

Critical Area Commission

PANEL REPORT

October 4, 2006

JURISDICTION: Dorchester County and the City of Cambridge

PROPOSAL: Blackwater Resort Communities – Growth Allocation

COMMISSION ACTION: VOTE

PANEL MEMBERS: Dave Blazer (Chair), Jim McLean, Stevie Prettyman, Gary Setzer, Cathy Vitale

PANEL RECOMMENDATION: Deny

STAFF: Mary Owens

**APPLICABLE LAW/
REGULATIONS:** Natural Resources Article §8-1809, COMAR 27.01.02.06,
Chapter 55 of the 2006 Laws of Maryland

DISCUSSION:

The Critical Area Commission Panel reviewing the Blackwater Resort Communities Growth Allocation Project held a public hearing on July 20, 2006 at Maple Elementary School. Prior to the hearing, the Panel received information describing the project and summarizing the major issues for discussion. Following the hearing, the public record was held open until July 28, 2006. Prior to the hearing and at the hearing itself, extensive information was submitted by the developer, the City, and the County describing the project and supporting the request for growth allocation. There has also been significant public interest in the project. There were over 100 people at the public hearing, numerous letters submitted, and over 4,000 e-mails sent regarding the project. After the hearing, the Panel met on August 2, 2006, August 17, 2006, September 6, 2006, September 15, 2006, September 28, 2006, and October 4, 2006.

This Report sets forth the discussions of the Panel, provides background information, and gives the Panel's recommendations to the full Commission. This report addresses the Critical Area Law's growth allocation guidelines, and the goals, policies, and provisions of the law and Criteria. For the reasons and supporting documentation set forth in this Report (and in the August 11, 2006, and September 26, 2006 Staff Memoranda), the Panel believes that there is a lack of documentation explaining how the growth allocation is consistent with the purposes, goals, and provisions of the Critical Area Commission; and therefore recommends that the proposed growth allocation Program amendment be denied. The vote of the Panel was unanimous.

Adjacency

Locate a new Intensely Developed Area in a Limited Development Area or adjacent to an existing Intensely Developed Area. *Natural Resources Article § 8-1808.1(c)(1)*

Both the City of Cambridge and Dorchester County determined in their findings that the project was not adjacent to existing LDA or IDA. The Panel discussed how "adjacent" does not necessarily mean "adjoining," but found that only a very small portion of the site is within one-half mile of an existing IDA and that the proposed IDA extends approximately 2.5 miles from the closest existing IDA. The Panel discussed that the concept of adjacency could be viewed broadly as proposed by the Black's Law Dictionary definition of "adjacent" to look at properties that may not be contiguous to the project site, but are nearby; however, the purpose of the statute must be considered. The Panel believes that the purpose of the statute is to accommodate growth by concentrating development and avoiding both isolated pockets of LDA or IDA located in the RCA and unwieldy patterns of development that promote areas of LDA or IDA that extend far from developed areas in a non-uniform manner.

In their analysis, the Panel agreed with the City and County that the project site is not adjacent to LDA or IDA, and in addition the Panel viewed the concept of adjacency as requiring a "nearby presence" of LDA or IDA, conditions that do not exist here. The Panel considered the definition of adjacency and although the definition does not require that the new IDA be immediately next to existing LDA or IDA, the distance proposed with this application is far too great.

The Panel has concluded that they cannot recommend to the full Commission that this guideline has been applied in a manner that is consistent with the purposes, policies, goals, and provisions of the Critical Area law. The Panel believes that the purpose of the statute is to accommodate growth by concentrating development and avoiding both isolated pockets of LDA or IDA located in the RCA and unwieldy patterns of development that promote areas of LDA or IDA that extend far from developed areas in a non-uniform manner.

