



# Unprotected Shoreline

Failures in Limiting Development along  
the Chesapeake and Coastal Bays

Environment Maryland  
Research & Policy Center





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## Failures in Limiting Development along the Chesapeake and Coastal Bays

Timothy Telleen-Lawton  
Joshua Hoen  
Frontier Group

Brad Heavner  
Environment Maryland  
Research & Policy Center

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Environment Maryland Research & Policy Center  
3121 Saint Paul Street, #26  
Baltimore, MD 21211

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Credit: Environment Maryland staff

# Executive Summary

The Chesapeake Bay is a natural treasure, a mainstay of Maryland's economy, and central to Marylanders' identity and quality of life. Pollution from a variety of sources, coupled with the rampant destruction of coastal wetlands, has degraded water quality in the bay, harming wildlife and threatening Marylanders' enjoyment of the bay.

To protect water quality in the bay, Maryland adopted the Critical Area Act in 1984. The act designated all areas within 1,000 feet of the bay and portions of its tributaries as a "Critical Area" in which development is limited. The intent of the law was to protect wetlands and natural areas that serve as natural filters for pollution, thereby reducing the flow of pollution and enabling the bay's long term recovery.

Unfortunately, with weak enforcement mechanisms, broad loopholes, and 64 separate jurisdictions implementing their own standards, the Critical Area Act has failed to stop many irresponsible developments that continue to threaten the health of the Chesapeake Bay, its tributaries and Maryland's Atlantic coastal bays.

**After-the-fact variances** allow those who have already broken the Critical Area law to ask for variances after they are caught by authorities. After-the-fact variances encourage developers and homeowners to ignore the law completely: many violators are never caught, once they are caught they can apply for an after-the-fact variance anyway, and they may be more likely to obtain a variance once the construction is already complete.

Development on Little Dobbins Island in the Magothy River is an example of the perverse incentives created by after-the-fact variances. The island was resurfaced by a developer who wanted to make a house for himself that would fall mostly within the 100-foot buffer most critical to wildlife habitat and pollution control. The developer did not try to get a variance until years later, after he was caught. Initial rulings granted him the after-the-fact variance for the main house, and the case is still being appealed.

Anyone seeking a variance in the critical area must show that following the Critical Area law would constitute **unwarranted hardship**. Each jurisdiction is also responsible for establishing other minimum

criteria for variance applicants, such as ensuring that the property owner would otherwise be deprived of “rights commonly enjoyed by other properties in similar areas.”<sup>1</sup> Unfortunately, the Maryland Court of Appeals has repeatedly interpreted these criteria to be weaker than they were originally intended, opening up a loophole in the Critical Area Act. While the General Assembly has attempted to patch up the loophole, it is not clear that the fix will stand up in court.

Court cases surrounding the *Belvoir Farms* development were among the first to demonstrate this loophole. The Belvoir Farms Homeowners Association illegally built a pier that accommodated more than four times as many boats as legally allowed. When the violation was discovered, they applied for an after-the-fact variance by arguing that a smaller dock would be an unwarranted hardship, and after multiple appeals they won, despite not meeting all the standards for a variance set out in the Critical Area Act.

In cases of **self-inflicted hardship**, individuals bring hardships upon themselves, and are therefore ineligible for arguing that the law creates unwarranted hardship. For example, if a developer decides to build a large house with decks that cover all the land on their property that isn’t in the critical area, the lack of more land on which to build a pool is not an unwarranted hardship because it is self-inflicted. However, under existing law as interpreted by the courts, buying a property in the critical area with full knowledge of the existing restrictions does not constitute self-inflicted hardship.

*Richard Roeser Professional Building, Inc.*, for example, bought a property in Anne Arundel County and subdivided it into two lots, the second of which only had enough space to build a house smaller than others in the neighborhood if it were to comply with Critical Area law. The company then

<sup>1</sup> Maryland Regulations Code, Title 27, § 01.11.01(A)(2), 2005.

applied for a variance arguing that the Critical Area law presented an unwarranted hardship since a larger house was desired. After several appeals and reversals, the final ruling maintained that buying and subdividing the lot did not make him ineligible for claiming unwarranted hardship.

Area classification determines the types of uses appropriate for different subsections of the Critical Area. Cities and counties can use their “**growth allocation**” to reclassify an area for more intense development in order to accommodate anticipated growth. Unfortunately, allowing developers to nominate preferred locations for development in pristine areas has led to poor choices for growth allocation in some jurisdictions. In such cases, inappropriate use of growth allocation undermines the Critical Area protections needed to repair the health of the Chesapeake Bay.

A *Four Seasons Resort* proposed on Kent Island benefited from this loophole. Despite containing much of the remaining wildlife habitat and open space farmland in the area, the land that Four Seasons wanted to use for its resort was reclassified at the highest development intensity level to make way for the project. Subsequently, the project was approved by Critical Area authorities despite posing major environmental concerns, such as adding a dozen stormwater discharges that would flow into bay tributaries. The proposal was eventually stopped by the state Board of Public Works due to these environmental concerns, but that decision is being appealed.

**Consistent protections** are necessary throughout the Chesapeake and Atlantic bays in order to effectively improve their health. The core of the Critical Area Act is the acknowledgment that the land closest to the bay is the most important for its health and should be protected, but pressure from local developer interests often leads to short-sighted exceptions.

For example, *Glen Riddle Farm*, the training grounds for legendary race horse



Man O' War in Worcester County, was replaced by a subdivision when developers obtained special provisions from the state to not be included in the 100-foot buffer that is designed to prevent bay pollution and protect diverse wildlife.

