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April 12, 2024

Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, 3rd Floor
Annapolis, MD 21401

Attn: Ms. Sterling Seay
Planning Administrator

*RE: Letter of Explanation
Application for Variance – Time Extension
Spring Path, Arnold, MD 21012
2021-0146-V*

Dear Ms. Seay,

Robert W. Posten and Ellen C. Bungay-Posten, Trustee (hereinafter, collectively the “Applicant”) seeks a variance pursuant to Anne Arundel County Code § 18-16-405(c) to extend the expiration date of a previously approved variance. Specifically, the requested variance would extend the expiration date of the Applicant’s variance, approved October 12, 2022, for the construction of a single-family detached dwelling unit at the above-referenced property located in Arnold, Maryland (the “Property”).

Property Background

The Property comprises a 0.15 parcel on Spring Path in the Pines on the Severn subdivision. The tax account number is 03-656-00306280 on map 39, parcel 174. The Property is zoned RLD – Residential Low Density and is located in the RCA – Resource Conservation Area critical area. The Property is currently unimproved.

Prior Variance Approval (2021-0146-V)

On or about August 12, 2021, the Applicant filed a variance application for a variance for (1) disturbance of slopes 15% or greater in the RCA, (2) the required planting buffer, and (3) disturbance within 50 feet of steep slopes. The Applicant’s application is attached here as *Attachment A*. On October 28, 2021, the Administrative Hearing Officer (the “AHO”) granted the Applicant’s application for a variance. The variances approved were:

1. A critical area variance from the prohibition in § 17-8-301 against disturbing the buffer or expanded buffer to construct the new two-story dwelling with associated features and a

- driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting; and
2. A critical area variance from the prohibition in § 17-8-201(a) against disturbing steep slopes to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting,
 3. A zoning variance to the prohibition in § 18-4-401 (b) that there shall be a minimum 50-foot planted buffer located and maintained between a principal structure and the crest of steep slopes on a property located in the RLD district to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting.

Attached hereto as *Attachment B* is a copy of the AHO's decision in Case No. 2021-0146-V. Specifically, the requested variances will allow the Applicant to construct a modest two-story dwelling unit.

Requested Variance

The Applicant seeks a variance to allow an extension in time for the implementation of a previously approved variance at the Property. Under § 18-16-405(a), a variance “that is not extended or tolled expires by operation of law unless the applicant within 18 months of the granting of the variance ... (1) obtains a building permit or (2) files an application for subdivision.” § 18-16-405(c) additionally provides that “[a]n applicant may file an application for a variance to extend the time periods set forth in subsection (a).”

The variance was granted on November 9, 2021. Under § 18-16-405(a), the variance is set to expire on April 12, 2024. The Applicant now seeks variance relief pursuant to § 18-16-405(c) to allow for an extension of the variance's expiration date.

County Code Provisions and Review Criteria

As outlined below, the Variance application satisfies all pertinent criteria for variances provided in County Code §§ 18-16-305(a) & (c).

(a) Requirements for zoning variances. The Administrative Hearing Officer may vary or modify the provisions of this article when it is alleged that practical difficulties or unnecessary hardships prevent conformance with the strict letter of this article, provided the spirit of law is observed, public safety secured, and substantial justice done. A variance may be granted only if the Administrative Hearing Officer makes the following affirmative findings:

(1) Because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with this article; or

(2) Because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship and to enable the applicant to develop the lot.

The Applicant's requested variance to extend the expiration date of the variance is necessary to avoid unnecessary hardship and to enable the Applicant to obtain approvals for the implementation of the

variance. Following the AHO's approval of the variance, the Applicant began diligently contacting builders to begin the permit process. However, there was interest from buyers to buy the Property before the house was constructed. The Applicant then paused communication with the builder. After the buyer backed out, there have been multiple circumstances which prevented the Applicant from obtaining a building permit. Firstly, the Applicant is aging and has needed assistance from her daughter. However, her daughter is currently overseas and expecting a child. Together the Applicant and daughter have started reaching out to potential buyers and builders to continue the project.

(c) **Requirements for all variances. A variance may not be granted unless it is found that:**

(1) the variance is the minimum variance necessary to afford relief; and

The requested variance seeks an extension of the expiration date of the Applicant's previously approved variance. The requested variance is the minimum variance necessary to afford relief.

(2) the granting of the variance will not:

(i) alter the essential character of the neighborhood or district in which the lot is located;

The requested variance seeks to extend the expiration date of a previously-approved variance. The essential character of the surrounding neighborhood or district in which the Property is located will not be altered.

(ii) substantially impair the appropriate use or development of adjacent property;

The requested variance will not substantially impair the appropriate use or development of adjacent property.

(iii) reduce forest cover in the limited development and resource conservation area;

The requested variance will not reduce forest cover in the limited development and resource conservation area. The Property is not located in the limited development area or the resource conservation area.

(iv) be contrary to acceptable replanting practices required for development in the critical area or a bog protection area; nor

The Property is located within the RCA critical area, however through mitigation forest cover will be increased.

(v) be detrimental to the public welfare.

The requested variance will not be detrimental to the public welfare. The requested variance seeks only to extend the expiration date of a previously approved variance. Approval of the requested variance will permit the Applicant extra time to obtain all permits to develop a single-family home on the Property.

Conclusion

The Applicant meets the required criteria set forth under § 18-16-305 for the above-requested variance. Accordingly, for the reasons stated above, the Applicant respectfully requests that the Administrative Hearing Officer grant the requested variance to extend the expiration of the Applicant's previously approved variance.

Sincerely,



Phil Dales, Principal
Dales Associates
238 West Street
Annapolis, Maryland 21401
dales@dalesassociates.com
(410) 946-1314

Attachment A

For Office Use Only

CASE # 2021-0146-V
FEE PAID 250-
DATE 8/12/21



For Office Use Only

ZONE RLD
CRITICAL AREA: IDA ___ LDA X RCA X
BMA: Yes ___ No X
NO. OF SIGNS 1

VARIANCE APPLICATION

NOTE: This form can be downloaded to your computer and filled out utilizing Adobe Reader (or similar product). It can also be printed and filled out by hand.

