

SENATE BILL 694

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2004 Regular Session
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By: **Senator Dyson (Chairman, Joint Committee on the Chesapeake and Atlantic Coastal Bays Critical Area) and Senators Grosfeld, Stone, and Frosh**

Introduced and read first time: February 6, 2004
Assigned to: Education, Health, and Environmental Affairs

A BILL ENTITLED

1 AN ACT concerning

2 **Chesapeake and Atlantic Coastal Bays Critical Area Protection Program -**
3 **Miscellaneous Enforcement Provisions**

4 FOR the purpose of requiring a local jurisdiction to make a certain presumption when
5 considering a variance application under the Chesapeake and Atlantic Coastal
6 Bays Critical Area Protection Program; establishing certain burdens of proof
7 and persuasion in an application for a certain variance; requiring a local
8 jurisdiction to make certain findings and authorizing the findings to be based on
9 certain evidence and testimony; authorizing a local jurisdiction to consider
10 certain facts when making certain findings; requiring a local jurisdiction's
11 critical area program to include certain buffer requirements and penalty
12 provisions; authorizing a local jurisdiction under certain circumstances to
13 request certain enforcement assistance from the Chairman of the Chesapeake
14 and Atlantic Coastal Bays Critical Area Commission or the Attorney General;
15 declaring and clarifying certain findings of the General Assembly; altering the
16 application of a certain defined term; providing for the application of this Act;
17 and generally relating to the enforcement of the Chesapeake and Atlantic
18 Coastal Bays Critical Area Protection Program.

19 BY repealing and reenacting, with amendments,
20 Article - Natural Resources
21 Section 8-1801, 8-1802(a), 8-1808, 8-1808.5(a), 8-1815, and 8-1815.1
22 Annotated Code of Maryland
23 (2000 Replacement Volume and 2003 Supplement)

24 Preamble

25 WHEREAS, With the enactment of the Chesapeake Bay Critical Area
26 Protection Act in 1984, State lawmakers recognized the major detrimental impact of
27 development activity along the shoreline of the Chesapeake Bay and its tributaries,
28 an area that is pivotal to the preservation and protection of water quality and natural
29 habitat; and

1 WHEREAS, Two years later, in approving the State Critical Area program and
2 its criteria, the General Assembly specified the need for a shoreline buffer of at least
3 100 feet, and this minimum buffer has been an essential critical area component ever
4 since that time; and

5 WHEREAS, Also considered fundamental to the critical area criteria since their
6 inception in the mid-1980s is, under certain circumstances, the allowance of
7 variances to a local jurisdiction's critical area program; and

8 WHEREAS, In keeping with an equitable application of critical area
9 requirements, on average 90% or more of the variances requested each year have
10 been granted; and

11 WHEREAS, The General Assembly has always recognized, nevertheless, that
12 attainment of critical area program goals necessitates a clear authority in support of
13 local jurisdictions when, in their discretion, a variance must be denied; and

14 WHEREAS, In 2002, with a particular awareness of the growing danger to
15 water quality and natural habitat presented by the magnitude of waterfront
16 development, the General Assembly expanded the application of critical area
17 protections so as to include the ecologically sensitive Atlantic Coastal Bays and their
18 tributaries; and

19 WHEREAS, Also in 2002, the General Assembly overruled three then-recent
20 decisions by the Maryland Court of Appeals that had substantially weakened the
21 authority of local jurisdictions' critical area programs in the denial of variances; and

22 WHEREAS, A recent decision by the Court of Appeals, *Lewis v. Department of*
23 *Natural Resources*, has: rejected the finding of the General Assembly that the
24 cumulative impact of development is harmful to the critical area; shifted the burdens
25 of proof and persuasion to local jurisdictions with respect to the denial of a critical
26 area variance application, thus adding burdensome requirements and unnecessary
27 expenses to their consideration of variance applications; and opened the door for
28 citizens to view unpermitted development activity in the critical area as viable due to
29 the lack of detrimental consequence; and

30 WHEREAS, The *Lewis* ruling is clearly contrary to the intent of the General
31 Assembly's enactment of both the Chesapeake Bay Critical Area Protection Act and
32 the Atlantic Coastal Bays Protection Act; and