*Villages at Swan Point*, which has proposed an expansion along the Potomac River, was given permission to develop pristine wildlife habitat for nesting bald eagles and other sensitive animals if it could demonstrate a plan to compensate with habitat restoration elsewhere in the watershed.

Addressing the shortcomings illustrated in this report could bolster Maryland's ability to encourage development that complements the state's resources rather than undermine one of its greatest natural assets, the Chesapeake Bay. Toward that end, Maryland should improve the Critical Area Act in several ways.

#### **Improve enforcement of the Critical Area Act.**

- Assist overburdened counties by implementing a state inspection program that can respond to citizen complaints about damaging developments and conduct proactive monitoring by water and land.
- Empower the Critical Area Commission with the ability to enforce the Critical Area Act, which currently can only be done by local jurisdictions.
- Stiffen fines and penalties to reflect the severity of violations and to prevent developers from taking calculated risks to break the law. Also, remove ambiguities in the law that make local jurisdictions wary of imposing fines for fear of litigation.

#### **Remove loopholes from the Critical Area Act.**

- Give the Critical Area Commission authority to amend and update regulations.
- Eliminate after-the-fact variances to prevent developers from gaining legal approval for actions that damage the Chesapeake Bay ecosystem after construction has begun.
- Disallow homebuyers and developers from buying Critical Area property and then claiming they should be exempted from the law because they were unaware of restrictions.
- Sunset grandfathering provisions to prevent the development of lots that were exempted from the law in 1984 but have not been developed.
- Give the Critical Area Commission greater authority to deny growth allocation applications if the proposed change is not done in a way that is consistent with the larger goals of protecting the health of the Chesapeake Bay and its residents.
- Create consistent statewide standards for variances and require the Critical Area Commission to sign off on variance rulings to prevent abuse.
- Require regular updates to Critical Area maps to avoid exploitation of errors.
- Ensure that new lots do not encroach upon the 100-foot Critical Area buffer, which is critical for pollution filtration and habitat preservation.



Credit: J. Woerner, IAN Image Library

# Introduction

The Chesapeake Bay is the continent's largest and most productive estuary.<sup>1</sup> Nearly 200 miles long, it contains diverse habitats for more than 3,600 species of plants and animals.<sup>2</sup> The rich biological wealth of the bay has supported fishing, hunting, and agriculture for thousands of years, and has allowed timber, tourism, and other industries to develop in the last few centuries.<sup>3</sup> The natural resources of the Chesapeake Bay and the economic activity it supports have attracted and sustained large populations. Today, 10 million people live along or near its shores.

Sadly, the same natural wealth that makes life in the bay possible and appealing is threatened by irresponsible development. The environmental impact of any single development along the bay's shores may appear to be minor. But when multiplied across the bay watershed, poorly planned development can wreak significant damage on the bay and the species that call it home.

Irresponsible development eliminates habitat for plant and animal species that use the coastal land, forests, wetlands, and shoreline to survive. Since the arrival of Europeans, most of the wetlands and forested shorelines of the bay have disap-

peared. And when one species suffers, the effects can ripple out to the rest of the ecosystem and damage populations in other areas.

Excessive development has many indirect consequences, too. Whereas open spaces act as natural water filters for sediment, pollution, and harmful nutrients that would otherwise end up in the bay, buildings and paved land prevent water from filtering through the ground, shunting more of it off to rivers and the bay as polluted runoff. Moreover, chemicals from developed areas such as pavement and fertilized lawns are washed away during rainstorms and pollute the bay.

Development also makes it harder for organisms in the bay to naturally remove pollutants. Aquatic grasses and filter feeding animals such as oysters slowly clean the water they inhabit, removing pollutants around them. But as the land around the Chesapeake Bay has been developed, shallow waters that were once prime habitat for grasses have been replaced with erosion control structures such as rock revetments. Sediment from construction sites, agriculture, and developed areas buries oysters alive and cuts off sunlight for submerged

aquatic vegetation. Since development began, underwater grasses are down to about 10% of their original extent, and the oyster population, also suffering from over-extraction and disease, has fallen 100-fold.<sup>4</sup> Decades of accelerated coastal development have also led to dramatic declines in native species, harmful algal blooms that kill thousands of fish a year, and tainted water throughout the bay.

Recognizing the severe impact that irresponsible coastal development can have on the bay, Maryland adopted the Critical Area Act in 1984. For similar reasons, five Atlantic Coastal bays were added to the protections of the Critical Area Act in 2002. While the act has made significant progress in some areas, weak enforcement, broad loopholes, and insufficient monitoring have prevented the program from providing the strong protection that the Chesapeake and other bays need.

While enormous damage has been done

to the bay, and continues to be done, due to irresponsible development along its shores, a healthier, more productive bay is possible. By strengthening the weakest parts of the act and creating more consistency throughout the state, Maryland can take a vital step toward restoring the Chesapeake Bay to health.

The following pages contain examples of developments that violate the spirit or the letter of the Critical Area Act. Each of these developments has occurred, or is proposed to occur, within the Critical Area. And in each case, the Critical Area Act has proven to be an inadequate or unwieldy tool to prevent the development.

In order to prevent irresponsible developments like these, Maryland must improve the law and its enforcement in ways that address its biggest weaknesses, ensuring that the Chesapeake Bay retains the ability to recover from its degraded state.



Credit: USDA Natural Resources Conservation Service

*The Great Blue Heron is one of many bird species that rely on critical area habitat and the bays they protect.*

# The Critical Area Act

Maryland's Critical Area Act, passed in 1984, was designed to improve the health of the Chesapeake Bay by limiting development within 1,000 feet of the bay and the portions of its tributaries that change with the tides.<sup>5</sup> By limiting development, the act was intended to reduce the number of sources of pollution, preserve open lands that absorb pollution, and protect habitat for plants and animals, including those that filter pollution out of the bay. Once a piece of land is developed, it is unlikely to ever return to its natural productive state, which is partly why Maryland must act quickly to ensure that any development alongside the bay is done responsibly.

