

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

January 10, 2008

Timothy R. Henderson, Esquire
Rich and Henderson, P.C.
51 Franklin Street Suite 300
P.O. Box 589
Annapolis, Maryland 21404-0589

Re: Chesapeake Cove – Cecil County, Maryland

Dear Mr. Henderson:

This letter acknowledges receipt of your correspondence dated January 7, 2008. Your letter purports "to lodge a formal objection" to a letter from staff of the Critical Area Commission to the Cecil County Department of Planning and Zoning.

While I note your objection, I also want to inform you that it is the intent of the Commission staff, and of the Attorney General's Office, to continue to work cooperatively with Cecil County on this matter, as we work with the County cooperatively on many other matters regarding the Critical Area Program.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Copy to: Anthony DiGiacomo, Cecil County Planning & Zoning
Eric Sennstrom, Cecil County Planning & Zoning
Margaret McHale, Chair, Critical Area Commission
Ren Serey
Kate Schmidt

PUBLIC LAWYERS LEGAL SERVICES PROGRAM

1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466

Reply to: Marianne E. Dise

January 11, 2008

Mr. Robert P. Duckworth, Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Re: *Kathy Renee Jennings v. Warren White*, Case No.02-C-07-126927

Dear Mr. Duckworth:

Enclosed please find for filing a Motion for Order of Default and Request for Hearing in the above-referenced case. My client has complied with the statutory requirements for representation by Maryland Volunteer Lawyers Service, and my client is entitled to a waiver of filing fees and court costs.

Please date-stamp and return to me in the enclosed self-addressed envelope a copy of the enclosed pleading.

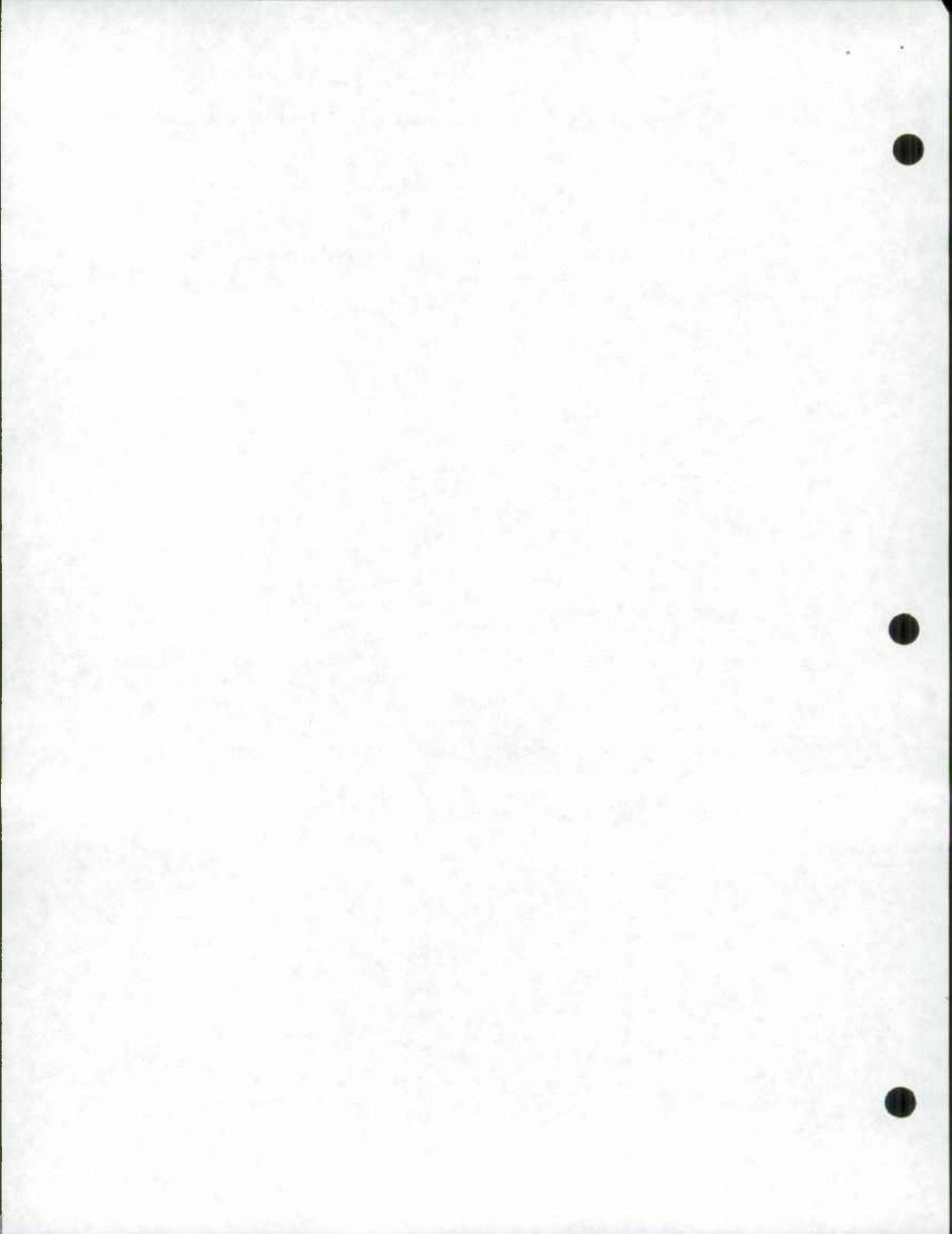
Please contact me if additional information is required. Thank you for your assistance.

Very truly yours,



Marianne E. Dise
Attorney for Plaintiff

✓ Enclosures
cc: Kathy Jennings



IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHY RENEE JENNINGS
7852 Willing Court
Pasadena, Maryland 21122

*

Plaintiff,

*

v.

Case No. 02-C-07-126927

*

WARREN WHITE
331 25th Street
Baltimore, Maryland,

*

Defendant.

*

* * * * *

MOTION FOR ORDER OF DEFAULT

Plaintiff, Kathy Renee Jennings, by her attorney, Marianne E. Dise, files this Motion for Order of Default against Defendant Warren White, and in support thereof states the following:

1. Plaintiff filed a Complaint for Absolute Divorce in this Court, as captioned above, on November 5, 2007.
2. This Court issued a Summons to Defendant Warren White on November 7, 2007.
3. Defendant was served with the Summons and Complaint on November 21, 2007. Affidavit of Service attached as Exhibit A.
4. The Affidavit of Service was filed with this Court on November 28, 2007.
5. More than thirty (30) days has elapsed since service of the Summons and Complaint on the Defendant. The Defendant has failed to file a responsive pleading.
6. The Defendant is not in the military service, as evidenced by the Affidavit attached as Exhibit B. The last known address of the Defendant is 331 25th Street, Baltimore, Maryland.

WHEREFORE, Plaintiff, Kathy Renee Jennings, respectfully prays that:

- A. This Honorable Court enter an Order of Default against Defendant Warren White;

and

B. This Honorable Court enter an Order requiring the taking of testimony on the matters alleged in the Complaint; and

C. That Plaintiff be awarded such other and further relief as the nature of her cause may require.

Marianne E. Dise

Marianne E. Dise, Esquire

Pro Bono via

Md. Volunteer Lawyers Service

1804 West Street Suite 100

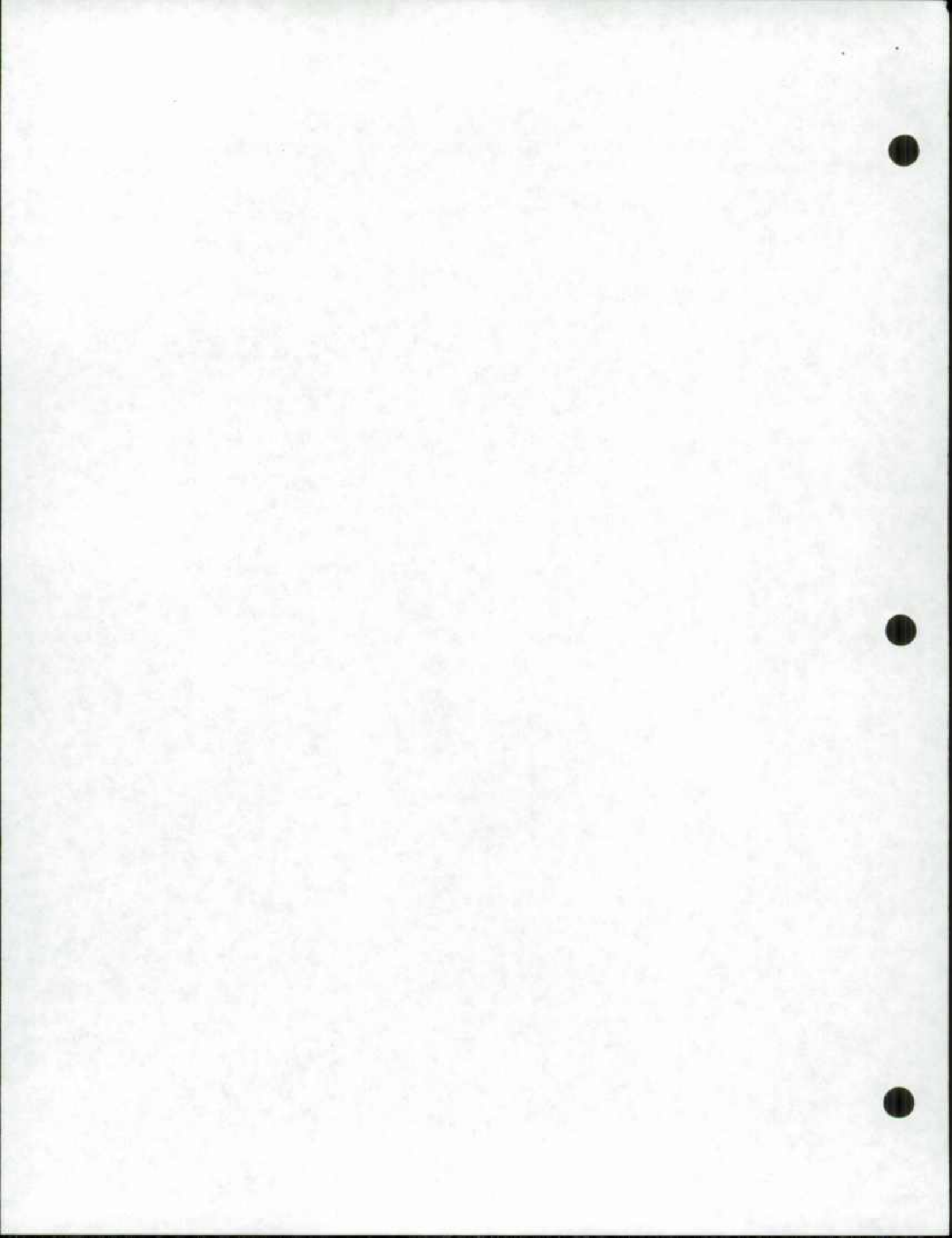
Annapolis, Maryland 21401

(410) 260-3466 (phone)

(410) 974-5338 (fax)

Attorney for Plaintiff

Dated: January 11th, 2008



AFFIDAVIT OF SERVICE

State of Maryland

County of Anne Arundel

Circuit Court

Case Number: 02-C-07-126927 DA

Plaintiff:
KATHY RENEE JENNINGS

vs.

Defendant:
WARREN WHITE

For:
PUBLIC LAWYERS LEGAL SERVICES PROGRAM
1804 West Street
Suite 100
Annapolis, MD 21401

Received by PRIORITY PROCESS to be served on **WARREN WHITE, 331 25TH STREET, BALTIMORE, MD.**

I, Sharon Alleyne, being duly sworn, depose and say that on the **21st day of November, 2007** at **9:25 am**, I:

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **A SUMMONS AND COMPLAINT, SHERIFF'S RETURN FORM** with the date and hour of service endorsed thereon by me, to: **WARREN WHITE** at the address of: **331 25TH STREET, BALTIMORE, MD**, and informed said person of the contents therein, in compliance with state statutes.

Description of Person Served: Age: 40s, Sex: M, Race/Skin Color: Black, Height: 5'9", Weight: 175, Hair: Black, Glasses: N

Under penalty of perjury, I certify that the above made statements are true. I am over the age of 18 and have no interest in the above action.



ERIN GODAIRE
Notary Public, State of Maryland
County of Montgomery
Expires January 1, 2010

Sharon Alleyne
Process Server

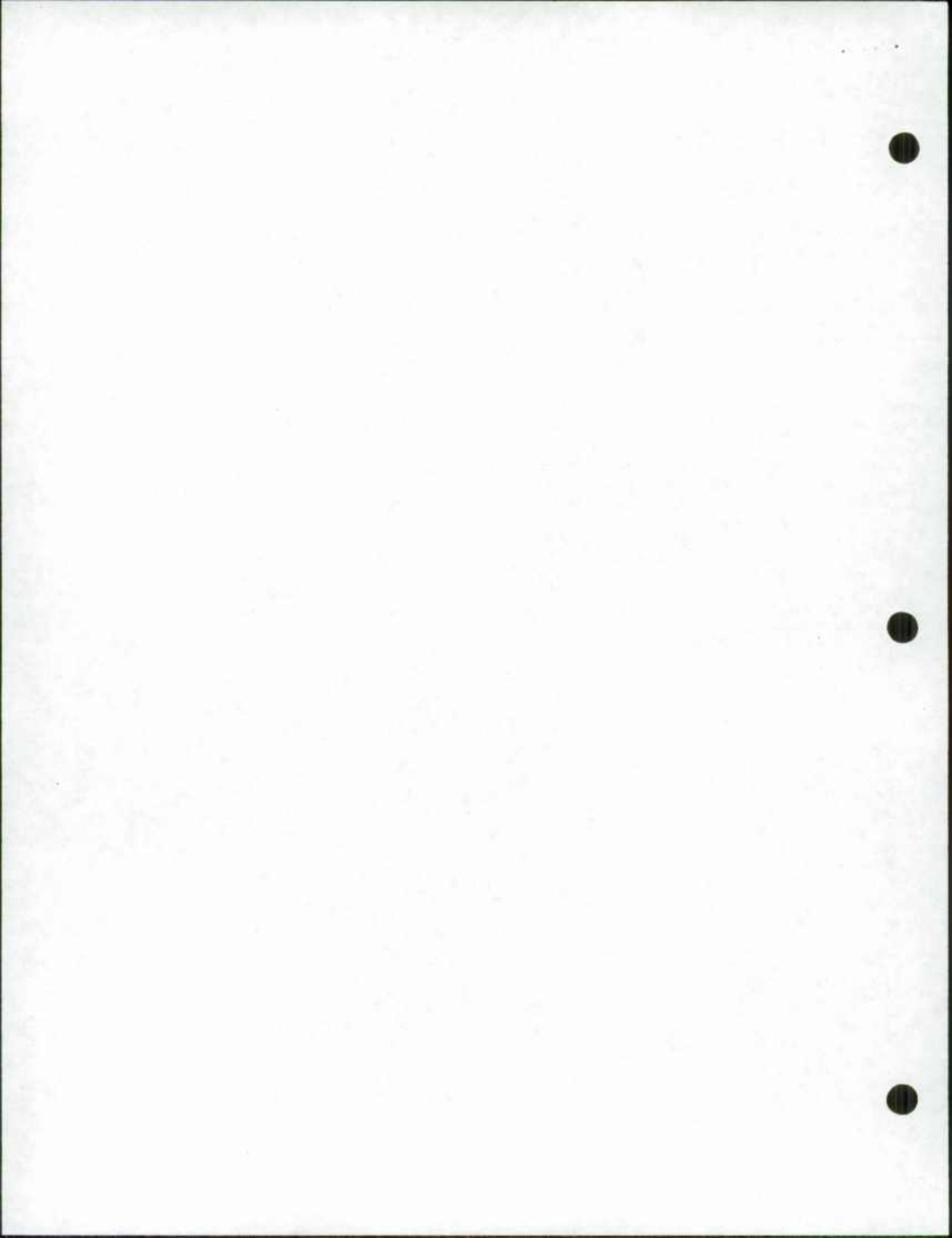
Subscribed and sworn to before me on the 26th day of November, 2007 by the affiant who is personally known to me.

Notary Public

PRIORITY PROCESS
P.O. Box 4189
Rockville, MD 20849-4189
(800) 420-8080

Our Job Serial Number: 2007019356
Ref: MVLS

Exhibit "A"



CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

Robert P. Duckworth
Clerk of the Circuit Court

7 Church Circle, R. W.
P.O. Office Box 71
Annapolis, MD 21404-0071, MARYLAND
(410) 222-1420, TTY for Deaf: (410) 222-1429
Civil (410) 222-1431 Case No. _____
Case: _____

WRIT OF HABEAS CORPUS

Jennings vs Warren White

Case Number: 02-C-07-126927 DA

Case Folder ID: _____ C07126927V01

CIVIL

Party fee: _____ By: _____
Kathy Renee Jennings vs Warren White

Served: STATE OF MARYLAND, ANNE ARUNDEL COUNTY, TO WIT:

Name: _____ Date: _____
To: Warren White
Address (Person):
331 25th Street
Baltimore, MD

This summons is effective for service only if you are hereby summoned to file a written response by pleading or motion within 30 days after service of this summons upon you, in this Court, to the attached Complaint filed by: Please state the reasons.

Return of Kathy Renee Jennings process shall be in accordance with Rule 2-126. If this summons is served by private process, it is

WITNESS the Honorable Chief Judge of the Fifth Judicial Circuit of Maryland.

Date Issued: 11/07/07

Robert P. Duckworth
Robert P. Duckworth
Clerk of the Circuit Court, per _____ is

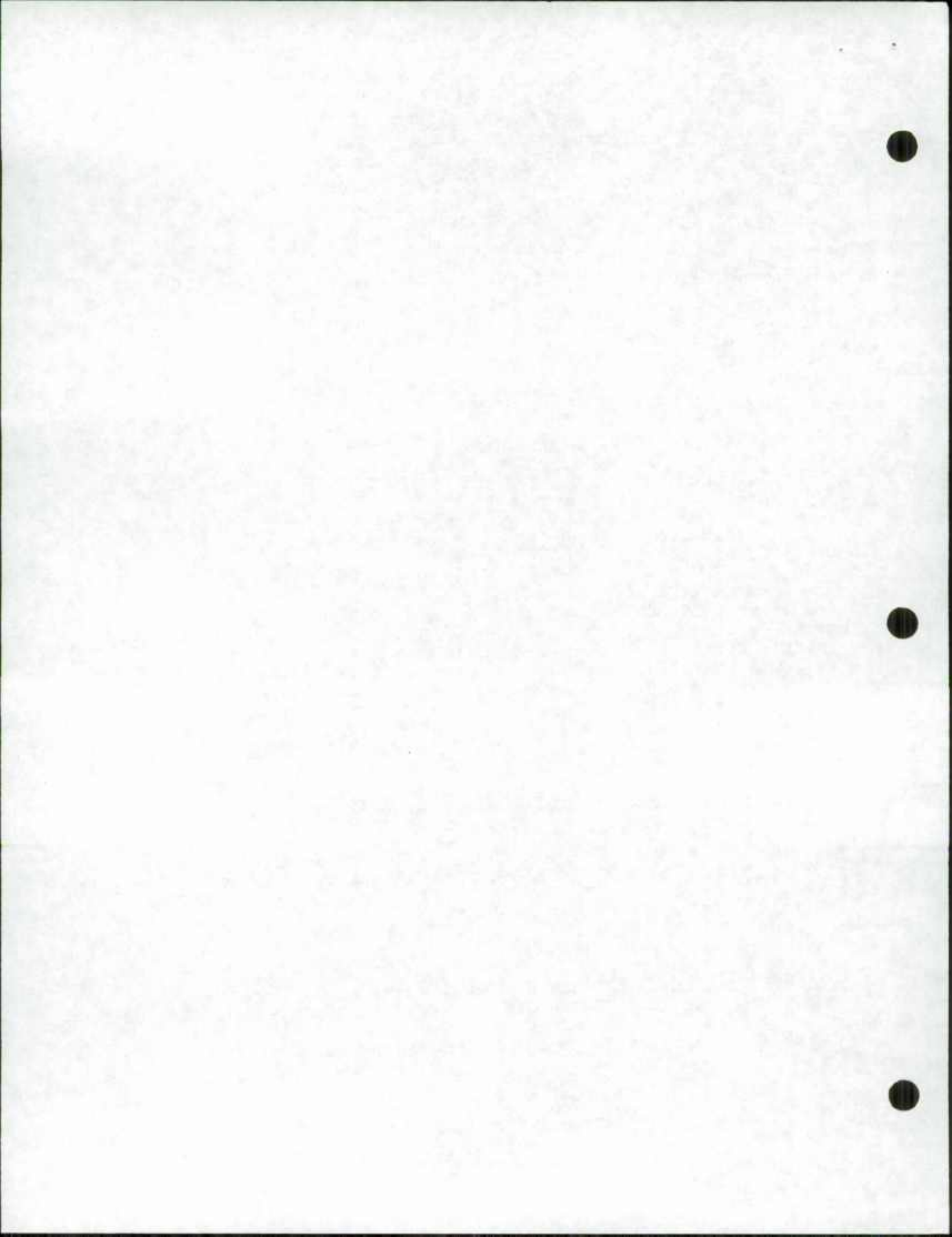


To the person summoned:

FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGMENT BY DEFAULT TO THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

Personal attendance in court on the day named is NOT required.

TRUE COPY,
TEST: Robert P. Duckworth, Clerk
By: _____ Deputy



IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHY RENEE JENNINGS
7852 Willing Court
Pasadena, Maryland 21122

*

Plaintiff,

*

v.

Case No. 02-C-07-126927

*

WARREN WHITE
331 25th Street
Baltimore, Maryland,

*

Defendant.

NON-MILITARY AFFIDAVIT

I, KATHY RENEE JENNINGS, being over the age of 18 years and competent to testify to the matters set forth in this Affidavit, hereby affirm that:

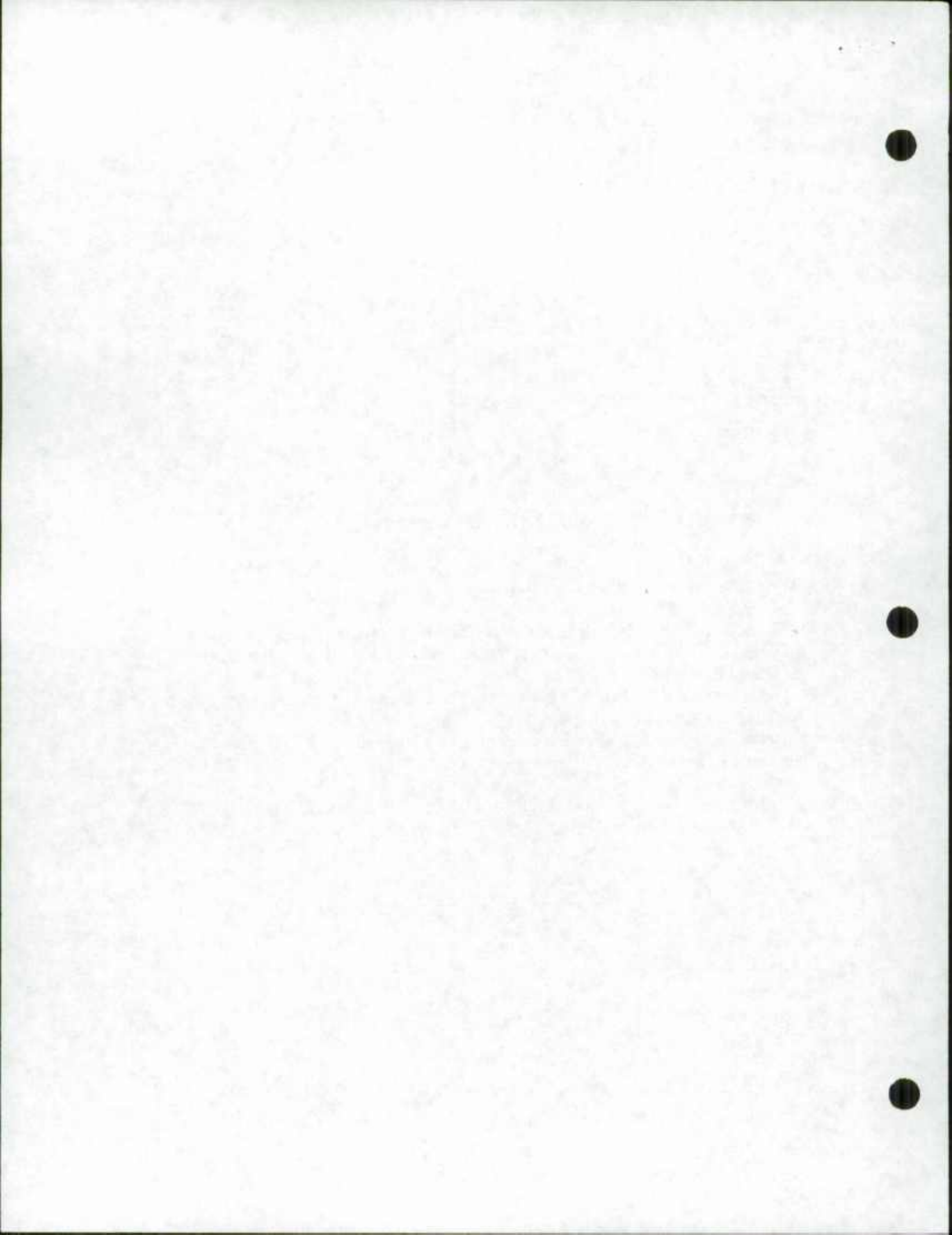
1. Defendant, WARREN WHITE is not in the military service of the United States;
2. Defendant WARREN WHITE is not in the military service of any nation allied with the United States;
3. Defendant WARREN WHITE has not been ordered to report for induction under the Selective Training and Service Act; and
4. Defendant WARREN WHITE is not a member of the Enlisted Reserve Corps who has been ordered to report for military service.

I solemnly affirm under the penalties of perjury that the contents of this paper are true to the best of my knowledge, information, and belief.

x Kathy Renee Jennings
Kathy Renee Jennings

x Date: 1-10-08

Exhibit "B"



IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHY RENEE JENNINGS
7852 Willing Court
Pasadena, Maryland 21122

*

Plaintiff,

*

v.

Case No. 02-C-07-126927

*

WARREN WHITE
331 25th Street
Baltimore, Maryland,

*

Defendant.

*

* * * * *

ORDER OF DEFAULT

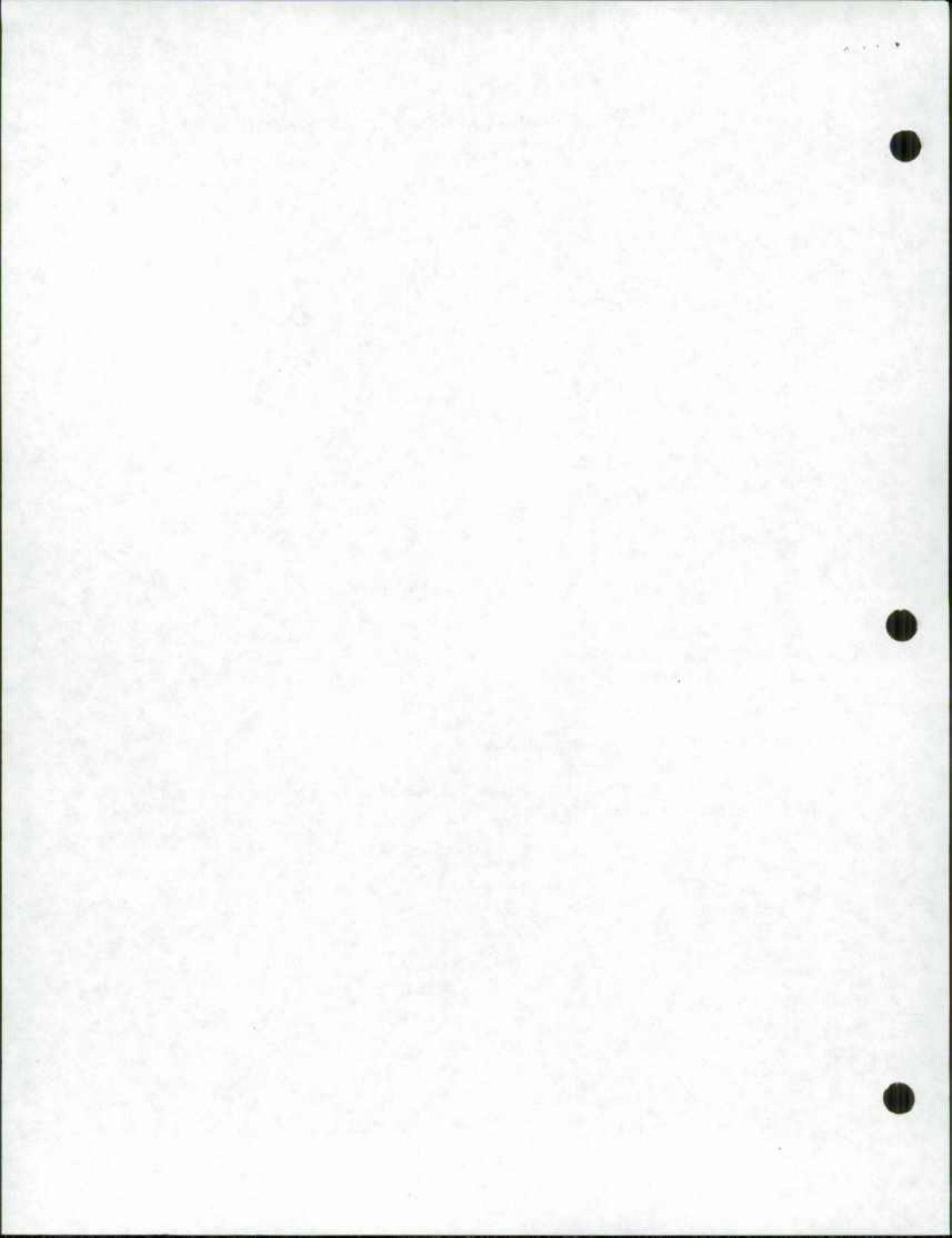
This Court, having considered the Complaint for Absolute Divorce and Motion for Order of Default filed by Plaintiff, Kathy Renee Jennings, and finding that the Defendant, Warren White, has failed to file a responsive pleading to the Complaint in this matter, therefore, it is on this _____ day of _____, 2008,

ORDERED, that this Court enters an Order of Default against Warren White, and

ORDERED, that testimony to support the allegations of the Complaint be taken before a Standing Examiner/Master of this Court.

JUDGE
Circuit Court for Anne Arundel County

Date



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

January 14, 2008

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

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

Dear Mr. Downs:

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

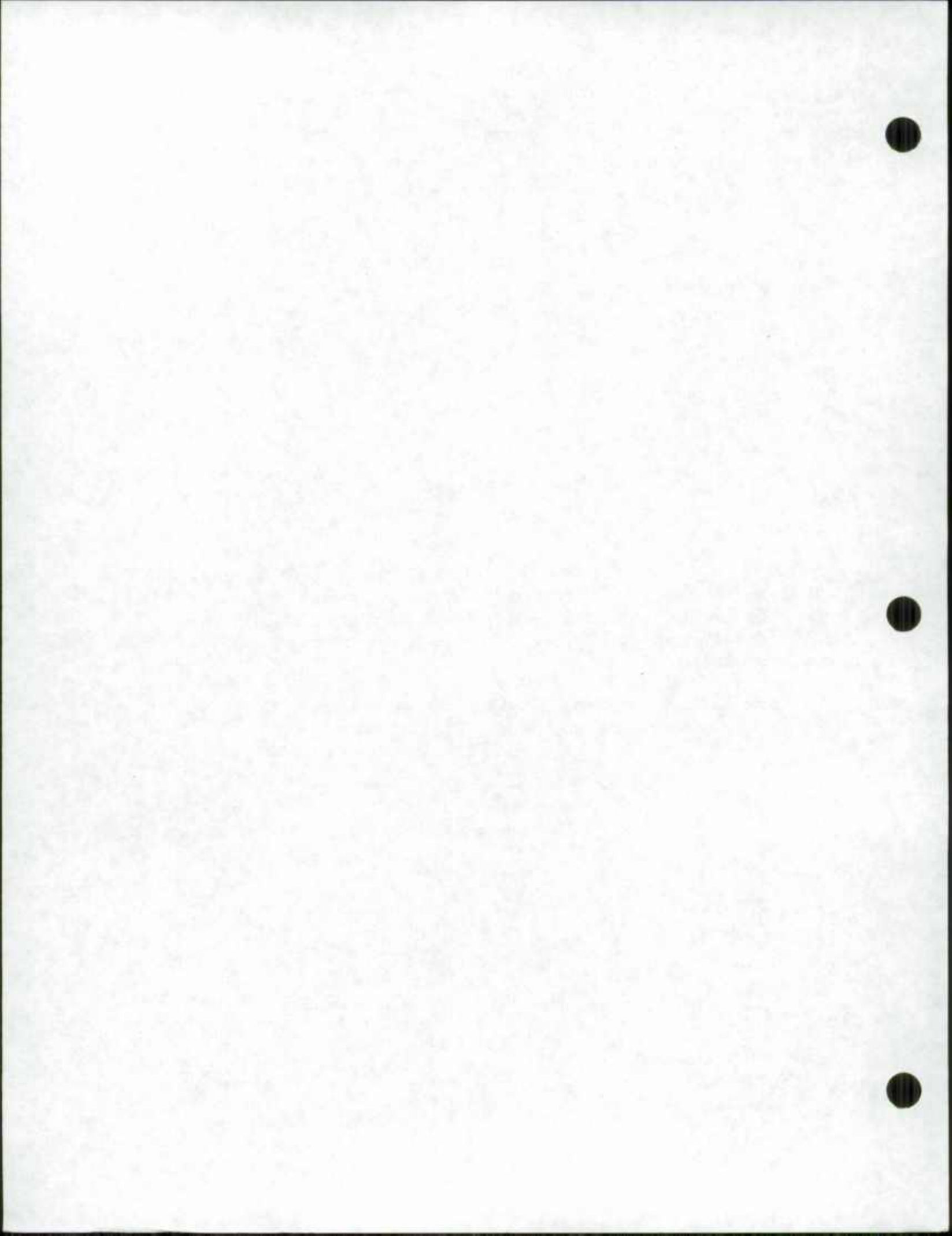
Thank you for your correspondence. If your client wishes to remove the structure and restore the site, please contact me before the January 29, 2008 hearing.

Sincerely,

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

Marianne E. Dise
Principal Counsel

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



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

January 10, 2008

Timothy R. Henderson, Esquire
Rich and Henderson, P.C.
51 Franklin Street Suite 300
P.O. Box 589
Annapolis, Maryland 21404-0589

Re: Chesapeake Cove – Cecil County, Maryland

Dear Mr. Henderson:

This letter acknowledges receipt of your correspondence dated January 7, 2008. Your letter purports "to lodge a formal objection" to a letter from staff of the Critical Area Commission to the Cecil County Department of Planning and Zoning.

While I note your objection, I also want to inform you that it is the intent of the Commission staff, and of the Attorney General's Office, to continue to work cooperatively with Cecil County on this matter, as we work with the County cooperatively on many other matters regarding the Critical Area Program.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Copy to: Anthony DiGiacomo, Cecil County Planning & Zoning
Eric Sennstrom, Cecil County Planning & Zoning
Margaret McHale, Chair, Critical Area Commission
Ren Serey
Kate Schmidt

PUBLIC LAWYERS LEGAL SERVICES PROGRAM

1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466

Reply to: Marianne E. Dise

January 11, 2008

Mr. Robert P. Duckworth, Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Re: *Kathy Renee Jennings v. Warren White*, Case No.02-C-07-126927

Dear Mr. Duckworth:

Enclosed please find for filing a Motion for Order of Default and Request for Hearing in the above-referenced case. My client has complied with the statutory requirements for representation by Maryland Volunteer Lawyers Service, and my client is entitled to a waiver of filing fees and court costs.

Please date-stamp and return to me in the enclosed self-addressed envelope a copy of the enclosed pleading.

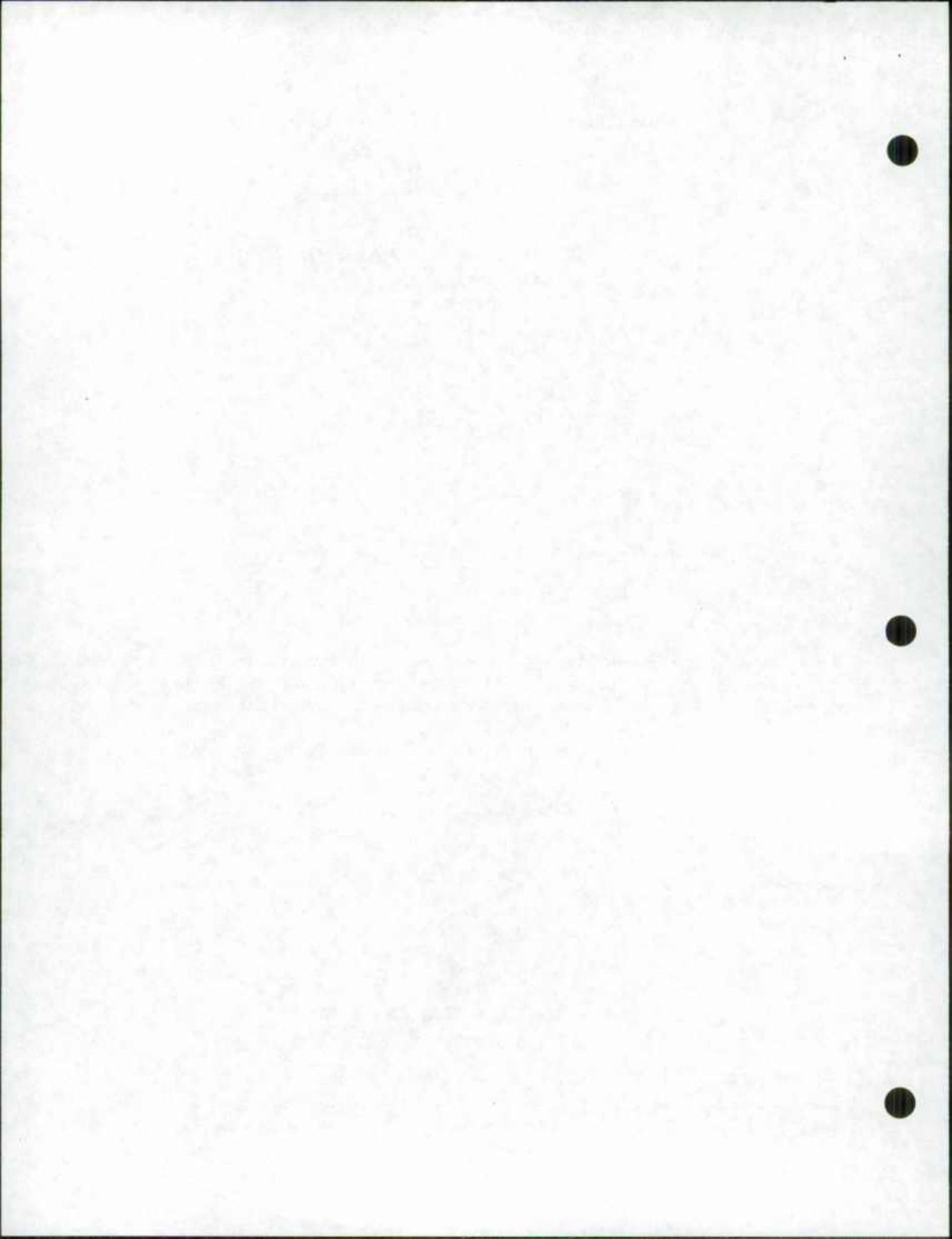
Please contact me if additional information is required. Thank you for your assistance.

Very truly yours,



Marianne E. Dise
Attorney for Plaintiff

✓ Enclosures
cc: Kathy Jennings



IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHY RENEE JENNINGS
7852 Willing Court
Pasadena, Maryland 21122

*

Plaintiff,

*

v.

Case No. 02-C-07-126927

*

WARREN WHITE
331 25th Street
Baltimore, Maryland,

*

Defendant.

*

* * * * *

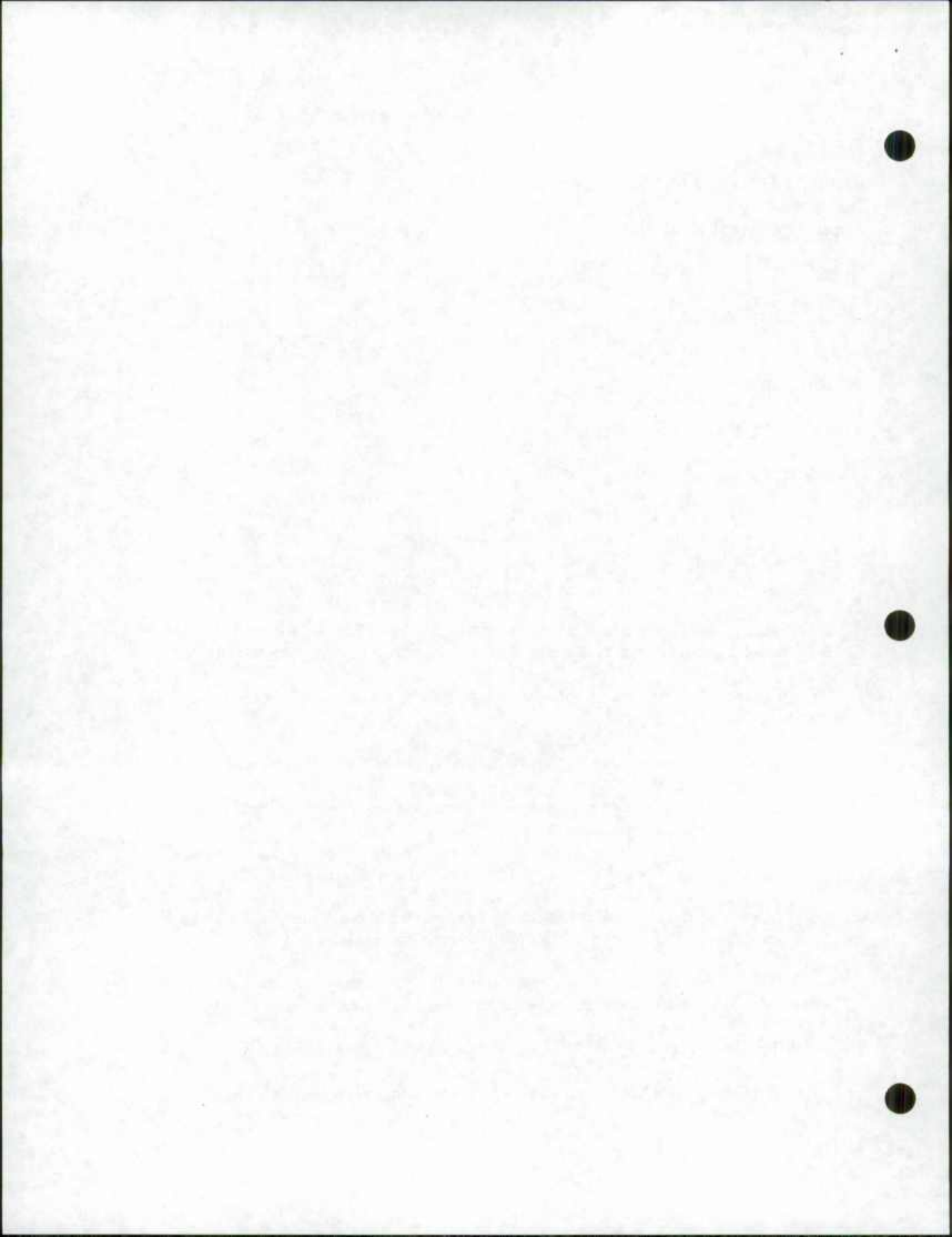
MOTION FOR ORDER OF DEFAULT

Plaintiff, Kathy Renee Jennings, by her attorney, Marianne E. Dise, files this Motion for Order of Default against Defendant Warren White, and in support thereof states the following:

1. Plaintiff filed a Complaint for Absolute Divorce in this Court, as captioned above, on November 5, 2007.
2. This Court issued a Summons to Defendant Warren White on November 7, 2007.
3. Defendant was served with the Summons and Complaint on November 21, 2007. Affidavit of Service attached as Exhibit A.
4. The Affidavit of Service was filed with this Court on November 28, 2007.
5. More than thirty (30) days has elapsed since service of the Summons and Complaint on the Defendant. The Defendant has failed to file a responsive pleading.
6. The Defendant is not in the military service, as evidenced by the Affidavit attached as Exhibit B. The last known address of the Defendant is 331 25th Street, Baltimore, Maryland.

WHEREFORE, Plaintiff, Kathy Renee Jennings, respectfully prays that:

- A. This Honorable Court enter an Order of Default against Defendant Warren White;



and

B. This Honorable Court enter an Order requiring the taking of testimony on the matters alleged in the Complaint; and

C. That Plaintiff be awarded such other and further relief as the nature of her cause may require.

Marianne E. Dise

Marianne E. Dise, Esquire

Pro Bono via

Md. Volunteer Lawyers Service

1804 West Street Suite 100

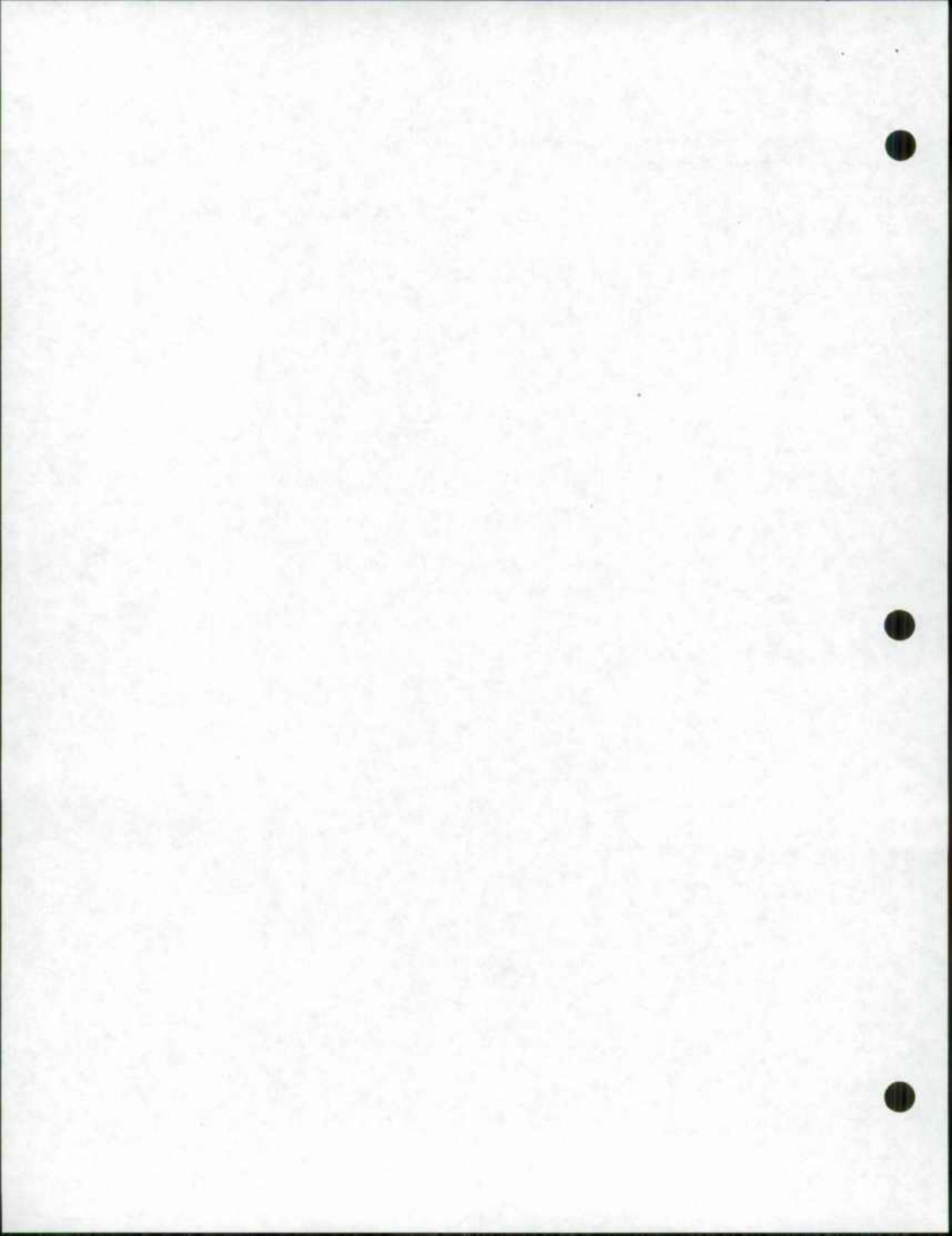
Annapolis, Maryland 21401

(410) 260-3466 (phone)

(410) 974-5338 (fax)

Attorney for Plaintiff

Dated: January 11th, 2008



AFFIDAVIT OF SERVICE

State of Maryland

County of Anne Arundel

Circuit Court

Case Number: 02-C-07-126927 DA

Plaintiff:
KATHY RENEE JENNINGS

vs.

Defendant:
WARREN WHITE

For:
PUBLIC LAWYERS LEGAL SERVICES PROGRAM
1804 West Street
Suite 100
Annapolis, MD 21401

Received by PRIORITY PROCESS to be served on **WARREN WHITE, 331 25TH STREET, BALTIMORE, MD.**

I, Sharon Alleyne, being duly sworn, depose and say that on the **21st day of November, 2007** at **9:25 am**, I:

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **A SUMMONS AND COMPLAINT, SHERIFF'S RETURN FORM** with the date and hour of service endorsed thereon by me, to: **WARREN WHITE** at the address of: **331 25TH STREET, BALTIMORE, MD**, and informed said person of the contents therein, in compliance with state statutes.

Description of Person Served: Age: 40s, Sex: M, Race/Skin Color: Black, Height: 5'9", Weight: 175, Hair: Black, Glasses: N

Under penalty of perjury, I certify that the above made statements are true. I am over the age of 18 and have no interest in the above action.



ERIN GODAIRE
Notary Public, State of Maryland
County of Montgomery
Commission Expires January 1, 2010

Sharon Alleyne
Process Server

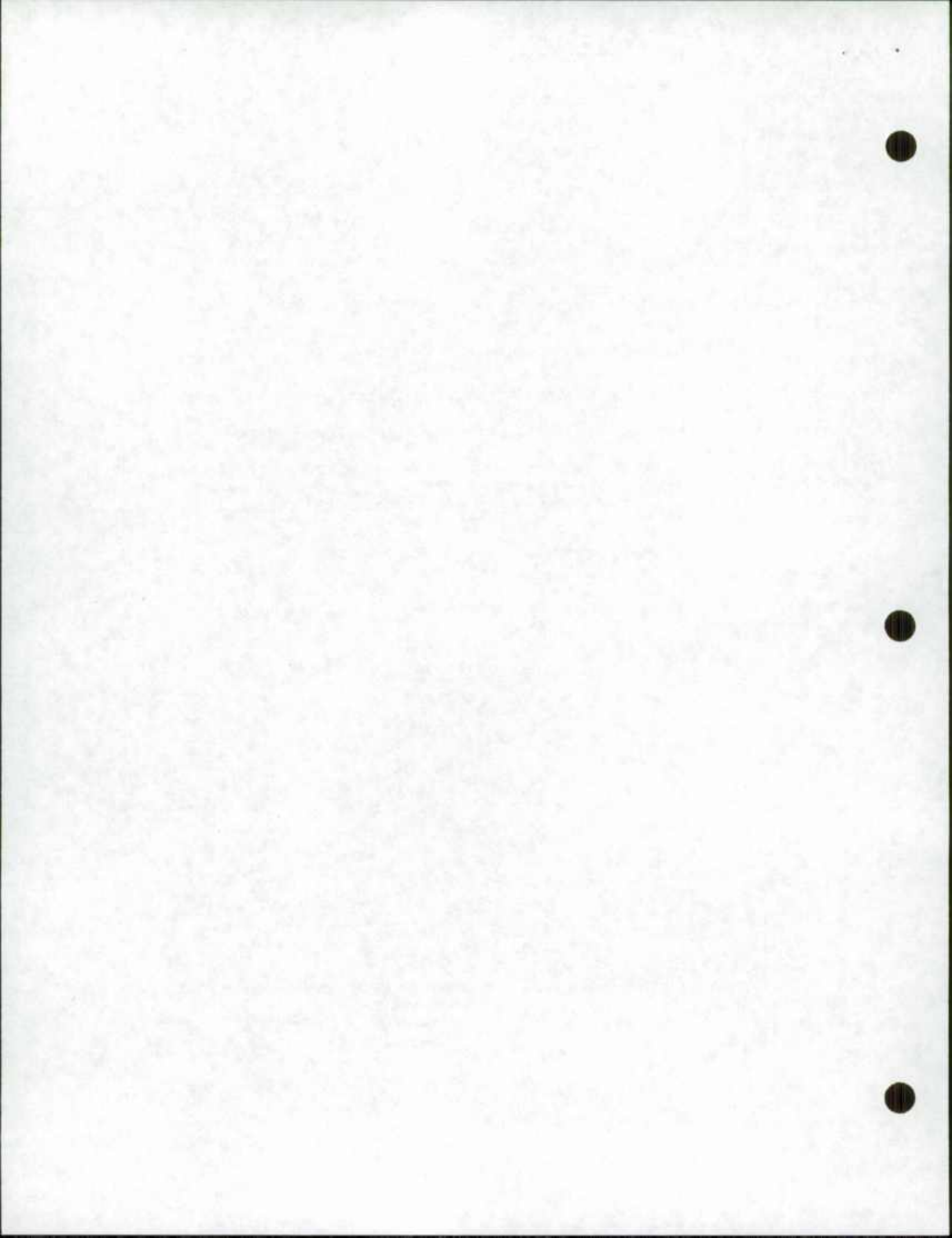
Subscribed and sworn to before me on the 26th day of November, 2007 by the affiant who is personally known to me.

Notary Public

PRIORITY PROCESS
P.O. Box 4189
Rockville, MD 20849-4189
(800) 420-8080

Our Job Serial Number: 2007019356
Ref: MVLS

Exhibit "A"



CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

Robert P. Duckworth
Clerk of the Circuit Court

7 Charles Circle, R. V.
Post Office Box 740

Annapolis, MD 21404-0071, Maryland
(410) 222-1420 TTY for Deaf: (410) 222-1429

Civil (410) 222-1431 Case No. _____
Case: _____

WRIT OF SUMMONS

Jennings vs Warren White

Case Number: 02-C-07-126927 DA

Case Holder ID: C07126927V01

CIVIL

Party fee: _____ By: _____
Kathy Renee Jennings vs Warren White

Served: STATE OF MARYLAND, ANNE ARUNDEL COUNTY, TO WIT:

Date: _____ To: Warren White

Address (Person):
331 25th Street

City: Baltimore, MD

This summons is effective for service only if you are hereby summoned to file a written response by pleading or
Promotion, within 30 days after service of this summons upon you,
in this Court, to the attached Complaint filed by:
Please state the reasons.

Return of Kathy Renee Jennings process shall be in accordance with Rule 2-126.

If this summons is served by private process, the

WITNESS the Honorable Chief Judge of the Fifth Judicial Circuit of Maryland.

Date Issued: 11/07/07

Robert P. Duckworth
Robert P. Duckworth
Clerk of the Circuit Court, per _____ is



To the person summoned:

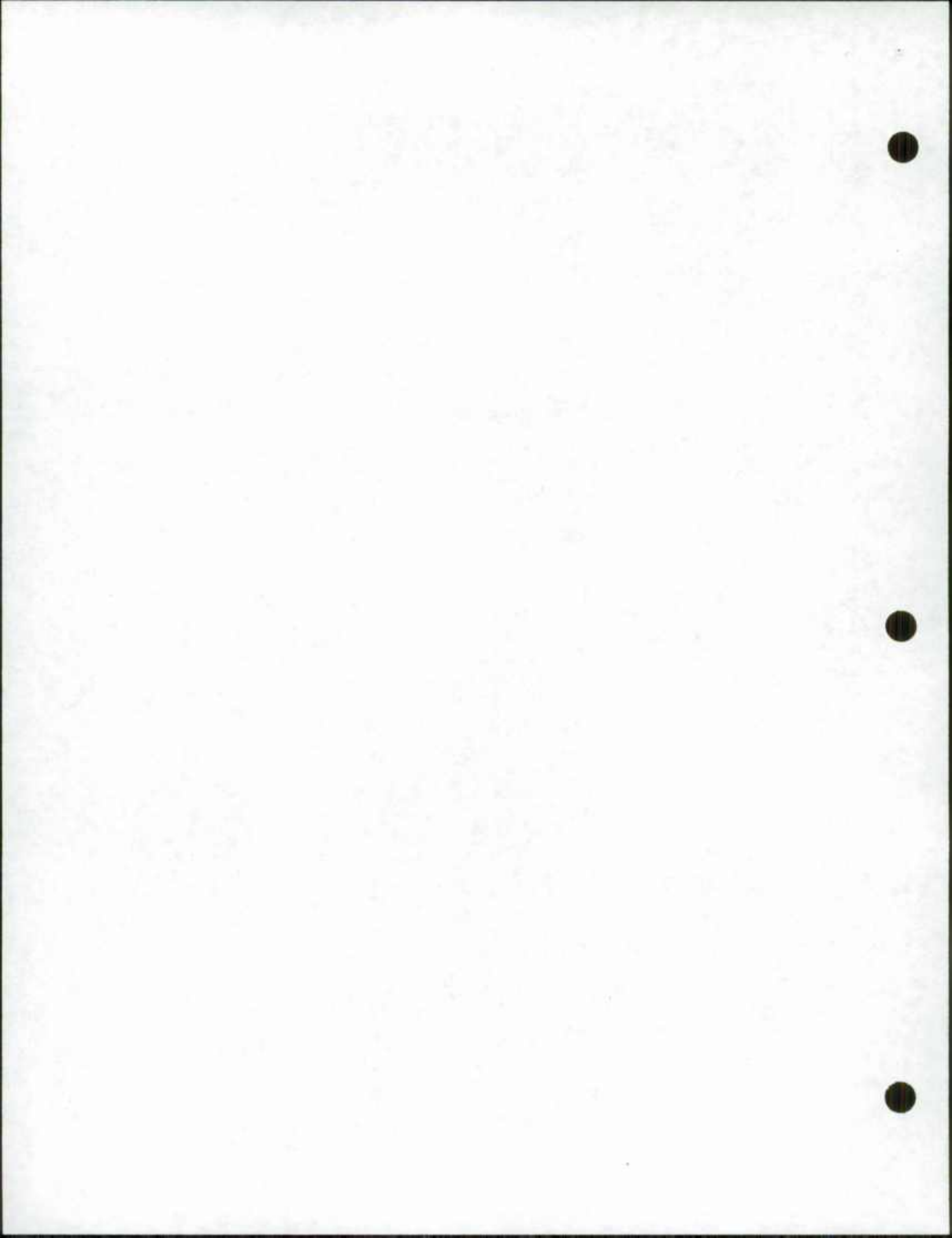
FAILURE TO FILE A RESPONSE WITHIN THE TIME ALLOWED MAY RESULT IN A JUDGMENT BY DEFAULT TO THE GRANTING OF THE RELIEF SOUGHT AGAINST YOU.

Personal attendance in court on the day named is NOT required.

TRUE COPY,

TEST: Robert P. Duckworth, Clerk

By: _____ Deputy



IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHY RENEE JENNINGS *

7852 Willing Court
Pasadena, Maryland 21122

Plaintiff, *

v.

Case No. 02-C-07-126927

WARREN WHITE *

331 25th Street
Baltimore, Maryland, *

Defendant.

NON-MILITARY AFFIDAVIT

I, KATHY RENEE JENNINGS, being over the age of 18 years and competent to testify to the matters set forth in this Affidavit, hereby affirm that:

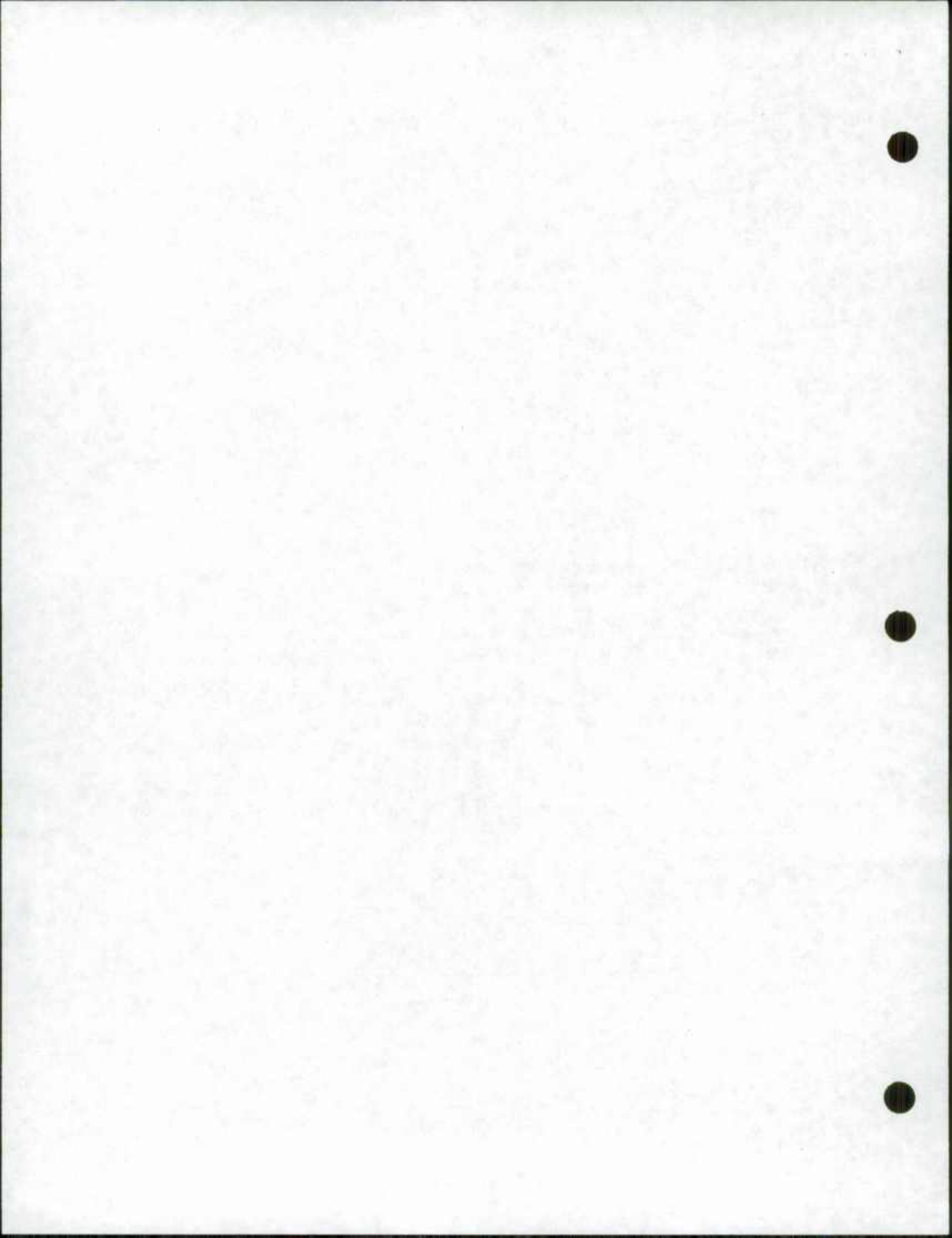
1. Defendant, WARREN WHITE is not in the military service of the United States;
2. Defendant WARREN WHITE is not in the military service of any nation allied with the United States;
3. Defendant WARREN WHITE has not been ordered to report for induction under the Selective Training and Service Act; and
4. Defendant WARREN WHITE is not a member of the Enlisted Reserve Corps who has been ordered to report for military service.

I solemnly affirm under the penalties of perjury that the contents of this paper are true to the best of my knowledge, information, and belief.

x Kathy
Kathy Renee Jennings

x Date: 1-10-08

Exhibit "B"



IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

KATHY RENEE JENNINGS *

7852 Willing Court
Pasadena, Maryland 21122

Plaintiff, *

v.

Case No. 02-C-07-126927

WARREN WHITE *

331 25th Street
Baltimore, Maryland, *

Defendant. *

* * * * *

ORDER OF DEFAULT

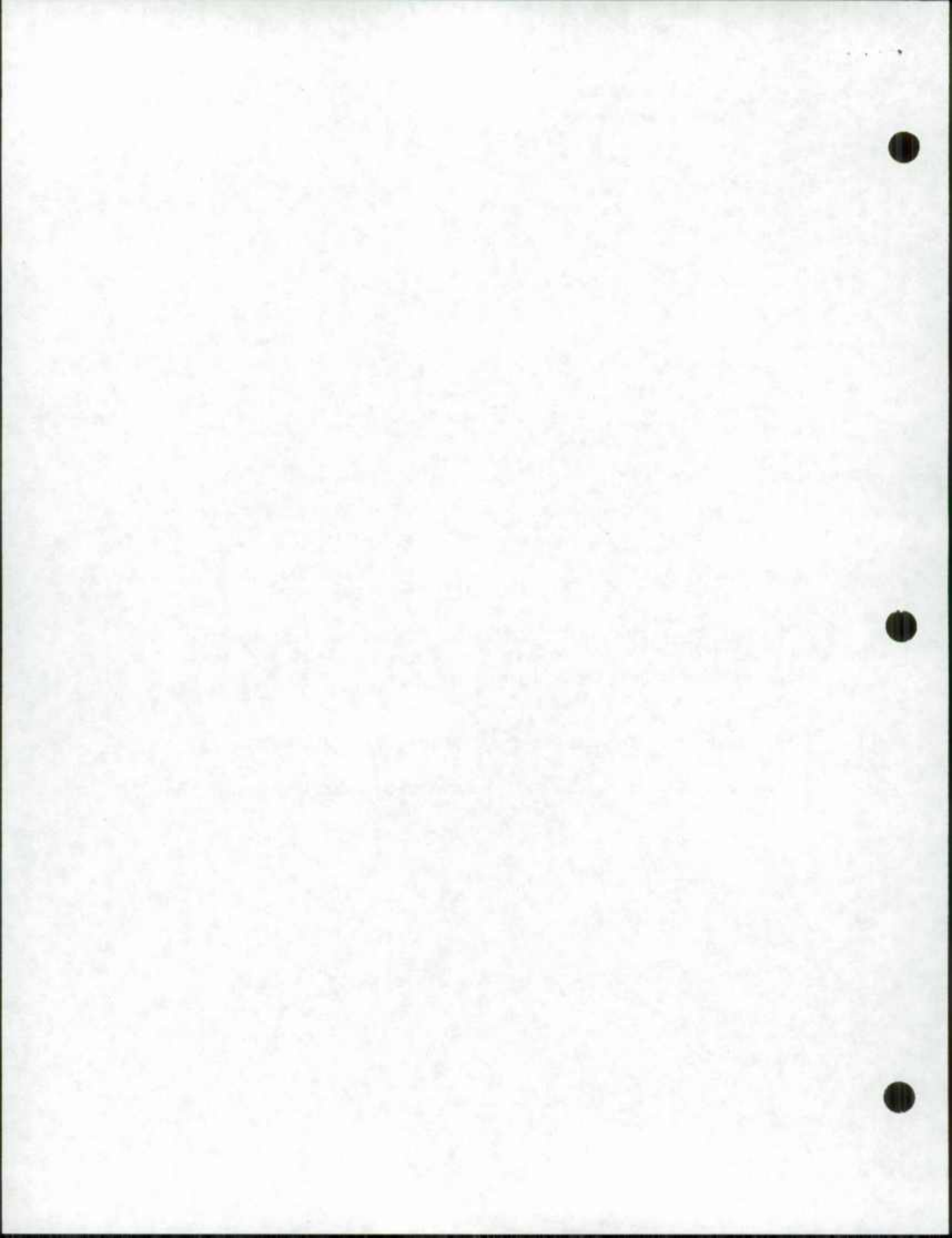
This Court, having considered the Complaint for Absolute Divorce and Motion for Order of Default filed by Plaintiff, Kathy Renee Jennings, and finding that the Defendant, Warren White, has failed to file a responsive pleading to the Complaint in this matter, therefore, it is on this _____ day of _____, 2008,

ORDERED, that this Court enters an Order of Default against Warren White, and

ORDERED, that testimony to support the allegations of the Complaint be taken before a Standing Examiner/Master of this Court.

JUDGE
Circuit Court for Anne Arundel County

Date



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

January 14, 2008

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

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

Dear Mr. Downs:

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

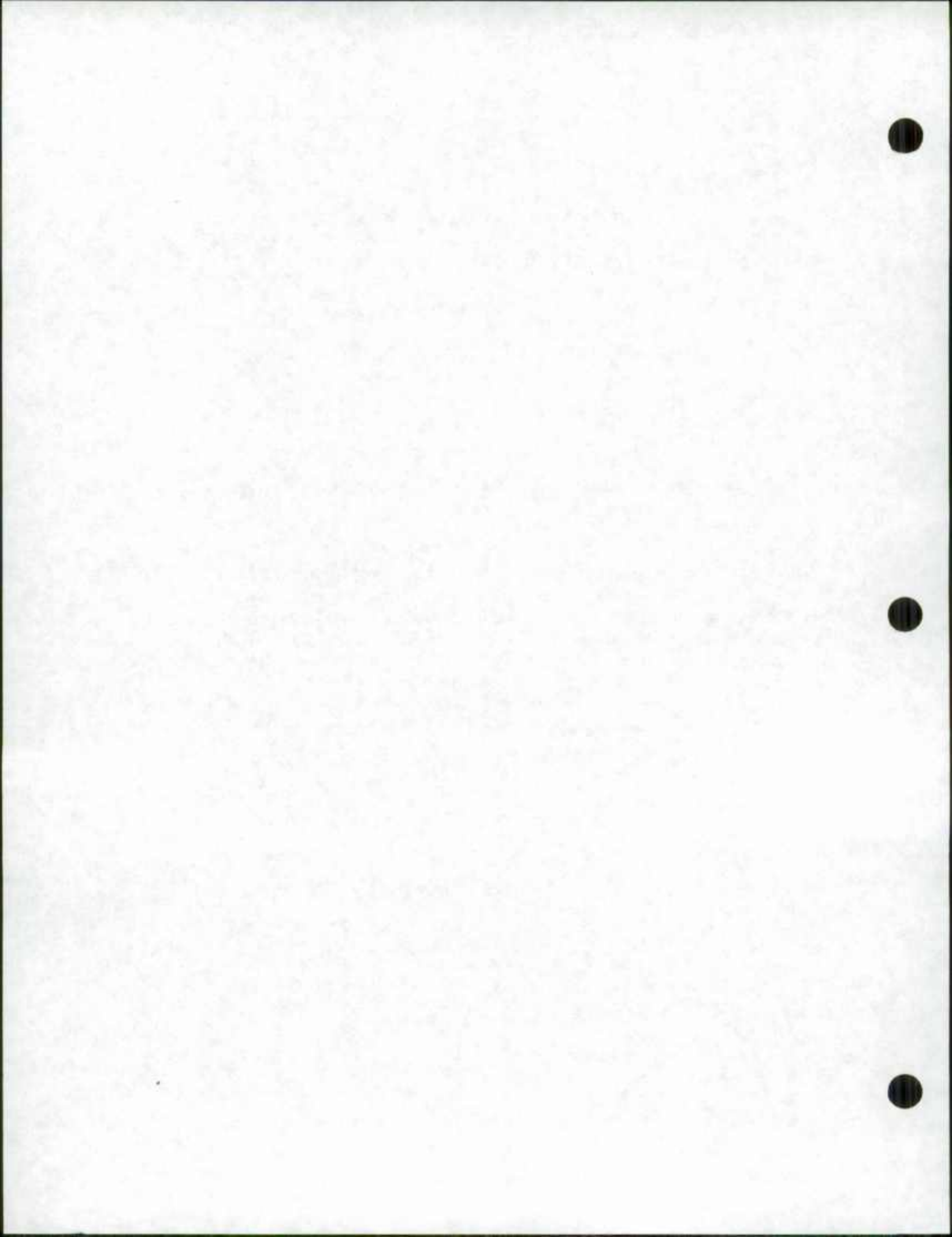
Thank you for your correspondence. If your client wishes to remove the structure and restore the site, please contact me before the January 29, 2008 hearing.

Sincerely,

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

Marianne E. Dise
Principal Counsel

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



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

January 17, 2008

Mark F. Gabler, Esquire
Rich and Henderson, P.C.
36 South Washington Street
Easton, Maryland 21601

RE: Subpoena for Dr. Nick Kelly - Appeal of Theodore Passyn

Dear Mark:

This letter acknowledges receipt of your correspondence dated January 15, 2008, and the accompanying subpoena for Dr. Nick Kelly. As we discussed, Dr. Kelly will be unavailable on February 11, 2008, due to scheduled surgery. At this time, I renew my offer to provide to you a Certification of Custodian under Code, Courts & Jud. Proc. §10-204, for the two letters written by Dr. Kelly to Talbot County concerning this matter. I am confident that the Talbot County Board of Appeals would accept the letters, with the accompanying certificate, as admissible in the administrative hearing, thus sparing Dr. Kelly from a trip to Easton to testify that he wrote the letters.

