

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE
Revised

House Bill 1253

(The Speaker, *et al.*) (By Request – Administration)

Environmental Matters

Education, Health, and Environmental Affairs

Chesapeake and Atlantic Coastal Bays Critical Area Protection Program -
Administrative and Enforcement Provisions

This Administration bill makes several changes to the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program. In general, the changes • provide greater authority to the Critical Area Commission; • update the basic components of the program, including the Critical Area boundary; • enhance buffer and water quality protection; • coordinate new development more closely with growth management policies and other environmental protection/planning processes; and • strengthen enforcement and variance provisions.

The bill generally takes effect July 1, 2008. The boundary provisions take effect 28 months after the State Base Map Project is completed.

Fiscal Summary

State Effect: The Critical Area Commission and other affected State agencies could handle the bill's changes with existing resources, including any additional workload for the Judiciary. The bill's enhanced enforcement provisions and the bill's changes to the licensing/registration statutes applicable to home builders, home improvement contractors, and tree experts are not anticipated to significantly affect State finances or operations.

Local Effect: Potential increase in local expenditures for program administration and enforcement. Potential increase in local fine revenues due to the bill's enhanced enforcement provisions. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). Legislative Services concurs with this assessment. (The attached assessment does not reflect amendments to the bill.)

Analysis

Bill Summary: The bill's major changes are described below.

Commission Authority to Adopt and Amend Regulations

The bill provides explicit authority to the commission to adopt and amend specified regulations to administer and enforce the program. The bill specifies parameters for the commission's regulatory authority, including the establishment of comprehensive standards and procedures for buffers, mapping, development, water-dependent facilities, enforcement, growth allocation, the conservation and protection of flora and fauna, and variances, among others. The regulations must provide flexibility wherever possible in order to accommodate variations among local programs.

Update Basic Components of State and Local Programs

The bill requires the Department of Natural Resources to develop a new Critical Area boundary as part of the ongoing State Base Map Project, subject to specified requirements. Once complete, copies are to be provided to each local critical area program. Each local program is required to adopt an amended map within 24 months or, with commission approval, as part of the six-year review of the local program that is required under current law. The Critical Area boundary is to be updated at least once every 12 years. Local updates are to be completed as part of the six-year review of the local program. The bill establishes provisions relating to the transition to the new map. Among other things, the bill grandfathers property that is determined to be in the Critical Area as a result of the new map under specified conditions.

Local programs must follow the State minimum requirements for all elements of their programs, whether or not they have formally adopted those requirements into their local codes. With the commission's approval, a local jurisdiction may establish procedures for the granting of an administrative variance. Local programs must include provisions for bringing specified grandfathered lands into conformance with the program, and must include procedures that are to be approved by the commission and that assure that those lands are brought into conformance with the program to the extent possible. The bill also authorizes the commission to amend the criteria for program development and approval.

The bill extends the 90-day clock for the commission's review of program amendments to 130 days. The bill also extends the timeframe for the commission to send notice of receipt of specified applications.

The commission must receive written notice of local decisions regarding project approvals or denials in accordance with local procedures approved by the commission.

The bill establishes specified reporting requirements for local jurisdictions. The bill also codifies current regulations with respect to various definitions.

Enhance Buffer and Water Quality Protection

The bill recasts current limits for "impervious surfaces" in terms of "lot coverage" so as to allow for technological improvements in paving materials while generally maintaining the current ceilings on development. Under the bill, "lot coverage" means the percentage of a total lot or parcel that is (1) occupied by a structure, accessory structure, parking area, driveway, walkway, or roadway; or (2) covered with gravel, stone, shell, impermeable decking, a paver, permeable pavement, or any manmade material. The term includes the ground area covered or occupied by a stairway or impermeable deck. The term does not include a fence or wall that is less than one foot in width that has not been constructed with a footer, a walkway in the buffer or expanded buffer, including a stairway, that provides direct access to a community or private pier, a wood mulch pathway, or a deck with gaps to allow water to pass freely.

In the buffer, lot coverage may not exceed the minimum amount necessary for water-dependent facilities, except under specified conditions.

Unless otherwise provided by a local jurisdiction, lot coverage in a subdivision approved after specified dates may not exceed 15%; however, the total lot coverage on an individual lot one acre or less may exceed 15%.

