

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/

December 15, 2008

Ms. Amy Moredock
Kent County Department of Planning and Zoning
400 High St.
Chestertown, Maryland 21620

Re: **AFTER THE FACT VARIANCE/VIOLATION**
Variance 08-53 Sanders

Dear Ms. ~~Moredock~~:

We are in receipt of your request for review of an after-the-fact variance for the above-referenced applicant. As of July 1, 2008, all Critical Area development activities which require after-the-fact variances are considered violations of the Critical Area law. Before seeking a variance to legalize the illegal structure, in this case a deck and wood walk in the Buffer, the County must issue a notice of violation, assess a fine, be in receipt of a restoration or mitigation plan, and the applicant shall have performed the abatement measures in said plan. The County may not issue the variance until these measures have been taken.

In this case, the applicants seek an after-the-fact variance to permit development within the 100 ft. Buffer for an open deck and wood walk. The property is currently developed with a single family dwelling and associated structures and it is classified as a Limited Development Area (LDA), zoned Critical Area Residential (CAR) and mapped as a Modified Buffer (BMA). Based on our recent conversation, I understand that grandfathered status is lost when a structure is removed, which in this case, places the BMA line at the corner of the house. Given this information, this variance should also be for relief from the BMA Standards of the CAR Zone.

It is our understanding that the County has issued a Violation Notice and the applicant has paid a \$7000 fine at this time. However, there has been no information provided regarding the required environmental restoration, mitigation, and abatement plan.

As stated in the first paragraph above, Chapter 119 of the 2008 Laws of Maryland includes a number of provisions for after-the-fact variances that are applicable in this case. In addition to sections on penalty determinations and variance standards, the following applies to initial processing:

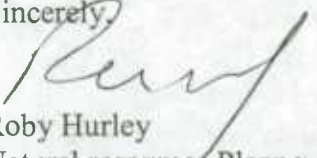


- Kent County may not accept an application for a variance to legalize a violation, including an un-permitted structure until the County first issues a notice of violation, including assessment of an administrative or civil penalty, for the violation.
- Kent County must consider the environmental impact, and costs of site restoration and local government inspections in determining a penalty.
- Kent County cannot issue a permit, approval, variance or special exception until the applicant has:
 - Fully paid all administrative, civil, and criminal penalties imposed.
 - Prepared a restoration or mitigation plan, approved by Kent County that abates impacts to water quality and natural resources as a result of the violation.
 - Implemented the abatement measures in accordance with the County's Program.

When the County has taken the above actions and is prepared to hear the variance, please include, as part of the record, the attached Comments On Proposed Variance letter.

If you have any questions, please call me at 410-260-3468.

Sincerely,



Roby Hurley
Natural resources Planner
KC 657-08

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Ms. Amy Moredock
Kent County Department of Planning and Zoning
400 High St.
Chestertown, Maryland 21620

Re: **COMMENTS ON PROPOSED VARIANCE**
Variance 08-53 Sanders

Dear Ms. *Moredock*:

Thank you for providing information on the above referenced variance. The applicant is requesting an after-the-fact variance from the 100-foot Buffer setback requirements in order to permit illegally constructed structures in the Buffer including a deck and wood walk encompassing 520 sq. ft. The property is currently developed with a single family dwelling and associated structures and it is classified as a Limited Development Area (LDA), zoned Critical Area Residential (CAR) and mapped as a Modified Buffer (BMA).

Regarding the violation, we have provided comments separately in the letter titled After The Fact Variance/Violation. Following the implementation of the requirements in Chapter 119 of the 2008 Laws of Maryland, should the applicant proceed to hearing, we offer comments below.

In 2002 and 2004, the General Assembly strengthened the standards, which an applicant must meet in order for a local jurisdiction to grant a variance to the Critical Area law. The State law provides that variances to a local jurisdiction's Critical Area program may be granted **only** if the Board of Zoning Appeals finds that an applicant has satisfied its burden to prove that the applicant meets each one of the county's variance standards, including the standard of "unwarranted hardship." Furthermore, the State law establishes presumption that a proposed activity for which a Critical Area variance is requested does not conform to the purpose and intent of the Critical Area law. The Board of Appeals must make an affirmative finding that the applicant has overcome this presumption, based on the evidence presented.