The Critical Area Act leaves most of the specifics of regulation and enforcement up to the 64 cities and counties that have Critical Area land, including Worcester County with the five Atlantic coastal bays. Each of these local jurisdictions is required to develop its own Critical Area law to comply with the act. The Critical Area laws vary from jurisdiction to jurisdiction, but some elements are mandated by the act.

All jurisdictions, for example, are required to maintain a map of the Critical

Area they control. The map divides the area into three categories corresponding to varying levels of development intensity: Intensely Developed Areas (IDA), Limited Development Areas (LDA), and Resource Conservation Areas (RCA). These designations guide future development to ensure that the most pristine areas of the Critical Area receive the greatest protection. Certain activities like most heavy industries are not allowed in any of the Critical Area across the state.

Cities and counties have a finite amount of acreage, called "growth allocation," which they can use to allow development in rural areas, changing the designation of areas from resource conservation to limited development or intense development. Each jurisdiction's growth allocation is equivalent to 5% of the original RCA in their area, excluding federal lands and State tidal wetlands.<sup>6</sup>

Statewide guidelines exist to direct the use of growth allocation in each jurisdiction. For example, any new limited development area must be adjacent to an existing limited or intense development area, not surrounded by rural areas. New intense development areas can replace any

limited development area, but can replace rural areas only when they are adjacent to existing intense development areas.

Another protection measure in the Critical Area Act is the 100-foot buffer. The buffer restricts all development activities except for shore erosion control, removing invasive plants, uses that depend on water such as access to a pier, and a few other exceptions. Maintaining the 100-foot buffer of undeveloped land around the bay and its tributaries helps filter pollutants out of stormwater before it reaches the bay, makes it easier for wildlife to access and travel around the bay, and decreases the risk of storm damage to buildings.

Homeowners and developers that want to make changes to the critical area within their property that would otherwise violate the local Critical Area law can seek a variance, an administrative exception to the law, from the local Board of Appeals or a special hearing examiner, depending on the jurisdiction. In order to receive the variance, the owner has to show that following the letter of the law would constitute unwarranted hardship. Variances can be received after the law has already been violated, which unfortunately creates a perverse incentive for homeowners to ignore the law and only seek a variance if they are caught.



Credit: Jane Hawkey, IAN Image Library

If a variance is not granted by the local Board of Appeals, the decision can be appealed to progressively higher courts in Maryland. One reason some jurisdictions have been reluctant to assess fines for violations of the Critical Area law is that being taken to court by homeowners can tie up resources that are already spread thin.<sup>7</sup>

The statewide Critical Area Commission, appointed by the governor, helps counties comply with the act and is charged with ensuring proper enforcement. The commission must approve any changes a local jurisdiction decides to make to its Critical Area law, including using its growth allocation to change the development intensity of an area. However, the Critical Area Commission does not become involved with enforcement decisions or approving variance applications.

Enforcement is left up to the jurisdictions themselves, which receive little money from the state for that purpose. Cities and counties rarely have enough resources to respond to all citizen reports of violations of the Critical Area law, much less to proactively monitor potential violations. None of the local jurisdictions own boats to use to monitor waterfront construction.<sup>8</sup>

Unfortunately, the Critical Area Act has not done enough to protect the bay from irresponsible new development, due to weaknesses in both the law and enforcement. For example, since many violations go undetected or unenforced every year, some homeowners may believe that it is “safe” to violate the law, assuming they will not be caught. Even among cases that are investigated, several loopholes allow for lax enforcement of the Critical Area programs. Sometimes even intentional violators have been allowed to keep their structures without any penalty, further encouraging blatant disregard of Critical Area protection.

# Loopholes and Enforcement Problems

Since the Critical Area Act passed in 1984, many developments have been built within Maryland's Critical Area. Some of the developments, such as those that were already planned before the act passed, were not intended to be stopped by the act. But many examples exist to show that despite the Critical Area laws in each local jurisdiction, developments are still often approved despite being inconsistent with state goals to improve the health of the Chesapeake Bay. To minimize such inappropriate developments, Maryland must strengthen the existing law.

The following areas of Maryland's Critical Area Act need to be strengthened.

## After-The-Fact Variances

After-the-fact variances allow those who have already violated local Critical Area law to ask for variances, which allow them to legally ignore the piece of the law they are violating, after they are caught by authorities. After-the-fact variances create several incentives for developers and homeowners to ignore the law completely.



Credit: University of Maryland

Many violators are never caught, in part due to insufficient enforcement resources, so many violators never have to deal with local authorities at all. If and when developers or homeowners are caught breaking Critical Area law, they can apply for an after-the-fact variance that makes their construction legal anyway, so they may be no worse off than if they had applied for a variance beforehand. Finally, a University of Maryland Law School report found that after-the-fact variances may be easier to obtain than standard variances since judges don't like to force a teardown or modification of a building that is already constructed.<sup>9</sup> Unfortunately, this combination



Credit: Critical Area Commission

of circumstances leads more developers and homeowners to ignore the Critical Area Act, further overwhelming enforcement resources and creating the harmful reputation that the act is not enforced.

The after-the-fact variances sought at Little Dobbins Island form one of the most well known examples of their abuse.

### **Little Dobbins Island in the Magothy River**

Daryl Wagner had tried for almost three decades to acquire the island on the north side of the Magothy River, a tidal river in Anne Arundel County that used to have aquatic grasses so thick along the shore that homeowners had to clear swaths of it to have room to swim.

