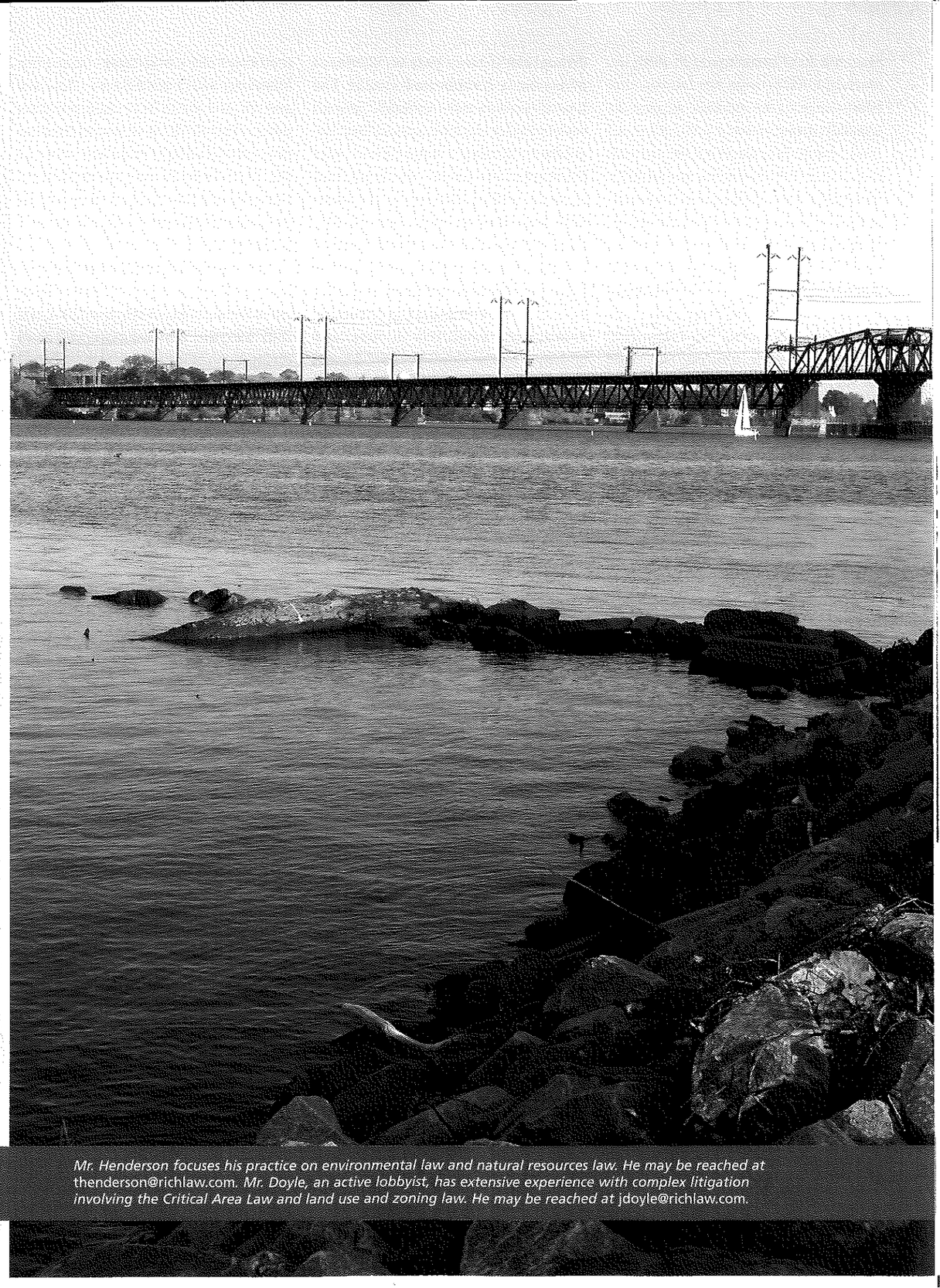
# Ever Expanding Reach of Critical Area Commission

By Timothy R. Henderson and James J. Doyle, III

In a non-descript two-story office building on West Street, about two miles outside of downtown Annapolis, is located a state commission that is for all intents and purposes the final authority over any development or disturbance in the 1,000-foot swath of land adjacent to the Chesapeake Bay and the Atlantic Coastal Bays and their tributaries. Technically part of the Department of Natural Resources, this Critical Area Commission ("CAC") is essentially independent. And although its office building may be unimpressive, the powers and duties granted it by the General Assembly in 1984 and a series of Amendments since, are not. Md. Code Ann., Nat. Res. §§ 8-101, et. seq. (the "Critical Area Law" or the "Law"). The CAC has become the final arbiter over land use in the Critical Area. Local officials are not pleased by the secondary role they now play to the CAC, and developers and private landowners increasingly find themselves caught in the middle of a state vs. local government power struggle.



