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

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The article *Legal Issues Affecting Local Governments in Implementing the Chesapeake Bay Preservation Act* (*Legal Issues* or "the article")[1] adds measurably to the growing literature[2] on the Chesapeake Bay Preservation Act ("the Act")[3] and offers a significant amount of historical background. However, inasmuch as the article attempts to ascribe certain areas of legislative intent on the part of the General Assembly in adopting the Act that the authors[4] of this comment believe are inaccurate, this comment will attempt to clarify those areas of legislative and regulatory intent. Additionally, this comment will discuss the regulatory development process of the Chesapeake Bay Local Assistance Board and the nature of the regulations themselves, to clarify several inaccuracies present in the article.

The principal issues briefly discussed in this comment will be: (1) the legislative history of the Act, including the genesis of the Chesapeake Bay Land Use Roundtable ("the Roundtable") and its final report,[5] the relationship of the final report to the bill drafted

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1. Benson & Garland, *Legal Issues Affecting Local Governments in Implementing the Chesapeake Bay Preservation Act*, 24 U. RICH. L. REV. 1 (1989).

2. *See, e.g.*, McCubbin, *Consensus Through Mediation: A Case Study of the Chesapeake Bay Land Use Roundtable and the Chesapeake Bay Preservation Act*, 5 J. OF L. & POL. 827 (1989).

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

4. One of the authors was the principal sponsor of the Act in the 1988 session of the General Assembly.

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

for submission to the General Assembly, the influence of the Maryland Critical Areas Act[6] on the Roundtable, the regulatory authority of the Chesapeake Bay Local Assistance Board envisioned by the General Assembly and the nature of the "criteria" as prescribed by the General Assembly; (2) the nature of the "cooperative state-local program" prescribed by the General Assembly; (3) the regulatory development process of the Chesapeake Bay Local Assistance Board; and (4) vested rights and grandfathering under the Act.

I. Legislative History of the Act

Legal Issues places undue emphasis on the report of the Governor's Commission on Virginia's Future[7] as the basis for the Act. While the members of the Roundtable were clearly aware of the earlier report, it was not an important factor in the development of their own report, except to the extent that its general tone validated their own investigations, which were directed by other factors that are discussed below. The Roundtable's investigations were certainly not limited by the Governor's Commission suggestion that the General Assembly place mandatory environmental criteria upon local governments.

A. *Genesis of the Roundtable*

The genesis of the Chesapeake Bay Land Use Roundtable can best be traced to Delegate Murphy's experiences as a member of the Westmoreland County Planning Commission and Board of Zoning Appeals during the period 1970-1982 and the controversy that arose in 1985 over the proposed development of the Thousand Trails Campground along the Rappahannock River in Caroline County.

Delegate Murphy has frequently observed that when land conversions occurred along the waterfront area in Westmoreland the effects of the point and non-point source pollution that would result from the land conversion activities rarely received appropriate attention. Little, if any, data relating to these issues was available, rendering most local decisions uninformed. Delegate Murphy became concerned about how state expertise in these areas might

6. Md. Nat. Res. Code Ann. §§ 8-1801 to -1816 (1989).
7. *See* Benson & Garland, *supra* note 1, at 5-9.

spur local governments into action. The Thousand Trails project acted as a catalyst for that action.

Caroline County invited Delegate Murphy to address its Board of Supervisors, which realized that the proposed project could have very significant environmental consequences. The Board of Supervisors felt that it did not possess the environmental expertise to evaluate those consequences and hence required expert advice from the state prior to making its land use decisions.

Because of the controversy surrounding the project, the publicity that the project received in the press, and the total lack of any objective information regarding the economic and environmental impacts of the project, the project was defeated. But Delegate Murphy continued to be troubled by the lack of a process by which the state environmental agencies could work with local governments to insure that local and regional environmental issues were adequately addressed in local land use decisions. Accordingly, he consulted with then Secretary of Commerce and Resources Betty Diener, who arranged for the Deputy Secretary for Resources, Richard L. Cook, to hold a meeting with state environmental agency personnel to see what assistance could be given. The meeting identified the Commonwealth's inability to provide such assistance to its constituent local governments.

The Chesapeake Bay Commission ("the Commission") had been concerned with the effect of land development on non-point source pollution for several years as a multi-state problem. Maryland had recently enacted the Critical Areas Act[8] as a result of similar problems. Delegate Murphy suggested that the Commission establish a group to study the approaches of Maryland and other states from a Virginia perspective and to recommend to the Commission and General Assembly measures to improve the situation.

The Chesapeake Bay Land Use Roundtable, a large, varied, dialogue group, was thus formed under the auspices of the Commission. It met at frequent intervals over an eighteen month period and issued its final report[9] in November 1987, shortly before the 1988 General Assembly session began.