33 WHEREAS, Over the past two decades, despite the vigilant efforts of the State
34 and local critical area programs and the ongoing focus of the General Assembly, State
35 agencies, advocacy groups, and private citizens, the health of the Chesapeake Bay has
36 continued to deteriorate, as has water quality overall, and this fact has been
37 substantiated in dozens of studies by a variety of government and private interest
38 groups; and

39 WHEREAS, It has become readily apparent that local jurisdictions must have
40 more viable enforcement options available to them if their critical area programs are
41 to be implemented as intended by the General Assembly; and

1 WHEREAS, Acting out of this long-standing and consistent commitment to the
2 preservation of the Chesapeake and Atlantic Coastal Bays and their ecosystems,
3 which are among Maryland's most precious resources, it is the intent of the General
4 Assembly that this Act shall overrule the Lewis decision, as well as enhance the
5 enforcement mechanisms available to local programs in the administration of their
6 critical area programs; now, therefore,

7 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
8 MARYLAND, That the Laws of Maryland read as follows:

9 **Article - Natural Resources**

10 8-1801.

11 (a) The General Assembly finds and declares that:

12 (1) The Chesapeake and the Atlantic Coastal Bays and their tributaries
13 are natural resources of great significance to the State and the nation;

14 (2) The shoreline and adjacent lands constitute a valuable, fragile, and
15 sensitive part of this estuarine system, where human activity can have a particularly
16 immediate and adverse impact on water quality and natural habitats;

17 (3) The capacity of these shoreline and adjacent lands to withstand
18 continuing demands without further degradation to water quality and natural
19 habitats is limited;

20 (4) HUMAN ACTIVITY IS ESPECIALLY HARMFUL IN THESE SHORELINE
21 AREAS, WHERE THE NEW DEVELOPMENT OF NONWATER-DEPENDENT STRUCTURES
22 OR THE ADDITION OF IMPERVIOUS SURFACES IS PRESUMED TO BE CONTRARY TO
23 THE PURPOSE OF THIS SUBTITLE, BECAUSE EACH ACTIVITY CAUSES ADVERSE
24 IMPACTS, OF BOTH AN IMMEDIATE AND A LONG-TERM NATURE, TO THE
25 CHESAPEAKE AND ATLANTIC COASTAL BAYS, AND THUS IT IS NECESSARY
26 WHEREVER POSSIBLE TO MAINTAIN A BUFFER OF AT LEAST 100 FEET LANDWARD
27 FROM THE MEAN HIGH WATER LINE OF TIDAL WATERS, TRIBUTARY STREAMS, AND
28 TIDAL WETLANDS;

29 (5) National studies have documented that the quality and productivity
30 of the waters of the Chesapeake Bay and its tributaries have declined due to the
31 cumulative effects of human activity that have caused increased levels of pollutants,
32 nutrients, and toxics in the Bay System and declines in more protective land uses
33 such as forestland and agricultural land in the Bay region;

34 [(5)] (6) Those portions of the Chesapeake and the Atlantic Coastal Bays
35 and their tributaries within Maryland are particularly stressed by the continuing
36 population growth and development activity concentrated in the
37 Baltimore-Washington metropolitan corridor and along the Atlantic Coast;

1 [(6)] (7) The quality of life for the citizens of Maryland is enhanced
2 through the restoration of the quality and productivity of the waters of the
3 Chesapeake and the Atlantic Coastal Bays, and their tributaries;

4 [(7)] (8) The restoration of the Chesapeake and the Atlantic Coastal
5 Bays and their tributaries is dependent, in part, on minimizing further adverse
6 impacts to the water quality and natural habitats of the shoreline and adjacent lands,
7 PARTICULARLY IN THE BUFFER;

8 [(8)] (9) The cumulative impact of current development AND OF EACH
9 NEW DEVELOPMENT ACTIVITY IN THE BUFFER is inimical to these purposes; and

10 [(9)] (10) There is a critical and substantial State interest for the benefit
11 of current and future generations in fostering more sensitive development activity in
12 a consistent and uniform manner along shoreline areas of the Chesapeake and the
13 Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality
14 and natural habitats.