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Since the Law's enactment in 1984, the reach of CAC powers has increased at every turn. Part of this is due to legislative responses by the General Assembly to Maryland appellate court decisions; and part to the CAC's proclivity for reading its statutory authority broadly in the absence of clear regulatory criteria. Over its nearly a quarter century of existence, the CAC has become increasingly focused on micro-managing the decisions of local governments regarding specific projects. No clear set of regulatory criteria exists to provide a roadmap for all stakeholders (e.g. developers, landowners, local zoning and planning staff, environmental groups and CAC staff). As a result, the CAC has lost track of the overall goals of the Critical Area Law, to minimize pollutant discharges and improve the water quality of the Chesapeake and Atlantic Coastal Bays.

## Background

The goals of the Law are laudable: "to establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity"; and "to implement the Resource Protection Program on a cooperative basis between the State and affected local governments...." *Id.* at § 8-1801. The CAC membership is expansive. It is comprised of 29 members, appointed by the governor, who are residents of 16 counties across the state and the City of Baltimore, including Secretaries of a number of state agencies and private citizens representing diverse interests. *Id.* at § 8-1804. Yet, it has a rather small staff of natural resource planners, legal counsel and support personnel.

Having the CAC and local jurisdictions share responsibilities in regulating the use of land and water throughout a large part of Maryland makes for a complicated statute. The Law's jurisdiction extends to all waters under the Chesapeake Bay, the Atlantic Coastal Bays and their tributaries affected by the tides, and all lands within 1000 feet of the mean high tide line at these waters. The Critical Area covers 16 of the 23 counties of Maryland, and grants these jurisdictions "primary responsibility for developing and implementing a program, subject to review and approval by the Commission." *Id.* at § 8-1808(a)(1). There are three Critical Area zones: (1) Intensely Developed Areas (IDA), which includes commercial, institutional, industrial, and developed land uses, (2) Limited Developed Areas (LDA), which includes low or moderate intensity use, and (3) Resource Conservation Areas (RCA) characterized by wetlands, forests, and fields. The intent is to concentrate intensive development toward those areas that have received IDA classification.

The local "program" must minimize adverse impacts on water quality caused by pollutants discharged from structures and run off from surrounding lands in order to conserve fish, wildlife and plant habitat, and to establish land use policies for development in the Critical Area which accommodate growth. They include a map showing the Critical Area and buffer in the jurisdiction, a comprehensive zoning map overlay depicting the type of Critical Area, amended provisions of the jurisdiction's subdivision regulations and zoning ordinances, provisions addressing grandfathering of development at the time of program adoption, and the establishment of buffer areas along shorelines. Development in the buffer is restricted to very few water dependent uses and farming activities. The local programs also include variance provisions, a method of correcting mapping mistakes, and a method to allow for growth, and are to be revised every six years. The CAC reviews individual projects including any subdivision, or site plan "wholly or partially within the Critical Area," unless the scope of the project is relatively small. *Id.* at § 8-1809(g).

Not surprising, implementation of this complex law has been controversial. By 2008, the CAC, its staff and the General Assembly had created a state land use control program over which local governments exercise increasingly less control. The following examples highlight how the implementation of the law has strayed dramatically from the original goal of having the CAC serve in an advisory, quasi-legislative role.

## Variances and Amendments

The issuance or denial of a variance has been particularly a contentious area. The Maryland appellate courts decided several cases under the Critical Area Law as it existed before 2002. In *Belvoir Farms v. North*, 355 Md. 259 (1999) the Maryland Court of Appeals determined that the "unwarranted hardship" standard was less restrictive than the constitutional "taking" standard and similar to the denial of "reasonable and significant use" of the property. Subsequently, the Court held in *White v. North*, 356 Md. 31 (1999) that when determining whether to grant a variance in the Critical Area, the local jurisdiction should consider "unwarranted hardship" as the key determination. In *Mastandrea v. North*, 361 Md. 107 (2000), the Court determined that the grant of the variance depended on whether the landowner would be denied reasonable and significant use of the buffer area, rather than use of the entire lot. It was the buffer area itself that the Court would look to, even if a reasonable and significant use of the entire lot remained available.

