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# THE CHESAPEAKE BAY CRITICAL AREA COMMISSION REGULATIONS: PROCESS OF ENACTMENT AND EFFECT ON PRIVATE PROPERTY INTERESTS

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*In 1984, the Maryland General Assembly enacted several bills to restore declining water quality and habitat values in the Chesapeake Bay, the most controversial of which was the Critical Areas Legislation. This article, co-authored by the Chairman of the Commission, discusses the creation of the Chesapeake Bay Critical Areas Commission and the development of its regulations. The article then examines the constitutional issue raised by the Criteria's requirement that certain land areas surrounding the Bay have a density of no more than one dwelling unit per twenty acres. The authors conclude that this highly debated density requirement constitutes neither a "taking" of the property without just compensation nor a deprivation of property without due process.*

## I. INTRODUCTION

The Chesapeake Bay Critical Area Protection Program was the most controversial of the laws enacted in 1984 to address the restoration of Maryland's most significant natural resource. This legislation created a Chesapeake Bay Critical Areas Commission (Commission) and authorized the Commission to adopt regulations that establish a resource protection program for the Bay and its tributaries.<sup>1</sup> The waters and lands included in the Commission's planning area are defined in the statute and designated as the Chesapeake Bay Critical Area (Critical Area).<sup>2</sup> Each county, or a municipal corporation with planning and zoning powers, in which any part of the Critical Area is located, is responsible for develop-

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1. MD. NAT. RES. CODE ANN. §§ 8-1803 to -1806 (Supp. 1986).

2. *Id.* § 8-1807.

ing and implementing a local program of resource protection in accordance with the Commission's regulations.<sup>3</sup> The programs of each local jurisdiction will be subject to review and approval by the Commission.<sup>4</sup>

The regulations, or "criteria," developed by the Commission establish land use policies in the Critical Area that accommodate growth, control pollution, and limit the movement and activities of persons in that area that may create adverse environmental impacts. The most controversial aspect of the criteria is the regulation that limits development in the Resource Conservation Area, one of the three classifications for land use around the Bay, to a density of one dwelling unit per twenty acres.<sup>5</sup> One of the legislature's chief concerns in its review of Commission activities was whether this regulation would so affect private property rights as to constitute a taking of that property without just compensation.

The Commission was established by the General Assembly of Maryland to protect the natural resources of the Bay by developing environmental regulations to be followed by local government authorities in the creation of their own local critical area programs. Section II of this article discusses the creation of the Commission and the development of its criteria. In section III, the authors examine the constitutionality of the criteria's limit of one dwelling unit per twenty acres. This section addresses whether this density limit constitutes an unconstitutional "taking" of the property without just compensation or an unjust deprivation of a landowner's property without due process.

## II. THE LEGISLATIVE ENACTMENT PROCESS

It is important to first outline the process and evolution of the law which gave rise to the Commission and the Chesapeake Bay Critical Area Protection Program. By examining that law in its full contextual setting, one can see that the process by which the Critical Areas legislation was enacted was fair and equitable.

### *A. The Critical Area Initiative and the Critical Area*

In 1984, the General Assembly of Maryland passed more than thirty bills designed to correct the diverse environmental problems besetting the Bay. The Chesapeake Bay Critical Area Protection Program is but one facet of the Legislature's Chesapeake Bay improvement strategy. Thus, an understanding of other improvement programs is necessary to place the Critical Area Program in perspective. The laws passed in 1984 included provisions for upgraded controls of erosion and sedimentation; better storm water management; increased funding for better sewage treatment plants; more inspectors and prosecutors to enforce industrial pollution and hazardous waste laws; implementation of agricultural prac-

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3. *Id.* §§ 8-1801(5), 8-1808(a).

4. *Id.* § 8-1808(a).

5. MD. REGS. CODE tit. 14, § .15.02.05(c) (1986). [hereinafter COMAR].

tices that will reduce pollution from farms; an increase in environmental monitoring and research efforts; an improved and expanded program for easement acquisition through the Maryland Environmental Trust to help save vital habitats; educational initiatives funded by state grants; and resource enhancement and restoration actions whereby fin and shell fish fisheries are to be improved through hatcheries, vegetation, and planting.<sup>6</sup> Additionally, on an interstate level, the Legislature authorized an intensive effort to cooperate and coordinate closely with the adjacent states of Pennsylvania and Virginia,<sup>7</sup> both of which also have instituted Bay-related cleanup programs.<sup>8</sup>

In the process of enacting these various bills, the General Assembly determined that land uses and activities occurring in a narrow strip of land surrounding the Bay and its tributaries could have a significant effect on the overall quality of the Bay's water and on its varied habitats. Thus, it chose to implement a special program to guide land uses and activities in this strip of land, which it referred to as the "Critical Area."<sup>9</sup>

### *B. Purposes and Scope of the Critical Area Program*

The Critical Area Protection Program statute, which became effec-

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6. MD. NAT. RES. CODE ANN. §§ 8-11A-01 to -08, § 8-1101 to -1108, § 8-1606 (1983 & Supp. 1986); MD. AGRIC. CODE ANN. §§ 8-701-705 (1985). In addition to these statutory changes, many initiatives only required supplemental funding to existing programs; funding requests were made by the Executive Office in the customary manner. Other significant bills included new funding programs for the issuance of grants, loans and bonds to cover improvements at sewage treatment plants and increase the state's share of such funding. See MD. HEALTH-ENVTL. CODE ANN. §§ 9-203(b), -302, -301(e), (f), -345, -351 (1982); MD. NAT. RES. CODE ANN. § 4-745 (Supp. 1986).
  7. For Maryland's Tri-state Agreement on the Chesapeake Bay see MD. NAT. RES. CODE ANN. §§ 8-302 to -304 (Supp. 1986). The Commonwealth of Pennsylvania enacted the Chesapeake Bay Commission Agreement in June, 1985. See 32 PA. CONS. STAT. ANN. §§ 820.11-.12 (Purdon Supp. 1986). The Commonwealth of Virginia enacted a similar agreement with Maryland in 1980, amending the legislation in 1985 to include Pennsylvania. See VA. CODE ANN. §§ 62.1-69.5 to -69.20 (1982 & Supp. 1986).
  8. 32 PA. CONS. STAT. ANN. §§ 820.11-.12 (Purdon Supp. 1986); VA. CODE ANN. §§ 62.1-69.5 to -69.20 (1982 & Supp. 1986).
  9. Subtitle 18 of Title 8 of the Natural Resources Article defines the Critical Area as:
    - (a) All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands and the heads of tides designated under Title 9 of the Natural Resources Article, Annotated Code of Maryland;
    - (b) All lands and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Title 9 of the Natural Resources Article, Annotated Code of Maryland.

MD. NAT. RES. CODE ANN. § 8-1807(a) (Supp. 1986). The statute described the "Critical Area" as the "initial planning area" because local jurisdictions may, through the development of their own local programs, propose expansions or exclusions to it. MD. NAT. RES. CODE ANN. §§ 8-1807(b),(c) (Supp. 1986).

tive on June 1, 1984,<sup>10</sup> includes the General Assembly's declaration of public policy and certain findings of fact. The Legislature found that the cumulative effects of human activity have deteriorated water quality and productivity of the Bay and its tributaries. This activity has caused increased levels of pollutants, nutrients, and toxics in the Bay system, and has resulted in the decline of more protective land uses such as forestland and agriculture. The Legislature concluded that the restoration of the Bay and its tributaries is dependent, in part, upon minimizing further adverse impacts to water quality and natural habitats of the shoreline and adjacent lands.<sup>11</sup>

The General Assembly stated its purposes in enacting the statute:

- (1) Establish a Resource Protection Program for the Chesapeake Bay and its tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and
- (2) Implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local governments establishing and implementing their programs in a consistent and uniform manner subject to State criteria and oversight.<sup>12</sup>

As this statutory language indicates, local governments are given the primary responsibility for developing and implementing the Critical Area resource protection programs and must use Commission-developed standards and criteria to achieve the three protective goals of the law:

- (1) Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;
- (2) Conserve fish, wildlife, and plant habitat; and
- (3) Establish land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement and activities of persons in that area can create adverse environmental impacts.<sup>13</sup>

The Critical Area Program affects sixteen counties and forty-four municipalities in the State of Maryland. Each of these local jurisdictions is required to submit to the Critical Area Commission for its approval a program necessary to achieve the goals identified in the statute.<sup>14</sup> Addi-

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10. The Act was adopted as Chapter 794 of the 1984 Md. Laws and codified as Subtitle 18 of Title 8 of the Natural Resources Article of the Maryland Annotated Code. MD. NAT. RES. CODE ANN. §§ 8-1801 to -1816 (Supp. 1986).

11. *Id.* § 8-1801(a).

12. *Id.* § 8-1801(b).

13. *Id.* § 8-1808(b).