15 (b) It is the purpose of the General Assembly in enacting this subtitle:

16 (1) To establish a Resource Protection Program for the Chesapeake and
17 the Atlantic Coastal Bays and their tributaries by fostering more sensitive
18 development activity for certain shoreline areas so as to minimize damage to water
19 quality and natural habitats; and

20 (2) To implement the Resource Protection Program on a cooperative
21 basis between the State and affected local governments, with local governments
22 establishing and implementing their programs in a consistent and uniform manner
23 subject to State criteria and oversight.

24 8-1802.

25 (a) (1) In this subtitle the following words have the meanings indicated.

26 (2) "Atlantic Coastal Bays" means the Assawoman, Isle of Wight,
27 Sinepuxent, Newport, and Chincoteague Bays.

28 (3) "Atlantic Coastal Bays Critical Area" means the initial planning area
29 identified under § 8-1807 of this subtitle.

30 (4) "BUFFER" MEANS AN EXISTING, NATURALLY VEGETATED AREA, OR
31 AN AREA ESTABLISHED IN VEGETATION AND MANAGED TO PROTECT AQUATIC,
32 WETLANDS, SHORELINE, AND TERRESTRIAL ENVIRONMENTS FROM MAN-MADE
33 DISTURBANCES.

34 (5) "Chesapeake Bay Critical Area" means the initial planning area
35 identified under § 8-1807 of this subtitle.

36 [(5)] (6) "Commission" means the Critical Area Commission for the
37 Chesapeake and Atlantic Coastal Bays established in this subtitle.

1 [(6)] (7) "Critical Area" means the Chesapeake Bay Critical Area and
2 the Atlantic Coastal Bays Critical Area.

3 [(7)] (8) "Development" means any activity that materially affects the
4 condition or use of dry land, land under water, or any structure.

5 [(8)] (9) "Growth allocation" means the number of acres of land in the
6 Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area that a local
7 jurisdiction may use to create new intensely developed areas and new limited
8 development areas.

9 [(9)] (10) "Includes" means includes or including by way of illustration
10 and not by way of limitation.

11 [(10)] (11) "Land classification" means the designation of land in the
12 Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in accordance
13 with the criteria adopted by the Commission as an intensely developed area or
14 district, a limited development area or district, or a resource conservation area or
15 district.

16 [(11)] (12) "Local jurisdiction" means a county, or a municipal corporation
17 with planning and zoning powers, in which any part of the Chesapeake Bay Critical
18 Area or the Atlantic Coastal Bays Critical Area, as defined in this subtitle, is located.

19 [(12)] (13) (i) "Program" means the critical area protection program of a
20 local jurisdiction.

21 (ii) "Program" includes any amendments to the program.

22 [(13)] (14) (i) "Program amendment" means any change to an adopted
23 program that the Commission determines will result in a use of land or water in the
24 Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner
25 not provided for in the adopted program.

26 (ii) "Program amendment" includes a change to a zoning map that
27 is not consistent with the method for using the growth allocation contained in an
28 adopted program.

29 [(14)] (15) (i) "Program refinement" means any change to an adopted
30 program that the Commission determines will result in a use of land or water in the
31 Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner
32 consistent with the adopted program.

33 (ii) "Program refinement" includes:

34 1. A change to a zoning map that is consistent with the
35 development area designation of an adopted program; and

36 2. The use of the growth allocation in accordance with an
37 adopted program.

1 [(15)] (16) (i) "Project approval" means the approval of development,
2 other than development by a State or local government agency, in the Chesapeake
3 Bay Critical Area or the Atlantic Coastal Bays Critical Area by the appropriate local
4 approval authority.

5 (ii) "Project approval" includes:

- 6 1. Approval of subdivision plats and site plans;
- 7 2. Inclusion of areas within floating zones;
- 8 3. Issuance of variances, special exceptions, and conditional
9 use permits; and
- 10 4. Approval of rezoning.

11 (iii) "Project approval" does not include building permits.

12 8-1808.

13 (a) (1) It is the intent of this subtitle that each local jurisdiction shall have
14 primary responsibility for developing and implementing a program, subject to review
15 and approval by the Commission.

