

Martin O'Malley
Governor

Anthony G. Brown
Lt. Governor



Margaret G. McHale
Chair

Ren Serey
Executive Director

**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/

July 31, 2008

Ms. Lori Rhodes
Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, MS 6301
Annapolis, MD 21401

Re: 2008-0057-V-Abbott, Dennis

Dear Ms. Rhodes:

We are writing in regard to the above-referenced case. As you know, we sent a letter on July 8, 2008, stating that under requirements of the recent 2008 amendments to the Critical Area law, the Board of Appeals was not authorized to proceed with a hearing in this matter. Subsequently, we received a letter from Nancy Duden on July 15, 2008 providing additional information with regard to enforcement actions that had already been undertaken. In light of this, there does not appear to be any reason that this variance cannot be heard by the Board of Appeals. Our recommendations as to the merits of the case as addressed in my July 8, 2008 letter still remain.

Please contact me if you have questions or need additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Julie Roberts".

Julie Roberts
Natural Resources Planner

cc: AA 50-08



THE UNIVERSITY OF CHICAGO
DEPARTMENT OF CHEMISTRY
5408 S. UNIVERSITY AVENUE
CHICAGO, ILLINOIS 60637
TEL: 773-936-3700



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July 8, 2008

Ms. Suzanne Schappert
Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, MS 6301
Annapolis, MD 21401

Re: 2008-0057-V – Abbott, Dennis

Dear Ms. Schappert:

On June 18, 2008, we received notice that the above-referenced case has been appealed and that a hearing is being held on July 31, 2008 before the County Board of Appeals. While it was unclear from the original submission that this was an after-the-fact variance request, please note the following in light of this new information.

The 2008 changes to the Critical Area law, which took effect July 1, 2008 require that before a local jurisdiction approves a variance for after-the-fact activities, the person seeking that variance has (1) fully paid all administrative, civil, and criminal penalties regarding the violation, (2) prepared a restoration or mitigation plan approved by the local jurisdiction, and (3) performed the abatement measures in the approved restoration or mitigation plan. Per the guidance provided by Commission Counsel as described in the attached letter, I do not believe the Board of Appeals may grant this variance request at this time.

Variance Request for After-the-Fact Addition

While the Board may not grant the variance as requested, the 2008 legislative changes to the Critical Area Law do not prevent the Board from hearing the case. As such, we provide the following comments.

The applicant has requested a variance to allow a dwelling addition (covered deck) with less Buffer and setbacks than required. In light of new information received regarding the development history on this parcel, as well as the history of several past variance requests, it does not appear that the applicant can meet the variance standards. This 19,600 square foot lot is designated as Limited Development Area (LDA) and is waterfront. It is currently improved with

Ms. Schappert

7/8/2008

Page 2 of 2

a dwelling unit, gravel driveway, shed, and slate patio. This applicant seeks a variance to retain the approximately 400 square foot covered deck over the existing patio.

This office cannot support this variance request. The Hearing Officer's report indicates that there have been multiple variance requests for this property in the past. In addition, the applicants applied for a similar variance previously and were denied by the Board of Appeals. Subsequently, the applicants built the covered porch without permits, which this Board is now hearing the request for. Given the existing development as well as the variance history on the property, it is well established that reasonable and significant use of the property currently exists. As such, the applicants do not meet the strict standard of unwarranted hardship. The County and State law provide that in order to grant a variance, the applicant must meet and satisfy each and every variance standard. Since the applicant has not met all of the variance standards, the variance should be denied, and the covered deck should be removed. In conjunction with the removal of the deck, the site should be restored and stabilized with native plantings.

Thank you for the opportunity to comment. Please include this letter in your file and submit it as part of the record for variance. Please notify the Commission 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: AA 50-08

enclosure

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISI
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANLDO
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

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mdise@oag.state.md.us

July 2, 2008

Anne Arundel County Board of Appeals
Arundel Center
Annapolis, Maryland

RE: Notice of Important Changes to Law re: Critical Area Variances

Dear Board Chair:

This letter advises you of important changes to the law governing your authority to grant "after-the fact" variances to the Critical Area program. Effective July 1, 2008, Chapter 119 of the 2008 Laws of Maryland prohibits a local government from issuing a variance, permit, or special exception to legalize a development activity conducted in violation of the Critical Area law, unless certain conditions precedent have been fully met. **Accordingly, no "after the fact" Critical Area variance may be issued by a local government from this day forward, unless full compliance with Chapter 119 has been achieved.** See *Layton v. Howard County Board of Appeals*, 399 Md. 36 (2007), where the Court of Appeals held that in land use and zoning cases, the case is governed by "the law as it exists at the time the case is before us."

Chapter 119 of the 2008 Laws of Maryland applies directly to, and must be applied by, all local jurisdictions, including zoning boards, regardless of whether local ordinances, codes, or practices have been amended. Effective July 1, 2008, the law prohibits the Board from granting any Critical Area variance, permit, or special exception for an "after-the fact" development project without proof that the applicant has fully paid all fines and performed all mitigation required for the violation. For your information and assistance, this Office has prepared the following summary of the provisions of Chapter 119 relevant to variances.

- A development activity commenced without a required permit, approval, special exception, or variance is a violation of Code, Natural Resources Article Title 8 subtitle 18 ("Critical Area law"). Ch. 119, 2008 Laws at 750.

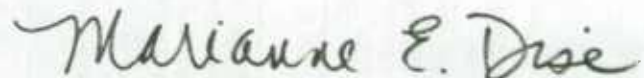
1804 West Street, Suite 100
Annapolis, Maryland 21401

- Notwithstanding any provision in a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the requirements of this subtitle (Title 8 Subtitle 18) shall apply to, and be applied by, a local jurisdiction as minimum standards for its Critical Area Program. Ch. 119, 2008 Laws at 743.
- Each violation of the Critical Area law constitutes a separate violation, and each calendar day is a separate offense. Ch. 119, 2008 Laws at 747.
- A local jurisdiction may not accept an application for a variance to legalize a violation, including an unpermitted structure or development activity, unless the jurisdiction has first issued a notice of violation, including assessment of a penalty. Ch. 119, 2008 Laws at 750.
- A local jurisdiction may not grant a variance for an unpermitted development activity unless the person seeking the variance has fully paid all penalties imposed by the local government; has prepared (and the local jurisdiction has approved) a mitigation or restoration plan; and has performed the mitigation required for the violation. Ch. 119, 2008 Laws at 748.
- Satisfaction of all fines and penalties, and performance of mitigation “shall be a condition precedent to the issuance of any permit, approval, variance, or special exception for the affected property.” Ch. 119, 2008 Laws at 747.

As of July 1, 2008, the prohibition on granting an “after the fact” variance without full satisfaction of the conditions precedent applies to all pending applications for “after the fact” variances regardless of when the application was accepted, when the hearing was held, or when the development activity occurred.

This letter is not a formal Opinion of the Attorney General, nor does this summary purport to include all provisions of the 2008 Law which may affect your practice and procedures. However, it is the view of this Office that any “after the fact” variance issued after July 1, 2008, without proof of full satisfaction of fines and mitigation for the violation, is of no legal effect.

Sincerely,



Marianne E. Dise
Assistant Attorney General
Principal Counsel



Martin O'Malley
Governor

Anthony G. Brown
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March 11, 2008

Ms. Suzanne Schappert
Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, MS 6301
Annapolis, MD 21401

Re: 2008-0057-V – Abbott, Dennis

Dear Ms. Schappert:

I have received the information regarding the above-referenced variance request. The applicant requests a variance to allow a dwelling addition (covered deck) with less Buffer and setbacks than required. This 19,600 square foot lot is designated as Limited Development Area (LDA) and is waterfront. It is currently improved with a dwelling unit, gravel driveway, shed, and slate patio. This applicant proposes to construct an approximately 20' x 20' (400 square feet) covered deck over the existing patio.

Provided that this lot is properly grandfathered, we do not oppose this variance request for this covered deck, as it is proposed to be located over an existing impervious surface. However, in choosing to enclose the existing patio, the applicant no longer has use of an outdoor deck or patio area. Please note that this office will not support future variances to construct a new patio or deck. We recommend that any variance approval contain a prohibition of the future construction of decks or patios within the Buffer. We also recommend that the applicant provide mitigation at a ratio of 3:1 for the area of disturbance in the Buffer and that these requirements are met by planting a mix of native species in the area waterward of the house. The applicant shall provide a plantings plan including species, size, spacing, and schedule for review and approval by the County.

We have no comment regarding the variance to setbacks.



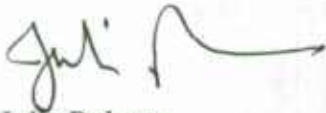
Ms. Schappert

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Page 2 of 2

Thank you for the opportunity to comment. Please include this letter in your file and submit it as part of the record for variance. Please notify the Commission of the decision made in this case.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie", followed by a long horizontal flourish.

Julie Roberts

Natural Resources Planner

cc: AA 50-08

AA 50 -08

**RE: An Appeal From A Decision Of The
Administrative Hearing Officer**

DENNIS & LINDA ABBOTT
Petitioners

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**BEFORE THE
COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY
CASE NO.: BA 31-08V
(2008-0057-V)
Hearing Date: July 31, 2008**

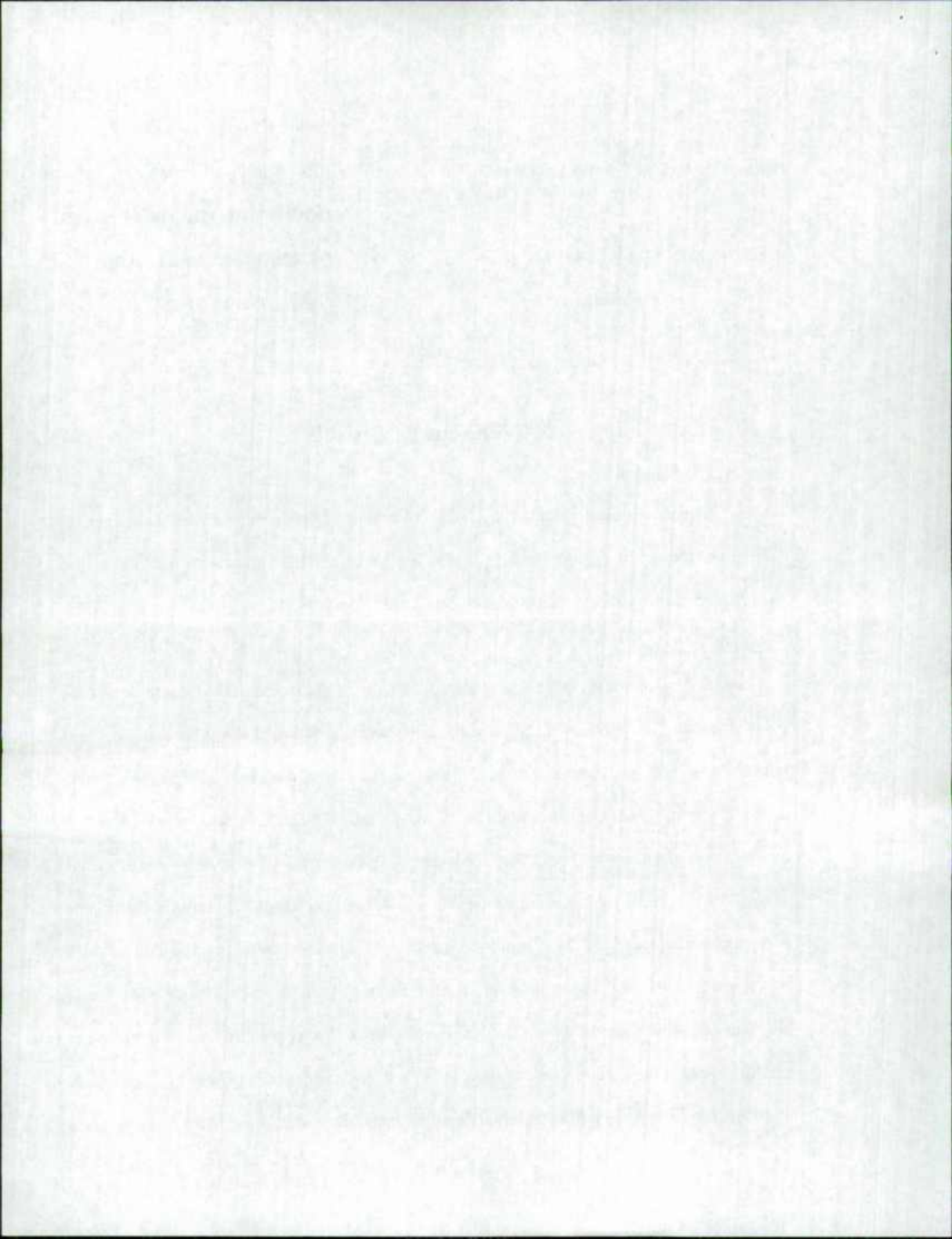
MEMORANDUM OF OPINION

Summary of Pleadings

This is an appeal from a decision of the Administrative Hearing Officer. This appeal is taken from the denial of a variance to perfect a covered porch addition with less buffer than required, on property known as 942 Main Street, Deale.

