It's a textbook example, some say, of how Maryland's Critical Area Protection Act is not working: On neighboring islands in the Magothy River north of Annapolis, two landowners set out to build houses, even though building is restricted on the islands under the state's Critical Area Act. One man doesn't bother to get the necessary permits; he just builds the house of more than 5,000 square feet. He also puts in a driveway and a faux lighthouse. The authorities challenge him, but the house is still there years later. The other landowner jumps through the regulatory hoops, filing for all the permits and zoning variances. Years later there is still no final decision, and no house. The example isn't hypothetical. It is real. The islands in question are Dobbins Island and Little Island, near the mouth of Sillery Bay behind Gibson Island.

The state's Critical Area Act, passed in the mid-1980s, is designed to discourage new development on land within 1,000 feet of the Bay or any of its tributaries. Land within 100 feet of water, called the buffer zone, is even more closely guarded under the law, which is administered not by the state but by county permitting offices and zoning boards.

Not surprisingly, there are people who say the law isn't working. Surprisingly, those people come from both sides of the philosophical aisle. Developers and landowners say the law is economically intrusive and a waste of public resources. Environmentalists and antigrowth advocates say the law is far too easy to get around. Perhaps that's proof that the law is working. If neither side is happy, the saying goes, it must be a good compromise. And it will make for a lively debate this winter, as the Critical Area Act is re-examined during the 2008 session of the Maryland General Assembly.

It seems as if everything is set up to help the developers jump through the hoops," says Howard Dent of the Cobb Neck Citizens Alliance in Charles County, Md. Vivian Mills of the Conservancy of Charles County says an official there told her the philosophy is "development by right"—that is, if developers simply play the game, they get a variance. Paul Spadaro, president of the Magothy River Association, says Anne Arundel County "is just giving variances away."

Spadaro has been a thorn in the side of both Daryl Wagner, the builder who put up the

by J. V. RIESTRUP
photographs by JOHN BILDAHL.
Maryland’s law regulating development around the Bay garners criticism from all quarters.
When developers and landowners cry foul, it's invariably because they feel they've been singled out and thwarted by the critical-area process.

A 5,000-square-foot home on the Magothy's Little Island without the required permits, and David Clickner, who would like to build a home on neighboring Dobbins Island but can't, at least so far. "It's just a nightmare. It's a dismal failure," Spadaro says of the Critical Area Act, pointing to inconsistent and often weak application of the law up and down the Bay. Creative lawyers can always find loopholes to get zoning variances, he says, even though "a variance is not a constitutional right."

Spadaro's adversaries also complain about the law, but for diametrically opposite reasons. When developers and landowners cry foul, it's invariably because they feel they've been singled out and thwarted by the critical-area process. Although Daryl Wagner began building his house on Little Island without following the rules, he has since retained a lawyer to help him keep it: Warren Rich, an Annapolis attorney who thinks the Critical Area restrictions have done more harm than good. On the plus side, the laws have changed how people think about waterfront property, he says, but they have also spurred waterfront development instead of discouraging it—partly because of a rush to make use of a gap between the law's enactment and the regulations to enforce it.

"It has accelerated development around the Bay... and water quality is worse now than it has been. I don't think anyone can dispute that," Rich says. Instead, "all this effort is going into these little bits and pieces," like projects by individual landowners. Rich thinks the fundamental problem is that politicians lack the will to confront a worse culprit in polluting the Bay, agricultural runoff. He contends Wagner has done a favor to the Bay by improvements that stabilized Little Island and halted its erosion, including installing riprap around it.

David Clickner also claims his plans would preserve Dobbins Island and curb erosion there. "It would be nice if they could structure the program so that a person could have a reasonable expectation of getting a permit within their lifetime," he says.

On the other side of the Bay, R. S. "Steve" Smethurst Jr. says his Salisbury law practice is about 80 percent devoted to representing landowners in property and land-use cases around the Eastern Shore. He has just spent seven
years unsuccessfully defending a landowner who, like Wagner of Little Island, started without permission. Like Rich, he came into the case only after the landowner got into trouble. The most common excuse, he says, is that landowners or the contractors they hire didn’t know the rules for building in a critical area.

Smethurst says he has won bigger and smaller variances than this one. “I think the Critical Area Act itself is a great idea, and I think for the most part it’s implemented pretty well. My only criticism of it is that occasionally they go off the deep end,” as in this case, he says. After years of legal costs and expenses for expert witnesses, he says, the Critical Area Commission (CAC) has gained no benefit for the Bay.

Edwin Lewis wanted to put a half-dozen buildings on Phillips Island, a wooded five-acre bump in the marshland near the Nanticoke River. Lewis, a successful apparel-industry executive, bought a total of about 300 acres in 1999, including the island and some marshland around it. There were about a dozen duck blinds already in the marsh, and an old boat pier and sewage-disposal area on the island. Lewis wanted to put in a 40-by-40-foot hunting lodge and several 14-by-16-foot sleeping cabins as temporary accommodations when he and his friends went hunting, and he hired a local contractor to build them out of cedar. “Lewis wasn’t even around. That was a mistake,” says Smethurst, who says the contractor said he thought no permits were needed because the structures weren’t permanent. That assumption was wrong, and Lewis learned that most of the structures were within the 100-foot buffer around the perimeter of the island.

Lewis stopped work on the uncompleted cabins in 2000 and sought a variance from the Wicomico County Board of Zoning Appeals. The Nanticoke Watershed Alliance and the Critical Area Commission opposed the application. (Smethurst claims critics “poisoned the well” with the CAC by arousing resentment against Lewis as a rich, big-shot executive with Tommy Hilfiger who was trying to throw his money and weight around.) Issues in dispute included the number of trees cut to make way for the buildings and whether the impervious surface added by the cabin roofs would add to the island’s stormwater runoff.

The zoning board denied the variance. Lewis appealed, but the Wicomico County Circuit Court upheld the board’s ruling. Lewis appealed again, but the Maryland Court of Special Appeals—the next level up—also affirmed the ruling. Lewis appealed a third time, and in 2003 the Maryland Court of Appeals vacated the decision, sending it back to the zoning board on grounds it had applied the wrong standard of law. In 2004 the board again denied the variance; the circuit and appellate court upheld the denial and finally last year the Court of Appeals refused to hear the case again.

So the case now ranks as a legal citation among precedents under the Critical Area

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