

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/

August 27, 2008

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

Re: 2008-0255-V

Dear Ms. Cotter:

Thank you for providing information on the above referenced variance. The applicant is proposing to raze the existing single family dwelling and construct a new dwelling on this lot (Lot 6) with disturbance to slopes greater than 15%. This lot is 17,284 square feet and is located in the Limited Development Area (LDA). Lot 6 is also considered a Buffer Modified Area (BMA). This office previously received a variance request (2008-0096-V) for this property in April of 2008. The Hearing Officer concurred with our recommendation of denial, as the applicant had not met the burden of unwarranted hardship, specifically as it appeared that the applicant could configure the desired porch and deck so as to not be any further waterward than the existing dwelling and setback. This current request shows the proposed porch and deck no further waterward than the existing dwelling (to be demolished), which is allowable under Anne Arundel County code. This lot appears to be significantly encumbered by areas of steep slopes, precluding the reconstruction of a dwelling without additional disturbance and the need for a variance. The proposed lot coverage for both Lots 6 and 13 are within the allowable amount.

Provided that the lot is properly grandfathered, we do not oppose the variance request to construct a modest dwelling with associated facilities. Mitigation should be performed at a ratio of 2:1 for the area of disturbance to the steep slopes and for the area of disturbance within the 100-foot Buffer. Mitigation should be in the form of native plantings and located on site, preferably in the Buffer Modification Area, if possible. The applicant shall provide a plantings plan including species, size, spacing and schedule for review and approval by the County. Also, it appears that the septic system is being replaced as part of the redevelopment. If not already provided, we recommend the Hearing Officer require the use of nitrogen removing technology in association with the new septic system.

TTY for the Deaf

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



Ms. Pam Cotter
8/27/2008
Page 2 of 2

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 Resource Planner
cc: AA 190-08

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April 7, 2008

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

Re: 2008-0096-V

Dear Ms. Schappert:

Thank you for providing information on the above referenced variance. The applicant is proposing to raze the existing single family dwelling and construct a new dwelling on this lot. The applicant requests a variance to perform a bank stabilization for steep slopes and to allow a deck in the Buffer Modification Area (BMA). The proposed deck (240 square feet) and a portion of the screened-in porch is proposed to extend in to the BMA. This lot is 17,284 square feet and is located in the Limited Development Area (LDA).

Provided that the lot is properly grandfathered, we do not oppose the variance request to stabilize the steep slopes. Mitigation should be performed as prescribed by the County, as required, for this disturbance to the slopes.

We oppose the variance request for the new deck and screened-in porch. In this case, the applicant already enjoys the flexibility associated with a reduced Buffer setback. As the applicant proposes to raze the existing structure and reconstruct a new dwelling, there is ample opportunity to construct the house, all decks and desired accessory structures outside of the BMA setback, in conformance with the law. The applicant has not provided evidence that reasonable and significant use of the property cannot be achieved without impacting the BMA setback. As such, we do not believe that the standard of unwarranted hardship can be met.

Structures in the 100-foot 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 a zoning board finds that an applicant

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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."

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 County must make an affirmative finding that the applicant has overcome this presumption, based on the evidence presented. The State law, including the presumption of non-conformance, applies to all variance decisions in the Critical Area. [2007 Laws of Maryland, Chapter 221(2)].

We do not believe that the applicant can meet the standard of unwarranted hardship, and we oppose this variance request. I have addressed each of the standards as it pertains to this case:

Relevant Variance Standards

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.*

As stated above, the General Assembly defined "unwarranted hardship" to mean that without the requested variance, reasonable and significant use of **the entire parcel or lot** would be denied. As the applicant is razing the existing dwelling and has the opportunity to design the dwelling so as to conform with the law, there is no hardship.

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.*

There is no right to build a structure in the Buffer or in the BMA setback. As mentioned, the applicant already enjoys a reduced Buffer setback, which affords greater room for development on the property. It appears that reasonable use of the lot can be accommodated outside of the Buffer Modification Area setback. Therefore, denial of this variance 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. This office would not support similar requests to build and encroach into the BMA setback, given the facts of this case. To allow this variance would be a special privilege. 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.

Ms. Suzanne Schappert

4/7/2008

Page 3 of 3

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.*

This variance request does not appear to be based on conditions and circumstances which are the result of the actions of the applicant. However, it appears that the need for a variance can be entirely avoided by constructing outside of the BMA setback.

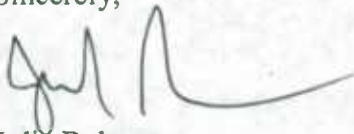
5. *The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's Critical Area, and that the granting of the variance will be in harmony with the general spirit and intent of the Critical Area law and the regulations.*

In contrast, the granting of this variance is not in harmony with the general spirit and intent of the Critical Area law and regulations. This proposal not only further reduces the functions provided by the limited Buffer on this site, but would contribute to the individual and cumulative impacts of development on the Bay. The County law recognizes that a naturally vegetated Buffer is vital to the water quality of the Chesapeake Bay and its Criteria are intended to assure that the integrity of the Buffer is not compromised by the individual and cumulative impacts of development within the County.

This letter has addressed five of the relevant variance standards. Based on the information provided, none of the five standards have been met for the variance request for the deck and porch. 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. Therefore, we recommend that the Board deny the applicant's request for the variance for the deck and porch.

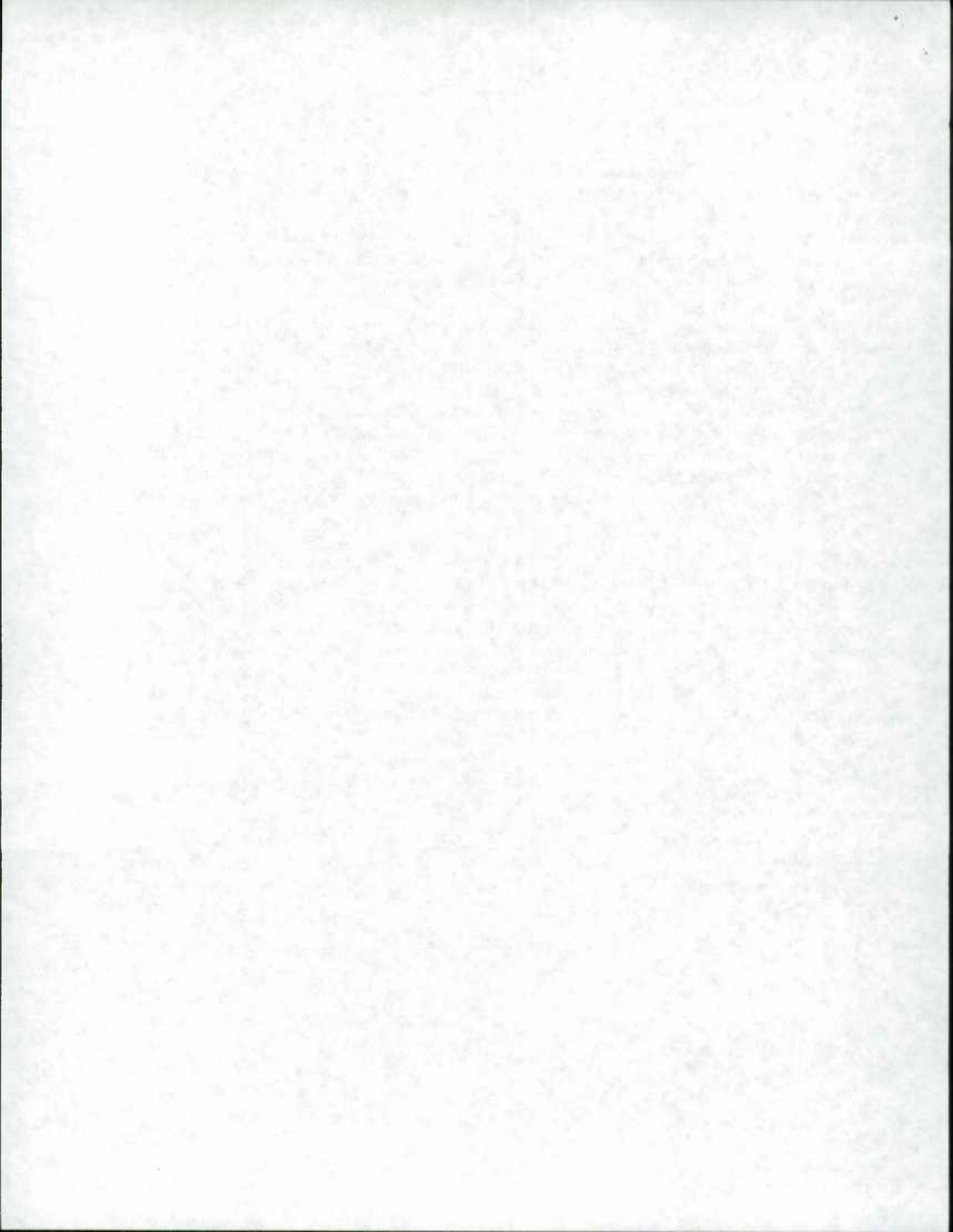
Thank you for the opportunity to provide comments. Please include this letter in your file and submit it as part of the record for this variance. Also, please notify the Commission in writing of the decision made in this case.