With respect to the changes regarding lot coverage, the bill establishes grandfathering provisions for specified lots and parcels legally developed before the bill's effective date; improvements on individual lots that are already in the pipeline; and specified large scale development projects already in the pipeline.

Current *guidelines* for locating new Intensely Developed Areas (IDAs) or Limited Development Areas (LDAs) are modified to become *standards*. The bill also establishes a standard for locating new IDAs and LDAs in a manner that minimizes their impacts to the defined land uses of the Resource Conservation Area (RCA). With respect to some standards, a local jurisdiction is authorized to use a different standard under specified conditions.

Except under specified conditions, with respect to an application for subdivision or site plan approval within the RCA that does not involve the use of growth allocation, the minimum buffer is 200 feet from tidal waters or a tidal wetland and 100 feet from a tributary stream. The new buffer provisions do not apply if an application is submitted before July 1, 2008 and legally recorded by July 1, 2010.

Shore erosion control projects must be nonstructural except under specified conditions.

Coordinate Growth Allocations with Growth Management Policies and Other Environmental Protection and Planning Processes

The bill specifies several factors the commission must consider in reviewing map amendments or refinements involving the award of growth allocation. Among other things, the commission must consider the consistency with the local comprehensive plan, consistency with specified growth management policies, consistency with various environmental protection policies, and specified environmental impacts. The bill provides that these consideration must be a part of each growth allocation determination made by the commission starting July 1, 2008.

Strengthen Enforcement and Variance Provisions

The bill provides the chair of the commission with the authority to prosecute or sue violators and to bring an action against a person who clears or cuts trees in violation of the law or a local program. A person who violates the Critical Area law is guilty of a misdemeanor and on conviction is subject to a fine of up to \$10,000 and/or imprisonment for up to 90 days, with costs imposed in the discretion of the court. The bill establishes a three-year statute of limitations for a criminal prosecution or a suit for a civil penalty.

The bill *requires* local jurisdictions to consider certain factors when determining the amount of the penalty authorized under current law (up to \$10,000) to be assessed. In addition to specified items that local jurisdictions are currently *authorized* to consider, a local jurisdiction must consider the cost of restoration and mitigation.

The bill requires local programs to include specified *administrative* enforcement procedures. Among other things, the procedures must provide that • each violation constitutes a separate offense; • each day is a separate offense; • for each offense, a person is subject to separate fines, orders, sanctions, and other penalties; • the local jurisdiction must impose the amount of the penalty; • satisfaction of specified conditions must be a condition precedent to the issuance of any permit, approval, variance, or special exception; and • unless an extension is appropriate, within 90 days of the issuance of a permit, approval, variance, or special exception, any required mitigation must be

completed. The bill provides for local variation if local requirements are at least as stringent as those required by the regulations adopted by the commission.

The bill provides right-of-entry authority to local authorities to identify or verify suspected violations, restrain development activities, or issue citations, subject to specified procedures. If entry is denied, the local authority may seek an injunction.

A local authority that identifies a violation is required to take enforcement action. Appropriate restoration and mitigation must be required, and in some cases, a bond or other financial security is required.

The commission must notify the Maryland Home Improvement Commission, the Home Builder Registration Unit in the Office of the Attorney General's Consumer Protection Division, or DNR of specified contractors under their respective jurisdictions who violate the Critical Area law. These contractors are subject to denial of or administrative action against their licenses or registrations. The bill also modifies the definition of "home improvement" under the professional licensing statutes applicable to home improvement contractors to include a shore erosion control project for a residential property.

The bill *requires* local jurisdictions to consider specified information if a request for a variance is based on conditions or circumstances that are the result of actions by the applicant.

Within 10 working days after a written decision regarding a variance application is issued, the commission must receive a copy of the decision from a local jurisdiction. In addition, a local jurisdiction may not issue a permit for the activity that was the subject of the variance application until the applicable 30-day appeal period has elapsed.

The bill establishes several provisions relating to "after-the-fact" variances. In general, a development activity commenced without a required permit, approval, variance, or special exception is a violation, and a local jurisdiction may not accept an application for a variance to legalize a violation until a notice of violation, including a penalty assessment, is issued. A violator may contest the violation and if found responsible, pay twice the amount of the assessment plus hearing and mitigation costs. Once all penalties and mitigation/restoration activities have been achieved, the application for a variance could be considered.