The BMA provisions within the Kent County Code are intended to provide flexibility as well as opportunities for reasonable use and redevelopment while providing for environmental benefits to the site. In this case, the applicant has a developed property with a house, driveway and a walkway located in the 100 ft. Buffer. Based on these improvements, reasonable and significant use of the property already exists and the applicant would not be subject to an unwarranted hardship if the variance for the deck is denied. Accordingly, the applicant has not met each and every one of Kent County's variance standards and should therefore be denied a variance. I have discussed each one of the variance standards below as it pertains to this site:

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



The State law standards, applicable to this variance request, define unwarranted hardship to mean that the applicant must prove that, without the requested variance, the applicant would be denied reasonable and significant use of the entire parcel or lot. Given that the applicant enjoys reasonable use of the property as evident by the amount of developed area we do not believe that the County has evidence on which to base a finding that, the entire parcel would be denied reasonable and significant use. In addition, many of the requested structures could be located outside of the BMA setback.

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

The applicant is not denied a right commonly enjoyed by similar properties. No property owner has the right to accessory structures in the Buffer and BMA setback. Therefore, the rejection of a variance does not deny the applicant 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, in this case constructing numerous structures within the Buffer and setback, which would be denied to others in this area as well as in similar areas found within the County's Critical Area. The applicant has the burden of proof and the burden of persuasion to overcome the presumption that the proposed variance does not conform to the Critical Area Law. The applicant has not overcome this burden.

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

As this is an after-the-fact variance, the variance request is directly based on conditions or circumstances that are the result of the applicant. Therefore, the applicant has not met this standard.

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.

Granting of this variance is not in harmony with the general spirit and intent of Critical Area law and regulations. A granting of a variance to allow structures within the Buffer and BMA setback results in an increase in stormwater runoff, the loss of essential infiltration opportunities, increased human impacts to the Buffer, and habitat loss. Given that the applicant can adequately redevelop this property and locate the accessory structures outside of the BMA setback, approval of this variance is not in harmony with the general intent and spirit of the Critical Area Law.

KC 657-08
December 15, 2008
Page 2

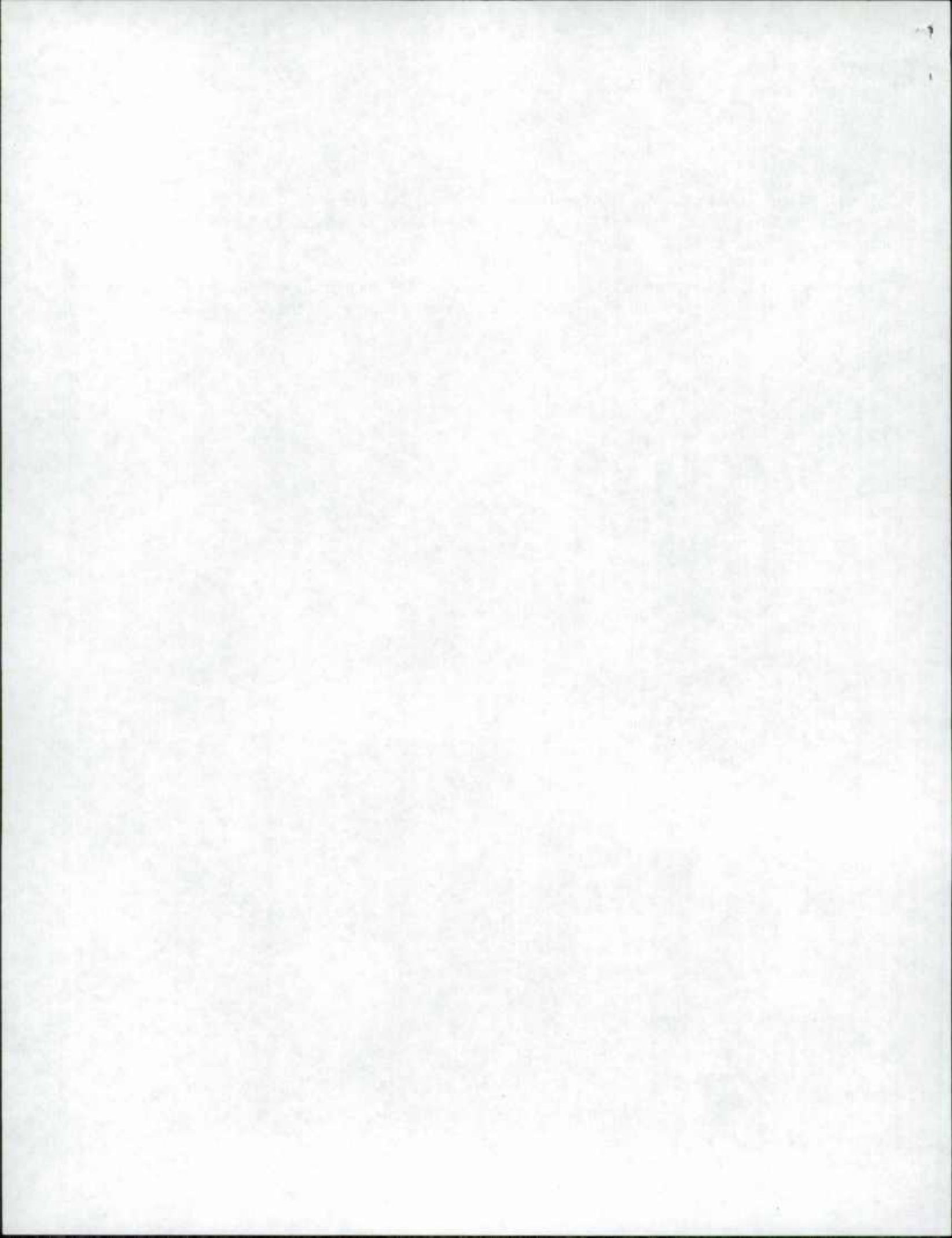
As a result of the information stated above and because each and every one of the County's variance standards has not been met, this office is opposed to the granting of a variance. We recommend that the Board deny the variance.