Optimization of Benefits to Water Quality

Locate a new Limited Development Area or an Intensely Developed Area in a manner that minimizes impacts to a Habitat Protection Area as defined in COMAR 27.01.09 and in an area and manner that optimizes benefits to water quality. *Natural Resources Article § 8-1808.1(c)(3)*

This locational guideline specifies that growth allocation should be located in a manner that optimizes benefits to water quality. The application package proposes that benefits to water quality have been optimized because the project will implement best management practices for treating the quality and quantity of stormwater runoff as required by the City of Cambridge Zoning Ordinance. In discussing this issue, the Panel identified three primary concerns. The first concern was whether the applicant's proposal to comply with the 10% pollutant reduction requirement, to "maintain stormwater run-off on the project site" and to treat the 10-year storm represents optimization of benefits to water quality particularly in light of the acknowledged complexity of the hydrology of the Little Blackwater River system, the flat topography of the site, the extensive areas of hydric soils, the high water table, and the vulnerability of the proposed best management practices to flooding or "blowing out" in severe storm events.

The second concern was the proposed design whereby stormwater facilities within the Critical Area will be treating runoff from highly developed portions of the site outside of the Critical Area, and all stormwater facilities (both inside and outside the Critical Area) will be hydrologically connected to streams and ditches within the Critical Area that discharge to the Little Blackwater River system. It was discussed that it could be preferable to collect, treat, and store all stormwater runoff on the site. Stormwater that was collected would be used for irrigation or would be infiltrated or evaporated resulting in no direct discharge to existing streams and ditches that discharge to the Little Blackwater River. Information about the viability of this option was not included in the growth allocation application.

The third concern involves the significance of the Little Blackwater River Habitat Protection Area as a significant component of a larger ecosystem, the Blackwater National Wildlife Refuge. Correspondence from the U.S. Fish and Wildlife Service (USFWS) states that the Refuge is “the downstream recipient of any chemical, sediment, and stormwater runoff from the proposed development.” Not only does the USFWS manage Blackwater National Wildlife Refuge, but also as a federal government agency, the USFWS provides important and significant comments, guidance, and recommendations to the Commission regarding projects that involve resources protected at the federal level.

In the letter from the USFWS dated July 11, 2006, and included in the public record, Glenn Carowan, John Wolflin, and Steve Minkkien express their concern about the need for additional studies of the Little Blackwater River (some of which are ongoing), the need for additional time to review studies that have been completed, and following review of the studies, the opportunity to provide additional input to the Commission. Among the letter’s recommendations are the following:

- 1. Delay making a decision on the project until an adequate peer-reviewed independent research program is completed by the U. S. Geological Survey, University of Maryland, and the U.S. Fish and Wildlife Service;*
- 2. Establish a requirement for an annual monitoring program to collect data on biological parameters that is adequate and peer-reviewed by all interested stakeholders;*
- 3. Provide the U.S. Fish and Wildlife Service with specific information on how stormwater runoff from the golf course will be managed; and*
- 4. Prohibit use of any chemicals on the golf course that may be environmentally harmful to the resources of Blackwater National Wildlife Refuge.*

The Panel discussed the last recommendation and whether it would be appropriate for the Commission to prohibit the use of certain chemicals on the golf course. The Panel discussed how pesticide, herbicide, and fertilizer applications are typically addressed in Integrated Pest Management (IPM) Plans and Nutrient Management Plans. The developer is proposing to develop and implement an Integrated Pest Management Plan and Nutrient Management Plan for the golf course; however, the Panel expressed concern that there may not be sufficient monitoring of the implementation of these Plans to provide adequate safeguards for the Blackwater National Wildlife Refuge.

The Panel expressed concern that there was insufficient information about immediate and cumulative impacts to water quality. Specifically, the Panel identified a lack of baseline data about the Little Blackwater River system, a lack of analysis of an alternative stormwater treatment system that would not discharge directly to any watercourses on the site or off-site, and a lack of information about appropriate monitoring. The Panel believes that the results of the independent research program, to be completed in 2007, recommended by the USFWS and any resulting recommendations are critical components of this request and are necessary for the Commission to make a determination regarding this standard. The Panel has concluded that they cannot recommend to the full Commission that this growth allocation is located in an area and in a manner that optimizes benefits to water quality.