Applicant(s): Ellen C. Bungay-Posten, Trustee
(Applicant must have a financial, contractual, or proprietary interest in the property)

Property Address: Spring Path, Arnold, MD 21012

Property Location: 60 feet of frontage on the (NW) side of Spring Path ;
(Enter Street Name)
160x feet (NE) of (Nearest intersecting street) Old Orchard Road .
(Enter Street Name)

12-digit Tax Account Number 03-656-00306280 Tax District (3) Council District (5)

Waterfront Lot: Y N Corner Lot: Y N Deed Title Reference L.19027 F.477

Zoning District RLD Lot # 240 Tax Map 0039 Block/Grid 0023 Parcel 0174

Area 0.15 (Acres) Subdivision Name Pines on the Severn

Description of Proposed Project and Variance Requested (Brief, detail fully in letter of explanation)
Construct new dwelling. Variances to 17-8-201 for disturbance of slopes 15% or greater in the RCA, to 18-4-401(b) to the required planting buffer between the principal structure and crest of slopes, and to 18-13-104(b)(1) for disturbance within 50-ft from the top of steep slopes

The applicant hereby certifies that he or she has a financial, contractual, or proprietary interest in the property; that he or she is authorized to make this application; that the information shown on this application is correct; and that he or she will comply with all applicable regulations of Anne Arundel County, Maryland.

Applicant's Signature [Signature] Owner's Signature [Signature]

Print Name Ellen C. Bungay-Posten, Trustee Print Name Ellen C. Bungay-Posten, Trustee

Mailing Address 1454 Ridgeway Mailing Address 1454 Ridgeway

City, State, Zip Arnold, MD 21012 City, State, Zip Arnold, MD 21012

Work Phone _____ Work Phone _____

Home Phone _____ Home Phone _____

Cell Phone 410-757-2694 Cell Phone 410-757-2694

Email Address ellenposten@aol.com Email Address ellenposten@aol.com

*** Below For Office Use Only ***

Application accepted by Anne Arundel County Office of Planning and Zoning: [Signature] 8/12/21
Initials Date

Variance to allow a dwelling with less setbacks and RLD planted buffer than required and with disturbance to slopes of 15% or greater

August 10, 2021

Anne Arundel County, Office of Planning and Zoning
2664 Riva Road, 3rd Floor
Annapolis, MD 21401

RE: PINES ON THE SEVERN ~ LOT 240
Spring Path
Arnold, MD 21012
Variance Application

Sir/Madam:

Attached is a variance application and associated submittal package for the above referenced property. In order to redevelop the subject building lot, the owner requires several variances to the Anne Arundel County Code. The requested variances include: **Article 17, Section 8-201(a)** for disturbance of slopes 15% or greater, to **Article 18, Section 4-401(b)** to the required planting buffer between the principal structure and the crest of slopes, and to **Article 18, Section 13-104(b)(1)** to allow disturbance within 50-ft of steep slopes.

The subject property is an unimproved legal building lot located in the community of Pines on the Severn in Arnold, Maryland. The lot is zoned RLD and will be served by public water and a private septic system. The property is located entirely within the Chesapeake Bay Critical Area with an RCA land use designation. The majority of the site is encumbered with steep slopes and the associated buffer, severely limiting and restricting the areas that allow redevelopment. Primary vegetation consists of developed woodland and creeping ground cover common to wooded areas.

The applicants propose construct a modest single-family dwelling with the associated improvements. Due to the unique physical conditions inherent to the property, specifically the presence of steep slopes, the expansion of the steep slope buffer, and planting requirements, the following variances to the Anne Arundel County Code are being requested: **Article 17, Section 8-201(a)** of 176-sf of disturbance on slopes 15% or greater in the LDA, to **Article 18, Section 4-401(b)** to the required planting buffer between the principal structure and the crest of slopes, and to **Article 18, Section 13-104(b)(1)** to allow 2,773-sf of disturbance within 50-ft of steep slopes.

In the pre-file notes, dated June 4, 2021, the property was not considered a corner lot. Therefore, the plan has been updated to reflect a side yard setback of 7-ft instead of 20-ft and the proposed dwelling was shifted away from slopes as requested by the County and as much

as the site condition allows. It should be noted that the proposed dwelling was decreased in depth from the initial design/grading permit submittal.

According to zoning requirements, the lot size is 33% of the required lot size for a lot served by private septic. The proposed dwelling is positioned to accommodate county recommendations, while also addressing the setback requirements of the septic system with minimal variance requirements to the plumbing code. Steep slopes and their associated buffer encumber 54% of the site, leaving no development possible without a variance. Denial of the requested variance would constitute an unwarranted hardship and deny the applicant's rights commonly enjoyed by other property owners. The variance request is not based on actions by the applicant, and will not confer upon the applicant any special privilege that would typically be denied by COMAR or the local Critical Area Program. With the implementation of stormwater management and the nitrogen reducing septic system, the development will not have an adverse effect on water quality or negatively impact fish, wildlife, or plant habitat, and is in conformance with the general purpose and intent of the Critical Area Program. The variance is the minimum necessary to afford relief from the Critical Area legislation. The granting of the variance will not alter the character of the neighborhood, impair the use and development of adjacent properties, reduce forest cover in the RCA, nor be detrimental to the public welfare.

We believe that these requests meet all the requirements for variance, per Article 18-16-305:

Requirements for Critical Area Variances.

1. Unique physical conditions - Specifically topography, the size of the lot, septic requirements, and encumbrance of steep slopes and their buffer. Denial of the requested variance would constitute an unwarranted hardship on the applicant and deprive them of the right to redevelop, and deny reasonable and significant use of the entire property.
2. Rights commonly enjoyed - The proposed improvements are similar and in character with those of surrounding properties. To deny the requested variance would deprive the applicant of rights commonly enjoyed by other properties in the area.
3. Will not confer special privilege - Granting this variance would not confer a special privilege to the applicant. Nearby properties enjoy improvements greater in scale to what is proposed for this project. The applicant has made extensive efforts to design the improvements in a manner that considers surrounding environmental features, has reduced the scope of improvements, and relocated the dwelling based on county recommendations.
4. Not based on conditions or circumstances that are the result of actions by the applicant - Conditions and circumstances are based on the size of the site, requirements of septic, and the presence of steep slopes, not because of actions by the applicants.

