

PRIVELEGED AND CONFIDENTIAL v6

**The Central Role of Official Maps in the Administration
of the Chesapeake Bay Critical Area Protection Program**

*[The implications of the Maryland Court of Special Appeals Opinion in K.
Hovnanian v Foley, et al, March 23, 2007 for the future of the Program]*

C O N T E N T S

Introduction.....	2
Historical Background ~ Maryland's Chesapeake Bay Critical Area Program.....	2
The Shoreline Protection Strategy.....	3
A State and Local Regulatory Partnership.....	4
Provisional Mapping.....	4
Adopted Maps.....	4
The Internal Mapping of Development Districts.....	5
Project Approvals.....	6
Map Amendment Procedures.....	7
Growth within the Critical Area and the Concept of Growth Allocation.....	8
The Four Seasons Petition.....	9
Circuit Court Proceedings, Memorandum and Injunction (Judge John W. Sause, Jr.)	10
The Court of Special Appeals Opinion (Judge J. Rodowsky).....	12
Summary and Conclusion.....	15
The Linger Truth: Calculating the Growth Allocation Debit [It doesn't add up!].....	16
Post Script.....	19
<hr/>	
Other Observations and Comments on the Court of Special Appeals Opinion.....	20
Exhibit 1: Four Seasons ~ Growth Allocation Debit.....	E-1
Exhibit 2: Four Seasons ~ Project Statistical Summary.....	E-2

Introduction

This memorandum establishes the central role of maps in the enactment and application of the Chesapeake Bay Critical Area Act. This is necessary context for the certiorari petition seeking review by the Court of Appeals of the intermediate appellate court's decision in *K. Kovnanian at Kent Island, LLC v. Robert W, Foley, Jr. et al* filed March 23, 2007.

The certiorari petition will present two fundamental questions.¹

First Question:

Does the Chesapeake Bay Critical Area Act allow additional intensive development in the Critical Area absent delineation of the supporting development district on the Official Critical Area Map?

Resolving this question has broad statewide significance, potentially affecting all land use determinations in the entire Chesapeake Bay Critical Area. The Critical Area comprises 10% of all state lands and is adjacent to 5,300 miles of Maryland's Chesapeake Bay shoreline. The Critical Area Law is the State's landmark environmental legislation and its most important tool for the protection of water quality in the Chesapeake Bay, the Nation's largest estuary.

Second Question:

What is the legal effect of an Ordinance enacted to create a new Critical Area district, when the Ordinance contains no information about the location of the new district boundaries?

Resolving this question has great significance for land survey and land records practice throughout Maryland. At issue is whether land regulation classification districts can be defined by criteria, regulation text, and legislation without resorting to mapping and survey descriptions sufficient to initially locate and reestablish, when required, the geographic position and extent of the district.

These matters affect not only the Chesapeake Bay Critical Area Program but also all other land regulation ordinances and land records procedures throughout Queen Anne's County and the State.

Resolving these matters to restore the integrity of the Program and the integrity of State land records practice is of the highest public importance.

Historical Background ~ Maryland's Chesapeake Bay Critical Area Program

In the summer of 1982, then Maryland Governor Harry Hughes received a credible report from the US Environmental Protection Agency (EPA) indicating deteriorating water quality and high concentrations of toxic chemicals in waters of

¹ The actual certiorari petition will present these two questions in reverse order and contain two additional questions. The two questions discussed here are of great Statewide importance.

the Chesapeake Bay and its tributaries. The EPA further informed the Governor the deterioration was forecast to increase as a result of population growth in the watershed, and that federal funds would not be available for the long-term clean-up effort needed to arrest and reverse the decline of the Bay.

Alarmed by the situation and the forecasts of accelerating degradation if current land patterns and growth trends continued, Governor Hughes and senior members of his administration began to formulate a strategy and an action program the State would pursue. Governor Hughes sought and received the cooperation of the governors of Virginia and Pennsylvania and the mayor of the District of Columbia when he proposed to convene a Governors' Conference in December of 1983. At this conference Governor Hughes committed to describe a Maryland program of corrective actions.

A multi-disciplinary, multi-department study group was assembled, under the leadership of John Griffin from the Governor's staff, to create the Maryland Program. After examination of several possible initiatives and a review of major conservation programs in other states— the Adirondacks in New York, the Pine Barrens in New Jersey and others— the group, which came to be known as the Wye Group, determined the most feasible alternative was a conservation/protection program for Maryland's approximately 5,300 miles of Bay shoreline.

Further refinement of this shore protection concept culminated in the proposed Chesapeake Critical Area Protection Program legislation in the fall of 1983. The proposed bill was approved by Governor Hughes shortly before the Governors' Conference, and later adopted after substantial negotiation and revision, by the Maryland legislature in 1984. The landmark Critical Area Law (Law) is considered to be the "centerpiece" of the Hughes administration's package of initiatives aimed at arresting the decline of the Chesapeake Bay.²

The Shoreline Protection Strategy

It was widely held within the study group that control of land use patterns, and land management practices in close proximity to the water's edge were critical to arresting the degradation of water quality in the Bay. The State had successfully adopted a land use reform and regulatory strategy based upon this insight in some areas of the State. The concept of a continuous "ribbon" buffer and management area, which came to be known as the Critical Area, is the central feature of the Law.

