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ARTICLES

LEGAL ISSUES AFFECTING LOCAL GOVERNMENTS IN IMPLEMENTING THE CHESAPEAKE BAY PRESERVATION ACT*

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I. INTRODUCTION

A profound chapter in Virginia land use law has begun. The Chesapeake Bay Preservation Act ("CBPA"),¹ passed in 1988, asks localities to look beyond their geographic boundaries and beyond the health and well-being of their citizens, and to exercise their police and zoning powers to protect the quality of state waters. Localities also are asked to cooperate with a new state agency violating the sanctum of the local government land use prerogative.

The authors believe the principal legal issues raised by the CBPA will revolve around the exercise of power. The issues will emerge as the CBPA highlights conflicts between localities and the following actors: the Chesapeake Bay Local Assistance Board ("CBLAB"), federal and state governments, and private landowners.

A fundamental issue is the extent of the authority conveyed to

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1. VA. CODE ANN. §§ 10.1-2100 to -2115 (Repl. Vol. 1989).

the CBLAB through the CBPA. This includes the extent to which the CBLAB has authority to promulgate regulations binding on localities.

The intergovernmental relationship is more complex. The players (and quite likely the courts) must determine the extent to which local zoning and subdivision ordinances will be binding upon the state and federal governments. The Coastal Zone Management Act² ("CZMA") specifically places upon the federal government obligations to act in a manner consistent with state initiatives;³ the CBPA is such a state initiative,⁴ albeit one delegated largely to the localities.⁵ Similarly, the CBPA requires state agencies to "exercise their authorities under the Constitution and laws of Virginia in a manner consistent with the provisions of comprehensive plans, zoning ordinances, and subdivision ordinances that comply with [the act]."⁶ At issue, consequently, will be the extent to which these two "higher" governmental authorities must comply as landowners with local requirements. A related concern is the potential for conflicts between the regulatory programs. For example, what should happen when a wetland proposal satisfies federal requirements for discharge of dredged or fill material into navigable waters,⁷ but does not satisfy more strict zoning requirements? Is the zoning preempted or must the applicant comply with both?

Finally, localities will have to exercise their new zoning authority in a manner consistent with traditional protections afforded to in-

2. Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-64 (1988)). The act "affirm[s] a national interest in the effective protection and careful development of the coastal zone by providing assistance and encouragement to coastal states . . . to voluntarily develop and implement management programs for their coastal areas." NATIONAL OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COMMERCE, COMMONWEALTH OF VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM AND DRAFT ENVIRONMENTAL IMPACT STATEMENT 7 (1985). Participation in the program is voluntary. "Governor Baliles signed Executive Order Thirteen (86) formally establishing the state program on June 23, 1986." COUNCIL ON THE ENV'T, VIRGINIA'S ENVIRONMENT 40 (1987). Federal approval of Virginia's participation was given in September, 1986. *Id.*

3. See 16 U.S.C. § 1456(c) (1982).

4. The Virginia coastal zone management program is known as the Virginia Coastal Resource Management program. The CBPA is not yet a designated program; it is assumed that it soon will be.

5. As discussed in Section IV of this article, the Chesapeake Bay Local Assistance Department apparently feels that the purpose of the CBPA is to create a state agency to regulate local government. The authors believe that this is incorrect; the CBPA gives local governments authority to protect state waters and calls upon state agencies to provide assistance.

6. VA. CODE ANN. § 10.1-2114 (Repl. Vol 1989).

7. Section 404 of the Clean Water Act regulates the discharge of dredged or fill material into waters of the United States. 33 U.S.C. § 1344 (1982).

dividual landowners. Not surprisingly, the two principal areas portending conflict will be the takings protection of the fifth amendment to the United States Constitution,⁸ and the vested rights protections specified in the Code of Virginia.⁹

These three areas are addressed below. First, however, this article presents a brief overview of the resource at issue and the legislative history of the CBPA.

II. THE RESOURCE: THE CHESAPEAKE BAY

The beneficial target of the CBPA is the Chesapeake Bay ("Bay").¹⁰ The Bay is an approximately 200 mile long estuary that lies within the borders of Maryland and Virginia. However, its ecosystem is much larger. It "draws water from an enormous 64,000 square mile drainage basin,"¹¹ which includes parts of New York, Pennsylvania, West Virginia, Maryland, Delaware, and Virginia.¹²

In Virginia, basins of the Potomac, Shenandoah, Rappahannock, York and James Rivers empty into the Bay.¹³ These basins, combined with the coastal river basin, constitute a drainage area of approximately 33,464 square miles and contribute an average daily flow into the Bay of 16,736 million gallons per day. The population within Virginia's portion of the drainage basin exceeds 4,061,950.¹⁴ Some areas of the basin are expected to show dramatic population increases over the next thirty years, particularly those areas adja-

8. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").

9. See VA. CODE ANN. § 10.1-2115 (Repl. Vol. 1989) ("The provisions of this chapter shall not affect vested rights of any landowner under existing law"); *id.* § 15.1-492 ("Nothing in this article shall be construed to authorize the impairment of any vested right . . .").

10. The act's remedial purposes are not limited to the Bay. The CBPA expressly authorizes local governments to exercise their police and zoning powers to protect the quality of state waters without limitation to any connection with the Bay. VA. CODE ANN. § 10.1-2108 (Repl. Vol. 1989). In addition, the CBPA states that "[a]ny local government, although not a part of Tidewater Virginia . . . may incorporate protection of the quality of state waters into their comprehensive plans, zoning ordinances and subdivision ordinances . . ." *Id.* § 10.1-2110.

11. U.S. ENVTL. PROTECTION AGENCY, CHESAPEAKE BAY: INTRODUCTION TO AN ECOSYSTEM 7 (1987).

12. *Id.* at 4.

13. VIRGINIA WATER RESOURCES RESEARCH CENTER, VIRGINIA'S WATERS 3-14 (1986).

14. The drainage and population figures are the authors' calculations, based on figures found in *Virginia's Waters*. See *id.*

cent to tidal waters.¹⁵

The CBPA recognizes that “[h]ealthy state and local economies and a healthy Chesapeake Bay are integrally related.”¹⁶ This bold statement is well justified.¹⁷ However, the capacity of the Bay to function as a “protein factory” is not without limit. By the mid 1970s, the Bay showed clear signs of stress. The Environmental Protection Agency (“EPA”) conducted a seven-year study to determine the cause of its decline. “[T]he study results confirmed the hypothesis: the condition of the Bay was deteriorating due to point and nonpoint sources of pollution.”¹⁸ Among other things, the 1983 EPA report documented “disturbing trends,”¹⁹ including excess nutrients in the water,²⁰ decline of submerged aquatic vegetation,²¹

15. See THE YEAR 2020 PANEL, POPULATION GROWTH AND DEVELOPMENT IN THE CHESAPEAKE BAY WATERSHED TO THE YEAR 2020, at 25-29 (1988).

16. VA. CODE ANN. § 10.1-2100 (Repl. Vol. 1989).

17. Today, the Chesapeake Bay is still one of the country’s most valuable natural treasures. Even after centuries of intensive use, the bay remains a highly productive natural resource. It provides millions of pounds of seafood, functions as a major hub for shipping and commerce, supplies a huge natural habitat for wildlife, and offers a wide variety of recreational opportunities for residents and visitors.

. . . .
 . . . More than half the total U.S. catch of both soft-shelled clams and blue crabs comes from the Chesapeake, along with more than a quarter of the nation’s total yearly oyster catch. A thriving fin-fish industry, primarily based on menhaden and rockfish, rounds out the Chesapeake’s major commercial seafood production. The value of the Bay’s fishing catch exceeds \$100 million annually.

Baltimore’s sage, H.L. Mencken, once called the Bay, “a great big outdoor protein factory.” A recent study . . . ranks the Chesapeake as third in the nation in overall fishery catch. The Bay’s production is exceeded only by the Atlantic and Pacific Oceans. That’s an impressive ranking, since the Bay covers a much smaller geographic area than the other major U.S. fishing centers.

U.S. ENVTL. PROTECTION AGENCY, *supra* note 11, at 3.

18. VIRGINIA COUNCIL ON THE ENV’T, PROGRESS REPORT OF VIRGINIA’S CHESAPEAKE BAY PROGRAM 1 (1987).

19. *Id.* at 2.

20. Excess Nutrients. Primarily phosphorus and nitrogen, these nutrients can foster the growth of aquatic plants such as algae when present in large quantities. When these blooms die off and decompose they reduce the dissolved oxygen which is critical to the survival of living resources in the Bay’s waters. Excess nutrients are coming from a combination of agricultural, forestry, and urban runoff, and municipal and industrial plant discharges. Since 1950, phosphorus and nitrogen entering Virginia’s tributaries to the Chesapeake Bay have increased 44% and 87% respectively. If no additional nutrient controls are implemented, these loadings will increase by another 36% and 23% by the year 2000 due to projected population increases.

Id.

21. Decline of Submerged Aquatic Vegetation. Submerged aquatic vegetation (SAV) has all but disappeared in the Chesapeake Bay and its tributaries since the late 1960s. SAV provides fish and crabs essential habitat and protection from predators, buffers wave energy, and produces much needed oxygen for the living resources of the Bay.

and excess toxics in specific areas of the Bay.²² The following year, Governor Robb's Commission on Virginia's Future concluded that "[f]or some time, the unwitting destruction of the Chesapeake Bay has been underway."²³

The realization that this valuable Virginia resource is at risk was the driving force behind the adoption of the CBPA.

III. LEGISLATIVE HISTORY OF THE ACT

A. Governor Robb's Commission on Virginia's Future

The legislative history of the CBPA can be traced to Governor Robb's Commission on Virginia's Future. The Commission's Task Force on the Environment and Natural Resources ("Task Force") opined that "existing legislation, institutions, and land management practices are not adequate"²⁴ for the purpose of dealing with "the new demographic and economic forces that, being of regional and statewide scope, require regional and statewide leadership and authority to protect and serve the citizens of the Commonwealth."²⁵ The Task Force cited several reasons for the failures.

First, it noted that "localities have been thwarted by court decisions that strike down attempts to extend their zoning powers to new situations."²⁶ Indeed, early Supreme Court of Virginia decisions have made clear that the prerogative to act on behalf of the

The decline of these grass beds is attributed to excess nutrients, turbidity, and sedimentation.

Id.

22. "Excess Toxics. Large quantities of toxic substances have been found in specific areas of the Bay primarily around urban and highly industrialized areas. Toxics contaminate waters, sediment, and living resources, and have the potential to affect humans as they accumulate in the food chain." *Id.*

23. GOVERNOR'S COMM'N ON VIRGINIA'S FUTURE, TOWARD A NEW DOMINION: CHOICES FOR VIRGINIANS 27 (1984) (Final Report Vol.).

24. GOVERNOR'S COMM'N ON VIRGINIA FUTURE, TOWARD A NEW DOMINION: CHOICES FOR VIRGINIANS 34 (1984) (Task Force Reports Vol.).

25. *Id.* at 34.

26. *Id.* at 35. Virginia is a Dillon's Rule state. In short, a locality can only exercise those powers expressly granted and any uncertainty as to the exercise of power is strictly construed against the locality. See *Mardikes, Cone & Van Horn, Government Leasing: A Fifty State Survey of Legislation and Case Law*, 18 THE URB. LAW. 1, 6 n.7 (1986) (citing DILLON, MUNICIPAL CORPORATIONS § 55 (1st ed. 1872)). Virginia continues to adhere to Dillon's Rule. See, e.g., *Tabler v. Board of Supervisors*, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980); *Commonwealth v. County Board*, 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977); see also *Board of Supervisors v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (county board's powers limited to those expressly, or by necessary implication, authorized by state law).

environment is reserved to the General Assembly.

The leading case on this point is *Old Dominion Land Co. v. County of Warwick*.²⁷ This case presented the question of the validity of two ordinances enacted by the Board of Supervisors of Warwick County. The ordinances prohibited the Old Dominion Land Company from connecting several of its recently constructed residences with a sewer line owned by the company and emptying raw or untreated sewerage into the adjacent tidal waters of the James River. As authority for these ordinances, the county relied upon the predecessor to section 15.1-510²⁸ of the Code of Virginia ("Code") as well as its authority to establish and maintain public sewers and watermains. Conversely, Old Dominion maintained that

since the acts complained of do not constitute a nuisance and were not injurious to the health of the community, the county board of supervisors has no power or authority to pass laws prohibiting an owner of property, bordering on tidal waters, from emptying its sewage into such waters, but that the control of such matters is exclusively within the authority of the General Assembly.²⁹

In holding that the locality had no authority to regulate pollution of water, *per se*, the court stated:

Clearly . . . [section 15.1-510 of the Code has] no application to the present case, since, under the agreed statement of facts, the act of the company in draining its sewage into the river is not a nuisance,

27. 172 Va. 160, 200 S.E. 619 (1939).

28. The Code of Virginia provides:

Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this Commonwealth. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county.

VA. CODE ANN. § 15.1-510 (Repl. Vol. 1989) (emphasis added). Note that the prevention of water pollution is limited to situations in which the pollution is dangerous to the health or lives of persons residing in the county. This limitation has created two significant deterrents to localities protecting the Bay. First, it establishes a water quality standard. The history of the federal Clean Water Act demonstrates that water quality standards as the first line of protection are doomed to failure. Second, as demonstrated in *Old Dominion Land Co.*, localities could not consider downstream pollution but were confined to the immediate health of their own citizens.

29. *Old Dominion Land Co.*, 172 Va. at 165, 200 S.E. at 620.

nor is there any evidence that it in any way endangers the health of the inhabitants of Warwick County.³⁰

Thus, a wall emerged separating public health from environmental health. Provided a locality could establish a nuisance or health threat to its citizens, it could legislate against water pollution. It was without authority to legislate, however, with an eye toward protecting the Bay.

Similarly, in *Commonwealth v. City of Newport News*,³¹ the Supreme Court of Virginia held that neither the executive nor the judicial branches of the state have authority to regulate pollution on their own initiative. In this case, the Attorney General filed an action alleging that Newport News was discharging raw, untreated sewage in considerable volume into the Hampton Roads. The Attorney General claimed the discharge was illegal, because it rendered shellfish and fish taken from the area unfit for human consumption, effectively destroying the right of fishery in those waters.³² The Commonwealth argued that it held its tidal waters and lands as a trustee for the benefit of the public, "to be administered as a trust for the enjoyment by them of their public rights therein, and subject to certain rights of users thereof which are common to all the people of the State."³³ The Commonwealth claimed it had no right or power to authorize tidal waters and lands to be used for any purpose or in any manner "which will substantially impair, or in effect destroy, the common right of all its people to use them for these [public] purposes."³⁴

The Supreme Court of Virginia rejected this argument, stating:

The legislature, of course, owed to the people of the State a most solemn duty to administer the *jus privatum* of the State and to exercise its *jus publicum* for the benefit of the people; but, except as is otherwise expressly or impliedly provided by the Constitution, what is for the benefit of the people is committed to its discretion free from the control or dictation of the executive or judicial department

30. *Id.* at 167, 200 S.E. at 621; see *Tabler v. Board of Supervisors*, 221 Va. 200, 204, 269 S.E.2d 358, 361 (1980) ("the legislature did not intend to grant local governing bodies the power to regulate or prohibit the sale or use of disposable containers").

31. 158 Va. 521, 164 S.E. 689 (1932).

32. *Id.* at 531, 164 S.E. at 691.

33. *Id.* at 532, 164 S.E. at 691.

34. *Id.*

of the government.³⁵

Thus, it is clear that environmental protection is an issue expressly controlled by the General Assembly. All authority for protecting the environment is derived therefrom. To the extent it is perceived that local governments are part of the problem and therefore must be part of the solution, Governor Robb's Task Force was correct in identifying the shortcomings of Virginia law. Heretofore, localities have not had the authority to legislate to protect the environment per se.³⁶

The second area of concern which the Task Force noted was localities' inability to work together. In this regard, the Task Force cited the following:

In the case of Bull Run, for example, the Northern Virginia Regional Park Authority bought land along the Fairfax County bank of the stream for watershed protection and public enjoyment. But Prince William County, which chose not to join the regional authority, allowed development to the water's edge on the other bank.³⁷

35. *Id.* at 549, 164 S.E. at 697.

36. Although Governor Robb's Commission on Virginia's Future found localities thwarted in attempts at innovative zoning, it may be argued that localities were thwarted generally.

From 1955 until 1981, localities generally lost zoning cases presented to the Supreme Court of Virginia. Indeed, a review of these cases led two law professors to conclude that "the preeminent criterion of the validity of a zoning action is whether that action is consistent with the land use preferences of the individual developer." L. BEVIER & D. BRION, JUDICIAL REVIEW OF LOCAL LAND USE DECISIONS IN VIRGINIA 105 (1981) (Inst. of Gov't, Univ. of Va.). BeVier & Brion also concluded that the opinions "reveal a strong judicial intolerance for the erosion of the land developer's constitutionally protected private rights by the exercise of the zoning power." *Id.* at 108. BeVier and Brion are not alone in their assessment. See, e.g., Foote, *Planning and Zoning in Virginia*, in HANDBOOK FOR LOCAL GOVERNMENT ATTORNEYS 305, 306 (R. Rosenberg ed. Supp. 1988) ("The implementation of effective land use controls in Virginia has been most problematic. Localities have been constrained by a legal and political climate that was antithetical to local regulation not only of land use decisions, but of community life generally."); W. Tayloe Murphy, Jr., *Development and the Environment in the Old Dominion: Where Should We Go?*, 64 INST. OF GOV'T 14 (1987) ("the problem has been compounded by the fact that, until recently, the Virginia Supreme Court has rather regularly interpreted local zoning authority to be limited generally to the matter of approving the 'highest and best use' . . .").