16 (2) (i) The Governor shall include in the budget a sum of money to be
17 used for grants to reimburse local jurisdictions for the reasonable costs of developing
18 a program under this section.

19 (ii) Each local jurisdiction shall submit to the Governor a detailed
20 request for funds that are equivalent to the additional costs incurred in developing
21 the program under this section.

22 (iii) The Governor shall include in the fiscal year 2003 budget a sum
23 of money to be used for grants to reimburse local jurisdictions in the Atlantic Coastal
24 Bays Critical Area for the reasonable costs of developing a program under this
25 section.

26 (3) The Governor shall include in the budget annually a sum of money to
27 be used for grants to assist local jurisdictions with the reasonable costs of
28 implementing a program under this section. Each local jurisdiction shall submit to
29 the Governor by May 1 of each year a detailed request for funds to assist in the
30 implementation of a program under this section.

31 (b) A program shall consist of those elements which are necessary or
32 appropriate:

33 (1) To minimize adverse impacts on water quality that result from
34 pollutants that are discharged from structures or conveyances or that have run off
35 from surrounding lands;

36 (2) To conserve fish, wildlife, and plant habitat; and

1 (3) To establish land use policies for development in the Chesapeake Bay
2 Critical Area or the Atlantic Coastal Bays Critical Area which accommodate growth
3 and also address the fact that, even if pollution is controlled, the number, movement,
4 and activities of persons in that area can create adverse environmental impacts.

5 (c) At a minimum, a program sufficient to meet the goals stated in subsection
6 (b) of this section includes:

7 (1) A map designating the critical area in a local jurisdiction;

8 (2) A comprehensive zoning map for the critical area;

9 (3) As necessary, new or amended provisions of the jurisdiction's:

10 (i) Subdivision regulations;

11 (ii) Comprehensive or master plan;

12 (iii) Zoning ordinances or regulations;

13 (iv) Provisions relating to enforcement; and

14 (v) Provisions as appropriate relating to grandfathering of
15 development at the time the program is adopted or approved by the Commission;

16 (4) Provisions requiring that project approvals shall be based on findings
17 that projects are consistent with the standards stated in subsection (b) of this section;

18 (5) Provisions to limit the amount of land covered by buildings, roads,
19 parking lots, or other impervious surfaces, and to require or encourage cluster
20 development, where necessary or appropriate;

21 (6) Establishment of buffer areas along shorelines within which
22 agriculture will be permitted only if best management practices are used, provided
23 that structures or any other use of land which is necessary for adjacent agriculture
24 shall also be permitted in any buffer area;

25 (7) Requirements for minimum setbacks for structures and septic fields
26 along shorelines, **INCLUDING THE ESTABLISHMENT OF A MINIMUM BUFFER**
27 **LANDWARD FROM THE MEAN HIGH WATER LINE OF TIDAL WATERS, TRIBUTARY**
28 **STREAMS, AND TIDAL WETLANDS.**

29 (8) Designation of shoreline areas, if any, that are suitable for parks,
30 hiking, biking, wildlife refuges, scenic drives, public access or assembly, and
31 water-related recreation such as boat slips, piers, and beaches;

32 (9) Designation of shoreline areas, if any, that are suitable for ports,
33 marinas, and industries that use water for transportation or derive economic benefits
34 from shore access;

1 (10) Provisions requiring that all harvesting of timber in the Chesapeake
2 Bay Critical Area or the Atlantic Coastal Bays Critical Area be in accordance with
3 plans approved by the district forestry board;

4 (11) Provisions establishing that the controls in a program which are
5 designed to prevent runoff of pollutants will not be required on sites where the
6 topography prevents runoff from directly or indirectly reaching tidal waters;

7 (12) Provisions for reasonable accommodations in policies or procedures
8 when the accommodations are necessary to avoid discrimination on the basis of
9 physical disability, including provisions that authorize a local jurisdiction to require
10 removal of a structure that was installed or built to accommodate a physical disability
11 and require restoration when the accommodation permitted by this paragraph is no
12 longer necessary; [and]

13 (13) Except as provided in subsection (d) of this section, provisions for
14 granting a variance to the local jurisdiction's critical area program, in accordance
15 with regulations adopted by the Commission concerning variances set forth in
16 COMAR 27.01.11; AND

17 (14) PENALTY PROVISIONS ESTABLISHING THAT, IN ADDITION TO ANY
18 OTHER PENALTY APPLICABLE UNDER STATE OR LOCAL LAW, A PERSON WHO
19 VIOLATES A PROVISION OF THIS SUBTITLE OR OF A PROGRAM IS SUBJECT TO A FINE
20 NOT EXCEEDING \$10,000.