The dimension of the buffer is defined, not in relation to existing patterns of land ownership and roadways as conventional zoning is, but as an area of fast-land of serpentine shape (following the shoreline) of relative constant width (1,000 feet

² This historical material was extracted from: *A Summary of the Chesapeake Bay Critical Area Commission's Criteria and Program Development Activities 1884-1988*, by J. Kevin Sullivan, August 1989, published by the Chesapeake Bay Critical Area Commission, Annapolis Maryland. (Program Summary)

plus all adjacent tidal wetlands landward of state tidal wetland and waters). This irregular, serpentine, and not previously delineated ribbon along the dynamic water's edge, is the geography within which land management criteria proposed within the Law would become manifest. Clearly one of the major implementation challenges presented by this strategy is delineating and legally defining this highly irregular, environmentally determined Critical Area.³

A State and Local Regulatory Partnership

The Law creates a 27 member state body, the Critical Area Commission (Commission), with a full time Chairman and staff to administer the Program. The central administrative concept of the Law is that the State and local jurisdictions (16 counties and 41 municipalities) are partners in delineation of the Critical Area, and in drafting and administering appropriate land management criteria. The Law creates and instructs the Commission to develop models, standards, methods, and procedures to guide local jurisdictions as they create and administer the Law's mandated local programs. Apparently concerned that the ambitious Law might lead to bureaucratic paralysis, the legislature established a very tight schedule for this work requiring the State's regulatory criteria be available by the fall of 1985. The tight schedule necessitated extensive reliance on available research and cartography.⁴

Provisional Mapping

In 1972 the State created a comprehensive statewide mapped inventory of tidal wetlands as an extension of federal work in wetland protection and identification. These large-scale photomaps (1"=200') became the basis for provisional delineation of Critical Area by the Commission. On copies of these photomaps State cartographers marked the 1,000 ft. offsets needed to provisionally establish the landward extent of the Critical Area. The Commission provided these provisional maps to each of the local jurisdictions with instructions to verify or improve their accuracy and to integrate the resultant territory into locally created maps for review and approval by the Commission as the geographic context of the local Critical Area Program.⁵

Adopted Maps

Most jurisdictions chose to integrate delineation of the Critical Area and the accompanying standards for land management into their existing land use regulations and zoning maps. This alone was a complex task as the extremities of the Critical Areas are environmentally determined and do not coincide with the patterns of land development, land ownership, deeds and surveys that have evolved with increasing accuracy for centuries in the land records of Maryland.

³ Ibid

⁴ Ibid

⁵ Ibid

The Law requires the local jurisdictions to submit proposed maps of their Critical Area lands for Commission validation and approval, and establishes a mechanism (map amendment) for correcting mistakes. After the local program, explicitly including the jurisdiction's official Critical Area maps, is adopted, the maps are legally controlling for purposes of local land development regulation and Commission approvals. Duplicate copies of the local program and official maps are to be maintained, and available for public inspection, in both Commission and local files.

It is interesting to note that Queen Anne's County (QAC), one of a few jurisdictions strongly resistant to the Law, chose uniquely to place the Critical Area delineations on separate "overlay maps" that relate to, but do not directly correlate with, existing county zoning classification lines. The County has also chosen to place regulations for the management of Critical Area lands in a separate Ordinance (Title 14) independent of the County's zoning and subdivision regulations (Title 18). It appears Queen Anne's County expected the Critical Area Law would be repealed and setup County regulations and maps so they could be discarded with little fuss or revision.

This reluctance to fully embrace the Law and integrate it into the fabric of local regulation, tolerated by the Commission, substantially complicates the administration of the local Queen Anne's County program and review of development proposed within the QAC Critical Area.

The Internal Mapping of Development Districts

After a local jurisdiction maps the extent of the Critical Area with Commission approval, the Law requires all land and private wetland that is within the Critical Area to be further classified and delineated into one of three development districts or zones (also called development areas) based upon the on-site development pattern existent at the time of original mapping and criteria defined in the Commission's regulations. These development districts, a sub-set of the local Critical Area, are required to be shown on the jurisdiction's Official Critical Area Maps. These, fully delineated maps, when approved by the Commission become a legally binding component of the local program.⁶

Boundaries of each of these development districts—intensive development area (IDA), limited development area (LDA), and resource conservation area (RCA)—are based solely upon the existing land development patterns present at the time a local program is originally adopted. In this way, a wide variety of existing development patterns are examined from an environmental perspective (impervious cover, intensity of use, density, runoff etc.) to allow them to be collapsed into the three-land-management districts that apply within the entire Critical Area (including fast-land, non-tidal waters, and private tidal wetland).

⁶ See QAC Title 14: §14-117(b) and COMAR 27.01.02.02.

These environmental districts modify, overlay, or replace the jurisdiction's conventional (Euclidian) zoning districts for the Critical Area portion of lands within a local jurisdiction. (See discussion of QAC Overlay maps above.)

Although additional development/redevelopment is permitted within the intensive and limited development districts, the fundamental strategy of the shoreline protection program is to limit the extent and proliferation of these areas in order to ensure large expanses of the shoreline lands retain the environmentally beneficial qualities of the resource conservation district. Criteria for the RCA district are modeled on the substantial success achieved in several eastern states using agricultural protection zoning allowing 1-house per 20-acres density.