Little Dobbins Island (also known as Little Island) and its bigger brother Dobbins Island were named after a 19<sup>th</sup> century judge who fell in love with them for their natural beauty. He would travel with friends in horse-drawn carriages and boats to hunt on the islands that were “beyond description” and teeming with wildlife. After buying the island in 1851 for \$50 (\$1,300 in 2007 dollars), the Dobbins family owned it until the 1990s. Mr. Wagner bought it in 2000.<sup>10</sup>

After purchasing the property, Mr. Wagner promptly began building a 6,000-square-foot house, transporting materials to the island with his military style amphibious vehicle.<sup>11</sup> As the *Washington Post* describes, “He replaced jagged banks with sloping grass, uprooted hardwood trees and planted plastic palms, dug an in-ground pool and raised a metal-roofed copy of a lighthouse.”<sup>12</sup> He also built a boat launch that included a 71-foot gravel road right through coastal wetlands.<sup>13</sup> The entirety of the island falls within Maryland’s Critical Area, a fact Mr. Wagner should have known from his experience as a Magothy River area resident and developer.

What surprised riverside neighbors after observing the entire process is learning that he had planned, built, and moved into the house without ever applying for the permits necessary to develop on the banks of the Chesapeake Bay tributary. He was finally caught years later by an inspector who was monitoring a nearby site and noticed the illegal construction.

Mr. Wagner asked Anne Arundel County to pretend it never happened by granting him an after-the-fact variance and reclassifying the shoreline on the island to allow him to keep the structures despite the Critical Area law. The after-the-fact vari-



ance would have allowed him to clear and grade the land, and develop in the critical area. Since the house is within 100 feet of the shore, however, Mr. Wagner also needed Anne Arundel County to change the local maps of the 100-foot buffer to classify it as “modified.” The buffer can’t simply be reclassified to allow development, but Mr. Wagner’s lawyer argued that such a change was justified because the island shore should have been considered modified when the maps were first made; that they were left out was simply a mistake.

Mr. Wagner conditionally won both requests he needed to keep the house, although the approval by the Anne Arundel County Board of Appeals required that he take down auxiliary structures such as the lighthouse. The Chesapeake Bay Foundation, a local environmental organization, appealed both decisions, and is joined in the variance appeal by the Critical Area

Commission. Those cases have not yet been decided.

If Mr. Wagner succeeds in keeping his house, it will exacerbate the perverse incentive for developers to build now and ask questions later, which undermines the ability of the Critical Area Act to protect the waters of the bay.

Like other developments on the bay, the house on Little Dobbins Island replaced natural vegetation with artificial surfaces and lawns. Additionally, the rock revetment Mr. Wagner installed around the perimeter of the island as well as the gravel road through wetlands destroy habitat for plants such as aquatic grasses that naturally filter out pollution in the bay over time. These environmental changes are precisely the types of activities that have left the Chesapeake Bay in its current state of deteriorated health.

The events at Little Dobbins Island



Credit: USDA Natural Resources Conservation Service



Credit: Critical Area Commission

illustrate several problems with the Critical Area Act that need to be addressed. First, if a developer can knowingly disregard the Critical Area Act, get caught, and still end up better off than if he had abided by the law from the beginning, then developers have little reason to pay any attention to the act at all.

Unfortunately, several factors make counties more likely to grant a variance after-the-fact than if the same request had been made before construction. One is that the time and cost of tearing down a house, and the environmental impacts of demolition, might dissuade a local board from withholding an after-the-fact variance even if the same board would not have granted a variance before the development was complete. Moreover, jurisdictions are often wary to assess fines because violators might respond by filing a lawsuit, which absorbs more local resources.<sup>14</sup> These perverse incentives must be corrected, and after-the-fact variances should not be allowed.

Additionally, staff resources for monitoring violations must be increased, as is illustrated by the years it took inspectors to realize Mr. Wagner had never received

permits for his house. More staff is needed to be able to investigate complaints and suspicious activity, work on weekends, and use boats to monitor waterside construction.

## Unwarranted Hardship

The Critical Area Act requires that anyone seeking a variance in the critical area must show that following the Critical Area law would constitute unwarranted hardship and meet other minimum standards set by the local jurisdiction. For example, jurisdictions must ensure that anyone applying for a variance show “that a literal interpretation of... the local Critical Area program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area of the local jurisdiction.”<sup>15</sup>

Unfortunately, the Maryland Court of Appeals has repeatedly interpreted the criteria other than unwarranted hardship to be merely demonstrations of the unwarranted hardship criterion, rather than strict requirements on their own. With such an interpretation, it is possible to obtain a variance without meeting all the requirements set out in the Critical Area law, making it too easy to get around the intent of the act. The General Assembly has made revisions to the Critical Area Act in an attempt to close this loophole, but it is unclear that the fix will stand up in court.

A development near Crownsville in Anne Arundel County was one of the first to exploit the loophole.

### Belvoir Farms near Crownsville

The 90 homes that make up the Belvoir Farms subdivision near Crownsville are attractive enough to sell for over a half million dollars apiece, but the subdivision’s track record for respecting the buffer area

around the Chesapeake Bay is far less grand.

The Belvoir Farms Homeowners Association built a pier to host more than four times as many boats as legally allowed, threatening the bay's delicate ecosystem with pollutants and toxic runoff. When the subdivision was able to receive a variance to operate the pier, the homeowners exploited weaknesses in the law to develop in the Critical Area again.