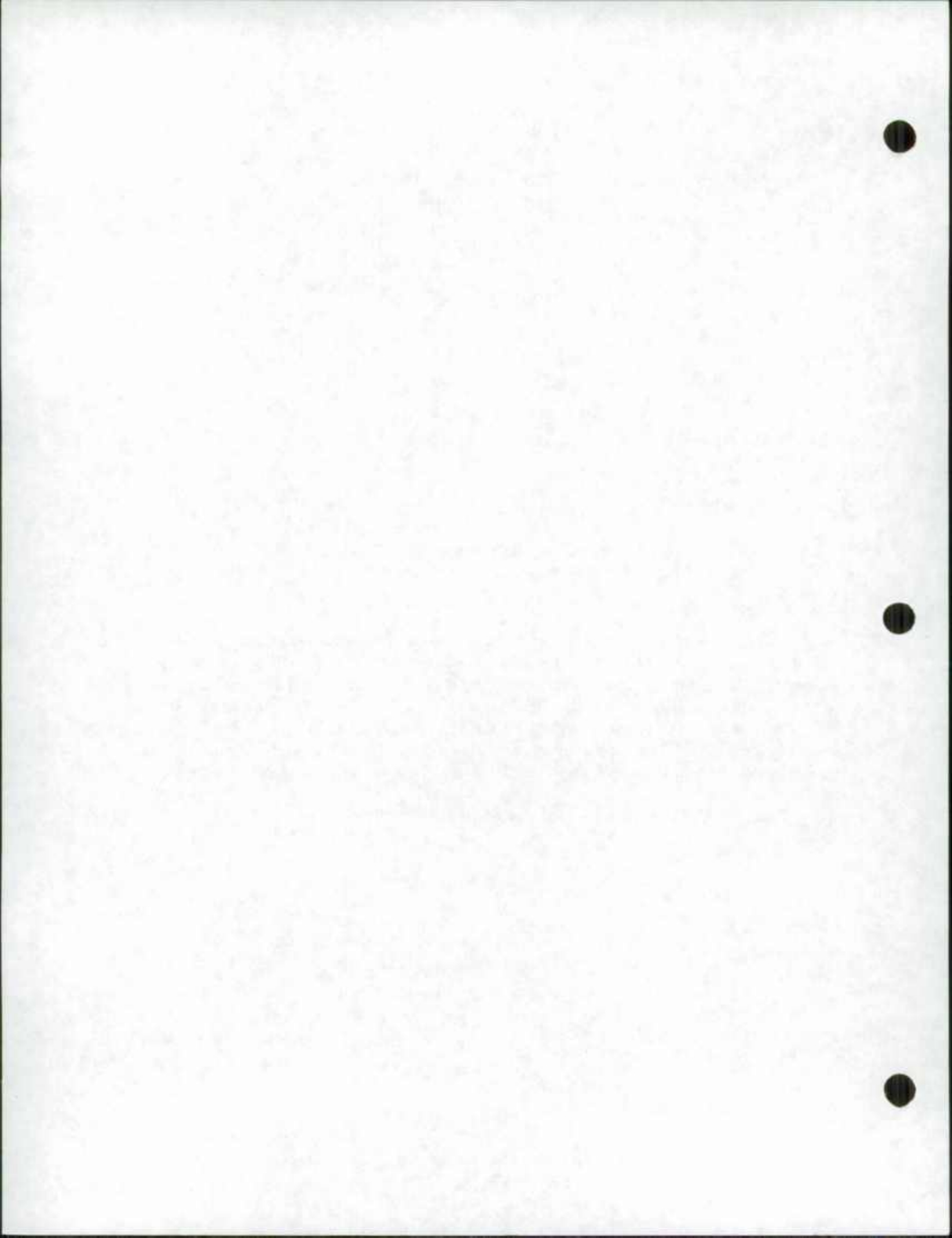
Please let me know if you will accept a Certification of Custodian.

Sincerely,

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

Marianne E. Dise
Principal Counsel

cc: Michael L. Pullen, Esquire
Dr. Nick Kelly



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREY
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANLIXO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

February 8, 2008

Mr. Craig O'Donnell
Kent County News
217 High Street
Chestertown, Maryland 21620

RE: Public Information Act Requests: January 9, 2008 and January 18, 2008
Drayton Manor Critical Area Commission Panel Meeting of July 30, 2007
and subsequent memos, emails, records pertaining to July 30 meeting and
Complaint filed by Mr. O'Donnell.

Dear Mr. O'Donnell:

Enclosed please find all records maintained by personnel of the Critical Area Commission, the Attorney General's Office, and Gary Setzer, an employee of the Department of the Environment, pertaining to your Public Information Act requests of January 9, 2008 and January 18, 2008. No additional information exists in any form. In particular, there exists no additional statement, no tape recording, no additional notes, emails, or memos other than those which I have provided to you.

If you have any questions about this matter, please contact me at the above phone number.

Sincerely,

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

Marianne E. Dise
Principal Counsel

cc: (w/o encl.) Hon. Margaret McHale, Chair
Gene Deems, DNR

1804 West Street, Suite 100
Annapolis, Maryland 21401

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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mdisc@oag.state.md.us

February 20, 2008

Ms. Kathy P. Smith
Clerk, Circuit Court for Calvert County
175 Main Street
Prince Frederick, Maryland 20678

Re: *Response to Harvey and Patricia Holland Petition for Judicial Review of Decision of Calvert County Board of Appeals, Case No. 07-3461, Civil Action No. 04-C-08-000090*

Dear Ms. Smith:

Please find enclosed for filing, pursuant to Rule 7-204, a Response to Petition for Judicial Review on Behalf of Margaret McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays. I have mailed a copy of the Response to the Calvert County Board of Appeals.

Thank you for your assistance in this matter.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

Enclosure

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

PETITION OF:

HARVEY HOLLAND AND
PATRICIA HOLLAND *
255 Chesapeake Avenue
Prince Frederick, Maryland 20678 *

FOR JUDICIAL REVIEW OF

The Decision of the
CALVERT COUNTY
BOARD OF APPEALS *
150 Main Street
Prince Frederick, Maryland 20678 *

CIVIL ACTION No.
04-C-08-000090

In the Case of:

Harvey and Patricia Holland
Variance to Critical Area Requirements
Case No. 07-3461

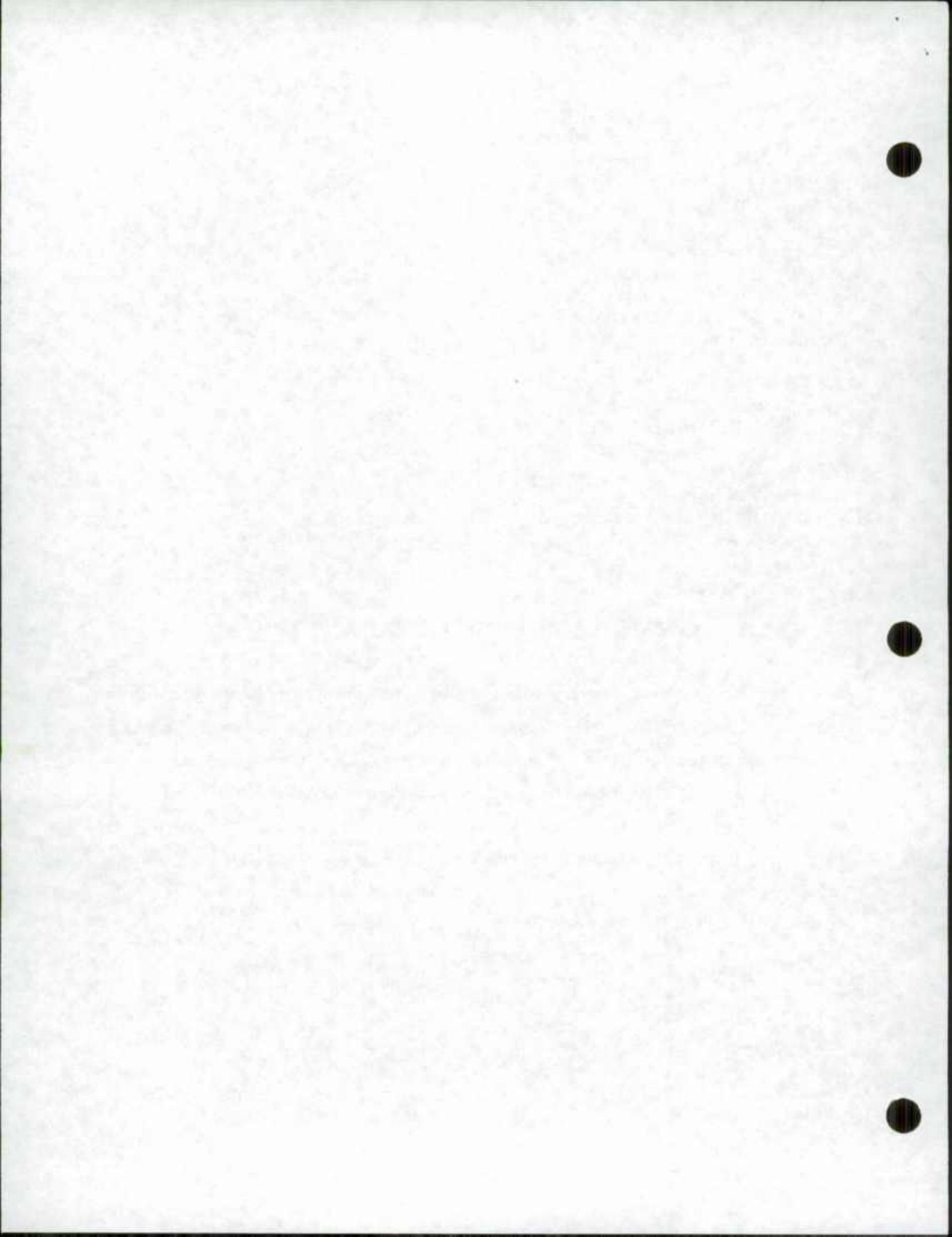
* * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

Margaret G. McHale, Chair of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, ("Chair McHale") by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Marianne E. Dise and Saundra K. Canedo, Assistant Attorneys General, pursuant to Maryland Rule 7-204(a), files this Response to Petition for Judicial Review and states that she was a party to the proceedings before the Board of Appeals, and she intends to participate in this judicial proceeding. In addition, Chair McHale has standing and the right and authority to participate in this matter pursuant to Annotated Code of Maryland, Natural Resources Article, 8-1812(a) and (c).

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland



Marianne E. Dise

Sandra K. Canedo/mcd

Marianne E. Dise

Sandra K. Canedo

Assistant Attorneys General

Critical Area Commission for the

Chesapeake and Atlantic Coastal Bays

1804 West Street Suite 100

Annapolis, Maryland 21401

(410) 260-3466

Attorneys for Margaret G. McHale, Chair,

Critical Area Commission for the

Chesapeake and Atlantic Coastal Bays

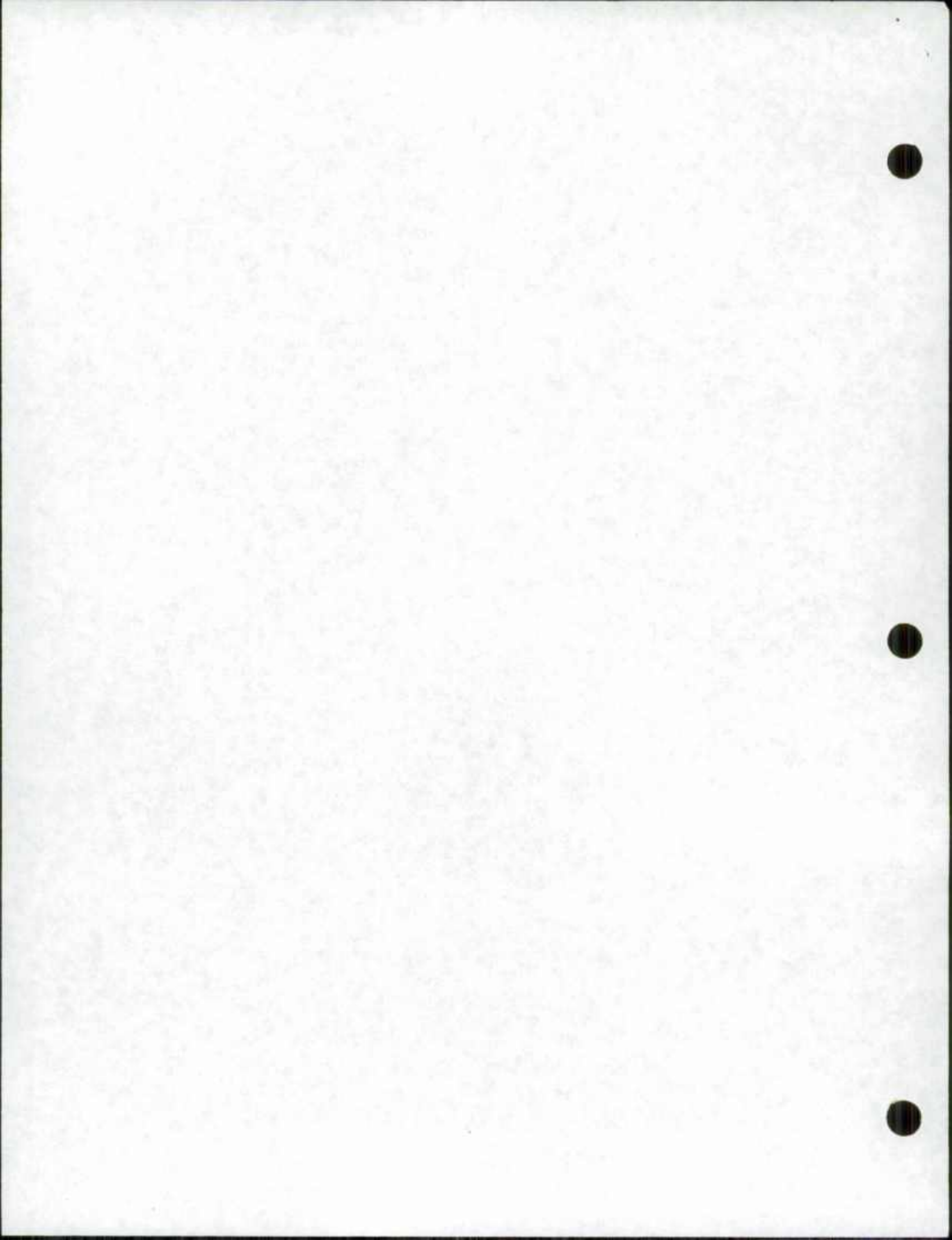
Dated: February 20, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, on this 20th day of February, 2008, I mailed a copy of the Response to Petition to Pamela Helie, Clerk, Calvert County Board of Appeals, 150 Main Street, Prince Frederick, MD 20678.

Marianne E. Dise

Marianne E. Dise



MICHAEL A. DARAS, *et al.*

Appellants

v.

STATE OF MARYLAND
CRITICAL AREA COMMISSION, *et al.*

Appellees

* IN THE
* COURT OF
* SPECIAL APPEALS
* OF MARYLAND
* No. 01629
* September Term, 2007

* * * * *

ORDER

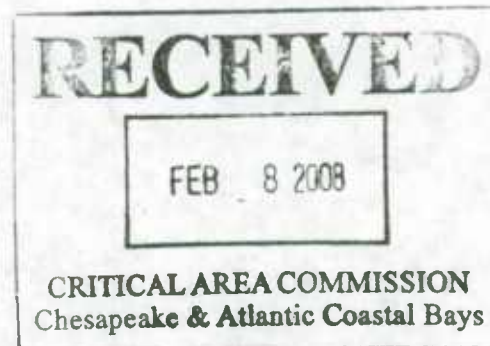
Upon consideration of the Consent Motion to Supplement the Record, it is this 4th day of February, 2008, by the Court of Special Appeals of Maryland,

ORDERED, that the record shall be supplemented by including the Commission Staff Report, April 4, 2007, and the Minutes of the Commission, November 1, 2006, attached as Exhibits A and B to the motion.

(CHIEF JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER)

Copies to:

Anthony F. Christilf, Esq.
Eileen E. Powers, Esq.
Kathleen E. Byrne, Esq.
Marianne E. Dise, Esq.
Sarah M. Iliff, Esq.



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
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FAX NO. (410) 974-5338

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mdise@oag.state.md.us

March 4, 2008

Mrs. H. W. Merritt
12211 Riverview Road
Ft. Washington, Maryland 20744-6014

RE: Your Public Information Act Request to the Office of the Attorney General

Dear Mrs. Merritt:

Enclosed please find all documents from the Attorney General's Office files responsive to your request of February 8, 2008.

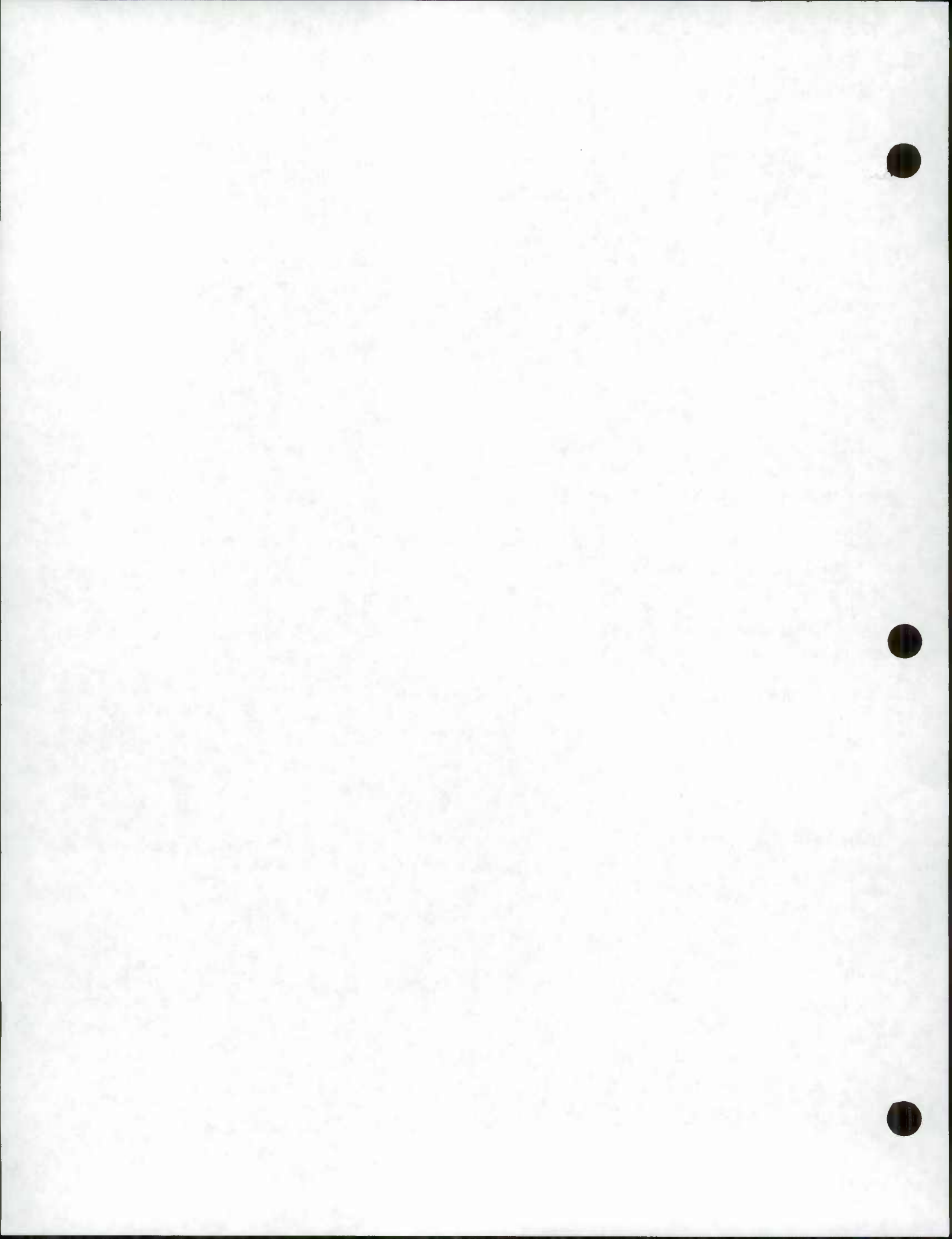
Please contact me if you have questions about any of the documents.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Enclosures



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
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mdise@oag.state.md.us

March 5, 2008

Mr. Craig O'Donnell
Kent County News
217 High Street
Chestertown, Maryland 21620

Re: Public Information Act Request for Panel Meeting Minutes

Dear Mr. O'Donnell:

Enclosed, please find the minutes of the Cooke's Hope panel hearing and meeting pertaining to your Public Information Act request.

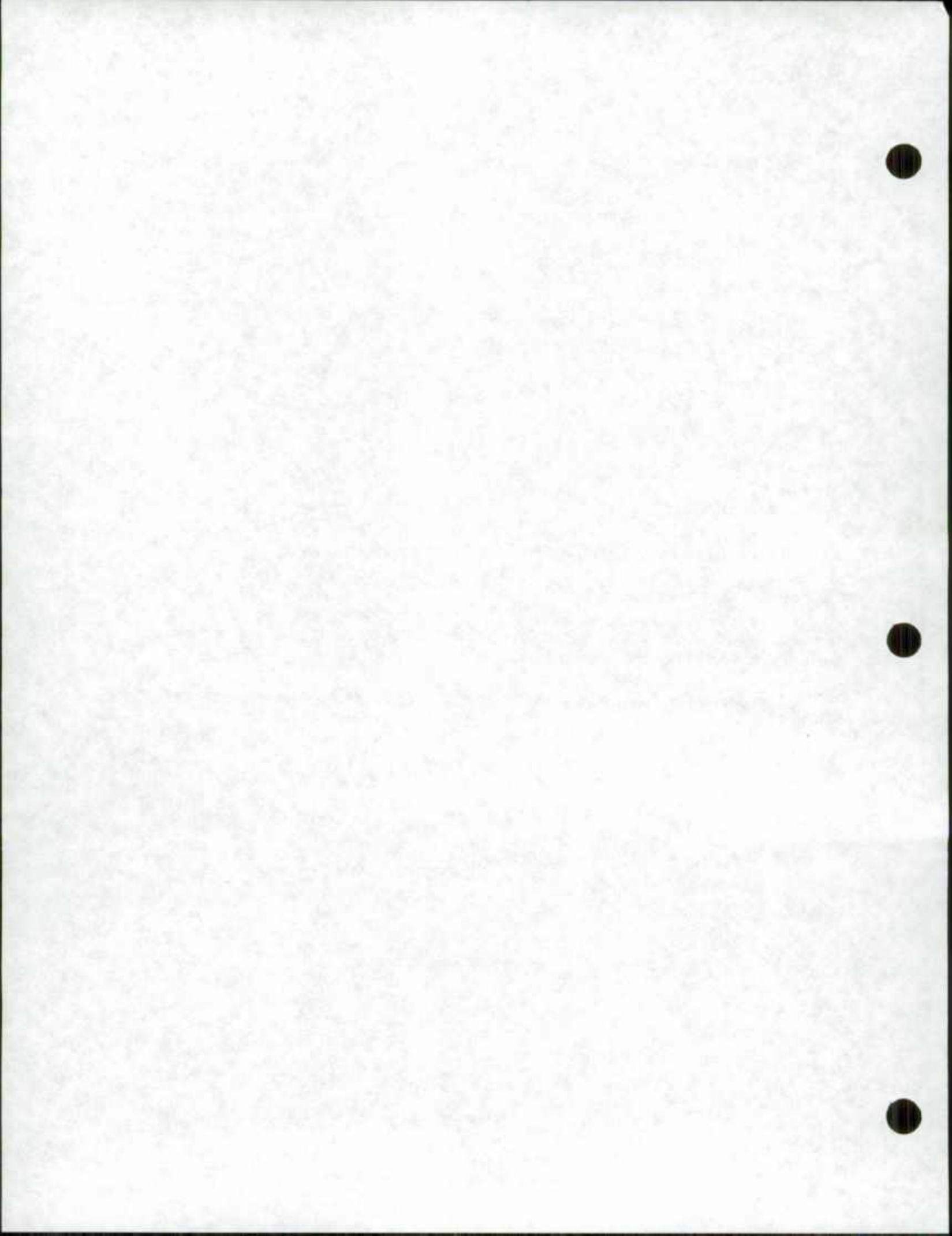
If you have any questions about this matter, please contact me at the above phone number.

Sincerely,

A handwritten signature in cursive script that reads "Marianne E. Dise" followed by a flourish.

Marianne E. Dise
Principal Counsel

Enclosure



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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FAX NO. (410) 974-5338

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mdise@oag.state.md.us

March 25, 2008

Mr. Steve Dodd
Board of Zoning Appeals
Dorchester County Government Offices
501 Court Lane
Cambridge, Maryland 21613

RE: Horsey Family LLC Special Exception - Board of Zoning Appeals Case 2338

Dear Mr. Dodd:

I am writing on behalf of the Chair of the Critical Area Commission ("Commission"). As you know, the Chair has exercised her right to intervene on behalf of the Commission as a party to the above-captioned proceeding. The Attorney General's Office will represent the Commission, and we intend to present testimony from Commission staff and other witnesses.

As a party, the Chair should be provided with all exhibits entered into the record before the Board of Zoning Appeals. While we did receive copies of the exhibits submitted by County staff to the Board at the hearing on March 20, 2008, we were not provided copies of the Applicant's exhibits entered into the record at last Thursday's hearing. Please provide a copy of each exhibit submitted by the Applicant and accepted by the Board.

By copy of a March 25, 2008 letter to you from K. King Burnett, Esquire, I learned that the Board has received 'suggestions' from an attorney (Walter Palmer) regarding the course of the upcoming hearing sessions. Since I was not copied on Mr. Palmer's letter, I do not know what he suggested, and accordingly I express no opinion on this matter. However, since my client is a party to the Board's proceedings, I request that you provide me with a copy of Mr. Palmer's letter.

I would also request that, for the purpose of scheduling the future hearing sessions for this case, you coordinate with my office to ensure that counsel and witnesses are available at the

1804 West Street, Suite 100
Annapolis, Maryland 21401

suggested dates and times. In light of the pace of the hearing last Thursday, it seems reasonable to assume that a minimum of five evenings should be set aside for the taking of testimony. My client would not object if the Board chooses to schedule future hearing sessions in day-long blocks, rather than during the evening.

Please contact Sandra Canedo at (410) 260-8356, or me at (410) 260-3466 with any questions. Many thanks for your kind assistance.

Sincerely,

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

Marianne E. Dise
Principal Counsel

cc: K. King Burnett, Esquire
William W. McAllister, Jr., Esquire
Margaret G. McHale, Chair

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
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mdise@oag.state.md.us

March 25, 2008

Dr. and Mrs. Leon J. Greenbaum, Jr.
3963 Germantown Road
Edgewater, Maryland 21037

RE: Your Request for Information regarding Anne Arundel County variances

Dear Dr. and Mrs. Greenbaum:

I write in response to your recent letter (received on March 4, 2008) to Margaret McHale, Chair of the Critical Area Commission. In your letter, you requested information about variances in Anne Arundel County. Commission staff have researched this matter, and they have informed me that the Commission received notice from Anne Arundel County of 168 applications for variances to the County's Critical Area program during 2007. Because the Commission does not always receive notification from the County of the County's final decision on each variance application, it is not possible for me to provide you with a firm number of applications granted or denied by the County in 2007.

In an effort to respond fully to your request, the staff will retrieve all 168 Anne Arundel County files, and make the files available for your inspection at the Commission's offices. Please contact Kerrie Gallo, Regional Program Chief, at the Commission's offices (410) 260-3482, or me, to advise us as to when you wish to inspect the files.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Dr. & Mrs. L.J. Greenbaum Jr.
3963 Germantown Rd.
Edgewater, MD 21037

Ms Margaret McHale
1804 Weat Street, Suite 100
Annapolis, MD 21401

Dear Ms McHale:

I talked to a staff member in the office of the Critical Areas Commission (CAC) and was referred to you for help. I am a past president of the Chesapeake Environment Protection Association (CEPA) and during our Board meetings we have discussed at length the actions of the CAC. Some of the Board members have attended hearings in which waterfront property owners have requested variances to build "near and or very close to the water". In almost all cases the Appeals Board has agreed with your approvals to build.

These actions have eroded the very intent of the law to protect the rivers, creeks and the Chesapeake Bay from continued erosion and pollution. It almost appears as if the CAC and Appeals Board don't understand the law and its purpose or prefer to side with developers.

During our Board discussions it was suggested that we get a "read-out" of actions in Anne Arundel County during the year 2007. Can your office give me information about how many waterfront requests were made, how many were approved and how many were disapproved. Your help in providing this information would be greatly appreciated.

Respectfully submitted,


Leon J. Greenbaum, Jr.

RECEIVED

MAR - 4 2008

CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

STATE OF MARYLAND
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CRITICAL AREA COMMISSION FOR THE
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FAX NO. (410) 974-5338

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

March 26, 2008

Mr. Hugh W. Wilkerson
1056 Wrighton Road
Lothian, Maryland 20711

Dear Mr. Wilkerson:

Thank you for your letter of March 5, 2008, discussing your concerns about the proliferation of construction projects in the Critical Area. As you may know, Governor O'Malley has proposed a Bill to strengthen the Critical Area law. That bill, (HB 1253) has passed the House of Delegates and is now pending in the Maryland Senate. Among other provisions, the Bill addresses the issue of lot coverage that you discussed in your letter. The Bill also provides for more uniform enforcement measures, so that violations of the law will be addressed promptly.

The text of House Bill 1253 is available on-line at www.maryland.gov. Click on "legislature" and you will see the General Assembly's home page which allows you to search for information on each bill. I hope that this letter is responsive to your inquiry. Please contact me if you want additional information.

Sincerely,

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

Marianne E. Dise
Principal Counsel



March 5, 2008

Ms. Marianne Dise Esq.
Critical Area Commission
1804 West St.
Suite 100
Annapolis, MD 21401

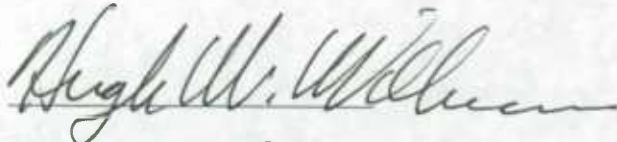
Dear Ms. Dise,

I recently viewed an MPT program dealing with the Bay Pollution from the many houses and impervious areas being constructed in the critical area.

As a retired engineer and surveyor I am familiar with the many small lots which were plotted alongside the Bay before there were any Subdivision Regulations. Most of them are still buildable thru the use of variances etc. as long as Health Department Requirements are satisfied. Its difficult and probably unconstitutional to keep someone from using their property without compensation however it is not unusual to define the density of usage.

I'm wondering if maybe we could pass a law restricting the impervious area constructed to a max of 10% of the lot area and of course, still maintain the current storm water management practices. In this way someone with a 5000 s.f. lot (50' X 100') for example, would be permitted a 500 s.f. house; not large but adequate for viewing and enjoying the ambiance of the Bay while still maintaining a small cottage with the necessary amenities. This would prevent huge mansions from being built on a relatively small lots and reduce runoff. All driveways, patios or other heavily used areas should also be constructed of pervious bricks or similar material with an underlayment of 6" or more sand and gravel.

Respectfully yours,



Hugh W. Wilkerson P.E. # 4565
1056 Wrighton Rd.
Lothian, MD 20711
410-741-1434

RECEIVED

MAR 25 2008

CRITICAL AREA COMMISSION
Chesapeake & Atlantic Coastal Bays

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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mdise@oag.state.md.us

April 24, 2008

Mr. Peter G. Robertson
P. O. Box 277
Queenstown, Maryland 21658

Dear Mr. Robertson,

This letter responds to your recent inquiry to the Office of the Attorney General regarding the status of the Critical Area buffer management plan for certain property in the Town of Queenstown. As we discussed on the telephone, your letter was forwarded to me for investigation and response.

After reviewing the matters set forth in your letter, reviewing the agency's file, and discussing the matter with the appropriate staff of the Critical Area Commission, I can state without qualification that the interaction of Commission staff with the property owners is entirely proper. Moreover, Commission staff have assumed direct responsibility for the issues on this property, and the Circuit Rider is no longer involved with this property.

Commission staff are working diligently to assist the property owners in obtaining approval of a Buffer management plan. In fact, the Commission staff went "above and beyond" to do the actual work of preparing a plan for these owners. Preparation of a Buffer management plan is usually performed by private consultants at the property owner's expense. At this time, the owners' counsel is reviewing the Commission staff's proposed plan.

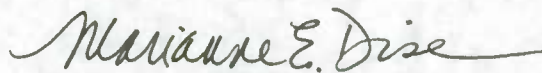
In my view, the difficulty experienced by the property owners stems in large part from the fact that the owners chose not to implement the 2004 Buffer management plan prepared by the owners' consultants. This plan was acceptable to provide a fully functioning, forested Buffer on the property. Since the owners chose not to implement the 2004 Plan, they are required to develop an alternative plan that provides equivalent benefits to the water quality and habitat functions of the Buffer.

1804 West Street, Suite 100
Annapolis, Maryland 21401

As you are no doubt aware, the protection and enhancement of the Buffer are crucial components of the effort to restore the Bay, and, to this end, the General Assembly recently strengthened the Critical Area law. The Office of the Attorney General is charged with enforcing this law, as well as advising and representing the Critical Area Commission. Please be assured that this Office takes these responsibilities very seriously.

Thank you for writing. If you have further questions, please do not hesitate to contact me directly. This letter is not a formal Opinion of the Attorney General.

Sincerely,

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

Marianne E. Dise
Principal Counsel

cc: Margaret G. McHale, Chair, Critical Area Commission
Mary R. Owens
Peggie McKee, Office of Attorney General # 08-1171

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/

April 30, 2008

Michael W. Bozman, P.E.
Maryland Port Administration
Manager of Permits & Special Projects
2310 Broening Highway
Baltimore, MD 21224

RE: Masonville DMCF – Environmental Education Center at Masonville Cove

Dear Mr. Bozman:

At its meeting of April 9, 2008, the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays approved the proposed Environmental Education Center at Masonville Cove with one condition.

The condition reads as follows:

“Prior to commencement of construction, the Maryland Port Administration shall obtain all necessary authorizations from the Maryland Department of the Environment.”

Please forward a copy of necessary approvals from MDE for our files when they are received.

If you have any questions or concerns regarding the Commission’s approval, or if changes are made to the project as approved, please contact me at (410) 260-3477.

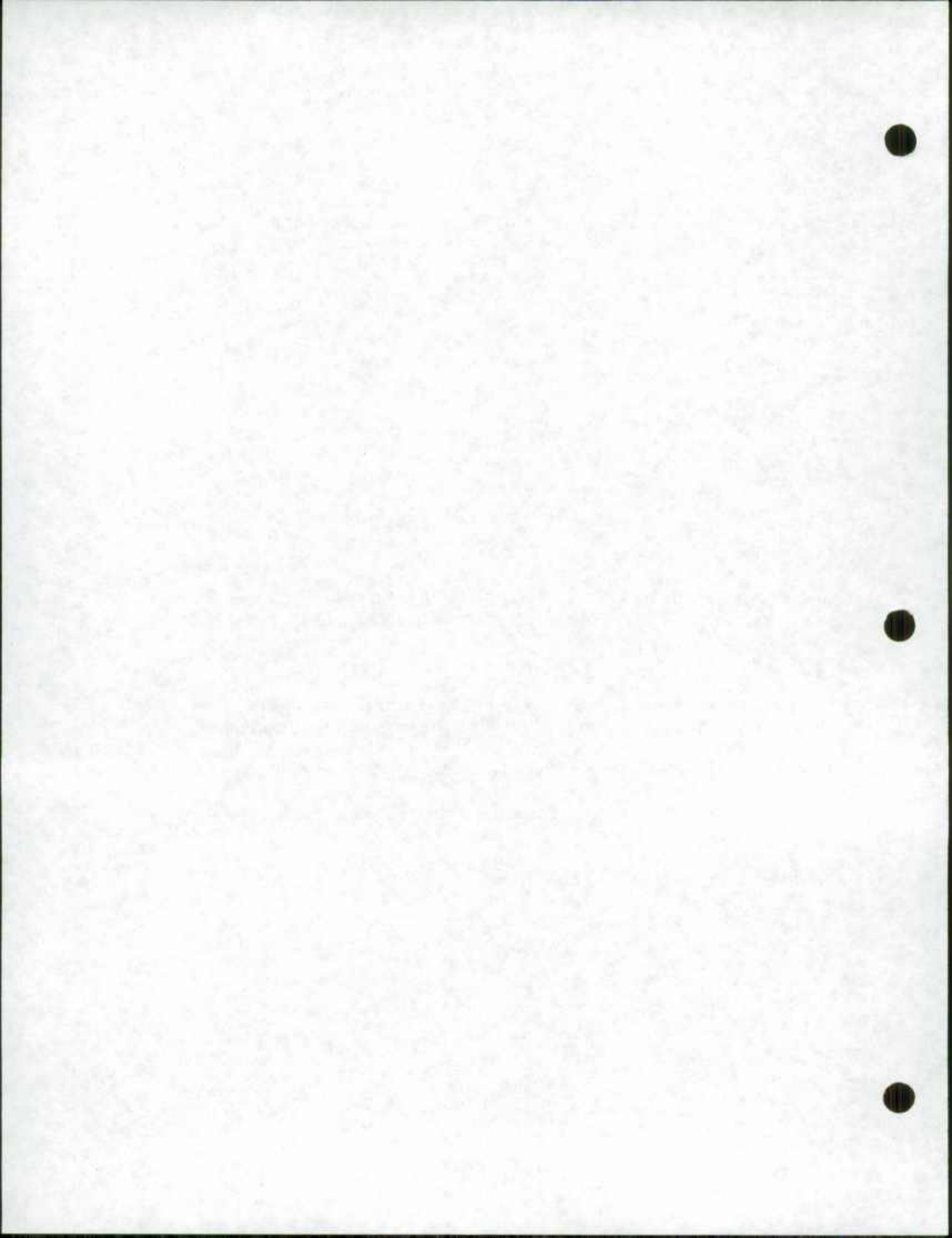
Sincerely,

A handwritten signature in cursive script that reads "LeeAnne Chandler".

LeeAnne Chandler
Science Advisor

cc: DOT16-06





DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREY
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

May 22, 2008

Vicki C. Rogers, Clerk of the District Court
District Court of Maryland for Somerset County
12155 Elm Street, Suite C
Princess Anne, Maryland 21853-1358

RE: State of Maryland v. John Bunting, CITATION: 2Z34076765 MI

Dear Madam Clerk:

Please file in the above-captioned case the enclosed Notice of Entry of Appearance of Douglas F. Gansler, Attorney General of Maryland.

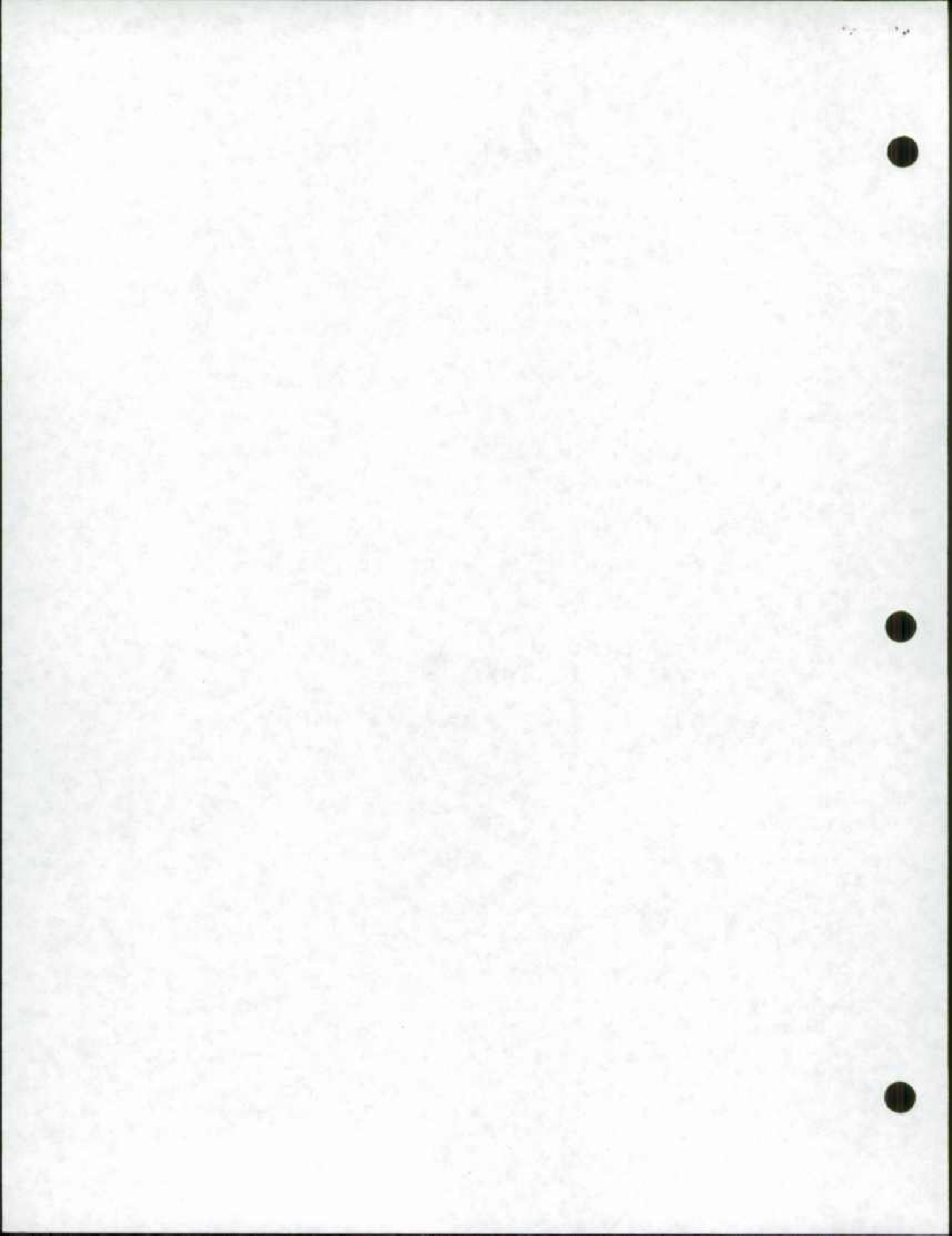
Thank you for your assistance.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

cc: Charles Butler
Raymond Smethurst
William Hall
David Lloyd



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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mdisc@oag.state.md.us

May 22, 2008

Vicki C. Rogers, Clerk of the District Court
District Court of Maryland for Somerset County
12155 Elm Street, Suite C
Princess Anne, Maryland 21853-1358

RE: State of Maryland v. John Bunting, CITATION: 3Z34076766 MI

Dear Madam Clerk:

Please file in the above-captioned case the enclosed Notice of Entry of Appearance of Douglas F. Gansler, Attorney General of Maryland.

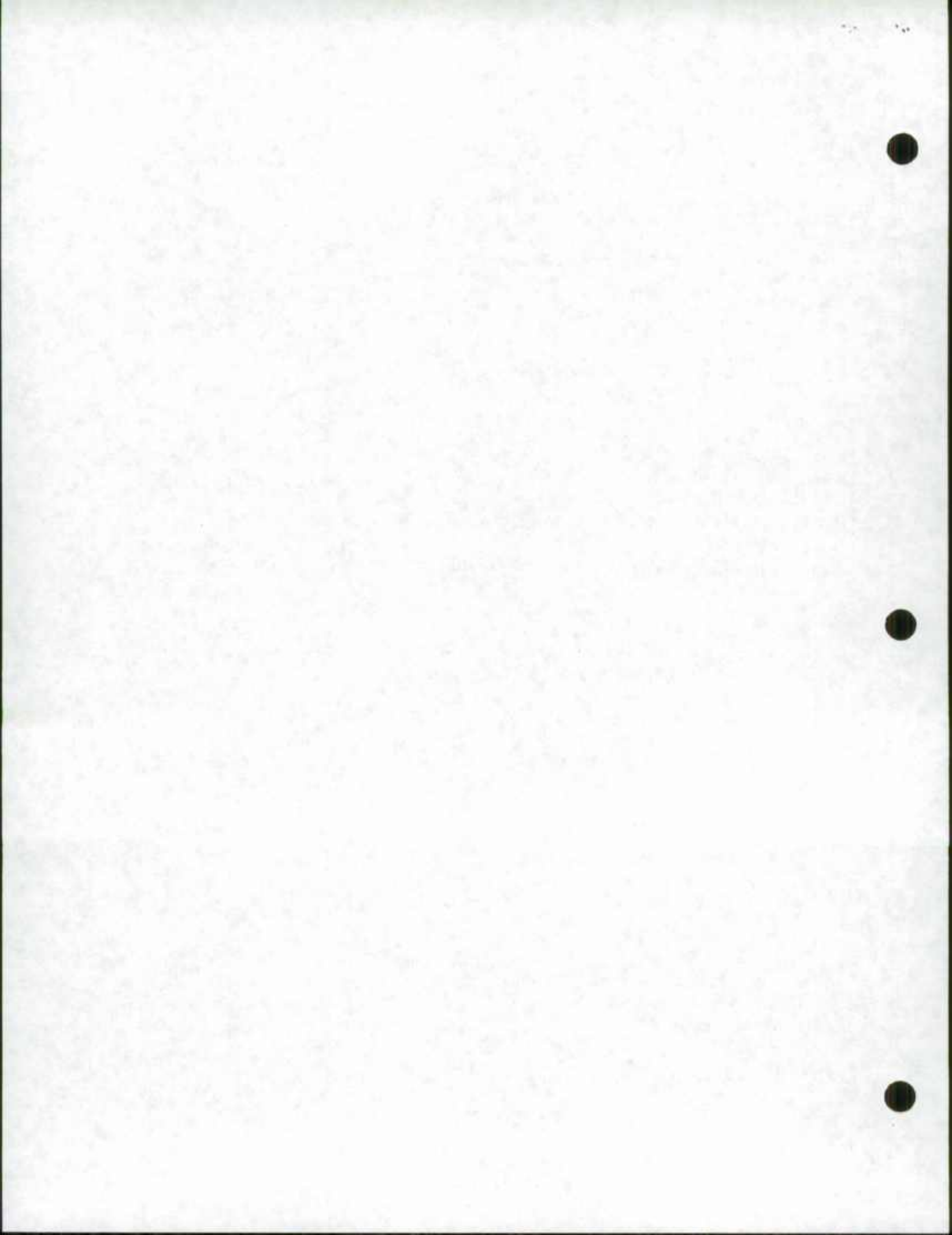
Thank you for your assistance.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

cc: Charles Butler
Raymond Smethurst
William Hall
David Lloyd



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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May 22, 2008

Vicki C. Rogers, Clerk of the District Court
District Court of Maryland for Somerset County
12155 Elm Street, Suite C
Princess Anne, Maryland 21853-1358

RE: State of Maryland v. John Bunting, CITATION: 4Z34076767 MI

Dear Madam Clerk:

Please file in the above-captioned case the enclosed Notice of Entry of Appearance of Douglas F. Gansler, Attorney General of Maryland.

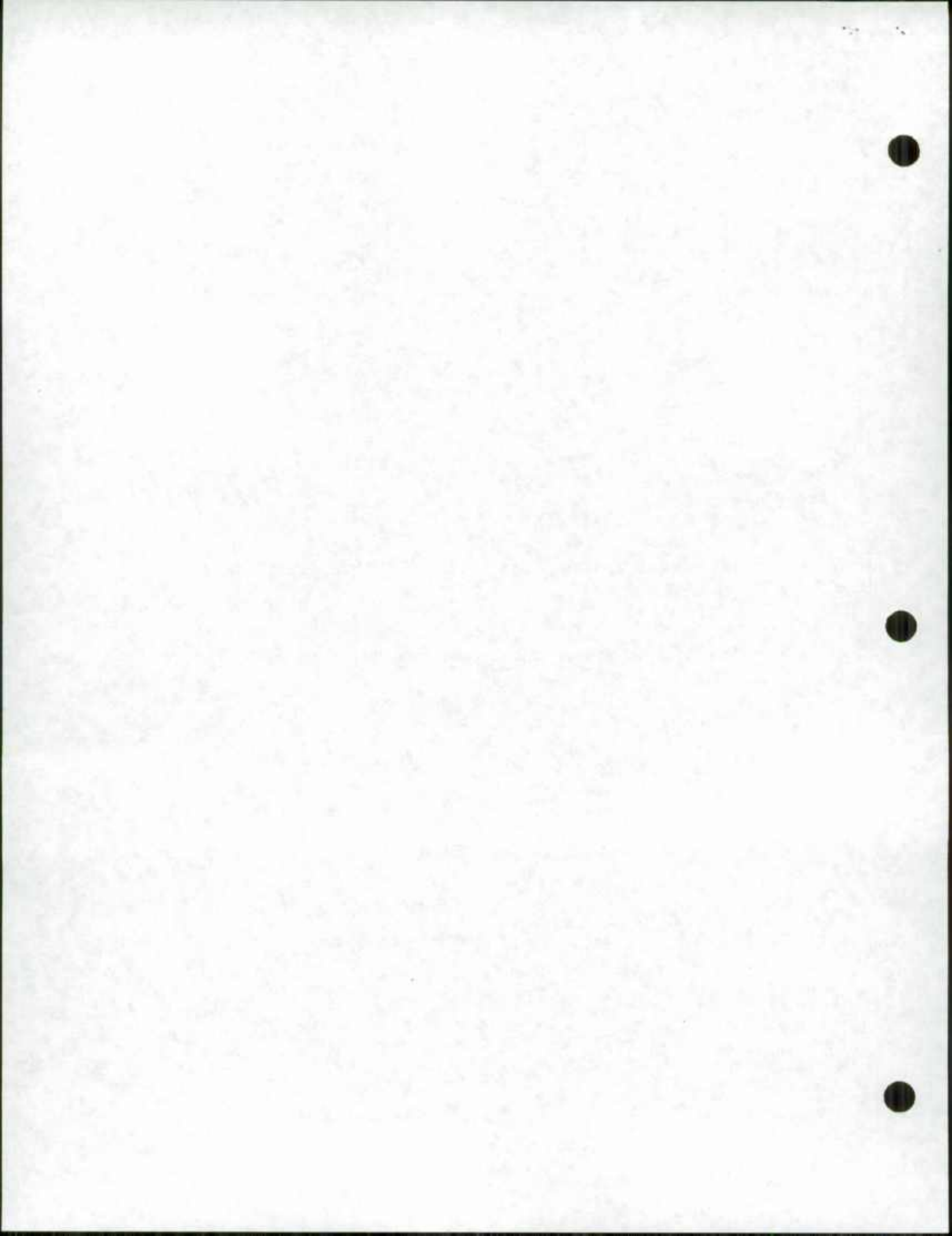
Thank you for your assistance.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

cc: Charles Butler
Raymond Smethurst
William Hall
David Lloyd



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
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Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

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mdisc@oag.state.md.us

May 22, 2008

Vicki C. Rogers, Clerk of the District Court
District Court of Maryland for Somerset County
12155 Elm Street, Suite C
Princess Anne, Maryland 21853-1358

RE: State of Maryland v. John Bunting, CITATION: 5Z34076768 MI

Dear Madam Clerk:

Please file in the above-captioned case the enclosed Notice of Entry of Appearance of Douglas F. Gansler, Attorney General of Maryland.

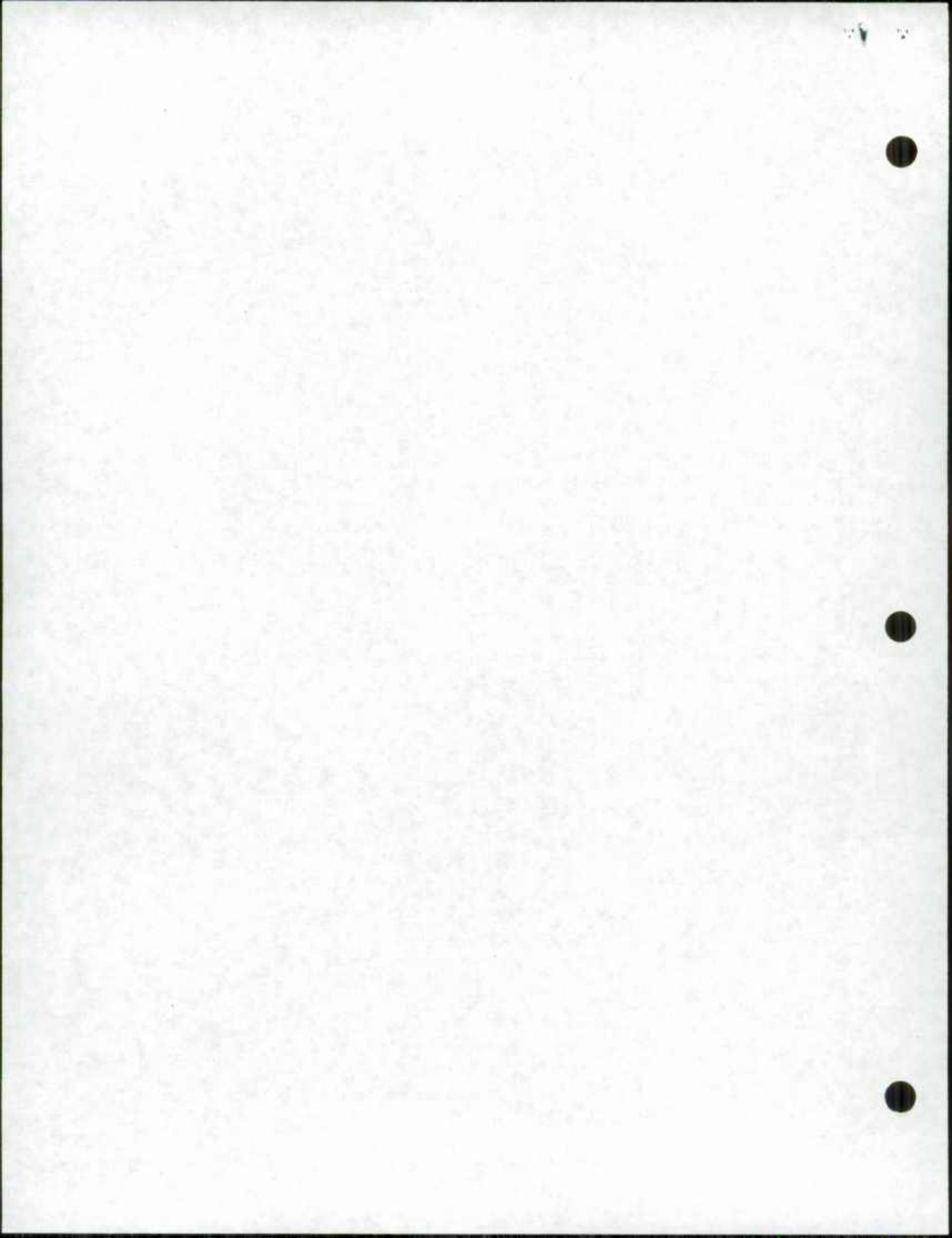
Thank you for your assistance.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

cc: Charles Butler
Raymond Smethurst
William Hall
David Lloyd



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

May 22, 2008

Vicki C. Rogers, Clerk of the District Court
District Court of Maryland for Somerset County
12155 Elm Street, Suite C
Princess Anne, Maryland 21853-1358

RE: State of Maryland v. John Bunting, CITATION: 6Z34076769 MI

Dear Madam Clerk:

Please file in the above-captioned case the enclosed Notice of Entry of Appearance of Douglas F. Gansler, Attorney General of Maryland.

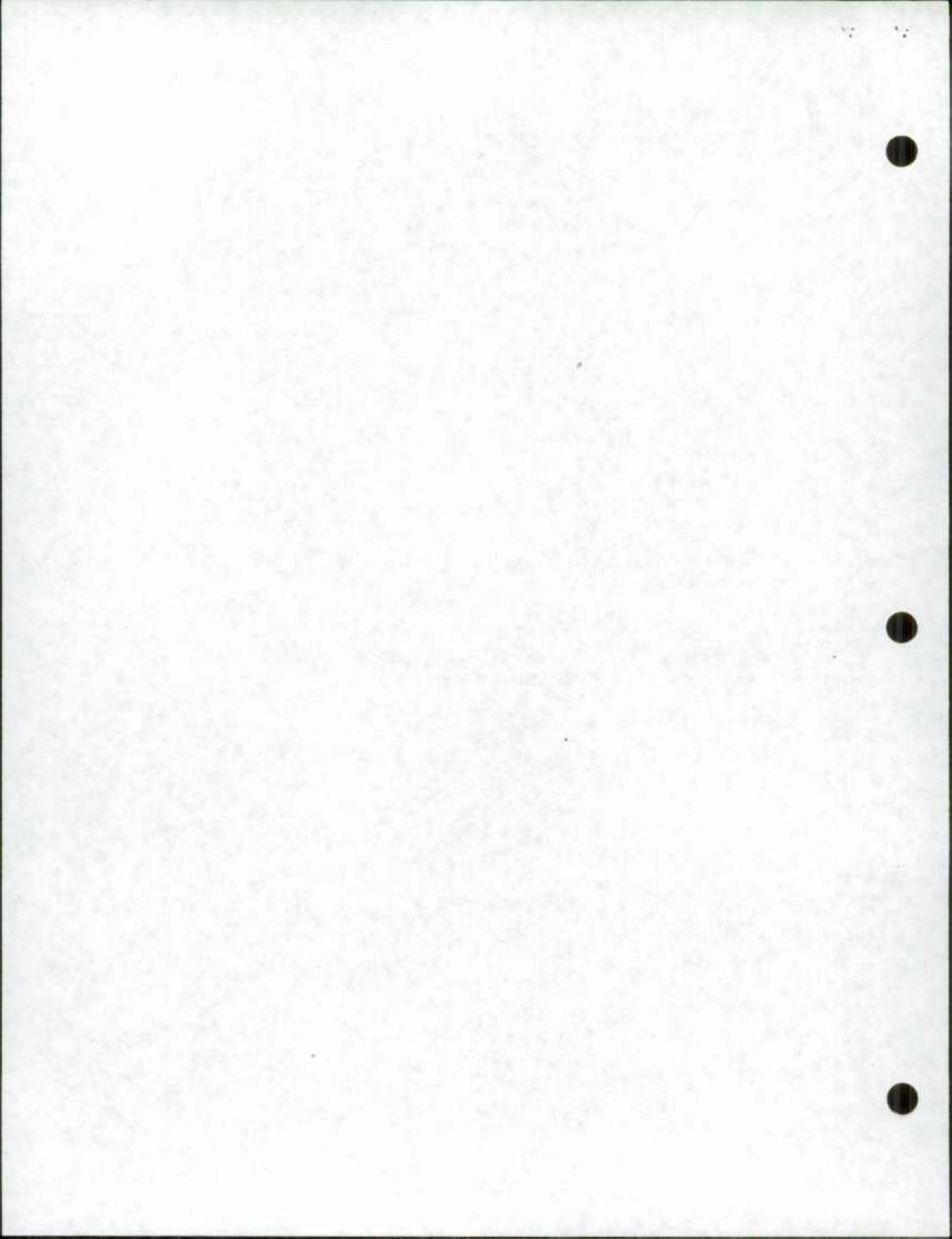
Thank you for your assistance.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

cc: Charles Butler
Raymond Smethurst
William Hall
David Lloyd



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

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May 22, 2008

Vicki C. Rogers, Clerk of the District Court
District Court of Maryland for Somerset County
12155 Elm Street, Suite C
Princess Anne, Maryland 21853-1358

RE: State of Maryland v. John Bunting, CITATION: 0Z34076784 MI

Dear Madam Clerk:

Please file in the above-captioned case the enclosed Notice of Entry of Appearance of Douglas F. Gansler, Attorney General of Maryland.

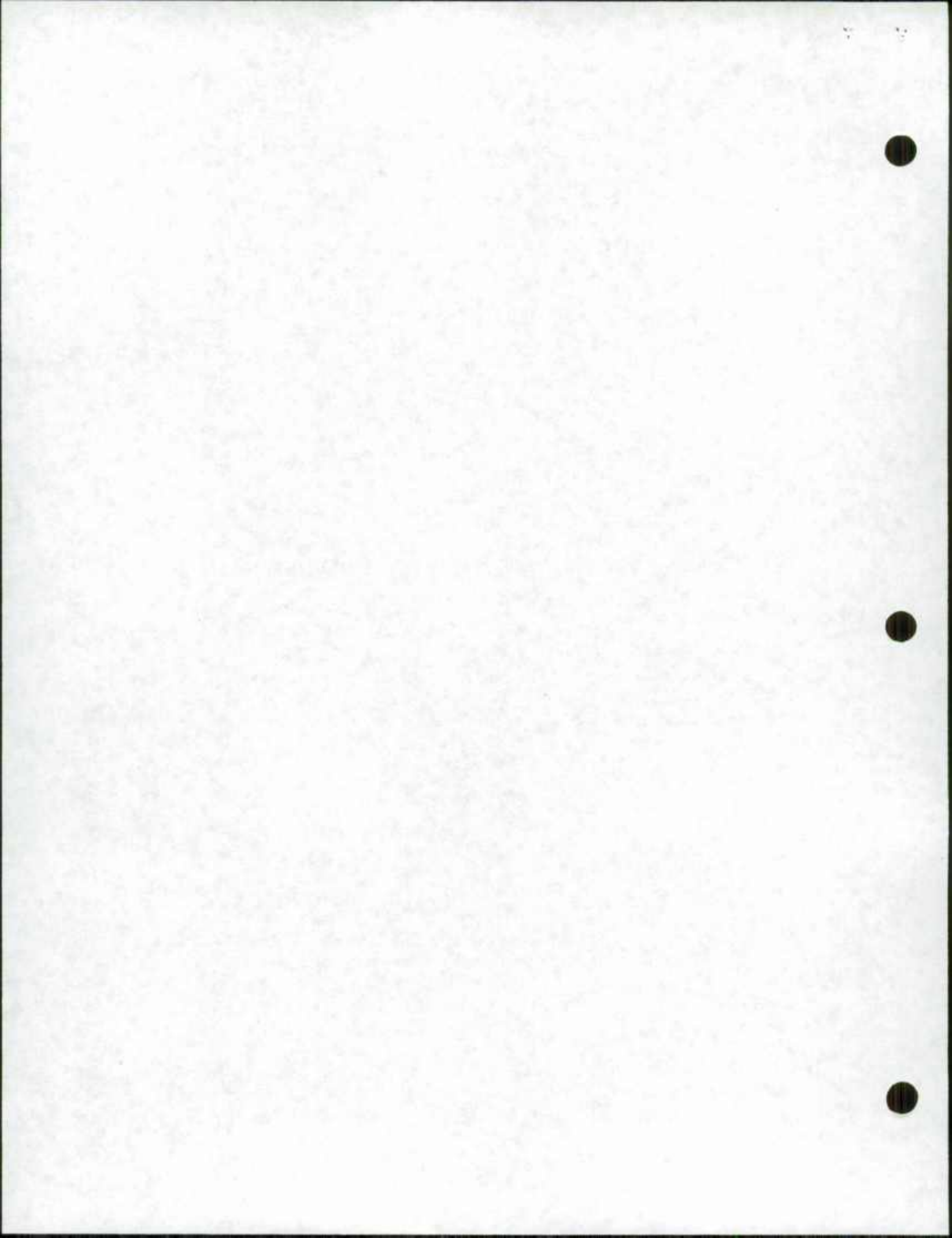
Thank you for your assistance.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

cc: Charles Butler
Raymond Smethurst
William Hall
David Lloyd



IN THE DISTRICT COURT OF MARYLAND FOR SOMERSET COUNTY

STATE OF MARYLAND

*

v.

* CITATION: 5Z34076768 MI

JOHN W. BUNTING

*

NOTICE OF ENTRY OF APPEARANCE

Please enter the appearance of Douglas F. Gansler, Attorney General of Maryland, and Sandra K. Canedo and Marianne E. Dize, Assistant Attorneys General, on behalf of the State of Maryland in the above-captioned case.

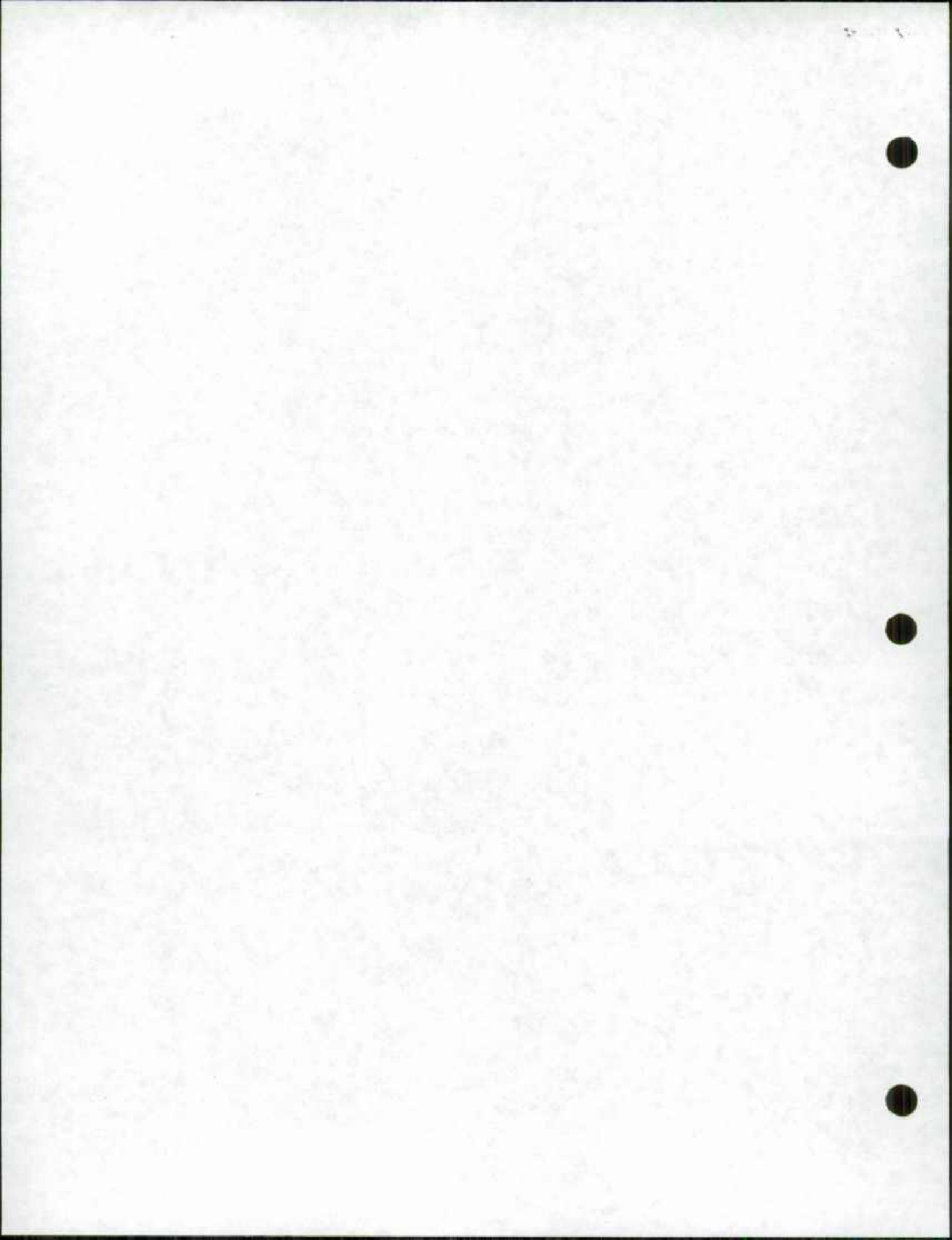
Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

Sandra K. Canedo/mad

Marianne E. Dize

SAUNDRA K. CANEDO
MARIANNE E. DISE
Assistant Attorneys General
Critical Area Commission
1804 West Street, Suite 100
Annapolis, Maryland 21401
(410) 260-3467



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May 2008, I sent a copy of the foregoing Notice of Entry of Appearance via U.S. Mail, postage prepaid to: Raymond S. Smethurst, Jr., Esq., P.O. Box 4247, Salisbury, Maryland 21803-4247 and to William Hall, Esq., 26348 High Banks Drive, Salisbury, Maryland 21801-2306, Attorneys for John Bunting, and to David Lloyd, Somerset County Technical & Community Services, 11916 Somerset Avenue, Princess Anne, Maryland 21853.

Marianne E. Dise

Marianne E. Dise



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

June 5, 2008

HAND DELIVERED

Leslie D. Gradet, Clerk
Court of Special Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Maryland 21401

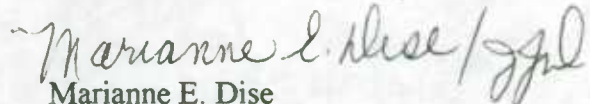
Re: *AES Sparrows Point LNG, LLC, et al. v. Critical Area Commission, et al.*
No. 2428, Sept. Term, 2007

Dear Ms. Gradet:

This is to inform the Court that the Critical Area Commission, though nominally an appellee, will not be filing a brief or participating in oral argument in this interlocutory appeal from the granting of a motion to transfer venue. The sole issue presented in the appeal is whether, in the underlying action filed by the appellant, AES Sparrows Point LNG, LLC, against the Critical Area Commission and Baltimore County, the circuit court properly granted Baltimore County's motion to transfer the case from Anne Arundel County to Baltimore County. Although the Commission did not object to Baltimore County's motion, the Commission would not be opposed to proceeding in either Baltimore County or Anne Arundel County. The brief filed by Baltimore County accurately sets forth the applicable law. Under these circumstances, a separate brief on behalf of the Commission would not benefit the Court's consideration of this appeal.

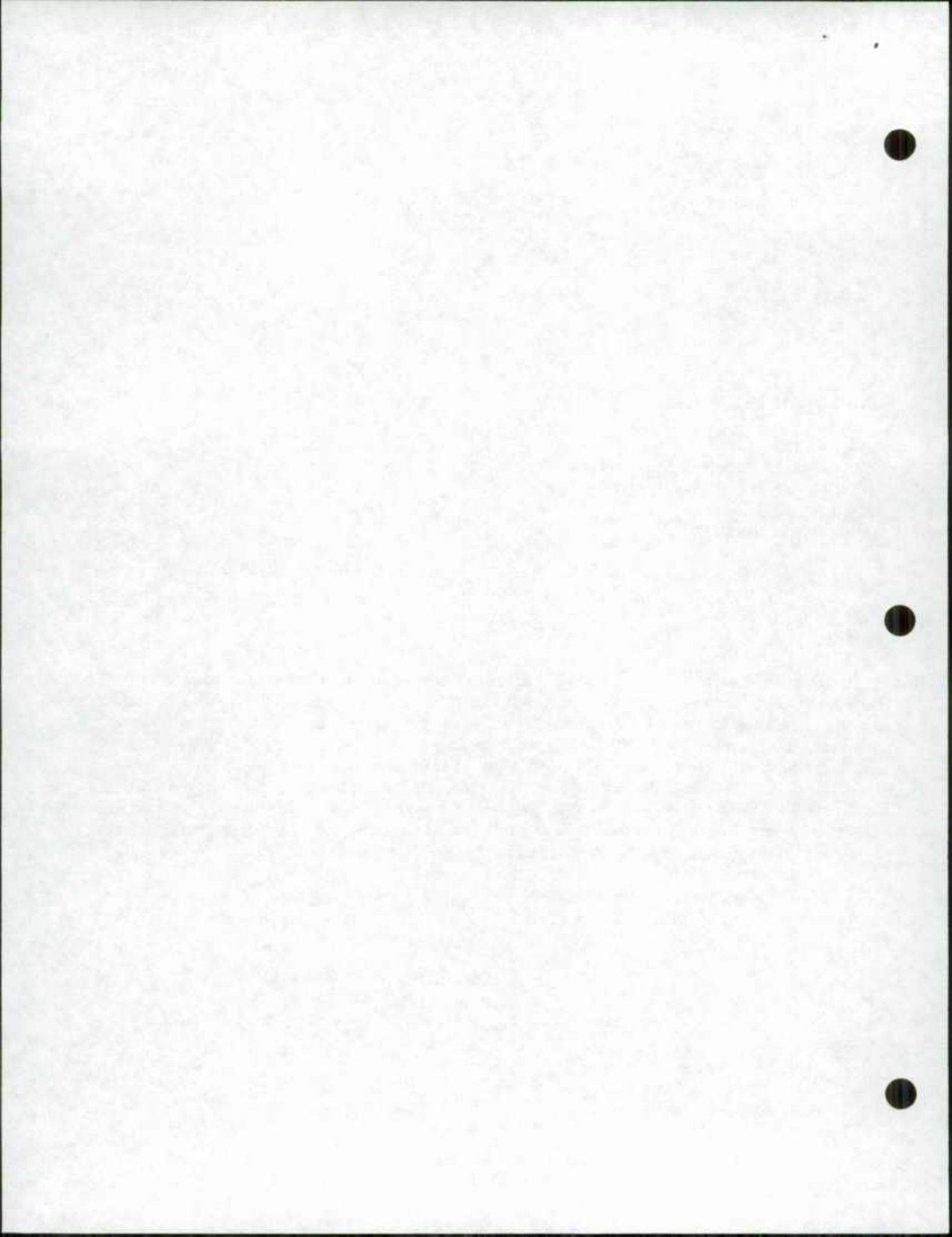
Please bring this letter to the attention of the judges assigned to this case.

Sincerely, .


Marianne E. DISE
Assistant Attorney General

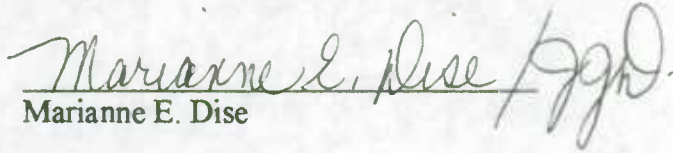
cc: Thomas A. Deming, Esq.
Robert C. Douglas, Esq.
Brian M. Quinn, Esq.
John E. Beverungen, Esq.