When the entire statewide program was in place in 1989–1,000 square miles was found to be within the Critical Area (10% of Maryland) and 80% of that was classified as resource conservation lands.⁷

Categorizing the existing land patterns and integrating those decisions into the three development districts to be delineated on official maps is, like overall Critical Area mapping, a local responsibility with Commission assistance and approval. This presents all of the cartographic challenges described above related to the delineation of the overall Critical Area. Once constructed and approved, the maps are the official record of the extent and position of the development districts, and can only be modified by using strictly limited change procedures (see below) and by taking advantage of improved mapping and surveying techniques to increase accuracy during periodic program updates.

Project Approvals

The Critical Area Law provides that:

"From the effective date of a [local] program approved or adopted by the Commission, a project approval that involves land located in the Chesapeake Bay Critical Area may not be granted unless the project approval is consistent and complies with the program"⁸

Elsewhere throughout State and local law it is clear that references to "program" means the entire local program including official maps and that project approval includes local approval of subdivision plats and site plans.⁹

This very straightforward mandate compels a project's applicant and approving authority to find on the official maps of the jurisdiction, and the development areas delineated thereon, the basis for the approval sought. The Law also guarantees that the Commission Chairman has standing to sue and access to the Attorney General to enforce this mandate.¹⁰ **Clearly the legislature intended that Official Maps**

⁷ Program Summary, Appendix C

⁸ See Annotated Code of Maryland, §8-1811(a)

⁹ See Annotated Code of Maryland, §8-1802(8) & (11); and QAC Title 14 §14-117.

¹⁰ See Annotated Code of Maryland, §§8-1812, 8-1815.

have a central role in local decisions involving the management of lands in the 1,000 square miles of Critical Area lands surrounding the tidal waters on the Bay.

Note also that County code speaks of " . . . three development areas districts . . . as delineated of the official critical area maps . . . **as they may be amended from time to time** . . ." [emphasis supplied].¹¹ A subdivision plat or site plan can only be locally approved if it is consistent with the applicable local Official Critical Area Map.

Map Amendment Procedures

In an effort to correct clear mistakes made when a local program is established, the Law directs a local jurisdiction to periodically "review its entire program and propose any necessary amendments to its entire program, including local zoning maps . . ." ¹² The Law also provides that the Commission may intervene to correct clear mistakes, omissions or conflicts in a local program and void approvals granted pursuant to them. ¹³

The Law further provides that—"Except for program amendments and refinements developed during program review, a zoning map amendment may be granted . . . "

" . . . only on proof of a mistake in the existing zoning"— §8-1809(h)(2)(i), or; in an instance that proposes "the use of a part of the remaining growth allocation in accordance with the adopted program."— §8-1809(h)(2)(ii)2."

[See discussion of growth allocation below. The above terms—"Existing zoning, zoning map, and zoning map amendment" refers to Critical Area development area classifications and Critical Area Maps and Map Amendments.] ¹⁴

The applicable local Official Critical Area Map is adopted law and can only be modified: (1) at periodic program update, (2) on showing of mistake, or (3) by authorized map amendment utilizing available growth allocation. **Only through one of these three methods can a project that is not consistent with the existing official map achieve consistency. Only upon a showing of map consistency can a project be lawfully approved.**

As will be discussed below, the Court of Special Appeals Opinion, if allowed to stand, modifies these cardinal principals and processes of the Critical Area Program, eviscerating the Law.

¹¹ QAC Title 14 §14-117

¹² See Annotated Code of Maryland, §8-1809(g)

¹³ See Annotated Code of Maryland, §8-1809(g)

¹³ See Annotated Code of Maryland, §8-1809(l)

¹⁴ See Annotated Code of Maryland, §8-1809(h)

Growth within the Critical Area and the Concept of Growth Allocation

The concept for a shoreline protection program was based upon the premise that the State's entire Critical Area, once mapped into the three development districts (development areas—IDA, LDA, and RCA) would basically stay that way and be modified only by three carefully spelled out mechanisms (described above), and not through comprehensive plan related, growth accommodating map revisions in the manner of conventional zoning.

Management criteria for each of the development districts allows for infill development and intensification if consistent with the criteria. For instance the RCA area allows agriculture or residential development at 1/20 density, and the LDA area allows intensification of existing uses that do not exceed 15% impervious cover of the site.

The IDA and LDA districts may include vacant parcels that do meet the criteria for RCA. The program permits these vacant parcels to be mapped as a part of the surrounding district and allows them to be developed consistent with the criteria for the surrounding district. These infill and limited intensification options are a primary growth opportunity within the Critical Area.

The option of occasionally mapping new territory to a more intense zoning, available to a local jurisdiction via conventional zoning during a comprehensive planning and zoning cycle, is restricted in the Critical Area Law to a special mechanism for map amendment utilizing the jurisdiction's "Growth Allocation."