It began in 1986 when the developer for the Belvoir Farms Homeowner's Association built a private 200-foot pier off the community-owned open space area that falls within the Chesapeake Bay Critical Area. Subsequently, the Anne Arundel County Board of Appeals granted the Homeowner's Association a variance to operate the pier and to permit the 18 boat slips—14 more than would otherwise be allowed by the local Critical Area program for a development of its size.<sup>16</sup>

The decision was twice appealed, and the Maryland Court of Appeals' ultimate decision interpreted the standards for granting variances in a disappointingly weak way. According to an analysis of the Critical Area Act prepared by the University of Maryland Environmental Law Clinic, the decision in the Belvoir Farms case "misinterpreted the [unwarranted hardship] standard" in a way that made it easier to satisfy.<sup>17</sup>

The General Assembly reacted to this misinterpretation by amending the Critical Area Act in an attempt to close up the loophole in 2002. Another decision by the Maryland Court of Appeals in 2003, however, used an even weaker interpretation, making it clear that the amendment had not succeeded in closing the loophole.<sup>18</sup> The General Assembly again amended the law in 2004, but the Maryland Court of Appeals has not issued a decision since the latest revision that would show whether



Credit: USDA Natural Resources Conservation Service

*A diverse array of plant and animal species survive on Maryland's remaining wetland habitats.*

the loophole still exists.<sup>19</sup> The loophole that prevented the Critical Area Act from protecting against inappropriate variances must be unambiguously closed.

After they were allowed to keep the original pier, developers in Belvoir Farms next applied to construct a parking lot adjacent to the pier, within the Critical Area, and again succeeded in claiming unwarranted hardship. The construction projects that have been permitted in Belvoir Farms have likely had significant environmental impacts. Pier development requires driving piles into the shallow waters of the Bay, which leaks toxins into the water, and destroys or shades bay grasses that are essential to the bay's ecosystem.<sup>20</sup> Increasing man-made surfaces such as parking lots reduces the area's ability to absorb and filter stormwater, which washes grease, copper and heavy metal into the bay.<sup>21</sup>

## Self-Inflicted Hardship

In cases of self-inflicted hardship, individuals bring hardships upon themselves, and are therefore ineligible for arguing that the law creates unwarranted hardship. For example, if a developer decides to build a large house with decks that cover all the land on their property that isn't in the Critical Area, then the lack of more land on which to build a pool is not an unwarranted hardship because it is self-inflicted. However, under existing law as interpreted by the courts, buying a property in the Critical Area with full knowledge of the existing restrictions does not constitute self-inflicted hardship.

This legal phenomenon was demonstrated in a case involving a property purchased by Richard Roeser Professional Buildings, Inc.



Credit: USDA Natural Resources Conservation Service

*Improper use of growth allocation can put the most valuable natural areas at risk of intense development.*



Credit: Jane Thomas, IAN Image Library

### **Richard Roeser Professional Building in Anne Arundel County**

In 1999, Richard Roeser Professional Building, Inc. purchased land near the Chesapeake Bay in Anne Arundel County and subdivided it into two lots.<sup>22</sup> Because the property included wetlands, one of the new lots only had enough room to build a 700-square-foot house without violating Critical Area laws. Most houses in the neighborhood range from 2,500 to 3,500 square feet.<sup>23</sup> At the time he purchased and subdivided the properties, Roeser knew that variances from the Critical Area Commission of Anne Arundel County would be required to build a home the size that he desired.<sup>24</sup>

His initial request for a variance to build a large home in the buffer zone was denied by the Anne Arundel County Board of Appeals, which maintained that Roeser's prior knowledge that the proposed structure was inconsistent with the zoning for the property disqualified him from claiming that the prohibition constituted unwarranted hardship.<sup>25</sup>

However, Anne Arundel's decision was overturned in the Maryland Court of Appeals, which found that although Roeser knew before buying the property that it was illegal to build his home there, that knowledge didn't preclude him from pursuing a variance to build the structure.<sup>26</sup>

It is important that the Critical Area Act be strengthened in order to keep developments like Roeser's proposal from backpedaling on the goal of preserving the Chesapeake Bay. While Roeser was ultimately unable to obtain a variance to build the smaller lot as he had hoped, the precedent from his court case revealed the loophole in the Critical Area Act. While there have been some legislative changes since the Roeser court case that attempt to strengthen the notion of self-inflicted hardship, a developer can still purchase a property in the Critical Area and then apply for a variance to get around the local standards. Developers who purchase land in the Critical Area should not be allowed to claim unwarranted hardship, since the law is known before the purchase is made.



Credit: Critical Area Commission

## Growth Allocation

Area classification determines the types of uses appropriate for different subsections of the Critical Area. To accommodate future growth, each jurisdiction can use their growth allocation to increase the development intensity of some of their critical area land. Unfortunately, poor placement of growth allocation, such as allowing developers to pave over the most valuable natural resources in an area, undermines the protections needed to repair the health of the Chesapeake Bay. Growth allocations allow counties to change the designations of their critical area to anticipate population growth, but too often simply serve as an excuse to allow a developer to change Resource Conservation Areas into developments.

The Four Seasons Resort proposed for Kent Island is an example of how inappropriate classification can undermine the spirit of the Critical Area law.

### Four Seasons Resort on Kent Island

Kent Island, the biggest island in the Chesapeake Bay at almost 32 square miles, is also home to the oldest continuous congregation in Maryland, Christ Church Parish, which was established in 1631.

In 2000, Four Seasons Resorts proposed building a resort designed to attract an active adult community on Kent Island on the Chester River. The proposal got approval under the Critical Area law because the county changed the land classification from Resource Conservation Areas (RCA) and Limited Development Areas (LDA) to Intensely Developed Areas (IDA).<sup>27</sup> Environmental concerns about the project and the resulting public opposition were nonetheless serious enough to eventually lead the state Board of Public Works to deny permitting. The proposed development would have put 1,350 units on a 554 acre site that is 88% within the Critical Area, including a bridge, water and sewer lines, and over a dozen storm-water discharges into the bay tributaries. It would have been the biggest single development within the Critical Area since the program began.

