

The Variance Process

**Critical Area Commission
for the
Chesapeake and Atlantic Coastal Bays
Coastal Training Program**

*September 21, 2011
Annapolis*

When Is a Variance Necessary?

- To develop on lots with site constraints created by the Critical Area Program
- To allow for reasonable expansion – may not be possible to fully comply with Critical Area requirements
- Address changes in site conditions
- For repairs and reconstruction
- Not needed to accommodate persons with disabilities as long as provisions in a local program



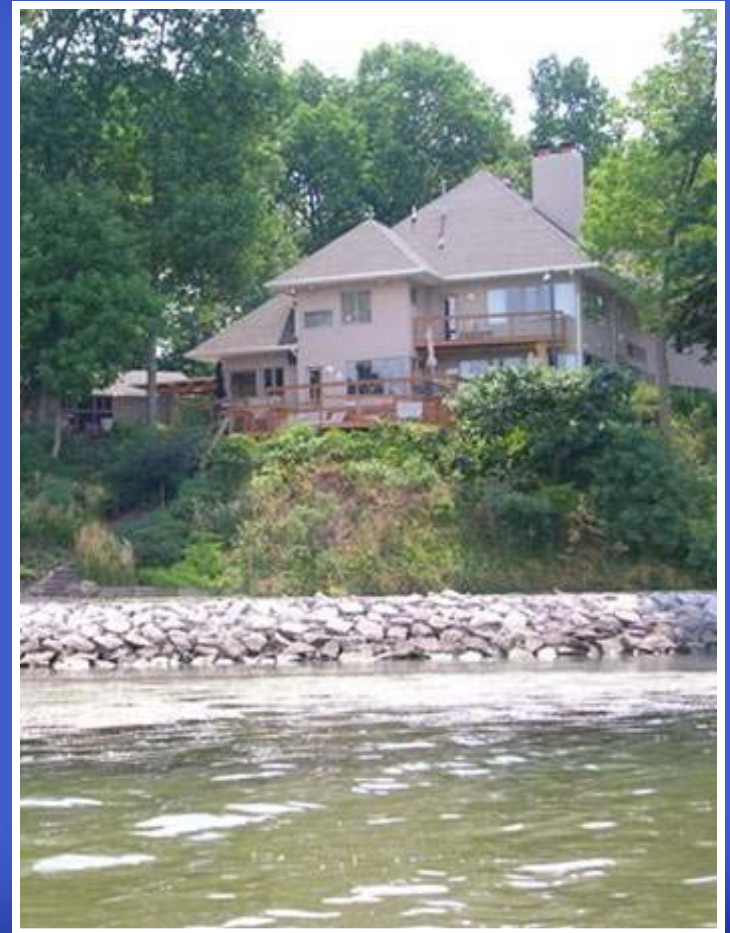
Typical Variance Applications

- New dwellings on vacant “grandfathered” lots in the Buffer
- Dwelling additions, patios and decks in the Buffer
- Grading in the Buffer
- Exceeding lot coverage limits
- Exceeding clearing limits
- Disturbing or building on steep slopes



But ...

- More than 300 applications each year
- Over 90% granted
- Application review is time consuming
- Variance process can be costly for landowners
- Outcome can be variable
- Often better site design, creative engineering could eliminate the need for a variance



Variations Can Be Problematic

- Boards grant too many for the wrong reasons
- Treated as “minor” regardless of impacts to natural resources
- Not treated as a rare exception
- Standards, especially “unwarranted hardship” difficult for Boards to apply effectively
- Often granted “after-the-fact” and treated as a “solution” to a violation
- Often granted on sites with other violations
- Mitigation sometimes considered optional, not implemented, or not effective

Variance Standards - Must Meet All 5

- Special features of a site – literal enforcement would result in an unwarranted hardship
- Applicant deprived of use permitted to others under a local Critical Area program
- Cannot confer a special privilege that would be denied others in the Critical Area
- Not based on actions by the applicant or related to a neighboring property
- Will not adversely affect water quality or habitat and will be in harmony with the general spirit and intent of the law and regulations

Unwarranted Hardship

- Consider special features of the site relating to an applicant's land or structure
- Without the variance, applicant would be denied reasonable and significant use of the entire parcel or lot
- Very high standard – goes well beyond “practical difficulty” (strengthened by General Assembly in 2004)
- Should not be considering:
 - Landowner convenience
 - After-the-fact construction
 - Owner not knowing regulations
- Boards often don't consider creative site design or engineering options

What Is Reasonable Use?