A local jurisdiction may not issue a permit, approval, variance, or special exception unless the applicant has

- fully paid all administrative, civil, and criminal penalties imposed;
- prepared a locally approved restoration or mitigation plan; and
- performed the abatement measures in the approved plan.

The bill requires a local jurisdiction to process an application for a variance regarding a parcel or lot that is subject to a current violation in accordance with the administrative enforcement procedures described above.

Current Law:

Program Overview

Chapter 794 of 1984 established the Chesapeake Bay Critical Area Protection Program in order to minimize damage to water quality and wildlife habitat by fostering more sensitive development activity along the shoreline areas of the Chesapeake Bay and its tributaries. The three goals of the program include the protection of water quality; the conservation of habitat; and the accommodation of future growth and development without adverse environmental impacts.

The law identified the Critical Area as all land within 1,000 feet of the mean high water line of tidal waters or the landward edge of tidal wetlands and all waters of and lands under the Chesapeake Bay and its tributaries. The 1,000-foot area was delineated on Maryland's 1972 State Wetlands Maps. Local governments then transferred the Critical Area boundary line to their own maps. In 2002, the law was expanded to include the State's coastal bays. Under current law, the 1,000-foot wide Critical Area encompasses approximately 680,000 acres (or roughly 11% of the land area in the State) and spans 64 local jurisdictions (16 counties, Baltimore City, and 47 other municipalities).

The 1984 legislation also created a statewide Chesapeake Bay Critical Area Commission (now called the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays) that oversees the development and implementation of local land use programs dealing with the Critical Area. Each local jurisdiction is charged with the primary responsibility for development and implementation of its own local program; that local authority, however, is subject to commission review and approval.

The 100-foot Buffer

Viewed as particularly sensitive were the "buffer areas" falling within 100 feet of the shoreline. Because the unique and critical environmental functions of these buffers were regarded as compromised by clearing and construction, their protection was considered a cornerstone of the program. Accordingly, the criteria of the commission require that a forested 100-foot buffer be established or maintained adjacent to tidal waters, tidal wetlands, and tributary streams. There are a limited number of circumstances where the program allows some disturbance within the buffer, such as water-dependent structures or activities that must be located within the buffer because of their function.

Local Programs

At a minimum, a program sufficient to meet the goals of the Critical Area law includes:

- a map designating the Critical Area in a local jurisdiction;
- a comprehensive zoning map;
- as necessary, new or amended provisions of specified regulations, plans, enforcement provisions, and, as appropriate, grandfathering provisions;
- provisions requiring project approvals to be based on findings that meet specified standards;
- provisions to limit the amount of land covered by specified impervious surfaces and to require or encourage cluster development;
- establishment of buffer areas along shorelines;
- requirements for minimum setbacks for structures and septic fields along shorelines;
- designation of shoreline areas suitable for specified uses;
- provisions related to harvesting of timber;
- provisions establishing the applicability of specified water pollution controls;
- provisions for reasonable accommodations in policies or procedures when the accommodations are necessary to avoid discrimination on the basis of physical disability;
- provisions for granting a variance to the local program; and
- penalty provisions that provide that a person who violates the law is subject to a fine not exceeding \$10,000.

Current law requires local governments to review their local programs comprehensively every six years. In addition, local jurisdictions are authorized to propose program amendments and program refinements subject to specified requirements. In general, zoning map amendments may be granted by a local approving authority only on proof of a mistake in the existing zoning. For proposed program amendments, a commission panel must hold a public hearing and must act on the proposed amendment within 90 days or it is deemed approved.

Land Classifications within the Critical Area

Land within the Critical Area is mapped and classified based on land uses that existed at the time the local program was adopted. The Critical Area law uses three land use designations:

- IDAs, areas of concentrated development where little natural habitat occurs;
- LDAs, areas in which development is of a low or moderate intensity; and
- RCAs, areas characterized by natural environments or by resource-utilization activities.

Certain provisions of the Critical Area criteria apply throughout the Critical Area and are applied uniformly regardless of the Critical Area designation. Other provisions are specific to the land classifications of IDA, LDA, and RCA; these result in particular development criteria and performance standards. For example, in an LDA, impervious surface coverage is generally limited to 15% of the site. In an RCA, residential development is limited to a density of one dwelling unit per 20 acres.