14. *Id.* § 8-1808.

tionally, the Legislature listed eleven minimum elements that each local program must include, the most important being new or amended land use planning, zoning, and subdivision regulations to protect their critical areas.<sup>15</sup>

*C. The Critical Area Commission: Creation, Formation and Criteria Development*

The Critical Area Commission, created by Chapter 794 of the 1984 Acts of the Maryland Legislature, consists of twenty-five voting members appointed by the Governor.<sup>16</sup> The Commission includes a full-time Chairman;<sup>17</sup> eleven individuals, each of whom is a resident and an

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15. The eleven minimum elements listed in the statute are:

- (1) A map designating the critical area in a local jurisdiction;
- (2) A comprehensive zoning map for the critical area;
- (3) As necessary, new or amended provisions of the jurisdiction's:
  - (i) Subdivision regulations;
  - (ii) Comprehensive or master plan;
  - (iii) Zoning ordinances or regulations;
  - (iv) Provisions relating to enforcement; and
  - (v) Provisions as appropriate relating to grandfathering of development at the time the program is adopted or approved by the Commission;
- (4) Provisions requiring that project approvals shall be based on findings that projects are consistent with the standards stated in subsection (b) of this section;
- (5) Provisions to limit the amount of land covered by buildings, roads, parking lots, or other impervious surfaces, and to require or encourage cluster development, where necessary or appropriate;
- (6) Establishment of buffer areas along shorelines within which agriculture will be permitted only if best management practices are used, provided that structures or any other use of land which is necessary for adjacent agriculture shall also be permitted in any buffer area;
- (7) Requirements for minimum setbacks for structures and septic fields along shorelines;
- (8) Designation of shoreline areas if any that are suitable for parks, hiking, biking, wildlife refuges, scenic drives, public access or assembly, and water-related recreation such as boat slips, piers, and beaches;
- (9) Designation of shoreline areas, if any, that are suitable for ports, marinas, and industries that use water for transportation or derive economic benefits from shore access;
- (10) Provisions requiring that all harvesting of timber in the Chesapeake Bay Critical Area be in accordance with plans approved by the district forestry board; and
- (11) Provisions establishing that the controls in a program which are designed to prevent runoff of pollutants will not be required on sites where the topography prevents runoff from directly or indirectly reaching tidal waters.

MD. NAT. RES. CODE ANN. § 8-1808(c) (Supp. 1986).

16. *Id.* § 8-1804(a).

17. Governor Harry R. Hughes appointed Judge Solomon Liss to be Chairman of the Commission. Judge Liss resigned from his position as Associate Judge of the Court of Special Appeals of Maryland to assume the Chairmanship of the Committee in October, 1984.

elected or appointed official of a local jurisdiction;<sup>18</sup> and eight individuals who represent diverse interests, including marinas, fishing, and ecology. The Secretaries of Agriculture, Economic and Community Development, Health and Mental Hygiene, Natural Resources, and State Planning, or their representatives, serve as *ex officio* members of the Commission.<sup>19</sup> Except for the Chairman and *ex officio* state officers, members of the Commission serve staggered terms of four years.<sup>20</sup>

The Commission was given all the powers necessary to carry out the purposes of the subtitle. These powers include the authority to: (1) adopt regulatory criteria in accordance with all State administrative procedures; (2) conduct hearings in connection with policies, proposed programs, and proposed regulations or amendments to regulations; and (3) contract for consultant or other services.<sup>21</sup> The Commission was empowered as an independent agency of the State to enact guidelines which local jurisdictions would then be required to follow in developing their own local programs. In some ways, this approach is similar to that used in other states where state land use commissions control local activities.<sup>22</sup> The Maryland Critical Areas legislation is unique, however, because it establishes a joint state/local effort that preserves local zoning and planning powers that are exercised in accordance with criteria developed by the state.

### 1. The First Hearings

The Commission, which began functioning on October 15, 1984, was required to promulgate by December 1, 1985, "criteria for program development and approval" which were necessary to achieve the purposes of the law.<sup>23</sup> The statute mandated that the Commission hold at least six regional public hearings in designated areas on the Eastern and Western Shores of the Chesapeake Bay before formulating and adopting any regulatory criteria. The Commission held seven public hearings, each of which was attended by approximately 250 persons.<sup>24</sup> Approximately fifty persons testified at each hearing, expressing their views of what should be done to implement the Critical Areas Act. Among those testifying were property owners, developers, farmers, marine operators, and watermen. The range of these early opinions was wide. Some of those testifying feared that the State would interfere unduly with private

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18. The original local jurisdiction representative members included two city council presidents, two county executives, two county planning directors, as well as county commissioners, council members, and planning commissioners.

19. MD. NAT. RES. CODE ANN. § 8-1804(a)(4) (Supp. 1986).

20. *Id.* § 8-1804(c).

21. *Id.* § 8-1806.

22. See Shoreline Management Act of 1971, WASH. REV. CODE §§ 90.58.010-.930 (1985); ORE. REV. STAT. §§ 197.005-.855 (1985).

23. MD. NAT. RES. CODE ANN. § 8-1808(d) (Supp. 1986).

24. The early hearings were held in December, 1984, and January, 1985, in Easton, Elkton, Prince Frederick, Salisbury, Crofton, Centreville, and Essex, Maryland.

property rights. Others emphasized environmental concerns and offered detailed recommendations for specific criteria to control development and decrease pollution from both industrial and agricultural sources. The testimony of the witnesses at the public hearings revealed that there was unanimous support of a save-the-Bay effort, but that there was a divergence of opinion as to the causes of the environmental problems besetting the Bay, as well as what remedial measures should be implemented. Although many witnesses admitted some fault on their part, others merely placed the blame elsewhere. All interest groups professed a love of the Bay, but none was anxious to assume the cost of restoration.

## 2. The Early Months

The Commission sought the expertise of individuals who had been engaged in similar planning and resource management programs. For this purpose, a two-day seminar<sup>25</sup> was held where presentations were given to the Commission and its staff by various environmental experts.<sup>26</sup> The distinguished speakers furnished the Commission with a crash course in the basic problems the Commission would face in the development of its criteria, and offered suggestions drawn from their own experiences with similar resource conservation programs.

The Commission divided its membership into three subcommittees: (1) resource-based activities subcommittee, dealing principally with surface mining, forestry, agriculture, and fisheries; (2) the land development subcommittee; and (3) resource enhancement and management subcommittee, which included consideration of habitat protection, establishment of buffer areas, protection of threatened and endangered species, and the protection of anadromous fish habitat. These subcommittees began a series of weekly meetings where individuals with knowledge and experience in the respective areas briefed the committee members. The meetings were open to the public and representatives of a number of industries such as forestry, residential development, fisheries, and marinas, appeared and offered their suggestions. In addition, several environmental organizations interested in the Chesapeake Bay attended the meetings of the subcommittees and offered their recommendations. The committees also heard from local planners and government advisory groups.

During this intense study period the Commission's staff conducted in-depth research and analysis on such varied topics as existing land uses around the Bay, pollution loadings and inputs, best management prac-

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25. The seminar was held at the Tidewater Inn in Easton, Maryland on January 24 and 25, 1985.

26. The environmental experts included Michael Mantell, representing the Conservation Foundation; Terry Moore, Executive Director of the Pinelands Commission of New Jersey; Joseph Petrillo, then Executive Director of the California Coastal Conservancy; David Owens, Director of Coastal Management for the State of North Carolina; and Dr. John Kusler, Director of the Association of Wetlands Managers of New England and a widely published legal scholar on conservation and environmental protection.



tices for dealing with non-point source pollution from farms and urban areas, habitat needs, current land use planning and controls being used around the Bay, and state-level resource protection/restoration programs from around the country.

### 3. Hearings: Round Two

After six months of study, consideration, and debate, each of the three subcommittees presented drafts of regulatory criteria to the full Commission in April and May of 1985. The Commission reviewed these drafts and then issued its first draft of the proposed regulations. This draft was printed in the *Maryland Register*<sup>27</sup> with a schedule of six more public hearings to be held on the Eastern and Western Shores of the Bay during late June and July, 1985.<sup>28</sup> Attendance at this series of hearings was even greater than at the earlier hearings. Approximately seventy-five persons registered to speak at each hearing. Transcripts of all testimony given at these hearings were furnished to the subcommittees and to the staff for further research.

After several weeks of redrafting and refining, the subcommittees and the staff submitted a revised set of proposed criteria to the Commission. The Commission debated the proposed changes over a three-day period and then adopted the revised regulatory criteria in August of 1985. The Commission furnished copies of these criteria to the Legislative Oversight Committee.<sup>29</sup> The Oversight Committee held two full-scale hearings and suggested several modifications and language clarifications to which the Critical Areas Commission agreed.<sup>30</sup>

Once revised by the Commission, the proposed criteria were then sent to the Administrative, Executive, and Legislative Review (AELR) Committee for its review, in accordance with Maryland law on administrative regulations.<sup>31</sup> The AELR Committee approved the publication of the regulations for public review and comment.<sup>32</sup> During this period a

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27. 12:12 Md. Reg. 1188-1206 (June 7, 1985).

