

MINUTES

MINUTES

**Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays
People's Resource Center
100 Community Place
Crownsville, Maryland**

February 7, 2018

The full Critical Area Commission met at the People's Resource Center, 100 Community Place, Crownsville, Maryland. Chairman Charles C. Deegan called the meeting to order.

Commission Members in Attendance:

Gail Blazer, Worcester County – Coastal Bays (Town of Ocean City)
Virginia Clagett, Western Shore Member-at-Large
Deborah Herr Cornwell, Maryland Department of Planning
Carolyn Cummins, Worcester County – Coastal Bays
Sandy Hertz, Maryland Department of Transportation
Michael Hewitt, St. Mary's County
Mark Konapelsky, Somerset County
Louise Lawrence, Department of Agriculture
James Lewis, Caroline County
David Marks, Baltimore County
Catherine McCall, Department of Natural Resources
Michael McCarthy, Talbot County
Patrick Nutter, Calvert County
Stephen Parker, Cecil County
Suzanne Pittenger-Slear, Eastern Shore Member-at-Large
Malachy Rice, Maryland Department of Commerce
Gary Setzer, Department of the Environment
Chris Trumbauer, Anne Arundel County

Commission Members Not in Attendance:

Curtis Beulah, Harford County
Robert Culver, Wicomico County
Brad Frome, Prince George's County
James Gesl, Charles County
Gary Mangum, Queen Anne's County
Jennifer Merritt, Worcester County – Chesapeake Bay
Donald Satterfield, Dorchester County

Karen Stokes, Baltimore City

Donald Sutton, Kent County

Caroline Varney-Alvarado, Department of Housing and Community Development

Chairman Deegan greeted the Commissioners, staff and guests and began the meeting with a call for a motion to approve the Minutes of November 1, 2017. A motion was made and seconded by Suzanne Pittenger-Slear, Eastern Shore Member-at-Large. A vote was taken with all in favor.

Special Guest and Speaker – Mark J. Belton, Secretary of Natural Resources

Chairman Deegan introduced Mr. Belton, Secretary of Natural Resources and Mr. Bill Anderson, Assistant Secretary of Natural Resources. Mr. Belton spoke to the Commission members, staff and guests concerning the state of the Department of Natural Resources. He addressed three major areas: aquatic resources, land resources and mission support and the improving trend of the health of the Chesapeake Bay. Mr. Belton took questions and finished speaking. Chairman Deegan thanked Mr. Belton and the Commission took a brief break before starting the meeting.

Washington Suburban Sanitary Commission (WSSC) Anacostia Wastewater Treatment Plant 102 Inch Sewer Replacement (Prince George's County)

Chairman Deegan introduced Mr. Nick Kelly to present for vote the Washington Suburban Sanitary Commission (WSSC) sewer replacement project. Mr. Kelly presented a PowerPoint presentation and reviewed the staff report, which is incorporated into and made part of these minutes.

Mr. Kelly reported that the Washington Suburban Sanitary Commission (WSSC) is proposing to rehabilitate the Anacostia Trunk Sewer (ATS) in Bladensburg, Maryland (Prince George's County). The ATS runs parallel to the Anacostia River and under the Bladensburg Waterfront Park. The entire project is within the Critical Area on lands designated as both an Intensely Developed Area (IDA) and Resource Conservation Area (RCA). A copy of the site plan is attached to the staff report. Mr. Kelly presented the project impacts, buffer impacts, storm water management, permit and agency reviews, coastal resiliency and public notice requirements. There were no questions.

Mr. Setzer moved on behalf of the Project Subcommittee, that the Commission approve the rehabilitation of the Anacostia Truck Sewer Project in Bladensburg, Prince George's County, Maryland. This motion was offered in accordance with the staff report and presentation and the following condition: Within 90 days of the date of the Critical Area Commission's approval, the Washington Suburban Sanitary Commission shall submit to Commission staff for review and approval a Buffer Management Plan (BMP) that provides mitigation for clearing and disturbance in the Buffer associated with this project. The Buffer Management Plan shall be completed in accordance with COMAR 27.01.09.01, including the requirements for natural regeneration.