Growth Allocation

In order to accommodate future population growth, the total acreage of IDAs and LDAs may be increased by a “growth allocation.” This allowable development increase is calculated by a formula. Each county has a finite amount of growth allocation acreage that can be used, and this acreage was determined at the time of original Critical Area mapping. Local governments consider the use of growth allocation on a project-by-project basis through a local review and approval process. Following local review and approval, the commission must also review and approve all growth allocation proposals as a map amendment to a local program.

When locating new IDAs or LDAs, local jurisdictions must follow specified guidelines, such as locating a new IDA in an existing LDA or adjacent to an existing IDA; and locating a new IDA or LDA in a manner that minimizes impacts to habitat protection areas and optimizes water quality benefits. Growth allocation projects must also comply with all of the purposes, policies, and goals of the law and criteria.

Grandfathering

Most provisions of the Critical Area law and criteria became effective December 1, 1985 in the Chesapeake Bay Critical Area and on June 1, 2002 in the Atlantic Coastal Bays Critical Area. As part of its local program, each local jurisdiction adopted grandfathering provisions that allowed certain pre-existing uses to continue even though they were inconsistent with the new law. The grandfathering provisions also allow undeveloped, legally recorded, buildable lots to be developed with a single family dwelling, even if the development exceeds the density provisions in the criteria.

Variances

In considering an application for a variance, a local jurisdiction must presume that the specific development activity that is subject to the application and for which a variance is required does not conform with the purpose of the law and the local program. An applicant has the burden of proof and the burden of persuasion to overcome this presumption. A variance may not be granted unless a literal enforcement of the program would result in unwarranted hardship to the applicant; the local jurisdiction finds that the applicant has satisfied each one of the variance provisions; and without the variance, the applicant would be deprived of a use of land or a structure permitted to others in accordance with the local program.

Local governments are required to send all applications for variances to the commission for review and comment.

Enforcement

Local jurisdictions are responsible for enforcement. Accordingly, individuals who violate the Critical Area law are subject to prosecution or suit by local authorities. As noted above, local programs must include penalty provisions that provide that a person who violates the law is subject to a fine not exceeding \$10,000.

If local authorities are unable to enforce the law on their own, they may request assistance from the Critical Area Commission or they may request that the chair of the commission refer an enforcement action to the Attorney General.

If the commission believes that a local jurisdiction is failing to enforce its local program, the commission must serve notice on that jurisdiction. If the jurisdiction fails to correct the problem or punish the violator within 30 days, the chair of the commission may refer the case to the Attorney General.

Upon referral, the Attorney General is authorized to invoke any sanction or remedy available to local authorities in any court of competent jurisdiction in which the local authorities would be authorized to prosecute or sue the violator. In addition, the Attorney General is authorized to bring an action to compel compliance, restrain noncompliance, and compel restoration under specified conditions.

With respect to the illegal cutting or clearing of trees within the Critical Area, the local jurisdiction is authorized to bring an action or request that the chair of the commission refer the matter to the Attorney General. If the commission believes that a local jurisdiction is failing to enforce those provisions, the chair of the commission is directed to refer the matter to the Attorney General.

The chair of the commission generally has the authority to commence or intervene in any administrative, judicial, or other proceeding or appeal in the State that involves project approval in the Critical Area.

Background: In May 2006, the Environmental Law Clinic at the University of Maryland School of Law released a report entitled *Enforcement in Maryland's Critical Area: Perception in Practice*. The report highlighted limitations of and weaknesses in the Critical Area law. In general, the report concluded that violations of the Critical Area law are likely occurring due to a lack of enforcement combined with weaknesses in the statute. Specific concerns raised in the report include:

- local implementation has led to a program that is slightly different in all participating jurisdictions, and inconsistencies create less predictability for landowners;

- the commission has no real authority to approve projects in the Critical Area;
- with respect to enforcement, there is no requirement for the State to step in and enforce the laws on behalf of local governments, nor is there any duty on the commission to refer violations to the Attorney General;
- the current grandfathering provision is a large loophole, allowing development that otherwise would be prohibited; and
- the interpretation of “unwarranted hardship” has resulted in inconsistencies with respect to the granting of variances.