This new term to the planning and zoning lexicon was coined and first described within the Critical Area Law and program criteria. The impetus for its creation stems from a desire on the part of the Wye Group, the drafters of the Law, the legislature, the Commission, and local interests to allow local jurisdictions some growth flexibility of the kind available in conventional zoning. Several plans to accomplish this were considered and discussed with the legislature and local jurisdictions.¹⁵

A plan emerged that created a unique and specific process for map amendment and set up a "growth allocation acreage account" with a starting balance allocated by the State to each jurisdiction. The starting balance established a total acreage of map change that the local jurisdiction can use in making discretionary map amendments to accommodate desirable growth.

A jurisdiction's Growth Allocation is a one-time grant, not to be replenished, that establishes an account for use by local jurisdictions to redesignate and divide of mapped development districts. The Law established detailed criteria to be incorporated into a local program for use of the Allocation. The starting balance, the initial Growth Allocation, denominated in acres, is computed as 5% of a

¹⁵ Program Summary.

jurisdiction's mapped RCA land, exclusive of private tidal and federally owned lands contained therein. Statewide this 5% conversion potential, when exhausted, will account for a 20% increase in the total of the IDA and LDA districts (from 20% to 24% of the Critical Area).¹⁶

Queen Anne's County's Critical Area regulations summarize this "debit account" concept well by defining Growth Allocation as follows:

"Growth allocation' means an area of land calculated as five percent of total resource conservation area designated land within the Critical Area (excluding tidal wetlands and federally owned land), that the County Commissioners may convert to more intensely developed areas."¹⁷

Note that "growth allocation" is a noun—it is the account starting balance against which a local jurisdiction debits the acreage involved in program-authorized map amendments. It is not a verb related to the sanctioned action of a map change itself, and it is not a separate "floating zone" awarded to a project.

A developer's "petition" is the starting point for consideration of this type of map amendment. Stated in the simplest way, a growth allocation petition seeks permission to utilize a portion of a jurisdiction's Growth Allocation account to lawfully amend an Official Map. The objective of this type of map amendment is to allow project approval consistent with the amended map..

Growth allocation is not a procedure to obtain project approval absent a conforming official map. The Circuit Court Judgment correctly recognizes this, but the Court of Special Appeals Opinion (both described below) erroneously posits the contrary.

The Fours Seasons Petition

On June 9, 2000 K. Hovnanian filed a petition asking the QAC County Commission to use a portion of its remaining growth allocation account to enable a map amendment of a portion of the Critical Area lands on the site of their planed Four Seasons development. Hovnanian specifically asked to change 293.25 acres of RCA mapped land to IDA and to change 79.55 acres of LDA mapped land to IDA. They represented that this change in relevant portions of Critical Area Maps would enable county site plan and subdivision plat approval for the project.

This memorandum will not attempt to recite the long and complex series of events that followed, relying instead on the Circuit Court file and the record extract of those proceedings submitted to the Md. Court of Special Appeals.

It is, however, useful to comment on two documents from that record important to the tenets of this memorandum. On April 17, 2001 the County Commissioners passed a Resolution (01-13) making numerous "findings of fact" and announcing

¹⁶ Ibid, Appendix C.

¹⁷ QAC Title 14: §14-111(45). See also Annotated Code of Maryland Title 8, §8-1808.1(b).

their intention to enact ordinances approving the map amendments sought by K. Hovnanian's petition if 25 conditions were satisfied. This action was followed by confirmatory approvals of this intention at the QAC Planning Commission and the Critical Area Commission.¹⁸

On August 21, 2001 Ordinance 01-01 and an amending Ordinance 01-01A were adopted. Ordinance 01-01 begins:

"AN ACT concerning the Repeal and Readoption with amendments of the Public Local Laws of Queen Anne's County (1996 Ed.) Title 14, Environmental Protection, 1996 Official Chesapeake Bay Critical Area Map Nos. 49 and 57.

FOR THE PURPOSE of **utilizing** Critical Area Growth Allocation to redesignate. . .

BE IT ENACTED . . . that . . . Title 14 . . . be amended by the repeal of Official Chesapeake Bay Critical Area Map Nos. 49 and 57 and the adoption of **the attached Map** Nos. 49 and 57 as the Official Chesapeake Bay Critical Area Map Nos. 49 and 57." [emphasis supplied].

There can be no doubt that this Ordinance is only about amending maps and that it anticipates that copies of the amended maps will be attached. They are not. There is no descriptive material contained in the ordinance, other than reference to the unattached maps, to locate and define the shape and area of the amended Critical Area development areas. Note also that the Ordinance speaks of utilizing growth allocation to redesignate portions of the maps. There is no suggestion that the ordinance or the other prior approvals establishes an alternate path to project approval.

Circuit Court Proceedings, Memorandum and Injunction (Judge John W. Sause, Jr.)

In Circuit Court CV 10855 proceedings it was established and conceded by all parties that Ordinance 01-01 had no maps attached at the time of signing and that the unsigned 2001 maps eventually attached, and later signed on December 4, 2001 were in no way consistent with any of K. Hovnanian's Growth Allocation Petition exhibits. It was further established that the 2001 maps were replaced, without public notice and not pursuant to a prescribed amendment process, by the 2002 maps, signed on October 8, 2002, that are also substantially inconsistent with any petition exhibits.