The motion was seconded by Commissioner Sandy Hertz. The motion was put to a vote and approved unanimously.

Maryland Department of Transportation State Highway Administration Superstructure Replacement of US 40 Bridges over Gunpowder Falls & Little Gunpowder Falls

Chairman Deegan introduced Ms. Claudia Jones to present for vote the Maryland Department of Transportation State Highway Administration Superstructure Replacement of US 40 Bridges over Gunpowder Falls & Little Gunpowder Falls. Ms. Jones presented a PowerPoint presentation and reviewed the staff report, which is incorporated into and made part of these minutes.

The Maryland State Highway Administration (SHA) is proposing improvements to the Route (Rt.) 40 bridges and roadway that cross over both the Big and Little Gunpowder Rivers in Baltimore County. The proposed work will consist of rehabilitation, superstructure replacement, and widening of these bridges on both the northbound and southbound sides of Rt. 40. The proposed rehabilitation will lengthen the substructure abutments and piers of each bridge to accommodate a wider superstructure. Approach roadway work, including resurfacing and full depth reconstruction will be required to tie into the widened bridges and allow for the use of the existing shoulders and medians to reroute traffic during construction. Riprap will be installed around the abutments and piers for scour protection.

The land surrounding the project is mapped mostly as Resource Conservation Area with a small portion of Limited Development Area (LDA) and Intensely Developed Area (IDA) along the eastern project limits. However, due to their linear nature all state road projects are reviewed in accordance with the requirements for an IDA.

Both bridges were constructed in 1935. The superstructures are structurally deficient and the decks, parapets, and beams at both crossings have significantly deteriorated. The wider superstructures will include two 12-foot lanes with 16.25-foot outside shoulders at the Little Gunpowder Falls and 12.75-foot outside shoulders at the Big Gunpowder Falls. The total width, including an open median, will be widened from the current 83.8 feet for the Little Gunpowder and 103 feet for Big Gunpowder Falls to match approach roadways and shoulders. Ms. Jones presented the project impacts, mitigation, permit and agency reviews, public notice requirements and coastal resiliency considerations. There were no questions.

Mr. Setzer moved on behalf of the Project Subcommittee, that the Commission approve the project to the US Route 40 Bridges over the Big and Little Gunpowder Falls and their approaches proposed by the Maryland State Highway Administration. The motion was offered in accordance with the staff report and presentation and the following condition: The State Highway Administration shall submit a signed Planting Agreement Form for the mitigation to Commission staff prior to the start of construction.

The motion was seconded by Commissioner David Marks. The motion was put to a vote and approved unanimously.

Nonwater-Dependent Structures Final Publication

Chairman Deegan introduced Ms. Lisa Hoerger to present for vote permission to publish as final regulations in the Maryland Register ‘Nonwater- Dependent Projects on Piers’. Ms. Hoerger reviewed the staff report, which is incorporated into and made part of these minutes.

In 2013 the General Assembly passed Senate Bill 524 that gave local governments the option to allow certain nonwater-dependent uses on piers. Senate Bill 524 amended §16-104 of the Environment Article and §8-1808.4 of the Natural Resources Article. The types of development allowed on piers include accessory uses, such as restaurants and bars, on existing commercial sites, and small-scale renewable energy generation through solar panels, wind turbines, and geothermal exchangers.

The law’s opt in provision was designed to provide local governments the ability to decide whether the development is consistent with their local plans and programs. Local jurisdictions can be stricter in their selection and implementation of these provisions, but must amend their Critical Area programs to allow these nonwater-dependent uses.

The purpose of these regulations is to incorporate into the Code of Maryland Regulations (COMAR) the nonwater-dependent projects provisions found in the Environment Article and the Natural Resources Article so that local planners and the public can find the requirements in one place in the regulations.

At the November 1, 2017 meeting staff presented the draft of the nonwater-dependent regulations to the Commission for review and discussion. The Commission voted to give the staff permission to publish the draft in the Maryland Register as proposed regulations. On December 22, 2017 the regulations were published and the public comment period ran through January 22, 2018.