- Some structures cannot meet the unwarranted hardship standard (pools, gazebos, detached decks)
- “Reasonable use” must analyze the whole site
- Comparison to surrounding properties developed under a local program may be helpful
- Multiple variance requests – proposal may not be “reasonable”
- Must design to site constraints

Rights Commonly Enjoyed

- Applicant deprived of rights enjoyed by other properties
- “Rights enjoyed” must have been implemented under the Critical Area program
- Other properties must be in the Critical Area
- Other land should be physically similar (size, shape, topography)



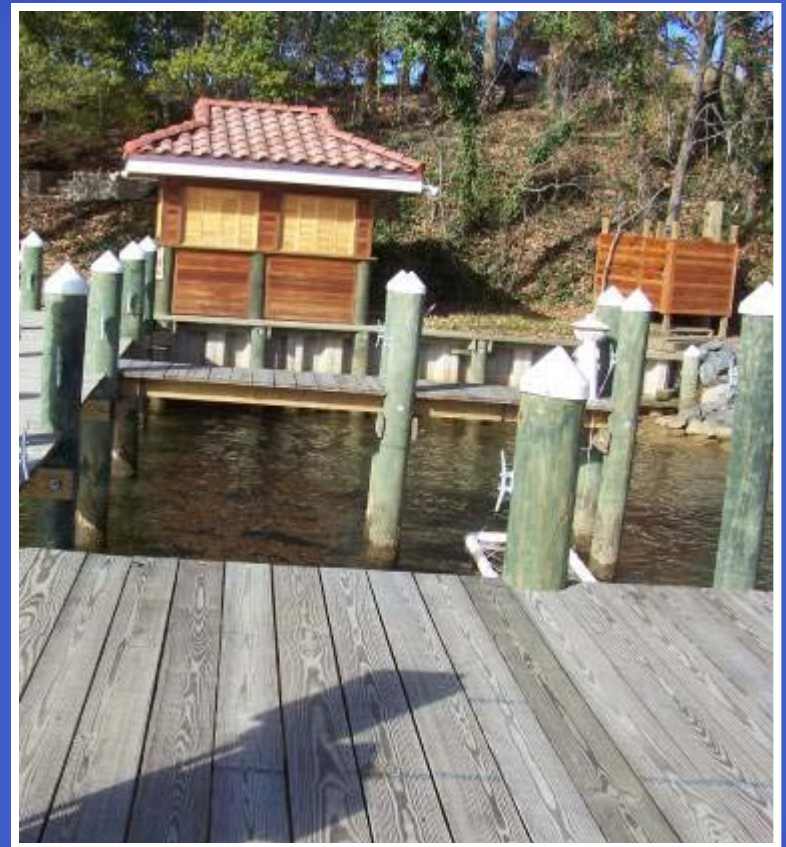
No Special Privilege Conferred

- Approval must not allow activities that would be denied on other properties in the Critical Area under the law
- Difficult not to personalize or attempt to “balance”
- Board’s consideration of “unique needs” of applicant often lead to special privilege
- BOA cannot consider other environmental stewardship activities



Variance Not Related to Actions by the Applicant or Off-Site Conditions

- Boards often don't consider that a hardship can be self-created
- Variance should not be based on applicant's actions – construction, disturbance without authorization
- General Assembly stated that jurisdictions shall consider this
- Variance should not relate to conditions on a neighboring property
- Variance should not be based on impacts associated with removal



No Adverse Impacts on Water Quality or Habitat

- Impacts of individual variances may seem small
- Law specifically addresses cumulative impacts
- Must consider thousands of variances over time
- Must consider overall environmental sensitivity of the Bays' ecosystems
- Boards must seek to minimize impacts for every application