In response to these decisions, the General Assembly amended the Law in 2002 that greatly proscribed the ability of the local jurisdiction to grant a variance. The amendment directed local variance provisions to require (1) an applicant to satisfy each and every variance factor; (2) a finding that, without a variance, the landowner would be deprived of a use permitted to others in the Critical Area; and (3) that the local jurisdiction must consider the reasonable use of the entire parcel, not the buffer area only. However, the amendment applied prospectively, having no effect on decisions submitted for judicial review before June 1, 2002.

Only two years later, in 2004, the General Assembly again amended the Law, in part to overturn *Lewis v. DNR*, 377 Md. 382 (2003). In *Lewis*, the Wicomico Board of Appeals denied a variance request to construct a hunting camp in the Critical Area buffer (which extends 100 feet from any tidal waterway, wetland or tributary). COMAR 27.01.09.01. Any new development of impervious surfaces that are not water-dependent are banned; hence, variances are necessary to build an impervious structure in the buffer.

The Wicomico County Board of Appeals had denied Lewis's application and concluded that Lewis would not suffer an unwarranted hardship because he would continue to enjoy reasonable and significant use of the property as a whole without the requested variance. *Lewis*, 377 Md. at 418-19. The Maryland Court of Appeals disagreed and confirmed its previous decision in *Belvoir Farms* stating that the unwarranted hardship standard is equivalent to the denial of reasonable and significant use of the property as to the buffer area only, not the entire property. *Id.*, 377 Md. at 419. The Court also rejected the board's finding that the variance request was a "self-induced hardship" because Lewis had begun construction of the hunting camp before applying for a variance, concluding that even if Lewis had not commenced the construction of the hunting cabins, he would have still needed to seek a variance. *Id.*, 377 Md. at 424.

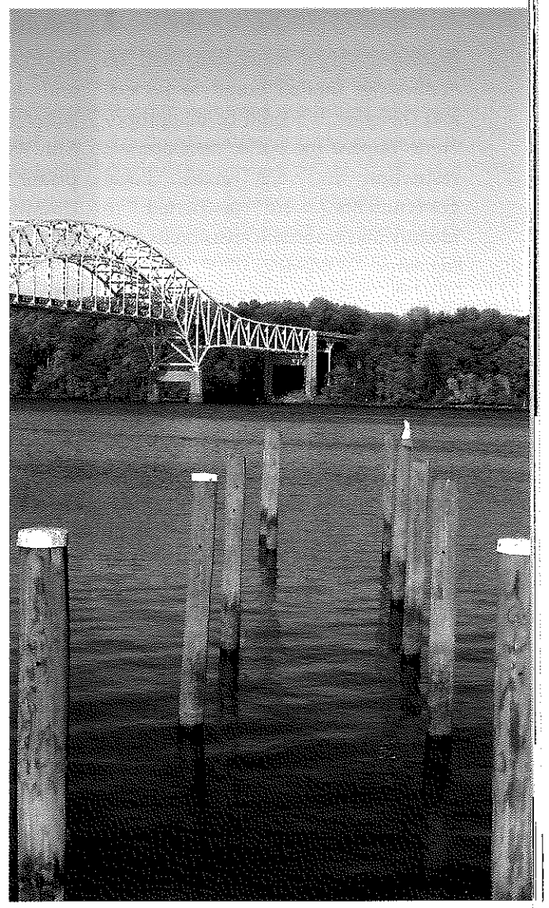
Finally, the Court rejected CAC's argument, in that the decision maker should not focus on the specific project subject to the variance application, but rather on the general effect that many such structures on many properties could have on the Critical Area. The Court reasoned that "once the Board accepts that the cumulative impacts of further development within the Critical Area reaches a point where it would harm the environment, no variance could be granted in the future." *Id.*, 377 Md. at 428-29.