Despite the huge environmental impact of the resort, it got the approval of the Critical Area Commission after the county used its growth allocation to change the land the resort would occupy to IDA. As pointed out by island residents, the fact that a full-scale resort can be built in the Critical Area at all demonstrates the need for a stronger law. Furthermore, poorly located growth allocations undermine the protections that do exist.

In 2006, the University of Maryland

Environmental Law Clinic published a report on the Critical Area Act and its perception among the public. One finding was that much of the population assumes that the 1,000-foot buffer designed to protect the bay is a stronger guarantee against development than it actually is in practice. This discrepancy is reflected especially well in the Four Seasons Resort development where significant environmental impacts were not enough to garner protection under Critical Area law.

The environmental concerns eventually swayed the state Board of Public Works, comprised of the governor, the treasurer, and the comptroller, to deny permitting to the development as a last-ditch effort to prevent the environmental destruction that such a resort would have caused.

The developer is appealing the decision. But the outcome only serves to highlight that the Critical Area Act isn't sufficiently protecting much of the land near the

Chesapeake Bay from even the largest developments and most radical land-use changes that would irreversibly alter the landscape on which the bay depends.

## Consistent Protections

In order to effectively improve the health of the Chesapeake and Atlantic coastal bays, Maryland needs consistent protections for its Critical Area. The core of the Critical Area Act is the acknowledgment that the land closest to the bay is the most important for its health and should be protected, but pressure from local developer interests often leads to short-sighted exceptions. The Critical Area Commission needs more authority to ensure consistent interpretation of the law throughout the state.

The following examples show ways in which developers are able to get around the



Credit: Patuxent Riverkeeper

measures intended to protect the important natural land around the Chesapeake and Atlantic coastal bays.

### **GlenRiddle in Worcester County**

GlenRiddle is a development in Berlin that overlays the historic training grounds of Man O' War, named "Horse of the Century" by the National Museum of Racing and Hall of Fame.<sup>28</sup> Glenn Riddle Farm, as the area was known before the development, was a 972-acre horse farm that was once owned by Sam Riddle, but started a long decline following his death in 1951.<sup>29</sup>

Local preservationists argued for preserving Glenn Riddle Farm for the importance it came to play in the region's ecosystem. The farm's forests and coastal wetlands on the Isle of Wight Bay had come to be the home of rare birds and amphibian species.<sup>30</sup> But those efforts were to no avail. The property was sold to developers and is now a gated, 600-unit resort community with two golf courses and an on-site marina.

Subdivisions such as GlenRiddle increase lot cover around the Isle of Wight

Bay. Lot cover is the extent to which natural ground cover is replaced with artificial cover such as buildings, decks, and driveways, which dramatically reduces stormwater filtration and replaces critical habitat. As infiltration decreases, stormwater runs off more quickly, filling streams more rapidly and carrying more sediment and other pollutants into the Maryland Atlantic coastal bays.<sup>31</sup>

Oil, grease, copper, and other heavy metals can wash from roads and, often, directly into streams and the bay. Other contaminants, such as nitrogen, can come from lawns through over-fertilization (common in subdivisions), airborne emissions of cars and power plants, and sewage.<sup>32</sup> In short, more population and development near bays leave them more degraded.

Beyond simply developing within the Critical Area, GlenRiddle developed on land usually reserved for one of the Critical Area Act's strictest designations: the 100-foot buffer directly adjacent to the waterway, in which virtually no development is allowed. GlenRiddle received special provisions from the state that reduced the buffer to only 50 feet in certain areas. As a result, there are houses in the GlenRiddle development that are only 50 feet from Turville Creek and Herring Creek, tributaries to Isle of Wight Bay, leaving the water open to the constant threat of fertilizer and polluted runoff.<sup>33</sup>

The 100-foot buffer is recognized as an especially important ribbon of land not just because it is the last stand against runoff pollution, but also because it represents a critical habitat for a diverse array of plant and animal life on land and in the adjacent water. Maintaining consecutive buffers throughout the bays provides a small corridor for wildlife to travel even in residential areas. To fulfill Maryland's commitment to the health of the bay, special provisions to allow developers to profit from unnecessary critical area infringement should not be tolerated.



Credit: Critical Area Commission



### U.S. Steel at Swan Point Habitat

Swan Point, in Charles County, is among the most beautiful parcels of land around the Chesapeake Bay. Home to bald eagles, great blue herons, and a variety of other species, the forests of Swan Point are among the most ecologically diverse in the area. People are some of the newest additions to the mix, often inspired to move to the area for its scenic beauty. Between 1990 at 2005, the population of Charles County jumped by 40 percent, and in the last decade the county's median home price has more than doubled.<sup>34</sup> Rapidly increasing population and property values have made Charles County a prime target for real estate developers.

Prior to the passage of Maryland's Critical Area Act, U.S. Steel Corporation purchased 900 acres along the Potomac River in Swan Point, developing 209 of the acres with 322 homes and a golf course. With the passage of the act in 1984, Charles County granted exemptions to U.S. Steel for house

plots they had already planned in the 100-foot buffer zone.<sup>35</sup> In 2002, the demographics of Charles County had changed enough that it was in the corporation's interest to develop even more land, proposing to build 852 homes, 678 condominiums, two marinas and retail space on the property.<sup>36</sup> The major obstacle preventing U.S. Steel from moving forward with this third section of development was that 160 acres are within the Critical Area.<sup>37</sup>

The negative environmental impacts of the planned building project were highlighted by a coalition of area residents as soon as U.S. Steel expressed renewed interest in the site. Many are worried about the management of stormwater runoff, as well as the impact of increased lot cover that will prevent stormwater from soaking into the land.

