

BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL



THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

SHAUNEE L. HARRISON
ASSISTANT ATTORNEY GENERAL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

August 18, 2022

The Honorable Dana Stein
251 Taylor House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Stein:

You have asked for advice concerning whether proposed Baltimore County Bill, HB 57-22 (“the proposed legislation”), conflicts with State law, in particular the Critical Area Act (“the Act”). It is my view that there is a significant possibility that implementation of the proposed legislation would be found to conflict with the Act. For the reasons explained below, however, I cannot give you a definitive answer on that matter.

The proposed legislation amends Baltimore County Code, § 33-2-403 to require the Director of Environmental Protection and Sustainability (“the Director”) to exempt a development or redevelopment that is intended to expand or enhance a marina facility or a waterfront restaurant that operates a full service restaurant on the premises and holds an alcoholic beverages license from regulations governing buffer managements areas, and to allow those uses and structures up to the edge of the water with no mitigation or buffer yard requirements. In addition, while appropriate stormwater management will be required, development, redevelopment, or retention of pervious areas “shall be permitted without mitigation.” The provision further states that to the extent these requirements conflict with any other regulation or law, the provisions of the bill would control.

The Act was enacted in 1984 to establish and implement a resource protection program to protect the water quality and natural habitats of the Chesapeake Bay and its tributaries. Natural Resources Article (“NR”), § 8-1801(b)(1). Chapter 794 of 1984. It provides for local jurisdictions to create critical area protection plans for parts of the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area (“critical areas”) within the jurisdiction. NR § 8-1809. The critical areas are the bays and their tributaries and all land and water areas within 1,000 feet beyond landward boundaries of State or private wetlands and the heads of tides designated under Article 16 of the Environment Article. NR § 8-1807(a) and (b). A local jurisdiction may exclude some property that would fall within the critical areas if the property is part of a developed urban area in which, in view of available public facilities and applicable laws, the imposition of a program would not substantially improve protection of tidal water quality or conservation of fish, wildlife, or plant habitats, or is located at least 1,000 feet from open water and separated from open water by an area of wetlands which it is found will serve to protect tidal water quality and fish, wildlife, or plant habitats from adverse impacts of development in the excluded area.

NR § 8-1807(c)(1). Exclusions must be approved by the Critical Area Commission (“the Commission”) before they can take effect. NR § 8-1807(c)(2).

“One of the most important aspects of any Critical Area program is the “buffer,” defined as “an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from manmade disturbances.” NR § 8-1802(a)(4). Restrictions upon development activities within buffer areas are integral components of each local Critical Area program.” *Lewis v. Gansler*, 204 Md. App. 454, 458 (2012), citing COMAR 27.01.09.01.C; *see also*, NR § 8-1801(a)(4)(declaring as a matter of public policy “it is necessary wherever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands.”). The regulations reflect that 100-foot limit. Subsequently, the General Assembly set minimum buffers of 100 feet from a tributary stream and 200 feet from tidal waters and a tidal wetland. NR § 8-1808.10(b)(1). The 200-foot limit applies only to a subdivision or site plan that receives final local approval on or after July 1, 2008, unless an application was submitted before July 1, 2008 and legally recorded by July 1, 2010, and does not involve the use of growth allocation. NR § 8-1808.10(a). This change is reflected in the regulations at COMAR 27.01.09.01E(3) and (5).

State law requires the Commission to establish regulations for buffer establishment, maintenance, measurement, mitigation, and enforcement. NR § 8-1806(b)(1)(i). It also provides for exceptions to lot coverage limits in the buffer area in limited circumstances, including for coverage provided in a “waterfront revitalization area or a waterfront industrial area under a local program. NR § 8-1808.3(b)(3). Approval depends, however, on the presence of certain factors, including that “the property owner performs on-site mitigation as required by the local jurisdiction to offset potential adverse water quality impacts from the new development activities that continue to lot coverage, or the property owner pays a fee to the local jurisdiction in lieu of performing the on-site mitigation.” NR § 8-1808.3(f)(5).

The Commission regulations permit a local jurisdiction to:

request a modification to the minimum requirements applicable in the buffer where it can be sufficiently demonstrated that the existing pattern of residential, industrial, commercial, institutional, or recreational development in the Critical Area prevents the buffer from fulfilling the functions stated in Regulation .01 of this chapter.

COMAR 27.01.09.01-8A. They further provide, however, that a local jurisdiction “shall require mitigation for a development activity within an area mapped as a modified buffer area.” COMAR 27.01.09.01-8B. The regulations also specify that a local jurisdiction may authorize disturbance in the buffer for certain activities “in conjunction with mitigation performed in accordance with an approved buffer management plan.” COMAR 27.01.09.01-8E(1). In addition, in one instance the regulations specifically require mitigation at a 2:1 ratio. COMAR 27.01.09.01-8E(8).

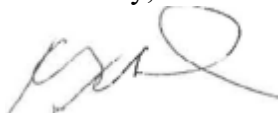
The Baltimore County Modified Buffer Area Plan reflects that the State critical area regulations generally require the establishment of a 100-foot, undisturbed, vegetated or planted

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buffer landward from the mean high water line of tidal waters or from the edge of tidal wetlands or tributary streams.¹ It further states that the State regulations “allow local jurisdictions to map “Modified Buffer Areas” . . . where it can be sufficiently demonstrated that existing (as of 1986) patterns of residential, commercial, institutional, and industrial development prevent the buffer from fulfilling the functions listed above.” It explains that the modified buffer areas are “intended to accommodate limited use of the shoreline areas in certain situations while protecting water quality and habitat to the greatest extent possible,” and that “[c]onvenience or expense shall not be factors considered when evaluating the extent of allowable impacts to the buffer.” The County Modified Buffer Area Plan further states that mitigation to offset water quality impacts, or payment of a fee-in-lieu of mitigation “will be required for all buffer impacts,” and sets out the required mitigation and offset requirements.

Clearly, the proposed legislation would require significant changes to these provisions. It also seems clear that the changes would necessarily violate the mitigation requirements found in State law and regulations. The new regulations, however, would be adopted only if the bill has passed, so it is not possible to reach a definite conclusion on that matter. More importantly, the Act requires that changes in a local jurisdiction’s critical areas plan must be approved by the Commission. NR § 8-1809(i). The Commission “shall approve” amendments that meet the standards set forth in NR § 8-1808(b)(1) through (3) and the criteria adopted by the Commission under NR § 8-1808. Thus, the law entrusts the decision of whether a local jurisdiction’s plan comports with State law and regulations to the Commission. As a result, I am unable to give a definitive answer to the question of whether the legislation would violate the Act.

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

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¹ This document is available on the Internet at
<https://resources.baltimorecountymd.gov/Documents/Environment/eir/modifiedbufferareaplan.pdf>.