Advocates for Herring Bay
c/o 404 Arundel Rd
Fairhaven, MD 20779
August 11, 2006

Linda M. Schuett
County Attorney, Heritage Office Complex
2660 Riva Road, 4th floor
Annapolis, MD 21401

Dear Ms. Schuett,

The Advocates for Herring Bay (AHB) hereby submits written comments on the proposed changes to Anne Arundel County's regulations governing the Critical Area. AHB is an organization of long-time residents and homeowners from the Fairhaven area who are committed to preserving and enhancing the environment of the Herring Bay region, a tributary of the Chesapeake Bay.

We have three general recommendations, which are discussed in detail in the attached document. We urge you to:

- Revise provisions that would expedite procedures at the expense of the substance of the law.

- Launch an effort to develop independent, scientifically based ecological profiles of the Critical Area. Such profiles would improve the accuracy of assessments of specific properties and of sensitive areas that must be addressed in the Comprehensive Plan.

- Adopt new policies to increase accountability for decisions regarding claims that there were "mistakes" in the original mapping of the Critical Area. Claims of mistakes will effectively circumvent the statutory limit on the County's growth allocation unless steps are taken to ensure their accuracy and minimize their impact on the environment.

Finally, we endorse provisions in the bill that would include non-tidal wetlands in the definition of habitat protection areas and require developers to reserve some of their allocation for impervious surfaces for future improvements by homeowners.

Thank you for the opportunity to comment on the proposals at this juncture. If you have any questions about our comments, please do not hesitate to contact us.

Sincerely,

Kathleen Gramp
President

Comments of the Advocates for Herring Bay
On Proposed Changes to Anne Arundel County's Critical Area Regulations
Draft 00028817.DOC;2

As noted in our letter, we have three major recommendations, which are discussed in more detail below. We urge you to:

• Revise provisions that would expedite procedures at the expense of the substance of the law

• Launch an effort to develop independent, scientifically based ecological profiles of the Critical Area. Such profiles would improve the accuracy of assessments of specific properties and of sensitive areas that must be addressed in the Comprehensive Plan.

• Adopt new policies to increase accountability for decisions regarding claims that there were "mistakes" in the original mapping of the Critical Area. Claims of mistakes will effectively circumvent the statutory limit on the County's growth allocation unless steps are taken to ensure their accuracy and minimize their impact on the environment.

Recommendation I: Revise Rules and Practices that Emphasize Process At the Expense of Substance

Anne Arundel County faces huge pressures to develop land in the Critical Area. Some of the proposed rule changes try to ease that pressure by simplifying the criteria and procedures used to approve development. Efforts to simplify procedures run the risk of jeopardizing the performance standards that are needed to protect the land and habitats along the shoreline of the Bay. We are especially concerned about five aspects of the proposed rules and urge you to retract or revise them. Those provisions would:

A. Compromise the integrity of decisions on minimum variances
B. Increase the extent of clearing allowed in RCA and LDA areas
C. Eliminate the afforestation requirement for some projects
D. Grant amnesty for past violations of rules on impervious surfaces, and
E. Continue the practice of basing land use decisions on property lines instead ecological zones.

A. Setting Minimum Variances. The proposed change to Section 3-1-207-H sounds innocuous, but it is not. It would require the Administrative Hearing Officer or Board of Appeals to specify in writing what they deem to be the "minimum"acceptable variance for a particular property. The stated purpose of this change is to address the understandable frustrations of applicants, who often have to go through numerous cycles of hearings before getting a final decision on the minimum variance. But the proposal doesn't eliminate the "guesswork." It just shifts it from the applicant to the decision-makers.

