests, and Worcester County had nine requests. All of the selected counties granted the vast majority of variance requests that they received.

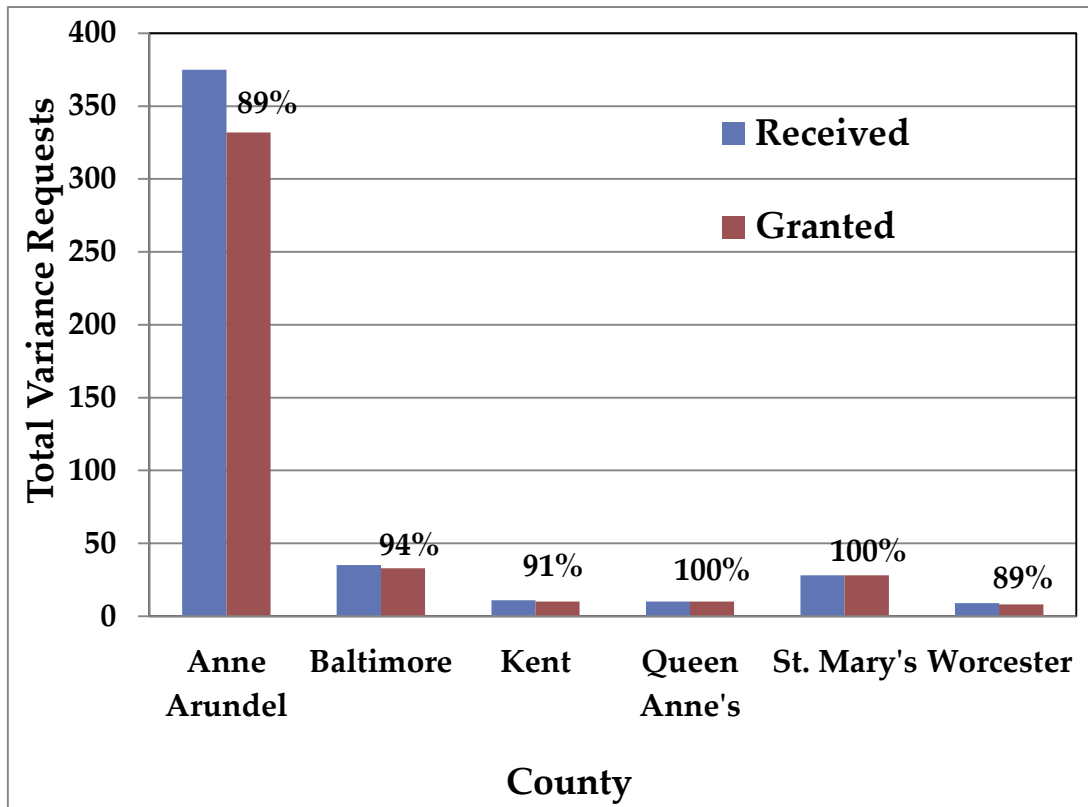


Figure 1: Comparison of the total number of variance requests received and the total number of variance requests granted (with percentage) in each selected county from 2012 to 2014.

A. Critical Area Commission Recommendations

Local jurisdictions must provide the Commission with copies of all variance applications.²⁸⁵ Although not required, the Commission generally responds with a letter indicating its position on the variance. The Clinic reviewed the Commission's recommendation letters for all of the variance requests in the selected counties from 2012 to 2014, unless the letter was absent from the file.

The Commission's letters state the development activity for which the variance is requested, describe some characteristics of the property, and identify the relevant critical area limitation(s). For example, the letter may indicate whether the development activity is in the buffer, whether it would disturb steep slopes, or whether it would exceed lot coverage limits. The Commission's letters also include the land designation of the property and often indicate whether the property is grandfathered. Additionally, the letters include mitigation requirements and sometimes indicate where on the property the mitigation efforts should be located.

The Commission has three common responses to variance applications. First, the Commission often does not oppose the variance, particularly if the lot is properly grandfathered.²⁸⁶ Second, the Commission sometimes provides comments without expressly stating a position as to whether the variance is appropriate.²⁸⁷ Third, the Commission sometimes opposes the variance or states that it cannot support the request as submitted.²⁸⁸ If the applicant re-submits an application, the Commission may send another letter updating its position.²⁸⁹

The Commission typically opposes, or otherwise does not support, variances in certain situations. First, the Commission opposes variances that would result in the property exceeding lot coverage limits.²⁹⁰ In those circumstances, the Commission usually states that it cannot support a variance that would result in, or increase, nonconformity on a lot.²⁹¹ Second, the

²⁸⁵ MD. CODE ANN., NAT. RES. § 8-1811(b), (c); MD. CODE REGS. 27.03.01.04 (2015).

²⁸⁶ *See, e.g.*, Letter from Alexandra Olaya, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Dec. 16, 2013); Letter from Alexandra Olaya, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Mar. 5, 2014).

²⁸⁷ *See, e.g.*, Letter from Danielle Schwarzmann, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (July 3, 2012); Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Patricia Cotter, Anne Arundel County, Office of Planning and Zoning (May 15, 2012).

²⁸⁸ *See, e.g.*, Letter from Alexandra Olaya, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Mar. 27, 2014); Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (July 29, 2013). The Commission may also oppose an application in part. *See, e.g.*, Letter from Danielle Schwarzmann, Natural Res. Planner, Critical Area Comm'n, to Suzanne Murphy, Anne Arundel County, Office of Planning and Zoning (May 2, 2012).

²⁸⁹ *See, e.g.*, Letter from Alexandra Olaya, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Dec. 16, 2013).

²⁹⁰ *See, e.g.*, Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Sept. 27, 2013); Letter from Kate Charbonneau, Regional Program Chief, Critical Area Comm'n, to Suzy Murphy, Anne Arundel County, Office of Planning and Zoning (Feb. 17, 2012).

²⁹¹ *See, e.g.*, Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Sept. 27, 2013); Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (July 9, 2013).

Commission opposes variances that it does not consider to be the minimum necessary to afford relief.²⁹² Similarly, the Commission sometimes opposes, does not support, or only provides comments on projects that it would not object to in some capacity, but cannot endorse as currently designed.²⁹³ Third, the Commission may oppose variances for pools or other structures that are purely for enjoyment because denying the variance will not constitute an unwarranted hardship.²⁹⁴ Fourth, the Commission sometimes opposes variances for development that will cause serious impacts to the buffer if the development is unnecessary or could be located elsewhere on the property.²⁹⁵ Finally, while not always the case, the Commission sometimes opposes after-the-fact variances because the development violated the law.²⁹⁶ When commenting on an after-the-fact variance, the Commission often reiterates the statutory requirements for resolving critical area violations.²⁹⁷

B. Anne Arundel County

Anne Arundel County is located on the western shore of the Chesapeake Bay. The county has a total population of about 564,200 people,²⁹⁸ covers approximately 418 square miles,²⁹⁹ and has approximately 534 miles of coastline.³⁰⁰ Thirty-seven percent of the land in Anne Arundel County has been developed for residential use, nearly fourteen percent has been developed for non-residential use, and just over forty-nine percent remains undeveloped.³⁰¹

²⁹² See, e.g., Letter from Alexandra Olaya, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Mar. 27, 2014); Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Mar. 25, 2015).

²⁹³ See, e.g., Letter from Alexandra Olaya, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Apr. 30, 2014); Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (July 9, 2013); Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Sept. 27, 2013).

²⁹⁴ See, e.g., Porter, Case No. 2015-0221-V (Anne Arundel Admin. Hearing Office Dec. 6, 2013); Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Mar. 22, 2013); Letter from Kate Charbonneau, Regional Program Chief, Critical Area Comm'n, to Suzanne Murphy, Anne Arundel County, Office of Planning and Zoning (May 11, 2012).

²⁹⁵ See, e.g., Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Sterling Seay, Anne Arundel County, Office of Planning and Zoning (Aug. 11, 2014); Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (July 23, 2014).

²⁹⁶ See, e.g., Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (July 23, 2014); Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Jan. 5, 2015).

²⁹⁷ See e.g., Letter from Kate Charbonneau, Regional Program Chief, Critical Area Comm'n, to Suzy Murphy, Anne Arundel County, Office of Planning and Zoning (Feb. 17, 2012); Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Jan. 5, 2015).

²⁹⁸ Maryland Dep't of Commerce, Maryland Data Explorer, <http://apps.esrc.org/dashboards/countycomparison/#compare/counties/set/geography> (last visited Jan. 28, 2016).

²⁹⁹ *Id.*

³⁰⁰ Anne Arundel County, Maryland, <http://www.aacounty.org/our-county/> (last visited Jan. 28, 2016).

³⁰¹ Maryland Dep't of Commerce, Maryland Data Explorer, <http://apps.esrc.org/dashboards/countycomparison/#compare/counties/set/geography> (last visited Jan. 28, 2016).

1. Local Variance Provisions

Anne Arundel County’s critical area program includes variance procedures that are substantively identical to the state criteria.³⁰² An applicant for a critical area variance in Anne Arundel County must demonstrate that he or she has “evaluated and implemented site planning alternatives.”³⁰³ Additionally, the Anne Arundel County Code includes several criteria applicable to all types of variances.³⁰⁴ First, a variance must be “the minimum variance necessary to afford relief.”³⁰⁵ Second, a variance should not alter the character of the neighborhood, negatively impact the use or development of neighboring properties, reduce forest cover in resource conservation and limited development critical areas, or contradict critical area practices for clearing and replanting.³⁰⁶ Finally, a variance cannot “be detrimental to the public welfare.”³⁰⁷

If approved, a variance in Anne Arundel County may be subject to any other “restrictions, conditions, or limitations . . . appropriate to preserve, improve, or protect the general character and design of the land.”³⁰⁸ The granted variance will lapse if the applicant fails to satisfy the conditions within the relevant time period.³⁰⁹ Anne Arundel County allows for after-the-fact variances if, within 90 days of the violation, the applicant obtains “an approved mitigation or restoration plan;” completes required abatement measures; and pays any fines.³¹⁰

The Office of Administrative Hearings (“OAH”) grants or denies variance applications based “on the evidence presented at the hearing and observations made during any site visit.”³¹¹ An Administrative Hearing Officer must issue a written decision “[w]ithin 30 days after the termination of the proceedings.”³¹² OAH decisions may be appealed to the Anne Arundel County Board of Appeals.³¹³

The Anne Arundel County Code includes specific requirements for development activities that are often the subject of variance requests. Development in the buffer and in habitat protection areas must meet all the requirements in the state regulations.³¹⁴ Development of residential properties in buffer modification areas is subject to different restrictions related to lot coverage and environmental site design, among other things.³¹⁵ Development on steep slopes in the critical area is prohibited, except in certain circumstances; for example to “facilitate the

³⁰² Compare ANNE ARUNDEL COUNTY, MD., CODE § 18-16-305 with MD. CODE REGS. 27.01.12.04.B (2015).

³⁰³ ANNE ARUNDEL COUNTY, MD., CODE § 18-16-305(b)(8).

³⁰⁴ The Anne Arundel County Code includes three discrete sections on variance requirements: requirements for zoning variances, requirements for critical area variances, and requirements for all variances. *Id.* § 18-16-305 (a)–(c).

³⁰⁵ *Id.* § 18-16-305(c)(1).

³⁰⁶ *Id.* § 18-16-305(c)(2)(i)–(v).

³⁰⁷ *Id.* § 18-16-305(c)(2)(v).

³⁰⁸ *Id.* § 18-16-306(b).

³⁰⁹ *Id.* § 18-16-305(e).

³¹⁰ *Id.* § 18-16-305(d)(1)(i-iii). The Office of Planning and Zoning may grant a 180-day extension upon a showing of good cause. *Id.* § 18-16-305(d)(2). Additionally, “the Office of Planning and Zoning may extend the time for abatement to the next planting season because of adverse planting conditions.” *Id.* § 18-16-305(d)(2).

³¹¹ *Id.* § 18-16-306(a).

³¹² *Id.* § 18-16-306(c).

³¹³ *Id.* § 18-16-402.

³¹⁴ *Id.* §§ 17-8-301; 17-8-501.

³¹⁵ *Id.* § 17-8-702.

stabilization of the slope.”³¹⁶ Lot coverage is limited to fifteen percent of the critical area on a site.³¹⁷ For grandfathered lots, a sliding scale allows for between fifteen percent and just over thirty one percent lot coverage, depending on the property.³¹⁸ Any increase in lot coverage on grandfathered lots must be minimized.³¹⁹ The County Code also includes specific limitations on clearing forests and woodland areas in limited development areas and resource conservation areas.³²⁰

2. Analysis of Variance Requests

Anne Arundel County decided 375 critical area variance requests from 2012 to 2014. Of those requests, 332 were granted, twenty-nine were denied, eleven were granted in part and denied in part, and three were dismissed or otherwise resulted in no decision. Thirteen of the twenty-nine denials were appealed to the Board of Appeals. Of those thirteen appeals, ten were granted in some form, while only one was denied again. Two appeals are still pending. The sole application denied on appeal involved a one-story addition to an existing dwelling that was to be built closer to the shoreline than the existing primary structure.³²¹

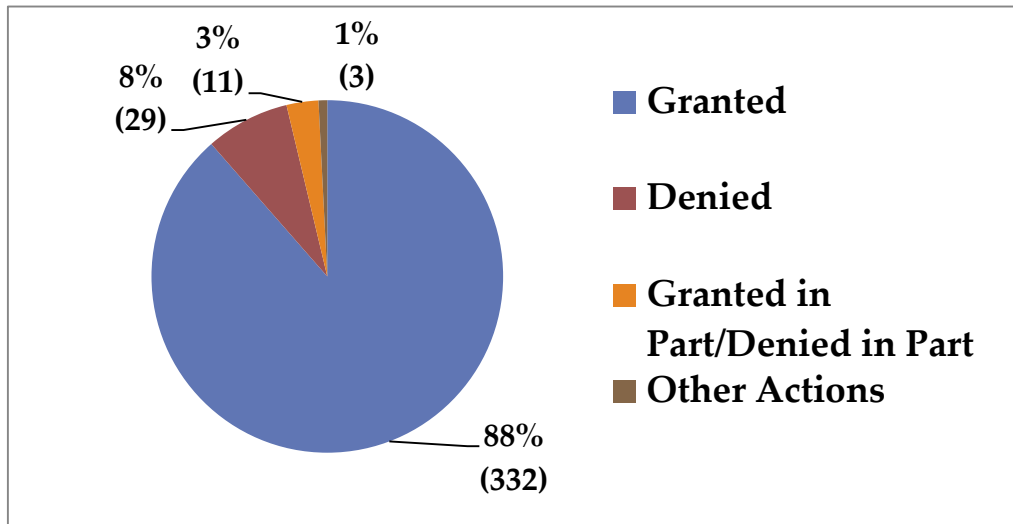


Figure 2: Total variance requests granted, denied, granted in part and denied in part, and resulted in other actions in Anne Arundel County from 2012 to 2014.

Eighty-three of the requests were for buffer or expanded buffer variances, sixty-eight requests were for modified buffer variances, 108 requests were for steep slopes variances, 107 requests were for variances to exceed lot coverage, five requests were for habitat protection area variances, and four requests were for clearing variances.

³¹⁶ *Id.* § 17-8-201(a), (b).

³¹⁷ *Id.* § 17-8-402(a).

³¹⁸ *Id.* § 17-8-402(b)(1).

³¹⁹ *Id.* § 17-8-402(b)(2).

³²⁰ *Id.* § 17-8-601.

³²¹ Cox, Case No. BA 3-14-V (Anne Arundel County Bd. of Appeals Apr. 8, 2014).

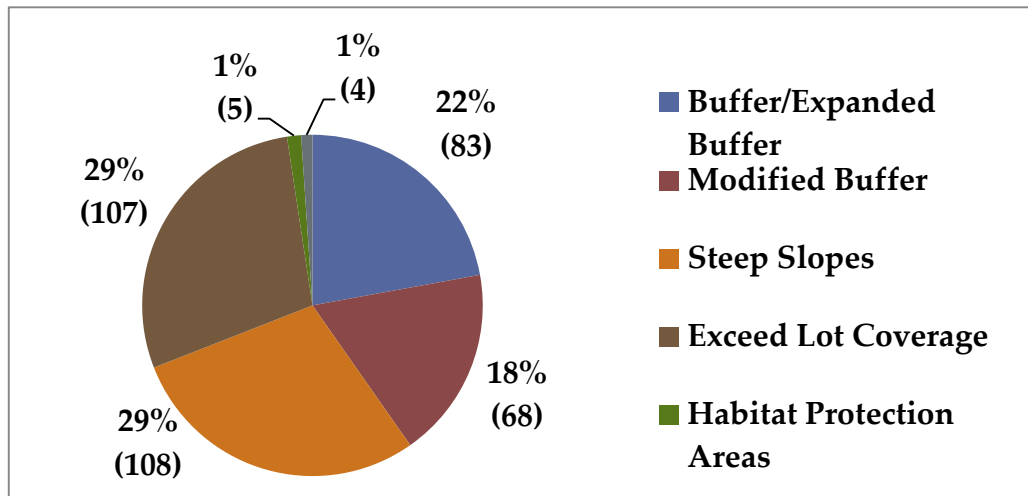


Figure 3: Total number of each type of variance request received in Anne Arundel County from 2012 to 2014.

Applicants commonly requested variances to allow the construction of dwellings, dwelling additions, and other structures such as sheds, garages, driveways, porches, decks, sidewalks, gazebos and pools. Anne Arundel County received variance requests for development activities in all three critical area land designations and a majority of the variance requests involved grandfathered lots. Approximately ten percent of the variance requests in Anne Arundel County involved at least one structure that required an after-the-fact variance.

Process and Decisions

The OAH decisions generally contain the following sections: a brief explanation of the matter; a determination regarding compliance with public notice; a description of the subject property and the proposed work; statements identifying the applicable county code provision(s) and the variance(s) requested; a summary of the evidence presented at the hearing; a decision, which includes the application of the variance provisions; and an order granting or denying the variance request(s).

The summary of evidence presented at the hearing typically consists of testimony from an Office of Planning and Zoning (“OPZ”) employee indicating whether OPZ supports or opposes granting the variance, a statement regarding the Critical Area Commission’s position and the position of other relevant agencies with regard to the variance, and testimony from the applicants and/or their agents (i.e. attorneys, engineers, and/or consultants). Occasionally, neighbors or other interested parties testify for or against a variance. The OPZ testimony, as summarized in the OAH opinions, provides the most detail about the project, and the testimony may correspond with the variance criteria. The OPZ employee describes the size, current condition, and location of the property, whether the property is grandfathered, the proposed lot coverage, and other pertinent information about the property subject to the variance request. The OPZ employee may also testify about variances that the applicant received in the past and whether a site visit occurred.

The OAH opinions reiterate the requirements for obtaining a critical area variance, including the presumption of nonconformance. The OAH recognizes that the state requirements place a “very high” burden on the applicant,³²² and that the applicant must satisfy that burden for “each one of the variance provisions.”³²³

The OAH makes specific findings with regard to certain variance criteria. First, the OAH considers whether the applicant has met the unwarranted hardship standard. The decisions often provide some explanation as to why the applicant met the unwarranted hardship standard. An example of a common, albeit brief, explanation regarding unwarranted hardship is that “[t]he applicant has the right to build a dwelling on [the] grandfathered lot in order to have ‘reasonable and significant use of the entire . . . lot.’”³²⁴ The right to build a dwelling on a grandfathered lot, the right to rebuild a previously existing dwelling or structure on a grandfathered lot, or the right to have amenities commonly enjoyed by others appear frequently in the OAH conclusions regarding the unwarranted hardship standard.

Sometimes, the OAH opinions contain circular reasoning as to why an applicant meets the unwarranted hardship standard. For example, with regard to a proposed garage, one Administrative Hearing Officer stated that:

denial of the variance would constitute an unwarranted hardship that would deny the applicants reasonable and significant use of the entire parcel. Denying the applicants the right to build the proposed garage would deny them ‘reasonable and significant use of the entire . . . lot’ that is the subject of this application. Therefore, I find that the applicants **have met** the requirements of [the unwarranted hardship factor].³²⁵

³²² See e.g., Ferrell, Case No. 12-0032-V, 5 (Anne Arundel County Admin. Hearing Office Apr. 19, 2012) (citing *Becker v. Anne Arundel County*, 174 Md. App. 114, 124 (Ct. Spec. App. 2007)); Reilly, Case No. 12-0199, 4 (Anne Arundel Admin. Hearing Office Oct. 18, 2012) (citing *Becker*, 174 Md. App. at 124).

³²³ See e.g., Reilly, Case No. 12-0199, 6 (Anne Arundel Admin. Hearing Office Oct. 18, 2012) (citing MD. CODE ANN., NAT. RES. § 8-1808(d)(4)(ii)); Vogel, Case No. 12-0115-V, 6–7 (Anne Arundel Admin. Hearing Office July 20, 2012) (citing MD. CODE ANN., NAT. RES. § 8-1808(d)(4)(ii)). The opinions expressly include each of the state and local critical area criteria. While substantively identical, the Anne Arundel County Code and the OAH opinions format those requirements in a slightly different way as follows:

- (1) whether a denial of the requested variance would constitute an unwarranted hardship,
- (2) whether a denial of the requested variance would deprive the applicant of rights commonly enjoyed by other property owners,
- (3) whether granting the variance would confer a special privilege on the applicant,
- (4) whether the application arises from actions of the applicant, or from conditions or use on neighboring properties,
- (5) whether granting the application would not adversely affect the environment and be in harmony with the critical area program, and
- (6) whether the applicant has overcome the presumption . . . of the State law that the variance request should be denied.

See, e.g., Nazario, Case No. 2013-0112-V, 6 (Anne Arundel Admin. Hearing Office Aug. 14, 2013).

³²⁴ Goodman, Case No. 2012-0310-V, 11 (Anne Arundel Admin. Hearing Office Mar. 5, 2013).

³²⁵ Cosgrove, Case No. 2012-0037-V, 7 (Anne Arundel Admin. Hearing Office Apr. 11, 2012) (emphasis in original).

While the OAH generally finds that the applicant satisfies the unwarranted hardship standard, especially when the lot in question is grandfathered, there have been instances in which the OAH has found the opposite. In a 2013 case, the OAH found that denying an applicant's request to widen a walkway did not constitute an unwarranted hardship.³²⁶ The OAH stated that denying the request would not prevent the applicants from having reasonable and significant use of their entire property.³²⁷ In addition, the OAH has denied variances for pools.³²⁸ In limited circumstances, the OAH has also found that the applicant failed to satisfy the unwarranted hardship standard for other structures including patios, fireplaces, and walls, upon determining that the structures are not necessary for reasonable and significant use of the applicant's entire property.³²⁹

Second, the OAH considers whether the applicant would be deprived of rights commonly enjoyed by others. The OAH does not often expand upon its reasoning for finding the applicant has met this standard. Instead, the opinions often reiterate the applicant's right to the variance, as identified by the OAH in the unwarranted hardship analysis. For example, the OAH has reasoned that the applicant would be deprived of rights commonly enjoyed by others without a variance because the applicant had "the right to develop the dwelling on this grandfathered lot."³³⁰ In that case, the OAH cited the same reason in concluding that the applicant's denial of a variance would constitute an unwarranted hardship.³³¹

Third, the OAH considers whether the variance will confer a special privilege upon the applicant. The OAH also generally provides little explanation when considering this factor. Often, the Administrative Hearing Officer simply states that the given testimony shows that "the proposed improvements are comparable to other improvements in the neighborhood," or other similar language.³³² This is not always the case, as demonstrated by a 2013 variance request for a dwelling, garage, pool, and patio.³³³ In that case, while the OAH granted variances for the dwelling and garage, the applicants were not permitted to build the pool or patio because those structures in the buffer would confer a special privilege.³³⁴

Fourth, the OAH considers whether the need for the variance resulted from the actions of the applicant. According to the Anne Arundel County Code, the OAH must consider whether the applicant commenced construction of the requested development when determining if an applicant satisfies this factor. Interestingly, while after-the-fact variances would seem to automatically fail on this point, the OAH does not generally deny after-the-fact variance requests for this reason alone. For example, in a 2012 application, the applicants sought after-the-fact variances for a stone patio and pool pump within the expanded buffer.³³⁵ Although the OAH

³²⁶ Habercam, Case No. 2013-0219-V, 16–17 (Anne Arundel Admin. Hearing Office Nov. 20, 2013).