28. Initially, six hearings were advertised and held. Three additional hearings were advertised and held at the request of several legislators. These hearings were held in June and July, 1985, in Havre de Grace, Waldorf, Chestertown, Easton, Salisbury, Annapolis, Leonardtown, and Essex, Maryland.

29. This committee, consisting of five state senators and five state delegates, was established by the General Assembly to meet periodically with the Critical Areas Commission to review the development of the Critical Areas regulatory criteria. MD. NAT. RES. CODE ANN. § 8-1808(d)(2) (Supp. 1986). This Legislative Oversight Committee was another unique feature of the Critical Areas regulation development process. It allowed for an ongoing discussion between the Critical Areas Commission and the legislature at every stage of the criteria development.

30. The Commission agreed that certain clarifications in various clauses would be useful, particularly in the "grandfathering" clauses, and instructed the staff to prepare the necessary clarifying language. For a discussion of "grandfathering" clauses in the criteria, see *infra* note 106 and accompanying text.

31. MD. STATE GOV'T CODE ANN. §§ 10-110 to -117 and §§ 2-501 to -507 (1984 & Supp. 1985).

32. 12:20 Md. Reg. 1953-1977 (September 27, 1985).

number of written and oral communications were received and duly reported to the AELR Committee. The criteria, with changes, finally were adopted by the Critical Areas Commission and were published in the *Maryland Register* on November 22, 1985.<sup>33</sup> The Commission thus met the December 1, 1985 deadline set a year and a half earlier by the Legislature.<sup>34</sup> During the next four months, however, the regulations faced an arduous test in the Legislature and were the subject of intensive commentary from opponents and proponents alike.

#### *D. The Critical Areas Criteria*

The criteria as adopted by the Commission and approved by the Legislature address the following subjects: land development, water-dependent facilities, shore erosion protection, forestry, agriculture, surface mining, shoreline buffers, and fish, plant and wildlife habitat.<sup>35</sup>

The criteria are intended to accommodate growth, while also providing for the conservation of habitat and the protection of water quality in the critical area. The policies that local jurisdictions must follow include: limitation of development activities in buffer areas to those that are water-dependent; encouragement of protection by landowners of the rapidly eroding shoreline; conservation of forests and woodland and provision for expansion of forested areas; assurance that agricultural lands are maintained in agricultural use, to the extent possible, and assurance that the creation of new agricultural lands is not accomplished if it will affect adversely water quality or destroy plant and wildlife habitat; protection of the Critical Area from all sources of pollution from surface mining operations; encouragement of recreational use of natural environments without destruction to the natural habitats by establishment of natural parks; protection of the wetlands and shorelines in the Critical Area; protection of species in need of conservation and threatened and endangered species, and their habitats in the Critical Area; and protection of fish propagation waters, wildlife habitat, and plant communities.<sup>36</sup>

The criteria comprise over sixty pages of regulations and set forth directives that local jurisdictions must follow in developing their local criteria programs.<sup>37</sup> These directives, in conjunction with the statutory guidelines for local program approval and adoption,<sup>38</sup> outline the process by which local governments must develop critical areas programs.

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33. 12:24 Md. Reg. 2352-2354 (November 22, 1985).

34. MD. NAT. RES. CODE ANN. § 8-1808(d) (Supp. 1986).

35. COMAR, *supra* note 5, §§ .15.02-.15.09.

36. *Id.* Each chapter in the regulations governs a separate aspect of the environment that the criteria are intended to affect. Each chapter sets forth policies which local jurisdictions shall follow when addressing each specific aspect of the environment. See, e.g., COMAR, *supra* note 5, §§ .15.03.02, .15.04.02, and .15.05.02.

37. *Id.* §§ .15.10-.15.11.

38. *Id.*; MD. NAT. RES. CODE ANN. §§ 8-1809 to -1815 (Supp. 1986).

*E. Proceeding Through the General Assembly*

The original enactment of the Critical Areas program required that the Commission promulgate by regulation criteria to assist the local subdivisions in preparing their own local programs. The law also required that these criteria be submitted to the General Assembly in its 1986 session for approval or rejection by means of a joint resolution of the two houses of the Legislature.<sup>39</sup> No amendment to the criteria was to be allowed; the criteria were to be approved or rejected *in toto*.<sup>40</sup>

The criteria as presented to the Legislature provoked heated debate between supporters and detractors. Many senators and delegates from the Eastern Shore supported the opposition of home builders and realtors contending that the criteria would reduce the tax base of the Eastern Shore counties and thereby hamper efforts to develop a desired infrastructure in those counties. The most strenuously opposed portion of the proposed criteria was the regulatory provision which stated that development in the Resource Conservation Area<sup>41</sup> was permissible under certain circumstances<sup>42</sup> but at a density of not more than one dwelling unit per twenty acres.

Several members of the Legislature in both the Senate and the House of Delegates, consisting principally of representatives of the Eastern Shore, introduced thirty-five bills which, if adopted, would have altered fundamentally the criteria as proposed. Consultation between the Governor's representatives and the representatives of those who sought relief from the provisions of the criteria began and extended over a period of more than two months. Many of the proposed bills designed to mod-

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39. Section 3 of 1985 Md. Laws 794 provides that the criteria promulgated by the Commission may not be implemented unless the General Assembly at the 1986 Session affirms by joint resolution that the criteria are reasonable and acceptable to accomplish the goals of Subtitle 18. MD. NAT. RES. CODE ANN. § 8-1801 (Supp. 1986). The executive branch caused the introduction of House Joint Resolution No. 17 and Senate Joint Resolution No. 9, and each concluded that the Commission had complied with the provisions of the act and that the criteria should be affirmed. The resolutions were assigned to the Economic and Environmental Affairs Committee of the State Senate and the Environmental Matters Committee of the House of Delegates. After several hearings, the resolutions were approved by both Committees by substantial majorities.

40. The General Assembly affirmed that the criteria promulgated are reasonable and acceptable in Joint Resolutions 36 and 37, enacted May 13, 1986. MD. NAT. RES. CODE ANN. § 8-1801 (Supp. 1986). Section 3, chapter 794 of the Acts of 1984 provided a mechanism for dealing with the General Assembly's potential disaffection with the regulations: a requirement that the regulations be revised by the Commission and resubmitted in 1987, which would delay their effective date to June 1, 1987. The General Assembly could also enact separate legislation outside the joint resolution process. Given this mechanism, it was the opinion of counsel for the General Assembly, as well as that of counsel for the Commission, that the joint resolution itself could not selectively alter or approve portions of the regulations.

41. COMAR, *supra* note 5, § .15.02.05 defines Resource Conservation Area as those areas characterized by nature-dominated environments and resource-utilization activities. COMAR, *supra* note 5, § .15.02.05.

42. *Id.* § 15.02.05(C)(4).

ify the criteria were defeated in either the Senate or House Committees.<sup>43</sup> Negotiations continued on several other proposed bills, some of which ultimately were adopted by the Legislature.<sup>44</sup> The Legislature then approved the joint resolutions and the Critical Areas criteria went into full force and effect on May 13, 1986.<sup>45</sup> One of the most significant modifica-

43. Those bills that were defeated in either the Senate or House Committees are summarized in the following table:

<u>Senate Number</u>	<u>House Number</u>	<u>Title</u>	<u>Status</u>
506	—	Baltimore City Exclusion	Defeated in Senate
529	1433	State Funding of Local Program	Defeated in House & Senate Committees
530	1107	"Local Jurisdiction" Definition	Defeated in House & Senate Committees
531	1497	Enforcement of Criteria	Defeated in House & Senate Committees
532	1365	Community Piers and Marinas	Defeated in House & Senate Committees
533	1515	Building Setbacks from Tidal Wetlands or Tidal Waters	Defeated in House & Senate Committees
534	1514	Eliminating Local Program Requirements	Defeated in House & Senate Committees
592	1110	Density of Development in RCAs	Defeated in House & Senate Committees
SJ16	—	Fiscal Impact on Local Government	Defeated in House & Senate Committees
SJ17	HJ39	Affirmation of Adopted Criteria	Defeated in House & Senate Committees
—	969	Compensation for Landowners	Defeated in Committee
633	—	Funding Restrictions for Local Jurisdictions	Defeated in Senate Committee
760	—	Environmental Impact Statements	Defeated in Senate Committee
765	—	Water Run-off	Defeated in Senate Committee
—	1855	Changing Boundaries of Critical Area	Defeated in Committee
1046	—	Residential Development of Land Request - Chesapeake Bay Critical Area	Withdrawn by Sponsor

44. The General Assembly passed five bills: (1) Senate Bill 528 and House Bill 1345, which increased the quorum requirement for Commission panels holding local hearings on the adoption of local programs; (2) Senate Bill 593 and House Bill 1434, which amended the growth allotment of Intensely Developed Areas and permitted the counting of wetlands in determining the density in Resource Conservation Areas; (3) House Bill 1513, which authorized counties and municipalities to adopt Transferable Development Rights programs; (4) House Bill 1495, which authorized and regulated intrafamily transfers; and (5) House Bill 1496, which governed maximum lot coverage as amended, and made the criteria slightly less restrictive.