Minimization of Impacts to Habitat Protection Areas

Locate a new Limited Development Area or an Intensely Developed Area in a manner that minimizes impacts to a Habitat Protection Area as defined in COMAR 27.01.09 and in an area and manner that optimizes benefits to water quality. Natural Resources Article § 8-1808.1(c)(3)

The Panel evaluated information on the Habitat Protection Areas on the project site in order to determine if impacts associated with the proposed growth allocation have been minimized. The Little Blackwater River and adjacent wetlands are identified by the City of Cambridge as Habitat Protection Area – Locally Significant Habitat. The Ordinance includes specific provisions addressing protection and conservation of these habitats. The Ordinance states that the City has maps on file to be used as a flagging device; however, it is stated that, “While these maps give a general indication of the area, they do not excuse any property owner or operator from establishing to the satisfaction of the City Planning Commission, whether or not the property or activity will affect the element of habitat to be protected. At the time of development, the applicant will be responsible for providing an on-site analysis and inventory.”

The Ordinance also includes specific standards to ensure that plant and wildlife habitats identified as Habitat Protection Areas are considered. These standards require a site-specific survey to determine the presence of any plant and wildlife habitat areas. They also require that the property owner submit the survey with design plans and a “written description of the measures that the property owner proposes to take to protect the habitats identified.” Site specific Habitat Protection Plans are to be prepared in consultation with the Department of Natural Resources (DNR). The Plans are to be used by the City in making a determination that development activities or land disturbances will not have or cause adverse impacts.

In addition to the Little Blackwater River Habitat Protection Area, the other significant HPA on the property within the Critical Area is the 100-foot Buffer. The Critical Area portion of the site borders the waters and adjacent wetlands of the Little Blackwater River and Maple Dam Branch along its entire length, involving approximately 14,700 linear feet or 2.78 miles of shoreline. In addition, there are approximately 5,770 linear feet of tributary streams. The City’s application package proposed that impacts to the 100-foot Buffer have been minimized by establishing the Buffer in forest vegetation as required by the City’s Critical Area Program, by expanding the forested Buffer beyond 100-feet in some areas, by locating the golf course, which includes nominal areas of impervious surface, in the area of the site closest to the Little Blackwater River, by restoring and

reconfiguring the six tributary streams and several agricultural drainage ditches, and by connecting wildlife corridors along the streams to forested areas on properties surrounding the site.

Over the past several weeks, the Panel has carefully examined the proposed impacts to the Buffer associated with the fairways for Hole #3, Hole #4, Hole #7, Hole #8, Hole #9, Hole #10, and Hole #18, the centralized public waterfront park area, and the conference center, as well as the proximity of the maintained areas of the golf course adjacent to tidal wetlands, tidal waters and tributary streams. The Panel has discussed and generally supports the concepts to protect, establish, and enhance the Buffer; however, a Buffer Management Plan for the entire project was not included in the City's application package. The Panel believes that without a detailed Buffer Management Plan depicting the proposed Buffer enhancements, the wildlife corridor network, and stream restoration activities, they do not have sufficient information regarding the minimization of impacts.

The project area has been defined by the City as a Habitat Protection Area – Locally Significant Habitat. This designation requires that the developer provide specific detailed studies to manage and protect the area. This information has not been provided. While the Panel acknowledges the positive aspects of the proposed project (e.g. stream restoration), the Panel believes that more information is needed on impacts to the downstream Blackwater Wildlife Refuge. The Panel has concluded that they cannot recommend to the full Commission that this growth allocation is located in a manner that minimizes impacts to Habitat Protection Areas without this information.

In addition, a Buffer Management Plan has not been submitted. The Panel acknowledges that in the past Buffer Management Plans have not been required as part of a growth allocation submittal. However, they believe that the size and intensity of the project, the linear extent and overall acreage of the Buffer on the site, the importance of providing viable wildlife corridors, and the unique and fragile nature of the primary watercourse that the Buffer is protecting warrant a different approach. They believe the Buffer Management Plan must be considered as part of the growth allocation application in order to determine if the 100-foot Buffer has been adequately protected. The Panel has concluded that they cannot recommend to the full Commission that this growth allocation is located in a manner that minimizes impacts to Habitat Protection Areas without a detailed Buffer Management Plan that addresses these habitat concerns.