Mr. Setzer moved that the Commission authorize Commission staff to publish the following Code of Maryland Regulations in the Maryland Register as final regulations: COMAR 27.01.01 entitled General Provisions, COMAR 27.01.11 entitled Directives for Updating Critical Area Maps, COMAR 27.02.01 entitled General Provisions, COMAR 27.03.01 entitled Notification of Project Applications, and COMAR 27.01.13 entitled Nonwater-Dependent Projects.

The motion was seconded by Commissioner Chris Trumbauer. The motion was put to a vote and approved unanimously.

Anne Arundel County Program Implementation Issues

Chairman Deegan asked Ms. Kate Charbonneau to present a briefing on Anne Arundel County Program implementation issues that were discussed at length by the Program Subcommittee. The purpose of Ms. Charbonneau’s presentation was to describe an omission in the County’s Critical Area program and to provide guidance as to how the Commission could require Anne Arundel County to address the issue. The omission related to the County’s application of

requirements for lot consolidation and reconfiguration on a proposed subdivision called Turtle Run. The County program did not contain specific procedures to allow the transfer of grandfathered development rights through reconfiguration and subdivision as was proposed by the Turtle Run subdivision. Ms. Charbonneau reviewed Critical Area Program requirements, Anne Arundel County's application of regulations for lot consolidation and reconfiguration, the omission in the Anne Arundel County Critical Area Program, and the process available to the Commission to correct mistakes, omissions, or conflicts with criteria or laws.

Program Subcommittee Chair Carolyn Cummins provided a recap of the morning conversation by the Subcommittee and noted there were some concerns, including one recommendation against the staff recommendation. However, based upon the concerns discussed, Ms. Cummins made the following motion on behalf of the Program Subcommittee:

The Program Subcommittee has determined that there is a clear conflict, mistake, or omission in the Anne Arundel County Critical Area Program. The County's Program (1) lacks specific standards that meet the Commission's regulations for the consolidation and reconfiguration of nonconforming parcels or lots in the Critical Area (COMAR 27.01.02.08) and (2) does not have a sufficiently tailored standard to allow for the reconfiguration of non-adjacent parcels in the Resource Conservation Area.

In accordance with Section 8-1809 (l) of the Natural Resources Article, the Commission will notify the County of this deficiency, and within 90 days, the County shall submit program amendments or refinements to correct this deficiency. From the date of this action, any future local approvals of lot consolidations or reconfigurations of nonconforming parcels in the Critical Area shall be null and void until this deficiency is corrected.

Until this deficiency is corrected, the County may not grant any approval of subdivisions involving the reconfiguration or consolidation of nonconforming parcels or lots in the Critical Area.

The motion was seconded by Commissioner Virginia Clagett. The motion was put to a vote and approved with one no vote.

After the vote, County Assistant Attorney Greg Swain asked to be recognized. Mr. Swain stated that he was concerned about the impact of the action by the Commission on the ongoing case with the County Board of Appeals.

Refinement – Talbot County Comprehensive Review – Zoning Map Amendment – Bill#1376 – Part I. Mapping Amendments

Chairman Deegan asked Ms. Jennifer Esposito to present a briefing on Bill #1376: Talbot County Critical Area Comprehensive Review – Part I. Mapping Amendments. Ms. Jennifer Esposito then reported on the issues and reviewed the staff report, which is incorporated into and made part of these minutes.

Bill #1376 is the first phase of a two-phase process of a comprehensive review of the County's

Critical Area Program, which includes transitioning from an integrated Critical Area local-based zoning district to implementing the County's Critical Area program through overlay zones. The second phase of the comprehensive review includes updates to the text of Talbot County's Critical Area Code and is expected to be reviewed by the Commission by the middle of this calendar year.

As directed by the County's 2016 Comprehensive Plan, including its adopted Tier Maps that were created to conform with the Sustainable Growth and Agricultural Preservation Act of 2012, Bill #1376 adjusts the village boundaries for thirteen villages within the County. Eight of the villages, Bozman, Claiborne, Copperville, McDaniel, Newcomb, Royal Oak, Tunis Mills, and Wittman, are located within the Critical Area and include Critical Area land designation changes as a result of Bill #1376. Under the comprehensive rezoning process, the County changed twelve parcels from LDA to RCA, and another twenty-eight parcels from RCA to LDA in order to align the newly adopted village boundaries with both the underlying zoning district and the Critical Area overlay zoning classification.