Let's remember what our officials are up against. The hearing officer processes about 10-15 cases a week, with each "hearing" allocated about 15 minutes. Under your proposal, that initial record would be the ONLY basis of a final decision on the extent of the minimum variance. What does the hearing officer need to know in order to set a minimum variance? When does he/she need to evaluate the likely level of development appropriate for the property? If the minimum variance is determined by the characteristics of a site, would that decision have to be made before the hearing, before the individual submits an application? Who will guarantee that the officials will have the information they need at that juncture? Who will provide it? Who will decide what constitutes sufficient information?

The only practical response to the draft proposal will be for those officials to standardize—not minimize—variances. Granting variances by formula is a mistake. The whole point of trying to minimize the variance is to protect the Bay's ecologically sensitive areas to the maximum extent possible within the law. From an ecological standpoint, there is no "standard" minimum. What is worse, such standardized rules-of-thumb would most likely be driven by legal precedents, not by the ecological merits of each case. We urge you to retract this proposal and consider different ways to shorten the delays without compromising the integrity of land use decisions involving the Critical Area.

B. Authorizing More Clearing of the Critical Area. The County currently relies on one-size-fits-all mathematical formulas to limit the extent of clearing allowed in Resource Conservation Areas (RCA) and Limited Development Areas (LDA). Under existing law, the basic rule is that those with lots larger than a half acre cannot clear more than 20 percent of their property, unless they get approval from Planning and Zoning to increase that to 30 percent. By the stroke-of-a-pen, proposed Section 17-8-303 would raise the limit to 30 in all cases, without regard to the size of the property or the characteristics of the area.

The rationale for this increase is unclear. Is it procedural convenience? Does Planning and Zoning routinely approve clearing 30 percent? If so, what criteria does that office use in deciding whether to approve increased clearing? How does staff account for the ecological features of the property? Is approval simply contingent on an applicant's request?

Absent a credible finding that allowing 30 percent clearing will benefit the Critical Area, the standard limit should remain at 20 percent. That 10 percent differential is significant: in RCA areas alone, it is equivalent to roughly 1,800 acres.[1] If there is a shortcoming in the current approach, it may be the lack of substantive criteria for granting exceptions to the existing limit. We strongly urge you to retract this change and instead develop criteria that will enable staff to base land-use decisions on scientifically valid information instead of arbitrary metrics.

C. Granting Exemptions from Afforestation Requirements. The staff memorandum suggests that the existing rules on afforestation deter property owners from applying for permits for porches and other small additions because the cost of afforestation may exceed the value of their

[1] This estimate assumes that virtually all RCA properties are at least one-half acre in size.

improvements. To give those owners an incentive to get a permit, the County proposes to exempt a project from the afforestation requirement if the project is equal to or less than 1,000 square feet. That size threshold (in section 17-8-304 (3)) is inappropriate for at least two reasons:

First, afforestation would only be required if the "proposed" development exceeds 1,000 square feet. Basing requirements on the incremental changes to a property ignores the cumulative impact of the development on a site. A developer or owner could incrementally expand without doing any afforestation, just by breaking up the development into 1,000 square-foot segments. We were pleased to hear that the staff intends to rewrite this provision to ensure the limit applies to the cumulative improvements on a property.

Second, the 1,000 square foot standard may bear little or no relationship to the value of the improvements. In fact, that square footage exceeds the footprint of some of our homes and homes being built in our area, all of which are valued well above the cost of afforesting 15 percent of our lots. If the concern is to balance costs, the metric should be expressed in dollar terms. If that is impractical, we recommend that you lower the square footage threshold. Those who are adding 1,000 square foot porches can afford to afforest their lot. If your goal is to accommodate those of us making small changes, a much smaller square footage figure will suffice.

D. Granting Amnesty for Impervious Surfaces Developed in Violation of the Law. Without enforcement and effective penalties—for example, requiring that offending structures be removed or that violators pay fees that have a material effect on the profits earned by violating the law—local controls are meaningless. In proposed section 17-8-304 (3), the County would give de facto approval to all impervious surfaces that existed in the Critical Area as of April, 2005. Absent directives to the contrary, the bill implies that the County would not take enforcement action against past violations, but might start enforcing the law in the future.