45. Upon the signing of the necessary certification of approval by the President of the State Senate and the Speaker of the House of Delegates, the Critical Areas criteria went into effect. The Legislature approved Joint Resolutions Numbers 36 (HJ17) and 37 (SJ9).

tions in the statute was a change in the density limitation for Resource Conservation Areas. The criteria as adopted by the Legislature limited development to one dwelling unit per twenty acres as intended by the Commission.<sup>46</sup> A statutory change, however, provided some flexibility for landowners along the wetlands to use the wetland acreage in arriving at a density figure of up to one dwelling unit per eight acres.<sup>47</sup> Although the modifying bills may weaken, to some extent, the criteria as originally proposed, the Commission has determined that the overall effect does not threaten materially the ability of the Commission to work with local jurisdictions to achieve the purposes which the local programs were intended to achieve.

#### *F. Adoption of Critical Areas Programs by Local Authorities*

Section 8-1809 of the Critical Areas legislation outlines the procedures local governments must follow in order to have their critical areas programs approved and adopted by the Commission. Under this provision, local jurisdictions were required to submit to the Commission written statements of their intention to develop or not develop the local programs within forty-five days after the criteria became effective.<sup>48</sup> If a jurisdiction decided not to develop a local program, or failed to meet the forty-five day deadline, the Commission was required to prepare a local program for it.<sup>49</sup>

Local jurisdictions were then given 270 days to prepare and submit their programs to the Commission, but upon satisfactory evidence of reasonable progress, an additional 180 days was to be accorded by the Commission.<sup>50</sup> Within this time and before submission, the local jurisdiction had to hold at least one public hearing on its proposed program, with due advance notice to the public.<sup>51</sup> Within thirty days after the program's submission, a Commission panel of five members<sup>52</sup> was to hold another public hearing on the proposed program in the affected jurisdiction.

The Commission had ninety days after receipt of a local program to approve it or notify the local jurisdiction of necessary changes before approval could be granted. "No action" is equivalent to approval. All necessary changes must have been made by local jurisdictions within forty days of the Commission's notice of the specific changes that must be

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46. COMAR, *supra* note 5, § .15.02.05(C)(4). The earliest draft of the criteria contained a density limitation for Resource Conservation Areas of one dwelling unit per fifty acres. The Commission changed this to one dwelling unit per twenty acres prior to proposing the regulations.

47. MD. NAT. RES. CODE ANN. § 8-1808.1(c).

48. *Id.* § 8-1809(a).

49. *Id.* § 8-1809(b).

50. *Id.* § 8-1809(c).

51. *Id.*

52. Pursuant to the newly enacted House Bill 1345 and Senate Bill 528, the former three member panel requirement is now five. See *supra* note 44.

made.<sup>53</sup>

Within ninety days of Commission approval of the local program, the local jurisdiction was to hold hearings and adopt the program in accordance with its procedures for enacting ordinances. The local jurisdiction's governing body may have proposed further changes, and these must have been acted upon by the Commission within thirty days.

The Critical Areas statute provides that within two years and one month (760 days) after the Commission's criteria became effective, "there shall be in effect throughout the Chesapeake Bay Critical Area programs approved or adopted by the Commission."<sup>54</sup> Then, at least once every four years, local jurisdictions are to review their programs and may propose amendments to them for Commission approval.<sup>55</sup>

### G. Conclusion: The Legislative Enactment Process

The creation of the Critical Area Commission's regulations has been a time consuming and involved process. The process included innumerable meetings; sixteen public hearings; the concerned testimony of hundreds of Bay-area citizens; commentary from a score of trade and environmental interest groups; exchanges of ideas between legislators, the Governor's staff and the Commission and its staff; and television, radio, and newspaper coverage. The Critical Areas legislation reflects the general consensus of environmental experts and the state legislature. One of the Legislature's chief concerns, as noted previously, was whether the regulations requiring a maximum of one dwelling unit per twenty acres in specified areas would so affect private property rights as to constitute a taking of that property without just compensation. The remaining portion of this article examines whether the regulation violates a property owner's due process rights or constitutes a taking without just compensation.

## III. THE EFFECT ON PRIVATE PROPERTY INTERESTS

Law review articles on land use control "takings" are legion because after nearly a hundred years of case decisions and intensive scholarship, the law on the takings question is still rather unsettled. Although various "rules" have been applied by the courts, disagreement continues on the fundamental question of what constitutes a taking. Often, the judicial determination of a taking is rendered on a "I-know-it-when-I-see-it" basis. This approach is appropriate given the traditional *ad hoc* analysis of takings issues.<sup>56</sup>

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53. MD. NAT. RES. CODE ANN. § 8-1809(d)(3) (Supp. 1986).

54. *Id.* § 8-1809(f).

55. *Id.* § 8-1809(g).

56. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In *Connolly v. Pension Benefit Guar. Corp.*, 106 S. Ct. 1018, 1025 (1986), the United States Supreme Court articulated that although it would need to look at the facts of each regulatory takings case on an *ad hoc* basis, three factors would be important in

This section of the article will not review the history of takings law. Nor will it discuss compensation as a possible remedy to a taking, a subject sufficiently treated elsewhere.<sup>57</sup> Rather, it discusses whether the Critical Areas regulation limiting density to one dwelling unit per twenty acres in that portion of a local jurisdiction's Critical Area known as the Resource Conservation Area, or "RCA," constitutes a "taking."

#### A. RCAs in The Critical Area Criteria

Under the Critical Area law, as described in section II of this article, the Commission was empowered to set standards and guidelines that would help achieve the statute's goals and deal positively with the General Assembly's findings. Perhaps the most fundamental aspect of the Critical Areas regulatory strategy is the process whereby each local jurisdiction must classify all of its land within its critical area into three categories based largely on existing land use characteristics: "Intensely Developed Areas" (IDAs), which generally may be characterized as urbanized settings; "Limited Development Areas" (LDAs), which encompass areas of more moderate development and less intensive land uses; and "Resource Conservation Areas" (RCAs), areas of very limited development where natural resources or resource utilization activities, such as farming and forestry, predominate.<sup>58</sup>

The amount of further development, the types of other activities permitted in the Critical Area, and the extent of control over those activities, generally follow from this initial classification.<sup>59</sup> The Critical Areas statute itself directs that each local jurisdiction shall categorize broadly its Critical Area so that various protections could be offered to different land uses.<sup>60</sup> Other states previously had adopted similar schemes in their regional resource protection programs and land planning practices.<sup>61</sup>

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its analysis: economic impact on the applicant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the overall character of the government action. For examples of judicial analysis of the takings question, see *infra* note 99.

57. For an interesting discussion of compensation as a possible remedy to governmental taking, see Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15 (1983); Freilich, *Solving the Takings Equation: Making the Whole Equal the Sum of its Parts*, 15 URB. LAW 447 (1983); Williams, *The White River Junction Manifesto*, 9 VT. L. REV. 1 (1984); Note, *Takings Law — Is Inverse Condemnation an Appropriate Remedy for Due Process Violations?*, 57 WASH. L. REV. 551 (1982).

58. COMAR, *supra* note 5, § .15.02.

59. *Id.* §§ .15.02-.15.09.

60. Section 8-1801 provides that declines in more protective land uses, such as forest and agricultural land, have contributed to Bay degradation. MD. NAT. RES. CODE ANN. § 8-1801(a)(4) (Supp. 1986).

61. See Pinelands Commission, State of New Jersey, Comprehensive Management Plan for the Pinelands National Reserve (National Parks and Recreation Act, 1979) and Pinelands Area (New Jersey Pinelands Protection Act, 1979 (1980)) [hereinafter *Pinelands Plan*].