In his memorandum, Judge Sause concluded that Critical Area maps conforming to the project proposal are a prerequisite to project approval, as Plaintiffs also conclude. However, he suggested that Ordinance 01-01 and the documents that preceded it, inferred an intention to allow Hovnanian future access to Growth Allocation giving the developer what might be called a "vested" privilege. This

¹⁸ Judgment Civil #10855, February 8, 2006, p.2, ¶1(d)

privilege he asserts, permits retention of the specified amounts of map amending acreage (the so-called "debit amount") independent of a map specifying where the allocation is to be placed on the earth. The Judge ruled that the inferred approvals indefinitely reserved use of a specified number of acres from the QAC Growth Allocation account, and that the act of map amendment itself can be separated substantially, perhaps indefinitely, in time (4.5 years at the time of his Judgment, 5.6 yrs. today).¹⁹

Judge Sause, in the language of this Judgment in the case, made findings consistent with his view of permissible bi-furcated action. He said that "approval" could be regarded separately from the "ministerial" act of properly delineating that approval on a map. Plaintiffs disagree, believing instead, that map amendment is a single act composed of two integrated components; especially in this case where the Ordinance expressly adopts "attached maps"—not maps to be created in the future.

But, Judge Sause clearly recognized that the act is not operative until the mapping step is complete. He emphatically declared that:

" . . . the County may not engage in any type of consideration, authorization, approval or action of other kind which presupposes or otherwise involves that approval, until a map properly delineating the approved development area is provided." [emphasis supplied].²⁰

This statement accurately reflects the Critical Area Law's requirements that development in the Critical Area must conform to the "zoning" delineated on applicable portions of Official Critical Area Maps.²¹ More precisely, until maps fully and lawfully delineating development areas consistent with the proposed project are provided, development approvals reliant on those maps may not be given.

The Circuit Court Judgment does not find or assume that the "redesignated development areas" are sufficient in amount, location, and configuration to permit approval of the K. Hovnanian development plans and plats. Further, Judge Sause does not find or assume that a single "best" representation of the "approved development area" exists on the developer's petition plats, as he had established that there are two clearly different representations of varying pedigree, the 2000 Sheet 1 and the 2001 Sheet 7.

The Memorandum and Judgment was issued without "findings" on these important considerations. Sause initially proposed to consider these matters in an evidentiary hearing concerning the process for creating and validating a "new correct map" pursuant to his Judgment (should the County Commissioners choose to advance

¹⁹ Memorandum—Civil #10855, February 8, 2006, pp. 11-13.

²⁰ Judgment Civil #10855, February 2006, ¶2(h).

²¹ See Annotated Code of Maryland, §8-1811

one).²² The defendant's appeal and plaintiff's cross appeal to the Maryland Court of Special Appeals caused Judge Sause to suspend his continuation of the case, pending a determination of the correctness of the initial Judgment in the appellate courts.

It is unfortunate that this completion of the factual record was suspended. Important and threshold questions remain, suggesting that a correct and complete official Critical Area map, consistent with the developer's petition, may not be possible (See– The Lingering Truth below).

The Court of Special Appeals Opinion (Judge J. Rodowsky)

The Maryland Court of Special Appeals (CSA) was persuaded to commit the court and the parties to an "expedited" briefing schedule, and then was promptly presented with an unusual K. Hovnanian *Pleading* styled a "Motion to Vacate Injunction" before any of the traditional briefs were filed. Although denied promptly by the Court, the Motion served to stress urgency, introduce evidence, and suggest a preferred outcome to the Court.

Variations on this posturing are palpable throughout the K. Hovnanian briefs and have apparently been effective with Judge Rodowsky who begins the opinion for the Court saying:

"The Appellant and cross-appellee, K. Hovnanian at Kent Island, LLC (Hovnanian), **is in the process of developing** an 'active adult, age restricted community' on Kent Island in Queen Anne's County. The appellees and cross appellants (**Protestants**) **are opposed.**" [emphasis supplied].

No development is underway, based upon the conventional meaning of that term.

The concluding sentence of the first paragraph on page one—"In approving the Project, the County Commissioners utilized growth allocations under the Act"—illustrates the Court's confused knowledge of the Critical Area Law and its application. The local Planning Commission grants project approvals with the review and concurrence of the Critical Area Commission under the Act, not the County Commissioners. Growth Allocation is utilized to permit official map amendment not to approve projects.

An auspicious beginning for Hovnanian, followed on page two with a lengthy footnote inventorying eleven prior judicial proceedings, included here undoubtedly to indicate the Court's empathy for Hovnanian's "innocent victim" posture. The footnote implies all were eleven initiated by the appellees, (labeled "Protestants" by Judge Rodowsky, a gratuitous synonym for the pejorative "Opponents" that permeates the Hovnanian brief). No mention made that the eleven proceedings include alternate filings to avoid certain claims by Hovnanian

²² Ibid, p. 3, ¶5.

of improper venue or that seven overlapping but different plaintiff groups brought these actions.

The CSA Opinion states:

"The principal issue on this appeal is whether the Circuit Court for Queen Anne's County erred in enjoining . . . the County and Hovnanian from proceeding in the development process with any activity which, directly or indirectly, involves the growth allocation approvals."²³

That is, undoubtedly, a major issue in this appeal and arguably Hovnanian's principal issue. But it is not the seminal issue in the case. At the source of this dispute is the lawfulness of County Ordinances 01-01 & 01-01A.

