

CE 176-07 Kaufman, Mark  
VAR 3313

4/10

Comments JR  
4/3/07  
Comments KS  
12/15/07

51829-6579



STATE OF MARYLAND  
CRITICAL AREA COMMISSION  
CHESAPEAKE AND ATLANTIC COASTAL BAYS

1804 West Street, Suite 100, Annapolis, Maryland 21401  
(410) 260-3460 Fax: (410) 974-5338  
[www.dnr.state.md.us/criticalarea/](http://www.dnr.state.md.us/criticalarea/)

April 3, 2007

Mr. Joseph Johnson  
Cecil County Department of Planning and Zoning  
129 East Main Street  
Elkton, MD 21921

Re: File #3313 – Variance Mark Kaugman

Dear Mr. Johnson:

Thank you for providing information on the above referenced variance. The applicant is requesting a variance to build a 192 square foot gazebo in a Buffer Exempt Area with an associated landscaping plan. Although the information provided by the applicant does not expressly state the distance of the proposed gazebo from Plum Creek, the drawings indicate that the gazebo would be built within feet of the water. This office does not oppose the variance to construct modest additions which are further waterward than the existing dwelling or a deck which is constructed to be and remain pervious. However, we do oppose the variance to build a gazebo in the Buffer.

In 2002 and 2004, the General Assembly strengthened the Critical Area Law, and reiterated its commitment to the Chesapeake Bay Critical Area's water quality and wildlife habitat values, especially emphasizing the importance of the 100-foot Critical Area Buffer. In particular, the General Assembly reaffirmed the stringent standards, which an applicant must meet in order for a local jurisdiction to grant a variance to the Critical Area law. The State law provides that variances to a local jurisdiction's Critical Area program may be granted **only** if the Hearing Officer finds that an applicant has satisfied its burden to prove that the applicant meets each one of the county's variance standards, including the standard of "unwarranted hardship." The General Assembly defined that term as follows: "without the variance, the applicant would be denied reasonable and significant use of the entire parcel or lot." Furthermore, the State law establishes presumption that a proposed activity for which a Critical Area variance is requested does not conform to the purpose and intent of the Critical Area law. The Hearing Officer must make an affirmative finding that the applicant has overcome this presumption, based on the evidence presented.

In this case the applicant is proposing to construct a gazebo in a Buffer Exemption Area. The Critical Area Buffer establishes an area of undisturbed natural forest vegetation, or an area for enhancement with vegetation native to the Critical Area, managed to protect shorelines, streams, wetlands, and riparian biological communities from adverse effects of land use. Thus, the County has enacted a specific set of provisions to recognize the importance of the 100-foot Buffer and maintain its integrity

by "minimizing the shoreward extent of impervious surfaces in so far as possible...in no case may such impervious surfaces be extended shoreward of any setback line as defined by existing structures..." (Cecil County Code XI.195.3c).

The variance to the 100-foot Buffer cannot be granted unless the applicant proves, and the hearing examiner finds, that without the variance, the applicant would suffer an unwarranted hardship, that is "denial of reasonable and significant use of the entire parcel or lot." We do not believe that this standard is met, and accordingly the variance should be denied. I have discussed each one of the County's variance standards below as it pertains to this site:

*1. That special conditions or circumstances exist that are peculiar to the land or structure within the jurisdiction's Critical Area program that would result in an unwarranted hardship to the applicant.*

Currently, the lot is developed with a single family home with a screened in porch. As stated above, the General Assembly defined "unwarranted hardship" to mean that the applicant must prove that, without the requested variance, he would be denied reasonable and significant use of **the entire parcel or lot**. Based on this information, we do not believe that the County has evidence on which to base a favorable finding on this factor for the gazebo as the applicant is able to use the property for residential purposes.

*2. That a literal interpretation of this subtitle or the local Critical Area Program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area of the local jurisdiction.*

The applicant has a reasonable use of this property for residential purposes, and therefore, would not be denied a right commonly enjoyed by neighboring properties. No one has the right to construct a new gazebo in the Buffer. Therefore, denial of a variance for the accessory gazebo would not deny the applicants a right commonly enjoyed.

*3. The granting of a variance will not confer upon an applicant any special privilege that would be denied by this subtitle or the local Critical Area program to other lands or structures within the jurisdiction's Critical Area.*

If the variance is granted, it would confer upon the applicant a special privilege that would be denied to others in this area, as well as in similar situations in the County's Critical Area. The applicant has the burden of proof and the burden of persuasion to overcome the presumption that his proposed variance does not conform to the Critical Area Law. We do not believe the applicant has overcome this burden.

*4. The variance request is not based upon conditions or circumstances, which are the result of the actions, by the applicant, nor does the request arise from any condition conforming, on any neighboring property.*

It appears the request is not based upon conditions or circumstances that are the result of the applicant.

*5. The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's Critical Area, and that the granting of the variance will be in harmony with the general spirit and intent of the Critical Area law and the regulations.*

by "minimizing the shoreward extent of impervious surfaces in so far as possible...in no case may such impervious surfaces be extended shoreward of any setback line as defined by existing structures..." (Cecil County Code XI.195.3c).

The variance to the 100-foot Buffer cannot be granted unless the applicant proves, and the hearing examiner finds, that without the variance, the applicant would suffer an unwarranted hardship, that is "denial of reasonable and significant use of the entire parcel or lot." We do not believe that this standard is met, and accordingly the variance should be denied. I have discussed each one of the County's variance standards below as it pertains to this site:

*1. That special conditions or circumstances exist that are peculiar to the land or structure within the jurisdiction's Critical Area program that would result in an unwarranted hardship to the applicant.*

Currently, the lot is developed with a single family home with a screened in porch. As stated above, the General Assembly defined "unwarranted hardship" to mean that the applicant must prove that, without the requested variance, he would be denied reasonable and significant use of **the entire parcel or lot**. Based on this information, we do not believe that the County has evidence on which to base a favorable finding on this factor for the gazebo as the applicant is able to use the property for residential purposes.

*2. That a literal interpretation of this subtitle or the local Critical Area Program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area of the local jurisdiction.*

The applicant has a reasonable use of this property for residential purposes, and therefore, would not be denied a right commonly enjoyed by neighboring properties. No one has the right to construct a new gazebo in the Buffer. Therefore, denial of a variance for the accessory gazebo would not deny the applicants a right commonly enjoyed.

*3. The granting of a variance will not confer upon an applicant any special privilege that would be denied by this subtitle or the local Critical Area program to other lands or structures within the jurisdiction's Critical Area.*

If the variance is granted, it would confer upon the applicant a special privilege that would be denied to others in this area, as well as in similar situations in the County's Critical Area. The applicant has the burden of proof and the burden of persuasion to overcome the presumption that his proposed variance does not conform to the Critical Area Law. We do not believe the applicant has overcome this burden.

*4. The variance request is not based upon conditions or circumstances, which are the result of the actions, by the applicant, nor does the request arise from any condition conforming, on any neighboring property.*

It appears the request is not based upon conditions or circumstances that are the result of the applicant.

*5. The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's Critical Area, and that the granting of the variance will be in harmony with the general spirit and intent of the Critical Area law and the regulations.*

Mr. Johnson

4/3/2007

Page 3 of 3

In contrast, granting of this variance is not in harmony with the general spirit and intent of the Critical Area law and regulations. An increase in impervious surface in the Buffer and consequential disturbance to the land results in increased stormwater and sediment runoff and the loss of essential infiltration opportunities. I understand that the applicant has provided a landscaping plan meant to minimize the effects of the impervious surface runoff from the proposed gazebo, but given that the applicant can adequately redevelop this property and enjoy outdoor activities without the addition of a gazebo in the 100-foot Buffer, approval of this variance would not be in harmony with the general intent and spirit of the Critical Area Law.

In conclusion, it is our position that, unless the Board finds, by competent and substantial evidence, that the applicant has met the burden of proof to overcome the presumption of non-conformance, and the burden to prove that the applicant has met each one of the County's variance standards, the Board must deny the application for variance to the Buffer.

Thank you for the opportunity to provide comments. Please include this letter in your file and submit it as part of the record for this variance. Also, please notify the Commission in writing of the decision made in this case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Julie Roberts', with a long horizontal flourish extending to the right.

Julie Roberts  
Natural Resources Planner

Cc: CE 176-07

DOUGLAS F. GANSLER  
Attorney General

KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General



MARIANNE E. DISE  
Assistant Attorney General  
Principal Counsel

SAUNDRA K. CANEDO  
Assistant Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL  
CRITICAL AREA COMMISSION FOR THE  
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338

WRITER'S DIRECT DIAL NO. (410) 260-3466  
mdise@oag.state.md.us

January 14, 2008

John P. Downs, Esquire  
105 South Street  
Elkton, Maryland 21921

RE: Mark Kaufman Critical Area Variance - Cecil County Board of Appeals

Dear Mr. Downs:

Thank you for your letter of January 9, 2008, setting forth a proposal for settlement of the above-described variance case before the Cecil County Board of Appeals. I have discussed your letter with my client, and, while we understand the situation as described in your letter, we are unable to accept a proposal that allows a free-standing accessory structure to remain in the protected Critical Area buffer.

Thank you for your correspondence. If your client wishes to remove the structure and restore the site, please contact me before the January 29, 2008 hearing.

Sincerely,

A handwritten signature in cursive script that reads "Marianne E. Dise".

Marianne E. Dise  
Principal Counsel

cc: Hon. Margaret McHale  
Kate Schmidt  
Saundra Canedo, Esquire  
Eric Sennstrom

Martin O'Malley  
Governor

Anthony G. Brown  
Lt. Governor



Margaret G. McHale  
Chair

Ren Serey  
Executive Director

STATE OF MARYLAND  
CRITICAL AREA COMMISSION  
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December 14, 2007

Mr. Joseph Johnson  
Cecil County Department of Planning and Zoning  
129 East Main Street  
Elkton, MD 21921

Re: Variance File #3313 – Variance Mark Kaufman

Dear Mr. Johnson:

Thank you for providing information on the above referenced variance. This case has been remanded by the Circuit Court to the Cecil County Board of Appeals for a full evidentiary hearing. The applicant is requesting a variance to build a 192 square foot gazebo in a designated Buffer Exemption Area (BEA) with an associated landscaping plan. It is the understanding of this office that the applicant has constructed the gazebo under a building permit issued by Cecil County.

This office is opposed to granting this variance request because the applicant may construct the gazebo outside the 110-foot Buffer and the applicant has not met all the variance standards. In this situation, the lot is 0.63 acres in size and developed with a single family home, shed and driveway outside the 110-foot Buffer. The submitted site plan does not indicate the location of the 110-foot Buffer; however based on evaluation of aerial images it appears there is sufficient room on the property to accommodate this structure outside the 110-foot Buffer. While the property may be located within a designated BEA, this designation only modifies the standards for allowing development. Section 195.3(c) of the Cecil County Zoning Ordinance states new development must minimize the shoreward extent of impervious surfaces in so far as possible. In this case, minimization may be achieved by locating the structure outside the Buffer. Additionally, in order to receive a variance, the applicant must meet all of the standards specified for a variance in the Critical Area.