Additionally, the Commission staff found evidence that linked low density land use to higher water quality and to preservation of terrestrial and aquatic habitats.<sup>62</sup> Accordingly, the Commission chose to adopt as one of its measures for conservation the "one per twenty" density limitation in the most resource-valuable of the three areas, the RCA. The Commission reasoned that such a limitation was required because of the pressure to convert the land to more urbanized or developed uses which would affect adversely the environment, particularly by disturbing upland habitat and impeding the natural ability of the land to handle runoff.<sup>63</sup> Under the "one per twenty" plan, development generally would be directed to areas where sewer systems — soon to be upgraded around the Bay — could help treat water quality problems.<sup>64</sup> Despite the compelling environmental interests at the basis of the "one per twenty" regulation, that regulation was the most intensely debated criteria among the public, in the Legislature, and within the Commission itself because of its impact on private property interests.<sup>65</sup>

### B. Due Process and Takings

The takings clauses of the United States and Maryland Constitutions are similar, though not identical.<sup>66</sup> Their effect is the same: the state may not deprive a person of his property without due process of law, nor may private property be taken for public use without just compensation.<sup>67</sup> In judicial interpretations and scholarly articles over the

62. See, e.g., Lynch & Whigham, *Configuration of Forest Patches Necessary to Maintain Bird and Plant Communities*, PPRP-59, Maryland Power Plant Research Program (1982); National Agricultural Lands Study, The Protection of Farmland, U.S.D.A. (1981).

63. See COMAR, *supra* notes, § .15.02.05. Farmland, which also had been identified as a source of non-point source pollution would, under other Commission regulations, be forced to utilize "Best Management Practices" to control the problem; forested areas, of course, would not require additional or artificial techniques. *Id.* § .15.05.06. Non-point source pollution refers to water pollution that has no discrete point of entry to the water. Runoff from a suburban lawn might enter a stream as non-point source pollution, for example, whereas discharge from an industrial plant usually enters via a pipe or conduit, or point source.

64. Chesapeake Bay Critical Areas Commission, *Rationale for 20 Acre Density Requirement in Resource Conservation Areas of the Chesapeake Bay Critical Area* (September, 1985) (unpublished paper).

65. The "one per twenty" criterion was itself a compromise. Early drafts contained "one per fifty" language. See *supra* note 46.

66. U.S. CONST. amends. V, § 4, XIV, § 1; MD. CONST. art. 24, Declaration of Rights, art. III, § 40.

67. Compare the fifth amendment of the United States Constitution:

... [N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V; and section 1 of the fourteenth amendment:

... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

U.S. CONST. amend. XIV, § 1, with article 24 of the Maryland Declaration of Rights, which provides:



years, these two clauses have been merged, separated, merged again, and distinguished so as to produce considerable bewilderment. Additional confusion on what constitutes a taking was generated by the opinion of the United States Supreme Court in the early case of *Pennsylvania Coal Company v. Mahon*.<sup>68</sup> In that case, Justice Holmes, writing for the Court, stated "if regulation goes too far it will be recognized as a taking."<sup>69</sup> What constitutes "too far" continues to be a subject of speculation and controversy.

The due process and the takings clauses of the fourteenth amendment traditionally have been interpreted differently. The due process clause historically has been considered to be a limit on the police power of the state and the takings clause has been interpreted to limit one aspect of that police power, the power of the state to resort to eminent domain. Owing to this distinction, modern courts have afforded differing remedies for violations of the due process and takings clauses: invalidation of the regulation under the due process clause and just compensation under the takings clause.<sup>70</sup>

The first prong of the traditional test to determine whether a government regulation that affects private property rights violates the due process clause is whether the government action is rationally based and reasonably constructed.<sup>71</sup> The due process requirements seem to have been satisfied by the Commission in its promulgation of the "one per twenty" regulation. The regulation cannot be said to have been enacted arbitrarily and capriciously, given the level of attention and detail with which the "one per twenty" criterion was studied, the open, public debate to which it was subjected, and the rationale upon which it was based. Although some may not agree that the "one per twenty" regulation constitutes good policy, it was only promulgated after ample deliberation and consideration of competing interests.<sup>72</sup> Further, the Commission's regulation is but a first step in the regulatory process. The

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That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

MD. CONST. art. 24, Declaration of Rights; and section 40 of article III of the Maryland Constitution, which provides:

The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

MD. CONST. art. III, § 40.

68. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1915).

69. *Id.* at 415.

70. See Note, *New Jersey Pinelands Plan and the Taking Question*, 7 COLUM. J. OF ENVTL. L. 227, 231 n.31 (1982).

71. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967); *Board of County Comm'rs v. Farr*, 242 Md. 315, 218 A.2d 923 (1966); *Elliott v. Joyce*, 233 Md. 76, 195 A.2d 254 (1963).

72. See *supra* notes 23-34 and accompanying text.

local jurisdictions still must propose, gain approval of, and enact their own critical area programs. Thus, the local procedures for employing critical area criteria are further safeguards to due process rights. It is only then that the impact of the local regulation upon a particular property owner can be assessed.

A closer question, considered in the second prong of the test of constitutionality, is whether the "one per twenty" regulation violates private rights protected under the takings, rather than the due process clause of the fourteenth amendment. The traditional standard for whether there has been a government taking, is whether the property owner is left with a "reasonable use" after the government action.<sup>73</sup> According to both early and recent Supreme Court opinions, reasonable use does not mean "highest and best use," nor the most or even the significantly more profitable use.<sup>74</sup> Similarly, the Court of Appeals of Maryland has held that the regulation in question must preclude all reasonable or beneficial uses of the property before a taking can be found.<sup>75</sup> Thus, lawfully enacted restrictions upon some of the "bundle of rights" which are said to characterize property ownership will not imply, necessarily, a taking. Where too many of that bundle of rights are destroyed, however, a taking may be found.<sup>76</sup>

### C. *How Much is Too Much?*

In zoning takings cases, the determination of whether there has been a taking often turns on considerations of degree. Thus, quantitative evaluations of when a large lot is too large, when a low density requirement is too low, and when a diminution in property value caused by a government action is too great are frequently dispositive of whether a taking has occurred. Courts do not, and cannot, however, measure these variables with precise formulas. The type of quantitative determinations just mentioned are only part of the total consideration by the court. Also of primary importance is whether the land use regulation is justified under, and within the scope of, the protection of public health, safety and general welfare. Courts also must balance the degree of private burden which the government action causes with the prevention of public harm. Finally, courts traditionally have afforded a significant degree of defer-

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73. *Agins v. City of Tiburon*, 447 U.S. 255, 260-62 (1980); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Averne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938).

74. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

75. *Mayor of Rockville v. Stone*, 271 Md. 655, 311 A.2d 536 (1974); *Arnold v. Prince George's County*, 270 Md. 285, 311 A.2d 223 (1973); *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455 (D. Md. 1978). *See also* *Baltimore City v. Borinsky*, 239 Md. 611, 622, 212 A.2d 508, 514 (1965) (clarifying that "the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough . . . to show that the zoning action results in substantial loss or hardship.").

76. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

ence to the elected or appointed officials who have mandated the government action in question.<sup>77</sup>

# 1. Lot size limitations

Large lot and low density zoning cases have a varied history. Ever since *National Land & Investment Co. v. Kohn*<sup>78</sup> and its Pennsylvania progeny in the late 1960's,<sup>79</sup> many courts have cast a wary eye on zoning ordinances which provide for districts in which the average or minimum lot sizes are high or in which the overall densities are low. Courts have held that it is impermissible to create low density zones for exclusionary purposes or, as stated by the Supreme Court of Pennsylvania, to "keep out people [and] refuse to confront the future."<sup>80</sup> Courts have invalidated low density zoning provisions where there was a lack of evidence for the basis of the large lot scheme,<sup>81</sup> the purpose or primary effect of the scheme was exclusionary,<sup>82</sup> the zoning mechanism appeared to be arbitrary,<sup>83</sup> or where it appeared that the *sole* purpose of the ordinance was to preserve open space and rural character.<sup>84</sup> Where, however, there

77. The courts, it is said, must not "substitute their judgment" for that of the decisionmakers; the first presumption is that the laws or regulations were lawfully enacted and are valid. *County Comm'rs v. Miles*, 246 Md. 355, 364, 268 A.2d 450, 454 (1967); *Montgomery County v. Fields Road*, 282 Md. 575, 583, 386 A.2d 344, 349 (1978).

78. *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

79. *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

80. *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970).

81. *Kasperek v. Johnson County Bd. of Health*, 288 N.W.2d 511 (Iowa 1980) (one dwelling per five acres held unreasonable in light of no evidence of purported water quality basis, and economic impact to owner who had already expended large sums to develop); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965) (one dwelling per four acres held confiscatory because no evidence of possible on-site septic problems); *Martin v. Township of Mill Creek*, 50 Pa. Commw. 249, 413 A.2d 764 (1980) (one dwelling per ten acres held unreasonable to protect watershed against pollution by on-site septic systems); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970) (three acre lot held unreasonable as unnecessary to support on-site sewerage system).

82. *Christ United Methodist Church v. Municipality of Bethel Park*, 58 Pa. Commw. 610, 428 A.2d 745 (1981) (five acres requirement for institutional houses held primarily exclusionary); *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959) (two acres minimum held unreasonable, arbitrary, and exclusionary in effect); *Grand Land Co. v. Township of Bethlehem*, 196 N.J. Super. 547, 483 A.2d 818 (1984) (twenty-five acres for every one and one-half acre building lot held invalid and exclusionary).