Sincerely,



Julie Roberts
Natural Resource Planner

cc: AA 190-08

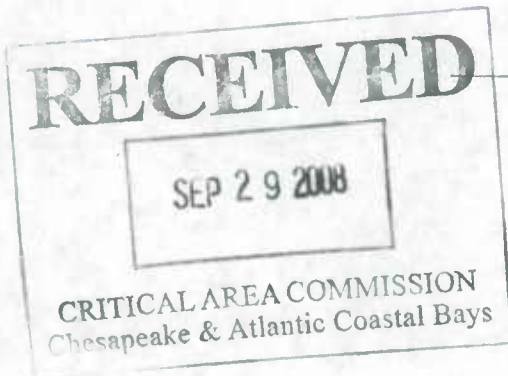


JR

190-08

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2008-0255-V



DR. KENNETH GREEN

THIRD ASSESSMENT DISTRICT

DATE HEARD: SEPTEMBER 23, 2008

ORDERED BY: STEPHEN M. LeGENDRE, ADMINISTRATIVE HEARING OFFICER

PLANNER: WILLIAM ETHRIDGE

DATE FILED: SEPTEMBER 25, 2008

1900

PLEADINGS

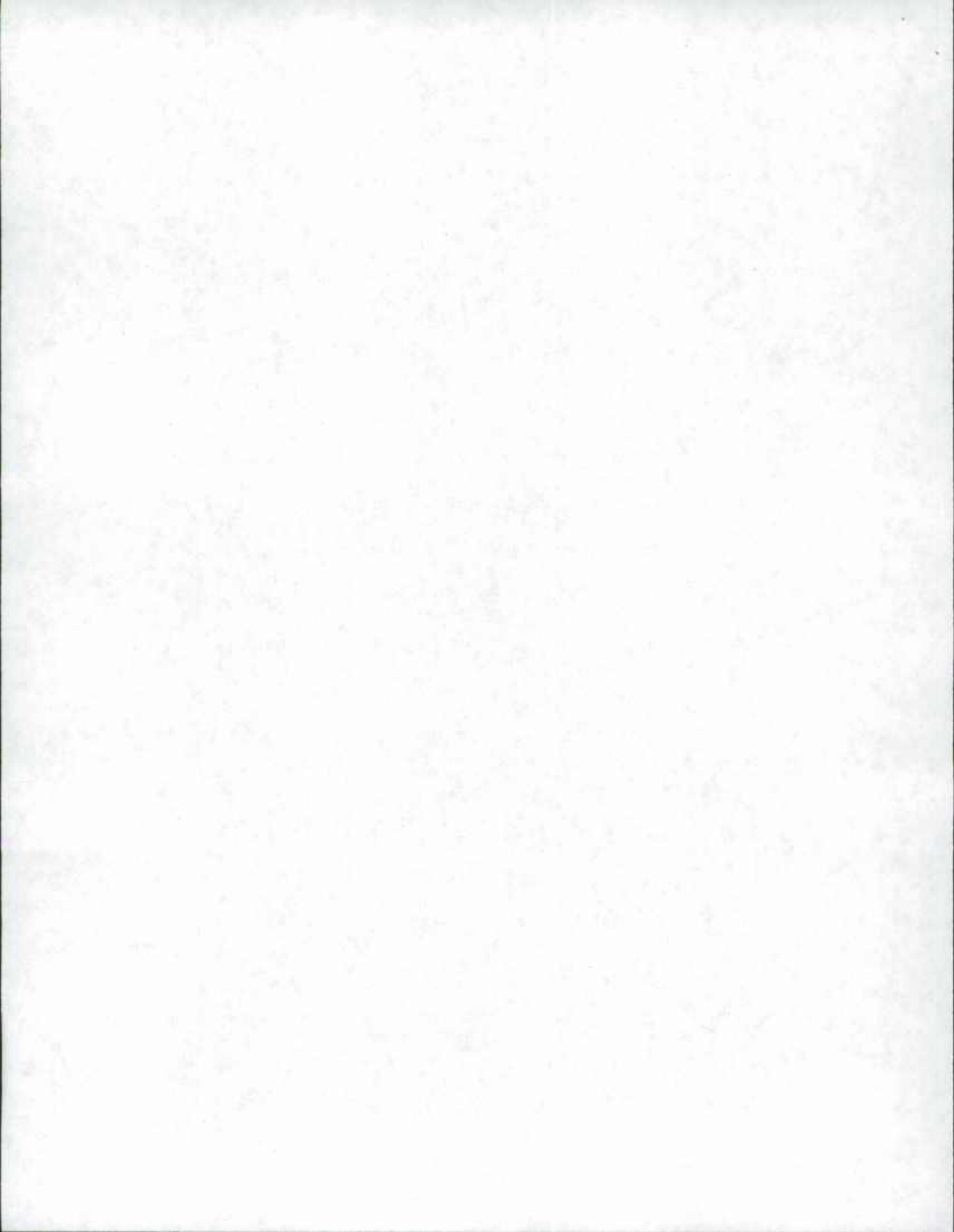
Dr. Kenneth Green, the applicant, seeks a variance (2008-0255-V) to allow a dwelling and associated facilities with disturbance of slopes 15% or greater on property located along the north side of Mulberry Hill Road, south of Greenbury Point Road, Annapolis.

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. Pete Loyka, the applicant's engineering consultant, 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

This case concerns the same property the subject of a decision by this office in Case No. 2008-0096-V (June 17, 2008). The prior Order denied variances to disturb the modified Chesapeake Bay Critical Area buffer and steep slopes in the Limited Development Area (LDA) to allow the redevelopment of this residential



lot. There was no appeal. The redevelopment request the subject of the present application only requires a variance to disturb steep slopes.