In 2002 and 2004, the General Assembly strengthened the Critical Area Law, and reiterated its commitment to the Chesapeake Bay Critical Area's water quality and wildlife habitat values, especially emphasizing the importance of the 100-foot Critical Area Buffer. In particular, the General Assembly reaffirmed the stringent standards, which an applicant must meet in order for a local jurisdiction to grant a variance to the Critical Area law. The State law provides that variances to a local jurisdiction's Critical Area program may be granted **only** if the Board of Appeals finds that an applicant has satisfied its burden to prove that the applicant meets each one of the county's variance standards, including the standard of "unwarranted hardship." The General Assembly defined that term as follows: "without the variance, the applicant would be denied reasonable and significant use of the entire parcel or lot." Furthermore, the State law establishes presumption that a proposed activity for

TTY for the Deaf

Annapolis: (410) 974-2609 D.C. Metro: (301) 586-0450

which a Critical Area variance is requested does not conform to the purpose and intent of the Critical Area law. The Board must make an affirmative finding that the applicant has overcome this presumption, based on the evidence presented.

In this instance, the applicant is proposing to construct a gazebo. The applicant currently has a single family home with a screened porch, shed, and driveway. Thus, the applicant has reasonable use of the entire property or lot. The variance to the 110-foot Buffer cannot be granted unless the applicant proves, and the Board of Appeals finds, that without the variance, the applicant would suffer an unwarranted hardship, that is "denial of reasonable and significant use of the entire parcel or lot." We do not believe that this standard is met, and accordingly the variance should be denied. I have discussed each one of the County's variance standards below as it pertains to this site:

Section 306.2.e(1) *That special conditions or circumstances exist that are peculiar to the land or structure within the jurisdiction's Critical Area program that would result in an unwarranted hardship to the applicant.*

Currently, the lot is developed with a single family home with a screened in porch. As stated above, the General Assembly defined "unwarranted hardship" to mean that the applicant must prove that, without the requested variance, he would be denied reasonable and significant use of **the entire parcel or lot**. Based on this information, we do not believe that the County has evidence on which to base a favorable finding on this factor for the gazebo as the applicant is able to use the property for residential purposes.

Section 306.2.e(2) *That a literal interpretation of this subtitle or the local Critical Area Program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area of the local jurisdiction.*

The applicant has a reasonable use of this property for residential purposes, and therefore, would not be denied a right commonly enjoyed by neighboring properties. No one has the right to construct a new gazebo in the Buffer. Therefore, denial of a variance for the accessory gazebo would not deny the applicants a right commonly enjoyed.

Section 306.2.e(3) *The granting of a variance will not confer upon an applicant any special privilege that would be denied by this subtitle or the local Critical Area program to other lands or structures within the jurisdiction's Critical Area.*

If the variance is granted, it would confer upon the applicant a special privilege that would be denied to others in this area, as well as in similar situations in the County's Critical Area. The applicant has the burden of proof and the burden of persuasion to overcome the presumption that his proposed variance does not conform to the Critical Area Law. We do not believe the applicant has overcome this burden.

Section 306.2.e(4) *The variance request is not based upon conditions or circumstances, which are the result of the actions, by the applicant, nor does the request arise from any condition conforming, on any neighboring property.*

In order to meet this standard, the applicant must present evidence as to why the gazebo could not be located outside the 110-foot Buffer on his property. The application forwarded to this office did not include any information regarding how this standard is met.

Mr. Joseph Johnson  
Variance Case - Kaufman  
December 14, 2007  
Page 3 of 3

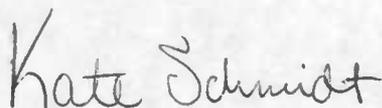
Section ~~306.8~~<sup>2</sup>.e(5) *The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's Critical Area, and that the granting of the variance will be in harmony with the general spirit and intent of the Critical Area law and the regulations.*

In contrast, granting of this variance is not in harmony with the general spirit and intent of the Critical Area law and regulations. An increase in impervious surface in the Buffer and consequential disturbance to the land results in increased stormwater and sediment runoff and the loss of essential infiltration opportunities. I understand that the applicant has provided a landscaping plan meant to minimize the effects of the impervious surface runoff from the proposed gazebo, but given that the applicant can adequately redevelop this property and enjoy outdoor activities without the addition of a gazebo in the 100-foot Buffer, approval of this variance would not be in harmony with the general intent and spirit of the Critical Area Law.

This letter has addressed five of the relevant variance standards. Based on the information provided, none of the variance standards are met. The County and State law provide that in order to grant a variance, the applicant must meet and satisfy each and every variance standard. This applicant has failed to meet all of the County standards. Because the applicant has not met each one of Cecil County's variance standards, this office recommends that the Board deny the applicant's request for this variance and require the applicant to locate the gazebo outside of the 110-foot Buffer.

Thank you for the opportunity to provide comments. Please include this letter in your file and submit it as part of the record for this variance. Also, please notify the Commission in writing of the decision made in this case.

Sincerely,



Kate Schmidt  
Natural Resources Planner

Cc: CE 176-07

CIRCUIT COURT FOR CECIL COUNTY  
 William L. Brueckman  
 Clerk of the Circuit Court  
 Courthouse, 2nd Floor  
 129 E. Main Street  
 Elkton, MD 21921-  
 TTY for Deaf: (410)-398-2097

**RECEIVED**

NOV 07 2007

CECIL COUNTY OFFICE OF  
 PLANNING & ZONING

Civil Equity(410)996-5377 Civil Law(410)996-5369 MD Toll Free 1(888)287-0576

11/07/07

Case Number: 07-C-07-000200 AA  
 Date Filed: 06/21/2007  
 Status: Closed/Inactive  
 Judge Assigned: To Be Assigned,  
 Location :  
 CTS Start : 06/21/07 Target : 12/17/08

In the Matter of Margaret McHale

**C A S E H I S T O R Y**

**OTHER REFERENCE NUMBERS**

Description	Number
-----	-----
Case Folder ID	C07000200V01

**INVOLVED PARTIES**

Type Num	Name(Last,First,Mid,Title)	Addr Str/End	Pty. Disp. Addr Update	Entered
PET 001	McHale, Margaret		CT DO 11/05/07	06/21/07
		Party ID: 0151853		
	Capacity : Chair			
	Mail: Critical Area Commission	06/21/07		06/21/07 DPB
	1801 West Street, Suite 100			
	Annapolis, MD 21401			
	Serve On: Margaret McHale, Chair			
	Attorney: 0027066 Gansler, Douglas	Appear: 06/21/2007		06/21/07
	Attorney General			
	300 West Preston Street			
	Suite 302			
	Baltimore, MD 21201			
	(410)767-6023			
	0803385 Canedo, Sandra K	Appear: 06/21/2007		06/21/07

Assistant Attorney General Department Of Natural Resources  
 1804 West Street  
 Suite 100  
 Annapolis, MD 21401  
 (410)260-3466

0811287 Dise, Marianne E Appear: 06/21/2007 06/21/07  
 Assistant Attorney General Department Of Natural Resources  
 1804 WEST ST  
 SUITE 100  
 Annapolis, MD 21401  
 (410)260-3466

Type Num	Name(Last,First.Mid,Title)	Addr Str/End	Pty. Disp. Addr Update	Entered
ADA 001	Cecil County Board Of Appeal		CT DO 11/05/07	06/21/07
		Party ID: 0151854		
	Mail: 129 East Main Street Office Of Planning & Zoning Elkton, MD 21921	06/21/07		06/21/07 DPB
	Attorney: 0015513 Baynes, Keith A Keith A. Baynes, Esquire, P.A. 210 E Main St Elkton, MD 21921 (410)398-6333		Appear: 07/12/2007	07/12/07
ITP 001	Kaufman, Mark		CT DO 11/05/07	06/21/07
		Party ID: 0151855		
	Mail: 53 Mallard Lane North East, MD 21901	06/21/07		06/21/07 DPB
ITP 002	Walbeck, Carl D		CT DO 11/05/07	07/20/07
		Party ID: 0153816		
	Mail: 47 Mallard Lane North East, MD 21901	07/20/07		07/20/07 DAW

**CALENDAR EVENTS**

Date	Time	Fac	Event Description	Text SA	Jdg Day	Of Notice	User ID
Result			ResultDt By Result Judge	Rec			
10/30/07	01:30P	I	Hearing		CMK	01 /01	DAW DAW
	Held/Concluded		10/30/07 E C.Kahl	N			

**DISPOSITION HISTORY**

Disp Date	Disp Code	Description	Stage Code	Description	Activity User	Date
11/05/07	DO	Decree or Order	CT	AFTER TRIAL/HEARING	DAW	11/06/07

**JUDGE HISTORY**

JUDGE ASSIGNED	Type	Assign Date	Removal RSN
T8A To Be Assigned.	J	06/21/07	

**DOCUMENT TRACKING**

Num/Seq	Description	Filed	Entered	Party	Jdg Ruling	Closed	User ID
0001000	Payments Received 6/21/07 Cost To Be Assessed At The End Of The Case; dpb.	06/21/07	06/21/07	000	TBA	06/21/07	DPB DPB
0002000	Petition for Judicial Review	06/21/07	06/21/07	PET001	TBA	11/05/07	DPB DAW
0002001	Response to Petition	07/12/07	07/12/07	ADA001	TBA	11/05/07	DAW DAW
0003000	Notice of Administrative Judicial Review Issued	06/21/07	06/21/07	PET001	TBA	06/21/07	DPB
0004000	Affidavit of Service	07/02/07	07/02/07	000	TBA	07/02/07	DPB
0005000	Administrative Agency Record Received (waiting for transcript)	07/03/07	07/06/07	ADA001	TBA	11/05/07	DAW DAW
0006000	Correspondence (letter requesting to be notified of any action in case)	07/20/07	07/20/07	000	TBA	07/20/07	DAW
0007000	Administrative Agency Transcript Received	08/06/07	08/06/07	ADA001	TBA	11/05/07	DAW DAW
0008000	Notice of Record Issued	08/06/07	08/06/07	ADA001	TBA	08/06/07	DAW
0009000	Notice of Assignment Issued	08/07/07	08/07/07	000	TBA	08/07/07	DAW
0010000	Motion to Dismiss	08/10/07	08/14/07	ADA001	ORL Denied	09/06/07	DAW DAW
0010001	Response to Motion to Dismiss	08/27/07	08/28/07	PET001	TBA	11/05/07	DAW DAW
0011000	Memorandum of Petitioner	08/30/07	08/30/07	PET001	TBA	08/30/07	DAW

Num/Seq	Description	Filed	Entered	Party	Jdg Ruling	Closed	User ID
0012000	Memorandum of Administrative Agency	10/17/07	10/17/07	ADA001	TBA	10/17/07	DAW
0013000	Motion to Strike Memorandum of Administrative Agency	10/23/07	10/23/07	PET001	TBA	11/05/07	DAW DAW
0013001	Response to Motion to Strike Memorandum	10/24/07	10/24/07	ADA001	TBA	11/05/07	DAW DAW
0014000	Order of Court passed and filed. The case is remanded to the Board of Appeals for a full evidentiary hearing.	11/06/07	11/06/07	000	CMK Ruled	11/05/07	DAW

**TICKLE**

Code	Tickle Name	Status Expires	#Days	AutoExpire	GoAhead	From	Type	Num	Seq
1YRT	One Year Tickle (Jud	CANCEL 06/20/08	365	no	no	DAAR	D	002	000
SLIL	Set List - Informati	CLOSED 07/03/07	0	no	no	DAAR	D	005	000
SLMR	Set List For Motions	EXPIRE 08/28/07	18	no	no	DANS	D	010	000

IN THE MATTER OF  
THE APPLICATION OF  
MARK KAUFMAN  
(Variance)

BEFORE THE CECIL COUNTY  
BOARD OF APPEALS  
FILE NO.: 3313

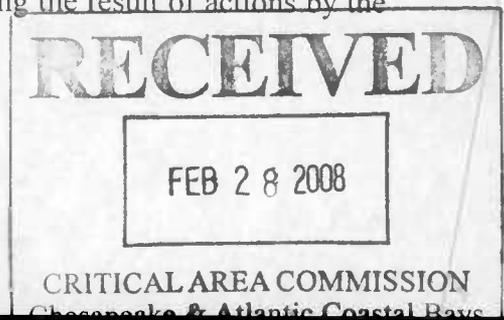
OPINION

Application of Mark Kaufman for a variance from the requirements of the Zoning Ordinance pertaining to the critical area buffer requirements within the 110' buffer zone for construction purposes at property located at 53 Mallard Drive, North East, in an area presently zoned Suburban Residential (SR).