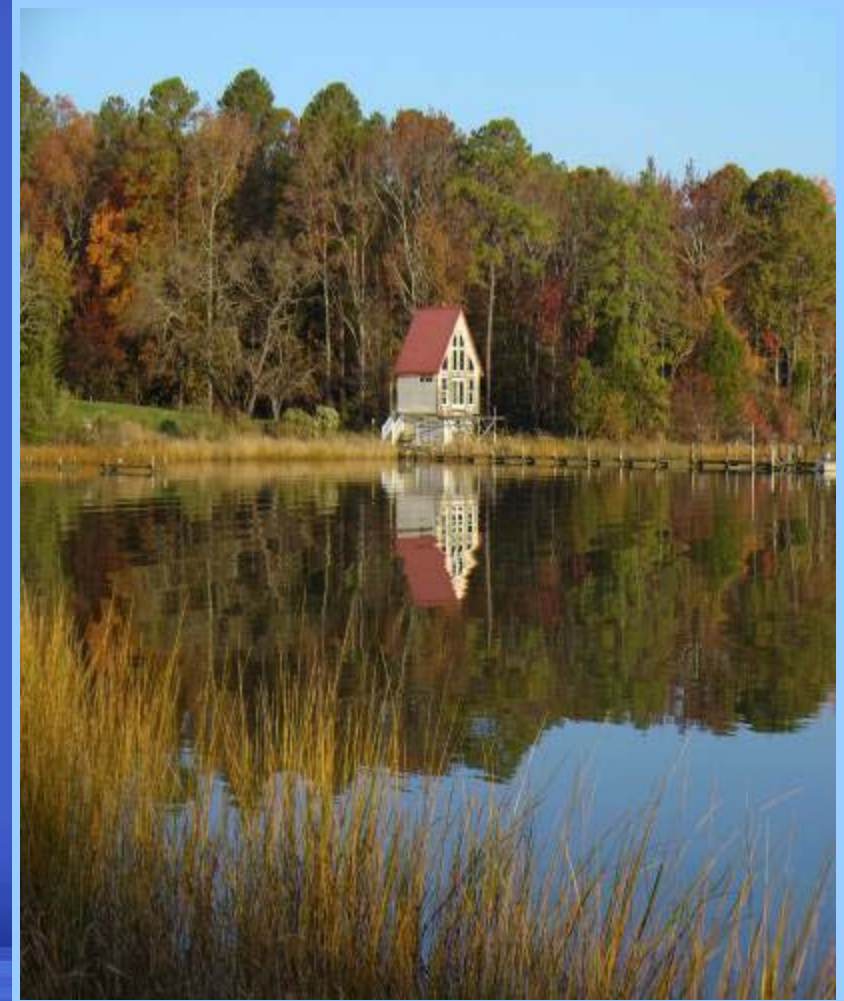
Harmony with Spirit and Intent of the Critical Area Program



- Boards must consider if request is the minimum necessary
- Reduction in size, change in location often feasible
- Board should always require mitigation (mandatory in the Buffer)
- Mitigation should address water quality and habitat
- Mitigation should be in addition to penalties or restoration for a violation

Local Government Role in the Variance Process

- Balance landowner desires with protection of resources
- Variances should not be granted lightly
- Explore alternatives with applicants
- If granted, mitigation is essential to meeting “spirit and intent” of the Program
- Clearly identify and explain required mitigation