³²⁷ *Id.* at 10.

³²⁸ Wooddell, Case No. 2013-0039-V (Anne Arundel Admin. Hearing Office May 3, 2013); Porter, Case No. 2013-0221-V (Anne Arundel Admin. Hearing Office Dec. 6, 2013).

³²⁹ *See, e.g.*, Hesdorffer, Case No. 2012-0098-V, 15–18 (Anne Arundel Admin. Hearing Office July 20, 2012).

³³⁰ Mays, Case No. 2012-0117-V, 9 (Anne Arundel Admin. Hearing Office July 13, 2012).

³³¹ *Id.*

³³² Dunlap, Case No. 2013-0009-V, 10 (Anne Arundel Admin. Hearing Office Apr. 26, 2013).

³³³ Wooddell, Case No. 2013-0039-V, 2 (Anne Arundel Admin. Hearing Office May 3, 2013).

³³⁴ *Id.* at 10–11.

³³⁵ Neall, Case No. 2012-0227-V, 2 (Anne Arundel County Admin. Hearing Office March 28, 2013).

recognized that the need for a variance resulted from the applicant's actions, the OAH still granted the variance.³³⁶ The Administrative Hearing Officer stated that commencing construction before requesting a variance, "[would] not, on the facts of this case, deprive the applicants of relief from the critical area."³³⁷ The decision does not provide any additional explanation as to why the Administrative Hearing Officer reached that conclusion.³³⁸ Additionally, the Critical Area Commission and the OPZ opposed the variance request.³³⁹

Similar results were not uncommon for other after-the-fact variances in Anne Arundel County. While only about ten percent of variance requests involved after-the-fact variances, approximately two-thirds of those requests were fully granted, and others were granted in part and denied in part.

Fifth, the OAH considers whether the variance will adversely affect water quality or habitats. The Administrative Hearing Officer typically does not describe in detail how a variance will or will not result in adverse impacts, but merely provides a statement to that effect—i.e., "[t]he granting of the requested critical area variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat"³⁴⁰ However, many decisions describe mitigation measures, stating something like "[t]he proposed work will be offset by stormwater management measures and mitigation that the applicants will undertake."³⁴¹

Sixth, the OAH considers whether the applicant has overcome the presumption of nonconformance. Generally, the Administrative Hearing Officer finds that the presumption of nonconformance is overcome when the applicant meets the other variance factors, especially the unwarranted hardship standard. The opinions typically identify the presumption of nonconformance, as outlined in *Becker v. Anne Arundel County*, and state that the Administrative Hearing Officer "find[s] that the applicant, by competent and substantial evidence, has overcome the presumption"³⁴²

Seventh, the OAH considers whether the variance is the minimum relief. Similar to the other factors, the OAH often uses conclusory statements to indicate the standard being satisfied, with no other explanation. For example, the only mention of minimum relief in some OAH opinions is that the Hearing Officer "find[s] that the critical area variances represent the minimum relief."³⁴³ The OAH and the Commission sometimes agree on this factor. In one 2014 case, the applicants requested an after-the-fact variance to perfect a patio within the modified

³³⁶ *Id.* at 10, 12.

³³⁷ *Id.* at 10.

³³⁸ *Id.*

³³⁹ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Nov. 10, 2012); Neall, Case No. 2012-0227-V, 4–5 (Anne Arundel Admin. Hearing Office March 28, 2013).

³⁴⁰ *See e.g.*, Hogan, Case No. 14-0016-V, 10–11 (Anne Arundel Admin. Hearing Office Aug. 8, 2014); Karney, Case No. 14-0216-V, 9 (Anne Arundel Admin. Hearing Office Oct. 27, 2014).

³⁴¹ Baines, Case No. 2014-0094-V, 11 (Anne Arundel Admin. Hearing Office July 22, 2014).

³⁴² O'Connor, Case No. 2014-0042-V, 12–13 (Anne Arundel Admin. Hearing Office May 12, 2014) (emphasis omitted).

³⁴³ *See e.g.*, Stillinger, Case No. 2014-0024-V, 11–12 (Anne Arundel Admin. Hearing Office Apr. 10, 2014); Fenzel, Case No. 2014-0192-V, 8 (Anne Arundel Admin. Hearing Office Sep. 30, 2014).

buffer. Both the Commission and the OPZ opposed the variance.³⁴⁴ The Commission explained that the property was already developed with accessory structures.³⁴⁵ Further, the project plan placed development nearer to the shoreline, did not reduce lot coverage, and did not make use of environmental site design.³⁴⁶ The OAH agreed with the Commission, and denied the variance because it was not the minimum necessary to afford relief. The OAH concluded that the applicants already had reasonable and significant use of their property, especially since the applicants were receiving a zoning variance to perfect a deck.³⁴⁷ In another 2014 case, the applicants sought to construct and expand a paver patio under a deck within the modified buffer.³⁴⁸ The Commission opposed the variance because in its view, the project was not the minimum necessary to afford relief.³⁴⁹ The Commission explained that the patio could be re-built under the footprint of the existing deck, without the need to expand.³⁵⁰ The OPZ also supported reducing the size of the patio.³⁵¹ The OAH ultimately granted a modified critical area variance, limiting the patio to the footprint of the deck, rather than allowing the expansion.³⁵²

However, the OAH and the Commission have also disagreed on the minimum relief factor. In a 2014 case, the applicants requested a variance to raze and construct a dwelling in the expanded buffer.³⁵³ The Commission opposed the variance because the proposal did not minimize the impacts to the buffer.³⁵⁴ In the Commission's view, the dwelling could be redesigned to be located outside the required setback, and would benefit from additional stormwater management.³⁵⁵ The OPZ supported the variance request and the OAH granted the variance in its original form.³⁵⁶

After going through each of the variance factors, the OAH issues an order granting or denying the requested variances. If granted, the variances may be subject to conditions. Those conditions almost always include the requirement for the applicant to comply with "any instructions and necessary approvals from the Permit Application Center, the Department of Health, and/or the Critical Area Commission," or some variant of this condition.³⁵⁷ The OAH also usually states that its decision is not a building permit. Other common conditions include a

³⁴⁴ Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Nov. 10, 2014); Hernandez, Case No. 2014-0230-V, 3-5 (Anne Arundel Admin. Hearing Office Dec. 16, 2014).

³⁴⁵ Letter Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Nov. 10, 2014);

³⁴⁶ Letter Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Nov. 10, 2014).

³⁴⁷ Hernandez, Case No. 2014-0230-V, 10 (Anne Arundel Admin. Hearing Office Dec. 16, 2014).

³⁴⁸ Ashton, Case No. 2014-0258-V, 2 (Anne Arundel Admin. Hearing Office Dec. 24, 2014).

³⁴⁹ Letter Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (Nov. 7, 2014).

³⁵⁰ *Id.*

³⁵¹ Ashton, Case No. 2014-0258-V, 3 (Anne Arundel Admin. Hearing Office Dec. 24, 2014).

³⁵² *Id.* at 11.

³⁵³ Doukas, Case No. 2014-0181-V, 2 (Anne Arundel Admin. Hearing Office Sept. 25, 2014).

³⁵⁴ Letter Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Lori Rhodes, Anne Arundel County, Office of Planning and Zoning (July 23, 2014).

³⁵⁵ *Id.*

³⁵⁶ Doukas, Case No. 2014-0181-V, 5, 13 (Anne Arundel Admin. Hearing Office Sept. 25, 2014).

³⁵⁷ *See e.g.* Hernandez, Case No. 2014-0230-V, 14 (Anne Arundel Admin. Hearing Office Dec. 16, 2014).

requirement to remove existing impervious surface such as concrete pads, to reduce the size of a project, or to revegetate an area before beginning construction.³⁵⁸

Critical Area Commission

As mentioned above, the OAH decisions reference the Critical Area Commission's position on the variance application. The Commission's influence is apparent in instances where it opposed a variance request. Anne Arundel County approved eighty-nine percent of the total variance requests during the target years. However, that approval rate decreased when the Commission opposed a request. The Commission opposed twenty-eight variances in Anne Arundel County during the target years. Sixteen of those variances, or approximately fifty-seven percent, were granted in some form. Twelve of those variances, or approximately forty-three percent, were denied.

In five additional requests, the Commission opposed the variance in part. In all five instances the variance was granted in part, and denied in part. Generally, the county's decision mirrored the Commission's recommendations in terms of what parts of the requests were granted or denied. Additionally, for eight variance requests, the Commission stated that it could not support the request based on its current design. Of those requests, seven were granted, while one was redesigned to eliminate the need for a critical area variance.

Appeals

Twenty-nine variance applications were appealed in Anne Arundel County from 2012 to 2014. Eleven appeals were from decisions granting the variance, four appeals were from decisions granting a modified variance, and one appeal was from a decision granting the variance application in part and denying it in part. The remaining thirteen appeals were from decisions denying the variances in full. Ten of the denied variances were granted in some form on appeal. Only one of the denied variances was denied in full again on appeal, while two are still pending.

Applicants often appealed adverse decisions from OAH to the Anne Arundel County Board of Appeals. For example, in one case, the property owners appealed the OAH's denial of after-the-fact variances for a patio and retaining walls that were constructed in steep slopes and resulted in new lot coverage.³⁵⁹ Although the requested variances were after-the-fact, the Board of Appeals granted the variances with conditions.³⁶⁰ The Board concluded that the property owners were entitled to the variances so long as they reduced the size of the patio.³⁶¹

The Board allowed the patio to remain because it found that removing it would cause greater damage to the environment.³⁶² The grandfathered patio was causing runoff and other environmental degradation on the property.³⁶³ The Board found that replacing the outdated patio

³⁵⁸ See e.g. Parrot, Case No. 2014-0162-V, 9–10 (County Bd. of Appeals of Anne Arundel County Mar. 18, 2015).

³⁵⁹ Parrot, Case No. 2014-0162-V, 1 (County Bd. of Appeals of Anne Arundel County Mar. 18, 2015).

³⁶⁰ *Id.* at 1, 9–10.

³⁶¹ *Id.* at 9–10.

³⁶² *Id.* at 7, 9.

³⁶³ *Id.* at 7.

with impervious pavers provided for more effective stormwater management.³⁶⁴ Further, the Board required the waterside eighteen inches of the patio to be removed, reasoning that this would reduce the new patio to the original patio's footprint dimensions and further improve the site's stormwater management.³⁶⁵ With regard to rights commonly enjoyed by others, the Board discussed how the property owners sought to reconfigure their property in a way that actually enhanced the environment, "which is a right commonly enjoyed by others in this area."³⁶⁶ Moreover, it stated that allowing the reconfiguration of lot coverage on a grandfathered lot in a way that benefits the environment does not confer a special privilege.³⁶⁷

In another case, the OAH denied an after-the-fact variance for a pool constructed in steep slopes.³⁶⁸ The property owners appealed the decision to the Board, which granted a variance for the existing pool foundation, but not for the pool itself.³⁶⁹ While the Board found that denying a variance for a pool would not constitute an unwarranted hardship, it nevertheless granted the variance for the foundation because it was necessary to ensure the structural integrity of the dwelling and to stabilize steep slopes.³⁷⁰

Decisions to grant variances were also subject to appeal. Those decisions were usually appealed by a party that opposed the variance request or the applicant, if he or she wanted to challenge the conditions placed on variance.

Withdrawn Variances

In Anne Arundel County, six critical area variance requests were withdrawn before the OAH issued a final decision. Of those six requests, three were for dwellings, one was for a dwelling addition, one was for a deck, and one was for a gazebo. The documents that the Clinic received did not indicate why the requests were withdrawn.

3. Summary

Anne Arundel County decided more variance requests from 2012 to 2014 than all of the other selected counties combined.³⁷¹ The Anne Arundel OAH granted the vast majority of variance requests that it received. While the OAH addressed each of the variance criteria, the opinions sometimes include circular reasoning or conclusory statements as to why the applicant meets certain criteria. The OAH generally provided a more substantive rationale when it denied a variance request. Virtually all variance requests granted by the OAH are subject to certain conditions, but those conditions are fairly uniform and rarely contain site-specific requirements.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 6.

³⁶⁷ *Id.* at 7.

³⁶⁸ Porter, Case No. 2013-0221-V, 1, 10 (Anne Arundel Admin. Hearing Office Dec. 6, 2013).

³⁶⁹ Porter, Case No. 2013-0221-V, 10 (County Bd. of Appeals of Anne Arundel County July 30, 2015).

³⁷⁰ *Id.* at 5.

³⁷¹ According to the Critical Area Commission, Anne Arundel County receives more variance applications than any other county in Maryland. From 2012 to 2014 Anne Arundel County received more than fifty percent of the variance applications on file with the Commission.

While Anne Arundel County grants the vast majority of variance requests that it receives, that percentage decreases when the Commission opposes the request. In addition to denying some variances, the OAH issued decisions that were consistent with the Commission's recommendations by granting or denying variances in part, and by granting modified variances. However, in some circumstances, the OAH granted variances despite the Commission's opposition.

From an administrative standpoint, Anne Arundel County handles variance requests in a consistent and organized manner. Moreover, Anne Arundel County generally complies with the requirement to send its decisions on variance requests to the Commission. Decisions that were not in the Commission's files were accessible via the County's website.

C. Baltimore County

Baltimore County is located on the western shore of the Chesapeake Bay, north of Anne Arundel County. The county has a population of about 831,100 people, covers approximately 597 square miles, and has approximately 232 miles of shoreline.³⁷² Roughly thirty-five percent of Baltimore County has been developed for residential use, nearly twelve percent has been developed for non-residential use, and almost fifty-three percent remains undeveloped.³⁷³

1. Local Variance Provisions

Baltimore County's Director of Environmental Protection and Sustainability ("EPS") may grant variance requests upon satisfaction of the critical area variance criteria in two circumstances.³⁷⁴ First, the Director of EPS may grant a variance if the Director of Permits, Approvals, and Inspections grants the development a hearing waiver under Baltimore County Code § 32-4-107(b).³⁷⁵ A waiver pursuant to § 32-4-107(b) may be granted when the Director of Permits, Approvals, and Inspection finds "[t]hat the size, scope, and nature of a proposed development does not justify strict compliance" with the code's requirements; "[t]hat a waiver would be within the scope, purpose, and intent of" the code's Development title; and "[t]hat the proposed development complies with all other county laws and regulations."³⁷⁶

Second, the Director of EPS may grant a variance if the development is exempt from review and approval under Baltimore County Code § 32-4-106.³⁷⁷ Pursuant to § 32-4-106, several types of development are exempt from the review and approval process that typically applies in Baltimore County, including "building or preparation of land for building a dwelling for one or two families on a single lot or tract that is not part of a recorded plat" and "construction of residential accessory structures or minor commercial structures."³⁷⁸ Before EPS grants a variance, it must provide notice of the proposed variance in a local newspaper at least

³⁷² Maryland Dep't of Commerce, Maryland Data Explorer, <http://apps.esrgc.org/dashboards/countycomparison/#compare/counties/set/geography> (last visited Jan. 28, 2016).

³⁷³ *Id.*

³⁷⁴ BALTIMORE COUNTY, MD., CODE § 33-2-205(a).

³⁷⁵ *Id.* § 33-2-205(a)(2).

³⁷⁶ *Id.* § 32-4-107(b)(i-iii).

³⁷⁷ *Id.* § 33-2-205(a)(1).

³⁷⁸ *Id.* § 32-4-106.

fifteen days in advance.³⁷⁹ The Director's decision on a variance may be appealed to the Baltimore County Board of Appeals.³⁸⁰

Baltimore County expressly provides for grandfathering uses in the critical area, but requires a variance if a property owner proposes to intensify or extend the use.³⁸¹ Moreover, if the Baltimore County Zoning Commissioner receives a petition for a variance or other zoning request within the critical area, it must obtain written recommendations from EPS about how the variance will minimize adverse impacts on water quality, wildlife, and habitat and meet the requirements of the Critical Area Program.³⁸²

2. Analysis of Variance Requests

Baltimore County decided thirty-five variance requests from 2012 to 2014. Thirty-one of those requests were for variances in the 100-foot buffer, three were for variances in the expanded buffer, and one was a variance to exceed lot coverage. Thirty-three variance requests were granted, including two after-the-fact variances. One variance request to exceed the fifteen percent lot coverage limit was denied.³⁸³ Lastly, one request to construct a dwelling, deck, and pool was granted in part and denied in part.³⁸⁴ In that case, EPS denied the variance for a pool in the buffer, but granted the variances for the deck and dwelling.³⁸⁵

The majority of the variances in Baltimore County involved grandfathered properties. Additionally, most variances were located on parcels within the limited development area. Many of the variance requests—all but four—were for residential structures, including decks, garages, dwellings, driveways, and other additions. Baltimore County also requires property owners to apply for continued use variances for pre-existing structures in the critical area.³⁸⁶ Several applicants requested and received variances for continued use of those existing structures, including houses, yards, and driveways.

³⁷⁹ *Id.* § 33-2-205(b).

³⁸⁰ *Id.* § 33-2-205(d).

³⁸¹ BALTIMORE COUNTY, MD., ZONING REGS. §§ 104.1; 104.5.

³⁸² *Id.* § 500.14.

³⁸³ Letter from Vincent Gardina, Dir., Dep't of Env'tl. Prot. and Sustainability, to Robert A. Sersen Sr. (January 15, 2014).

³⁸⁴ Letter from Vincent Gardina, Dir., Dep't of Env'tl. Prot. and Sustainability, to Devin Leary (August 22, 2014).

³⁸⁵ *Id.*

³⁸⁶ BALTIMORE COUNTY, MD., CODE § 33-2-104(a).

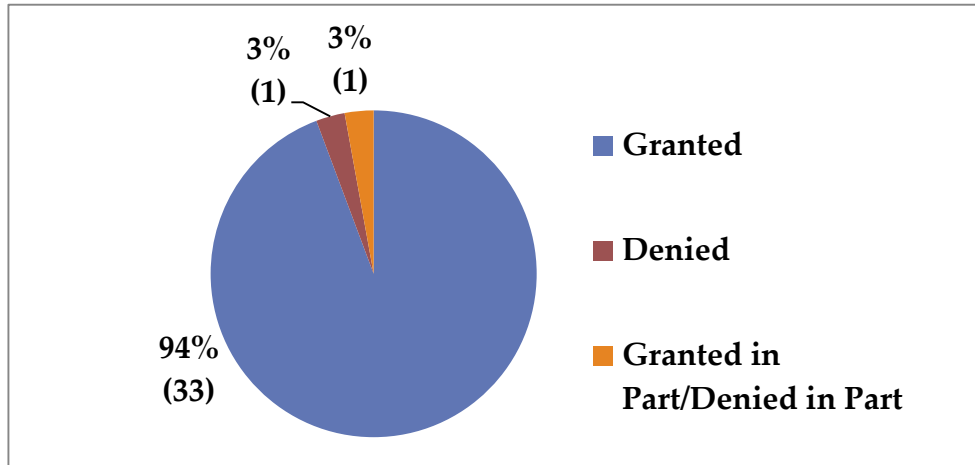


Figure 4: Total variance requests granted, denied, and granted in part/denied in part in Baltimore County from 2012 to 2014.

Process and Decisions

In deciding whether to grant or deny a variance request, EPS generally reviews the variance application and makes written findings. EPS subsequently sends the written findings to the property owner. Nothing in the written findings indicates that Baltimore County holds a hearing before making its decisions.

EPS usually begins its analysis with a short discussion about the request, including the location of the property, site design, variance description, zoning, and other pertinent information. Unlike Anne Arundel County, Baltimore County does not specify in detail the type of variance the applicant is seeking, nor does it cite to the county code provision containing the critical area restriction. Baltimore County also does not state whether the project requires variances to multiple critical area restrictions. Instead, most applications appeared to be for a single buffer variance.

EPS evaluates variance requests using five criteria derived from the critical area variance factors enumerated in the Maryland regulations. Specifically, EPS considers whether denying the variance would result in an unwarranted hardship; whether denying the variance would deprive the applicant of rights commonly enjoyed; whether granting the variance would result in a special privilege; whether the need for the variance is the result of a situation created by the applicant; and whether the variance would not adversely affect water quality or wildlife and is in harmony with the spirit of the Critical Area Program.³⁸⁷ EPS does not reference any additional variance requirements or case law in analyzing whether to grant a variance, and makes no mention of the presumption of nonconformance. EPS also does not typically include specific facts related to the request when explaining its decision.

The decisions in Baltimore County tend to reiterate the language of the same five variance criteria. In several decisions, EPS provided the same justification as to why a request

³⁸⁷ See e.g., Letter from Vincent Gardina, Dir., Dep't of Env'tl. Prot. and Sustainability, to Devin Leary (Jan. 16, 2013); Letter from Vincent Gardina, Dir., Dep't of Env'tl. Prot. and Sustainability, to Rich Good (Feb. 13, 2013).

met those criteria. For example, EPS used the phrase “site work or construction has not started on the property, and the applicant is not requesting this variance due to conditions on neighboring properties” to explain why applicants satisfied the fourth criteria, that the need for a variance was not based on conditions caused by the applicant, almost uniformly throughout the decisions.³⁸⁸

In the majority of its decisions granting a variance request, EPS imposes conditions on the applicant. Those conditions include describing the variance and any conditions in all future project plans, mitigating any disturbance, paying a security to ensure mitigation, drafting and implementing a buffer management plan, and creating and physically marking a critical area easement.

Baltimore County decided four noteworthy variance requests from 2012 to 2014. In the first case, the property owners originally applied for a variance to construct an 1800-square foot deck in the buffer.³⁸⁹ However, by the time EPS granted the variance, the applicant had revised the plans to reduce the deck area.³⁹⁰ In the second case, the applicant requested a variance to construct a commercial building, parking, and stormwater facilities within the buffer.³⁹¹ Before the EPS granted the variance, the applicant had to submit revised site plans, a full wetlands survey, an official survey of the critical area zone, and calculations for mitigating pollution.³⁹² In the third noteworthy case, EPS denied a variance request to exceed lot coverage limits to further develop a dwelling.³⁹³ EPS reasoned that the redevelopment could have been redesigned to meet the 15 percent coverage limit.³⁹⁴ Further, designing the site in a way that exceeded lot coverage limits constituted a self-created hardship.³⁹⁵ Finally, in the last case, the applicants requested a variance to build a replacement house, deck, and pool in the buffer.³⁹⁶ EPS granted the variance for the house and the deck, but denied the variance for the pool because it did not meet the applicable criteria, including the unwarranted hardship standard.³⁹⁷

Critical Area Commission

The majority of the Commission’s recommendation letters for variance requests in Baltimore County either expressed no opposition or offered only comments on the requests. In those instances, the Commission generally reiterated that Baltimore County must find that the variance request meets the critical area criteria, and recommended mitigation. However, the

³⁸⁸ See e.g., Letter from Vincent Gardina, Dir., Dep’t of Env’tl. Prot. and Sustainability, to Rick Richardson (May 15, 2014); Letter from Vincent Gardina, Dir., Dep’t of Env’tl. Prot. and Sustainability, to Robert A. Sersen Sr. (January 15, 2014).

³⁸⁹ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm’n, to Regina Esslinger, Baltimore County, Dep’t of Env’tl. Prot. (October 24, 2012).

³⁹⁰ Letter from Vincent Gardina, Dir., Dep’t of Env’tl. Prot. and Sustainability, to Rick Richardson (May 15, 2014).

³⁹¹ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm’n, to Regina Esslinger, Baltimore County, Dep’t of Env’tl. Prot. and Sustainability (Jan. 3, 2014).

³⁹² Letter from Regina Esslinger, Baltimore County, Dep’t of Env’tl. Prot., to Henry Leskinen (Sept. 27, 2012).

³⁹³ Letter from Vincent Gardina, Dir., Dep’t of Env’tl. Prot. and Sustainability, to Robert A. Sersen Sr. (January 15, 2014).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ Letter from Vincent Gardina, Dir., Dep’t of Env’tl. Prot. and Sustainability, to Devin Leary (August 22, 2014).