21 (d) (1) IN THIS SUBSECTION, "UNWARRANTED HARDSHIP" MEANS THAT,
22 WITHOUT A VARIANCE, AN APPLICANT WOULD BE DENIED REASONABLE AND
23 SIGNIFICANT USE OF THE ENTIRE PARCEL OR LOT FOR WHICH THE VARIANCE IS
24 REQUESTED.

25 (2) (I) IN CONSIDERING AN APPLICATION FOR A VARIANCE, A LOCAL
26 JURISDICTION SHALL PRESUME THAT ANY NEW DEVELOPMENT ACTIVITY IN THE
27 CRITICAL AREA FOR WHICH A VARIANCE IS REQUIRED DOES NOT CONFORM WITH
28 THE LOCAL PROGRAM.

29 (II) IF THE VARIANCE REQUEST IS BASED ON CONDITIONS OR
30 CIRCUMSTANCES THAT ARE THE RESULT OF ACTIONS BY THE APPLICANT,
31 INCLUDING THE COMMENCEMENT OF DEVELOPMENT ACTIVITY BEFORE AN
32 APPLICATION FOR A VARIANCE HAS BEEN FILED, A LOCAL JURISDICTION MAY
33 CONSIDER THAT FACT.

34 (3) (I) AN APPLICANT HAS THE BURDEN OF PROOF AND THE BURDEN
35 OF PERSUASION TO OVERCOME THE PRESUMPTION ESTABLISHED UNDER
36 PARAGRAPH (2)(I) OF THIS SUBSECTION.

37 (II) 1. A LOCAL JURISDICTION SHALL MAKE WRITTEN FINDINGS
38 AS TO WHETHER THE APPLICANT HAS OVERCOME THE PRESUMPTION ESTABLISHED
39 UNDER PARAGRAPH (2)(I) OF THIS SUBSECTION.

1 (2) During the hearing process, the Commission shall consult with each
2 affected local jurisdiction.

3 (f) Nothing in this section shall impede or prevent the dredging of any
4 waterway in a critical area. However, dredging in a critical area is subject to other
5 applicable federal and State laws and regulations.

6 (g) In adopting the initial land classification for the Atlantic Coastal Bays
7 Critical Area, the local program:

8 (1) Of the Town of Ocean City shall classify as an intensely developed
9 area that area that is within the municipal boundaries of Ocean City as of January 1,
10 2002; and

11 (2) Of Worcester County shall classify as an intensely developed area
12 that area located on the western mainland that is east of Golf Course Road, south of
13 Charles Street, and north of Route 707 (Old Bridge Road).

14 (h) The provisions of this subtitle and Title 27 of the Code of Maryland
15 Regulations apply to the Atlantic Coastal Bays Critical Area.

16 8-1808.5.

17 (a) (1) In this section [the following words have the meanings indicated.

18 (2) "Buffer" means an existing, naturally vegetated area, or an area
19 established in vegetation and managed to protect aquatic, wetlands, shoreline, and
20 terrestrial environments from man-made disturbances.

21 (3) (i) "Community], "COMMUNITY pier" means a boat docking facility
22 associated with a subdivision or similar residential area, or with condominiums,
23 apartments, or other multiple-family dwelling units.

24 [(ii) (2) "Community pier" does not include a private pier or a
25 mooring.

26 8-1815.

27 (a) (1) Violators of the provisions of programs approved or adopted by the
28 Commission shall be subject to prosecution or suit by local authorities, who may
29 invoke the sanctions and remedies afforded by State or local law.