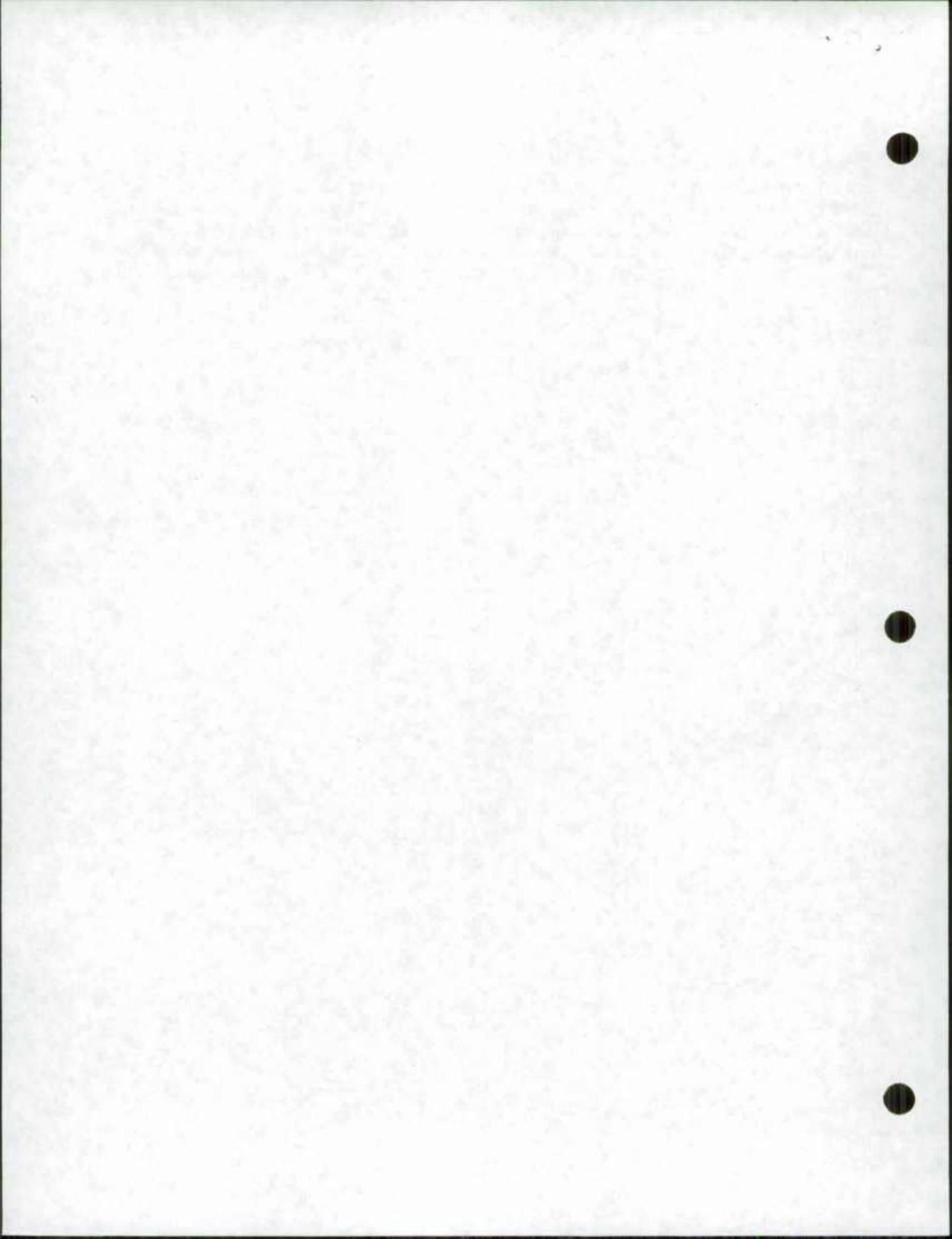
1804 West Street, Suite 100
Annapolis, Maryland 21401



CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2008, I sent a copy of this foregoing letter postage prepaid to Thomas A. Deming, Esq., Semmes, Bowen and Semmes, 25 South Charles Street, Suite 1400, Baltimore, Maryland 21201, Robert C. Douglas, Esq. and Brian M. Quinn, Esq., DLA Piper US LLP, 6225 Smith Avenue, Baltimore, Maryland 21209-3600, John E. Beverungen, Esq., Baltimore County Office of Law, 400 Washington Avenue, Towson, Maryland 21204, Attorneys for Appellant AES Sparrows Point LNG, LLC.


Marianne E. Dise
Marianne E. Dise



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

June 13, 2008

Via Hand-Delivery

Mr. Robert P. Duckworth
Clerk, Circuit Court for Anne Arundel County
P.O. Box 71
7 Church Circle
Annapolis, Maryland 21403

RE: *Margaret McHale v. DCW Dutchship, LLC,*
Civil Action No.: C-07-119778

Dear Mr. Duckworth:

Please accept for filing the attached Memorandum of Petitioner Margaret McHale in the above referenced case. We have also included an additional copy to be date stamped.

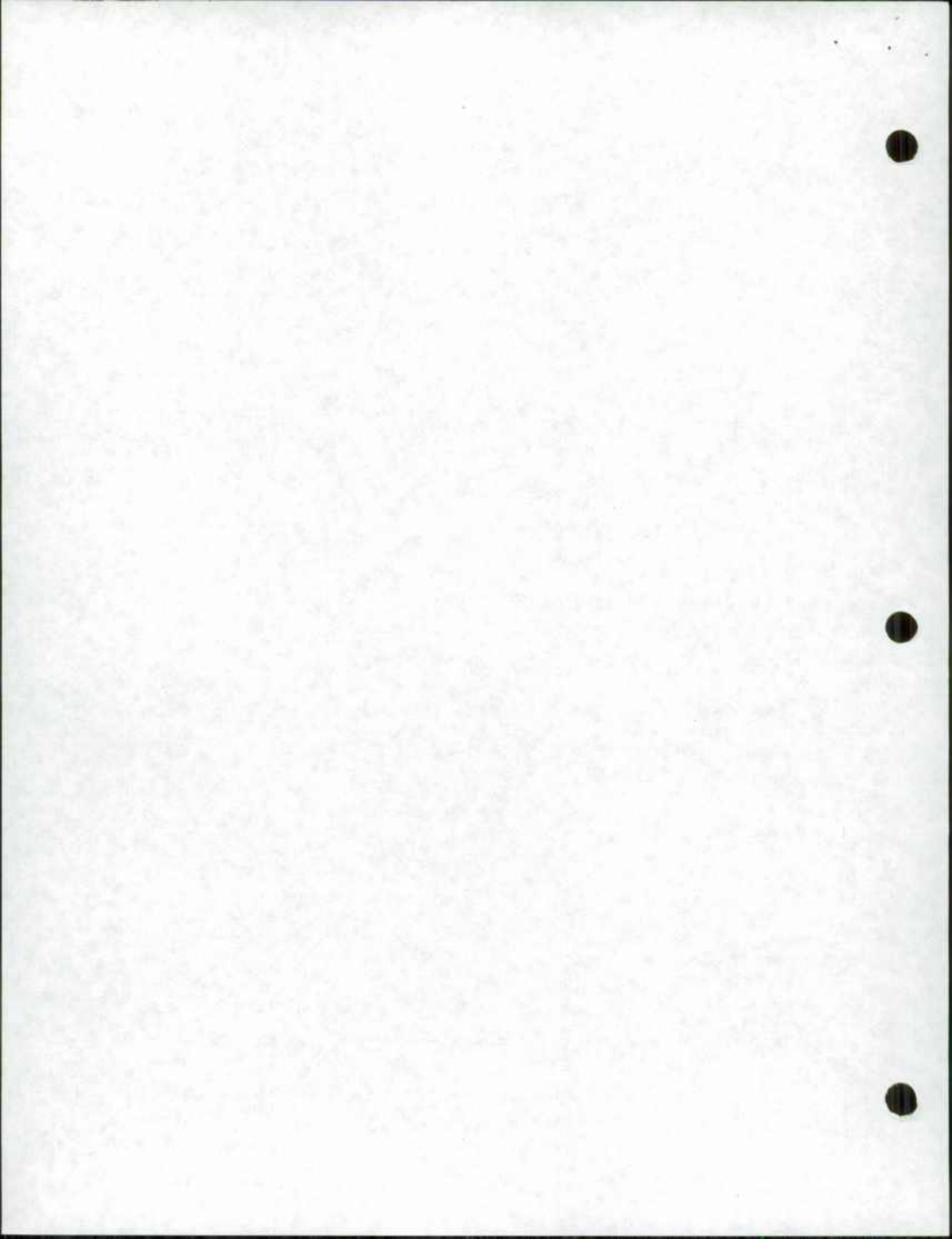
Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Marianne E. Dise".

Marianne E. Dise
Assistant Attorney General

cc: Robert J. Fuoco, Esq.
Warren Rich, Esq.
Jon A. Mueller, Esq.
Ann Fligsten, Esq.
Sarah M. Iliff, Esq.



IN THE CIRCUIT COURT OF MARYLAND FOR
ANNE ARUNDEL COUNTY

MARGARET G. Mc HALE,

CASE NO. C-119778

Petitioner

v.

DCW DUTCHSHIP ISLAND LLC.,

Respondents

MEMORANDUM OF PETITIONER MARGARET Mc HALE, CHAIR,
STATE OF MARYLAND CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

Margaret G. McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays ("Critical Area Commission" or "Commission"), by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Marianne E. Dise and Sandra K. Canedo, Assistant Attorneys General, hereby respectfully submits this Memorandum pursuant to Maryland Rule 7-207(a).

INTRODUCTION

Chair McHale seeks review of the January 3, 2007 Memorandum of Opinion and Order ("Mem. Op." or "Decision") of the Anne Arundel County Board of Appeals ("Board"), in which the Board granted variances to the Chesapeake Bay Critical Area protection program to allow an illegally-constructed house, lighthouse, and additional impervious structures to remain in the 100-foot Critical Area Buffer. Despite holding that "Mr. Wagner openly and knowingly violated the laws of the County and State, when he flagrantly constructed his residence on a grassy knoll on this island at nearly the water's edge," the Board allowed the violator to retain the fruits of his illegal activity. Mem. Op. 19. Chair McHale seeks reversal of the Board's Decision because the

decision is “void” under Annotated Code of Maryland (“Code”) Natural Resources Article (“NR”) §8-1811(b)(2). However, even if the Court holds that the Decision is not void, the Board’s Decision must be reversed because it is infused with grievous errors of law.

First, the Board purported to adjudicate an application for variance to the Critical Area law, without having followed the process established in State law for notice to the Critical Area Commission. The Critical Area law, Code, NR §8-1801 et seq., establishes requirements which local jurisdictions, including Anne Arundel County, must abide by in implementing their local Critical Area Programs. Among those requirements is that notice of each variance application must be sent to the Commission. The sanction for failing to comply with the notice requirement in Code, NR §8-1811(b)(2) is that “any action of the local approving authority in violation” of this notice requirement “shall be void.”

Second, the Board’s refusal to bifurcate the variance appeal cases and the buffer modification appeal cases created a procedural nightmare, and denied to the Chair her statutory right under Code, NR §8-1812, to participate fully in the variance cases. Beyond this fundamental error in tangling the records from two separate cases, the Board made numerous errors of law in its Decision to grant the variances. These errors include: failing to apply the correct legal standards for unwarranted hardship and self-created hardship under the Critical Area law; and failing to make the required finding that the variance for the new impervious surface will not “adversely affect water quality, or adversely impact fish, wildlife, or plant habitat.” Merely discussing (and approving) the proffered mitigation for the demonstrable harm caused to the habitat by the illegal construction does not amount to the required finding which the Board failed to make. Finally, the Board’s Decision ignored the only testimony presented by unbiased, not-for-hire, competent experts on the purpose, intent, and requirements of the Critical Area law.

In effect, the Board’s Decision to allow DCW Dutchship, LLC, and its owner, Daryl

Wagner, a professional builder, (collectively "DCWD") to keep this Board-described "showplace for environmental enhancement" (Mem. Op. 41) stands the Critical Area law on its head. By awarding variances to legalize the outlandish construction project on Little Island in the Magothy River, the Board turned a blind eye to the actions of DCWD and rewarded the applicant's illegal activity. This decision makes a mockery of the State law and criteria that have been in place for over 20 years to protect the Bays and their tributaries from precisely this sort of unbridled development activity at the water's edge.

The Critical Area Commission is charged by the General Assembly to ensure that local governments' Critical Area programs, including zoning boards' granting of variance requests, are implemented in a "consistent and uniform manner subject to State criteria and oversight." Code, NR §8-1801(b)(2). This is why the State law, Code, NR §8-1811 (b)(2) and COMAR 27.03.01.03D, require each local jurisdiction to send to the Commission "a copy of every new application for approval" of new projects in the Critical Area, including "all applications for variances." If the local government fails to follow this required process, as is the case with the DCWD "application" presented for the first time (as Pet. Exh. 60, Tr. 10/26/06 at 21) during the Board's hearings, then the State law sets a clear penalty for this failure of notice. The local action "shall be void."

Although the Anne Arundel Board stated that "there are very few remarkable legal issues before this Board," (Mem. Op. 19) this belief can only stem from the Board's utter failure to perceive the legal issues. The Board accepted a new application in the middle of the ongoing adjudicatory hearings, and failed to send the application, as required by law, to the Commission. The Board failed to conduct its proceedings in a manner that ensured due process of law for Petitioner McHale. The Board failed to apply the law to require DCWD to overcome the statutory presumption that this illegal construction project in the Buffer does not meet the goals

and objectives of the Critical Area law. The Board failed to require DCWD to prove that it would suffer an "unwarranted hardship" without a variance to retain what the applicant built in defiance of the law. The Board glossed over the undisputed fact that DCWD created the "need" for the variance, and accordingly that DCWD cannot, as a matter of law, meet the standard that no variance may be issued for "self-created hardship." The Board failed to make the finding that the variance would not adversely affect habitat - a finding that the Board *could not* make on this record, given that the Island's habitat was virtually obliterated by the actions for which the variance was sought.

The Chair of the Critical Area Commission maintains that DCWD failed to carry its burden to prove that it meets each and every one of the variance standards. The Chair urges this Court to give no deference to the Board's application of the law, particularly on the variance standards discussed below. Accordingly, Chair McHale urges this Court to reverse the Decision of the Board of Appeals.

ERRORS OF PROCEDURE

After DCWD was cited for numerous violations of Anne Arundel County law (both Critical Area law and other building codes), the applicant sought variances to retain all of the illegally constructed structures on the Island. (Mem. Op. 34, stating that Little Island contained 9060 square feet of 'existing' impervious surfaces.) This is the application which the Board was required to adjudicate. Although the Board (Mem. Op. 34) seemed to assume that DCWD's revised site plan (Exhibit 60) constituted an application for variance approval for structures totaling 5,649 square feet, DCWD *never submitted a new application to the Anne Arundel County Office of Planning and Zoning*, nor did Anne Arundel County forward any such new application to the Critical Area Commission. The transcript of the Board's October 26, 2006 hearing at 41-44 where DCWD first introduced the site plan, shows that the Commission had not

received notice of this new application. On cross-examination, DCWD's witness relied on this site plan to explain the new scope of the variances that DCWD was now requesting. *Id.*

If DCWD's testimony about the revised site plan at the variance hearing was, as the Board assumed, a new application for variance, the Board had no authority to process this "new" application. Code, NR §8-1811(b)(3) provides that local authorities "may not process an application [for variance], until the local authority has received "notice of receipt" from the [Critical Area] Commission, and **any action of the local approving authority in violation of this paragraph shall be void.**" (Emphasis added). Accordingly, Chair McHale urges this Court to reverse the Board's Decision because under Code, NR §8-1811, the Board had no authority to "process" this new application, and the Board's Decision is void under State law.

Should this Court decline to reverse the Decision on the grounds that the Decision is void for non-compliance with NR §8-1811, Chair McHale argues that the Decision should be reversed to correct the Board's gross violations of the Chair's due process rights. As this Court recognized (Opinion of March 3, 2008 at 3, n. 4) the Critical Area Commission participated as a party only in the variance cases (BA 111-05V, BA 112-05V, BA 115-05V, BA 116-05V, BA 119-05V, BA 120-05V, BA 121-05V, BA 122-05V), which were heard by the Board on nine dates beginning on October 24, 2006, through November 28, 2006. The Chair filed a Petition for Judicial Review (No. C-07-119778) from the Board's decision in the variance cases. Neither the Critical Area Commission nor the Chair participated as a party to the buffer exemption/modification appeals (BA 114-05A, BA 117-05A and BA 118-05A). Accordingly, as this Court observed, the Commission is "not an appellant on the buffer map amendment issue." Opinion of March 3, 2008 at 3.

Under State law, the Critical Area Commission is the reviewing and approving authority for any proposal by Anne Arundel County to amend its Critical Area maps, including requests to

amend the maps due to a decision by the Board in a buffer modification appeal. Code, NR §8-1809(o). For the Chair or Commission staff to participate as advocates before the Board in the buffer modification cases would be tantamount to this Court's participating as a party at the administrative level, and then reviewing a decision to which the Court had been a party litigant. Obviously, this would be improper. Nonetheless, the Board proceeded to "consolidate" all of the appeals in both matters, and to insist that the record from the buffer modification cases would be part of the Board's consideration in the variance cases. Transcript of Board Hearing ("Tr.") 09/26/06 at 128. Because the Board denied the Chair's Motion to Bifurcate, and overruled counsel's several objections to the "consolidation," (Tr. 04/20/06 at 6; Tr. 09/26/06 at 127-128), the Board knowingly violated the due process rights of the Chair. This, alone, is reason for this Court to reverse the Board.

Moreover, in the "consolidated" proceedings, the Board did not develop, announce, or employ procedures designed to assure that each witness and exhibit was clearly identified in advance as pertaining only to the buffer cases, only to the variance cases, or to both proceedings. Accordingly, the parties were left to guess as to which witnesses, which exhibits, which photographs, drawings, and other evidence, the Board relied upon to make its decisions? Chair McHale was denied her right as a party to view *all* evidence, cross-examine *all* witnesses, and to participate fully as a party to the variance cases. "A fundamental requirement of the due process of law in a quasi-judicial proceeding is the right of the parties to be apprised of the facts relied upon by the tribunal in its decision." *Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 39, 909 A.2d 235, 249 (2006), citing *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 64, 806 A.2d 662, 676 (2002).

The Board's Decision, based as it is on some (or possibly all) of the record from cases in which the Chair was not a party and thus had no opportunity to cross-examine witnesses, is fundamentally flawed. "When an administrative board or agency is required to hold a public

hearing and to decide disputed adjudicative facts based upon evidence produced and a record made,...a reasonable right of cross-examination must be allowed the parties.” *Mayor and Council of Rockville v. Woodmont Country Club*, 348 Md. 572, 583, 705 A.2d 301, 306 (1998), quoting *Hyson v. Montgomery County*, 242 Md. 55, 67, 217 A.2d 578, 585 (1966).

The Board’s misguided and flawed process requires the Chair, a party to the variance proceedings, to speculate as to which parts of the record from the buffer cases (to which the Chair was not a party) the Board may have used in its variance Decision. The Chair of the Critical Area Commission was denied her fundamental right to due process of law. For this reason, the Chair respectfully requests this Court to reverse the Board and to remand the matter with instructions to afford all parties the due process of law required under the Court of Appeals’ cases cited above.

Should the Court decline to reverse on the grounds argued above, the Chair submits the following argument, based only on the testimony and evidence presented at the hearings to which the Chair was a party, and from which the Chair noted this Petition for Judicial Review.

FACTS AND PROCEDURE

Due to the lengthy nature of the record in this case, Petitioner McHale will not separately recite the facts or procedure.

BACKGROUND OF THE CRITICAL AREA LAW

In response to national studies documenting a dramatic decline in the health of the Chesapeake Bay, the General Assembly enacted Chapter 794 of the Laws of 1984, the Chesapeake Bay Critical Area Protection Program, Code, NR §§8-1801 et seq. (“Critical Area Act”). The General Assembly described the plight of the Bay:

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

* * * *

(4) Human activity is harmful in these shoreline areas, where *the new development of nonwater-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle...* and thus it is necessary wherever possible to *maintain a buffer of at least 100 feet landward* from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

* * * *

(8) The restoration of the Chesapeake Bay and its tributaries is dependent, in part, on minimizing further adverse impacts to the water quality and natural habitats of the shoreline and adjacent lands.

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

Code, NR §8-1801(a) (emphasis added).

Based on these findings, the General Assembly devised a resource protection program for the Bay's Critical Area, to be implemented "on a cooperative basis between the State and affected local governments" ... with oversight by a State-level Critical Area Commission to ensure implementation in a "consistent and uniform" manner. Code, NR §8-1801(b). Anne Arundel County administers a Critical Area program for the County ("County program"), "subject to State criteria and oversight." *Id.* Both the County program and the State Critical Area Criteria provide protection for the 100- foot Buffer by prohibiting the development of new non-water-dependent structures or facilities¹ without a variance. "New development activities, including structures, roads, parking areas and other impervious surfaces....may not be permitted in the Buffer...." COMAR 27.01.09.01.C.

¹Houses with or without a lighthouse, decks, porches, driveways, and sheds are not water-dependent facilities. See COMAR 27.01.03.01: "An activity is water-dependent if it cannot exist outside the Buffer and is dependent on the water by reason of the intrinsic nature of its operation."

The General Assembly has consistently reinforced its finding that protection of the Critical Area and more specifically, the Buffer, is of paramount importance. In the Buffer, "addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle." Code, NR §8-1801(a)(4). Likewise, the General Assembly has steadfastly required any person who wishes to build a nonwater-dependent structure in the Buffer to first satisfy each one of the law's strict variance standards. An applicant for a variance has the "burden of proof and the burden of persuasion to overcome the presumption" 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 the Critical Area law and regulations. (emphasis added) Code, NR §§8-1808(d)(2)(i) and 1808(d)(3)(i).

Twice, in 2002 and 2004, the legislature responded to the Court of Appeals' weakening of the Critical Area program in variance cases. Again, in 2007, the General Assembly reiterated its commitment to the consistent and uniform application of the Critical Area law among the 16 Critical Area counties and 46 municipalities, by requiring that all of the State standards for Critical Area variances be applied by each local government, even if the local code did not repeat those standards. Code, NR §8-1808(d)(6). Time and time again, the General Assembly has reacted to the attempted weakening of the Critical Area law by local zoning boards, and has consistently strengthened the language of the Critical Area Act to mandate the standards that local zoning boards must use for consideration of variance applications. The Decision by the Board in this case strikes at the very heart of those standards.

It is against the General Assembly's statements of legislative purpose and intent that the Board should have measured DCWD's request for variances. A review of the Board's Decision shows that the Board did not consider the legislative findings, purposes, and intent of the Critical Area law. Moreover, the Board did not apply the State-law standards of "unwarranted hardship" and "self-created hardship." Nor did the Board find, as was required, that the variances granted

would not adversely affect fish, wildlife, and plant habitat. As the State's witnesses testified, a new, large house, with lighthouse and accessory structures in the Buffer, constructed with disregard for the law, definitely does not conform to the spirit and intent of the Critical Area law. Tr. 11/02/06 at 82, Testimony of LeeAnne Chandler; Tr. 11/08/06 at 22-24, Testimony of Mary Owens; Tr. 10/31/06 45-52, Testimony of Ren Serey.

VARIANCES TO THE CRITICAL AREA LAW

The law is intentionally tough on applicants for Critical Area variances. The General Assembly requires local zoning boards to presume that the requested project "does not conform with the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the local jurisdiction's program." Code, NR §8-1808(d)(2)(i); Tr. 10/31/06 at 44. The variance applicant bears the *burden of proof and the burden of persuasion* to overcome this statutory presumption. Critical Area Act, Code, NR §8-1808(d)(3). In the present case, although the Board gave lip service to these burdens, the record betrays a stunning failure on the part of the Board to hold DCWD to its burden to prove that its enormous new construction project met even one, let alone all, of the statutory standards. ²

The Board did not acknowledge the General Assembly's finding about the deleterious effect of **each new impervious surface** added to the 100-foot Buffer. The Board cavalierly discounted the testimony of the State's experts on the issues of burden of proof and noncompliance with the spirit and intent of the law. *See, e.g.*, Mem. Op. 12 (summarizing in three lines the testimony of the Commission's Executive Director); Mem. Op. 13 (summarizing the testimony of the Commission's Chief of Program Implementation without mentioning the

²The fact that DCWD proposed to "remove" 3,411 square feet of the illegally-constructed impervious surface is nothing more than a red herring to disguise the oft-changed scope of its variance application. Removal of part of the illegal construction does not in any way ameliorate the negative effects of the remaining illegal structures.

State-law presumption that the requested variance does not conform to the purpose and intent of the State law). In addition to overcoming the presumption of non-conformance, a variance applicant must meet each and every one of the County's enumerated Critical Area variance provisions, including the requirement to prove that, without the requested variance, the applicant would suffer an "unwarranted hardship." The County Code incorporates the Critical Area Act's definition of "unwarranted hardship" from Code, NR §8-1808(d)(1): "'Unwarranted hardship' means that, without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested."

The Anne Arundel County Code establishes eleven specific criteria for Critical Area variances.³ Consistent with the State Critical Area Act, the County program provides that an applicant must meet each and every one of the standards, and *if he fails to meet just one*, then the variance must be denied.⁴ Among those standards is the requirement for the applicant to prove that if the variance were denied, the applicant would be deprived of a use or structure *permitted to others under the critical area program*. Code NR §8-1808(d)(4). Thus, non-conforming structures in the Buffer, or those constructed before the Critical Area law, cannot be used as a basis of comparison for a new structure in the Buffer.⁵ Moreover, if the variance request is based on conditions caused by the applicant's actions, including commencement of development activity before an application for a variance has been filed, the local jurisdiction may take that fact into account in determining whether the applicant qualifies for a variance. Critical Area Act,

³The Board Decision does not quote the text of the county variance standards, and Petitioner McHale relies on the language of the State-law standards.

⁴ The 2002 amendments to the Critical Area Act, Code NR §8-1808(d) reinstated the legislative requirement that each individual variance standard must be met. In 1999, *White v. North* expressed a contrary view. 356 Md. 31, 50 (1999).

⁵ This provision of the 2002 amendments to the State law (2002 Laws of MD, chs. 431, 432, 433) overrules a contrary interpretation by the Court of Appeals in *White v. North*.

NR §8-1808(d)(2)(ii).⁶ In this case, DCWD's open and notorious construction of a large house, lighthouse, driveways, and other impervious structures on a once-pristine island makes a more obvious case of self-created "hardship" hard to imagine.

The General Assembly has, again and again, revisited the Critical Area Act to strengthen that law, and especially the standards required for granting variances to the protections afforded to the Critical Area Buffer. A review of the record in this case leads to only one conclusion: the Board reached around the Critical Area law in order to allow DCWD to retain massive amounts of new impervious structures in the protected 100-foot Critical Area Buffer. The Decision was not based on the correct application of the Critical Area law to the facts, and the Board should be reversed.

ARGUMENT ON VARIANCE STANDARDS

The Board neglected, ignored, and mis-applied the controlling law. DCWD failed to carry its burden to prove compliance with each and every one of the State's critical area variance standards, in particular that, without *the variance requested*, it would be denied reasonable and significant use of the entire parcel or lot. As discussed above, it is nearly impossible to discern exactly which of the several site plans constituted the "application" in this case. Bearing in mind that the "specific development activity... for which a variance is requested" (Code, NR §8-1808(d)(2)(i)) is what must meet the standards, it is beyond dispute that DCWD's request to retain in excess of 9,000 square feet of illegal impervious structures is **not** the application that was adjudicated, and is **not** the variance that the Board granted. By construing DCWD's application as requesting to retain in a non-specific location an amount of impervious surface, the Board utterly vitiated the requirement for the applicant to prove that the specific development

⁶ This provision of the 2004 amendments to the Critical Area Act overrules a contrary interpretation expressed in *Lewis v. Department of Natural Resources*, 377 Md. 382 (2003).

activity for which a variance is requested conforms to the purpose and intent of the Critical Area law. This, alone, requires reversal of the Decision.

Substantively, DCWD failed to meet at least four of the variance standards. Even if DCWD had failed to meet just *one* of the standards, this Court would be obligated to reverse the Board's Decision. *Becker v. Anne Arundel County*, 174 Md. App. 114, 131-133 (2007). Although *Becker* concerned a denial of a variance, the standard of appellate review of variance decisions is the "same whether the agency grants or denies the application", and this Court must review "the reasons given by the Board." *Chesley v. City of Annapolis*, 176 Md. App. 413, 428, 933 A.2d 475 (2007), *cert. denied*, 403 Md. 305 (2008), *quoting Stansbury v. Jones*, 372 Md. 172, 185 (2002). In this case, as discussed below, the Board failed to apply the law correctly to at least four of the variance standards

Burden of Proof and Burden of Persuasion

The Board's Decision barely mentions, much less supports, a conclusion that DCWD succeeded in overcoming its burden of proof and persuasion that the variances requested for development on Little Island met all the variance standards under the Critical Area law and criteria.⁷ In considering whether this variance application met the standards in the law, the Board should have, but did not, evaluate the application against the expressed findings of the General Assembly. How else could the Board have performed its duty to "make written findings as to whether the applicant has overcome the presumption... that the specific development activity in the critical area that is subject to the application does not conform with the general purpose and intent of this subtitle?" Code, NR §§8-1808(d)(2)(i) and 8-1808(d)(3)(i). As the Court of Special Appeals recently observed, "In cases involving critical area variances, it has

⁷"A variance to a local jurisdiction's critical area program may not be granted unless: . . . (ii) The local jurisdiction finds that the applicant has satisfied each one of the variance provisions." Code, NR §8-1808(4)(ii).

been made clear by statute that applicants 'have the burden of meeting all of the requirements enumerated in the law governing such variances.'" *Chesley v. City of Annapolis*, 176 Md. App. 413, 428, 933 A.2d 475 (2007), *cert. denied*, 403 Md. 305 (2008), quoting *Becker v. Anne Arundel County*, 174 Md. App. 114, 130-132 (2007).

Among the legislative findings that the Board neglected is the following: "Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent structures or the addition of impervious surfaces is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature. . ." Code, NR §8-1801(a)(4). DCWD's variance request included a dwelling, driveway, sheds, pool, a deck, porches, sidewalks, a gazebo, lighthouse, septic system and two replacement systems, and a pier.⁸ All development activity conducted by DCWD on Little Island is within the Buffer or expanded Buffer. The Board's Decision leaves unanswered the question of how this unauthorized development activity in the Buffer conforms to the expressed purposes and goals of the Critical Area program. The Board erred by failing to explain this required finding.

The Critical Area Commission intervened in this matter as a party opponent in order to present to the Board of Appeals the Commission's expert witnesses' testimony on the State law and the Board's role in considering applications for variances to the Critical Area law. The Court of Appeals has instructed that the courts must "accord a great deal of deference ...to an

⁸ Although the applicant's representatives and counsel stated at the Board hearings that the variance request has been modified, the Commission did not receive the required notice that any formal submission of a modified variance application had occurred. See Code, NR §8-1811, discussed above. Lacking a new variance application to review, the Commission's participation in the proceedings before the Board, including the submission of the Commission's Closing Memorandum on November 28, 2006, was based on the **only** variance application of which the County sent the required notice. That application was originally submitted to Anne Arundel County in 2004.

administrative agency's interpretation of its own regulation." *Md. Transp. Auth. v. King*, 369 Md. 274, 288 (2002). Because the Commission is charged by the General Assembly to ensure that local governments' Critical Area programs (including the processing of variance requests) are implemented in a "consistent and uniform manner," it is beyond question that the Commission possesses unique expertise in the administration and interpretation of the State law. Yet, as set forth below, the Board gave little, if any, credence to the testimony of the State's experts on these crucial issues.

Unwarranted Hardship

Unrefuted testimony from the previous inhabitant of Little Island established beyond doubt that the Island had been used in a reasonable and significant residential manner for over 50 years before DCWD purchased the property. Tr. 11/08/06, Testimony of Sid Levin. Although the Board acknowledged that "Mr. Levin's testimony was among....the most well documented in terms of the number of family photos retained" (Mem. Op. 22, n.7), the Board nonetheless disregarded the detailed portrait presented by Mr. Levin of family gatherings on Little Island; crab feasts enjoyed on the screened in porch of the pre-existing dwelling; and general use of the boathouse and footpath.

Mr. Levin and his family and friends managed quite comfortably to use Little Island without a swimming pool, sidewalks, porches, gazebo, impervious concrete patios, decks, a lighthouse, and huge driveway.⁹ Yet, in the face of this admittedly "well-documented" testimony, the Board inexplicably found that "the action of the [Critical Area] regulations on this island have eliminated the property owner's ability to develop anything without a variance." Mem. Op. 31. It goes without saying that the record belies this incredible "finding."

⁹Mr. Levin's testimony established conclusively that no impervious driveway of any size ever existed on Little Island before DCWD built the driveway for which it sought a variance.

Somehow, the Board leapt from the praise of the witness whose family had used and enjoyed the Island for 50 years, to the mystifying conclusion that, in order to obtain reasonable and significant use of the property, the new owner needed a variance for most of the illegally-built "improvements." The Board's conclusion is just wrong. Under the State law, in order to prove unwarranted hardship, the applicant must show that without the granting of *this particular variance* for the construction of *this particular dwelling*, driveway, decks, sidewalks, porches, pool, etc, that he would be denied reasonable and significant use of the entire property or lot.

Two recent variance cases from the Court of Special Appeals provide direction for zoning boards' analysis of the factor of hardship. In *Montgomery County v. Rotwein*, 169 Md. App. 716, 906 A.2d 959 (2006), the Court of Special Appeals affirmed the rejection of a setback variance for construction of a new detached garage. The Court found that the applicant failed to demonstrate "practical difficulties" (a more lenient standard than unwarranted hardship); and the Court found that the applicant had created her own hardship by building other accessory structures on her property. These structures limited the space available for the applicant's desired garage. The Court stated that "any hardship that [the applicant] did demonstrate was the result of improvements to the property, and therefore, self-created and did not justify the variances." 169 Md. App. at 730, 906 A. 2d at 967. The Court observed that "the decision whether to build those improvements and where to place them was [the applicant's]." *Id.* In *Rotwein*, neither additional expense, nor an inconvenient location, nor economic loss to the property owner were sufficient justification for the variance.

Similarly, in *Chesley v. City of Annapolis*, 176 Md. App. 413, 933 A.2d 475 (2007), *cert. denied*, 403 Md. 305 (2008), the Court of Special Appeals affirmed the denial of a variance for construction of a garage. Noting that a variance "authorizes the property owner to 'use his property in a manner forbidden' by applicable zoning restrictions, the Court stated that a variance is ' a departure from the terms of the [zoning] ordinance in order to preclude confiscation of the

property.” 403 Md. at 423-424, quoting *Cromwell v. Ward*, 102 Md. App. 691, 700 (1995).

“The burden of showing facts to justify ...[a] variance rests upon the applicant.” *Chesley* at 428, quoting *Easter v. Mayor of Baltimore*, 195 Md. 395, 400 (1950). The direction of the Courts is clear: an applicant for a variance must prove true hardship to show entitlement to relief from the ordinances that everyone else must obey; and an applicant may not create, by building on the property, its own “hardship.” DCWD met neither of these standards.

In the instant case, the Anne Arundel Board seemed to be swayed by DCWD’s repeated illogical insistence that Little Island is a grandfathered lot and that accordingly the applicant is entitled to keep the dwelling and associated structures that DCWD built, in the location chosen by the applicant. DCWD demanded, and the Board seemed to believe, that the Board must approve what the applicant did. However, as explained by the Critical Area Commission witnesses, the fact that the County considers Little Island to be a grandfathered lot is beside the point.

The Critical Area criteria provide that grandfathered lots may “be developed with a single family dwelling, *if a dwelling is not already placed there.*” COMAR 27.01.02.07B (emphasis added). Tr. 10/31/06 at 46, 91, Testimony of Ren Serey; Tr. 11/08/06 at 20, 39, Testimony of Mary Owens. In this case, a dwelling with a footprint of 1,911 square feet was already in existence on Little Island when DCWD acquired the property. The Critical Area grandfathering provisions do not allow an applicant to move around, combine impervious surfaces, or disturb sensitive areas in the name of re-development. Tr. 10/31/06 at 92, Testimony of Ren Serey. “The one dwelling grandfather provision [in COMAR 27.01.02.07] is the appropriate standard. This primary dwelling, was, according to the site plan, 1911 square feet.” *Id.*

The simple fact is that DCWD did not establish that these extensive variances were needed in order to relieve DCWD of ‘unwarranted hardship’ - that is, to provide reasonable and

significant use of the entire property or lot. Rather than starting from the premise that the requested variance is presumptively contrary to the goals and intent of the Critical Area program, this Board started from the premise that the property owner should be able to keep as much as possible of the illegal construction in the Buffer.

In its Decision to allow DCWD to retain the house, lighthouse, and other impervious structures in the Buffer, the Board ignored the dictates of the General Assembly's 2004 amendments to the Critical Area Act. The General Assembly could not have been more adamant about its intent in amending the Critical Area law in 2004. As explained in *Becker v. Anne Arundel County*, 174 Md. App. 114, 132-133, "The General Assembly expressly stated that its intent in amending the law [in 2004] was to overrule *Lewis* [*Lewis v. Dep't of Natural Resources*, 377 Md. 382 (2003)] and reestablish the understanding of unwarranted hardship that existed before being 'weakened by the Court of Appeals.'" The *Lewis* standard, which considers the use that the property owner wishes to make of the Buffer, is the standard the Board used in the instant case.

The Board heard Mr Levin testify that the 1,911 square-foot house provided for residential use for his family for over 50 years. Tr. 11/02/06 at 5-9, Testimony of Sid Levin. Yet, the Board rejected the fact that DCWD could have obtained reasonable and significant use of the property with a similarly-sized house. Mem. Op. 30-31, 37. The old owner had reasonable use, and so did the new owner - before the destruction of the natural habitat and the extensive construction activity. That the new owner wanted more is not relevant.

Rights Commonly Enjoyed/ Special Privilege

In determining whether to grant the variances for the new impervious structures on Little Island, the Board was obligated to consider whether DCWD showed that denial of the requested after-the-fact variance would deprive the applicant of rights commonly enjoyed by other

properties in similar areas in the Critical Area. As the Commission's expert witness explained, "we look at similar properties developed under the county's critical area regulations....looking at the fact that their development activity within the buffer [is that] there is no right to build within the 100-foot buffer." Tr. 11/08/06 at 18-19, Testimony of Mary Owens. The "rights commonly enjoyed" standard thus speaks to a comparison with other property owners whose property is entirely within the Buffer or expanded Buffer. Code, NR §8-1808(d)(4)(iii).

Ms. Owens, Chief of Program Implementation for the Critical Area Commission, further explained that, in this case, where there was a residential use enjoyed by the previous owner, "looking at what existed prior to the applicant's activity there were 3005 square feet of impervious surface existing on the island prior to development and after development there was 9060, an increase of 200 percent." Tr. 11/08/06 at 18-19. On this island, as Ren Serey testified, because of the previous documented use and "because of the sensitivity of the island environment, it [the house] should be no larger than the existing dwelling, the old dwelling." Tr. 10/31/06 at 57. Under the Critical Area variance standards, an applicant has a right to a *residential use* of a parcel or lot, but does not have a right to a certain sized dwelling or to a dwelling, sheds, driveway, or other structures in a certain location.

A property owner has *no right* to build any structure, other than a water-dependent structure (e.g., a pier or boat ramp) in the Critical Area Buffer. Contrary to DCWD's assertions, there is no right to build a house, driveway, decks or other structures within the 100-foot Critical Area Buffer. To do so, all applicants desiring to undertake *any* development activities in the buffer must first seek variances, giving the appropriate County and State agencies an opportunity to review the proposed development.

This applicant did not seek any review or permission prior to the development activities in the Buffer and instead increased the impervious surface on Little Island *from 3,005 square feet to 9,060 square feet*. Generally, when property owners go through the variance process, they ask

the County for permission to build that which they propose to build, not to retain what they in fact have already built. Undoubtedly, had DCWD gone through the normal process, it would have had to significantly revise its initial plans in terms of structure size, location and construction techniques in order to minimize impacts to the Buffer and to the steep slopes. Tr. 10/31/06 at 66-67, Testimony of Ren Serey, and Tr. 11/108/06 at 20-21, Testimony of Mary Owens. The Board's grant of these variances to DCWD awarded a special privilege to which this applicant is not entitled under the law.

Self-Created Hardship

The Board's Decision encourages landowners to violate the Critical Area law by building structures without a variance. Moreover, the Board failed to recognize a self-created hardship when it was literally staring at them from the photos presented during the hearings. *See, e.g.*, Prot. Exh. 44, photograph of Little Island. Tr. 11/02/06.

In 2004, in response to the *Lewis* case, the General Assembly amended the law to restore the self-created hardship standard which the Court of Appeals had abandoned in *Lewis*. (*Lewis v. Dep't of Natural Resources*, 377 Md. 382 (2003), *abrogated by statute*, 2004 Laws of Md. Ch. 526, as stated in *Becker v. Anne Arundel County*, 174 Md. App. 114 (2007). When the *Lewis* Court announced that Boards of Appeal must look at after-the-fact requests for variances as if the construction had not already occurred, these boards were faced with an impossible situation. The General Assembly acted quickly to restore the long-standing self-created hardship standard to Critical Area variances. Code, NR §8-1808(d)(2)(ii). Here, inexplicably, the Anne Arundel Board followed the dictates of *Lewis*. "While the applicant has violated the law and the improvements are in place, we have considered this request for variances as if the structures were not in place." Mem. Op. 31, emphasis added. In using the *Lewis* standard, and considering the variance application as if the structures did not exist, the Board committed a clear error of law.

DCWD built what it wanted, with neither a building permit nor a health department

permit. Needing variances to keep the buildings, DCWD turned to the Board. The Board not only concluded that the illegal actions were irrelevant, but rewarded the applicant for its bad acts. While the Board stated that it had “reviewed” the State law, as amended in 2004, Code NR§8-1808(d)(2)(ii), the Decision gave no weight to the after-the-fact nature of the request. Instead, the Board simply imagined that “the structures were not in place.” Mem. Op. 31. Even if this were humanly possible, the notion that a Board must pretend not to see what is plainly on the land is a doctrine that was discarded by the General Assembly in 2004. For a zoning board to turn a blind eye to the illegal structures (as if that were possible), and then to try to open its eyes to consider fully the environmental impact of the actual construction, is a conundrum that was resolved by statute in 2004. This Board simply ignored the law.

The Board’s Decision nullifies the self-created hardship variance criterion and promotes disregard for the law in building permit processes all over Anne Arundel County, and indeed, throughout Maryland’s Critical Area. A landowner who wants to build a structure that may require a variance – a pool, a shed, a house of a certain size – and needs a use or area variance now has a choice: either seek a permit, or build illegally now, and ask for permission later. If one of the factors in considering a variance request is environmental impact (as it is for all Critical Area cases), a landowner is now better off violating the law because the actual impact of illegal construction may assist the landowner’s case. Why not build a house twice the size allowed by a local zoning ordinance? Why not ignore the setback rules?

The standard requiring the Board to find that the variance is not based on conditions or circumstances that are the result of actions by the applicant has existed in Maryland case law since the early 1900s. See *Montgomery County v. Rotwein*, 169 Md. App. 716, 733 (2006) and cases cited therein. The variances requested by DCWD are **directly the result of its actions** as they are based on development activity and construction undertaken prior to seeking any permits or approvals. Had the Applicant followed the same process as is required of any other property

owner seeking to develop in the Buffer, the County, citizens of Anne Arundel County, and the Critical Area Commission would have had an opportunity to weigh the development proposal and consider the placement of the dwelling, its footprint, area of disturbance, tree and vegetation removal, steep slope and water quality, fish, plant and wildlife habitat impacts. Tr. 10/31/06 at 91, Testimony of Ren Serey; Tr. 11/08/07 at 23-24, Testimony of Mary Owens. The Applicant invited the Board to accommodate its wrongdoing, rather than to analyze the type, location, and extent of development that would alleviate a hardship. This Board should not have accepted the invitation.

Fish, Wildlife, and Plant Habitat - Harmony with Spirit and Intent of

Critical Area Program

The Board failed to affirmatively find that the granting of the requested variances will not adversely affect fish, wildlife, or plant habitat, and that the variances will be in harmony with the spirit and intent of the Critical Area program. This finding is required by law. COMAR 27.01.11.01A (5). As the Commission's expert witness, Ren Serey, opined, the "development of the island, redevelopment, the location of the house, the size of the house, the location of the impervious surfaces, the clearing of vegetation....all of those do have and have had impacts on the immediate critical area, the immediate resources of the island." Tr. 10/31/06 at 52.

Although the Board heard from four expert witnesses for the State, each of whom chronicled the harm to fish, wildlife, and plant habitat, the Board side-stepped its responsibility to make a finding on this factor.

Again, the applicant must prove that the variances will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat and further that the granting of the variance is in harmony with the general spirit and intent of the Critical Area program. This variance standard harkens back to the purpose of the Critical Area law and the finding of the General Assembly, that development in the Buffer is presumed to have a negative impact and to not

conform with the spirit and intent of the Critical Area program. See Code, NR §§8-1801(a) and 8-1808(d). If the Board had considered this standard in light of the findings and purposes of the General Assembly, the only possible conclusion would have been that these variances are anathema to the expressed purposes and intent of the Critical Area program.

The Commission provided expert testimony from witnesses with long experience in administering the Program with regard to this variance standard. Ren Serey testified that “the buffer is a designated habitat protection area. The water quality and wildlife habitats are presumed under the law to be important.” Tr. 10/31/06 at 59. Mr. Serey further testified that “development in impervious surfaces or cutting of trees, or grading of slopes, within the buffer it requires a heightened review. It is by statute a more sensitive area, the most sensitive area from a critical area point of view.” Tr. 10/31/06 at 70. Mr. Serey believed that the DCWD application did not satisfy the standard of no adverse impact to fish, wildlife, and plant habitat. Tr. 10/31/06 at 52. Similarly, Mary Owens gave her expert opinion that “this standard has not been met.” Tr. 11/08/06 at 23-24. “There are adverse impacts to water quality....created by this situation....there were extensive areas cleared, extensive parts of the property were graded, much of the existing habitat on the island has been altered,...so it no longer provides its optimum function.”

Dr. Gwen Brewer, the science program manager for the State’s Natural Heritage Program, and an expert in wildlife ecology specializing in avian ecology, testified about the numerous habitats on Little Island that were lost due to the Applicant’s development activity. Tr. 11/02/06 at 14-24. Dr. Brewer testified that photographs depicting the pre-construction condition of the island showed trees, shrubbery, and beach areas. Tr. 11/02/06 at 14-15. All of these areas, according to Dr. Brewer, provided food, nesting cover, and habitat for species of birds and insects. In particular, the bank in front of the pre-existing house would provide “nesting habitat for belted kingfisher, a species that burrow into sandy or dirt banks.” Tr. 11/02/06 at 17.

Dr. Brewer also mentioned the dead trees along the edge of the sandy shoreline, and

opined that this area “would be used by species such as great blue heron for resting along the shoreline.” Id. Asked about the functioning of the habitat on Little Island in its pre-construction state, Dr. Brewer said: “In my expert opinion that island had wildlife habitat.” Id. at 33.

Dr. Brewer then contrasted the pre-construction habitat of the Island to the conditions existing today: “The larger expanse of lawn area doesn’t include the trees, especially maybe some of the taller trees that osprey, for example, eastern wood peewee, Carolina chickadees, tufted titmice, might use for nesting. Also the missing shrub layer and leaf litter that accumulates underneath forested and areas with forest and shrub is not present.” Tr. 10/31/06 at 22.

In terms of the grading and removal of the natural cliff face, Dr. Brewer stated that “[for] habitat for terrestrial animals the grading and the removal of the natural banks and the natural shoreline, including the vegetation that was associated with those features, has in my opinion produced a habitat that is not valuable to wildlife, that is a decrease in the wildlife habitat present.” Id. at 24. Asked specifically about the removal of woody vegetation and shrubbery, Dr. Brewer stated, “that habitat has been lost.” Id. Further, Dr. Brewer testified that an increase in impervious coverage on the land “has not been a benefit to wildlife.” Her expert opinion to the Board was that the first option is “to do no harm to start with....not make restoration a necessity, to try to preserve what is there in the first place, the natural processes, the organisms that are present.” Id. at 42.

The Commission’s Science Advisor, LeeAnne Chandler, testified as an expert on implementation of Critical Area program buffer provisions and interpretation of the criteria regarding functions and policies of the buffer. Tr. 11/02/06 at 52. Ms. Chandler’s testimony explained in detail the State law amendments which strengthened the protections afforded to the Critical Area Buffer. Id. at 55-56. In her words, the function of the buffer is “to protect those types of [aquatic wetland and shoreline] environments from man made disturbances....as well as providing riparian wildlife habitat and provide a transition zone between aquatic and terrestrial

environments.” Id. at 56. Ms. Chandler examined Prot. Exh. 44 (a photograph of the Island in April of 2005) and concluded that “in terms of water quality the presence of impervious surfaces basically eliminates that area from providing any habitat whatsoever as well as removing that area from the ability to allow infiltration into the ground.” Id. at 57. She confirmed Dr. Brewer’s testimony about the value of fallen trees as habitat for wildlife. Further, she informed the Board that the construction on Little Island caused “a negative effect on the buffer due to the grading which has occurred, the placement of the house, driveway and accessory structures.” Id. at 61.

According to the Commission’s Science Advisor, there would be greater environmental harm in allowing the new structures to remain, than to require removal of those structures. The temporary impact to the slopes caused by removal of impervious surface can be ameliorated by the restoration and planting of the area with trees and shrubs. Tr. 11/02/06 at 62 and 82. In Ms. Chandler’s opinion, the construction (for which the variance was requested) caused a negative effect on the buffer, particularly with regard to the removal of the natural vegetation.

The testimony of these four expert witnesses addressed precisely the variance standard that requires an affirmative finding that the variance will not adversely affect fish, wildlife, or plant habitat. Yet, the Board did not, and could not, make this finding. Rather, the Board accepted DCWD’s destruction of the natural habitat and blessed the applicant’s plan for “restoration.” The Board also permitted DCWD to introduce testimony about the alleged environmental benefits to Little Island from the revetment. Yet, none of the requested variances pertained to the revetment. As applicant’s counsel observed on the first night of the Board’s hearings, the revetment is not at issue in this case. Even if it were, the revetment does little to bolster the applicant’s case, because no variance was requested for the revetment. Moreover, as Dr. Brewer testified, the revetment and associated grading of the slope destroyed the sandy beach and fallen trees that provided habitat on the Island before development. Tr. 11/02/06 at 17-33.

The purposes, spirit and intent of the Critical Area program are plainly expressed in the

words of the State law, including “to conserve fish, wildlife, and plant habitat.” Code, NR 8-1808(b). In addition, Mr. Serey, Ms. Owens, and Ms. Chandler each testified about their collective decades of experience in implementing the Critical Area program and its requirement of habitat conservation. Each witness emphatically opined that the variance request does not conform to the spirit and intent of the Critical Area Program. Tr. 10/31/06 at 52; Tr. 11/02/06 at 61; Tr. 11/08/06 at 26.

The purpose of the Critical Area program is “(1) [T]o establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats. . .” Code, NR §8-1801(b)(1). Significantly, the applicant provided *not one shred of evidence* to show that any steps were taken to preserve or minimize damage to the natural habitat of the Island. In contrast, the State’s witnesses demonstrated that habitat was removed from the island, and that the remaining habitat was significantly altered.

Extensive grading of steep slopes, destruction of natural habitat, planting of plastic palm trees, building a house, lighthouse, pool, and massive driveway, all in the Critical Area buffer: this, the Board found, “will be a showplace for environmental enhancement.” Mem. Op. 41. This statement defies credulity. The Applicant did not meet the standard, and the Board erred as a matter of law by granting the variance without having made this required finding.

Minimum Variances Necessary to Afford Relief

Without meaningful explanation, the Board found that the variance it devised for a specific number of square feet of impervious surface was the “minimum necessary.” Mem. Op. 35. A review of the Board’s Decision reveals that the Board arrived at this conclusion by cobbling together a new variance request for the Applicant. Rather than deciding on the request submitted for *all* of the ‘improvements’ on Little Island (amounting to over 9,000 square feet),

the Board instead described the request as : “sufficient variances to construct a two-story home with a roofline impervious coverage of 2,883 square feet, retain a long-existing boat house with deck (890 square feet), two sheds (total 274 square feet), concrete driveway (698 square feet), sidewalks of 694 square feet and a 210 square foot patio.” Mem. Op. 34. Essentially working from what DCWD constructed, rather than from what was the “minimum necessary” to provide reasonable use of the entire Island, the Board ignored the requirements of State law. Mary Owens explained: “In order to determine what the minimum necessary relief would be it’s important to go back to the fact that they had reasonable use of the property when there was 1911 square foot dwelling there.” Ms. Owens cautioned the Board not to “be swayed by what you see out there now.” Tr. 11/08/07 at 25-26.

Mr. Serey’s testimony reinforced this view. He informed the Board that the Commission viewed the starting point for the Board’s consideration of the issue of the minimum necessary to afford relief to be the 1,911 square feet of the previous dwelling. Tr. 10/31/06 at 61. This is because, as explained above, the law does not provide an applicant with the *right* to build any particular size or type of dwelling in the Critical Area Buffer. To the contrary, the law provides that, on a grandfathered lot, the local government shall provide for *residential use*, by permitting a dwelling, *if a dwelling is not already on the lot*. COMAR 27.01.02.07 B. In this case, a dwelling existed on the Island. That dwelling provides the baseline on which the Board should have determined the minimum amount of development necessary to provide relief.

The point of limiting or not allowing development in the Buffer is due to the sensitive nature of the functions of a buffer. Several witnesses for DCWD testified that the applicant is entitled to 15% impervious surface on this lot. This is simply not true. Tr. 11/08/07 at 11, Testimony of Mary Owens. Because the entire Island is in the Buffer or expanded Buffer, the applicant is *entitled to zero* percent impervious. The variance, which affords minimum necessary relief, is for the minimum necessary *residential use* of a grandfathered property. But no one is

entitled to cover any part of the Buffer with impervious surface. In order to minimize impacts to the Buffer, 0% impervious is the standard. The Board should have started from zero and worked upward, rather than starting from 9,000 and working backward. Since there was a pre-existing dwelling on the property consisting of 1,911 square feet of impervious surface, that is the minimum necessary to afford relief.¹⁰ Development consisting of over 9,000 square feet of impervious surface, or even just over 5,600 square feet of impervious surface as proffered in the purported 'revised application' in the October 26, 2006 site plan, is much more than necessary to afford minimum relief pursuant to the County Code. The Board erred, and should be reversed.

CONCLUSION

The Critical Area Act assigns to the Applicant the burden of proof on each and every variance factor. Code, NR§8-1808(d)(3)(i). An applicant for a variance to the Critical Area Act bears a heavy burden to prove that strict application of the law will work a true, unwarranted hardship, and that the proposed variance meets each of the legislatively-prescribed standards. In this case, DCWD failed to meet its burden to prove the factors of unwarranted hardship, rights commonly enjoyed/special privilege, self-created hardship, and lack of adverse effect on fish, wildlife, and plant habitat. On the record in this case, the law compels exactly the opposite conclusion from that reached in the Board's Decision. The Board's treatment of these factors reveals a fundamental mis-application of the governing law.

DCWD took it upon itself to decide whether the fact that the whole of Little Island was in the sensitive Critical Area Buffer merited concern for the sensitive environment. By altering the

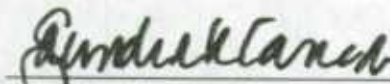
¹⁰Admittedly, it was used as a summer cottage, but as this Applicant is a builder in Anne Arundel County, the knowledge of how to turn the summer cottage into a year-round home utilizing the 1,911 square foot footprint should have been within the Applicant's grasp.

natural habitat, building at will, and demonstrating no regard for the processes and laws which apply to everyone, this applicant, in the words of the Board, created a "wonderland of improvements on this island without permits." Mem. Op. 38. This type of self-approved development activity is anathema to the intent and spirit of the Critical Area law. The Decision of the Anne Arundel Board of Appeals allowing DCWD's "wonderland" to remain should be reversed.

Respectfully submitted,

DOUGLAS F. GANSLER,
ATTORNEY GENERAL OF MARYLAND


Marianne E. Dise


Sandra K. Canedo
Assistant Attorneys General
Critical Area Commission for the Chesapeake and
Atlantic Coastal Bays
1804 West Street, Ste. 100
Annapolis, MD 21401
(410) 260-3466

Dated: June 13, 2008

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of June, 2008, I mailed a copy of the foregoing Memorandum of Law, by U.S. mail, postage prepaid, to the following five persons:

Robert J. Fuoco, Esquire
105 Padfield Road
Glen Burnie, Maryland 21061

Warren Rich, Esquire
Rich and Henderson, P.C.
P.O. Box 589
Annapolis, Maryland 21404

Sarah M. Iliff, Esquire
Senior Assistant County Attorney
Anne Arundel County Office of Law
2660 Riva Road, 4th Floor
Annapolis, Maryland 21401

Jon A. Mueller, Esquire
Director of Litigation
Chesapeake Bay Foundation, Inc.
6 Herndon Avenue
Annapolis, Maryland 21403

Ann Fligsten, Esquire
Attorney for Magothy River Association
1337 Kinloch Circle
Arnold, Maryland 21012

Marianne E. Dize

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREY
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

June 20, 2008

Edgar A. Baker, Jr., County Attorney
Wicomico County Government
P.O. Box 870
Salisbury, Maryland 21803-0870

Hard Copy of Letter Sent via Electronic Mail on June 20, 2008

RE: Critical Area Commission Notice of Action

Dear Ed,

Having been unsuccessful in contacting you by telephone, I am responding by this e-mail to your letter of June 13, 2008. You asked for the statutory authority for the Critical Area Commission's letter of May 7, 2008 to Wicomico County. The Commission sent two letters to the County on that date. The first letter ("Program letter") notified the County of action taken by the Commission pursuant to Annotated Code of Maryland, Natural Resources Article 8-1809, to find that the County's Critical Area program contains an omission: the lack of provisions to ensure effective implementation and enforcement of the County's program with regard to variances. The second letter ("Enforcement letter") notified the County of the Chair's determination under Code, NR 8-1815, that the County was failing to enforce the requirements of its Critical Area program with regard to the development activity undertaken by Mr. Edwin Lewis on Phillips Island. Both letters state the authority (State law) under which the Commission and/or the Chair acted in sending the respective notices.

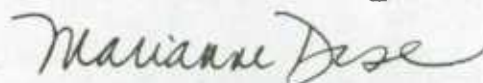
The Program letter, which reflects official action taken by the full Critical Area Commission, speaks for itself. I cannot interpret or expand that letter. The County, through a letter from Jack Lenox dated June 2, 2008 to Raymond Smethurst, complied with the Program letter's directive that the County "may not accept or process any variance application" until the County submits, and the Commission, approves amendments to the County's Critical Area Program to correct the identified deficiencies. To date, I am not aware that the County has submitted proposed amendments to the County's Program for review and approval by the Commission. Accordingly, the sanction remains in place. Should the County choose to defy the

terms of the Commission's action, the Commission would be compelled to enforce its action through the courts.

The Enforcement letter also speaks for itself. The County has responded to the Enforcement letter, by letter from County Executive Pollitt to Chair McHale requesting that the Chair ask the Attorney General's Office to undertake the enforcement of the County's order requiring removal of the illegal structure on Phillips Island. The Attorney General's Office has accepted this request.

I trust that this e-mail is responsive to your request for assistance.

Very truly yours,

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

Marianne E. Dise
Principal Counsel

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINTREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

July 2, 2008

St. Mary's County Board of Appeals
St. Mary's County Government
Department of Land Use and Growth Management
P O Box 653
Leonardtown, Maryland 20650

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.

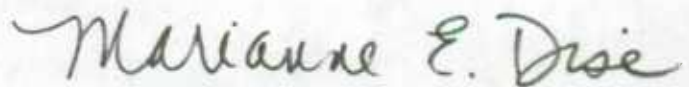
1804 West Street, Suite 100
Annapolis, Maryland 21401

- 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

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

July 2, 2008

Prince George's County Board of Appeals
County Administration Building
Upper Marlboro, Maryland 20772

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.

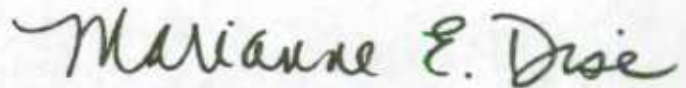
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As of July 1, 2008, the prohibition on granting an “after the fact” variance without full satisfaction of the conditions precedent applies to all pending applications for “after the fact” variances regardless of when the application was accepted, when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



Calvert Co Board of Appeals
c/o Dept of Planning & Zoning
Co Services Plaza, 175 Main Street
P.O. Box 107
Frederick, MD 20678

Cecil Co Board of Appeals
Co Administration Bldg
Elk Room, 200 Chesapeake Blvd
Elkton, MD 21921

Dorchester Co Board of Appeals
P O Box 107
Cambridge, MD 21613

Worcester Co Board of Zoning
Appeals
Gvt Center, One West Market St
Snow Hill, MD 22863

Wicomico Co Board of Zoning
Appeals
Gvt Office Bldg, P O Box 870
North Division Street & Rt 50
Salisbury, MD 21803-0870

Charles Co Board of Appeals
P O Box 2150
La Plata, MD 20646

Talbot Co Board of Appeals
28712 Glebe Road
Suite 2
Easton, MD 21601

Harford Co Hearing Examiner
212 S Bond Street
Bel Air, MD 21014

Attn: Board of Appeals Clerk
Queen Anne's County
160 Coursevall Drive
Centreville, MD 21617

Kent Co Zoning Board of Appeals
Couty Government Center
400 High Street
Chestertown, MD 21620

Prince George's County
Board of Appeals
County Administration Bldg
Upper Marlboro, MD 20772

Board of Municipal & Zoning
Appeals
417
E Fayette Street, #1432
Baltimore, MD 21202

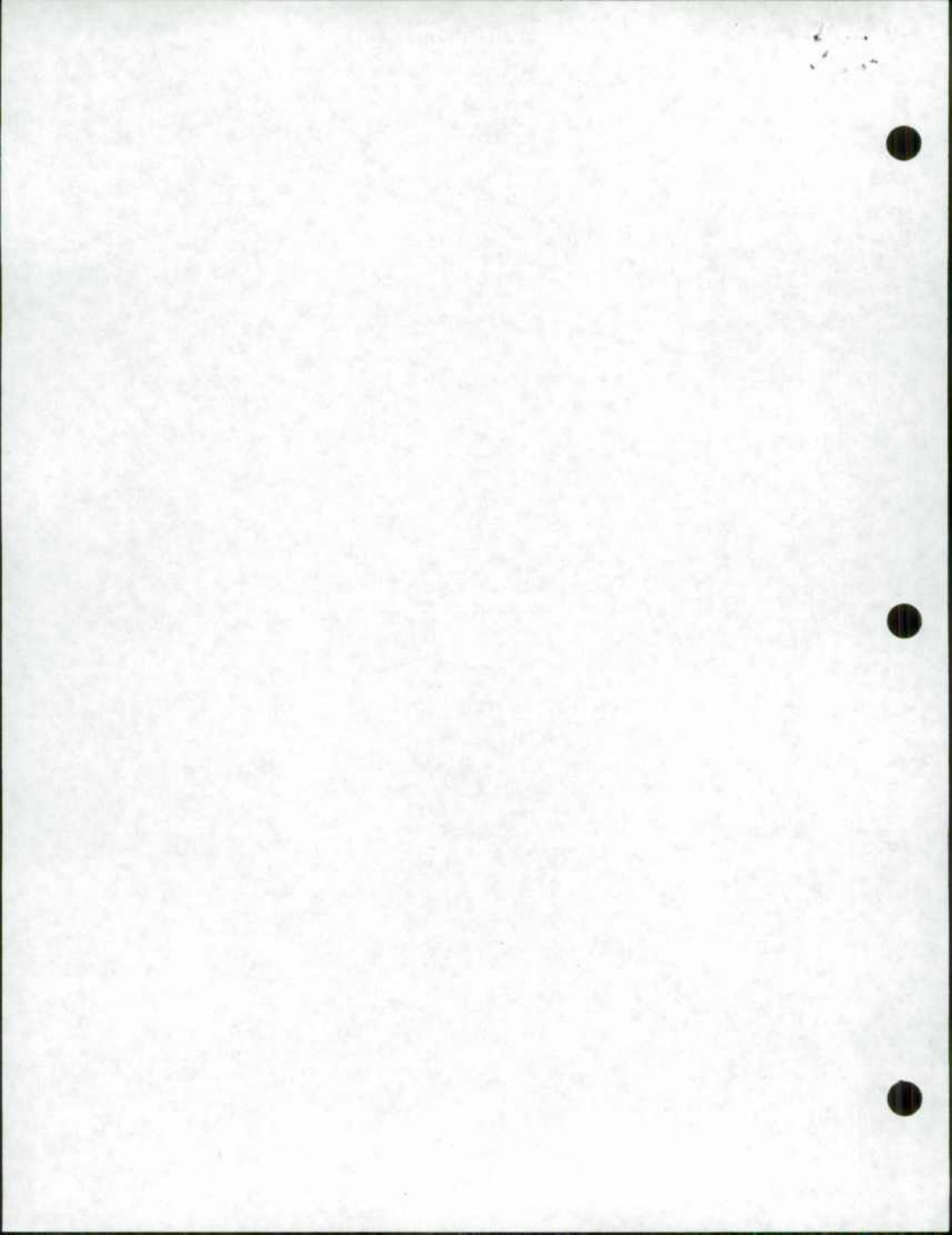
Anne Arundel Co Board of Appeals
44 Calvert Street
Annapolis, MD 21401

Baltimore Co Board of Appeals
Jefferson Building, Suite 203
105 W Chesapeake Avenue
Towson, MD 21204

St. Mary's Co Board of Appeal
Dept of Land Use & Growth Mangt
P O Box 653
Leonardtwn, MD 20650

Caroline Co Board of Zoning
Appeals, Health & Public Serv Bldg
403 S 7th Street, Suite 210
Denton, MD 21629-1335

Somerset Co Brd of Zoning Appeals
Somerset Office Complex
11916 Somerset Avenue
Princess Anne, MD 21853





Department of Planning & Zoning
Board of Appeals
Attn: Sally Nash
1600 Duke of Gloucester Street
Annapolis, MD 21401

Ms. Sharon Humm
Secretary to the Board of Appeals
Town Hall
P O Box 400
Chesapeake Beach, MD 20732

Ms. Betty Jamison
P O Box 99
North Beach, MD 20714

The Honorable Lester Branson
13 North 3rd Street
Denton, MD 21629

Ms. Christy Marshall
118 North Main Street
P O Box 471
Federalsburg, MD 21632

Ms. Melinda Stafford
Town of Hillsboro
P O Box 128
Hillsboro, MD 21641

Ms. Awilda Hernandez
Town of Indian Head
4195 Indian Head Highway
Indian Head, MD 20640

Mr. David Kibler
Town of Greensboro
P O Box 340
Greensboro, MD 21639

Ms. Janice Henderson
City of Cambridge
705 Leonard Lane
Cambridge, MD 21613

Mr. Jerry Clark
P O Box 248
Secretary, MD 21664

The Honorable Russell Brinsfield
P O Box 86
Vienna, MD 21869

Ms. Anne Vansant
118 North Cross Street
Chestertown, MD 21620

Mr. Brad Watts
P O Box 520
Easton, MD 21601

Ms. Christina Myles-Tochko
P O Box 339
Oxford, MD 21654

Ms. Debbie Renshaw
P O Box 206
St. Michaels, MD 21663

Karen Houtman
Mayor and Council Office
Municipal Building
PO Box 348
Snow Hill, MD 21863

Mr. Donald Braden
Town Hall
100 Lawyers Row
P O Box 100
Centreville, MD 21617

Mr. Henry Burden
P O Box 154
Charlestown, MD 21914

Ms. Janet Rochester
P O Box 144
Church Hill, MD 21623

Mr. Marty Salmon
P O Box 205
Chesapeake City, MD 21915

Mr. Larry Tyler
Board of Zoning Appeals
P O Box 270
Crisfield, MD 21817

Building & Zoning Department
100 Railroad Avenue
Elkton, MD 21922

Mr. Keith Dashfield
c/o City of Fruitland
P O Box F
Fruitland, MD 21826

Mr. Charles Packard
712 Shawnee Brook Drive
Havre de Grace, MD 21078

Mr. Herbert Winnik
Board of Appeals
P O Box 1
Leonardtown, MD 20650

Mr. David Insley
P O Box 81
Mardela Springs, MD 21837

Ms. Betsy Vennell
106 S Main Street
North East, MD 21901

Board of Zoning Appeals
P O Box 773
Perryville, MD 21903

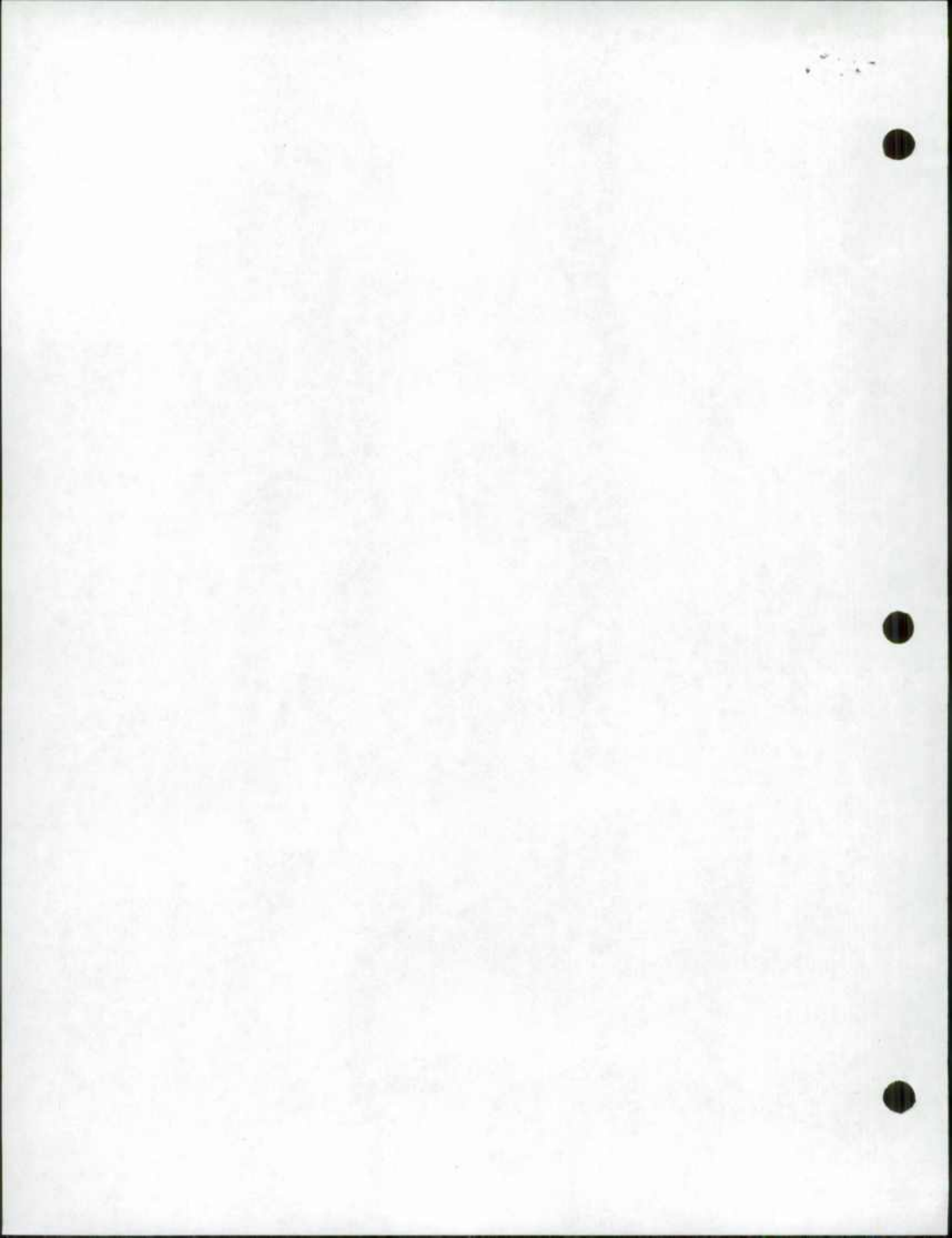
The Honorable Kerry Abrams
64 S Main Street
Port Deposit, MD 21904

Ms. Tracy Grangier
30489 Broad Street
Princess Anne, MD 21853



Mr. Lonnie L. Anthony
P O Box 4
Queenstown, MD 21658

Mr. Charles McGee
P O Box 338
Sharptown, MD 21861



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREY
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

July 3, 2008

Timothy Henderson, Esquire
Rich and Henderson, P.C.
51 Franklin Street, Suite 300
Annapolis, Maryland 21404

ATTENTION: Daniella Einik

RE: Your Public Information Act Request of June 11, 2008

Dear Ms. Einik:

Pursuant to your letter of June 11, 2008, enclosed are copies of the documents you requested. These documents were selected by you, during your examination of the Critical Area Commission's files, which were made available for your inspection in accordance with the requirements of the Maryland Public Information Act. The files were made available in response to your June 11th request, as subsequently modified by e-mails from you to me. Payment should be remitted as per the enclosed invoice.