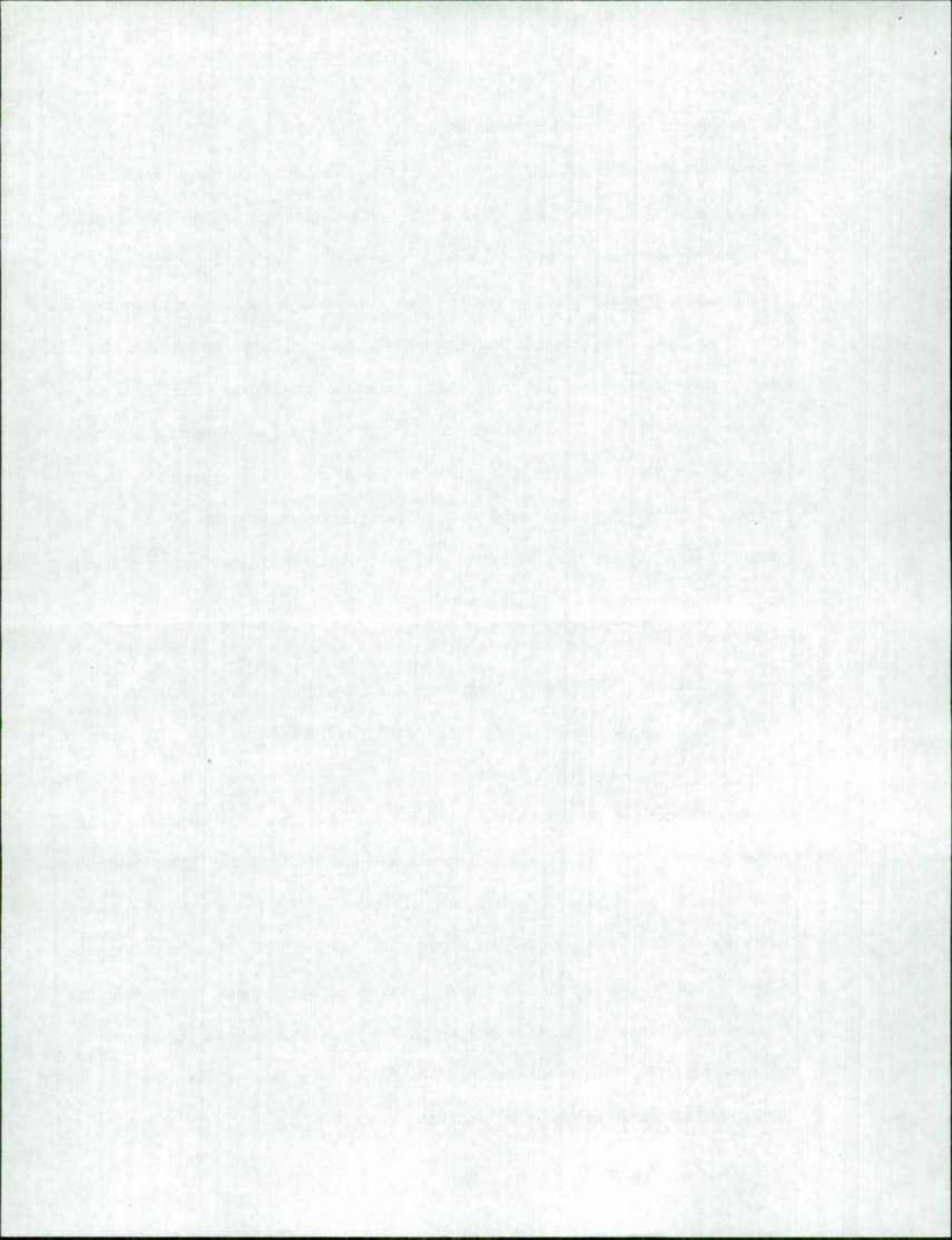
Summary of Evidence

Mr. Dennis Abbott, one of the Petitioners, testified that he and his wife are one of the neighborhood's few permanent residents. Since becoming a resident, Mr. Abbott noted larger homes being built in the area. Mr. Abbott's home is a waterfront home along Carr's Creek. Carr's Creek is shallow. When Mr. Abbott moved into his house, it was improved with a concrete boat ramp and bulkhead, both of which were falling apart. Mr. Abbott explained the state of his waterfront to the Department of Natural Resources ("DNR"). In turn, DNR issued a permit, pursuant to which the Petitioner moved the boat ramp and attempted to repair his bulkhead. In 1994, Mr. Abbott improved part of his property by extending the second floor of his home four feet closer to the water. Ms. Pam Cotter, a County planner, visited the property and told him that the County would not oppose a deck over the patio. Mr. Abbott built his deck in 2006. The decision to build was based primarily upon Mr. Abbott's resources as a contractor



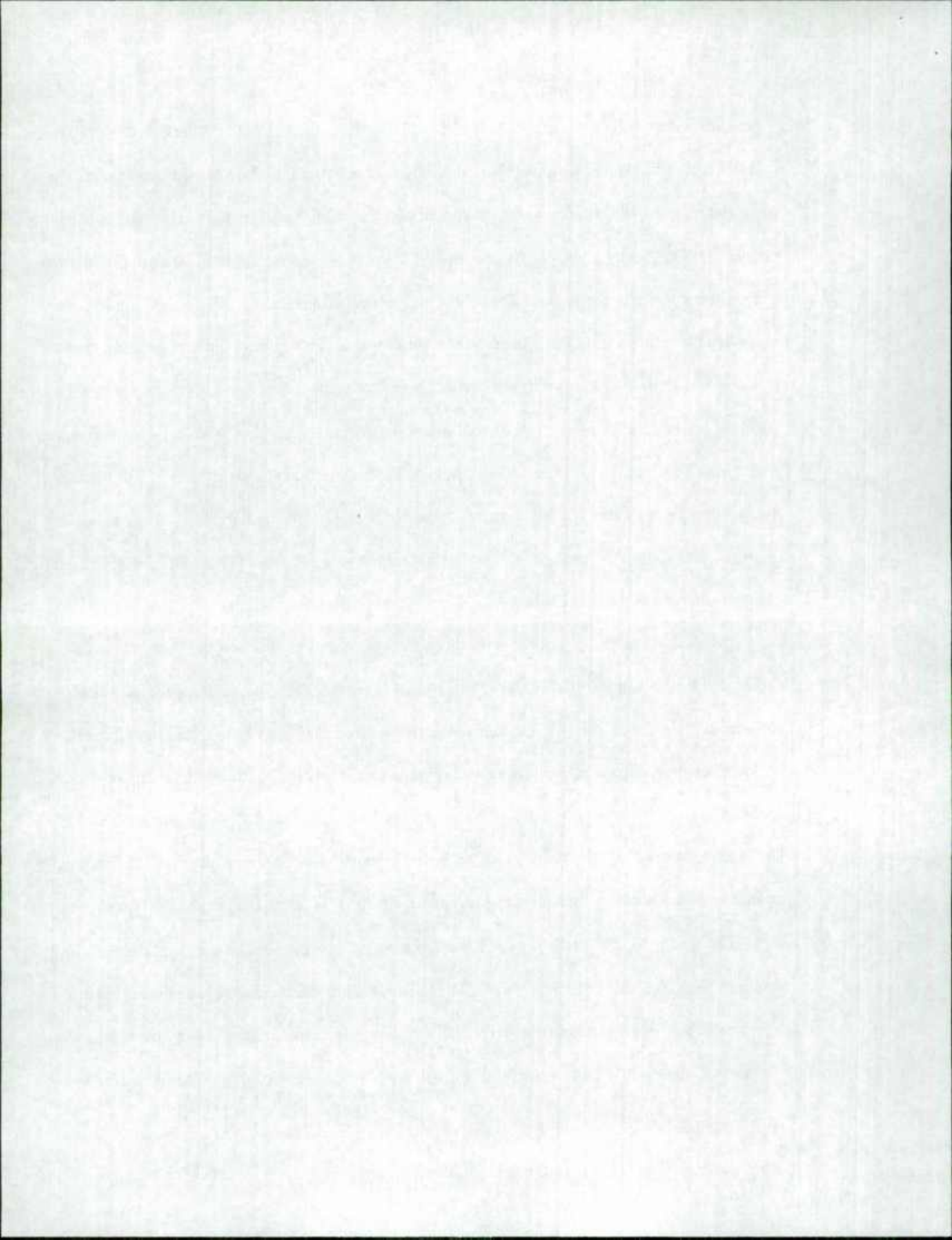
in the construction business. Mr. Abbott acquired the wood and manpower to build the deck and completed it in one weekend. Mr. Abbott constructed the deck without a permit; but, he did not foresee the permit as a problem based upon Pam Cotter's earlier opinion. The deck is open on three sides as shown on Petitioner's exhibits six and seven. The structure cannot be placed on the west side of the property because of a well location. Stairs access the deck on the west side of the primary structure. The house is 35 feet from the well. There are sewer lines and many trees to the east side of the property. The entire house is within the Critical Area buffer. The house (by virtue of a ground level patio) is 40 feet from the water. In 1995, Mr. Abbott appeared before this Board and was denied a variance to build a screened-in porch in his waterside yard. His property and the property next door have decks over their respective patios. The subject deck cannot be seen from the street. Mr. Abbott assumed he would get a permit; but, he knows his deck was not legal when built. He acted impulsively, to use his resources effectively.

Mr. Eric E. See, an expert in environmental science planning, testified as to his experience with the subject property. He agrees with the conclusions in the Critical Area Report. To that end, Mr. See believes there is no impact on fish, wildlife habitat or water quality from the second floor deck. To construct the deck, four 6" x 6" posts were placed in the ground at the edge of the stone patio. As such, there is only one square foot of new impervious surface within the Critical Area from this deck. The well is set back 35 feet from the house. The Code requires a minimum 30 foot setback. Therefore, only a five foot building envelope would remain in which to add a deck, which is not a reasonable size. The deck was built over existing impervious surface. The patio is two feet wider than the deck. Stormwater runoff from the second floor deck falls onto the patio and does not erode the lawn. This deck is not a detriment to the environment. However, Mr. Abbott already enhanced the Critical Area by removing a boat ramp from his property and reduced the overall impervious surface on site.



Mr. Shep Tullier, an expert in land use planning, testified regarding the subject location and the requirements for a variance to the Critical Area Program. Mr. Abbott constructed the patio sometime in 1982—prior to the enactment of the Critical Area Program. The patio area has not been subsequently removed or enclosed. Currently, there is a four foot cantilever of the second story towards the water. The whole house lies within the buffer. In his opinion, the property is unique. It is 115 feet deep on the western side. The eastern side has a depth of 149 feet, but 13 feet of the lot is within the creek. There is only 29 feet of non-buffer land on this lot, but most of that area is within the 20 foot minimum required rear yard setback. This variance would not be a special privilege. Other houses in the area have second story decks. More importantly, most of the lots are improved with decks close to the water. Mr. Tullier supports the request to allow a covered deck over existing impervious surface. There will be no increase in human activity within the Critical Area should this variance be granted.

Ms. Lori Rhodes, a planner with the Office of Planning and Zoning, testified that the deck extends outward into the buffer zone towards the water. The west side of the property is constrained by the well and the east side is constrained by sewer lines and vegetation. Given the thickness of the vegetation, it could not be removed easily. If the Petitioner had applied for a variance, it could have been granted if the deck were built to the east of the principal structure. The deck does not alter the character of the neighborhood, given so many other nonconforming structures. Ms. Rhodes would recommend a deck which is 14 x 16 feet, which is the same as here. The Code, §17-8-301(b) provides that no new impervious surface can be closer to the shoreline than the principal structure. The Code further provides that structures are not “accessory” if they are within three feet of the main structure or attached by an enclosed breezeway. This deck is part of the principal structure because it is connected to the house and covered.



Ms. Barbara Thomas, a proponent, testified that she has known the Abbotts for 10-15 years. They are sensitive to environmental issues and the deck does not hurt Carr's Creek. The four poles are in the ground and they do not disturb the property. She believes that the Abbotts have learned their lesson as a result of the County's actions in this case. The waterfront property looks like mudflats on certain days. There are other places in the creek with water at all times. Low tide effects the subject location.

Ms. Elisa Moore, a proponent, testified as the main representative of the Carr's Creek dredging project. The property has little "waterfront". If the area is not dredged, it will be even less of a waterfront.

Mr. Chris Papvasiliou, a proponent, testified in his capacity as a member of the Abbott's community specifically. The Abbott's deck does not impede the view of the bay. In his opinion, there are many creek side structures in the area--some are covered and some are not.

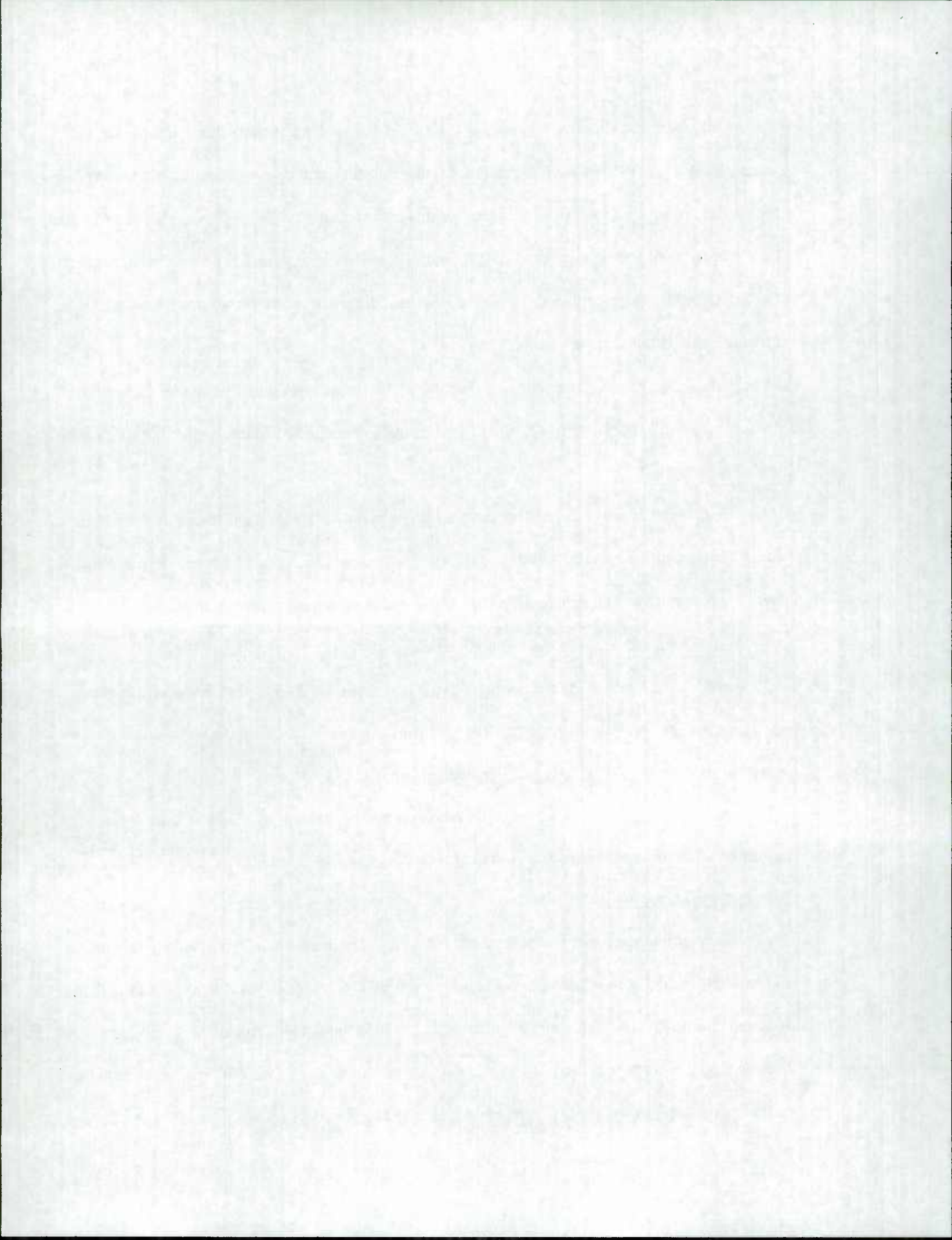
Ms. Donna Rhodes testified in favor of the Petitioners.

Mr. Jacob Kuitwaard, a proponent, explained that the Abbotts are very concerned about the environment and the potential for fertilizer runoff into the bay. The deck does not obstruct wind, air or view.