37. GOVERNOR'S COMM'N ON VIRGINIA'S FUTURE, *supra* note 24, at 35. The Task Force also cited the absence of local land use controls to protect Smith Mountain Lake. *Id.* Such problems, in part, are a direct result of the problem immediately discussed above. Historically, localities have had no authority to protect the environment per se; their authority has been limited to protecting the health and well-being of their citizens. Thus, local zoning initiatives taken to protect regional or state resources outside of their jurisdictions were illegal and void. Although the Task Force may have mourned Prince William County's failure to protect the stream, unless their citizens directly were affected by any resulting deteri-

Finally, the Task Force noted that “[l]ocalities are confronted with technical or economic problems that they do not have the competence or resources to deal with.”³⁸

To remedy such limitations, the Task Force made several recommendations. The most significant for purposes of this article are recommendations 1 and 3:

1. To deal with the increasing pressures on land—to protect it and use it wisely for the long term benefit of all Virginians—the Commonwealth should take a more positive leadership role

. . . .

3. Local government should be empowered and encouraged to deal innovatively and responsively with complex land use problems. The General Assembly should review the series of Supreme Court decisions striking down attempts by local governments to extend their zoning powers to cover new situations and determine whether those extensions should be authorized by law.³⁹

The recommendations included an important caveat. The Task Force clearly stated that dramatic shifts in the balance of power between the Commonwealth and the localities were not necessary.⁴⁰ This caveat was in keeping with general legislative consensus. Four years earlier, the General Assembly had defeated a measure to participate in the Federal Coastal Zone Management program. “Opposition . . . centered primarily on the concept of the 1000’ coastal strip under special [state] management rules.”⁴¹ In short, the General Assembly believed that land use was to remain a local prerogative although additional authority and guidance were needed. The Task Force report echoed this belief.

B. *Chesapeake Bay Land Use Roundtable Report*

The next major piece of the CBPA’s legislative history is the Chesapeake Bay Land Use Roundtable Report⁴² (“Roundtable Re-

oration in water quality, Prince William County was without authority to prevent the criticized development.

38. *Id.*

39. *Id.* at 36-37.

40. *See id.* at 28-29.

41. COUNCIL ON THE ENV’T, *supra* note 2, at 39.

42. CHESAPEAKE BAY LAND USE ROUNDTABLE, LAND USE INITIATIVES FOR TIDEWATER VIRGINIA: THE NEXT STEP IN PROTECTING THE BAY (1987).

port"). In 1986, the General Assembly appropriated funds to support the formation of the Chesapeake Bay Land Use Roundtable ("Roundtable"). The Roundtable was to find ways to address the relationship between land use issues and the health of the Bay.⁴³

The significance of this report in analyzing the CBPA cannot be overstated. First, the principal architect of the CBPA, Delegate Tayloe Murphy, Jr., was a member of the Roundtable; he was committed to drafting legislation which implemented the Roundtable recommendations. Many elements of the Roundtable Report are contained in the CBPA.

The Roundtable Report contained five principles which guided the Roundtable's deliberations. The first three principles are germane to the issue of delegation of powers in the CBPA,⁴⁴ with Principle 1 serving as "a foundation for the recommendations that followed."⁴⁵ Principle 1 stated that "Virginia's response to issues related to land use and the Bay should flow from an analysis and understanding of Virginia's laws, institutions, historical context, and natural setting."⁴⁶ The Roundtable agreed not to "simply adopt approaches used in other states,"⁴⁷ but "to craft a response rooted in Virginia's experience."⁴⁸ This explanatory language is important when viewed in historical context. Only several years before, Maryland had enacted "critical areas" legislation to address water quality problems of the Bay.⁴⁹ However, the Maryland legislation created a strong central agency to regulate local land use from Annapolis. It also declared all land within 1,000 feet of

43. *Id.* at 1.

44. Principles 4 and 5 are not directly related to the power sharing issue under the CBPA. Principle 4 provides that "[t]ensions between public responsibilities to protect natural resources and the environment and private interests in property are inevitable; they must be dealt with as fairly and equitably as possible." Principle 5 espouses the view that "[h]ealthy state and local economies and a healthy Chesapeake Bay are integrally related; economic development and resource protection are not and cannot afford to be seen as mutually exclusive." *Id.* at 8.

45. *Id.* at 7.

46. *Id.*

47. *Id.*

48. *Id.*

49. See Chesapeake Bay Critical Area Protection Program, MD. NAT. RES. CODE ANN. §§ 8-1801 to -1816 (Cum. Supp. 1989). As recently noted by Governor Schaefer of Maryland, "We have strict development guidelines. In Maryland, we passed . . . the first law. It was the critical area restriction which said that within 1,000 feet of the bay, there were restrictions on development." *Effectiveness of Programs for the Protection of the Chesapeake Bay, Hearing Before the Subcommittee on Environmental Protection of the Committee on Environment and Public Works*, 101st Cong., 2d Sess. 19 (1988).

use from Annapolis. It also declared all land within 1,000 feet of wetlands and tidal waters as critical areas,⁵⁰ an approach clearly rejected by the Virginia General Assembly in the recent past.⁵¹ Thus, the Roundtable's caveat suggested a repudiation of the Maryland response. This repudiation was further suggested by Principles 2 and 3.⁵²

The Roundtable Report then announced a series of "essential elements" for a program "designed to preserve local autonomy and flexibility while guaranteeing protection of the water quality, shorelands, tributaries, and habitats of the Chesapeake Bay."⁵³ All of these "essential elements" found themselves in the initial drafts of the CBPA, although not all remained.⁵⁴

After enunciating the "essential elements," the Roundtable Report went on to articulate a policy the Roundtable believed should be established by the Commonwealth. The second paragraph of this policy coupled with Principle 5 eventually became subsection A of the "preamble" to the CBPA.⁵⁵

The Roundtable Report finally recommended that the state identify minimum standards and requirements consistent with Virginia's Coastal Resources Management Program. The Roundtable advised that state standards govern at least the shorelands along tributaries in the Bay, wetlands, coastal sand dunes, and barrier islands.⁵⁶ As part of this, the Roundtable recommended a mechanism for state review "to ensure consistency with all appropriate *state requirements*."⁵⁷ It suggested a new citizen's board be created, with authority "to approve local plans and ordinances once consistency with state policy and standards is achieved."⁵⁸ These final recommendations were, of course, inconsistent with Principles

50. MD. NAT. RES. CODE ANN. § 8-1807 (Cum. Supp. 1989); *see also supra* note 49.

51. *See supra* note 41 and accompanying text.

52. ¶Principle #2: Local government should retain primary responsibility for local land use decisions whenever possible and should be granted the powers necessary to execute that responsibility at the local level.

Principle #3: The state should play a strong leadership role in the protection of public lands, critical resources, and environmental quality. The State would have to work closely with local governments to assure that state policies and goals are met.

CHESAPEAKE BAY LAND USE ROUNDTABLE, *supra* note 42, at 7.

53. *Id.* at 9.

54. *Compare id.* at 9-10 with VA. CODE ANN. § 10.1-2100 to -2110 (Repl. Vol. 1989).

55. *See* VA. CODE ANN. § 10.1-2100(A) (Repl. Vol. 1989).

56. CHESAPEAKE BAY LAND USE ROUNDTABLE, *supra* note 42, at 12.

57. *Id.* at 14 (emphasis added).

58. *Id.*

ginia's Future, and the reasons for the 1979 defeat of coastal zone management participation.⁵⁹ It is submitted and discussed below that the Roundtable's recommendation for a strong state agency with authority to approve land use decisions was the single most significant recommendation not adopted by the General Assembly.

C. *Chesapeake Bay Preservation Act*

Work on drafting the CBPA began even before the Roundtable Report was released. On November 20, 1987 a first draft had been prepared by Jeter M. Watson⁶⁰ in consultation with Delegate Murphy. The draft legislation was entitled "The Land and Water Planning and Protection Act." Section I of the first draft contained verbatim the policy statement recommended by the Roundtable. Like the Roundtable Report, this draft was aggressive vis-a-vis the new citizen board's proposed authority.⁶¹ Similarly, local governments

59. This incongruous recommendation apparently resulted from the Roundtable's myopic view of the Bay's problems. In its "findings" the Roundtable placed responsibility for the demise of the Bay on the localities. This "finding" is now being used by the Chesapeake Bay Local Assistance Department to justify its actions under the CBPA. See CHESAPEAKE BAY LOCAL ASSISTANCE DEP'T BRIEFING PAPER SERIES, No. 89-01, PRELIMINARY ASSESSMENT OF WATERSHED APPROACH TO DESIGNATION OF CHESAPEAKE BAY PRESERVATION AREAS AS PROPOSED BY THE VIRGINIA INSTITUTE OF MARINE SCIENCE 4 (1989).

The Roundtable's conclusion that localities are the prime culprits is not consistent with the conclusions of other organizations studying the Bay. Moreover, it completely ignores limitations on local governments under Dillon's Rule and relevant case law. Heretofore, it would have been illegal for localities to zone to protect the Bay. Any criticism of localities for acting within the law is therefore unjustified.

60. At that time, Mr. Watson was the staff attorney for the Virginia office of the Chesapeake Bay Foundation, a private, public interest organization dedicated to Chesapeake Bay issues. Mr. Watson is now the Executive Director of the Chesapeake Bay Local Assistance Department, the administrative agency created by the CBPA. While drafting the CBPA, Mr. Watson frequently consulted with land use lawyers representing divergent interests including one of this article's authors, W. Todd Benson.

61. The draft authorized the new board to:

1. Exercise general supervision and control over the coordination of land use and development and water quality protection activities at the various levels of local, regional, and state government within the Commonwealth.

.....

4. Develop and keep current land use criteria and standards for water quality protection.

.....

8. Approve, disapprove, require modifications, and recertify local government comprehensive plans, zoning ordinances, subdivision ordinances, special use permit criteria in accordance with the criteria, standards, policy and goals of this Act.

.....

11. Make separate orders and regulations it deems necessary to implement the criteria, standards, policies, and goals of this Act.

were directed to use board criteria to determine the extent of the shoreline area within their jurisdiction subject to board approval. Furthermore, local governments were advised that comprehensive plans and zoning would be "subject to review and approval" by the board for compliance with the CBPA.⁶²

By December 22, 1987, the draft was styled "The Shoreland Planning and Protection Act." The overall provisions remained the same, including the philosophy relative to the citizen board's authority.

By January 10, Secretary Daniel⁶³ had reviewed the draft legislation, and changed the name of the intended act to "The Chesapeake Bay Preservation Act."⁶⁴ Similarly, the new board envisioned by the draft was changed to the "Chesapeake Bay Local Assistance Board"⁶⁵ ("Board" or "CBLAB"). After a few minor adjustments, the January 10, 1988 version of the CBPA was formally introduced as House and Senate bills.

The mood was ripe for passage but localities still had significant concerns. Dominant among the concerns was any legislation implementing "zoning from Richmond."

Representatives for the localities pressed Delegate Murphy and Secretary Daniel to remove all language granting the Board authority to approve local land use decisions, or establish binding standards. In return, localities would support the legislation. An agreement was reached, and the following day, Secretary Daniel proposed the necessary amendments to the House Committee on the Chesapeake Bay and its Tributaries.⁶⁶ The requested amendments were made. Section 10.1-2102(D)⁶⁷ was amended, deleting reference to the Board's authority to "approve local government

. . . .
13. To abate land use and development practices that violate the standards or are inconsistent with the criteria, standards, policies, or goals of this Act or hazards and nuisances dangerous to public health, safety, or the environment, both emergency and otherwise, created by the improper use and development.

Draft of CBPA (Nov. 20, 1987).

62. *Id.*

63. John Daniel, II, is Virginia's Secretary of Natural Resources.

64. Draft of CBPA (Jan. 10, 1988).

65. *Id.*

66. Interview with C. Flippo Hicks, lobbyist for the Virginia Association of Counties (Feb. 10, 1989) [hereinafter *Interview*] directly involved with the compromises made prior to passage of the CBPA.

67. For the reader's convenience, reference is made to sections of the codified CBPA rather than to the section designations used in the bills.

programs." Section 10.1-2103 was amended, deleting reference to the Board's authority to "[m]ake separate orders and regulations deemed necessary to implement the provisions of this Act." Also deleted were the requirements in section 10.1-2109 for local governments to have their comprehensive plans, zoning, subdivisions, and Chesapeake Bay Preservation Areas *reviewed or approved* by the Board. With one exception, all of these changes were made in the House committee and are now present in the CBPA.⁶⁸

The localities intended to limit the Board's enforcement authority to a formal review and comment; absent agreement between the Board and locality, the Board's follow-up authority was envisioned as limited to instituting a declaratory judgment proceeding against the locality, upon the vote of five of its members.⁶⁹ Because the Virginia Administrative Process Act had a hearing process similar to the one requested, the language of section 10.1-2103(8)⁷⁰ was agreed upon.⁷¹

When the bill emerged from the House Committee on the Chesapeake Bay and its Tributaries, it was discovered that section 10.1-2103 had not been corrected pursuant to the agreement reached between Delegate Murphy, Secretary Daniel, and the localities.⁷² The CBPA still contained language authorizing the Board to approve, disapprove, alter, or amend those elements of local government comprehensive plans and zoning ordinances for compliance with the CBPA.⁷³ Secretary Daniel again was pressed and once again, he submitted the necessary amendments on behalf of the administration.⁷⁴ The House Rules Committee made the changes requested.⁷⁵

By early February, 1988, the board envisioned by the proposed legislation was indeed a *local assistance* board. It had regulatory authority to promulgate criteria "*to assist* counties, cities and towns in regulating the use and development of land . . . and to

68. *Interview, supra* note 66.

69. *Id.*

70. "[The Board is authorized to] [e]nsure that local government comprehensive plans, zoning ordinances and subdivision ordinances are in accordance with the provisions of this chapter. Determination of compliance shall be in accordance with the provisions of the Administrative Process Act." VA. CODE ANN. § 10.1-2103(8) (Repl. Vol. 1989).

71. *Interview, supra* note 66.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

determine the ecological and geographic extent of the Chesapeake Bay Preservation Areas.”⁷⁶ Gone from the legislation were the broad references to “standards” contained in earlier drafts, reference to the CBLAB’s authority to promulgate general “orders and standards,” references to the CBLAB’s authority to “approve, disapprove, and require modifications” of local land use actions, and the requirements that localities submit land use initiatives for “review and compliance.” With the compromises made, the CBPA was passed, and signed into law in March, 1988.

IV. THE RELATIONSHIP BETWEEN LOCALITIES AND THE BOARD

The first issue that localities must confront is the CBLAB’s authority to promulgate regulations binding upon the localities. The CBLAB is sharply limited in its authority, which extends only to: (1) promulgating *criteria* which can assist and guide the localities in making land use decisions consistent with the CBPA; and (2) standing to institute litigation if a particular locality fails to exercise its land use authority in a manner consistent with the CBPA. Basic land use authority, however, remains with the localities. The basis for these conclusions is set forth below.

The “purpose and policies” section of the CBPA provides an excellent overview of the entire act.⁷⁷ The first sentence in subsection A articulates the public purpose behind the act—the integral relationship between a healthy economy and a healthy Chesapeake Bay. Subsection A continues by setting forth four major principles. The first two are addressed to the localities:

- (i) the counties, cities and towns of Tidewater Virginia [shall] incorporate general water quality protection measures into their compre-

76. VA. CODE ANN. § 10.1-2107 (Repl. Vol. 1989). This result was consistent with Governor Robb’s Commission on Virginia’s Future calling for “a more positive leadership role” by the state with the caveat that “a call for a concentration of power in the agencies of our state government is not required.” See *supra* notes 40-41 and accompanying text.

77. In order for localities’ ordinances under the CBPA to be valid, they must promote the goals expressed in the preamble. Note that two common means of determining legislative intent are not applicable in this dispute. The first is that the legislation should be liberally construed to accomplish its remedial effect. This method is inapplicable because the dispute is not between the regulated and the regulator — but between two claimants to the throne. Both the localities and the Board believe they are the governmental unit given primacy for controlling nonpoint source pollution. Therefore, examining the CBPA’s remedial purpose does nothing to resolve this conflict. Similarly, the common tool of looking to the lead agency for its interpretation of the CBPA also is inapplicable when it is unclear which agency is the lead agency.

hensive plans, zoning ordinances, and subdivision measures or ordinances; (ii) the counties, cities, and towns of Tidewater Virginia [shall] establish programs, in accordance with criteria established by the Commonwealth, that define and protect certain lands, hereinafter called Chesapeake Bay Preservation Areas, which if improperly developed may result in substantial damage to the water quality of the Chesapeake Bay and its tributaries.⁷⁸

The remaining two principles are addressed to the Commonwealth:

(iii) the Commonwealth [shall] make its resources available to local governing bodies by providing financial and technical assistance, policy guidance, and oversight when requested or otherwise required to carry out and enforce the provisions of this chapter; and (iv) all agencies of the Commonwealth [shall] exercise their delegated authority in a manner consistent with water quality protection provisions of local [ordinances].⁷⁹

The "purpose and policies" section also addresses the relationship between the localities and the CBLAB. First, principle (ii) establishes that the localities—not the CBLAB—are to establish programs that *define and protect* certain lands. To the extent the CBLAB is involved at all, this principle provides that localities are to implement their programs "in accordance with criteria" established by the CBLAB.