If I may be of further assistance, please contact me.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Enclosures

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
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SAUNDRA K. CANEDO
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STATE OF MARYLAND
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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 3, 2008

Warren K. Rich, Esquire
Rich and Henderson, P.C.
51 Franklin Street, Suite 300
Annapolis, Maryland 21404

RE: County Comm'rs of Queen Anne's County v. Kent Island, LLC

Dear Warren:

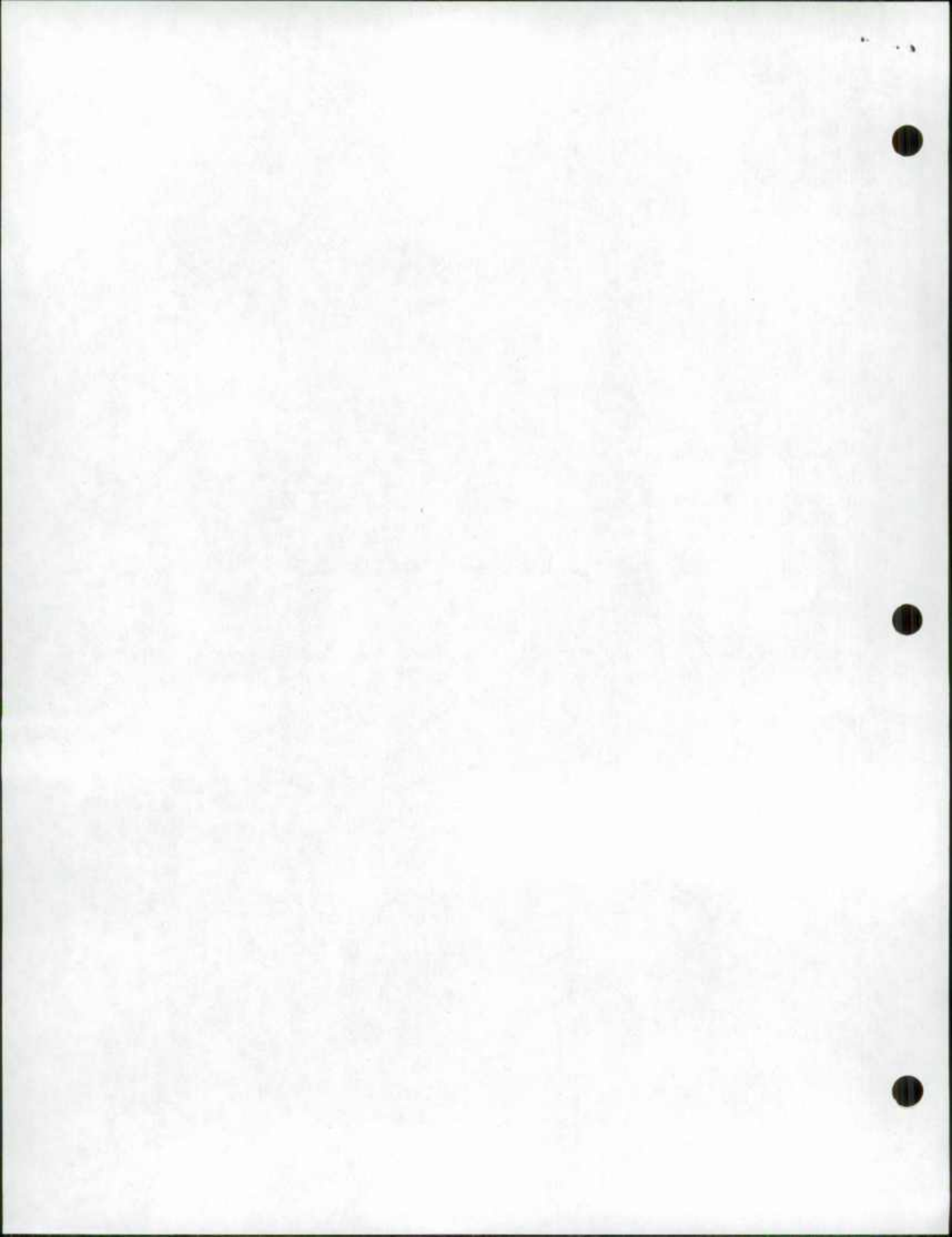
The enclosed communication from the Queen Anne's County Commissioners made its way to my office (via the main AG's office in Baltimore). I assume that it was intended for you.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Enclosure





Queen
Anne's
County

County Commissioners:

Eric S. Wargotz, M.D., Commission President
Courtney M. Billups, District 1
Paul L. Gunther, District 2
Gene M. Ransom III, District 3
Carol R. Fordonski, District 4

BOARD OF COUNTY COMMISSIONERS

The Liberty Building
107 North Liberty Street
Centreville, MD 21617

Telephone: (410) 758-4098
Fax: (410) 758-1170
e-mail: gacc@qac.org

County Administrator: John P. Borders, Jr.
Executive Assistant to County Commissioners: Margie A. Houck

May 6, 2008

Warren K. Rich, Esquire
Rich & Henderson, P.C.
51 Franklin Street, Suite 300
P.O. Box 589
Annapolis, Maryland 21404

Re: County Commissioners of
Queen Anne's County, et al.
v. Kent Island, LLC

Dear Mr. Rich:

We have reviewed and discussed the offer of settlement outlined in your letter of April 7, 2008. We cannot agree to the proposed terms of settlement.

If your client would be interested either in a business park concept or a mixed use of limited commercial with a residential component of 100 units or less, we would be more than happy to continue settlement discussions, however, we feel further high density residential development (even with the proposed reduction to 199 units) is not in the best interests of the Kent Island area and the citizens of Queen Anne's County.

Thank you for your efforts in attempting to resolve this matter. Please let us know if either of the concepts mentioned above would warrant further discussion.

THE COUNTY COMMISSIONERS OF
QUEEN ANNE'S COUNTY

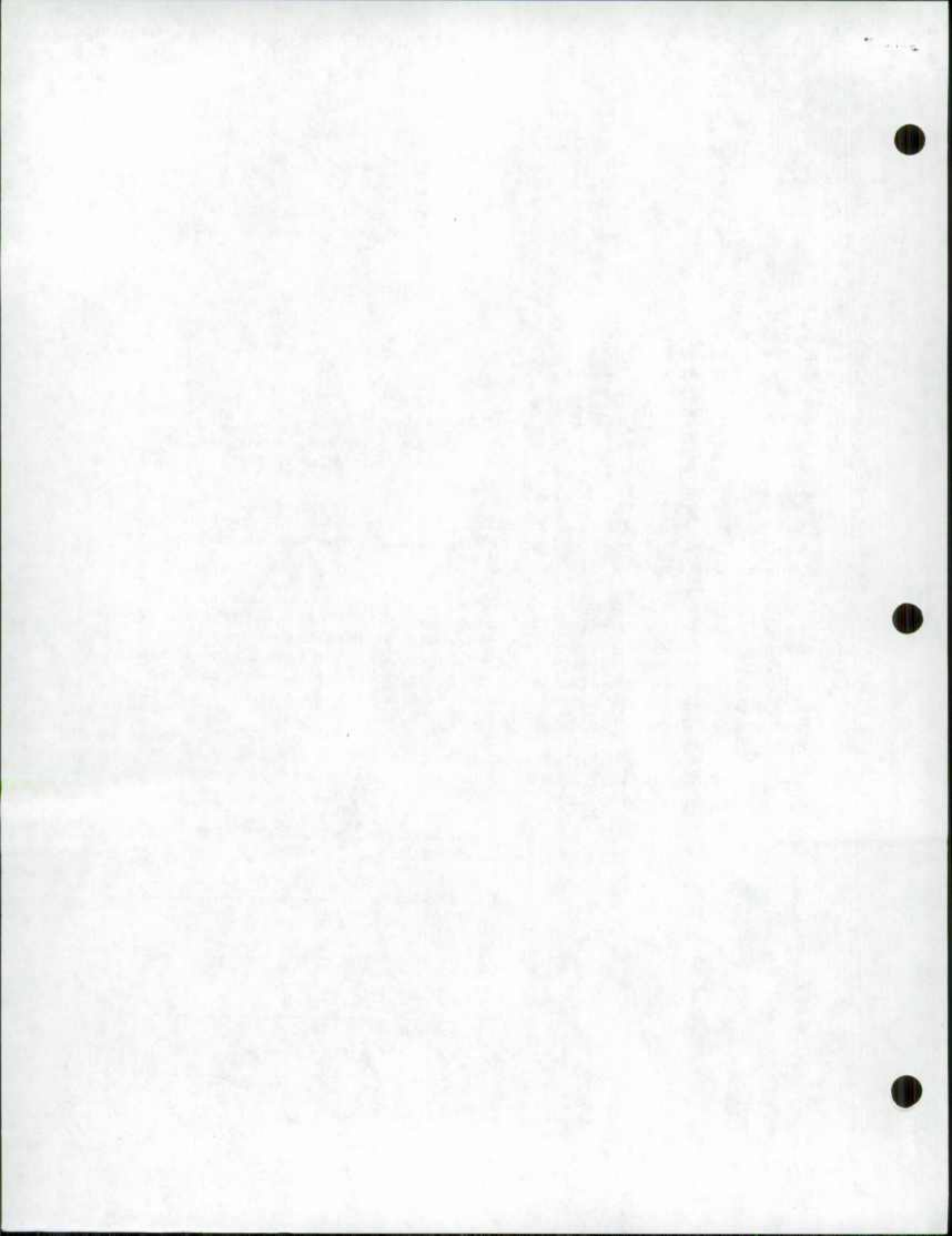
Eric S. Wargotz, M.D.

Gene Ransom, III

Courtney M. Billups

Paul L. Gunther

Carol R. Fordonski



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 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. DISL
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO (410) 974-5338

WRITER'S DIRECT DIAL NO (410) 260-3466
mdisc@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."

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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
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 8, 2008

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

Re: 2008-0201-V – Newby, Laurus

Dear Ms. Cotter,

Thank you for forwarding the above-referenced variance. The applicant has requested a variance to perfect a patio constructed in the Buffer without proper permits. This site is 16,293 square feet and is designated as Limited Development Area (LDA). It is currently improved with a dwelling unit and gravel driveway. This lot is mapped as a Buffer Management Area (BMA). This applicant seeks a variance to retain the approximately 503 square foot patio. It does not appear that prior to the construction of this patio that there was any egress to the waterward side of the dwelling.

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 Hearing Officer may grant this variance request at this time.

Variance Request for After-the-Fact Patio

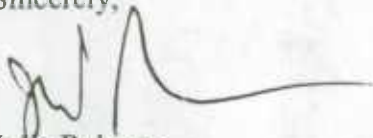
Provided that the applicant first satisfies requirements of the compliance process as stated above in association with the existing violation, and provided that this lot is properly grandfathered, we do not generally oppose a variance to retain the patio; however, it appears that there may be the opportunity to minimize the size of the patio. After the applicant has provided mitigation in conjunction with the violation aspect of this request, please note that additional mitigation must be provided for the area of the patio if it is granted a variance to remain. It appears that the

Ms. Cotter
7/8/2008
Page 2 of 2

applicant has shown an area proposed for implementing 2:1 mitigation for the patio; However, the southern area indicated for 500 square feet of mitigation appears to already be forested. In conjunction with an approved variance, the applicant must provide a plantings plan to the County for review and approval for the total area of the mitigation on this lot.

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 344-08

enclosure

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREY
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNI E. DISI
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANIDO
Assistant Attorney General

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

FAX NO (410) 974-5338

WRITER'S DIRECT DIAL NO (410) 260-3466
mdisc@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.

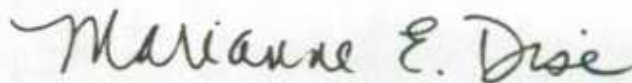
1804 West Street, Suite 100
Annapolis, Maryland 21401

- 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.
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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

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

July 10, 2008

HAND-DELIVERED

Bessie M. Decker, Clerk
Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Annapolis, Maryland 21401

RE: *Sara Caldes, et al., v. Elm Street Development, et al.*, No. 12, Sept. Term 2008

Dear Madam Clerk:

Enclosed for filing in the above-captioned case are twenty (20) copies of the Brief of Amicus Curiae Critical Area Commission for the Chesapeake and Atlantic Coastal Bays. Two copies of each brief have been mailed to each of the parties, including amicus, in this case.

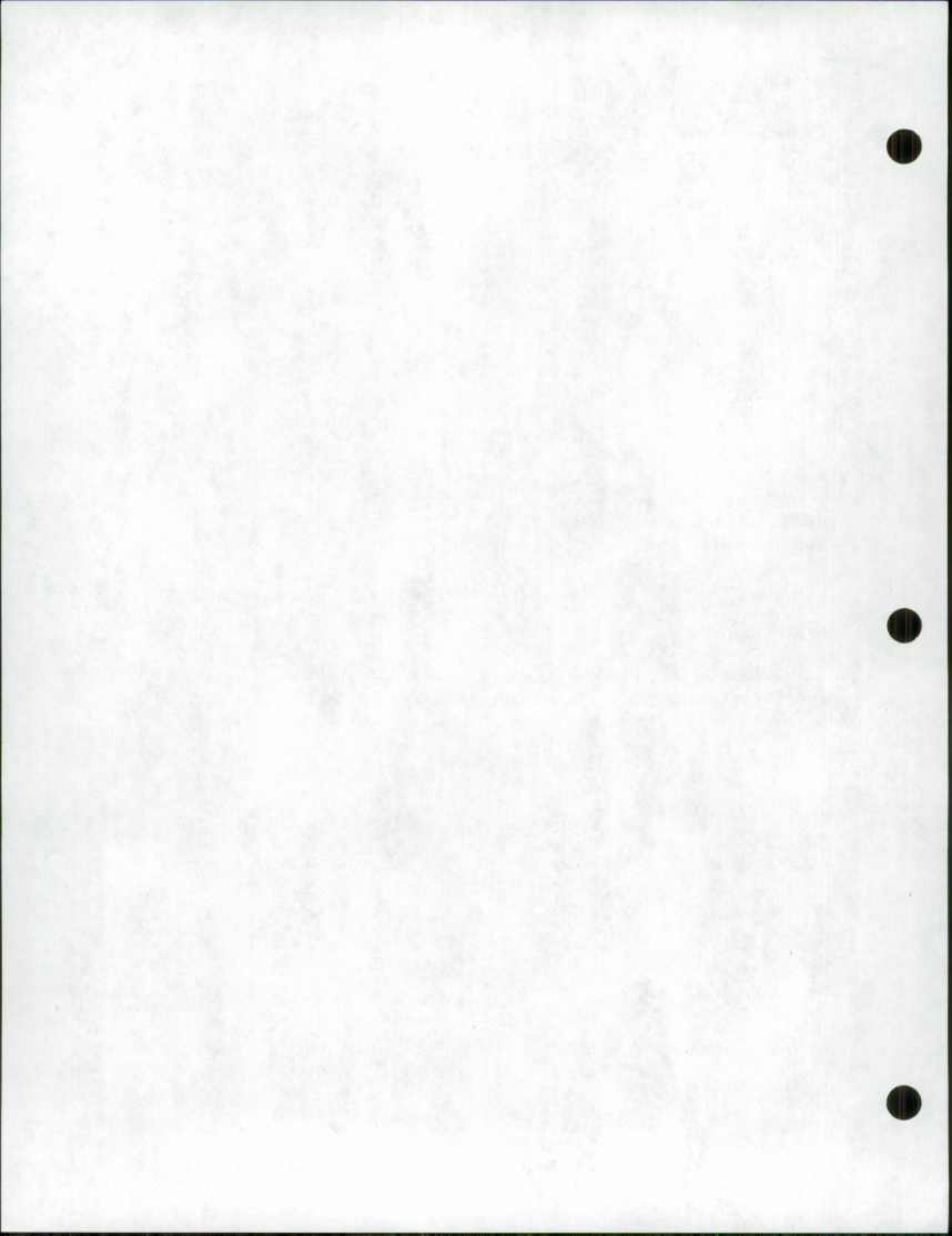
Thank you for your kind assistance.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Copy to All Counsel



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

July 25, 2008

HAND-DELIVERED

Mr. Robert P. Duckworth, Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Re: *Petition of Ray and Marianne Lokay, et al. For Judicial Review of a Decision of the
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays*
Case No C-08-132736

Dear Mr. Duckworth:

Enclosed please find for filing in the above-referenced case the State of Maryland Critical Area Commission's Response to Petition, Motion to Dismiss, Memorandum in Support of Motion, and Proposed Order.

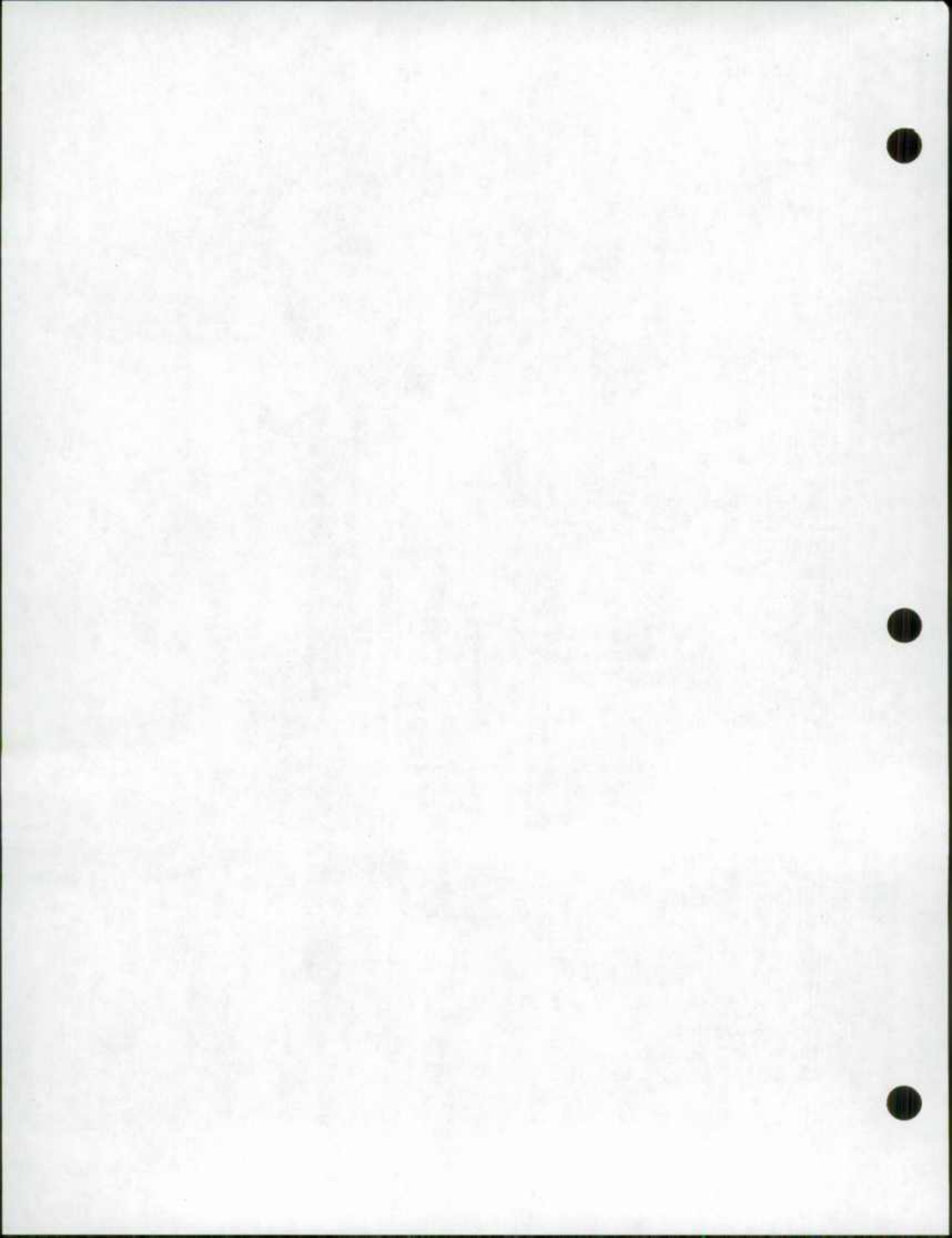
Very truly yours,

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

Marianne E. Dize
Assistant Attorney General

Enclosures

cc: C. Daniel Saunders, Esquire
Paul N. DeSantis, Esquire
Thomas N. Yeager, Esquire



IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF
RAY AND MARIANNE LOKAY,
ET AL.,

*

FOR JUDICIAL REVIEW OF THE
DECISION OF THE
CRITICAL AREA COMMISSION FOR
THE CHESAPEAKE AND ATLANTIC
COASTAL BAYS,

*

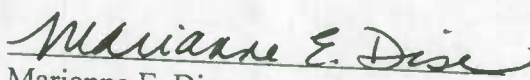
* Case No. C-08-132736

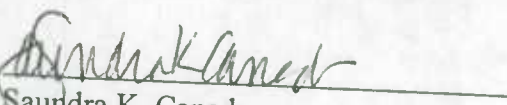
RESPONSE TO PETITION FOR JUDICIAL REVIEW

The State of Maryland, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays, by its attorneys, Douglas F. Gansler, Attorney General of Maryland, and Marianne E. Dise and Sandra K. Canedo, Assistant Attorneys General, hereby states its intention to participate as a party Respondent in this action.

Respectfully submitted,

DOUGLAS F. GANSLER,
ATTORNEY GENERAL OF MARYLAND

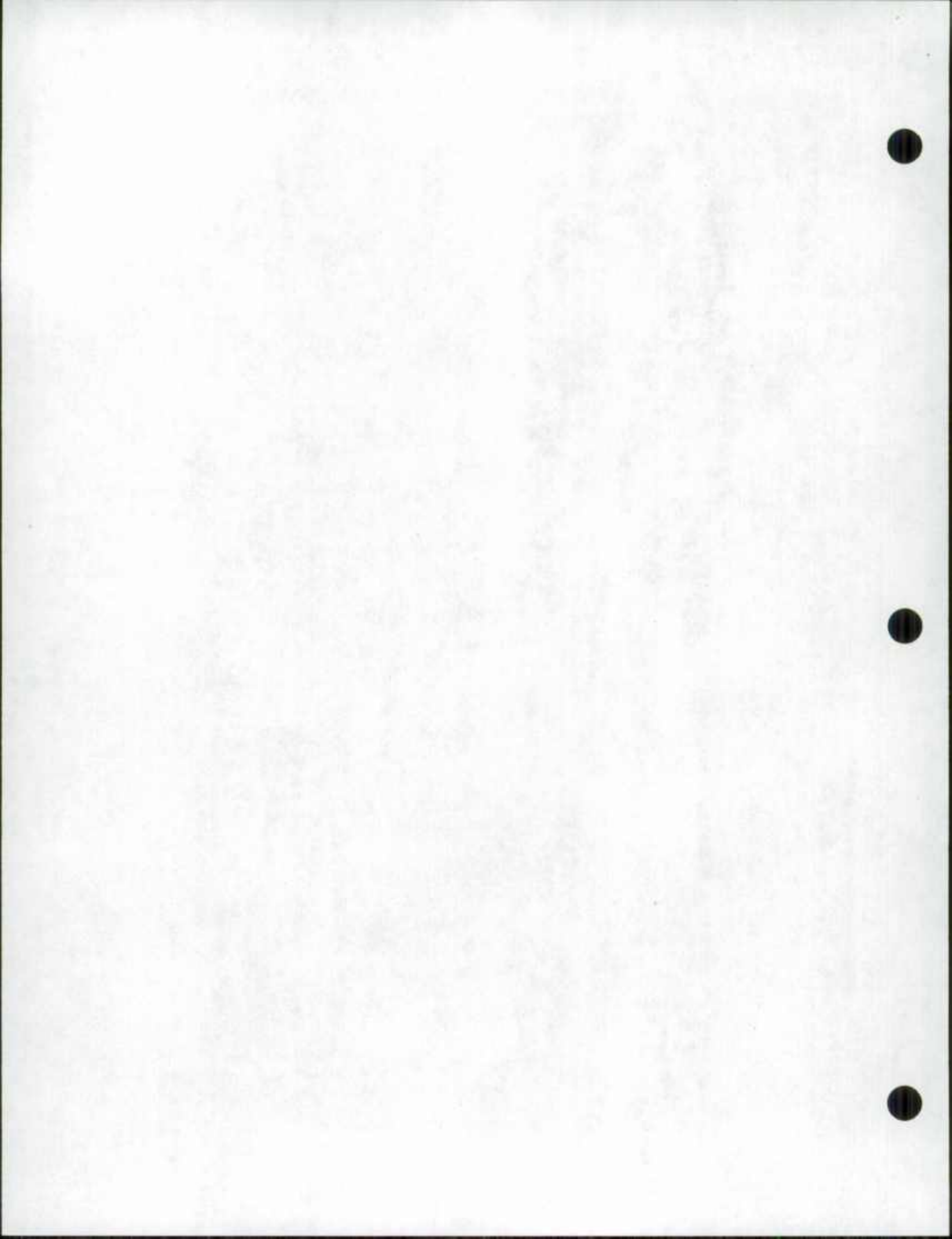

Marianne E. Dise


Sandra K. Canedo

Assistant Attorneys General
Critical Area Commission for the Chesapeake and
Atlantic Coastal Bays
1804 West Street, Suite 100
Annapolis, Maryland 21401
(410) 260-3466 (phone)
(410) 974-5338 (fax)

Dated: July 25, 2008

Attorneys for the State of Maryland, Critical Area
Commission for the Chesapeake and Atlantic Coastal
Bays



IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF
RAY AND MARIANNE LOKAY,
ET AL.,

FOR JUDICIAL REVIEW OF THE
DECISION OF THE
CRITICAL AREA COMMISSION FOR
THE CHESAPEAKE AND ATLANTIC
COASTAL BAYS

*

*

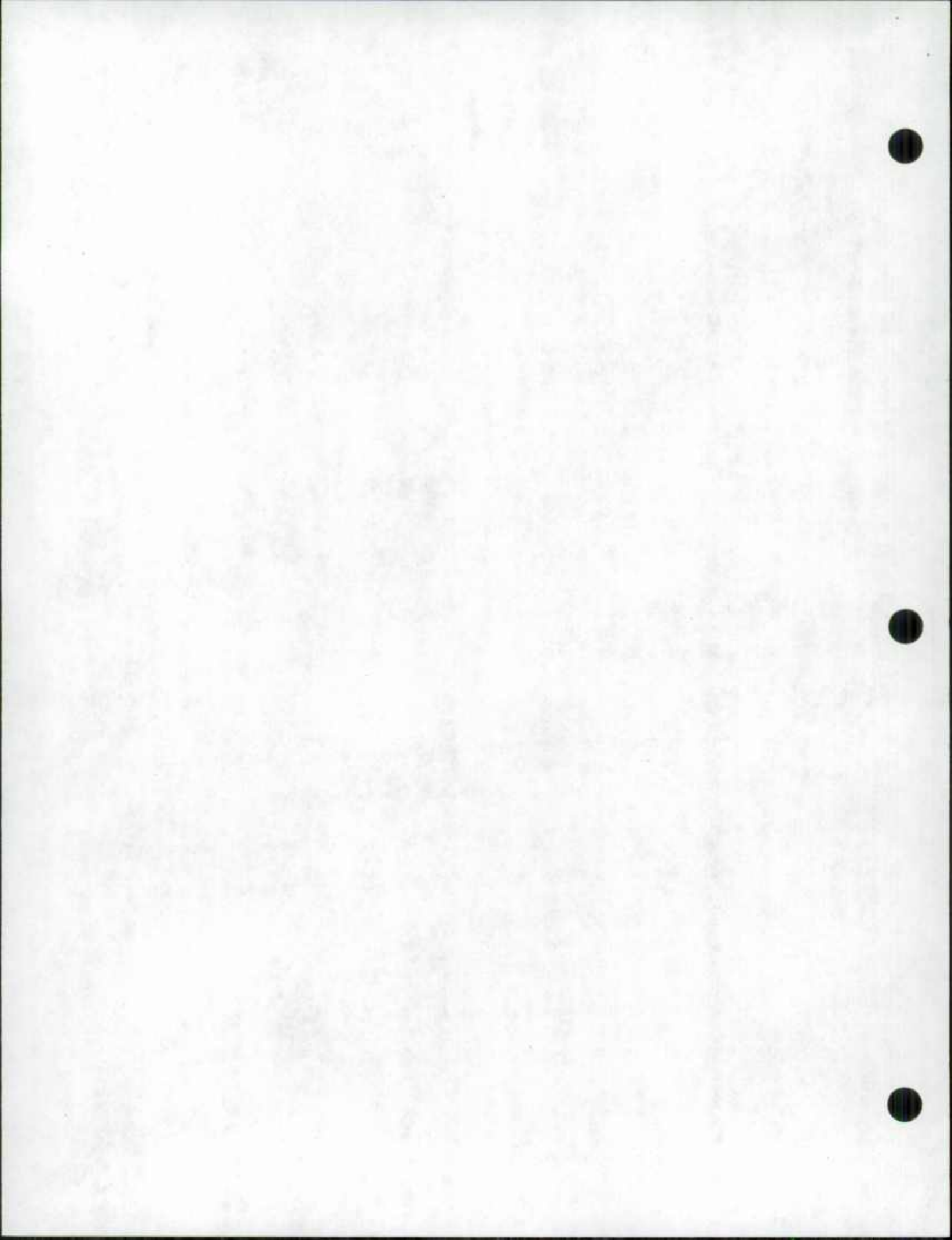
* Case No. C-08-132736

* * * * *

MOTION TO DISMISS PETITION

Respondent State of Maryland Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, Douglas F. Gansler, Attorney General of Maryland, and Marianne E. Dise and Sandra K. Canedo, Assistant Attorneys General, moves pursuant to Maryland Rule 2-322 to dismiss the Petition for Judicial Review, ("Petition"), and states for cause:

1. The action of the Critical Area Commission on the proposed amendment to Kent County's local Critical Area program regarding the proposed map change for the Drayton Manor property was a quasi-legislative action, and, as such, for the reasons set forth in the accompanying Memorandum in Support of Motion to Dismiss, is not subject to administrative judicial review under Rule 7-201.
2. The Critical Area statute (Code, Natural Resources Article §§8-1801 et seq.), does not provide for administrative judicial review of the decisions of the Commission. Accordingly, for the reasons set forth in the accompanying Memorandum in Support of Motion to Dismiss, the Commission's decision is not subject to review under Rule 7-201 et seq.



WHEREFORE, the State of Maryland Critical Area Commission requests that the Court dismiss the Petition for failure to state a claim on which relief may be granted.

Respectfully Submitted,

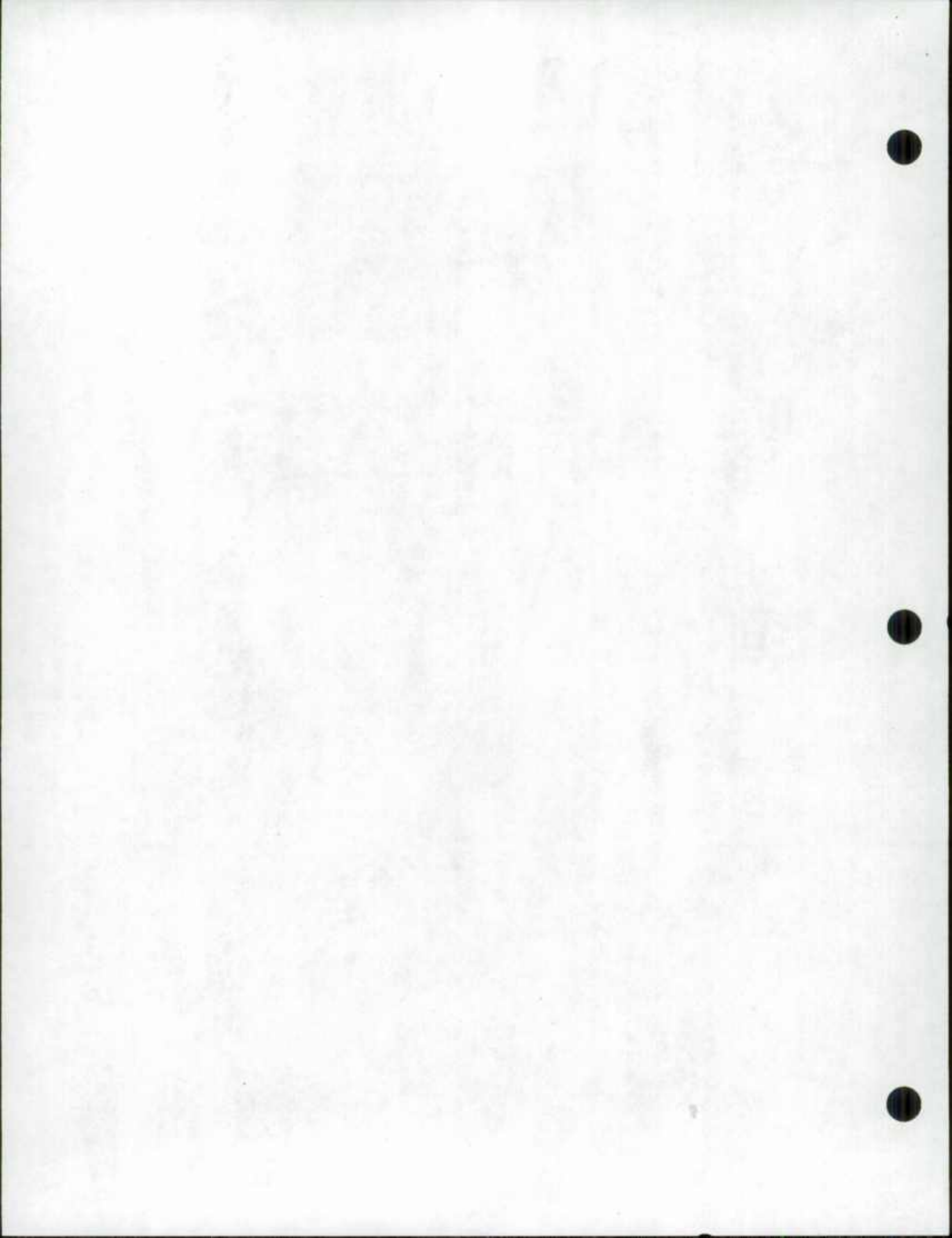
DOUGLAS F. GANSLER
ATTORNEY GENERAL OF MARYLAND

Marianne E. Dise

Sandra K. Canedo

Marianne E. Dise
Saundra K. Canedo
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
*Attorneys for State of Maryland Critical Area
Commission for the Chesapeake and Atlantic
Coastal Bays*

Dated: July 25, 2008



IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF
RAY AND MARIANNE LOKAY,
ET AL.,

*

FOR JUDICIAL REVIEW OF THE
DECISION OF THE
CRITICAL AREA COMMISSION FOR
THE CHESAPEAKE AND ATLANTIC
COASTAL BAYS.

*

* Case No. C-08-132736

*

* * * * *

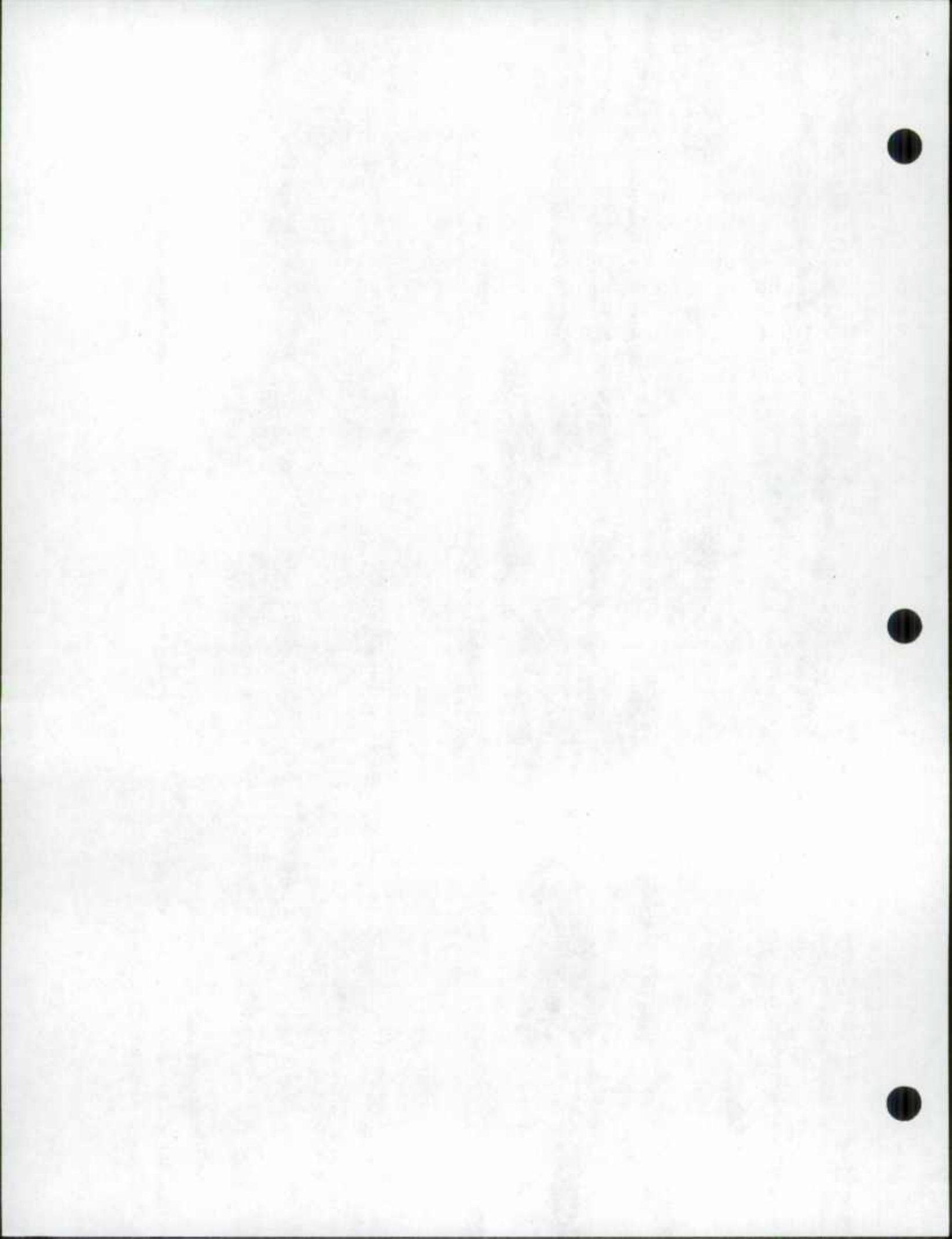
ORDER

The Court, having considered the State of Maryland, Critical Area Commission's Motion To Dismiss and Memorandum In Support Of Motion To Dismiss, together with any response thereto, and having found that the Petition for Judicial Review fails to state a claim on which relief may be granted, does, this ___ day of _____, 2008,

ORDER that the Motion to Dismiss is hereby GRANTED and that the Petition is hereby dismissed.

Judge, Circuit Court of Maryland
for Anne Arundel County

Copy to All Counsel



IN THE CIRCUIT COURT OF MARYLAND
FOR ANNE ARUNDEL COUNTY

PETITION OF
RAY AND MARIANNE LOKAY,
ET AL.,

*

FOR JUDICIAL REVIEW OF THE
DECISION OF THE
CRITICAL AREA COMMISSION FOR
THE CHESAPEAKE AND ATLANTIC
COASTAL BAYS,

*

* Case No. C-08-132736

*

*

* * * * *

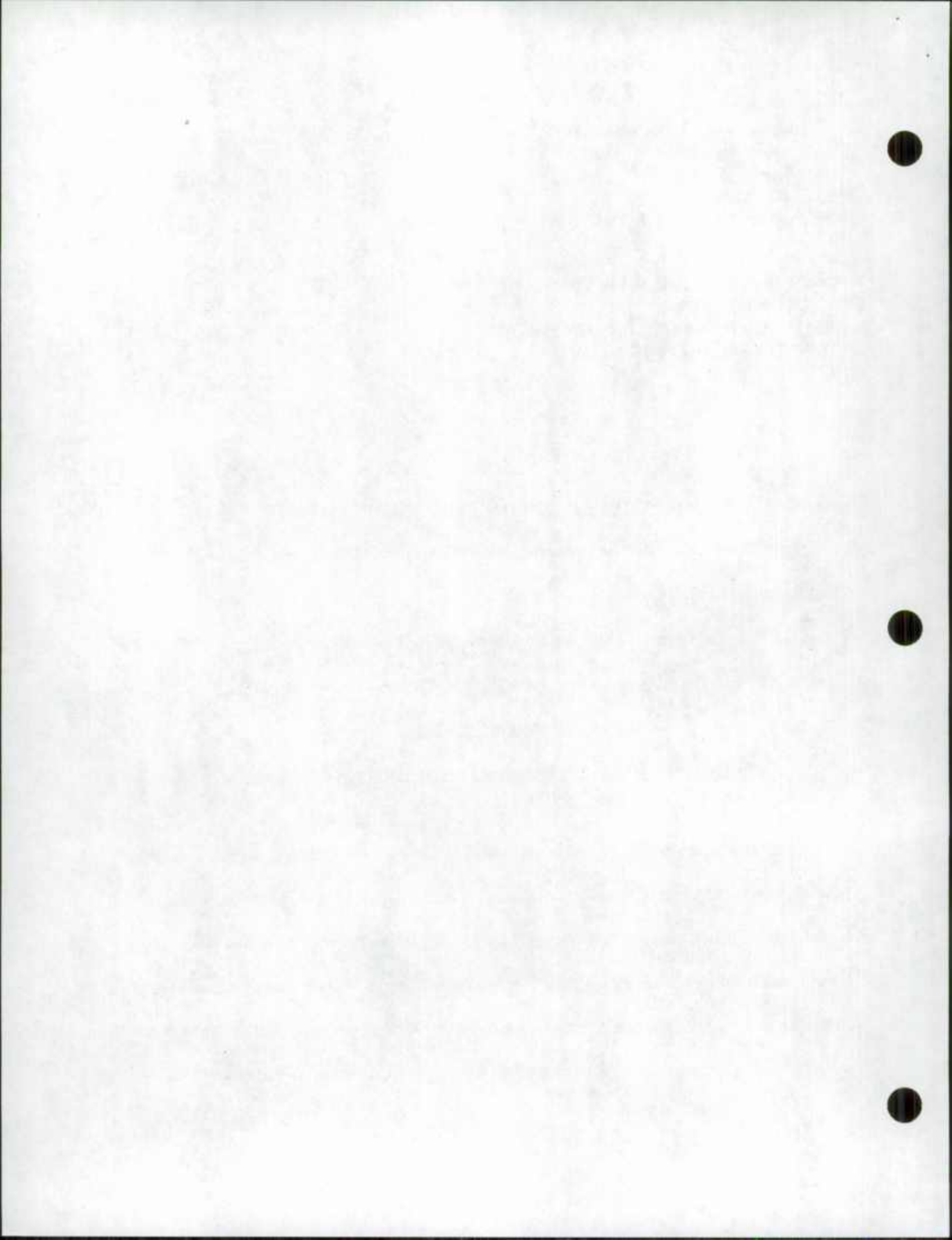
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The State of Maryland, Department of Natural Resources, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Critical Area Commission"), by its attorneys, Douglas F. Gansler, Attorney General of Maryland, and Marianne E. Dise and Sandra K. Canedo, Assistant Attorneys General, files this Memorandum In Support of Motion to Dismiss.

ARGUMENT

1. The Critical Area Statute Does Not Provide For Judicial Review of Commission Decisions Under Rule 7-201 et seq.

Petitioner seeks judicial review in the form of an administrative appeal under Maryland Rule 7-201 *et seq.* of the Critical Area Commission's decision to approve with conditions a proposed amendment to Kent County's ("the County") local Critical Area Program regarding the award of growth allocation for the Drayton Manor property in the County. Pursuant to Maryland Rule 7-201(a)(1), judicial review of an action of an administrative agency is permitted only where such review is authorized by statute. *See Bucktail, LLC v. County Council of Talbot County*, 352 Md.

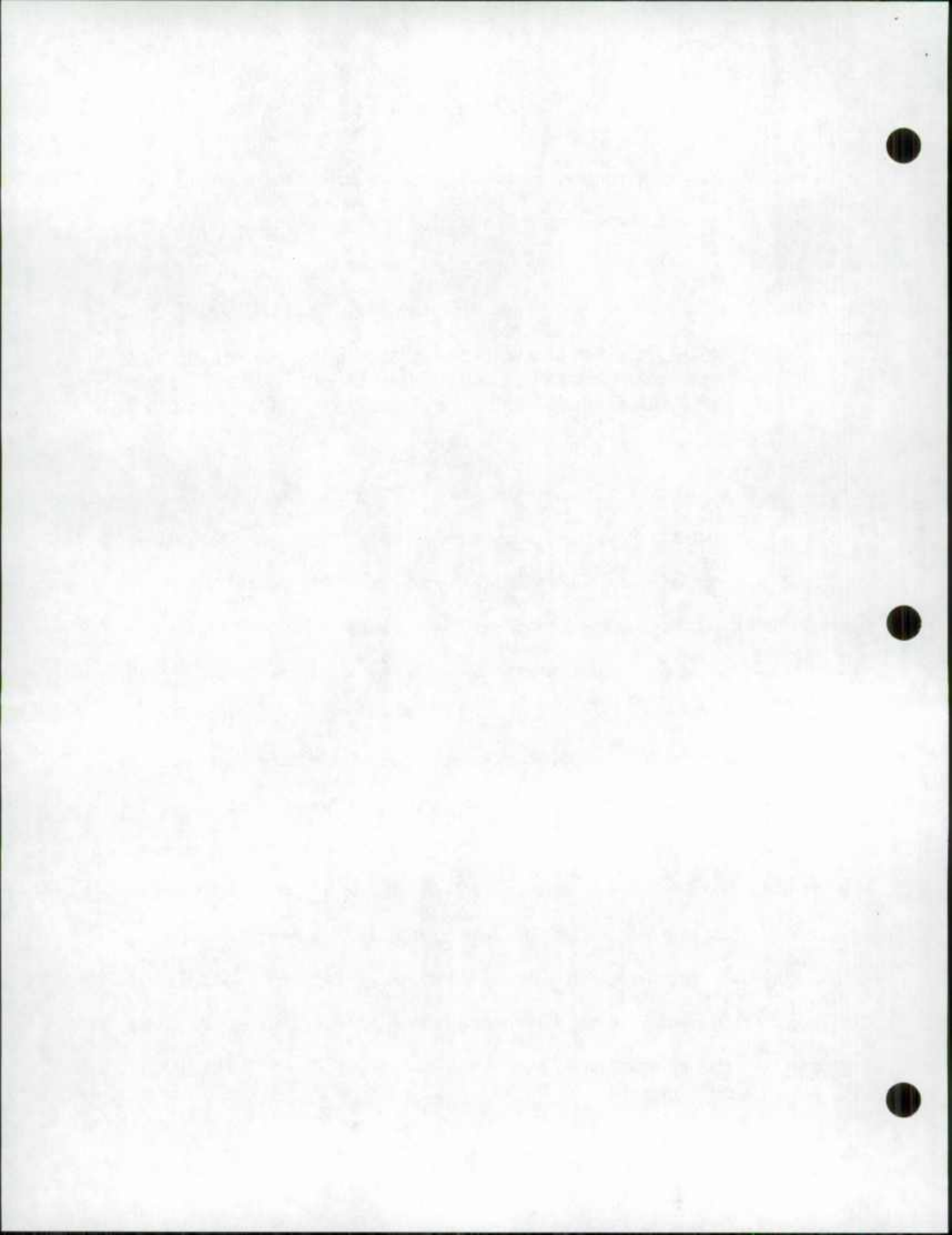


530, 541 (1999). Petitioner does not allege that the Critical Area Law authorizes judicial review of the Commission's action on a proposed local Critical Area program amendment. Indeed the Critical Area Law does not authorize such review. Accordingly, and because judicial review of the Commission's action is not "authorized by statute," judicial review under Rule 7-201 *et seq.* is not available. *Dozier v. Department of Human Resources*, 164 Md. App. 526 (2005).

2. **Because The Critical Area Commission's Action On the Proposed Kent County Program Amendment for the Drayton Manor Property Was Not A Contested Case Action, The Administrative Procedures Act Does Not Authorize Judicial Review.**

The Maryland Administrative Procedures Act ("APA"), Md. Code Ann., State Gov't § 10-201 *et seq.*, does not entitle Petitioner to judicial review under Rule 7-201 *et seq.* The APA only provides for judicial review of a final decision in a "contested case." State Gov't § 10-222(a). If a proceeding before an administrative agency is not a contested case proceeding, as defined by State Gov't § 10-201(d), an agency action taken as a result of the proceeding is not subject to judicial review in an action brought under Rule 7-201.

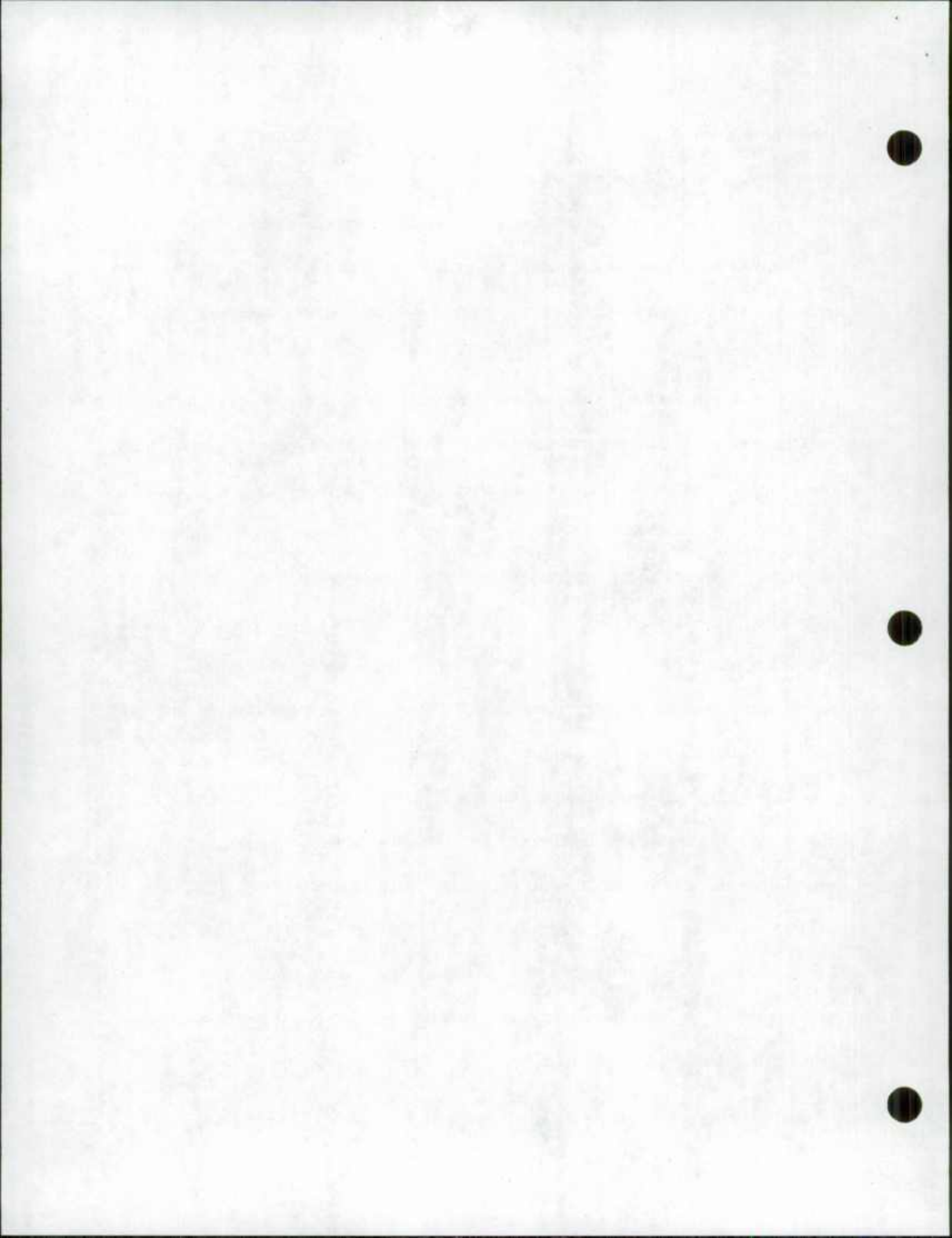
The Critical Area Commission's proceedings on proposed amendments to local Critical Area programs are not contested case proceedings. As the Court of Special Appeals recently stated, "The Commission acts in a 'quasi-legislative' capacity when it reviews local critical area programs and program amendments." *Talbot County v. Town of Oxford*, 177 Md. App. 480, 493 (2007), *citing North v. Kent Island Limited Partnership*, 106 Md. App. 92, 103 (1995) (for a proceeding to meet the definition of "contested case," the agency must provide trial type procedures). Indeed, the Court of Special Appeal in *North* determined that nothing in the Critical Area Commission's program review or program amendment review procedures, as outlined in Code, Nat. Res. II § 8-1809,



requires a contested case hearing. *Id.* The Court thus specifically held that “[t]he role of the Commission is quasi-legislative and does not encompass a contested case hearing.” *Id.* Since the Commission’s proceedings that reviewed, and ultimately approved with conditions, the proposed Kent County Critical Area Program amendment for the Drayton Manor growth allocation were not contested case proceedings, Petitioner does not have a right of judicial review under Maryland Rule 7-201 *et seq.*

As explained above, the action for which Petitioner seeks judicial review was the Critical Area Commission’s legislative act of considering a request from Kent County to amend its local Critical Area Program: specifically, the County requested approval to change the Critical Area map designation for the Drayton Manor Property by awarding growth allocation. Under the Critical Area Law, a locality may not amend its program without first receiving approval of the amendment from the Critical Area Commission. Nat. Res. II § 8-1809(i). Once the Critical Area Commission accepts for review a locality’s proposed program amendment, a Commission panel must hold a public hearing on the proposed amendment and the full Commission must act upon the proposed amendment within 130 days of accepting the proposal for review. *Id.* § 8-1909(o)(1).

Here, the Critical Area Commission accepted Kent County’s proposal to change its Critical Area program regarding the Drayton Manor property, a panel of Commission members conducted a public informational hearing, and the full Commission voted to approve the County’s request with conditions. As set forth in *North v. Kent Island and Talbot County v. Town of Oxford, id.*, the Commission’s action on Kent County’s proposed Critical Area program amendment was a quasi-legislative action, and not a quasi-judicial action. Accordingly, the Commission’s action is not subject to judicial review under Rule 7-201.



CONCLUSION

For the foregoing reasons and authorities, Respondent, Critical Area Commission's Motion To Dismiss the Petition for Judicial Review should be granted.

Respectfully Submitted,

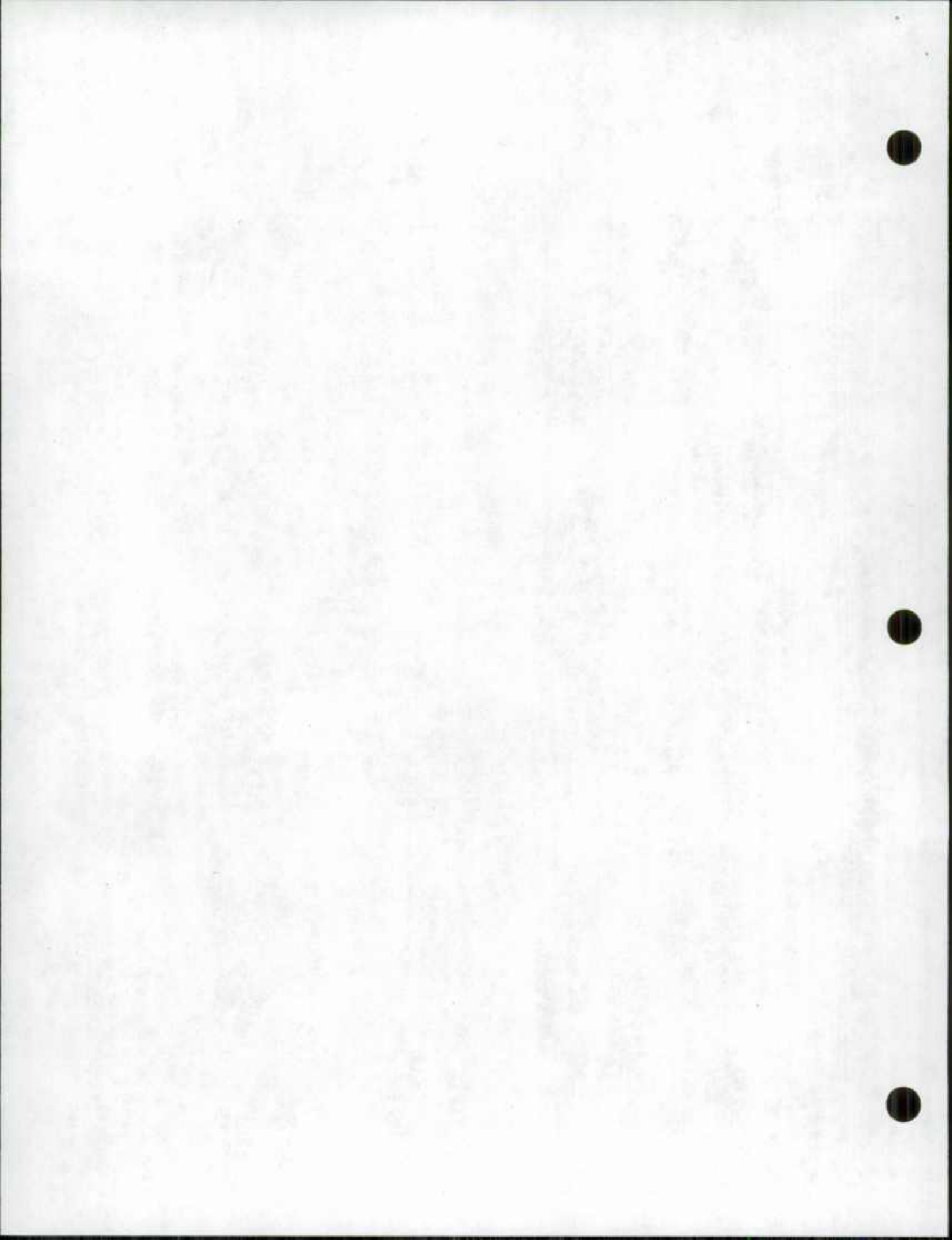
DOUGLAS F. GANSLER
ATTORNEY GENERAL OF MARYLAND

Marianne E. Dise

Sandra K. Canedo

Marianne E. Dise
Sandra K. Canedo
Assistant Attorneys General
Maryland Department of Natural Resources
Critical Area Commission
1804 West Street Suite 100
Annapolis, Maryland 21401
(410) 260-3466
Fax: (410) 974-5338
*Attorneys for State of Maryland Critical Area
Commission for the Chesapeake and Atlantic
Coastal Bays*

Dated: July 25, 2008



CERTIFICATE OF SERVICE

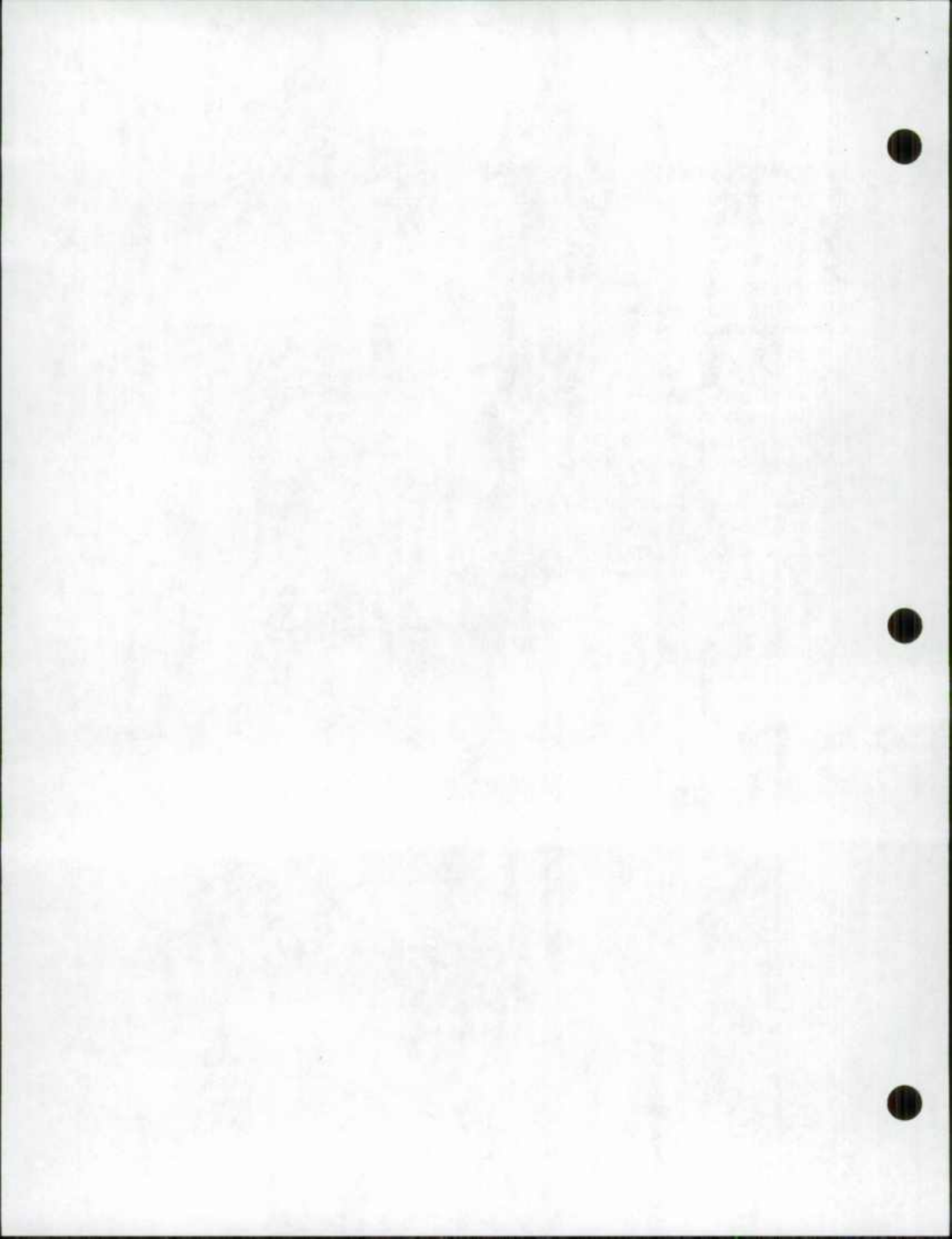
I HEREBY CERTIFY THAT, on this 25th day of July, 2008, I mailed a copy of the foregoing Response to Petition, Motion to Dismiss, Memorandum, and proposed Order, first-class U.S. mail, to:

Paul N. DeSantis, Esquire
Law Office of G. Macy Nelson
401 Washington Avenue, Suite 803
Towson, Maryland 21204
Attorney for Petitioners

C. Daniel Saunders, Esquire
P.O. Box 158
Chestertown, Maryland 21620
Attorney for Respondents Drayton Manor, LLC

Thomas N. Yeager, Esquire
203 Maple Avenue
Chestertown, Maryland 21620
Attorney for Kent County Commissioners


Marianne E. Dise



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

August 18, 2008

Robert J. Fuoco, Esquire
105 Padfield Boulevard
Glen Burnie, Maryland 21061

RE: McKeldin case, Anne Arundel Board of Appeals No. BA 16-08V

Dear Bob:

This letter responds to your fax of August 14, 2008, in which you asked whether, in my view, the Board of Appeals may resume the hearing of the above-captioned case on August 27, 2008. In light of the Consent Judgments entered into by your client, I believe that Anne Arundel County has taken the necessary enforcement action to address the Critical Area violations as cited in the Judgments. Accordingly, I believe that the provisions of Chapter 119 of the 2008 Laws of Maryland (as described in my letter of July 2, 2008 to the Board) have been satisfied, and that the Board may proceed with the variance hearing.

If you have any further questions, please do not hesitate to contact me.

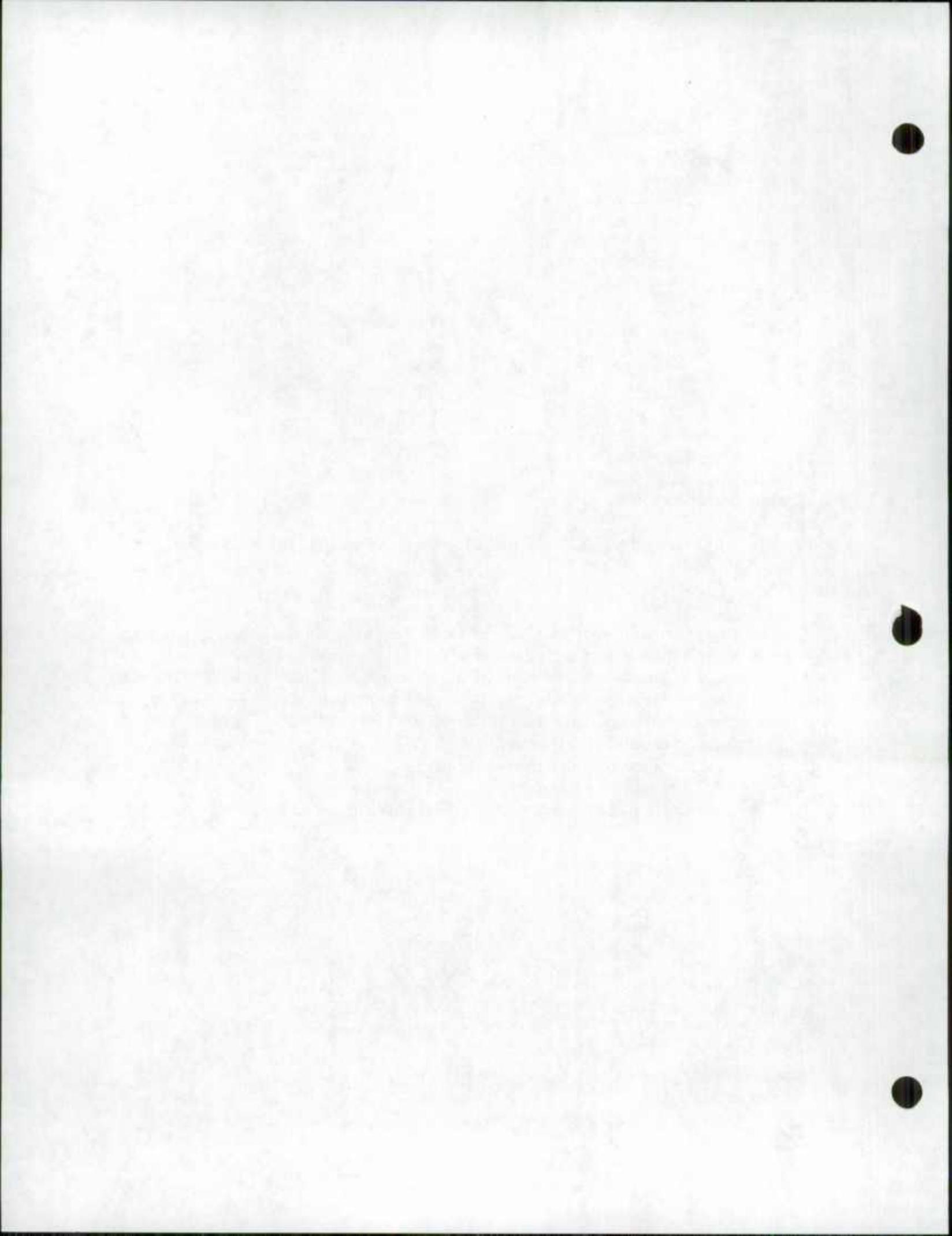
Sincerely,

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

Marianne E. Dise
Principal Counsel

cc: James Chance, Anne Arundel County Office of Law
Kerrie Gallo

1804 West Street, Suite 100
Annapolis, Maryland 21401



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

August 19, 2008

Mrs. Kay Parris
7770 Swann Lane
Owings, Maryland 20736

RE: *Mc Hale v. Parris*, No. 00374, Sept. Term 2008, Court of Special Appeals

Dear Mrs. Parris:

As a supplement to the August 15, 2008 letter from Sandra Canedo to you, and pursuant to Maryland Rule 8-501 (d), the Appellant proposes to include the following matters in the record extract for the above-captioned case:

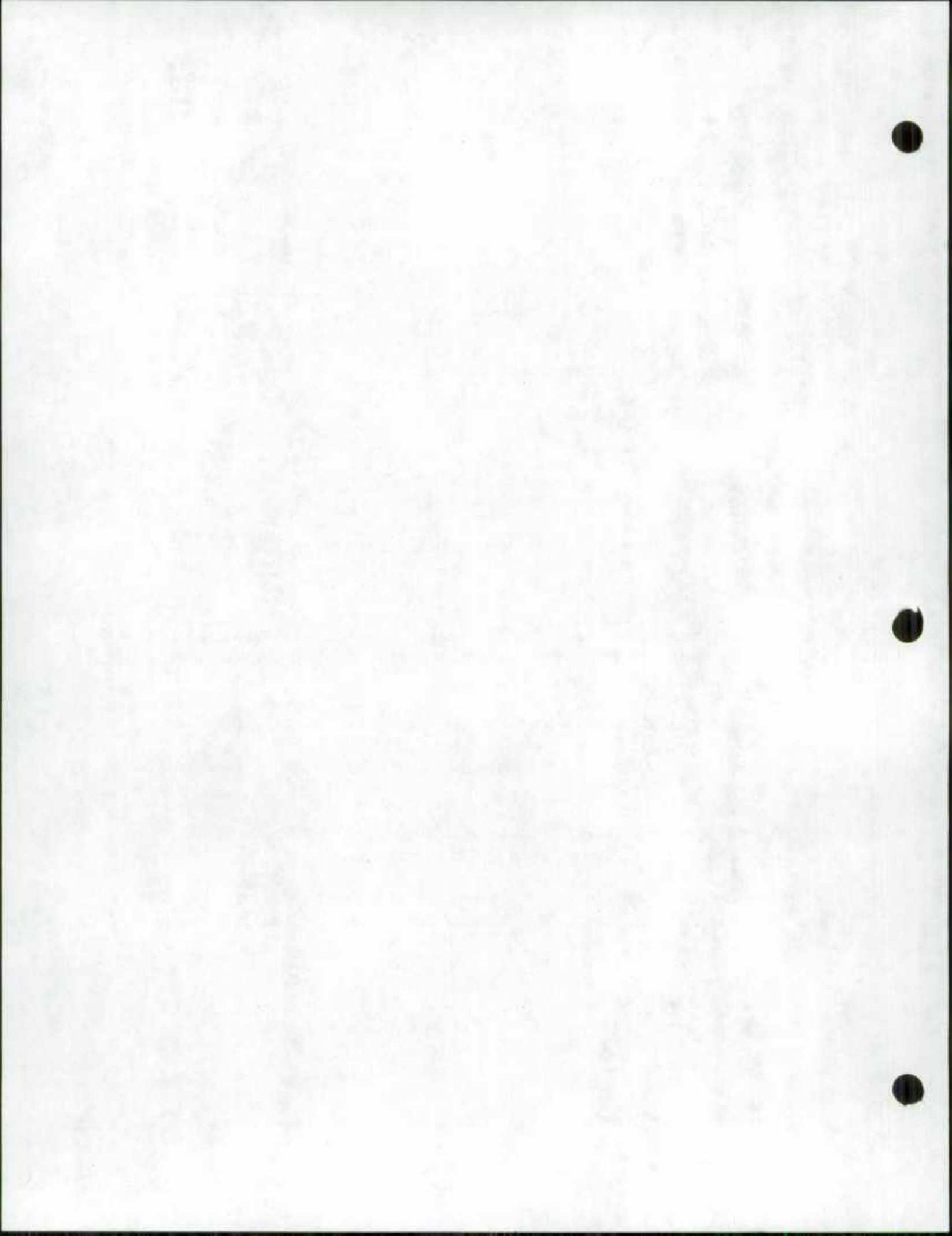
1. Complete Transcript of Testimony before Calvert County Board of Appeals, dated August 2, 2007 (91 pages);
2. Applicant's Exhibits 1, 2, and 3 before the Calvert County Board of Appeals (August 2, 2007);
3. County Staff Exhibit 1 (August 2, 2007);
4. Letter from Kerrie Gallo, Critical Area Commission to Calvert County, dated 11/28/2006 (Critical Area Exhibit at August 2, 2007 hearing).

The above materials are supplemental to those identified in Ms. Canedo's August 15, 2008 letter. Please advise me if you desire any additional parts of the record to be included in the record extract.

Sincerely,

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

Marianne E. Dise
Principal Counsel



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO. (410) 974-5338

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

August 20, 2008

Mrs. H. Wm. Merritt
12211 Riverview Road
Silesia, Maryland 20744-6014

Dear Mrs. Merritt:

Thank you for your letter regarding the enforcement of our State's environmental laws. Attorney General Gansler is committed to the protection of our environment, and, since taking office last year, he has pursued the vigorous enforcement of the State laws which preserve our natural resources.

As you know, the Critical Area law is a keystone of the State's environmental protection program. In the 2008 Session of the General Assembly, the Critical Area law was significantly strengthened, and we expect that the enforcement tools provided by the new legislation will enable more uniform and certain enforcement of the law. As you know, the Critical Area program is enforced primarily by the local jurisdictions (counties and towns), each of which administers the Critical Area program for its own jurisdiction. Thus, it is important to stay in contact with your local officials and to advise them of your concerns.