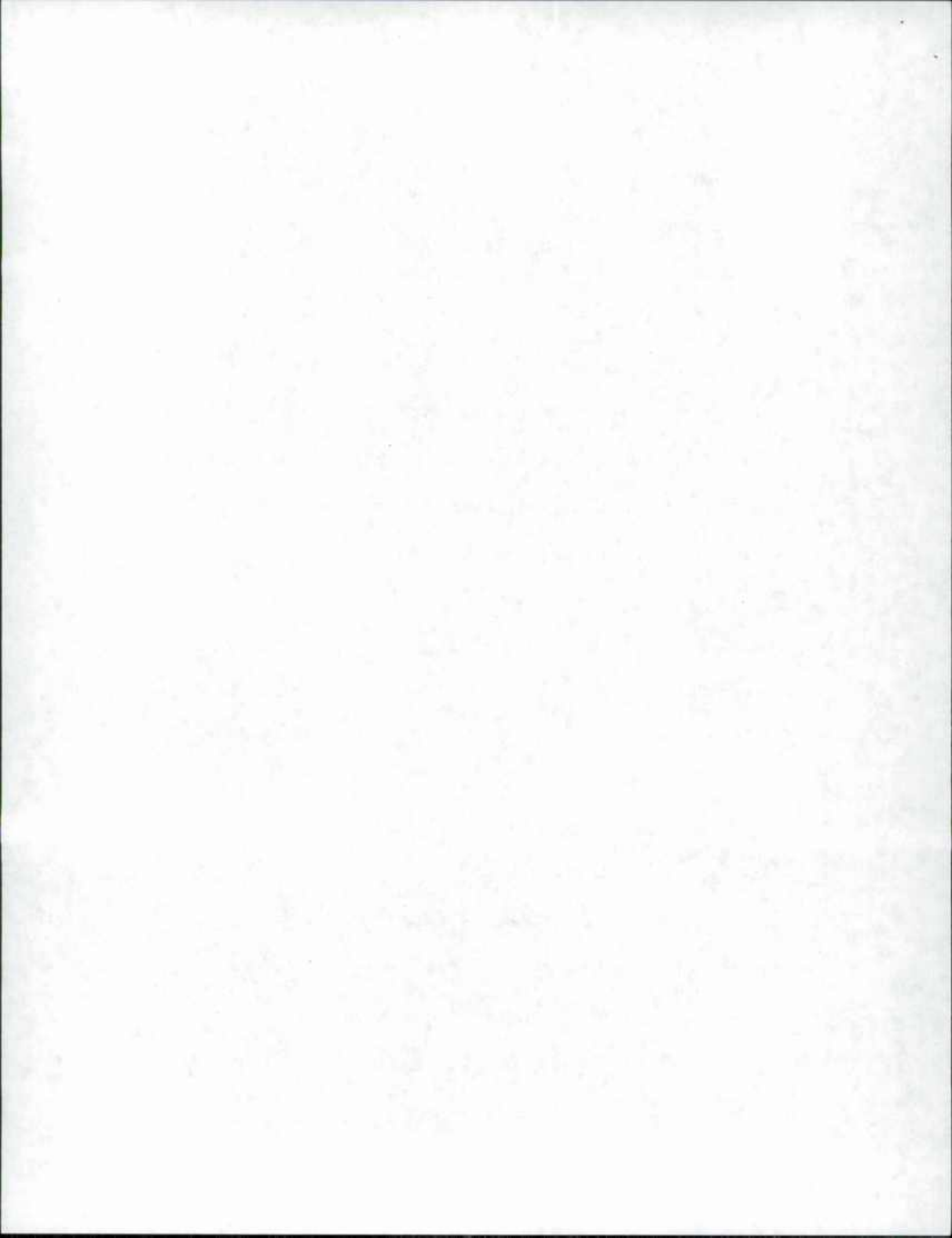
Anne Arundel County Code, Article 17, Section 17-8-201 proscribes the disturbance of steep slopes in the LDA. Accordingly, the proposal requires a variance to disturb steep slopes.

William Ethridge, a planner with the Office of Planning and Zoning, testified that the property is below the minimum width for the district, with steep slopes near the center of the improved portion of the property. As compared to the prior application, the present request reduces the footprint of the dwelling by 492 square feet. Impervious coverage is within the allowance. The slope disturbance relates to the stabilization and relocation of a portion of the driveway as well as the installation of a Coastal Plain Outfall to rectify an erosive condition. The witness summarized the agency comments. The Department of Health requested plan approval. The County's Development Division and the Chesapeake Bay Critical Area Commission did not oppose the request.¹ By way of conclusion, Mr. Ethridge supported the application.

Mr. Loyka confirmed the substance of the request. The Department of Health has approved the septic design, which includes nitrogen removal. There was no other testimony in the matter.

Based on my familiarity with the property, I find and conclude that the applicant has satisfied the Critical Area variance standards under Section 18-16-

¹ The Commission requested mitigation and nitrogen removal technology for the new septic system.



305(b) and (e). As compared to the application that was denied, the present request eliminates the need for a buffer variance and decreases the slopes disturbance. The approval is subject to the conditions in the Order.

ORDER

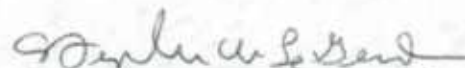
PURSUANT to the application of Dr. Kenneth Green, petitioning for a variance to allow a dwelling and associated facilities with disturbance of slopes 15% or greater, and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 25th day of September, 2008,

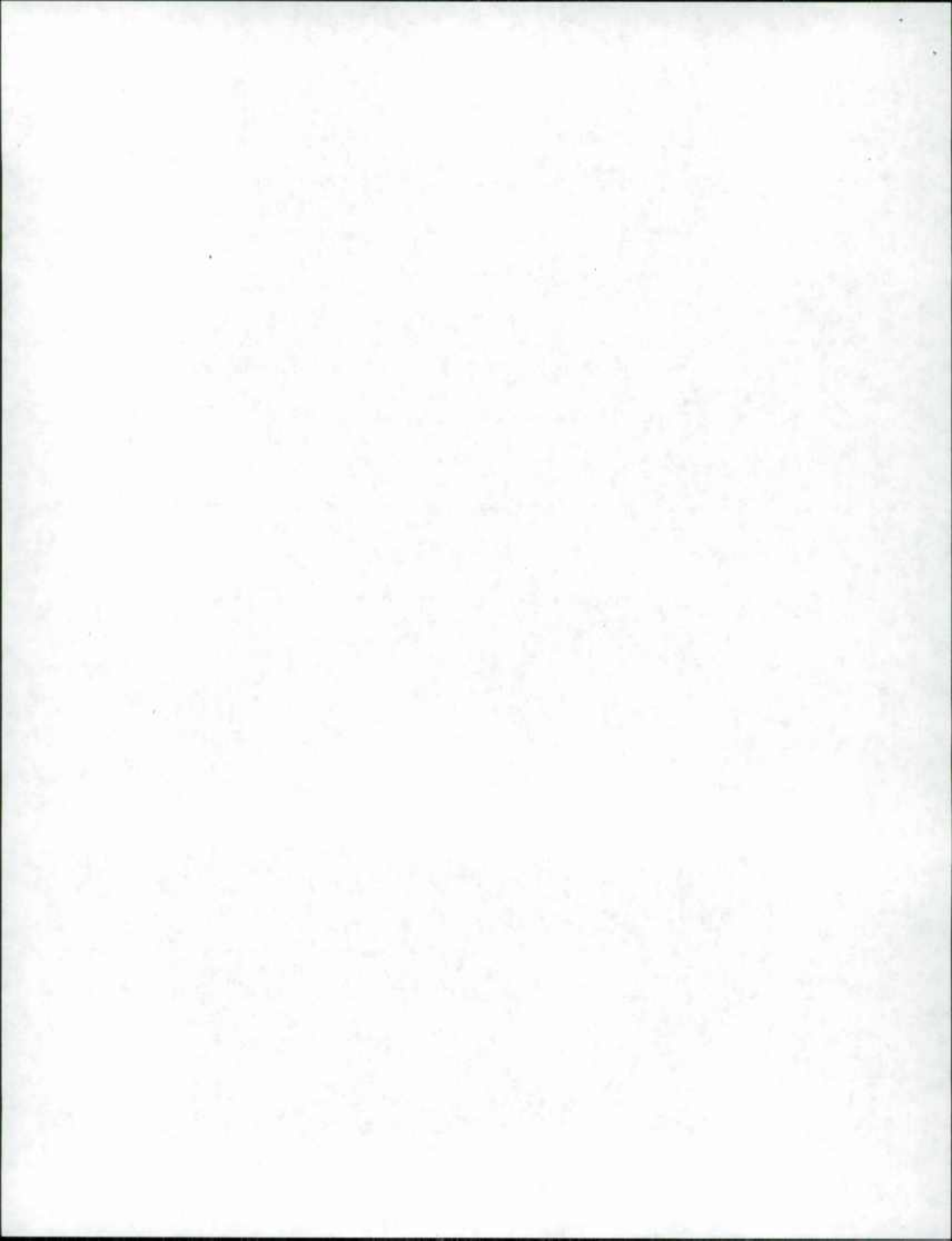
ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicant is **granted** a variance to disturb steep slopes to allow a dwelling and associated facilities in accordance with the site plan.