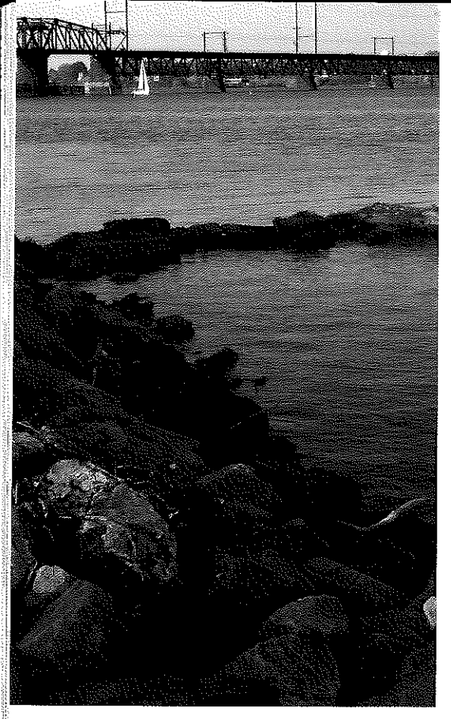
The General Assembly disagreed and amended the variance procedures in the Law. The 2004 amendment again emphasized that an "unwarranted hardship" for a variance means that without a variance an applicant would be denied reasonable and significant use of the *entire* parcel for which the variance is requested, and the local jurisdiction must find that a variance applicant has satisfied each of the variance provisions. It provided that a local jurisdiction shall presume that a specific development activity in the Critical Area for which the variance is required does not conform to the general purpose and intent of the requirements of the Law. Also, in determining whether a variance request is based on a self-created hardship, the Amendment directed that the reviewer may consider if the variance applicant had begun construction before filing an application.

The latest amendment in 2007 further reduces local jurisdictions' discretion by making *all* provisions of the Law part of the local program, even the ones not set forth in the local program. The 2007 Amendment also made the 2002 and 2004 amendments retroactive.

## Buffer Exemptions

The Critical Area Law and regulation acknowledged that in 1984 the shoreline of heavily developed areas (i.e.





Baltimore City's waterfront) had no "buffer" or limited buffer to protect, and therefore, it would be inappropriate to impose the buffer development restriction in such areas. Local governments were instructed to identify and map such areas on its zoning maps. COMAR 27.01.09.01(B)(8).

In the last five to eight years, the CAC has altered its view of what buffer exempt language to require of local programs. Original local program buffer exemption provisions approved by the CAC in the 1980s and 1990s typically contained general instructions on how to identify the portion of the buffer which pre-Critical Area Law development had impacted. The modern era CAC (with no change to its underlying authority to do so) has determined that local programs had to dictate a minimum setback within the buffer.

For example, in 2005, the CAC directed Calvert County to impose a 30-foot minimum setback in its buffer exemption areas, regardless of development history. This makes little sense. It is impossible for some pre-existing developments to meet a 30-foot minimum setback requirement, and is contrary to the entire purpose of designating buffer exemption areas.

## Growth Allocation

To accommodate growth, the Law gave each county a growth allocation for converting RCA areas to either LDA or IDA. It acknowledged that some counties had far more undeveloped land which fit the classification of RCA than others and that it would be appropriate to give the less developed counties a greater potential for growth. Therefore, it set the allocation equal to 5% of a county's portion of RCA designated land.

Recently, a number of counties have bumped up against their growth allocation limit and, not surprisingly, disputes among the counties, the CAC and developers have increased. *See Talbot County v. Town of Oxford*, 177 Md. App. 480 (2007) (finding appropriate the CAC's denial of Talbot County's revisions to the Critical Area allocation).

## Mapping Mistakes and Amendments

Another flash point of controversy which has plagued the Critical Area Program is disputes over the original designations of RCA, LDA and IDA areas. The typical dispute arises when the landowner or developer asserts a mistake in RCA designation for property with pre 1984 structures, roads or other impervious surfaces. In *North v. Kent Island Limited Partnership*, 106 Md. App. 92 (1995), the property owner wished to have a portion of its property in the Critical Area changed from LDA to IDA. The applicant contended that there had been a mistake in the original mapping by the County. The County Planning Commission found that there had indeed been a mistake and recommended amendment.

Subsequently, the CAC determined that there had not been a mistake and denied the amendment. Upon submission for appellate review, the Court held that because the CAC was not a "state level zoning board," the CAC has no authority as "an oversight Committee" to determine whether there was an actual mistake in the original zoning. It found persuasive the fact that the General Assembly had discarded the idea of making CAC a permitting agency for all projects in the Critical Area, stating "such a role was undesirable because the CAC would become tangled in collisions with local agencies and developers over the specifics of particular projects." Thus, the Court held that once the local jurisdiction determined that there was a mistake in the original zoning, the sole issue before the CAC was simply whether the property as rezoned satisfied the definition of IDA as set forth in the criteria. *North*, 106 Md. at 104-08.