83. *Hopewell Township Bd. of Supervisors v. Golla*, 499 Pa. 246, 452 A.2d 1337 (1982) (development in farmland area, restricted to five one and one-half acre plots per tract, regardless of size of tract, held arbitrary and unreasonable); *Appeal of Buckingham Developers, Inc.*, 61 Pa. Commw. 408, 433 A.2d 931 (1981) (subdivision in farmland limited to five single family homes per tract, regardless of size of tract, held unreasonable per *Golla* opinion, although no taking because owner could still get reasonable housing yield).

84. *Kavenensky v. Zoning Bd. of Appeals*, 160 Conn. 597, 279 A.2d 567 (1971) (one unit per two acres held solely to keep community rural and in open space and thus unlawful under zoning purposes of enabling statute); *Eldridge v. City of Palo Alto*,

is a fairly wide range of other density zones in the community, and the intention is to achieve other legitimate objectives or deal positively with exigent circumstances, courts are more circumspect concerning the local actions they will review, much less overturn, for constitutional infirmity.<sup>85</sup> Low density zoning regularly has been upheld across the country when, in addition to the other takings analysis factors mentioned previously, it is rationally based, reasonably formulated, and accomplishes, among other justifiable ends, such objectives as environmental protection, resource conservation, and agricultural preservation.<sup>86</sup> Maryland cases reflect this strong trend.<sup>87</sup>

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57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) (one unit per ten acres requirement held a taking because only done to preserve open space).

85. Among those objectives or circumstances likely to be considered favorably are maintaining water quality in surface and groundwaters, providing for the conservation of wetlands, preserving agricultural lands, or providing for a mix, adequate siting, and the compatibility of land uses and characteristics, including open space.
86. *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (five acre zoning district not an unreasonable method of, *inter alia*, providing for open space, growth management and rural character); *Steel Hill Dev., Inc. v. Town of Sanborton*, 469 F.2d 956 (1st Cir. 1972) (minimum lot sizes of three and six acres upheld on soils and water pollution bases); *Wermayer v. Cormorant Township Bd.*, 716 F.2d 1211 (8th Cir. 1983) (one unit per five acres requirement upheld in area around lake); *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974) (one per 18 acre requirement in agricultural zoning held not a taking); *Napro Corp. v. Town of Cherry Hills Village*, 181 Colo. 217, 504 P.2d 344 (1972) (two and one-half acre minimum lot size requirement for residential use held reasonable); *Zygmunt v. Planning and Zoning Comm'n of Town of Greenwich*, 152 Conn. 550, 210 A.2d 172 (1965) (no taking in one residence per four acre district where basis was nature of land); *Moviematic Indus. Corp. v. Board of County Comm'rs*, 349 So. 2d 667 (Fla. App. 1977) (one dwelling per five acres zoning upheld for water quality reasons); *County of Ada v. Henry*, 105 Idaho 263, 668 P.2d 994 (1983) (80 acres minimum lot size in certain zones upheld against takings challenge); *Wilson v. County of McHenry*, 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981) (160 acres minimum lot size in agricultural zone upheld as applied); *Wilson v. Town of Sherborn*, 3 Mass. App. 237, 326 N.E.2d 922 (1985) (two acre minimum lot size restriction upheld on soil condition basis); *D & R Pipeline Constr. Co. v. Green County*, 630 S.W.2d 236 (Mo. App. 1982) (one dwelling per ten acres not a taking in area around reservoir to protect water quality therein); *Salamar Builders v. Tuttle*, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971) (no taking in one unit per one and one-half acre zoning district because protection against well pollution was held to be an adequate reason for a density requirement); *Boundary Drive Assocs. v. Shrewsbury Township*, 507 Pa. 487, 491 A.2d 86 (1985) (sliding scale restrictions upheld for agricultural land preservation purposes); *Kelly v. Zoning Hearing Bd.*, 87 Pa. Commw. 534, 487 A.2d 1043 (1985) (restriction of one residence per three acres upheld); *Codurus Township v. Rodgers*, 89 Pa. Commw. 79, 492 A.2d 73 (1985) (50 acre remainder requirement upheld in sliding scale farmland preservation scheme); *Caste v. Zoning Hearing Bd.*, 70 Pa. Commw. 368, 453 A.2d 69 (1982) (10 acre minimum lot size for apartments held reasonable regulation); *DeCaro v. Washington Township, Berks County*, 21 Pa. Commw. 252, 344 A.2d 725 (1975) (three acre density upheld on evidence of unsuitability for septic disposal systems); *Aldre Properties, Inc. v. Board of Supervisors, Chancery Nos. 78463-A, 78476, 78450, 78425*, letter op. (19th Cir. Va. Jan. 7, 1985) (five acre zoning not unreasonably related to water quality protection and other matters).
87. *Norbeck Village Joint Venture, Inc. v. Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969) (downzoning of 50 square miles held lawful exercise of police

Very low density zoning has been accomplished widely and lawfully both across the country and in Maryland. In Maryland three counties already have adopted zoning densities similar to or lower than the one unit per twenty acre requirement of the Critical Area's RCA.<sup>88</sup> For agricultural land conservation purposes, scores of communities nationwide have adopted low density and sliding scale zoning schemes ranging from ten acre to 640 acre minimums.<sup>89</sup> Local and regional zoning plans that evolved out of the New Jersey Pinelands Commission study have created districts in that region where eighteen acres is required per dwelling unit and, in one township, where a seventy acre minimum now is found.<sup>90</sup>

Against this background of what constitutes constitutional land use control, the Commission's "one per twenty" density regulation in RCAs does not appear to be an unconstitutional taking. The regulation is rationally based, reasonably formulated and accomplishes numerous justifiable ends, including environmental protection, resource conservation, and agricultural preservation. Here it would appear that the large lot requirements are probably not unconstitutionally too large.

## 2. Diminution in value

Just as there is no mechanical formula by which a court can determine when a low density zone is too low, there is no precise method of determining when a diminution of private property values by means of government regulation is so great as to constitute a taking.<sup>91</sup> As with density determinations, case law reveals a wide range of judicial opinion, and the matter of pre- and post-petition regulation value is but one of many factors considered in the takings analysis.

In one recent case, the court affirmed as valid an action which re-

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power); *County Comm'rs. v. Miles*, 246 Md. 355, 228 A.2d 450 (1967); *DuFour v. Montgomery County Council*, Law Nos. 56964, 56968, 56969, 56970, 56983, unpublished op. (January 20, 1983) (downzoning of 88,000 acres [137 square miles] to one unit per twenty-five acres requirement upheld in face of takings challenge); *Klein v. Anne Arundel County*, Equity No. 3102157, letter op. (August 3, 1982) (95,000 acre [150 square miles] downzoning to one unit per twenty acres for farmland preservation, environmental protection, and growth management purposes upheld as no taking).

88. Maryland counties that have adopted zoning densities similar to the one unit per twenty acres requirement are Anne Arundel, Carroll, Montgomery. See ANNE ARUNDEL COUNTY, MD., CODE art. 28, § 2-211 (Supp. 1986), § 2-608 (Feb. 23, 1987); CARROLL COUNTY, MD., ZONING ORDINANCES § 6.6 (1986); MONTGOMERY COUNTY, MD., ZONING ORDINANCES § 5, art. 59-C-9.41 (Supp. 1985).

89. R. COUGHLIN & J. KEENE ET AL., NATIONAL AGRICULTURAL LANDS STUDY, "Protection of Farmland" Guidebook 112 (1980).

90. These densities were reported in a telephone interview with William Harrison (April 9, 1986).

91. The question of value diminution is complicated further because, as noted, the decrease in property value is but one factor in the overall determination of whether there has been a taking.

sulted in perhaps a ninety-five percent reduction in value.<sup>92</sup> In an older case, an eighty-seven percent reduction in value was permitted.<sup>93</sup> In 1975 a California court upheld a rezoning where the land value diminished by about seventy-seven percent.<sup>94</sup> In more recent cases courts have upheld the local action where the differences in value were between sixty and eighty-five percent.<sup>95</sup> The rationale for upholding ordinances even where they result in significant decreases of property value was provided by the Supreme Court of California in *HFH, Ltd. v. Superior Court of Los Angeles County*:<sup>96</sup>

Plaintiffs fail to distinguish between the 'damaged' property which is a requisite for a finding of compensability, and the 'damages' by which courts measure compensation due. Reasoning backwards, plaintiffs erroneously contend that since they can calculate damages (by measuring the decline in market value), they must have been 'damaged'.<sup>97</sup>

Quite clearly, a showing of a decrease in property value, even when significant, is not necessarily sufficient to warrant a finding of unconstitutionality or awarding of compensation as a remedy, if so found. Where

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92. *William C. Haas & Co. v. San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

93. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

94. *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 508, *cert. denied*, 425 U.S. 904 (1975).