³⁹⁷ *Id.*

Commission opposed variance requests in three of the four cases discussed above. First, the Commission opposed the variance request to exceed lot coverage limits,³⁹⁸ which EPS later denied.³⁹⁹ The Commission took the position that with proper site design, the applicant could make the additions within the allowable lot coverage.⁴⁰⁰ Second, the Commission also initially opposed the variance request for an 1800-square foot deck, asserting that it did not satisfy the unwarranted hardship standard.⁴⁰¹ However, as discussed above, the applicant subsequently revised the request to reduce the size of the deck, which the Commission did not oppose.⁴⁰² Finally, the Commission opposed in part the variance request for a house, deck, and pool,⁴⁰³ which EPS later granted in part and denied in part, consistent with the Commission's position.⁴⁰⁴ The Commission stated that the inability to construct a pool in the buffer does not constitute an unwarranted hardship and is at odds with the spirit of the Critical Area Program.⁴⁰⁵

Appeals

The documents that the Clinic reviewed did not indicate that any decisions in Baltimore County were appealed during the target years.

Withdrawn Variances

The documents that the Clinic reviewed did not indicate that any applications in Baltimore County were withdrawn during the target years.

3. Summary

Baltimore County differs from the other selected counties in its implementation of the Critical Area Program in two ways. First, Baltimore County does not appear to hold hearings on variance requests before EPS issues a decision. Second, Baltimore County requires applicants to apply for continuing uses in the critical area that would have required a variance if proposed after the Critical Area Program was enacted.

Baltimore County decided a significant number of variance applications from 2012 to 2014, second only to Anne Arundel County. EPS granted the vast majority of variance requests that it received. EPS's analysis of the variance criteria is very similar in all of its decisions to

³⁹⁸ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Paul Dennis, Baltimore County, Dep't of Env'tl. Prot. and Sustainability (Jan. 13, 2013).

³⁹⁹ Letter from Vincent Gardina, Dir., Dep't of Env'tl. Prot. and Sustainability, to Robert A. Sersen Sr. (January 15, 2014).

⁴⁰⁰ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Paul Dennis, Baltimore County, Dep't of Env'tl. Prot. and Sustainability (Jan. 13, 2013).

⁴⁰¹ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Regina Esslinger, Baltimore County, Dep't of Env'tl. Prot. and Sustainability (October 24, 2012).

⁴⁰² Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Regina Esslinger, Baltimore County, Dep't of Env'tl. Prot. and Sustainability (April 10, 2014).

⁴⁰³ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Thomas Panzarella, Baltimore County, Dep't of Env'tl. Prot. and Sustainability (August 1, 2014).

⁴⁰⁴ Letter from Vincent Gardina, Dir., Dep't of Env'tl. Prot. and Sustainability, to Devin Leary (August 22, 2014).

⁴⁰⁵ Letter from Julie Roberts, Natural Res. Planner, Critical Area Comm'n, to Thomas Panzarella, Baltimore County, Dep't of Env'tl. Prot. and Sustainability (August 1, 2014).

grant variance requests. There is more variation in the rare instances where EPS denies a variance request. Although the Commission only opposed three variance requests, EPS issued decisions consistent with the Commission's recommendations by either denying the request in whole or in part, or requiring the applicant to redesign the project in accordance with the Commission's suggestions. Finally, like Anne Arundel County, Baltimore County imposes conditions on virtually all variances that it grants, but those conditions tend to be very similar across the board.

D. Kent County

Kent County is located on the eastern shore of the Chesapeake Bay, directly east of Baltimore City.⁴⁰⁶ The county has a population of about 19,800 people,⁴⁰⁷ covers approximately 278 square miles,⁴⁰⁸ and has 265 miles of tidal shoreline.⁴⁰⁹ Approximately seven and a half percent of Kent County has been developed for residential use and one and a half percent has been developed for non-residential use.⁴¹⁰ Just over ninety-one percent remains undeveloped.⁴¹¹

1. Local Variance Provisions

Critical area variances in Kent County generally require approval from the Board of Appeals.⁴¹² The Kent County Planning Commission conducts an initial review of each variance application.⁴¹³ The Department of Planning and Zoning must send notice to adjacent property owners and post notice on the property at least fifteen days before the Planning Commission meets to review the application.⁴¹⁴ The Department must also schedule a hearing before the Board, send notice to adjacent property owners, and post notice on the property at least fifteen days before the hearing.⁴¹⁵ The Board must decide whether to grant the variance within thirty days of the hearing.⁴¹⁶ The Board's decision may be appealed to the circuit court.⁴¹⁷

The Planning Director has the authority to approve administrative variances from the buffer requirements on grandfathered properties "in order to repair, replace, or install septic systems for the applicable zoning district so as to relieve unwarranted hardships or other injustices. . ." ⁴¹⁸ The Planning Director also has the discretion to submit those applications to the

⁴⁰⁶ Md. Dep't of Commerce, Brief Economic Facts: Kent County, Maryland, <http://commerce.maryland.gov/Documents/ResearchDocument/KentBef.pdf> (last visited July 14, 2016).

⁴⁰⁷ Md. Dep't of Commerce, Maryland Data Explorer, <http://apps.esrgc.org/dashboards/countycomparison/#compare/counties/set/geography> (last visited Jan. 28, 2016).

⁴⁰⁸ Maryland.Gov, Maryland at a Glance, <http://msa.maryland.gov/msa/mdmanual/01glance/html/pop.html> (last visited July 14, 2016).

⁴⁰⁹ Md. Dep't of Commerce, Brief Economic Facts: Kent County, Maryland, <http://commerce.maryland.gov/Documents/ResearchDocument/KentBef.pdf> (last visited July 14, 2016).

⁴¹⁰ Md. Department of Commerce, Maryland Data Explorer, <http://apps.esrgc.org/dashboards/countycomparison/#compare/counties/set/geography> (last visited Jan. 28, 2016).

⁴¹¹ *Id.*

⁴¹² KENT COUNTY, MD., LAND USE ORDINANCE art. IX, §§ 2.1, 2.2.

⁴¹³ *Id.* § 2.2.2.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* § 2.2.5.

⁴¹⁷ *Id.* § 2.2.8.

⁴¹⁸ *Id.* § 2.1.1.

Board for approval.⁴¹⁹ Prior to approving an administrative variance, the Planning Director must hold a public hearing and provide notice in the same manner as the Department.⁴²⁰ The Planning Director's decisions can be appealed to the Board of Appeals.⁴²¹

Kent County can only grant a variance from the steep slopes, lot coverage, or buffer requirements “for reasons of demonstrable and exceptional *unwarranted hardship*.”⁴²² The County's addition of “exceptional” before “unwarranted hardship” could impose a more stringent standard for granting a variance.⁴²³

The Kent County Land Use Ordinance includes many of the variance criteria outlined in the state regulations.⁴²⁴ However, the Ordinance does not expressly require that the Board find that, “[t]he variance request does not arise from any conforming or nonconforming condition of any neighboring property” before granting a variance.⁴²⁵ Notably, the Ordinance emphasizes how granting a variance would affect the surrounding area and how it would alter the rights of the applicant compared to others similarly situated.⁴²⁶ The Board must consider “the reasonable use of the entire parcel,” and may consider what prompted the request or whether the request is for an after-the-fact variance.⁴²⁷

2. Analysis of Variance Requests

Kent County decided eleven variance requests from 2012 to 2014. Nine requests were for variances to the 100-foot buffer, one request was for the expanded buffer, and one request was for steep slopes. The Board granted ten of the eleven variance requests. Upgrading or replacing septic or sewage systems accounted for six of the eleven variance requests. Of the remaining variance requests, two were to replace an existing dwelling and upgrade the septic system, two were to construct a deck and sunroom, and one was to construct a patio. Three of the eleven requests were for after-the-fact variances. The only request that the Board denied was for an after-the-fact variance to perfect a stone patio in the buffer.⁴²⁸ The majority of variances involved grandfathered properties, and most were located within the limited development area.

⁴¹⁹ *Id.*

⁴²⁰ *Id.* § 2.2.2.

⁴²¹ *Id.* § 2.1.9.

⁴²² *Id.* § 2.2.1 (emphasis in original).

⁴²³ Compare KENT COUNTY, MD., LAND USE ORDINANCE art. IX, § 2.2.2, with MD. CODE ANN., NAT. RES. § 8-1808(d)(5)(i) and MD. CODE REGS. 27.01.12.04.B(1).

⁴²⁴ Compare MD. CODE REGS. 27.01.12.04B with KENT COUNTY, MD., LAND USE ORDINANCE art. IX, § 2.2.3.

⁴²⁵ MD. CODE REGS. 27.01.12.04.B(5).

⁴²⁶ Compare KENT COUNTY, MD., LAND USE ORDINANCE art. IX, § 2.2.3(f), with Md. Code Regs. 27.01.12.04.B.

⁴²⁷ KENT COUNTY, MD., LAND USE ORDINANCE art. IX, §§ 2.2.3(g),(i).

⁴²⁸ Letter from Bill Kerbin, Kent County Dep't of Planning, Housing, and Zoning, to Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n (November 10, 2014).

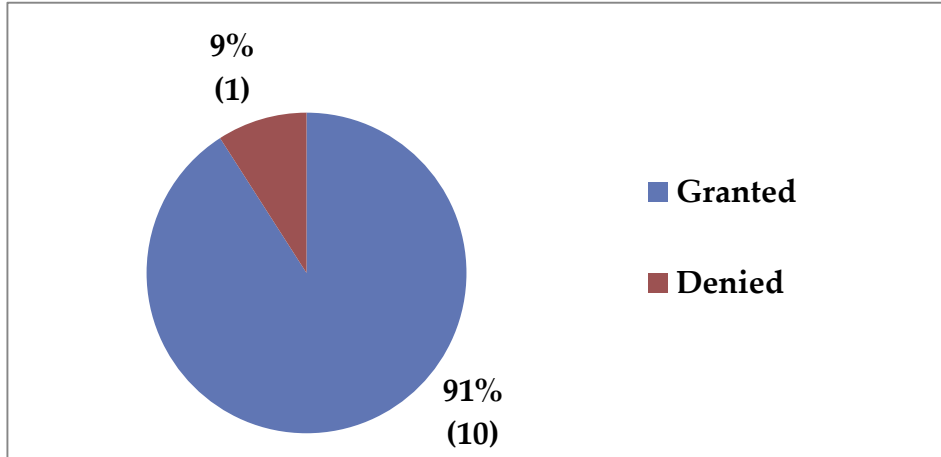


Figure 5: Total variance requests granted and denied in Kent County from 2012 to 2014.

Process and Decisions

The Kent County Board of Appeals (“the Board”) holds public hearings and issues written findings on variance requests. At the hearings, the Board hears testimony from the applicants, the applicant’s contractors or consultants, and representatives from the Department of Planning and Zoning. The representatives from Planning and Zoning typically testify about the facts related to the request and confirm that the information on the application and in the record is correct.

When analyzing a variance request, the Board or the Planning Director considers both the variance criteria enumerated in the Maryland regulations and the requirements specific to Kent County’s critical area program. In their decisions, the Board and Planning Director cite specific facts related to the request, as well as applicable laws. The decisions do not discuss whether the applicant has overcome the presumption of nonconformance. The Board and Planning Director frequently refer to a provision of the county’s land use ordinance that describes variances as a means “to relieve practical difficulties or other injustices . . .”⁴²⁹ The language that Kent County uses regarding practical difficulties, however, is very similar to that of unwarranted hardship, and includes phrases such as the unusual conditions or characteristics of the property. Moreover, the variance provisions for steep slopes, impervious surfaces, and the buffers specifically provide that “the strict application of the Ordinance would produce an *unwarranted hardship*.”⁴³⁰

Kent County is unique among the selected counties in that the majority of its variance requests involved septic or sewage systems, either in whole or in part. In those eight cases, the Board or Planning Director consistently found that septic systems would benefit neighboring property owners, would not affect the character of the neighborhood, and would be consistent with the Comprehensive Plan. The Board also held in one case that the failure of a septic system can be a contributing factor to a finding of unwarranted hardship.⁴³¹

⁴²⁹ KENT COUNTY, MD., LAND USE ORDINANCE art. IX, §§ 2.1.1, 2.2.1.

⁴³⁰ *Id.* § 2.2.3(f)(iv).

⁴³¹ Ampula, Case No. 12-33-V, 7 (Kent County Bd. of Appeals Aug. 9, 2012).

The Board and Planning Director required mitigation as a condition for granting some variances. The most common condition required mitigation and replanting, which the Critical Area Program regulations mandate at a 3:1 ratio. In some cases, the Board or Planning Director imposed variance or project-specific mitigation conditions. For example, a condition on one variance for a septic tank replacement required the applicant to remove and abandon the existing tank.⁴³²

Critical Area Commission

The Commission either offered comments or did not oppose the majority of the variance requests in Kent County. However, the Commission opposed the previously mentioned after-the-fact variance for a stone patio because it had been built without a variance, significantly disturbed steep slopes, and could have easily been constructed outside the buffer.⁴³³ Kent County ultimately denied that request.⁴³⁴

Appeals

The documents that the Clinic reviewed did not indicate that any applications in Kent County were appealed during the target years.

Withdrawn Variances

The documents that the Clinic reviewed did not indicate that any applications in Kent County were withdrawn during the target years.

3. Summary

Kent County received relatively few variance requests from 2012 to 2014. The Board of Appeals and the Planning Director granted the vast majority of those requests. Unlike the other selected counties, many of the variance requests in Kent County were to replace septic or sewage systems. Kent County only denied one variance request, and that denial was consistent with the Commission's recommendation.

E. Queen Anne's County

Queen Anne's County, known as the "gateway to the Eastern Shore," is bounded to the north by the Chester River, to the south by the Wye River, and to the west by the Chesapeake Bay.⁴³⁵ The county has a population of about 48,900 people, covers 372 square miles, and has

⁴³² *Id.*

⁴³³ Letter from Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n, to Bill Kerbin, Dep't of Planning, Hous., and Zoning (October 1, 2014).

⁴³⁴ Letter from Bill Kerbin, Dep't of Planning, Hous., and Zoning, to Charlotte Shearin, Natural Res. Planner, Critical Area Comm'n (November 10, 2014).

⁴³⁵ Gateway to the Eastern Shore - Queen Anne's County, THE FREDERICK NEWS-POST, http://www.fredericknewspost.com/places/state_region/maryland/gateway-to-the-eastern-shore---queen-anne-s/article_0430f6af-e4e1-5de0-9e12-bc02d97d83a8.html (March 16, 2014).

414 miles of shoreline.⁴³⁶ Just over ten percent of Queen Anne’s County has been developed for residential use, whereas just over two percent has been developed for non-residential use, and over eighty-seven percent remains undeveloped.⁴³⁷

1. Local Variance Provisions

Queen Anne’s County incorporated most of the state variance criteria into its local program.⁴³⁸ However, the local program does not mention two of the state requirements.⁴³⁹ First, Queen Anne’s County does not expressly require the Board of Appeals to find that denying the variance will deprive the landowner of the right to use the land.⁴⁴⁰ Second, Queen Anne’s County does not require the Board to find that the variance application does not “arise from any conforming or nonconforming condition of any neighboring property.”⁴⁴¹

The Queen Anne’s County local critical area program also includes three additional requirements.⁴⁴² First, the variance must be “the minimum deviation” from the local program “that will make possible the reasonable use of land or structures.”⁴⁴³ Second, the variance must be consistent with the applicable use restrictions and density limitations in the development area.⁴⁴⁴ Lastly, granting the variance must “not be contrary to the public interest or the policies, goals, and objectives [of the local ordinance or the Program.]”⁴⁴⁵

The Queen Anne’s County Board of Appeals, and in limited circumstances the Planning Director, have the power to grant variances to the critical area requirements.⁴⁴⁶ Under the county program, the Planning Commission, the Planning Director, and the Board of Appeals have a duty to ensure that any development activities in Queen Anne’s County’s critical area are consistent with the goals of the Program.⁴⁴⁷

For variances requiring board approval, the Board is required to hold a hearing on a variance application promptly after the application is filed.⁴⁴⁸ The Board must also notify the public and the applicant of the hearing.⁴⁴⁹ At a minimum, the Board must post notice of the public hearing on the related property at least fourteen days before the hearing, and publish the notice in the newspaper.⁴⁵⁰ Anyone may appear “in person or by agent or attorney at any

⁴³⁶ Maryland Dep’t of Commerce, Maryland Data Explorer, <http://apps.esrgc.org/dashboards/countycomparison/#compare/counties/set/geography> (last visited Jan. 28, 2016).

⁴³⁷ *Id.*

⁴³⁸ *Compare* MD. CODE REGS. 27.01.12.04.B with QUEEN ANNE’S COUNTY, MD., CODE OF PUB. LAW, § 14:1-66 (2015).

⁴³⁹ MD. CODE REGS. 27.01.12.04.B; QUEEN ANNE’S COUNTY, MD., CODE OF PUB. LAW, § 14:1-66.

⁴⁴⁰ MD. CODE REGS. 27.01.12.04.B(2).

⁴⁴¹ *Id.* at 27.01.12.04.B(5).

⁴⁴² QUEEN ANNE’S COUNTY, MD., CODE OF PUB. LAW, § 14:1-66.

⁴⁴³ *Id.* § 14:1-66G.

⁴⁴⁴ *Id.* § 14:1-66H.

⁴⁴⁵ *Id.* at § 14:1-66D.

⁴⁴⁶ *Id.* §§ 14:1-61, 14:1-68A–B.

⁴⁴⁷ *Id.* § 14:1-5B.

⁴⁴⁸ *Id.* § 14:1-63A.

⁴⁴⁹ *Id.* § 14:1-63B.

⁴⁵⁰ *Id.*

hearing.”⁴⁵¹ The Board must determine whether to grant or deny the variance “within a reasonable time.”⁴⁵²

The Planning Director may grant administrative variances to allow “new development or redevelopment within 100 feet of tidal waters, tidal wetlands and tributary streams on single-family lots of record as of June 29, 1988.”⁴⁵³ The requirements for granting an administrative variance are the same as variances requiring Board approval.⁴⁵⁴ The Planning Director’s decision can be appealed to the Board.⁴⁵⁵ The Board must hold a public hearing on the appeal after providing public notice, and render a final decision within a reasonable time.⁴⁵⁶ The Board’s decisions can be appealed to the circuit court.⁴⁵⁷

If the Board denies a variance application or an administrative variance on appeal, the applicant cannot reapply for a variance “involving the same property and substantially the same issues” for one year.⁴⁵⁸ If the applicant withdraws the application or appeal, an application for the same property and issues cannot be filed again for six months.⁴⁵⁹

2. Analysis of Variance Requests

Queen Anne’s County decided ten variance requests from 2012 to 2014. Nine requests were for variances from the 100 foot buffer, and one request was to grant a transfer to a non-family member. All ten of the variance requests were granted. The variance applications requested approval for structures including dwellings, dwelling additions, garages, decks, and a driveway. The majority of variances were for properties in the limited development area. Additionally, most variances involved properties that were not grandfathered. Queen Anne’s County provided additional comments to the Clinic about its decisions to grant the critical area variances analyzed in this report.⁴⁶⁰ The county indicated that, in most cases, no alternative existed outside of the buffer for the development activity.⁴⁶¹

⁴⁵¹ *Id.* § 14:1-63C.

⁴⁵² *Id.* § 14:1-63D.

⁴⁵³ *Id.* § 14:1-68A–B.

⁴⁵⁴ *Id.* § 14:1-68A.

⁴⁵⁵ *Id.* § 14:1-65A.

⁴⁵⁶ *Id.* § 14:1-63.

⁴⁵⁷ *Id.* § 14:1-103.

⁴⁵⁸ *Id.* § 14:1-64B.

⁴⁵⁹ *Id.* § 14:1-64C.

⁴⁶⁰ Queen Anne’s County Dep’t. of Planning and Zoning, Queen Anne’s County Critical Area Variances 2012-2014 (on file with the Clinic).

⁴⁶¹ *Id.*

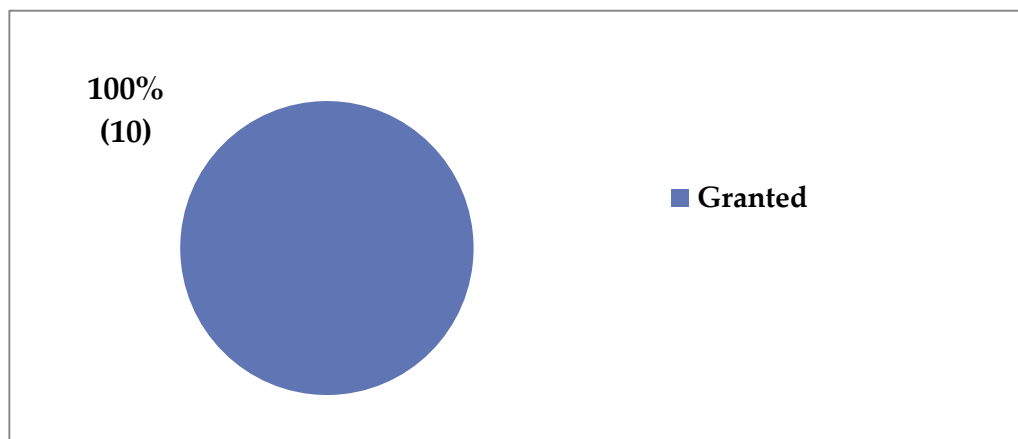


Figure 6: Total variance requests granted in Queen Anne’s County from 2012 to 2014.

Process and Decision

The Queen Anne’s County Board of Appeals holds a hearing and issues written findings for each variance application. In all but one case, a staff member from the Department of Planning and Zoning testified about the application and confirmed the information about the property and request was accurate. The applicants or their representative also testified about the variance requests. In making its findings, the Board relies on both the variance factors enumerated in the Maryland regulations and the additional factors in the local program. The Board does not refer to the specific facts or controlling law to support its findings for each variance factor. Instead, the Board simply recites the language of the variance factors. The Board’s decisions also make no mention of the presumption of nonconformance.

The Board generally does not impose conditions when it approved variances. However, in one request to construct a dwelling addition within the buffer, the Board did impose specific conditions. The conditions required the applicant to place stockpiles of material outside the buffer and to avoid disturbing the buffer with vehicles.⁴⁶²

Critical Area Commission

Between 2012 and 2014, the Commission only opposed one variance in Queen Anne’s County—a request to build a pool in the buffer.⁴⁶³ The Commission reasoned that not having a pool is not an unwarranted hardship, and that the pool could be located outside the buffer.⁴⁶⁴ That request was ultimately withdrawn.⁴⁶⁵ The Commission indicated no opposition, or only offered comments on the rest of the variance requests in Queen Anne’s County.

⁴⁶² Gray, Case No. V-07003, 1, 4 (Queen Anne’s County Bd. of Appeals Sep. 13, 2013).

⁴⁶³ Letter from Rob Hurley, Natural Res. Planner, Critical Area Comm’n, to Cathy Maxwell, Dep’t of Planning, Hous., and Zoning (April 29, 2012).

⁴⁶⁴ *Id.*

⁴⁶⁵ Memorandum from the Queen Anne’s County Dep’t of Planning and Zoning to File (May 2, 2013).

Appeals

The documents that the Clinic reviewed did not indicate that any applications in Queen Anne's County were appealed during the target years.

Withdrawn Variances

Two variance requests were withdrawn before the Board of Appeals made a final decision.⁴⁶⁶ In one case, the homeowner decided to construct a pool outside the buffer, eliminating the need for a variance.⁴⁶⁷ In the other case, upon consultation with the Commission, the applicants withdrew their request for a variance to locate a lawn irrigation system in the buffer.⁴⁶⁸ Discussions with the Commission led to the determination that the irrigation system was a temporary disturbance that did not require a variance.⁴⁶⁹

3. Summary

Queen Anne's County decided relatively few variance requests from 2012 to 2014, all of which were granted by the Board of Appeals. The Board's decisions generally consisted of conclusory statements regarding the variance factors, and did not directly address the presumption of nonconformance. The Commission only opposed one variance request in Queen Anne's County, which was withdrawn before the Board issued a final decision.