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusions

The subject property is a waterfront lot located in the Critical Area and designated as LDA. It is zoned R5-Residential. The lot is severely constrained by the shoreline and the required minimum 100 foot buffer therefrom as set forth in the Critical Area Program. A variance is, therefore, required for any construction within such 100 foot buffer, even when buffer modification might allow such construction. *See*, Code §18-13-104(b). The Petitioners

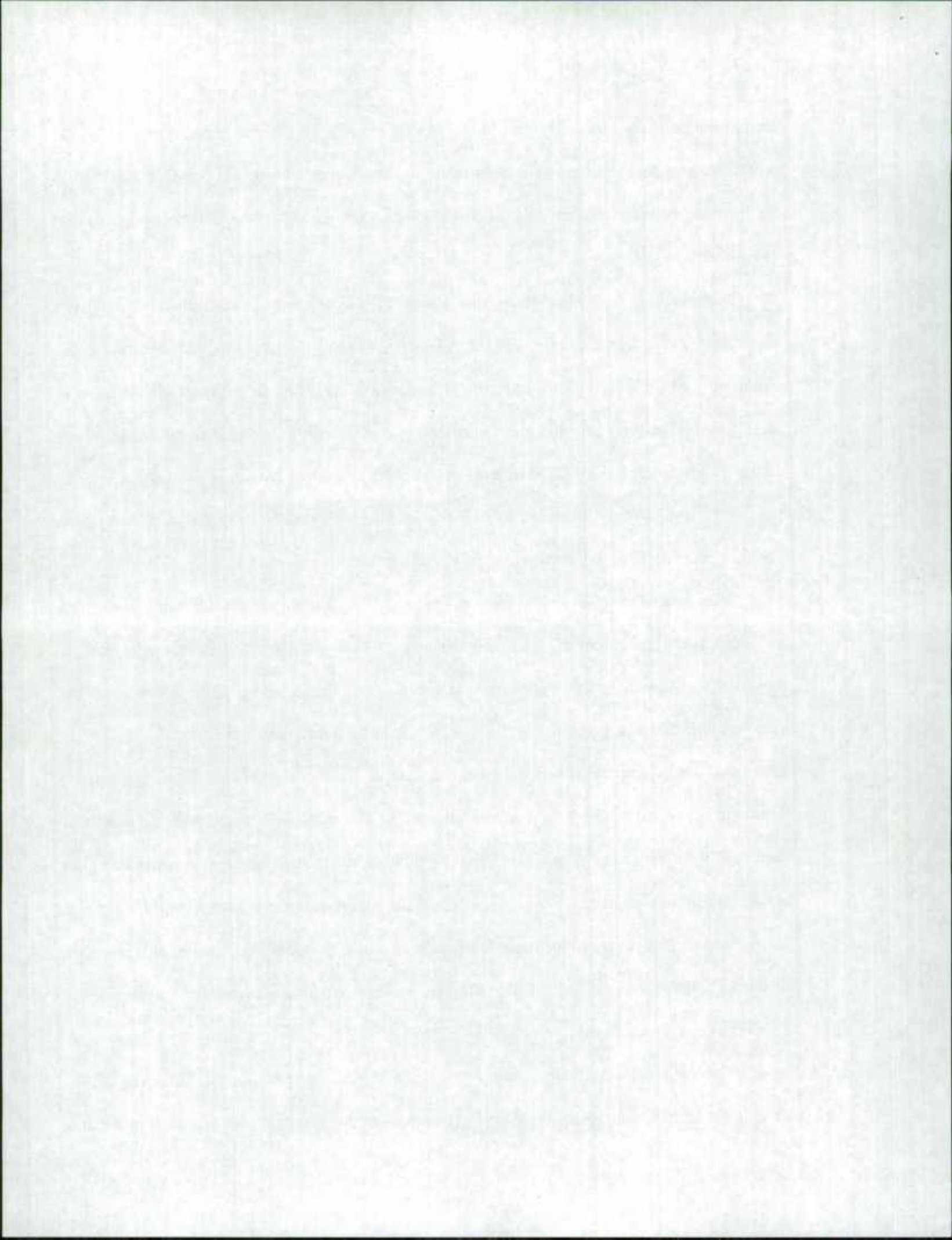


are requesting a variance of 18 feet to the minimum 100 foot Critical Area buffer and habitat protection area requirements. The deck is not a water-dependent use and the deck will disturb the habitat protection area established by the Code. *See*, Code, §17-8-301(b); §17-8-501; and §17-8-502.

Variances to the Critical Area criteria require the Petitioners to satisfy an extensive list of requirements set out in the Code. *See, id.*, §3-1-207. The requirements established for variances within the Critical Area are exceptionally difficult to overcome and an applicant for variances to the Critical Area Program must meet each and every one of the variance requirements of the Code. *Id.* If an applicant fails to meet even one of the criteria, the variance must be denied. In the instant case, we find that the Petitioners have met their onerous burden of proof regarding the variance criteria. Thus, the variances requested are granted.

The Petitioners must first show that “because of certain unique physical conditions, such as exceptional topographical conditions peculiar to and inherent in the particular lot, or irregularity, narrowness, or shallowness of lot size and shape, strict implementation of the County's critical area program . . . would result in an unwarranted hardship.” *Id.* § 3-1-207(b)(1). There is no denying that there are unique physical conditions on the subject property. Testimony provided by the Petitioners’ experts and the County all indicated that the lot is located almost entirely within the required 100 foot minimum Critical Area buffer from the mean high water line of tidal waters. Without variances, this property cannot be developed with any impervious surface nearer to the mean high water line than the dwelling. Accordingly, we find that strict adherence to the Critical Area Program would result in an unwarranted hardship to the Petitioners.

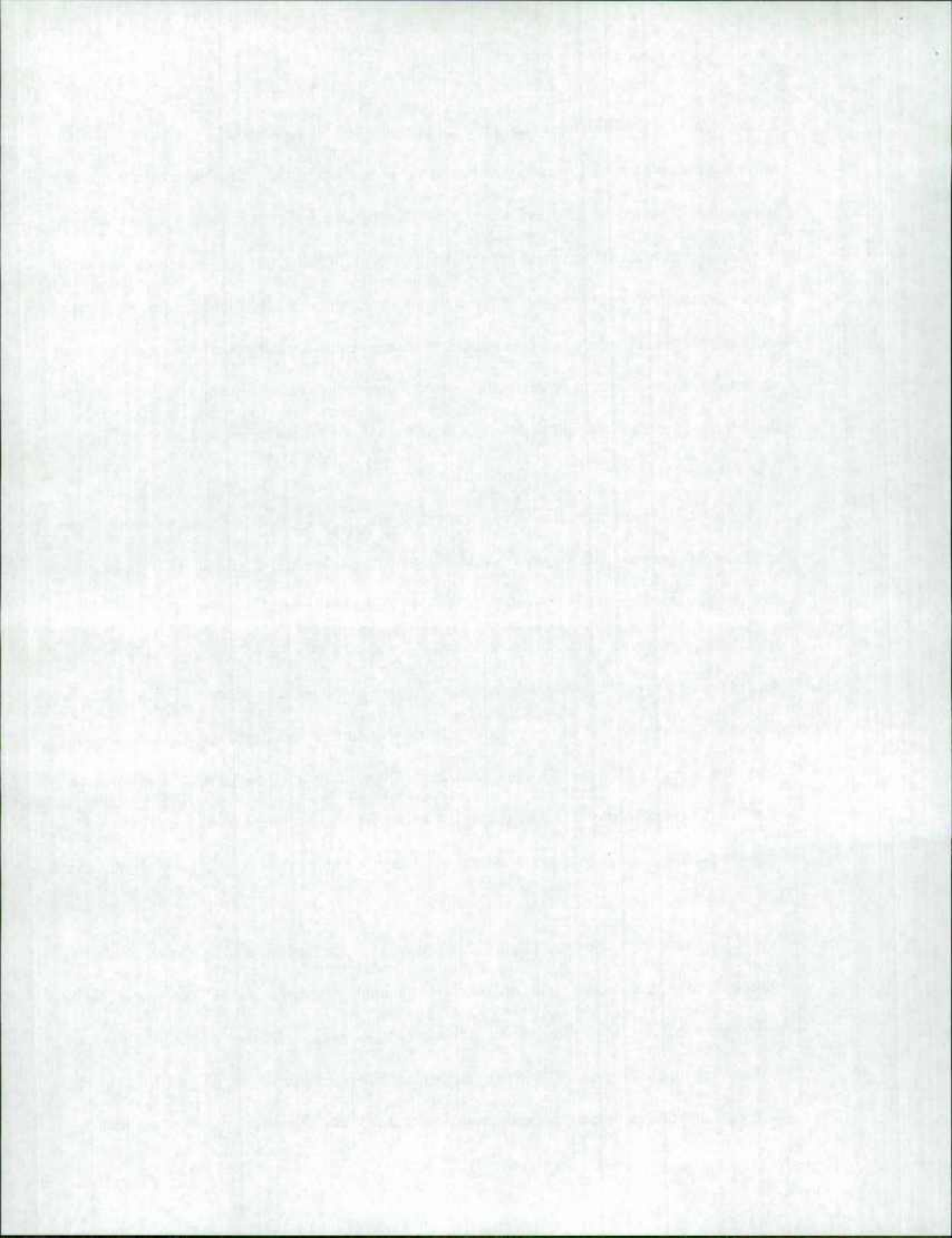
The Petitioners next must establish that “[a] literal interpretation of COMAR, 27.01, Criteria for Local Critical Area Program Development or the County’s critical area program and



related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas as permitted in accordance with the provisions of the critical area program within the critical area of the County.” *Id.* § 3-1-207(b)(2)(i). The surrounding community is developed with waterfront, single-family dwellings and dwellings on non-waterfront lots in the Critical Area. Many of the homes in the community are within the 100 foot Critical Area buffer and have second story decking. One such home is adjacent to the Petitioners. Also, decks are an expected use on waterfront property and, we think, represent reasonable and significant uses on these lots. Therefore, we find that the Petitioners would be denied rights commonly enjoyed by others if the Critical Area laws are applied literally.

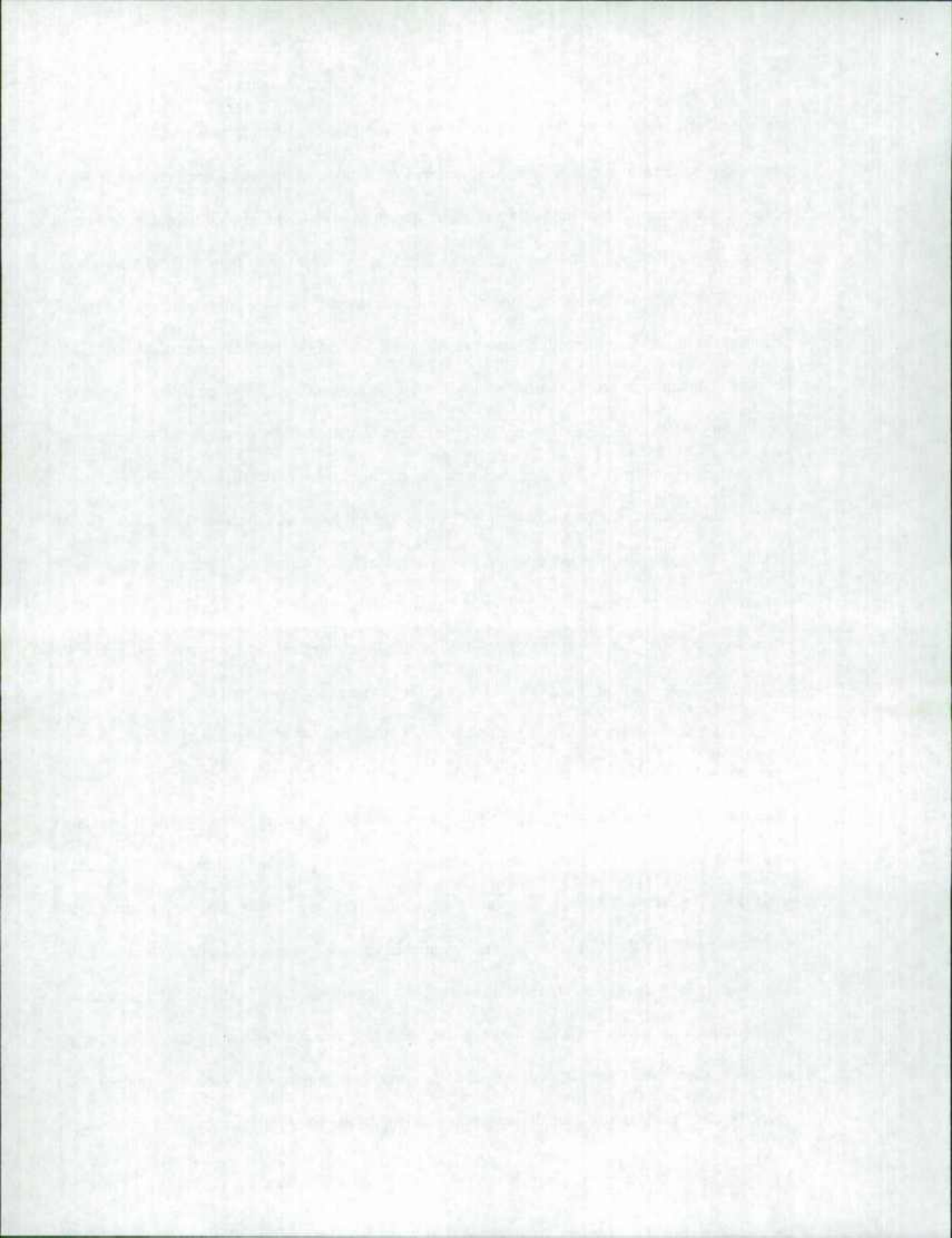
Next, the Petitioners must show that “[t]he granting of a variance will not confer on an applicant any special privilege that would be denied by COMAR, 27.01, the County’s critical area program to other lands or structures within the County critical area, or the County’s bog protection program to other lands or structures within a bog protection area.” *Id.* §3-1-207(b)(3). As we previously addressed, there are a significant number of homes in the community located inside the 100 foot Critical Area buffer that have decks which face the waterfront areas. As described by Ms. Rhodes for the County, any new construction waterward of a dwelling within the 100 foot Critical Area buffer will require a variance. This deck is reasonably sized. Thus, we do not believe that granting the Petitioners’ requested variances would give them a special privilege.

The Petitioners also must establish that “[t]he variance request is not based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development before an application for a variance was filed, and does not arise from any condition relating to land or building use on any neighboring property.” *Id.* §3-1-207(b)(4). The site conditions of this property near the water lead to the need for variances. We acknowledge



that the Petitioners constructed without permits. We find compelling, however, Mr. Abbott's testimony relative to the tacit, unwritten approval to build a second story deck on the property. We are also satisfied that the Petitioners took appropriate actions and paid applicable fees and fines such that this application for variance may proceed, albeit later than it should have been filed. To note, the Petitioners applied for these several variances immediately following approval of legislation to modify penalties for home owners or construction professionals who perform construction activities prior to application for variance. As these penalties are assessed by various other state agencies, the Petitioners and County must testify that all penalties and requirements were paid and met prior to any hearing for request of variance. The Petitioners and County made such testimony, although the County did not grant its approval. As such the Board retains the power to grant or deny Critical Area variances in this matter and measures this criterion outside of whether the application "commenced development before an application for a variance was filed". *Id.* Accordingly, we find that the requested variances are needed due to nature, not from any acts of the Petitioners or to that on neighboring property.