Throughout the approval process, Talbot County conducted public outreach that included advertising, multiple public information meetings, and mailed postcards to all of the property owners impacted by the village boundary modifications.

Ms. Anderson reviewed the map amendments which changed the underlying zoning to RC and the Critical Area designation from LDA to RCA. She stated that the information provided by the County indicated these changes were consistent with the County's comprehensive plan and Tier IV mapping designations for resource protection areas. Ms. Anderson stated that the twelve parcels appear to meet the requirements for Critical Area designation of RCA as the dominant land use on the parcels is agriculture, forest, or single family dwelling. Ms. Anderson advised that the proposed change from LDA to RCA is consistent with the purposes, policies, and goals of the Critical Area law and Criteria.

Ms. Anderson next reviewed the map amendments which changed the underlying zoning to VC and the Critical Area designation from RCA to LDA on twenty-eight parcels. The County provided information stating that the change in the Critical Area designation is consistent with the County's comprehensive plan and Tier III-B mapping designation. The new VC zone is inconsistent with an RCA designation which is why the County changed the Critical Area designation to LDA. Ms. Anderson stated that the proposed Critical Area designation change to LDA does not meet Critical Area requirements. Specifically, the change to LDA requires the County to use growth allocation, or demonstrate that the change could be made on the basis of a mistake.

Program Subcommittee Chair Carolyn Cummins made a motion that first, the Commission concur that Bill 1376 can be handled as a refinement, second the Subcommittee recommends that the Chairman approve those portions of Bill 1376 pertaining to the downzoning of the twelve parcels, as listed in Table III attached to the Staff Report, from Limited Development Area to Resource Conservation Area, and finally the Subcommittee recommends that the Chairman return those portions of Bill 1376 pertaining to the upzoning of twenty-eight parcels from

Resource Conservation Area to Limited Development Area, as listed in Tables I and II attached to the Staff Report with the following list of changes to be made:

1. Talbot County shall amend the Critical Area component of their Zoning Ordinance to provide a process to coordinate comprehensive zoning map amendments of the Talbot County Zoning map and the upzoning of any corresponding Critical Area maps during a comprehensive review of the County's Critical Area program. This text amendment shall include:
 - a. A process to demonstrate how the upzoning of a Critical Area mapping designation on a parcel utilizes growth allocation, unless evidence of a mapping mistake can be provided. This text amendment shall address the following:
 - i. The ability to grant growth allocation to multiple properties simultaneously;
 - ii. Alternative adjacency standards for non-adjacent growth allocation requests; and
 - iii. Standards for growth allocation requests for Intensely Developed Areas that are less than 20 acres in size.
 - b. A process to demonstrate how the downzoning of the Critical Area designation of the parcels complies with the Critical Area Law and Criteria.

Program Subcommittee Chair Carolyn Cummins mentioned that there was one “no” vote and one abstention in the subcommittee.

The motion was seconded by Commissioner James Lewis. Commissioner Hewitt commented that he had insufficient time to consider this request by Talbot County. Commissioner Pittenger-Slear noted that she too was concerned about the many issues that were needed to discuss and insufficient time to review them. The motion was put to a vote and was approved with fourteen in favor and four opposed. Chairman Deegan, taking into consideration the recommendations, stated that this will be his final decision.

Program Subcommittee Chair Carolyn Cummins stated that after the subcommittee meeting it was decided that a policy was needed to address the review time for amendments and refinements. Chairman Deegan thanked the subcommittee for their hard work in the morning. He also wanted to state that he has asked staff to help jurisdictions and not hold up local government.

Refinement – Calvert County – Amendment to Critical Area Map – Ordinance #49-17

Chairman Deegan asked Ms. Lisa Hoerger to present a briefing on Calvert County Ordinance #49-17. Ms. Hoerger then reported on the issues and reviewed the staff report, which is incorporated into and made part of these minutes.