The foregoing variance is subject to the following conditions:

1. The applicant shall provide mitigation and stormwater management as required by the Permit Application Center.
2. The building permit is subject to the approval of the Department of Health.



Stephen M. LeGendre
Administrative Hearing Officer

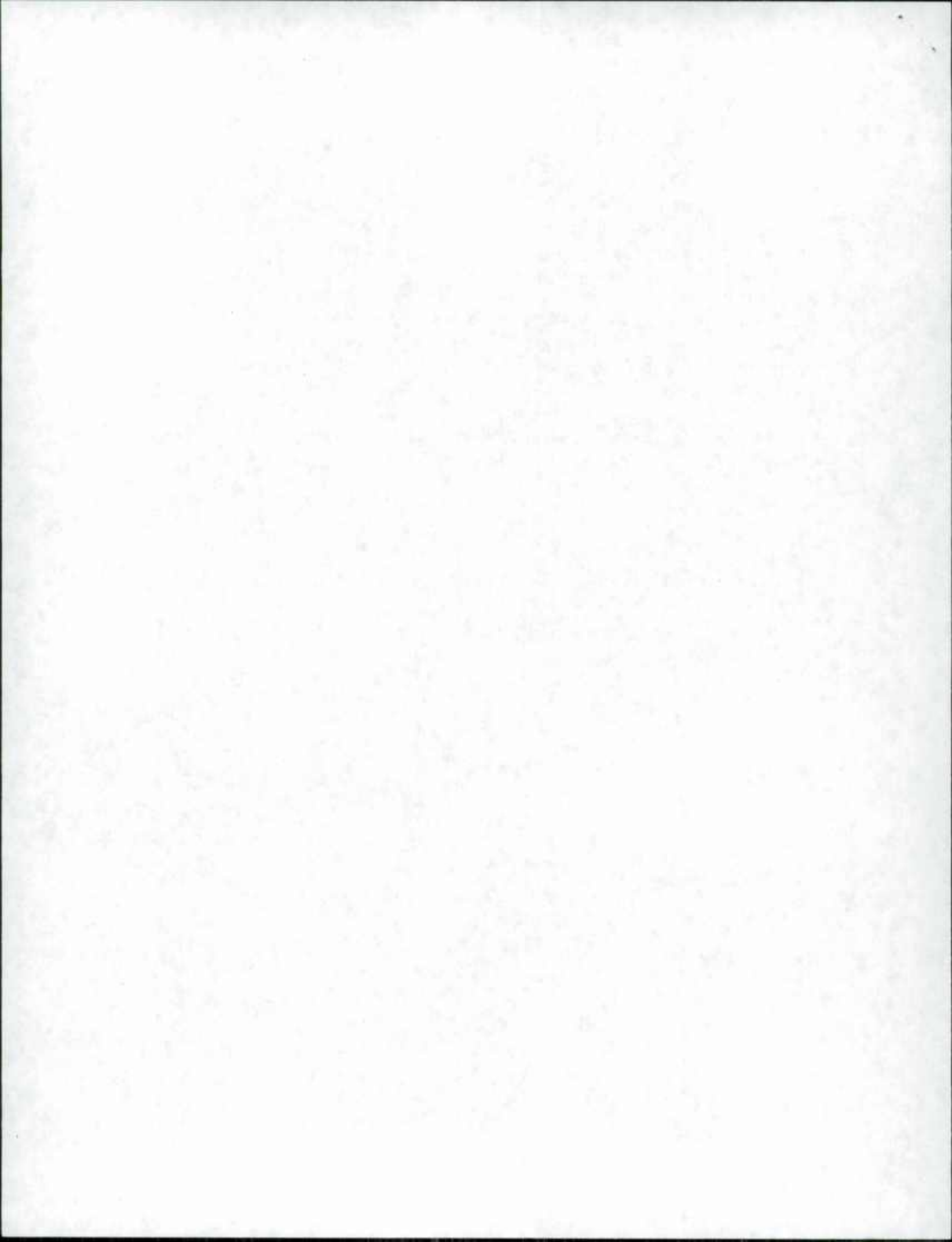


NOTICE TO APPLICANT

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. **A permit for the activity that was the subject of this variance application will not be issued until the appeal period has elapsed.**

Further Section 18-16-405(a) provides that a variance expires by operation of law unless the applicant obtains a building permit within 18 months. Thereafter, the variance shall not expire so long as construction proceeds in accordance with the permit.

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



JR

190-03

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2008-0096-V

KENNETH GREEN

THIRD ASSESSMENT DISTRICT



DATE HEARD: MAY 15, 2008

ORDERED BY: STEPHEN M. LeGENDRE, ADMINISTRATIVE HEARING OFFICER

PLANNER: ROBERT KONOWAL

DATE FILED: JUNE 17, 2008



PLEADINGS

Kenneth Green, the applicant, seeks a variance (2008-0096-V) to allow a dwelling, garage and associated facilities with less buffer than required and with disturbance to slopes 15% or greater on property located along the north and south sides of Mulberry Hill Road, south of Greenbury Point Road, Annapolis.