F. St. Mary's County

St. Mary's County is bordered on the west by the Wicomico River, on the south by the Potomac River, on the east by the Chesapeake Bay, and on the northeast by the Patuxent River.⁴⁷⁰ The county has a population of about 111,400 people, covers 372 square miles, and has 536 miles of shoreline.⁴⁷¹ Just over twenty-five percent of St. Mary's County has been developed for residential use, five percent has been developed for non-residential use, and nearly seventy percent remains undeveloped.⁴⁷²

1. Local Variance Provisions

The St. Mary's County Ordinance creates a Critical Area Overlay in the official Zoning Map, which includes all of the critical area within the County.⁴⁷³ The goal of the Critical Area Overlay is to "minimize adverse impacts on water quality from run off from surrounding lands"

⁴⁶⁶ *Id.*

⁴⁶⁷ Memorandum from the Queen Anne's Cty. Dep't of Planning and Zoning to File (May 2, 2013).

⁴⁶⁸ Klein, Case No. CU-080008, 1-2 (Queen Anne's County Bd. of Appeals Oct. 9, 2013).

⁴⁶⁹ *Id.*

⁴⁷⁰ St. Mary's County, Maryland, Comprehensive Plan, <http://www.stmarysmd.com/docs/compplan.pdf> (last visited Jan. 28, 2016).

⁴⁷¹ Maryland Dep't of Commerce, Maryland Data Explorer, <http://apps.esrgc.org/dashboards/countycomparison/#compare/counties/set/geography> (last visited Jan. 28, 2016).

⁴⁷² *Id.*

⁴⁷³ ST. MARY'S, MD., COMPREHENSIVE ZONING ORDINANCE, § 41.1.1.

and “conserve fish, wildlife, and plant habitat.”⁴⁷⁴ The County Ordinance also creates a Buffer Management Overlay, to allow limited use of shoreline areas where preexisting development prevents the buffer from functioning as envisioned by the state critical area regulations.⁴⁷⁵ The applicant must demonstrate that no feasible alternative exists when applying for development in the Buffer Management Overlay.⁴⁷⁶ Additionally, the applicant must minimize buffer impact regardless of convenience or expense.⁴⁷⁷ Other than performing proposed construction or installing environmental protection measures, the applicant may not remove any natural vegetation in the buffer.⁴⁷⁸ The Board of County Commissioners must review the Critical Area Overlay Zone Maps, which includes the overlay districts and the Buffer Management Overlay, at least every four years.⁴⁷⁹

The County Ordinance incorporates most of the state variance criteria.⁴⁸⁰ However, the County Ordinance does not include the requirement that need for a variance application does not “arise from any conforming or nonconforming condition of any neighboring property.”⁴⁸¹ The County also adds the requirement that “[t]he variance is the minimum necessary to achieve a reasonable use of land or structures.”⁴⁸²

The applicant must provide a written variance application to the Director of the St. Mary’s County Department of Land Use and Growth Management (“the Planning Director”), and include information necessary to satisfy the variance standards.⁴⁸³ The County Ordinance authorizes the Planning Director to approve administrative variances.⁴⁸⁴ Administrative variances in St. Mary’s County are allowed for lots and parcels recorded before December 1, 1985 to “construct, alter, or enlarge attached decks, porches, sheds, garages, patios, breezeways, septic fields, wells, utility installations, principal structures for residential use, or structures for incidental storage uses.”⁴⁸⁵ The Planning Director’s decision on an administrative variance may be appealed to the Board of Appeals.⁴⁸⁶

All other critical area variances require approval from the Board of Appeals.⁴⁸⁷ The Board of Appeals must hold at least one public hearing for variance applications and appeals from decisions of the Planning Director.⁴⁸⁸ Before a public hearing, the applicant must provide all of the necessary information for public notice, subject to the Planning Director’s approval.⁴⁸⁹

⁴⁷⁴ ST. MARY’S, MD., COMPREHENSIVE ZONING ORDINANCE, § 40.1.1.

⁴⁷⁵ *Id.* § 41.7.1.

⁴⁷⁶ *Id.* § 41.7.4.

⁴⁷⁷ *Id.*.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* § 41.3.3.

⁴⁸⁰ Compare ST. MARY’S, MD., COMPREHENSIVE ZONING ORDINANCE, § 24.4.1 with MD. CODE REGS. 27.01.12.04.B.

⁴⁸¹ ST. MARY’S, MD., COMPREHENSIVE ZONING ORDINANCE, § 24.4.1.

⁴⁸² *Id.* § 24.4.1.f.

⁴⁸³ *Id.* § 24.2.

⁴⁸⁴ *Id.* § 22.5.2.

⁴⁸⁵ *Id.* § 22.5.4.a.

⁴⁸⁶ *Id.* § 22.5.4.c.

⁴⁸⁷ *Id.* § 20.3.4.

⁴⁸⁸ *Id.* § 21.2.1.

⁴⁸⁹ *Id.* § 21.3.

The Department of Land Use and Growth Management must publish the notice at least fifteen days before the public hearing.⁴⁹⁰ The applicant is responsible for notifying owners of contiguous property by mail and for posting notice on the property at least fifteen days before the hearing.⁴⁹¹

The Board of Appeals must make a decision on a variance application in writing within thirty days following the hearing.⁴⁹² The Board of Appeals may grant a variance with conditions that are necessary for the development to be consistent with the local program.⁴⁹³ If the Board of Appeals grants a variance, it is presumed to lapse one year after the decision if the applicant fails to make progress on the use or project for which the variance was obtained.⁴⁹⁴ If the Board of Appeals denies a variance, it will not act “on another application for substantially the same proposal on the same premises” within two years of the denial.⁴⁹⁵ The Board’s decision on a variance application can be appealed to the circuit court.⁴⁹⁶

2. Analysis of Variance Requests

St. Mary’s County decided twenty-eight variance requests from 2012 to 2014. The Board of Appeals granted twenty-five requests, while the Planning Director granted the remaining three requests as administrative variances. The majority of the variances were located on parcels within the limited development area, and all but three of the requested variances involved grandfathered properties.

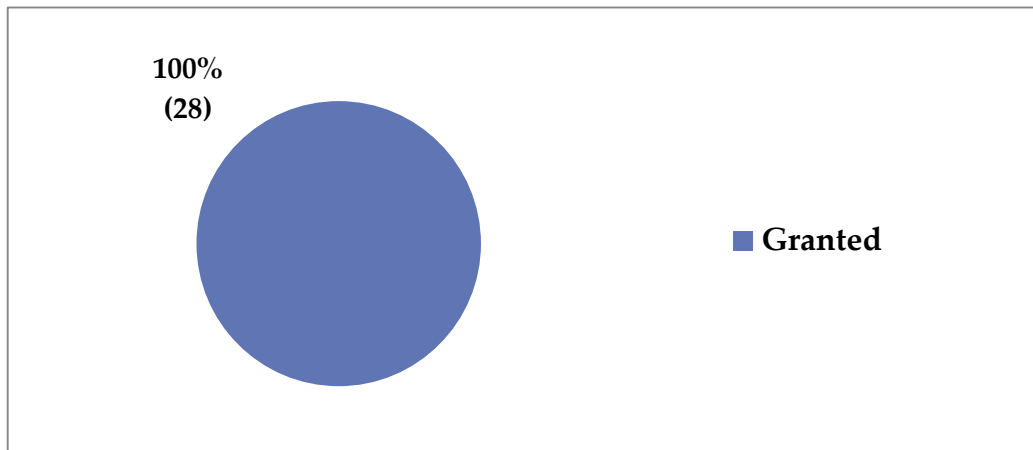


Figure 7: Total variance requests granted in St. Mary’s County from 2012 to 2014.

Process and Decision

Either the St. Mary’s County Board of Appeals or the Planning Director reviews and makes determinations on variance requests. A hearing is held on each application, which

⁴⁹⁰ *Id.* § 21.3.1.

⁴⁹¹ *Id.* § 21.3.2-3.

⁴⁹² *Id.* § 20.3.7.b.

⁴⁹³ *Id.* § 24.4.2.

⁴⁹⁴ *Id.* § 24.8.

⁴⁹⁵ *Id.* § 24.7.

⁴⁹⁶ *Id.* §§ 23.5, 24.9.

typically includes testimony from the applicant or their representatives and staff from the County Department of Land Use and Growth Management. At one hearing, representatives from the Critical Area Commission offered testimony in opposition to a variance request.⁴⁹⁷ The Board or the Planning Director issues written orders with findings of fact and conclusions of law for each application that it approves. However, the orders generally provide little factual support for the Board's findings and often rely on generic facts, such as the property being grandfathered, or small in size, with no further explanation to support its decision. The Board and the Planning Director do not mention the presumption of non-conformance in their decisions. The Board imposed conditions on some granted variances, mostly requiring either a Planting Plan or a Buffer Management Plan before the applicant could obtain building permits.

In four instances, the Board granted variances despite opposition from the Critical Area Commission. In two of those cases, the applicants proposed to construct additional outdoor living space on their property.⁴⁹⁸ The Commission opposed the variances because granting them would have resulted in more than 800 square feet of outdoor living space within buffer on the properties.⁴⁹⁹ The Commission took the position that more than 800 square feet is excessive and not the "minimum adjustment necessary to afford relief. . . ."⁵⁰⁰ However, the Board disagreed with the Commission in both cases.⁵⁰¹ The Board explained that the Critical Area Program does not define or limit outdoor living space, and that without a regulatory or law-making process, an 800 square foot limit was arbitrary and capricious.⁵⁰² The Board determined that the applicants met all of the legal requirements and granted the variances.⁵⁰³

The third variance granted despite the Commission's opposition involved a request to exceed lot coverage limits to construct a shed, patio, and a walkway on the property within the LDA.⁵⁰⁴ The Commission found that the property, with a dwelling, an expanded driveway, and several accessory structures, had been heavily developed and these developments already exceeded the coverage limit without a variance.⁵⁰⁵ The Commission opposed the variance and

⁴⁹⁷ Mitchell, Case No. 12-0051, 1 (St. Mary's County Bd. of Appeals Dec. 13, 2013).

⁴⁹⁸ Ballard, Case No. 11-1597, 1 (St. Mary's County Bd. of Appeals Mar. 28, 2013); Mitchell, Case No. 12-0051, 1 (St. Mary's County Bd. of Appeals Dec. 13, 2013).

⁴⁹⁹ Letter from Mary Owens, Education and Conservation Coordinator, Critical Area Commission, to Yvonne Chaillet, St. Mary's County, Dep't of Land Use and Growth Mgmt. (Dec. 12, 2012) ; Letter from Mary Owens, Education and Conservation Coordinator, Critical Area Comm'n, to Yvonne Chaillet, St. Mary's County Dep't. of Land Use and Growth Management (Dec. 5 2012).

⁵⁰⁰ Letter from Mary Owens, Education and Conservation Coordinator, Critical Area Comm'n, to Yvonne Chaillet, St. Mary's County Dep't. of Land Use and Growth Management (Dec. 12, 2012); Letter from Mary Owens, Education and Conservation Coordinator, Critical Area Comm'n, to Yvonne Chaillet, St. Mary's County Dep't. of Land Use and Growth Management (Dec. 5 2012).

⁵⁰¹ Ballard, Case No. 11-1597, 132-133 (St. Mary's County Bd. of Appeals Mar. 28, 2013); Mitchell, Case No. 12-0051, 109 (St. Mary's Board of Appeals, Dec. 13, 2013) .

⁵⁰² Ballard, Case No. 11-1597, 132-33 (St. Mary's County Bd. of Appeals Mar. 28, 2013); Mitchell, Case No. 12-0051, 109 (St. Mary's Board of Appeals, Dec. 13, 2013).

⁵⁰³ Ballard, Case No. 11-1597, 133 (St. Mary's County Bd. of Appeals Mar. 28, 2013); Mitchell, Case No. 12-0051, 109 (St. Mary's Board of Appeals, Dec. 13, 2013).

⁵⁰⁴ Felps, Case No. 13-0908, 173 (St. Mary's County Bd. of Appeals Nov. 14, 2013).

⁵⁰⁵ Letter from Amber Widmayer, Natural Res. Planner, Critical Area Comm'n, to Kelly Palmer, St. Mary's County Dep't. of Land Use and Growth Management (August 29, 2013).

recommended that the excess lot coverage be removed.⁵⁰⁶ However, the Board granted the variance without discussing the Commission’s recommendation in its decision.⁵⁰⁷

The fourth variance granted despite the Commission’s opposition was a request to exceed lot coverage limits and disturb the buffer in order to construct a shed, a patio, a two-story garage, and an expanded walkway.⁵⁰⁸ The Commission did not oppose the buffer variance, but did oppose the lot coverage variance because the improvements were not, in its view, “the minimum necessary” for the owner to reasonably use his property.⁵⁰⁹ Additionally, the Commission believed the improvements could be built within the lot coverage limit.⁵¹⁰ The Board again granted the variance without discussing the Commission’s recommendation.⁵¹¹ The Board reasoned that the required mitigation and vegetation could actually result in environmental benefits and therefore granting the variance would not adversely impact water quality.⁵¹²

From 2012 to 2014, three applicants resubmitted applications for the same projects, all of which were eventually granted.⁵¹³ In one case, the owner applied for a buffer variance to construct an addition to an existing dwelling.⁵¹⁴ However, before granting the variance, the country staff discovered that the applicant had constructed a new dwelling without variances or permits.⁵¹⁵ In those circumstances, when a violation occurs, the Critical Area Program requires that the applicant pay a fine, as well as submit and perform an approved restoration plan before the Board can grant the variance after-the-fact.⁵¹⁶ The applicant resubmitted the application after taking those steps to remedy the violation.⁵¹⁷

Critical Area Commission

The Commission offered only comments or no opposition to most of the variance requests for St. Mary’s County from 2012 to 2014. As discussed above, the Commission opposed four variance requests, all of which were granted despite the Commission’s objections.⁵¹⁸ Among all the applications for grandfathered properties, the Commission commented on one application that if the property was properly grandfathered, the Commission

⁵⁰⁶ *Id.*

⁵⁰⁷ Felps, Case No. 13-0908, 175 (St. Mary’s County Bd. of Appeals Nov. 14, 2013).

⁵⁰⁸ Crawford, Case No. 12-0632, 179 (St. Mary’s County Bd. of Appeals Dec. 12, 2013).

⁵⁰⁹ Letter from Amber Widmayer, Natural Res. Planner, Critical Area Comm’n, to Yvonne Chaillet, St. Mary’s County Dep’t. of Land Use and Growth Management (October 31, 2013).

⁵¹⁰ *Id.*

⁵¹¹ Crawford, Case No. 12-0632, 181–82 (St. Mary’s County Bd. of Appeals Dec. 12, 2013).

⁵¹² *Id.* at 181.

⁵¹³ Medlin, Case No. 12-0511, 202 (St. Mary’s County Bd. of Appeals Feb. 26, 2013); Grant, Case No. 05-3122, 198 (St. Mary’s County Bd. of Appeals May 8, 2014); Johnson, Case No. 12-0457, 140 (St. Mary’s County Bd. of Appeals May 9, 2013).

⁵¹⁴ Johnson, Case No. 12-0457, 138 (St. Mary’s County Bd. of Appeals May 9, 2013).

⁵¹⁵ *Id.*

⁵¹⁶ MD. CODE ANN., NAT. RES. § 1808(c)(4).

⁵¹⁷ Letter from Kate Charbonneau, Reg. Prog. Chief, Critical Area Comm’n, to Yvonne Chaillet, St. Mary’s County Dep’t. of Land Use and Growth Management (March 29, 2013).

⁵¹⁸ Ballard, Case No. 11-1597 (St. Mary’s County Bd. of Appeals Mar. 28, 2013); Crawford, Case No. 12-0632 (St. Mary’s County Bd. of Appeals Dec. 12, 2013); Felps, Case No. 13-0908 (St. Mary’s County Bd. of Appeals Nov. 14, 2013); Mitchell, Case No. 12-0051 (St. Mary’s County Bd. of Appeals Dec. 13, 2013).

did not oppose the variance.⁵¹⁹ With the other variance applications, the Commission either did not oppose or only provided comments about satisfying the mitigation requirements and variance standards.

Appeals

The documents that the Clinic reviewed did not indicate that any applications in St. Mary's County were appealed during the target years.

Withdrawn Variances

One critical area variance request was withdrawn in St. Mary's County before the Board or the Planning Director made a final decision.⁵²⁰ In that case, the applicant applied for an after-the-fact variance to exceed lot coverage limits.⁵²¹ The Commission commented that the applicant should further reduce the size of the driveway and parking area to avoid the need for the variance and that the applicant should provide three-to-one mitigation for the unauthorized tree removal.⁵²² The Commission did not oppose mitigation for the unauthorized driveway construction.⁵²³ After the hearing, the applicant submitted the revised site plan, which eliminated the need for a variance.⁵²⁴

3. Summary

St. Mary's County decided a significant number of variance requests during the target years, almost as many as Baltimore County. The Board of Appeals and the Planning Director granted all of the requests. The Board of Appeals and Planning Director's findings generally consist of conclusory statements for each of the of the variance factors with little or no explanation based on the facts of the request. Additionally, the Board of Appeals and the Planning Director do not mention the presumption of non-conformance. Notably, in four instances, the Board granted variances despite the Commission's opposition.

G. Worcester County

Worcester County is considered a part of the Lower Eastern Shore region of Maryland, and borders both the Chesapeake Bay and the Atlantic Coastal Bays.⁵²⁵ Worcester County has a population of about 51,500 people, covers about 474 square miles, and has 774 miles of shoreline.⁵²⁶ Over seven and a half percent of the County has been developed for residential use,

⁵¹⁹ Letter from Kate Charbonneau, Reg'l Program Chief, Critical Area Comm'n, to Kelly Palmer, St. Mary's County Dep't. of Land Use and Growth Management (February 28, 2014).

⁵²⁰ Letter from Mary R. Owens, Educ. and Conservation Coordinator, Critical Area Comm'n, to Yvonne Chaillet, St. Mary's County Dep't. of Land Use and Growth Management (November 16, 2012).

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ Md. Dep't of Commerce, Brief Economic Facts: Worcester County (2016), <http://commerce.maryland.gov/Documents/ResearchDocument/WorcesterBef.pdf>.

⁵²⁶ Md. Dep't of Commerce, *Maryland Data Explorer*, <http://commerce.maryland.gov/about/rankings-and-statistics/data-explorer> (last visited Feb. 27, 2016).

over three percent has been developed for non-residential use, and just over eighty-nine percent is undeveloped.⁵²⁷

1. Local Variance Provisions

Worcester County implements the Critical Area Program through two separate programs: the Chesapeake Bay Critical Area Program and the Atlantic Coastal Bays Critical Area Program.⁵²⁸ The programs establish several factors that an applicant must meet to obtain a variance. Those factors are substantively identical to the state requirements.⁵²⁹ The two programs are similar, but not identical. The Atlantic Coastal Bays Critical Area Program has specific rules for individual piers and docks and for non-tidal wetlands and non-tidal wetland buffers.⁵³⁰ For example, new piers cannot extend for more than 100 feet over a wetland in the Atlantic Coastal Bays Critical Area, while no such prohibition exists in the Chesapeake Bay Critical Area.⁵³¹

The County Commissioners may designate buffer exemption areas, with approval by the Critical Area Commission.⁵³² In the Chesapeake Bay Critical Area Program, proposed exemption areas must have an “existing pattern of development ... [that] prevents the buffer from fulfilling [its] functions.”⁵³³ The county “must propose other measures for achieving the water quality and habitat protection objectives” when applying for a buffer exemption area, including “public education and forestry programs.”⁵³⁴ The Atlantic Coastal Bay program does not have similar requirements, and simply allows the County Commissioners to designate buffer management areas in the Atlantic Coastal Bay critical area subject to Commission approval.⁵³⁵

The variance process and requirements differ slightly depending on whether the application is for a variance in the Chesapeake Bay or the Atlantic Coastal Bays critical areas.⁵³⁶ Applications for critical area variances in the Chesapeake Bay must be submitted in writing to the Worcester County Board of Zoning Appeals.⁵³⁷ The Board of Zoning Appeals must review variance applications and hold a hearing before making a decision on a variance request in the Chesapeake Bay Critical Area.⁵³⁸ The Board of Zoning Appeals also has to forward the application and any additional documentation to the Critical Area Commission at least two weeks before the scheduled hearing for variance applications.⁵³⁹ The public must be notified of the hearing through signs on the property, notification in a locally circulated newspaper, and via

⁵²⁷ *Id.*

⁵²⁸ WORCESTER COUNTY, MD., NAT. RES. ART § NR 3-211; *Id.* at § NR 3-111.

⁵²⁹ *Compare id.* at § NR 3-211(b), § NR 3-111(b) with MD. CODE ANN., NAT. RES. § 1808-8(d); MD. CODE REGS. 27.01.12.04.

⁵³⁰ WORCESTER COUNTY, MD., NAT. RES. ART § NR 3-125.

⁵³¹ *Id.* § NR 3-125(b).

⁵³² *Id.* § NR 3-219(e).

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.* § NR 3-104(e).

⁵³⁶ *Compare* WORCESTER COUNTY, MD., NAT. RES. ART § NR 3-211 with § NR 3-111.

⁵³⁷ *Id.* § NR 3-211(c).

⁵³⁸ *Id.*

⁵³⁹ *Id.*

regular mail at least fifteen days before the scheduled hearing date.⁵⁴⁰ After a hearing, the Board must make findings “reflecting analysis of each standard before making a decision.”⁵⁴¹

Applications for critical area variances in the Atlantic Coastal Bays also must be submitted in writing to the Worcester County Board of Zoning Appeals.⁵⁴² Unlike variances in the Chesapeake Bay, variances in the Atlantic Coastal Bays do not require a hearing. Further, there is no requirement that the Board of Zoning Appeals forward variance applications involving the Atlantic Coastal Bays to the Critical Area Commission before making a decision. Additionally, the Atlantic Coastal Bay Program requires that the Board of Zoning Appeals review comments from the Worcester County Department of Environmental Programs before making a decision on a variance request, which is not a requirement of the Chesapeake Bay Critical Area Program.⁵⁴³ The Board of Zoning Appeals must find that the applicant satisfied each of the variance provisions and standards before granting a variance.⁵⁴⁴

In making its decision, the Board of Zoning Appeals must consider variance standards before making a decision in both the Chesapeake Bay Program and the Atlantic Coastal Bays Program.⁵⁴⁵ The county variance requirements are substantively the same as the state requirements.⁵⁴⁶ Additionally, the Board can grant a variance subject to reasonable conditions.⁵⁴⁷ These conditions can include requiring planting equal to three times the square footage of the variance, or siting of impervious surfaces as far as possible from “mean high water, the landward edge of tidal wetlands, tributary streams, non-tidal wetlands, or steep slopes.”⁵⁴⁸ The Board of Zoning Appeals’ decision can be appealed to the circuit court.⁵⁴⁹

2. Analysis of Variance Requests

Worcester County decided nine critical area variance requests from 2012 to 2014, all of which were within the Atlantic Coastal Bays Critical Area. Eight of the requests were granted, while one was denied. The denied request involved a proposed shed, which the Board found could be moved to an area farther from the shoreline.⁵⁵⁰ Eight of the requests were for activity in the buffer or expanded buffer and one request was to construct a pier in excess of 100 feet. The majority of the variances were for properties in the limited development area. A slight majority of variances were for properties that were not grandfathered, and one variance was after-the-fact.

⁵⁴⁰ WORCESTER COUNTY, MD., ZONING ART. § ZS 1-114.

⁵⁴¹ WORCESTER COUNTY, MD., NAT. RES. ART § NR 3-211(c).

⁵⁴² *Id.* § NR 3-111(c).

⁵⁴³ *Id.* § NR 3-111(b)(7).

⁵⁴⁴ *Id.* §

⁵⁴⁵ *Id.* § NR 3-211(b), § NR 3-111(b).

⁵⁴⁶ The county code combines the requirements that the variance request is not made as a result of conditions caused by the applicant, and the requirement that the request does not arise from conditions on a neighboring property. The county also combines the requirements that the granting of variance should not “adversely affect water quality or adversely impact fish, wildlife or plant habitat” in the critical area and that “the granting of the variance will be in harmony with the general spirit and intent of the State Critical Area Law and County Critical area program.”

Compare id. § NR 3-211(b), § NR 3-111 (b); *with* MD. CODE REGS. 27.01.12.04.

⁵⁴⁷ WORCESTER COUNTY, MD., NAT. RES. ART § NR 3-211(f); *Id.* at § NR 3-111(f).