Rather than grant amnesty to those who violated the law on impervious surfaces, the County should take an aggressive stand on enforcement. We were encouraged to hear staff say that they plan amend the bill to include language making it clear past violations can and will be prosecuted. Making that change has wide-spread support not just from us, but from citizens county-wide, who have recently demonstrated their support for the County taking enforcement actions in high profile cases of illegal development within the Critical Area.

E. Focusing on Property Lines, Not Ecological Zones. We are dismayed by the County's willingness to abdicate its responsibility to base land-use decisions in the Critical Area on the ecological characteristics of the affected area. In proposing to repeal the definition of a "developed woodland," the staff memorandum states on page 4:

> The Critical Area Commission staff state that they look across lot lines to determine the existence of developed woodland, but this is not the way the County evaluates

development. Attempting to do this would greatly complicate the development review process.

Property lines that have been drawn and re-drawn over the past 400 years tell us little about the ecological value of a particular tract of land in the Critical Area. For example, in our area there are 32 acres of land for sale, advertised as suitable for building 3 houses. A portion of that land was illegally cleared a few years ago, so the vegetative cover on that segment is largely limited to grasses and weeds. However, the property also has significant forest cover, including a densely wooded tract that itself adjoins a separate, forested property with an inlet that flows directly into the Bay. A tree-top canopy connects those properties to tens of acres of undeveloped woodlands on the other side of a narrow, rural road.

Together, those properties provide a multi-acre stretch of woodlands that filter groundwater and host a diverse array of amphibians, owls, eagles, and other wildlife. The County may or may not view this zone as a "habitat protection area;" it may not meet the 100-acre benchmark in the code, for example. Yet it would simply be wrong for the County to ignore the ecological differences among those tracts when deciding how they may be developed.

Doing land-use assessments across property lines is not easy. The task is even harder if those doing the assessments are overworked. But degree of difficulty is no excuse for not doing what needs to be done to protect the 1,000-foot buffer along the shores of the Chesapeake Bay. We—and future generations—need you to protect the few ecologically valuable tracts of land remaining in the Critical Area in Anne Arundel County.

Recommendation II: Develop Ecological Profiles of the Critical Area

We encourage the County to launch an effort to develop the ecological data needed to make sound land-use decisions in the Critical Area. This effort could be a collaboration among Bay scientists, planners, and the affected communities—perhaps analogous to the profiles done in the Small Area plans, but with a more scientific bent. Such profiles would increase the odds that County actions would be ecologically as well as legally and procedurally sound. They would aid the Hearing Officer and Appeals Board in determining what the minimum variance should be for a particular property. Habitat profiles would enable staff to better assess the impacts of the County's decisions on an ecological scale, across property lines.

These profiles also could provide a scientifically valid basis for the County's upcoming comprehensive plan, which by law must address management of environmentally sensitive areas (HB 1141, enacted in 2006). While some sensitive areas have already been identified, it is likely that many others remain undocumented. Aerial photos will not reveal the diversity of flora and fauna; you need on-site monitoring as well.

Doing such profiles will take time and effort. We recognize that Anne Arundel County may not have the resources necessary to do full-scale profiles overnight. But we are willing to assist in

such efforts, and believe that other communities would be willing to do the same. Requirements like those in HB 1141 may be "unfunded mandates," but the job can be done if the County taps the skills and support of its residents.

Recommendation III: Increase Accountability for Decisions On Mapping "Mistakes"

Finally, we urge you to adopt new policies that will increase accountability for decisions on claims that the County made a "mistake" when it mapped the Critical Area more than 20 years ago. As a practical matter, your approval of those claims leads to more intense development of the Critical Area. The intensity of development in the Critical Area matters, which is why the law sought to balance the amount of land classified as RCA, LDA, and IDA. Claims of mistakes will undermine that balance unless steps are taken to minimize the ecological impact of reclassifications resulting from true mistakes and to ensure that "mistakes" are not mistakenly 'corrected' based on flawed analysis.

