

Department of Legislative Services

Maryland General Assembly

2004 Session

FISCAL AND POLICY NOTE

Revised

House Bill 1009

(Delegate Frush, *et al.*)

(Chairman, Joint Committee on the Chesapeake and Atlantic Coastal Bays Critical Area)

Environmental Matters

Education, Health, and Environmental Affairs

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

This bill makes several changes to the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program in the Department of Natural Resources (DNR).

The bill takes effect June 1, 2004.

Fiscal Summary

State Effect: The bill's changes could be handled with existing budgeted resources.

Local Effect: Local revenues could increase minimally due to the bill's penalty provision. The bill could reduce administrative expenditures associated with handling variance requests that could occur as a result of a recent court decision.

Small Business Effect: Minimal.

Analysis

Bill Summary: First, the bill clarifies legislative intent regarding human impacts on the bay and the importance to the program of a minimum "buffer." Second, the bill establishes in statute specific procedural aspects of a local jurisdiction's consideration of a variance request. Third, the bill defines "unwarranted hardship" to mean that, without a variance, an applicant would be denied reasonable and significant use of the entire parcel

or lot for which the variance is requested. Fourth, the bill codifies current regulations requiring a local program to include the establishment of a minimum buffer. Fifth, the bill enhances enforcement authority by: (1) requiring a local program to include specified penalty provisions; and (2) authorizing a local authority to request assistance from the Chesapeake and Atlantic Coastal Bays Critical Area Commission in specified enforcement actions or to request that the chairman of the commission refer enforcement actions to the Attorney General.

In considering an application for a variance, a local jurisdiction must presume that the specific development activity in the critical area that is subject to the application and for which a variance is required does not conform to the general purpose and intent of the critical area law and the requirements of the local program. If the variance request is based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, a local jurisdiction may consider that fact. The bill provides that the burden of proof and the burden of persuasion lie with the applicant. Based on competent and substantial evidence, a local jurisdiction must make written findings as to whether the applicant has overcome the presumption that the development activity does not conform to the general purpose and intent of the critical area law and the requirements of the local program.

A local program is required to include penalty provisions establishing that, in addition to any other applicable penalty, a person who violates a provision of the program is subject to a fine of up to \$10,000. The bill authorizes a local jurisdiction to consider several specified factors in determining the amount of the penalty to be assessed.

Current Law/Background: Chapter 794 of 1984 established the Chesapeake Bay Critical Area Protection Program in order to minimize damage to water quality and wildlife habitat by fostering more sensitive development activity along the shoreline areas of the Chesapeake Bay and its tributaries. The law identified the “critical area” as all land within 1,000 feet of the mean high water line of tidal waters or the landward edge of tidal wetlands and all waters of and lands under the Chesapeake Bay and its tributaries. Viewed as particularly sensitive were the “buffer areas” falling within 100 feet of the shoreline. Because the unique and critical environmental functions of these buffers were regarded as compromised by clearing and construction, their protection was considered a cornerstone of the program.

The 1984 legislation also created a statewide Chesapeake Bay Critical Area Commission that oversees the development and implementation of local land use programs dealing with the critical area. As required, the commission adopted regulations to implement overall program criteria, and these criteria were approved by the General Assembly in

1986. Each local jurisdiction is charged with the primary responsibility for development and implementation of its own local program; that local authority, however, is subject to commission review and approval. According to the commission, the vast majority of applications for variances in the critical area are approved by local jurisdictions.

In three cases decided in 1999 and 2000, the Maryland Court of Appeals reinterpreted long-held understandings of “unwarranted hardship” in the context of local zoning variances in the buffer area. At issue were: what extent of reasonable and significant use of a property must be denied before the owner would be eligible for a variance; whether satisfaction of all variance standards would be required or merely general satisfaction; and the fairness of comparing a new request to nonconforming uses developed before 1984 or to variances granted after the institution of the critical area program. Legislation enacted in 2002, which in effect overruled the Court of Appeals in these three cases, clarified the underlying intent to protect the viability of the buffer area. Also in 2002, the critical area program was expanded to include the Atlantic Coastal Bays.

In July 2003, the Court of Appeals again departed from widely understood principles of critical area zoning law in the case of *Lewis v. Department of Natural Resources*. This ruling allowed for the construction of a hunting camp in the environmentally sensitive buffer. Several facts seemed of slight or no bearing to the court: the landowner commenced building before applying for a variance or other local permits; the property could have accommodated an alternative layout of the camp buildings; and serious environmental degradation had occurred. Likewise, the court did not consider the cumulative environmental impact of development on an ongoing basis.

In October 2003, the court denied the commission’s request for reconsideration or clarification, thus affirming its original ruling. The commission and some legal scholars regard *Lewis* as shifting the burdens of proof and persuasion from an applicant seeking a variance to the local program if it denies the variance request. The impact of this shift, in effect requiring a local program to disprove the need for the variance, is predicted to cause significant escalation of administrative costs associated with each local program, thus crippling enforcement of the entire critical area program. Already, *Lewis* has come up in several other critical area enforcement cases. Moreover, this decision is expected to impact a variety of other legal issues related to land use and zoning. This legislation is intended to override the court.

The bill is also intended to enhance enforcement of the critical area program. Under current law, violators of the provisions of local programs are subject to prosecution or suit by local authorities. The commission advises, however, that the local attorneys engaged by many of the local programs have little experience with the critical area law and its program components. While violations may be referred to the Attorney General,

who is authorized to compel compliance, restrain noncompliance, and take other specified actions, enforcement by the Attorney General is not triggered unless the chairman of the commission has reason to believe that the local program has failed in its enforcement requirements. Such a failure is rarely the case. Also, if a person cuts or clears trees within the critical area in violation of regulations adopted by the commission, the local jurisdiction may bring an action to require replanting, restrain the violation, or for monetary damages up to \$500. Such violations also may be referred to the Attorney General under specified conditions.

Because current enforcement provisions are not viewed as significant enough to deter violations, the bill's streamlined process for referral to the Attorney General and its enhanced penalty amount are intended to strengthen program enforcement.

Additional Information

Prior Introductions: None.

Cross File: SB 694 (Senator Dyson, *et al.*) (Chairman, Joint Committee on the Chesapeake and Atlantic Coastal Bays Critical Area) – Education, Health, and Environmental Affairs.

Information Source(s): Department of Natural Resources, Office of the Attorney General, Howard County, Montgomery County, Department of Legislative Services

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