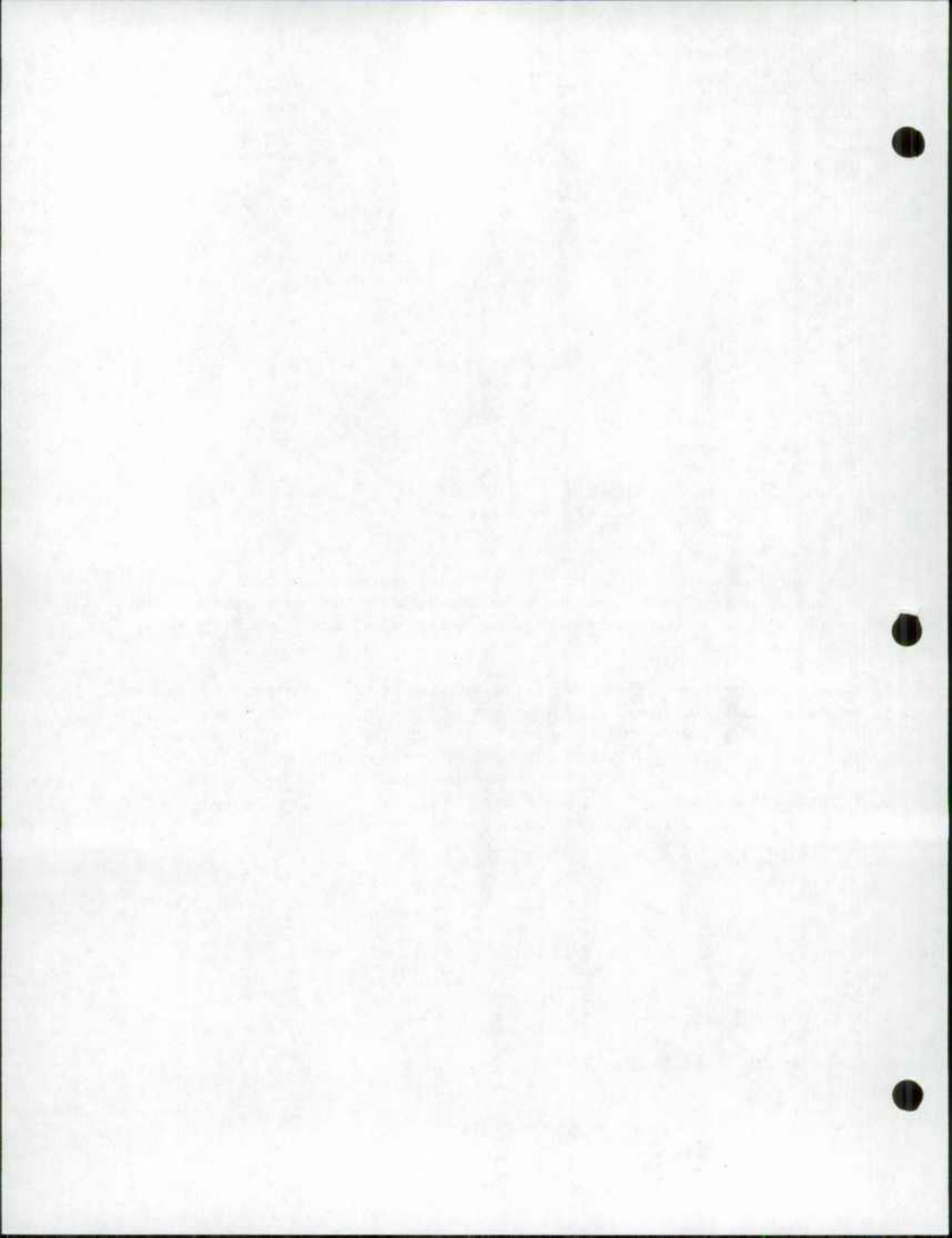
Thank you again for writing.

Sincerely,

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

Marianne E. Dise
Principal Counsel

cc: Hon. Margaret G. McHale



IN THE MARYLAND CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

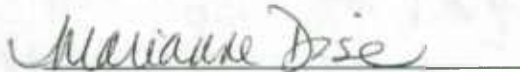
PETITION OF *
*
THE CHESAPEAKE BAY FOUNDATION, INC. *
*
*
*
FOR JUDICIAL REVIEW OF * CIVIL ACTION No.
The Decision of the * C-07-119778
ANNE ARUNDEL COUNTY BOARD OF APPEALS *
*
IN THE CASE OF *
*
*
DCW DUTCHSHIP ISLAND, LLC, Petitioner *

STIPULATION FOR EXTENSION OF
TIME TO SUBMIT REPLY MEMORANDA

Pursuant to Md. Rule 7-207(c) the parties agree that the Reply Memoranda of the Chair of the Critical Area Commission, the Chesapeake Bay Foundation, Inc, and the Magothy River Association, Inc. shall be filed on or before September 26, 2008.

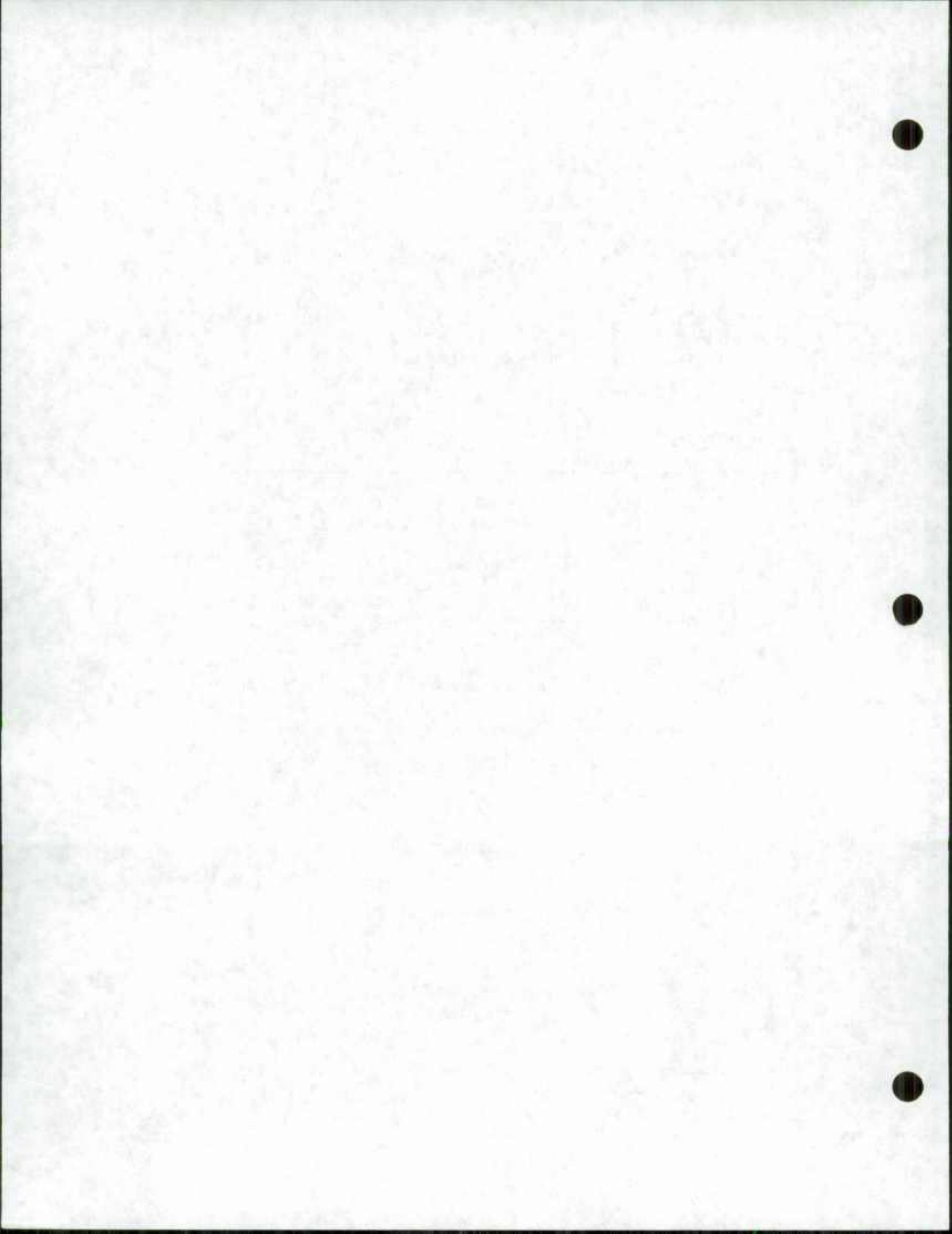
This Stipulation will require all reply memoranda to be filed at least ten (10) days prior to the scheduled hearing date of October 6, 2008, also the subject of an unopposed Motion before this Court requesting postponement until November 17, 2008, and is therefore proper pursuant to Md. Rule 7-207(c).

Respectfully Submitted,



Marianne Dise
Assistant Attorney General
Attorney for the Critical Area Commission
1804 West Street, Suite 100
Annapolis, Maryland 21401
(410) 260-3466

Dated: September __, 2008



THIS STIPULATION CONSENTED
AND AGREED TO BY:

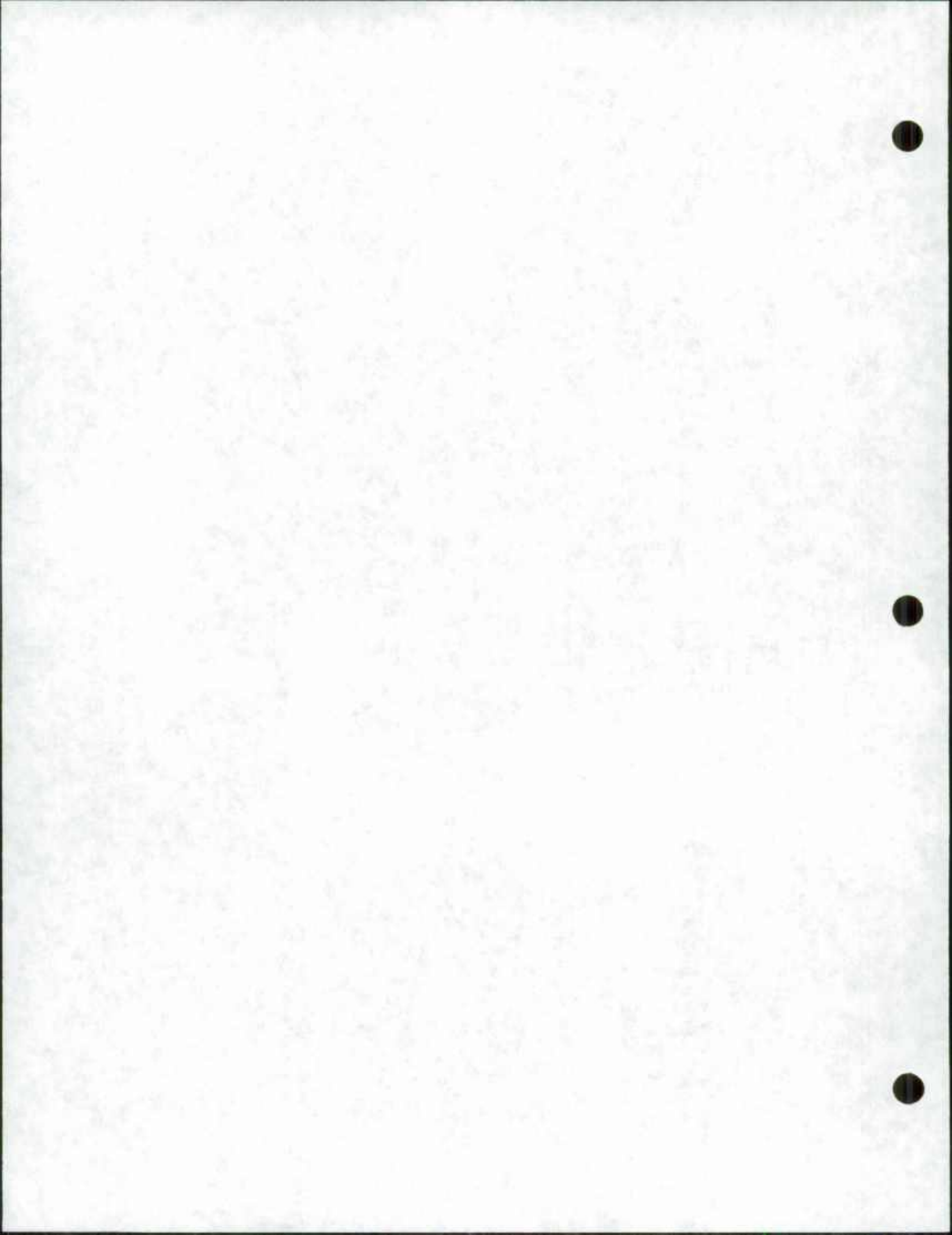
Jon A. Mueller
Director of Litigation
Chesapeake Bay Foundation, Inc.
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Ann Fligsten
Attorney for the Magothy River Association
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Arnold, Maryland 21012

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September 4, 2008

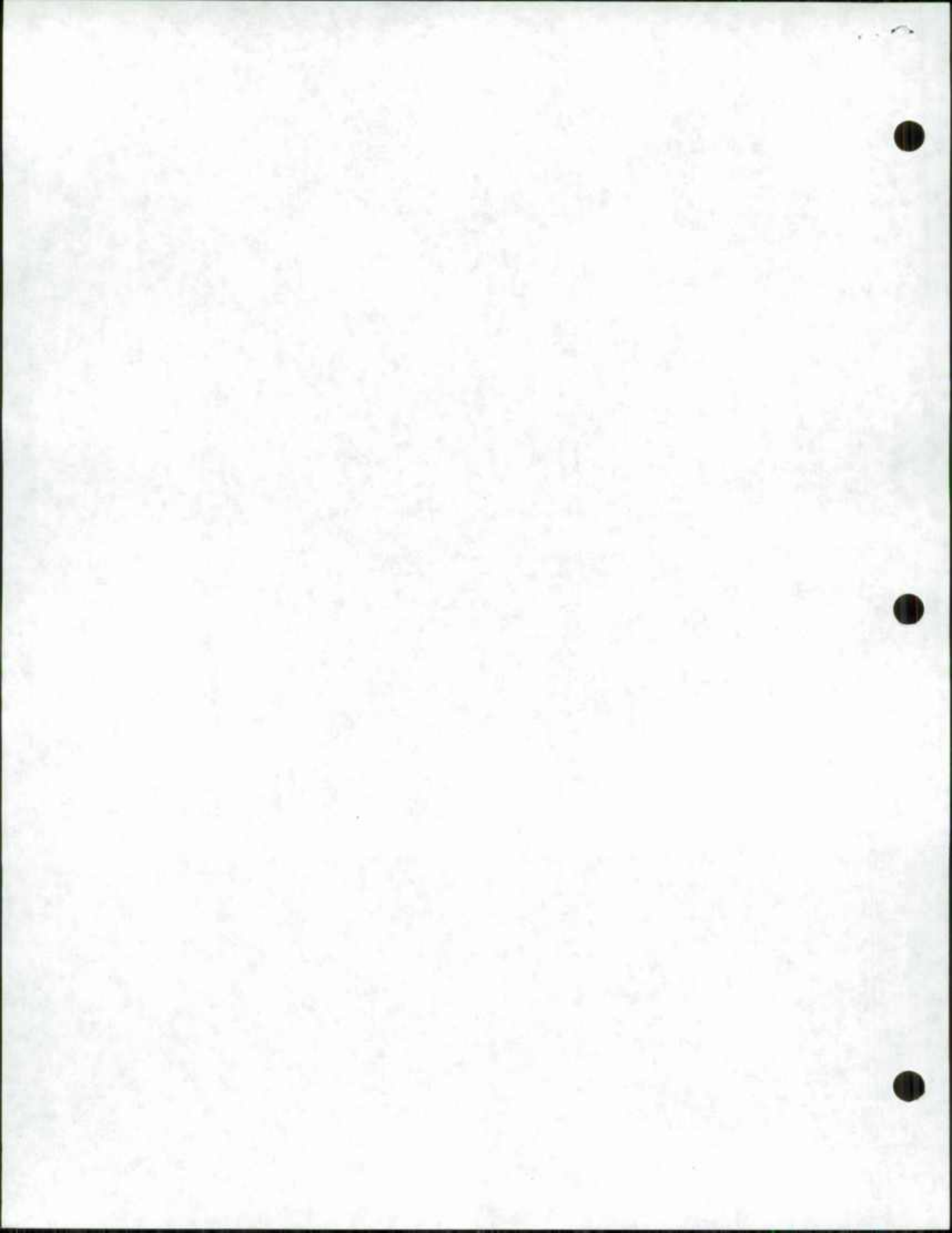
MEMORANDUM

TO: Gary Kuc

FROM: Marianne E. Dise 

RE: Affidavit of Ren Serey – Gansler v. Bunting

Enclosed is the affidavit of the custodian of Critical Area Commission records. Thanks.



DOUGALS F. GANSLER,
ATTORNEY GENERAL OF THE
STATE OF MARYLAND,

Plaintiff,

v.

JOHN BUNTING,

Defendant.

* IN THE
*
* CIRCUIT COURT
*
* FOR
*
* SOMERSET COUNTY
*
* Case No. 19-C-08-012354

* * * * *

AFFIDAVIT OF REN SEREY

I, REN SEREY, being over 18 years of age and competent to testify to the matters and facts set forth below, hereby swear and affirm that:

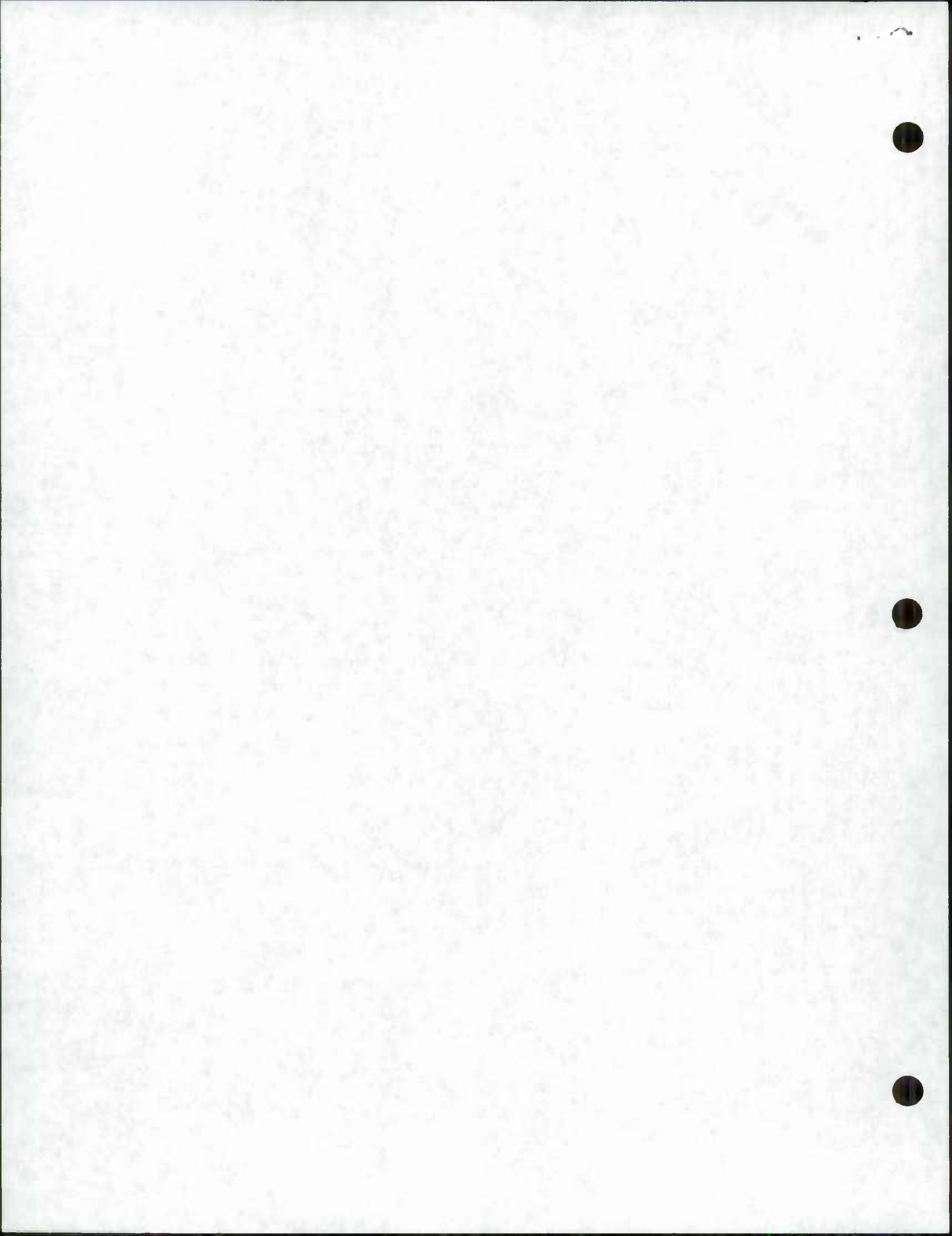
1. I am the Executive Director of the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays. As the Executive Director, I am the official custodian of the records of the Commission.

2. The letter dated June 6, 2008, from Margaret G. McHale, Chair of the Critical Area Commission, to Mr. Daniel Powell, County Administrator, Somerset County, attached to this Affidavit as Exhibit A, is a true and accurate copy of the original document in the files of the Critical Area Commission.

I solemnly affirm under penalty of perjury that the foregoing statements are true.

DATED: 9-4-08


REN SEREY



IN THE CIRCUIT COURT OF MARYLAND FOR
ANNE ARUNDEL COUNTY

MARGARET G. Mc HALE,

*

CASE NO. C-119778

Petitioner

*

v.

*

DCW DUTCHSHIP ISLAND LLC.,

*

Respondents

*

*

REPLY MEMORANDUM OF PETITIONER MARGARET Mc HALE, CHAIR,
STATE OF MARYLAND CRITICAL AREA COMMISSION FOR THE
CHESAPEAKE AND ATLANTIC COASTAL BAYS

Margaret G. McHale, Chair, Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (“Critical Area Commission” or “Commission”), by her attorneys, Douglas F. Gansler, Attorney General of Maryland, and Marianne E. Dise and Sandra K. Canedo, Assistant Attorneys General, hereby respectfully submits this Memorandum pursuant to Maryland Rule 7-207(a), in reply to the Memoranda of Anne Arundel County and DCW Dutchship Island, LLC (collectively, “the Respondents”).

INTRODUCTION

Chapter 119 of the 2008 Laws of Maryland, effective on July 1, 2008¹, imposes new requirements on applicants for “after the fact” Critical Area variances (i.e., a variance to legalize development activity performed in violation of the Critical Area program). The 2008 Law prohibits a Board of Appeals from issuing an “after the fact” Critical Area variance unless the local jurisdiction has completed its enforcement action for the violation, and unless the applicant

¹ All citations to Chapter 119 of the 2008 Laws of Maryland are to the official version of the Laws of Maryland, attached to this Memorandum as Exhibit 1.

has first performed mitigation for the violation to abate the impacts to the natural resources caused by the unlawful development activity. 2008 Laws of Maryland at 748. As of July 1, 2008, the prohibition on granting an “after the fact” variance without full satisfaction of the conditions precedent applies to all cases involving “after the fact” variances, regardless of when the hearing was held, or when the development activity occurred. In land use and zoning cases, the Court of Appeals has ruled that courts must consider the case “based upon the law as it exists at the time the case is before us.” *Layton v. Howard County Board of Appeals*, 399 Md. 36, 922 A.2d 576, 589 (2007). The question before this Court is purely one of law – and Chapter 119 of the 2008 Laws of Maryland requires reversal of the Decision of the Anne Arundel County Board of Appeals.

ARGUMENT

CHAPTER 119 OF THE 2008 LAWS OF MARYLAND REQUIRES REVERSAL OF THE BOARD OF APPEALS’ GRANT OF AFTER-THE-FACT VARIANCES.

A. The Critical Area Law Requires Payment Of A Fine And Performance Of Mitigation For Violations As A Condition Precedent To The Issuance Of An After-the-Fact Variance.

In its 2008 Session, recognizing the “ongoing, accelerating decline of the State’s water quality resources and the loss of valuable shoreline areas,” the General Assembly enacted the first comprehensive overhaul of the Critical Area Law in twenty-four years. Preamble to Chapter 119, 2008 Laws of Maryland at 728. The “significant improvements” to the Law, including “the institution of more meaningful enforcement mechanisms,” became effective on July 1, 2008. 2008 Laws of Maryland at 728, 772. Among the most important substantive changes wrought by Chapter 119 was an absolute prohibition on the issuance of a variance to legalize, “after-the fact,” a violation of the Critical Area Program unless two conditions precedent have been met:

(1) the local government has taken enforcement action, including assessment and collection of a monetary penalty; and (2) the applicant for the variance has prepared a restoration or mitigation planting plan for the impacts to natural resources, and has implemented the plan. Ch. 119, 2008 Laws at 748-750.

In the case before this Court, Respondents readily acknowledge that DCW Dutchship and its owner, Daryl Wagner (collectively “DCWD”), constructed a house, lighthouse, pool, and other impervious surfaces on Little Island, in the Critical Area Buffer, without obtaining any permits or variances.² The Anne Arundel County Board of Appeals (“Board”) granted after-the-fact variances for the illegally-constructed house, lighthouse, and additional impervious structures to remain in the 100-foot Critical Area Buffer, even while recognizing that “Mr. Wagner openly and knowingly violated the laws” by building without the required County approvals. Board Opinion (“Mem. Op.”) at 19. It is undisputed that DCWD has neither paid a fine, nor performed abatement and mitigation for the impacts to the natural resources on Little Island.

Under Chapter 119 of the 2008 Laws, satisfaction of all fines and performance of mitigation for the violations of the Critical Area Law “shall be a condition precedent to the issuance of any permit, approval, variance, or special exception for the affected property.” 2008 Laws of Maryland at 747. Because DCWD has not satisfied the requirements of Chapter 119, any after-the fact variance purporting to legalize the violations is null and void. “In land use and zoning cases, the law shall be applied as it is in effect at the time of argument.” *Layton v. Howard County Board of Appeals*, 399 Md. 36, 922 A. 2d 576, 593 (2007).

In reviewing the Board’s grant of variances to DCWD, this Court owes no deference to a decision that is based on an error of law. *Ad+ Soil, Inc. v. County Comm’rs of Queen Anne’s*

²County Memorandum of Law at 2, 6, 7, 28; DCW Memorandum of Law at 6, 7.

County, 307 Md. 307, 338 (1986). Although the Anne Arundel Board decided the instant case under the law in effect in 2006, this Court must conduct judicial review of the Board's decision under the law in effect as of today. That is, the Court must retrospectively apply the changed Critical Area Law, and, under that changed Law, the variances cannot be affirmed. Because Chapter 119 imposes requirements that neither DCWD nor the Board has met, the variances are void as a matter of law and accordingly, the Board's Decision must be reversed.

Chapter 119 made dramatic and substantive changes to the Critical Area law, and in particular, to the law governing Critical Area violations and variances. Moreover, the General Assembly required all local Critical Area jurisdictions to apply the provisions of State law, "[n]otwithstanding any provision in a local law or ordinance, or the lack of a provision in a local law or ordinance." 2008 Laws at 743. Thus, "all of the requirements of this subtitle [subtitle 18, Title 8, Natural Resources Article] shall apply to, and be applied by, a local jurisdiction as minimum standards" of its Critical Area Program. 2008 Laws at 743. As of July 1, 2008, Anne Arundel County and all other Critical Area counties and municipalities were obligated to apply the State standards set forth in Chapter 119 to lands and development activities in the entire Critical Area.

The General Assembly foreclosed any debate about what constitutes a "violation" of the Critical Area Law: "A development activity commenced without a required permit, approval, variance, or special exception is a violation of this subtitle." 2008 Laws at 750. In the case before this Court, there is no question about whether the clearing, grading, and construction activities conducted by DCWD on Little Island were, and are, "violations" of the Critical Area law. Even the Board of Appeals acknowledged this fact. Mem. Op. at 19, 38. What has changed is that the General Assembly put an end to the perceived incentive to "build now and ask forgiveness later" – i.e., to forego the normal process of seeking permits/variances before development, while counting on the local Boards of Appeal to forgive the transgression by

awarding “after the fact” variances. Often, the person who first violated the Law escaped “punishment” completely, because, by obtaining a variance, the violator had “legalized” his activity. Fines, mitigation, and other enforcement actions either were never initiated, or were abandoned after the property owner obtained his variance. This, the Legislature decided, had to stop.

Effective July 1, 2008, a local jurisdiction “may not accept an application for a variance to legalize a violation of this subtitle [Nat. Res. Title 8, Subtitle 18] including an unpermitted structure or development activity, unless the local jurisdiction first issues a notice of violation, including assessment of an administrative or civil penalty, for the violation.” 2008 Laws at 750. Each person, including contractors, property owners, “or any other person who committed, assisted, authorized, or participated in the violation” is subject to fines of up to \$10,000 per offense, per day. 2008 Laws at 746.³ Only *after* enforcement action has occurred, may the local jurisdiction *accept* an application for an “after the fact” variance. Although an after-the-fact variance application may be processed while enforcement action is pending, the local jurisdiction may not *issue any approval*, including a permit, variance, or special exception, unless the person seeking the approval has:

fully paid all administrative, civil, and criminal penalties imposed under paragraph (1)(III)15 of this subsection;

prepared a restoration or mitigation plan, approved by the local jurisdiction, to abate impacts to water quality or natural resources as a result of the violation; and performed the abatement measures in the approved plan in accordance with the critical area program.

³ “Each violation of this subtitle or of a regulation, rule, order, program, or other requirement adopted under the authority of this subtitle constitutes a separate offense; Each calendar day that a violation continues constitutes a separate offense; For each offense, a person shall be subject to separate fines, orders, sanctions, and other penalties. ...” Ch. 119, 2008 Laws at 747.

2008 Laws at 748.

Thus, in order for this Court to affirm the variances issued to DCWD, the applicant would have had to satisfy its mitigation obligation for the Critical Area violations admittedly committed on Little Island. The 2008 Law expressly makes “satisfaction of all conditions specified [as quoted immediately above] a *condition precedent* to the issuance of any permit, approval, variance, or special exception for the affected property.” 2008 Laws at 747 (italics added). Thus, only *after* enforcement action is taken, the violation is abated, and mitigation planting is completed, may a permit, approval, or variance be issued.

The Anne Arundel Board of Appeals stated that “decisions regarding punishment are not within the purview of this Board of Appeals.” Mem. Op. at 6-7. In the 2008 Session, the General Assembly addressed that issue, and made emphatic, definite, and mandatory “decisions regarding punishment” for Critical Area violations. As of July 1, 2008, all violations of the Critical Area law must be treated as violations, and abated, before a Board of Appeals may grant a variance to the violator/applicant. As set forth more fully below, the provisions of the 2008 Law, including provisions affecting enforcement and variances, apply to *all pending cases*, regardless of when the development activity occurred, or when the variance case was heard by the Board. Because enforcement action against DCWD was not completed, and DCWD neither abated its ongoing violations, nor performed mitigation planting, the variances cannot be affirmed.

B. The 2008 Law Applies To This Case, And Requires This Court To Reverse The Decision Of The Board Of Appeals.

Addressing, “in a land use or zoning context,” the question of “the retrospective applicability of a related statutory law which is amended during the course of litigation,” the Court of Appeals held in 2007 that the new law must be retrospectively applied. *Layton v.*

Howard County Board of Appeals, 399 Md. 36, 922 A.2d 576 (2007). This is true, regardless of whether the new law works to the benefit of, or the detriment of, the person seeking application of the new law. The *Layton* Court framed the issue as: “Whether one who challenges a decision of a zoning board may have, as Petitioners here seek, (a) the benefit of a legislated change in the basis of a decision of the zoning board and (b) demand application on judicial appeal of the ‘new law’?” 922 A.2d at 577. The Court answered both questions in the affirmative.

In *Layton*, the Petitioners operated an animal sanctuary for monkeys and other primates, and a wildlife rehabilitation center. They applied for a special exception for the primate sanctuary, but the Howard County Board of Appeals denied the special exception, finding that a primate sanctuary was not a permitted use under the County Code and Zoning Regulations. The operators appealed, but prior to the hearing in circuit court, the County amended the pertinent provisions of the Code to define an “animal sanctuary” for wild or exotic animals, and to provide an exemption from County permits for an “animal sanctuary” that meets all state and federal licensing and permitting requirements. 922 A.2d at 581. The circuit court rejected the argument that the county code amendment should be retrospectively applied to the special exception application, so that the primate sanctuary would effectively be exempt from regulation. The Court of Special Appeals affirmed the circuit court, holding that the amendment to the county zoning law operated only prospectively. 171 Md. App. 137 (2006). The Court of Appeals reversed.

In reversing the Court of Special Appeals, the Court of Appeals framed the question as “purely one of law- whether the Circuit Court should have retrospectively applied (or remanded the case for the Board to consider) the changed Code.” *Layton*, 922 A.2d at 584. Ever since *Yorkdale Corp. v. Powell*, the Court of Appeals has maintained, for land use and zoning cases, an exception to the general rule that statutes are presumed to operate prospectively. *Yorkdale*, 237 Md. 121, 205 A.2d 269 (1964), discussed in *Layton*, 922 A. 2d at 585. The *Layton* Court

explained that, “*Yorkdale*, as an exception to the general rule, provides for the retrospective application of changes to statutes that impact land use issues made during the course of litigation in land use and zoning cases.” *Layton, id.* Even if the “new law” requires reversal of a ‘judgment rightful when rendered by the court below’, an appellate court is bound to decide a case according to existing laws. *Layton*, at 586, quoting *Woman’s Club v. State Tax Comm’r*, 195 Md. 16, 19 (1950).

In land use and zoning matters, application of the changed statute is required, even for an applicant who has been successful before the zoning authorities, as long as the applicant has not acquired a vested right. In the case before this Court, DCWD has not obtained a ‘vested right’ to its after-the-fact variances.

In instances where there is ongoing litigation, there is no different ‘rule of vested right’ for special exceptions and the like. Until all necessary approvals, including all final court approvals, are obtained, nothing can vest or even begin to vest. Additionally, even after final court approval is reached, additional actions must sometimes be taken in order for rights to vest.

Powell v. Calvert County, 368 Md. 400, 407-408 (2002). In *Powell*, a landowner obtained a special exception for outdoor storage of excavating materials. While the case was on appeal, the applicable zoning ordinance was amended to disallow outdoor storage of excavating material. On remand to the Zoning Board, the Board granted the landowner’s application for a second time, applying the law as it existed at the time of the original application, and not applying the new ordinance. On a second appeal, the Court of Appeals rejected the argument that the landowner had established a vested right to the special exception under the former ordinance. “One who has been successful before the zoning authorities and the circuit court does not acquire a vested or substantive right which may not be wiped out by legislation which takes effect during the pendency in this Court of the appeal.” *Layton*, 922 A. 2d at 595, quoting

Powell, 368 Md. at 413, and *Yorkdale*, 237 Md. at 126.

Elaborating on the rule set forth in *Yorkdale*, the *Layton* Court said:

[N]ot only does it [*Yorkdale*] stand for the proposition elucidated in *Powell*, that approval pending ongoing litigation does not create a vested right, but also for the rule that we reiterate today, that in the case of land use and zoning issues, appellate courts generally are bound to apply the law (whatever its source) relating to those issues as it exists at the time of their decision.

Layton, 922 A.2d at 596. The Court addressed the argument that Howard County's Animal Control law is not part of the zoning ordinance, and that accordingly the cases arising under "zoning" law were not precedential. In rejecting that narrow reading of *Yorkdale*, the Court of Appeals said:

The zoning law, however, impliedly incorporates those relevant provisions of the Animal Control Law. The Animal Control Law was applied by the Board in making its land use determination as to whether Frisky's was entitled to a special exception under the zoning ordinance. It was applied in a land use context. Therefore, it was a determinative provision in a zoning context, and we will apply it retrospectively under *Yorkdale*. On remand, the Board shall apply the current law.

Layton, id.

In the present case, the Anne Arundel Board obviously applied the County's and the State's Critical Area law throughout its decision. See, e.g. Mem. Op. at 30-42, containing numerous citations to State and County Critical Area law. The Board's decision as to whether DCWD was entitled to a variance is a "land use or zoning decision." Certainly, the Critical Area Law and standards were "determinative" provisions in a "zoning context" in the Board's consideration and decision on DCWD's variance application. Under the unequivocal direction of *Layton*, this Court, in reviewing the Board of Appeals, must apply the provisions of Chapter 119 of the 2008 Laws of Maryland. Application of Chapter 119 mandates reversal of the Board's Decision.

CONCLUSION


The Critical Area Commission is charged by the General Assembly to ensure that local governments' Critical Area programs, including zoning boards' granting of variance requests, are implemented in a "consistent and uniform manner subject to State criteria and oversight."

Annotated Code of Maryland, NR §8-1801(b)(2). The General Assembly strengthened the Critical Area program in 2008, by enacting Chapter 119 of the 2008 Laws. For the reasons and authorities cited in this Memorandum, Chair McHale maintains that Chapter 119 of the 2008 Laws of Maryland requires reversal of the Decision of the Board of Appeals.

Respectfully submitted,

**DOUGLAS F. GANSLER,
ATTORNEY GENERAL OF MARYLAND**


Marianne E. Dise


Sandra K. Canedo
Assistant Attorneys General
Critical Area Commission for the Chesapeake and
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1804 West Street, Ste. 100
Annapolis, MD 21401
(410) 260-3466

Dated: September 25, 2008



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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of September, 2008, I mailed a copy of the foregoing Reply Memorandum of Law, by U.S. mail, postage prepaid, to the following five persons:

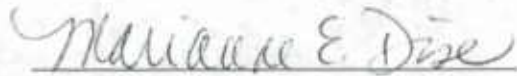
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Annapolis, Maryland 21403

Ann Fligsten, Esquire
Attorney for Magothy River Association
1337 Kinloch Circle
Arnold, Maryland 21012



Marianne E. Dise
Marianne E. Dise

(IV) THE STATE ADMINISTRATOR MAY NOT ALTER ANY TIME REQUIREMENT RELATING TO VOTING OR POLLING PLACE PROCEDURES ON ELECTION DAY UNLESS AUTHORIZED BY THE PROCLAMATION.

(3) A POLITICAL PARTY THAT HAS LOCAL CENTRAL COMMITTEES SHALL MAKE A NOMINATION FOR A SPECIAL GENERAL ELECTION CALLED UNDER THIS SUBSECTION AS FOLLOWS:

(j) THE CENTRAL COMMITTEES OF THE POLITICAL PARTY IN EACH OF THE COUNTIES INCLUDED IN THE DISTRICT OF THE OFFICE SHALL VOTE TO RECOMMEND A CANDIDATE.

(ii) IF THE CENTRAL COMMITTEES IN EACH COUNTY THAT IS INCLUDED IN THE DISTRICT OF THE OFFICE RECOMMEND THE SAME CANDIDATE, THE STATE CENTRAL COMMITTEE SHALL NOMINATE THAT CANDIDATE.

(iii) IF THE CENTRAL COMMITTEES IN EACH COUNTY THAT IS INCLUDED IN THE DISTRICT OF THE OFFICE RECOMMEND DIFFERENT CANDIDATES, THE STATE CENTRAL COMMITTEE SHALL SELECT ONE OF THE CANDIDATES RECOMMENDED BY THE LOCAL CENTRAL COMMITTEES AS THE NOMINEE.

8-711.

(a) [A:] IF THERE IS A SPECIAL PRIMARY ELECTION, AT LEAST 30 DAYS BEFORE THE SPECIAL PRIMARY ELECTION, THE STATE BOARD SHALL CERTIFY TO THE APPROPRIATE LOCAL BOARDS THE NAME, RESIDENCE, AND PARTY AFFILIATION OF EACH NOMINEE WHO QUALIFIES TO APPEAR ON THE GENERAL ELECTION BALLOT.

(b) AT LEAST 20 DAYS BEFORE THE SPECIAL GENERAL ELECTION, THE STATE BOARD SHALL CERTIFY TO THE APPROPRIATE LOCAL BOARDS THE NAME, RESIDENCE, AND PARTY AFFILIATION OF EACH NOMINEE WHO QUALIFIES TO APPEAR ON THE GENERAL ELECTION BALLOT.

SECTION 2. AND BE IT FURTHER ENACTED, THAT AS TO ANY CONFLICT BETWEEN THIS ACT AND ANY OTHER PROVISION OF THE ELECTION LAW ARTICLE, THE PROVISIONS OF THIS ACT SHALL PREVAIL.

SECTION 3. AND BE IT FURTHER ENACTED, THAT THIS ACT IS AN EMERGENCY MEASURE, IS NECESSARY FOR THE IMMEDIATE PRESERVATION OF THE PUBLIC HEALTH OR SAFETY, HAS BEEN PASSED BY A YEA AND MAY VOTE SUPPORTED BY THREE-FIFTHS OF ALL THE MEMBERS ELECTED TO EACH OF THE TWO HOUSES OF THE GENERAL ASSEMBLY, AND SHALL TAKE EFFECT FROM THE DATE IT IS ENACTED. IT SHALL REMAIN EFFECTIVE UNTIL DECEMBER 31, 2008, AND AT THE END

Martin O'Malley, Governor

Ch. 118

of December 31, 2008, with no further action required by the General Assembly, this Act shall be abrogated and of no further force and effect.

Approved by the Governor, April 17, 2008.

EXHIBIT 1

CHAPTER 119

(House Bill 1253)

AN ACT concerning

Chesapeake and Atlantic Coastal Bays Critical Area Protection Program - Administrative and Enforcement Provisions

FOR THE PURPOSE OF AUTHORIZING THE MARYLAND HOME IMPROVEMENT COMMISSION TO DENY, REPRIMAND, SUSPEND, OR REVOKE CERTAIN LICENSES FOR FAILURE TO COMPLY WITH CERTAIN LEGAL TERMS OR REQUIREMENTS IN THE CHESAPEAKE AND ATLANTIC COASTAL BAYS CRITICAL AREA, AUTHORIZING THE HOME BUILDER REGISTRATION UNIT TO DENY, REPRIMAND, SUSPEND, OR REVOKE A HOME BUILDER'S REGISTRATION, OR IMPOSE CERTAIN CIVIL PENALTIES ON A REGISTRANT FOR FAILURE TO COMPLY WITH CERTAIN CRITICAL AREA LEGAL TERMS AND REQUIREMENTS; AUTHORIZING THE DEPARTMENT OF NATURAL RESOURCES TO REVOKE OR SUSPEND THE LICENSE OF A LICENSED TREE EXPERT FOR FAILURE TO COMPLY WITH CERTAIN CRITICAL AREA LEGAL TERMS AND REQUIREMENTS; REQUIRING THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS TO NOTIFY THE MARYLAND HOME IMPROVEMENT COMMISSION ~~OF A CONTRACTOR'S FAILURE,~~ THE HOME BUILDER REGISTRATION UNIT, OR THE DEPARTMENT OF NATURAL RESOURCES ON THE FAILURE OF CERTAIN CONTRACTORS TO COMPLY WITH CERTAIN TERMS OR REQUIREMENTS IN THE CRITICAL AREA; AUTHORIZING THE CRITICAL AREA COMMISSION TO ADOPT AND AMEND CERTAIN REGULATIONS REGARDING CERTAIN MATTERS; REQUIRING THE CRITICAL AREA COMMISSION TO ADOPT CERTAIN PROCEDURES, PENALTY PROVISIONS, AND OTHER ELEMENTS; REPEALING A PROVISION OF LAW THAT ALLOWS FOR THE OMISSION OF CERTAIN TRAFFIC PREVENTION MEASURES ON CERTAIN SITES; REQUIRING A LOCAL JURISDICTION TO CONSIDER CERTAIN FACTORS IN THE DETERMINATION OF CERTAIN PENALTIES; REQUIRING THAT THE CRITICAL AREA COMMISSION RECEIVE CERTAIN NOTICE FROM A LOCAL JURISDICTION WITHIN A CERTAIN TIME; ESTABLISHING THAT CERTAIN DEVELOPMENT ACTIVITIES VIOLATE CERTAIN PROVISIONS OF LAW; PROHIBITING A LOCAL JURISDICTION FROM ACCEPTING CERTAIN APPLICATIONS FOR A VARIANCE OR ISSUING CERTAIN AUTHORIZATIONS UNLESS CERTAIN CONDITIONS ARE SATISFIED; REQUIRING A LOCAL JURISDICTION TO DENY A VARIANCE AND ORDER CERTAIN ACTIONS UNDER CERTAIN CIRCUMSTANCES; AND AUTHORIZING A LOCAL JURISDICTION TO GRANT PROPOSED APPROVAL TO A VARIANCE UNDER CERTAIN

~~circumstances; requiring the Critical Area Commission to review certain proposed variance approvals and issue certain decisions; specifying the applicability of certain standards under certain circumstances; requiring the Critical Area Commission to consider certain factors when reviewing certain map amendments or refinements; prohibiting lot coverage in the buffer in excess of a certain amount, except under certain circumstances; specifying the applicability of certain limitations to the extent of lot coverage, with certain exceptions and subject to a certain construction; requiring the establishment of a certain buffer in a certain area, and allowing for certain reductions under certain circumstances; requiring that certain erosion protections consist of nonstructural shoreline stabilization measures, except under certain circumstances; requiring that the Critical Area Commission consider a local jurisdiction's determination of a classification interim and make a certain determination; requiring the Department of the Environment to adopt certain regulations to include a certain waiver process; authorizing a local authority to obtain access and enter a certain property for certain purposes and under certain circumstances; requiring a local authority to take certain actions under certain circumstances related to certain violations; authorizing the Chairman of the Critical Area Commission to invoke certain sanctions and remedies and bring certain actions under certain circumstances; requiring that certain criminal prosecutions and suits for civil penalties be instituted within a certain time; modifying the initial planning areas for the determination of the Chesapeake Bay Critical Area and Atlantic Coastal Bays Critical Area by the use of a certain map; providing for the preparation, distribution, review, refinement, formal adoption, and periodic update of a certain map certain maps; requiring the Department of Natural Resources to notify the Department of Legislative Services regarding the date of completion of a certain mapping project; clarifying the applicability of certain provisions of law; specifying certain legislative findings; defining certain terms; requiring certain local jurisdictions to report to the Critical Area Commission by a certain date regarding certain procedures; prohibiting a certain construction certain constructions of this Act; making the effective date of a certain provision of this Act subject to a certain contingency; and generally relating to the Chesapeake and Atlantic Coastal Bays Critical Area Protection Program.~~

BY repealing and reenacting, without amendments,
 Article - Business Regulation
 Section 8-101(a)
 Annotated Code of Maryland
 (2004 Replacement Volume and 2007 Supplement)

BY repealing and reenacting, with amendments,
 Article - Business Regulation
 Section 8-101(e), 4.5-308(a), 8-101(g), and 8-311(a)
 Annotated Code of Maryland

(2004 Replacement Volume and 2007 Supplement)

BY adding to
 Article - Business Regulation
 Section 8-506
 Annotated Code of Maryland
 (2004 Replacement Volume and 2007 Supplement)

BY repealing and reenacting, with amendments,
 Article - Natural Resources
 Section 5-421(a)
 Annotated Code of Maryland
 (2005 Replacement Volume and 2007 Supplement)

BY repealing and reenacting, with amendments,
 Article - Natural Resources
 Section 8-1801, ~~8-1809(c)(15) through (18)~~ 8-1802(a)(13) through (23), 8-1806,
 8-1807(a) and (b), 8-1808(c), (d), and (e), 8-1808.1(c) and (e)(2)(i),
 8-1808.3, ~~8-1809(b) and (c)(1)~~ 8-1809(c)(1), 8-1811(b)(2), 8-1815(a), and
 8-1815.1(b)
 Annotated Code of Maryland
 (2007 Replacement Volume)

BY repealing and reenacting, without amendments,
 Article - Natural Resources
 Section 8-1802(a)(1)
 Annotated Code of Maryland
 (2007 Replacement Volume)

BY adding to
 Article - Natural Resources
 Section 8-1802(a)(15), 8-1808.10, and 8-1808.11
 Annotated Code of Maryland
 (2007 Replacement Volume)

Preamble

WHEREAS, Following extensive research and the issuance of a report by the United States Environmental Protection Agency that clearly demonstrated an alarming extent of degradation of the Chesapeake Bay, in significant part because of prominent land use and growth patterns, the Critical Area Commission was created in 1984 in order to preserve and restore water quality in the State, to maintain valued wildlife habitat, and to accommodate inevitable growth, and these same legislative concerns were addressed in 2002 when the protections of the Critical Area Program were expanded to include the Atlantic Coastal Bays; and

continue to allow for flexibility in recognition of local partners' varying needs; now, therefore,

SECTION 1 BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - Business Regulation

4-6-308.

§ 111. The State may deny registration to an applicant, suspend or revoke a registration, or impose a civil penalty on a registrant if the Unit determines that the applicant or registrant:

(i) fraudulently or deceptively obtained or attempted to obtain a registration;

(ii) fraudulently or deceptively used a registration;

(iii) presented or attempted to present the home builder registration number of another registrant as the applicant's or registrant's home builder registration number;

(iv) used or attempted to use an expired, suspended, or revoked home builder registration number;

(v) impersonated or falsely represented oneself as a registered home builder;

(vi) repeatedly violated this title;

(vii) engaged in a pattern of unfair or deceptive trade practices under the Consumer Protection Act, as determined by a final administrative order or judicial decision;

(viii) repeatedly violated a local building, development, or zoning permit law or regulations, or a State or Federal law or regulation, including an environmental protection law or regulation, that relates to the fitness and qualification or ability of the applicant or registrant to build homes;

(ix) engaged in a pattern of poor workmanship as evidenced by one or more of the following:

1. [60] repeated unresolved building code violations;

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WHEREAS, The Critical Area, which comprises approximately 11% of Maryland's land mass, includes the majority of the State's most ecologically fragile and valuable properties; and

WHEREAS, From its inception, partnership between State and local government has been a cornerstone of the Critical Area Program; and

WHEREAS, To date local Critical Area programs are operative in Baltimore City, 16 counties, and 47 other municipalities, and Critical Area issues directly impact at least seven State departments; and

WHEREAS, After nearly a quarter-century of operation, the Critical Area Program has effectively influenced thousands of land use decisions, addressed and minimized the adverse impacts of growth associated with hundreds of requests for growth allocation, and represented a comprehensive effort between the State and local governments to enforce a variety of water quality and habitat protection standards; and

WHEREAS, Despite these efforts, additional measures are necessary in order to enhance a cooperative land use and natural resource management program that will restore the quality and productivity of the Chesapeake Bay, Atlantic Coastal Bays, their tidal tributaries, and associated land-based ecosystems; and

WHEREAS, Particularly in light of the ongoing, accelerating decline of the State's water quality resources and the loss of valuable shoreline areas due to erosion and global warming, it is the view of the General Assembly that significant improvements are in order at this time so as to accomplish Program preservation goals more effectively while streamlining the Program and enhancing its efficiency and predictability; and

WHEREAS, Experience has provided several strong indicators of how to ensure these Program improvements; and

WHEREAS, A key element that is fundamental to the ordinary business operations of all other State agencies is the general authority to adopt regulations, but the ability of the Critical Area Commission to do so was rendered unclear by the March 10, 1987 Opinion of the Attorney General, 72 Md. Op. Atty. Gen. 14, 1987 WL 339797 (MD AG.), and it is the intent of this legislation to clarify and supersede that Opinion; and

WHEREAS, It is likewise the intent of this legislation to strengthen and clarify the reach of the Program where necessary to compensate for gaps in the current structure, such as the institution of more meaningful enforcement mechanisms, and to provide for fairer and more effective Program procedures around the State that will

~~[(ii)]~~ 2. ~~repeated unsatisfied arbitration awards in favor of consumers against the applicant or registered home builder based on incomplete or substandard work; or~~

~~[(iii)]~~ 3. ~~an unsatisfied final judgment in favor of a consumer;~~

~~[(10)]~~ ~~(X)~~ ~~repeatedly engaged in fraud, deception, misrepresentation, or knowing omissions of material facts related to home building contracts;~~

~~[(11)]~~ ~~(XI)~~ ~~had a similar registration or license denied, suspended, or revoked in another state or jurisdiction; [or]~~

~~[(12)]~~ ~~(XII)~~ ~~had the renewal of a similar registration or license denied for any cause other than failure to pay a renewal fee; OR~~

~~(XIII) IN THE CHESAPEAKE AND ATLANTIC COASTAL BAYS CRITICAL AREA, AS DEFINED UNDER § 8-1802 OF THE NATURAL RESOURCES ARTICLE, FAILED TO COMPLY WITH:~~

~~1. THE TERMS OF A STATE OR LOCAL PERMIT, LICENSE, OR APPROVAL; OR~~

~~2. ANY STATE OR LOCAL LAW, AN APPROVED PLAN, OR OTHER LEGAL REQUIREMENT.~~

~~(2) THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AND ATLANTIC COASTAL BAYS, AS ESTABLISHED UNDER TITLE 8, SUBTITLE 18 OF THE NATURAL RESOURCES ARTICLE, SHALL NOTIFY THE UNIT OF ANY APPLICANT OR REGISTRANT WHO FAILS TO COMPLY WITH ANY REQUIREMENT UNDER PARAGRAPH (1)(XIII) OF THIS SUBSECTION.~~

8-101.

(a) In this title the following words have the meanings indicated.

(g) (1) "Home improvement" means:

(i) the addition to or alteration, conversion, improvement, modernization, remodeling, repair, or replacement of a building or part of a building that is used or designed to be used as a residence or dwelling place or a structure adjacent to that building; or

(ii) an improvement to land adjacent to the building.

(2) "Home improvement" includes:

(i) construction, improvement, or replacement, on land ad to the building, of a driveway, fall-out shelter, fence, garage, landscaping, ~~PIER~~, porch, or swimming pool;

(ii) A SHORE EROSION CONTROL PROJECT, AS DE UNDER § 8-1001 OF THE NATURAL RESOURCES ARTICLE, FOR A RESIDE PROPERTY;

(iii) connection, installation, or replacement, in the build structure, of a dishwasher, disposal, or refrigerator with an icemaker to e exposed household plumbing lines;

~~[(iii)]~~ (IV) installation, in the building or structure, awning, fire alarm, or storm window; {and}

~~[(iv)]~~ (V) work done on individual condominium units;

~~(iv) CONSTRUCTION, IMPROVEMENT, ALTERATION, REPLACEMENT OF LAND OR ANY STRUCTURE IN THE CHESAPEAKE ATLANTIC COASTAL BAYS CRITICAL AREA, AS DEFINED UNDER § 8-18 THE NATURAL RESOURCES ARTICLE.~~

(3) "Home improvement" does not include:

(i) construction of a new home;

(ii) work done to comply with a guarantee of completio new building project;

(iii) connection, installation, or replacement of an appli existing exposed plumbing lines that requires alteration of the plumbing lines;

(iv) sale of materials, if the seller does not arrange to per does not perform directly or indirectly any work in connection with the install: application of the materials;

(v) work done on apartment buildings that contain four t single-family units; OR

(vi) work done on the commonly owned areas of condomini or

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(13) violates a regulation adopted under this title; OR

(14) IN THE CHESAPEAKE AND ATLANTIC COASTAL BAY CRITICAL AREA, AS DEFINED UNDER § 8-1802 OF THE NATURAL RESOURCE ARTICLE, FAILS TO COMPLY WITH:

(i) THE TERMS OF A STATE OR LOCAL PERMIT, LICENSE, OR APPROVAL ISSUED FOR HOME IMPROVEMENT; OR

(ii) ANY STATE OR LOCAL LAW, AN APPROVED PLAN, OR OTHER LEGAL REQUIREMENT.

8-506.

(A) IN THIS SECTION, "CRITICAL AREA" HAS THE MEANING DESIGNATE UNDER § 8-1802 OF THE NATURAL RESOURCES ARTICLE.

(B) THE CRITICAL AREA COMMISSION FOR THE CHESAPEAKE AN ATLANTIC COASTAL BAYS, AS ESTABLISHED UNDER TITLE 8, SUBTITLE 18 OF THE NATURAL RESOURCES ARTICLE, SHALL NOTIFY THE COMMISSION OF AN CONTRACTOR WHO, IN THE CRITICAL AREA, FAILS TO COMPLY WITH:

(1) THE TERMS OF A STATE OR LOCAL PERMIT, LICENSE, OR APPROVAL ISSUED FOR HOME IMPROVEMENT; OR

(2) ANY STATE OR LOCAL LAW, APPROVED PLAN, OR OTHER LEGAL REQUIREMENT.

Article - Natural Resources

8-421.

(a) (1) The Department may permanently revoke or temporarily suspend the license of any licensed tree expert who lists:

(i) IS found guilty of any fraud or deceit in obtaining a license, or guilty of wrongful conduct in the practice of tree culture care; OR

(ii) IN THE CHESAPEAKE AND ATLANTIC COASTAL BAY CRITICAL AREA, AS DEFINED UNDER § 8-1802 OF THIS ARTICLE, FAILS TO COMPLY WITH:

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(vi) a shore erosion control project, as defined in § 8-1001 of the Natural Resources Article, for a residential property].

8-311.

(a) Subject to the hearing provisions of § 8-312 of this subtitle, the Commission may deny a license to an applicant, reprimand a licensee, or suspend or revoke a license if the applicant or licensee or the management personnel of the applicant or licensee:

(1) fraudulently or deceptively obtains or attempts to obtain a license for the applicant or licensee or for another person.

(2) fraudulently or deceptively uses a license;

(3) fails to give the Commission information required by this subtitle about an application for a license;

(4) fails to pass an examination required by this subtitle;

(5) under the laws of the United States or of any state, is convicted of misdemeanor that is directly related to the fitness and qualification of the applicant or licensee to engage in home improvement services;

(6) often fails to perform home improvement contracts;

(7) falsifies an account;

(8) engages in fraud;

(9) as a contractor or subcontractor fails to show financial solvency, based on the intended scope and size of the business in relation to total assets, liabilities, credit rating, and net worth;

(10) as a contractor or subcontractor lacks competence, as shown by the performance of an unworkmanlike, inadequate, or incomplete home improvement;

(11) violates this title;

(12) attempts to violate this title; for]

1. THE TERMS OF A STATE OR LOCAL PERMIT, LICENSE, OR APPROVAL; OR

2. ANY STATE OR LOCAL LAW, AN APPROVED PLAN, OR OTHER LEGAL REQUIREMENT.

(2) THE CRITICAL AREA COMMISSION SHALL NOTIFY THE DEPARTMENT OF ANY TREE EXPERT WHO FAILS TO COMPLY WITH ANY REQUIREMENT UNDER PARAGRAPH (1)(II) OF THIS SUBSECTION.

8-1801.

(a) The General Assembly finds and declares that:

(1) The Chesapeake and the Atlantic Coastal Bays and their tributaries are natural resources of great significance to the State and the nation, AND THEIR BEAUTY, THEIR ECOLOGICAL VALUE, AND THEIR ECONOMIC IMPACT ALL REACH FAR BEYOND ANY ONE LOCAL JURISDICTION;

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

(3) The capacity of these shoreline and adjacent lands to withstand continuing demands without further degradation to water quality and natural habitats is limited;

(4) Human activity is harmful in these shoreline areas, where the new development of nonwater-dependent structures or [the addition of impervious surfaces] AN INCREASE IN LOT COVERAGE is presumed to be contrary to the purpose of this subtitle, because these activities may cause adverse impacts, of both an immediate and a long-term nature, to the Chesapeake and Atlantic Coastal Bays, and thus it is necessary wherever possible to maintain a buffer of at least 100 feet landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands;

(5) National studies have documented that the quality and productivity of the waters of the Chesapeake Bay and its tributaries have declined due to the cumulative effects of human activity that have caused increased levels of pollutants, nutrients, and toxics in the Bay System and declines in more protective land uses such as forestland and agricultural land in the Bay region;

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(6) Those portions of the Chesapeake and the Atlantic Coasts and their tributaries within Maryland are particularly stressed by the combined population growth and development activity concentrated in the Baltimore-Washington metropolitan corridor and along the Atlantic Coast;

(7) The quality of life for the citizens of Maryland is enhanced by the restoration of the quality and productivity of the waters of the Chesapeake and Atlantic Coastal Bays, and their tributaries;

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

(9) The cumulative impact of current development and of future development activity in the buffer is inimical to these purposes, AND THEREFORE IMPERATIVE THAT STATE LAW BE SUFFICIENT TO PREVENT IRREPLACEABLE STATE BUFFER RESOURCES FROM UNPERMITTED ACTS AND

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

(b) It is the purpose of the General Assembly in enacting this subtitle:

(1) To establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats; and

(2) To implement the Resource Protection Program on a cooperative basis between the State and affected local governments, with local government establishing and implementing their programs in a consistent and uniform manner subject to State AND LOCAL LEADERSHIP, [criteria] CRITERIA, and oversight.

8-1802.

(a) (1) In this subtitle the following words have the meanings indicated:

(1) "INTENSELY DEVELOPED AREA" MEANS AN AREA OF AT LEAST 20 ACRES OR THE ENTIRE UPLAND PORTION OF THE CRITICAL AREA WITHIN A MUNICIPAL CORPORATION, WHICHEVER IS LESS, WHERE:

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- 1. RESIDENTIAL, COMMERCIAL, INSTITUTIONAL, OR INDUSTRIAL DEVELOPED LAND USES PREDOMINATE; AND
- 2. A RELATIVELY SMALL AMOUNT OF NATURAL HABITAT OCCURS.

(ii) "INTENSELY DEVELOPED AREA" INCLUDES:

- 1. AN AREA WITH A HOUSING DENSITY OF AT LEAST FOUR DWELLING UNITS PER ACRE;
- 2. AN AREA WITH PUBLIC WATER AND SEWER SYSTEMS WITH A HOUSING DENSITY OF MORE THAN THREE DWELLING UNITS PER ACRE; OR

3. A COMMERCIAL MARINA REDESIGNATED BY A LOCAL JURISDICTION FROM A RESOURCE CONSERVATION AREA OR LIMITED DEVELOPMENT AREA TO AN INTENSELY DEVELOPED AREA THROUGH A MAPPING CORRECTION THAT OCCURRED BEFORE JANUARY 1, 2006.

(14) "Land classification" means the designation of land in the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in accordance with the criteria adopted by the Commission as an intensely developed area or district. A limited development area or district, or a resource conservation area or district.

(15) (i) "LIMITED DEVELOPMENT AREA" MEANS AN AREA:

- 1. THAT IS DEVELOPED IN LOW OR MODERATE INTENSITY USES AND CONTAINS AREAS OF NATURAL PLANT AND ANIMAL HABITAT; AND
- 2. WHERE THE QUALITY OF RUNOFF HAS NOT BEEN SUBSTANTIALLY ALTERED OR IMPAIRED.

(ii) "LIMITED DEVELOPMENT AREA" INCLUDES AN AREA:

- 1. WITH A HOUSING DENSITY RANGING FROM ONE DWELLING UNIT PER FIVE ACRES UP TO FOUR DWELLING UNITS PER ACRE;
- 2. WITH A PUBLIC WATER OR SEWER SYSTEM;

- 3. THAT IS NOT DOMINATED BY AGRICULTURE, WETLAND, FORESTS, BARREN LAND, SURFACE WATER, OR OPEN SPACE;
- 4. THAT IS LESS THAN 20 ACRES AND OTHER QUALITIES AS AN INTENSELY DEVELOPED AREA UNDER PARAGRAPH (1) OF THIS SUBSECTION.

(16) (i) "Local jurisdiction" means a county, or a municipality, or a city and county, in which any part of the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area, as defined in subtitle 3, is located.

(17) (i) "LOT COVERAGE" MEANS THE PERCENTAGE TOTAL LOT OR PARCEL THAT IS:

- 1. OCCUPIED BY A STRUCTURE, ACCESS STRUCTURE, PARKING AREA, DRIVEWAY, WALKWAY, OR ROADWAY; OR
- 2. COVERED WITH A PAVEMENT, WALKWAY OR STONE, SHELL, IMPERMEABLE DECKING, A PAVEMENT, PERMEABLE PAVEMENT, OR OTHER ANY MANMADE MATERIAL.

(ii) "LOT COVERAGE" INCLUDES THE TOTAL GROUND COVERED OR OCCUPIED, INCLUDING TERRACES, PROTRUDING CANOPIES, PORCHES, PATIOS, DECKS, STAIRWAYS, AND OVERHANGING DECK OR BALCONY BY A STAIRWAY OR IMPERMEABLE DECK.

(iii) "LOT COVERAGE" DOES NOT INCLUDE:

- 1. A FENCE OR WALL THAT IS LESS THAN 1 FOOT WIDTH THAT HAS NOT BEEN CONSTRUCTED WITH A FOOTER FOOTER;
- 2. A WALKWAY IN THE BUFFER OR EXPOSED BUFFER, INCLUDING A STAIRWAY, THAT PROVIDES DIRECT ACCESS TO A COMMUNITY OR PRIVATE PIER; OR

- 3. A WOOD MULCH PATHWAY; OR
- 4. A DECK WITH GAPS TO ALLOW WATER TO DRAIN FREELY.

[(15)] ~~(16)~~ (18) (i) "Program" means the critical area protection program of a local jurisdiction.

(ii) "Program" includes any amendments to the program.

[(16)] ~~(17)~~ (19) (i) "Program amendment" means any change or proposed change to an adopted program that is not determined by the Commission chairman to be a program refinement.

(ii) "Program amendment" includes a change to a zoning map that is not consistent with the method for using the growth allocation contained in an adopted program.

[(17)] ~~(18)~~ (20) (i) "Program refinement" means any change or proposed change to an adopted program that the Commission chairman determines will result in a use of land or water in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in a manner consistent with the adopted program, or that will not significantly affect the use of land or water in the critical area.

(ii) "Program refinement" may include:

- 1. A change to an adopted program that results from State law;
- 2. A change to an adopted program that affects local processes and procedures;
- 3. A change to a local ordinance or code that clarifies an existing provision; and
- 4. A minor change to an element of an adopted program that is clearly consistent with the provisions of this subtitle and all of the criteria of the Commission.

[(18)] ~~(19)~~ (21) (i) "Project approval" means the approval of development, other than development by a State or local government agency, in the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area by the appropriate local approval authority.

(ii) "Project approval" includes:

- 1. Approval of subdivision plats and site plans;
- 2. Inclusion of areas within floating zones;

3. Issuance of variances, special exceptions, and conditional use permits; and

4. Approval of rezoning.

(iii) "Project approval" does not include building permits.

(22) (i) "RESOURCE CONSERVATION AREA" MEANS AN AREA THAT IS CHARACTERIZED BY:

- 1. NATURE DOMINATED ENVIRONMENTS, SUCH AS WETLANDS, SURFACE WATER, FORESTS, AND OPEN SPACE; AND
- 2. RESOURCE-BASED ACTIVITIES, SUCH AS AGRICULTURE, FORESTRY, FISHERIES, OR AQUACULTURE.

(ii) "RESOURCE CONSERVATION AREA" INCLUDES AN AREA WITH A HOUSING DENSITY OF LESS THAN ONE DWELLING PER FIVE ACRES.

(23) "TRIBUTARY STREAM" MEANS A PERENNIAL STREAM OR AN INTERMITTENT STREAM WITHIN THE CRITICAL AREA THAT HAS BEEN IDENTIFIED BY SITE INSPECTION OR IN ACCORDANCE WITH LOCAL PROGRAM PROCEDURES APPROVED BY THE COMMISSION.

8-1806.

(a) The Commission has all powers necessary for carrying out the purpose of this subtitle, including the following:

(1) [To adopt regulations and criteria in] IN accordance with Title 5 Subtitle 5 (Joint Committee on Administrative, Executive and Legislative Review) and Title 10, Subtitle 1 (Administrative Procedure Act) of the State Government Article TO ADOPT AND AMEND REGULATIONS AS NECESSARY AND APPROPRIATE AND AUTHORIZED UNDER THIS SUBTITLE FOR THE ADMINISTRATION AND ENFORCEMENT OF THE STATE AND LOCAL PROGRAMS;

(2) To conduct hearings in connection with policies, proposed programs, and proposed regulations or amendments to regulations;

(3) To contract for consultant or other services; and

(4) To establish an advisory committee, composed of members of the Commission and local citizens and local stakeholder groups, to make recommendations to the Commission with respect to Atlantic Coastal Bays Critical Area programs.

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3. FLEXIBILITY FOR REDEVELOPMENT;

4. STORMWATER MANAGEMENT;

5. APPLICATION OF THE 10% POLY-

6. FOREST AND DEVELOPED WOOD-

7. CLEARING OF NATURAL VEGETATION;

8. LOT COVERAGE STANDARDS;

9. COMMISSION REVIEW OF LOCAL PROVISIONS

10. THE EXCLUSION OF STATE TIDAL WET-

FROM CALCULATIONS OF DENSITY, FOREST AND DEVELOPED WOOD- PROTECTIONS, LIMITATIONS ON CLEARING NATURAL VEGETATION, AND COVERAGE STANDARDS;

(N) CONSISTENT ENFORCEMENT OF STATE AND L CRITICAL AREA LAW, WITH RESPECT TO THE ESTABLISHMENT OF MIN PENALTIES AND MITIGATION REQUIREMENTS;

(XII) GROWTH ALLOCATION APPLICATIONS, WITH RES-

1. THE DEDUCTION OF GROWTH ALLOC-

2. COMMISSION REVIEW AND DETERMINATION

3. ACCOMMODATION OF VARIATIONS AMONG L JURISDICTIONS CONCERNING LAND USES IN THE RESOURCE CONSERV- AREA THAT DO NOT REQUIRE GROWTH ALLOCATION;

4. THE LOCATION OF SEPTIC SYSTEMS;

5. GOLF COURSES; AND

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(b) ~~As a condition~~, REGULATIONS, REVISIONS, AND LONG TERM PROTECTION AND FOR BUFFER MITIGATION ACTIVITIES ASSOCIATED WITH VIOLATIONS, MANAGEMENT, MAINTENANCE, AND LONG TERM PROTECTION

(1) ESTABLISH COMPREHENSIVE STANDARDS AND PROCEDURES FOR BUFFER ESTABLISHMENT, MAINTENANCE, AND LONG TERM PROTECTION AND FOR BUFFER MITIGATION ACTIVITIES ASSOCIATED WITH VIOLATIONS, MANAGEMENT, OR APPROVED DEVELOPMENT ACTIVITIES, INCLUDING PROVISIONS TO ENSURE THE:

(i) BUFFER ESTABLISHMENT, MAINTENANCE, AND ENFORCEMENT MEASUREMENT, MITIGATION, AND ENFORCEMENT;

(ii) BUFFER EXEMPTION AREAS;

(iii) IMPACTS OF SHORE EROSION CONTROL ACTIVITIES ON

THE BUFFER;

(iv) COMMUNITY PIER;

(v) COMMERCIAL MARINAS;

(vi) WATER DEPENDENT FACILITIES;

(vii) PUBLIC WATER ACCESS;

(viii) THE PROTECTION AND CONSERVATION OF THE BUFFER AS A STATE WATER QUALITY AND HABITAT RESOURCE ESSENTIAL TO THE RESTORATION OF THE CHESAPEAKE AND ATLANTIC COASTAL BAYS; AND

(ix) MAPPING THE CRITICAL AREA WITH RESPECT TO REVISION OF THE 1,000 FOOT BOUNDARY AND VOLUNTARY ADDITIONS OF PROPERTY TO THE CRITICAL AREA;

(x) DEVELOPMENT IN THE CRITICAL AREA, WITH RESPECT

TO:

1. CLEARING, GRADING, AND CONSTRUCTION

ACTIVITY;

2. CLUSTERING TO PROMOTE CONSERVATION OF NATURAL SITE FEATURES;

6. THE COMMISSION'S EVALUATION OF A LOCAL JURISDICTION'S USE OF CLUSTER DEVELOPMENT UNDER § 8-1808.1 OF THIS SUBTITLE:

(XIII) IN CONSULTATION WITH APPROPRIATE STATE AND FEDERAL AGENCIES, THE CONSERVATION AND PROTECTION OF:

1. HABITAT PROTECTION AREAS;
2. THREATENED AND ENDANGERED SPECIES;
3. SPECIES IN NEED OF CONSERVATION;
4. FOREST INTERIOR DWELLING BIRDS;
5. ANADROMOUS FISH PROPAGATION WATERS; AND
6. PLANT AND WILDLIFE HABITAT;

(XIV) DIRECTIVES FOR LOCAL PROGRAM DEVELOPMENT AND IMPLEMENTATION, WITH RESPECT TO:

1. NOTIFICATION OF PROJECT APPLICATIONS;
2. THE 6-YEAR COMPREHENSIVE REVIEW OF A LOCAL CRITICAL AREA PROGRAM;
3. ~~PUBLIC NOTICE AND COMMENT FOR A STATE OR LOCAL GOVERNMENT DEVELOPMENT ACTIVITY;~~
3. FOR A STATE OR LOCAL GOVERNMENT DEVELOPMENT ACTIVITY:
 - A. PUBLIC NOTICE, INCLUDING NOTICE TO BE PUBLISHED IN A NEWSPAPER OF GENERAL CIRCULATION IN THE AREA WHERE THE PROPOSED DEVELOPMENT ACTIVITY WOULD OCCUR; AND
 - B. AN OPPORTUNITY FOR PUBLIC COMMENT IN THE LOCAL JURISDICTION IN WHICH THE PROPOSED DEVELOPMENT ACTIVITY WOULD BE LOCATED.
4. REPORTING REQUIREMENTS;

5. THE SUBMISSION AND PROCESSING OF A PROPOSED PROGRAM AMENDMENT OR REFINEMENT; AND

6. PROVISIONS APPLICABLE TO AREAS REQUESTED FOR EXCLUSION FROM THE CRITICAL AREA;

(XV) IN CONSULTATION WITH THE DEPARTMENT OF THE ENVIRONMENT, SURFACE MINING IN THE CRITICAL AREA; AND

(XVI) THE APPLICATION FOR AND PROCESSING OF A VARIANCE, WITH RESPECT TO:

1. AMENDING A VARIANCE APPLICATION;
2. ADVANCE NOTICE TO THE COMMISSION;
3. THE CONTENTS OF A COMPLETE VARIANCE APPLICATION;
4. ENSURING THAT COMMISSION RECOMMENDATIONS ARE MADE PART OF THE VARIANCE RECORD;
5. THE USE OF VARIANCE STANDARDS; AND
6. NOTICE OF A VARIANCE DECISION; AND

(2) PROVIDE FLEXIBILITY WHEREVER POSSIBLE IN ORDER TO ACCOMMODATE VARIATIONS AMONG LOCAL PROGRAMS.