⁵⁴⁸ *Id.* §§ NR 3-211(f), § NR 3-111(f).

⁵⁴⁹ *Id.* §§ NR 3-211(e), § NR 3-111(e).

⁵⁵⁰ Jones, Case No. 14-44, 1–4 (Worcester County Bd. of Appeals Dec. 11, 2014).

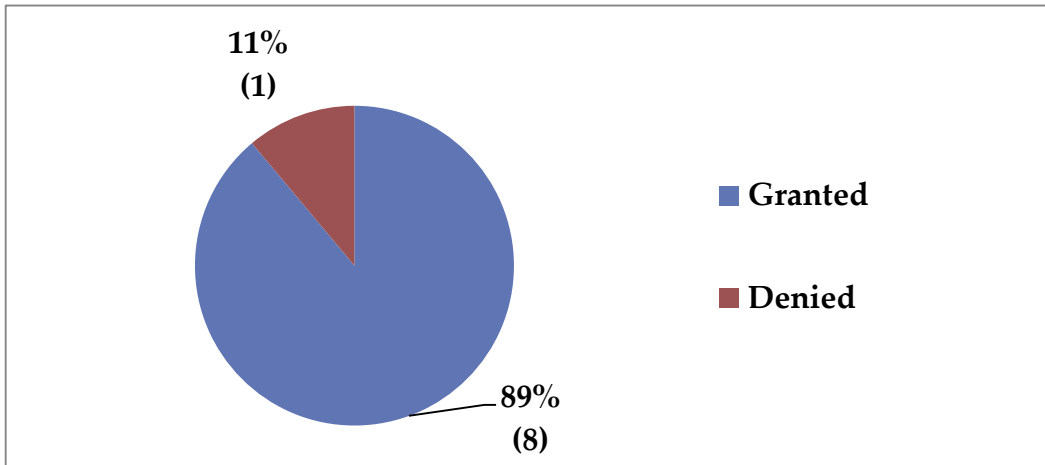


Figure 8: Total variance requests granted and denied in Worcester County from 2012 to 2014.

Process and Decisions

All of the Board’s decisions on buffer variances cite the same provisions of the Worcester County Code in describing the variance request: NR 3-104(c)(4) and NR 3-111. NR 3-104(c)(4) details the restrictions placed on development within the buffer, and outlines the need for a variance.⁵⁵¹ NR 3-111 states the county’s variance process, requirements, and procedures.⁵⁵² The Board’s decisions also cite to the zoning title of the county code. However, unlike Anne Arundel County, the Board treats all of the development activities as requiring a single variance, rather than parsing out individual types of critical area and zoning variances.

In most of its decisions, the Board analyzed the variance standards. Those analyses range from a few general sentences to a detailed paragraph for each standard. Within those analyses, the County went into varying levels of detail and only sometimes tailored its analysis to the facts of the case. About half of the variance requests were for parcels located within a buffer management area. In those instances, the Board always mentioned that fact at the beginning of its decisions and applied it in its findings.⁵⁵³ However, in one 2014 case, the Board did not mention the variance standards at all in its decision.⁵⁵⁴ Rather, it simply stated that the zoning administrator and the applicant testified before the Board and concluded by granting the variance “[a]fter duly considering the application and the testimony and other evidence.”⁵⁵⁵ Finally, of the eight variances that the Board granted, it only imposed conditions in three decisions.

Critical Area Commission

The Commission opposed three requests because, in each case, the owner had an option to easily relocate the structure outside the buffer. The Board granted two of those variance

⁵⁵¹ WORCESTER COUNTY, MD., NAT. RES. ART § NR 3-104(c)(4).

⁵⁵² *Id.* § NR 3-111.

⁵⁵³ *See e.g.*, Johnson, Case No. 13-18 (Worcester County Bd. of Appeals Sept. 9, 2013); Clarke, Case No. 13-12 (Worcester County Bd. of Appeals Aug. 8, 2013).

⁵⁵⁴ Dennis, Case No. 14-31 (Worcester County Bd. of Appeals, Nov. 13, 2014).

⁵⁵⁵ Dennis, Case No. 14-31, 1 (Worcester County Bd. of Appeals, Nov. 13, 2014).

requests. One request was for a second floor deck, which the Board granted as long as the deck was pervious and the applicant mitigated the effects.⁵⁵⁶ The other request was for a walkway, which the Board granted due to a disability and the fact that the walkway reduced overall impervious surface.⁵⁵⁷ The Board agreed with the Commission on the third request, and denied it because the applicant had the option of moving the proposed shed out of the buffer area.⁵⁵⁸

The Commission either did not oppose, or provided comments, on six other variance requests. If it did not oppose a request, the Commission noted the particular facts relevant to its position. For example, the Commission did not oppose a deck if it would be pervious and the applicant provided for mitigation.⁵⁵⁹ When it only provided comments, the Commission usually explained that the applicant should meet the variance criteria and implement mitigation measures.

Appeals

One variance from Worcester County was appealed during the target years, and eventually came before the Court of Appeals in *Assateague Coastal Trust v. Schwalbach*.⁵⁶⁰ In that case, the property owner applied for a variance to construct a pier over 100 feet in length over a private wetland to reach navigable water.⁵⁶¹ The Critical Area Commission did not oppose the variance to construct the pier so long as the request satisfied all variance standards and mitigation requirements.⁵⁶² The Board subsequently granted the variance.⁵⁶³ In the unwarranted hardship analysis, the Board reasoned that the property was platted well before the adoption of the Atlantic Coastal Bays Critical Area Program, and that the wetlands at the rear of the property would prohibit the owner from enjoying his riparian rights without the pier.⁵⁶⁴ The Court of Appeals affirmed the Board's decision to grant the variance in an opinion issued in May 2016.⁵⁶⁵

Withdrawn Variances

One critical area variance request was withdrawn in Worcester County before the Board made a final decision.⁵⁶⁶ In that case, the applicant installed a rear open deck in the buffer and subsequently applied for an after-the-fact variance.⁵⁶⁷ The Commission noted that the County has not issued a citation to the owner.⁵⁶⁸ Additionally, the Commission opposed the variance because

⁵⁵⁶ Clarke, Case No. 13-12, 1, 4 (Worcester County Bd. of Appeals, Aug. 8, 2013).

⁵⁵⁷ Johnson, Case No. 13-18, 1, 4–5 (Worcester County Bd. of Appeals Sep. 12, 2013).

⁵⁵⁸ Jones, Case No. 14-44, 3–4 (Worcester County Bd. of Appeals Dec. 11, 2014).

⁵⁵⁹ Letter from LeeAnne Chandler, Science Advisor, Critical Area Comm'n, to Joy S. Barrs, Worcester County, Dev. Review & Permitting (January 21, 2014).

⁵⁶⁰ Schwalbach, Case No. 13-44 (Worcester County Bd. of Appeals Nov. 14, 2013).

⁵⁶¹ *Id.*

⁵⁶² Letter from Nick Kelly, Reg'l Program Chief, Critical Area Comm'n, to David Bradford, Worcester County, Dev. Review & Permitting (August 29, 2013).

⁵⁶³ Schwalbach, Case No. 13-44 (Worcester County Bd. of Appeals Nov. 14, 2013).

⁵⁶⁴ *Id.*

⁵⁶⁵ *Assateague Coastal Trust v. Schwalbach*, No. 59, slip op. at 34–35 (Md. Ct. App. May 23, 2016).

⁵⁶⁶ Scherer, Case No. 13-53 (Worcester County Bd. of Appeals Minutes Form, Jan. 9, 2014).

⁵⁶⁷ Letter from LeeAnne Chandler, Science Advisor, Critical Area Comm'n, to David Bradford, Worcester County, Dev. Review & Permitting (December 3, 2013).

⁵⁶⁸ *Id.*

the owner could relocate the deck to eliminate the need for a variance. The Board noted in its meeting minutes that the variance request was withdrawn and that the “applicant met [critical area] standards, [and the] variance [is] no longer needed.”⁵⁶⁹

3. Summary

Worcester County is distinct from other jurisdictions in that its Board of Zoning Appeals implements two critical area programs: one for the Atlantic Coastal Bays Critical Area and one for the Chesapeake Bay Critical Area. These programs are similar, but differ mainly in that the Atlantic Coastal Bays Critical Area program has different standards for certain kinds of structures, like piers, and certain types of properties, like non-tidal wetlands. All of the variance requests in Worcester County fell under the Atlantic Coastal Bays Critical Area Program.

Worcester County decided relatively few variance requests from 2012 to 2014. The Board of Appeals granted eight requests, and denied one request. In its decisions granting or denying variance requests, the Board applies the facts to the variance criteria. In doing so, the Board sometimes analyzes the factors with specificity, but sometimes makes general, conclusory statements. The Board imposed conditions on only a few granted variances. Moreover, the Board granted two of the three variance requests that the Commission opposed. Finally, the Commission only had final decisions on file for about half of the variance requests in Worcester County, indicating that the County may not be providing the Commission with all of its decisions in a timely manner.

H. County Surveys

The county surveys included four main questions regarding critical area variances. First, the Clinic asked whether the counties ever advised potential applicants not to submit an application for a variance. Anne Arundel County, Baltimore County, Queen Anne’s County, and Worcester County provided similar responses, indicating that staff may advise applicants about the likelihood of the county supporting, or the applicant obtaining, the variance.⁵⁷⁰ County staff may also provide recommendations on how to reduce the impacts of the project or reconfigure the project so that a variance is no longer necessary.⁵⁷¹ Kent County advises applicants not to submit a variance application in circumstances where the applicant does not meet the unwarranted hardship standard.⁵⁷²

Second, the Clinic inquired about the extent to which the counties considered the Commission’s recommendations on variance applications. All of the selected counties indicated that they review and/or consider the Commission’s recommendations.⁵⁷³ Additionally, Kent

⁵⁶⁹ Scherer, Case No. 13-53 (Worcester County Bd. of Zoning Appeals Minutes Form, Jan. 9, 2014).

⁵⁷⁰ See University of Maryland Environmental Law Clinic, Critical Area Program Surveys (2016) (including the following counties: Anne Arundel, Baltimore, Kent, Queen Anne’s, St. Mary’s and Worcester) (on file with the Clinic).

⁵⁷¹ Critical Area Program Surveys: Anne Arundel County, Baltimore County, Queen Anne’s County, Worcester County, *supra* note 570.

⁵⁷² Critical Area Program Surveys: Kent County, *supra* note 570.

⁵⁷³ Critical Area Program Surveys: Anne Arundel, Baltimore, Kent, Queen Anne’s, Worcester, *supra* note 570.

County and Worcester County indicated that they consult or work closely with Commission staff on variance requests.⁵⁷⁴

Third, the Clinic asked whether the counties follow up with property owners to ensure that they comply with any conditions or mitigation requirements attached to critical area variances. All of the selected counties indicated that there are ways in which the conditions and mitigation requirements are monitored.⁵⁷⁵ For example, the requirements may be subject to other provisions of the county code or other permitting requirements.⁵⁷⁶ County staff may also conduct inspections prior to issuing other permits for the activity or as part of an enforcement proceeding.⁵⁷⁷ Worcester County specifically mentioned annual inspections of the mitigation planting requirements for two growing seasons.⁵⁷⁸ Baltimore and Worcester Counties also responded that they require financial securities as a way to encourage compliance.⁵⁷⁹

Finally, the Clinic asked whether the counties notify property owners about the critical area requirements. The majority of the selected counties indicated that they notified property owners about critical area requirements through direct communications and/or through information available on the county's website.⁵⁸⁰ Anne Arundel County makes a critical area planner available twice a week to provide information to property owners about critical area regulations.⁵⁸¹ Other counties meet with property owners directly, respond to telephone and email inquiries, and provide information through the mail.⁵⁸² Queen Anne's County specifically mentioned guidance documents as a way of notifying homeowners.⁵⁸³ In addition to communicating with property owners, Kent County staff presents critical area information to realtors so that they can notify potential home buyers about the critical area regulations.⁵⁸⁴

I. Non-Selected Jurisdictions

In addition to the selected counties, the Critical Area Commission made variance requests from the remaining jurisdictions available to the Clinic. Those jurisdictions include Calvert, Cecil, Charles, Dorchester, Hartford, Prince George's, Somerset, Talbot and Wicomico Counties, and the towns of Rock Hall, North East, Oxford, Sharpton, Princess Anne, Snow Hill, Ocean City, and Annapolis. While the Clinic did not undertake an extensive analysis of variance

⁵⁷⁴ Critical Area Program Surveys: Kent and Worcester, *supra* note 570.

⁵⁷⁵ The Clinic did not obtain specific documentation to support the descriptions of the manner and ways in which each county monitors mitigation requirements. The Clinic's clients provided anecdotal information suggesting a lack of follow-up in specific cases. For example, as noted in footnote 272, the property owners in *Chesapeake Bay Found. v. DCW Dutchship Island, LLC*, 439 Md. 588 (2014) have yet to remove the structures that both the Court of Appeals and the Anne Arundel County Board of Appeals required that he remove. *See* Email from Gregory Swain, Anne Arundel County Law Office to Amanda Van Houten, Chesapeake Bay Foundation (Sept. 21, 2016); Letter from Jon Mueller, Chesapeake Bay Foundation to Brian Frosh, Attorney General of Maryland (Nov. 19, 2015).

⁵⁷⁶ Critical Area Program Surveys: Anne Arundel, Baltimore, Kent, Queen Anne's, *supra* note 570.

⁵⁷⁷ Critical Area Program Surveys: Anne Arundel, Baltimore, Kent, Queen Anne's, *supra* note 570.

⁵⁷⁸ Critical Area Program Surveys: Worcester County, *supra* note 570.

⁵⁷⁹ Critical Area Program Surveys: Baltimore, Worcester, *supra* note 570.

⁵⁸⁰ Critical Area Program Surveys: Anne Arundel, Baltimore, Kent, Worcester, *supra* note 570.

⁵⁸¹ Critical Area Program Surveys: Anne Arundel County, *supra* note 570.

⁵⁸² Critical Area Program Surveys: Baltimore, Kent, Worcester, *supra* note 570.

⁵⁸³ Critical Area Program Surveys: Queen Anne's, Worcester, *supra* note 570.

⁵⁸⁴ Critical Area Program Surveys: Kent County, *supra* note 570.

requests in those jurisdictions, a brief review of the files indicate noticeable state-wide trends regarding critical area variances. First, as in the selected counties, the remaining jurisdictions granted the vast majority of variance requests that they received from 2012 to 2014. Second, the few denials typically involved after-the fact variances and/or variances that the Commission opposed. It should be noted, however, that applications from several jurisdictions on file with the Commission did not include the local jurisdiction's final decision on the variance.

J. Summary

All of the selected counties granted the vast majority of variance requests that they received. The majority of variances were for development in the limited development area. While there is some variation among the individual counties, the majority of variances involved properties that were grandfathered. Counties generally conclude that "reasonable and significant use" includes a right to develop reasonable structures on grandfathered lots.

In general, the majority of variances were for additional living space. Variances for constructing new dwellings, and adding to existing dwellings were common in the selected counties. In addition to houses and dwelling additions, requests to construct decks, patios, and garages were also common. Kent County provides the exception, as the majority of variances requested were for replacing or constructing septic systems.

Although there is no bright line rule applicable to all variance requests, it seems clear that the inability to construct a house on one's property would constitute an unwarranted hardship. In contrast, the inability to construct a pool most likely would not constitute an unwarranted hardship. Other development activities fall somewhere in between those two ends of the spectrum.

The selected counties varied in how often their decisions were consistent with the Commission's opposition to a variance. For example, the percentage of requests that Anne Arundel County granted decreased in circumstances where the Commission opposed the variance. In addition, Baltimore, Kent and Queen Anne counties were fairly likely to issue decisions consistent with the Commission's recommendation when it opposed a variance. St. Mary's and Worcester counties, on the other hand, were less likely to issue decisions that aligned with the Commission's recommendation in those circumstances.

The counties also varied in terms of analyzing the variance factors. Anne Arundel County addresses each individual factor, and provides a fairly detailed explanation as to why the requirement has or has not been met. Other counties did not provide substantial support for each variance factor, and some, like St. Mary's County, mostly relied on conclusory statements. In addition, some counties, like Kent and Queen Anne's, did not make any specific findings regarding the presumption of nonconformance.

Based on the Clinic's review of the variances on file with the Critical Area Commission, the selected counties do not submit all of their decisions to the Commission in a timely manner. Some counties, such as Anne Arundel, send the vast majority of their decisions to the Commission. However, the Clinic's file review indicates that other jurisdictions are less likely to

do so on a regular basis. For example, the Clinic was only able to obtain five of Worcester County's nine variance decisions from the Commission.

V. Enforcement in the Selected Counties

This section discusses critical area enforcement in Anne Arundel County, Baltimore County, Kent County, Queen Anne's County, St. Mary's County, and Worcester County from 2012 to 2014. The Clinic's analysis focused on the type and number of critical area violations that occurred in each jurisdiction and the follow-up actions taken by the counties, including the issuance of any fines.⁵⁸⁵

A. Anne Arundel County

The Department of Inspections and Permits enforces Anne Arundel County's local critical area program, as provided by the County Code.⁵⁸⁶ Potential violations can include: failure to comply with any of the provision in the County's critical area overlay, which contains the requirements for development in the critical area;⁵⁸⁷ failure to comply with the County's erosion and sediment control or stormwater management requirements in the critical area;⁵⁸⁸ clearing in the critical area without proper authorizations;⁵⁸⁹ and zoning violations in the critical area.⁵⁹⁰

In enforcing the county code provisions related to the critical area overlay, erosion and sediment control, and stormwater management, the Department of Permits and Inspections may seek injunctive relief, suspend or revoke relevant authorizations, issue a stop work order or a notice of violation, impose a fine, and pursue the matter criminally.⁵⁹¹ Moreover, certain violations can result in a fine of up to \$10,000.⁵⁹² Regardless of the enforcement measures that the County pursues, any person found to be in violation must promptly correct the violation.⁵⁹³ For zoning violations in the critical area, the Department may issue an administrative order to correct the violation within a certain amount of time or seek injunctive relief.⁵⁹⁴ Fines for those violations range from \$500 for the initial violation to \$1,000 for subsequent violations.⁵⁹⁵

⁵⁸⁵ The Clinic submitted Public Information Act Requests to the selected counties for the following information: (1) The total number of complaints that each county received regarding alleged critical area violations; (2) The total number of inspections within the critical area performed by the county; (3) The total number of critical area violations in the county, including citations and/or correction notices; (3a.) Of those violations, the total number resolved through mitigation or other means; (3b.) Of those violations, the total number resolved through the court system with a civil citation, injunction, or other means; (3c.) Of those violations, the total number prosecuted as criminal misdemeanors; and (4) The total amount of fines and/or penalties that the county imposed for critical area violations. Letters from Erin Doran, Environmental Law Clinic, to each County requesting critical area enforcement information (on file with the Clinic).

⁵⁸⁶ ANNE ARUNDEL COUNTY, MD., CODE § 17-8-104.

⁵⁸⁷ *Id.* § 16-5-105(b)(3).

⁵⁸⁸ *Id.* § 16-5-105(b)(1), (2).

⁵⁸⁹ *Id.* § 16-5-101(10).

⁵⁹⁰ *Id.* § 18-17-203(b).

⁵⁹¹ *Id.* § 16-5-102(d).

⁵⁹² *Id.* § 16-5-102(d); *Id.* § 9-2-101(f)(1).

⁵⁹³ *Id.* § 16-5-102(b).

⁵⁹⁴ *Id.* § 18-17-202(a); *Id.* § 18-17-204.

⁵⁹⁵ *Id.* § 18-17-203(b).

In response to a Public Information Act request for critical area enforcement information, Anne Arundel County directed the Clinic to its monthly code enforcement litigation reports.⁵⁹⁶ The Clinic’s analysis of those reports focused on construction, grading, and clearing violations in the critical area from 2012 to 2014. Over that three year period, the number of critical area matters before the Anne Arundel County District Court was relatively consistent.⁵⁹⁷ Specifically, the 2012 litigation reports include thirty-three matters with code violations in the critical area; the 2013 litigation reports include twenty-nine matters with code violations in the critical area; and the 2014 litigation reports include thirty-five matters with code violations in the critical area.⁵⁹⁸ During those years, fourteen property owners came before the District Court repeatedly for the same violations.⁵⁹⁹ Most of the code violations involved construction and/or grading in the critical area without the necessary permits and approvals.⁶⁰⁰ Clearing or tree cutting occurred less frequently, and, when it did occur, it was often in conjunction with a grading violation.⁶⁰¹

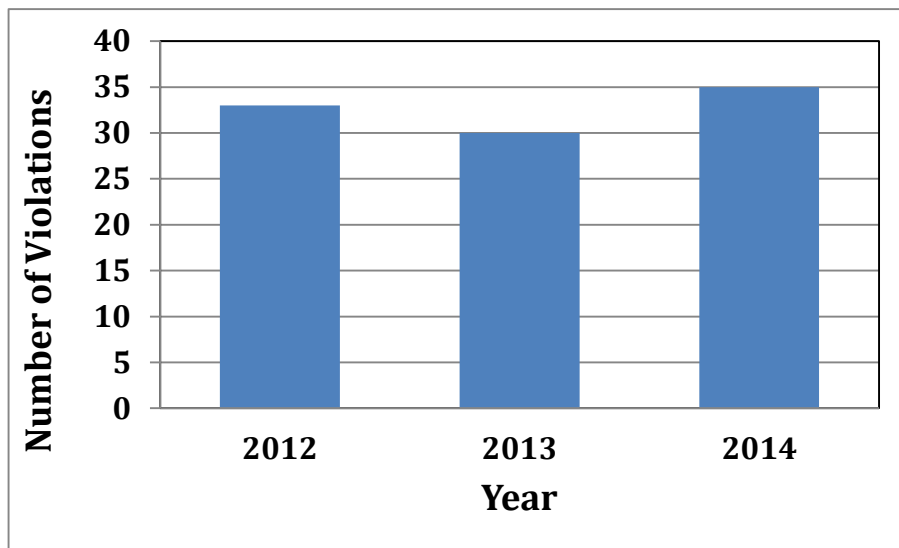


Figure 9: Critical area violations in Anne Arundel County from 2012 to 2014.

In response to code violations in the critical area, the District Court often enters a consent judgement requiring the violator to obtain the necessary approvals.⁶⁰² If the violator fails to do so, he or she may have to remove the structure and/or pay a fine.⁶⁰³ In some circumstances, the

⁵⁹⁶ Anne Arundel County Office of Law, *Code Enforcement Litigation Reports*, years 2013–2014, available at <http://www.aacounty.org/departments/law/forms-and-publications/litigation-reports/> (last visited July 25, 2016) (hereinafter *AAC 2013–2014 Litigation Reports*); Anne Arundel County Office of Law, *Code Enforcement Litigation Report*, year 2012 (on file with the Clinic) (hereinafter *AAC 2012 Litigation Reports*).

⁵⁹⁷ *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596.

⁵⁹⁸ See *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596. Several matters included multiple individual code violations.

⁵⁹⁹ *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596.

⁶⁰⁰ *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596.

⁶⁰¹ *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596. For the purposes of this report, the Clinic did not consider certain types of code violations, such as operating a public pool in the critical area or storing junk, solid waste, and other objects in the critical area.

⁶⁰² *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596.

⁶⁰³ See e.g., *AAC 2012 Litigation Reports*, *supra* note 596, at January 2012, Miller & Thomas.