5. Will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the County's critical area – The proposed development will not cause adverse impacts to fish, wildlife, or water quality in the Critical Area. Disturbance is minimized only to what is necessary to complete the project. Mitigation will occur in accordance with county regulations and will be addressed during the permitting process. Sediment and erosion controls will be utilized to ensure that construction and grading will not adversely affect the surrounding environmental features located within the Critical Area. These precautions will ensure that water quality, fish, wildlife, and plant habitat will not be adversely affected.

Requirements for all variances.

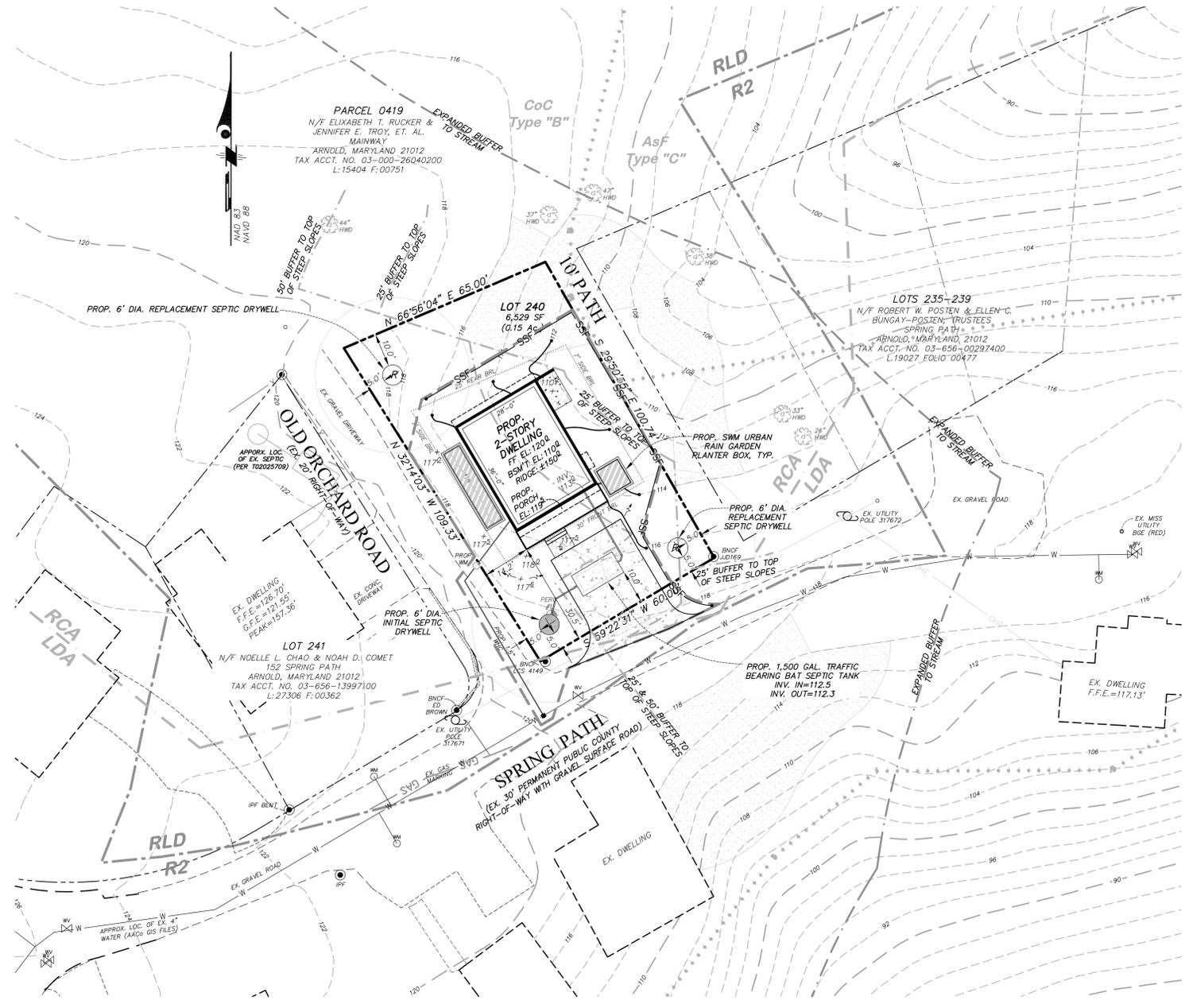
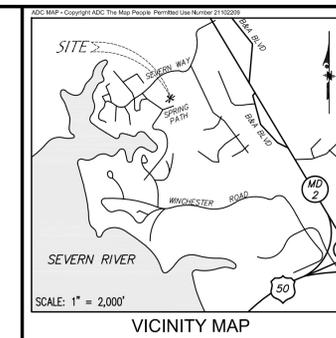
1. Minimum necessary - The improvements are minimal and are sited to minimize disturbance. The scope of improvements has been reduced throughout the process and the dwelling location is based on county recommendations.
2. The granting of the variance will not:
 - i. alter the essential character of the neighborhood, and all proposed development will be harmonious with other properties of the surrounding area.
 - ii. substantially impair the appropriate use or development of adjacent properties.
 - iii. reduce forest cover in the RCA. Forest cover will ultimately be increased through appropriate mitigation
 - iv. be contrary to acceptable clearing or replanting practices required for development of the Critical Area or Bog Protection Area.
 - v. be detrimental to the public welfare

Thank you for your attention to this matter. Please contact us if we may be of further service during your review of this variance request.