(C) The members of the Commission who reside in the Atlantic Coastal Bays Watershed shall serve on any committee established under subsection (a)(4) of this section.

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(c) (1) (1) [At a minimum.] 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 SHALL APPLY TO, AND BE APPLIED BY, A LOCAL JURISDICTION AS MINIMUM STANDARDS FOR a program sufficient to meet the goals [stated in subsection (b) of this section includes] OF THE CRITICAL AREA PROGRAM.

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(vi) 6. Establishment of buffer areas along shorelines which agriculture will be permitted only if best management practices are provided that structures or any other use of land which is necessary for agriculture shall also be permitted in any buffer areas.

(vii) 7. Requirements for minimum setbacks for street and septic fields along shorelines, including the establishment of a minimum buffer landward from the mean high water line of tidal waters, tributary streams, and wetlands;

(viii) 8. Designation of shoreline areas, if any, that suitable for parks, hiking, biking, wildlife viewing, scenic drives, public access assembly, and water-related recreation such as boat slips, piers, and benches;

(ix) 9. Designation of shoreline areas, if any, that suitable for ports, marinas, and industries that use water for transportation or derive economic benefits from shore access;

(x) 10. Provisions requiring that all harvesting of timber the Chesapeake Bay Critical Area or the Atlantic Coastal Bays Critical Area in accordance with plans approved by the district forestry board;

(xi) 11. Provisions establishing that the contours in a plan which are designed to prevent runoff of pollutants will not be required or altered if the topography prevents runoff from directly or indirectly reaching that water;

(xii) 12. Provisions for reasonable accommodations in public procedures when the accommodations are necessary to avoid discrimination or basis of physical disability, including provisions that authorize a local jurisdiction to require removal of a structure that was installed or built to accommodate a physical disability and require restoration when the accommodation permitted by paragraph is no longer necessary;

13. PROCEDURES, INCLUDING CONSOLIDATION OR RECONFIGURATION OF LOTS, THAT SHALL BE APPROVED BY THE COMMISSION AND ASSURE THAT THE FOLLOWING LOTS AND LANDS BROUGHT INTO CONFORMANCE WITH THE PROGRAM TO THE EXTENT POSSIBLE

A. ANY IN THE CHESAPEAKE BAY CRITICAL AREA ANY LEGAL PARCEL OF LAND, NOT BEING PART OF A RECORDED OR APPROPRIATE SUBDIVISION, THAT WAS RECORDED AS OF DECEMBER 1, 1985; AND

(ii) WITH THE APPROVAL OF THE COMMISSION, A LOCAL JURISDICTION MAY ESTABLISH PROCEDURES FOR THE GRANTING OF AN ADMINISTRATIVE VARIANCE.

(iii) AT A MINIMUM, A PROGRAM SHALL CONTAIN ALL OF THE FOLLOWING ELEMENTS, INCLUDING:

- (i) 1. A map designating the critical area in a local jurisdiction;
- (ii) 2. A comprehensive zoning map for the critical area;
- (iii) 3. As necessary, new or amended provisions of the jurisdiction;

- (1) A. Subdivision regulations;
- (2) B. Comprehensive or master plan;
- (3) C. Zoning ordinances or regulations;
- (4) D. Provisions relating to enforcement; and
- (5) E. Provisions as appropriate relating to grandfathering of development at the time the program is adopted or approved by the Commission, INCLUDING PROVISIONS FOR BRINGING LANDS INTO CONFORMANCE WITH THE PROGRAM AS REQUIRED UNDER ITEM 12 OF THIS SUBPARAGRAPH;

4. (iv) Provisions requiring that projects A. PROJECT approvals shall be based on findings that projects are consistent with the standards stated in subsection (b) of this section; AND

B. THE COMMISSION SHALL RECEIVE WRITTEN NOTICE OF LOCAL DECISIONS ON REGARDING PROJECT APPROVALS WITHIN 10 WORKING DAYS AFTER THE DATE OF ISSUANCE OR DENIALS IN ACCORDANCE WITH LOCAL PROCEDURES APPROVED BY THE COMMISSION.

(v) 5. Provisions to limit [the amount of land covered by buildings, roads, parking lots, or other impervious surfaces.] LOT COVERAGE and to require or encourage cluster development, where necessary or appropriate;

B. ~~LAND IN THE CHESAPEAKE BAY CRITICAL AREA, LAND THAT WAS SUBDIVIDED INTO RECORDED LEGALLY BUILDABLE LOTS, WHERE THE SUBDIVISION RECEIVED THE LOCAL JURISDICTION'S FINAL APPROVAL BEFORE JUNE 1, 1984;~~

C. ~~IN THE ATLANTIC COASTAL BAYS CRITICAL AREA, ANY LEGAL PARCEL OF LAND, NOT BEING PART OF A RECORDED OR APPROVED SUBDIVISION, THAT WAS RECORDED AS OF JUNE 1, 2002; AND~~

D. ~~IN THE ATLANTIC COASTAL BAYS CRITICAL AREA, LAND THAT WAS SUBDIVIDED INTO RECORDED LEGALLY BUILDABLE LOTS, WHERE THE SUBDIVISION RECEIVED THE LOCAL JURISDICTION'S FINAL APPROVAL BEFORE JUNE 1, 2002;~~

~~[(xiii)]44, 13.~~ Except as provided in subsection (d) of this section, provisions for granting a variance to the local jurisdiction's critical area program, in accordance with regulations adopted by the Commission concerning variances set forth in COMAR 27.01.11; [and]

~~[(xiv)]45, 14.~~ Penalty provisions establishing that, in addition to any other penalty applicable under State or local law, a EACH person who violates a provision of this subtitle or of a program, INCLUDING A CONTRACTOR, PROPERTY OWNER, OR ANY OTHER PERSON WHO COMMITTED, ASSISTED, AUTHORIZED, OR PARTICIPATED IN A TITLE VIOLATION;

~~A. HE IS~~ subject to a fine not exceeding \$10,000; AND

~~B. MAY BE HELD JOINTLY OR SEVERALLY RESPONSIBLE FOR EACH VIOLATION; AND~~

~~16.15. IN ACCORDANCE WITH REGULATIONS ADOPTED BY THE COMMISSION, ADMINISTRATIVE ENFORCEMENT PROCEDURES IN ACCORDANCE WITH DUE PROCESS PRINCIPLES, INCLUDING NOTICE AND AN OPPORTUNITY TO BE HEARD, AND ESTABLISHING THAT:~~

A. EACH VIOLATION OF THIS SUBTITLE OR OF A REGULATION, RULE, ORDER, PROGRAM, OR OTHER REQUIREMENT ADOPTED UNDER THE AUTHORITY OF THIS SUBTITLE CONSTITUTES A SEPARATE OFFENSE;

B. EACH CALENDAR DAY THAT A VIOLATION CONTINUES CONSTITUTES A SEPARATE OFFENSE;

C. FOR EACH OFFENSE, A PERSON SHALL BE SUBJECT TO SEPARATE FINES, ORDERS, SANCTIONS, AND OTHER PENALTIES;

D. CIVIL PENALTIES FOR CONTINUING VIOLATIONS SHALL ACCRUE WITHOUT A REQUIREMENT FOR AN ADDITIONAL ASSESSMENT, NOTICE, OR OPPORTUNITY FOR HEARING FOR EACH SEPARATE OFFENSE;

E. ON CONSIDERATION OF ALL THE FACTORS INCLUDED UNDER THIS SUBSECTION AND ANY OTHER FACTORS IN THE LOCAL JURISDICTION'S APPROVED PROGRAM, THE LOCAL JURISDICTION'S ~~CORRECTION ENFORCEMENT PERSONNEL~~ JURISDICTION SHALL IMPOSE THE AMOUNT OF THE PENALTY; ~~AND~~

~~F. PAYMENT OF ALL CIVIL PENALTIES AND CORRECTION OF THE VIOLATION~~ SATISFACTION OF ALL CONDITIONS SPECIFIED UNDER PARAGRAPH (4) OF THIS SUBSECTION SHALL BE A CONDITION PRECEDENT TO THE ISSUANCE OF ANY PERMIT, APPROVAL, VARIANCE, OR SPECIAL EXCEPTION FOR THE AFFECTED PROPERTY; ~~AND~~

G. UNLESS AN EXTENSION OF TIME IS APPROPRIATE BECAUSE OF ADVERSE PLANNING CONDITIONS, WITHIN ~~60~~ 90 DAYS OF THE ISSUANCE OF A PERMIT, APPROVAL, VARIANCE, OR SPECIAL EXCEPTION FOR THE AFFECTED PROPERTY, ANY ADDITIONAL MITIGATION REQUIRED AS A CONDITION OF APPROVAL FOR THE PERMIT, APPROVAL, VARIANCE, OR SPECIAL EXCEPTION SHALL BE COMPLETED.

(2) (i) In determining the amount of the penalty to be assessed under paragraph [(1)(xiv)] ~~(1)(i)-(1)(iii)~~ (1)(iii) of this subsection, a local jurisdiction [may] SHALL consider:

- (i) 1. The gravity of the violation;
- (ii) 2. Any willfulness or negligence involved in the violation; [and]
- (iii) 3. The environmental impact of the violation; ~~AND~~
- (iv) 4. THE COST OF RESTORATION OF THE RESOURCE AFFECTED BY THE VIOLATION AND MITIGATION FOR DAMAGE TO THAT RESOURCE, INCLUDING THE COST TO THE STATE OR LOCAL AUTHORITIES FOR PERFORMING, SUPERVISING, OR RENDERING ASSISTANCE TO THE RESTORATION AND MITIGATION.

(d) IN PARAGRAPH (4)(b) OF THIS SUBSECTION, "PROPERTY OWNER" INCLUDES TWO OR MORE PERSONS HOLDING TITLE TO THE PROPERTY UNDER ANY FORM OF JOINT OWNERSHIP.

(3) REGULATIONS ADOPTED UNDER PARAGRAPH (4)(b) OF THIS SUBSECTION SHALL PROVIDE FOR THE COMMISSION'S CONSIDERATION OF ENFORCEMENT PROVISIONS SUBMITTED BY A LOCAL JURISDICTION THAT ARE AT LEAST AS EFFECTIVE AS ENFORCEMENT REQUIREMENTS UNDER THIS SUBTITLE AND REGULATIONS ADOPTED UNDER THE AUTHORITY OF THIS SUBTITLE.

(4) A LOCAL JURISDICTION MAY NOT ISSUE A PERMIT, APPROVAL, VARIANCE, OR SPECIAL EXCEPTION UNLESS THE PERSON SEEKING THE PERMIT, APPROVAL, VARIANCE, OR SPECIAL EXCEPTION HAS:

(i) FULLY PAID ALL ADMINISTRATIVE, CIVIL, AND CRIMINAL PENALTIES IMPOSED UNDER PARAGRAPH (1)(iii) OF THIS SUBSECTION;

(ii) PREPARED A RESTORATION OR MITIGATION PLAN APPROVED BY THE LOCAL JURISDICTION TO ABATE IMPACTS TO WATER QUALITY OR NATURAL RESOURCES AS A RESULT OF THE VIOLATION; AND

(iii) PERFORMED THE ABATEMENT MEASURES IN THE APPROVED PLAN IN ACCORDANCE WITH THE LOCAL CRITICAL AREA PROGRAM.

(d) (1) In this subsection, "unwarranted hardship" means that, without a variance, no applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.

(2) (i) A LOCAL JURISDICTION SHALL PROCESS AN APPLICATION FOR A VARIANCE REGARDING A PARCEL OR LOT THAT IS SUBJECT TO A CURRENT VIOLATION OF THIS SUBTITLE, A REGULATION ADOPTED UNDER THE AUTHORITY OF THIS SUBTITLE, OR ANY PROVISION OF AN ORDER, PERMIT, PLAN, OR LOCAL PROGRAM IN ACCORDANCE WITH SUBSECTION (C)(1)(iii) OF THIS SECTION.

(ii) In considering an application for a variance, a local jurisdiction shall presume that the specific development activity in the critical area that is subject to the application and for which a variance is requested 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.

(b) (iii) If the variance request is based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, a local jurisdiction may **SHALL** consider that fact.

(3) (i) An applicant has the burden of proof and the burden of persuasion to overcome the presumption established under paragraph (4)(ii) of this subsection.

(ii) 1. Based on competent and substantial evidence, a local jurisdiction shall make written findings as to whether the applicant has overcome the presumption established under paragraph (2)(i) of this subsection.

2. With due regard for the person's experience, technical competence, and specialized knowledge, the written findings may be based on evidence introduced and testimony presented by:

A. The applicant;

B. The local jurisdiction or any other government agency; or

C. Any other person deemed appropriate by the local jurisdiction.

(4) A variance to a local jurisdiction's critical area program may not be granted unless:

(i) Due to special features of a site, or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the critical area program would result in unwarranted hardship to the applicant;

(ii) The local jurisdiction finds that the applicant has satisfied each one of the variance provisions; and

(iii) Without the variance, the applicant would be deprived of the use of land or a structure permitted to others in accordance with the provisions of the critical area program.

(5) (i) WITHIN 10 WORKING DAYS AFTER ISSUING A WRITTEN DECISION REGARDING A VARIANCE APPLICATION AS ISSUED, THE COMMISSION SHALL RECEIVE WRITTEN NOTICE A COPY OF THE DECISION FROM AN APPLICANT JURISDICTION REGARDING THE DECISION ON EACH VARIANCE APPLICATION.

(ii) A LOCAL JURISDICTION MAY NOT ISSUE A PERMIT FOR THE ACTIVITY THAT WAS THE SUBJECT OF THE VARIANCE APPLICATION UNTIL THE APPLICABLE 30-DAY APPEAL PERIOD HAS ELAPSED.

(6) (i) A DEVELOPMENT ACTIVITY COMMENCED WITHOUT A REQUIRED PERMIT, APPROVAL, VARIANCE, OR SPECIAL EXCEPTION IS A VIOLATION OF THIS SUBTITLE.

(ii) A LOCAL JURISDICTION MAY NOT ACCEPT AN APPLICATION FOR A VARIANCE TO LEGALIZE A VIOLATION OF THIS SUBTITLE, INCLUDING AN UNPERMITTED STRUCTURE OR DEVELOPMENT ACTIVITY, UNLESS THE LOCAL JURISDICTION ~~FIRST~~

1. ISSUES FIRST ISSUES A NOTICE OF VIOLATION, INCLUDING ASSESSMENT OF AN ADMINISTRATIVE OR CIVIL PENALTY, FOR THE VIOLATION; AND

2. VERIFIES, THROUGH ON-SITE INSPECTION OR OTHER RELIABLE MEANS, THAT:

A. FULL COMPLIANCE WITH THE TERMS OF THE NOTICE OF VIOLATION HAS BEEN ACHIEVED, INCLUDING PAYMENT OF ALL ASSESSED FINES AND COMPLETION OF ANY REQUIRED MITIGATION; OR

B. A FINAL ADJUDICATION ON THE MERITS OF THE NOTICE OF VIOLATION HAS DETERMINED THAT A VIOLATION HAS NOT OCCURRED OR THAT THE FINAL ADJUDICATION HAS DETERMINED THAT A VIOLATION DID OCCUR AND THE PERSON HAS FULLY COMPLIED WITH THE TERMS OF THAT ADJUDICATION, INCLUDING FULL PAYMENT OF ANY PENALTIES AND COSTS THAT MAY BE ASSESSED.

(iii) IF ~~THE~~ A FINAL ADJUDICATION OF A NOTICE OF VIOLATION RESULTS IN A DETERMINATION THAT A VIOLATION HAS OCCURRED, THE PERSON SHALL BE LIABLE FOR A PENALTY THAT IS TWICE THE AMOUNT OF THE ASSESSMENT IN THE NOTICE OF VIOLATION, IN ADDITION TO THE COST OF THE HEARING AND ANY APPLICABLE MITIGATION COSTS.

(iv) APPLICATION FOR A VARIANCE UNDER THIS PARAGRAPH CONSTITUTES A WAIVER OF THE RIGHT TO APPEAL THE TERMS OF A NOTICE OF VIOLATION AND ITS FINAL ADJUDICATION, INCLUDING THE PAYMENT OF ANY PENALTIES AND COSTS ASSESSED.

(v) IF THE LOCAL JURISDICTION FINDS THAT THE ACTIVITY OR STRUCTURE FOR WHICH A VARIANCE IS REQUESTED COMMENCED WITHOUT PERMITS OR APPROVALS AND:

1. DOES NOT MEET EACH OF THE VARIANCE CRITERIA UNDER THIS SUBSECTION, THE LOCAL JURISDICTION SHALL DENY THE REQUESTED VARIANCE AND ORDER REMOVAL OR RELOCATION OF ANY STRUCTURE AND RESTORATION OF THE AFFECTED RESOURCES; OR

2. DOES MEET EACH OF THE VARIANCE CRITERIA UNDER THIS SUBSECTION, THE LOCAL JURISDICTION MAY GRANT ~~PROPOSED~~ APPROVAL TO THE REQUESTED VARIANCE.

~~(4) 1. WITHIN 10 WORKING DAYS AFTER ISSUANCE OF A PROPOSED APPROVAL OF A VARIANCE UNDER SUBPARAGRAPH (v)2 OF THIS PARAGRAPH, THE LOCAL JURISDICTION SHALL SUBMIT THE PROPOSED APPROVAL TO THE COMMISSION FOR THE COMMISSION'S REVIEW AND FINAL APPROVAL.~~

~~2. THE COMMISSION SHALL REVIEW AND ISSUE A FINAL DECISION ON A PROPOSED LOCAL APPROVAL IN ACCORDANCE WITH PROCEDURES ESTABLISHED IN REGULATIONS ADOPTED BY THE COMMISSION.~~

[5] (7) This subsection does not apply to building permits or activities that comply with a buffer exemption plan or buffer management plan of a local jurisdiction which has been approved by the Commission.

[(6)] (8) Notwithstanding any provision of a local law or ordinance, or the lack of a provision in a local law or ordinance, all of the provisions of this subsection shall apply to, and shall be applied by, a local jurisdiction in the consideration, processing, and decision on an application for a variance.

(e) (1) The Commission shall adopt by regulation on or before December 1, 1985 criteria for program development and approval, which are necessary or appropriate to achieve the standards stated in subsection (b) of this section. Prior to developing its criteria and also prior to adopting its criteria, the Commission shall hold at least 6 regional public hearings, 1 in each of the following areas:

- (i) Harford, Cecil, and Kent counties;
- (ii) Queen Anne's, Talbot, and Caroline counties;
- (iii) Dorchester, Somerset, and Wicomico counties;

(v) Baltimore City and Baltimore County;

(v) Charles, Calvert, and St. Mary's counties; and

(vi) Anne Arundel and Prince George's counties.

(2) During the hearing process, the Commission shall consult with each affected local jurisdiction.

(3) IN ACCORDANCE WITH ITS POWERS UNDER § 8-1806(A) OF THIS SUBTITLE, THE COMMISSION MAY AMEND THE CRITERIA FOR PROGRAM DEVELOPMENT AND APPROVAL ADOPTED UNDER PARAGRAPH (1) OF THIS SUBSECTION.

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(c) (1) When locating new intensely developed or limited development areas, local jurisdictions shall use the following [guidelines] STANDARDS:

(i) Locate a new intensely developed area in a limited development area or adjacent to an existing intensely developed area;

(ii) Locate a new limited development area adjacent to an existing limited development area or an intensely developed area;

(iii) Locate a new limited development area or an intensely developed area in a manner that minimizes impacts to a habitat protection area as defined in COMAR 27.01.09, and in an area and manner that optimizes benefits to water quality;

(iv) Locate a new intensely developed area or a limited development area in a resource conservation area at least 300 feet beyond the landward edge of tidal wetlands or tidal waters, UNLESS THE LOCAL JURISDICTION PROPOSES, AND THE COMMISSION APPROVES, ALTERNATIVE MEASURES FOR ENHANCEMENT OF WATER QUALITY AND HABITAT THAT PROVIDE GREATER BENEFITS TO THE RESOURCES;

(v) LOCATE NEW INTENSELY DEVELOPED AREAS AND LIMITED DEVELOPMENT AREAS IN A MANNER THAT MINIMIZES THEIR IMPACTS TO THE DEFINED LAND USES OF THE RESOURCE CONSERVATION AREA.

(v) (vi) Except as provided in item (vii) (viii) of this paragraph, no more than one-half of the expansion allocated in the criteria of the Commission may be located in resource conservation areas;

(v) (vi) New intensely developed or limited development areas [to be located in the resource conservation areas] INVOLVING THE USE OF GROWTH ALLOCATION shall conform to all criteria of the Commission and shall be designated on the comprehensive zoning map submitted by the local jurisdiction as part of its application to the Commission for program approval or at a later date in compliance with § 8-1809(g) of this subtitle; and

(vii) (viii) In Calvert, Caroline, Cecil, Charles, Dorchester, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Worcester, and Worcester counties, if the county is unable to utilize a portion of the growth allocated to the county in items (i) and (ii) of this paragraph within or adjacent to existing intensely developed or limited development areas as demonstrated in the local plan approved by the Commission, then that portion of the allocated expansion which cannot be so located may be located in the resource conservation area in addition to the expansion allocated in item [(v)] [(vi)] of this paragraph. A developer shall be required to cluster any development in an area of expansion authorized under this paragraph.

(2) A LOCAL JURISDICTION MAY USE A STANDARD THAT VARIES FROM THE STANDARDS REQUIRED UNDER PARAGRAPH (1)(i) AND (ii) OF THIS SUBSECTION IF:

(i) THE ALTERNATIVE STANDARD IS CONSISTENT WITH THE JURISDICTION'S ADOPTED COMPREHENSIVE PLAN; AND

(ii) THE COMMISSION HAS APPROVED THE ALTERNATIVE STANDARD AS PART OF THE LOCAL PROGRAM.

(3) IN REVIEWING MAP AMENDMENTS OR REFINEMENTS INVOLVING THE USE OF GROWTH ALLOCATION, THE COMMISSION SHALL CONSIDER THE FOLLOWING FACTORS:

(i) CONSISTENCY WITH THE JURISDICTION'S ADOPTED COMPREHENSIVE PLAN AND WHETHER THE GROWTH ALLOCATION WOULD IMPLEMENT THE GOALS AND OBJECTIVES OF THE ADOPTED PLAN;

(ii) CONSISTENCY WITH SMART GROWTH PRINCIPLES UNDER TITLE 5, SUBTITLES 7A AND 7B OF THE STATE FINANCE AND PROGRAMMENT ARTICLE AND OTHER STATE GROWTH POLICIES, INCLUDING:

~~4. CERTIFIED-PRIORITY FUNDING AREAS UNDER § 5-7B-08 OF THE STATE FINANCE AND PROGRAMMENT ARTICLE; AND~~

3. MAXIMIZATION OF STATE INVESTMENT IN EXISTING PUBLIC INFRASTRUCTURE

1. FOR A MAP AMENDMENT OR REFINEMENT INVOLVING A NEW INTENSELY DEVELOPED AREA, WHETHER THE DEVELOPMENT IS:

A. TO BE SERVED BY A PUBLIC WASTEWATER SYSTEM;

B. TO HAVE AN ALLOWED AVERAGE DENSITY OF AT LEAST 2.5 UNITS PER ACRE, AS CALCULATED UNDER § 5-7B-03(H) OF THE STATE FINANCE AND PROCUREMENT ARTICLE; AND

C. FOR A NEW INTENSELY DEVELOPED AREA THAT IS GREATER THAN 20 ACRES, TO BE LOCATED IN A PRIORITY FUNDING AREA, AS DESCRIBED UNDER §§ 5-7B-02(1) AND 5-7B-03 OF THE STATE FINANCE AND PROCUREMENT ARTICLE; AND

D. TO HAVE A DEMONSTRABLE ECONOMIC BENEFIT TO THE AREA; AND

2. FOR A MAP AMENDMENT OR REFINEMENT INVOLVING A NEW LIMITED DEVELOPMENT AREA, WHETHER THE DEVELOPMENT IS:

A. TO BE SERVED BY A PUBLIC WASTEWATER SYSTEM OR SEPTIC SYSTEM THAT USES THE BEST AVAILABLE NITROGEN REMOVAL TECHNOLOGY;

B. A COMPLETION OF AN EXISTING SUBDIVISION;

C. AN EXPANSION OF AN EXISTING BUSINESS; OR

D. TO BE CLUSTERED;

(III) THE USE OF EXISTING PUBLIC INFRASTRUCTURE WHERE PRACTICAL;

(IV) CONSISTENCY WITH STATE AND REGIONAL ENVIRONMENTAL PROTECTION POLICIES AND MEASURES, INCLUDING THOSE THAT PROTECT CONCERNING THE PROTECTION OF THREATENED AND

ENDANGERED SPECIES AND SPECIES IN NEED OF CONSERVATION THAT MAY BE LOCATED ON- OR OFF-SITE;

(IV) LOCATION IN OR NEAR

(V) IMPACTS ON A PRIORITY PRESERVATION AREA, AS DEFINED UNDER § 2-518 OF THE AGRICULTURE ARTICLE;

(VI) ENVIRONMENTAL IMPACTS ASSOCIATED WITH TREATMENT OF WASTE;

(VII) ENVIRONMENTAL IMPACTS ASSOCIATED WITH WASTEWATER AND STORMWATER MANAGEMENT PRACTICES AND WASTEWATER AND STORMWATER DISCHARGES TO TIDAL WATERS, TIDAL WETLANDS, AND TRIBUTARY STREAMS; AND

(VIII) ENVIRONMENTAL IMPACTS ASSOCIATED WITH LOCATION IN A COASTAL HAZARD AREA OR AN INCREASED RISK OF SEVERE FLOODING ATTRIBUTABLE TO THE PROPOSED DEVELOPMENT; AND

(IX) THE OVERALL SUITABILITY OF THE PROJECT SITE FOR MORE INTENSE DEVELOPMENT IN A REGIONAL CONTEXT DEVELOPMENT.

[(2)] (3) (4) The Commission shall ensure that the [guidelines] STANDARDS AND FACTORS in [paragraph (1)] PARAGRAPHS (1) AND (2), (2), AND (3) of this subsection have been applied in a manner that is consistent with the purposes, policies, goals, and provisions of this subtitle, and all criteria of the Commission.

(e) (2) (i) Within a resource conservation area, a local jurisdiction may consider one additional dwelling unit per lot or parcel as part of a primary dwelling unit for the purpose of the density calculation under this subsection if the additional dwelling unit:

1. A. Is located within the primary dwelling unit or its entire perimeter is within 100 feet of the primary dwelling unit;

B. Does not exceed 900 square feet in total enclosed area; and

C. Is served by the same sewage disposal system as the primary dwelling unit; or

2. A. Is located within the primary dwelling unit,

(H) 4. THE PROVISIONS OF THIS SUBCHAPTER DO NOT APPLY TO BUFFER EXCEPTION AREAS, AS ESTABLISHED UNDER AN APPROVED LOCAL PROGRAM.

3. EXCEPT BY VARIANCE GRANTED IN ACCORDANCE WITH THE PROVISIONS OF THIS SUBTITLE, NEW NONWATER-DEPENDENT LOT COVERAGE MAY NOT OCCUR IN THE BUFFER, REGARDLESS OF THE ORIGINAL AREA CLASSIFICATION ON THE SIZE OF THE PARCEL OR LOT.

(e) On or before December 31, 1995, a local jurisdiction shall amend the local area protection program to meet the provisions of this section.

(d) (1) Except as otherwise provided in this subsection for stormwater runoff, [man-made impervious surfaces are] LOT COVERAGE IS LIMITED TO 15% OF A PARCEL OR LOT.

(2) If a parcel or lot one-half acre or less in size existed on or before December 1, 1985 in the Chesapeake Bay Critical Area or on or before June 1, 2002 in the Atlantic Coastal Bays Critical Area, then [man-made impervious surfaces are] LOT COVERAGE IS LIMITED TO 25% OF THE PARCEL OR LOT.

(3) If a parcel or lot greater than one-half acre and less than one acre in size existed on or before December 1, 1985 in the Chesapeake Bay Critical Area or on or before June 1, 2002 in the Atlantic Coastal Bays Critical Area, then [man-made impervious surfaces are] LOT COVERAGE IS LIMITED TO 15% OF THE PARCEL OR LOT.

(4) If an individual lot one acre or less in size is part of a subdivision approved after December 1, 1985 in the Chesapeake Bay Critical Area or after June 1, 2002 in the Atlantic Coastal Bays Critical Area, then [man-made impervious surfaces are] LOT COVERAGE MAY NOT EXCEED 50% OF THE LOT. HOWEVER, THE TOTAL LOT COVERAGE IMPERVIOUS SURFACES OVER THE ENTIRE SUBDIVISION MAY NOT EXCEED FIFTY PERCENT OF THE TOTAL LOT COVERAGE.

(5) A local jurisdiction may allow a property owner to exceed the [imperVIOUS SURFACES] LOT COVERAGE limits provided in subsection (d)(2) and (3) of this section if the following conditions exist:

(a) This section does not apply to a trailer park that was in residential use on or before December 1, 1985 in the Chesapeake Bay Critical Area or on or before June 1, 2002 in the Atlantic Coastal Bays Critical Area.

(b) This section controls over any other requirement concerning [imperVIOUS SURFACES] LOT COVERAGE limitations in limited development areas and resource conservation areas in the critical area.

(c) AS PROVIDED IN A WATERFRONT REVITALIZATION AREA OR A WATERFRONT INDUSTRIAL AREA UNDER A LOCAL PROGRAM.

(d) FOR A VARIANCE GRANTED IN ACCORDANCE WITH THIS SUBTITLE; OR

(e) FOR A BUFFER EXCEPTION AREA, AS MAPPED OR ESTABLISHED UNDER AN APPROVED LOCAL PROGRAM.

(f) LOT COVERAGE IN THE BUFFER MAY NOT EXCEED THE MINIMUM AMOUNT NECESSARY FOR WATER-DEPENDENT FACILITIES, REGARDLESS OF THE CRITICAL AREA CLASSIFICATION OR THE SIZE OF THE PARCEL OR LOT, EXCEPT:

(1) FOR A BUFFER EXCEPTION AREA, AS MAPPED OR ESTABLISHED UNDER AN APPROVED LOCAL PROGRAM.

(2) THIS SECTION MAY NOT BE CONSTRUED TO AFFECT A CREDIT APPLICABLE TO A STORMWATER MANAGEMENT PRACTICE THAT IS APPROVED BY THE DEPARTMENT OF THE ENVIRONMENT.

(3) ANY OTHER PROVISION OF THIS SUBTITLE; OR

(4) ANY CRITERIA OR GUIDELINE OF THE COMMISSION ADOPTED UNDER THIS SUBTITLE.

B. By its construction, does not increase the amount of [imperVIOUS SURFACE] LOT COVERAGE already attributed to the primary dwelling unit; and

C. Is served by the same sewage disposal system as the primary dwelling unit.

(a) (1) This section applies notwithstanding:

(2) THIS SECTION MAY NOT BE CONSTRUED TO AFFECT A CREDIT APPLICABLE TO A STORMWATER MANAGEMENT PRACTICE THAT IS APPROVED BY THE DEPARTMENT OF THE ENVIRONMENT.

(b) LOT COVERAGE IN THE BUFFER MAY NOT EXCEED THE MINIMUM AMOUNT NECESSARY FOR WATER-DEPENDENT FACILITIES, REGARDLESS OF THE CRITICAL AREA CLASSIFICATION OR THE SIZE OF THE PARCEL OR LOT, EXCEPT:

(1) FOR A BUFFER EXCEPTION AREA, AS MAPPED OR ESTABLISHED UNDER AN APPROVED LOCAL PROGRAM.

(2) FOR A VARIANCE GRANTED IN ACCORDANCE WITH THIS SUBTITLE; OR

(3) AS PROVIDED IN A WATERFRONT REVITALIZATION AREA OR A WATERFRONT INDUSTRIAL AREA UNDER A LOCAL PROGRAM.

(c) This section controls over any other requirement concerning [imperVIOUS SURFACES] LOT COVERAGE limitations in limited development areas and resource conservation areas in the critical area.

(d) IN THE BUFFER, LOT COVERAGE MAY NOT EXCEED THE MINIMUM AMOUNT NECESSARY FOR WATER-DEPENDENT FACILITIES.

- (1) [New impervious surfaces] LOT COVERAGE ASSOCIATED WITH NEW DEVELOPMENT ACTIVITIES on the property [have] HAS been minimized;
- (2) For a lot or parcel one-half acre or less in size, total [impervious surfaces do] LOT COVERAGE DOES not exceed [impervious surface] LOT COVERAGE limits in subsection (d)(2) of this section by more than 25% or 500 square feet, whichever is greater;
- (3) For a lot or parcel greater than one-half acre and less than one acre in size, total [impervious surfaces do] LOT COVERAGE DOES not exceed [impervious surface] LOT COVERAGE limits in subsection (d)(3) of this section or 5,445 square feet, whichever is greater;
- (4) Water quality impacts associated with runoff from [the] new [impervious surfaces] DEVELOPMENT ACTIVITIES, ~~INCLUDING CLEARING AND GRADING ACTIVITIES,~~ THAT CONTRIBUTE TO LOT COVERAGE can be and have been minimized through site design considerations or use of best management practices approved by the local jurisdiction to improve water quality; and
- (5) The property owner performs on-site mitigation as required by the local jurisdiction to offset potential adverse water quality impacts from the new [impervious surfaces] DEVELOPMENT ACTIVITIES THAT CONTRIBUTE TO LOT COVERAGE, or the property owner pays a fee to the local jurisdiction in lieu of performing the on-site mitigation.
- (g) All fees collected by a local jurisdiction under subsection (f)(5) of this section must be used to fund projects that improve water quality within the critical area consistent with the jurisdiction's local critical area protection program.
- (h) (1) IN THIS SUBSECTION, "LEGALLY DEVELOPED" MEANS THAT ALL PHYSICAL IMPROVEMENTS TO A PROPERTY:
- (i) EXISTED BEFORE COMMISSION APPROVAL OF A LOCAL PROGRAM; OR
- (ii) WERE PROPERLY PERMITTED IN ACCORDANCE WITH THE LOCAL PROGRAM AND IMPERVIOUS SURFACE POLICIES IN EFFECT AT THE TIME OF CONSTRUCTION.
- (2) (i) A LOT OR PARCEL LEGALLY DEVELOPED IN ACCORDANCE WITH A LOCAL PROGRAM'S APPLICABLE IMPERVIOUS SURFACE LIMITATIONS AS OF ~~JUNE 30~~ JULY 1, 2008 MAY BE CONSIDERED LEGALLY NONCONFORMING FOR PURPOSES OF LOT COVERAGE REQUIREMENTS.

(ii) FOR THE PURPOSE OF INCREASING LOT COVERAGE ON A LOT OR PARCEL UNDER SUBPARAGRAPH (i) OF THIS PARAGRAPH, THE LOT COVERAGE LIMITATIONS UNDER THIS SECTION MAY NOT BE CONSTRUED TO APPLY TO A DEVELOPMENT ACTIVITY FOR WHICH:

1. PROJECT APPROVAL OR A BUILDING PERMIT WAS ISSUED BEFORE ~~JUNE 30~~ JULY 1, 2008; AND

2. CONSTRUCTION WAS INITIATED AND AN INSPECTION WAS PERFORMED BY ~~JUNE 30~~ BEFORE JULY 1, 2009.

(i) A local jurisdiction may grant a variance from the provisions of this section in accordance with THE PROVISIONS OF THIS SUBTITLE, regulations adopted by the Commission concerning variances as part of local program development set forth in [COMAR 27.01.11] COMAR 27.01.11, and notification of project applications set forth in COMAR 27.03.01.

8-1808.10.

~~(A) EXCEPT AS PROVIDED UNDER SUBSECTION (C) OF THIS SECTION, THE PROVISIONS OF THIS SECTION APPLY TO:~~

~~(1) AN APPLICATION FOR SUBDIVISION WITHIN THE RESOURCE CONSERVATION AREA THAT RECEIVES FINAL LOCAL APPROVAL AFTER JUNE 30, 2008; AND~~

~~(2) DEVELOPMENT WITHIN A NEWLY DESIGNATED INTENSELY DEVELOPED AREA OR LIMITED DEVELOPMENT AREA THAT IS AWARDED GROWTH ALLOCATION BY A LOCAL GOVERNMENT AFTER JUNE 30, 2008.~~

~~(B) (1) THE MINIMUM BUFFER AS DEFINED AND ESTABLISHED UNDER COMAR 27.01.09.01 SHALL BE 300 FEET IN A RESOURCE CONSERVATION AREA.~~

~~(2) ALL PROVISIONS APPLICABLE TO DEVELOPMENT ACTIVITIES WITHIN THE 100 FOOT BUFFER, INCLUDING THE ESTABLISHMENT OF VEGETATION AND EXPANSION REQUIREMENTS, SHALL APPLY TO THE 300 FOOT BUFFER.~~

~~(C) (1) THE 300 FOOT BUFFER MAY BE REDUCED IF:~~

(iii) AN INTRA-FAMILY TRANSFER AUTHORIZED UNDER

§ 8-1808.2 OF THIS SUBTITLE; AND

(2) THE REDUCTION WILL OCCUR IN ACCORDANCE WITH LOCAL

PROGRAM PROCEDURES APPROVED BY THE COMMISSION.

8-1808.11.

(a) IMPROVEMENTS OTHER THAN IN AREAS DESIGNATED BY THE

DEPARTMENT OF THE ENVIRONMENT MAPPING AS APPROPRIATE FOR

STRUCTURAL SHORELINE STABILIZATION MEASURES, IMPROVEMENTS TO

PROTECT A PERSON'S PROPERTY AGAINST EROSION SHALL CONSIST OF

NONSTRUCTURAL, SHORELINE STABILIZATION MEASURES THAT PRESERVE THE

NATURAL ENVIRONMENT, SUCH AS MARSH CREATION, EXCEPT IN AREAS WHERE

THE PERSON CAN DEMONSTRATE TO THE SATISFACTION OF THE DEPARTMENT

OF THE ENVIRONMENT THAT THESE MEASURES ARE NOT FEASIBLE, INCLUDING

AREAS OF EXCESSIVE EROSION, AREAS SUBJECT TO HEAVY TIDES, AND AREAS

TOO NARROW FOR EFFECTIVE USE OF NONSTRUCTURAL SHORELINE

STABILIZATION MEASURES.

(b) (1) IN CONSULTATION WITH THE DEPARTMENT, THE

DEPARTMENT OF THE ENVIRONMENT SHALL ADOPT REGULATIONS TO

IMPLEMENT THE PROVISIONS OF THIS SUBSECTION.

(2) THE REGULATIONS SHALL INCLUDE A WAIVER PROCESS THAT

EXEMPTS A PERSON FROM THE REQUIREMENTS OF SUBSECTION (a) OF THIS

SECTION ON A DEMONSTRATION TO THE SATISFACTION OF THE DEPARTMENT

OF THE ENVIRONMENT THAT NONSTRUCTURAL SHORELINE STABILIZATION

MEASURES ARE NOT FEASIBLE FOR THE PERSON'S PROPERTY.

8-1809

(a) (i) It often is necessary but not more than 1 year for calendar years

to adopt a program. It is not necessary to propose program amendments and program refinements to

its adopted program. (ii) Except for program amendments or program

refinements developed during program review under subsection (c) of this section,

including criteria and map amendments may be granted, proposed to the

GENERAL AREA COMMISSION by a local approving authority jurisdiction only

on proof of a waiver in the meeting [meeting] criteria and map amendments.

7. THE COMMISSION SHALL

(i) THE STRICT APPLICATION OF THE MINIMUM 300-FOOT

OR OVER DWELLING UNIT PER 20 ACRES, AND

(ii) ALL OTHER LOCAL ZONING AND SUBDIVISION

REQUIREMENTS WITH RESPECT TO

(a) THIS SECTION APPLIES TO AN APPLICATION FOR SUBDIVISION OR

SITE PLAN APPROVAL WITHIN THE RESOURCE CONSERVATION AREA THAT

2008, UNLESS AN APPLICATION FOR SUBDIVISION OR SITE PLAN APPROVAL IS

2008 JULY 1, 2010, AND

(1) RECEIVES FINAL LOCAL APPROVAL ON OR AFTER JULY 1,

(2) 100 FEET FROM A TIDAL WATERS OR A TIDAL

WETLAND; AND

(3) 300 200 FEET FROM TIDAL WATERS OR A TIDAL

(i) 100 FEET FROM A TIDAL WATERS OR A TIDAL

(ii) 300 200 FEET FROM TIDAL WATERS OR A TIDAL

(iii) ALL OTHER LOCAL ZONING AND SUBDIVISION

REQUIREMENTS WITH RESPECT TO

(a) THIS SECTION APPLIES TO AN APPLICATION FOR SUBDIVISION OR

SITE PLAN APPROVAL WITHIN THE RESOURCE CONSERVATION AREA THAT

~~A. CONSIDER THE LOCAL JURISDICTION'S DETERMINATION OF MISTAKE IN THE EXISTING CRITICAL AREA CLASSIFICATION; AND~~

~~B. DETERMINE WHETHER THAT PROPOSED CORRECTION OF MISTAKE IS CONSISTENT WITH THE PURPOSES, POLICIES, GOALS, AND PROVISIONS OF THIS SUBTITLE AND ALL CRITERIA OF THE COMMISSION.~~

~~(c) The requirement in [paragraph (2)(c) of this subsection] SUBPARAGRAPH (I) OF THIS PARAGRAPH that a [certain] CRITICAL AREA map amendment may be granted only on proof of a mistake does not apply to proposed changes to a [certain] CRITICAL AREA map that:~~

~~1. Are wholly consistent with the land classifications in the adopted program; or~~

~~2. Propose the use of a part of the remaining growth allocation in accordance with the adopted program.~~

(a) (1) For proposed program amendments, a Commission panel shall hold a public hearing in the local jurisdiction, and the Commission shall act on the proposed program amendment within [90] 130 days of the Commission's acceptance of the proposal. If action by the Commission is not taken within [90] 130 days, the proposed program amendment is deemed approved.

8-1811

(b) (2) From the data designated by the Commission in approving or adopting a program, an applicant for project approval or the local agency authorized to grant project approval on an application in any of the identified classes shall send to the Commission in accordance with the regulations and any other instructions of the Commission, a copy of every pending or new application for approval that is in any of the identified classes. Before the close of the [next] FIFTH business day after receipt of a copy of an application from the applicant or the local approving authority, the Commission shall send written notice of receipt to the applicant and to the local approving authority. A failure of the Commission to send a timely notice shall render paragraph (3) of this subsection inapplicable as to that application.

-1815.

(a) (1) (1) ★ EXCEPT AS OTHERWISE AUTHORIZED IN A LOCAL JURISDICTION, IN ACCORDANCE WITH THE PROCEDURES SET FORTH IN

SUBPARAGRAPH (II) OF THIS PARAGRAPH, A LOCAL AUTHORITY MAY OBTAIN ACCESS TO AND ENTER A PROPERTY IN ORDER TO IDENTIFY OR VERIFY A SUSPECTED VIOLATION, RESTRAIN A DEVELOPMENT ACTIVITY, OR ISSUE A CITATION IF THE LOCAL AUTHORITY HAS REASONABLE PROBABLE CAUSE TO BELIEVE THAT A VIOLATION OF THIS SUBTITLE OR THE LOCAL PROGRAM HAS OCCURRED, IS OCCURRING, OR WILL OCCUR.

(II) 1. A LOCAL AUTHORITY SHALL MAKE A REASONABLE EFFORT TO CONTACT A PROPERTY OWNER BEFORE OBTAINING ACCESS TO OR ENTERING THE PROPERTY, BUT BEFORE CONTACTING THE OWNER MAY NOT PREVENT THE LOCAL AUTHORITY FROM OBTAINING ACCESS TO OR ENTERING THE PROPERTY TO PURSUE ENFORCEMENT ACTION.

2. IF ENTRY IS DENIED, THE LOCAL AUTHORITY MAY SEEK AN INJUNCTION TO ENTER THE PROPERTY TO PURSUE AN ENFORCEMENT ACTION.

(III) 1. A LOCAL AUTHORITY THAT IDENTIFIES A VIOLATION OF THIS SUBTITLE OR OF THE LOCAL PROGRAM SHALL TAKE ENFORCEMENT ACTION.

2. THE LOCAL AUTHORITY SHALL REQUIRE APPROPRIATE RESTORATION AND MITIGATION AS NECESSARY TO OFFSET ADVERSE IMPACTS TO THE CRITICAL AREA RESULTING FROM THE VIOLATION.

3. A. FOR RESTORATION OR MITIGATION THAT EXCEEDS 1,000 SQUARE FEET OR INVOLVES EXPENSES EXCEEDING \$1,000, THE LOCAL AUTHORITY SHALL COLLECT A BOND OR OTHER FINANCIAL SECURITY OR ADOPT APPROPRIATE PROCEDURES TO ENSURE THAT THE RESTORATION OR MITIGATION IS PROPERLY COMPLETED.

B. IF THE RESTORATION OR MITIGATION INVOLVES PLANTING, THE BOND SHALL BE HELD FOR AT LEAST 2 YEARS AFTER THE DATE THE PLANTINGS WERE INSTALLED TO ENSURE PLANT SURVIVAL.

C. ON REQUEST OF THE PROPERTY OWNER, THE LOCAL AUTHORITY SHALL SCHEDULE INSPECTIONS AS NECESSARY TO ENSURE COMPLIANCE AND THE RETURN OF THE BOND OR OTHER FINANCIAL SECURITY.

(2) (f) [Violators of the provisions of programs approved or adopted by the Commission] A PERSON WHO VIOLATES A PROVISION OF AN ORDER, PERMIT, PLAN, LOCAL PROGRAM, THIS SUBTITLE, OR REGULATIONS ADOPTED,

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Martin O'Malley, Governor

(3) For damages:

(i) To be assessed by a circuit court in an amount equal to the estimated cost of replanting trees; and
(ii) To be paid to the Department by the person found to have violated the provisions of this subsection.

SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland read as follows:

Article - Natural Resources

8-1807.

(a) The initial planning area for determination of the Chesapeake Bay Critical Area consists of THE FOLLOWING AREAS, AS INDICATED ON THE STATEWIDE BASE MAP:

(1) All waters of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the "MD MAP" State Wetlands map; ~~Base Map and all;~~

(2) All State and private wetlands designated under Title 16 of the Environment Article; and

(3) All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tide designated under Title 16 of the Environment Article; ~~THE RESOURCES IDENTIFIED UNDER PARAGRAPHS 16 OF THE Environment Article;~~

(1) AND (2) OF THIS SUBSECTION.

(b) The initial planning area for determination of the Atlantic Coastal Bays Critical Area consists of THE FOLLOWING AREAS, AS INDICATED ON THE STATEWIDE BASE MAP:

(1) All waters of and lands under the coastal bays and their tributaries to the head of tide as indicated on the "MD MAP" State Wetlands map; ~~Base Map and all;~~

(2) All State and private wetlands designated under Title 16 of the Environment Article; and

(3) All land and water areas within 1,000 feet beyond the landward boundaries of State or private wetlands and the heads of tide designated under Title 16 of the Environment Article; and

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APPROVED, OR ISSUED UNDER THE AUTHORITY OF THIS SUBTITLE shall be subject;

1. SUBJECT to prosecution or suit IN CIRCUIT COURT OR DISTRICT COURT by THE CHAIRMAN OR local authorities, who may invoke the sanctions and remedies afforded by State or local law;

2. GUILTY OF A MISDEMEANOR; AND

3. ON CONVICTION IN A COURT OF COMPETENT JURISDICTION, SUBJECT TO A FINE NOT EXCEEDING \$10,000 OR IMPRISONMENT NOT EXCEEDING 90 DAYS OR BOTH, WITH COSTS IMPOSED IN THE DISCRETION OF THE COURT.

(ii) A CRIMINAL PROSECUTION OR A SUIT FOR A CIVIL PENALTY FOR VIOLATION OF A PROVISION OF AN ORDER, PERMIT, PLAN, LOCAL PROGRAM, THIS SUBTITLE, OR REGULATIONS ADOPTED, APPROVED, OR ISSUED UNDER THE AUTHORITY OF THIS SUBTITLE SHALL BE INSTITUTED WITHIN 3 YEARS AFTER THE COMMISSION OR THE LOCAL AUTHORITIES IN FACT KNEW OR REASONABLY SHOULD HAVE KNOWN OF THE VIOLATION.

(2) (3) A local authority may request:
(i) Assistance from the Commission in an enforcement action;
(ii) That the chairman refer an enforcement action to the Attorney General.

8-1811.

(b) If a person cuts or clears or plans to cut or clear trees within the Chesapeake Bay Critical Area or Atlantic Coastal Bays Critical Area in violation of an approved local critical area program or of regulations adopted by the Commission, THE CHAIRMAN MAY BRING AN ACTION, OR the local jurisdiction may bring an action or request that the chairman of the Commission refer the matter to the Attorney General to bring an action;

(1) To require the person to replant trees where the cutting or clearing occurred in accordance with a plan prepared by the State Forester, a registered professional forester, or a registered landscape architect;

(2) To restrain the planned violation; or

16 of the Environment Article THE RESOURCES IDENTIFIED UNDER PARAGRAPHS
(1) AND (2) OF THIS SUBSECTION.

SECTION 3. AND BE IT FURTHER ENACTED, That the process of transition from reliance on the State wetlands maps to the Statewide Base Map for determination of the Chesapeake and Atlantic Coastal Bays Critical Area, as enacted under Section 2 of this Act, shall proceed as follows:

(1) The Department of Natural Resources shall prepare a State Base Map that includes a State-determined shoreline and edge of tidal wetlands and a digitally generated 1,000-foot Critical Area Boundary overlaid on aerial imagery obtained in 2007 and 2008 as part of the "MD iMap" State Base Map project. Within 30 days of the date of official completion of the "MD iMap" State Base Map project, which shall include distribution of the Base Map by the Department of Natural Resources to each local jurisdiction with an approved Critical Area program, the Department shall notify the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays in writing regarding the applicable date of project completion.

(2) Following receipt of notice from the Department, and where practical as part of the required 6-year comprehensive review process, the Commission shall notify each local jurisdiction with an approved Critical Area program in writing regarding the effective date of project completion and the requirement to adopt an amended Critical Area Map based on the "MD iMap" State Base Map project within 24 months.

(3) In accordance with notification from the Commission, each local jurisdiction, with assistance from the Critical Area Commission and the Department of Natural Resources as appropriate, shall review and refine the "MD iMap" State Base Maps prepared by the Department of Natural Resources. This process will be used to:

(i) verify the boundaries of the existing Critical Area designations;

(ii) appropriately designate unclassified areas that were not within the original Critical Area boundary in accordance with the mapping standards set forth in COMAR 27.01.02.02 through 27.01.02.05 and as further determined through regulations developed by the Commission; and

(iii) identify areas where there appear to be inconsistencies between the "MD iMap" State Base Maps and local Critical Area Maps.

(4) Following resolution of any inconsistencies and as appropriate to its form of government and in conformance with all applicable requirements, each jurisdiction with an approved Critical Area program shall formally amend its program

by adopting the "MD iMap" State Base Map for that jurisdiction, including shoreline and edge of tidal wetlands, the 1,000-foot Critical Area Boundary, and all applicable Critical Area designations.

(5) In accordance with regulations adopted by the Critical Area Commission in coordination with the Department of Natural Resources:

(i) the State Base Map, including the State-determined shoreline and edge of tidal wetlands and a digitally generated 1,000-foot Critical Area boundary, shall be periodically updated, at least once every 12 years, starting with the date specified under paragraph (1) of this section; and

(ii) as part of the required 6-year comprehensive review of the local Critical Area program, each local government shall formally amend its Critical Area Maps to reflect the State-determined shoreline and edge of tidal wetlands and a digitally generated 1,000-foot Critical Area boundary as shown on the current "MD iMap" State Base Map in effect at that time, the Department of the Environment, and the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays shall:

(i) By October 1, 2008, complete a pilot project to develop and implement an appropriate mapping methodology for at least two counties with approved local Critical Area programs; and

(ii) Based on this pilot project, develop procedures, source documents, and joint regulations as necessary and appropriate to most accurately and effectively create new maps of the Critical Area, based on the Statewide Base Map, for the State and each affected local jurisdiction;

(2) In accordance with the following requirements and conditions, the Department of Natural Resources shall prepare a Statewide Base Map that includes a State-determined shoreline and landward boundary of tidal wetlands and a digitally generated, georeferenced 1,000-foot Critical Area boundary, as appropriate for integration into a Geographic Information System:

(i) Aerial imagery obtained in 2007 and 2008 or the best available imagery of comparable scale shall be used to identify the shoreline and landward boundary of tidal wetlands as part of the Statewide Base Map project;

(ii) The boundary shall be accurate to a scale of 1:1200; and

(iii) The mapped shoreline and landward boundary of tidal wetlands may not be construed to represent an official wetland delineation or to change in any way any statutory provision under Title 16 of the Environment Article, any regulatory provision under Title 26, Subtitle 24 of the Code of Maryland

(6) In accordance with regulations adopted by the Critical Area Commission, each local jurisdiction shall provide public notice of changes anticipated in that jurisdiction as a result of the transition from the State wetlands maps to the Statewide Base Map and provide for a public hearing and public comment regarding those changes.

(7) Following resolution of any inconsistencies and as appropriate to the form of local government and in conformance with all applicable requirements, each jurisdiction with an approved Critical Area Program shall:

(i) Repeal or amend the program by adopting the Statewide Base Map for that jurisdiction, including the shoreline and landward boundary of tidal wetlands, the digitally generated and georeferenced 1,000-foot Critical Area boundary, and all applicable Critical Area designations as its official Critical Area Map; and

(ii) Within 90 days of formally amending its program under item (i) of this paragraph, provide the Critical Area Commission with a list of the development projects or activities within that jurisdiction that were newly mapped under this Act as within the critical area and that received growth allocation, final subdivision approval, final site plan approval, any other final approval, or were vested by December 31, 2008.

(8) Upon official adoption of the new Critical Area Map, each local jurisdiction shall ensure that, where applicable, each project submitted utilizes the digitally generated, georeferenced Critical Area boundary; and

(9) (i) The Department of Natural Resources shall adopt regulations providing for the periodic review and updating, at least once every 12 years of the Statewide Base Map, including the State-determined shoreline and landward boundary of tidal wetlands and a digitally generated, georeferenced 1,000-foot Critical Area boundary, beginning with the date of initial preparation and official completion under paragraph (2) of this section; and

(ii) In coordination with the regulations adopted under subparagraph (i) of this paragraph, the Critical Area Commission shall adopt regulations providing for the periodic review and formal update of a local jurisdiction's Critical Area Map in accordance with each jurisdiction's required 6-year comprehensive review, in order to reflect the State-determined shoreline and landward boundary of tidal wetlands and the digitally generated, georeferenced 1,000-foot Critical Area boundary shown on the Statewide Base Map in effect at the time of the comprehensive review.

SECTION 4. AND BE IT FURTHER ENACTED, That the

Regulations, or any other provision related to a project-specific wetland delineation that may be necessary and appropriate.

(3) Within 4 months of the date of official completion of the Statewide Base Map project, the Department of Natural Resources shall:

(i) Distribute the appropriate portion of the Statewide Base Map to each local jurisdiction with an approved Critical Area Program; and

(ii) Notify the Critical Area Commission in writing regarding the distribution date applicable to each local jurisdiction.

(4) ~~Within 6 months of receipt of notice from the Department of Natural Resources and in accordance with the following conditions, the Commission shall notify each local jurisdiction in writing regarding the effective date of project completion applicable to that jurisdiction.~~

(i) A local jurisdiction shall formally adopt its amended Critical Area Map based on the Statewide Base Map within 24 months of its receipt from the Department of Natural Resources; and

(ii) However, where practicable, and after submission by the local jurisdiction of evidence satisfactory to the Commission that reasonable progress has been made toward formal adoption of its amended map, the Commission may authorize the local jurisdiction to proceed toward formal adoption of its amended map in coordination with its required 6-year comprehensive review process.

(5) In accordance with notification from the Commission, each local jurisdiction, with assistance from the Department of Natural Resources, the Department of the Environment, and the Critical Area Commission, as appropriate, shall review and refine its portion of the Statewide Base Map prepared by the Department of Natural Resources and proceed to:

(i) Verify the boundaries of the existing Critical Area designations;

(ii) Appropriately designate unclassified areas that were not within the original Critical Area boundary in accordance with the mapping standards set forth under COMAR 27.01.02.03 through 27.01.02.05 and as further determined through regulations adopted by the Commission; and

(iii) Identify areas where there appear to be inconsistencies between the Statewide Base Map and the local jurisdiction's Critical Area map.

(1) The Department of Natural Resources shall notify the Department of Legislative Services in writing on the date of official completion of the Statewide Base Map project, as specified under Section 3(2) of this Act.

(2) The provisions of Section 2 of this Act shall take effect 24 23 months after the date of official completion of the "MD Map" State Base Map project, as specified under Section 3(1) of this Act completion of the Statewide Base Map project; and

(3) The Critical Area Commission shall adopt regulations regarding the administration of local critical area programs related to mapping issues during the process of transition from reliance on the State wetlands maps to the Statewide Base Map for determination of the Chesapeake and Atlantic Coastal Bays Critical Area.

SECTION 5. AND BE IT FURTHER ENACTED, That for the purpose of a new subdivision, this Act may not be construed to apply to a property for which:

(1) ~~an initial application for subdivision was submitted before January 1, 2008; and~~

(2) ~~a final plat is recorded by December 31, 2006~~ criminal prosecution under § 8-1815(a)(2)(ii) of the Natural Resources Article, as enacted under Section 1 of this Act, this Act shall be construed prospectively to apply only to a Critical Area violation alleged to have arisen out of an act or omission that originated on or after July 1, 2008, and this Act may not be applied or interpreted to have any effect on or application to an alleged critical area violation that originated before the effective date of this Act.

SECTION 6. AND BE IT FURTHER ENACTED, That each local jurisdiction with an approved Critical Area program shall report to the Critical Area Commission by January 1, 2009 regarding its proposed procedures for notice of Critical Area project approval or denial and for bringing lots into Program conformance under § 8-1809(c)(1)(ii) 4 and 12 of the Natural Resources Article, as enacted under Section 1 of this Act.

SECTION 7. AND BE IT FURTHER ENACTED, That the considerations required under § 8-1808.1(c)(3) of the Natural Resources Article, as enacted under Section 1 of this Act:

(1) Shall be a part of each growth allocation determination made by the Critical Area Commission at a formal meeting of the Commission occurring on July 1, 2008 or thereafter, and

(2) May not be applied to:

(i) Property in the town of St. Michael's designated as an intensely developed area by an award of growth allocation approved by the Critical Area Commission before July 1, 2006; or

(ii) Any other award of growth allocation approved by the Critical Area Commission before July 1, 2008.

SECTION 8. AND BE IT FURTHER ENACTED, That:

(1) The provisions of this Act regarding lot coverage under § 8-1808.3 of the Natural Resources Article, as enacted under Section 1 of this Act, may not be construed to affect a development project, including the plans for the development project and any subsequent permits related to those plans, if the development project meets the following requirements:

(i) 1. An application for a building permit or a grading permit is filed by October 1, 2008, and the permit is issued by January 1, 2010; or

2. An initial application for development that satisfies all local requirements for submittal is filed by October 1, 2008, and the development plan is approved by July 1, 2010;

(ii) The approved permit or approved development plan remains valid in accordance with local procedures and requirements;

(iii) By July 1, 2010:

1. In accordance with the requirements of the local jurisdiction regarding impervious surface limitations applicable before the effective date of this Act, the applicant prepares a detailed lot coverage plan that is drawn to scale and shows the amounts of impervious surface area, partially pervious surface area, and developed pervious surface area in the development project; and

2. The lot coverage plan is approved by the local jurisdiction and maintained in the local jurisdiction's files; and

(iv) The development project is implemented in compliance with the approved lot coverage plan, except as authorized under paragraph (3)(ii) of this section;

(2) By October 1, 2010, a local jurisdiction shall provide the Critical Area Commission with a list of the projects for which lot coverage plans have been approved under paragraph (1)(iii)2 of this section.

(3) If a change or revision to a lot coverage plan approved under paragraph (1)(iii) of this section operates so as to:

- (i) Increase the amount of impervious surface area, partially pervious surface area, or developed pervious surface area, partially pervious surface area, or developed pervious surface area in the development project, the provisions of paragraph (1) of this section shall continue to apply.
- (ii) Equal or decrease the amount of impervious surface area, partially pervious surface area, or developed pervious surface area in the development project, the provisions of paragraph (1) of this section shall continue to apply.

(4) If a development plan does not receive final approval by July 1, 2010, as required under paragraph (1)(ii) of this section, this Act may not be continued to terminate the operation of paragraph (1) of this section as to that development project if the failure to meet that date is due solely to the application of a building moratorium or an adequate public facilities ordinance in the local jurisdiction in which the development project is located, and

(5) A property owner, through subsequent development or redevelopment, may not exceed the amounts of impervious surface, partially pervious, or developed pervious surface area shown and specified on the lot coverage plan approved under paragraph (1)(ii) of this section.

SECTION 9. AND BE IT FURTHER ENACTED, That, as a result of reapplying under this Act, the designation of an unclassified area that was not previously within the Chesapeake and Atlantic Coastal Bays Critical Area may not affect the initial construction of a development project or activity if by December 31, 2008, the development project or activity receives either growth allocation, final subdivision approval, final site plan approval, or any other final approval, or is vested.

SECTION 10. AND BE IT FURTHER ENACTED, That, subject to the provisions of Section 4 of this Act, this Act shall take effect July 1, 2008.

Approved by the Governor, April 24, 2008.

CHAPTER 120
(Senate Bill 213)

AN ACT concerning

Chesapeake Bay and Atlantic Coastal Bays 2010 Trust Fund and Nonpoint Source Fund

FOR the purpose of altering the Chesapeake Bay and Atlantic Coastal Bays 2010 Trust Fund and its purposes, stating the intent of the General Assembly, providing for the uses of the Fund, establishing in statute the BayStat Program and BayStat Subcommittees, requiring the BayStat Subcommittees to oversee the administration of the Program, establishing the responsibilities of the Program, requiring the BayStat Subcommittees to submit to the public a certain annual report and develop annual work and expenditure plans, requiring the Governor to submit the annual work and expenditure plans to the General Assembly as part of the annual budget submission, requiring the BayStat Subcommittees to prepare a final work and expenditure plan, requiring the Subcommittees to implement certain measures for certain purposes, requiring the Program to distribute funds from the Trust Fund to the BayStat Subcommittees, requiring the BayStat Subcommittees to redetermine the funds through certain criteria and to the Chesapeake Bay Nonpoint Source Fund administer the funds, including redistributing the funds in a certain manner, requiring the Program to develop certain grant solicitations, guidelines, and applications, requiring grant agreements to comply with certain requirements, requiring grant recipients to submit a certain annual report that includes certain information, prohibiting the use of the Trust Fund for certain purposes, establishing a BayStat Program Scientific Advisory Panel, composed of certain individuals appointed by the Governor, establishing certain responsibilities for the Panel, authorizing State the BayStat Subcommittees that administration grants to receive certain administrative cost account from the Trust Fund to distribute to a certain administrative cost account a certain amount to administer grant programs, establishing the Chesapeake Bay and Atlantic Coastal Bays Nonpoint Source Fund as a special, continuing, nonlapsing fund in the Water Quality Financing Administration in the Department of the Environment, establishing the purpose of the Fund, establishing certain funding for the Fund, requiring the Fund to be subject to a certain audit, authorizing the Administration to establish accounts and subaccounts in the Fund for certain purposes, establishing the uses of the Fund, providing for certain bonding authority relating to money in the Fund, requiring the Administration to provide for a certain system of financial accounting, controls, audits, and reports for certain funds that conforms with certain State and federal laws, requiring a certain audit and audit report of certain funds, defining certain terms, and generally relating to dedicated funding sources for the restoration of the Chesapeake Bay and Atlantic Coastal Bays and the waters of the State.

Martin O'Malley, Governor

Chesapeake Bay and Atlantic Coastal Bays 2010 Trust Fund and Nonpoint Source Fund

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BY renumbering
Article - Natural Resources

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
Assistant Attorney General

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

FAX NO (410) 974-5338

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

September 25, 2008

HAND-DELIVERED

Mr. Robert P. Duckworth, Clerk of the Court
Circuit Court for Anne Arundel County
7 Church Circle
Annapolis, Maryland 21401

Re: *Petition of Margaret G. McHale for Judicial Review of the Decision of the Anne Arundel County Board of Appeals, DCW Dutchship Island, LLC.*
Case No. C-119778

Dear Mr. Duckworth:

Enclosed please find for filing in the above-referenced case the Reply Memorandum of Law of Petitioner Margaret G. McHale, Chair of the Critical Area Commission. Kindly date-stamp and return one copy for my files.

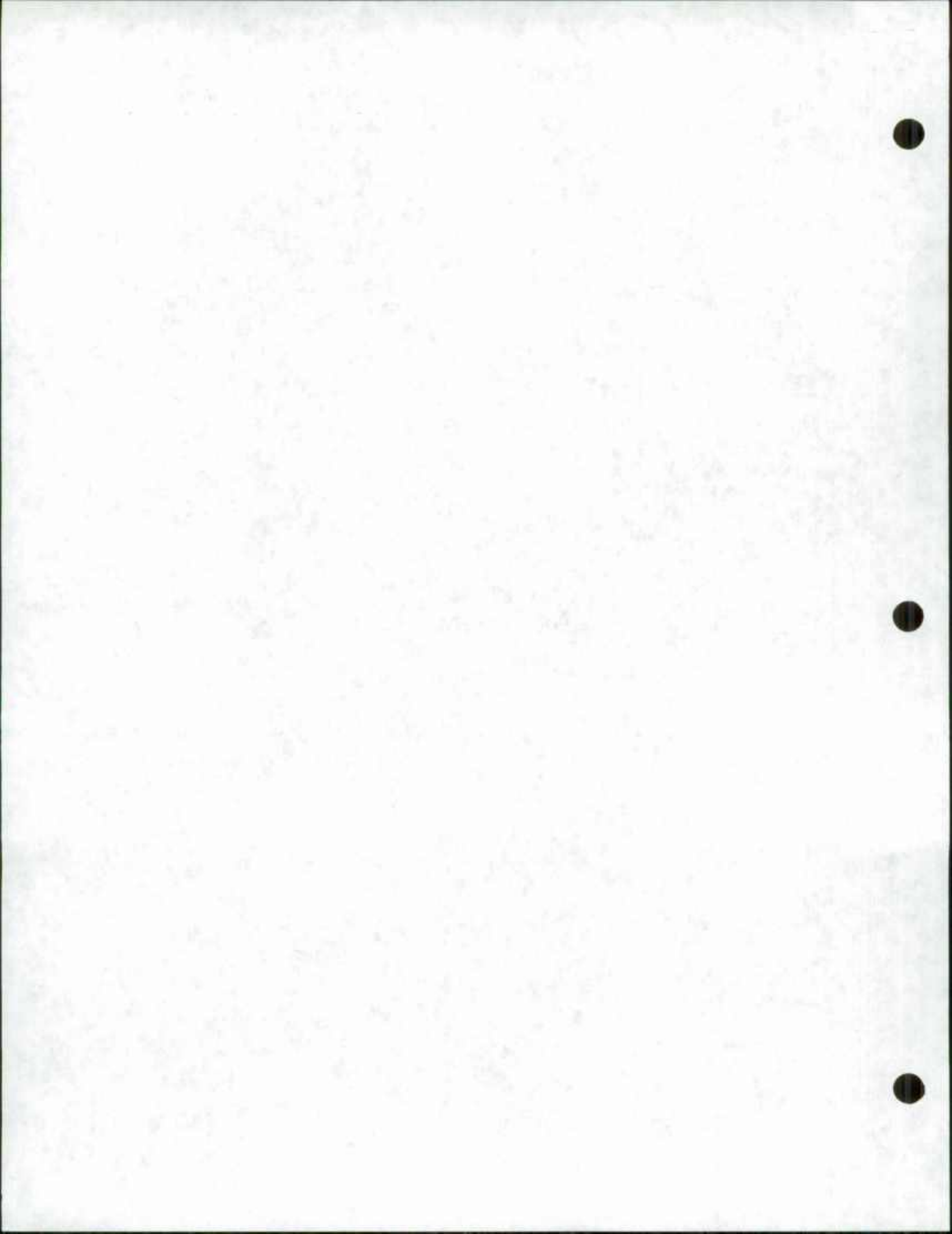
Thank you for your assistance.

Very truly yours,


Marianne E. Dise
Assistant Attorney General

Enclosure

cc: All Counsel



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Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

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September 29, 2008

BY FACSIMILE AND U.S. MAIL

President William C. Manlove
Cecil County Board of Commissioners
County Administration Building
200 Chesapeake Blvd. Suite 2100
Elkton, Maryland 21921

Mr. David Willis, Chairman
Cecil County Board of Appeals
County Administration Building
200 Chesapeake Blvd. Suite 2300
Elkton, Maryland 21921

RE: Cecil County Board of Appeals Critical Area Variance Case # 3409 - Mita

Dear Gentlemen:

This letter notifies you that the Cecil County Board of Appeals Decision, issued in the above-referenced case on August 27, 2008, is Null and Void. As you know, the Critical Area Commission for the Chesapeake and Atlantic Coastal Bays voted on October 11, 2007 to notify the County that certain provisions of the Cecil County Critical Area Program are deficient. Among those provisions was the Buffer Exemption Provision of the Cecil County Zoning Ordinance.

Under State law, from the date of the Critical Area Commission's action, "[l]ocal project approvals granted under a part of a program that the Commission has determined to be deficient shall be null and void after notice of the deficiency." A variance is a "project approval" and hence is subject to the quoted provision of State law. Although the staff of the Critical Area Commission informed Mr. Joe Johnson of the County's Office of Planning and Zoning on June 9, 2007 (copy of letter attached) that "the Board of Appeals may not approve any variance request for the Mita project because the decision will be null and void per Natural Resources

4-1-1



Article Section 8-1809 (1)(3),” the Board apparently proceeded in spite of that notice.

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The Critical Area Commission takes very seriously the matter of a County Board of Appeals purporting to act on a matter over which the Board has no jurisdiction. The Commission and the Office of the Attorney General remain willing to work with the County to resolve the issue discussed in this letter. We look forward to your prompt and favorable response.

Sincerely,



Marianne E. Dise
Principal Counsel

cc: Hon. Margaret G. McHale, Chair
Keith Baynes
Eric Sennstrom
Norman Wilson, County Attorney
Kate Schmidt

1



Martin O'Malley
Governor

Anthony G. Brown
Lt. Governor



Margaret G. McHale
Chair

Ren Serey
Executive Director

STATE OF MARYLAND
CRITICAL AREA COMMISSION
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1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea

June 9, 2008

Mr. Joseph Johnson
Cecil County Office of Planning and Zoning
County Administration Building
200 Chesapeake Boulevard, Suite 2300
Elkton, MD 21921

Re: Local Variance Case #3409; Mita
Susquehannock Boulevard, North East

Dear Mr. Johnson:

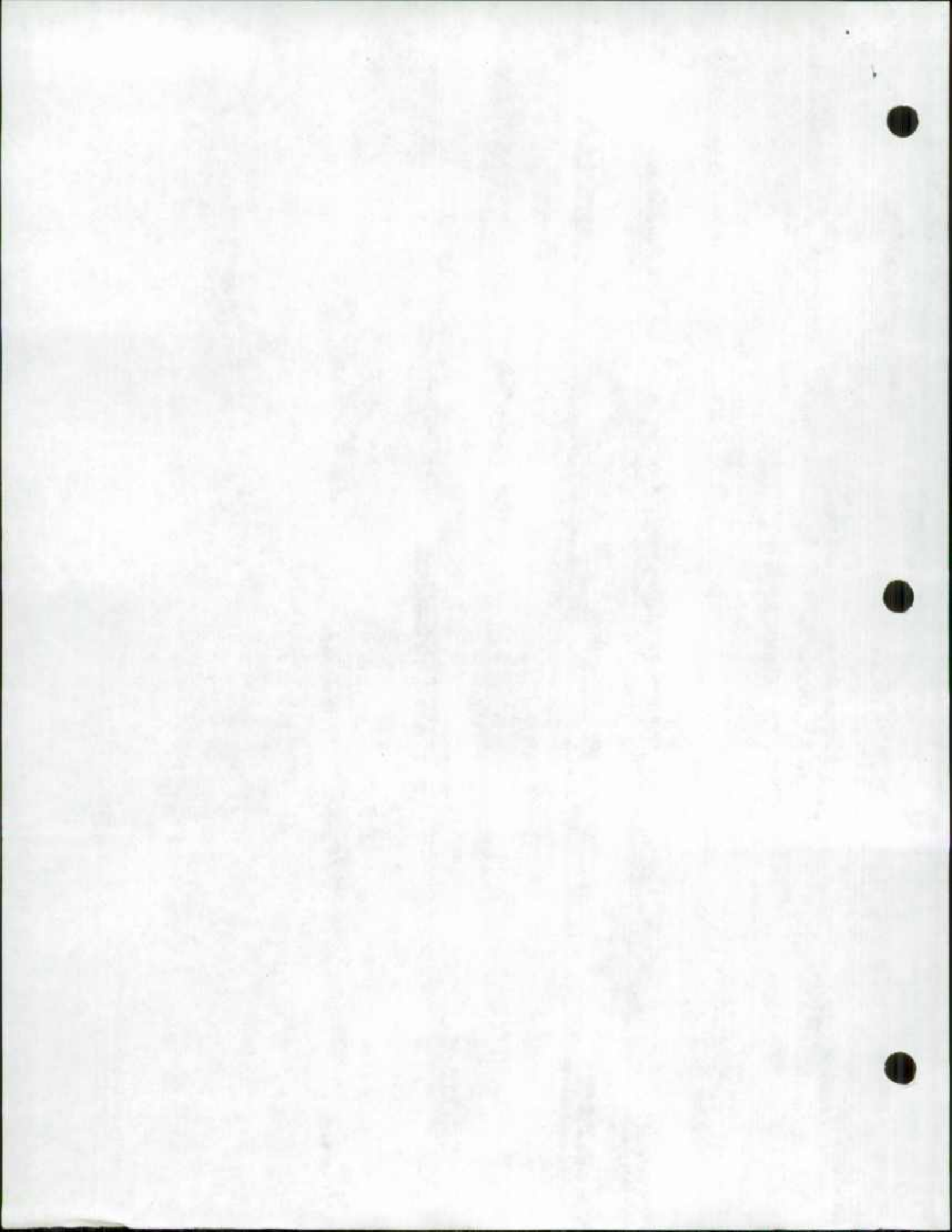
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Therefore, I will not be providing comments at this time. Please notify this office when the County intends to reschedule this variance request. Thank you for your attention. If you have any questions, please contact me at (410) 260-3475.