These Ordinances purport to authorize use acreage from the County's Growth Allocation account to amend Official Critical Area Maps in such a way that Hovnanian project will be consistent with the revised maps. The exclusive purpose of Ordinance 01-01 is to amend maps and Ordinance 01-01A is to condition that amendment upon subsequent execution of a development agreement.

The operative language of the ordinances is: "BE IT ENACTED . . . that the . . . Public Local Laws of Queen Anne's County (1996 Ed.) be amended by the repeal of Official Chesapeake Bay Critical Area Map Nos. 49 and 57 and the **adoption of the attached Map Nos. 49 and 57 . . .**"²⁴ (emphasis supplied). No maps were attached to the ordinance.

This fundamental flaw in the enactment of map amendments was clearly identified in plaintiff's briefs to Circuit Court and CSA. Judge Sause opined that it had not been raised, Judge Radowsky, keying on the Sause mistake, dismissed the claim on the premise that it had not been raised below. It had been vigorously raised in Circuit Court and again in the CSA.

Both Judge Radowsky and Judge Sause seek refuge from the clear and unambiguous language of the ordinance by observing that local and state critical area programs permit subsequent preparation of amended official maps. But that is not the process envisioned by these Ordinances and nothing in the local or State program prohibits the attachment of the revised maps at enactment. Why is it that the 1996 QAC Title 14, takes priority over 2001 Ordinances adopting attached maps, when both are legislative acts?

More generically the Ordinance, absent an attached map or land description of any kind, is meaningless. It describes acreage "near Stevensville, Maryland"²⁵ as the intended location of the map amendment. Both Judges imply that, given the acreage figures in the ordinance and a map of the Stevensville area, it is a mere

²³ CSA Opinion ¶1, p.2.

²⁴ QAC Ordinance 01-01, Section I, adopted 8/12/2001.

²⁵ Ibid, ¶2.

"ministerial act" to make the correct and intended map amendment. **No mortal is capable of this task, as could be easily demonstrated in court.**

This is clearly the threshold issue on appeal and should not have been ignored. A proper legislative process should have attached, at minimum, a metes and bounds description of the amended development districts which Hovnanian could easily have been asked to provide.

In section "I" on page 10 of the Opinion Judge Rodowsky, as if to belatedly answer Hovnanian's initial "Motion to Vacate Injunction," signals in the first sentence that the Opinion will be "result-driven" stating: "Hovnanian is particularly aggrieved by the injunctions." He ignores substantial and compelling evidence in the record that Hovnanian is fully complicit in events that precipitated the Circuit Court injunctions.

To confuse matters further, CSA concludes that both of the maps eventually prepared and signed in 2001, revised again and signed in 2002, are not substantially similar to the developer's petition exhibit, must be corrected. To deal with this finding CSA remands the matter to Circuit Court for further proceedings.

However, while Judge Sause believes these inaccuracies prohibits the developer from seeking, and the County from granting project approvals, CSA sees no problems and reverses the Circuit Court's decision on that point. Judge Rodowsky cites, as his nearly exclusive statute, an improper version of Queen Anne's County Code Title 14, Subtitle 14: Chesapeake Bay Critical Area Act.²⁶ He ignores the County's Critical Area Program that contains extensive sections on growth allocation and state law and regulations (Annotated Code of Maryland, Title 8, Subtitle 18 and COMAR Title 27). This incomplete reading of relevant law undoubtedly contributed to the CSA's misunderstanding of fundamental principles and concepts underlying the Chesapeake Bay Critical Area Act and the procedures for map amendment utilizing Growth Allocation.

The CSA, unlike the Circuit Court, implicitly assumes that the petitioner's requested development area is sufficient in amount, location, and configuration to permit approval of the K. Hovnanian development and that a single "best" representation of the petitioner's requested development area exists on the differing developer's petition plats. This is in spite of allegations in the record to the contrary that have yet to be the subject of a fact-finding hearing and ruling.

The appellate court's conclusion has the potential to undo the entire basis of the Critical Area Act's project approval process. It says, in effect, (1) Critical Area maps are irrelevant to land management decisions and approvals, (2) the relevant decisions can be made based upon other documents or standards, (3) maps are just a ministerial record of those decisions, and (4) cartographers and

²⁶ See ¶3: Other Observations and Comments on the Court of Special Appeals Opinion later in this Memorandum.

surveyors are mere scribes in these matters with no knowledge or necessity to contribute meaningfully to the process.

The initial 13 pages of the CSA Opinion, leading to its conclusion that the Sause Injunction must be vacated, repeats the phrase "the growth allocations" in relation to actions taken by the County Commissioners and others in the processing of the Kovnanian growth allocation petition.²⁷ It is as though indication of the willingness to allow use of a portion of the County's growth allocation to accomplish a map amendment somehow transfers some of the county's high intensity growth allocation zoning directly and irrevocably to the developer. As the foregoing demonstrates, this is not consistent with local or State Critical Area law.