30 (2) A LOCAL AUTHORITY MAY REQUEST:

31 (I) ASSISTANCE FROM THE COMMISSION IN AN ENFORCEMENT
32 ACTION; OR

33 (II) THAT THE CHAIRMAN REFER AN ENFORCEMENT ACTION TO
34 THE ATTORNEY GENERAL.

1 (b) Whenever the chairman has reason to believe that a local jurisdiction is
2 failing to enforce the requirements of a program applicable to a particular
3 development, the chairman shall serve notice upon the local enforcement authorities.
4 If within 30 days after service of the notice, the local authorities have failed to initiate
5 an action to remedy or punish the violation, the chairman may refer the matter to the
6 Attorney General.

7 (c) Upon referral of an alleged violation under subsection (A) OR (b) of this
8 section, the Attorney General may invoke any sanction or remedy available to local
9 authorities, in any court of competent jurisdiction in which the local authorities would
10 be authorized to prosecute or sue the violator.

11 (d) In addition to any other sanction or remedy available, the Attorney
12 General may bring an action in equity to compel compliance or restrain
13 noncompliance with the requirements of approved project plans, and to compel
14 restoration of lands or structures to their condition prior to any modification which
15 was done in violation of approved project plans.

16 (e) Notwithstanding any other provision of this section, whenever a
17 development in the Critical Area is proceeding in violation of approved project plans
18 and threatens to immediately and irreparably degrade the quality of tidal waters or
19 fish, wildlife, or plant habitat, the Attorney General, upon request of the chairman,
20 may bring an action to restrain the violation and, as appropriate, to compel
21 restoration of any land or water areas affected by the development.

22 8-1815.1.

23 (a) (1) The provisions of this section are in addition to any other sanction,
24 remedy, or penalty provided by law.

25 (2) This section does not apply to any cutting or clearing of trees that is
26 allowed under regulations adopted by the Commission under this subtitle.

27 (b) If a person cuts or clears or plans to cut or clear trees within the
28 Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in violation of
29 AN APPROVED LOCAL CRITICAL AREA PROGRAM OR OF regulations adopted by the
30 Commission, the local jurisdiction may bring an action OR REQUEST THAT THE
31 CHAIRMAN OF THE COMMISSION REFER THE MATTER TO THE ATTORNEY GENERAL
32 TO BRING AN ACTION:

33 (1) To require the person to replant trees where the cutting or clearing
34 occurred in accordance with a plan prepared by the State Forester, a registered
35 professional forester, or a registered landscape architect;

36 (2) To restrain the planned violation; or

37 (3) For damages:

38 (i) To be assessed by a circuit court in an amount equal to the
39 estimated cost of replanting trees; and

1 (ii) To be paid to the Department by the person found to have
2 violated the provisions of this subsection.

3 (c) If the Chairman of the Commission has reason to believe that the local
4 jurisdiction is failing to enforce the requirements of subsection (b) of this section, the
5 Chairman shall refer the matter to the Attorney General as provided under § 8-1815
6 (b) of this subtitle.

7 (d) On the Chairman of the Commission's referral of an alleged violation
8 under subsection (c) of this section to the Attorney General, the Attorney General may
9 invoke the remedies available to the local jurisdiction under subsection (b) of this
10 section in any court of competent jurisdiction in which the local jurisdiction would be
11 authorized to prosecute or sue.

12 (e) On the request of a local jurisdiction or the Chairman of the Commission,
13 the State Forester, a registered professional forester, or a registered landscape
14 architect may prepare, oversee, and approve the final implementation of a plan to:

15 (1) Replant trees in any part of the Chesapeake Bay Critical Area where
16 trees in the Chesapeake Bay Critical Area are cut or cleared in violation of subsection
17 (b) of this section; and

18 (2) Replant trees in any part of the Atlantic Coastal Bays Critical Area
19 where trees in the Atlantic Coastal Bays Critical Area are cut or cleared in violation
20 of subsection (b) of this section.

21 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be
22 construed to apply only prospectively and may not be applied or interpreted to have
23 any effect on or application to any dwelling unit in existence or for which all necessary
24 permits for construction had been issued before the effective date of this Act.

25 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take
26 effect June 1, 2004.