Under the provisions of Article XVII, Part I, Section 306, Paragraph 1, variances, as defined in Article II, may be granted by the Board of Appeals. In addition, due to special features of a site or other circumstances where a literal enforcement of the provisions relating to the Critical Area District would result in unwarranted hardship to the property owner, the Board of Appeals may grant a variance of the Critical Area District. *An unwarranted hardship means that without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.* (Italics added)

Paragraph 2 of Section 306 requires the Board to examine all facts of the case and render a decision based upon the following criteria:

- a. The variance request is based upon a situation where, because of special conditions, a literal enforcement of the provisions of the Ordinance would deprive the applicant of a right commonly enjoyed by other parties in the same zone under the terms of this Ordinance.
- b. Special conditions and circumstances exist that are peculiar to the land, buildings or structures involved, and that are not applicable to other lands, buildings, or structures in the same zone, such conditions and circumstances not being the result of actions by the applicant.



- c. The granting of the variance will not confer upon the applicant any special privileges that are denied by this Ordinance to other properties in the same zone.
  - d. The variance request does not arise from any condition related to land or building use, either permitted or non-conforming, on any neighborhood property.
  - e. Variance requests in the Critical Area District shall not be granted unless the decision is based on the following additional criteria:
    - (1) Special conditions or circumstances exist that are unique to the subject property or structure and a strict enforcement of the provisions within the Critical Area District would result in unwarranted hardship that is not generally shared by owners of property in similar management areas (i.e., IDA, LDA, RCA) of the Critical Area.
    - (2) Strict enforcement of the provisions within the Critical Area District would deprive the property owner of rights commonly shared by other owners of property in similar management areas within the Critical Area District.
    - (3) The granting of a variance will not confer upon an applicant any special privilege that would be denied to other owners of like property and/or structures within the Critical Area District.
    - (4) The variance request is not based upon conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels.
    - (5) The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area District, and that the granting of the variance will be consistent with the spirit and intent of the County's Critical Area Program and associated ordinances as well as state law and regulations adopted under Subtitle 18 of the Natural Resources Article of the Annotated Code of Maryland and COMAR 20.01.
    - (6) Greater profitability or lack of knowledge of the restrictions shall not be considered as sufficient cause for a variance.
3. A variance in the Critical Area District will not be granted by the Board of Appeals unless and until:
- b. The Board of Appeals shall find that the reason set forth in the application justifies the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of land, building, or structures. In making this determination for variance requests in the Critical Area District, the Board of Appeals shall consider the following as tantamount to a minimum variance:

- (1) The granting of a variance to the yard and/or Buffer requirements results in new structures or impervious surfaces being located as far back from Mean High Water Line, tidal wetlands, or tributary streams in Critical Area as is feasible; and,
- (2) The applicant takes steps to mitigate impacts, insofar as possible, including:
  - i. Reforestation on the sit to offset disturbed forested or developed woodlands on at least an equal area basis;
  - ii. Afforestation of areas of the site to that at least fifteen (15) percent of the gross site is forested; and,
  - iii. Implementation of any mitigation measures that relate to Habitat Protection Areas, Threatened or Endangered Species, or Species in Need of Conservation, and Plant and Wildlife Habitats, as delineated in the Cecil County Critical Area Program, recommended by state and/or County agencies, are included as conditions of approval.
- (3) The Board of Appeals shall further find that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance, shall not result in a use not permitted in the zone in which the property subject to variance is located, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
- (4) For variances in the Critical Area District, the Board of Appeals shall find that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance and the Cecil County Critical Area Program and shall not result in a use not permitted in the management area (i.e., IDA, LDA, RCA) or an increase in the number of permitted dwelling units (i.e., density limits) in which the property subject to the variance is located, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
- (5) In addition and to the extent possible based on best available information, all property owners immediately contiguous to the application shall be notified by Certified Mail and be furnished a copy of the said application.
- c. In granting the variance, the Board of Appeals may prescribe such conditions and safeguards as it deems appropriate that comply with the intent of this Ordinance and the Cecil County Critical Area Program. Violations of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this Ordinance and punishable under Section 340 of this Ordinance.
- d. In considering an application for a variance, the County shall presume that specific development activity in the Critical Area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of Natural

Resources Article, Title 8, Subtitle 18, COMAR Title 27, and the requirements of the County's Critical Area Program.

- e. If the variance request is based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, the County may consider that fact.
- f. An applicant has the burden of proof and the burden of persuasion to overcome the presumption of nonconformance established in paragraph d above.
- g. Based on competent and substantial evidence, the County shall make written findings as to whether the applicant has overcome the presumption of nonconformance as established above.
- h. With due regard for the person's experience, technical competence, and specialized knowledge, the written findings may be based on evidence introduced and testimony presented by:
  - (1) The Applicant;
  - (2) The County or any other government agency; or
  - (3) Any other person deemed appropriate by the County.

This is the second time this application has been heard by the Board. The initial application was heard and granted by the Board on April 24, 2007. Subsequent to this approval Applicant constructed his gazebo.

Subsequent to the above approval the Chesapeake Bay Critical Area Commission filed an appeal. A hearing was held before the Honorable Christian M. Kahl and by Order dated November 5, 2007 this application was remanded back to the Board of Appeals for a full evidentiary hearing.

At the hearing before the Board of Appeals on January 30, 2008 the Applicant, through his attorney, John Downs, represented that the Applicant could not meet the above criteria, especially subsections (e), 1, 2 & 4. As a result Applicant offered no evidence.

A representative from the Chesapeake Bay Critical Area testified in opposition to the requested variance. A letter dated December 14, 2007 was also submitted as part of the record.

From the evidence presented the Board is not satisfied that the criteria set forth in Section 306 has been met and makes the following findings:

1. The Board further does not find any unwarranted hardship that would deny Applicant reasonable and significant use of the entire parcel for which the variance is requested. The property currently is improved with a single family dwelling. Thus the Board finds that Applicant has reasonable use of the entire parcel.
2. That strict enforcement of the provisions within the Critical Area District will not deprive the property owner of rights commonly shared by other owners of property in similar management areas within the Critical Area District. As noted above the Board finds Applicant has a reasonable use of his property for residential purposes.
3. That the granting of a variance will confer upon an applicant a special privilege that would be denied to other owners of like property and/or structures within the Critical Area District.
4. That the variance request is based upon conditions or circumstances that are self-created or self-imposed, and the request does not arise from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels.

For the reasons stated, a motion to disapprove the application was made and seconded.

By unanimous vote the application for variance is hereby **DENIED**.

Date: 2/26/08

David Willis, Chairman  
David Willis, Chairman

*True Copy*  
*Gene L. Dempsey 2-27-08*

IN THE MATTER OF  
THE APPLICATION OF  
MARK KAUFMAN

BEFORE THE CECIL COUNTY  
BOARD OF APPEALS  
FILE NO.: 3313

(Variance)

OPINION

Application of Mark Kaufman for a variance from the Zoning Ordinance pertaining to the critical area buffer requirements within the 110' buffer zone for construction purposes on property located at 53 Mallard Lane, North East, in the Fifth Election District, in an area presently zoned Suburban Residential (SR).

Under the provisions of Article XVII, Part I, Section 306, Paragraph 1, variances, as defined in Article II, may be granted by the Board of Appeals. In addition, due to special features of a site or other circumstances where a literal enforcement of the provisions relating to the Critical Area District would result in unwarranted hardship to the property owner, the Board of Appeals may grant a variance of the Critical Area District. An unwarranted hardship means that without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.

Paragraph 2 of Section 306 requires the Board to examine all facts of the case and render a decision based upon the following criteria:

- a. The variance request is based upon a situation where, because of special conditions, a literal enforcement of the provisions of the Ordinance would deprive the applicant of a right commonly enjoyed by other parties in the same zone under the terms of this Ordinance.
- b. Special conditions and circumstances exist that are peculiar to the land, buildings or structures involved, and that are not applicable to other lands, buildings, or structures in the same zone, such conditions and circumstances not being the result of actions by the applicant.

- c. The granting of the variance will not confer upon the applicant any special privileges that are denied by this Ordinance to other properties in the same zone.
  - d. The variance request does not arise from any condition related to land or building use, either permitted or non-conforming, on any neighborhood property.
  - e. Variance requests in the Critical Area District shall not be granted unless the decision is based on the following additional criteria:
    - (1) Special conditions or circumstances exist that are unique to the subject property or structure and a strict enforcement of the provisions within the Critical Area District would result in unwarranted hardship that is not generally shared by owners of property in similar management areas (i.e., IDA, LDA, RCA) of the Critical Area.
    - (2) Strict enforcement of the provisions within the Critical Area District would deprive the property owner of rights commonly shared by other owners of property in similar management areas within the Critical Area District.
    - (3) The granting of a variance will not confer upon an applicant any special privilege that would be denied to other owners of like property and/or structures within the Critical Area District.
    - (4) The variance request is not based upon conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels.
    - (5) The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area District, and that the granting of the variance will be consistent with the spirit and intent of the County's Critical Area Program and associated ordinances as well as state law and regulations adopted under Subtitle 18 of the Natural Resources Article of the Annotated Code of Maryland and COMAR 20.01.
    - (6) Greater profitability or lack of knowledge of the restrictions shall not be considered as sufficient cause for a variance.
3. A variance in the Critical Area District will not be granted by the Board of Appeals unless and until:
- b. The Board of Appeals shall find that the reason set forth in the application justifies the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of land, building, or structures. In making this determination for variance requests in the Critical Area District, the Board of Appeals shall consider the following as tantamount to a minimum variance:

- (1) The granting of a variance to the yard and/or Buffer requirements results in new structures or impervious surfaces being located as far back from Mean High Water Line, tidal wetlands, or tributary streams in Critical Area as is feasible; and,
- (2) The applicant takes steps to mitigate impacts, insofar as possible, including:
  - i. Reforestation on the site to offset disturbed forested or developed woodlands on at least an equal area basis;
  - ii. Afforestation of areas of the site to that at least fifteen (15) percent of the gross site is forested; and,
  - iii. Implementation of any mitigation measures that relate to Habitat Protection Areas, Threatened or Endangered Species, or Species in Need of Conservation, and Plant and Wildlife Habitats, as delineated in the Cecil County Critical Area Program, recommended by state and/or County agencies, are included as conditions of approval.
- (3) The Board of Appeals shall further find that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance, shall not result in a use not permitted in the zone in which the property subject to variance is located, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
- (4) For variances in the Critical Area District, the Board of Appeals shall find that the granting of the variance will be in harmony with the general purpose and intent of this Ordinance and the Cecil County Critical Area Program and shall not result in a use not permitted in the management area (i.e., IDA, LDA, RCA) or an increase in the number of permitted dwelling units (i.e., density limits) in which the property subject to the variance is located, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.
- (5) In addition and to the extent possible based on best available information, all property owners immediately contiguous to the application shall be notified by Certified Mail and be furnished a copy of the said application.
  - c. In granting the variance, the Board of Appeals may prescribe such conditions and safeguards as it deems appropriate that comply with the intent of this Ordinance and the Cecil County Critical Area Program. Violations of such conditions and safeguards, when made a part of the terms under which the variance is granted, shall be deemed a violation of this Ordinance and punishable under Section 340 of this Ordinance.
  - d. In considering an application for a variance, the County shall presume that specific development activity in the Critical Area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of Natural

Rcsources Article, Title 8, Subtitle 18, COMAR Title 27, and the requirements of the County's Critical Area Program.