## Habitat Protection

The Law directs the CAC to protect plant and wildlife habitat within the Critical Area; the regulations devote a fair amount of print on habitat protection. COMAR 27.01.09. However, the regulations lack specificity, and rely on references to guidelines which lack precision. As a result, there is no predictability in how the particular CAC staff member reviewing a particular project will address or incorporate habitat protection issues. It is a moving target which frustrates developers, landowners, local officials and citizen groups alike.

One good example of the problem is illustrated by the CAC and local government efforts to identify and protect forest interior dwelling species ("FIDS") habitat. The CAC 2000/2001 guidance states that a FIDS habitat is present if one's property contains forest with 100 or more contiguous acres or contains riparian forest areas with a width of at least 300 feet. *A Guide to the Conservation of Forest Interior Dwelling Birds in the Chesapeake Bay Critical Area* (2000/2001). The regulation, however describes these as only examples of FIDS habitat, without any further elaboration which implies the area could be smaller or larger. COMAR 27.01.09.04(C)(2)(a)(iii) and (a)(iv). County officials attempting to interpret the requirement naturally consult with the CAC staff, who as a result are given veto power over a project. Often lost in such analysis is whether the forest actually serves as habitat for the birds of concern.

## Tributary Streams

The act of designating the buffer becomes a point of controversy on every project. The typical local program directs that the buffer extends 100 feet from the edge of the mean high tide line of "tidal waters, tributary streams, and tidal wetlands." COMAR 27.01.09.01(C)(1). Under the law this should only encompass tidally influenced streams, which by definition must flow throughout the year.

The CAC regulations define tributary to include "intermittent" streams which by definition are freshwater. COMAR 27.01.09.C(1) requires "a minimum buffer landward from the mean high water line to tidal waters, tributary streams and tidal wetlands," meaning that the buffer only extends from the mean high water line of a tributary stream, which are the only streams that are affected by the tide. Tributary streams are "those perennial and intermittent streams in the Critical Area which are so noted on the most recent U.S. Geological Survey 7-1/2 minute topographic quadrangle maps (scale 1:24,000) or on more detailed maps or studies at the discretion of the local jurisdictions." COMAR 27.01.01.01 (B)(72).

This regulation establishes a clear directive to local government officials to rely on the U.S.G.S. map, and only if it so chooses, to rely on another map. As with habitat designations, however, county officials approach tributary designations reluctantly due to a perceived lack of expertise. CAC staff has no reluctance jumping in to fill the void and render site specific determinations of what are tributaries, or intermittent streams. County officials typically defer, regardless of what the U.S.G.S. maps show.

## Conclusion

In its original 1984 form, the Critical Area Law clearly tipped the balance of project by project decision-making authority to local governments. Recent amendments have altered that balance in the area of granting variances. These amendments also appear, in our experience, to have emboldened the CAC and its staff to become increasingly involved in the day to day administration of local Critical Area programs in areas such as buffer exemptions, mapping mistake determinations, tributary stream designations and habitat protection area designations.

The net effect, in our view, is that the CAC has been diverted from achieving the primary mission given to it—the protection and improvement of water quality in the Bay (and the Atlantic Coastal Bays). Simply stated, "[n]ew development is increasing nutrient and sediment loads at rates faster than restoration efforts are reducing them." EPA Office of Inspector General, *Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay*, Report No. 2007-P-00031 (September 10, 2007).

The General Assembly in 1984 pointedly chose not to create a state level zoning board and sought to minimize the potential of the CAC skirmishing with local agencies and developers over particular projects. Nevertheless, the CAC is making decisions in a 1,000-foot swath throughout 16 Maryland counties based on subjective application of loosely drawn guidelines, and on an individual project basis rather than on a program wide basis. New legislation, or at a minimum, precisely drawn regulatory criteria, is needed to clarify the powers of the CAC, and restore the balance between county and state oversight. Absent such changes, every development in the Critical Area will continue to run the gauntlet of unpredictable requirements whose interpretation will vary depending on the individual CAC staff or local zoning and planning official involved.