95. *See Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978); *Pompa Const. Corp. v. City of Saratoga Springs*, 706 F.2d 418 (1983); *Rogers v. Town of Brookhaven*, 39 Misc. 2d 927, 242 N.Y.S.2d 142 (1963) (85% diminution); *Urann v. Village of Hinedale*, 30 Ill. 2d 170, 195 N.E.2d 643 (1964) (69% diminution); *Brown v. City of Fremont*, 75 Cal. App. 3d 141, 142 Cal. Rptr. 46 (1978) (81% devaluation); *Arnold v. Prince George's County*, 270 Md. 285, 311 A.2d 223 (1973) (no taking where \$32,100 devaluation alleged due to road placement); *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969) (alleged 66% reduction in value due to downzoning, thus no taking found); *Marino v. City of Baltimore*, 215 Md. 206, 137 A.2d 198 (1957) (refusal to grant permit alleged to reduce value from \$140,000 to \$14,000 held no confiscation); *City of Baltimore v. Borinsky*, 239 Md. 611, 212 A.2d 508 (1965); *Neubauer v. Town of Surfside*, 181 So.2d 707 (Fla. Dist. Ct. App. 1966) (property worth 69% less as zoned than as requested, held valid exercise of police powers and legislative discretion to refuse upzoning); *Chicago Title & Trust Co. v. City of Chicago*, 30 Ill. App. 2d 45, 264 N.E.2d 730 (1970) (value disparity between zoning requested and current zoning not determinative, local decision upheld); *Lapukus Builders v. City of Chicago*, 30 Ill. 2d 304, 196 N.E.2d 682 (1964); *Martin v. City of Rockford*, 27 Ill. 2d 273, 189 N.E.2d 280 (1963); *Raynor v. Rockville Centre*, 62 Misc. 2d 870, 310 N.Y.S.2d 210 (1969); *Maywood Proviso State Bank v. Berkeley*, 5 Ill. App. 2d 84, 204 N.E.2d 144 (1965) (plaintiff who bought property with full knowledge of existing zoning had no valid complaint that higher density would yield 65% more value); *Joyce v. City of Portland*, 24 Or. App. 689, 546 P.2d 1100 (1976). *Contra* *La Salle National Bank of Chicago v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); *Frantz v. Village of Morton Grove*, 28 Ill. 2d 246, 190 N.E.2d 790 (1963).

96. *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365, *cert. denied*, 425 U.S. 904 (1975).

97. *Id.* at 518, 542 P.2d at 244, 125 Cal. Rptr. at 372.

the need for the regulation is compelling, courts generally will not find a taking, even where private interests are affected substantially. The general rule is that if the property owner can make reasonable economic use of the property, no taking will be found, even if that use earns a substantially lower profit than the original or planned use.

Comparing the case law on the value diminution issue to the action undertaken by the Commission, one could conclude logically that even a significant diminution in value would not serve, by itself, to invalidate the RCA's "one per twenty" criterion. While "reasonable investment-backed expectations"<sup>98</sup> of property owners are relevant to a determination of the overall constitutionality of a regulation, economic injury to *prospective* uses does not necessarily constitute a taking.<sup>99</sup> Offsetting the apparent harshness of the "one per twenty" regulation is the fact that various economically viable resource utilization activities such as farming or timbering may continue in the RCAs, as may residential land uses at low density. Moreover, the density restrictions of the regulation may be modified somewhat by the local programs' application of such mechanisms as "transferable development rights"<sup>100</sup> and various other flexibil-

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98. The phrase "reasonable investment-backed expectations" used by Justice Brennan in *Penn Central* can be explained as follows: "reasonable expectations" are those that may be justified by a rational and logical analysis of all the available facts; "investment-backed" generally refers to money spent in reliance upon those expectations. See *Penn Central*, 438 U.S. at 124-25.

99. *Penn Central*, 438 U.S. 104. On the other hand, it is important to note that a taking might well be found where a property has been rendered substantially useless. The mere remainder of title, or the right to exclude others, without more, is not enough of the bundle of rights remaining to keep a taking from occurring. *Curtis v. Main*, 482 A.2d 1253 (Me. 1984). There are several United States Court of Claims cases where an analysis of such a taking is made. *E.g.*, *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977) (denial of right to make significant changes to Willard Hotel); *Florida Rock Indus. v. United States*, U.S. Ct. Cl., No. 266-82L, May 6, 1985 (Corps of Engineers denial of permit to mine limestone held a taking because no other viable use of property remained). The latter case analyzed the remaining bundle of rights by defendants to be still present (the right to sell, lease, restrict or permit access, etc.) as largely illusory, and found that there will always be some residual market value, but that it was too speculative a value to consider. These are indeed relevant considerations, although it appears that the *Florida Rock* court may well have stepped outside the mainstream of takings law in its examination of and conclusions regarding these issues, given the facts before it. In fact, the United States Court of Appeals for the Federal Circuit disagreed with the most significant part of the Claims Court's holding in that case, and vacated and remanded that holding in part. *Florida Rock*, 791 F.2d 893. The court of appeals determined that the residual market value, though speculative, was indeed a remaining value that required examination before a taking could be declared. If believed, the appraiser's assertion in this regard could represent a sufficient remaining use to forestall a determination that a taking had occurred. 791 F.2d at 903.

100. Transferable development rights (TDRs) refer to an evolving local planning tool in which the right to develop property is severed from other land ownership rights. Development rights of one parcel of land (the "sending" parcel), may then be transferred to another parcel (the "receiving" parcel). The tool generally helps preserve some features of the sending parcel and increases the density or changes development in the receiving parcel. For case law discussing TDRs, see *infra* note 113.

ity measures built into the regulations, some of which are discussed below.<sup>101</sup>

#### *D. Relief Valves, Flexibility, and Mitigation*

Previous parts of section III of this article have examined several of the factors used in takings analysis in low density zoning cases and compared these factors with the density regulation in the Commission's RCA criterion. As part of the takings law equation it is necessary to examine how other Critical Areas criteria may mitigate the effects of the "one in twenty" criterion and what impact such mitigating criteria may have upon whether "one in twenty" constitutes a taking.<sup>102</sup>

Of prime importance is the initial understanding that the Critical Area law generally affects only land within 1,000 feet of the shoreline and wetlands of the Chesapeake Bay and its tributaries. Entire counties, cities and towns are, for the most part, unaffected.<sup>103</sup> Local jurisdictions may continue to regulate land use outside of the Critical Area as before. Thus, jurisdictions may "up-zone" in those areas outside the Critical Area to whatever densities their citizens and legislators believe is appropriate.

Even within the Critical Area, the zoning regulations are not as extensive or burdensome as they initially may appear. First, it is essential to note what the Commission established. Of the three distinct management areas into which the local jurisdictions must classify their Critical Area land, only the RCA is subject to the "one per twenty" criterion. Moreover, by definition, RCA zones are already low density areas; RCAs are defined as areas with no more than one dwelling unit per five acres. Portions of the Critical Area in all jurisdictions will be classified as Intensely Developed and Limited Development Areas. On these lands moderate and intense development can continue within the Critical Area.<sup>104</sup> The Commission was attentive to the need for areas of higher intensity, as well as to the need for conservation areas of low intensity uses. Thus, just as whole zoning ordinances are judged in takings cases to determine whether various densities are provided, so too must the local Critical Area Programs be judged in their entirety.

Second, the Commission provided a variety of offsetting mechanisms that would help local jurisdictions blunt the impact of Critical Area regulations and prevent the operation of the regulation from being viewed as a taking. The criteria, and thus the local implementing pro-

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101. COMAR, *supra* note 5, §§ .15.01-.02.

102. See Freilich & Senville, *Taking, TDRs, and Environmental Preservation: 'Fairness' and the Hollywood North Beach Case*, 35 Land Use Law and Zoning Digest 4 (September 1983).

103. A county can *choose* to include much more or even all of its land area through its local program development; due to the economic effects of such inclusion, however, it is unlikely that many counties would expand the area to be regulated much beyond the minimum area specified in the Critical Areas legislation.

104. COMAR, *supra* note 5, §§ .15.02.03-.04.



grams, permit variances in the case of unusual circumstances, special conditions, or unwarranted hardship.<sup>105</sup> Thus, relief from application of the criteria may be possible where application of the criteria would be too harsh and might otherwise constitute a taking.