Most important, however, is the effect that the development will have on the wildlife and ecosystem of the Chesapeake Bay, especially in the buffer zone. If The



Credit: USDA Natural Resources Conservation Service

*Lotus plants provide valuable wildlife habitat in Worcester County.*

Villages at Swan Point is expanded, new roadways and a bridge will impact thousands of square feet of the buffer zone. The construction would also destroy a Blue Heron nesting site and 203 acres of forested bird habitat.<sup>38</sup>

Concerns over the environmental harm of U.S. Steel's Swan Point development led to a five-year back and forth permit process with Charles County, which conditionally approved the project in 2006. One condition that the developers have to fulfill before attaining final approval is a specific Habitat Protection Area Plan.<sup>39</sup>

U.S. Steel's Habitat Protection Area Plan has yet to be approved by the commission. A chief sticking point: the corporation must build offsite conservation areas in order to mitigate the impact to wildlife onsite.<sup>40</sup> Major questions remain as to whether this is an appropriate plan, as it does little to address the impacts at the affected site, and seems to defy the intention of the Critical Area Act to preserve as much of the bay as possible.

The Chesapeake Bay Critical Area Commission has been enforcing the strictures of the act and making sure that U.S. Steel addresses many of the environmental impacts of their development at Swan Point. However, they need a stronger act to enforce. Because of weaknesses in the Critical Area Act, the Villages at Swan Point will be built over land that should not be developed, exposing the bay to more fertilizer, runoff, and ecosystem damage.

### **Hunting Lodge in Wicomico**

Wicomico County, bordering Delaware on the final stretch of the Mason-Dixon line, contains some of the least developed land in the state. In 1999 Edwin Lewis purchased 300 acres of idyllic marshland in the county, all of which was within the 100-foot buffer zone protected most by Maryland's Critical Area Act.<sup>41</sup>

Lewis built a hunting lodge and four cabins on the property without permits despite being entirely within Critical Area.<sup>42</sup> By the time the authorities caught on, construction was nearly completed. Mr. Lewis then sought a variance to allow the structures to remain, claiming that removing the buildings represented an "unwarranted hardship."

What resulted was a seven-year legal battle between Mr. Lewis and the Maryland Critical Area Commission, as well as a back-and-forth between the state's legislative and judicial branches over whether having no lodge constituted unwarranted hardship. In 2002 the General Assembly passed a law to clarify the meaning of unwarranted hardship with cases such as Lewis's in mind, but it failed to sway an appeals court in 2003 which ruled in favor of Lewis.<sup>43</sup>

In response the General Assembly again clarified the law by redefining unwarranted hardship as "without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot."<sup>44</sup> The tug-of-war ended in May 2007 when the State Court of Appeals refused to hear Lewis' latest appeal.<sup>45</sup> The next step in the saga is to get Lewis to develop an environmentally friendly plan to tear down the existing structures.<sup>46</sup>

In the end, the Lewis hunting lodge case was a victory for the Chesapeake Bay. The illegal structure was ordered to be taken down. However, the ambiguous language and roomy loopholes of the Critical Area Act empowered the developer to tie up the case for years.

Additionally, the Lewis example makes a strong case for the need for improved enforcement mechanisms of the Critical Area Act: the development was nearly completed by the time any authorities caught wind of it. It is imperative that the state of Maryland clarify and strengthen the Act in order to effectively protect the delicate ecosystem of the Chesapeake Bay.

# Better Enforcement and Legal Reforms

As the above examples illustrate, the Critical Area Act, has been an imperfect tool in protecting the health of the Chesapeake and Atlantic coastal bays. Most of the problems are either with lack of enforcement or with loopholes in the Critical Area laws that allow developers to buy and develop the very land that Maryland most needs to protect. Maryland should adopt the following changes to close loopholes and strengthen protections for the bays:

## Improve Enforcement of the Critical Area Act

- Assist overburdened counties by implementing a state inspection program that can respond to complaints and conduct proactive monitoring by water or land. Such a program could prevent developments before they are completed, and would help to eliminate the expectation that developers and homeowners can do whatever they

want with the land on the bay without being caught.

- Empower the Critical Area Commission with the ability to enforce the law. This would provide another channel for overburdened local jurisdictions to receive help in enforcing their Critical Area law. Additionally, allow the Critical Area Commission to update the law by authorizing it to adopt its own regulations.
- Stiffen fines and penalties to reflect the severity of violations and to dissuade developers from taking calculated risks to break the law. Also, remove ambiguities in the law that



Credit: USDA Natural Resources Conservation Service

make jurisdictions wary of imposing fines for fear of litigation. Local jurisdictions must not be afraid to penalize developers that break the law.

## Remove Loopholes from the Critical Area Act

- Give the Critical Area Commission authority to amend and update regulations.
- Eliminate after-the-fact variances to prevent developers from gaining legal approval for actions that damage the Chesapeake Bay ecosystem after construction has begun.
- Disallow homebuyers and developers from buying Critical Area property and then claiming they should be exempted from the law because they were unaware of restrictions.
- Sunset grandfathering provisions to prevent the development of lots that were exempted from the law in 1984 but have not been developed.
- Give the Critical Area Commission greater authority to deny growth allocation applications if the proposed change is not done in a way that is consistent with the larger goals of protecting the health of the Chesapeake Bay and its residents.
- Create consistent statewide standards for variances and require the Critical Area Commission to sign off on variance rulings to prevent abuse.
- Require regular updates to Critical Area maps to avoid exploitation of errors.
- Ensure that new lots do not encroach upon the 100-foot Critical Area buffer, which is critical for pollution filtration and habitat preservation.