Sincerely,

A handwritten signature in cursive script that reads "Kate Schmidt".

Kate Schmidt
Natural Resources Planner
CE303-08



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
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September 25, 2008

HAND-DELIVERED

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Annapolis, Maryland 21401

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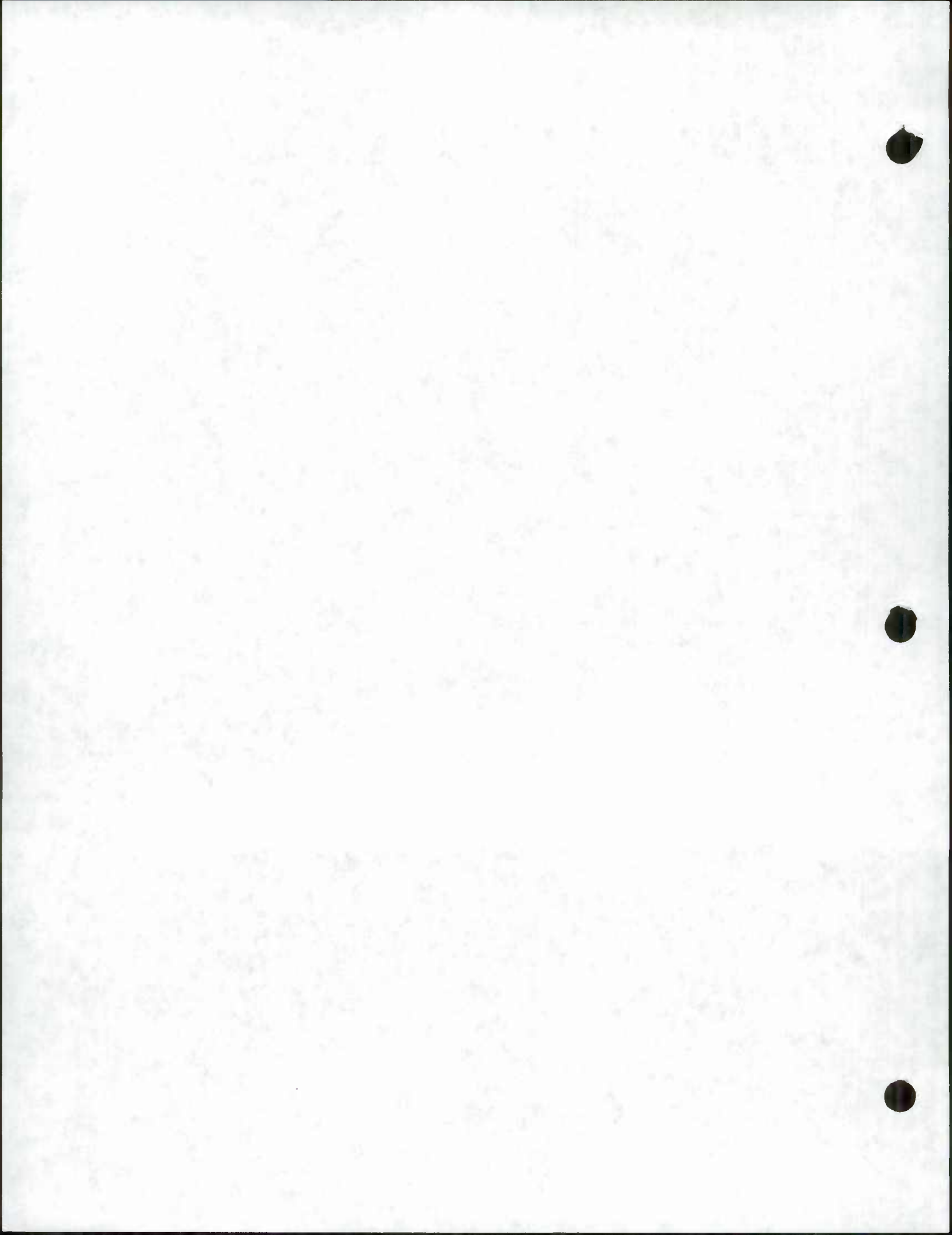
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Marianne E. Dise
Assistant Attorney General

Enclosure

cc: All Counsel



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



file copy

MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

SAUNDRA K. CANEDO
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September 29, 2008

BY FACSIMILE AND U.S. MAIL

President William C. Manlove
Cecil County Board of Commissioners
County Administration Building
200 Chesapeake Blvd. Suite 2100
Elkton, Maryland 21921

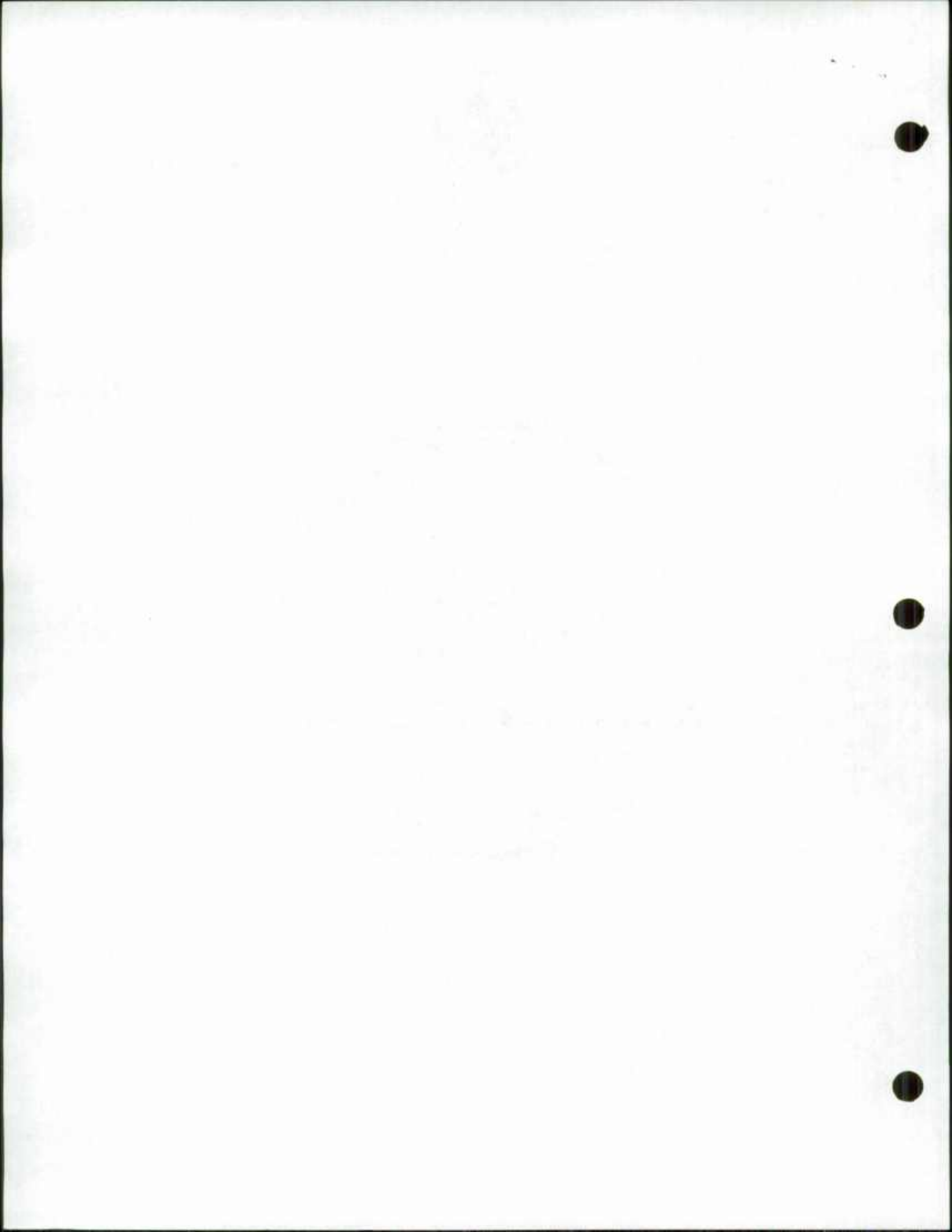
Mr. David Willis, Chairman
Cecil County Board of Appeals
County Administration Building
200 Chesapeake Blvd. Suite 2300
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Sincerely,



Marianne E. Dise
Principal Counsel

cc: Hon. Margaret G. McHale, Chair
Keith Baynes
Eric Sennstrom
Norman Wilson, County Attorney
Kate Schmidt

Martin O'Malley
Governor

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Margaret G. McHale
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June 9, 2008

Mr. Joseph Johnson
Cecil County Office of Planning and Zoning
County Administration Building
200 Chesapeake Boulevard, Suite 2300
Elkton, MD 21921

Re: Local Variance Case #3409; Mita
Susquehannock Boulevard, North East

Dear Mr. Johnson:

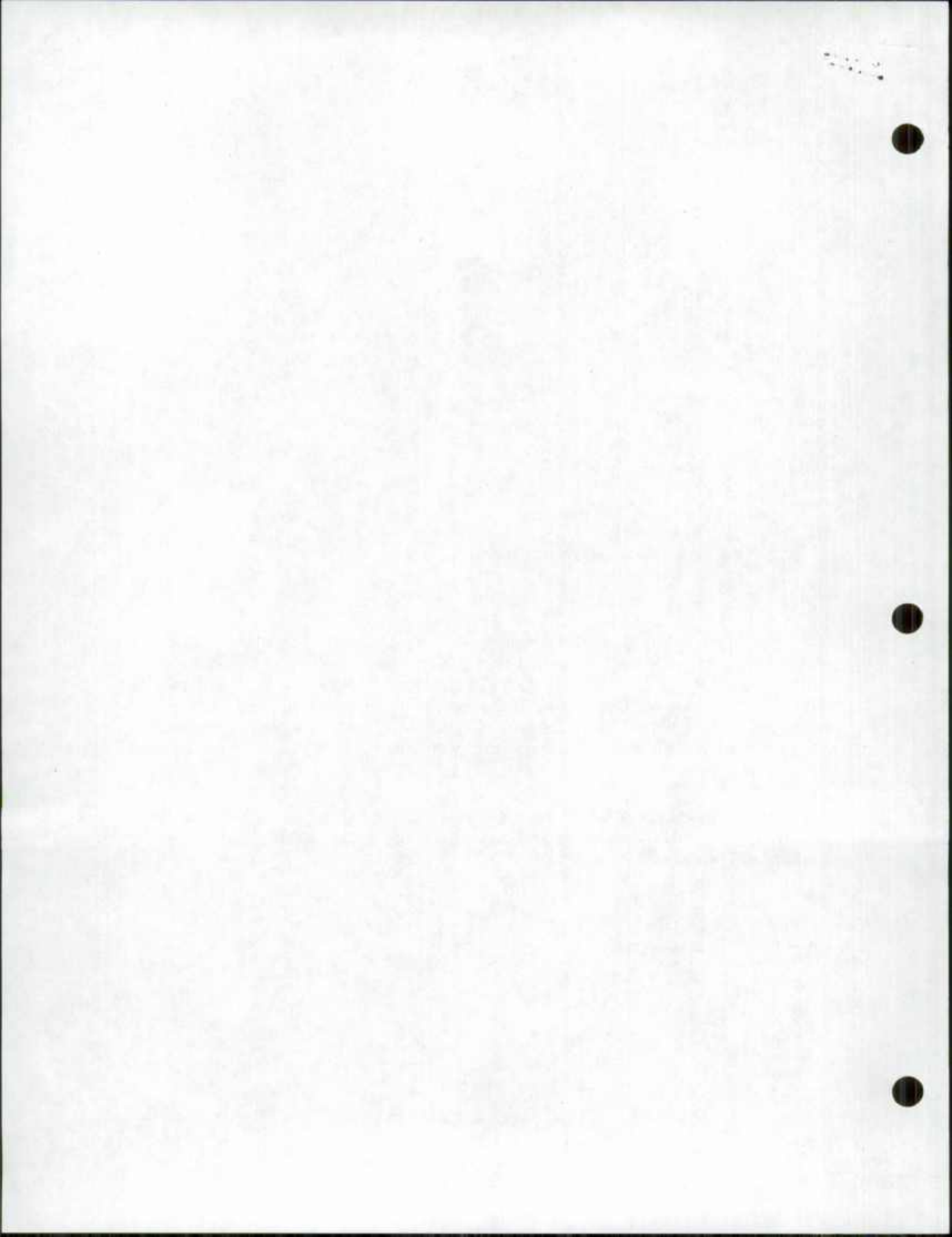
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Kate Schmidt
Natural Resources Planner
CE303-08



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
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MARIANNE E. DISE
Assistant Attorney General
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STATE OF MARYLAND
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CRITICAL AREA COMMISSION FOR THE
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FAX NO. (410) 974-5338

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

October 1, 2008

Mr. Eustace W. Mita
2224 East Deerfield Drive
Media, PA 19063

RE: Cecil County Board of Appeals Case No. 3409

Dear Mr. Mita:

I am taking the unusual step of writing directly to you to inform you that, in the opinion of this Office, the variance granted by the Cecil County Board of Appeals in the above-referenced case is null and void. I am enclosing correspondence from the Critical Area Commission to the County (dated June 9, 2008), which advised the County that any variance granted in this case would be null and void under State law, Annotated Code of Maryland, Natural Resources Article Section 8-1809 (1)(3). Apparently, the County proceeded with a hearing, and purported to grant the variance. You, as the property owner, may not have had knowledge of the events preceding the Board of Appeals' hearing, and the Board's Decision does not reflect that the Board was informed of the State law sanction imposed on the County.

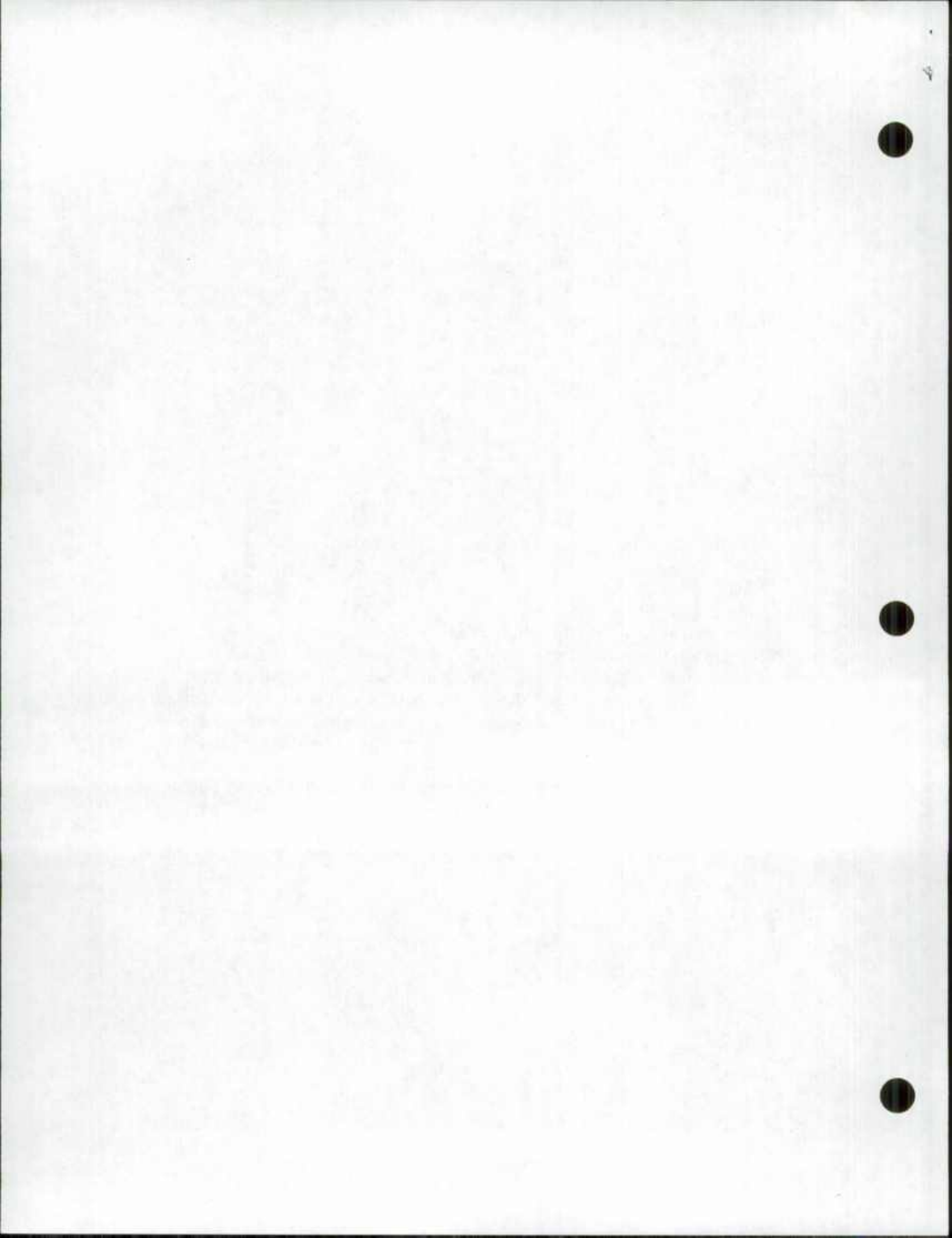
Please feel free to contact me with any questions about this letter or the attachments.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Enclosures



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
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MARIANNE E. DISE
Assistant Attorney General
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September 29, 2008

BY FACSIMILE AND U.S. MAIL

President William C. Manlove
Cecil County Board of Commissioners
County Administration Building
200 Chesapeake Blvd. Suite 2100
Elkton, Maryland 21921

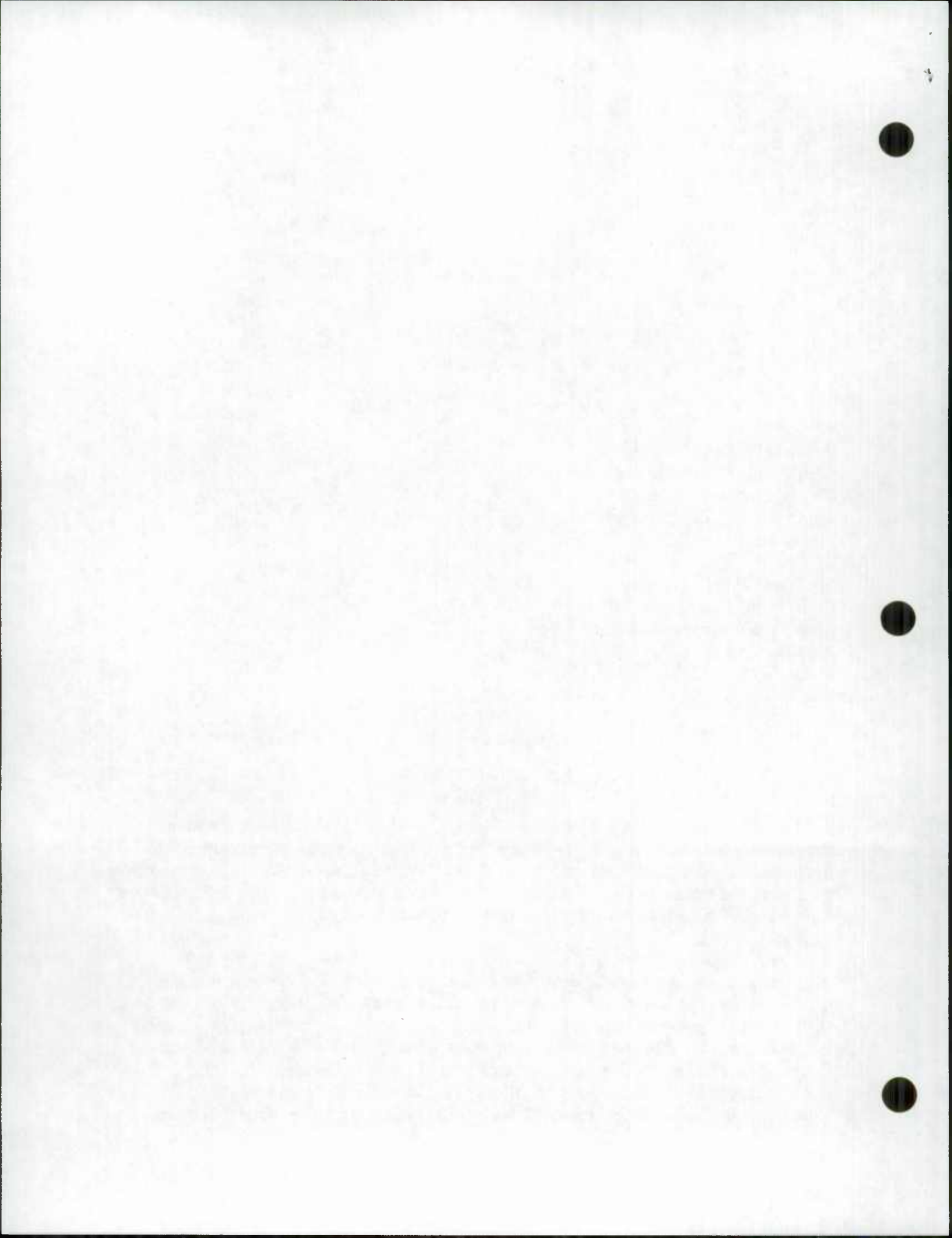
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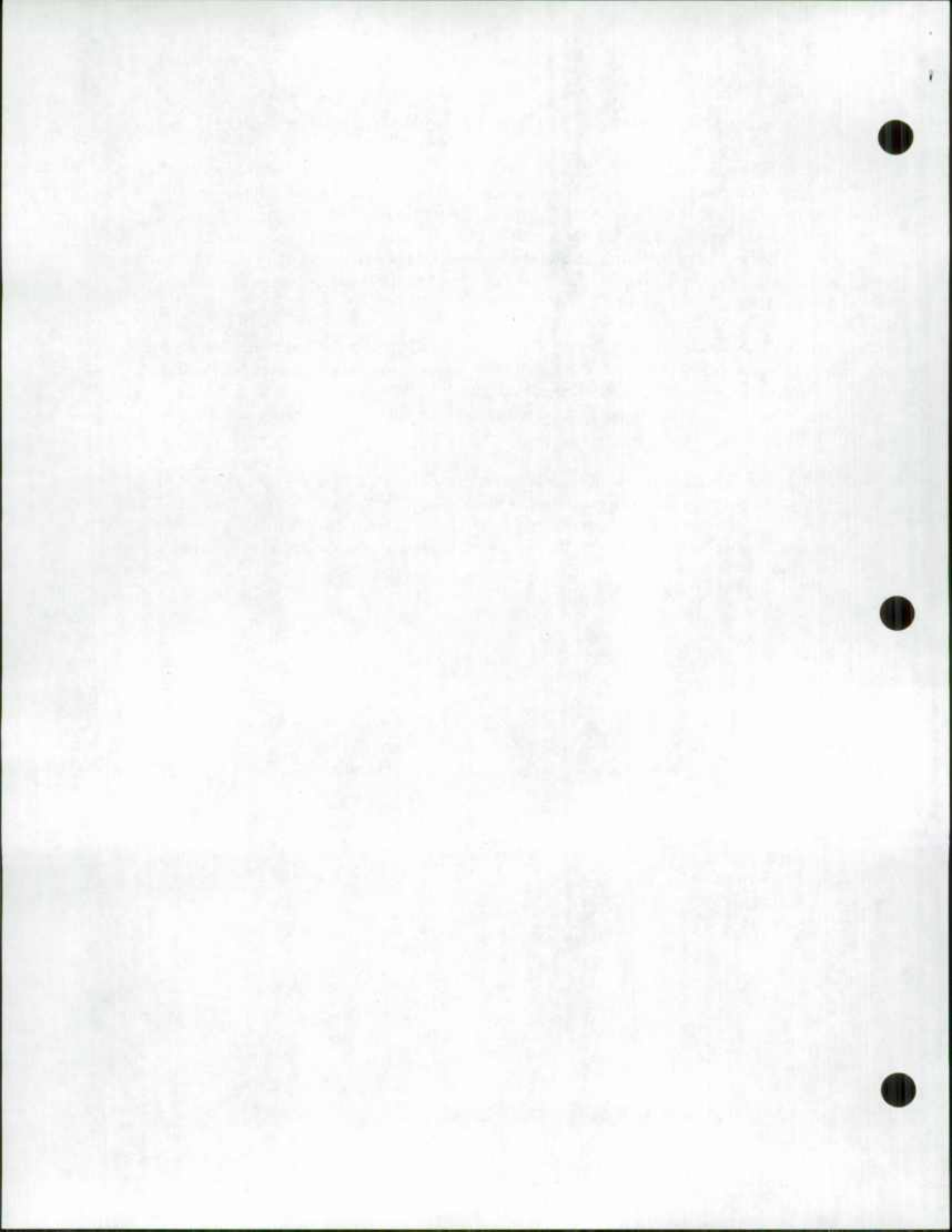
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Sincerely,



Marianne E. Dise
Principal Counsel

cc: Hon. Margaret G. McHale, Chair
Keith Baynes
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STATE OF MARYLAND
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1804 West Street, Suite 100, Annapolis, Maryland 21401
(410) 260-3460 Fax: (410) 974-5338
www.dnr.state.md.us/criticalarea/

June 9, 2008

Mr. Joseph Johnson
Cecil County Office of Planning and Zoning
County Administration Building
200 Chesapeake Boulevard, Suite 2300
Elkton, MD 21921

Re: Local Variance Case #3409; Mita
Susquehannock Boulevard, North East

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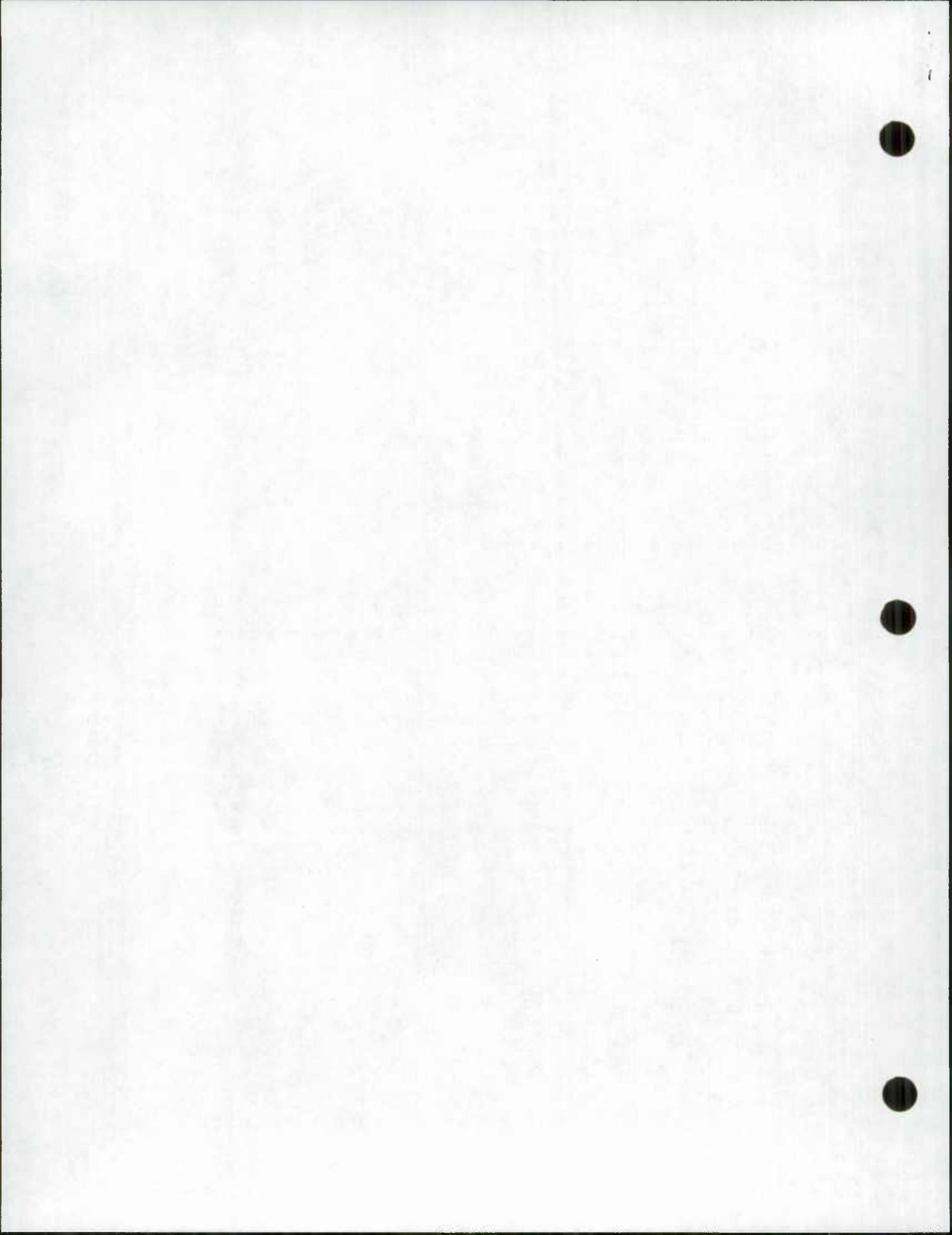
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Kate Schmidt
Natural Resources Planner
CE303-08



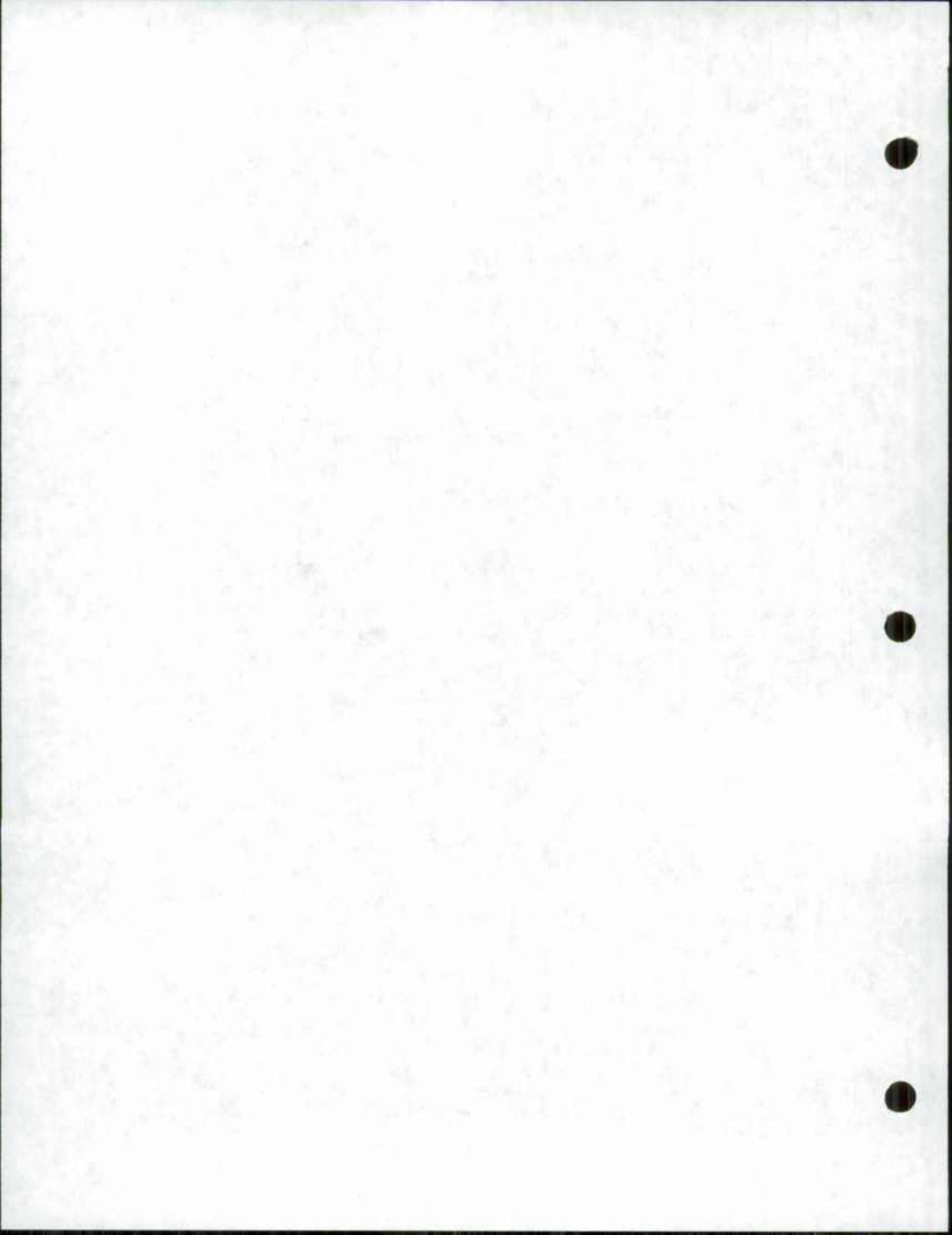
OFFICE OF THE ATTORNEY GENERAL
for the
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
1804 West Street, Suite 100
Annapolis, Maryland 21401
(410) 260-3466
(410) 974-5338 (Fax)

October 9, 2008

MEMORANDUM

TO: Kay Winfree
FROM: Marianne E. Disc 
RE: Golf Courses in the Critical Area

Attached to this memo is the Critical Area Commission's Policy on golf courses in the Resource Conservation Area. Also attached are the staff memos summarizing the development of the Commission's policy on golf courses. The staff memos reflect the discussion of the CAC subcommittee and the public comments received on the draft policy. The final policy was adopted by the full Commission in August, 2005 (excerpt from minutes attached). I hope that these documents are useful to you and the Attorney General. If you would like more background information on any topic in the memos or the policy, I'd be happy to arrange a meeting with the staff planner who was responsible for this project.



DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
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mdise@oag.state.md.us

October 9, 2008

Edward H. Nabb, Jr., Esquire
Harrington, Harrington, and Nabb, P.A.
526 Poplar Street
P.O. Box 238
Cambridge, Maryland 21613

RE: Proposed Intra-Family Subdivision - Wayne Markey Property

Dear Mr. Nabb:

This letter follows up on our recent telephone conversation, and your letter of September 24, 2008, concerning the expansion of the Critical Area Buffer on the above-referenced property. As you noted in your letter, I have already responded to a request by Steve Dodd, Director of the Dorchester County Planning and Zoning Office, for my legal interpretation of the language in Dorchester County's Critical Area Program related to the expansion of the Buffer. Your recent letter poses another question related to Mr. Dodd's earlier inquiry; moreover, Mr. Markey has been in contact with Mary Owens and Ren Serey of the Critical Area Commission staff, to discuss his concerns. I believe that the exchange of written correspondence may not provide the best vehicle for discussing the issues related to the Markey property, so I suggest that we schedule a mutually convenient time to meet in Cambridge.

In the meantime, I want to respond to the specific question you posed in your letter: whether the County's Planning Commission may determine "by fact finding" that the non-tidal wetlands on the Markey property should or should not be subject to expanded tidewater buffer protection as sensitive non-tidal wetlands. In my view, the Planning Commission does not have this authority. In the case of non-tidal wetlands, the "factual determination" is limited to establishing whether or not non-tidal wetlands exist in a given location (in this case, in a location contiguous to the 100-foot Buffer). Non-tidal wetlands are considered, by their very nature, to be "sensitive areas." The word "sensitive" is a descriptive adjective, and not a limiting modifier. The Critical Area Commission's consistent interpretation of the COMAR provision and the

Dorchester County provision (as explained in my June 20, 2008 Memorandum, attached to this letter) is that the tidewater Buffer must be expanded beyond 100 feet to include contiguous sensitive areas, including, as per the Dorchester Program, non-tidal wetlands.

As I mentioned above, I believe that the issues related to the Markey property could better be discussed if we meet in-person, with all parties as participants to the discussion. I suggest that a meeting be arranged among you, Mr. Dodd, Mr. Markey, myself, and Commission staff. We are willing to come to Cambridge for the meeting. Please contact me at your convenience to discuss this proposal.

Sincerely,



Marianne E. Dise
Principal Counsel


cc: Wayne Markey
Steve Dodd
Ren Serey
Mary Owens
Julie Roberts

OFFICE OF THE ATTORNEY GENERAL
for the
Critical Area Commission for the Chesapeake and Atlantic Coastal Bays
1804 West Street, Suite 100
Annapolis, Maryland 21401
(410) 260-3466
(410) 974-5338 (Fax)

June 20, 2008

MEMORANDUM

TO: Ren Serey
Executive Director, Critical Area Commission

FROM: Marianne E. Diserens 
Principal Counsel

RE: Inquiry from Dorchester County Planning & Zoning Office

This Memorandum responds to your request for advice about a letter dated May 13, 2008 from Steve M. Dodd, Director of the Dorchester County Planning & Zoning Office. On behalf of the Dorchester County Planning Commission, Mr. Dodd asked you to obtain an "official, legal interpretation" of certain language in Dorchester County's Critical Area program. Specifically, Mr. Dodd requested this Office's interpretation of comments in a letter dated April 22, 2008 from Julie Roberts, a Natural Resources Planner with the Critical Area Commission. Ms. Roberts' letter addressed a proposed three lot intra-family subdivision of property in Dorchester County owned by Wayne Markey (local case P&Z # 1116). Ms. Roberts identified an area on the Markey property which requires an expansion of the minimum 100-foot Critical Area Buffer, due to the existence of non-tidal wetlands which are contiguous to the 100-foot Buffer. Ms. Roberts then commented that, due to the required expansion of the Buffer, "variances must be obtained for the disturbance associated with the proposed driveways on Lots 1 and 2." Finally, she noted that the Critical Area Commission would not oppose variances for access to these intra-family transfer lots.

Mr. Dodd explained the County's view that because the nontidal wetlands are not adjacent to the tidal wetlands, the nontidal wetlands are not considered a Habitat Protection Area and are therefore not regulated under the Dorchester County Critical Area Program. Mr. Dodd also stated that only grandfathered lots and parcels are eligible for variances. Apparently, it is Dorchester County's policy not to consider variance applications for intra-family transfer lots.

At your request, I have reviewed Mr. Dodd's letter, Ms. Roberts' letter, and the pertinent language of COMAR and of the Dorchester County Critical Area program. While this

Memorandum is advice of counsel only, and not a formal opinion of the Attorney General, it does express my view as to the matters discussed in Mr. Dodd's and Ms. Roberts' letters.

Expansion of the 100-foot Buffer: Ms. Roberts quoted COMAR 27.01.09C (7), which provides that "local jurisdictions shall expand the Buffer beyond 100 feet to include contiguous sensitive areas, such as steep slopes, hydric soils, or highly erodible soils, whose development or disturbance may impact streams, wetlands, or other aquatic environments." This requirement for expansion of the 100-foot Buffer pertains to all listed "contiguous sensitive areas." That is, where a listed sensitive area is contiguous to ("neighboring, adjoining")¹ the 100-foot Buffer, then the Buffer must be expanded to include the contiguous sensitive area. This is so, even if the listed contiguous sensitive area is separated from tidal waters or tidal wetlands by man-made features. As long as the listed contiguous sensitive area is contiguous to the 100-foot Buffer, then the Buffer must be expanded. Dorchester County's Program language confirms this interpretation. "Dorchester County has determined that the tidewater **buffer will be a minimum of 100 feet wide** landward from the mean high water line oftidal wetlands. **The buffer will be expanded beyond 100 feet to include contiguous, sensitive areas of nontidal wetlands....**" Dorchester County Critical Area Program at 41. In my view, Ms. Roberts has accurately stated the requirement for expansion of the Buffer in this case.

Variance for an Intra-Family Lot: Ms. Roberts stated that the Commission "would not oppose" a variance for driveways for proposed Lots 1 and 2. This position reflects a policy interpretation that recognizes the provision made by the General Assembly for creation of intra-family transfer lots. See Code, NR II, §8-1808.2. The Commission would not actively *support* variances for these intra-family lots. Rather, the Commission would likely request that, if the County grants variances, that the variances be the minimum necessary to afford relief, and that appropriate mitigation be required. Of course, Dorchester County is free to interpret its Critical Area program in a manner that is stricter than the State's interpretation, and accordingly, to decline to support a variance request for a new intra-family lot.

This Memorandum reflects my view as Principal Counsel to the Critical Area Commission, and it is not a formal Opinion of the Attorney General. Please contact me if I may be of further assistance.

¹Black's Law Dictionary (4th Ed.)

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



MARIANNE E. DISE
Assistant Attorney General
Principal Counsel

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

FAX NO. (410) 974-5338

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

October 31, 2008

Hon. Donald Dwyer, Jr.
Maryland House of Delegates
154 Lowe House Office Building
Annapolis, Maryland 21401-1991

RE: Frazier Property, Anne Arundel County

Dear Delegate Dwyer:

Thank you for your letter to the Attorney General of October 2, 2008, in which you reported your concern with an ongoing situation involving a junk yard on the Frazier Property at 8270 Edwin Raynor Boulevard in Pasadena, Anne Arundel County. Your letter stated that the junk yard lies within several hundred feet of the river, and you asked that this Office and the Critical Area Commission to investigate the site, including performing a survey and taking core samples of the soil.

As you know, Anne Arundel County is responsible for inspection and enforcement of its local zoning laws regulating junk yards, and the County is also responsible for inspection and enforcement of the County's Critical Area Program. The Critical Area Commission's role under State law is to oversee the implementation of the Critical Area program by the 64 local jurisdictions with approved Critical Area programs, but the Critical Area Commission employs no inspectors.

Because the Critical Area Commission records contained no information regarding violations on the site, I contacted the County Attorney's Office to discuss the serious concerns raised by your letter. We ascertained that Anne Arundel County has cited the property owner numerous times for violations of the local zoning code related to the junk and debris on the property, and that the owner has paid fines to the District Court for these local zoning violations. However, none of the violations involved the Critical Area law or regulations. The County assured me and the Critical Area Commission staff that the zoning violations are limited to violations of the local zoning code, and that the activities on the property do not violate the

Critical Area criteria. (Examples of Critical Area violations would include illegal grading, clearing, or exceeding the impervious surface limit on the site). We verified with the County that there has been no illegal grading or clearing on the Critical Area portion of the site, and that the limits on impervious surfaces are not exceeded.

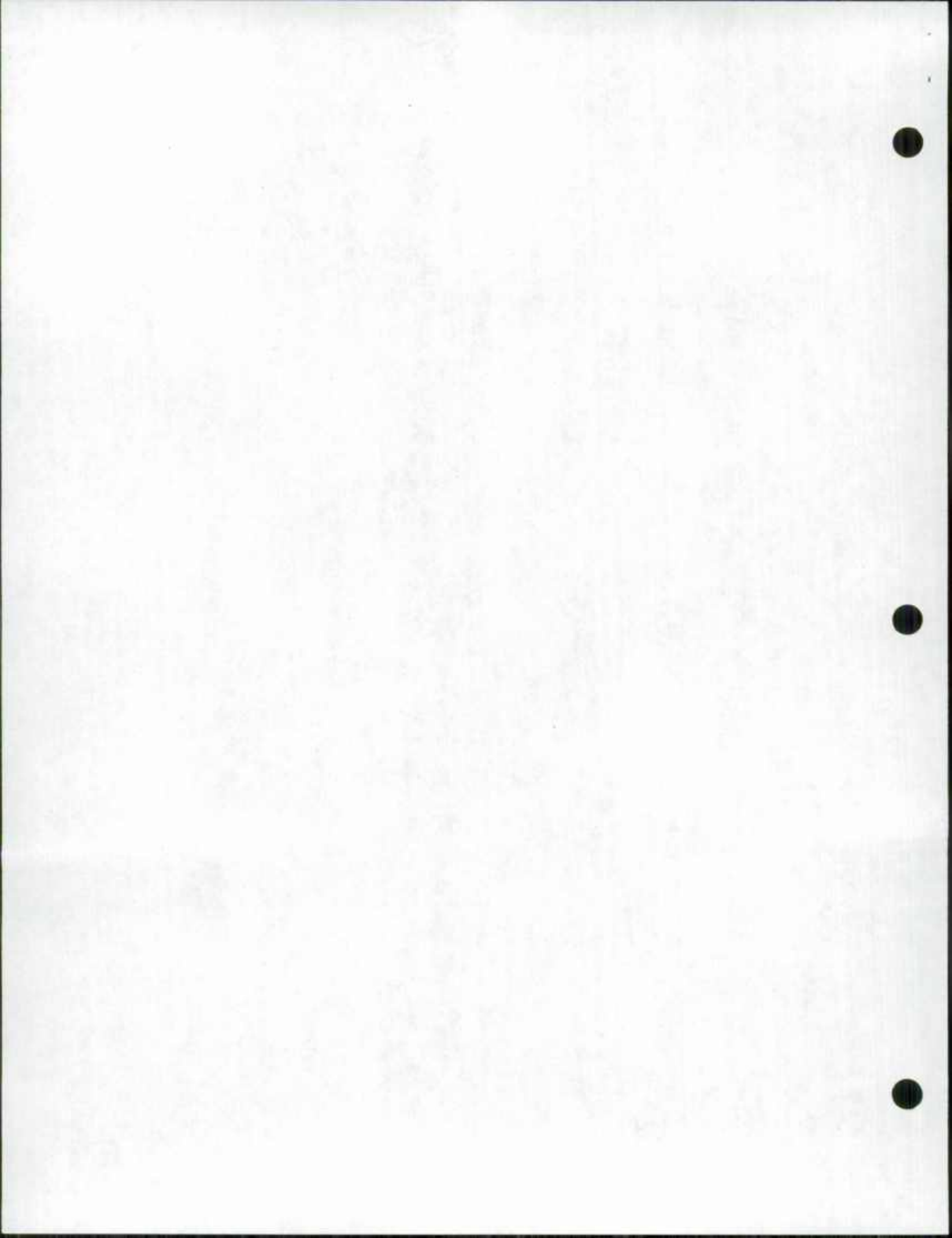
I appreciate your concern for the protection of our environment, and I trust that this letter has responded to your inquiry. For further information, please contact me directly at (410) 260-3466. You may also wish to speak to Ms. Betty Dixon, Director of the Anne Arundel County Office of Inspections and Permits at (410) 222-7790.

Sincerely,

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

Marianne E. Dise
Assistant Attorney General

cc: Hon. Douglas F. Gansler
Ms. Betty Dixon



Pls return with copy of letter

Please forward copies of finalized correspondence (with pink slip) to Peggie McKee at the address below.

Reference No: MAIL 08-3823

MAIL-Tracker Assignment and Tracking Form

OAG Mail Tracking Services Unit

200 Saint Paul Place

Baltimore, MD 21202

Email: pmckee@oag.state.md.us

Fax: 410-230-1708

Telephone: 410-576-6972

TO: Steve Johnson

FROM: Shanetta Paskel, Director Legislation *CC*

DATE: 10/6/08

Please prepare draft response by 10/20/08 and forward it to Shanetta Paskel with reference number.

If you have any questions about the response, or do not think a response can be prepared by the date above, please contact Shanetta at 410-576-7939.

Upon receiving the draft response, Shanetta will contact you to review it and prepare to send it out.

Please note that we will contact the author(s) of the letter to let him/her know we have received the correspondence and are looking at the matter. The author(s) of the letter will be instructed to contact Shanetta Paskel if they have any questions or want to check on the status of the response.

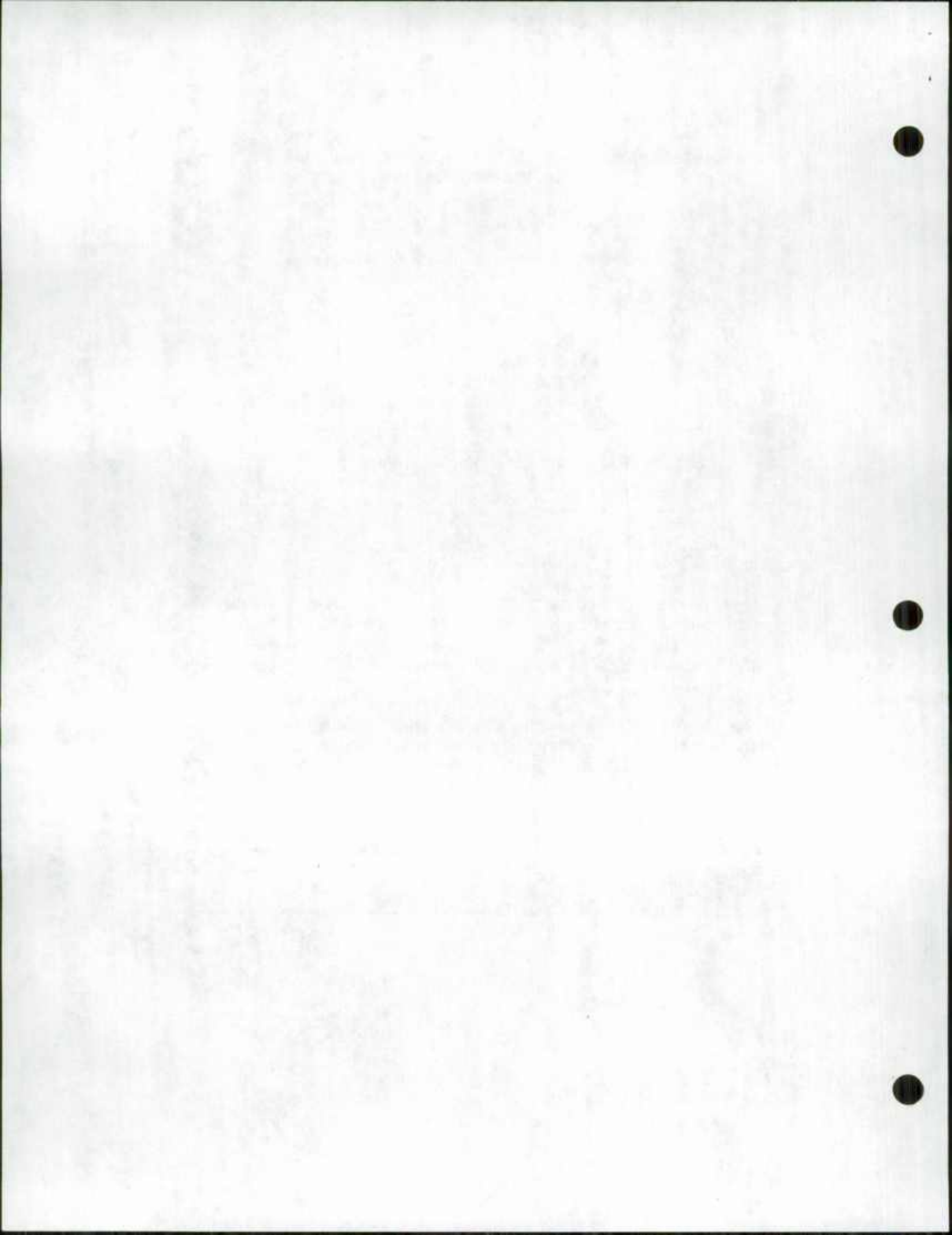
Comments: cc: Douglas Gansler
Kay Winfree
J.B. Howard
Dan Friedman
Erica Fitzgibbon } *cc's*

RECEIVED

OCT 09 2008

MD. Dept of the Environment
Office Of The Attorney General

cc Michelle Parrish (OAG)



DON DWYER, JR.
31st Legislative District
Anne Arundel County

DEPUTY MINORITY WHIP

JUDICIARY COMMITTEE



Annapolis Office
154 Lowe House Office Building
Annapolis, Maryland 21401-1991
Annapolis 410-841-3298
Glen Burnie 410-590-4320

The Maryland House of Delegates

ANNAPOLIS, MARYLAND 21401-1991

Attorney General Douglas Gansler
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

Thursday, October 02, 2008

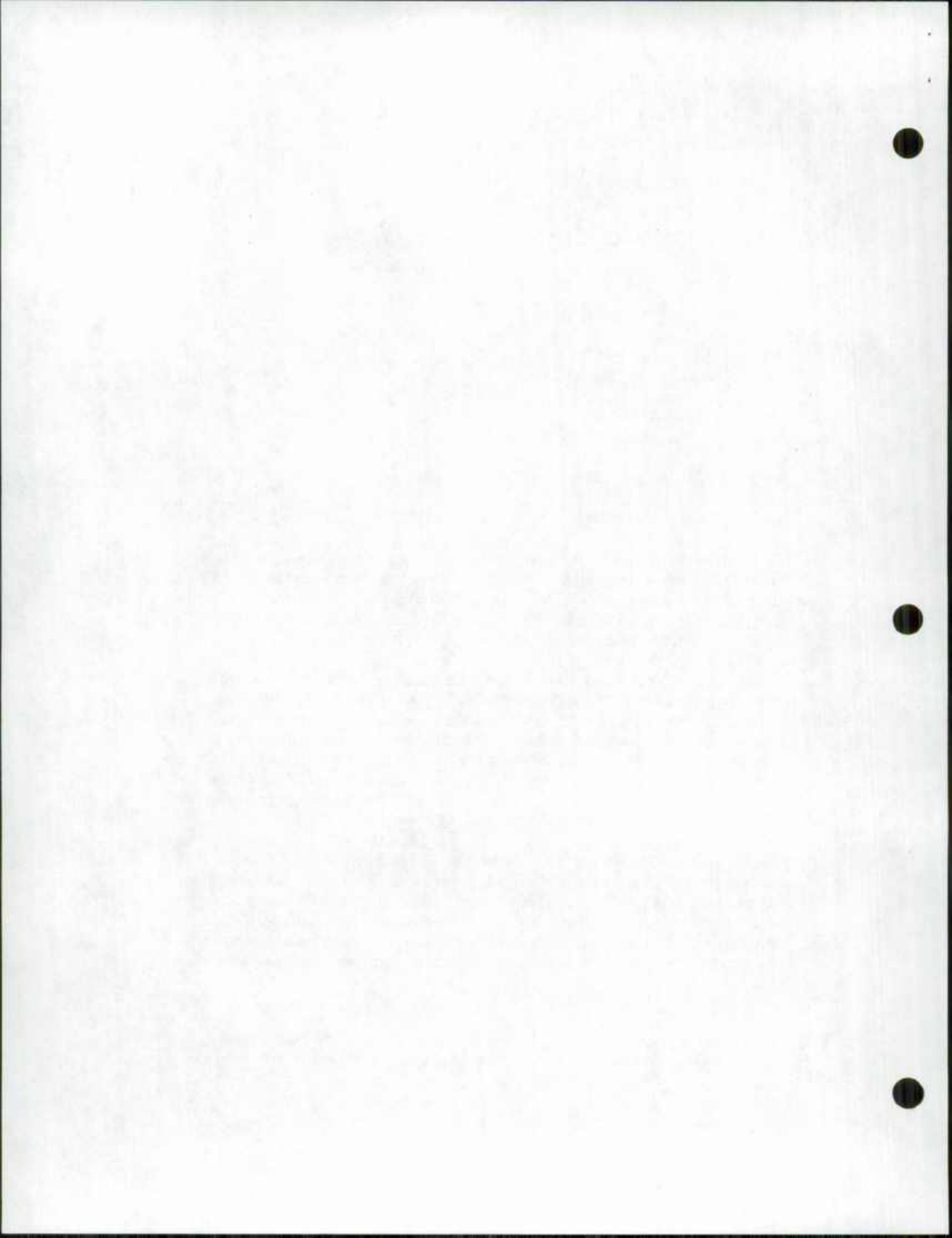
Dear Attorney General Gansler,

I am writing regarding a serious environmental violation that has been allowed to go on for over 23 years in Anne Arundel County. Based on newspaper accounts that I have in my possession, Anne Arundel County first became aware of this violation in 1985. It took from that time in 1985 until 1991 (6 years) for Anne Arundel County to take action against the property owner.

Amazingly, on September 5, 1991 Anne Arundel County entered into a lease with the same property owner to use a portion of the 45 acre parcel as a "dredge spoil" area. Again on February 16, 1993 the lease was amended to extend the term and increase the amount. Ironically, according to the Director of Inspections and Permits (Betty Dixon), the County was leasing the land for the amount of fines and charges levied by the county in court earlier that year. Concerned, she went to the office of law and questioned the situation. I am under the impression that something did not sit just right regarding her meeting with the Anne Arundel County office of law and this situation.

On September 9, 2006, the property owner (Connie Frazier) was issued a grading permit to close the dredge site. Ironically, the permit issued clearly indicates that the property is located within the critical area. This is the only official document indicating correctly that the property is in the critical area. There are specific requirements contained in the 2006 permit that to date have not been complied with yet Anne Arundel County fails to enforce the requirements of the permit and it remains open even though no work has begun.

It is interesting that there are recorded complaints on the county's website dated from 2003 through 2007 (Ref Case ID 7-2003-0430). However the complaint is listed as a



"Junk and debris" case. If you look at a Google Earth satellite view at 8270 Edwin Raynor Blvd. Pasadena MD 21122 you will see that this is clearly an illegal junk yard within several hundred feet of the river that has been there since 1985. It seems that there are many irregularities concerning how Anne Arundel County zoning enforcement has handled this case.

- No legal action from 1985 until 1989.
- Oct 14, 1987 Property sold to Connie Frazier while under investigation.
- Jan 13, 1989 AACO Files land use Suit against Connie Frazier.
- Sept 5, 1991 AACO leases land for dredge spoil site.
- Significant fines of 1991 were offset by county lease.
- From 2003 through 2008 multiple citations issued without follow up.
- To date no critical area violations have been sited.
- No enforcement of 2006 grading permit.
- Over a half a dozen homes have been constructed without permits or subdivisions
- Dredge Spoil remains open on a violated grading permit.

You will see in a Google Earth satellite view that the property is within several hundred feet of the Magothy River. Further, a newspaper account of 1991 states that "the junk is more easily seen from the water than the highway. Ms. Finklestein said, "It's a nice waterfront junkyard."

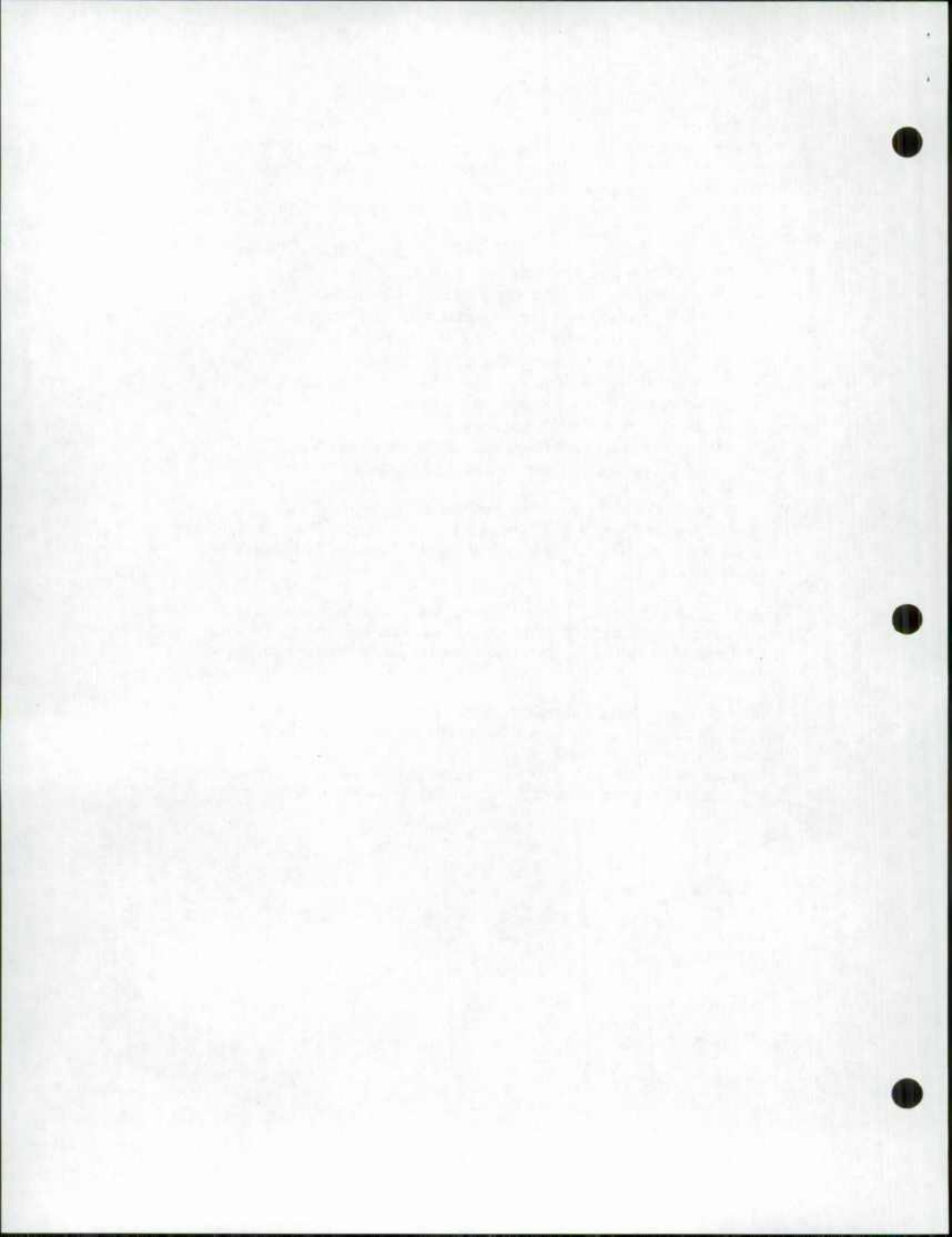
With this being the case, why in over 23 years, have none of the complaints been recorded or prosecuted as "Critical Area" violations, and why is it that Anne Arundel County ignored for so long the serious violations and possible contaminations regarding this property?

I am requesting an official investigation by the Office of the Maryland Attorney General and the Critical Area Commission pertaining to the irregularities and inconsistencies related to this property. I would request that the site be surveyed for possible filling of ravines and ask that core samples be taken and tested at various locations on the property. I would ask that the assigned investigator meet me personally to review my many documents.

Constitutionally yours,



Delegate Don Dwyer, Jr.
AACO District 31



Mrs. Betty Dixon
Director, Anne Arundel County
Office of Inspections and Permits
2664 Riva Road
Annapolis, MD 21401

John B. Howard, Jr.
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

Michelle Parrish
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

Shanetta Paskel
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

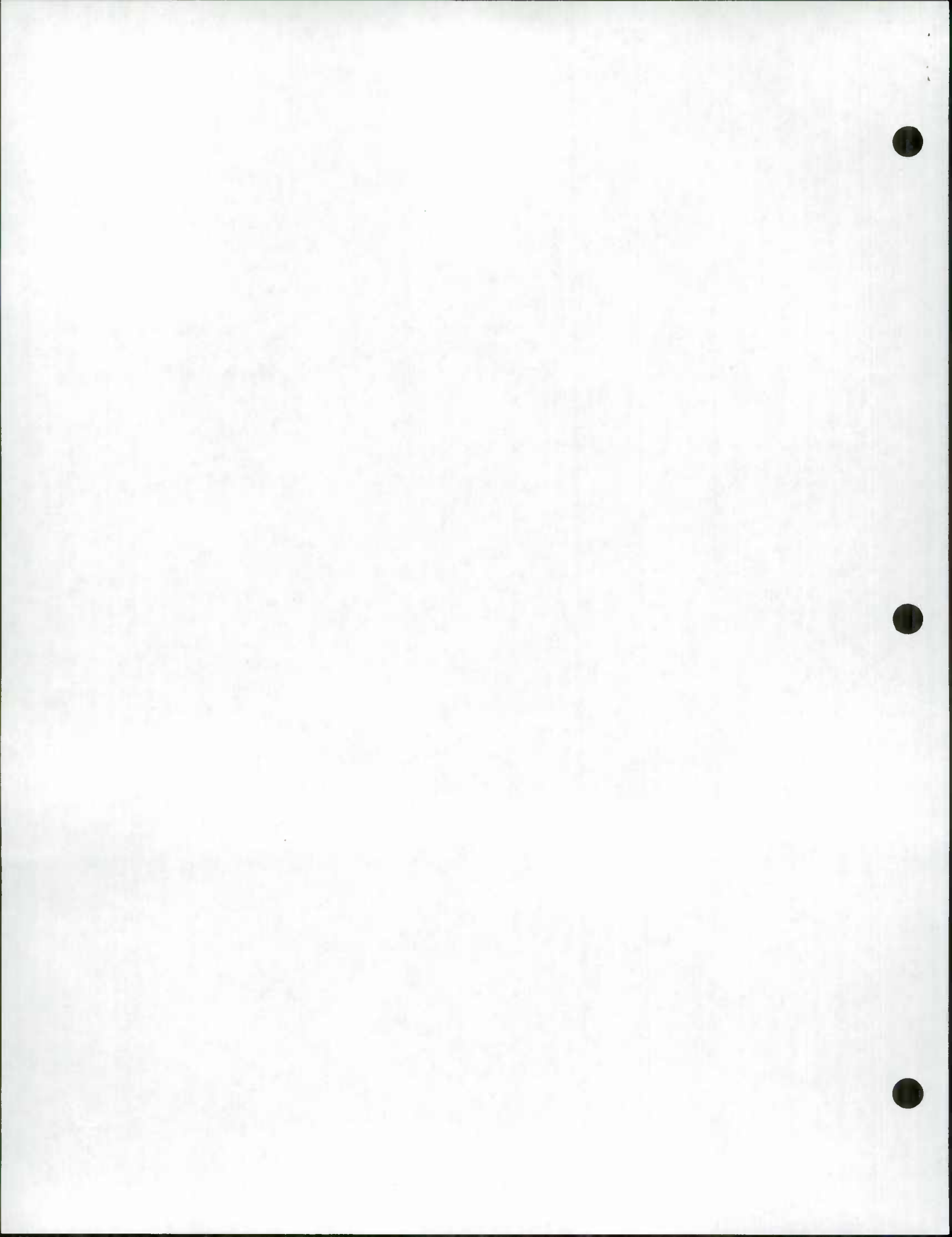
Dan Friedman
Annapolis Legislative office
Legislative Services Building
90 State Circle
Annapolis, MD 21401

Attorney General
Douglas F. Gansler
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

Katherine Winfree
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

Erin Fitzsimmons
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

also :
Margaret
Ren
Kate
Kerrie
Saundra



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FAX NO (410) 974-5338

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

November 12, 2008

Alexis E. Kramer, Esquire
Ewing, Dietz, Fountain & Kehoe
16 South Washington Street
Post Office Box 1146
Easton, Maryland 21601-1146

RE: Public Information Act Request to the Critical Area Commission:
5782 Shipyard Point Road, Royal Oak, Maryland (Blevins)

Dear Ms. Kramer:

Enclosed please find all records and documents in the files of the Maryland Critical Area Commission pertaining to your request for information dated October 23, 2008, received in this Office on October 27, 2008.

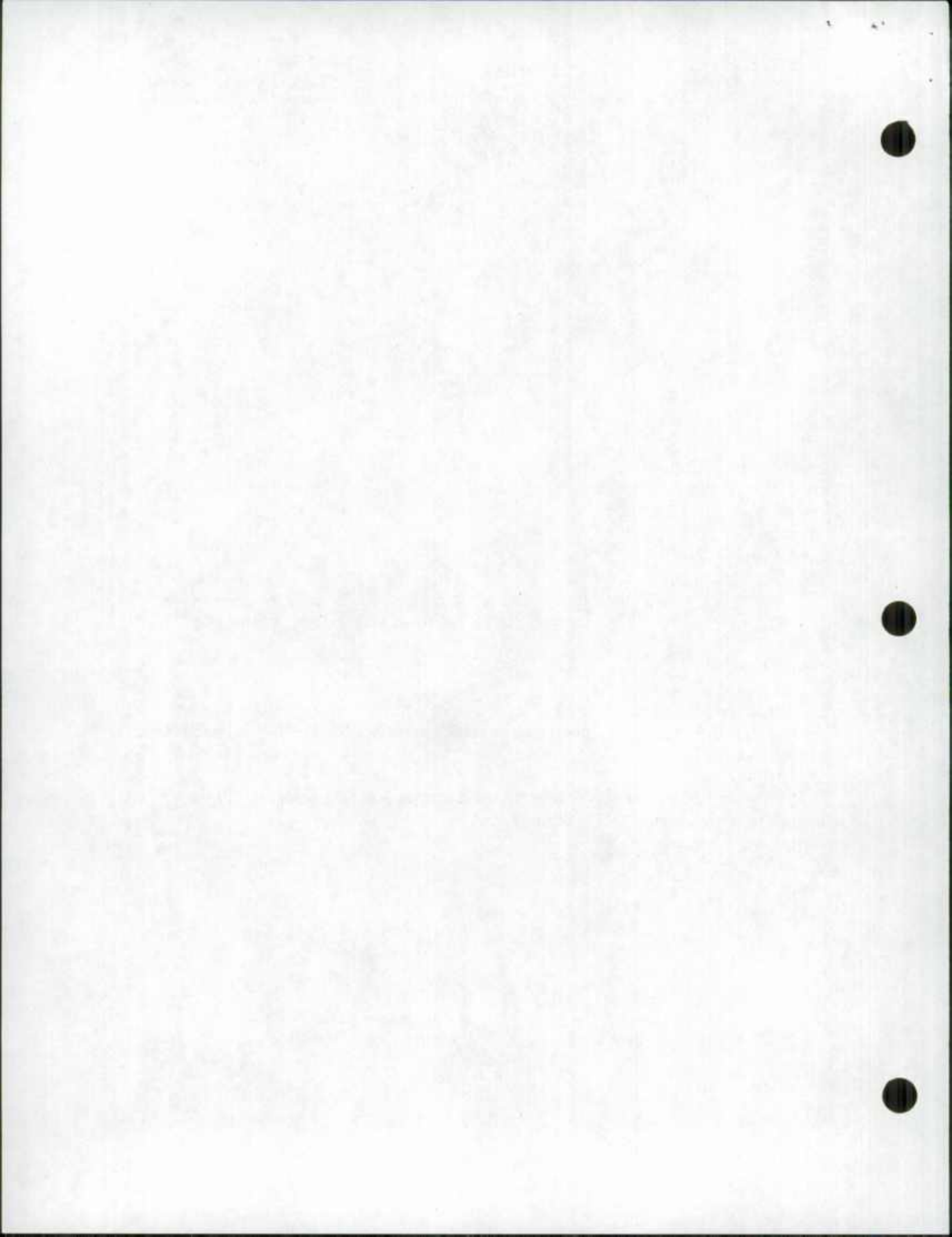
The Commission has waived the search and copying fees for this request. Please contact me if you have any questions about this response.

Sincerely,

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

Marianne E. Dise
Principal Counsel

Enclosures



Dise, Marianne E.

From: Dise, Marianne E.
Sent: Monday, September 15, 2008 12:08 PM
To: Cucuzzella, Paul
Subject: FW: Blevins boathouse

Fyi - It's RCA and not BEA

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

From: Kelly, Nick
Sent: Monday, September 15, 2008 9:58 AM
To: Gallo, Kerrie
Cc: Dise, Marianne E.
Subject: RE: Blevins boathouse

D'oh! Good call. I checked it out. It's not BEA.

NK

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

From: Gallo, Kerrie
Sent: Monday, September 15, 2008 9:26 AM
To: Kelly, Nick
Subject: RE: Blevins boathouse

Could you please double check the County BEA maps just to be sure its not BEA? Thanks!