In February 2008, the Chesapeake Bay Foundation released a report entitled *The Critical Area Act: Intent, Reality, and the Need for Reform*. The report outlines CBF’s findings with respect to a comprehensive study of the law’s effectiveness in four representative counties. Among other things, CBF reports that, in the four counties studied, an average of 76% of variance requests were approved. In the report, CBF recommends that the Governor and the General Assembly reform the Critical Area law to ensure consistent application of the law; provide more robust and equitable enforcement; correct Critical Area boundaries to reflect current conditions; update variance and grandfathering procedures to minimize natural resource and water quality impacts; and ensure that development in the Critical Area is consistent with Maryland’s Smart Growth policies.

This bill is intended to strengthen the Critical Area law in light of the ongoing, accelerating decline of the State’s water quality resources and the loss of valuable shoreline areas. Specifically, the measure is intended to stop unrestrained growth near the water; to stop illegal building in the Critical Area; and to require offenders to restore the harm they inflict on the State’s waters. According to the Administration, giving the commission the tools it needs to more effectively deal with these issues is critical to those purposes.

Local Fiscal Effect: Because local critical area programs are administered and enforced by affected local jurisdictions, the bill’s changes could result in additional costs for local governments to • update their local programs to incorporate the bill’s changes; • amend local ordinances; • update local maps; • conduct outreach, advertising, and education activities; • modify local forms/applications; • conduct additional enforcement activities; • hold additional hearings; • handle additional legal issues; • mail additional notices; and • handle any additional project review activities.

According to the commission, however, the bill’s changes are generally anticipated to *assist* local jurisdictions in effectively implementing their local programs and although the bill does require local jurisdictions to do certain things, the commission advises that any additional costs should not be significant for most local jurisdictions. In fact, the commission advises that in some situations, the bill could even reduce certain costs.

Legislative Services contacted several counties and municipalities for their perspective on the bill's potential impacts. Some local jurisdictions report the potential for significant costs (these costs do not necessarily reflect amendments to the bill):

- Kent County advises that it could incur additional costs of an estimated \$30,000 to \$115,000 for the various activities noted above;
- Somerset County reports that costs for those activities, including costs to hire additional staff and to purchase a truck for inspections, would likely total \$225,000;
- Dorchester County indicates that costs would likely total approximately \$30,000 for additional staff, advertising, and legal fees;
- Charles County reports that it would likely incur \$50,000 in additional staffing costs and, if it is required to acquire digitally created tax maps, additional costs of an estimated \$364,000; and
- Leonardtown advises that costs would increase by an estimated \$30,000 for additional staff, technical services, supplies, and communications.

Legislative Services notes that some local jurisdictions anticipate costs related to updating their local maps. As noted above, for example, Charles County notes the potential for significant costs to acquire digitally created tax maps. However, the commission advises that the State will be providing the electronic data (*i.e.*, the State Base Map) to local jurisdictions; accordingly, this should reduce local costs.

Worcester County advises that certain costs (such as for enforcement and review of larger projects) would increase, but that the overall impact of the bill is difficult to estimate; the county notes, however, that it would likely increase its applicable fees in order to offset certain costs. Presumably, other local jurisdictions would also do this to the extent possible.

Other jurisdictions, such as Baltimore City, Harford County, the City of Annapolis, and the City of Salisbury, indicate that the fiscal impact of the bill would likely *not* be significant.

Given the additional administrative enforcement activity that could result from the bill's changes, local revenues from penalties assessed as a result of Critical Area violations would likely increase, although any such increase cannot be reliably estimated at this time, as future violations cannot be predicted. The bill's incarceration provision is not anticipated to significantly affect local correctional expenditures.

Additional Information

Prior Introductions: None.

Cross File: SB 844 (The President, *et al.*) (By Request – Administration) – Education, Health, and Environmental Affairs.

Information Source(s): Department of Natural Resources (Critical Area Commission); Maryland Department of the Environment; Office of the Attorney General; Department of Labor, Licensing, and Regulation; Maryland Department of Planning; Judiciary (Administrative Office of the Courts); Office of Administrative Hearings; Maryland Association of Counties; Charles County; Harford County; Kent County; Montgomery County; Somerset County; Baltimore City; Maryland Municipal League; City of Annapolis; City of Salisbury; Leonardtown; University of Maryland Environmental Law Clinic; Chesapeake Bay Foundation; Department of Legislative Services

Fiscal Note History: First Reader - March 3, 2008
ncs/lgc Revised - House Third Reader - March 26, 2008
Revised - Enrolled Bill - April 24, 2008

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