- e. If the variance request is based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, the County may consider that fact.
- f. An applicant has the burden of proof and the burden of persuasion to overcome the presumption of nonconformance established in paragraph d above.
- g. Based on competent and substantial evidence, the County shall make written findings as to whether the applicant has overcome the presumption of nonconformance as established above.
- h. With due regard for the person's experience, technical competence, and specialized knowledge, the written findings may be based on evidence introduced and testimony presented by:
  - (1) The Applicant;
  - (2) The County or any other government agency; or
  - (3) Any other person deemed appropriate by the County.

Applicant desires to construct and locate a non-permanent 12' x 16' gazebo within the 110' foot buffer zone. This location will allow Applicant a view of the North East River and Chesapeake Bay. The gazebo and surrounding area will be landscaped to prevent the existing sediment run-off into the Chesapeake Bay. Applicant will plant vegetation to create, restore and enhance existing habitat for wildlife. These plantings will also stabilize an existing erosion problem.

Carl Walbeck appeared and testified in favor of the application.

No one appeared in opposition to the application.

From the evidence presented the Board is satisfied that the criteria set forth in Section 306 has been met and makes the following findings:

1. The variance request is based upon a situation where because of special conditions (specific location to view the North East River and Bay) a literal enforcement of the provisions of the Ordinance would deprive the Applicant of a right commonly enjoyed by other properties in the same zone under the terms of this Ordinance.
2. The Board further finds unwarranted hardship that would deny Applicant reasonable and significant use of the entire parcel for which the variance is requested.
3. The Board finds that Applicant met his burden of proof of demonstrating that the non-permanent gazebo can not be located at any other location and still allow Applicant a view of the water.
4. That the granting of the variance will not confer upon the Applicant special privileges that are denied by this Ordinance to other properties in the same zone.
5. That strict enforcement of the provisions within the Critical Area District will deprive the property owner of rights commonly shared by other owners of property in similar management areas within the Critical Area District.
6. That the variance request is not based upon conditions or circumstances that are self-created or self-imposed.

For the reasons stated, by unanimous vote, the application for a critical area buffer variance is hereby **GRANTED**.

Date: 5/29/07

David Willis  
David Willis, Chairman

**TRUE COPY**

Gale Dempsey 5-30-07

IN THE CIRCUIT COURT FOR CECIL COUNTY

\*

PETITION OF:

\*

MARGARET MCHALE,  
Chair, Critical Area Commission

\*

FOR JUDICIAL REVIEW OF THE DECISION  
OF THE CECIL COUNTY BOARD OF APPEALS

\*

CASE NO.: C-07-200 AA

\*

IN THE CASE OF:

\*

In the Matter of the Application of  
MARK KAUFMAN  
File No.: 3313

\*

ORDER

Upon consideration of the record, memorandums and arguments of counsel, it is this  
5<sup>th</sup> day of November, 2007 by the Circuit Court for Cecil County,

**ORDERED** that the above captioned matter is hereby **REMANDED** to the Cecil County  
Board of Appeals for a full evidentiary hearing.



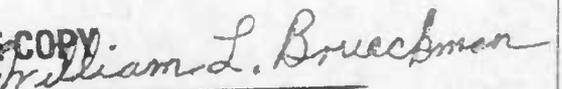
Honorable Christian M. Kahl

**COPIES SENT TO  
ALL COUNSEL AND  
UNREPRESENTED PARTIES**

07 NOV -6 11 9: 36

TH A. BAYNES  
ORNEY AT LAW  
AST MAIN STREET  
STON, MD 21921  
JO-398-6333

**TRUE COPY  
TEST**

  
William L. Brueckman, Clerk

**DOUGLAS F. GANSLER**  
*Attorney General*

**KATHERINE WINFREE**  
*Chief Deputy Attorney General*

**JOHN B. HOWARD, JR.**  
*Deputy Attorney General*



**STATE OF MARYLAND**  
**OFFICE OF THE ATTORNEY GENERAL**  
**DEPARTMENT OF NATURAL RESOURCES**

**JOSEPH P. GILL**  
*Assistant Attorney General*  
*Principal Counsel*

**SIAUN P.K. FENLON**  
**RACHEL L. EISENHAUER**  
**ROGER H. MEDOFF**  
**SHARA MERVIS ALPERT**  
**SAUNDRA K. CANEDO**  
**PAUL J. CUCUZZELLA**  
**KRISTEN O. MANEVAL**  
*Assistant Attorneys General*

FAX NO.: 410-260-8364

WRITER'S DIRECT DIAL NO.  
(410) 260-8356  
scanedo@oag.state.md.us

August 29, 2007

Mr. William Brueckman, Clerk of the Court  
Circuit Court for Cecil County  
129 East Main Street  
Elkton, Maryland 21921

RE: Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Cecil County Board of Appeals in the Case of Mark Kaufman, Civil Action No.: 07-C-07-000200AA

Dear Mr. Brueckman:

Enclosed for filing please find Memorandum of Petitioner in the above referenced case. Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra K. Canedo".

Sandra K. Canedo  
Assistant Attorney General

Enclosures

cc: Counsel of Record

**IN THE CIRCUIT COURT OF MARYLAND  
FOR CECIL COUNTY**

**PETITION OF:**  
MARGARET MCHALE,  
Chair, Critical Area Commission for  
the Chesapeake and Atlantic Coastal Bays

\*  
\*  
\*

**FOR JUDICIAL REVIEW OF  
THE DECISION OF:  
THE CECIL COUNTY BOARD  
OF APPEALS**

\*  
\*

Civil Action No.: 07-C-07-000200 AA

**IN THE CASE OF:**  
No. 3313  
MARK KAUFMAN

\*  
\*

\* \* \* \* \*

**MEMORANDUM OF PETITIONER**

Petitioner Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (“Critical Area Commission”) by her attorneys, Douglas F. Gansler, Attorney General of Maryland and Sandra K. Canedo and Marianne E. Dise, Assistant Attorneys General, pursuant to Rule 7-207, files this Memorandum.

**INTRODUCTION**

Petitioner Critical Area Commission seeks reversal of the May 29, 2007 Decision of the Cecil County Board of Appeals (“Board”), in which the Board granted a variance to the 110-foot Critical Area Buffer requirements of the County’s and State’s Critical Area Law. The Board’s decision authorizes the Applicant to construct a 12’ x 16’ gazebo in the legally-protected waterfront Buffer. In its decision granting the variance, the Board erred as a matter of law by failing to apply, or even to mention, the State-mandated variance requirement of “unwarranted hardship;” by failing to apply all of the variance standards required by the County’s Critical Area law; and by failing to make the written

findings required by the State Law and County Code. Consequently, this Court should reverse the Board.

### **PROCEEDINGS BY BOARD OF APPEALS**

A hearing was held by the Cecil County Board of Appeals in the matter of a variance application by Mark Kaufman (the "Applicant") on April 24, 2007. At the hearing, Mark Kaufman testified that the gazebo needed to be in the Critical Area buffer because "where the proposed gazebo would be is all woods... so it is very unobtrusive" to his neighbor on his left. Transcript of Board hearing, April 24, 2007 ("Tr.") at 5. The Critical Area Commission submitted a three page comment letter addressing five of the County's variance standards that are not met by this variance application<sup>1</sup>. The Board incorrectly summarized the letter's entirety by simply quoting the concluding paragraph which stated,

In conclusion, it is our position that, unless the Board finds, by competent and substantial evidence, that the applicant has met the burden of proof to overcome the presumption of non-conformance, and the burden to prove that the applicant has met each one of the County's variance standards, the Board must deny the application for variance to the buffer.

Tr. at 10; Critical Area Commission letter dated April 3, 2007 at 3. The letter specifically discussed unwarranted hardship and the Commission staff concluded that, "we do not believe that the County has evidence on which to base a favorable finding on this factor for the gazebo as the applicant is able to use the property for residential purposes."

Critical Area Commission letter at 2.

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<sup>1</sup> The letter was addressed to Mr. Joseph Johnson, at the Cecil County Office of Planning and Zoning and dated April 3, 2007. The letter refers to a 100-foot Buffer, but the Cecil County Code requires a 110-foot Critical Area Buffer.

The Applicant requested a variance for his proposed gazebo because he wanted to locate it in the 110-foot Critical Area Buffer. Consistent with State law, the Cecil County Critical Area law prohibits the construction of new impervious surfaces (including gazebos) in the Buffer. See Annotated Code of Maryland (“Code”), Natural Resources Article 8-1808(c)(vii). The State law (Nat. Res. Art. 8-1808(d)(4)(ii)), and the County Code require that the Applicants satisfy each and every variance standard in order to be granted a variance.<sup>2</sup> See, County Code, Article XVII, Part I, §306. In addition, State and County law alike require the Board to make written findings to support its decision on a variance application. Nat. Res. §8-1808(d)(3)(ii); County Code, Art. XVII, §306.3.g.

In this case, the Board erroneously granted the variance, while applying neither the unwarranted hardship standard nor any other applicable variance standard. No testimony was proffered by the Applicant which would support a finding of unwarranted hardship, other than Applicant’s proffer of planting some “plants and ferns” as he would “like to be able to sit out there and enjoy it.” Tr. at 3. Even if the Applicant is doing some plantings, the requested variance is for the gazebo, not the plants. The new construction, that of the gazebo, needs to meet all of the variance standards. The law does not allow the Board to grant a variance simply because the applicant promises to

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<sup>2</sup> The County Code does not follow the precise language of the State law, requiring “each and every” standard be met; however, the language of the County variance standards explicitly states, “[V]ariance requests in the Critical Area District *shall not* be granted unless the decision is based on the following additional criteria.” (emphasis added) County Code, Article XVII, Part I, Section 306. In any event, the Court of Special Appeals has held that the language of the State law in Nat. Res. Art. 8-1808 is mandatory for all Critical Area variances. *Becker v. Anne Arundel County*, 174 Md. App. 114, 136 (2007).

plant some ferns along the shoreline.<sup>3</sup> In Critical Area cases, the General Assembly has mandated that a variance **may not be granted** unless the applicant establishes by competent and substantial evidence that the applicant will suffer an “unwarranted hardship.” The General Assembly has defined “unwarranted hardship” as “without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.” Code, Nat. Res. Art. 8-1808(d)(4)(i).