Credit: USDA Natural Resources Conservation Service

# Notes

1. Critical Area Commission, Bay Smart: *A Citizen's Guide to Maryland's Critical Area Program*, September 2007.
2. Chesapeake Bay Foundation, *Chesapeake Bay Overview*, downloaded November 2007 from [www.cbf.org/site/PageServer?pagename=exp\\_sub\\_watershed\\_overview](http://www.cbf.org/site/PageServer?pagename=exp_sub_watershed_overview).
3. William G. Thomas III, "The Chesapeake Bay," *Southern Spaces*, April 16, 2004.
4. Chesapeake Bay Program, *Animals and Plants*, downloaded November 2007 from [www.chesapeakebay.net/baybio.htm](http://www.chesapeakebay.net/baybio.htm) Chesapeake Bay Foundation, *Chesapeake Bay Overview*, downloaded November 2007 from [www.cbf.org/site/PageServer?pagename=exp\\_sub\\_watershed\\_overview](http://www.cbf.org/site/PageServer?pagename=exp_sub_watershed_overview).
5. In 2002, the land around five bays along Maryland's Eastern Shore were added to the land regulated by the Critical Area Act. For more information see Critical Area Commission, *Bay Smart: A Citizen's Guide to Maryland's Critical Area Program*, September 2007.
6. See note 1.
7. Megan Moeller et al, University of Maryland Environmental Law Clinic, *Enforcement in Maryland's Critical Area: Perception and Practice*, May 2006.
8. Ibid.
9. Ibid.
10. Polly Thornton, "The Islands of the Magothy", *Maryland Life*, 5 September 2007.
11. Daniel de Vise, "One Man is an Island: Environmentalists Assail Owner Who Built Without Permits in Md.", *Washington Post*, 25 February 2006.
12. Ibid.
13. Childs Walker, "Big Home Lacks Only One Thing: Permits", *Baltimore Sun*, 6 December 2004.
14. See note 7.
15. Maryland Regulations Code, Title 27, § 01.11.01(A)(2), 2005.
16. Circuit Court for Anne Arundel County Case # C-1997-42848 AA, *Belvoir Homeowner's Association v. John C. North, II*, Chairman Chesapeake Bay Critical Area Commission.
17. See note 7.
18. The 2003 case was *Lewis v. Department of Natural Resources*, discussed in this report in the section "Hunting Lodge in Wicomico". Megan Moeller et al, University of Maryland Environmental Law Clinic, *Enforcement in*

*Maryland's Critical Area: Perception and Practice*, May 2006.

19. Earl Kelley, "Group says court cases weaken Critical Areas laws," *The Daily Record* (Baltimore), 14 March 2002.

20. S. Nayar, Science Direct, *Environmental Impact of Heavy Metals from Dredged and Resuspended Sediments*, 14 October 2003.

21. See note 1.

22. Circuit Court for Anne Arundel County Case # C-1999-58456, *Richard Roeser Professional Builder, Inc. v. Anne Arundel County, Maryland*.

23. See note 19.

24. See note 22.

25. See note 19.

26. James Lawlor, "It doesn't hurt to ask for a variance, Maryland appeals court rules," *Planning*, 1 May 2002. Circuit Court for Anne Arundel County Case # C-1999-58456, *Richard Roeser Professional Builder, Inc. v. Anne Arundel County, Maryland*.

27. Like all land classification changes, this change was approved by the Critical Area Commission. Since 2006, the commission has been given greater authority to scrutinize such changes, which will hopefully help prevent similar occurrences in the future: Private communication with Mary Owens, Critical Area Commission, 24 January 2008.

28. Larry Lewis, "Riddle and Man O'War Linked," *Philadelphia Inquirer*, 19 May 2004. Frederic N. Rasmussen, "Time Has Not Been Kind to Historic Glen Riddle Farm," *Mid-Atlantic Thoroughbred*, November 2003.

29. John Steadman, "Spirit of Mighty Man O'War Hangs Over Decayed Shore Farm," *Baltimore Sun*, 18 May 1997.

30. Frederic N. Rasmussen, "Time Has Not Been Kind to Historic Glen Riddle Farm," *Mid-Atlantic Thoroughbred*, November 2003.

31. See note 1.

32. *Ibid.*

33. Interview with Kathy Phillips, Coastkeeper of the Assateague Coastal Trust, 29 November 2007.

34. Jen Degregorio, "U.S. Steel's Swan Point Project Moving Forward," *The Daily Record* (Baltimore), 10 October 2006.

35. Personal communication with Charles Rice, Program Manager, Charles County Department of Planning, 1 February 2008.

36. Nancy Shertler, Cobb Neck Citizen's Alliance, *The Villages at Swan Point: Growth Allocation Request*, power point given to Charles County.

37. See note 34.

38. See note 36.

39. Dave Umling, Planning Director, Charles County Government, Interoffice Memorandum, *The Villages at Swan Point - Critical Area Growth Allocation - CBCAC Condition & Commissioners Conditions*, 24 April 2007.

40. Private communication with Mary Owens, Critical Area Commission, 24 January 2008.

41. Van Smith, "Time and Tide: Will the Erosion of Maryland's Critical Areas Act Mean Bigger Trouble When the Next Isabel Comes Along?" *City Paper Online*, 22 October 2003.

42. *Ibid.*

43. See note 7.

44. Maryland House Bill 1009, 2004.

45. Greg Latshaw, *The Delmarva Daily Times*, "Court Battle Ends in Demolition: After Seven-Year Struggle, Executive Must Tear Down Illegally-Built Cabins," 12 November 2007.

46. *Ibid.*