Third, the Commission provided for certain parcels of land to be "grandfathered" by local jurisdictions. Thus, for example, anyone with a lot or parcel of record when the criteria were promulgated may at least place a single house on that lot or parcel, regardless of the lot's size or location, as long as the building meets local requirements.<sup>106</sup>

Fourth, a "growth increment" was provided to local jurisdictions, based on five percent of the amount of RCA land each jurisdiction has.<sup>107</sup> Statutory changes in the 1986 legislative session made this growth increment concept more readily available to underdeveloped counties.<sup>108</sup> In a related legislative clarification, landowners whose property includes large areas of wetlands may now count that unusable land area for density purposes on the upland portion of their parcels, up to a density of one unit per eight acres.<sup>109</sup>

Finally, the Commission's regulations permit and encourage the use of transferable development rights (TDRs).<sup>110</sup> Once developed by the local jurisdiction, a TDR program in a local Critical Area might permit, for example, RCA property owners to sell their development rights outside the RCA to an owner in a local IDA or LDA "receiving" zone. TDR programs have been viewed favorably by the courts as mitigative measures in the overall takings equation. In *Penn Central*,<sup>111</sup> the United States Supreme Court stated that New York's potential transfer of the rights for development over Grand Central Terminal "undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."<sup>112</sup> Although the courts have not based "no taking" holdings completely on the presence of a TDR program, such programs do seem to be afforded great weight in considering the overall justice and fairness of the regulatory activity.<sup>113</sup> As stated by one commentator, "TDRs rep-

105. *Id.* § .15.11. Local jurisdictions can vary their programs somewhat where special conditions or circumstances exist that are peculiar to the land or structure and literal enforcement of the criteria would result in unwarranted hardship. *Id.*

106. *Id.* § .15.02.07. The Legislature also has provided for a limited ability to transfer property to family members in order to erect several structures. MD. NAT. RES. CODE ANN. § 8-1808.2 (Supp. 1986).

107. COMAR, *supra* note 5, § .15.02.06. That is, the Commission has permitted the growth of intense land uses beyond those shown by its current land use. The growth increment is based on five percent of its RCA land area. *Id.* § .15.01.06(A)(1).

108. MD. NAT. RES. CODE ANN. § 8-1808.1(b) (Supp. 1986).

109. *Id.* § 8-1808.1(c).

110. COMAR, *supra* note 5, § .15.02.05(C)(4). For a description of TDRs, see *supra* note 100.

111. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

112. *Id.* at 137.

113. See, e.g., *Penn Central*, 438 U.S. 104 (1978) (TDR discussion by Court); *DuFour v. Montgomery County Council*, Law Nos. 56964, 56968, 56969, 56970, 56983, un-

resent a right supplemental to the beneficial use allowed on [the property owner's] land."<sup>114</sup>

Upon examining the various measures designed to provide flexibility in the takings law equation it would seem that the Commission's RCA density criterion fares rather well. Devices which mitigate the perceived harshness of the regulation also serve to enhance its constitutionality.

### *E. Vested Rights*

Private property owners adversely affected by a government action often advance the argument that they have a vested right in the status of their property prior to the government action. The general majority rule on this subject is straightforward: no vested rights are said to accrue in a particular zoning classification absent substantial good faith reliance thereon, usually in the form of reliance on a valid building permit.<sup>115</sup> The approval of a plan and the filing for a permit generally do not place the lots shown on a subdivision plat beyond the power of future zoning changes, absent some express statutory provision to the contrary.<sup>116</sup> Further, in Maryland, a concrete physical change arising from reliance on the building permit is required to vest rights in a development. The case law in Maryland has established that there must be actual construction on the ground before the judicial concept of vested rights will invalidate the zoning change.<sup>117</sup> Thus, under Maryland law, a challenge to the "one per twenty" regulation based on a vested right in a particular proposed land use would usually be untenable.

Vested rights arguments are often wound up in, and confused with, takings claims. Sometimes they are jointly pled. The important point for the purpose of this article is that a takings claim supported or bolstered by a vested rights argument has, in Maryland, quite limited application to some very specific facts.

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published op. (January 20, 1983) (Montgomery County, Maryland downzoning of large land area to a one unit per twenty-five acres density upheld as no taking, with judge separately remarking on TDR scheme); *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. 1983) (court held downzoning of beachfront not confiscatory, finding that the TDR mechanism utilized there was not "offensive"). It must be noted, however, that a TDR mechanism on its own, as the sole means for balancing fairness and investment-backed expectations, may not be able to pull an otherwise clear taking out of an unconstitutional tailspin. *Fred R. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381 (1976). It remains important, for example, that the TDRs created have adequate worth. It is also important for other aspects of the zoning program to accord with substantive and procedural fairness.

114. Note, *New Jersey's Pinelands Plan and the 'Taking' Question*, 7 COLUM. J. ENVTL. L. 227, 238 (1982).

115. *City of Fort Pierce v. Davis*, 400 So. 2d 1242 (Fla. Dist. Ct. App. 1981).

116. *R.A. Vachon & Son, Inc. v. Concord*, 112 N.H. 107, 289 A.2d 646 (1972).

117. *Washington Suburban Sanitary Comm'n v. TKU Assoc.*, 201 Md. 1, 376 A.2d 505 (1977) (preliminary expenditures of over \$1,500,000 not sufficient absent construction); *County Council v. District Land Corp.*, 274 Md. 691, 337 A.2d 712 (1975).

*F. Conclusion: The Effect on Private Property Interests*

Section III of this article has explored one of the most controversial of the Commission's regulations, its "one per twenty" density criterion. Downzonings, or zoning from a higher to a lower density, although occurring regularly throughout the state and the nation, are naturally the subject of takings claims.

Among the factors the courts have applied in the analysis of takings claims is the size of the purported taking, measured by whether the density is too low or whether the diminution of property value is too great. Neither variable can be stated in terms of a formula because a wide variety of other factors must be taken into consideration: the full range of benefit and burden; the presumptive validity accorded legislative actions; the degree of compliance with statutory purposes and guidance; the role of the particular regulation in the overall regulatory scheme for the particular geographical area; and the relative availability of mitigation, relief, and general flexibility.

Low density regulations have been overturned when found to be arbitrary, enacted for inappropriate reasons, or without an adequate foundation. On the other hand, large lot zoning and similar conservation mechanisms routinely have been upheld as valid when reasonably developed and adequately based, even where, in extreme cases, the zoning regulations allow for only one unit in as large an area as 50, 70 or 640 acres.<sup>118</sup> In light of the Commission's research, reasoning, and process, its requirement would seem similarly valid.

Concomitantly, there is no formula by which diminution in value is tested. Courts recently have upheld regulatory actions which diminish value from ninety-five through sixty percent, provided the other variables noted above are sufficiently present.<sup>119</sup> Reasonable economic use, not highest and best or most profitable use, is an oft-cited test. In Maryland the regulation must deprive the owner of "all reasonable use" before a taking will be found.

The Commission's criteria provide for various mitigative mechanisms, as well as considerable flexibility and reasonableness of application. Densities that accommodate more intense development are provided within each locality's critical area as well as outside of it. Further, the criteria provide for variances in the event of unwarranted hardships; "grandfathering" of certain lands and development; a "growth increment" for future development; and importantly, TDR programs, should the local subdivision wish to enact them. Each of these, and all of them together, may tend to lend balance in purported takings situations though, of course, a parcel-specific situation may not present all or any of these variables.

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118. See *supra* notes 94-95 and accompanying text.

119. See *supra* note 95.

## IV. CONCLUSION

This article has examined the legislative process of the Critical Areas criteria and a constitutional issue raised by the controversial low density zoning requirement contained in the regulations. Local downzoning usually will withstand constitutional takings claims if the zoning action is the result of rational study and review, achieves legitimate statutory purposes, is implemented with adequate procedural safeguards allowing the affected public to be heard and allows for some reasonable use of the affected property. Local downzonings, undertaken properly to help achieve the Commission's low density criterion, would seem to meet these constitutional minimums.

The Critical Area criteria have a rational basis inasmuch as they are specifically designed to meet the public objectives and minimum requirements set forth in the Critical Areas legislation. The criteria were developed after extensive research, analysis and debate before the Commission. Similar environmental and resource conservation purposes are found generally in local jurisdictions' planning and zoning enabling legislation.<sup>120</sup> Case law nationwide, as well as in Maryland, generally has supported the imposition of strict land use regulation to implement such purposes.<sup>121</sup>

The entire package of Critical Area criteria is the result of innumerable reasoned judgments and compromises, based upon extensive study and deliberation. The criteria achieves a delicate balance of private rights and public necessity. Even the most controversial criterion, the "one per twenty" density criterion, is a logical, valid, and constitutional application of the State's police powers. What remains now is to see how effectively local authorities implement the Critical Areas criteria and what impact these actions will have in the future.

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120. MD. ANN. CODE art. 66B, §§ 3.05, 4.01, 4.03 (1983 & Supp. 1985).

121. See, e.g., *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981), *cert. denied sub nom. Taylor v. Graham*, 454 U.S. 1083 (1981); *S. Volpe & Co. v. Board of Appeals*, 4 Mass. App. 357, 348 N.E.2d 807 (1976); *Potomac Sand & Gravel Co. v. Governor of Md.*, 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972).