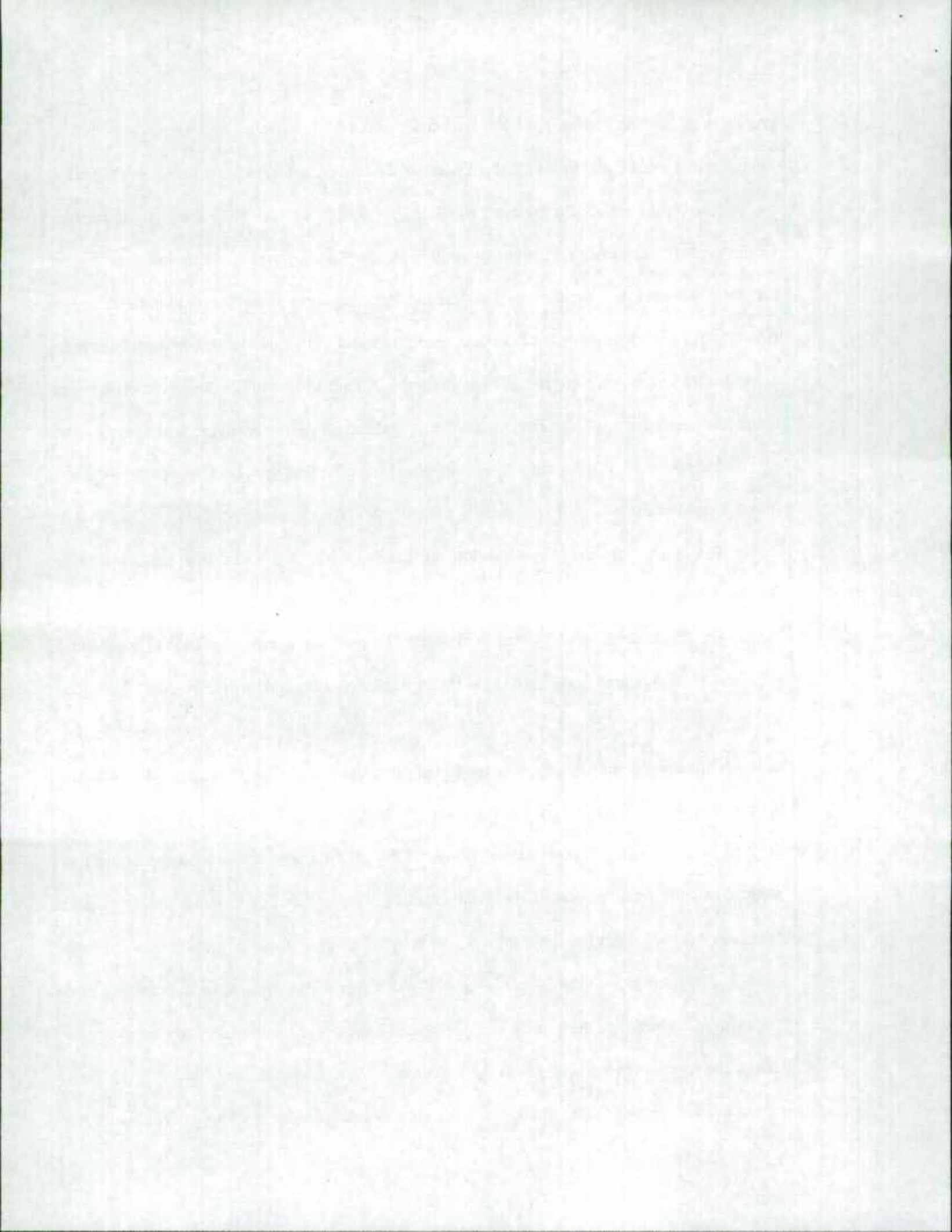
The next burden that the Petitioners must overcome is to show that "[t]he granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the County's critical area or a bog protection area and will be in harmony with the general spirit and intent of the County's critical area program or bog protection program." *Id.* §3-1-207(b)(5). The subject property is a waterfront lot located in the Critical Area. We agree with the Petitioner, not the County, that the reasonable use of the second story deck would be significantly hindered if placed along the east or west side of the principal dwelling. The need of the Petitioners to have a reasonable use of their property, and we think a waterfront deck is a reasonable use, must be balanced with the environmental impact of any construction of the property. We are satisfied that the suggested mitigation program set forth by the County will



protect the site. The Critical Area Report states that the deck added no new impervious surface to the property and that, "as built", the property meets lot coverage requirements. Additionally, the Petitioners are willing to enter a mitigation program on or off site to meet any mitigation requirements. Such efforts, though determined by the Critical Area Commission, may not be necessary because the Petitioners meet the 31.25% impervious surface requirements. The Critical Area Commission differed from our decision today in that the Petitioners already possess a reasonable and significant use of their property without the second story deck. Given the number of second story decks in the community and the miniscule impact to soil (literally one square foot) waterward from the principal dwelling, we find that the variances would not harm the environment and would be consistent with the Critical Area Program.

The subject property is not within the County's bog protection area, and thus Code Section 3-1-207(b)(6) does not apply and need not be addressed.

The Petitioners' next burden is to establish that through competent and substantial evidence, the applicants have "overcome the presumption contained in the Natural Resources Article, § 8-1808(d)(2), of the State Code." *Id.* § 3-1-207(b)(7). Under the above cited section of the Natural Resources Article it is presumed "that the 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 this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction's program." Md. Code Ann., Natural Resources §8-1808(d)(2)(i). Here, the Petitioners have a very narrow strip at the back of their property in which to build without variance to the Critical Area Program; but, construction therein would require variance to the rear yard setback criteria. Additionally, construction of a deck in the rear yard would not enable the parties to enjoy waterfront views. We find this both impractical and unreasonable. The construction of a second story deck within this community is

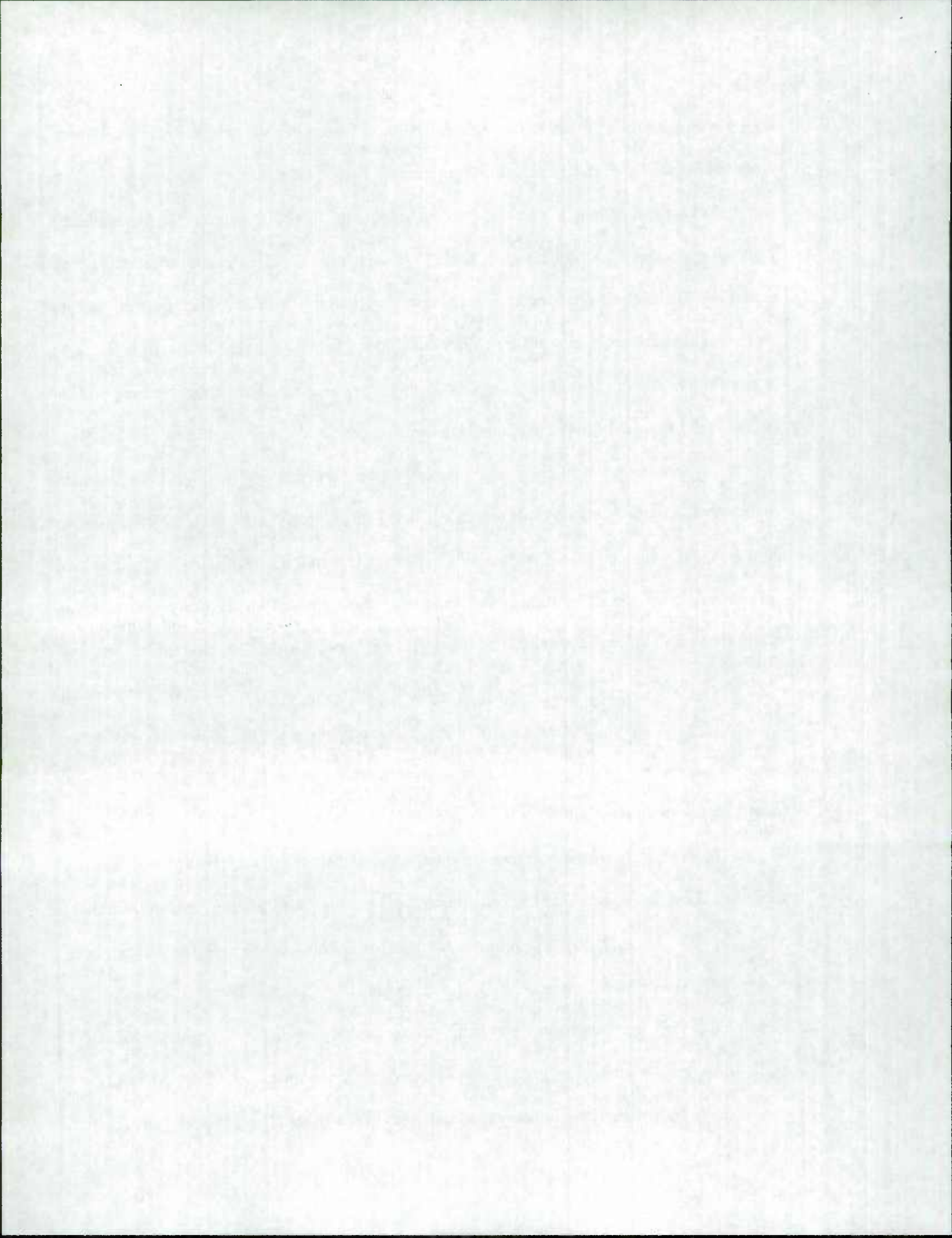


a reasonable use of property in the Critical Area. Therefore, we find that the Petitioners' proposed house is within the intent of the program.

Next, the Petitioners have the burden of proving that "the variance is the minimum variance necessary to afford relief." Code, § 3-1-207(c)(1). The deck is constructed atop impervious surface that predates the Critical Area legislation. The deck added only one square foot of additional impervious surface within the Critical Area. We have never seen less impact in the Critical Area. Additionally, as described by Mr. See, Mr. Abbott removed impervious surface well in excess of one square foot at the water's edge in the removal of the boat ramp.

In addition, the Petitioners must show that the variances will not "alter the essential character of the neighborhood or district in which the lot is located." *Id.* § 3-1-207(c)(2)(i). As described, the neighborhood is improved with homes and multiple nonconforming structures. All of the neighbors testified in favor of the request. There are similar decks on most of the lots in the community. We are satisfied that the deck would not alter the "the essential character of the neighborhood." *Id.* Similarly, the granting of the variances "will not substantially impair the appropriate use or development of adjacent property." *Id.* § 3-1-207(c)(2)(ii). The surrounding community is completely developed with homes and most have decks. There were many proponents and no protestants of this deck.

The Petitioners next hurdle requires them to show that "the granting of the variance will not reduce forest cover in the limited development and resource conservation areas of the critical area." *Id.* § 3-1-207(c)(2)(iii). The property is classified as LDA. No forest cover was removed as part of the construction of this deck. It was constructed over an existing patio. Likewise, the grant of the variances "will not be contrary to acceptable clearing and replanting practices required for development in the critical area or a bog protection area." *Id.* § 3-1-207(c)(2)(iv). The deck was constructed atop impervious surface—not open ground (but for one square foot).



Lastly, we find that the variances will not “be detrimental to the public welfare.” *Id.* § 3-1-207(c)(2)(v). A request to construct a deck atop previously existing impervious surface (added before the adoption of the Critical Area Program) would not be detrimental to the public welfare.

To be granted a variance to the Critical Area Program requirements, the Petitioners have the burden to satisfy each and every Code requirement. *Id.* § 3-1-207. As discussed previously in this opinion, failure to meet even one of the Code provisions requires this Board to deny the requested variances. Here, the Petitioners satisfied all of the applicable requirements of Section 3-1-207. Therefore, the requested variances must be granted.

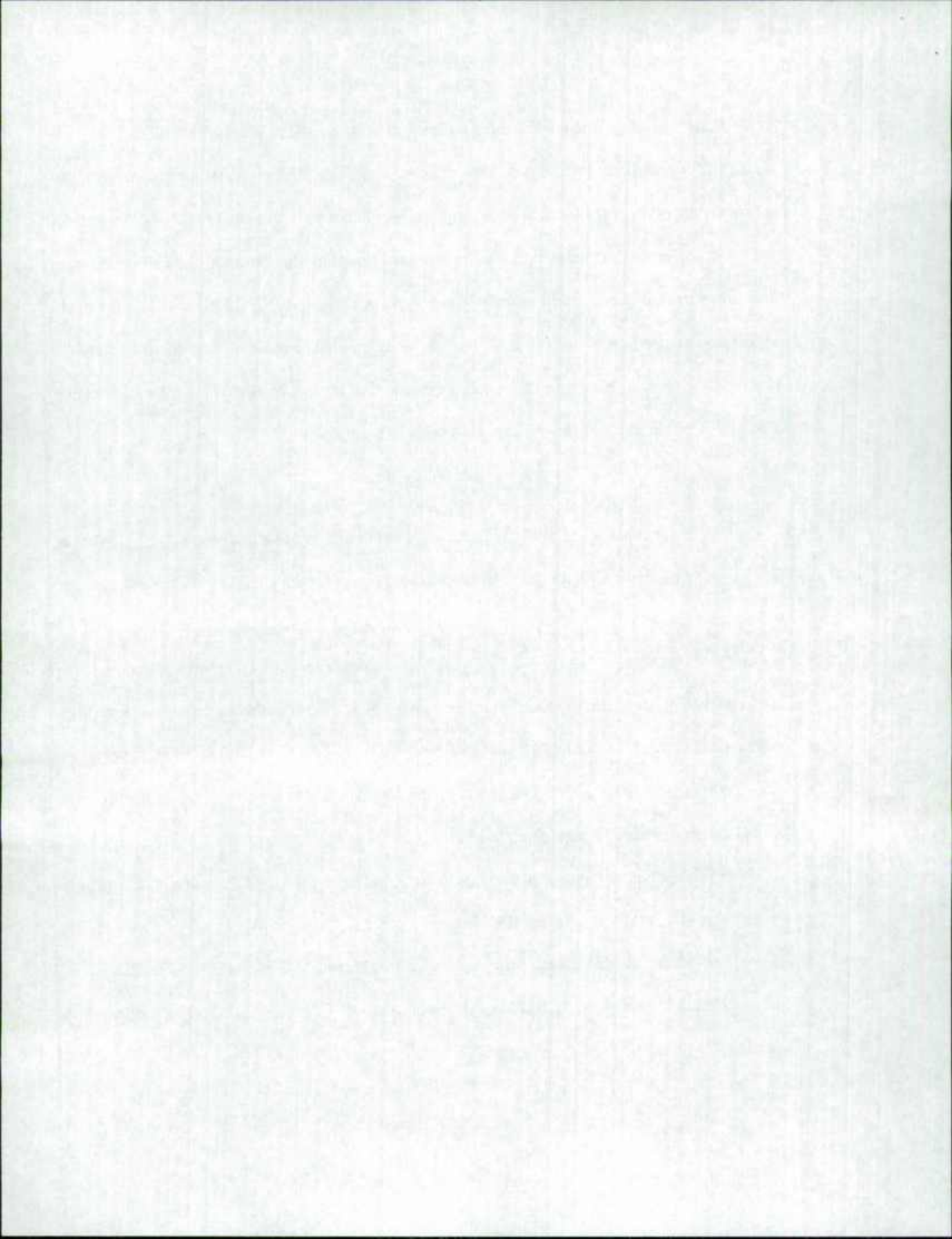
ORDER

For the reasons set forth in the foregoing Memorandum of Opinion, it is this 17th day of Dec, 2008, by the County Board of Appeals of Anne Arundel County, ORDERED, that the Petitioners’ requests for variances to place a 17 by 16 foot, second story deck within the buffer, as modified, (Sections 18-13-104(a) and (b)), within a Habitat Protection Area (Section 17-8-502) and variances to the required minimum buffer of 100 feet landward from the mean high water line (Section 17-8-301(b)) are hereby **GRANTED**.

Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

If this case is not appealed, exhibits must be claimed within 90 days of the date of this Order; otherwise, they will be discarded.

Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Mary M. Leavell, Clerk.



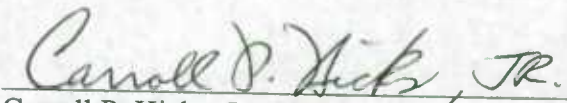
COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY



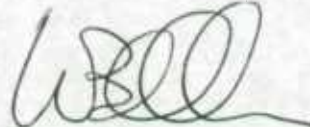
William C. Knight, III, Chairman



John W. Boring, Member



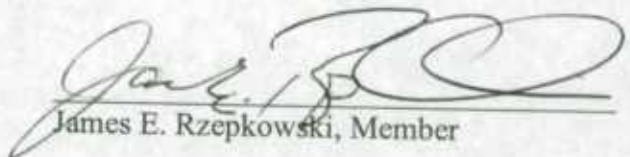
Carroll P. Hicks, Jr., Member



William Moulden, Member

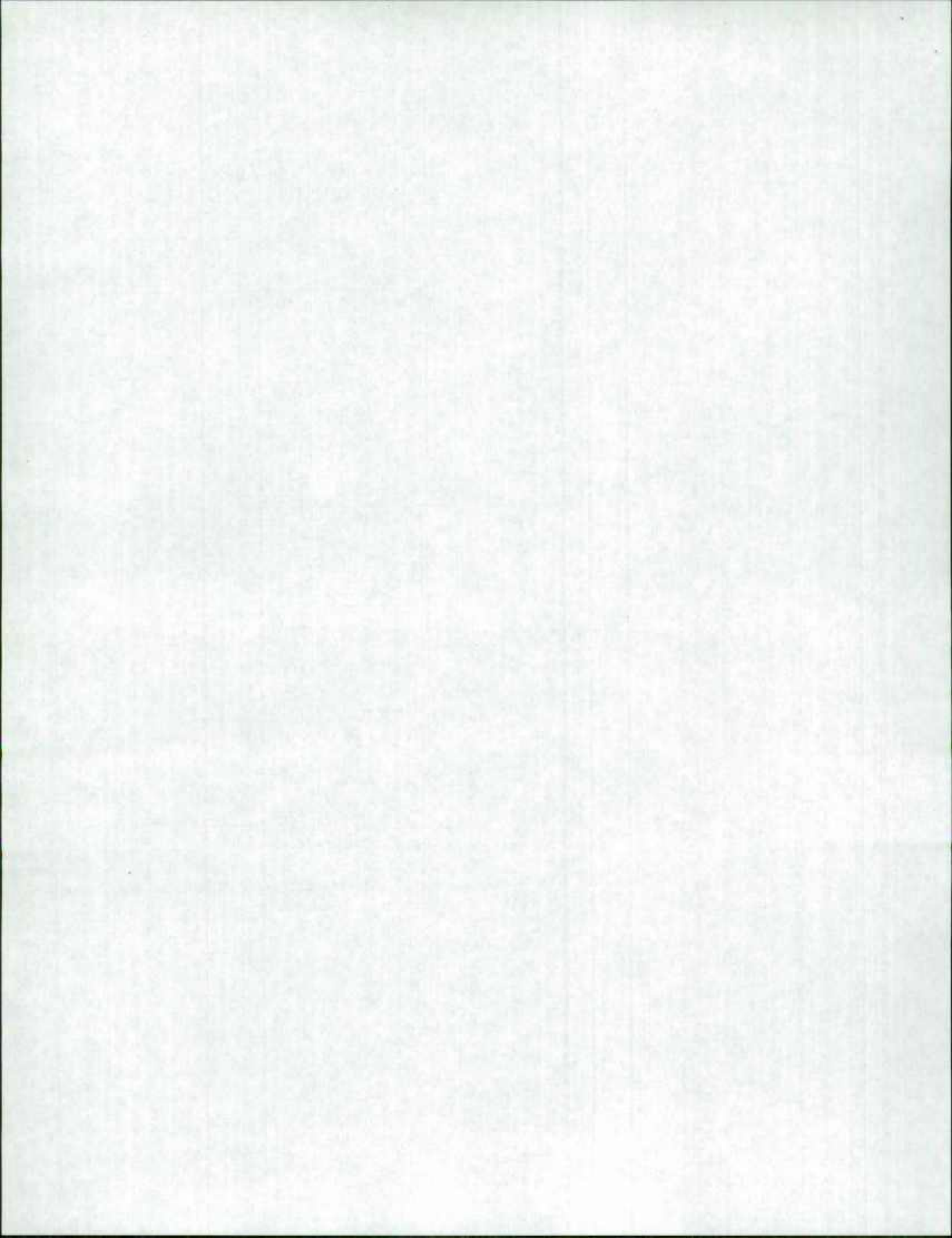


Andrew C. Pruski, Member



James E. Rzepkowski, Member

(Arnold McKechnie, Vice Chairman, did not participate in this appeal.)



July

50-08

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2008-0057-V

DENNIS AND LINDA ABBOTT

RECEIVED

MAY 20 2008

SEVENTH ASSESSMENT DISTRICT

CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

DATE HEARD: APRIL 22, 2008

ORDERED BY: **STEPHEN M. LeGENDRE**, ADMINISTRATIVE HEARING OFFICER

PLANNER: **LORI RHODES**

DATE FILED: MAY 14th, 2008

RECEIVED

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PLEADINGS

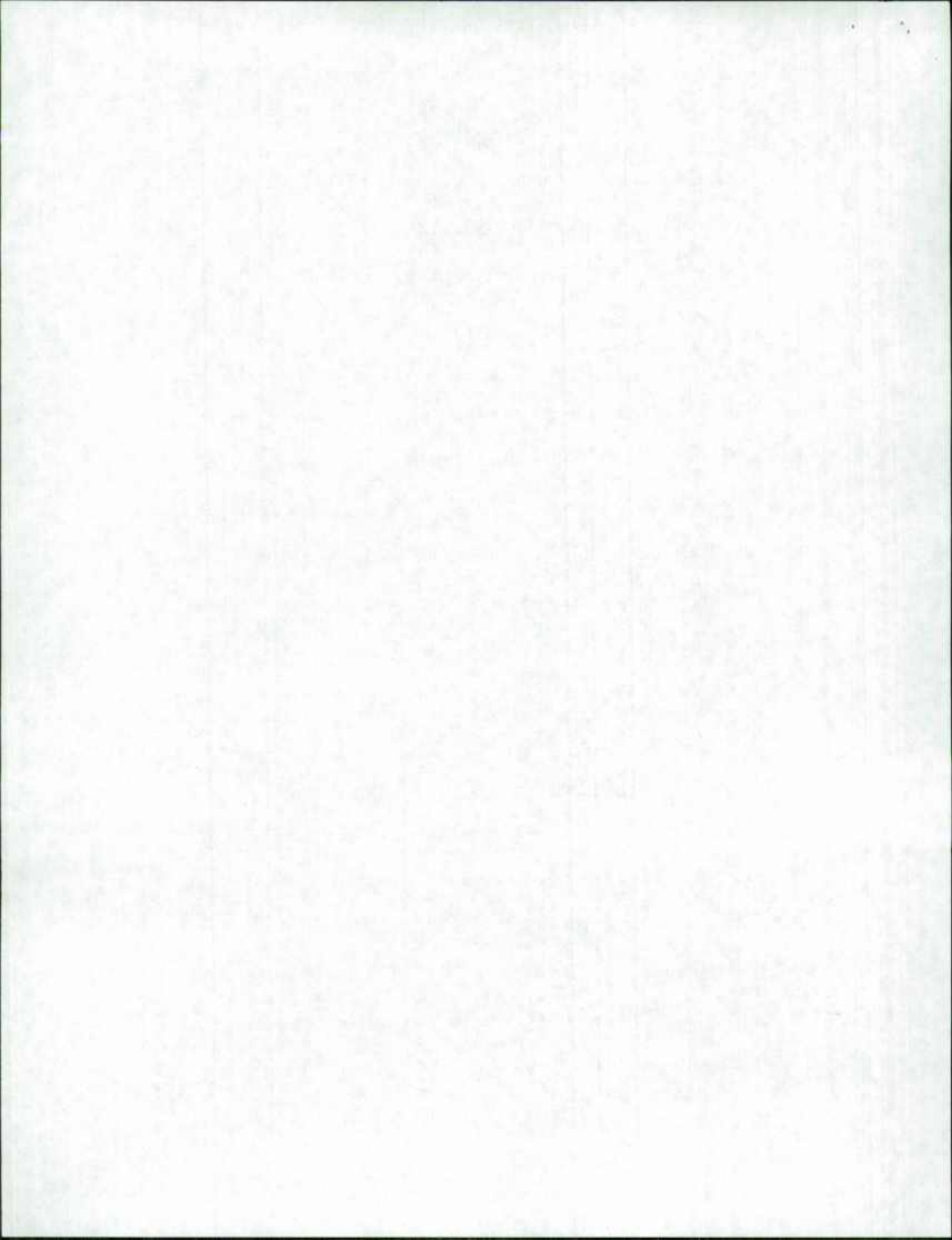
Dennis and Linda Abbott, the applicants, seek a variance (2008-0057-V) to allow a covered porch addition with less buffer than required on property located along the north side of Main Street, northwest of Fifth Street, Deale.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's web site in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 175 feet of the property was notified by mail, sent to the address furnished with the application. Mr. Abbott testified that the property was posted for more than 14 days prior to the hearing. I find and conclude that there has been compliance with the notice requirements.

FINDINGS AND CONCLUSIONS

The applicants own a single-family residence with a street address of 942 Main Street, in the Higgins subdivision, Deale. The property comprises 19,600 square feet and is zoned R5 residential with a Chesapeake Bay Critical Area designation as Limited Development Area (LDA). This waterfront lot on Carrs Creek is mapped as a buffer modification area. In Case No. V-219-94 (September 1, 1994), this office conditionally approved a modified variance to allow a

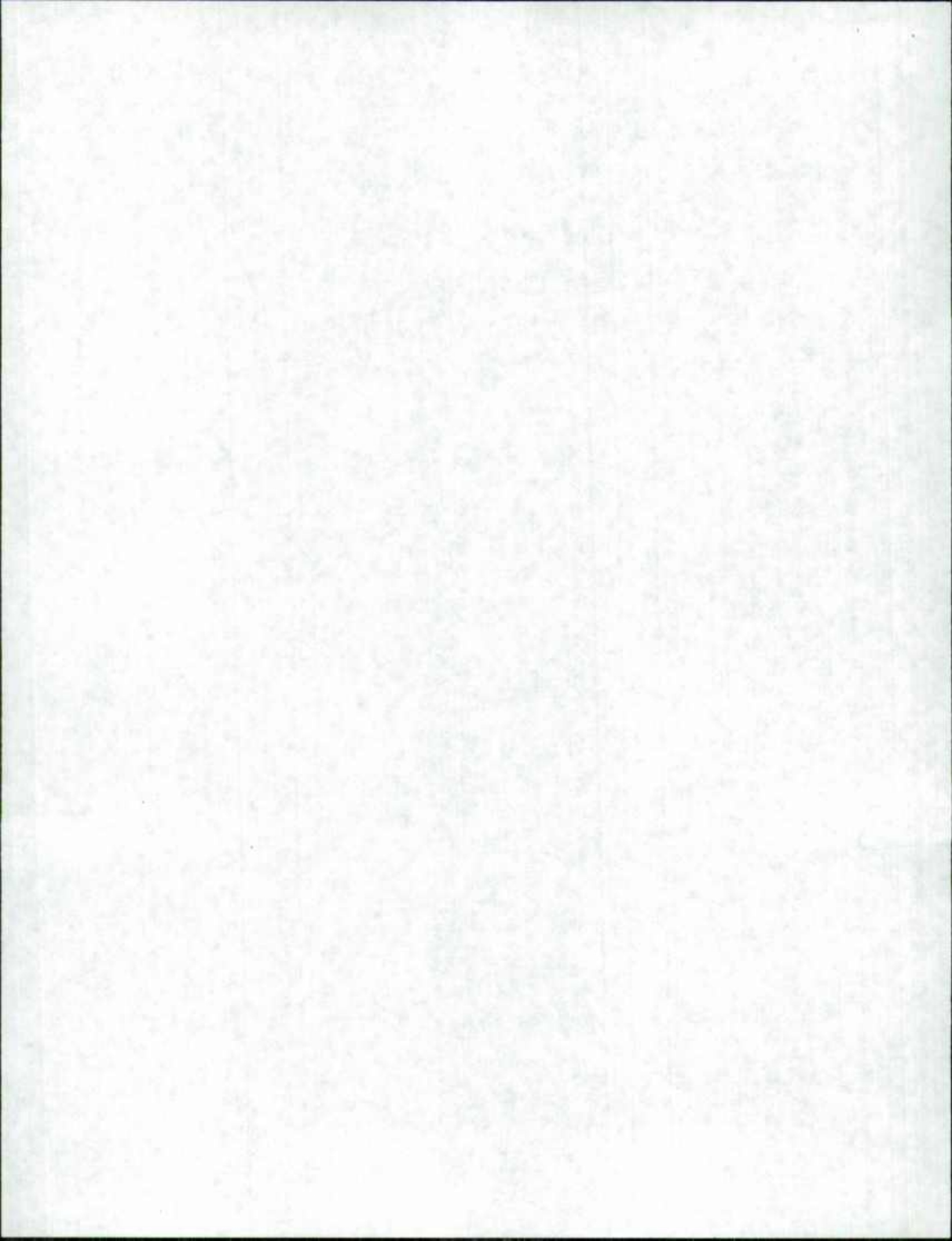


detached garage and dwelling additions.¹ The applicants appealed the conditional approval to the County Board of Appeals of Anne Arundel County. The Board of Appeals denied further relief. See, Case No. BA 73-94V (January 4, 1995). There was no further appeal. The present request is to perfect a second floor covered porch addition 43 feet from mean high water. The porch addition is built atop a preexisting, at grade waterfront patio. The front façade of the dwelling is located 61 feet from mean high water.

Anne Arundel County Code, Article 18, Section 18-13-104(a) establishes a 100-foot buffer from tidal water. However, Section 18-13-104(b) creates a buffer modification area on lots platted before December 1, 1985 on which the existing pattern of development prevents the buffer from performing its protective functions. Under Article 17, Section 17-8-301(b), the expansion of an existing dwelling in a buffer modification area shall be no closer to water. Accordingly, the proposal requires a buffer variance of 18 feet.

Lori Rhodes, a planner with the Office of Planning and Zoning, testified that aerial photography from 2007 shows an open deck. She conceded the existence of other homes in the neighborhood that are closer to water. Additionally, the only new impervious coverage is for the support posts. Nevertheless, she questioned the hardship, which is considered self-created. Ms. Rhodes summarized the agency comments. The County's Development Division

¹ In particular, a modified variance of 43 feet to the 100 foot Critical Area buffer allowed an enclosed porch along the south side and west side, to be located 57 feet from mean high water.