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8. MD. NAT. RES. CODE ANN. § 8-1801 to -1816 (1989).
9. ROUNDTABLE REPORT, *supra* note 5.

B. *The Roundtable Report*

The final report of the Roundtable recommended land use initiatives for Tidewater Virginia calling for nine essential elements:

> * a statutory policy setting forth state interests in protecting the Bay
>
> * new planning and zoning enabling legislation language that grants localities specific powers to regulate for natural resources protection purposes
>
> * minimum state standards for comprehensive plans in Tidewater localities that would pertain to geographic areas of particular concern: shorelands, wetlands, sand dunes and barrier islands
>
> * mandatory zoning in Tidewater localities
>
> * requirements that zoning and subdivision ordinances within the geographic areas of particular concern be consistent with the goals and policies established in local comprehensive plans
>
> * requirements that any changes made in comprehensive plans, zoning ordinances, subdivision ordinances — plan amendments, zoning ordinance text or map changes, subdivision ordinance revisions — that involve the geographic areas of particular concern be consistent with state policies and standards
>
> * state financial and technical assistance to Tidewater localities to aid in the preparation of local plans and ordinances
>
> * advisory state comment on any project proposal in a Tidewater jurisdiction that requires local government action when such comment is requested by a local government; advisory comments should be completed within established time limits
>
> * a new state-level citizen board responsible for carrying out these new activities including developing state standards, approving local plans and ordinances once consistency with state standards is achieved, and preparing advisory comments on individual proposals when requested by local government.[10]

These nine essential elements became the basis for the bill presented to the General Assembly by Delegate Murphy. The final report recommended, as *Legal Issues* noted, "a response rooted in Virginia's experience."[11] The Roundtable was wary of the Mary-

10. *Id.* at 9-10.
11. Benson & Garland, *supra* note 1, at 10.

land Critical Areas Act, but not expressly because it had a strong state oversight as the Article implies.[12] The two aspects of the Maryland act that the Roundtable chose not to include (not repudiate) in its proposal were the act's overt manifestations of growth management policy — density limitations and the 1,000 foot definition of critical areas. These aspects were omitted more for political reasons than as a result of a philosophical rejection by the Roundtable of a strong state oversight.[13] In fact, the Roundtable's final report called for minimum standards for local governments to be prescribed by the state and for the state to have approval authority over local government plans adopted.[14]

C. *Drafting and Passage of the Act*

Delegate Murphy assembled a drafting committee[15] composed of lawyers experienced in the public interest, state government, local government, and private sector areas, as well as individuals with state legislative, planning, and regulatory expertise. While the Roundtable's final report served as the basis of the Act, the drafters were conscious of the need for developing legislation that fit in with existing state environmental legislation and with local government enabling legislation. *Legal Issues* is generally complete in its discussion of this process.

There was considerable debate over several features of the bill, centering on the mandatory nature of the state standards, the approval authority of the state over local government programs, and what property rights should be vested or grandfathered. Delegate Robert Bloxom argued before several committees and on the floor of the General Assembly that the state criteria called for should instead be made voluntary "guidelines." This proposal was rejected by those committees and by the House of Delegates. Local governments, led by the Virginia Association of Counties, argued for removal of the state approval authority before the House Committee on the Chesapeake and Its Tributaries and the Senate Agriculture

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The final report of the Roundtable cited to a guiding principle that "Virginia's response to issues . . . should flow from an analysis and, understanding of Virginia's laws, institutions, historical context and natural setting." ROUNDTABLE REPORT, *supra* note 5, at 7.

12. *See* Benson & Garland, *supra* note 1, at notes 49-52 and accompanying text.

13. The General Assembly apparently agreed with that assessment. There was never any attempt to insert a growth management policy or specific distance inland for regulatory purposes.

14. *See* ROUNDTABLE REPORT, *supra* note 5, at 12-13.

15. Mr. Benson was a member of the drafting committee.

and Natural Resources Committee. They were successful in that amendment. The vested rights and grandfathering issues are discussed later in this comment.

The article incorrectly asserts that both the state's authority to impose mandatory requirements (if not "standards") on local governments *and* preapproval authority over local government plans were deleted by the General Assembly; only the preapproval authority was deleted.[16] *Legal Issues* also goes on to conclude incorrectly that the General Assembly's deletion of the terms "orders and standards" removed the regulatory authority of the state from the "criteria" the Chesapeake Bay Local Assistance Board (the Board) was to promulgate. This line of reasoning does not reflect the history of the amendment rescinding the principle of plan preapproval.