District Court required the violator to pay a fine regardless of other measures.⁶⁰⁴ From 2012 to 2014, the fines ranged from \$125.00 to \$15,625.⁶⁰⁵ Some cases also involved mitigation or other actions to restore the property to its previous condition.⁶⁰⁶ In limited circumstances, for example if the violator abated the violation, the District Court did not impose any additional conditions.⁶⁰⁷

B. Baltimore County

The Director of Environmental Protection and Sustainability enforces Baltimore County's local critical area program.⁶⁰⁸ Potential violations can include: failure to comply with the critical area protection provisions of the County Code, including development and clearing requirements, or failure to comply with permits or approved plans, including unauthorized construction, grading, or clearing.⁶⁰⁹ In enforcing the local program, the Director may issue correction notices⁶¹⁰ or citations,⁶¹¹ and suspend or revoke relevant authorizations.⁶¹² The Baltimore County Code also provides for civil or criminal penalties and injunctive relief.⁶¹³

In response to a Public Information Act Request, Baltimore County provided its Critical Area Site Inspection Reports from 2012 to 2014.⁶¹⁴ The site inspection reports include the date of the complaint, the date of any inspection, a box that states "Valid (Yes/No) Did a violation occur?," a description of the alleged violation, the name of the inspector, and any follow-up action by the County.⁶¹⁵ Over the three year period, the number of inspection reports indicating that a violation occurred (where the box on the form contained a "Yes") initially decreased and then remained consistent.⁶¹⁶ Specifically, in 2012, seventeen site inspection reports indicate that violations occurred, while in 2013 and 2014, eleven site inspection reports from each year indicate that violations occurred.⁶¹⁷ The most common type of violation noted in the reports is

⁶⁰⁴ See e.g., *AAC 2012 Litigation Reports*, *supra* note 596, at April 2012, Willett (requiring a \$1,125 fine in addition to new building permits).

⁶⁰⁵ *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596; see e.g., *AAC 2013–2014 Litigation Reports*, *supra* note 596, at May 2014, Poist (requiring payment of an outstanding \$125 fine for plumbing work in the critical area, among other fines); *AAC 2012 Litigation Reports*, *supra* note 596, at February 2012, K&K Adams, Inc. (requiring a \$15,625 fine for multiple violations, including grading and building, among other violations). Penalties are meant to deter violations and ensure that the violator does not benefit economically from the violation. Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1226–27 (1998). Thus, in order for penalties to actually deter violations, the regulator must set them high enough that paying a penalty reduces or eliminates any potential economic gains that may be realized from the violation. *Id.* Given the relatively high gains that property owners could realize from building in the critical area, a \$125 penalty may not be an effective deterrent.

⁶⁰⁶ *AAC 2013–2014 Litigation Reports*, *supra* note 596; *AAC 2012 Litigation Reports*, *supra* note 596.

⁶⁰⁷ See e.g., *AAC 2013–2014 Litigation Reports*, *supra* note 596, at September 2013, Silvestri.

⁶⁰⁸ BALTIMORE COUNTY, MD., CODE § 33-2-901.

⁶⁰⁹ *Id.* § 33-2-901(c).

⁶¹⁰ *Id.* § 33-2-901(b).

⁶¹¹ *Id.* § 3-6-205(a)–(b).

⁶¹² *Id.* § 33-2-901(c).

⁶¹³ *Id.* §§ 33-2-902, 903, 904.

⁶¹⁴ Baltimore County Dep't. of Env'tl. Prot. & Sustainability, Baltimore County Critical Area Inspection Reports for Years 2012–2014 (on file with the Clinic and the author) (hereinafter BC Inspection Reports).

⁶¹⁵ BC Inspection Reports, *supra* note 614.

⁶¹⁶ BC Inspection Reports, *supra* note 614.

⁶¹⁷ BC Inspection Reports, *supra* note 614.

construction in the critical area.⁶¹⁸ Clearing or tree cutting and lot coverage violations also occurred multiple times over the three-year period.⁶¹⁹

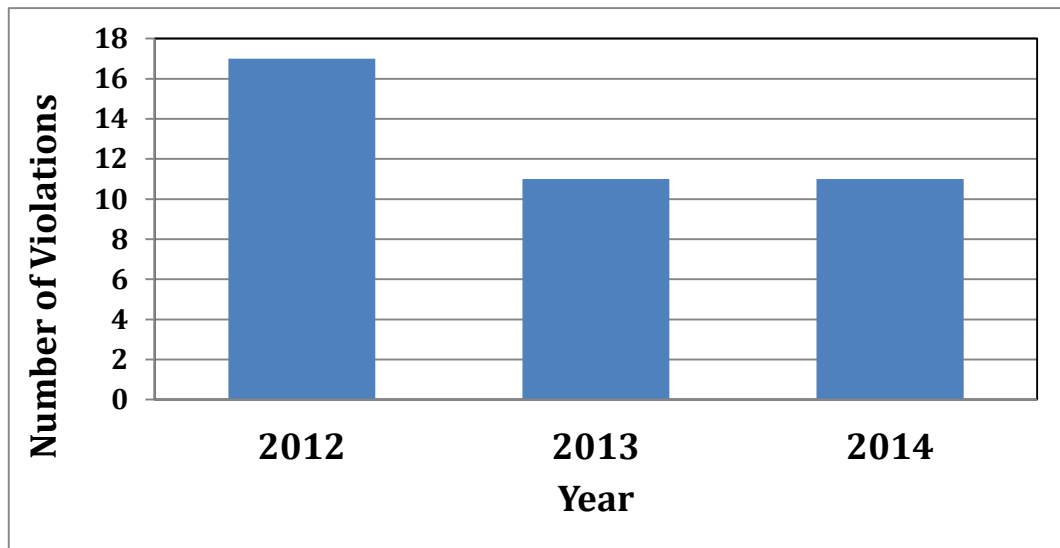


Figure 10: Critical area violations in Baltimore County from 2012 to 2014.

Approximately fourteen additional site inspection reports do not definitively indicate whether a violation occurred, despite the fact that a “No” appears in response to that question in the reports.⁶²⁰ The follow-up portion of those reports does not clearly state whether the inquiry into the alleged violation is complete.⁶²¹ Rather, it states that the follow up is “pending” or that the “Department will conduct a site inspection to determine whether the complaint is valid.”⁶²² Similarly, the “Date of Inspection” field in most of those reports is either blank or indicates that an inspection is pending.⁶²³ Alleged lot coverage and clearing or tree cutting violations appear frequently in those reports.⁶²⁴

After identifying a violation, Baltimore County often sends a violation letter to the property owner.⁶²⁵ Other follow up requirements include removing the construction, developing a restoration plan, or obtaining the necessary approvals. The inspection reports do not indicate whether fines were issued.⁶²⁶

⁶¹⁸ BC Inspection Reports, *supra* note 614.

⁶¹⁹ BC Inspection Reports, *supra* note 614.

⁶²⁰ BC Inspection Reports, *supra* note 614.

⁶²¹ BC Inspection Reports, *supra* note 614.

⁶²² BC Inspection Reports, *supra* note 614.

⁶²³ BC Inspection Reports, *supra* note 614.

⁶²⁴ BC Inspection Reports, *supra* note 614.

⁶²⁵ BC Inspection Reports, *supra* note 614.

⁶²⁶ BC Inspection Reports, *supra* note 614.

C. Kent County

The Zoning Administrator enforces the Kent County Land Use Ordinance, which encompasses a number of land use regulations, including the local critical area program.⁶²⁷ Potential violations can include the failure to comply with the Ordinance (including the critical area development requirements) when constructing structures or using property, and the failure to comply with any conditions imposed by the Board of Appeals or the Planning Commission.⁶²⁸

In enforcing the Ordinance, the Zoning Administrator “treat[s] any violation as a civil violation,” and must issue a citation to the alleged violator.⁶²⁹ The Zoning Administrator also has the authority to issue stop work orders, require corrective action, suspend or revoke relevant authorizations, or seek injunctive relief.⁶³⁰ Violators are subject to a fine or up to 30 days imprisonment, or both.⁶³¹ The fine for a violation within the critical area cannot exceed \$10,000.⁶³² Any fine or penalty does “not excuse the violation or permit it to continue, and all such violations shall be corrected within a reasonable time.”⁶³³

In response to a Public Information Act Request, Kent County provided its Critical Area Inspection Reports.⁶³⁴ Similar to the Baltimore County Critical Area Site Inspection Reports, the Kent County Critical Area Inspection Reports include the date of a complaint, the date of any inspection, a description of the alleged violation, the name of the inspector, and any follow-up actions taken by the County.⁶³⁵ The reports also indicate whether the County determined that a violation occurred.⁶³⁶ According to the reports, very few critical area violations occurred in Kent County from 2012 to 2014.⁶³⁷ Specifically, three violations occurred each year in 2012 and 2013, and two violations occurred in 2014.⁶³⁸ The violations generally involved construction or clearing in the critical area buffer without the required permits or plans.⁶³⁹

Many of the reported violations were derived from complaints and were resolved without litigation.⁶⁴⁰ Kent County typically followed up on violations by requiring removal of the structure or some other form of mitigation to restore the property to its previous condition.⁶⁴¹

⁶²⁷ KENT COUNTY, MD., LAND USE ORDINANCE, art. XII, §§ 2.4, 4.1.

⁶²⁸ *Id.* § 4.3.

⁶²⁹ *Id.* § 4.4.

⁶³⁰ *Id.* §§ 4.12.–4.15.

⁶³¹ *Id.* § 4.3

⁶³² *Id.* § 4.5.

⁶³³ *Id.* § 4.11.

⁶³⁴ Kent County Dep’t of Planning, Housing & Zoning, Critical Area Inspection Reports for Years 2012–2014 (on file with the Clinic) (hereinafter KC Inspection Reports).

⁶³⁵ KC Inspection Reports, *supra* note 634.

⁶³⁶ KC Inspection Reports, *supra* note 634.

⁶³⁷ KC Inspection Reports, *supra* note 634.

⁶³⁸ KC Inspection Reports, *supra* note 634.

⁶³⁹ KC Inspection Reports, *supra* note 634.

⁶⁴⁰ Email from Stephanie Jones, Environmental Planner for Kent County Dep’t of Planning, Housing & Zoning, to Erin Doran, Environmental Law Clinic, regarding Public Information Act Request (Feb. 3, 2016) (on file with the Clinic).

⁶⁴¹ KC Inspection Reports, *supra* note 634.

Each matter included a fine, ranging from \$500 to \$10,000, and all but one fine had been paid.⁶⁴² Kent County did not pursue any violations as criminal misdemeanors.⁶⁴³

The County directed the Clinic to the Department of Planning, Housing, and Zoning annual reports for additional enforcement information. The Clinic reviewed those reports and compiled some of the information in the table below.⁶⁴⁴

Kent County Enforcement Information	2012	2013	2014
Critical Area Violations	2	3	2
Total Recorded Violations	25	33	38
Buffer Management / Enhancement Plans	71	44	50
Forest Clearing Plans	146	116	143
Site Inspections	240	200	247

Table 2: Kent County critical area enforcement information from 2012 to 2014.

D. Queen Anne's County

The Planning Director enforces Queen Anne’s County’s local critical area program.⁶⁴⁵ Potential violations can include the failure to obtain, maintain, or comply with necessary approvals and undertaking any development activity, disturbance, clearing, or grading that is otherwise prohibited.⁶⁴⁶ In enforcing the local critical area program, Queen Anne’s County may take any action to prevent the violation, correct the violation, or stop the violation.⁶⁴⁷ Violators are subject to a fine of up to \$500 per day, for each day the violation continues.⁶⁴⁸ Criminal misdemeanors, which typically involve false statements or willful violations, result in a fine of at least \$100 but not more than \$500 per day or up to ninety days of imprisonment, or both.⁶⁴⁹

⁶⁴² See e.g., KC Inspection Reports, *supra* note 634, at complaints on 4/9/2012 and 9/14/2012 (imposing \$500 fines in each case); KC Inspection Reports, *supra* note 634, at complaint on 5/8/2013 (imposing a \$10,000 fine, which has not yet been paid).

⁶⁴³ Email from Stephanie Jones, Environmental Planner for Kent County Dep’t of Planning, Housing & Zoning, to Erin Doran, Environmental Law Clinic, regarding Public Information Act Request (Feb. 3, 2016) (on file with the Clinic).

⁶⁴⁴ Kent County Dep’t of Planning, Housing & Zoning, *2012 Annual Report*, 21 (2012), available at http://www.kentcounty.com/images/pdf/planning/2012_KC_Annual_Report.pdf; Kent County Dep’t of Planning, Housing & Zoning, *2013 Annual Report*, 20 (2013), available at http://www.kentcounty.com/images/pdf/planning/2013_KC_Annual_Report.pdf; Kent County Dep’t of Planning, Housing & Zoning, *2014 Annual Report*, 22 (2014), available at http://www.kentcounty.com/images/pdf/planning/2014_KC_Annual_Report.pdf. Enforcement reports for the Critical Area can be found under the Codes Enforcement section of each year’s annual report.

⁶⁴⁵ QUEEN ANNE’S COUNTY, MD., CODE OF PUB. LOCAL LAWS § 14:1-97.

⁶⁴⁶ *Id.* § 14:1-100C.

⁶⁴⁷ *Id.* § 14:1-99.

⁶⁴⁸ *Id.* § 14:1-100A.

⁶⁴⁹ *Id.* § 14:1-102A, C.

In response to a Public Information Act Request, Queen Anne’s County provided spreadsheets of the citations issued by the Department of Planning & Zoning.⁶⁵⁰ In addition to the property owner’s name, the spreadsheets include the number and date of the citation, the fine issued, the status, whether the citation was in the critical area, and the reason for the citation.⁶⁵¹ Over the three year period, the number of citations for disturbances in the critical area was relatively consistent.⁶⁵² In 2012, the County issued eight citations involving construction, grading, or clearing in the critical area;⁶⁵³ in 2013, the County issued six citations involving clearing or construction in the critical area; and in 2014, the County issued five citations for clearing or construction in the critical area.⁶⁵⁴ A fine of \$500 accompanied each issued citation, and most fines had been paid.⁶⁵⁵

Queen Anne’s County also provided a table containing the number of permits and inspections in the Critical Area from 2012 to 2014.⁶⁵⁶ The Clinic compiled the information from that table below.

Queen Anne's County Enforcement Information	2012	2013	2014
Number of Permits	101	139	172
Number of Inspections	202	260	344

Table 3: Permits and inspections in the critical area in Queen Anne’s County from 2012 to 2014.

E. St. Mary's County

The Director of Land Use and Growth Management enforces the St. Mary’s County Zoning Ordinance, which includes the local Critical Area program.⁶⁵⁷ Potential violations can include failure to obtain, maintain, or comply with the proper approvals and engaging in development activity, disturbance, clearing, or grading that is otherwise prohibited.⁶⁵⁸ In enforcing the local Critical Area program, the Director may provide a person with notice of the alleged violation and a period of time to remedy the problem or issue a citation.⁶⁵⁹ The

⁶⁵⁰ Queen Anne’s County Dep’t. of Planning and Zoning, Spreadsheets of Citations for Years 2012–2014 (Feb. 9, 2016) (on file with Clinic) (hereinafter QAC Citation Spreadsheets).

⁶⁵¹ QAC Citation Spreadsheets, *supra* note 650.

⁶⁵² QAC Citation Spreadsheets, *supra* note 650.

⁶⁵³ QAC Citation Spreadsheets, *supra* note 650, at 2012. One additional citation appears on the spreadsheet, but was not issued because the problem (construction without permits) was resolved. *See* QAC Citation Spreadsheets, *supra* note 650, at 2012, Preski.

⁶⁵⁴ QAC Citation Spreadsheets, *supra* note 650. For the purposes of this report, the Clinic did not consider certain types of code violations, like operating a business without site plan approval or without permits, storing trash, junk, or untagged vehicles, using accessory building for weddings, or failing to have a certificate of occupancy.

⁶⁵⁵ QAC Citation Spreadsheets, *supra* note 650.

⁶⁵⁶ Memorandum from James H. Barton, Zoning Administrator, to Patrick Thompson, Attorney to the County Commissioners of Queen Anne’s County (Feb. 2, 2016) (on file with Clinic).

⁶⁵⁷ ST. MARY’S COUNTY, MD., COMPREHENSIVE ZONING ORDINANCE § 20.4.1.

⁶⁵⁸ *Id.* § 80.4.2.a.

⁶⁵⁹ *Id.* §§ 80.2.1, 2.

Ordinance authorizes any appropriate action, including injunctive relief, to prevent or abate a violation.⁶⁶⁰ Critical area violations are subject to a fine of up to \$500 per day.⁶⁶¹

In response to a Public Information Act Request, St. Mary’s County provided a table containing the following information for calendar years 2012, 2013, and 2014: the total number of complaints regarding alleged critical area violations; inspections within the critical area; critical area violations, including the resolution and the amount of fines collected for critical area violations.⁶⁶² The Clinic compiled the information from that table below.

Saint Mary's County Enforcement Information	2012	2013	2014
Number of Cases	52	35	37
Number of Cases Resolved	52	35	32
Number of Cases Resolved in Court	0	0	0
Number of Citations	52	35	32
Fines Collected	\$26,000	\$17,500	\$16,000
Number of Inquiries	52	35	32

Table 4: St. Mary’s County critical area enforcement information.

St. Mary’s County noted in its response that the “[n]umber of inquires does not reflect [the] actual number called in” and that “[n]ot all inquiries are logged because after quick research there is no violation.”⁶⁶³

F. Worcester County

The Department of Environmental Programs, and specifically the Natural Resources Division, enforces Worcester County’s local critical area programs.⁶⁶⁴ Potential violations can include any failure to comply with the Atlantic Coastal Bays or the Chesapeake Bay Critical Area provisions of the Worcester County Code, which include development requirements and additional clearing requirements in the Atlantic Coastal Bays Critical Area.⁶⁶⁵

⁶⁶⁰ *Id.* § 80.3.

⁶⁶¹ *Id.* § 80.4.2.a.

⁶⁶² Letter from George Sparling, St. Mary’s County Attorney, to Erin Doran, Environmental Law Clinic, regarding Public Information Act Request (Feb. 25, 2016) (on file with the Clinic); St. Mary’s County, Critical Area Citations Chart for Years 2012–2013 (on file with Clinic).

⁶⁶³ St. Mary’s County, Critical Area Citations Chart for Years 2012–2013 (on file with Clinic).

⁶⁶⁴ WORCESTER COUNTY, MD., CODE, NAT. RES. ART. § NR 3-212(a) (authorizing a county department “designated or created . . . by the County Commissioners” to administer and enforce the critical area program); *see also*, Worcester County, Maryland, *Natural Resources Division*, <http://www.co.worcester.md.us/departments/env/natural> (last visited July 29, 2016) (noting that this Division is responsible for “implementing and enforcing the local and state regulations associated with . . . Atlantic Coastal Bays Critical Area, [and] Chesapeake Bay Critical Areas . . .”).

⁶⁶⁵ WORCESTER COUNTY, MD., CODE, NAT. RES. ART. § NR 3-114, 115; *Id.* § NR 3-212(a).

With regard to the Atlantic Coastal Bays Critical Area program, the Worcester County Commissioners may seek any available remedy, including seeking injunctive relief, requiring the violator to abate a violation, and compelling restoration.⁶⁶⁶ Moreover, if a person violates or plans to violate the tree clearing requirements in the Atlantic Coastal Bays Critical Area, the Commissioners may seek to prevent the violation, require additional replanting, or obtain damages.⁶⁶⁷ With regard to the Chesapeake Bay Critical Area program, the Department must notify a person of an alleged violation and the necessary corrective action.⁶⁶⁸ If the alleged violator does not remedy the issue within a reasonable period of time, the Department should seek injunctive relief to compel corrective action or take any other appropriate action to prevent or abate violations.⁶⁶⁹ All critical area violations are subject to a fine of up to \$10,000 dollars.⁶⁷⁰

In response to a Public Information Act Request, Worcester County provided documents generated throughout the county’s enforcement process.⁶⁷¹ According to those documents, there were seven critical area violations each year in 2012 and 2013, and twenty-three critical area violations in 2014.⁶⁷² All of the violations in Worcester County involved either construction or clearing in the buffer.⁶⁷³

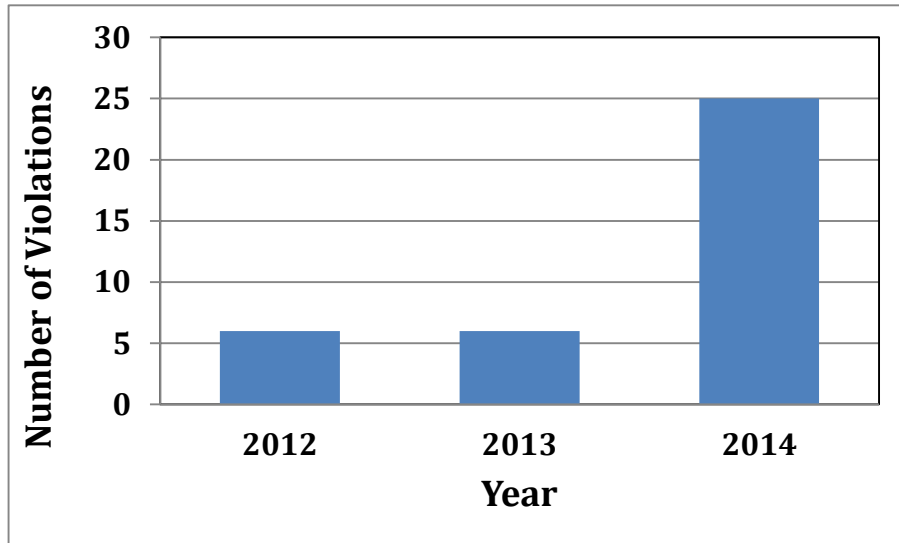


Figure 11: Critical area violations in Worcester County from 2012 to 2014.

In general, each enforcement action began with the county issuing a notice of violation. The notice explains that the recipient is in violation of the Natural Resources Code, and directs that the property owner remedy the issue immediately. The Notice of Violation is accompanied

⁶⁶⁶ *Id.* § NR 3-114(b).

⁶⁶⁷ *Id.* § NR 3-115(b).

⁶⁶⁸ *Id.* § NR 3-212(a).

⁶⁶⁹ *Id.* As an alternative, minor cases (“as determined by the Department”) may be considered a civil infraction subject to a fine of up to \$500. *Id.*

⁶⁷⁰ *Id.* § NR 3-114(c); *Id.* § NR 3-212(b).

⁶⁷¹ Worcester County Dep’t of Development Review and Permitting, Compilation of Violation Notices for Years 2012–2014 (on file with the Clinic) (hereinafter WC Violation Notices).

⁶⁷² WC Violation Notices, *supra* note 671.

⁶⁷³ WC Violation Notices, *supra* note 671.

by a report from the Department of Development Review and Permitting. The report contains a description the offense, the code provision being violated, and steps that need to be taken to achieve compliance. Those actions can include carrying out mitigation and/or submitting a variance application or a planting agreement within a specified timeframe. The county concludes enforcement actions with a final letter from the Department of Environmental Programs stating that the issue has been resolved. The letter usually indicates how it was resolved, such as through mitigation plantings or applying for the proper permits.

Worcester County only issued one fine during the target years, to a property owner who failed to apply for a permit before constructing a walkway within the buffer management area.⁶⁷⁴ The county discovered the violation in the fall of 2012, and issued a \$100 fine in June 2013 because the property owner had not taken action to resolve the violation.⁶⁷⁵

G. County Surveys

The county surveys included four main questions regarding critical area enforcement. First, the Clinic asked whether the documents that it reviewed for this report included all of the known critical area violations that occur in the county. Anne Arundel County and Queen Anne's County indicated that some violations are mitigated and/or resolved voluntarily before a citation is issued.⁶⁷⁶ In addition, Baltimore County indicated that minor non-compliance issues may not be included in its reports.⁶⁷⁷ Kent County and Worcester County both responded that the documentation provided to the Clinic reflects all known critical area violations in those jurisdictions.⁶⁷⁸

Second, the Clinic inquired as to whether the counties investigate potential violations only upon receiving a complaint. None of the selected counties indicated that investigations are solely triggered by complaints.⁶⁷⁹ The counties may also conduct investigations based on staff observations, which can occur in the field (i.e., during site visits or inspections), or, in Anne Arundel County, via GIS technology.⁶⁸⁰

The Clinic received a range of responses to the third question, whether the counties have adequate funding to proactively seek out potential critical area violations. Anne Arundel County responded affirmatively, with the caveat that the county "[does] not 'patrol' communities in the sense of typical law enforcement methodology."⁶⁸¹ Anne Arundel County indicated that it does

⁶⁷⁴ WC Violation Notices, *supra* note 671; Letter from Kevin Layfield, Critical Area Inspector, Worcester County Dep't of Development Review and Permitting, to Thomas Johnson, re citation for code violation (June 19, 2013)(on file with the Clinic).