"In accordance" does not require lock-step compliance. Rather, the phrase contemplates more flexibility.⁸⁰ Furthermore, localities are charged with acting in accordance with criteria, not standards.⁸¹ "Criteria" contemplate "[a] standard of judging; a rule or

78. VA. CODE ANN. § 10.1-2100 (Cum. Supp. 1988).

79. *Id.*

80. *See, e.g., Love v. Board of County Comm'rs*, 108 Idaho 728, ____, 701 P.2d 1293, 1295 (1985):

"[I]n accordance" does not mean that a zoning ordinance must be exactly as the Comprehensive Plan shows it to be. Rather, the question of whether a zoning ordinance is "in accordance" with the Comprehensive Plan is a question of fact. Thus, a governing body charged to zone "in accordance" with its comprehensive plan . . . must make a factual inquiry to determine whether the requested zoning ordinance or amendment reflects the goals of, and takes into account those factors in, the comprehensive plan in light of the latter present factual circumstances surrounding the request.

Id.

81. This distinction was made as early as the November 20, 1987 draft of the CBPA wherein "criteria" and "standards" were separately defined.

test, by which facts, principles, opinions, and conduct are tried in forming a correct judgment respecting them.”⁸² The import of this language is clear enough. The Board is charged with developing “standards for judging” or “facts and principles” which the localities can then adopt to improve their comprehensive plans, zoning ordinances, and subdivision ordinances in order to accomplish the goals of the CBPA. Thus, for example, the Board may develop criteria which indicate that nonpoint source pollutant X must be reduced by fifty percent, but it is for the localities to determine which land use tools are appropriate to achieve such a standard.

This interpretation of principle (ii) is reinforced by principle (iii). Here, the role of the Commonwealth is described as providing assistance, guidance, and oversight. Nowhere is it envisioned that the Board will draft regulations imposing substantive requirements, timetables, and zoning procedures. If this point is not made abundantly clear in subsection A, then subsection B, which gives localities “the initiative for planning and for implementing” the CBPA’s provisions,⁸³ can leave no doubt.

82. WEBSTER’S NEW INTERNATIONAL DICTIONARY 627 (2d ed. 1954). The distinction was clearly on the minds of localities when they lobbied for and succeeded in having the references to standards replaced with references to criteria. See *supra* notes 65-68 and accompanying text.

83. VA. CODE ANN. § 10.1-2100(B) (Cum. Supp. 1988). The “preamble” was a significant departure from the Roundtable Report. The Roundtable Report specifically provided for localities to exercise their land use authorities “compatible with *state regulation* and policy and [in a way] that ensures the *proper discharge of the public trust responsibilities* of the Commonwealth.” CHESAPEAKE BAY LAND USE ROUNDTABLE, *supra* note 42, at 11 (emphasis added). However, reference to both state regulations and public trust responsibilities were deleted from the “preamble.”

In an unpublished opinion dated June 27, 1989, the Attorney General’s office came to the same conclusion as the authors.

In other words, the Board’s criteria should dictate the ultimate result to be reached, but the localities, working within the Board’s guidelines, should be free to adopt whatever reasonable measures are necessary to comply with the criteria. For example, the Board may set as a goal or standard the removal or reduction of runoff with potentially harmful or toxic substances entering the Bay equivalent to that provided by a 100 foot buffer area, and the locality must determine the best way to achieve the result.

. . . .

Read together, all of these provisions [of the Act] appear to evince an intent to allow localities flexibility in determining the best methods to comply with the criteria and standards set by the Board. If the legislation meant that the Board was to set both the goals and the specific methods by which to reach those goals, then the above-sited provisions would be unnecessary and, in fact, contradictory. There would be no need, for example, to state that the local governments were to establish programs in accordance with the criteria, nor that they had the initiative for planning and implementing the Act and that the Commonwealth was to act primarily in a

The sections of the CBPA which define the powers and duties of the two principal players also envision the localities as the lead party. Sections 10.1-2108 and 10.1-2110 of the Code authorize localities to exercise their police and zoning powers to protect the quality of state waters "consistent with" the provisions of the CBPA. In a regulatory setting, exercising authority "consistent with" enabling legislation does not envision any lock-step conformity. "It means instead, 'in harmony with,' 'compatible with,' 'holding to the same principles,' or 'in general agreement with.'"⁸⁴

A worthwhile comparison is that between language granting authority to the CBLAB and language employed by boards intended to have regulatory authority. The CBLAB is directed "to assist [localities] . . . [by promulgating] regulations which establish criteria for use by local governments."⁸⁵ In contrast, the State Board of Health is directed "to promulgate and enforce such regulations and provide for reasonable variances and exemptions therefrom as may be necessary to carry out the provisions of this title"⁸⁶ The contrast is sharp and obvious. The CBLAB does not have a roving commission to do good works throughout Tidewater Virginia. Instead, it is principally a support agency, a *local assistance board*.

Any interpretation of the CBPA for a strong state agency with traditional regulatory authority is inconsistent with the CBPA's language and the legislative history of its passage.⁸⁷ Yet, the

supportive role. Similarly, the criteria are for use by local governments and are there to "assist" them in regulating the use and development of land in protecting the quality of state waters. If the Board were to regulate not only the goals, but also the methods by which to reach those goals, then the Board would be providing much more than assistance, and, for all intents and purposes, there would be nothing left for local governments to determine or use since they would simply have a laundry list of mandated rules.

Attorney General Letter Opinion to Jeter M. Watson and James C. Wheat, Jr. at 6-7 (June 27, 1989) (unpublished) (signed by Deputy Attorneys General R. Claine Guthrie and Stephen D. Rosenthal).

84. Roanoke Memorial Hosp. v. Kenley, 3 Va. App. 599, 606, 352 S.E.2d 525, 529 (1987).

85. VA. CODE ANN. § 10.1-2107 (Cum. Supp. 1988).

86. VA. CODE ANN. § 32.1-12 (Repl. Vol. 1985).

87. Proponents of the CBPA have repeatedly bolstered it by declaring it Virginia's unique response to a Virginia problem. Board Chairman Wheat stressed this point at the February, 1989 meeting of the Board. The uniqueness comes from its being "[a] cooperative state-local program." W. Murphy, Jr., The Chesapeake Bay Preservation Act: A Step Toward the Public Trust Doctrine, presented to the 15th Annual National Specialty Conference, Water Resources Planning Division, American Society of Civil Engineers (June 1-3, 1988). However, as envisioned by the Board, it is anything but a cooperative state-local problem. Rather, a master-slave relationship is created by the Board in the proposed regulations. Indeed, Dele-

CBLAB has already started to assume power which it was never delegated by the General Assembly. In January 1989, the Chesapeake Bay Local Assistance Department circulated draft "criteria" for discussion purposes.⁸⁸ These "criteria" were essentially draft regulations requiring specific standards to be complied with by the localities. Little substance was left to local discretion. All pretext of a state-local cooperative program was abandoned as the CBLAB set out to regulate local land use decisions.

A selective review of the draft regulations circulated in January, 1988 by the Chesapeake Bay Local Assistance Department highlights the Board's overreaching.

Section II.1.B stated:

Goals of program. A program shall consist of those elements which are necessary or appropriate to:

1. Minimize adverse impacts on the quality of state waters and aquatic habitat from nonpoint source pollutants that run off from surrounding lands;
2. Establish land use practices for development in and adjacent to Chesapeake Bay Preservation Areas that will accommodate growth and prevent significant degradation of state waters, consistent with the criteria in these regulations;
3. Provide for the improvement of water quality in the redevelopment of currently intensely-developed lands.⁸⁹

This section purported to establish the goals of the program. However, section 10.1-2100 of the Code establishes program goals and grants primary authority for program development to localities.⁹⁰ Accordingly, the language in the January draft regulations was inappropriate. A more useful approach would have been for the

gate Murphy contends that "the Chesapeake Bay Local Assistance Board . . . is vested with powers and duties generally consistent with other state boards." *Id.* If this is true then the unique Virginia solution of a cooperative state-local program disappears. Quite the contrary, the authors believe that the Board was given carefully limited authority to assist localities in their compliance with the CBPA. Legislative compromise created a unique Virginia response, inconsistent with a strong state agency "zoning from Richmond."

88. CHESAPEAKE BAY LOCAL ASSISTANCE DEP'T. BRIEFING PAPER SERIES No. 89-01, CRITERIA DISCUSSION DOCUMENT (Feb. 1989). [hereinafter January Draft Regulations]. Actually two different documents were circulated by the Department in January, the second one with the February 1989 date. Discussed herein is the latter document.

89. *Id.*

90. VA. CODE ANN. § 10.1-2100(A) (Repl. Vol. 1989).

Board to suggest recommended plan elements, supplemented with milestones for determining progress.

Language in the January draft regulations appeared to exempt from local zoning requirements those developers who otherwise could receive a permit from a state or federal authority.⁹¹ Section 10.1-2113 of the Code, however, merely states that the authority granted in the CBPA is supplemental to other state and local authority.⁹² It does not suggest exemptions. Moreover, section 10.1-2114 of the Code requires state agencies to exercise their authority consistent with the CBPA.⁹³ Thus, section 10.1-2113 does not give other agencies grandfathered supremacy over the CBPA as the January draft regulations suggest. Rather, in the event of a conflict (*e.g.*, a subaqueous bed permit is appropriate but local zoning precludes the activity) some manner of accommodation would have to be made between the developer and the locality (*e.g.*, variance) or the activity will be unlawful. The CBLAB has the authority to grant a variance from the requirements of the act in certain circumstances.⁹⁴ The "requirements" of the CBPA will be manifested in local comprehensive plans, local zoning ordinances, and local subdivision ordinances. Variances are controlled by the requirements of sections 15.1-430 and 15.1-494 through 15.1-497 of the Code. A variance issued by the CBLAB would be in direct violation of these sections.

Section V.1.A.1. of the January draft regulations required each local government to "submit to the Department a tentative work plan for accomplishing [implementation of its] . . . program." Subsequent provisions were to the same effect: "Within 60 days . . . the Department . . . shall either approve the proposed program or

91. In accordance with Code of Virginia Section 10.1-2113, the regulatory authorities of other state, regional, and local regulatory agencies in Chesapeake Bay Preservation Areas shall not be affected in any way by the requirements of these regulations.

Except as otherwise allowed in accordance with the section above, the following management criteria shall be used in accordance with the procedures outlined in the following sections of these regulations.

January Draft Regulations, *supra* note 88, at § IV, ¶ 1.

92. VA. CODE ANN. § 10.1-2113 (Repl. Vol. 1989).

93. *Id.* § 10.1-2114.

94. The Board may grant a variance from the requirements of these regulations if: (i) strict application of the criteria will result in undue hardship unique to the particular situation of the applicant by denying all reasonable economic use of the property as a whole, and (ii) granting the variance will not result in a violation of water quality standards.

January Draft Regulations, *supra* note 88, at § IV, ¶ 9.

notify the local government of specific changes that must be made”⁹⁵ As previously discussed, authority for the CBLAB to “review and approve” local initiatives was expressly and emphatically deleted from the original bill.⁹⁶

The attempt to promulgate regulations in the absence of authority to do so created substantive problems with the draft regulations. For example, instead of providing *criteria* to guide the localities, in “defin[ing] and protect[ing] certain lands . . . which if improperly developed may result in substantial damage,”⁹⁷ the draft regulations simply designated in such areas: “The following . . . shall be used by the local government as the basis for designation of . . . Chesapeake Bay Preservation Areas: 1. Tidal wetlands . . . 2. Nontidal wetland . . . 3. Tidal shorelines” This is not “guidance” because there is nothing for the localities to define. Rather, this is a zoning decision which usurps local prerogatives.⁹⁸

On May 5, 1987, Chairman Wheat met with representatives of local governments and listened to their concerns about the proposed regulations published for comment in the Virginia Register. At the conclusion of the meeting, Mr. Wheat mentioned that if the current system does not work, the Maryland Critical Areas Program will be imposed. From this, an inference can be made that Mr. Wheat agrees that the Virginia General Assembly did not go as far as the Maryland legislature in setting up its act to regulate nonpoint source pollution. However, the draft regulations then en-

95. *Id.* at § V.I.C.

96. *See supra* note 87 and accompanying text.

97. VA. CODE ANN. § 10.1-2100(A) (Repl. Vol. 1989).

98. By comparison, consider the Report of the Joint Subcommittee Studying The Commonwealth's Tidal Shoreline Erosion Control Policy. This report indicates that numerous factors must be taken into consideration in order to identify lands which if improperly developed may adversely affect water quality. It strongly suggests that not all shoreline necessarily constitutes “environmentally sensitive zones;” rather, detailed extensive analysis must be undertaken to make such decisions. *See* HOUSE DOCUMENT No. 58, app. A, at 1-3 (1989). This conflicts with the CBLAB declaration that all shoreline is environmentally sensitive and in need of protection. Such “zoning from Richmond” was clearly rejected by the General Assembly in the past. *See supra* notes 47-52 and accompanying text. The legislative history of the act does not support this interpretation.

Guidance by the Board on issues similar to the factors described in the report cited above is what was contemplated by Virginia Code section 10.1-2107 and expected by the localities. The January Draft Regulations were substantially lacking in this regard.

The final regulations offer no substantial improvement. *See infra* notes 100, 210. Compare Chesapeake Bay Preservation Area Designation and Management Regulations, 6:1 Va. Regs. Reg. 11, 14 (Oct. 9, 1989) (Resource Protection Areas “shall include: 1.) Tidal wetlands; 2.) Nontidal wetlands . . . 3.) Tidal shores”) with quoted portion of draft regulations.

visioned were equivalent to the Maryland program. This difference between the legislative intent of the CBPA and the intent of the draft regulations raises legal concerns over the validity of the proposed regulations.

The hallmark of the Maryland system is the 1,000 foot critical area. In the proposed draft regulations, the CBLAB assumed the authority to declare all shoreline as "critical area" and to establish a 50 foot or a 100 foot buffer, depending upon the circumstances. This is identical to the Maryland program, except for the difference in the distance.⁹⁹ However, the authority to declare a 50 foot or 100 foot buffer today may eventually lead to the declaration of a 1,000 foot buffer tomorrow. Indeed, the significant difference between the Maryland and Virginia programs is that lawmakers at least declared this to be their purpose under the Maryland program. In Virginia, Chairman Wheat and the authors agree that "zoning from Richmond" was rejected by the General Assembly.

Despite the usurpation of authority by the Board, much improvement is possible while still avoiding this conflict over authority. The Chesapeake Bay Local Assistance Department has articulated the justification for requiring the buffers. For example, the Board has data which show that a 50 foot buffer will remove $X\%$ of Y pollutant. Presumably, the CBLAB is not interested in a 50 foot buffer *per se*; it is interested in a reduction of Y pollutant. Therefore, the Board should make $X\%$ reduction of Y pollutant the standard that localities should achieve, if the CBLAB is to view their efforts as consistent with the act. The CBLAB should further promulgate a 50 foot buffer as presumptive evidence that the standard is met, while leaving the localities the flexibility to achieve the standard through other land use and police power methods. In this manner the CBLAB's objectives would be met and the localities would retain "the initiative for planning and/or implementing the provisions of the [act]" as mandated in section 10.1-2100(B) of the Code.¹⁰⁰

99. Most readers are familiar with the following story attributed to Winston Churchill. Presumably, Mr. Churchill asked a woman if she would sleep with him for \$1,000,000. She replied she would. Mr. Churchill then asked if she would sleep with him for \$5.00. To this she responded, "What do you take me for?" He, of course, responded, "Madam, we have already determined that, we are simply haggling over a price." Similarly, the CBLAB is simply haggling over the distance.

100. Initially, the CBCAB adopted this approach when it adopted its final regulations in June 1989. By "allowing" localities to adopt measures which were equivalent in performance to the CBCAB regulations, the regulation became nothing more than performance stan-

The language and the legislative history of the CBPA make clear that the localities have primacy for land use decisions under the act. The CBLAB, on the other hand, is charged with the responsibility of promulgating criteria to assist localities in delineating Chesapeake Bay Protection Areas, and providing guidance on how to protect water quality. The CBLAB was created to assist the localities in fulfilling their responsibilities and does not have authority to dictate how Chesapeake Bay Protection Areas will be delineated or used or how water quality will be protected. It also does not have authority to dictate the procedures or time tables to be utilized. However, because the CBLAB does not agree with this interpretation of its authority, future conflict is likely.

V. CONFLICTS BETWEEN GOVERNMENTAL PROGRAMS

A. *Effect of the Act Upon Federal Agencies and Actions*

Upon implementation of the CBPA, most local governments will encounter conflicts with federal agencies. Therefore, localities should anticipate and prepare for federal actions that are inconsistent with their local ordinances. This is particularly true for the Tidewater governments who have military bases and other federal government installations within their jurisdictions.¹⁰¹ To cope with these situations, localities need to realize the extent of their powers under the CBPA in relation to the federal government.

The CBPA's relation to the federal government is quickly summarized. The federal government and its agencies are not bound by state regulation because of the supremacy clause of the United States Constitution.¹⁰² Nevertheless, Congress may allow federal

dards. The "final regulations" did not become effective because Governor Baliles suspended the regulatory process for additional comments on this precise issue. In final regulations published in October, the equivalency provision was debated, making the regulations in conflict with the author's analysis and the Attorney General's analysis. The final regulations are found at 6:1 Va. Regs. Reg. 11 (Oct. 9, 1989).

101. The total acreage in Tidewater, Virginia was 5,738,380. The federal government owned 362,356.38 acres in Tidewater, Virginia, which amounts to 6.3% of the land. In some planning districts, the federal government owned as much as 14.7% of the land. 1 NATIONAL OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T. OF COMMERCE, COMMONWEALTH OF VIRGINIA COASTAL RESOURCES MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT II-6, II-7 (1986).

102. U.S. CONST. art. VI, cl. 2 (supremacy clause) states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to

entities to be regulated by subordinate (state and/or local) governments if it specifically and clearly consents to such regulation. At present, the CBPA will not bind the federal government or its instrumentalities because Congress has not consented to the jurisdiction of the CBPA.