In the first place, the Act states that the criteria are to be promulgated as regulations.[17] Given the similarity of the format of the Act to the Wetlands Act,[18] had the General Assembly meant for the criteria to be merely advisory, as the article asserts, it would have directed the Board to promulgate "guidelines" similar to the wetlands guidelines in that act,[19] not with the full formality of regulations. In the second place, the mere fact that localities are to implement their programs "in accordance with the criteria" in the Act does not render the criteria advisory, as *Legal Issues* asserts, even by the customary definition cited to advance that proposition.[20]

II. The "Cooperative State-Local Program"

Legal Issues implies that in a cooperative state-local program, the state can have no direct regulatory authority over a local government. Somehow, once the state gives authority to a local government, no strings or oversight requirements can be retained if the program is termed "cooperative." We assert that a "cooperative" state-local program can be mandatory to the same extent as a "coercive" state-local program can be; only the working relation-

16. The article actually states this fact. *See* Benson and Garland, *supra* note 1, at 13-15.

17. Va. Code Ann. § 10.1-2107 (Rep. Vol. 1989).

18. *Id.* §§ 62.1-13.1 to -13.20 (Repl. Vol. 1987 & Cum. Supp. 1989).

19. *See id.* § 62.1-13.3 to 13.4 (Repl. Vol. 1987).

20. Benson and Garland correctly note that "in accordance with" does not mean "lockstep compliance" with, but then jump from this observation to the conclusion that the criteria are merely advisory. *See* Benson & Garland, *supra* note 1, at 16-17.

ship need vary. By retaining "oversight" authority over local government programs, the state reserves the "first among equals" status that the status of local government as a creation of the state seems to imply.[21] Further, for the state to waive completely such oversight role would be a dereliction of its public trust duties under Article XI of the Constitution of Virginia[22] which gives the Commonwealth, not the local governments, the responsibility of protecting natural resources.

The Commonwealth's narrow Dillon Rule[23] approach to construing the state as the repository of all authority not vested in the federal government supports this interpretation. Under this rule of constitutional and statutory construction, the Commonwealth, must formally delegate any of its responsibilities for protection of natural resources that it does not intend to exercise directly itself. The localities, being creations of the state, have no natural resource protection authority of their own that is not explicitly granted by the state or necessarily implied from that explicit grant.

Such delegation carries the implication that it is the Commonwealth's natural resource interests as well as the local governments' natural resource interests that are being delegated to the local governments. The Commonwealth cannot wholly absolve itself from its overall constitutional responsibility for such natural resource protection. Therefore, the Commonwealth must retain oversight to avoid an unlawful delegation.

The Commonwealth then is giving the local governments the opportunity, albeit by mandate, to cooperate in the protection of the state's (and therefore at least partially the local governments') natural resources. If the local governments choose not to do so, then the Commonwealth has no option under the responsibility articulated by the Act except to perform the required natural resources protection itself. While there was apparently no direct requirement for the Commonwealth to act in this area *prior* to the Act's passage,[24] subsequent to that passage, all "partners" are "jointly and severally liable," and the Commonwealth now has an absolute responsibility to protect if its partners fail to do so.[25]

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21. *See* VA. CODE ANN. § 10.1-2100(B) (Repl. Vol. 1989).

22. VA. CONST. art. XI, § 1.

23. For a discussion of the Dillon rule, see Benson & Garland, *supra* note 1, at 5 n.26.

24. *See* Robb v. Shockoe Slip Found., 228 Va. 678, 324 S.E.2d 674 (1985).

25. This argument has interesting implications where state funding of the "cooperative state-local partnership" is concerned. Local government cries that there should be no re-

III. THE BOARD'S PROMULGATION OF REGULATIONS

The Article treats the Board's January *Criteria Discussion Document* as draft regulations.[26] This is incorrect. The Act requires that the Board's regulations be promulgated in accordance with the Virginia Administrative Process Act (VAPA).[27] When the Board promulgated its proposed regulations in April 1989,[28] it did so within the full requirements of the VAPA.

Beginning in July 1988, monthly Chesapeake Bay Local Assistance Board meetings were held to gather technical information, which was updated by the Chesapeake Bay Local Assistance Department's continuing technical evaluations and meetings with numerous governmental and interest groups. The initial information base was shared with the public at nine regional information meetings, held in each of the Tidewater Planning Districts during September and October 1988. A number of issue papers, including the *Regulatory Discussion Document*, were circulated for informal review and comment prior to the staff's development of the proposed regulations. The Board held two work sessions to discuss the latter document and to hear public comment on it. Only after that extensive informal public participation process did the Board go through the formal process of promulgating proposed regulations.