300-Foot Setback

Locate a new Intensely Developed Area or a Limited Development Area in a Resource Conservation Area at least 300 feet beyond the landward edge of tidal wetlands or tidal waters. *Natural Resources Article § 8 -1808.1(c)(4)*

In the City's submittal, it is stated that generally areas proposed for residential and commercial structures, parking and stormwater management are located approximately 300-feet from tidal waters and tidal wetlands; however, much of the commercial center and portions of roads, pedestrian paths, cart paths, and stormwater management practices are within the 300-foot setback. In evaluating this locational standard, the Panel discussed that the primary development activity within the 300-foot setback is the golf course. Although golf courses may include relatively few structures and low impervious surface coverage, they are highly maintained and manipulated landscapes that provide active recreation and limited habitat value. The Panel expressed concern

about the commercial development located within the 300-foot setback and believed that its location is not consistent with this guideline.

Although, the Blackwater Resort Communities Project is designed with most of the intense development outside the Critical Area, the zoning classification used for the portion of the project outside the Critical Area is intrinsically linked to the water frontage, recreational amenities, and open space provided in the Critical Area portion of the project. Historically for projects involving significant growth allocation acreage and intense development, the Commission has looked at the 300-foot setback as a means to mitigate for and offset adverse impacts associated with development. The Panel discussed that the 300-foot setback has been identified as a way to provide increased buffering of aquatic resources from development activity, to provide additional forest cover on otherwise intensely developed sites with high levels of impervious surface, to provide a wider Buffer potentially expanding its habitat value for a larger number of species, and to provide numerous water quality benefits associated with riparian forest buffers. On some projects, it has not been practical or effective to provide the 300-foot setback. On these projects, applicants have proposed a variety of alternative measures and demonstrated to the Commission that these alternative measures provide equivalent, or in some cases, greater benefits.

The application does not provide a 300-foot setback. If it is impractical for the applicant to provide a 300-foot setback, then the applicant must demonstrate that the proposed design provides equivalent or greater benefits. However, the application does not include alternative measures that meet or exceed the water quality and riparian habitat benefits that would be provided by a 300-foot setback on this project site. The Panel also expressed concern about the location of the commercial center within the 300-foot setback and the proximity of the conference center to the 300-foot setback. The Panel believes that these structures and associated parking must be located outside the setback. The Panel has concluded that they cannot recommend to the full Commission that this growth allocation guideline has been applied in a manner that is consistent with the purposes, policies, goals, and provisions of the Critical Area law and Criteria because neither a 300-foot setback nor alternative measures for protection of the resources have been provided.

Buffer Expansion for Hydric Soils

Local jurisdictions shall expand the Buffer beyond 100 feet to include contiguous sensitive areas, such as steep slopes, hydric soils, or highly erodible soils, whose development or disturbance may impact streams, wetlands, or other aquatic environments. COMAR 27.01.09.02.C(7)

There are extensive areas of hydric soils on the project site, some of which are contiguous to the 100-foot Buffer of the Little Blackwater River, its adjacent nontidal wetlands, and the streams feeding the Little Blackwater River. The Panel has reviewed a soils map and discussed that these soils have severe limitations and that special design, significant increases in construction costs, and possibly increased maintenance may be required for all types of development. The commercial area, portions of the golf clubhouse and parking lot, and numerous stormwater management facilities are located in areas of hydric soils.

In analyzing the second concept, the Panel considered environmental impacts associated with consequences and situations that result, both directly and indirectly, from the presence and activities of people. These impacts, which are inherently difficult to specifically identify and quantify, tend to contribute over the long term to degradation of habitat and water quality and ultimately the effectiveness of the Critical Area law. The Panel discussed that if this growth allocation request were approved and this property were designated IDA, the particular configuration of the new IDA could easily lead to many additional requests in the area based on adjacency. The Panel was concerned that such action by the Critical Area Commission could serve to further intensify growth and increased human population in an area that extends more than 2.5 miles from the existing downtown and into an area where increased human activity would be detrimental to water quality and habitat over time.