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,



Roby Hurley
Natural Resource Planner
KC 657-08



BEFORE THE KENT COUNTY BOARD OF APPEALS

IN THE MATTER OF

KENT COUNTY, MARYLAND

SCOTT SANDERS

APPEAL NO. 08-53



A hearing was held before the Board of Appeals on Monday, April 20, 2009, in the Commissioners' Hearing Room, Kent County Government Center, Chestertown, Maryland. Sitting for the Board were Allen Davis, Acting Chairman, and Trey Hill and Charlotte Staelin, Members. Alice S. Ritchie served as attorney for the Board and Kim Dixon as Clerk.

DECISION

The Board has before it the Application of Scott Sanders, 1334 West Chester Pike, West Chester, Pennsylvania 19382, requesting a buffer and side yard variance, as well as a special exception for a deck in the front and side yard within the Critical Area Buffer of a waterfront lot, on property located on Gregg Neck Road in the First Election District, Kent County, Maryland. Public notice was given, and the property was posted in a conspicuous manner. All interested persons were given an opportunity to be heard in a public hearing held on Monday, April 20, 2009. The Board, having read and considered all matters filed in the proceedings and evidence offered, having studied the specific property and the neighborhood, and having deliberated in a public hearing, decides as follows:

FINDINGS OF FACT

The Board finds based on the evidence before it, testimony given and exhibits presented the following facts. The subject property is a .2755 acre waterfront lot improved with a dwelling and two sheds. The property is zoned Critical Area Residential (CAR) and in a Modified Buffer Area. The shape of the lot is a rectangle set on the angle of the waterfront which is improved with a wooden bulkheading and a pier. The existing dwelling is well within the 100 foot buffer and is at one point 3.5' from the side property line. Mr. Sanders testified on behalf of his request. He constructed a deck to the side and water front of his house and he also constructed a deck at a lower level, from which you continue down stairs to the waterfront. The decks were built without any building permits. Mr. Sanders has been cited for these violations and has paid the fine. Now he wishes to keep what he built. Mr. Sanders stated he was told by a neighbor that he could replace what was there without a building permit. The neighborhood is characterized by small lots and the dwelling is on a steep slope to the creek. Other surrounding houses have decks to the waterside of their houses. He believes he ought to be able to enjoy the water and have a deck similar to his neighbors.

Mr. Carl Starkweather, the property owner to the east of the subject property, testified that he has been in residence since before Mr. Sanders purchased the property.

His testimony is there was not, in the past, a deck to the front of Mr. Sander's dwelling. Mr. Starkweather also believes that the side deck is one foot from his property line.

Amy Moredock, Environmental Planner, testified that in 2005 when the wooden bulkhead was constructed at the subject property; a survey and site plan was done. It is this document that establishes what existed. The decks are clearly new construction which has occurred since 2005 and the construction is within the buffer, between the dwelling and the waterfront. She said that stairs to the water are allowed within the buffer and depending on how steep the slope is there maybe a switch in the stairs permitted. The Board received a letter, dated December 11, 2008, from the Kent County Planning Commission, signed by Elizabeth H. Morris. The Commission voted to make an unfavorable recommendation for the variances and special exception, principally citing 1) the lack of unwarranted hardship, 2) it is an "after the fact" request, 3) it is not consistent with the general spirit and intent of the Critical Area Law, regulations adopted by the County or the Comprehensive Plan.