The *Criteria Discussion Document* was informally circulated to gather discussion on the concepts that had been raised at the series of public information meetings held by the Board in September and October of 1988. It successfully elicited such discussion, including comments by the County Administrator of Henrico County which appear to form the basis of *Legal Issues*. As a result of the discussion raised by the *Criteria Discussion Document* and developed at two Board work sessions held in February and March of 1989, the proposed regulations were developed, deleting many of the concepts commented on in *Legal Issues*.

Prior to adopting its proposed regulations, the Board conducted nine public hearings on the proposed regulations. Nearly 3,000 citizens participated in this process. The Board adopted its proposed

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quired compliance with the state mandates without 100% state funding seem to fly in the face of such a partnership. If the state fully funded the entire program then it would hardly be a "cooperative state-*local* program."

26. *See* Benson & Garland, *supra* note 1, at 19 & n.88.

27. VA. CODE ANN. §§ 9-6.14:1 to -6.14:25 (Repl. Vol. 1989); *see id.* § 10.1-2103(4).

28. 5 Va. Regs. Reg. 1891 (Apr. 24, 1989).

regulations as final regulations at its June 27, 1989 meeting.

During the statutorily imposed executive and legislative review periods[29] the regulations were reviewed by both the Governor and the Senate Committee on Agriculture, Conservation and Natural Resources. The Governor suspended the regulations for an additional thirty day public comment period to review issues relating to septic tanks, agricultural land uses, and equivalent measures for compliance with buffer area requirements.[30] The Board followed the Governor's directives and adopted new, revised regulations on September 27, 1989, with an effective date of October 1, 1989.[31]

IV. VESTED RIGHTS AND GRANDFATHERING

Legal Issues treats vested rights and "grandfathering" as the same thing. In fact the two are distinct, the former being a judicially developed concept and the latter a legislative act. The Act deals with both.

First and foremost, the Act does nothing to change the law of vested rights in Virginia.[32] This issue was one of the most heavily debated during the passage of the Act. Development interests, particularly the Homebuilders of Virginia (the Homebuilders) and the Virginia Association of Realtors, (the Realtors) sought to have a grandfather clause added to the Act. In the alternative, they requested a broader statutory definition of vested rights. They made these requests at both hearings before both the House Committee on Chesapeake and its Tributaries and the House Rules Committee. The Committee on the Chesapeake ignored the request and in the House Rules Committee, House Speaker A.L. Philpott made it clear that he did not think it advisable for the General Assembly to attempt to change the law of vested rights, which is based primarily on constitutional rights.[33] There was no further effort to add additional vesting language to the Act after this. The Act simply recognizes the existence of the doctrine of vested rights. It does not seek to define, enlarge, or limit them.

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29. *See* VA. CODE ANN. §§ 9-6.14:9.1 to -14:9.2 (Repl. Vol. 1989).

30. 5 Va. Regs. Reg. 3751 (Aug. 16, 1989).

31. *See* 6 Va. Regs. Reg. 11 (Oct. 9, 1989).

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

33. VA. CODE ANN. § 15.1-492 (Repl. Vol. 1989).

The Act contains no specific grandfathering provision. Although the Homebuilders and Realtors proposed grandfathering language tracking the grandfathering provision of the Virginia Wetlands Act,[34] those suggestions were not adopted. However, the Board's final regulations did include two limited grandfathering provisions. The regulations exempt property recorded prior to the effective date of the regulations from the reserve septic tank drainfield requirements of the regulations.[35] Further, the final regulations exempt property recorded prior to the effective date of the regulations from the full effect of the buffer area requirements of the regulations, provided certain ameliorative procedures are followed.[36]

V. Conclusion

Legal Issues is thorough in its approach and contains much useful information about the genesis and passage of the Chesapeake Bay Preservation Act, and as such helps develop a better understanding of the Act's legislative history. However, the article incorrectly asserts that the General Assembly intentionally passed a bill that denied the state strong regulatory authority over the manner in which local governments protect water quality. The article's further assertion, stemming from the first, that the regulations adopted by the Board exceed the regulatory authority granted by the General Assembly, is also incorrect. Its implication that the Chesapeake Bay Local Assistance Board followed improper procedures by promulgating "draft regulations" prior to required formal procedural requirements is also in error. Finally, the article's argument that vested rights and grandfathering under the Act are identical is incomplete and inaccurate.

The unfolding implementation of the Act will result in a continuing evolution of the "cooperative state-local program" envisioned by the Roundtable and the General Assembly. The Board has attempted to craft regulations that will allow that evolution to occur in an orderly fashion. All observers will find the process a lively and interesting experience.

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34. *Id.* § 62.1-13.20 (Repl. Vol. 1987).
35. 6 Va. Regs. Reg. 11, 16 § 4.2(7)(b) (Oct. 9, 1989)
36. *Id.* § 4.3(B)(2).