

**Rich and Henderson, P.C. Successfully Persuades Court to Strike Down  
Application of Provisions of the Critical Area Act**

On May 26, 2009, attorneys with Rich and Henderson, P.C. of Annapolis, Maryland, and the Law Office of Robert Fuoco, jointly and successfully argued that provisions of the Critical Area Act amended in 2008 could not be applied retroactively. As a result, the Circuit Court for Anne Arundel County dismissed an action filed against the owner of a two-acre island located in the Magothy River known as Little Island.

The case had its genesis when the owner of the island developed the island around 2001 without obtaining the necessary Critical Area permits or variances. Subsequently, in 2004, the owner filed requests for specific variances to the Critical Area Program, in effect “after the fact” variances. Those variances for the development of the island were granted by the Anne Arundel County Board of Appeals in 2007.

In 2008, the Maryland Legislature imposed new requirements on applicants for “after the fact” Critical Area variances, now set out in title 8, subtitle 18 of the Natural Resources Article. The 2008 Act prohibited a county board of appeals from issuing any such Critical Area variances unless certain conditions precedent were satisfied, including the local government taking enforcement action and the applicant for the variance preparing and implementing a restoration or mitigation plan.

The issue before the Court in this case was whether the 2008 Act could be applied retroactively, in a Court proceeding brought by the Critical Area Commission, to the after the fact variances granted in 2007; that is, whether the new conditions precedent, including enforcement action and a restoration plan, could be required in this particular case.

The Court agreed with our attorneys representing the property owner and arguing that the law could not be applied retroactively. The Court concluded that the 2008 legislative changes affected only the procedure used to enforce rights to an after the fact variance and not substantive rights to those variances. As a result the Court held that the 2008 statute, which took effect on July 1<sup>st</sup> of that year, could not be applied retroactively to after the fact variances granted before the effective date of the Act. Our attorneys also raised various constitutional arguments against retroactive enforcement, which the Court did not need to address in light of its statutory interpretation of the 2008 legislation. While the Act may be applied prospectively, property owners, and local county boards of appeal should be aware of the fact that the 2008 amendments regarding after the fact variances should not be applied retroactively.