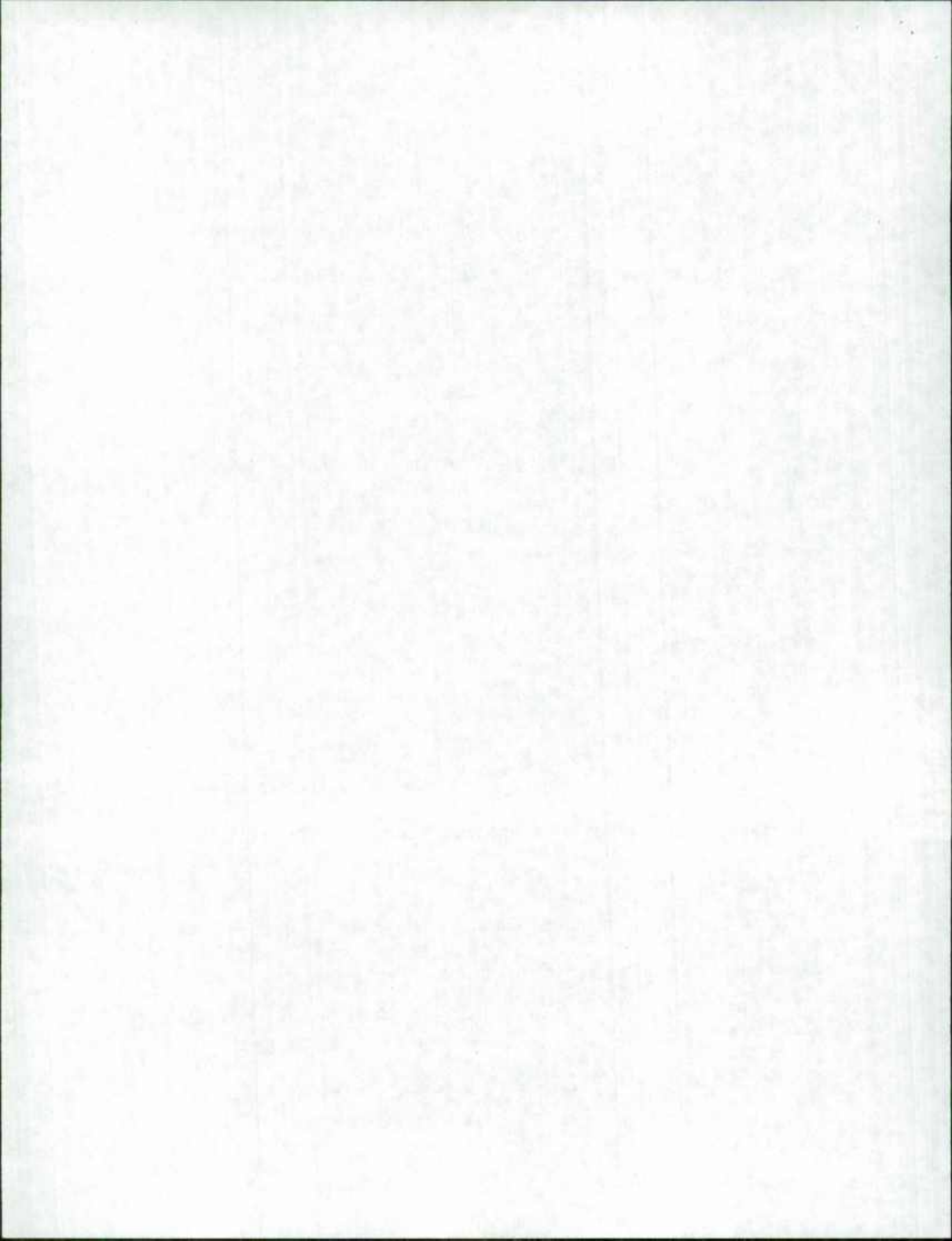
opposed the application and suggested that the porch addition could have been located elsewhere. The Chesapeake Bay Critical Area Commission did not oppose the application, but recommended no further construction of decks or patio in the buffer.² By way of conclusion, Ms. Rhodes opposed the application.

On cross-examination by counsel to the applicants, Ms. Rhodes acknowledged that the Department of Health requires 30 feet of separation to the well, which is located in the west side yard.

Mr. Abbott testified that the applicants rented the property in 1978, followed by purchase in 1982. The waterside patio dates to at least 1983. The original cottage consisted of 800 square feet on one floor. The applicants consulted with an engineer, architect and landscape architect in connection with the original variance application. After the denial by the Board of Appeals, they abandoned the plans. Then, in 1995, they added a second floor to the dwelling based on their own design. The approved plans show a second floor slider and blocking for a deck addition.³ The applicants added an open deck three years ago and installed the roof last year. Mr. Abbott also testified that a covered porch addition could not be built elsewhere due to the proximity to the well (west side yard), the driveway and an original porch opening (east side yard) and utilities (street side). He submitted several site photographs and photographs of other

² The Commission also requested mitigation.

³ According to the witness, the County's zoning analyst at the time of the 1994 case - Patricia Cotter (now Miley) - led them to believe that the deck was allowed.



properties with waterside improvements, including decks and porches as close as 20 feet from shore; and several letters in support of the application.⁴

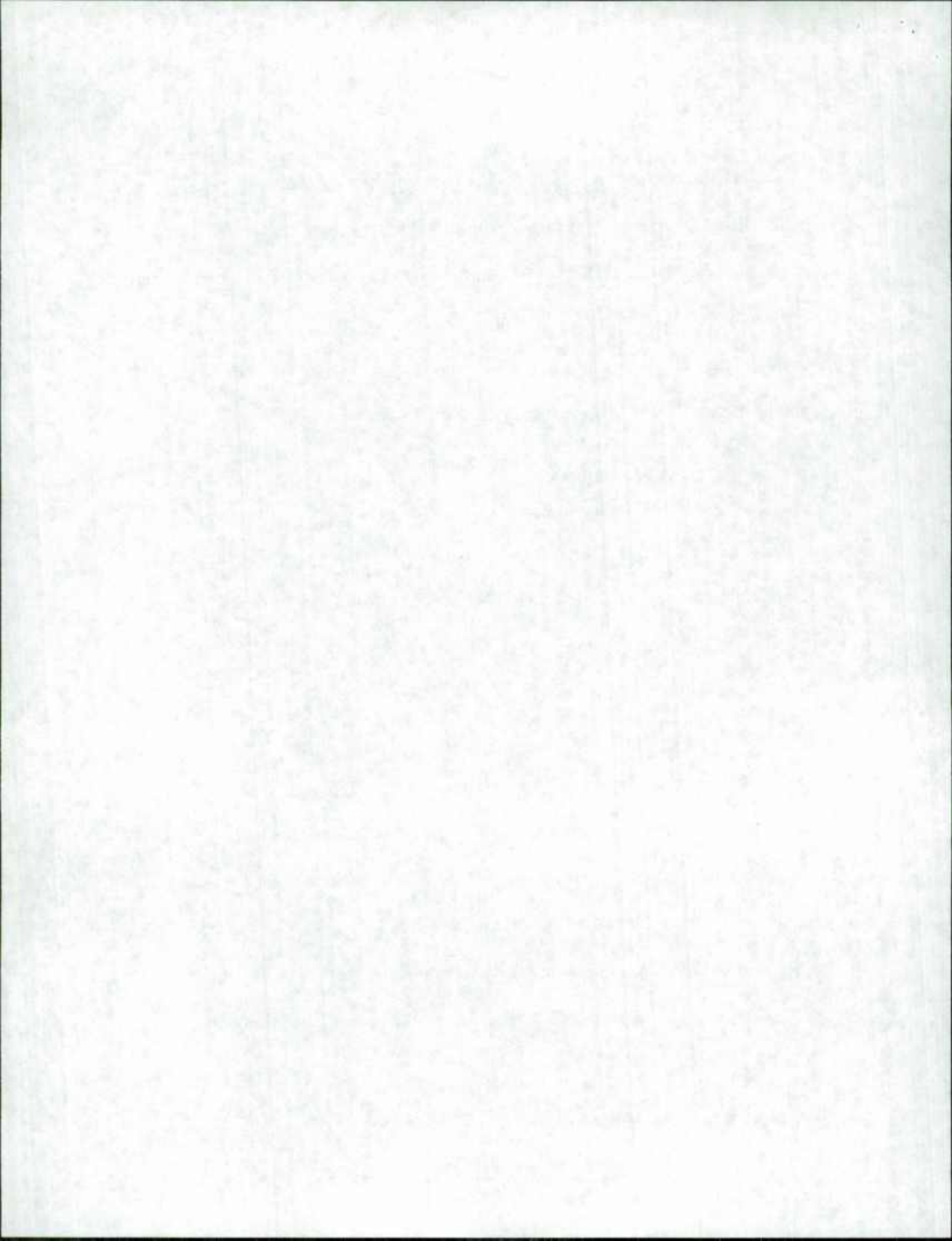
Eric See, an environmental consultant to the applicants, testified that the applicants' dwelling is the same distance from water as the homes on both sides as well as many other homes in the community. The location of the porch addition is preferable to other locations because it is built over impervious surface. Mr. See anticipated no adverse environmental impact from the porch addition. He observed that the applicants removed other areas of impervious surfaces.⁵ He also suggested that the porch addition might have been allowed in 1994 absent a variance because the Critical Area program at that time did not include the buffer modification provisions. Finally, Mr. See opined that the variance standards are satisfied.

Area residents Chris Papavasiliou, Jacob Kuitwaard and Donna Rhodes all supported the application.

The standards for granting variances are contained in Section 18-16-305. Under subsection (b), for a property in the Critical Area, a variance to the Critical Area program requirements may be granted only after determining that (1) due to unique physical conditions, peculiar to the lot, a strict implementation of the program would result in an unwarranted hardship to the applicants; (2) a literal interpretation of the program will deprive the applicants of rights commonly

⁴ Ms. Abbott confirmed the conversation with Ms. Cotter in 1994.

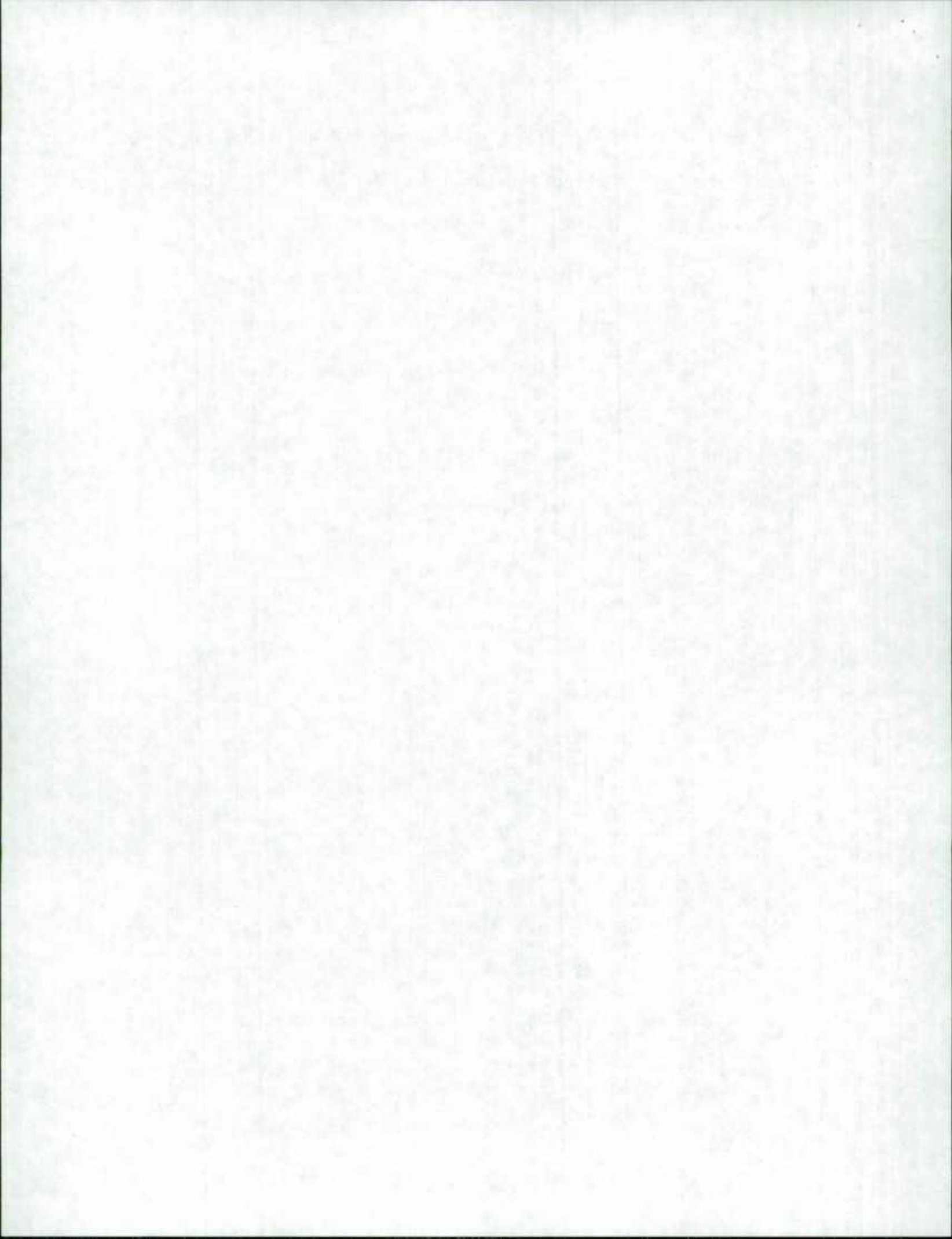
⁵ Mr. Abbott testified that a concrete boat ramp was removed in the 1980s.



enjoyed by other properties in similar areas within the Critical Area; (3) the granting of the variance will not confer on the applicants any special privilege that would be denied by the program to other lands within the Critical Area; (4) the variance request is not based on circumstances resultant of actions by the applicants and does not arise from conditions relating to land use on neighboring property; and (5) the granting of the variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the Critical Area and will be in harmony with the general spirit and intent of the program. Under subsection (c), any variance must be the minimum necessary to afford relief; and its grant may not alter the essential character of the neighborhood, substantially impair the appropriate use or development of adjacent property, or be detrimental to the public welfare. The law is well settled that the applicant must prove that all of the variance standards are satisfied. The relief must be denied if the evidence is wanting for even a single criterion.

As a preliminary matter, the application must be evaluated in light of the earlier history for the same property. In the words of my predecessor:

The existing one family dwelling is located 57 feet from the mean high water line, thus encroaching 43 feet into the Critical Area buffer. The Applicants propose to add a wraparound porch to the west side of the dwelling, with the result that the porch will encroach 13 feet further into the Chesapeake Bay Critical Area buffer. In addition, it appears from the plans submitted by the Applicants after the hearing that a second floor will be added to the dwelling which will also encroach further into the Critical Area buffer than does the existing dwelling. The plans show a master bedroom and balcony on top of portion of the porch which encroaches the additional 13 feet into the buffer.