At the Commission's May 3, 2017 meeting the Commission concurred with Chairman Deegan's determination that the Calvert County Critical Area map update could be reviewed as a refinement and he subsequently deemed approved the County's maps. A few months later an error was discovered on Tax Maps 32 and 35. The County's original Critical Area maps showed an area designated as Limited Development Area, but it was somehow designated as Resource Conservation Area during the mapping update. As a result the County Commissioners reapproved

tax maps 32 and 35 through Ordinance #49-17 to reflect the corrected Critical Area designations, which were attached to the Staff Report.

Program Subcommittee Chair, Carolyn Cummins, stated that since the original map update is being completed in accordance with State Law and the Commission's mapping regulations the Program Subcommittee concurred that this request could be reviewed as a refinement to the Calvert County Critical Area Program.

Chairman Deegan said the Chair's determination of Refinement stands, and the Program Subcommittee's recommendation will be his final determination.

Refinement – Town of Ocean City (Worcester County) Critical Area Program Comprehensive Review

Chairman Deegan asked Ms. Tay Harris to present the Town of Ocean City's Comprehensive Review of its Critical Area Program. Ms. Harris then reported on the issues and reviewed the staff report, which is incorporated into and made part of these minutes.

Natural Resources Article, §8-1809(g) requires each local jurisdiction to review its entire Critical Area Program at least every six years. The Town's Atlantic Coastal Bays Critical Area Program (Program) is unique. The entire Town is located within the Atlantic Coastal Bays Critical Area, including those areas more than 1,000 feet from the Coastal Bays. It is also nearly entirely mapped as an Intensely Developed Area (IDA) and Buffer Management Area (BMA).

The Town's Critical Area program is premised on a Critical Area Mitigation (CAM) fee, which exponentially increases with proposed lot coverage and may be reduced onsite with extra mitigation plantings, or utilized by the Town for stormwater improvements and habitat enhancements. Furthermore, in addition to the 100-foot Buffer, depending upon property size, a five to 25-foot "waterfront setback" to all wetlands, canals, marshes and the Coastal Bays, excluding the Atlantic Ocean, is required. Within the waterfront setback no more than 60% impervious surface is allowed; no additional impervious surface is allowed if more than 60% impervious surface exists; and native plantings are required (if applicable), or encouraged within the remaining 40%.

A summary of zoning ordinance changes were reviewed and final changes were proposed; those changes included:

- integration of landscaping requirements, plantings and environmentally sensitive design;
- mitigation on a residentially zoned, fully wooded, vacant property;
- lot coverage in the waterfront setback;
- stormwater infiltration elevation; and
- provisions for reasonable accommodations.

The majority of the remaining changes are non-substantive, as they pertain to grammatical errors, adding or revising definitions due to the changes made to the Ordinance (i.e., integration of landscaping requirements) or to become consistent with the definitions found in the Natural Resources Article and COMAR, and integrating policies into the Ordinance to ensure more

effective implementation and enforcement (i.e., 1:1 mitigation for bulkhead replacements, requiring the CAM worksheet and the 10% Critical Area Stormwater Management Rule worksheet with project submission, the one-year timeframe to plant after permit approval and the forfeiture of the Critical Area bond upon expiration of that one year; and the Town's authority to enforce violations, etc.).

Program Subcommittee Chair, Carolyn Cummins stated that since the proposed changes are consistent with Critical Area law and regulations the Program Subcommittee concurs that the Comprehensive Review can be reviewed as a refinement.

Chairman Deegan said the Chair's determination of Refinement stands, and the Program Subcommittee's recommendation will be his final determination.

Refinement – Town of North Beach (Calvert County) Critical Area Program Comprehensive Reivew - Ordinance 17-13

Chairman Deegan asked Ms. Alex Deweese to present the Town of North Beach Comprehensive Review of its Critical Area Program. Ms. Deweese then reported on the issues and reviewed the staff report, which is incorporated into and made part of these minutes.

Natural Resources Article, §8-1809(g) requires each local jurisdiction to review its entire Critical Area Program at least every six years. The Town of North Beach adopted their Critical Area program in September of 1989. There have been no comprehensive reviews of the Town's Critical Area Program since then. However, the Town's Critical Area maps were updated in November 2017.