Sincerely,
Drum, Loyka & Associates, LLC



Katie Yetman



LEGEND

	Existing Contour
	Existing Woods Line
	Existing Power Pole
	Existing Overhead Electric Line
	Existing Waterline
	Existing Spot Elev.
	25' Buffer to Steep Slopes
	Anne Arundel County Setbacks
	Steep Slopes 15% or Greater

SITE TABULATIONS

• Total Site Area:	6,529 S.F. (0.15 Ac.)
• Critical Area Designation:	RCA
• Site Zoning:	RLD
• Lot Coverage:	
-Existing Lot Coverage:	0 S.F. (0.00 Ac.)
-Allowable Lot Coverage:	2,132 S.F. (0.05 Ac.)
-Proposed Lot Coverage:	1,930 S.F. (0.04 Ac.)
• Coverage by Structures:	
-Existing Coverage by Structures:	0 S.F. (0%)
-Allowable Coverage by Structures:	1,959 S.F. (30%)
-Proposed Coverage by Structures:	1,242 S.F. (±19%)
• Steep Slopes:	
-Total On-Site Steep Slopes:	676 S.F. (0.02 Ac.)
-On-Site Steep Slopes Disturbed:	176 S.F. (0.00 Ac.)
-Total Off-Site Steep Slopes Disturbed:	0 S.F. (0.00 Ac.)
• Expanded Buffer:	
-Total On-Site Buffer Area:	3,497 S.F. (0.08 Ac.)
-On-Site Buffer Disturbance:	2,464 S.F. (0.06 Ac.)
-Total Off-Site Buffer Disturbance:	309 S.F. (0.01 Ac.)

P:\PP19819\CADD-20-PP19819\Eng Drawings\PP19819-1.dwg 08/11/21_9.32

DESIGNED: MMD DRAWN: KLY

ORIG. DATE: 11-22-2019

MODIFIED BY/DATE:

CADD DWG # PP19819

DLA PROJECT # PP19819

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REVISIONS TO APPROVED PLANS			
No.	DATE	BY	DESCRIPTION

Drum, Loyka & Associates, LLC
 CIVIL ENGINEERS - LAND SURVEYORS
 1410 Forest Drive, Suite 35
 Annapolis, Maryland 21403
 Phone: 410-280-3122 · Fax: 410-280-1952
 www.drumloyka.com

OWNER:
 MRS. ROBERT W. POSTEN, TRUSTEE
 1454 RIDGEWAY
 ARNOLD, MARYLAND 21012

VARIANCE PLAN
PINES ON THE SEVERN ~ LOT 240
 SPRING PATH ARNOLD, MARYLAND 21012
 TAX ACCT. NO 03-656-00306280
 TAX MAP 0039 GRID 0023 PARCEL 0174 DISTRICT 3RD
 ANNE ARUNDEL COUNTY, MARYLAND

SCALE: 1"=20' DATE: AUG. 11, 2021 PROJ. NO: PP19819 SHEET 1 OF 1

Attachment B

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2021-0146-V

**ELLEN C. BUNGAY-POSTEN TRUSTEE OF THE
ROBERT W. POSTEN AND ELLEN C. BUNGAY-POSTEN TRUST**

THIRD ASSESSMENT DISTRICT

DATE HEARD: OCTOBER 28, 2021

ORDERED BY:

**DOUGLAS CLARK HOLLMANN
ADMINISTRATIVE HEARING OFFICER**

PLANNER: **JOAN JENKINS**

DATE FILED: **NOVEMBER 9, 2021**

PLEADINGS

Ellen C. Bungay-Posten, as trustee of the Robert W. Posten and Ellen C. Bungay-Posten Trust, hereinafter the Trust or the applicant, seeks a variance (2021-0146-V) to allow a dwelling with less setbacks and planted buffer than required and with disturbance to slopes of 15% or greater (steep slopes) on property located along the northwest side of Spring Path, northeast of Old Orchard Road, Arnold, MD 21012.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's website in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 300 feet of the subject property was notified by mail, sent to the address furnished with the application. Ellen Bungay-Posten testified that the property was posted for more than 14 days prior to the hearing. Therefore, I find and conclude that there has been compliance with the notice requirements.

FINDINGS

A hearing was held on October 28, 2021, in which the witnesses were sworn and the following was presented regarding the proposed variance requested by the applicant.

The Property

The Trust owns the subject property, which has 60 feet of frontage on the northwest side of Spring Path, 160 feet northeast of Old Orchard Road, Arnold. It is known as Lot 240 of Parcel 174 in Block 23 on Tax Map 39 in the Pines on the Severn subdivision. The property comprises 6,529 square feet and is zoned RLD – Residential Low Density District. The property is designated in the Chesapeake Bay Critical Area as resource conservation area (RCA) with a small area designated as limited development area (LDA). The site is encumbered by steep slopes, the expanded buffer to a tributary stream, and the 50-foot top of slopes buffer within the RLD. The property is currently undeveloped and will be served by public water and a private septic system.

The Proposed Work

The applicant proposes to construct a new two-story dwelling 28' by 36' by 31' high with associated features and a driveway as shown on the site plan admitted into evidence at the hearing as County Exhibit 2.

The Anne Arundel County Code

§ 18-13-104 requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands. The buffer is expanded where there are contiguous steep slopes of 15% or more and the buffer is expanded to include the contiguous slopes and land within 50 feet of the top of slopes.

§ 17-8-301 (b) prohibits disturbance in the 100-foot buffer and the expanded buffer.

§ 17-8-201(a) stipulates that development in the LDA may not occur within slopes of 15% or greater (steep slopes) unless development will facilitate stabilization of the slope, is to allow connection to a public utility, or is to provide direct access to the shoreline.

§ 18-4-401(b) requires that there shall be a minimum 50-foot buffer located and maintained between a principal structure and the crest of steep slopes on a property located in the RLD district.

The Variances Requested

The proposed work will require the following variances:

1. A critical area variance from the prohibition in § 17-8-301 against disturbing the buffer or expanded buffer to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting; and
2. A critical area variance from the prohibition in § 17-8-201(a) against disturbing steep slopes to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting.
3. A zoning variance to the prohibition in § 18-4-401(b) that there shall be a minimum 50-foot planted buffer located and maintained between a

principal structure and the crest of steep slopes on a property located in the RLD district to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting.