The State legislature has assigned both the burden of proof and the burden of persuasion to the Applicants in Critical Area variance cases. Code, Nat. Res. Art. 8-1808(d)(3). These burdens, and the standards for Critical Area variances, are not optional. As the Court of Special Appeals recently held: “The criteria contained in [Natural Resources Article] 8-1808, including the criteria for granting a variance, are mandatory.” *Becker v. Anne Arundel County*, 174 Md. App. at 136. In the present case, the Cecil County Board failed to ensure that Applicant provided evidence to meet those burdens and to support the findings required by law. Moreover, the Board failed to make the written findings required by law (“a local jurisdiction shall make written findings”), Code, Nat. Res. Art. 8-1808(d)(3)(ii). The Board also erred as a matter of law by failing to require the Applicant to overcome the statutory presumption of non-conformance with the general purpose and intent of the critical area law (“In considering an application for a variance, a local jurisdiction shall presume that the specific development activity in the critical area ... for which a variance is required does not conform with the general purpose and intent of this subtitle ... and the requirements of the local jurisdiction’s program.”) Nat. Res. Art. 8-1808(d)(2)(i).

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<sup>3</sup> The plantings are proposed as a means of shore stabilization. That is not the subject of this variance request. Tr. at 3, 6, and 8; Bd. Decision at 4.

## BACKGROUND OF CRITICAL AREA ACT

In an effort to protect the Chesapeake Bay from further decline, the General Assembly enacted Chapter 794 of the Laws of 1984, the Chesapeake Bay Critical Area Protection Program, Md. Code Ann. Nat. Res. II, §8-1801 et seq. (the "Critical Area Law"). In doing so, the General Assembly made findings that:

(2) The shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats; . . .

(4) Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus 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 systems, and tidal wetlands; . . .

(8) The restoration of the Chesapeake and the Atlantic Coastal Bays and their tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands, particularly in the buffer;

(9) The cumulative impact of current development and of each new development activity in the buffer is inimical to these purposes; and

(10) There is a critical and substantial State interest for the benefit of current and future generations in fostering more sensitive development activity in a consistent and uniform manner along shoreline areas of the Chesapeake and Atlantic Coastal Bays and their tributaries so as to minimize damage to water quality and natural habitats.

Code, NR §8-1801(a). As required by the Critical Area Law, each affected local government, including Cecil County developed a Resource Protection Program – or "Critical Area Program" – which is implemented "on a cooperative basis between the State and local governments." Code, NR §8-1808(b)(2). Cecil County administers its Critical Area Program subject to the oversight of the Critical Area Commission.

## VARIANCES TO THE CRITICAL AREA LAW

Relevant here, Cecil County law requires the Applicant to apply for and receive a variance to the Critical Area Program before the Applicant can build the proposed gazebo in the 110-foot Buffer. The State Law mandates that when local zoning boards consider Critical Area variance applications, the Boards must presume that the requested project “does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction’s program.” Code, NR §8-1808(d)(2)(i).<sup>4</sup> The variance applicant bears the burden of proof and the burden of persuasion to overcome this statutory presumption. Code, NR §8-1808(d)(3). In this case, despite the utter dearth of supporting evidence, the Board concluded that the Applicant overcame the presumption of nonconformance as required by the Critical Area Act and Article XVII, Part I, Section 306 of the County Zoning Ordinance<sup>5</sup>. Bd. Decision at 4.

In addition to overcoming the presumption of non-conformance, an applicant must meet all of the County’s enumerated variance standards, including that of unwarranted hardship. County Code, Art. XVII, Part 1, §306.1. The County Code specifically incorporates the Critical Area Act’s definition of “unwarranted hardship.” “Unwarranted hardship means that without a variance, an applicant would be denied reasonable and significant use of the *entire* parcel or lot for which the variance is requested.” (emphasis added). Id. This definition was added to the State law, Natural

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<sup>4</sup> Cecil County has adopted this presumption as part of the County’s ordinance. County Code, Art. XVII, Part 1, §306.3.d.

<sup>5</sup> The Board Decision merely states that “[F]rom the evidence presented the Board is satisfied that the criteria set forth in Section 306 has been met...” Bd. Decision at 4.

Resources Article 8-1808 in 2004, and it is intentionally strict. See 2004 Laws of Md., ch.526.

The Cecil County Code establishes specific criteria for Critical Area variances.<sup>6</sup> Each of these standards must be satisfied. Moreover, the State Critical Area Act provides that “a local jurisdiction shall make *written* findings as to whether the applicant has overcome the presumption of non-conformance” and also, a variance to a local jurisdiction’s critical area program may not be granted unless “the applicant has satisfied each one of the variance provisions.” NR §8-1808(d)(3)(ii) and (4)(ii). In the case before this Court, the Board made **no** findings supported by the law, and none of the testimony at the hearing even touched on the relevant statutory standards. Thus, the Board’s decision is facially deficient.

The Court of Special Appeals has held that when reviewing an administrative agency’s conclusion of law, “no deference is given to the agency’s conclusions.” *Layton v. Howard County Bd. of Appeals*, 171 Md. App. 137, 173-174 (2006), quoted in *Becker v. Anne Arundel County*, 174 Md. App. 114, 138 (2007). Further, it is well-settled that “a reviewing court may not uphold an agency’s decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking.” *Becker*, *id.* at 138. The Court of Special Appeals explained that “[f]indings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions.” *Becker*, *id.* at 139, quoting *Bucktail, L.L.C. v. County Council of Talbot County*, 352 Md. 530, 553 (1999). See also, *Ocean Hideaway Condominium Association v. Boardwalk Plaza Venture*, 68 Md.App. 650, 661 (1986). The *Ocean Hideaway* Court

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<sup>6</sup> The Board Decision at 1 - 4 sets forth the text of the county variance standards.

elaborated its reasoning for requiring findings in quoting *Gough v. Board of Zoning Appeals*, 21 Md.App. 697, 702 (1974):

Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to read the records, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision thus arrived at should be sustained.

*Ocean Hideaway* at 662. In this case, the Board did not provide any basis upon which this Court could ascertain how, or indeed whether, the Board analyzed each variance standard. Instead, the Board merely quoted each standard in the County Code. A review of the record in this case leads to only one conclusion: the Board's Decision was based on numerous and serious errors of law. Accordingly, this Court should reverse the Board.

#### **QUESTION PRESENTED**

Did the Board err as a matter of law, by failing to apply the standard of unwarranted hardship; by failing to require the Applicants to meet the burden of satisfying each variance standard of the Cecil County Code; and by failing to make the written findings required by state and county law?

#### **ARGUMENT**

The Board erred as a matter of law by failing to apply the standard of unwarranted hardship; by failing to require the Applicants to meet all of the variance standards; and by failing to make the written findings required by the County Code.

This Court's review is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine

if the administrative decision is based upon an erroneous conclusion of law.” *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999), citing *United Parcel v. People’s Counsel*, 336 Md. 569 (1994). In this case, the record is devoid of evidence to support the Board’s decision to grant the variance for a new gazebo in the Buffer. The Applicant did not provide one shred of evidence that could possibly support any findings regarding the satisfaction of any of the variance standards. With virtually no written findings<sup>7</sup> (other than the mere recitation of the County standards), the Board’s Decision is facially deficient as a matter of law. *Bucktail v. Talbot County*, 352 Md. at 553.

Moreover, the Board made reversible errors of law by failing to apply the statutory standard of unwarranted hardship, and by failing to require that the Applicants satisfy each one of the variance standards. The Board found an “unwarranted hardship [that] would deny Applicant reasonable and significant use of the entire parcel for which the variance is requested.” Bd. Decision at 5. However, the Board did not explain what constitutes the unwarranted hardship. The record of the hearing contains no mention of the unwarranted hardship standard, yet, somehow the Board managed to make that finding without any evidence proffered by the Applicant. *Id.* Failure of a variance application to meet just one of the variance standards requires this Court to reverse the Board, but in this case, the Applicants failed to meet **any** of the standards. Yet, the Board nevertheless approved the variance. The Board’s Decision is clearly erroneous, and it must be reversed.

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<sup>7</sup> For the burden of proof requirement, the Board found “that Applicant met his burden of proof demonstrating that the non-permanent gazebo can not be located at any other location **and** still allow Applicant a view of the water.” (emphasis added) Bd. Decision at 5.

**A. Applicant provided no evidence to meet his burden of proof and persuasion that he satisfied each of the variance standards.**

1. Applicant failed to prove that denial of a variance for his gazebo in the Buffer would cause an “unwarranted hardship” as defined by the General Assembly.

Under the State and County Critical Area law cited on pages 3-6 of this Memorandum, a variance applicant must prove that, without the specific requested variance, that he will be denied “reasonable and significant use of the entire parcel or lot for which the variance is requested,” and thus, will suffer an “unwarranted hardship.” Code, NR §8-1808(d)(1); County Code, Art. XVII, Part I, §306. This standard is intentionally strict, and the General Assembly expressly required that it be applied by every local Board of Appeals in Critical Area variance cases. *Becker v. Anne Arundel County*, 174 Md. App. 114, 124 (2007). In the instant case, the Applicant presented no evidence on which the Board could have based a finding that the Applicants would be denied reasonable and significant use of their entire property without this variance<sup>8</sup>. In fact, the record supports a finding to the contrary: Applicant currently enjoys more than reasonable and significant use of his property<sup>9</sup>.

The property consists of .63 acres and contains a house and a screened-in porch. CAC letter at 2. Clearly, the record provides undisputed evidence that the Applicant does enjoy reasonable and significant residential use of the property. The language of the State Critical Area Act narrowly defines unwarranted hardship. The legal test is whether

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<sup>8</sup> The Court of Special Appeals has previously held that, “[A]lthough unwarranted hardships may be alleged, those hardships must be such as would preclude . . . from developing their lot.” *Citrano*, 123 Md.App. at 241.

<sup>9</sup> There was no clear evidence at the hearing of what the Applicant’s use of the property consists of, other than the brief statement by the Applicant that, “[A]nd in this area, the water comes down the road and my driveway. . .” Tr. at 6.

without a variance, an applicant will be denied reasonable and significant use of his *entire* lot or parcel. (emphasis added.). The Applicant did not even allege, much less carry the burden to prove, that he would suffer an unwarranted hardship. In fact, the testimony openly implied that there might be an alternative location, but that the desire for a view of the river dictated locating the gazebo at the water's edge as, "...down where his property comes to the water it's {sic} a beautiful view out there, that I can see where he would like to have a desirable spot from which he can watch the river. . ." Tr. at 9. Even the Board's Decision acknowledges that another location might be available, except that another location would not allow the Applicant a view of the water. Bd. Decision at 5. Clearly, the General Assembly did not anticipate that obtaining a desirable view of the water from the Critical Area Buffer would satisfy the unwarranted hardship standard. Tr. at 9.