⁶⁷⁵ Letter from Kevin Layfield, Critical Area Inspector, Worcester County Dep't of Development Review and Permitting, to Thomas Johnson, re citation for code violation (June 19, 2013)(on file with the Clinic). As noted previously, it is unclear that a \$100 fine would have any effect on deterring violations. *See supra* text accompanying note 605.

⁶⁷⁶ Critical Area Program Surveys, *supra* note 570, at Anne Arundel County, Queen Anne's County.

⁶⁷⁷ Critical Area Program Surveys, *supra* note 570, at Baltimore County.

⁶⁷⁸ Critical Area Program Surveys, *supra* note 570, at Kent County, Worcester County.

⁶⁷⁹ Critical Area Program Surveys, *supra* note 570.

⁶⁸⁰ Critical Area Program Surveys, *supra* note 570.

⁶⁸¹ Critical Area Program Surveys, *supra* note 570, at Anne Arundel County.

investigate all potential violations reported to the county or observed by county staff.⁶⁸² Kent County stated that it does not have adequate funding to proactively seek out potential violations and mentioned that critical area enforcement is shared among three employees who also have many other responsibilities.⁶⁸³

The remaining counties did not indicate whether they had adequate funding to proactively seek out critical area violations. Queen Anne's County stated that it "reviews and inspects every permit" and "maintain[s] adequate inspection of our Critical Area permits."⁶⁸⁴ Worcester County stated that "[g]iven the resources that we have, we feel that we do an excellent job with potential critical area violations or non-compliance issues."⁶⁸⁵ Baltimore County declined to comment on the question.⁶⁸⁶

Finally, the Clinic asked whether the counties follow up with property owners to ensure that they remedy the violation. Several of the selected counties rely on inspections and violation letters to monitor and track violations.⁶⁸⁷ Anne Arundel County maintains a database as a way to track violations until the problem has been remedied.⁶⁸⁸

H. Summary

Anne Arundel County, Baltimore County, Kent County, Queen Anne's County, St. Mary's County, and Worcester County all provided different types of documents and levels of detail in response to the Clinic's requests for critical area enforcement information. Because the Clinic was unable to obtain consistent information, the Clinic was unable to draw any significant conclusions within or among the counties regarding the effectiveness of critical area enforcement. It is clear, however, that critical area violations occurred in all of the selected counties. Anne Arundel County and St. Mary's County experienced a relatively high number of violations, whereas Kent County and Queen Anne's County reported a relatively low number of violations. Certain types of violations were common among several counties, including construction, grading, and clearing violations.

The selected counties varied greatly in terms of the amount of enforcement information available, the way the information was organized and maintained, and the time and resources necessary to provide the information to the Clinic. For example, Anne Arundel County maintains an online database of litigation reports, which summarize enforcement actions. Information from other counties is much less readily accessible. For example, Worcester County provided several different documents in response to the Clinic's Public Information Act request, rather than one consistent document type or database of information. There were also costs associated with the Worcester County request due to the search and review time necessary to compile the documents. St. Mary's County, on the other hand, compiled a chart of its enforcement

⁶⁸² Critical Area Program Surveys, *supra* note 570, at Anne Arundel County.

⁶⁸³ Critical Area Program Surveys, *supra* note 570, at Kent County.

⁶⁸⁴ Critical Area Program Surveys, *supra* note 570, at Queen Anne's County.

⁶⁸⁵ Critical Area Program Surveys, *supra* note 570, at Worcester County.

⁶⁸⁶ Critical Area Program Surveys, *supra* note 570, at Baltimore County.

⁶⁸⁷ Critical Area Program Surveys, *supra* note 570, at Baltimore County, Kent County, Queen Anne's County, Worcester County.

⁶⁸⁸ Critical Area Program Surveys, *supra* note 570, at Anne Arundel County.

information at no cost. Queen Anne's County was also able to provide a spreadsheet containing critical area citations at no cost. Baltimore County and Kent County both provided a similar document type—critical area inspection reports—but it is unclear whether those reports contain comprehensive critical area enforcement information.

VI. Recommendations

A. Variance Criteria

The General Assembly, the Critical Area Commission, and local jurisdictions should consider revising the variance process to focus on recognizing, minimizing, and mitigating impacts. The process for obtaining critical area variances is based on local land use decision-making. As a result, Planning Directors and Boards of Appeals are responsible for making what are essentially environmental decisions, under a program intended to protect the health of the Chesapeake Bay, the Atlantic Coastal Bays, and their tributaries. In an interview with the Clinic, Ren Serey, the former Executive Director of the Critical Area Commission, recognized that the variance process is a good tool for zoning. However, it does not work well for an environmental analysis. A better system would focus on recognizing, minimizing, and mitigating environmental impacts.

The General Assembly should clarify the unwarranted hardship standard. The selected counties granted between eighty-nine and 100 percent of the critical area variance requests that they received from 2012 to 2014, even though the unwarranted hardship standard places a seemingly high burden on the applicant. The Critical Area Protection Program defines unwarranted hardship to mean that “without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.”⁶⁸⁹ Prior case law established that the unwarranted hardship standard lies somewhere between the practical difficulties standard and the standard for an unconstitutional taking.⁶⁹⁰ The Maryland Court of Appeals has most recently applied the unwarranted hardship standard in *Assateague Coastal Trust v. Schwalbach*.⁶⁹¹ In that case, the Court articulated the applicant’s burden as follows:

[I]n order to establish an unwarranted hardship, the applicant has the burden of demonstrating that, without a variance, the applicant would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance.⁶⁹²

The unwarranted hardship standard as defined by the General Assembly and as interpreted by Maryland courts does not establish a bright line rule for local jurisdictions to follow as to what constitutes an unwarranted hardship and what does not. In practice, however, based on the Clinic’s review of variance requests in the selected counties, the inability to construct a dwelling on a grandfathered lot constitutes an unwarranted hardship in most, if not all, circumstances. Conversely, the inability to construct a pool does not typically constitute an unwarranted hardship, absent extenuating circumstances.

⁶⁸⁹ MD. CODE. ANN., NAT. RES. § 8-1808(d)(1) (West 2016).

⁶⁹⁰ *See, e.g.*, *Belvoir Farms Homeowners Ass’n, Inc. v. North*, 355 Md. 259, 282 (1999).

⁶⁹¹ *Assateague Coastal Trust, Inc. v. Schwalbach*, No. 59-2015, slip op. at 28–29 (Md. May 23, 2016).

⁶⁹² *Id.* at 28.

The stringent language of the unwarranted hardship standard does not translate into a stringent requirement in practice, as demonstrated by the clear trend among the selected counties to grant nearly all of the critical area variance requests that they received. Local jurisdictions determined that the vast majority of property owners who applied for variances to construct structures other than dwellings, including dwelling additions, decks, porches, driveways, and garages, also met the unwarranted hardship standard. That trend is consistent with recent court decisions, but stands in contrast to early decisions from the Maryland Court of Special Appeals where the inability to construct a deck or a gazebo did not constitute an unwarranted hardship if the owner otherwise had reasonable use of the property.⁶⁹³

The Clinic’s review of variance requests indicates that there is a discrepancy between the stringent unwarranted hardship standard as articulated in the Critical Area Protection Program and the lenient application of the standard in practice. The General Assembly and Maryland courts have also disagreed in their interpretations of the unwarranted hardship standard, as demonstrated by the legislative amendments in response to specific court decisions. Despite the General Assembly’s efforts to strengthen the Critical Area Program, the courts have not returned to the stringent application of the law seen in the early critical area cases. Therefore, the General Assembly should consider clarifying the unwarranted hardship standard, particularly what constitutes reasonable and significant use. The General Assembly should also consider identifying the structures that it considers within the realm of an unwarranted hardship, as opposed to a mere convenience.

The General Assembly should strengthen the self-created hardship factor. State law requires local jurisdictions to consider whether a variance request “is based on conditions or circumstances that are the result of actions by the applicant”⁶⁹⁴ Similarly, state regulations require an applicant for a variance to demonstrate that “[t]he variance request is not based upon conditions or circumstances that are the result of actions by the applicant.”⁶⁹⁵ This self-created hardship factor could be interpreted as to prohibit after-the-fact variances, which involve development that occurred in violation of the Critical Area Protection Program.⁶⁹⁶ However, based on the Clinic’s review of variance requests in the selected counties, local jurisdictions grant the majority of after-the-fact variance requests that they receive.

In the Anne Arundel County Code, the self-created hardship factor contains additional language regarding the failure to apply for a variance. The Anne Arundel County Office of Administrative Hearings must determine that “[t]he variance request is not based on conditions or circumstances that are the result of actions by the applicant, *including the commencement of development before an application for a variance was filed*”⁶⁹⁷ Despite this language, Anne Arundel County grants the majority of after-the-fact variance requests that it receives. Approximately two-thirds of after-the-fact variances are fully granted. Several other requests were partially granted, or granted in some form on appeal.

⁶⁹³ North v. St. Mary’s County, 99 Md. App. 502, 517–18 (Ct. Spec. App. 1994); Citrano v. North, 123 Md. App. 234, 241–42 (Ct. Spec. App. 1998).

⁶⁹⁴ MD. CODE ANN., NAT. RES. § 8-1808(d)(3)(iii).

⁶⁹⁵ MD. CODE REGS. 27.01.12.04.B (2016).

⁶⁹⁶ *Id.* at 27.01.12.06.A.

⁶⁹⁷ ANNE ARUNDEL COUNTY, MD., CODE § 18-16-305(b)(4) (emphasis added).

The General Assembly should strengthen the self-created hardship factor to expressly include after-the-fact variances, particularly in light of the Court of Appeals' decision in *Chesapeake Bay Foundation v. DCW Dutchship Island, LLC*. In that case, the Court considered the applicant's failure to obtain a variance prior to commencing construction to be irrelevant.⁶⁹⁸ Moreover, the Court upheld the Anne Arundel County Board of Appeal's conclusion that "so called 'after-the-fact' variances are subject to the same evaluation as 'before-the-fact' variances—no more, and no less."⁶⁹⁹

The General Assembly should adopt a requirement that the variance represents the minimum necessary to afford relief. Anne Arundel County, Queen Anne's County, and St. Mary's County all have some variation of the requirement that the variance is the minimum necessary to afford relief or the minimum deviation to allow reasonable use of the property. In *Becker v. Anne Arundel County*, the Court of Special Appeals stated that whether the variance is the minimum necessary to afford relief "must be considered . . . in the context of the purpose of the proposed construction, recognizing that appellants are entitled to build some type of reasonable structure."⁷⁰⁰

The Court of Special Appeals articulated the same standard with regard to this factor in *Chesapeake Bay Foundation v. Clickner*. In an unreported opinion, the Court found that substantial evidence supported the conclusion that the variance requests for a driveway, turnaround area, stormwater management system, septic system, and a well were the minimum necessary to afford relief.⁷⁰¹ The evidence that the Court relied on indicated that the property owners had reduced the impacts of construction, that the proposed structures were comparable to neighboring properties, and that the variances were necessary in order to build a house on the property.⁷⁰²

Adopting a state-wide requirement that a variance represent the minimum necessary to afford relief would be consistent with the general spirit and intent of the Critical Area Program. Moreover, it would increase uniformity among local programs, as several jurisdictions including Anne Arundel County already consider some variation of that requirement. Finally, it would allow the General Assembly to clarify how development should be evaluated in that context. Based on *Becker* and *Clickner*, it seems like a variance for a reasonable dwelling and/or related accessory structures would be the minimum necessary to afford relief. The analysis may also include whether the applicant has reduced the impacts of construction and, perhaps more controversial, the extent to which neighboring properties have been developed.

B. Critical Area Commission

Local jurisdictions should defer to the Critical Area Commission's recommendation when it opposes a variance request. The Critical Area Commission submits recommendations on nearly all variance requests. For the most part, the Commission either does not oppose the

⁶⁹⁸ *Chesapeake Bay Found. v. DCW Dutchship Island, LLC*, 439 Md. 588, 625 (2014).

⁶⁹⁹ *Id.* at 626.

⁷⁰⁰ *Becker v. Anne Arundel County*, 174 Md. App. 114, 144 (Ct. Spec. App. 2007).

⁷⁰¹ *Chesapeake Bay Found. v. Clickner*, No. 1926-12, slip op. at 38–39 (Md. Ct. Spec. App. Feb. 20, 2014).

⁷⁰² *Id.*

request or provides comments on the request without expressly stating a position. However, in limited circumstances, the Commission opposes variance requests. Based on the Clinic's review of the selected counties, not all jurisdictions issue decisions that are consistent with the Commission's opposition.

The Critical Area Commission should promulgate regulations to address variance requests to exceed lot coverage limits. The Clinic's review of the selected counties revealed that the Commission typically opposes variance requests to exceed lot coverage limits. Because local jurisdictions are not bound by the Commission's recommendation, some of those requests were granted. Regulations imposing more stringent requirements for lot coverage variances could more effectively limit new impervious surfaces in the critical area.

The Critical Area Commission should promulgate regulations that prohibit local jurisdictions from granting variances for pools in the buffer. The Clinic's review of the selected counties revealed that the Commission typically opposes variance requests for pools in the buffer based on the failure to meet the unwarranted hardship standard. Regulations prohibiting variances for pools would begin to clarify, in terms of structure types, exactly what constitutes an unwarranted hardship as opposed to a mere inconvenience.

C. Existing Requirements

All decisions to grant or deny variance requests should include a substantive analysis of each variance factor. Local decision-makers cannot simply state that the variance criteria have or have not been met.⁷⁰³ Rather, the decision-makers must support their findings by referencing evidence in the record.⁷⁰⁴ Despite the case law on this issue, the Clinic's review of the selected counties indicates that decisions from some jurisdictions, namely Queen Anne's County, St. Mary's County, and Worcester County, often contain conclusory statements with no reference to supporting evidence.

Local jurisdictions should submit a copy of all of their decisions on variance requests to the Critical Area Commission. The Critical Area Program requires local jurisdictions to submit a copy of all of their decisions on variance applications to the Commission within ten days.⁷⁰⁵ However, the Clinic's review of the selected counties indicates that local jurisdictions do not always provide the Commission with copies of their decisions. The Clinic obtained between three and seven decisions from each of the selected counties that were not on file with the Commission. The failure to send all decisions to the Commission was particularly apparent in the selected counties that received the fewest variances applications. For example, four of Worcester County's nine critical area variance decisions were not on file with the Commission.

⁷⁰³ See, e.g., *Becker*, 174 Md. App. at 145–46; *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 134 (2011).

⁷⁰⁴ See, e.g., *Becker*, 174 Md. App. at 145–46; *Moreland*, 418 Md. at 134.

⁷⁰⁵ MD. CODE ANN., NAT. RES. § 8-1808(d)(6)(i) (West 2016).

D. Transparency, Accountability, and Reporting

The Critical Area Program would benefit from increased transparency. The Critical Area Commission maintains files for the critical area variance applications that it receives, and those files are publically available. However, those files are sometimes incomplete. To provide better access to information, the Commission and/or the local jurisdictions should make critical area variance applications and decisions available online. Local jurisdictions could look to Anne Arundel County, which maintains an online database of decisions from the Office of Administrative Hearings.⁷⁰⁶

Increased transparency is essential to further evaluate critical area enforcement. The Critical Area Commission does not maintain enforcement information. Therefore, the Clinic submitted Public Information Act requests to the selected counties and received varying levels of information in response. The Clinic encountered high cost estimates in two counties, which resulted in the Clinic narrowing its request to a more limited set of information. In one county, the process of narrowing the request to avoid excessive fees took over three months. Local jurisdictions could again look to Anne Arundel County, which posts its code enforcement reports online.⁷⁰⁷

The Critical Area Program would benefit from increased accountability and reporting, including uniform recordkeeping of inspection and enforcement information. It is difficult and time-consuming to obtain and evaluate critical area information. The Critical Area Commission provided the Clinic with the number of applications that it received from each jurisdiction, but it could not provide the Clinic with the number of applications that were granted or denied. Obtaining that information required a detailed review of the Commission's files. A state-wide database that tracks local jurisdictions' decisions of variance applications would allow interested persons to easily obtain information about critical area variances without conducting an extensive document review.

Increased accountability and reporting is essential to further evaluate critical area enforcement. Based on the Clinic's review of the selected counties, local jurisdictions vary in documenting violations, recordkeeping, and their ability to provide information to the public at low or no cost. Requiring local jurisdictions to report uniform records of critical area enforcement information to the Commission regarding complaints, violations, and penalties would allow interested persons to evaluate critical area enforcement in a more efficient and effective way. It would also provide some level of consistency so that interested persons could compare information from different jurisdictions and identify state-wide trends in critical area enforcement.

The Critical Area Commission should prepare annual reports on the implementation and enforcement of the Critical Area Program. Annual reports on critical area variances and enforcement would increase transparency and accountability at the state and local levels. The General Assembly recognized that local jurisdictions should have some

⁷⁰⁶ Anne Arundel County Government, Administrative Hearing Decision Archive, <http://www.aacounty.org/departments/admin-hearings/decision-archive/index.html> (last visited July 21, 2016).

⁷⁰⁷ AAC 2013–2014 *Litigation Reports*, *supra* note 596.

flexibility in developing their critical area programs.⁷⁰⁸ However, that flexibility should not undermine the public's ability to obtain basic information about critical area variances and enforcement. Annual reports would generate consistent and uniform information necessary to evaluate the state-wide implementation of the Critical Area Program.

Local jurisdictions should document circumstances in which potential applicants decide not to apply for a variance after consulting with county staff. The selected counties granted the vast majority of variance requests that they received. However, it is possible that upon consultation with county staff regarding their likelihood of success, some property owners decided not to submit an application. In Anne Arundel County, applicants must participate in a prefile process, during which the Office of Planning and Zoning holds a prefile meeting and makes recommendations regarding potential variance applications.⁷⁰⁹ Anne Arundel County documents those preliminary recommendations.⁷¹⁰ Other counties also indicated that staff may offer advice or recommendations to potential applicants, but provided no indication that those communications were documented in any way.⁷¹¹ Documenting preliminary communications and recommendations with property owners interested in obtaining variances could provide a better indication of whether the critical area requirements influence potential applicants' decisions to seek variances for development activities in shoreline areas.

E. Enforcement

Local jurisdictions should be more proactive in enforcing their critical area programs and ensure that penalties are substantial enough to deter critical area violations. Based on the Clinic's review of the selected counties, several jurisdictions investigate potential violations primarily in response to complaints. In response to the survey, the selected counties indicated that they will also initiate investigations based on staff observations. Local jurisdictions should take more proactive approach to identifying and remedying critical area violations. However, funding for additional staff may be necessary to implement this recommendation. For example, Kent County indicated that it does not have adequate funding to proactively seek out violations, and Anne Arundel County noted that its enforcement efforts do not include patrolling communities. Additionally, in an interview with the Clinic, Mr. Serey indicated that local enforcement could be improved with more state resources and funding for staff and education. Finally, according to the information the Clinic collected, some counties issued penalties as low as \$100 and \$125. Since penalties tend to deter violations when they are high enough to outweigh the economic gains that may be realized by violating the law,⁷¹² it seems unlikely that

⁷⁰⁸ MD. CODE ANN., NAT. RES. § 8-1806(b)(2).

⁷⁰⁹ Critical Area Program Surveys, *supra* note 570, at Anne Arundel County.

⁷¹⁰ Critical Area Program Surveys, *supra* note 570, at Anne Arundel County.

⁷¹¹ Critical Area Program Surveys, *supra* note 570, at Baltimore County, Kent County, Queen Anne's County, Worcester County.

⁷¹² See *supra* text accompanying note 605; see also U.S. Env'tl. Prot. Agency, *Policy on Civil Penalties*, EPA General Enforcement Policy # GM-21 (Feb. 16, 1984) available at <https://www.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf> ("If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance.").

imposing \$100 fines has much of an effect on deterring critical area violations. Thus, enforcement can also be improved if local jurisdictions set minimum penalty amounts that are likely to deter violations.

F. Education

Critical area education courses should include case law and legislative history of the Critical Area Program, if they do not already. Members of local planning commissions and Boards of Appeals must complete a critical area education course within six months of being appointed.⁷¹³ The course includes the proper standards for exceptions and variances.⁷¹⁴ The course should also include relevant case law and legislative history. This would allow the planning commissions and Boards to better understand the General Assembly's intent in enacting the Critical Area Program, the continuing struggle to define certain variance provisions, particularly the unwarranted hardship standard, and the degree to which local decision-makers must support their decisions to grant or deny a variance.

The Critical Area Commission and local jurisdictions should look for ways to better educate existing and prospective property owners about the Critical Area Program and need to protect the Chesapeake Bay and Atlantic Coastal Bays. In an interview with the Clinic, Mr. Serey recognized that local jurisdictions have accepted and incorporated the Critical Area Program into their decision-making processes. The current challenge is for state and local governments to collaborate on finding better ways to implement the program. Educating property owners, potential buyers, and real estate professionals about the Critical Area Program could support the jurisdictions' implementation efforts and build environmental consciousness about the importance of shoreline areas in protecting the Chesapeake Bay and Atlantic Coastal Bays.

⁷¹³ MD. CODE ANN., LAND USE § 1-206(a)(2) (West 2016).

⁷¹⁴ *Id.* § 1-206(a)(2)(ii).

VII. Historical Look of Coastline

A. Overview of GIS Project

Geographic information system (GIS) is a computer system that allows visual representation of information, provided that the data includes a location component.⁷¹⁵ Location information can include, but is not limited to, latitude and longitude, zip code(s), census tracts, and road names.⁷¹⁶ The data is compiled, typically in a spreadsheet or table, and is entered into the GIS program.⁷¹⁷ Once the data is entered, the information can be displayed visually on a map.⁷¹⁸ This visual representation of data is useful because it allows the user to display several data sets simultaneously.⁷¹⁹ This representation allows a user to better understand patterns and correlations between those data sets.⁷²⁰ GIS mapping also allows comparative analysis between different time periods by using historical and current data.⁷²¹ GIS also provides access to more in-depth data within the visual mapping.⁷²² By selecting a certain data point, many GIS programs will display a window with more in-depth information.⁷²³

Because environmental issues often involve complex data sets, GIS is an important tool for government agencies, advocacy organizations, and citizens working on those issues. For example, the National Center for Atmospheric Science uses GIS to map variations in weather patterns, temperature, carbon dioxide emissions, and even community data.⁷²⁴ The Maryland government also uses GIS to track impervious surfaces in the state, to map the Chesapeake Bay critical area, to track clean energy development, and to monitor stream health.⁷²⁵

The Environmental Law Clinic retained Washington College's GIS Program ("GIS Program") to map critical area variance applications from 2012 to 2014. The final product is an interactive web tool that uses a series of colored dots, or points, on a map of Maryland to show variance applications. These points can also display colors corresponding to the types of variance applied for. When the user selects a specific variance application, a window with more in-depth information appears. The window displays the property location, type of variance, structure, county treatment, etc. The GIS web tool also shows the three critical area land designations (RCA, LDA, IDA) overlaid on the variance application data.

⁷¹⁵ National Geographic Society, Encyclopedic Entry, GIS (geographic information system), <http://education.nationalgeographic.org/encyclopedia/geographic-information-system-gis/> (last visited Feb. 27, 2016).

⁷¹⁶ U.S. Environmental Protection Agency, Region 3, How We Use Data in the Mid-Atlantic Region, Geographic Information System (GIS), <http://archive.epa.gov/reg3esd1/data/web/html/gis.html> (last visited Feb. 27, 2016).

⁷¹⁷ Washington College, What is GIS, <https://www.washcoll.edu/centers/ces/gis/about.php> (last visited Feb. 28, 2016).

⁷¹⁸ National Geographic Society, *supra* note 715.

⁷¹⁹ *Id.*

⁷²⁰ *Id.*

⁷²¹ Washington College, *supra* note 717.

⁷²² National Geographic Society, *supra* note 715.

⁷²³ *Id.*

⁷²⁴ Nat'l Center for Atmospheric Sciences, GIS Program, Projects, <https://gis.ucar.edu/projects> (last visited Feb. 27, 2016).

⁷²⁵ MD iMap, Environment, <http://imap.maryland.gov/Pages/environment.aspx> (last visited Feb. 27, 2016).

The GIS Program also performed a Land Use Land Cover Analysis using historical land data to show how land uses in the Critical Area changed between 1995 and 2015. The GIS Program’s report is included as an Appendix, and the results of its analysis are viewable through the GIS web tool.