The Evidence Submitted At The Hearing

Findings and Recommendations of the Office of Planning and Zoning (OPZ)

Joan A. Jenkins, a zoning analyst with the OPZ, presented the following findings:

- OPZ finds that the subject property is grossly undersized for the minimum lot requirement in the R2 district not served by public sewer (6,529 square feet provided, 20,000 square feet required) and does not meet the minimum lot width requirement for a lot in the R2 district. More than half of the lot is encumbered by the expanded buffer to a tributary stream and there are steep slopes on the property making development difficult without a variance.
- The lot is currently undeveloped with no lot coverage. The post-construction lot coverage will be 1,930 square feet, which is below the 2,132 square feet allowed under § 17-8-402 (b) of the Code.
- A review of the County 2020 aerial photograph shows an eclectic mix of dwellings and lots in this waterfront community. Many nearby homes were constructed prior to the enactment of critical area laws; therefore, variances were not required for construction. The aforementioned environmental

constraints on the property prevent development of the site without the requested critical area and zoning variances.

- The applicant's letter of explanation states that the applicant has made extensive efforts to design the improvements in a manner that considers surrounding environmental features, has reduced the scope of improvements, and has relocated the dwelling based on County recommendations.
- The Soil Conservation District has no objections to the proposal and will provide comments during sediment control review.
- The Fire Department recommends approval of the variance request.
- The Department of Recreation and Parks commented that the variance case will not have an impact on Anne Arundel County greenways, parks, and trails and has no comment.
- The Health Department has reviewed the onsite sewage disposal and has no objection to the request.
- The Department of Inspections and Permits, Engineering Division commented that the septic system will need to be reviewed and approved by the Health Department. Engineering does not have enough information to make a favorable recommendation on this application. The proposed SWM approach seems feasible. The proposed water meter will not be allowed as shown and must be adjacent to the Spring Path right-of-way.

- The Development Division (Critical Area Team) commented that, based upon State Wetland maps, a portion of this site falls within a mapped Wetland of Special State Concern. Any development of this site will be subject to all applicable regulations specific to the protection of this environmental feature regardless of the approval status of this application.
- The Critical Area Commission took no position but commented that appropriate mitigation should be provided.
- For the granting of a critical area variance, a determination must be made as to whether, because of certain unique physical conditions peculiar to and inherent in the property, strict implementation of the County's Critical Area Program would result in an unwarranted hardship. In this case, this lot is encumbered by steep slopes and the expanded buffer and the proposal is development of a vacant lot with a residential dwelling.
- A literal interpretation of the County's Critical Area Program will deprive the applicant of rights that are commonly enjoyed by other properties in similar areas within the critical area of the County by denying them the right to develop an existing residential lot with an allowed use. The granting of the variances will not confer on the applicant special privileges that would be denied by COMAR, Title 27. The variance request is not based on conditions or circumstances that are the result of actions by the applicant and does not arise from any condition relating to land or building use on any neighboring property. With stormwater management the granting of the variance should not

adversely affect water quality or impact fish, wildlife or plant habitat and will be in harmony with the general spirit and intent of the County's Critical Area Program. The applicant has overcome the presumption that the specific development does not conform to the general purpose and intent of the critical area law and has evaluated and implemented site planning alternatives.

- Approval of the variances would not alter the essential character of the neighborhood as the proposal is comparable to other dwellings in the area. Approval of the variances will not substantially impair the appropriate use or development of adjacent property, as the dwelling will meet all required setbacks and will be located well away from the dwellings on abutting lots. The variances will not reduce forest cover in the limited development area or the resource conservation area, will not be contrary to acceptable clearing and replanting practices, and will not be detrimental to the public welfare.
- With regard to the requirements for all variances, the request is considered to be the minimum necessary to afford relief as the request is for a modest-sized house that has been sited to minimize disturbance. The 50-foot top of steep slopes buffer and the expanded buffer encompasses more than 50% of the property and runs through the middle of the property making any development impossible without a variance.
- With regard to the standards by which a variance may be granted as set forth in § 18-16-305, under the County Code, OPZ recommends *approval* of the critical area and zoning variances.

Other Testimony and Exhibits

Ms. Ellen C. Bungay-Posten, trustee for the applicant Trust, explained that she is a long-term resident of Pines on the Severn with longstanding involvement in efforts to preserve the environment and the character of her community. She wants to build a modest single-family dwelling on the property that fits into the neighborhood and complies with all environmental regulations.

Michael Drum of Drum, Loyka & Associates, LLC, the applicant's engineer, testified that the proposed dwelling is modest and compatible with the neighborhood. The property is approximately one-third of the required size for a lot in the RLD district. The property is fairly level, with small portions of steep slopes. A small portion of the northeast corner of the property that contains steep slopes would be temporarily disturbed during construction (175 square feet). A third-party wetlands expert was retained who determined there were no wetlands within 100 feet. Mr. Drum opined that development of the site as proposed would not have an adverse impact on adjoining property.

Beverly C. Rucker testified that she and her family have been instrumental in saving the twenty acres that border the headwaters of Chase Creek from development by protecting it with a conservation easement. It is also a Non-tidal Wetland of Special State Concern and contains State Threatened Species and erosive soils. Approvals from the Maryland Department of the Environment and the Maryland Department of Natural Resources will have to be obtained. She testified that development of the subject property would erode fragile slopes and

create unmitigated and irreversible damage to the protected area adjoining the subject property. The adjoining area is also a Habitat Protection Area and BioNet in which there is a population of State-listed endangered plants. Also, there are highly erodible soils onsite.

Ms. Rucker provided exhibits that showed the relationship of the subject property to the protected area surrounding Chase Creek, the RCA and LDA designated areas, the extent of the Non-tidal Wetland of Special State Concern,¹ the extent of the Habitat Protection Area and BioNet, and the soil types for the subject property and adjoining properties. Ms. Rucker believes that, on these facts, the requested variances should not be granted.

There was no other testimony taken or exhibits received in the matter. The Hearing Officer did not visit the property.