It is quite disturbing that the Board granted this variance without any mention of unwarranted hardship during the hearing. This was the opportunity for the Applicant to make his case, to satisfy the burdens of proof and persuasion and meet the variance standards. There was no evidence proffered which would satisfy the requirements of either the State or County laws or criteria for unwarranted hardship. The Applicant enjoys numerous reasonable uses of his property. The Board erred as a matter of law, because the Board did not apply the definition of unwarranted hardship as required by the General Assembly in Code, NR 8-1808(d)(1) and by the County Code, Art. XVII, Part I, §306.1. For this reason alone, the Board should be reversed.

2. Denial of a gazebo in the 110-foot Buffer will not deprive Applicant of a right commonly enjoyed by others under the County Critical Area program. Allowing such construction would grant a special privilege to the Applicant.

Other than the Board's statement in its Decision and Applicants' unsupported assertion that, without the granting of this variance, the applicant would be deprived of rights commonly enjoyed by others, there is no evidence in the record to support a finding on this variance factor. Bd. Decision at 5. In fact, the 'special condition' that the Board identified is the "specific location to view the North East River and Bay." Bd. Decision at 5. It is unclear what 'right' the Applicants are claiming, as there is no 'right' to build any new non-water dependent structure in the 110-foot Buffer. Indeed, The Critical Area program expressly prohibits new impervious structures in the Buffer. Code of Maryland Regulations (COMAR) 27.01.09.01C.

In 2002, the General Assembly amended the Critical Area law to expressly require that, in determining if a variance applicant would be denied a 'right commonly enjoyed by others', the comparison had to be made to "a use of land or a structure permitted to others in accordance with the provisions of the critical area program." 2002 Laws of Md. Ch. 431, 432; Code, Nat. Res. Art. 8-1808(d)(4)(iii). Here, the Board simply had no evidence that other persons enjoy the right to place a gazebo in the Buffer under the Cecil County Critical Area program. The reality is that there is no **right** under the Critical Area program to place a new gazebo in the Buffer. The Board erred as a matter of law, and the Board should be reversed.

3. Applicants failed to prove that a variance for a gazebo in the Buffer would not adversely affect fish, wildlife, or plant habitat, and that the variance would be in harmony with the spirit and intent of the Critical Area program.

The Applicants did not submit any evidence from which the Board could make a finding required under the County's ordinance that the variance would not cause an adverse effect on fish, wildlife, or plant habitat, and that the variance would be in harmony with the spirit and intent of the County's Critical Area program. In fact, discussion during the hearing consisted of testimony by the Applicant that the shoreline was unstable with sediment run-off and despite the sensitive conditions, Applicant proposed to place the gazebo at the waterline. Tr. at 7. Instead of adhering to the State law which provides that "new development activities . . . may not be permitted in the Buffer," the Board merely reiterated the variance standard and failed to provide any supporting evidence or cite to testimony that there would be no adverse impact resulting from the construction at the water's edge. COMAR 27.01.09.01C.(2); Bd. Decision at 4. Although the Board did note that the Applicants testified that he will landscape the gazebo and "plant vegetation to create, restore and enhance existing habitat for wildlife," they also noted that the plantings would be done to stabilize an erosion problem. Bd. Decision at 4. The new gazebo is new development in the 110-foot Buffer, and the General Assembly has specifically found that "each new development activity in the buffer is inimical" to the purposes of the Critical Area law. Code, Nat. Res. Art. 8-1801(a)(9). The Applicants did not rebut this legislative finding. The standard is whether, without the gazebo in the Buffer, the Applicants will be denied reasonable and significant use of the entire property or lot. The Board did not apply this mandated standard, and the Board should be reversed.

**B. The Board failed to make the written findings required by State and County law.**

The Board's Decision is fatally flawed, because the Decision does not contain written findings as required by the Code, NR §8-1808(d). In a recent Critical Area variance case, the Court of Special Appeals reiterated this principle: "A reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking." *Becker v. Anne Arundel County*, 174 Md. App. 114, 138 (2007). An applicant for a variance to the Critical Area Act bears a heavy burden to prove that application of the law will result in an unwarranted hardship and that the proposed variance meets each of the legislatively-prescribed standards.

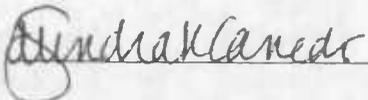
In Critical Area variance cases, the burden is placed on the Applicant. Code, Nat. Res. Art. 8-1808(d). Recently, the Supreme Court reaffirmed this long-standing principle: The burdens of proof and persuasion "have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." *Schaffer ex. rel Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 534 (2005), quoting C. Mueller & L. Kirkpatrick, *Evidence* §3.1, p. 104 (3d ed. 2003). In the present case, the Applicants had the obligation to submit evidence sufficient to carry this burden. They did not meet their burdens of proof and persuasion on any of the statutory variance standards. The Board failed to make the required written findings to support its Decision. The Board's Decision to grant the Critical Area variance is incorrect as a matter of law and this Honorable Court should reverse the Board.

CONCLUSION

For the reasons and authorities cited above, the Critical Area Commission respectfully requests this Honorable Court to reverse the decision of the Cecil County Board of Appeals.

Respectfully submitted,

DOUGLAS F. GANSLER  
Attorney General of Maryland

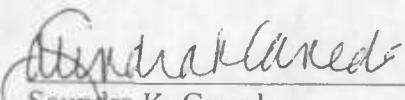
  
\_\_\_\_\_  
  
\_\_\_\_\_

Sandra K. Canedo  
Marianne E. Dise  
Assistant Attorneys General  
Department of Natural Resources  
580 Taylor Avenue, C-4  
Annapolis, Maryland 21401  
(410) 260-8356  
*Attorneys for Margaret McHale, Chair,  
Critical Area Commission for the  
Chesapeake and Atlantic Coastal Bays*

August 29, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of August 2007, I sent a copy of the foregoing Memorandum of Law via U.S. Mail, postage prepaid to: Keith Baynes, Attorney for the Board of Appeals, 210 East Main Street, Elkton, Maryland 21921.

  
\_\_\_\_\_  
Sandra K. Canedo

DOUGLAS F. GANSLER  
Attorney General

KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General



MARIANNE E. DISE  
Assistant Attorney General  
Principal Counsel

SAUNDRA K. CANEDO  
Assistant Attorney General

STATE OF MARYLAND  
OFFICE OF THE ATTORNEY GENERAL  
CRITICAL AREA COMMISSION FOR THE  
CHESAPEAKE AND ATLANTIC COASTAL BAYS

FAX NO. (410) 974-5338

WRITER'S DIRECT DIAL NO. (410) 260-3466  
mdise@oag.state.md.us

August 24, 2007

Mr. William Brueckman, Clerk of the Court  
Circuit Court for Cecil County  
Court House  
129 East Main Street  
Elkton, Maryland 21921

Re: *Petition of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays for Judicial Review of Decision of the Cecil Count Board of Appeals, In the Case of: Mark Kaufman Civil No. 07-C-07-200AA*

Dear Mr. Brueckman:

Enclosed please find for filing in the above-referenced case the Petitioner's Response to Motion to Dismiss.

Thank you for your assistance.

Very truly yours,

A handwritten signature in cursive script that reads "Marianne E. Dise".

Marianne E. Dise  
Assistant Attorney General

Enclosure

cc: Counsel of Record

**IN THE CIRCUIT COURT OF MARYLAND  
FOR CECIL COUNTY**

**PETITION OF:**

MARGARET MCHALE, \*  
Chair, Critical Area Commission for \*  
the Chesapeake and Atlantic Coastal Bays \*

**FOR JUDICIAL REVIEW OF \*  
THE DECISION OF THE \*  
CECIL COUNTY BOARD \*  
OF APPEALS \***

Civil Action No. 07-C-07-000200 AA

**IN THE CASE OF \*  
Case No. 3313, \***  
Mark Kaufman \*

\* \* \* \* \*

**RESPONSE TO MOTION TO DISMISS**

Petitioner, Margaret McHale, Chair of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, ("Chair McHale") by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Marianne E. Dise and Sandra K. Canedo, Assistant Attorneys General, hereby responds to Respondent Board of Appeals of Cecil County's Motion to Dismiss.

**Statement of Facts**

On June 21, 2007, Chair McHale filed a Petition for Judicial Review of the Cecil County Board of Appeals (the "Board") Decision granting Mark Kaufman a variance to the 110-foot Critical Area Buffer to allow for the construction of a gazebo. The Board held a public hearing on the variance application on April 24, 2007 and did not issue its written decision, in the form of an Opinion, until May 29, 2007. The Petition for judicial review was filed on June 21, 2007, well in advance of the thirty-day time limit in Md. Rule 7-203.

On August 9, 2007, the Respondent filed a Motion to Dismiss (received by the Commission on August 14, 2007), claiming that the Petition was filed "beyond the thirty (30) day provision provided by Maryland Rule 7-203." See Motion to Dismiss ¶5. For the reasons

and authorities that follow, the County is incorrect as a matter of law, and the Motion should be denied.

### Law and Argument

Pursuant to Maryland Rule 7-203, “a petition for judicial review shall be filed within 30 days after the latest of: (1) the date of the order or action of which review is sought; (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner.” Here, the written decision (“the Opinion”) of the Cecil County Board of Appeals is dated May 29, 2007. Because that is the date of the Board’s decision, the Rules provide that a Petition for judicial review is timely if filed by June 28, 2007. Respondent acknowledges that the Petitioner filed on June 21, 2007 ( Motion to Dismiss ¶5). By the terms of Rule 7-203, and the *applicable, enforceable* Cecil County Zoning Ordinance, Art. XVI, Section 298.7B, the Petition was clearly filed within the 30-day time limit.

Respondent’s Motion is based on an alleged recent amendment to the Cecil County Zoning Ordinance, Art. XVI Sec. 298.7B. Under the amended ordinance, according to Respondent, the date of the Board’s public hearing (April 24<sup>th</sup>) becomes the “date of decision,” notwithstanding that the Board’s written Order/Opinion was not issued until a month later! (Motion to Dismiss, ¶¶ 2 and 4.) Setting aside the serious due process concerns that would be raised if such an interpretation were upheld, the Respondent’s argument must fail for the very simple reason that the purported amendment to Section 298.7B is *not effective in the Critical Area*. The County did not submit the new ordinance to the Critical Area Commission for review and approval, and accordingly, the revised ordinance cannot, as a matter of State law, be effective in the Critical Area. See Affidavit of Ren Serey, attached hereto as Exhibit A. In essence, the County is asking this Court to apply an unenforceable ordinance as a means to circumvent the Chair’s right under State Critical Area law to review this variance decision.

While the December, 19, 2006 amendments to the Cecil Zoning ordinance may govern the Zoning Board's process elsewhere in Cecil County, the new procedures have not been adopted as part of the Critical Area program, and thus are not effective in the Critical Area. *Kent Island Defense League, LLC v. Queen Anne's County Board of Elections*, 145 Md. App. 684, 693, *cert. denied*, 371 Md. 615 (2002) (rejecting plaintiffs' argument that the local critical area ordinance was a zoning ordinance, enacted under the county's zoning authority: "Amendments to the County Critical Area program ...are not zoning matters....the ordinances were part of the implementation of a State program. ...") The December 19, 2006 amendments to Section 298.7B at issue in this case were not merely zoning matters, but were part of the County's implementation of the Critical Area Program. Accordingly, it is incorrect as a matter of law to claim, as Respondent does, that the date of the Board's decision was April 24, 2007. This could only be true if the December 19, 2006 amendments to the Ordinance had been submitted to, and approved by, the Critical Area Commission. They were not, and the revised ordinance is not applicable within the Critical Area.