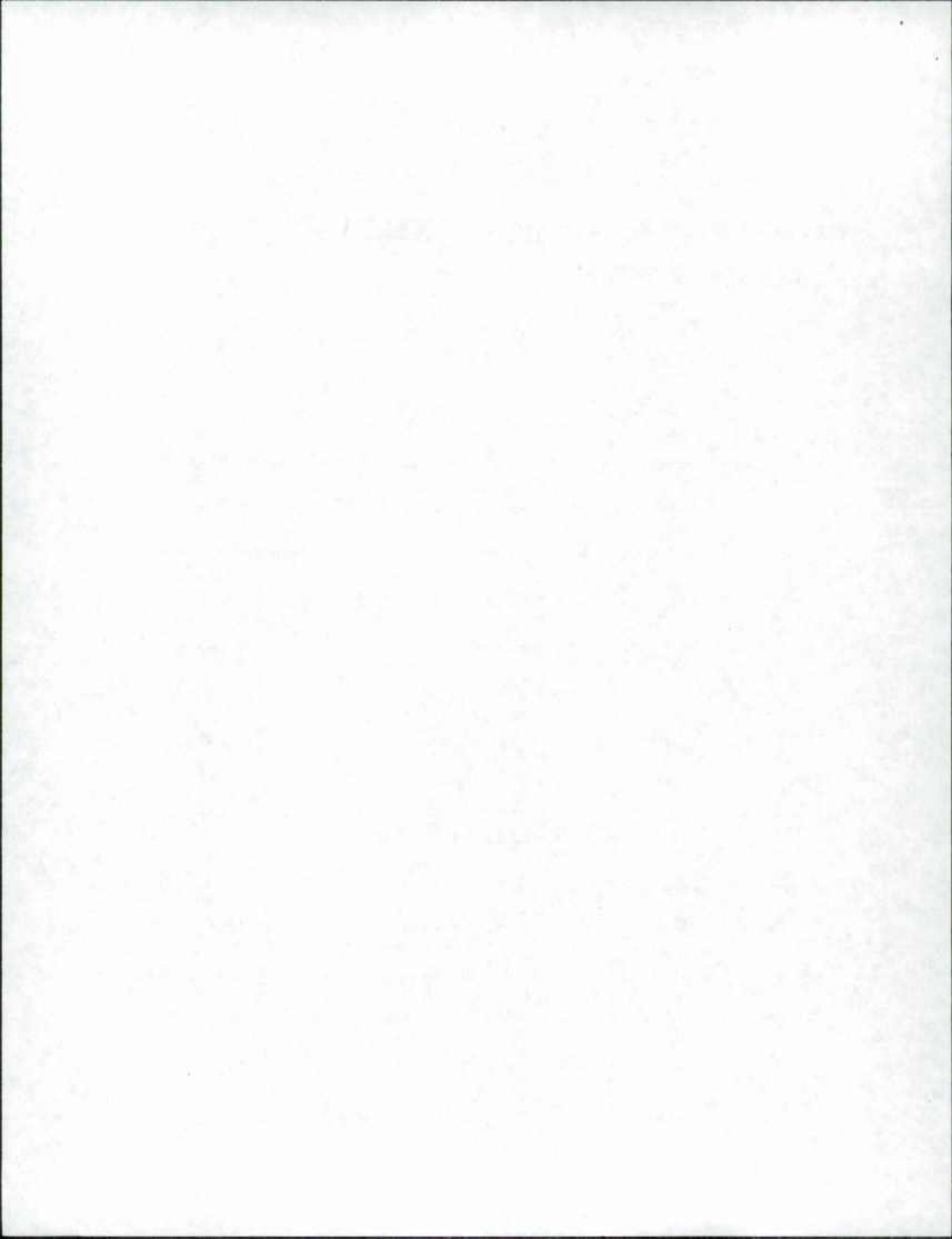
PUBLIC NOTIFICATION

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. Peter Loyka, the applicant's engineering consultant, testified that the property was posted on April 29, 2008. I find and conclude that there has been compliance with the notice requirements.

FINDINGS AND CONCLUSIONS

The applicant owns a single-family residence with a street address of 2232 Mulberry Hill Road, also identified as Lots 6 and 13 of the H.W. Gunther subdivision, Annapolis.¹ The property comprises 17,284 square feet and is zoned R2 residential with a Chesapeake Bay Critical Area designation as Limited Development Area (LDA). This waterfront lot on Martins Cove is mapped as a

¹ The dwelling is located on Lot 6, which is on the north side of Mulberry Hill Road.

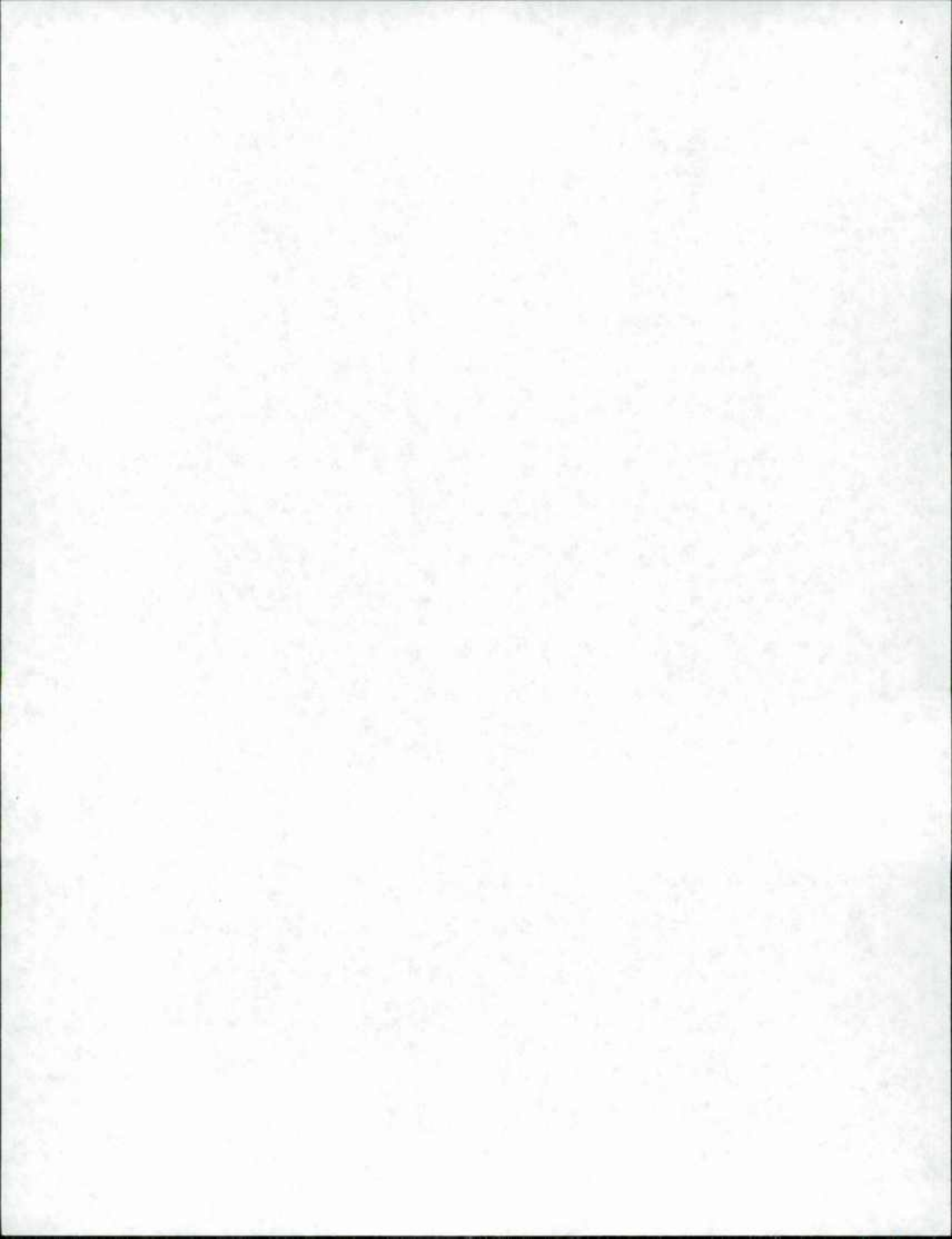


buffer modification area. The request is to raze the dwelling, followed by the redevelopment of the property. The existing dwelling is located 43 feet from mean high water. Based on the revised site plan, the leading edge of the waterfront deck addition to the replacement dwelling is 33 feet from mean high water. The project also disturbs steep slopes.

Anne Arundel County Code, Article 18, Section 18-13-104(a) creates a 100-foot buffer from tidal waters. However, Section 18-13-104(b) establishes 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 17-8-702(b), new development shall be no closer to the shoreline than the existing principal structure. Finally, Section 17-8-201 proscribes the disturbance of steep slopes in the LDA. Accordingly, the applicant requests a buffer variance of 10 feet and a variance to disturb steep slopes.

Robert Konowal, a planner with the Office of Planning and Zoning, testified that the property is below the minimum area for the district and steeply sloped. Only the slope condition is considered a basis for relief. Alternatively, the request exceeds the minimum relief. In this regard, the applicant seeks to replace a modest dwelling (footprint 550 square feet) with one that is much larger.² The witness suggested that the buffer variance could be eliminated by removing the

² Based on the revised site plan, the replacement dwelling has a footprint of 1,080 square feet, exclusive of porches and deck. The garage has a footprint of 548 square feet.