Based on the plans, it appears that the Applicants are reconstructing this older home by adding a wraparound porch and a second story.

Thus, the variance to permit porch to encroach 43 feet into the 100 foot buffer ... [and other additions] ... are the minimum necessary to afford the Applicants relief.

The application is for variances to construct and (sic) enclosed porch The application said nothing about a second story addition to the home. The modified variances granted are only modifications for the variances applied for, and do not include any variances that may be necessary for the remainder of the construction as shown on the plans submitted by the applicants after the hearing.

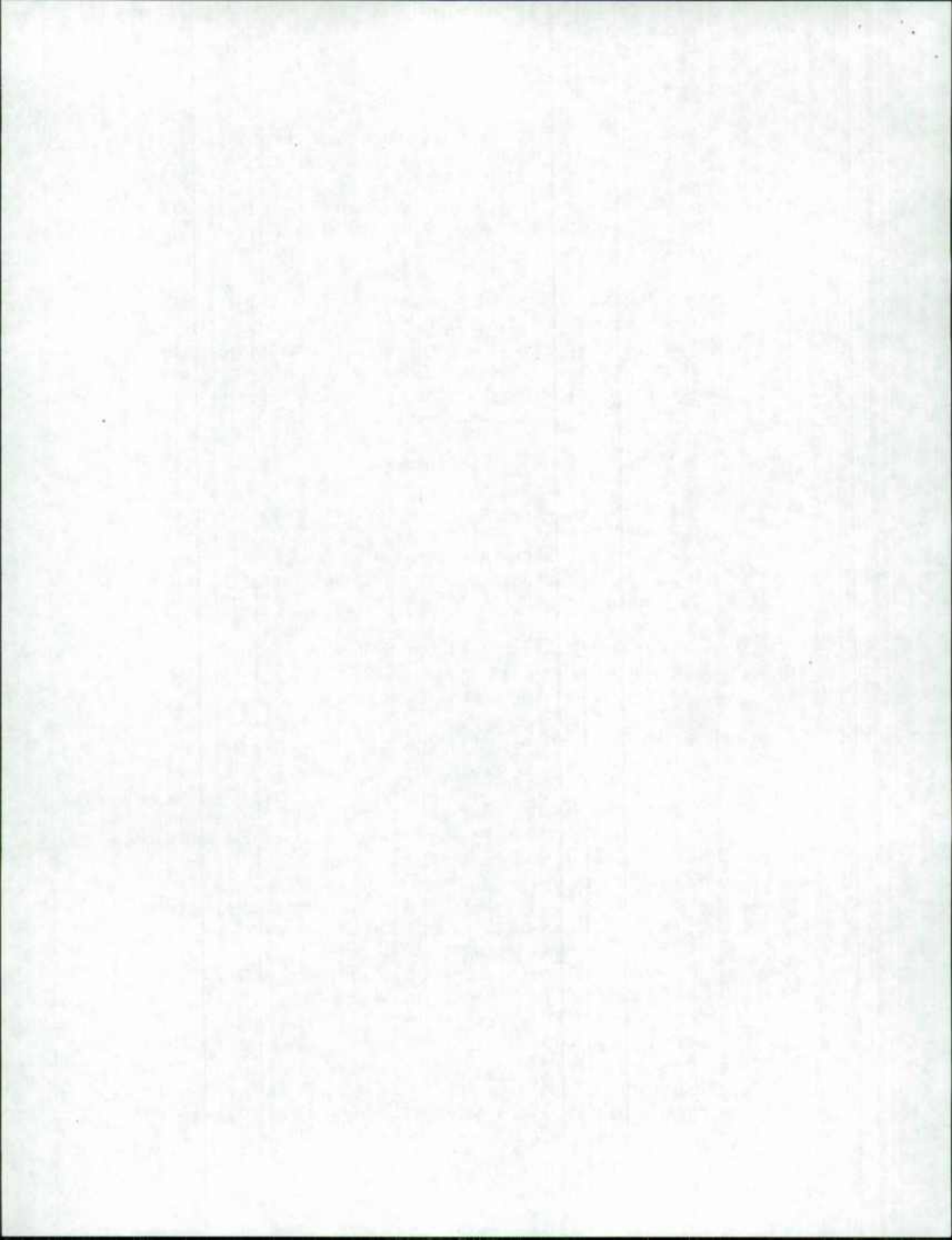
Continuing with the words of the Board of Appeals:

The Petitioners in this case appeared before the Administrative Hearing Officer and requested several variances. Their request for relief was granted, but their desire to construct an addition to the dwelling that encroaches toward the water line was denied. From that limited denial, they have appealed.

[T]he Petitioners' (sic) seek approval from this Board for the construction of additional porches, a substantial portion of which would be constructed on the water side of the dwelling

[T]he Board concludes that the Petitioners fall far short of meeting their burden of proof.

The Board notes that the Petitioners have presented evidence of what may be considered unusual conditions or circumstances affecting the lot. The Petitioners' land planner testified that the 100 foot buffer extends beyond the dwelling, that only a small area of the lot is buildable without violating some setback, and that the location of the well and sewer line restrict the placement of improvements. All of these factors, the Board presumes, were considered by the Administrative Hearing Officer when he granted the other relief sought by the Petitioners. These conditions, however, do not preclude the "...reasonable possibility of developing the lot..." or deny the Petitioners the right "...to develop such lot." In fact, with the approvals granted by the Administrative Hearing Officer, the Petitioners will be able to proceed with their plans to construct a major addition to the existing dwelling. This Board's denial of the request



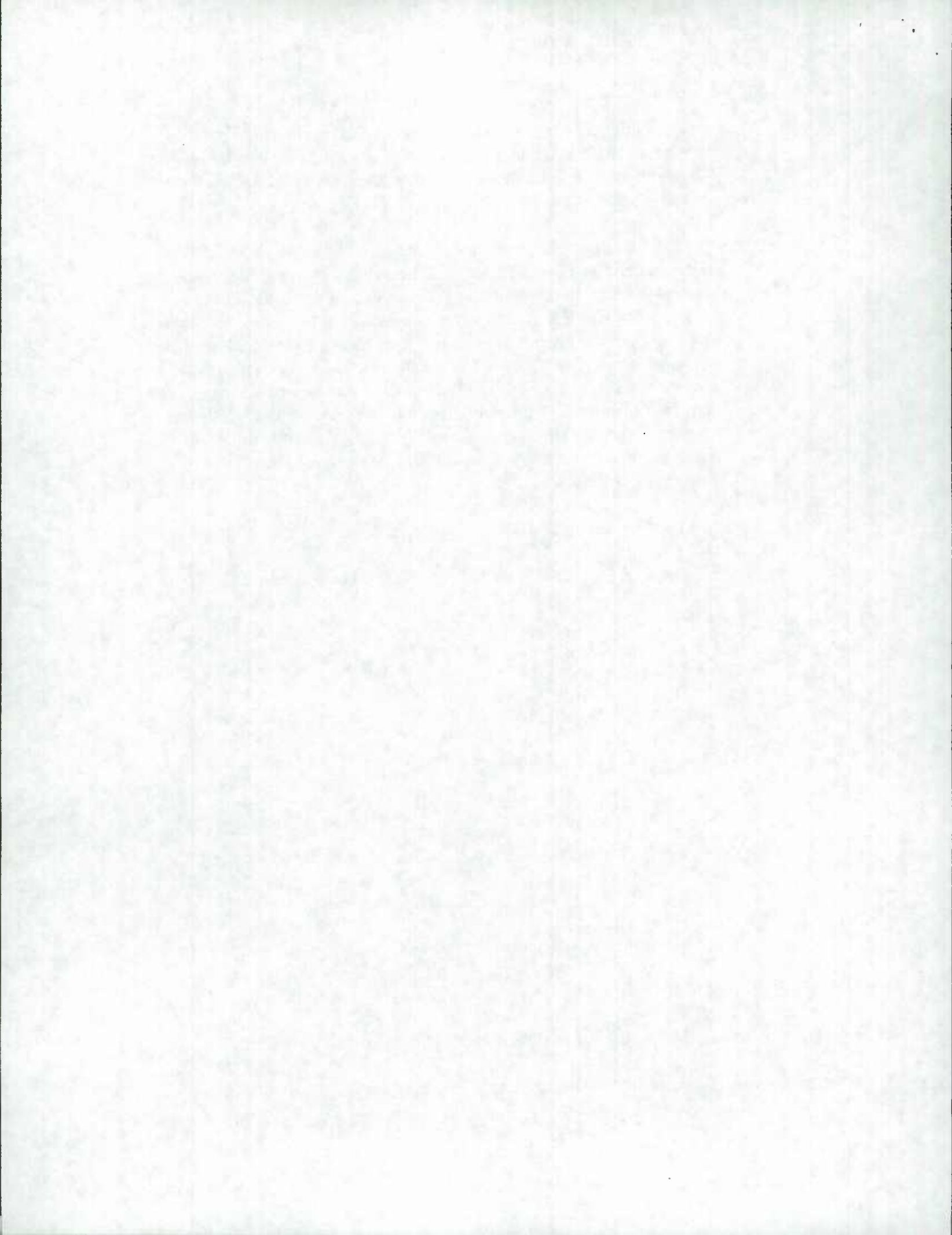
now pending only means that the number and extent of the porches will be more limited than the Petitioners desire. In no way can the Board interpret a limitation on the porches as being the same as a denial of the right to develop the lot.

[T]he Board finds that the inability to construct a dwelling with all the porches that they seek will not constitute an unwarranted hardship to the Petitioners. In addition, the Petitioners will not be denied of any rights commonly enjoyed by other properties in the critical area, as encroachment in the buffer is always a factor which is considered with great seriousness by this Board. Finally, the Board cannot conclude that the variance request is not based on conditions or circumstances that result from the Petitioners' actions. In fact, they have designed their proposed dwelling with extensive porches and it is this circumstance (the design of the dwelling) that causes the variance request to be made.

Rather than proceeding on the basis of the approved variance, the applicants added a second floor based on their own design. The approved plans included a slider and blocking for a deck.

A preliminary comment is in order. To the extent the applicants were told in 1994 that a deck is allowed or to the extent that Mr. See suggests that a covered porch was allowed in 1994, the short answer is that the present law is nonetheless controlling.

Applying the facts to the law, I am constrained to deny the application. While a few of the variance standards are satisfied, most of them are not. Considering first the subsection (b) criteria, there is insufficient proof that a literal application of the program will deprive the applicants of any right in common enjoyment by other properties in similar areas of the Critical Area; rather, the grant of relief will confer on the applicants a special privilege denied by the

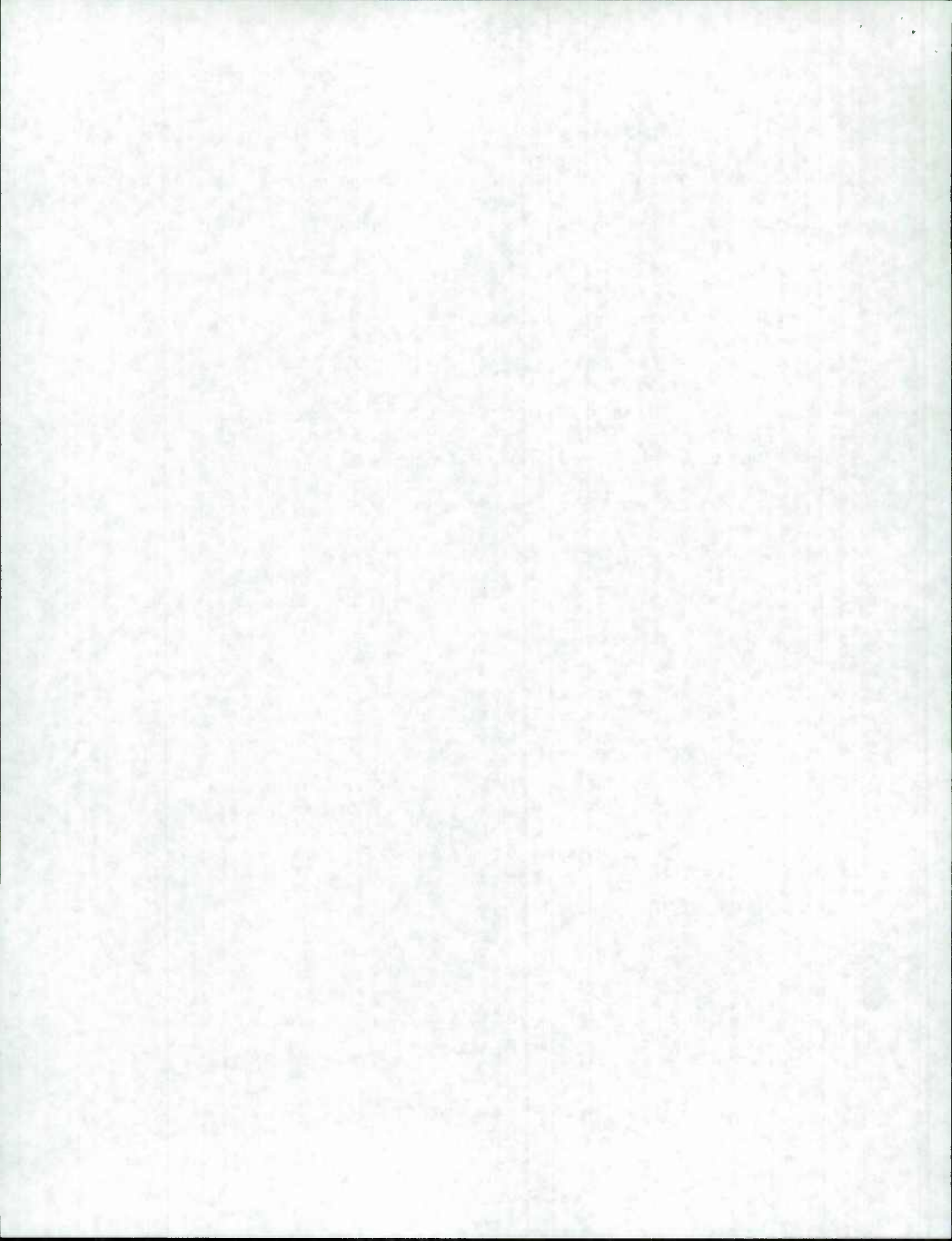


program to other lands in the Critical Area. The events in this case reveal that the applicants got permission from this office for a porch that maintained the same distance to water as the preexisting dwelling. Their subsequent appeal to the Board denied additional porches on the waterside of the dwelling. Even though they abandoned the approved variance for their own design, there is nothing in the record to show that any one else has been afforded the right to a covered porch addition under similar circumstances. I further find that the need for relief results from the actions of the applicants in proceeding absent the requisite permit.

Finally, I do not believe that the applicants have established that the granting of the variance will not adversely impact Critical Area assets and harmonizes with the general spirit and intent of the program. See, in this regard, the decision by the Board:

[A] variance may not be granted unless the Board finds that the granting of the variance will not be inconsistent with the spirit and intent of the critical area program. Protecting the buffer area along the Bay and its tributaries is an essential feature of the Chesapeake Bay Critical Area program. The Petitioners are privileged to be among the relatively few individuals who live on the water. The Board believes that "those who benefit the most from the beauty and abundance of the Bay also bear the heaviest responsibility for its future." Critical Area and You: The Chesapeake's First Line of Defense, Chesapeake Bay Critical Area Commission, Annapolis Maryland.