The Board received a letter from the Critical Area Commission, dated December 15, 2008, and signed by Roby Hurley. The letter stated, in part, the Commission's position that the applicant had not met each and every one of the County's variance standards and that the Board must make a specific finding on whether the presumption that the proposed activity does not conform to the purpose and intent of the Critical Area law has been overcome.

CONCLUSIONS OF LAW

Article V, Section 5.5 of the Kent County Land Use Ordinance (hereafter referred to as Ordinance) entitled "Density, Area, Height, Width and Yard Requirements" sets the waterfront and side set back in Critical Area Residential Zoning District. Article V, Section 5.7.B.3 of the Ordinance addresses new development in the Critical Area buffer. This section generally provides that new construction is prohibited, however the applicant's property is in a Modified Buffer area where new construction is permitted under certain conditions. Permitted however, only if the new construction is not closer to the mean high tide or the edge of tidal wetlands than the existing dwelling or the average line of neighboring properties.

Article IX, Section 2.2 of the Land Use Ordinance authorizes this Board to grant variances from the setback and buffer requirements of the Ordinance. In the case of the front and side yard setback only for reasons of practical difficulty and Article IX, Section 2.3 a-e apply, in the case of the buffer variance f-i apply and an unwarranted hardship must be demonstrated. Unwarranted hardship is defined as a denial of reasonable and significant use of the land. In order to grant a variance the Board must find :

- a. That the variance will not cause a substantial detriment to adjacent or neighboring property.
- b. That the variance will not change the character of the neighborhood or district.

- c. That the variance is consistent with the Comprehensive Plan and the general intent of the Ordinance.
- d. That the practical difficulty or other injustice was caused by the following:
 - i. Some unusual characteristic of size or shape of the property.
 - ii. Extraordinary topographical or other condition of the property.
 - iii. The use or development of property immediately adjacent to the property, except that this criterion shall not apply in the Critical Area.
- e. That the practical difficulty or other injustice was not caused by the applicant's own actions.
- f. That within the Critical Area for variances of 15% slope, impervious surface, buffer requirements:
 - i. The granting of a variance will be in harmony with the general spirit and intent of the Critical Area Law and the regulations adopted by Kent County.
 - ii. The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat.
 - iii. That the applications for a variance will be made in writing with a copy provided to the Critical Area Commission.
 - iv. The strict application of the Ordinance would produce unwarranted hardship.
 - v. Such hardship is not shared generally by other properties in the same zoning district and the same vicinity.
 - vi. The authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.
 - vii. That a literal interpretation of the Ordinance deprives the applicant of rights commonly enjoyed by other properties in similar areas with the Critical Area of Kent County.
 - viii. That the granting of a variance will not confer upon an applicant any special privilege that would be denied by the Ordinance to other lands or structures.
- g. In considering an application for a variance, the Board shall consider the reasonable use of the entire parcel or lot which the variance is requested.
- h. In considering an application for a variance, the Board shall presume 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 Ordinance and Critical Area Law.
- i. The Board may consider the cause of the variance request and if the variance request is the result of action by the applicant, including the

commencement of development activity before an application for a variance has been filed.

Ordinance, Article IX, Section 2.2.3 f-i.

The Board, based on the evidence, does not find that the Applicant is denied a reasonable and significant use of his land, if denied the two decks he has constructed without a permit and in violation of setback and buffer requirements. In fact, the Applicant has not explored the possibilities for construction within the requirements of the Ordinance for a deck, stairs or switch back. Further, the Board finds that the activity in the Critical Area Buffer does not conform to the purpose and intent of the Critical Area law. See Article IX, Section 2.2 (h). Given the lack of unwarranted hardship and the nonconformity with the Critical Area law, the Board further denies the special exception and side and front setback variances requested. Further, to grant the request would confer upon the applicant a special privilege that would be denied by the Ordinance to other lands or structures.

IT IS THEREFORE, this 19th day of May, 2009
ORDERED that the application for a buffer and side yard variances and a special exception be and is hereby **DENIED**.