DECISION

State Requirements for Critical Area Variances

§ 8-1808(d)(2) of the Natural Resources Article, Annotated Code of Maryland, provides in subsection (ii), that “[i]n considering an application for a variance [to the critical area requirements], a local jurisdiction shall presume that the specific development in the critical area that is subject to the application and for which a variance is required does not conform to the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements

¹ The extent of the Non-tidal Wetland of Special State Concern is shown extending into the subject property more than is shown on other exhibits. The true extent will have to be determined by the State during permit review.

of the jurisdiction's program." (Emphasis added.) "Given these provisions of the State criteria for the grant of a variance, the burden on the applicant is very high." *Becker v. Anne Arundel County*, 174 Md. App. 114, 124; 920 A.2d 1118, 1124 (2007).

In *Becker v. Anne Arundel County*, *supra*, 174 Md. App. at 131; 920 A.2d at 1128, the Court of Special Appeals discussed the history of the critical area law in reviewing a decision from this County. The court's discussion of the recent amendments to the critical area law in 2002 and 2004, and the elements that must be satisfied in order for an applicant to be granted a variance to the critical area, is worth quoting at length:

In 2002, the General Assembly amended the [critical area] law. ... The amendments to subsection (d) provided that, (1) in order to grant a variance, the Board had to find that the applicant had satisfied each one of the variance provisions, and (2) in order to grant a variance, the Board had to find that, without a variance, the applicant would be deprived of a use permitted to others in accordance with the provisions in the critical area program. ... The preambles to the bills expressly stated that it was the intent of the General Assembly to overrule recent decisions of the Court of Appeals, in which the Court had ruled that, (1) when determining if the denial of a variance would deny an applicant rights commonly enjoyed by others in the critical area, a board may compare it to uses or development that predated the critical area program; (2) an applicant for a variance may generally satisfy variance standards rather than satisfy all standards; and, (3) a board could grant a

variance if the critical area program would deny development on a specific portion of the applicant's property rather than considering the parcel as a whole.

...

In 2003, the Court of Appeals decided *Lewis v. Dept. of Natural Res.*, 377 Md. 382, 833 A.2d 563 (2003). *Lewis* was decided under the law as it existed prior to the 2002 amendments (citation omitted), and held, *inter alia*, that (1) with respect to variances in buffer areas, the correct standard was not whether the property owner retained reasonable and significant use of the property outside of the buffer, but whether he or she was being denied reasonable use within the buffer, and (2) that the unwarranted hardship factor was the determinative consideration and the other factors merely provided the board with guidance. *Id.* at 419-23, 833 A.2d 563.

Notwithstanding the fact that the Court of Appeals expressly stated that *Lewis* was decided under the law as it existed prior to the 2002 amendments, in 2004 Laws of Maryland, chapter 526, the General Assembly again amended State law by enacting the substance of Senate Bill 694 and House Bill 1009. The General Assembly expressly stated that its intent in amending the law was to overrule *Lewis* and reestablish the understanding of unwarranted hardship that existed before being "weakened by the Court of Appeals." In the preambles, the General Assembly recited the history of the 2002 amendments and the *Lewis* decision. The amendment changed the definition of unwarranted hardship [found in § 8-1808(d)(2)(i)] to mean that, "without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested." (Emphasis added.)

The question of whether the applicant is entitled to the variance requested begins, therefore, with the understanding that, in addition to the other specific factors that must be considered, the applicant must overcome the presumption, “that the specific development in the critical area that is subject to the application ... does not conform to the general purpose and intent of [the critical area law].”² Furthermore, the applicant carries the burden of convincing the Hearing Officer “that the applicant has satisfied each one of the variance provisions.”³ (Emphasis added.) “*Anne Arundel County’s local critical area variance program contains ... separate criteria. ...Each of these individual criteria must be met.*” *Becker v. Anne Arundel County, supra*, 174 Md. App. at 124; 920 A.2d at 1124. (Emphasis in original.) In other words, if the applicant fails to meet just *one* of these criteria, the variance is *required* to be denied.

In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals ruled that:

In ... order to establish an unwarranted hardship, the applicant has the burden of demonstrating that, without a variance, the applicant would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot

² § 8-1808(d) (2) (ii) of the Natural Resources Article. References to State law do not imply that the provisions of the County Code are being ignored or are not being enforced. If any difference exists between County law and State law, or if some State criteria were omitted from County law, State law would prevail. *See*, discussion on this subject in *Becker v. Anne Arundel County, supra*, 174 Md. App. at 135; 920 A.2d at 1131.

³ § 8-1808(d) (4) (ii).

be accomplished elsewhere on the property without a variance.

(Emphasis added.)

The variances sought in this application are variances from the critical area law (buffers and steep slopes) and from the zoning law (planted buffer requirements). “[A number of requests in the *Becker* decision] were for variances from the stringent critical area law. The request for a variance from the planted buffer, however, is a request under the more lenient general zoning requirements. As indicated above, the criteria for a general zoning variance and the criteria for a critical area variance are not the same.” *Becker v. Anne Arundel County, supra*, 174 Md. App. at 141; 920 A.2d at 1134.

Therefore, the critical area variances must be considered separately from the general zoning or setback variances.⁴ I will first analyze the facts in light of the requested critical area variances, and then analyze the facts in light of the zoning variance requested.

County Requirements for Critical Area Variances

§ 18-16-305(b) sets forth six separate requirements (in this case) that must be met for a variance to be issued for property in the critical area. They are (1) whether a denial of the requested variance would constitute an unwarranted hardship, (2) whether a denial of the requested variance would deprive the applicants of rights commonly enjoyed by other property owners, (3) whether

⁴ “We agree that the Board should have distinguished between the critical area variance and the setback variance.” *Becker v. Anne Arundel County, supra*, page 174 Md. App. at 141; 920 A.2d at 1134.

granting the variance would confer a special privilege on the applicants, (4) whether the application arises from actions of the applicants, or from conditions or use on neighboring properties, (5) whether granting the application would not adversely affect the environment and be in harmony with the critical area program, and (6) whether the applicants have overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), of the State law that the variance request should be denied.