The CSA Opinion's concluding paragraph in this chain of reasoning states:

"Here the task of creating a conforming overlay fell upon an unidentified (on this record) person or persons in the County Government. Failure to perform with sufficient accuracy that non-discretionary and, therefore, ministerial task does not void the previously validly granted growth allocations."²⁸

Again, CSA asserts (1) map amendment somehow occurred elsewhere (based upon the developer's exhibits and the expressed intention of the commissioners to make available a debit from their allocation account to accommodate map amendment), and (2) in the process the developer obtained vested rights to a sort of "floating-zone" unattached to the official map that could be used for project approvals, and (3) the actual process of map amendment is unimportant and unnecessary. CSA would have local jurisdictions and courts, in the future, no longer rely on official maps in granting development approvals. Like the QAC Planning Commission and Critical Area staff before them, **CSA failed to consider the real possibility that the developer's exhibit will prove insufficient and inadequate to create map revisions that conform to established State and local criteria.**

Summary and Conclusion

The Circuit Court Judgment affirms the principle that development districts being established, originally or by amendment, must conform to established State and local criteria and be delineated on Official Critical Area Maps. This is consistent with the Law and with established precedents and case law related to the Commission.

To hold otherwise, as the CSA Opinion does by indicating that the Injunction must be vacated, would make the growth allocation map amendment processes dependent on mapping procedures that lack standards and clear tabulation

²⁷ See first mention in Rodowsky Opinion, *Hovnanian v. Foley*, March 23, 2007, p.1, ¶2, and approximately ten following uses of the terms.

²⁸ *Ibid*, p. 13, ¶2.

methods. The claim that development districts are "determined by criteria established for each development area" somehow independent from, and not requiring, delineation on the official map, runs counter to the obvious intent of the Law requiring maps to be officially adopted by local jurisdictions as the definitive record of criteria determinations.²⁹

This erroneous interpretation of the Law would result in all Critical Area development districts suddenly losing an identified shape, position and defining edges to be replaced with unspecified methods of demarcation. **This Opinion, if allowed to stand, could eviscerate cardinal tenets of the Critical Area Program and the important public policy on which it is based.**

The CSA findings must be reversed.

The Critical Area Commission has two significant remedies available. They have standing to intervene in opposition to an unlawful project approval, such as the already granted final phase one subdivision and site plan approval on appeal at QAC Board of Zoning Appeals. They are also empowered to act unilaterally to correct clear mistakes or conflicts with criteria. The Hovnanian growth allocation petition and its review and approval history clearly warrant this action.

The Lingering Truth: Calculating the Growth Allocation Debit [It doesn't add up]

As stated above, the Circuit Court did not reach the intended evidentiary hearing. This is unfortunate as the appeals court was denied the facts that would have been established in that proceeding. The court's ruling did not anticipate that any significant issues will be encountered when, what the court regarded as a "non-discretionary and, therefore, ministerial task," is attempted.³⁰

Appellees and cross appellants see the task as neither non-discretionary nor ministerial, as will be set forth below. This is with full knowledge that additional findings of fact were not before the Court of Special Appeals. However, appellees and cross appellants believe that an explanation of relevant issues will bring additional clarity to the understanding of the Critical Area Law and the mechanisms it requires when preparing and amending Critical Area maps.

Title 14, §14-117 provides, as stated above, that the entire Critical Area (upland, non-tidal water, and private tidal wetland) is to be divided into one of three development districts, IDA, LDA or RCA as delineated on the Official Critical Area maps, as they may be amended from time to time. This is pursuant to COMAR regulations §27.01.02.02-.06.

Map amendment pursuant to a growth allocation petition must follow this same delineation procedure. In the case of a growth allocation petition amendment, further instruction is provided in the QAC Critical Area program:

²⁹ Ibid, p. 11

³⁰ Ibid, p. 13, ¶2

"Computing Use of the Growth Allocation. The manner in which growth allocation for a proposed project will be subtracted from the total County growth allocation will be determined on a project-by-project basis, subject to Critical Area Commission approval . . . Subdivision of any parcel that was recorded as of December 1, 1985, and classified as RCA or LDA, where all or part of the parcel is identified by the County as a Growth Allocation area, **shall result in the acreage of the entire parcel counting against the Growth Allocation, unless** the following conditions apply:" [emphasis supplied]³¹

Hovnanian's Four Seasons growth allocation petition sought to propose a lower growth allocation debit by taking advantage of several of the conditions allowing exceptions to the general rule cited above. Note, however, that the calculation starts with a presumed debit for the entire parcel, then reduces the debit for portions of the parcel that qualify for exception.

To establish the "net debit" for the Four Seasons project the starting point is the acreage of the entire tract. An ALTA/ACSM boundary survey had been commissioned by Hovnanian and referenced on several submitted plats and documents. However the survey was neither provided nor requested by the QAC Planning Department or the Critical Area Commission in the course of project approvals. Many of the documents submitted to the Department contain conflicting site area acreage, yet all purport to be based upon this survey.

In an effort to confirm the correct development parcel gross acreage (the starting point in a calculation of the necessary Growth Allocation debit), plaintiff's surveyor plotted the metes and bounds data and computed the area for parcels within the subject property, defined in the project's development agreement, to determine that it contained 554.21 acres. Modern survey methods yield considerable accuracy and allow these boundaries to be established and re-established on the ground.