While each local jurisdiction implements its own critical area program, the State law provides that the programs themselves, and the implementation of those programs, are "subject to State criteria and oversight." Code, Nat. Res. II §8-1801(b)(2). As the Court of Special Appeals stated, "[t]he Commission was designed to be an oversight committee." *North v. Kent Island Limited Partnership*, 106 Md. App. 92, 106 (1995). Each local Critical Area Program, including Cecil County's program, had to be approved by the Critical Area Commission before the County could begin to implement and enforce its program. See Code, Nat. Res. II §8-1809(a)(i) ("Each local jurisdiction shall submit to the Commission a written statement of its intent...to develop a critical area protection program to control the use and development of...the Critical Area located within its territorial limits.") Cecil County chose to implement and enforce

its own Critical Area Program, and this Program was approved by the Commission in 1988. See Affidavit of Ren Serey.

Among the required elements of a Critical Area Program are “new or amended zoning ordinances or regulations” and “provisions for granting a variance to the local jurisdiction’s critical area program.” Code, Nat. Res. II §8-1808(c)(1)(iii); (c)(1)(xiii). Cecil County’s Ordinance Article XVI, the procedures for the Board of Appeals, was submitted to and approved by the Critical Area Commission as part of the Cecil County Critical Area Program in 1988, and amendments to that ordinance were approved in 1993 and 1994. See Affidavit of Ren Serey, Exhibit A.

The Critical Area law expressly states that no change to a local program is enforceable until such time as it is approved by the Critical Area Commission. Code, Nat. Res. II §8-1809(h): “A program may not be amended except with the approval of the Commission.” Although Respondent asserts that the Board of County Commissioners for Cecil County amended Article XVI, Section 298.7B on December 19, 2006, this purported amendment was not submitted to the Critical Area Commission. If the County wanted the amended ordinance to become part of its Critical Area program, and to be effective in Critical Area variance cases, the County needed to submit the amendments to the State for approval, pursuant to Code, Nat. Res. II §8-1809(h): “Each local jurisdiction may propose program amendments and program refinements to its adopted program.” This, the County simply did not do. See Affidavit of Ren Serey, Exhibit A. Because the County did not follow the State law, the County may not implement the amended version of Section 298.7B in this case, or in any other Critical Area case. “[A] program may not be amended except with the approval of the Commission.” Code, Nat. Res. II §8-1809(h)(1) and (i).

In addition to receiving approval of a program change before it is deemed effective and

enforceable, local jurisdictions “shall establish notification procedures to permit Commission review of findings made in the granting of variances.” COMAR 27.01.11.01B. The current, approved, Cecil County Ordinance provides, “The Board shall then decide the matter within thirty-five (35) days from the time of hearing, such decision to become effective as of the date the decision is signed by the Chairman of the Board of Appeals or his designee.” Cecil County Zoning Ordinance Article XVI, Section 298.7.B (Attachment 1 to Serey Affidavit). This version of the ordinance governs Board decisions in Critical Area cases. This ordinance allows Cecil County to comply with the Critical Area notification requirements while also providing the Critical Area Commission with an opportunity to review the findings made in the granting of the variance.

In considering the role of the Critical Area Commission with regard to oversight of local governments’ implementation of Critical Area programs, the Courts have been steadfast in holding that the General Assembly gave the Commission the responsibility to approve local Critical Area program amendments to ensure consistency and uniformity throughout the Critical Area. See *North v. Kent Island, id.* and *Kent Island Defense League, id.* (“The ordinances were enacted pursuant to a public general law....they are not purely local in origin or effect. Any change to the County’s Critical Area program has a potential effect on the entire Critical Area.”) *Kent Island Defense League, id.* at 695. As in the *Kent Island Defense League* case, the purported amendment to the Cecil County ordinance Sec. 298.7B is not a “purely local” zoning ordinance amendment, but is an attempt to change the Cecil County Critical Area program. This change is ineffective until approved by the Critical Area Commission. It is well-settled that a local government may not unilaterally change part of its Critical Area program by disguising the change as an ordinary zoning ordinance amendment.

In order for the Cecil County ordinance change of December 19, 2006, to be effective as

part of the Cecil County Critical Area program, the County must submit the proposed change to the Critical Area Commission for review and approval. This was not done. Cecil County has not submitted any Zoning Board procedural changes to the Critical Area Commission since conducting a comprehensive review and update of its Zoning Ordinance that was approved by the Critical Area Commission in 1993 and 1994. See Affidavit of Ren Serey, Exhibit A. Any subsequent change to the ordinance passed by the County Commissioners is inoperative within the Critical Area until it is approved by the Critical Area Commission.

**Conclusion**

For the foregoing reason, the Cecil County Board of Appeals' Motion to Dismiss should be denied.

Respectfully submitted,

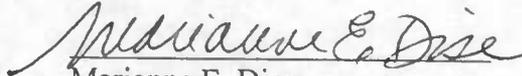
DOUGLAS F. GANSLER  
Attorney General of Maryland

  
Marianne E. Dise

  
Sandra K. Canedo  
Assistant Attorneys General  
Department of Natural Resources  
Critical Area Commission  
1804 West Street Suite 100  
Annapolis, MD 21401  
(410) 260-3466  
Attorneys for Margaret McHale, Chair  
Critical Area Commission for the  
Chesapeake and Atlantic Coastal Bays

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August 2007, I sent a copy of the foregoing Memorandum in Opposition to Motion to Dismiss via U.S. Mail, postage prepaid to: Keith Baynes, Attorney for Respondent Board of Appeals, 210 East Main Street, Elkton, Maryland 21921.

  
Marianne E. Dise

**IN THE CIRCUIT COURT OF MARYLAND  
FOR CECIL COUNTY**

**PETITION OF:**

MARGARET MCHALE,  
Chair, Critical Area Commission for  
the Chesapeake and Atlantic Coastal Bays

\*

\*

**FOR JUDICIAL REVIEW OF  
THE DECISION OF THE  
CECIL COUNTY BOARD  
OF APPEALS**

\*

Civil Action 07-C-07-000200 AA

\*

**IN THE CASE OF**  
Case No. 3313,  
Mark Kaufman

\*

\* \* \* \* \*

**AFFIDAVIT OF REN SEREY**

I, Ren Serey, do hereby state as follows:

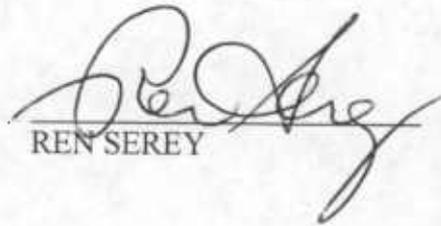
1. I am over the age of 18 and am competent to testify to the following matters which are based upon my personal knowledge.
2. I am the Executive Director of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays.
3. In my capacity as Executive Director, I am responsible to maintain the official records and files of the Critical Area Commission, including the files containing the official, approved Critical Area Program of Cecil County, Maryland.
4. The Critical Area Commission approved the Cecil County Critical Area Program on May 18, 1988.
5. The Cecil County Critical Area Program was amended in 1993 and 1994 as a result of the required six-year comprehensive review.
6. Attached to my Affidavit as Attachment "1" is the official copy of Cecil County's Critical Area Zoning Ordinance, Section 298. This Ordinance was submitted to and approved by the Critical Area Commission as an amendment to the Cecil County Program on December 1, 1993 and July 6, 1994.

*Exhibit A*

7. To date, Cecil County has not requested approval of any additional changes to Section 298 of its Zoning Ordinance.

I HEREBY SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALITIES OF PERJURY THAT THE FOREGOING STATEMENT IS TRUE AND CORRECT.

8/24/07  
DATE

  
REN SEREY

# CECIL COUNTY ZONING ORDINANCE

---

*Adopted:* June 29, 1993

*Effective:* July 1, 1993

*Amended:* November 23, 1993  
January 4, 1994  
February 15, 1994

*Board of County Commissioners for Cecil County:*

*W. Edwin Cole, Jr.*

*A. Marie Cleek*

*Grayson L. Abbott, Jr.*

*Attachment 1*

## Part II Board of Appeals

### Section 298. Board of Appeals Established

1. Pursuant to Article 66 B, Code of Public General Laws of Maryland, a Board of Appeals is hereby established, which shall consist of five (5) members to be appointed by the County Commissioners.
2. The County Commissioners shall designate one (1) alternate member for the Board of Appeals, who shall sit on the Board in the absence of any member of the Board.
3. The terms of any existing Board of Appeals members duly appointed under the terms of a previous Zoning Ordinance shall continue for the duration of that term. However, beginning in August 1994, in order to stagger the terms of the Board of Appeals members, one (1) regular member and the alternate member of the Board of Appeals shall be appointed for one (1) year terms; two (2) regular members shall be appointed for two (2) year terms; and two (2) regular members shall be appointed for three (3) year terms. Each member shall then serve three (3) year terms. Vacancies shall be filled by appointment by the County Commissioners for the unexpired portion of the term. The Board shall elect one (1) of its five (5) regular members as Chairman, whose term as Chairman shall be three (3) years. A member of the Board of Appeals may be replaced by the County Commissioners if such member fails to attend three (3) or more consecutive meetings of the Board, or fails to attend six (6) meetings in any calendar year.
4. The Board of Appeals shall have the following powers and duties:
  - a. To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by the Zoning Administrator or any other administrative official in the enforcement of this ordinance.
  - b. To hear and decide special exceptions as provided in Article XVII, Part II of this Ordinance.
  - c. To authorize upon application a variance from the provisions of this Ordinance, as provided in Section 306 herein.

In exercising the above powers, the Board of Appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination which has been appealed from, to the extent that such action is consistent with the provisions of this Ordinance.

The applicant for a special exception or variance and the appellant in an appeal shall have the burden of proof (including the burden of going forward with the evidence and the burden of persuasion) of all questions of fact.

5. Proceedings of the Board of Appeals.

- a. Meetings of the Board of Appeals shall be held as scheduled by the Chairman and at such other times as the Board may determine. The Chairman, or in his absence, the acting Chairman, may administer oaths and compel the attendance of witnesses.
- b. The staff of the Office of Planning and Zoning shall be present during all deliberations by the Board of Appeals and shall answer such questions and render such advice and assistance as may be appropriate to the action being taken, but such staff shall not participate in the decision of the Board beyond the submitting of a staff recommendation as to the action proposed to be taken in each case.
- c. The Board of Appeals shall adopt such other rules of procedure as it deems appropriate provided such rules are consistent with the provisions of this Ordinance and with applicable State enabling legislation.
- d. The Board of Appeals shall keep minutes of its proceedings, showing the vote of each member upon question, or if absent or failing to vote indicating such fact, and shall keep records of its official actions.
  - a. The deliberations of the Board of Appeals shall be open to the public, but public participation shall be limited to periods during which testimony is permitted.