However, the CBPA will likely be incorporated into the Virginia Coastal Resource Management Program ("VCRMP").¹⁰³ The Federal Coastal Zone Management Act ("federal CZMA" or "CZMA"), of which the Virginia program is a part, contains a federal consistency provision wherein Congress specifically has consented to federal compliance "to the maximum extent practicable" with state programs. Therefore, assuming the CBPA is incorporated into the VCRMP, the CBPA will be binding on the federal government to the extent specified under the CZMA's consistency provision. The following portion of this article will expand on this summary of the CBPA's relation to the federal government.

Traditionally, the federal government and its instrumentalities have not been obliged to comply with state or local laws, and are therefore generally free from state regulation.¹⁰⁴ Support for this position derives directly from the supremacy clause of the United States Constitution. For example, in *Johnson v. Maryland*,¹⁰⁵ Maryland required a driver's license of anyone who operated an automobile. Maryland tried to enforce this law upon a federal mail delivery driver. Even though Maryland's law was a valid exercise of its police powers, the federal government argued that the law interfered with the federal duties being carried out by the unlicensed driver.¹⁰⁶ The Supreme Court agreed and held the law did not apply to federal mail delivery drivers. Similarly, the CBPA and local ordinances under the CBPA may not be binding on the federal government.

the Contrary notwithstanding.

See *South Carolina v. Baker*, 108 S. Ct. 1355 (1988); *McCulloch v. Maryland*, 17 U.S. (1 Wheat) 316, 427 (1819).

103. Sharon Anderson, from the Virginia Council on the Environment, told one of the authors that the Council on the Environment plans to have the CBPA incorporated into the Virginia Coastal Resources Program before the end of 1989 and foresees no opposition from the National Oceanic and Atmospheric Administration.

104. See, e.g., *Johnson v. Maryland*, 254 U.S. 51 (1920) (post office employee not required to have a state driving license for driving a mail truck); *McCulloch*, 17 U.S. (1 Wheat.) 316 (federal government immune from state taxation).

105. 254 U.S. 51 (1920).

106. *Id.* at 53.

While the federal government reserves the power to make any necessary rules or regulations respecting property of the United States, states still retain jurisdiction over federal lands within their territory and may enforce state criminal and civil laws within those lands so long as the state laws do not conflict with federal law.¹⁰⁷ State law will be preempted (1) if Congress clearly intends to occupy a field; or (2) when Congress does not intend this, the state law will be preempted "to the extent it actually conflicts with the federal law" by either making it impossible to comply with both state and federal law or by interfering with the goals of Congress.¹⁰⁸

In *California Coastal Commission v. Granite Rock Co.*,¹⁰⁹ Granite Rock was a privately owned company that ran a mining operation in federally owned lands pursuant to the Mining Act of 1872.¹¹⁰ In 1980, Granite Rock began removing substantial amounts of limestone in accordance with a plan approved by the United States Forest Service.¹¹¹ The California Coastal Commission informed Granite Rock that it would have to apply for a coastal development permit to continue mining.¹¹² The Court held that the commission was not preempted by federal law and was therefore allowed to impose a permit requirement on Granite Rock, despite the company's operation in a national forest.¹¹³ The Court noted that the commission did not seek to determine basic uses of federal land, but to regulate a given mining use so that it is carried out in a more environmentally sensitive and resource-protective fashion.¹¹⁴ The Court distinguished between land use planning which was the role of the Forest Service, and environmental regulation, which was the permissible role of the commission so long as it did not dictate land uses.¹¹⁵ Even though the two may overlap at times, the state law is not preempted if it does not conflict with the federal law.¹¹⁶

107. *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1425 (1987) (citing *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)).

108. *Id.*

109. 107 S. Ct. 1419 (1987).

110. *Id.* at 1422.

111. *Id.* at 1422-23.

112. *Id.* at 1423.

113. *Id.* at 1424.

114. *Id.* at 1428.

115. *Id.* at 1428-29.

116. *Id.* at 1429.

Even when the federal government appears to occupy a field, it may still be bound by the CBPA under certain circumstances. The federal government may waive its immunity from state regulation by consenting to such regulation.¹¹⁷ Absent specific congressional authorization, there is a presumption that federal actions are immune from state regulation.¹¹⁸ However, this presumption of immunity only applies to regulations that interfere with the fulfillment of federal law, program or policy.¹¹⁹ Otherwise, state law is presumptively applicable to federal instrumentalities and enclaves.¹²⁰ Consequently, state law enacted prior to federal acquisition of state property will govern so long as it is consistent with federal policy and remains unaltered by congressional legislation.¹²¹ This implies that so long as local ordinances under the CBPA do not interfere with the realization of federal duties or policy then the federal instrumentalities will need to comply with the ordinances. Unfortunately, the extent of specific federal duties and policies as well as the extent of interference required to trigger the supremacy clause are often unclear and extremely relative to the specific circumstances.

As stated previously, state regulation of the federal government is possible when there is congressional intent. It is important to remember that although consent is given, states will have limits on their regulatory power. The supremacy clause and the commerce clause¹²² create the boundaries for federal consistency with state regulation. Despite congressional consent to state regulation of federal instrumentalities, such state regulation may not exceed the

117. See *EPA v. Water Resources Control Bd.*, 426 U.S. 200 (1976) (under Clean Water Act, state NPDES permits not applicable to federal agencies); see also *Hancock v. Train*, 426 U.S. 167 (1976) (under Clean Air Act, state permits not applicable to federal agencies). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-28 (1978).

118. L. TRIBE, *supra* note 117, at § 6-28.

119. See, e.g., *Sperry v. Florida*, 373 U.S. 379, 385 (1963) (Florida law prohibiting nonlawyers from practicing law is preempted as far as practicing before the Patent Office which allows nonlawyers to practice before it); *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920).

120. L. TRIBE, *supra* note 117, at § 6-28.

121. See *Penn Dairies, Inc. v. Milk Control Comm'n of Pa.*, 318 U.S. 261 (1943) (milk dealer contracting with the U.S. Army does not benefit from governmental immunity when contracting sales within the territorial limits of the state in a place subject to the state's jurisdiction); cf. *Pacific Coast Dairy v. Department of Agric.*, 318 U.S. 285, 294 (1943) (California price fixing laws do not reach contracts made in territory subject to the exclusive jurisdiction of the United States).

122. U.S. CONST. art. I, § 8 (commerce clause) (Congress shall have power to regulate commerce among the states).

amount consented to by Congress, nor may the regulation violate the commerce clause.

The applicability of the commerce clause to environmental regulations has recently been reviewed in *Norfolk Southern Corp. v. Oberly*¹²³ where Delaware's Coastal Zone Act ("DCZA") banned "top-off" service for supercolliers carrying coal in the Delaware Bay, despite the Delaware Bay having the only naturally protected anchorage between Maine and Mexico that would accommodate that type of activity. Norfolk Southern claimed the DCZA ban violated the dormant commerce clause while Delaware claimed the ban was protected by "congressional consent" via the federal CZMA.¹²⁴ The court refused to find congressional consent since it requires express intent to remove state regulation from the reach of the commerce clause.¹²⁵ The court held that "while the F[ederal] CZMA states a national policy in favor of coastal zone management, it does not . . . on its face expand state authority to legislate in ways that would otherwise be invalid under the Commerce Clause."¹²⁶ The court applied a balancing test¹²⁷ to conclude that Delaware's coastal zone program was not immunized from the commerce clause review by the federal CZMA, nor was it in violation of the commerce clause.¹²⁸

*Hancock v. Train*¹²⁹ is a good illustration of how the supremacy clause confines state regulation of federal instrumentalities when there is congressional consent. In *Hancock*, the Supreme Court decided whether Kentucky, whose federally approved air quality implementation plan had forbidden an air contaminant source to operate without a state permit, could require existing federally owned and operated facilities to obtain a permit.¹³⁰ Kentucky's program

123. 822 F.2d 388 (3d Cir. 1987).

124. *Id.* at 392.

125. *Id.* at 393-95.

126. *Id.* at 394-95.

127. Three standards of review are applied in performing dormant Commerce Clause analysis: (1) state actions that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity in areas of particular federal importance are given heightened scrutiny; (2) legislation in areas of peculiarly strong state interest is subject to very deferential review; and (3) the remaining cases are governed by a balancing rule, under which state law is invalid only if the incidental burden on interstate commerce is clearly excessive in relation to the putative local benefits.

Id. at 398-99.

128. *Id.* at 407.

129. 426 U.S. 167 (1976).

130. *Id.* at 168.

was established in accordance with the Clean Air Act ("CAA"), which required federal instrumentalities to be consistent with state air quality and emission standards.¹³¹ However, the CAA had no specific requirements for federal entities to apply for state permits.¹³²

The Court recognized and accepted that under the CAA, Congress committed federal agencies to comply with Kentucky's air quality and emission standards, but not Kentucky's permit requirements.¹³³ The Court noted that under Kentucky's program, the federal facilities could not operate without a permit even if they were in compliance with the program's air quality and emission standards.¹³⁴ Kentucky's regulations were found to have exceeded the congressional consent and were therefore found to be in violation of the supremacy clause.¹³⁵

Hancock reaffirmed the rule that where Congress does not affirmatively and clearly declare its instrumentalities or property subject to state regulation, the federal function is considered free of state regulation.¹³⁶ Therefore, congressional consent to state regulation or federal activities will only be found where there is "a clear congressional mandate" that makes the authorization of state regulation "clear and unambiguous."¹³⁷

Accordingly, the CBPA and local ordinances under it may be able to regulate federal instrumentalities if Congress specifically and affirmatively consents to the regulation. Such congressional consent does not now exist for the CBPA. However, incorporation of the CBPA into the Virginia Coastal Resources Management Program ("VCRMP") is expected by the autumn of 1989.¹³⁸ The VCRMP was established in accordance with the federal Coastal Zone Management Act.¹³⁹ As a part of the VCRMP, the CBPA will

131. *Id.* at 171-72. Note, the Clean Air Act requires federal compliance while still allowing the President to exempt certain federal emission sources when paramount national interests are at stake.

132. *Id.* at 175.

133. *Id.* at 177.

134. *Id.* at 180.

135. *Id.* at 181.

136. *Id.* at 179.

137. *Id.*

138. *See supra* note 4.

139. 16 U.S.C. § 1451 (1985). The Virginia Coastal Resources Management Program was approved by the federal government in 1986.

benefit from the federal consistency provision within the CZMA.¹⁴⁰ Therefore, the following portion of this article will review the federal consistency doctrine of the CZMA¹⁴¹ and its application through the VCRMP.

The CZMA allows coastal states to operate coastal zone management programs so long as they are approved by the federal government.¹⁴² The CZMA is not intended to preempt states from exercising their police powers, but rather to encourage states to utilize their powers.¹⁴³ As an enticement for establishing state coastal management programs, the CZMA offers federal funding plus the federal consistency provision, which is a "legally enforceable commitment" requiring federal actions to be as consistent as possible with approved state programs.¹⁴⁴ The consistency provision has been a very alluring element of the CZMA and easily the most controversial.

The consistency provision addresses four basic areas of federal action that affect the coastal one.¹⁴⁵ These are federal activities,¹⁴⁶ federal development projects,¹⁴⁷ federal permitting and licensing of activities that affect the coastal zone,¹⁴⁸ and federal funding and

140. 16 U.S.C. § 1456 (1985). The incorporation of the CBPA into the VCRMP should make the CBPA a much more effective and useful environmental planning tool for local governments.

141. This article does not attempt to make a detailed review of the CZMA or its federal consistency provision. There are numerous articles and treatises published on the subject. See, e.g., Archer & Bondareff, *Implementation of the Federal Consistency Doctrine — Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115 (1988); Eichenberg & Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism"*, 14 ECOLOGY L.Q. 9 (1987); Finnell, *Intergovernmental Relationships in Coastal Land Management*, 25 NAT. RESOURCES J. 31 (1985); Hildreth & Johnson, *CZM in California, Oregon, and Washington*, 25 NAT. RESOURCES J. 103 (1985); Schell, *Living with the Legacy of the 1970's: Federal/State Coordination in the Coastal Zones*, 14 ENVTL. L. 751 (1984); Wolf, *Accommodating Tensions in the Coastal Zone: An Introduction and Overview*, 25 NAT. RESOURCES J. 7 (1985).

142. 16 U.S.C. § 1451 (1985).

143. See *California Coastal Comm'n v. Granite Rock*, 107 S. Ct. 1419, 1431 (quoting S. REP. NO. 753, 92d Cong., 2d Sess. 20 (1972)); Archer & Bondareff, *supra* note 141, at 147.

144. Archer & Bondareff, *supra* note 141, at 117.

145. See 16 U.S.C. § 1456(c), (d) (1982); NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-1.

146. "The term 'Federal activity' means any function performed by or on behalf of a federal agency in exercise of its statutory responsibilities." 15 C.F.R. § 930.31(a) (1988).

147. "A Federal development project is a Federal activity involving the planning, construction, modification, or removal of public works, facilities other structures, and the acquisition, utilization, or disposal of land or water resources." *Id.*

148. "The term 'Federal license or permit' means any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an

assistance to state and local governments for projects affecting the coastal one.¹⁴⁹ The consistency standards and procedures vary according to the federal action being considered.¹⁵⁰

Under the CZMA, any federal agency which conducts or supports an activity that "directly affects" the coastal zone is required to do so in a manner consistent to the "maximum extent practicable" with approved state management programs.¹⁵¹ However, the responsibility of determining whether a federal activity "directly affects" the coastal zone and whether the activity is consistent to the "maximum extent practicable rests with the federal government."¹⁵²

Therefore, the first step of an agency's consistency review involves determining whether the questioned activity "directly affects" a state's coastal zone. This determination is generally based on the federal agency's judgment unless the state already has listed the specific activity as one that directly affects the coastal zone and requires consistency review.¹⁵³ Unfortunately the term "directly affecting" has not been clearly defined by case law.

In a lengthy opinion, the Court in *Secretary of the Interior v. California*¹⁵⁴ held that the sale of oil and gas leases off the California coast was not an activity "directly affecting" the coastal zone under the CZMA, thus not triggering consistency review.¹⁵⁵ "[T]he sale of a lease grants the lessee the right to conduct only very limited, 'preliminary activities' on the OCS [Outer Continental Shelf]" and therefore cannot be said to be "directly affecting" the coastal zone.¹⁵⁶

applicant." *Id.* § 930.51(b). This section of the CZMA also covers the sale of leases for the exploration, development, and production of Outer Continental Shelf Resources. However, this particular topic will not be addressed in this article since it is not truly applicable to the CBPA.

149. "The term 'Federal assistance' means assistance provided under a Federal program to an applicant agency through grant or contractual arrangements, loans subsidies, guarantees, insurance, or other form of financial aid." *Id.* § 930.91(a).

150. Archer & Bondareff, *supra* note 141, at 119.

151. 16 U.S.C. § 1456(c)(1), (2); NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-2; Archer & Bondareff, *supra* note 141, at 119.

152. See 15 C.F.R. §§ 930.33(a) to -.34(a) (1988); see also NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-2; Archer & Bondareff, *supra* note 141, at 119.

153. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-2.

154. 464 U.S. 312 (1984).

155. *Id.* at 315.

156. *Id.* at 342. This is a decision that has drawn considerable criticism from legal scholars and the environmental community. See Reed, *Supreme Court Beaches Coastal Zone Management Act*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,161 (1984).

Another controversial issue arising from the CZMA consistency provision is whether the state programs may regulate activities outside the coastal zone. The CZMA defines "coastal zone" to include state land near the shorelines of the several coastal states.¹⁵⁷ The Supreme Court has held that the phrase "directly affecting" applied to activities on the federal enclaves within the coastal zone, but not to Outer Continental Shelf lands which lie outside the coastal zone.¹⁵⁸ The Court recently affirmed this position, declaring that while the CZMA excludes federally owned lands from the definition of coastal zone, it does not preempt all state regulation of activities on federal lands.¹⁵⁹

In *Commonwealth of Puerto Rico v. Muskie*,¹⁶⁰ Puerto Rico challenged the United State Army's plan to change an abandoned military site into a refugee camp for Cuban and Haitian refugees. The Army claimed that the CZMA did not apply to the military base since it was federal property.¹⁶¹ The court clarified the issue by stating that "the exclusion of 'federal lands' from the term 'coastal zone' applies only to the land itself and not to the effects on the surrounding non-federal coastal zone that may be caused by federal activities conducted on federal lands."¹⁶² The court went on to quote a Senate report which stated that federal consistency with approved state coastal zone programs included "conducting or supporting activities in or out of the coastal zone which affect the area."¹⁶³

In *Ono v. Harper*,¹⁶⁴ Hawaii challenged a transfer of title of federal lands to private persons. The court held that "a consistency determination is required under the CZMA when any federal activity directly affects the coastal zone of a state," even though federal property is specifically excluded from the CZMA.¹⁶⁵ Since the mere transfer of title does not change the way the land is being utilized, it does not directly affect the coastal zone or the state's manage-

157. 16 U.S.C. § 1453(1) (1982).

158. *Secretary of the Interior v. California*, 464 U.S. 312, 315 (1984).

159. *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419, 1431 (1987); see Archer & Bondereff, *supra* note 141, at 129-30.

160. 507 F. Supp. 1035 (D.P.R. 1981).

161. *Id.* at 1059.

162. *Id.* at 1060.

163. *Id.* (quoting S. REP. No. 94-277 (1976)).

164. 592 F. Supp. 698 (D.C. Haw. 1983).