Ordinance 17-13 repeals and replaces the entirety of the Critical Area Overlay District. Updates to the Town of North Beach Critical Area Overlay District are based upon the Critical Area Commission's model ordinance for municipalities. This text amendment also makes necessary corrections and citations, and adds a Water Dependent Facilities section (Part 16) and a Critical Area definitions section (Part 17). Part 16 permits the Town to allow certain nonwater-dependent uses on piers. The types of development allowed on piers include accessory uses, such as restaurants and bars, on existing commercial sites, and small-scale renewable energy generation through solar panels, wind turbines, and geothermal exchangers. This language is consistent with §16-104 of the Environment Article and §8-1808.4 of the Natural Resources Article.

Program Subcommittee Chair, Carolyn Cummins stated that since the proposed changes are consistent with Critical Area law and regulations the Program Subcommittee concurs that the Comprehensive Review can be reviewed as a refinement.

Chairman Deegan said the Chair's determination of Refinement stands, and the Program Subcommittee's recommendation will be his final determination.

LEGAL UPDATES:

Chairman Deegan asked Assistant Attorney General Emily Vainieri to report any legal updates on any of the cases that the Commission is involved in.

Christopher Radtke (Baltimore County). Ms. Vainieri first provided an update on a case in Baltimore County that involved an after-the-fact variance application to perfect a 1700 sq. ft. concrete patio that was built about nine feet from mean high water and built without permits. The property is located in Dundalk along Bear Creek. The Baltimore County Planning and Zoning Officer denied the variance. Mr. Radtke appealed to the Board of Appeals. The County, as well as the Commission opposed that appeal before the Board of Appeals. In a thorough decision that discussed each variance standard, the Board of Appeals denied the after-the-fact variance. The Board found the Commission's testimony useful and persuasive. Mr. Radtke filed a Petition for Judicial Review in the Circuit Court for Baltimore County challenging the BOA's decision. The County and the Commission, again, are both participating to ask the Court to affirm the Board's decision to deny the after-the-fact variance application. Petitions for Judicial Review are on-the-record reviews. There will be no new testimony and no new evidence. The parties' arguments are based on the transcript and evidence before the Board of Appeals.

Morton Bender (Talbot County). For the Bender case, Commission staff assisted Talbot County in the penalty phase of its enforcement case by providing expert testimony before the Board of Appeals. Mr. Bender constructed a second driveway on his property clearing forest, nontidal wetlands partially in the Critical Area and potential FIDs habitat within and outside of the Critical Area without permits. At the outset many years ago, the parties divided this case into two parts: violation and penalty. In 2015, the Board determined that violations had occurred and Mr. Bender removed the driveway and implemented a restoration plan. At the last meeting, we were awaiting the Board's decision on the penalty portion of the case. The Board agreed with the County's Compliance Officer that the six penalty violations imposed in 2009 were justified. The Board, however, did not agree with the number of days that the County assessed each penalty. As a result, the Board brought the penalty amount down significantly – from more than \$700,000 to about \$25,000. Mr. Bender filed a Petition for Judicial Review in Talbot County Circuit Court challenging the Board's decision. We will continue to monitor this case and continue to assist the County in whatever way we can.

Turtle Run (Anne Arundel County). The final case reported to the Commission was the Turtle Run development which is the 11-lot subdivision in Anne Arundel County discussed earlier in the meeting. Anne Arundel County Planning and Zoning granted conditional sketch plan approval in March 2016. The sketch plan approval was appealed to the Board of Appeals. The Commission is not participating in the sketch plan appeal because one of the conditions of the sketch plan approval is that, prior to final plan approval, the applicant is required to address all outstanding Critical Area Commission comments.

As part of the development process, Anne Arundel County also submitted reconfiguration findings to the Commission in December 2017 on the Turtle Run development. The Commission filed a petition for judicial review in the Circuit Court for Anne Arundel County. Because there is a potential question about the appropriate place to challenge the reconfiguration

findings, the Commission also filed an appeal to the County's Board of Appeals. The same groups that are challenging the preliminary sketch plan approval also filed an appeal of the reconfiguration findings before the Board of Appeals.

NEW BUSINESS:

No new business came before the Commission.

Chairman Deegan adjourned the meeting at 3:10 PM.

Minutes respectfully submitted by Anita McQuighan.