Provided that the applicants meet the above requirements, a variance may not be granted unless six additional factors are found: (1) the variance is the minimum variance necessary to afford relief; (2) the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located; (3) the variance will not substantially impair the appropriate use or development of adjacent property; (4) the variance will not reduce forest cover in the limited development and resource conservation areas of the critical area; (5) the variance will not be contrary to acceptable clearing and replanting practices required for development in the critical area; or (6) the variance will not be detrimental to the public welfare.

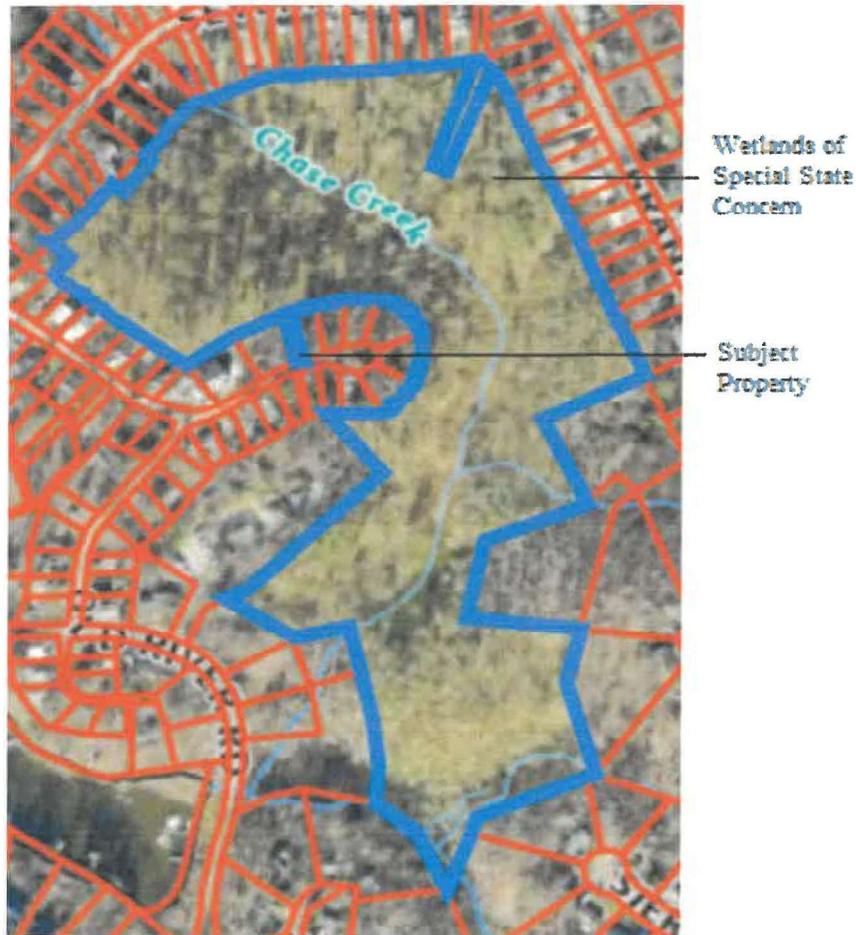
Findings – Critical Area Variance

Background

The subject property is an undeveloped lot in the subdivision of Pines on Severn. The property is outlined in blue on the following aerial photograph:



The property is surrounded by sensitive environmental features, including the expanded buffer to tidal waters and a stream, steep slopes, and a Non-tidal Wetlands of Special State Concern centered on Chase Creek that wraps around it, as shown by the following aerial photograph:



It is also a grandfathered legal lot, created before zoning came into effect in 1952 and the critical area law came into effect in 1988. The question of how the critical area law is applied to property that was subdivided prior to the enactment of the critical area law is answered in § 27.01.02.07 of the Code of Maryland Regulations (COMAR):

.07 Grandfathering.

B. ... A local jurisdiction shall permit a single lot or parcel of land that was legally of record on the date of program approval to be developed with a single family dwelling, if a dwelling is not already placed there, notwithstanding that such development may be

inconsistent with the density provisions of the approved local program.

This does not mean that any dwelling of any size or height may be constructed on the property. Variances to the critical area law are still required. Furthermore, any relief from the critical area law must be, among other things, the minimum allowable. This requires a review of the facts as presented during the hearing and an analysis of them based upon the criteria found in § 18-16-305(b) of the Code.

Ms. Rucker, a nearby property owner, submitted a detailed analysis of the environmental limitations in the law that may affect how and whether the subject property can be developed. (Protestant's Exhibit 1, with detailed analysis of the factors discussed above.) She raised questions of how the proposed development of the subject property would be affected by the restrictions and conditions of the conservation area that protects Chase Creek and the Non-tidal Wetlands of Special State Concern in the same area. Also, maps that she produced showed that the Habitat Protection Area and BioNet extended into the subject property in which there is a population of State-listed endangered plants. Finally, she questioned how the presence of highly-erodible soils on the property and on the adjoining protected area.

Findings – Critical Area

The jurisdiction of this Office is limited to deciding whether to grant or deny the variances requested by the applicant. How development of the subject

property should be altered or affected because of the presence of the protected area adjoining the subject property, the presence and extent of the Non-tidal Wetlands of Special State Concern, the Habitat Protection Area and BioNet, and the presence of highly-erodible soils will have to be determined by the State and County engineers and permit examiners during the permitting process.

The applicant is entitled to relief from the Code because denying the requested variances would constitute an unwarranted hardship under the *Assateague* test as set forth above. The subject property is a legal lot that could have been developed prior to the imposition of the critical area law restrictions. To decide otherwise would be to force the applicant to donate its property to the State and County without compensation. The concerns about how development would affect adjoining properties are not sufficient at this point to deny any development of the property.

The question is not whether the applicant is entitled to the critical area variances it requests but how much development should be allowed. In other words, is the proposed development the minimum needed to allow the applicant to develop the property? The Code does not specify what “the minimum variance necessary [is] to afford relief.”