165. *Id.* at 700.

ment program.¹⁶⁶ Therefore, a consistency determination was not required under the CZMA.¹⁶⁷

Controversy has also arisen over the meaning of "consistent to the maximum extent practicable." In *Cape May Greene, Inc. v. Warren*,¹⁶⁸ New Jersey exempted a developer from its general prohibition against flood plain development, conditioned on the development obtaining sewage hookups. However, the EPA refused to allow sewer hookups for the development.¹⁶⁹ EPA claimed that its actions were reasonable since it had authority to deter development in flood plains, as well as the power to enforce federal standards that are more demanding than state standards.¹⁷⁰ In response, the developers contended that EPA's actions were inconsistent with the CZMA.¹⁷¹ The EPA acknowledged that its goal was to prevent development in the floodplain and conceded that the restriction was unnecessary to insure the efficiency of the sewage plant.¹⁷²

In determining that the EPA acted arbitrarily and capriciously by imposing the restrictions, the court placed great emphasis on the EPA's failure to "give sufficient weight to the congressional admonition in the Coastal Zone Management Act that, to the 'maximum extent practicable,' federal actions are to be consistent with the state's management plan."¹⁷³ Consistency to the maximum extent practicable is at the heart of the statutory scheme of encouraging, but not directing, state management of the coastal areas.¹⁷⁴ The court recognized the significance of local governments' role under the CZMA by quoting a Senate report:

Local government does have continuing authority and responsibility in the coastal zone.

. . . .

Whenever local government has taken the initiative to prepare com-

166. *Id.*

167. *Id.*

168. 698 F.2d 179 (3d Cir. 1983).

169. *Id.* at 181.

170. *Id.* at 186. EPA contended that the consistency doctrine only required federal agencies not to allow activities prohibited under the state plan, while allowing federal agencies to prohibit activities allowed under state plans. (Allowing prohibited development versus prohibiting allowed development). *Id.* at 191.

171. *Id.* at 186.

172. *Id.*

173. *Id.* at 190-91.

174. *Id.* at 191.

mercial plans and programs which fulfill the requirements of the Federal and coastal state zone management legislation, such local plans and programs should be allowed to continue to function under the state management program.¹⁷⁵

It is important to note that the court distinguished "federal activity" from "federal assistance" under a National Oceanic and Atmospheric Administration regulation that would have allowed federal agencies to have stricter standards than state management programs.¹⁷⁶ Therefore, the federal agencies are able to enforce stricter standards when issuing federal permits, but otherwise are expected to be consistent to the maximum extent practicable with state programs.

When a federal agency concludes that an activity does not directly affect a state's coastal zone, the federal agency must notify the appropriate state agency, which in Virginia is the Virginia Council on the Environment ("Council").¹⁷⁷ If a federal agency determines that an activity would directly affect Virginia's coastal zone then the agency must determine whether the activity is consistent with the VCRMP.¹⁷⁸ Similarly, if the federal agency finds that an activity will directly affect Virginia's coastal zone but is consistent with Virginia's management program, it must notify the council.¹⁷⁹ Also, it is inherent in the notification requirement that the state be given enough information in the consistency statement to make an informed decision to either concur or object to the consistency determination.¹⁸⁰ After being notified of the finding, the Council has forty-five days to notify the federal agency of any ob-

175. *Id.* at 192 (quoting S. REP. NO. 753, 92d Cong., 2d Sess. ____, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4776, 4779).

176. Schell, *supra* note 141, at 760.

177. 15 C.F.R. § 930.35(d) (1988); see also NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-2, X-3.

178. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-2, X-3.

179. *Id.*

180. Commonwealth of P.R. v. Muskie, 507 F. Supp. 1035, 1059 (D.P.R. 1981). In response to the arrival of Cuban and Haitian refugees, the federal government, including the United States Army, arranged to transform military sites in Puerto Rico into refugee camps. *Id.* at 1041-44. Puerto Rico challenged the construction of the camps claiming failure to comply with various environmental laws. *Id.* at 1044. The defendants sent a letter to the Secretary of the Puerto Rico Department of Natural Resources asserting that the operations on the federal land were consistent with the coastal zone program and would have no adverse effects on the coastal zone. *Id.* at 1058. The court noted that the purpose of such a statement is to inform the state about the intended federal activity and thereby allow the state to participate in determining whether the activity is consistent to the "maximum extent practicable" with the program. *Id.*

jection to, or concurrence with, the consistency determination.¹⁸¹ If the Council fails to make an objection within the forty-five day period, then the Council is presumed to be in concurrence with the consistency determination.¹⁸²

If the Council and federal agency disagree about whether an activity directly affects the coastal zone or whether it is consistent with the VCRMP, the Council may resort to mediation by the United States Secretary of Commerce, or may pursue an injunction in federal court to prevent the federal agency from proceeding with an inconsistent activity.¹⁸³ Obviously, this review will have to be coordinated with the localities. The recently promulgated regulations are understandably silent on this issue. Expeditious amendment will be appropriate once the CBPA is brought into the Coastal Zone Management Program via the VCRMP.

The CZMA also regulates the issuance of all federal licenses and permits for activities affecting any land or water use in the coastal zone.¹⁸⁴ In order for activities to be subject to CZMA consistency review, the state must provide the federal agencies with a list of activities that describes the type of federal permit and license applications the state wishes to review.¹⁸⁵ If an activity is unlisted, the state must inform the federal agency and federal permit applicant that the proposed activity requires CZMA consistency review within thirty days of receiving notice of the federal permit application.¹⁸⁶

When applying to a federal agency, an applicant for such federal

181. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-3.

182. *Id.*

183. Archer & Bondareff, *supra* note 141, at 119; NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-5.

184. 15 C.F.R. § 930.50 (1988); NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-4; *see, e.g.*, Southern Pac. Transp. Co. v. California Coastal Comm'n, 520 F. Supp. 800 (N.D. Cal. 1981). The California Coastal Commission in *Southern Pac.* sought to review an Interstate Commerce Commission ("ICC") permit allowing Southern Pacific to tear up old rail tracks on its right-of-way in accordance with the ICC abandonment decision. The court noted that it was "Congress' intention to make compliance with the consistency review procedure mandatory as to any applicant for a required federal license or permit." *Southern Pac.*, 520 F. Supp. at 803. The court went on to hold that the FCZMA was intended to extend to ICC permits and that track removal is a future land use subject to consistency review. *Id.* at 803-04.

185. 15 C.F.R. § 930.53 (1988); *see also* California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1430-31 (1987); NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-4.

186. 15 C.F.R. § 930.54 (1988); *see also* Granite Rock Co., 107 S. Ct. at 1430-31; NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-4.

licenses or permits must provide the permitting agency with a certification that the proposed activity is consistent with Virginia's coastal management program.¹⁸⁷ An applicant must simultaneously submit a copy of the application together with whatever information or data is necessary for the Council to review the applicant's consistency certification.¹⁸⁸ If necessary, the applicant must also submit required NEPA documents. The federal agency may issue the license or permit only if the Council expressly concurs, or presumptively concurs by failing to respond within six months of the applicant's consistency certification, or if the United States Secretary of Commerce decides the proposal is consistent with the CZMA's purpose or is necessary in the interest of national security.¹⁸⁹ Still, the CZMA "does not compel a federal agency to issue a permit for any activity which does not violate the provisions of an approved coastal management plan."¹⁹⁰ Federal agencies may deny permits despite program consistency since federal criteria that are more exacting than local criteria take precedence.¹⁹¹

There have also been exceptions to the procedural rules regarding consistency review of permits. In *Enos v. Marsh*,¹⁹² the Army Corps of Engineers approved the construction of an entrance channel and harbor basin without determining whether it was consistent with Hawaii's coastal zone management program. However, the development project had begun prior to federal approval of Hawaii's coastal management program. Under the CZMA and the regulations promulgated under it, a consistency determination is not required for development projects initiated prior to the approval of the state's coastal zone management program.¹⁹³

In *Quinones Lopez v. Coco Lagoon Development Corp.*,¹⁹⁴ Lopez challenged the issuance of a permit by the Army Corps of Engineers ("Corps"). The Corps admittedly did not comply with the CZMA, by failing to require Coco Lagoon to submit a certificate of

187. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-4.

188. 15 C.F.R. § 930.50 (1988); *see also* NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-4.

189. 15 C.F.R. § 930.50 (1988); NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-4.

190. Hildreth & Johnson, *supra* note 141, at 139 n.209.

191. *Id.*

192. 616 F. Supp. 32 (D.C. Haw. 1984), *aff'd*, 769 F.2d 1363 (9th Cir. 1985).

193. *Id.* at 62.

194. 562 F. Supp. 188 (D.P.R. 1983).

compliance with the coastal zone management program.¹⁹⁵ However, because a formal certification procedure under the program had not yet been established, the Corps notified the state agency overseeing the program, who in turn gave the Corps a favorable response.¹⁹⁶ The court held that the "corps cannot be found at fault when there was no procedure to follow, particularly when, as here, it complied with the spirit of the law."¹⁹⁷

Where a state agency operates a federal license or permit program, such as the Virginia State Water Control Board operating the NPDES permit program, concurrence of a consistency certification will be conclusively presumed upon the issuance of such a license or permit.¹⁹⁸ If the Council objects to a consistency certification, it must give written notification to the applicant, the federal agency and the assistant administrator of NOAA. This notification must describe how the proposed activity is inconsistent and the means to remedy the inconsistency, and the applicant's right to appeal to the United States Secretary of Commerce.¹⁹⁹

Federal assistance to state and local governments for projects that will affect the coastal zone is also subject to consistency review by the Council.²⁰⁰ State and local government applications for federal assistance must contain a consistency certification.²⁰¹ The application will be forwarded to the Council who must concur with the consistency certification before the federal fund can be obligated to the project.²⁰² If the Council does not object to the consistency certification within sixty days of receiving the application, the Council will be presumed to have concurred with the certification and the federal agency may proceed with the assistance.²⁰³ When the Council objects to federal assistance, it must follow the

195. *Id.* at 193.

196. *Id.* at 194.

197. *Id.*

198. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-5. "In the case of the VMRC and the joint permitting process for local, state and federal wetlands permits the issuance of a state wetland permit for any activity also requiring a Corps of Engineers' 404 permit shall constitute state concurrence with the consistency certification." *Id.*

199. 15 C.F.R. § 930.64 (1988).

200. *Id.* § 930.64; *see also* NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-6.

201. 15 C.F.R. § 930.90 (1988); *see also* NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-6.

202. 15 C.F.R. § 930.90 (1988); *see also* NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-6.

203. 15 C.F.R. § 930.90 (1988); *see also* NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-7.

same notification procedure that applies to federal licenses and permits.²⁰⁴

In Virginia, the CZMA is applied through the VCRMP²⁰⁵ which operates as a "networking" system.²⁰⁶ Under this system, the state programs in the coastal zone are reviewed by the Virginia Council on the Environment.²⁰⁷ Once the CBPA is incorporated into the VCRMP, local governments affected by a federal consistency problem should have the option of directly notifying the Council on the Environment or notifying the CBLAB who in turn could notify the Council. If a federal action is in violation of a locality's CBPA ordinances, the Council would presumably object to a consistency determination or certification based on the information supplied by the locality.

B. Consistency of State Agencies with Local Programs Implemented Under the Chesapeake Bay Preservation Act

Upon implementation of the CBPA, conflicts may arise between localities and state agencies when state agencies either initiate inconsistent projects or issue permits for inconsistent activities. For instance, the State Department of Transportation may seek to construct a road through an area which has been designated by a locality as a "preservation area" or "management area," and therefore, the project might be in violation of the local program. While a state agency would not ordinarily be restricted by a local regulation, there exist measures within the CBPA and within the VCRMP, which the CBPA will presumably be part of, that are designed to address these situations.

State agency "consistency" should be enhanced because a sister agency promulgated the criteria,²⁰⁸ and state agencies are required to give due consideration to any comments submitted by other state agencies when developing criteria.²⁰⁹ However, since localities

204. 15 C.F.R. § 930.90 (1988); see also NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at X-6, X-7.

205. Authority for the VCRMP is found in Executive Order 12 (June 30, 1978) which "binds all state coastal resource management activities into a coordinated effort and requires that those activities be consistent with the VCRMP." NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at IV-1, IV-2.

206. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at IV-3.

207. *Id.* at IV-4.

208. See VA. CODE ANN. §§ 10.1-2103, -2107 (Repl. Vol. 1989).

209. *Id.* § 10.1-2107(D).

have the ability to impose standards much stricter than those required by the criteria,²¹⁰ the extent of state "consistency" remains uncertain. State agencies may find themselves subject to more stringent standards than they suggested to the CBLAB or the CBLAB actually promulgated. Also, state agencies are likely to be subject to standards that vary in stringency depending upon the local jurisdiction. For convenience, agencies would presumably seek to avoid compliance with local restrictions absent laws to enforce compliance.

The General Assembly must have recognized that in order for the CBPA to be effective it would have to be binding upon more than just local governments and private citizens. Therefore, provisions were added to the CBPA that make it binding on state agencies. The first section of the CBPA highlights the necessity of protecting the public interest in the state waters and promoting the general welfare of the Commonwealth's citizens.²¹¹ In particular, the General Assembly acknowledged that localities need the cooperation and conformity of state agencies to effectuate the goals of the CBPA.²¹² The realization of these goals requires that "all agencies of the Commonwealth exercise their delegated authority in a manner consistent with the water quality protection provisions" of local governments created under the CBPA.²¹³ While this section of the CBPA does not actually require state agencies to comply with local regulations, it is a prelude to more specific sections of the CBPA that require conformity by state agencies.

Several sections of the CBPA expressly grant localities authority to create restrictions on state agencies in order to protect the state waters and the Bay in particular. In a general grant of power, section 10.1-2108 of the Code of Virginia authorizes localities to "exercise their police and zoning powers to protect the quality of state waters."²¹⁴ However, this section does not bind state agencies to conform with local regulations. Rather, it merely satisfies Dillon's Rule²¹⁵ by expressly granting to localities the power to protect

210. See, e.g., 6:1 Va. Regs. Reg. 3245, § 3.1 (1989) (the criteria merely provide direction for local governments); *id.* at 16, § 4.1(B) (localities may exercise discretion in determining site-specific boundaries); *id.* at 21, § 5.2(c) ("[CBLAB] manual is for the purpose of guidance only and is not mandatory" for localities).

211. VA. CODE ANN. § 10.1-2100 (Repl. Vol. 1989).

212. See *id.*

213. *Id.* § 10.1-2100(A)(iii).

214. *Id.* § 10.1-2108.

215. *Supra* note 26 and accompanying text.

state waters, which otherwise would be reserved by the Commonwealth. Furthermore, this grant of power is qualified by section 10.1-2113 of the Code, which ensures that other local governmental authority remains unaffected.²¹⁶

Probably the most far reaching grant of authority to localities in the CBPA (at least on its face) is found in section 10.1-2114 of the Code. This section is an apparent attempt by the General Assembly to force state agencies to respect and conform to local programs imposed under the CBPA. It directs all state agencies to act in a manner consistent with local restrictions and ordinances.²¹⁷ While this appears to be a generous grant of power to localities, it also raises some important issues. First, what exactly does the phrase "in a manner consistent with the provisions" of local programs require of state agencies?²¹⁸ The degree of consistency required of state agencies to satisfy the CBPA remains a crucial uncertainty. If the CBPA stated "to the maximum extent practicable" as in the CZMA, then the answer would be much easier to predict.

The corollary to the first issue is who has the power to determine and enforce consistency under the CBPA. The CBPA provides the CBLAB with the power to enforce the CBPA against localities,²¹⁹ but is silent on the issue of enforcement against other state agencies. One interpretation would have the state agencies govern themselves, by making their own consistency determinations. Another possibility would allow localities to institute legal actions to determine and enforce consistency. Presumably, localities would bring an action for an injunction or possibly a writ of mandamus to

216. VA. CODE ANN. § 10.1-2113 (Repl. Vol. 1989).

The authorities granted herein are supplemental to other state, regional and local governmental authority. No authority granted to a local government by this chapter shall affect in any way the authority of the State Water Control Board to regulate industrial or sewage discharges under Articles 3 (§ 62.1-44.16 *et seq.*) and 4 (§ 62.1-44.18 *et seq.*) of the State Water Control Law (§ 62.1-44.1 *et seq.*). No authority granted to a local government by this chapter shall limit in any way any other planning, zoning, or subdivision authority of that local government.

Id.

217. *Id.* § 10.1-2114. All agencies of the Commonwealth shall exercise their authorities under the Constitution and laws of Virginia in a manner consistent with the provisions of comprehensive plans, zoning ordinances and subdivision ordinances that comply with §§ 10.1-2109 and 10.1-2110. *Id.* Compare VA. CODE ANN. § 15.1-457 *with id.*

218. See *supra* note 84 and accompanying text.

219. VA. CODE ANN. § 10.1-2104 (Repl. Vol. 1989). "The Board shall have the exclusive authority to institute legal actions to ensure compliance by local governing bodies with this chapter and with any criteria or regulations adopted hereunder." *Id.*

force state agencies to conform with the local programs. However, since the CBPA does not expressly grant localities the authority to institute such actions, Dillon's Rule may prevent localities from doing so, unless the court is willing to infer such a grant of authority from the CBPA. The last possibility would have the CBLAB instituting actions against other state agencies on behalf of the localities, either at the localities' request or on the CBLAB's own initiative.

Regardless of the method of enforcement permitted under the CBPA, the issue may be moot since the VCRMP prescribes its own method for enforcing programs within the VCRMP. Assuming the CBPA is incorporated into the VCRMP, there will be at least one method of enforcement available, in addition to whatever other means of enforcement are permissible under the CBPA.

The VCRMP, as indicated previously, is a state program designed to protect the coastal resources of Virginia in conjunction with the coastal resources of neighboring states. The VCRMP operates on a "networking" system.²²⁰ Under this system, all the state agencies which regulate matters relating to coastal zone management are linked together through the Council on the Environment (COE), which coordinates the activities of the various agencies.²²¹

While the COE is not statutorily empowered to coordinate and control the various state agencies' actions, it does have authority stemming from an executive order.²²² The order directs all state agencies to exercise their powers in a manner consistent with the VCRMP and in a manner which promotes coordination among those agencies.²²³ Furthermore, the order requires state agencies that conduct activities which may affect coastal resources conduct the activities "in a manner consistent with and supportive of [the VCRMP]."²²⁴ Still, the executive order does not give localities a judicial recourse for violations of their local programs by state agencies. Instead it offers an administrative method for enforcing the local programs.