- 3) Is the use of growth allocation consistent with the City and County comprehensive plans as directed in the growth allocation provisions of the City's and the County's Critical Area Programs?

In evaluating the third issue, the Panel discussed that both the City's Zoning Ordinance and the County's Code specify that the use of growth allocation shall be consistent with the adopted comprehensive plans. The Panel also discussed that this project involved an annexation that significantly extended a municipal boundary into an undeveloped portion of Dorchester County in manner that does not appear to have been contemplated by the 1996 Dorchester County Comprehensive Plan or the 1998 City of Cambridge Comprehensive Plan. The Panel understands that the Dorchester County Council did pass a resolution amending the comprehensive plan to facilitate the use of growth allocation for this project and its ultimate development. However, although the project site has been annexed into the City, and the City and Dorchester County have jointly submitted the request to use growth allocation, the City of Cambridge Comprehensive Plan has not been amended.

The Panel also discussed the tremendous public interest that this project has generated over the last several months. More than 100 people attended the Commission's public hearing, and the Commission, both prior to, and during the public comment period, received approximately 4,000 e-mails and 100 letters. Almost all of the public comment expressed opposition to the project. Many of the e-mails received were similar in format highlighting the Commission's responsibility to protect the Bay and to prevent pollution from reaching the streams, wetlands, and shores of the Bay; urging the Commission to deny the application because an "adequate, peer-reviewed, independent water quality study has not been done that would assess the impacts of the proposed development on the natural resources of the area;" and stating that the proposed location is not the right place for a development of this size. Many of the e-mails were personalized with detailed accounts of the writer's concerns about adverse impacts to the Blackwater National Wildlife Refuge and its significance, both personally and as a "national" resource.

The City and the County have not provided information regarding all of the direct environmental impacts associated with a project of this size and intensity, as well as the indirect impacts associated with the number, movement, and activities of people in the Critical Area relative to this project. As the City's Plan is currently written, it does not propose this area for future growth and development. The Panel believes that because the property was annexed into the City, and the

project reviewed under City zoning, subdivision, and site plan regulations, the City should have amended its comprehensive plan in an appropriate manner to address the direct environmental and indirect impacts of the project. The Panel has concluded that they cannot recommend to the full Commission that the growth allocation request as submitted is consistent with the purposes, policies, goals, and provisions of the Critical Area law because this goal of the Critical Area law has not been met.

Mapping Mistake

“Critical Area” means all lands and waters defined in Natural resources Article §8-1807, Annotated Code of Maryland. They include: (a) All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetland maps, and all State and private wetlands designated under Natural Resources Article, Title 9, Annotated Code of Maryland; (b) All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tides designated under Natural Resources Article, Title 9, Annotated Code of Maryland; and ...” COMAR 27.01.01.01.B(18)

At the Panel meeting on September 15, 2006, an issue was raised regarding the extent of tidal wetlands at the southern end of the site and how the Critical Area boundary was drawn in this area. Commission staff researched the issue and identified at least one apparent error on the County’s Critical Area Maps, which appear to have been used to identify the Critical Area boundary on the project site plan. The limit of tidal wetlands is shown on the County’s Critical Area Maps, and this line does not match the line shown on the 1972 State Tidal Wetland Maps. As a result, the 1,000-foot Critical Area boundary shown on the County’s Maps is also incorrect. At least one area is part of the project site and is proposed for development; therefore, any change to the Critical Area boundary in this area would affect the acreage of the growth allocation request.

The Panel has concluded that they cannot recommend to the full Commission that the growth allocation request as submitted is consistent with the purposes, policies, goals, and provisions of the Critical Area Criteria because it appears that the Critical Area boundary has been incorrectly mapped, which affects the growth allocation acreage that is being requested.