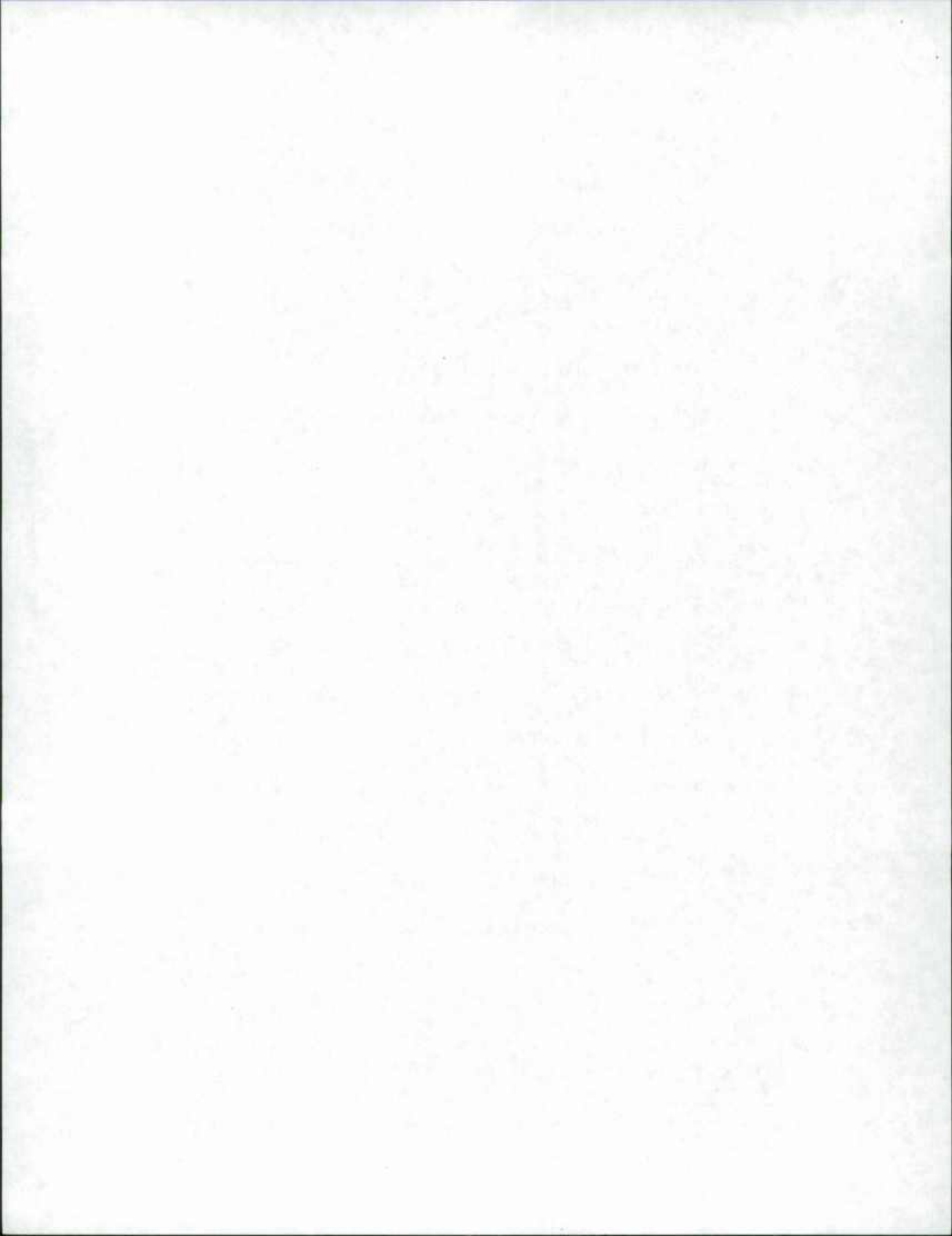


rear porch addition (six feet deep) and reducing the length of the house by four feet. He summarized the agency comments. The County's Development Division opposed the buffer variance. So did the Chesapeake Bay Critical Area Commission.³ By way of conclusion, Mr. Konowal opposed the buffer variance; the steep slope variance is unobjectionable.

On cross-examination by counsel to the applicant, Mr. Konowal conceded that the size of the new dwelling is comparable to the homes on the adjacent properties. However, the homes on the adjacent properties predate the Critical Area program.

Mr. Loyka testified that the two lots would be merged as a single site. The septic system is located on Lot 13 on the south side of Mulberry Hill Road. The Department of Health has been given technical approval to the septic design, subject to an easement in the roadbed. The septic accommodates up to 1,500 square feet of living area. The applicant is proposing a house 26 feet wide (exclusive of balconies and porches) on a narrow (50-foot) lot. The property is at the low point on Mulberry Hill Road with an outfall to Martins Cove. The project also includes a coastal plain outfall - new technology - for water quality benefits and infiltration. The slope disturbance includes 732 square feet of off-site impacts for the outfall. The project also includes decreasing the grade of the driveway from more than 15 percent. The separation between the septic tank and the dwelling (20 feet) and between the septic tank and the garage (10 feet) are

³ The Commission did not oppose the slope variance, subject to mitigation.



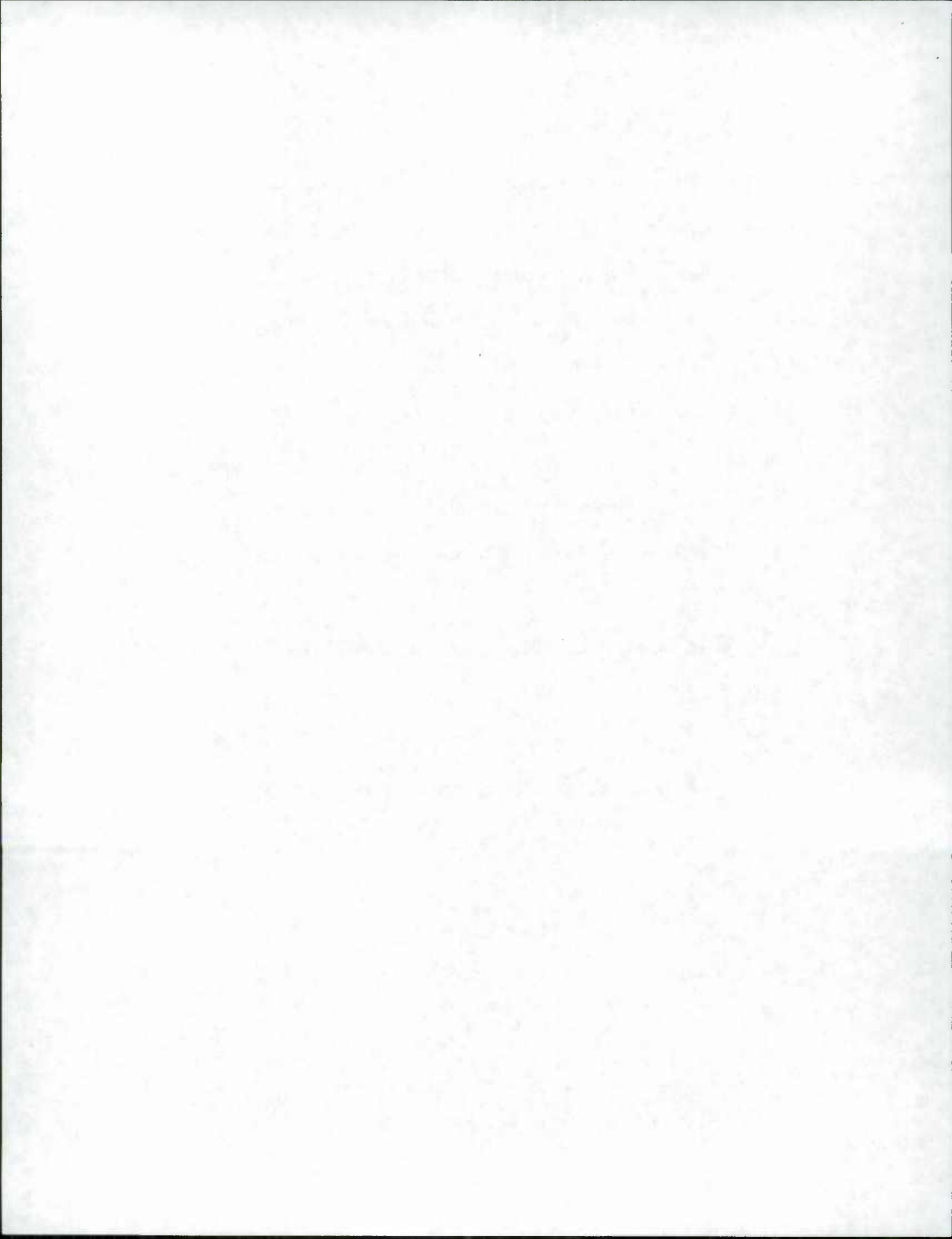
additional site constraints. The witness provided several site and neighborhood photographs. The project is below the allowance for impervious coverage (3,700 square feet versus 5,401 square feet). All of the new impervious coverage is behind the front façade of the dwelling. And finally, a four-foot section of the deck addition is cantilevered to minimize the disturbance, which does not exceed the limits of disturbance for the dwelling.