As an administrative method for enforcement, the VCRMP has its own guidelines and procedures for ensuring consistency and co-

220. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at IV-3.

221. *Id.* at IV-4.

222. Exec. Order No. 13 (1986).

223. *Id.*

224. *Id.*

operation between the various state agencies. Within the VCRMP, there is a hierarchy of authority that oversees the management and coordination of the "network" elements, *i.e.* the state agencies. Every person who is within the line of authority is required to exercise their authority in a manner that furthers the goals of the VCRMP.²²⁵ On the bottom of the hierarchial ladder are the various state agencies which operate according to their own programs.²²⁶ Next in line is the COE which acts as the program manager.²²⁷ COE is headed by its administrator, who is under the direction of the Secretary of Natural Resources.²²⁸

The COE has the responsibility of monitoring the various agencies' actions in order to recognize and address any consistency problems that might arise within the state.²²⁹ The COE oversees the agencies and ensures their consistency with the VCRMP by utilizing various monitoring devices.²³⁰ When consistency problems do arise within the state government, the administrator confers with the appropriate agency head to resolve the inconsistency.²³¹ If the administrator and the agency head cannot resolve the inconsistency, then the Secretary of Natural Resources is called upon to settle the matter.²³² The secretary may resolve the problem through his own authority, or consult with other cabinet offices.²³³ If the Secretary of Natural Resources cannot resolve the inconsistency then, as a last resort, the Governor is responsible for resolv-

225. "Any person having authority to resolve consistency problems under the terms of this Executive Order shall resolve those problems in a manner which furthers the goals and objectives of the Program as set forth above and in accordance with existing state law, regulations and administrative procedures." *Id.*

226. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at IV-3.

227. *Id.* at IV-4. The Council on the Environment was authorized to assist the Secretary of Natural Resources in carrying out the responsibilities with respect to the VCRMP under VA. CODE ANN. § 10-186. *Id.* at IV-1.

228. NATIONAL OCEANIC & ATMOSPHERIC ADMIN., *supra* note 101, at IV-1 to -5.

229. *Id.* at IV-4.

230. *Id.* The Council on the Environment monitors the agencies under the VCRMP "through review of the following types of information:

- Notices of applications for state environmental permits.
- Periodic reports by state agencies and permit applications and issuances, etc.
- Agendas and minutes of agency meetings.
- Other state agency publications such as newsletters.
- News Media.
- Comments and questions by interested parties." *Id.*

231. *Id.*

232. *Id.* at IV-5.

233. *Id.*

ing the matter.²³⁴

Uncertainties still exist concerning the position of localities within the VCRMP. Based on the existing VCRMP networking system, the CBPA, if incorporated into the VCRMP, should be represented within the VCRMP by the Chesapeake Bay Local Assistance Board and possibly by the individual localities. In the event a state agency consistency problem arises, the local government affected by the state agency's action may have the option of directly notifying the COE, or notifying the CBLAB which in turn could notify the COE. If a state agency's actions violated a locality's program, the COE would presumably contact the violating agency and begin the previously mentioned administrative procedure for effectuating agency consistency.

VI. LOCALITIES—PRIVATE LAND OWNERS

A. *Fifth Amendment Taking Considerations in the Administration of the Chesapeake Bay Preservation Act*

Essentially, the fifth amendment's "taking clause" requires the government to pay just compensation to private individuals whose property is taken for the public good.²³⁵ Conversely, the government does not have to pay for incidental harm to private property occasioned by the exercise of the police power.²³⁶

Courts have recognized, however, that an excessive use of the police power can constitute a taking, thus requiring compensation. This concept is known as inverse condemnation. The difficult issue is determining when the legitimate exercise of the police power is so excessive that it constitutes a taking. Since 1978, the Supreme Court has decided a number of significant "takings" cases which cast light upon this and other takings issues.²³⁷

The Court has not articulated a test for determining what constitutes a taking,²³⁸ but a review of the Court's opinions since 1978

234. *Id.*

235. U.S. CONST. amend. V.

236. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

237. See *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Agins v. City of Tiberon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 428 U.S. 104 (1978).

238. *E.g.*, *Penn Central Transp. Co.*, 438 U.S. at 124 ("[t]his Court, quite simply, has

suggests that it commonly uses a structured analysis. The Court looks at whether the regulation: (1) substantially advances a legitimate state interest; and (2) the extent to which it deprives the owner of the use of his land.²³⁹ Robert H. Freilich and Stephen P. Chinn call the first step the "legitimacy analysis" and break it down into a two-prong inquiry.²⁴⁰ According to Freilich and Chinn, the Court examines: (1) whether the purpose of the regulatory action is a "legitimate state interest," and if so, (2) whether the means used to achieve the objective "substantially advance the intended purpose."²⁴¹ "If the regulatory action passes muster under the legitimacy review, it is only then that the court must undertake the second inquiry into the regulation's economic impact on the property owner."²⁴²

The sovereign's interest is probably the most dynamic portion of the equation because it constantly changes in order to meet the needs of a changing society. Both the United States Supreme Court²⁴³ and the Supreme Court of Virginia²⁴⁴ recognized the fluid nature of the sovereign's interest in their early zoning decisions. Since the early sixties many environmental laws and regulations have been promulgated in order to meet the explosion of environmental concerns: water pollution, air pollution, the greenhouse effect, acid rain, ozone depletion, oil spills, hazardous waste, and species extinction. It is unlikely that a reviewing court would find that a state is without a legitimate interest in protecting the environment. Indeed, in a state like Virginia, which has placed a clean

been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons").

239. *Nollan*, 483 U.S. at 834 ("[w]e have long recognized that land-use regulation does not affect a taking if it 'substantially advance[s] legitimate state interests' and does not 'deny any owner economically viable use of his land'"); *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 492-93 ("[n]onetheless, we need not rest our decision on [the legitimacy of the police power] alone, because petitioners have also failed to make a showing of diminution of values sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases"); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land").

240. Freilich & Chinn, *Finetuning the Taking Equation: Applying it to Development Exactions, Part I*, LAND USE L. & ZONING DIG., Feb. 1988, at 3, 8.

241. *Id.*

242. *Id.*

243. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

244. See *West Bros. Brick v. City of Alexandria*, 169 Va. 271, 281, 192 S.E. 881, 885 (1937).

environment section in its constitution,²⁴⁵ the state interest in land use decisions adversely affecting the natural environment is direct and compelling.²⁴⁶ Thus, in most cases, little would be achieved by challenging the CBPA on the ground that its purpose is not a legitimate state interest.

In Virginia, localities historically have been subject to a kind of legitimacy analysis called Dillon's Rule.²⁴⁷ Thus, determining what constitutes a "legitimate local interest" is relatively simple because the General Assembly decrees these interests. Under the CBPA the localities are given a mandate to: (1) protect water quality; and (2) protect certain lands "called Chesapeake Bay Preservation Areas."²⁴⁸ It is difficult to imagine that local zoning would be declared a taking based upon this initial component of the legitimacy review.

245. VA. CONST. art. XI, § 1.

246. Virginia's interest is not without limit, however. It remains subject to challenge on grounds of federal preemption. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (zoning ordinance restricting hours of operation of planes preempted by pervasive federal regulation); *Lauricella v. Planning and Zoning*, 32 Conn. Supp. 104, 342 A.2d 374 (1974) (state law regulating tidal wetlands preempted local ordinance). *But see Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (local ordinance regulating ship air emissions not preempted by federal regulatory scheme that was for different purpose); *DeCoals, Inc. v. Board of Zoning Appeals*, 284 S.E.2d 856 (W. Va. 1981) (upholding zoning prohibition on fugitive dust from coal tipple notwithstanding regulatory permits issued by West Virginia Department of Natural Resources, West Virginia Air Pollution Control Commission, and Department of the Army Corps of Engineers).

For additional cases on preemption, see *Pace v. Board of Adjustment*, 492 So. 2d 412 (Fla. Dist. Ct. App. 1986); *People v. Poveromo*, 71 Misc. 2d 524, 336 N.Y.S.2d 764 (N.Y. Crim. Ct. 1972); *Harvard Refuse, Inc. v. City of Cleveland*, 18 Ohio App. 3d 80, 481 N.E.2d 656 (1984); *Municipality of Monroeville v. Chambers Dev. Corp.*, 88 Pa. Commw. 603, 491 A.2d 307 (1985); *Sunny Farms, Ltd. v. North Codorus*, 81 Pa. Commw. 371, 474 A.2d 56 (1984); *J.M. Mills, Inc. v. Murphy*, 116 R.I. 54, 353 A.2d 661 (1976); *Wisconsin's Env'tl. Decade, Inc. v. Department of Natural Resources*, 85 Wis. 2d 518, 271 N.W.2d 69 (1978).

In general, these cases attempt to determine one of the following: (1) whether there is express preemption; if not, has the dominant legislative body either (2) created a scheme so pervasive as to make reasonable inference that no room is left to supplement; or (3) whether interest is so dominant that it will be assumed to preclude other laws.

For cases considering commerce clause implications of environmental legislation, compare *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (New Jersey ban on out-of-state garbage fell "squarely within the area that the commerce clause [put] off limits to state regulations because New Jersey acted with protectionist reasons") with *Shayne Bros. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984) (District's prohibition on receiving Maryland and Virginia trash does not violate the commerce clause because the district acted in proprietary capacity). *See also Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 643 F. Supp. 127 (D. Or. 1986); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987).

247. *See supra* note 26 and accompanying text.

248. VA. CODE ANN. § 10.1-2100 (Repl. Vol. 1989).

However, the pale can be transgressed. For example, the January Draft Regulations circulated by the CBLAB provided that “[a] program shall consist of those elements which are necessary or appropriate to . . . [m]inimize adverse impacts on the quality of state waters and *aquatic habit*. . . .”²⁴⁹ It is not entirely clear what was contemplated by the directive to protect aquatic habit. It is clear, however, that to ensure validity under the first prong of a legitimacy analysis, localities should restrict themselves to the two interests articulated in the preamble of the CBPA; protecting water quality and Chesapeake Bay Preservation Areas.

The second prong of the legitimacy analysis is the review of the means chosen to implement the sovereign’s interest. This prong was discussed in depth in the landmark case of *Nollan v. California Coastal Commission*.²⁵⁰ *Nollan* invalidated a California regulation which required a homeowner to give a lateral easement across his property as a condition for a building permit. The regulation was necessary because of the state’s interest in protecting the public’s view and psychological awareness of the beach.²⁵¹ In rejecting California’s regulation, the Court did not challenge the state’s interest but, rather, the means employed:

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any “psychological barrier” to using the public beaches. . . .²⁵²

Indeed, the Court went on to characterize California’s exaction as “‘an out-and-out plan of extortion.’”²⁵³

The *Nollan* decision has forced lawyers to reexamine this second component of the analytical process. Uncertainty now exists as to how tightly tailored the regulation must be to the goal, and whether it is proper to have an intermediate or strict level of scru-

249. January Draft Regulations, *supra* note 88, at § II.1.B. (emphasis added).

250. 483 U.S. 834 (1987); *see* *Agins v. Tiburon*, 447 U.S. 255, 260. (“[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests”) (emphasis added).

251. Psychological awareness of clean water is not a legitimate interest of Virginia localities under the CBPA.

252. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 838 (1987).

253. *Id.* (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

tiny applied to local land use decisions when a constitutional right,²⁵⁴ secured by the Bill of Rights, is at issue. Furthermore, it is not known whether *Nollan* is limited to exaction cases. The relationship between "interest" and "method" should be the focus of the next round of takings cases. As a result of this uncertainty, localities are at risk of regulatory takings under the CBPA.

Several qualitative tests for judging the relationship between interest and method have emerged.²⁵⁵ In Virginia, reviewing the holding in *Board of County Supervisors v. Rowe*²⁵⁶ is appropriate because it was cited favorably in *Nollan* on this issue.

Rowe concerned an ordinance which required the dedication of a fifty-five feet wide strip of land as a precedent to development. The purpose of the required dedication was to provide land necessary for providing a road, "the need for which [was] substantially generated by public traffic demands rather than by proposed development."²⁵⁷ The Supreme Court of Virginia found this mandatory dedication violated article I section 11 of the Constitution of Virginia which expressly and unequivocally provides "that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation."²⁵⁸ The violation resulted because the Supreme Court of Virginia found that the development did not create the primary need for the road.²⁵⁹ Hence, the regulation was not reasonable.²⁶⁰

254. Such as the fifth amendment's protection against taking private property for public purpose without payment of just compensation.

255. See Brooks, *Exactions After Nollan*, 8 VA. J. NAT. RESOURCES L. 141, 148 (1988).

256. 216 Va. 128, 216 S.E.2d 199 (1975). The relationship between method and means was not a significant component of the Supreme Court of Virginia's opinion. Precisely how the Supreme Court of Virginia will handle this issue remains to be seen.

257. *Id.* at 138, 216 S.E.2d at 208.

258. *Id.*

259. The precise question before us is whether a local governing body has the power to enact a zoning ordinance that requires individual land owners, as a condition to the right to develop their parcels, to dedicate a portion of their fee for the purpose of providing a road, the need for which is substantially generated by public traffic demands rather than by the proposed development.

Id. at 138, 216 S.E.2d at 208-09.

260. See also *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297, 301 (1980) ("[t]he distinction . . . which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made . . ."); *Town of Longboat Key v. Lands End, Ltd.*, 433 So. 2d 574, 576 (Fla. Dist. Ct. App. 1983) ("[e]xactions . . . are permissible so long as [they] . . . offset reasonable needs sufficiently attributable to the [development]'"); *J.E.D. Assocs. v. Town of Atkinson*, 121 N.H. 581, —,

Localities should consider each proposed land use decision under the CBPA using the this legitimacy analysis and should limit their activities to protection of water quality and Chesapeake Bay Protection Areas. Ordinance provisions should be tailored, as the circumstances warrant, to protecting these interests.²⁶¹ In this way localities should withstand a legitimacy review.

As noted earlier, however, if an ordinance passes a legitimacy review, the review process is not complete. The court must then decide whether the regulation has gone too far and whether "the public at large, rather than a single owner, must bear the burden of [the] exercise of state power in the public interest. . . ."²⁶² Exactly when a regulation goes so far as the constitute a taking is one of the most perplexing questions of our time. For practical purposes, one must comb the many "takings" cases and find a favorable decision with similar facts, because determining when diminution reaches a certain magnitude, so as to amount to an exercise of eminent domain "*depends upon the particular facts.*"²⁶³

A few general principles have emerged which are useful in determining whether a taking has occurred. These include:

(1) Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership that do not constitute a taking;²⁶⁴ (2) mere assertion of regulatory jurisdiction by a governmental body does not constitute a taking;²⁶⁵ (3) the regulation must deprive the owner of all reasonable use of his property *viewed as a whole* in order to constitute a taking;²⁶⁶ (4) a physical invasion by the sovereign constitutes a tak-

432 A.2d 12, 15 (1981) ("[a locality] may not attempt to extort from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to *reasonable* regulations").

261. Tailoring zoning ordinances to protection of the resource is made more difficult by the Board's determination that the Board, and not localities, delineates the scope of Chesapeake Bay Preservation Areas. Under the regulations published for comment, zoning must exclude development within one hundred feet of the tidal shore. The VIMS factors, however, suggest that not all shoreline is sensitive. See *supra* notes 97-98 and accompanying text. Statewide regulations, as opposed to site specific determinations should encourage development of this prong of the "taking" test.

262. *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 492 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

263. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

264. *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980).

265. *Hodell v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981).

266. No taking occurs (at least in Virginia) unless an individual is deprived of all reasonable use of his property. See *Commonwealth v. County Utils.*, 223 Va. 534, 542, 290 S.E.2d

ing for which compensation is required;²⁶⁷ and (5) a regulation can "take" all property without requiring compensation if the regulation acts to prevent a nuisance.²⁶⁸

867, 872 (1982):

All citizens hold property subject to the proper exercise of the police power for the common good. Even where such an exercise results in substantial diminution of property values, an owner has no right to compensation therefore [N]o taking occurs in these circumstances unless the regulation interferes with all reasonable beneficial uses of the property, taken as a whole.

Id.; accord *Boggs v. Board of Supervisors*, 211 Va. 488, 491, 178 S.E.2d 508, 510 (1971) ("if the application of a zoning ordinance has the effect of completely depriving the owner of the beneficial use of his property by precluding all practical uses, the ordinance is invalid as to that property"). Compare *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("[w]e merely hold that where the government's activities have already worked a taking of all use of property . . . [compensation is required]").

In *Jackson v. City Council*, 659 F. Supp. 470 (W.D. Va. 1987) the federal courts were called upon to determine whether an ordinance which prohibited off-site advertisements (billboard ban) violated the fifth amendment. In holding that it did not, the court stated: "[T]he plaintiff must shoulder a heavy burden in establishing a taking claim. . . . An ordinance which merely deprives the owner of the highest and best use of his property, or causes a diminution of its market value, does not constitute an unlawful taking." *Id.* at 475-76.

What constitutes "all reasonable" or "all practical uses" is uncertain and any case may well turn on the ability of the advocate. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value is not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (diminution in value by over 90% is not a taking); *William C. Haas & Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (diminution in value of 95% is not a taking — \$2,000,000 to \$100,000); *Turnpike Realty v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972); (diminution in value at 88% is not a taking). But see *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964) (diminution of 75% is a taking — \$800,000 to \$60,000). Note that in *Commonwealth v. County Utils.*, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982) the Virginia Supreme Court held that "in the case of a regulated utility, the State may, under the police power, impose controls that are even more stringent than those that can be impressed upon other private property owners." *Id.* at —, 290 S.E.2d at 872.

267. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). ("[w]e conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"). Pay particular attention to this distinction when dealing with "overlay zones" such as flood plains or Chesapeake Bay Preservation Areas. Compare *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure of mine to prevent strike constitutes a taking) with *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (wartime directive that nonessential gold mines cease operations is not a taking since no physical possession resulted).

268. In *Miller v. Schoene*, 276 U.S. 272 (1928), for example, the Supreme Court was faced with a takings challenge to Virginia's Cedar Rust Act. In this case, the state had ordered the plaintiff to cut down a large number of ornamental red cedar trees as a means of preventing communication of a rust or plant disease with which they were infected to an apple orchard in the vicinity. Neither the act as written or applied provided for compensation for trees thus ordered destroyed. The Court rejected the takings challenge:

It would have been nonetheless a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of

In sum, a two-step analysis appears to be a sound, structured way of considering takings issues. The first step must determine whether the sovereign has a legitimate interest in the subject of the regulation and if so, whether the regulation is reasonably related to the expressed interest. The second step must determine whether the regulation has gone so far that the government, rather than the individual, must bear the burden of the expense. The understanding and application of these factors by localities should reduce their exposure to takings violations.

B. *Vested Rights in Relation to the Chesapeake Bay Preservation Act*

“By its nature, the doctrine of vested rights is fraught with inconsistencies. Balancing the equities will always be a case-by-case determination based upon the facts a court deems relevant under the circumstances.”²⁶⁹

As may be expected with many land use regulations, the implementation of the CBPA is destined to result in landowners and developers bringing actions involving the issue of “vested rights.” Therefore, it will be useful to review the theory of “vested rights”

property in order to save another which, in the judgment of the legislature, is of greater value to the public.

Id. at 279; see *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (sustaining an ordinance prohibiting the mining of sand and gravel below the water table; the Court reasoned that the prohibition of a noxious use did not entitle the owners to compensation); *Mugler v. Kansas*, 123 U.S. 623 (1887) (sustaining a state law prohibiting the manufacturer and sale of liquor on the basis that the state had the power to deem such activities public nuisances and prohibit them); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (in which the Court upheld an ordinance banning livery stables within the city limits because they were a public health nuisance). See also *Penn Central Transp. v. City of New York*, 438 U.S. 104, 144 (1978) (“[a]s early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate . . .” (Rehnquist, J. dissenting); *First English Evangelical Luthern Church v. County of Los Angeles*, 482 U.S. 304, 313 (1987) (“[w]e accordingly have no occasion to decide . . . whether the County might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State’s authority to enact safety regulations”).

Of course, where regulation of a “nuisance” ends and a taking for public benefit begins often begs the question. Compare *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (regulation of wetland is within the police power because it prohibits land users from harming adjacent navigable waters) with *Morris County Land Improvement Co. v. Township of Parsippany Troy Hills*, 40 N.J. 539, 193 A.2d 32 (1963) (regulation of wetland requires compensation because it is designed to confer a benefit on the public-clean water and water retention area.)

269. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *HANDLING THE LAND USE CASE* § 9.25.5 (1984).

and the foreseeable effect these rights will have on the implementation of the CBPA and vice versa. Section 10.1-2115 of the Code of Virginia is designed to protect the vested rights of landowners by specifically excluding vested rights from the scope of the CBPA.²⁷⁰ Essentially, this section is a "grandfather clause". While this section resolves the question of whether the CBPA affects vested rights, it raises and leaves unresolved the issue of defining and identifying "vested rights" and determining when they vest.

1. The Race to Vest

Generally, vested rights are considered to be those rights that "cannot be interfered with by retrospective laws" or divested without the owner's consent unless by "established methods of procedure and for the public welfare."²⁷¹ Still, this kind of definition fails to provide any insight as to when a vested right exists. Instead, it merely highlights the qualities of a vested right. The more significant point is determining how and when vested rights are created.

The "vested rights" theory is an off-shoot of the "takings" doctrine.²⁷² If the enforcement of a new regulation will result in an unconstitutional taking of existing property rights that have already "vested," then the regulation will not apply.²⁷³ In the same vein, the "nonconforming use" doctrine grants a large degree of protection to lawfully existing and established land uses that predated existing regulations or prohibitions that would otherwise make such uses illegal.²⁷⁴ The "vested rights" doctrine is the next progression of the "nonconforming use" doctrine and extends protection to land uses that are in the process of being developed, thereby allowing them to be completed and maintained.²⁷⁵ Therefore, if a landowner is unable to show that a proposed use is sufficiently established to qualify for nonconforming use status, the owner will have to satisfy a vested rights test in order to receive

270. "The provisions of this chapter shall not affect vested rights of any landowner under existing law." VA. CODE ANN. § 10.1-2115 (Repl. Vol. 1989).

271. BLACK'S LAW DICTIONARY 1402 (5th Ed. 1979); see also *American States Water Serv. v. Johnson*, 31 Cal. App. 2d 606, 88 P.2d 770, 774 (1939).

272. S. ROBIN, *ZONING AND SUBDIVISION LAW IN VIRGINIA* 66 (1980).

273. *Id.*

274. Cunningham & Kremer, *Vested Rights, Estoppel and the Land Development Process*, 29 HASTINGS L.J. 625, 669 (1978); see Hagman, *The Vesting Issue: The Rights of Fetal Development vis a vis the Abortions of Public Whimsy*, 7 ENVTL. L. 519, 526 (1977).

275. Hagman, *supra* note 274, at 526.

protection from the new regulation.²⁷⁶

In either nonconforming use or vested rights cases, the main issue is whether the "landowner's activities acquired sufficient status to be accorded legal protection against new laws."²⁷⁷ Nonconforming use cases ask if the use was in existence when the law took effect, whereas vested rights cases ask "whether the proposed use had acquired so many of the characteristics of a property right that it should receive protection as *if* it were an *existing* use of property."²⁷⁸

The "vesting rule" and the "equitable estoppel rule" are the two basic tests used to determine whether a right has been acquired to complete a project as conceived.²⁷⁹ However, these rules are frequently confused with one another or treated as the same rule.²⁸⁰ The vesting rule is based on principles of common law and constitutional law, and focuses on the existence of real property rights that cannot be taken away by government regulation.²⁸¹ The estoppel rule, which involves a balancing approach by necessity, is derived from equity and focuses on whether it would be equitable to allow the government to repudiate its prior conduct.²⁸²

The estoppel test, which acts to estop a local government from enforcing its zoning regulation, has been stated a number of ways.²⁸³ A frequently used formulation of the rule states:

276. Cunningham & Kremer, *supra* note 274, at 669.

Though not actually a vested rights case, Virginia Electric & Power Co. v. Board of County Supervisors, 226 Va. 382, 309 S.E.2d 308 (1983) is an example of where an owner was unable to show a sufficiently established nonconforming use nor a vested right to develop the use. Virginia Electric & Power Co. sought to upgrade an existing use, a transmission line, without conforming to a use regulation. Despite having originally expended in excess of \$350,000 to acquire the right of way and having used it as a lower voltage transmission line, the court noted that there was no evidence Virginia Electric & Power Co. acquired the right of way with a plan to upgrade the line and, therefore, required compliance with the applicable regulation.

277. Cunningham & Kremer, *supra* note 274, at 671.

278. *Id.*

279. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *supra* note 269, at § 9.25.1.

280. Cunningham & Kremer, *supra* note 274, at 648. Courts often improperly apply the equitable estoppel rule resulting in an "imperfectly formulated rationale." See Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 65. This confusion of the rules is an example of the courts either not understanding what they are saying or saying something other than what they mean.

281. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *supra* note 269, at § 9.25.1.

282. *Id.*

283. D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 5.10 (2d ed. 1986).

A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith, (2) upon some act or omission of the government, (3) has made such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he had ostensibly acquired.²⁸⁴

The vesting rule has also been stated in various ways depending upon the jurisdiction.²⁸⁵ Often both rules are referred to as zoning estoppel²⁸⁶ and in either case "the developer or builder must demonstrate (1) the existence of a valid government act, (2) substantial reliance on the government act, (3) good faith, and (4) that the rights are substantial enough to make it fundamentally unfair to eliminate those rights."²⁸⁷

The leading Virginia case on this point is *Board of Supervisors v. Medical Structures, Inc.*²⁸⁸ In this case, the Supreme Court of Virginia declared:

[W]here. . . a special use permit has been granted under a zoning classification, a bona fide site plan has thereafter been filed and diligently pursued, and substantial expense has been incurred in good faith before a change in zoning, the permittee then has a vested right to the land use described in the use permit and he cannot be

284. Cunningham & Kremer, *supra* note 274, at 649; see 9 P. ROHAN, ZONING AND LAND USE CONTROLS § 52.08[4][b] (1979); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.13 (2d ed. 1976) (quoting *North Miami v. Marquies*, 289 So. 2d 424 (Fla. Dist. Ct. App. 1974)).

285. P. ROHAN, *supra* note 284, at § 52.08[4][b]; see Hagman, *supra* note 274, at 519.

To vest the right to develop land under the [Washington Vested Rights Rule], a party must meet the following three-part test: A right to develop land vests *if the applicant files a building permit application that:*

- 1) Complies with the existing zoning ordinances and building code (Compliance);
- 2) Is filed during the effective period of the ordinance under which the applicant seeks to develop (Timeliness); and
- 3) Is sufficiently complete (Completeness).

Note, *Washington's Zoning Vested Rights Doctrine*, 57 WASH. L. REV. 139, 143 (1981).

286. Heeter, *supra* note 280 at 66.

287. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *supra* note 269, at § 9.25.2.

288. 213 Va. 35, 192 S.E.2d 799 (1972) (held that Medical Service had acquired a vested right to completion of their project based on the special use permit and their good faith expenditures in reliance on the zoning ordinance in force at the time of their original site plan application); see *Board of Supervisors v. Cities Serv. Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972) (since Cities Service had purchased property for \$186,500 in reliance upon the use permit and had expended substantial sums of money to prepare its site plan, thereby substantially changing its position in good faith reliance on the existing zoning of the property, it obtained a vested right in the land use upon the filing of the site plan); see also *United States v. County Bd.*, 487 F. Supp. 137, 141 (E.D. Va. 1979) (the United States tried to prevent the construction of highrise buildings that would create an unsightly backdrop to national monuments, but the court found vested rights existed).

deprived of such use by subsequent legislation.²⁸⁹

This approach to vested rights amounts to an exceptionally protective "early vesting" doctrine,²⁹⁰ particularly in comparison to other jurisdictions and model acts.²⁹¹ Unfortunately, a general rule has not evolved from the Virginia vested rights cases where special use permits were not present; therefore, it is difficult to predict how Virginia courts will apply the rule when presented with different factual settings. General principles from other jurisdictions may provide valuable guidance.

The governmental conduct element, though not considered to be as important as the good faith or reliance elements,²⁹² must be such as to give the builder authorization to develop the use (*i.e.*, a building permit).²⁹³ It has been observed that a permit is merely "a peg upon which an owner can hang his reliance," rather than an immunity from a zoning change.²⁹⁴ The existence or the absence of a zoning ordinance is not a governmental act that warrants reliance.²⁹⁵ Therefore, the purchase of land in reliance on an existing zoning classification will not endow the purchaser with a vested right to commence uses authorized by such classification after a more restrictive amendment is adopted.²⁹⁶ Similarly, a person who purchases land in reliance upon its current zoning classification

289. 213 Va. 355, 358, 192 S.E.2d 799, 801 (1972).

290. L. BEVIER & D. BRION, *supra* note 36, at 123.

291. *E.g.*, *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976) (upon the passage of the California Coastal Zone Conservation Act, a developer, who had spent over two million dollars in reliance of preliminary permits and approval granted by the proper officials, was denied the necessary approval from the Coastal Commission needed to obtain a building permit and was found to lack vested rights by the court); see MODEL LAND DEV. CODE § 2-309 (1975).

292. *Heeter*, *supra* note 280, at 82. "If a court is willing to allow zoning estoppel and finds that good faith and substantial reliance were present, it will find some sort of governmental conduct upon which the owner can be said to have relied." *Id.*

293. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *supra* note 269, at § 9.25.2. In Virginia, courts have repeatedly found zoning site plan approvals to be presumptively valid government acts upon which landowners may claim reliance. *United States v. County Bd.*, 487 F. Supp. 137 (E.D. Va. 1979); *Byrum v. Board of Supervisors*, 217 Va. 37, 225 S.E.2d 369 (1976); *Bolinger v. Board of Supervisors*, 217 Va. 185, 227 S.E.2d 682 (1976).

Also, the decisions discussed *supra* note 288 indicate that the Supreme Court of Virginia is willing to recognize a special use permit as a valid government act.

294. *Heeter*, *supra* note 280, at 83.

295. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *supra* note 269, at § 9.25.4 (citing *Town of Vienna v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978)).

296. R. ANDERSON, *supra* note 284, at § 6.20; see *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 192 S.E. 881 (1937), *reh'g denied*, 302 U.S. 781; see also *Town of Vienna v. Kohler*, 218 Va. 966, 244 S.E.2d 542 (1978).

does not acquire a vested right to the continuation of that classification²⁹⁷ Further, a landowner does not have a vested right to continuation of the zoning of the general area in which he resides.²⁹⁸

However, it is crucial that the government act being relied upon is valid. A landowner who relies upon a government act that is improper runs the serious risk of failing to establish a nonconforming use.²⁹⁹ A building permit that is in conflict with an applicable zoning ordinance is considered unauthorized and void ab initio; therefore, such a permit confers no vested rights on the permittee, even though it was issued in good faith.³⁰⁰ In essence, a permit issued in violation of a zoning ordinance confers no greater rights upon a permittee than the ordinance itself.³⁰¹ Furthermore, Virginia courts have declared that the doctrine of estoppel does not apply to the discharge of governmental functions by local governments.³⁰²

Unless a landowner relies in good faith upon official conduct,³⁰³ a

297. R. ANDERSON, *supra* note 284, at § 4.27; *see also* Allgood v. Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972); *Kohler*, 218 Va. 966, 244 S.E.2d 542.

298. R. ANDERSON, *supra* note 284 at § 4.27; *see also Kohler*, 218 Va. 966, 244 S.E.2d 542.

299. *See, e.g.,* Board of Supervisors v. Booher, 232 Va. 478, 352 S.E.2d 319 (1987); Town of Blacksburg v. Price, 221 Va. 168, 266 S.E.2d 899 (1980); Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968).

300. *See Booher*, 232 Va. 478, 352 S.E.2d 319 (1987) (upon the amendment of a zoning ordinance, a landowner was forced to cease an established use several years after having his property rezoned and the use approved by the zoning administrator since the use was never a permitted use in any of the county's zones); Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968) (a property owner was issued a building permit to construct a store. Once construction had begun, an official noticed a zoning violation in the building's design and notified that the violation would have to be corrected. The court held that the city was not estopped from withdrawing the permit since it was issued in violation of a zoning ordinance and that the zoning regulation may be enforced notwithstanding the fact that the permittee and commenced construction in reliance of the permit); Town of Blacksburg v. Price, 221 Va. 168, 266 S.E.2d 899 (1980) (a person leased commercial property, submitted a complete set of building and site plans to the proper officials, who in turn issued him a building permit, then began construction immediately. After completing nearly 60% of the construction and having spent or committed to spend about \$100,000, he was informed that he had to change part of his building plans in order to conform with the zoning ordinance).

301. Segaloff v. City of Newport News, 209 Va. 259, 163 S.E.2d 135 (1968); Hurt v. Caldwell, 222 Va. 91, 279 S.E.2d 138 (1981) (the court declared that a building permit issued in violation of the law confers no greater rights upon a permittee than an ordinance itself. "An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute") (quoting *Richmond v. County of Henrico*, 185 Va. 176, 189, 37 S.E.2d 873, 879 (1946)).

302. Board of Supervisors of Washington County v. Booher, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987); Segaloff v. City of Newport News, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968).

303. S. ROBIN, ZONING AND SUBDIVISION LAW IN VIRGINIA 68 (1960). It should be noted that

right to a nonconforming use will not be established.³⁰⁴ The good faith element of the vested rights tests focuses on the mental attitude of the landowner and is often defined by "what constitutes a lack of good faith."³⁰⁵ An owner must act with honest intentions and not accelerate his development or increase his investment in an attempt to escape rezoning through estoppel.³⁰⁶ Courts seem to apply a subjective test for good faith, although an objective measure is often applied (*i.e.*, "whether a reasonable property owner would have acted in the fact of such a high probability that the property would be rezoned").³⁰⁷

Courts generally look for a lack of notice of proposed changes in the zoning ordinance or invalidity of the permit.³⁰⁸ Therefore, when construction is continued before an appeal period has expired, the landowner risks a determination of bad faith.³⁰⁹ Similarly, good faith is lacking if a landowner proceeds with improvements which will be proscribed by the adoption of an ordinance that he knows or should know is pending.³¹⁰ In this context, courts have held that good faith actions in reliance on the current zoning refer to obligations incurred in relation to the property before the owner learns of a pending rezoning.³¹¹ However, the fact that an amendment is pending before a local legislature is not found by most courts to be sufficient probability of bad faith.³¹²

A corollary to the good faith element is the "pending ordinance" doctrine, which allows localities to deny an application for zoning relief, if at the time of the application, a zoning ordinance is pend-

property owners and localities must both act in good faith. Therefore, a locality may not delay the processing of a landowner's building application until it can rezone the property so as to disallow the intended use, "with the full intent to defeat the property owner's attempt to act pursuant to the existing zoning." *Id.*

304. R. ANDERSON, *supra* note 284, at § 6.13.

305. Heeter, *supra* note 280, at 77.

306. *Id.* at 78.