While it is unnecessary to consider the subsection (c) criteria, I have nonetheless done so. The application of the subsection (c)(1) criterion of minimization is necessarily subjective. But, the applicant is held to a higher standard of proof than merely showing other properties with waterside amenities



that are closer to shore. Even accepting that the granting of the variance will not alter the essential character of the residential neighborhood or substantially impair the use or development of adjacent property, the granting of the relief is nonetheless detrimental to the public welfare.

Because the applicants have not met their burden of proof, the denial of the variance does not deny reasonable use and is not an unwarranted hardship.

ORDER

PURSUANT to the application of Dennis and Linda Abbott, petitioning for a variance to allow a covered porch addition with less buffer than required, and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 14th day of May, 2008,

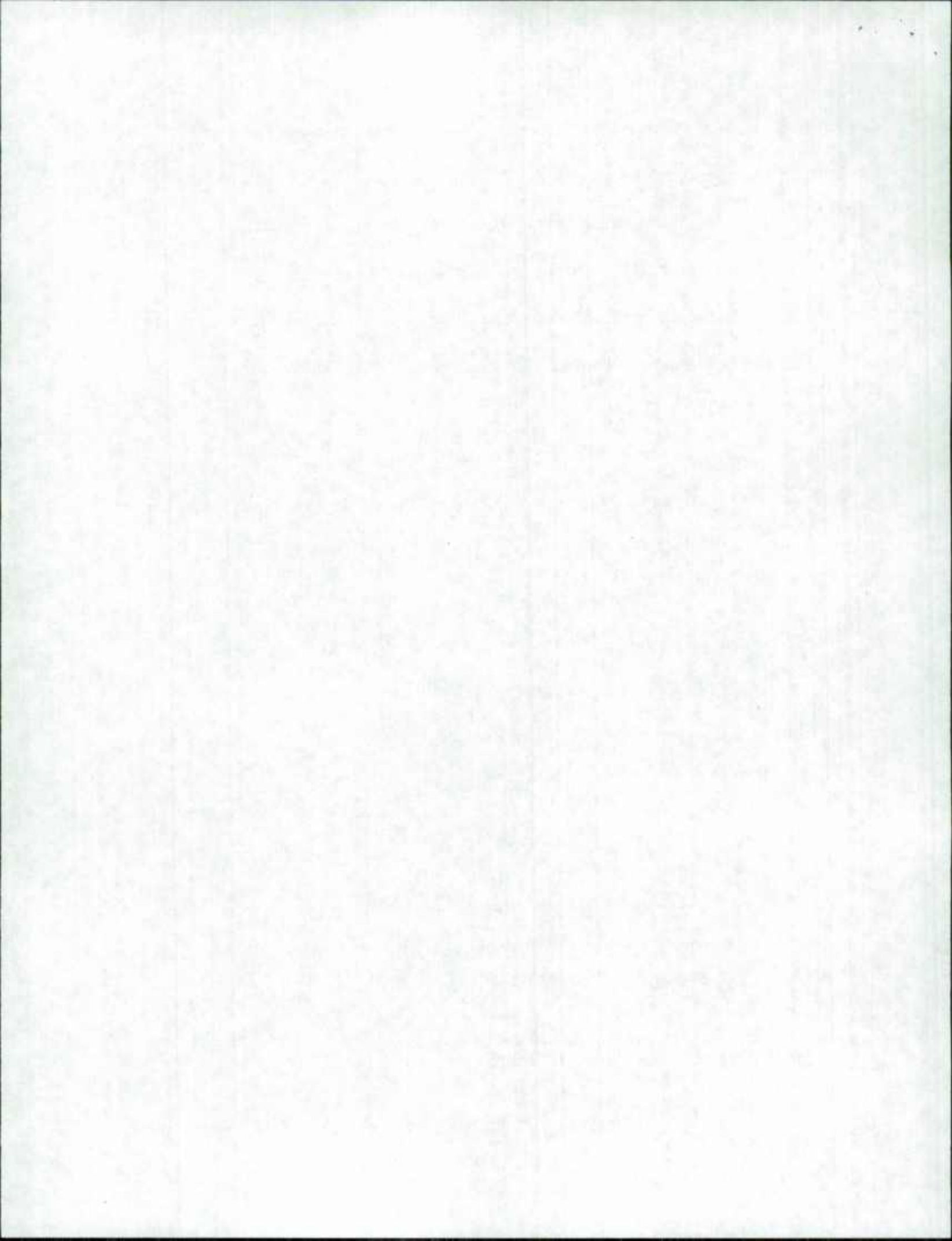
ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicants' request is **denied**.

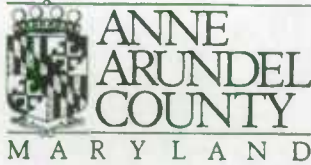

Stephen M. LeGendre
Administrative Hearing Officer

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise they will be discarded.





Office of Law

Jonathan A. Hodgson, County Attorney

County Executive John R. Leopold

2660 Riva Road, 4th Floor
P.O. Box 6675
Annapolis, Maryland 21401
410-222-7888 410-222-7835 Fax

Nancy McCutchan Duden
Supervising County Attorney
nduden@aacounty.org

July 15, 2008

Marianne E. Dise, Principal Counsel
Office of the Attorney General, Critical Area Commission
1804 West Street, Suite 100
Annapolis, Maryland 21401

Re: Your Letter of July 2, 2008 to the Board of Appeals

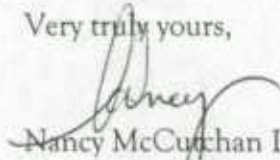
Dear Marianne:

I am writing to confirm our telephone conversation of earlier today. Anne Arundel County has a case pending before the Board of Appeals on July 31, 2008, BA31-08V. The applicant, Dennis Abbott, is requesting an after-the-fact variance to perfect a deck built in the critical area. As you and I discussed, this case should proceed to be heard by the Board of Appeals because Mr. Abbott has satisfied the last three bullet points on page 2 of your letter to the Board dated July 2, 2008, *i.e.* he was cited for the violation, assessed a penalty which he has paid in full, and is subject to a District Court judgment/mitigation plan which he is following. Therefore, as we both agreed, there is nothing in Chapter 119 of the 2008 Laws of Maryland (the "new law") that would prohibit this case from being heard by the Board.

This will also confirm that it is the County's intention to review each case currently pending on a case-by-case basis to determine whether the requirements of the new law have been met and whether the case should be heard by the Board. I am copying the Board with this letter so that they are aware of our agreement that the Abbott case should be heard and, also, of the County's intention to review all pending cases for compliance with the new law.

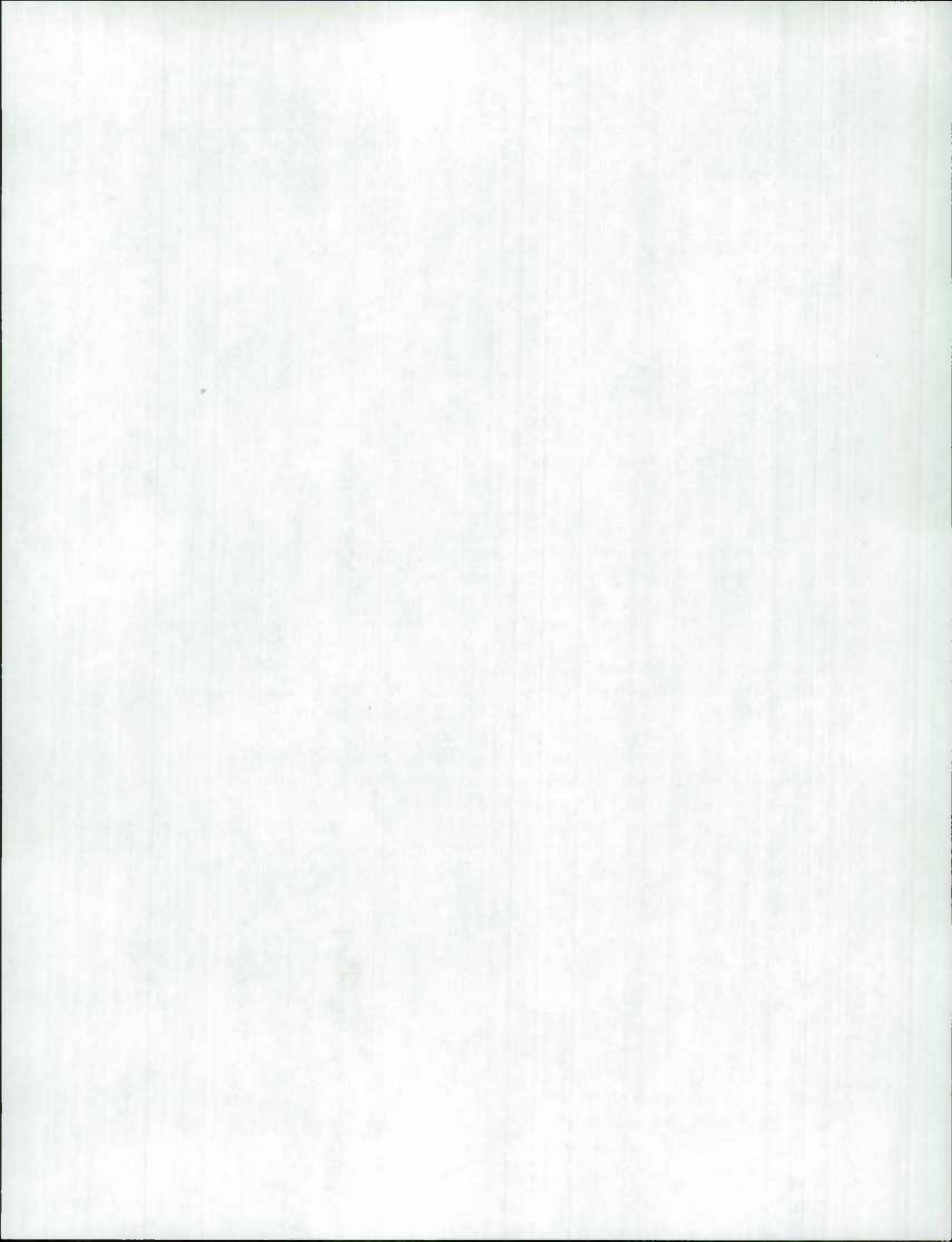
Please do not hesitate to contact me with any questions or concerns.

Very truly yours,



Nancy McCutchan Duden
Supervising County Attorney

cc: Jonathan A. Hodgson, County Attorney
Elizabeth L. Dixon, Director of Inspections and Permits
Larry Tom, Director of Planning and Zoning



Statement in Support of Request for Variance

Dennis and Linda Abbott (collectively the "Applicant" or "Abbotts") are the owners of the property known as 942 Main Street, Deale, MD 20751, more particularly described as Tax Map 78, Parcel 276, Lot A (the "Property"). The Property is located in the "Higgins Subdivision", which was platted in 1945. The Property is zoned R5-Residential, it is located within the Limited Development Area ("LDA") of the Critical Area, and it is buffer exempt. The Property totals approximately 19,600 square feet in area.

The single family dwelling on the Property was built in 1940 and is located entirely within the critical area buffer. The Abbotts purchased the Property in 1982 and since that time, it has remained their primary residence. In 1994, Applicants undertook the task of renovating and modernizing the 1940s cottage. Since the dwelling was located entirely within the critical area buffer, the Abbotts applied for and received a variance to add a second floor and expand the dwelling. The County approved the renovation and the Abbotts complied with all permit conditions, including the planting and impervious surface requirements imposed by the County. The home today consists of approximately 1,962 square feet of living space. Since taking ownership of the Property, the Abbotts have reduced the overall impervious surface coverage on the Property and have planted numerous trees, bushes and grasses over and above what was required by the County.

The flagstone patio located on the water side (front yard) of the Property was in existence prior to the enactment of the Critical Area Law and has been part of the footprint of the dwelling before the Abbotts' occupancy. See attached site plan. The edge of the patio closest to the water line encroaches approximately 57+/- feet into the 100 foot critical area buffer. The Abbotts recently installed a covered deck over the existing footprint of the flagstone patio without the proper County permits. Since the County Code identifies a patio as "impervious surface," but not a "structure," a critical area variance is required for a covered deck to be located over the existing patio, even though the patio is tied to the building's foundation.

The existing footprint of the house/patio has not been altered and no additional impervious surface has been added by the construction of covered deck over the patio. The existing impervious coverage on the Property is approximately 2,844 +/- square feet representing 15% overall impervious coverage on the Property. The percentage of impervious coverage for the Property is far below the 31.25% permitted by the County Code.¹

The Applicant's project will require a variance to the following:

- A variance for new development in the critical area buffer (Code, Article 18, § 16-305(b));

The project creates no adverse impact on the critical area and creates no new impervious surface area on the Property. The covered deck will not alter the character of the neighborhood or impair the use or development of adjacent properties. The covered deck sits further back from the shoreline than the many other dwellings in the Higgins Subdivision/Deale Beach area including the immediately adjacent

¹ See Anne Arundel County Code, Section 17-8-402(b)

DENNIS AND LINDA ABBOTT – VARIANCE APPLICATION
942 Main Street, Deale, MD 20751
Tax Map 78, Parcel 276, Lot A

property's existing patio/sun room.² Approval of the requested variances will not confer on the Applicant any special privilege that would be denied by various environmental regulations. In light of the pre-critical area law existence of the patio and the age of the dwelling, the project is in harmony with the spirit of the critical area program. Without variance approval, the Applicant would be denied the same rights currently enjoyed by many neighboring properties. Given the foregoing, the Applicant requests a variance to the Code provisions listed above so that they might proceed with their building permit.

² See aerial photographs of neighboring properties.

Critical Area Notification Report Statement

Dennis and Linda Abbott (collectively the "Applicant" or "Abbotts") are the owners of the property known as 942 Main Street, Deale, MD 20751, more particularly described as Tax Map 78, Parcel 276, Lot A (the "Property"). The Property is located in the "Higgins Subdivision", which was platted in 1945. The Property is zoned R5-Residential, it is located within the Limited Development Area ("LDA") of the Critical Area, and it is buffer exempt. The Property totals approximately 19,600 square feet in area and contains approximately 2,400 +/- square feet of vegetation.

The Applicant seeks a variance to permit a second floor covered deck over an existing flagstone patio with less critical area buffer than required. Since purchasing the property in 1982, the Applicant has planted a crape myrtle, two maple trees, a variety of grasses along the shoreline, various shrubs, and larger evergreen trees along both sides of the Property. Two large, approximately 60 to 80-foot high, oak trees are also located on the Property as well as three locust trees along the street side of the property and two weeping cherry trees near the house. As the covered deck is located over an existing flagstone patio, the structure will not create any additional impervious surfaces on the Property. Only the installation of four, 4" by 4" posts at the edge of the patio was required for construction. The Applicant is willing plant any required additional vegetation on Property, even though no additional impervious surfaces have been added to the site and disturbance for construction was limited to four separate holes to accommodate the posts.

Attached please find the topographic map, vicinity map and site plan.