KENT COUNTY BOARD OF APPEALS

R. Allen Davis
Tom
Charlotte Staelin (KBD)

Kent County Planning Commission

TELEPHONE 410-778-7475

Kent County Government Center
400 High Street
Chestertown, Maryland 21620

FACSIMILE 410-810-2932

11 December 2008

Dr. Al Townshend
Kent County Board of Appeals
400 High Street
Chestertown, MD 21620

RE: Scott Sanders—Buffer and Setback Variances and Special Exception

Dear Dr. Townshend:

At its 4 December 2008 meeting, the Kent County Planning Commission reviewed Mr. Sanders' proposal to retain a large wooden two-tiered deck within the Critical Area Buffer and within the side yard setback. A special exception was also reviewed to locate the second tier of the deck within the front yard of a waterfront parcel. The .275-acre property is located on the Gregg Neck Road along Mill Creek in the 1st Election District. The parcel is zoned "CAR" Critical Area Residential and is located in the Gregg Neck subdivision which is characterized by waterfront homes on relatively small lots.

After some discussion, the Planning Commission voted to make an unfavorable recommendation to the Board of Appeals for the buffer variance, the side yard setback variance, and the special exception to retain the two-tiered deck within the Buffer, side yard setback, and within the front yard of a waterfront lot. The commission based their decision on the following findings:

- This is an after the fact buffer variance, side yard setback variance, and special exception.
- No unwarranted hardship exists.
- No practical difficulty exists in the size or shape of the property.
- The applicant has a right to access the water; however, access as construction exceeds the permitted limits.
- The variances may cause a substantial detriment to neighboring properties.
- The variances may change the character of the neighborhood.
- The granting of the variances will confer upon the applicant privileges uncommon to the area.
- The construction may adversely impact water quality and does not minimize impact on fish, wildlife, or plant habitat.
- The proposal is not consistent with the general spirit and intent of the Critical Area Law and the regulations adopted by Kent County.
- The proposal is not consistent with the Comprehensive Plan.

If the Board is inclined to grant approval, then the Commission recommends a water quality improvement plan and a buffer mitigation plan at a rate of 3:1 be implemented onsite.

Sincerely,
Kent County Planning Commission

Elizabeth H. Morris

Elizabeth H. Morris
Chairman

EHM/AGM/agm
cc: Harry Smith



RECEIVED

DEC 22 2008

CRITICAL AREA COMMISSION

KC 657-08

Delve, Jennifer

From: Hurley, Roby
Sent: Tuesday, November 18, 2008 11:58 AM
To: Delve, Jennifer
Subject: FW: Scott Sanders Variances

File pls. Would you also put a copy of this e-mail in the file. Thanx

-----Original Message-----

From: Amy Moredock [mailto:amoredock@kentgov.org]
Sent: Tuesday, November 18, 2008 11:05 AM
To: Hurley, Roby
Subject: Scott Sanders Variances

Hello Roby,

Attached please find the project notification submittal for Scott Sanders. This is an after the fact buffer and side yard setback variance. The applicant has paid a \$7,000.00 and is seeking variance. This application was received in May 2008 and has been awaiting a proper survey onsite.