307. *Id.* at 79.

308. F. SCHNIDMAN, S. ABRAMS & J. DELANEY, *supra* note 269, at § 9.25.4.

309. *Id.* at 645-46.

310. R. ANDERSON, *supra* note 284, at § 6.05, (Cum. Supp. 1985). A pending ordinance is a new zoning ordinance which has been proposed by a zoning commission, made open to public inspection, and advertised to be discussed at an upcoming public meeting. "However, an ordinance does not become pending to a particular landowner until it is clear that the use applied for is repugnant to the proposed ordinance." *Id.*; see 2 E.C. YOKELY, ZONING LAW AND PRACTICE § 14-5 (4th ed. 1978 & Cum. Supp. 1988).

311. P. ROHAN, *supra* note 284, at § 52.08[4][b].

312. Heeter, *supra* note 280, at 79.

ing which would prohibit the desired land use³¹³ and public notice has been given³¹⁴ If the proposed change is not yet a matter of public record, the applicant is entitled to the permit based upon the zoning existing at the time of the application.³¹⁵

Despite the significance placed upon the good faith element by the majority of jurisdictions, the Supreme Court of Virginia seems to have either downcast the role of good faith or has been willing to presume its presence in the absence of convincing evidence to the contrary. In *Medical Structures*, the court found good faith even though Medical Structures actively continued to seek site plan approval while the notice, hearing, and adoption process was proceeding for a zoning amendment inconsistent with the proposed site plan.³¹⁶ Also, it has been observed that the "Cities Service facts appear to involve a bizarre race between the board of supervisors to rezone and Cities Service to obtain site plan approval."³¹⁷ Regardless of the race, which saw Cities Service risk expenditures on a site plan that was not filed until two months after the board publicly proposed a zoning change, the court was willing to find good faith.³¹⁸

The Supreme Court of Virginia's willingness to find good faith in both *Medical Structure* and *Cities Service* lends itself to alternative interpretations. The holdings may signify a strong judicial policy in favor of development and protecting private rights.³¹⁹ On the other hand, the court may have approached the cases with the view that once the special use permit was obtained, the developer's actions were entitled to a presumption of good faith. In either case, it is apparent that the court must have considered the developer's possession of special use permits to be a critical factor.

313. R. ANDERSON, *supra* note 284, at § 6.05, (Cum. Supp. 1985); see Appeal of Gillies Corp., 430 A.2d 694 (Pa. Commw. 1981).

314. P. ROHAN, *supra* note 284, at § 52.08[4][b]; E.C. YOKELY, *supra* note 310, at § 14-5.

315. P. ROHAN, *supra* note 284, at § 52.08[4][b].

316. Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 357, 192 S.E.2d 799, 801 (1972); L. BEVIER & D. BRION, *supra* note 36, at 61-62. A gap of six years between the grant of the special use permit and the initial filing of the site plan raises the question of whether Medical Structures had been diligent and acted in good faith. It is also unclear on how much of the \$247,500 expenditures was made *after* the zoning amendments were first proposed. L. BEVIER & D. BRION, *supra* note 36, at 63.

317. L. BEVIER & D. BRION, *supra* note 36, at 63 (discussing Board of Supervisors v. Cities Serv. Oil Co. 213 Va. 359, 193 S.E.2d 1 (1972)).

318. *Id.* "Nor does [the court] explain why Cities Service should have been able to rely on the existing zoning when it purchased the property five months *after* the announcement of the proposed zoning change." *Id.*

319. *Id.* at 61-63.

Jurisdictions differ on how substantial the landowner's reliance upon current zoning must be in order for a landowner to establish vested rights in a nonconforming use.³²⁰ This is a particularly sensitive issue in an era of large projects requiring multiple permits from diverse governmental agencies.³²¹ Generally, a use must be "existing and actual" as opposed to "planned or intended," and the use must be "substantial" for a right to vest.³²² Some jurisdictions, such as Virginia, hold that no actual physical construction is required, but that substantial expenditures, the undertaking of considerable contractual commitments, and extensive preparatory work will give rise to vested rights.³²³ However, most courts agree that merely purchasing the land without some greater reliance will not constitute sufficient reliance.³²⁴

Substantial reliance can be measured in various ways.³²⁵ The majority of courts apply a "set quantum" test, which requires the owners to have "changed position beyond a certain set degree or amount, measured quantitatively."³²⁶ Another less common test used in close cases is the balancing test, which requires the court to weigh the owner's interest in establishing a use against the public's interest in enforcing the restriction.³²⁷ Some of the factors courts consider include "the type of preparations made by a property owner prior to putting his property to a certain use, whether the owner acted in good faith, how substantial were the incurred expenses, and whether the expenses were directly related to its intended use."³²⁸

In *Medical Structures*, the Supreme Court of Virginia noted that the site plan³²⁹ is the main obstacle in obtaining a building

320. P. ROHAN, *supra* note 284, at § 52.08[4][b]; Heeter, *supra* note 280, at 85.

321. P. ROHAN, *supra* note 284, at § 52.08[4][b].

322. S. ROBIN, *supra* note 272, at 66; Heeter, *supra* note 280, at 85.

323. P. ROHAN, *supra* note 284, at § 52.08[4][b].

324. Heeter, *supra* note 280, at 86.

325. D. HAGMAN & J. JUERGENSMEYER, *supra* note 283, at § 5.11; Heeter, *supra* note 280, at 85.

326. Heeter, *supra* note 280, at 85; D. HAGMAN & J. JUERGENSMEYER, *supra* note 283 at § 5.11.

327. Heeter, *supra* note 280, at 88.

328. D. HAGMAN & J. JUERGENSMEYER, *supra* note 283, at § 5.11.

329. In general, a "site plan" is a physical plan showing the layout and design of the site of a proposed use, prepared by the building or developer. It generally should indicate the proposed location of all structures, parking areas, and open space on the plot and their relations to adjacent roadways and uses. Specifically, items such as grade elevation levels, drainage plans, means of access, landscaping, screening, architectural features, building dimensions and other elements relevant to the community welfare are

permit, and that once site plans have been approved, permits are almost always issued.³³⁰ This seems to indicate that when determining whether there has been sufficient reliance, the court looks at the greatest obstacle an owner must overcome in the process of establishing a use. Consequently, two main factors the court considers when looking for substantial reliance appear to be: (1) the amount of expenditures made in reliance on a government act; and (2) how far in the development process the owner has progressed.

It is difficult to predict how Virginia courts will react to vested rights challenges to the CBPA until more cases are heard by the Supreme Court of Virginia. The most critical determination to be made by the court is probably the relationship between the good faith requirement and the CBPA. If *Medical Structures* and *Cities Service* foreshadow what is to come, it is likely that many landowners seeking to develop a use will be able to escape the CBPA by racing to vest.

It commonly is recognized that the land rush in Tidewater Virginia is on. It started shortly after passage of the CBPA in March, 1988 and accelerated with the circulation of draft criteria in January, 1989.

Nevertheless, there exists one possible solution to cutting short the vesting race. Under Section 109.1 of the Virginia Uniform Statewide Building Code³³¹ a building official need not issue a building permit unless he is satisfied that "the proposed work conforms to . . . all applicable laws and ordinances."³³² Thus, if a particular project might pose a risk to the Chesapeake Bay or its tributaries, the building official could arguably deny the permit. Authority for this analysis is found in *Polygon Corp. v. City of Seattle*.³³³

In *Polygon*, the Polygon Corporation brought an action against the City of Seattle and the superintendent of buildings³³⁴ to review

properly included in a site plan Under most provisions, a building permit is conditioned upon submission and approval of a site plan.

P. ROHAN, *supra* note 284, at § 55.05[1].

330. Board of Supervisors v. Medical Structures, Inc., 213 Va. 355, 357, 192 S.E.2d 799, 801 (1972).

331. 1 BOARD OF HOUSING & COMMUNITY DEV., Virginia UNIFORM STATEWIDE BUILDING CODE § 109.1 (1984).

332. *Id.*

333. 90 Wash. 2d 59, 578 P.2d 1309 (1978).

334. From the context of the case a "superintendent of buildings" in Washington is equivalent to a "building official" under Virginia's BOCA Code.

a decision denying Polygon's application for a building permit. The denial was based on the proposed building's adverse impact on the environment. The superintendent of buildings found substantive authority to deny application in the Local Building Code and State Environmental Policy Act. The State Environmental Policy Act set forth a state policy of protection, restoration, and enhancement of the environment. At the same time, the Seattle Municipal Code authorized the superintendent of buildings to issue building permits "[i]f the superintendent of buildings is satisfied that the work described in the application for permit and the plans filed therewith conform to the requirements of . . . other pertinent laws and ordinances."³³⁵ The State Environmental Policy Act coupled with the Seattle Municipal Code led the building official to believe that he could deny building permits if a project threatened environmental harm.

The Supreme Court of Washington agreed. The court noted that its ruling was buttressed by a provision in the State Environmental Protection Act providing that "[t]he policies and goals set forth in this Chapter are supplementary to those set forth in existing authorizations of all branches of government of the state, including . . . municipal . . . corporations."³³⁶ The court concluded that the State Environmental Protection Act covered the requirements which existed prior to its adoption. Thus, the court expressly held that the State Environmental Protection Act "confers on the city, acting through its superintendent of buildings, the discretion to deny a building permit application on the basis of adverse environmental impacts disclosed by an EIS."³³⁷

Statutory authority substantially similar to Washington's scheme is found in Virginia's CBPA and the BOCA Code. First, Section 10.1-200 of the Code of Virginia clearly directs localities to protect the Chesapeake Bay and its tributaries. Similarly, Section 10.1-2108 directs localities "to exercise their police and zoning powers to protect the quality of state waters consistent with the provisions of [the CBPA]." Further, Section 10.1-2113 clearly states that the authorities granted within the CBPA are supplemental to other local government authority. Finally, the State BOCA Code conveys the same discretion to Virginia building offi-

335. 90 Wash. 2d at ___, 578 P.2d at 1312-13, (quoting The Seattle Municipal Code § 3.03.020(e)).

336. *Id.* at ___, 578 P.2d at 1313.

337. *Id.*

cial as the Washington BOCA Code.³³⁸ Consequently, it appears that a building official could deny building permits for projects which threaten environmental harm.

This analysis is not without its weakness. In *Polygon*, the building official was able to base his determination of environmental harm upon an environmental impact statement mandated by existing law. An environmental impact statement is not required under similar circumstances in Virginia, and it may be difficult for a building official to justify his or her determination of inconsistency with the CBPA. However, if a means of providing a building official with adequate information is found, the *Polygon* decision remains sound. Indeed, the CBLAB may be suited for providing such information. It is well suited for evaluating the potential impact of shoreline development on water quality. If its comments are substituted for the environmental impact statement, then *Polygon* might control.

Polygon Corporation also contended that the building official's denial of the building permit constituted a de facto rezoning. The Supreme Court of Washington disagreed, stating that:

We find no de facto rezone of the property since the permit denial was not based on the intended multi-family use, but rather on the environmental impacts of the particular plan submitted. The zoning was not changed and Polygon was not deprived of the opportunity to develop its property under the zoning within the parameter of the allowable environmental rights. The EIS here involved even suggest alternative configurations for a multi-family building with less adverse environmental impacts.

Since the permit denial was not a rezone, either in law or in fact, the doctrines and rules which intend such action are not applicable.³³⁹

Thus, if a building official were to deny a building permit because he or she found that the construction of any building in a certain area would violate the CBPA, then it would arguably be a de facto rezoning and thus illegal. This suggests that the decision should be based upon a determination of actual impact as opposed to a determination based upon use. For example, if a zoning ordinance

338. 1 VIRGINIA UNIFORM STATEWIDE BUILDING CODE, NEW CONSTRUCTION CODE § 109.1 (1987).

339. 90 Wash. 2d at ___, 578 P.2d at 1313.

currently allows residential units to be constructed in a flood plain, a building official would not be authorized to prohibit residential uses because he found them to be inconsistent with the CBPA. Presumably, such decision would have to result through the zoning amendment process. However, the building official could base his decision upon inadequate buffers and other means to control run-off into the adjacent tributary of the Bay.

Finally, Polygon Corporation argued that if the State Environmental Policy Act is found to confer substantive authority, it is an unconstitutional delegation of legislative power. The court disagreed with this argument noting that constitutional requirements for such a delegation require that the legislature provide standards defining what is to be done and what body is to accomplish it, as well as procedural safeguards to control arbitrary administrative action. As to the first requirement, the court found that the Act defined the responsibilities of governmental entities, and further noted that the EPA did not act in isolation, but rather was supplemented by an overlay of governmental authorization. "Thus, operative procedural safeguards can be found not only in SEPA, but in the underlying statutes, ordinances, and practices of the agency concerned. One such safeguard lies in the fact that Seattle's building permit application process provided ample opportunity for Polygon to present its views."³⁴⁰ By analogy, Virginia courts should uphold similar actions by Virginia building officials. Less clear is whether the Act articulates adequate standards defining what is to be done and what body is to accomplish it. The locality would likely argue that the CBPA supplies sufficient standards by mandating a protection of state water quality and certain lands, which if improperly developed, may result in substantial damage to the water quality of the Bay and its tributaries. A *Polygon* analysis also is premised upon the right to turn down a project as part of a building permit review. In *Medical Structures*, the Supreme Court of Virginia established a vesting date as the submission of a site plan:

Under current planning practice in many urban localities, the site plan has virtually replaced the building permit as the most vital document in the development process The filing of such a plan creates a monument to the developer's intention, and when the plan is approved, the building permit, except in rare situations, will

340. *Id.* at ___, 578 P.2d at 1313-14.

be issued.³⁴¹

The court understandably discussed this in terms of what is, not what must be. To overcome this, a locality simply must announce a CBPA analysis as part of its building code review process, thereby precluding the "automatic issuance" relied upon by the court.

This particular issue, however, may be a red herring. As discussed above, it is not for the building official to undertake a rezoning, but rather to protect the Bay and its tributaries through *police powers*. It also should not matter when *use* rights vest in order to enforce new health and safety performance standards. The vitality of a *Polygon* analysis will not be known unless tried and challenged. For those localities worried about the rush to vest, *Polygon* merits consideration.

2. Regulation After Rights Vest

A major issue to be resolved is whether existing uses (including those that win the vesting race) are immune from *any* CBPA regulation. Unfortunately, Virginia case law is inadequate to sufficiently predict the answer to this question. In the absence of controlling state precedent, the Arizona case of *Watanabe v. City of Phoenix*³⁴² may be influential.

At issue in *Watanabe* was whether a locality could use a zoning ordinance to require an existing nonconforming use to change the dust-proofing of its parking area from gravel to paving.³⁴³ The plaintiffs based their argument upon their interpretation of a vested rights statute similar to Virginia's.³⁴⁴ The plaintiffs argued that a locality may not enforce any zoning ordinance which affects their existing nonconforming property.³⁴⁵ The Arizona Court of

341. *Board of Supervisors v. Medical Structures*, 213 Va. 355, 357-58, 192, S.E.2d 799, 801 (1972).

342. 140 Ariz. 575, 683 P.2d 1177 (1984).

343. *Id.* at ___, 683 P.2d at 1179.

344. Nothing in an ordinance or regulation authorized by this article [municipal planning] shall affect existing property or the right to its continued use for the purpose used at the time the ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings or property used for such existing purposes.

ARIZ. REV. STAT. ANN. § 9-462.01 (1977), *quoted in Watanabe v. Phoenix*, 140 Ariz. at ___, 683 P.2d at 1179.

345. 140 Ariz. at ___, 683 P.2d at 1179; *see Witt, Vested Rights in Land Uses*, in *PLANNING IN VIRGINIA* 15 (Jan. 1988) ("[t]he concept of vested rights in land uses, involves the question of when, if ever, does a landowner or developer acquire the immutable right to use

Appeals rejected this contention as too broad:

The principle of nonconforming uses is based upon the injustice and doubtful constitutionality of compelling immediate discontinuance of the nonconforming use. While nonconforming uses existing at the time zoning ordinance became effective cannot be prohibited, they are subject to reasonable regulations under the police power to protect the public, health, safety, welfare, or morals. . . . However, cities cannot impose zoning restrictions which make the nonconforming use economically impossible.³⁴⁶

The court went on to find a dust-control ordinance well within the police powers of the locality and further found that the dust-control measures did not render the underlying nonconforming uses impossible. Accordingly, the ordinance was upheld. By analogy, Virginia localities may regulate existing users of land in Tidewater Virginia, providing the regulations do not render the existing use impossible.³⁴⁷ The second prong of the takings test³⁴⁸ suggests that such regulation could be extensive without violating the vested rights of the landowner.

VII. CONCLUSION

Governor Robb's Commission on Virginia's Future called upon the General Assembly to convey authority to protect the environment to the localities. It did not "issue a call for concentration of power in the agencies of our state government." Both of these results were obtained with passage of the CBPA. For the first time, localities are given authority to protect a portion of the environment without limitation defined by the health and well-being of their individual citizens. This protection will evolve through existing land use mechanisms; principally comprehensive plans, zoning ordinances, and subdivision ordinances.

This reliance upon existing laws and programs should bring a reassuring level of certainty to this necessary effort to protect the

or develop land free from impairment by legislative action").

346. 140 Ariz. at ___, 683 P.2d at 1179 (citations omitted).

347. See Foote, PLANNING AND ZONING IN VIRGINIA, HANDBOOK FOR LOCAL GOV'T ATT'YS 307, 322 (1987).

348. See *supra* section VI A.

Bay. Nevertheless, a number of legal issues will be pressed. This article has suggested a few. Only time will tell how they are resolved.