Dr. Green supplied a copy of the house plans and elevations. The dwelling comprises 1,080 square feet of living area on the first floor and 406 square feet of living area on the second floor (cathedral ceiling on the waterside). The basement is unfinished. The witness supplied letters from area residents in support of the request.⁴

Eric See, an environmental consultant to the applicant, testified that the stormwater management and mitigation plantings would benefit Martins Cove. The deck addition, which is located in a grassed area, aligns with the deck additions on the adjacent properties. Finally, the project stabilizes the steep slopes. In sum, he opined that the variance standards are satisfied.

James Harrison, a resident of Mulberry Hill Road, testified that the applicant's proposal would improve water quality. Although Mr. Harrison's dwelling is further from water, the location of applicant's new dwelling is

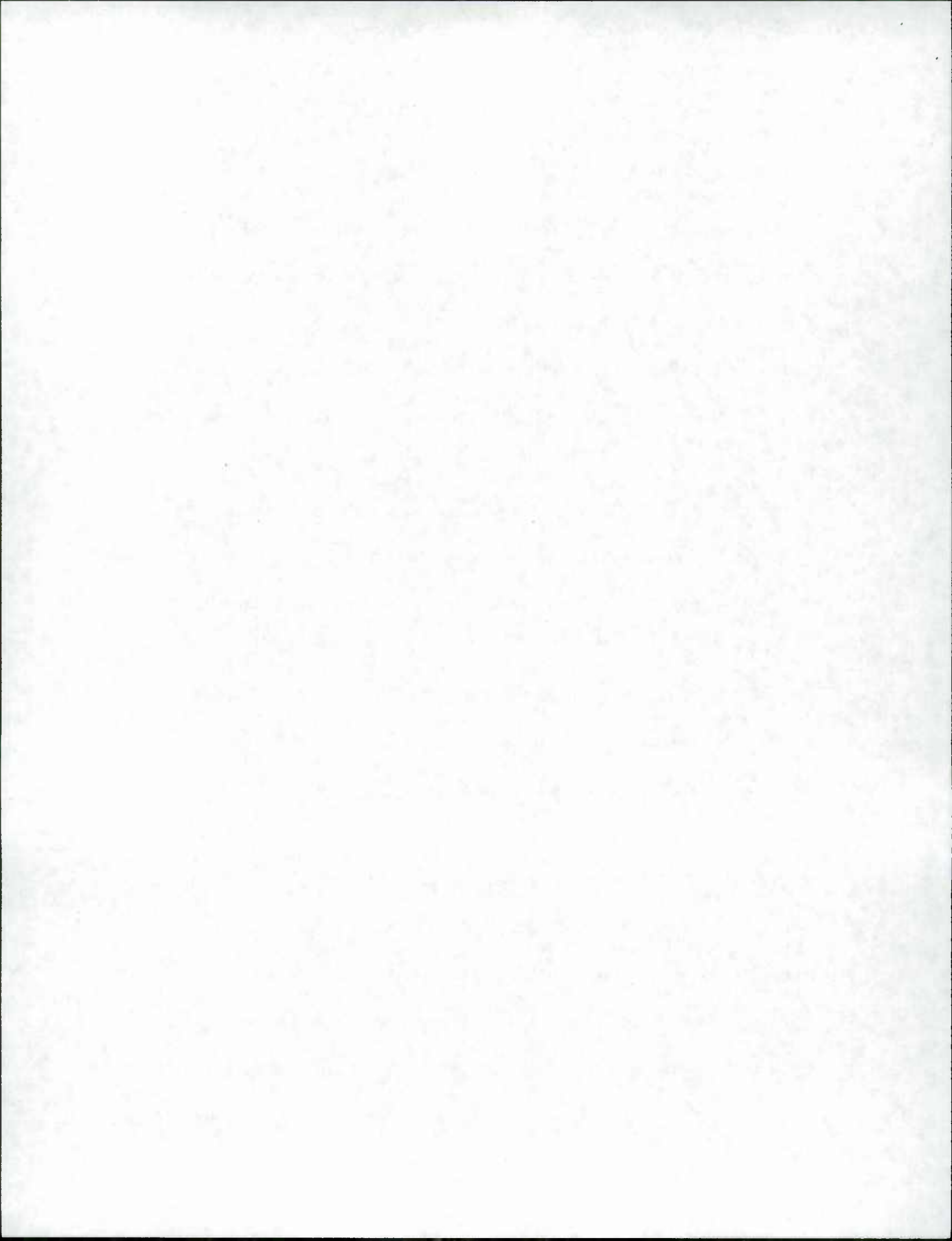
⁴The applicant, through counsel, also submitted a list of approved variances on Martins Cove intended to show the pattern of development.



consistent with area development, which includes dwellings with waterside deck additions.

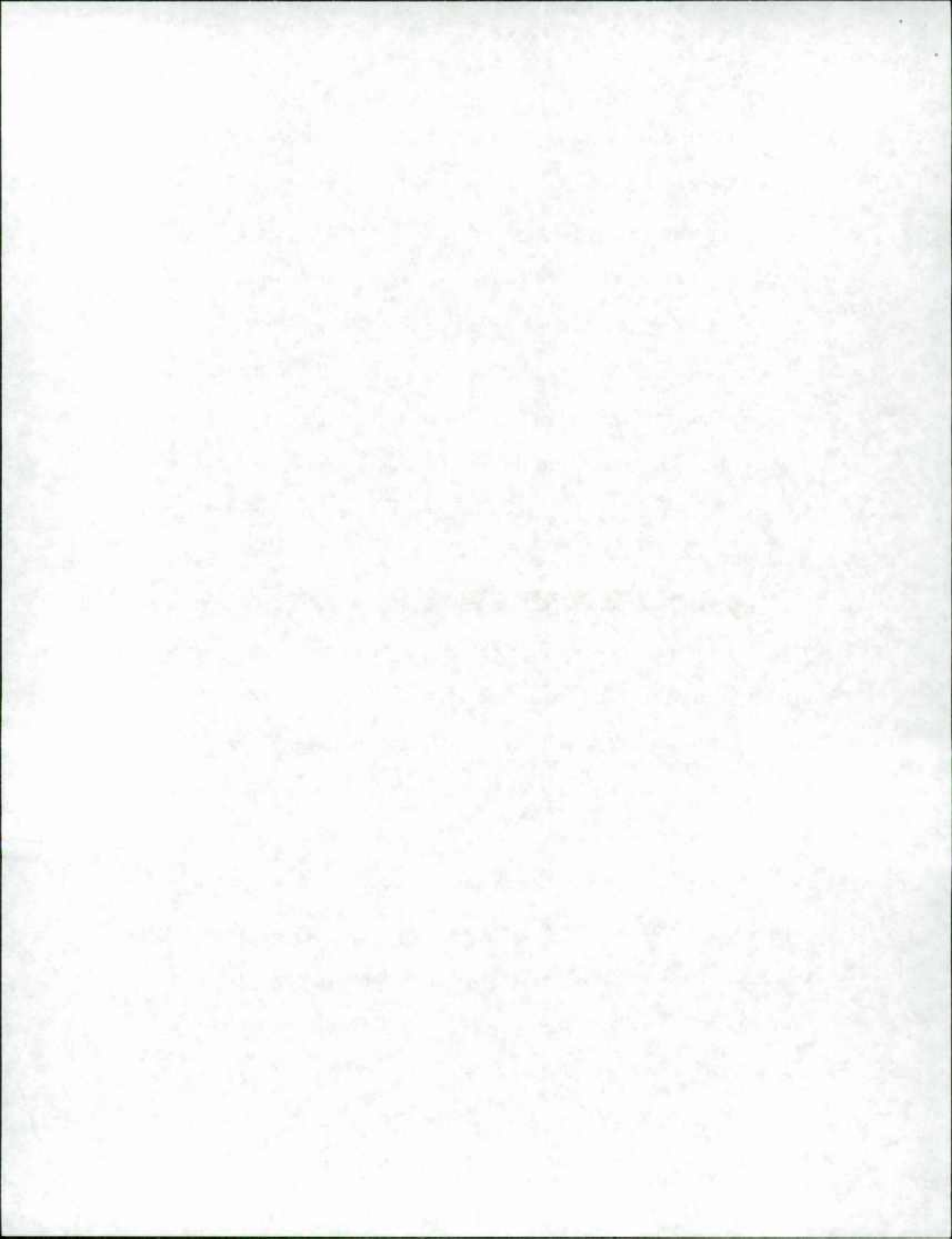
I visited the site and the neighborhood. The property is located at a bend in the road. Lot 6 falls away steeply from the road. A gravel drive serves the very small and deteriorated cottage. The front yard is planted in a level lawn with a few trees. The shoreline is notched with a bulkhead. The grade rises to the properties on both sides. Both properties are improved with two-story dwellings with waterfront deck additions that are closer to the water than the applicant's cottage. The property to the west has an extensive graveled parking area retained by a stone wall along the common boundary. Lot 13 has a level graveled parking pad near the road. This is an older neighborhood. Many of the properties do not have covered parking.