6. Quorum and Voting.

- a. Three (3) members of the Board shall constitute a quorum for the conducting of business.
- b. A minimum vote of three (3) members of the Board shall be required to reverse any order, requirement, decision, or determination of the administrative official, or to decide in favor of the applicant on any manner upon which it is required to pass under this Ordinance, or to effect any variation in the application of this Ordinance.

←  
MHC  
MHC

7. Hearings, Appeals, Notices.

- a. Appeals to the Board of Appeals shall be filed within fifteen (15) days of the signing of the decision from which the appeal is taken. Appeals shall be filed with the Office of Planning and Zoning and with the Board of Appeals and shall specify the grounds thereof. The Office of Planning and Zoning shall forthwith transmit to the Board of Appeals all papers constituting the record upon which the action appealed was taken.
- b. The Board of Appeals shall fix a reasonable time for the hearing of appeals and requests for variances and special exceptions, give public notice thereof as well as due notice to the parties in interest, and hold the public hearing within sixty (60) days from the date of request of appeal notice was filed. At least fifteen (15) days notice of the time and place of such hearing shall be published in a newspaper of general circulation in the County. At the hearing, any party may appear in person or by agent or attorney. The Board shall then decide the matter within thirty-five (35) days from the time of hearing, such decision to become effective as of the date the decision is signed by the Chairman of the Board of Appeals or his designee.

**Part III Other Administrative Provisions**

**Section 299. Zoning Administrator**

1. The administration and enforcement of the provisions of this Ordinance shall be, except as otherwise specified in this Ordinance, within the scope of responsibility of the Director, Office of Planning and Zoning. Within this office, there is hereby established the position of County Zoning Administrator. The Director, Office of Planning and Zoning shall recommend a person to fill the position of County Zoning Administrator and the County Commissioners shall appoint a person to this position.
2. The Zoning Administrator shall be a regular County employee. He shall perform such duties and responsibilities in the administration and enforcement of this Ordinance as are hereinafter set forth, and such other duties as may be assigned by the Director.
3. The Zoning Administrator may be provided with such assistance in the carrying out of his responsibilities under this Ordinance as may be sanctioned by the County Commissioners.
4. It shall be the duty of the Zoning Administrator to administer and enforce the provisions of this Ordinance. If the Zoning Administrator shall find that any of the provisions of this Ordinance are being violated, he shall notify in writing the person responsible for such violation, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land,

**BOARD OF APPEALS APPLICATION**  
**CECIL COUNTY, MARYLAND**

MEET. MONTH: April 2007  
 FILE NO. 3313

**THIS REQUEST IS FOR:**

- SPECIAL EXCEPTION RENEWAL
- SPECIAL EXCEPTION
- VARIANCE
- APPEAL

**RECEIVED**

DATE FILED: 3-15-07  
 AMOUNT PD: Rec'd of 1 #842  
 ACCEPTED BY: Bp

MAR 15 2007

**A. APPLICANT INFORMATION**

MARK KAUFMAN CECIL COUNTY OFFICE OF PLANNING & ZONING  
 APPLICANT NAME - PLEASE PRINT CLEARLY  
53 MILLARD LANE NORTH EAST MD 21901  
 ADDRESS CITY STATE ZIP CODE  
Mark Kaufman 443-350-5737  
 APPLICANT SIGNATURE PHONE NUMBER

**B. PROPERTY OWNER INFORMATION**

MARK KAUFMAN  
 PROPERTY OWNER NAME - PLEASE PRINT CLEARLY  
53 MILLARD LANE NORTH EAST MD 21901  
 ADDRESS CITY STATE ZIP CODE  
Mark Kaufman 443-350-5737  
 PROPERTY OWNER SIGNATURE PHONE NUMBER

**C. PROPERTY INFORMATION**

53 MILLARD LANE NORTH EAST MD 5 0805068508  
 PROPERTY ADDRESS ELECTION DIST. ACCT. NUMBER  
36 8 178 - .63 SR  
 TAX MAP # BLOCK PARCEL LOT # #ACRES ZONE

**D. PURPOSE OF APPLICATION** - Indicate reasons why this application should be granted. (attach separate sheet if necessary)

LAZEBO AND SURROUNDING AREA WOULD BE LANDSCAPED TO PREVENT THE EXISTING SEDIMENT RUN-OFF INTO CREEK FROM HEAVY RAINS BY CREATING A BAYSCAPE BENEFICIAL TO THE CHESAPEAKE BAY PLUM CREEK. IN ADDITION THE STRUCTURE, FLOWERS, SEEDS, BERRIES & OTHER PLANTS PROVIDE FOOD & SHELTER FOR WILDLIFE.

**E. On an attached sheet, PLEASE submit a sketch of the property indicating the proposed project. Show distances from the front, side and rear property lines and the dimensions of the project.**

**F. LAND USE DESIGNATION**

Is property in the Critical Area?  YES  NO  
 If yes, Pertinent provision of the Chesapeake Bay Critical Area Program: Struct. in Buffer of Forested Area  
 Is property in the 100 year Floodplain?  YES  NO  
 Is property an Agricultural Preservation District?  YES  NO

If property is located in the Critical Area, all provisions and requirements must be met as outlined in Article XVII, Part I, II & III of the Zoning Ordinance.

**G. PROVISION OF ZONING ORDINANCE:** Variance Request - Section 306

**II. SPECIAL EXCEPTION RENEWAL** - PREVIOUS FILE NO. & CONDITIONS FOR APPROVAL: 1/1

**I. SPECIAL EXCEPTION FOR A MANUFACTURED HOME** - Please fill out the following information:

Will unit be visible from the road? \_\_\_\_\_ If yes, distance: \_\_\_\_\_  
 Will unit be visible from adjoining properties? \_\_\_\_\_ If yes, distance: \_\_\_\_\_  
 Distance to nearest manufactured home: \_\_\_\_\_ Size/Model/Year of Unit: \_\_\_\_\_  
 Number of units on property at present time: \_\_\_\_\_

CRITICAL AREA COMMISSION

MAR 20 2007

RECEIVED

*Variance for structure in the critical area buffer*

RECEIVED

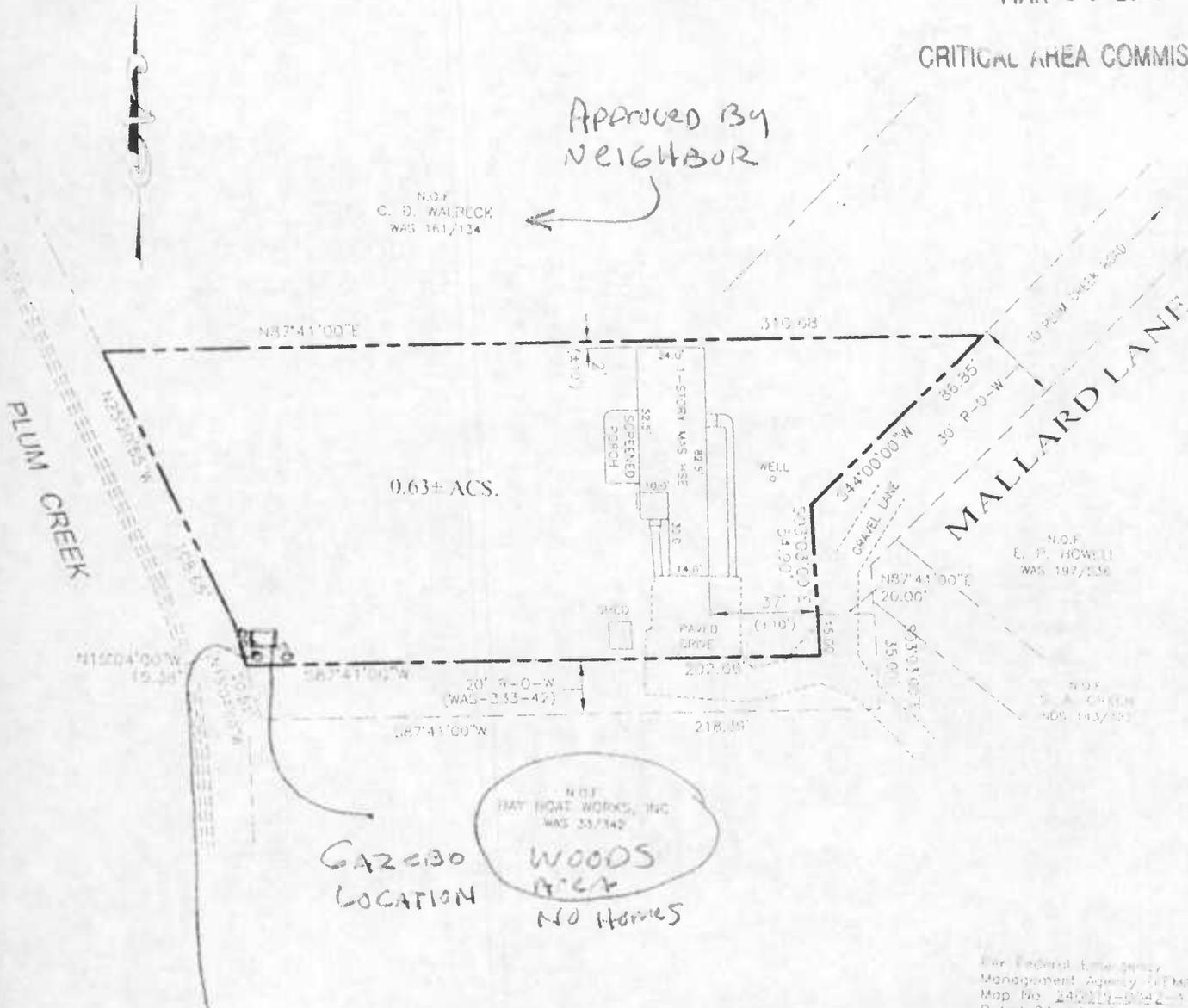
MAR 20 2007

CRITICAL AREA COMMISSION

Plan Map 36 and 8; Parcel 178

APPROVED BY NEIGHBOR

N.O.F.  
C. D. WALBECK  
WAS 161/134



0.63± ACS.

PLUM CREEK

MALLARD LANE

N.O.F.  
E. P. HOWELL  
WAS 197/136

N.O.F.  
RAY HOAT WORKS, INC  
WAS 33/142

GAZEBO LOCATION

WOODS AREA  
NO HOMES

For Federal Emergency  
Management Agency (FEMA)  
Map No. 240811-0042-01  
Dated 04-04-03 This drawing  
lies in Parcel 178.

New Native Plants for waterfowl/wildlife habitat &  
to restrict silt run off into Plum Creek

Improvements Location Drawing

for lands of

MARK A. KAUFMAN

owner of

53 MALLARD LANE

located in

Fifth Election District - Cecil County - Maryland

**American**  
Engineering & Surveying, Inc.  
P.O. Box 2004  
4401 East 10th Street  
Cecil, MD 21031  
410-326-1111  
FAX 410-326-1112

The client warrants to verify and defend the accuracy, boundary, area, and easement shown on this drawing. The client warrants to defend the validity of all easements, rights, and interests shown on this drawing. The client warrants to defend the validity of all easements, rights, and interests shown on this drawing. The client warrants to defend the validity of all easements, rights, and interests shown on this drawing.

*[Signature]*

Date: 03/16/07  
Scale: 1" = 40'  
File # 240811-0042-01