Stronger safeguards are necessary and appropriate for several reasons. First, the acreage at stake is growing. Over the last year or so, the County has reviewed claims involving at least 75 acres, an area equivalent to 8 percent of the County's 917-acre growth allocation. Now that the County has nearly exhausted that original allocation,[2] the only way an owner can intensify the development of a RCA or LDA property is to convince the County and the State Critical Area Commission that the 1985 mapping was a mistake.

Second, the process for considering mistakes is biased, because it only corrects one kind of mistake. From a practical standpoint, only property owners initiate such claims. Virtually all of their claims assert that the original mapping was too restrictive, which means that correcting an error will result in more intense development. But were all of the County's errors one-sided? Isn't it likely that some IDA or LDA acreage should instead have been mapped as LDA or RCA? Not correcting both types of mistakes undermines the balance of land use in the Critical Area in Anne Arundel County, to the detriment of the long-term health of the Bay's ecosystems.

Third, the evidentiary basis for considering mistakes is incomplete. We no longer have access to the personnel and data that could explain or defend the basis of decisions made more than 20 years ago. Instead, County officials often rely on materials provided by the applicant to assess the merits of the case. Applicants probably are not the most reliable source of information and analysis because they have a vested interest in the outcome.

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[2]According to the County's website, 794 acres have already been allocated, leaving 40 acres that could be upgraded from RCA and 84 acres from LDA.

Fourth, too much acreage will be allocated for intense development unless the County carefully adheres to the mapping approach intended for the Critical Area. Applicants often want their entire property classified IDA or LDA, but that may not be appropriate. As noted earlier, Critical Area classifications cross property lines, reflecting the ecological and economic features of the area. Thus, it is possible that a correction should change only small part of a property. There also is a risk of using the wrong property lines when correcting mistakes, because ownership patterns today often are not what they were 20 years ago.

Finally, County decision-makers have no accountability for their mistakes, past or present. Making mistakes, fixing mistakes: both are easy to do if no one pays a price for messing up. The only thing that suffers as a result of the County's mistakes is the ecological health of the Bay.

In light of these concerns, we recommend that the County:

- make a commitment to offset any net loss of land classified as RCA or LDA as a result of its past mistakes, with a goal of maintaining the balance of land uses originally envisioned by the Critical Area Act. For example, if the cumulative acreage that has been reclassified because of the County's mapping mistakes exceeds some amount---say, 50 acres (which is equivalent to a 5 percent increase in the statutory growth allocation)---the County should make a commitment to obtain conservation easements or purchase LDA or IDA properties that could compensate for the loss of the reclassified acreage.

- ensure that the amount of land reclassified as a result of a mistake is the absolute minimum necessary to correct the error. Requiring the County to be accountable for its mistakes, as suggested above, would give decision-makers an economic incentive to minimize the area being reclassified.

- uphold the strict standards set by the Courts on the findings of fact that justify the correction of a mistake. The County should do all it can to ensure that it has access to the best information and analysis possible, from all possible sources. Because these decisions are often precedent-setting, it is appropriate for all citizens of the County to have an opportunity to identify issues that should be considered before a decision is made.

- require applicants to provide maps and information on a more regional scale, not just the details of their property.

- require applicants (including the County) to provide a complete set of the materials supporting their claims to the Anne Arundel Public Library closest to the property several weeks in advance of the hearing. The Critical Area Commission does this for its hearings, so this is not an undue burden on the applicant or the County.

- require that all Critical Area remapping actions be subject to public hearings, regardless of their procedural form (amendments or refinements) or rationale (mistakes

or growth allocation). These hearings should be held in the evening to increase the odds that the official deciding the case would have the benefit of broad community input.

Respectfully Submitted,
August 11, 2006
Kathleen Gramp
President