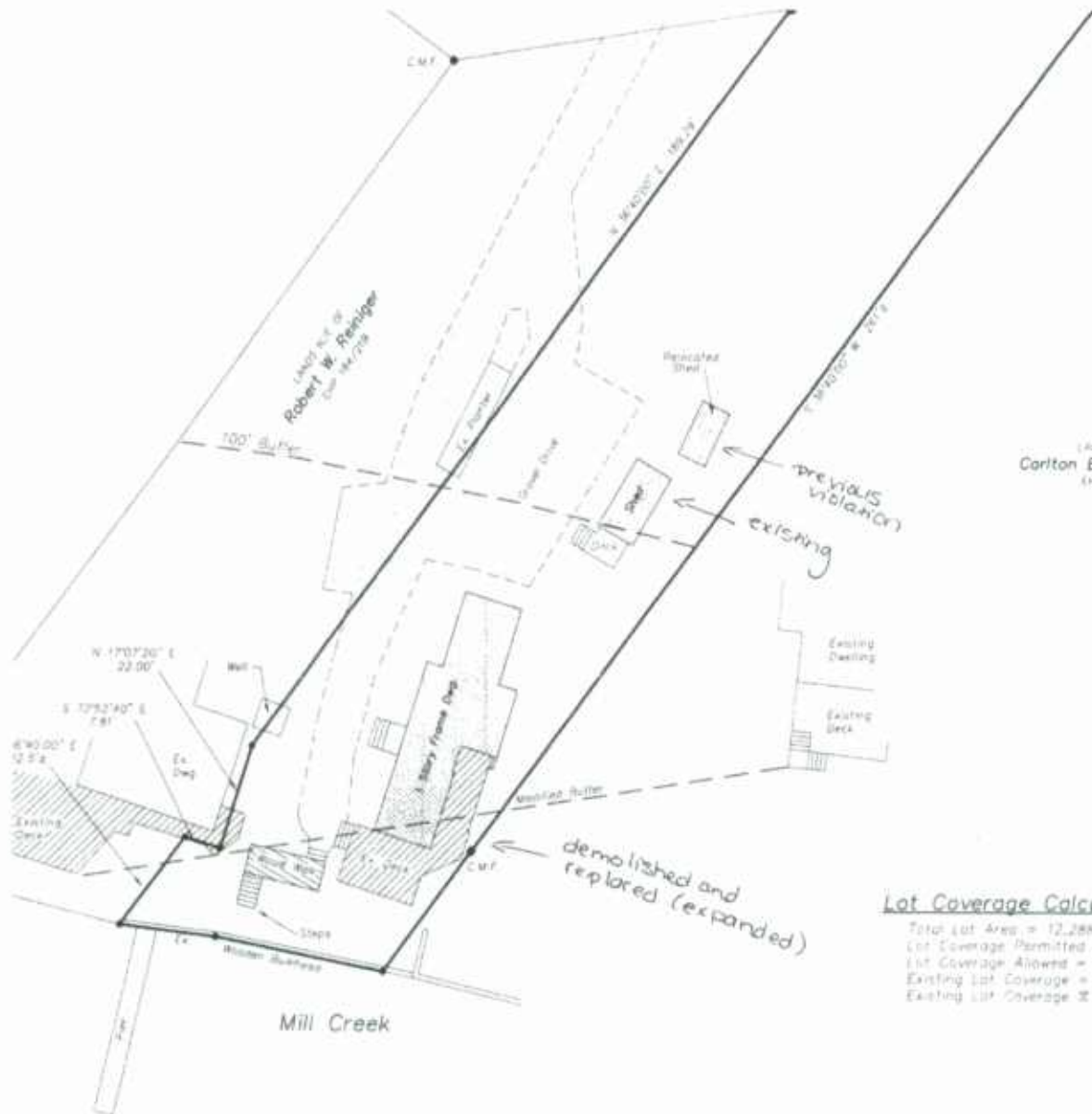
Thanks,
Amy

*paid.
No Mit Plan*

*Amy G. Moredock
Environmental Planner
Kent County Department of Planning, Housing, and Zoning
Phone: 410.778.7473
Fax: 410.810.2932*

 Save a tree... Please don't print this email unless you really need to.

Scott Sanders
 map 7, parcel 269
 .275 acrs
 BMA/CAR (LDA)



LANDS OUT OF
 Carlton B. Starkweather
 LMP 124/294

Lot Coverage Calculations

Total Lot Area = 12,288 Sq.Ft.
 Lot Coverage Permitted = 31,252
 Lot Coverage Allowed = 3,640 Sq.Ft.
 Existing Lot Coverage = 3,457 Sq.Ft.
 Existing Lot Coverage % = 28.08%

- NOTES:
1. FOR DEED REFERENCE, SEE MAP 201/4/9
 2. PROPERTY ADDRESS - 14248 DRETT NECK RD
 OAKLAW, MAP/CARD 216/25
 3. THE DWELLING SHOWN HEREON APPEARS TO EXIST WITHIN ZONE "R1" AS SCALED FROM FLOOD INSURANCE RATE MAP. CONVEYANCE PANEL NO. 200005 0025 B. NO ON-SITE ELEVATIONS HAVE BEEN TAKEN TO VERIFY ACTUAL FIELD CONDITIONS.
 4. ——— DENOTES DEED POINT (UNLESS OTHERWISE NOTED)
 5. LUT — DENOTES LOT OR FORMERLY
 6. LWF — DENOTES HIGH FIRE ZONE
 7. CMT — DENOTES CONCRETE MONUMENT
 8. DIMENSIONS BETWEEN PROPERTY LINES AND BUILDING STRUCTURES SHOWN HEREON HAVE A TOLERANCE OF 2".

DATE: 12/15/2011
 BY: SCOTT SANDERS
 TITLE: SURVEYOR