Sent by GoodLink (www.good.com)

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

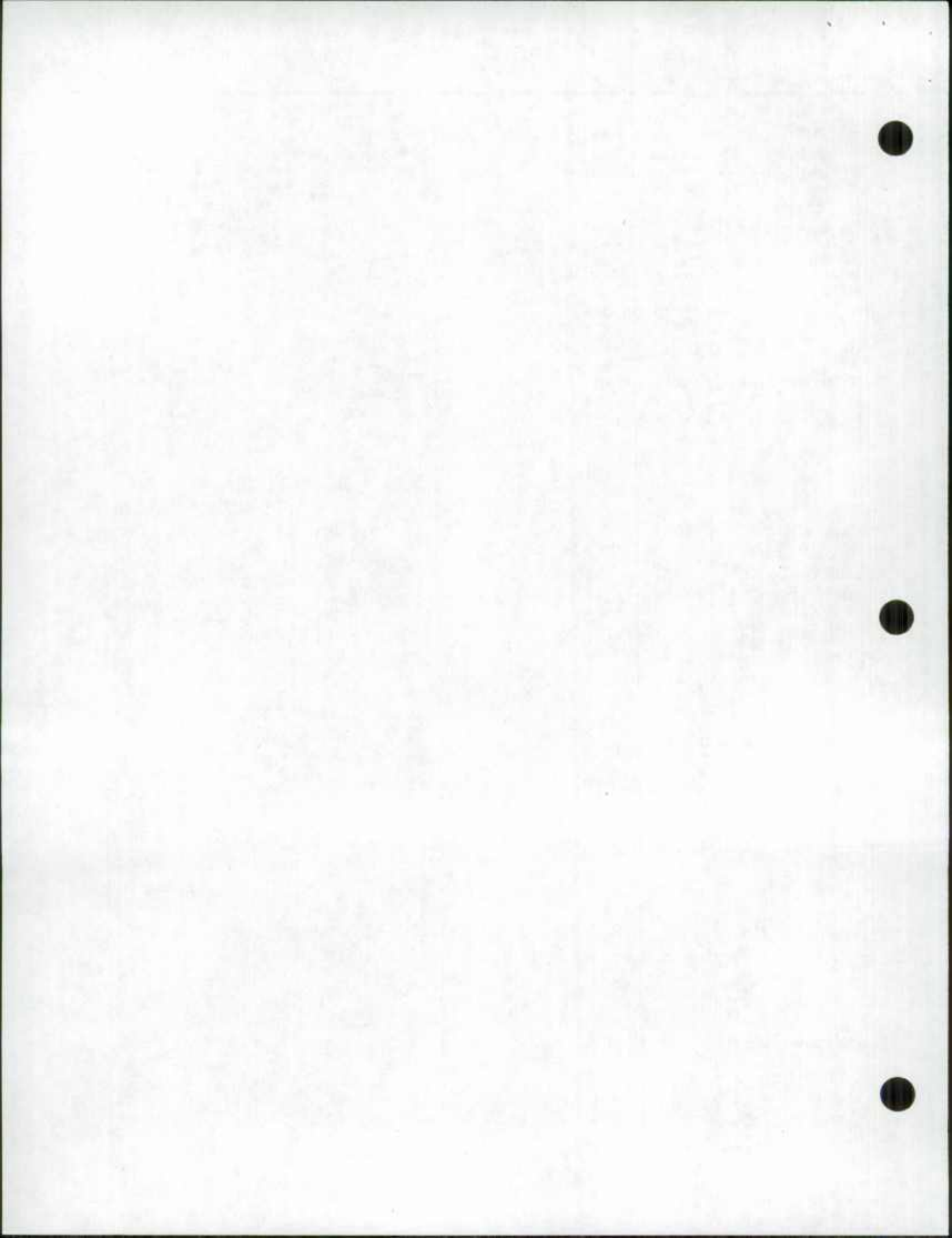
From: Kelly, Nick
Sent: Monday, September 15, 2008 09:07 AM Eastern Standard Time
To: Dise, Marianne E.
Cc: Gallo, Kerrie
Subject: RE: Blevins boathouse

Hi Marianne,

The site is designated RCA, according to our GIS layer. However, I couldn't located any file related to the property. Kerrie, do you happen to know of any file that may be related to this project?

Let me know if there's anything else I can do.

Thanks



Nick

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

From: Dise, Marianne E.
Sent: Friday, September 12, 2008 2:25 PM
To: Gallo, Kerrie; Kelly, Nick
Cc: Schmidt, Katherine; Cucuzzella, Paul; Canedo, Sandra
Subject: FW: Blevins boathouse

Nick,

Can you please check this property on the CA maps? The case involves a boat house that was converted to a residence, in violation of the terms of a conservation easement on the property. We are interested in the CA designation of the property, as well as whether the property has been mapped as buffer exempt. Also, if you have any project files on the property, that would be helpful. Thanks,

Marianne

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

From: Cucuzzella, Paul
Sent: Friday, September 12, 2008 2:02 PM
To: Dise, Marianne E.
Subject: Blevins boathouse

Marianne, the Blevins boathouse is located on Talbot County Tax Map 46, Parcel 38, on Irish Creek. As discussed, please have the planner check to confirm that it's not buffer-exempt. The boathouse is adjacent to the property's pier, and is certainly w/i 100' of the water. Thanks.

Paul J. Cucuzzella

Assistant Attorney General

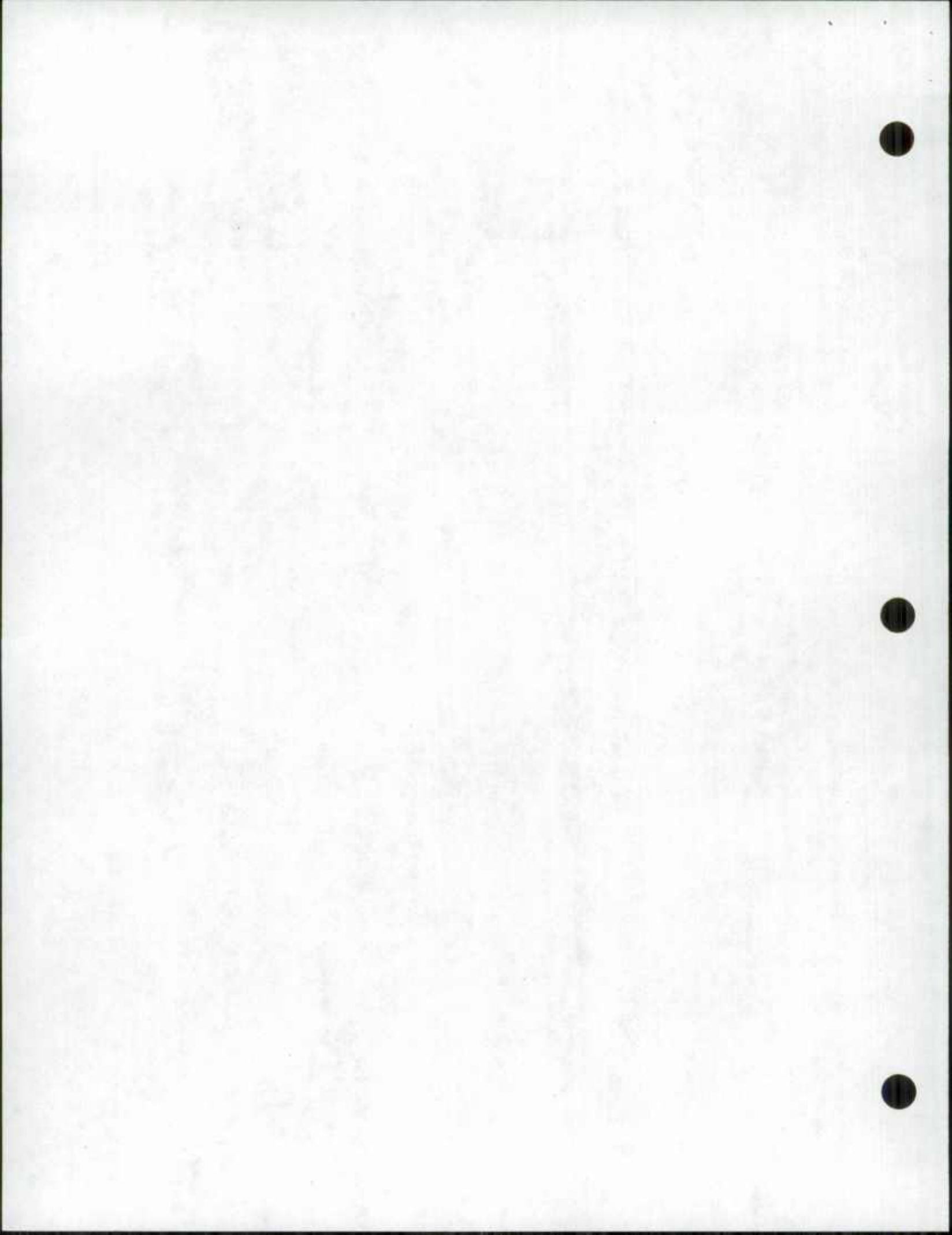
Maryland Department of Natural Resources

580 Taylor Ave., C-4

Annapolis, Maryland 21401

(410) 260-8352

fax (410) 260-8364



Dise, Marianne E.

From: Dise, Marianne E.
Sent: Monday, September 15, 2008 1:46 PM
To: Kelly, Nick
Subject: RE: Blevins boathouse

Tracking: Recipient Delivery

Kelly, Nick Delivered: 9/15/2008 1:46 PM

Thanks, Nick. I've passed along to Paul C. He may be contacting you re testifying about the Talbot program, and/or the buffer.

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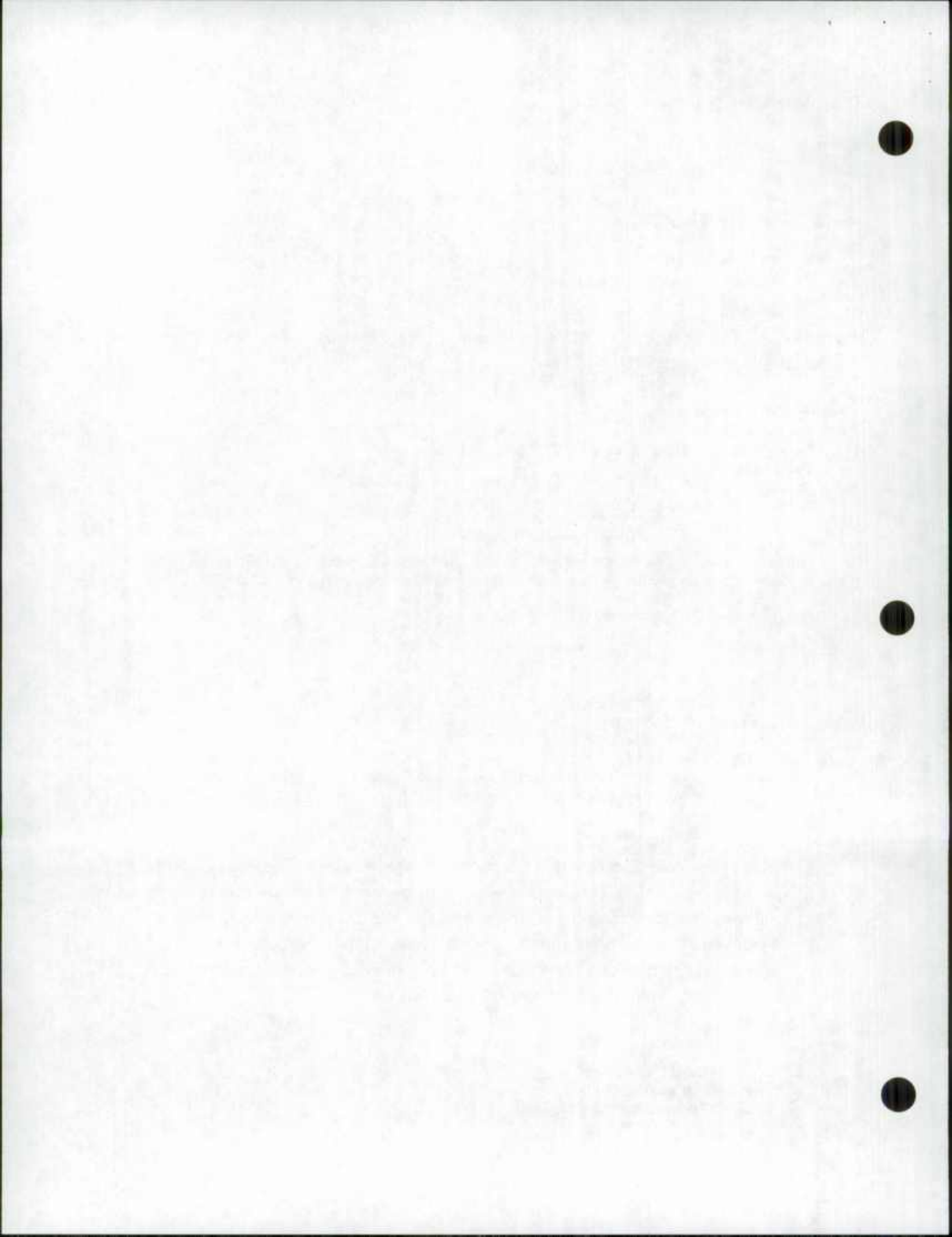
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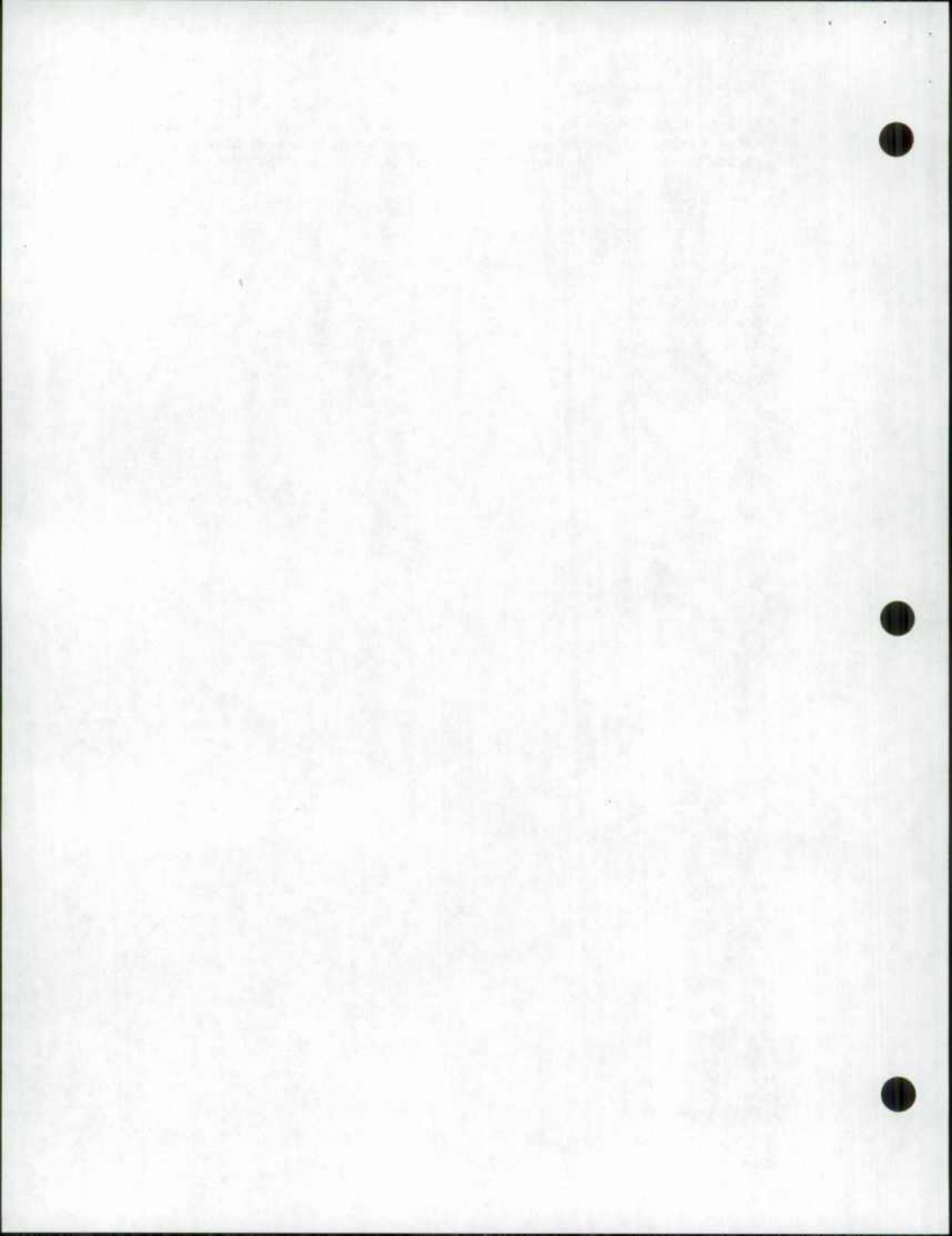
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pcucuzzella@dnr.state.md.us



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Tracking:	Recipient	Delivery
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	Kelly, Nick	Delivered: 9/12/2008 2:25 PM
	Schmidt, Katherine	Delivered: 9/12/2008 2:25 PM
	Cucuzzella, Paul	Delivered: 9/12/2008 2:25 PM
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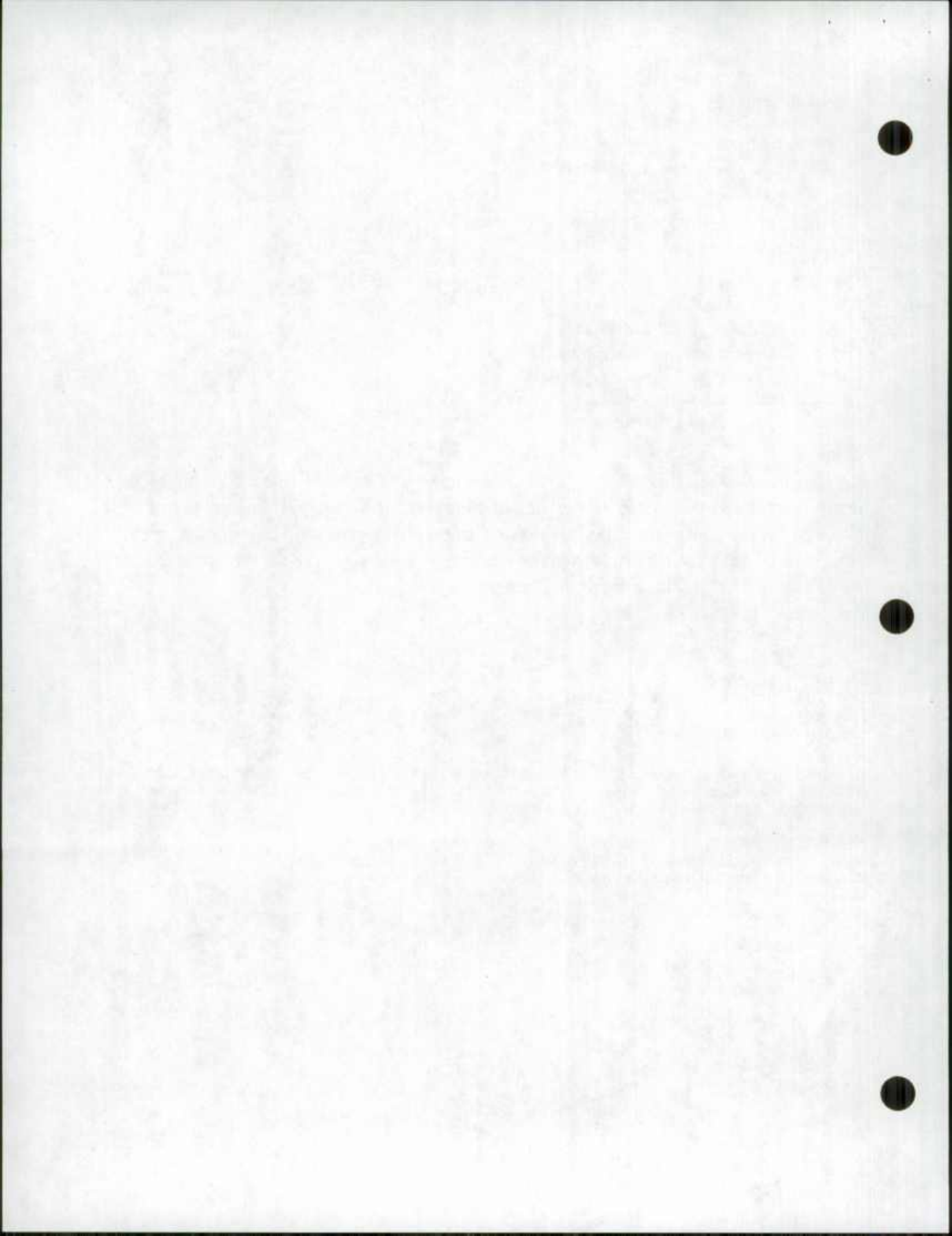
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Annapolis, Maryland 21401
(410) 260-8352
fax (410) 260-8364
pcucuzzella@dnr.state.md.us



Kelly, Nick

From: Kelly, Nick
Sent: Monday, September 15, 2008 1:47 PM
To: Dise, Marianne E.
Subject: RE: Blevins boathouse

Excellent. I always love a chance to testify!

Nick

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

From: Dise, Marianne E.
Sent: Monday, September 15, 2008 1:46 PM
To: Kelly, Nick
Subject: RE: Blevins boathouse

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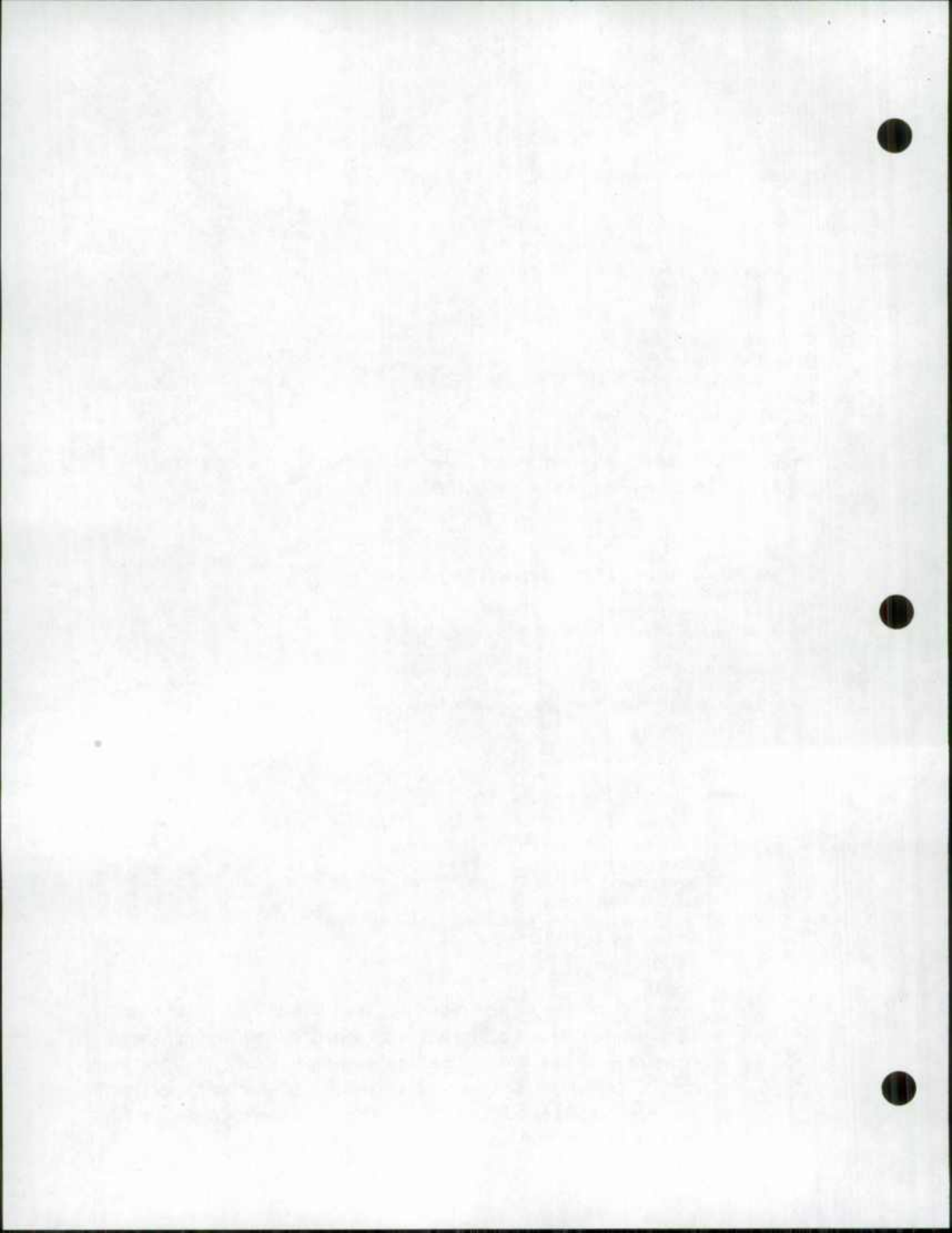
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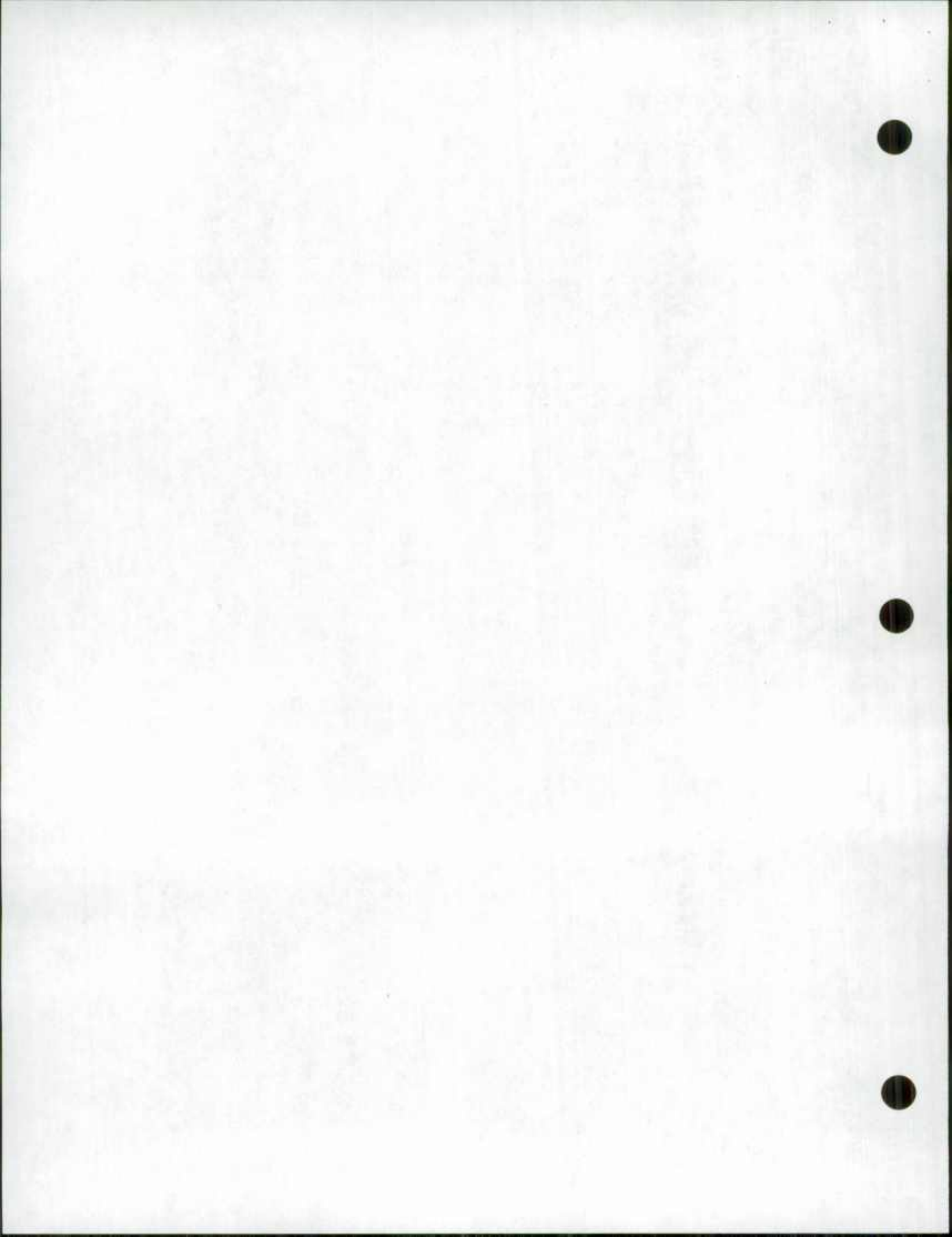
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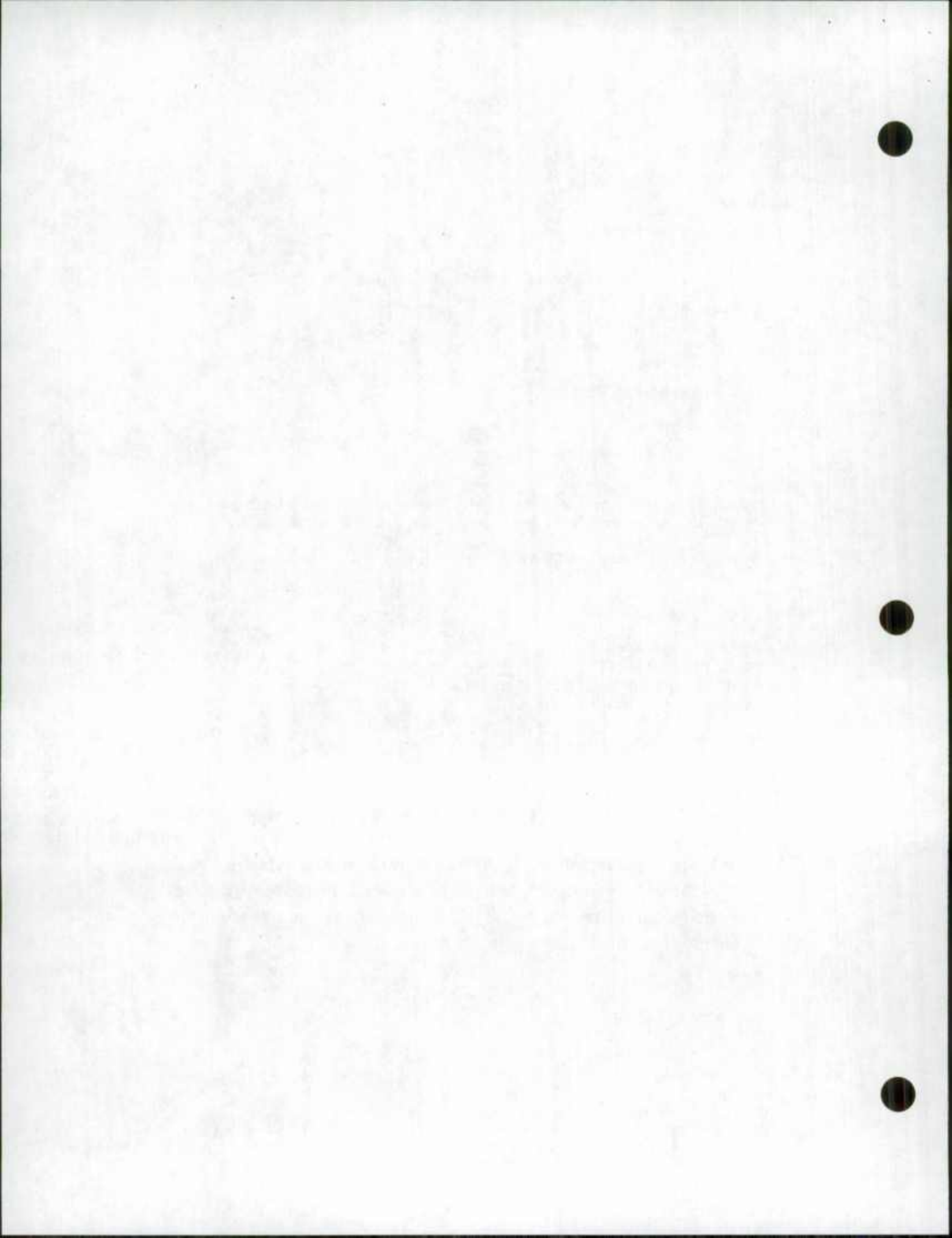
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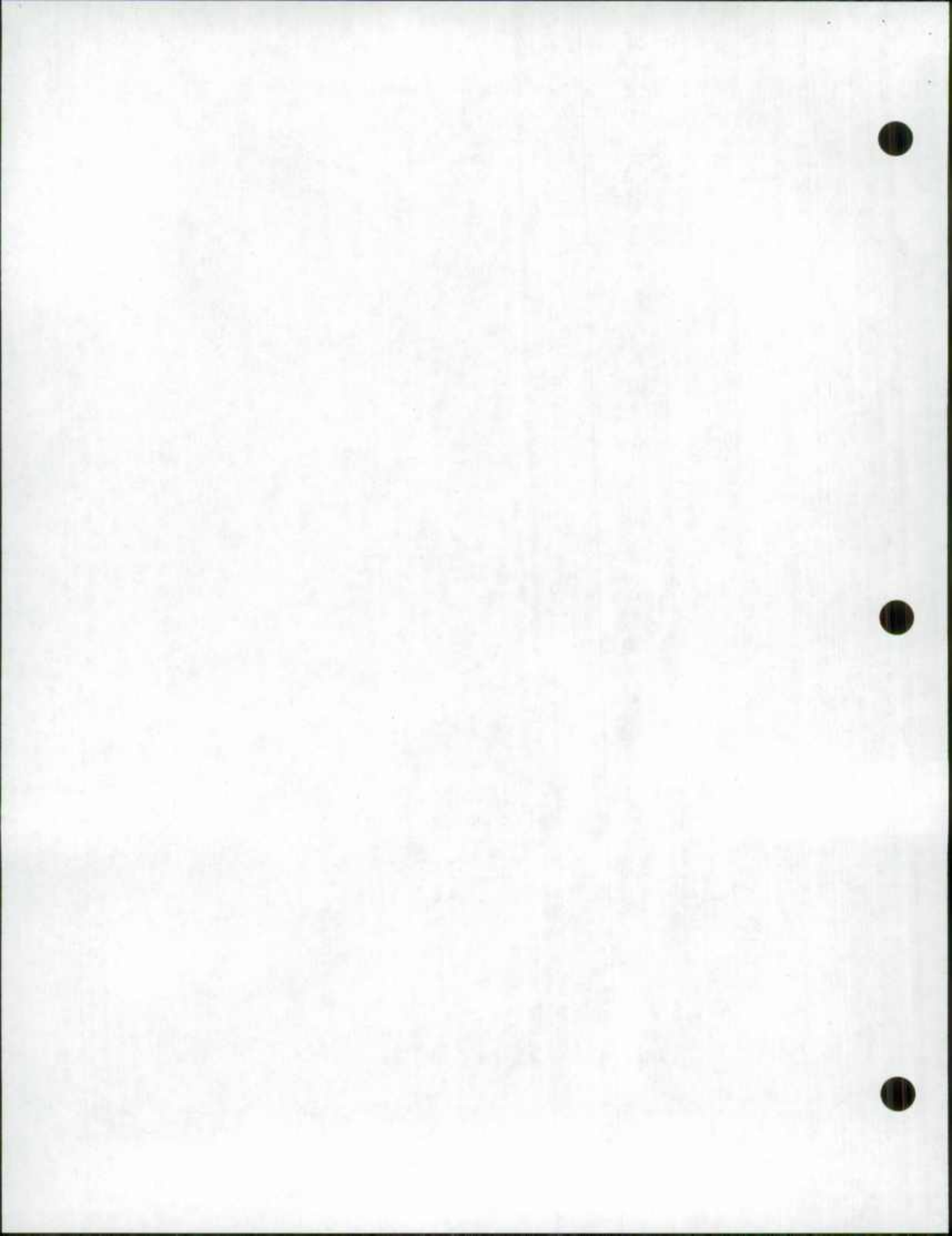
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Cc: Dise, Marianne E.
Subject: RE: Blevins boathouse

D'oh! Good call. I checked it out. It's not BEA.

NK

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

From: Gallo, Kerrie
Sent: Monday, September 15, 2008 9:26 AM
To: Kelly, Nick
Subject: RE: Blevins boathouse

Could you please double check the County BEA maps just to be sure its not BEA? Thanks!

Sent by GoodLink (www.good.com)

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

From: Kelly, Nick
Sent: Monday, September 15, 2008 09:07 AM Eastern Standard Time
To: Dise, Marianne E.
Cc: Gallo, Kerrie
Subject: RE: Blevins boathouse

Marianne,

The site is designated RCA, according to our GIS layer. However, I couldn't located any file related to the property. Kerrie, do you happen to know of any file that may be related to this project?

Let me know if there's anything else I can do.

Thanks

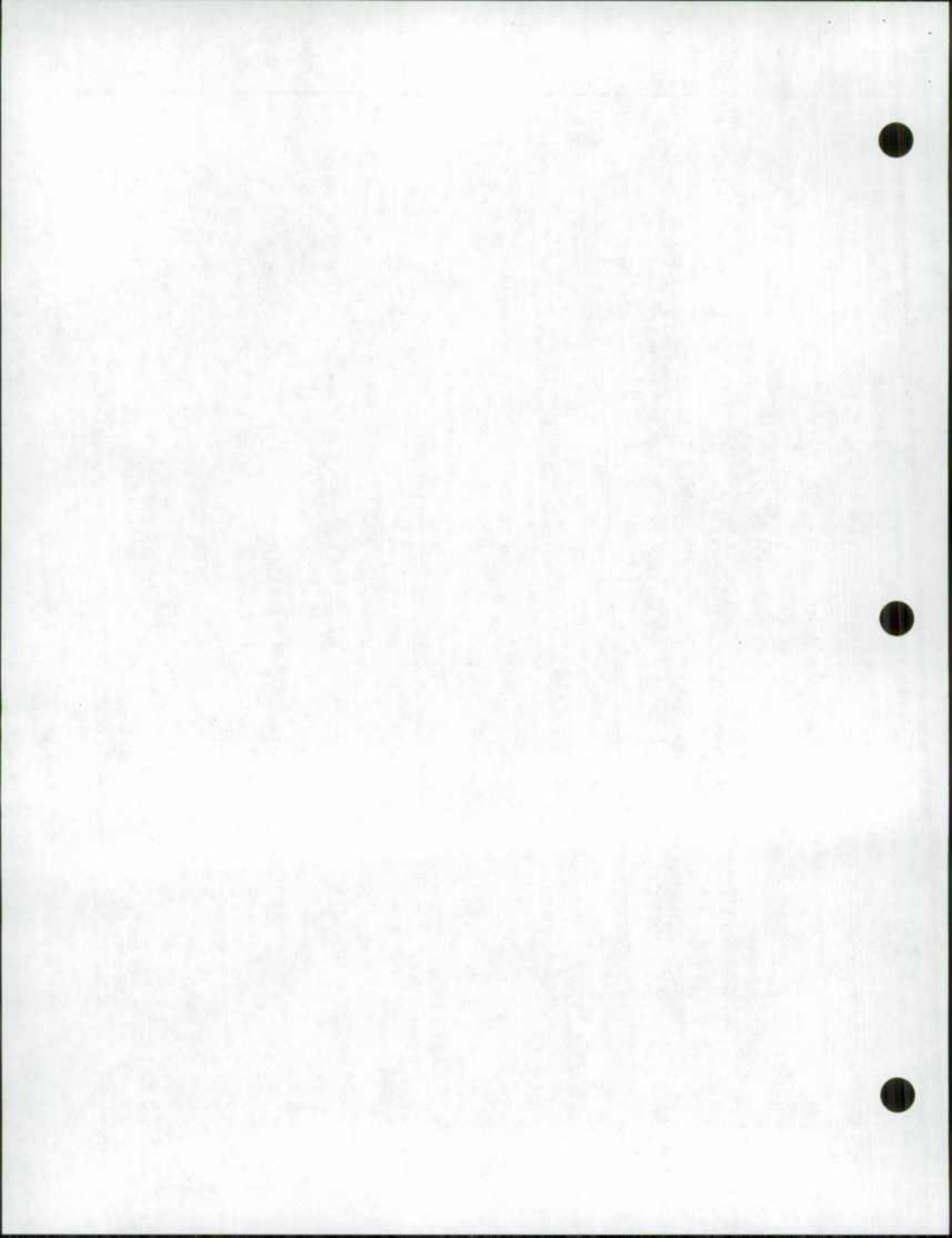
Nick

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

From: Dise, Marianne E.
Sent: Friday, September 12, 2008 2:25 PM
To: Gallo, Kerrie; Kelly, Nick
Cc: Schmidt, Katherine; Cucuzzella, Paul; Canedo, Sandra
Subject: FW: Blevins boathouse

Nick,

Can you please check this property on the CA maps? The case involves a boat house that was converted to a residence, in violation of the terms of a conservation easement on the property. We are interested in the CA designation of the property, as well as whether the property has been mapped as buffer exempt. Also, if you have any project files on the property, that would be helpful. Thanks,



Marianne

--Original Message-----

From: Cucuzzella, Paul
Sent: Friday, September 12, 2008 2:02 PM
To: Dise, Marianne E.
Subject: Blevins boathouse

Marianne, the Blevins boathouse is located on Talbot County Tax Map 46, Parcel 38, on Irish Creek. As discussed, please have the planner check to confirm that it's not buffer-exempt. The boathouse is adjacent to the property's pier, and is certainly w/i 100' of the water. Thanks.

Paul J. Cucuzzella

Assistant Attorney General

Maryland Department of Natural Resources

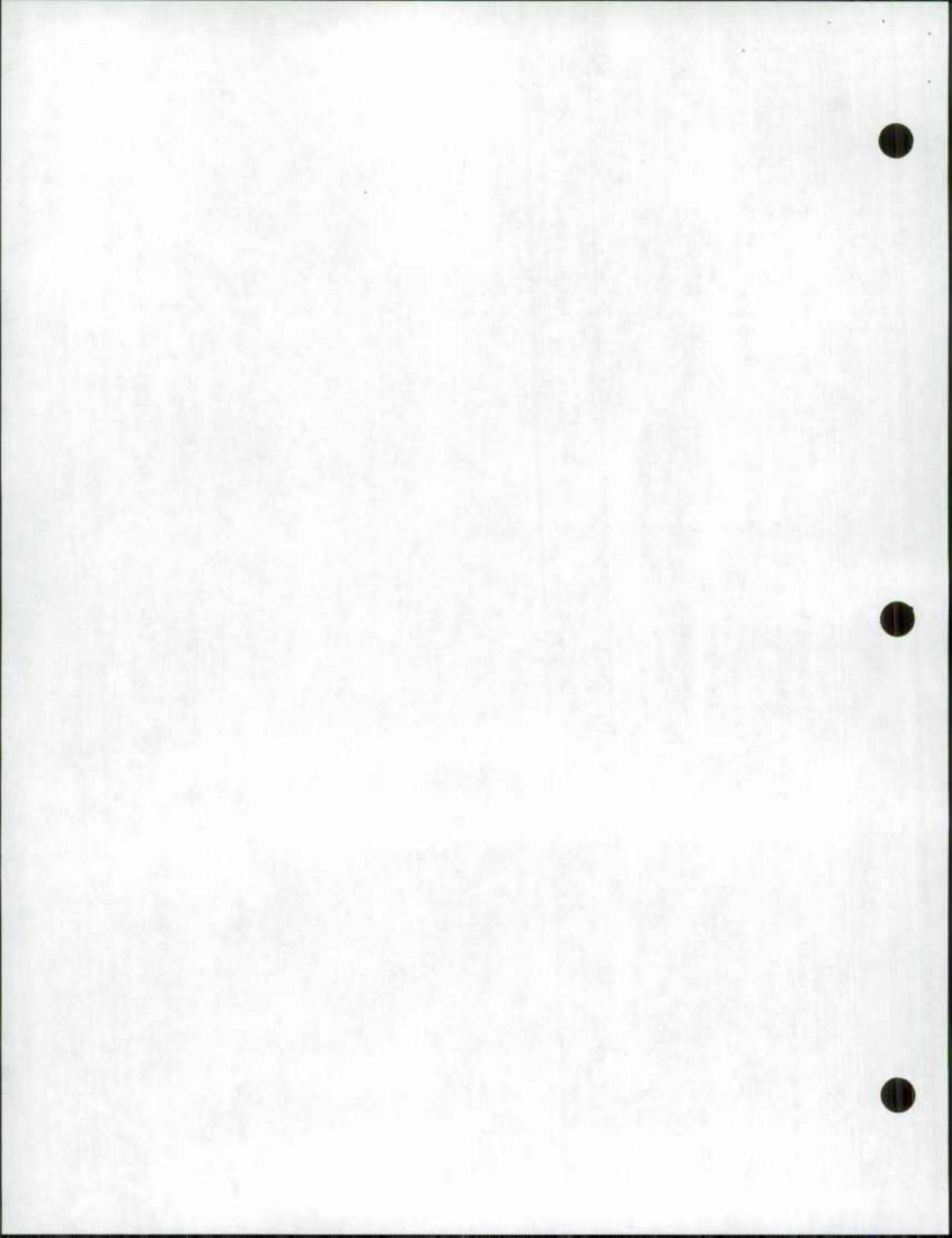
580 Taylor Ave., C-4

Annapolis, Maryland 21401

(410) 260-8352

fax (410) 260-8364

pjucuzzella@dnr.state.md.us



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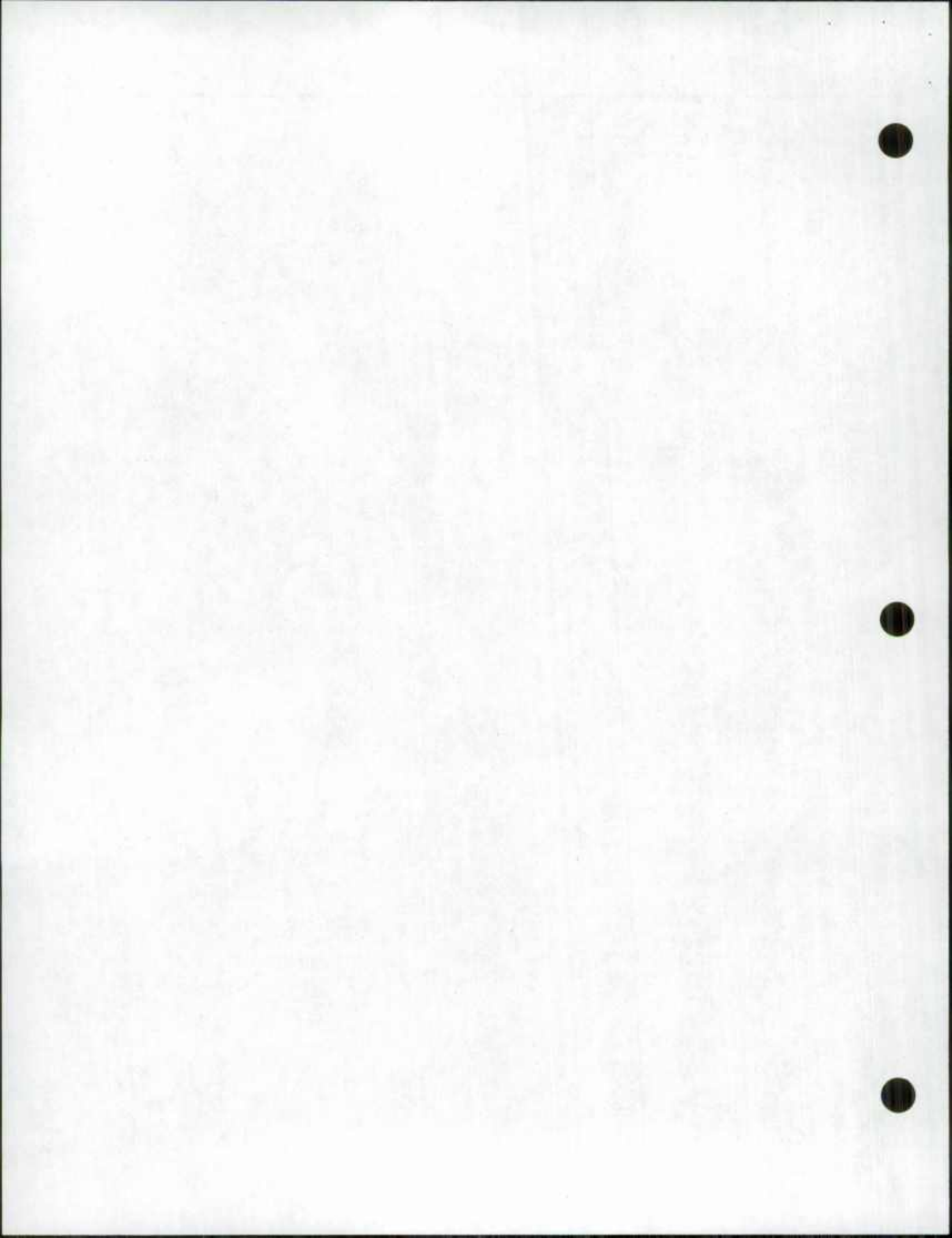
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Assistant Attorney General

Maryland Department of Natural Resources

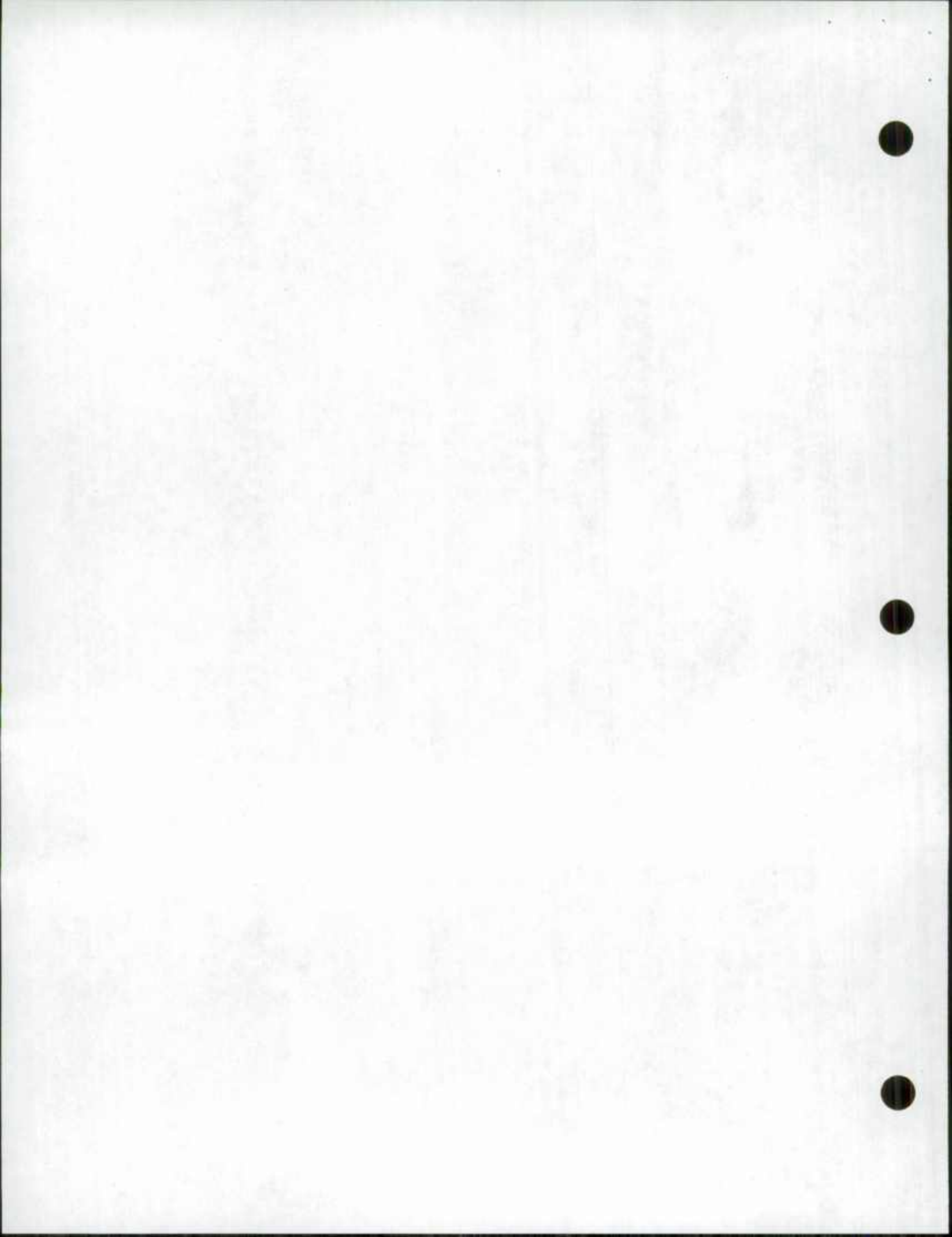
580 Taylor Ave., C-4

Annapolis, Maryland 21401

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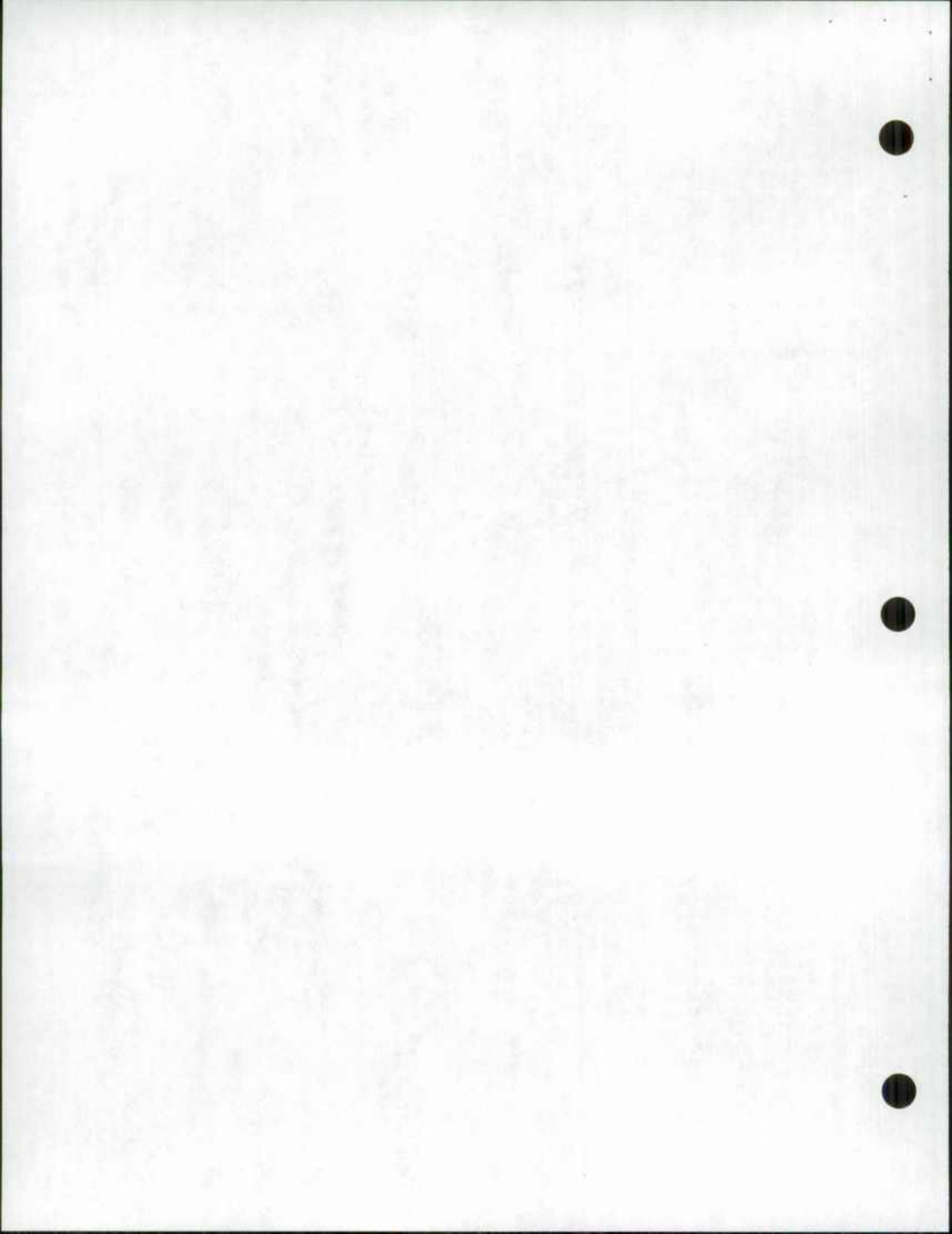
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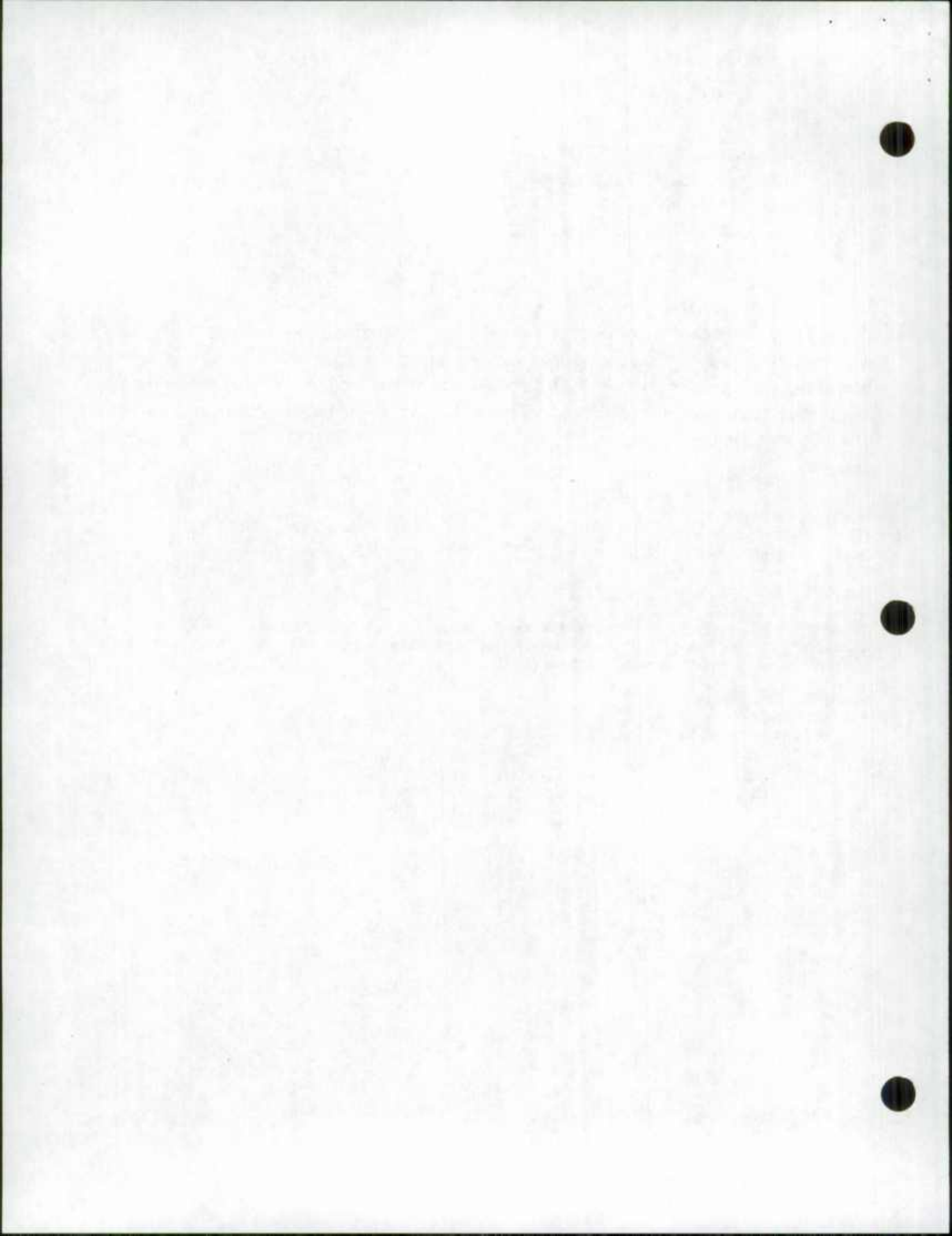
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pcucuzzella@dnr.state.md.us



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KAREN M. KALUDIS
STEPHEN H. KEHOE
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16 SOUTH WASHINGTON STREET
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FIRM EMAIL: INFO@EWINGDIETZ.COM

DAVID C. BRYAN
OF COUNSEL

L. CLARK EWING
1916 - 1998

FACSIMILE
TRANSMISSION
(410) 820-5053

October 23, 2008

VIA CERTIFIED MAIL
Shirley Massenburg, Administrator
Critical Area Commission
1804 West Street
Annapolis, MD 21401

Re: Maryland Public Information Act Request

Dear Custodian of the Records:

This is a request under the Maryland Public Information Act, *State Government Article*, Sections 10-611 through 628. I am making this request on behalf of my clients, Phillip and Gloria Blevins. In this capacity, I wish to obtain copies of all records in your custody and control pertaining to the following:

any and all records, documents or other written information pertaining to the real property located at 5782 Shipyard Point Road, Royal Oak, Talbot County, Maryland and owned by Phillip and Gloria Blevins from 1995 to present.

If all or any part of this request is denied, I request that I be provided with a written statement of the grounds for the denial. If you determine that some portions of the requested records are exempt from disclosure, please provide me with the portions that can be disclosed.

I also anticipate that I will want copies of some or all of the records. Therefore, please advise me as to the cost, if any, for obtaining copies of the records and the total cost of any or for all records described above. If you have adopted a price schedule for obtaining copies of records or other rules or regulations pertaining to the Act, please send me a copy.

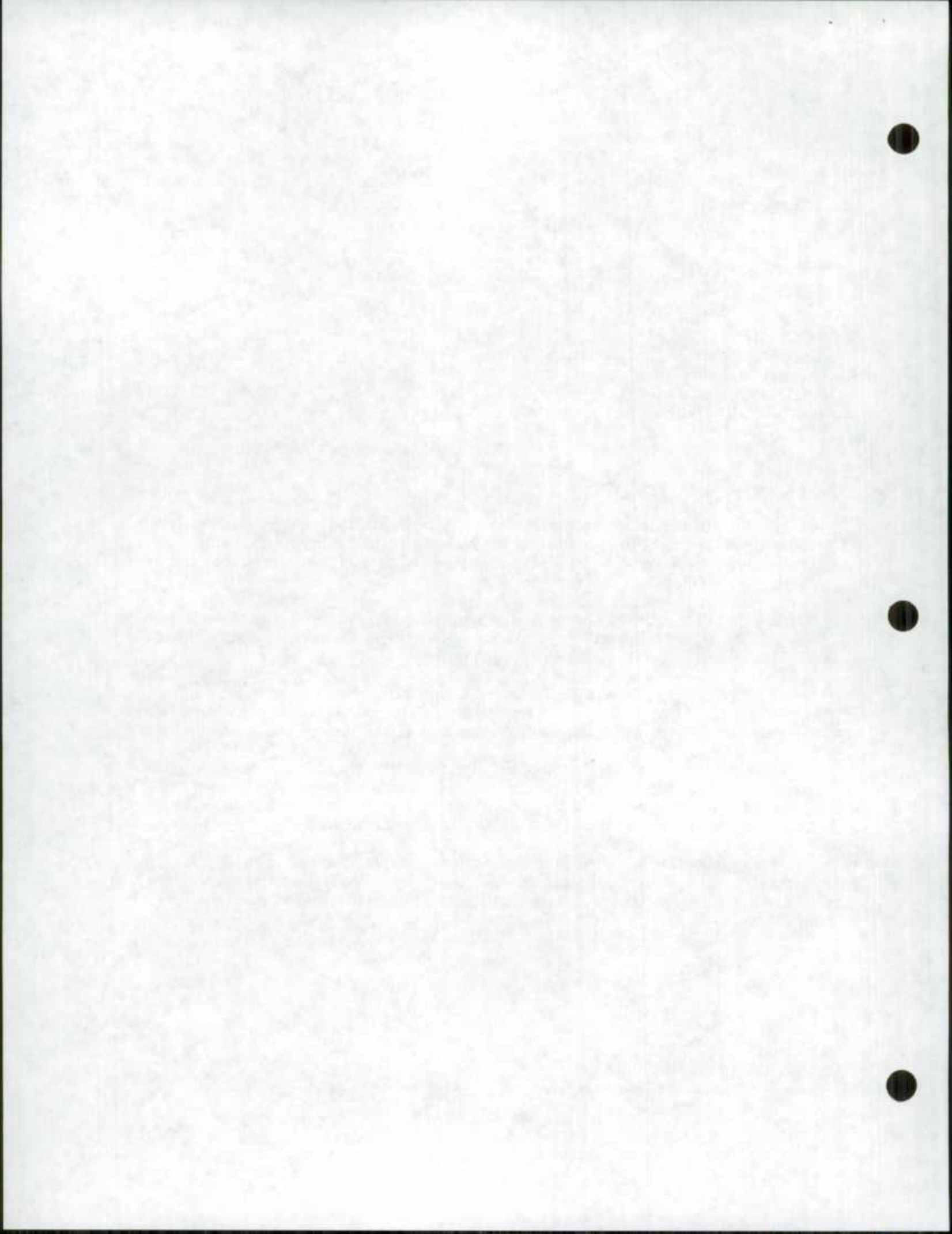
I look forward to receiving your disclosable records promptly and, in any event, to a decision about all of the requested records within thirty days. Thank you for your cooperation. If you have any questions concerning the request, please feel free to telephone me at the above number.

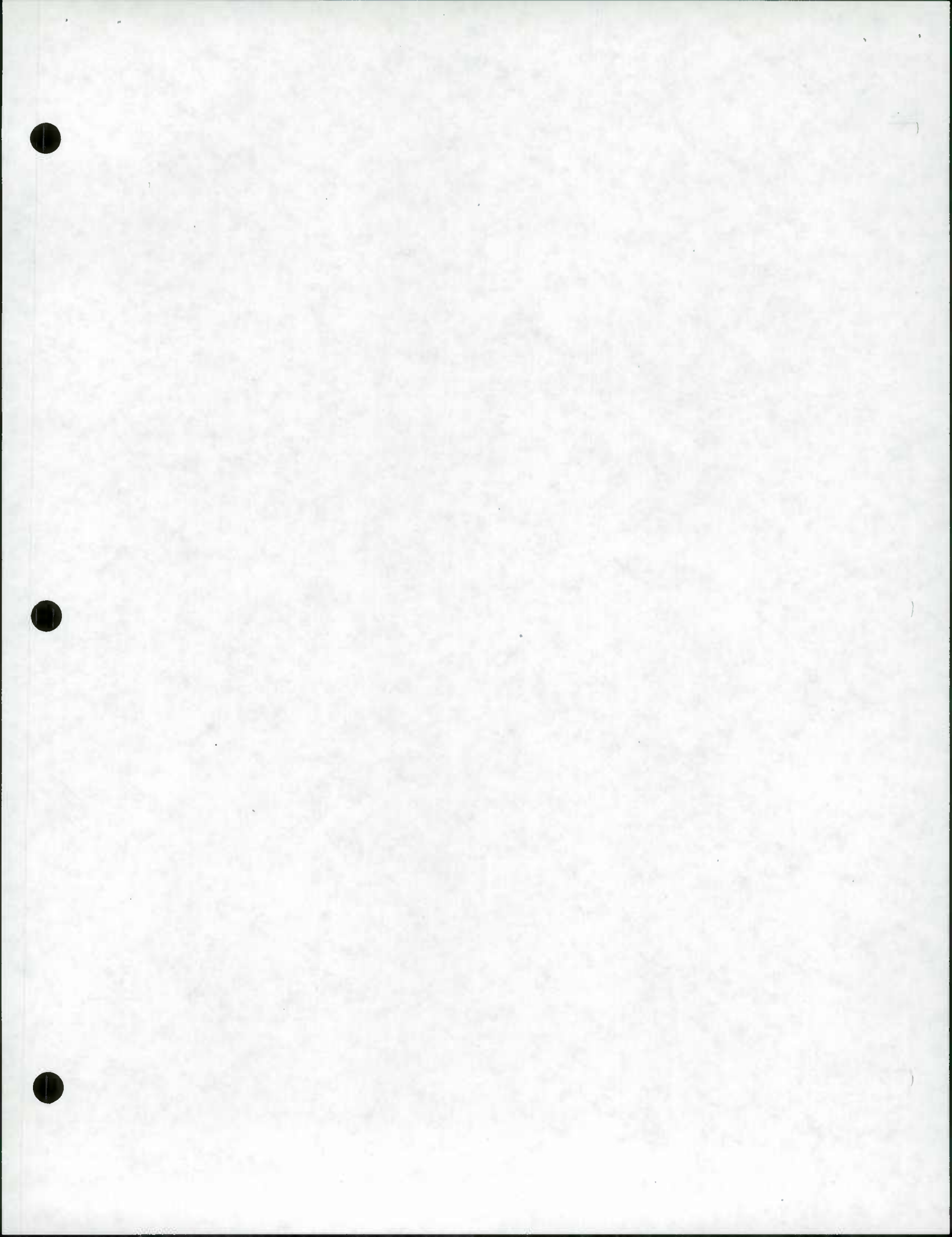
Sincerely,

Alexis E. Kramer

AEK/mln
cc: Phillip and Gloria Blevins

Y:\Kramer\Client Work (009)A - K\Blevins, Phillip and Gloria\Correspondence\cac public info request.wpd





Min 1305 01

LAW OFFICES

EWING, DIETZ, FOUNTAIN &

PROFESSIONAL ASSOCIATION
16 SOUTH WASHINGTON STREET
PO BOX 1146



0 0001 3926 4428



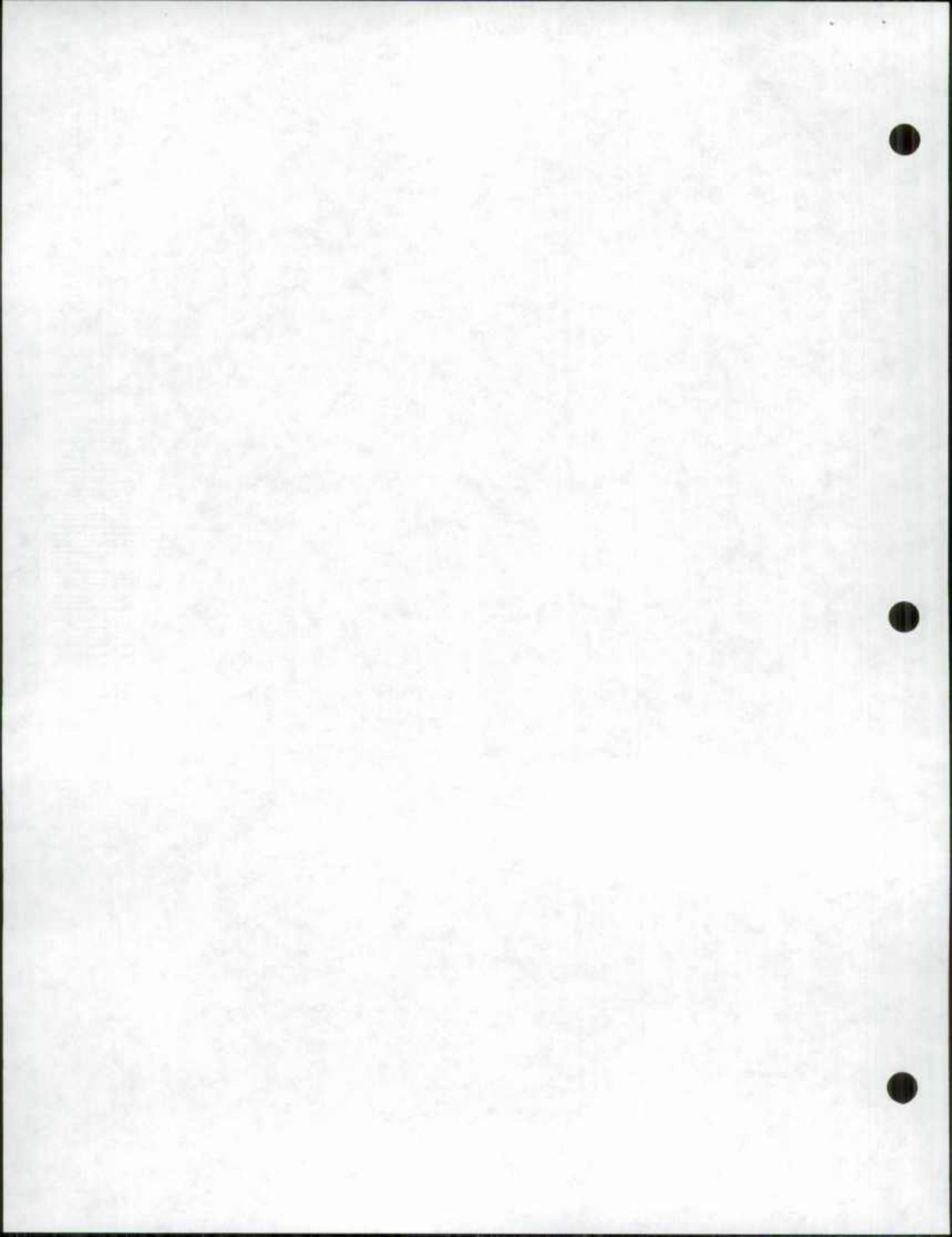
RECEIVED

OCT 27 2008

CRITICAL AREA COMMISSION

Kogged in

Shirley Massenburg, Administrator
Critical Area Commission
1804 West Street
Annapolis, MD 21401



Ma 1402

EWING. DIETZ. FOUNTAIN S

PROFESSIONAL ASSOCIATION
18 SOUTH WASHINGTON STREET
PACER CENTER, Box 1146

RECEIVED MAIL



10 0001 3925 4428

RECEIVED

OCT 27 2008

CRITICAL AREA COMMISSION

Keegan d. vi

Shirley Massenburg, Administrator
Critical Area Commission
1804 West Street
Annapolis, MD 21401