Factors that may serve as guidelines have been discussed in other cases. They can be:

- The substandard size of this grandfathered lot, which is one-third the required 20,000 square feet in area;
- the size of other developed properties in the neighborhood (which is in the applicant's favor here because the size of the proposed dwelling is in accordance with the average size of homes in the neighborhood);
- the amount of disturbance proposed (which is in the applicant's favor here because the proposed disturbance is less than the allowable amount);
- the livability of the proposed dwelling as opposed to a smaller home (which is in the applicant's favor here because of testimony that the proposed home is standard); and
- the fact that no zoning setback variances are needed.

Having reviewed the many different ways this property can be viewed, looked at, compared, and measured, the proposal sufficiently meets the "minimum relief" standard for the requested critical area variances to be granted.

Requirements for Zoning Variances

§ 18-16-305 sets forth the requirements for granting a zoning variance. Subsection (a) reads, in part, as follows: a variance may be granted if the Administrative Hearing Officer finds that practical difficulties or unnecessary hardships prevent conformance with the strict letter of this article, provided the spirit of law is observed, public safety secured, and substantial justice done. A variance may be granted only if the Administrative Hearing Officer makes the following affirmative findings:

- (1) Because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with this article; or
- (2) Because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship and to enable the applicants to develop the lot.

The variance process for subsection (1) above is a two-step process. The first step requires a finding that special conditions or circumstances exist that are peculiar to the land or structure at issue which requires a finding that the property whereupon the structures are to be placed or use conducted is unique and unusual in a manner different from the nature of the surrounding properties. The second part of the test is whether the uniqueness and peculiarity of the property causes the zoning provisions to have a disproportionate impact upon the subject property causing the owner a practical difficulty or unnecessary hardship. “Uniqueness” requires that the subject property have an inherent characteristic not shared by other properties in the area. *Trinity Assembly of God of Baltimore City, Inc. v. People’s Counsel for Baltimore County*, 178 Md. App. 232, 941 A.2d 560 (2008); *Umerley v. People’s Counsel for Baltimore County*, 108 Md. App. 497, 672 A.2d 173 (1996); *North v. St. Mary’s County*, 99 Md. App. 502, 638 A.2d 1175 (1994), cert. denied, 336 Md. 224, 647 A.2d 444 (1994).

The variance process for subsection (2) - practical difficulties or unnecessary hardship - is simpler. A determination must be made that, because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship, and to enable the applicants to develop the lot.

Findings - Zoning Variances

I find, based upon the evidence, that because of unique physical conditions peculiar to and inherent in the subject property, i.e., the substandard area and width of the lot, there is no possibility of developing the subject property in strict conformance with the Code. Therefore, I will grant the zoning variance requested by the applicant.

I further find that the granting of the requested critical area and zoning variances are the minimum needed for relief, will not alter the essential character of the neighborhood or district in which the lot is located, will not substantially impair the appropriate use or development of adjacent property, will not reduce forest cover in the limited development and resource conservation areas of the critical area, will not be contrary to acceptable clearing and replanting practices required for development in the critical area, or be detrimental to the public welfare.

ORDER

PURSUANT to the application of Robert W. Posten and Ellen C. Bungay-Posten Trust, petitioning for a variance to allow a dwelling with less setbacks and

planted buffer than required and with disturbance to slopes of 15% or greater (steep slopes) on property located along the northwest side of Spring Path, northeast of Old Orchard Road, Arnold;

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this **9th day of November, 2021**,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the applicant are **granted**:

1. A critical area variance from the prohibition in § 17-8-301 against disturbing the buffer or expanded buffer to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting; and
2. A critical area variance from the prohibition in § 17-8-201(a) against disturbing steep slopes to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting.
3. A zoning variance to the prohibition in § 18-4-401(b) that there shall be a minimum 50-foot planted buffer located and maintained between a principal structure and the crest of steep slopes on a property located in the RLD district to construct the new two-story dwelling with associated features and a driveway as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting.

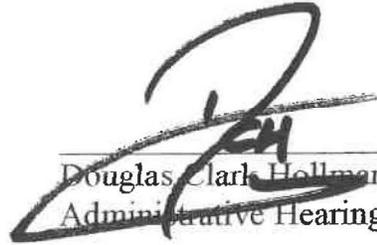
The foregoing variances are subject to the following conditions:

- A. The applicant shall comply with any instructions and necessary approvals from the Office of Planning and Zoning, the Department of Inspections and Permits, the Department of Health, and/or the Critical Area Commission.
- B. The applicant shall comply with any instructions and necessary approvals from the Soil Conservation District, the Maryland Department of the Environment, and the Maryland Department of Natural Resources.

This Order does not constitute a building permit. In order for the applicant to construct the structures permitted in this decision, the applicant must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Furthermore, County Exhibit 2, referenced in this decision, is incorporated herein as if fully set forth and made a part of this Order. The proposed improvements shown on County Exhibit 2 shall be constructed on the subject property in the locations shown therein. The decision and order shall not prohibit the applicant from making minor changes to the facilities as presently shown on County Exhibit 2 to adjust for changes made necessary by comments or requirements that arise during plan review or construction, provided those minor changes do not exceed the variances granted herein. The reasonableness of any

such change shall be determined by the Office of Planning and Zoning.



Douglas Clark Hollmann
Administrative Hearing Officer

NOTICE TO APPLICANT

This Order does not constitute a building permit. In order for the applicant to perform the work permitted in this decision, the applicant must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Any person, firm, corporation, or governmental agency having an interest in this Decision and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals within thirty (30) days from the date of this Decision. **If the variance or variances granted in this case relate to work in the critical area, a permit for the activity that was the subject of this variance application will not be issued until the appeal period has elapsed.**

Further, § 18-16-405(a) provides that a variance or special exception that is not extended or tolled **expires by operation of law** unless the applicant **within 18 months** of the granting of the variance or special exception (1) obtains a building permit or (2) files an application for subdivision. Thereafter, the variance or special exception shall not expire so long as (1) construction proceeds in accordance with the permit or (2) a record plat is recorded among the land records pursuant to the application for subdivision, the applicant obtains a building permit within one year after recordation of the plat, and construction proceeds in accordance with the permit.

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