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 applicant; (2) a literal interpretation of the program will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area; (3) the granting of the variance will not confer on the applicant 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 applicant



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 settled that the applicant's burden of proof is to satisfy all of the variance criteria. If the proof is lacking as to even one criterion, then the relief must be denied.

Upon review of the facts and circumstances, I am constrained to deny the application. While some of the criteria are met, others are not. Thus, with respect to the subsection (b) criteria for the slope variance, a literal application of the program will deny the applicant the right to redevelop the property with a dwelling, which is a right in common enjoyment elsewhere in the Critical Area. Conversely, the granting of a limited variance to disturb the slopes for access is not a special privilege that the program typically denies to other properties in the Critical Area. On the other hand, the request for the garage on or near steep slopes does represent a special privilege that the program typically denies. Even conceding that the need for the slope variance is not based on the actions of the applicant or land use on neighboring property, the added disturbance for the

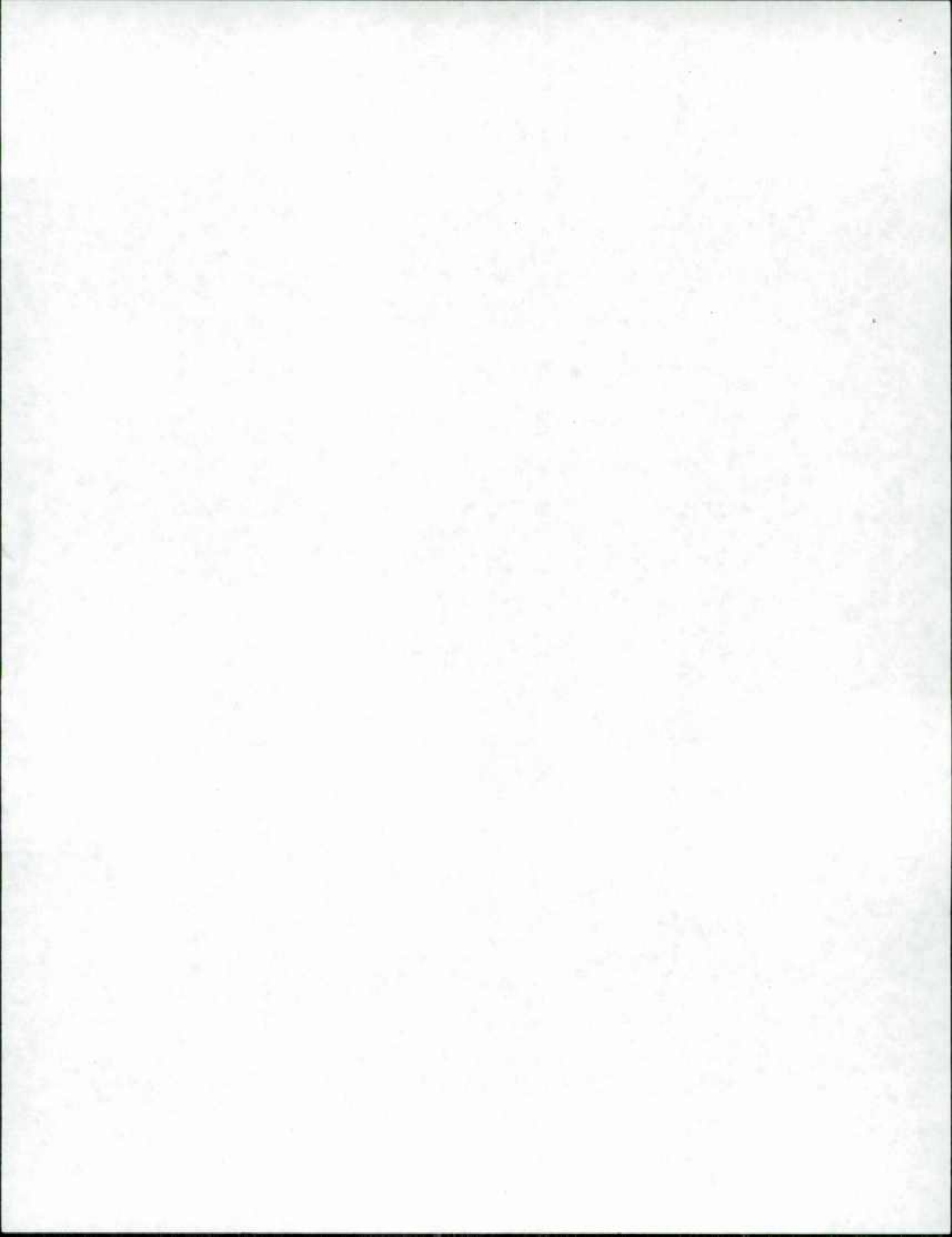


garage adversely impacts Critical Area assets and does not harmonize with the spirit and intent of the program.

Considering the subsection (b) criteria for the buffer variance, a strict application of the program does not deny any right in common enjoyment; and conversely, the relief represents a special privilege. In this case, the need for the buffer variance is a direct result of the site design. The buffer variance is a function of not only the length and features of the dwelling, but also the inclusion of the garage and the required separation from the septic to the two structures. Accepting that the buffer variance is not the result of the actions of the applicant, its grant adversely impacts Critical Area assets and does not harmonize with the spirit and intent of the program.

I also find that the variances do not represent the minimum relief. As indicated, there is the opportunity to minimize the slope variance and to eliminate the buffer variance. Even conceding that the granting of the variances will not alter the essential character of the neighborhood, or substantially impair the use or development of adjacent property, the granting of the variances constitutes a detriment to the public welfare.

Because the applicant has not met his burden of proof, the denial of the application does not deny reasonable use and is not an unwarranted hardship.



ORDER

PURSUANT to the application of Kenneth Green, petitioning for a variance to allow a dwelling, garage and associated facilities with less buffer than required and with disturbance to slopes 15% or greater, and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 17th day of June, 2008,

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


Stephen M. LeGenre
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.