Even a casual review of this property and the intended development plan suggest that several large qualifying exception areas are available. The Developer's initial petition exhibit, Sheet 1, and the modified successor Sheet 7, reveal many such opportunities. However, unlike the ALTA/ACSM survey of the entire property, boundaries for these sub-areas only occasionally follow property lines or roads and are complex, serpentine and irregular in shape and are not described by metes and bounds.

The developer chose not to, was not asked to, and has refused to provide metes and bounds information for these "exception areas." Acreage figures (of unknown derivation) of the areas and a graphic depiction are provided, but there is no way to verify the accuracy of the plat acreage representations or to establish and re-

³¹ Queen Anne's County Chesapeake Bay Critical Area Program, 1996 edition, p. 21, and 22.

establish the "exemption areas" on the ground. This is a major failure of county and Critical Area oversight.³²

That being said, if the acreage figures contained in the developer's exhibit, Sheet 7, are used as though they are accurate, a net debit can be approximated. (See attached table, Exhibit 1). This reveals that **Sheet 7 is a contrived and convoluted ruse to disguise the fact that the Four Seasons development plan requires a larger debit to the County's growth allocation account than is represented in the K. Hovnanian petition.** Calculated properly, even using the unverifiable acreage of Sheet 7, a net growth allocation debit 42.3 acres larger than was requested is necessary to permit the project approvals granted, prior to the Sause injunction, by the Queen Anne's County Planning Commission.

The CSA Opinion leaves no room for this outcome. **CSA's denigration of the role of Official Maps and of mapping/surveying specialists in Critical Area transactions violates the tenets of the Critical Area Law. If allowed to stand it will permit a gross miscarriage of justice and establish an unfortunate precedent for State efforts to Save The Bay.**

³² Note: For the Blackwater project Dorchester County required a metes and bounds description of all Critical Area lands as well as for the areas of development district amendment proposed using growth allocation.

~Post Script~

"HERE'S A snapshot of the precarious state of the Chesapeake Bay, circa 2007: The oyster population has been decimated, and crab stocks are at an all-time low. Fish are sick and dying. Oxygen-starved 'dead zones,' negligible 40 years ago, now cover up to a third of its area."

The lead paragraph from a Washington Post editorial, Friday, April 6, 2007.

Given this situation Maryland can ill afford judicial action that decimates its most successful and far reaching program to arrest the Bay's decline.

Other Observations and Comments on The Court of Special Appeals Opinion

- 1) The CSA opinion incorrectly reiterates Judge Sause's erroneous claim that the plaintiffs failed to raise the issue that Ordinance 01-01 stated that maps were attached when they clearly were not. Plaintiffs' briefs devoted considerable space to this issue. This is a substantial mistake on the part of both judges.
- 2) The primary position of the Court—that a conforming Official Critical Area Map is unnecessary to project approvals—was first advanced by Hovnanian in their Court of Special Appeals final reply brief and was not raised in Circuit Court [verify]. If the Court could reject Plaintiffs' "no maps attached" argument for failure to preserve the issue by raising it in Circuit Court, as they have erroneously done, then would not the Hovnanian argument likewise be beyond consideration?
- 3) The CSA apparently is not aware that the Four Seasons DRRA vested the project in the land use laws and regulations in place on September 17, 2002. The citations throughout the Opinion are to code sections using citation syntax adopted after that date. (See the terse complaint at the bottom of p.22 that §§ 14-174 and 14-177 do not exist. They most certainly do in the DRRA required code.)
- 4) The CSA incorrectly states (top p. 25) that conditions imposed for the utilization of growth allocation to make map amendments were "hammered out in the Development Rights and Responsibilities Agreement (DRRA) required by Resolution 01-13." This is incorrect in several ways. Resolution 01-13 does not require a DRRA. The DRRA required by Ordinance 01-01A, a post enactment condition of that ordinance was neither drafted nor executed until long after Resolution 01-13 and Ordinances 01-01 and 01-01A were approved.
- 5) The CSA faults the Sause Judgment for enjoining the use the entire Maps 49 and 57, pointing out that many parcels in addition to the Hovnanian parcels are included on those Maps. Sause implies, but does not make clear, that he refers only to the portions of the maps affected by the Four Seasons map revisions or necessary project approvals.
- 6) The CSA does not acknowledge that approvals (Final Subdivision and Site Plan) had already been granted to Hovnanian in December 2005, prior to the Circuit Court Injunction. At the time it was acknowledged by all parties that proper Critical Area Districts, sufficient to permit the approvals, did not exist on the Official Maps.
- 7) The CSA and Hovnanian utilize a prior Judge Sause opinion in a referendum case concerning the Hovnanian Growth Allocation Petition (CV 8530) that Critical Area development criteria map districts are not zoning because the law and regulations does not originate from the State's Article 66B. This contradicts the plain language of the State's Chesapeake Bay Critical Area Protection Program, Title 8, Subtitle 18. Numerous locations in this state law refer to "zoning map" or "zoning" to describe the operation of the Critical Area law.³³

³³ See Annotated Code of Maryland, §§8-1802(9), 18-1808(c), 18-1808.1(c)(4), 8-1809(h)(2)(i).