B. Selected Written Findings of GIS Project

The GIS Program provided the Clinic with a report summarizing the methodology and results of its land change analysis.⁷²⁶ The GIS report includes a brief summary of the land use category changes observed in each of the six counties. It also includes color maps of the land use categories in each county in 1995 and 2015, and maps showing where changes in the land use categories occurred in each county during the 20 year period.

The GIS report breaks down the percentage change in each of the land use categories for the critical area in each county. The Clinic used information from the report to produce the table below, which shows the difference in percentage of land in the critical area of each county recognized as developed in 1995 and 2015. Worcester County had the greatest increase, going from 19.04 percent to 31.40 percent (a 65 percent increase). Queen Anne’s County had the second greatest increase, going from 19.03 percent to 26.90 percent (a 41 percent increase). Anne Arundel County had the greatest decrease of land recognized as developed, dropping from 46.43 percent to 43.03 percent, or a 7 percent decrease.

County	1995	2015	Percentage Change
Anne Arundel	46.43%	43.03%	-3.40%
Baltimore	38.27%	37.94%	-0.33%
Kent	9.92%	12.56%	2.64%
Queen Anne’s	19.03%	26.90%	7.86%
St. Mary’s	12.54%	16.49%	3.95%
Worcester	19.04%	31.40%	12.36%

Table 5: Change in Developed Land Use Land Cover Category⁷²⁷

The percentage of land recognized as agricultural decreased in all of the selected counties. Queen Anne’s and Worcester Counties saw declines of 23 percent and 30 percent, respectively. The following table shows the difference in percentage of land in the critical area of each county categorized as agriculture land use land cover in 1995 and 2015.

⁷²⁶ Stewart Bruce, et al., *Maryland Critical Area Project Report: Land Use Land Cover Analysis & Parcel*, 9 (Sep. 2016) (attached Appendix).

⁷²⁷ *Id.* at 9.

County	1995	2015	Percentage Change
Anne Arundel	6.17%	4.56%	-1.61%
Baltimore	6.66%	3.31%	-3.36%
Kent	47.91%	41.27%	-6.64%
Queen Anne's	44.15%	34.09%	-10.06%
St. Mary's	36.30%	30.47%	-5.83%
Worcester	33.88%	23.61%	-10.28%

Table 6: Change in Agriculture Land Use Land Cover Category⁷²⁸

Land recognized as scrubland in Kent County's critical area increased by 177 percent between 1995 and 2015. In St. Mary's County, scrubland declined by 38 percent. The table below shows the difference in percentage of land in the critical area of each county recognized as scrubland in 1995 and 2015.

County	1995	2015	Percentage Change
Anne Arundel	1.64%	1.06%	-0.58%
Baltimore	3.10%	4.43%	1.33%
Kent	1.28%	3.54%	2.26%
Queen Anne's	3.30%	5.08%	1.78%
St. Mary's	2.82%	1.74%	-1.08%
Worcester	5.19%	4.70%	-0.49%

Table 7: Change in Scrubland Land Use Land Cover Category⁷²⁹

Between 1995 and 2015, land recognized as forest in Baltimore County's critical area increased by 20 percent. In Worcester County, forest in the critical area decreased by 9 percent during that time. The table below shows the difference in percentage of land in the critical area of each county recognized as forest in 1995 and 2015.

County	1995	2015	Percentage Change
Anne Arundel	39.91%	44.75%	4.84%
Baltimore	34.29%	41.26%	6.97%
Kent	36.32%	38.59%	2.27%
Queen Anne's	24.59%	25.38%	0.79%
St. Mary's	42.98%	42.72%	-0.26%
Worcester	39.73%	36.28%	-3.45%

Table 8: Change in Forest Land Use Land Cover Category⁷³⁰

Finally, St. Mary's County saw a 60 percent increase in critical area land recognized as wetland between 1995 and 2015. In Baltimore County, land recognized as wetland decreased by 28 percent during that time. The following table shows the difference in percentage of land in the critical area of each county categorized as wetland in 1995 and 2015.

⁷²⁸ *Id.*

⁷²⁹ *Id.* at 10.

⁷³⁰ *Id.*

County	1995	2015	Percentage Change
Anne Arundel	5.86%	6.60%	0.75%
Baltimore	13.32%	9.63%	-3.69%
Kent	4.58%	4.05%	-0.53%
Queen Anne's	8.93%	8.56%	-0.37%
St. Mary's	5.35%	8.56%	3.20%
Worcester	2.16%	4.06%	1.89%

Table 9: Change in Wetland Land Use Land Cover Category⁷³¹

The GIS Program concluded that “each county has experienced unique land use change over the 20 year period analyzed.”⁷³² Identifying the causes of land use change in each county was beyond the scope of the report.⁷³³ However, the varying nature and degree of land use change in each county suggests that further study of the factors influencing those changes may be warranted.⁷³⁴

C. Historical Look of Selected Counties' Coastline

The following maps were generated by the GIS Program as part of its report. The map for each county highlights the parts of the critical area that experienced a change in land use between 1995 and 2015. The GIS report includes two additional maps for each county showing the land use categories in the critical area in 1995 and 2015, respectively. Additionally, the GIS web tool accompanying this report allows users to examine the land use categories and changes for each county in greater detail.

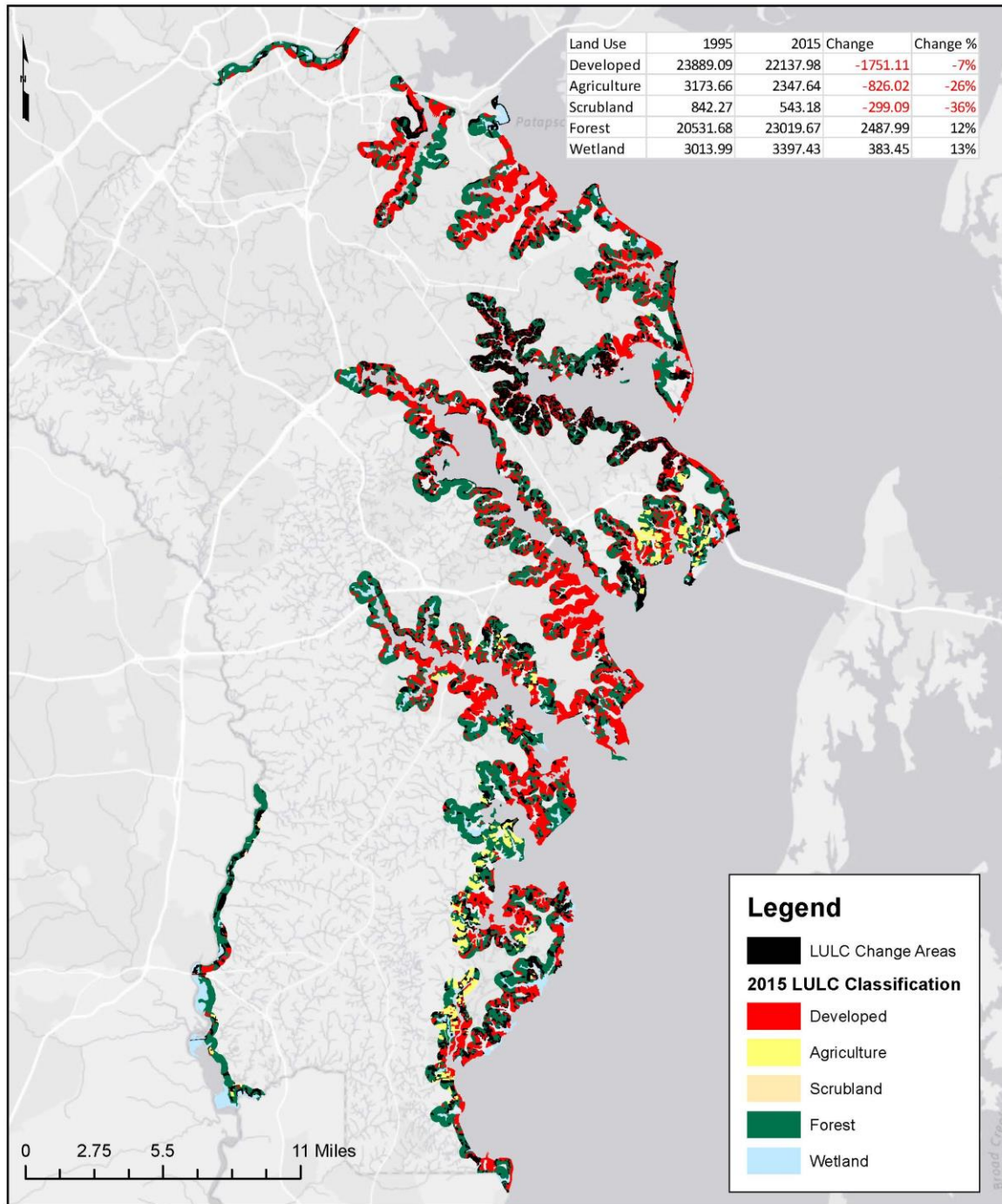
⁷³¹ *Id.*

⁷³² *Id.* at 11.

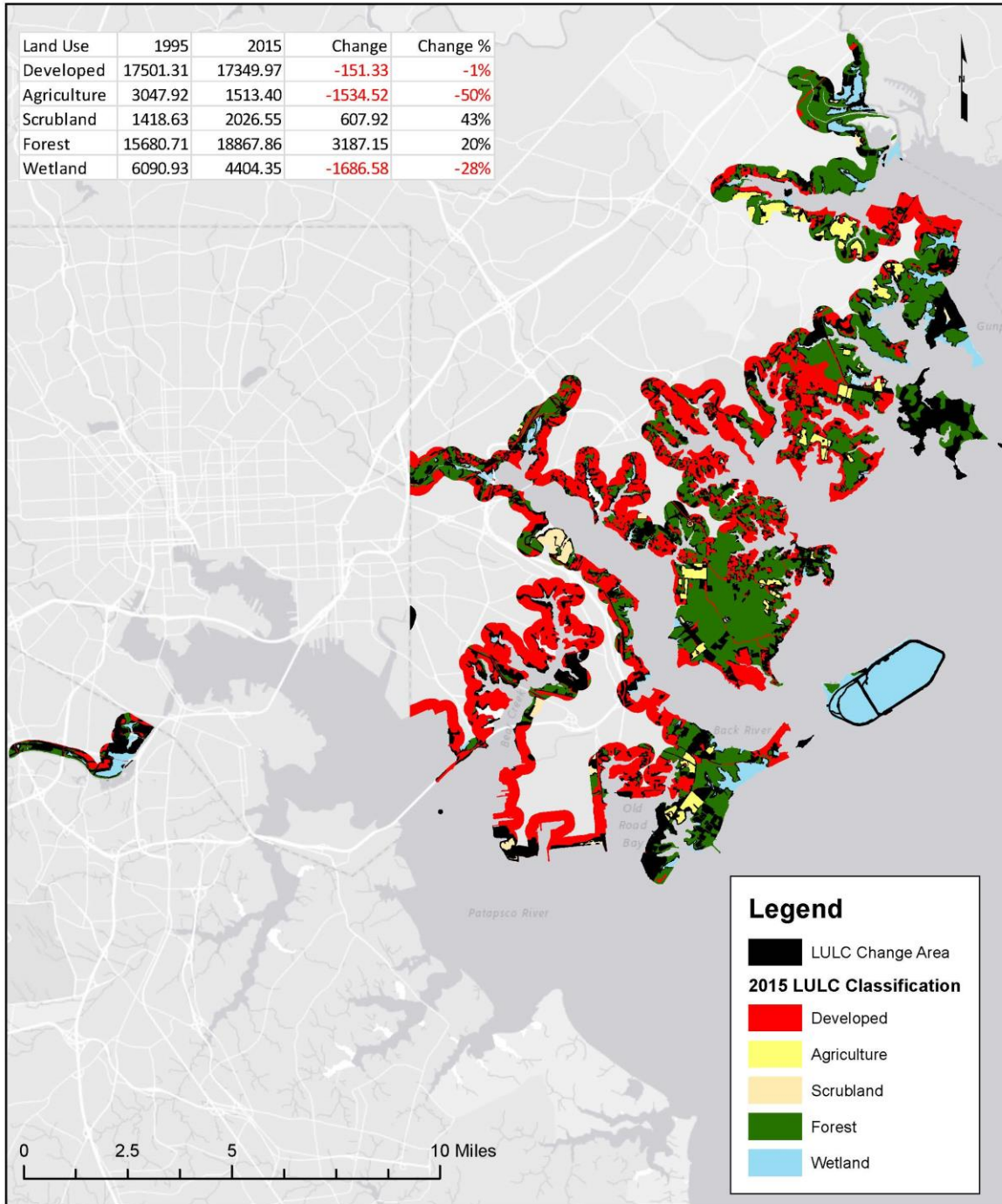
⁷³³ *Id.*

⁷³⁴ *Id.*

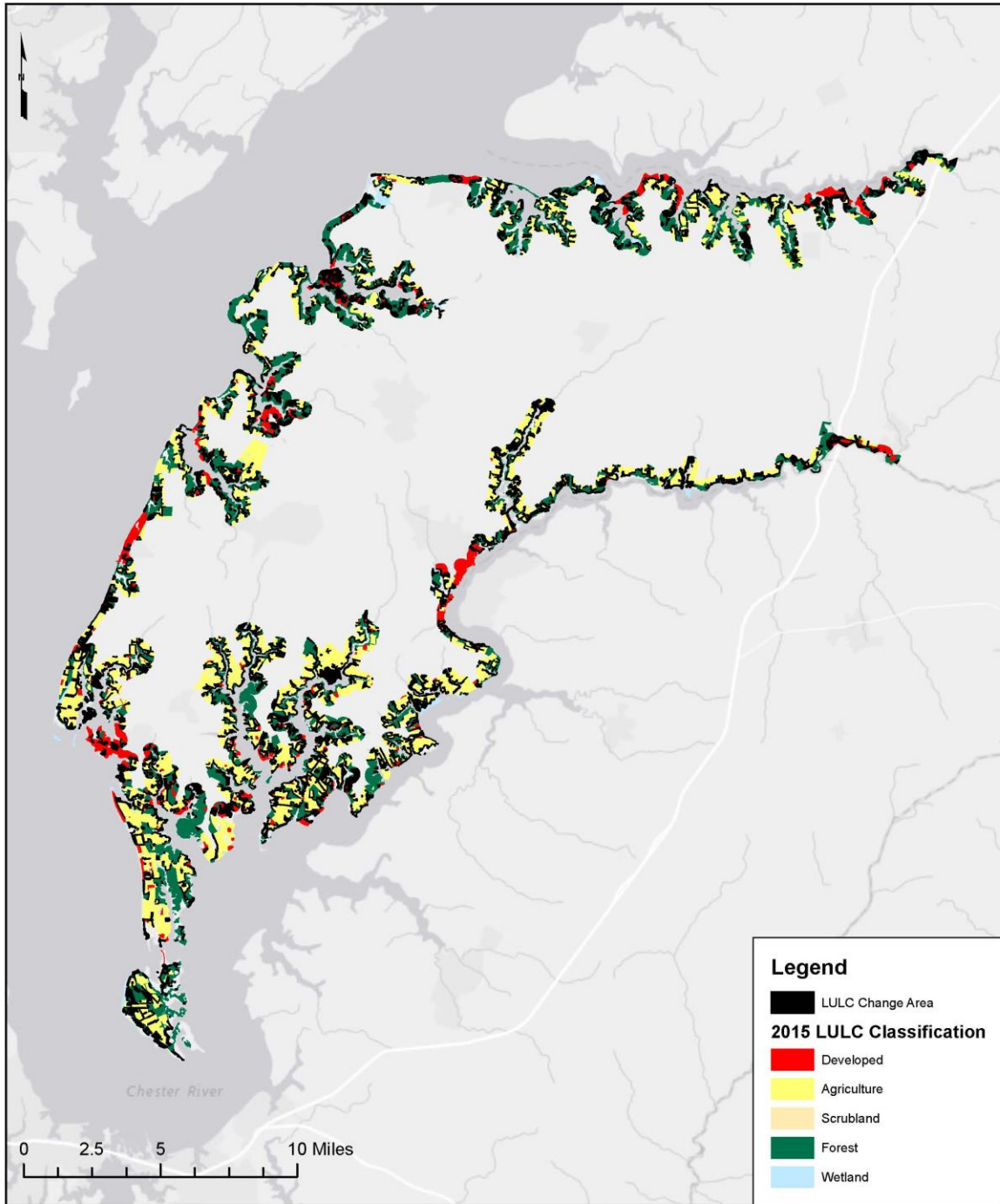
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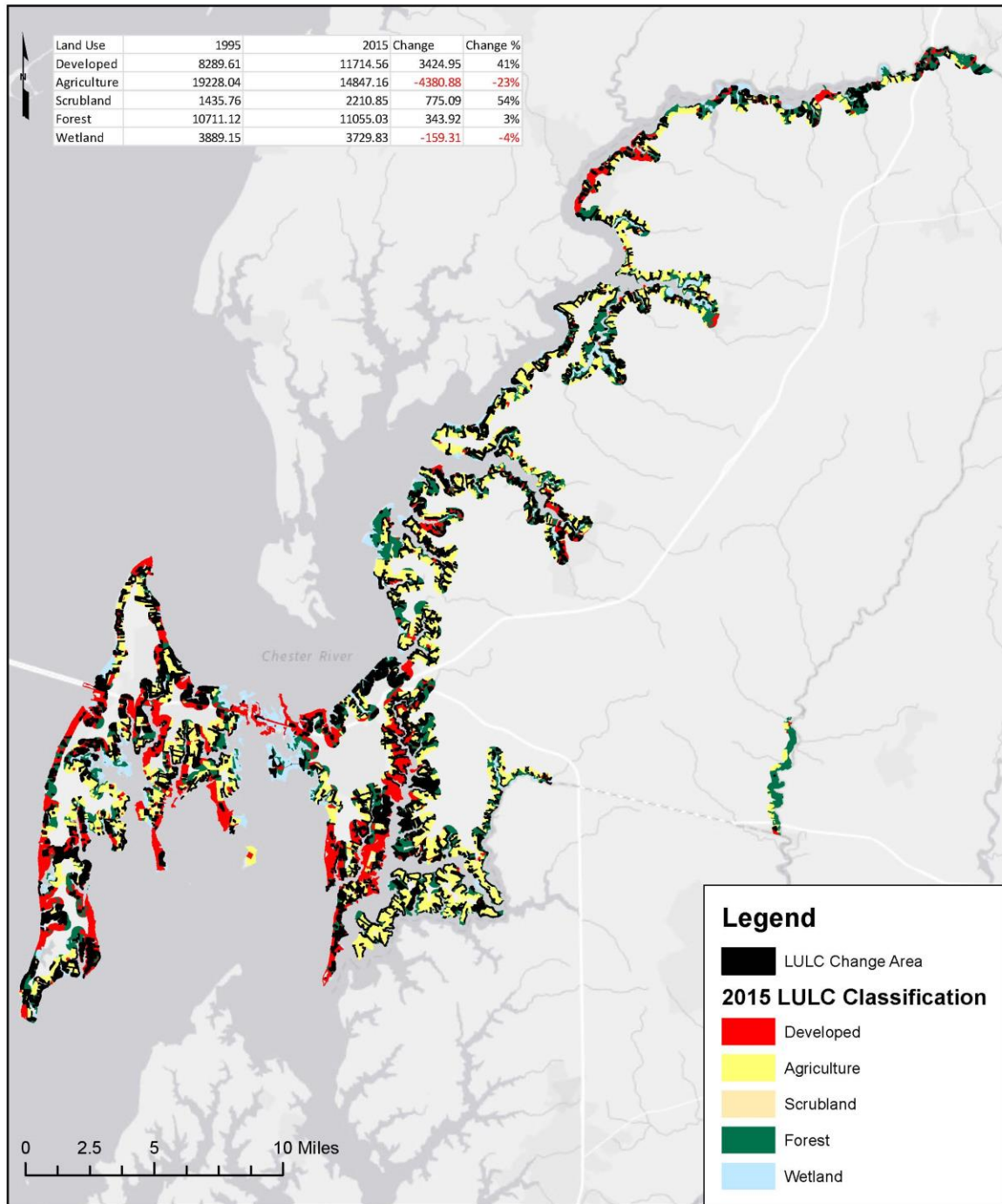
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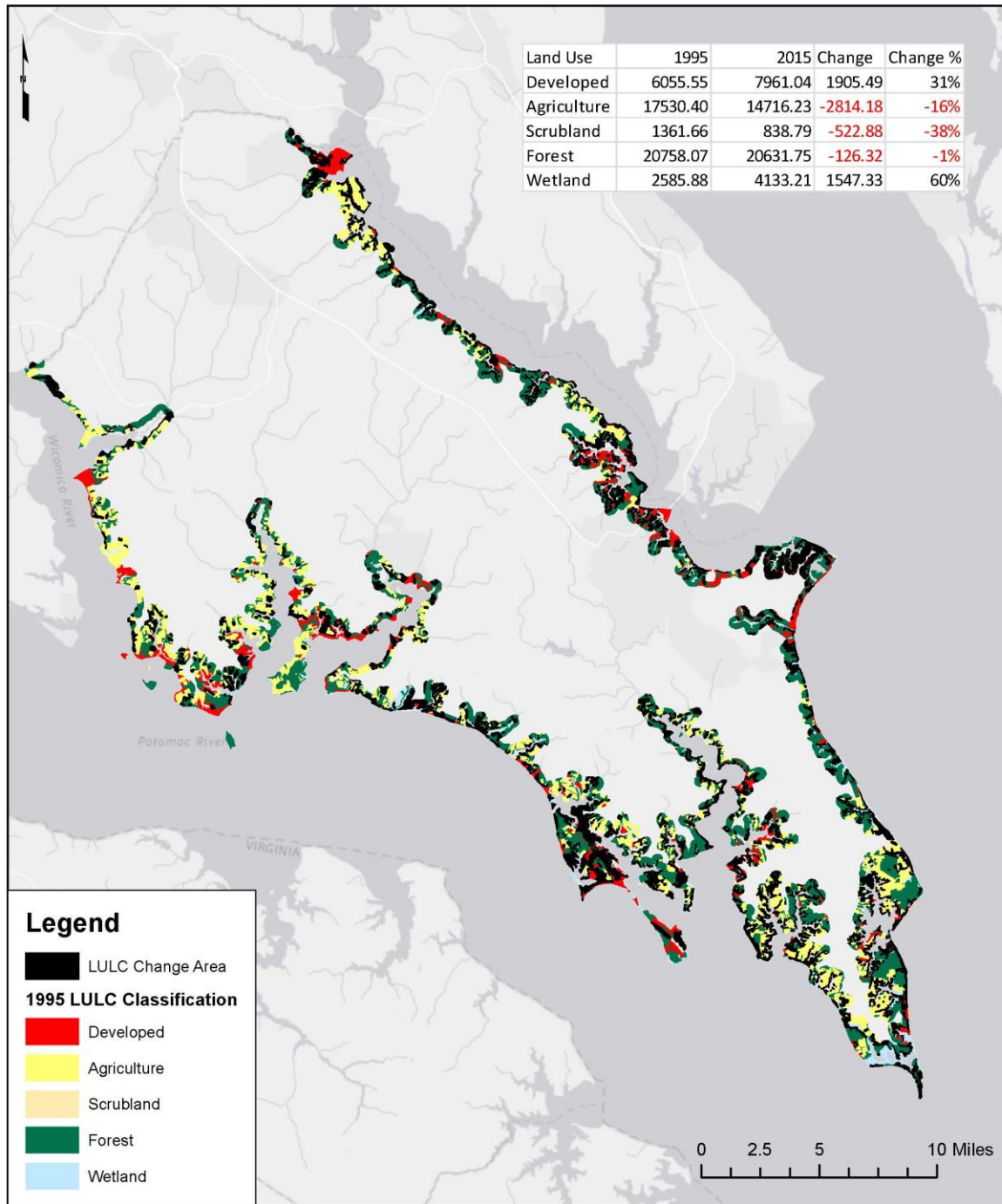
LULC Change Classification of Kent County



LULC Change Classification of Queen Anne's County



LULC Change Classification of Saint Mary's County



1995 LULC Classification of Worcester County