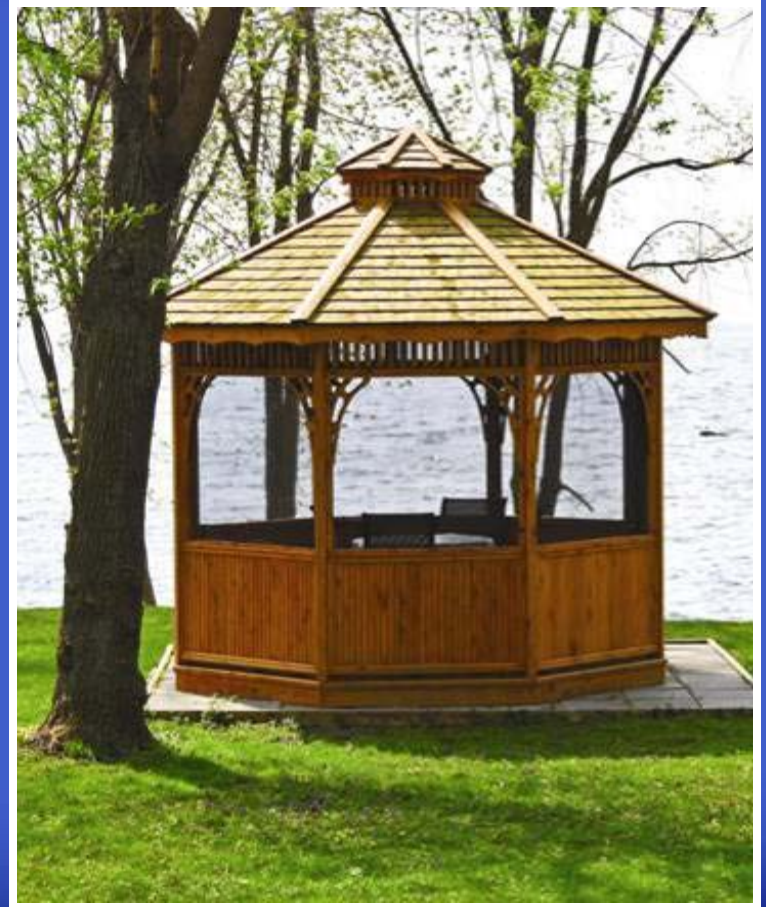


Be Creative to Avoid Unnecessary Variances

- Avoidance
 - Avoid the need for a variance through creative design
 - Relocate or reconfigure development
- Minimization
 - If impacts are unavoidable – minimize them
 - Reduce footprint
- Mitigation
 - Address conservation of existing resources (forest, wetlands, etc.)
 - Provide water quality improvement
 - Provide habitat enhancement

Commission's Role in the Variance Process

- Review and comment on all variance requests based on information submitted
- Evaluate “grandfathered status”
- In some cases perform site visits to assess actual conditions
- Provide technical assistance and design guidance
- Try to eliminate the need for a variance or minimize impacts



Commission's Role in the Variance Process

- Provide consistent State-wide guidance in the application of standards and overall variance review
- Assist local governments by appearing before local BOAs when necessary
- Facilitate interpretation of local program, State law, and Criteria
- Assess adequacy and comment on proposed mitigation



Good Decisions by Local Boards

- Based on an accurate site plan
- Address conditions of the site and overall lot constraints
- Must include substantiated written findings for each variance standard
- Identify the unwarranted hardship and lack of reasonable use
- Include design alternatives explored; why they were rejected
- Ensure environmental impacts are minimized
- Include mitigation to address water quality and habitat impacts



Appeals to Courts – Should Not Be Way Around BOA

- Bad variance cases often lead to bad decisions
- CAC has “standing” to appeal decisions
- Applicants often view going to Court as a part of the variance process
- Court process is typically lengthy and unpleasant
- Court decisions can sometimes make the situation worse
- Court decisions set legal precedent that can be harmful to the Critical Area Program



Photo by Jimmy Emerson

How the Courts Support the Critical Area Law

- Review variance decisions based on the standards
- Remand or reverse decisions that do not properly apply the Critical Area law, or that lack complete findings
- Ensure that relief provided is the minimum necessary for reasonable use
- Consider alternative designs, construction techniques, strategies that may be practical and effective
- Ensure that approved variances include appropriate mitigation and that the mitigation gets implemented
- Consider the sensitivity of the Bays' watersheds and the degradation caused by thousands of "minor impacts"

Alternatives to BOA Variances

- Creative site design
- Creative building design
- Better staff and applicant coordination
- Administrative variance process
- Use of Modified Buffer Areas
- Creative zoning approaches



Is a Variance Necessary?

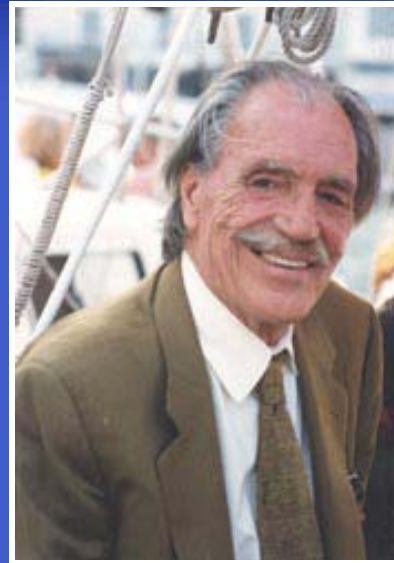
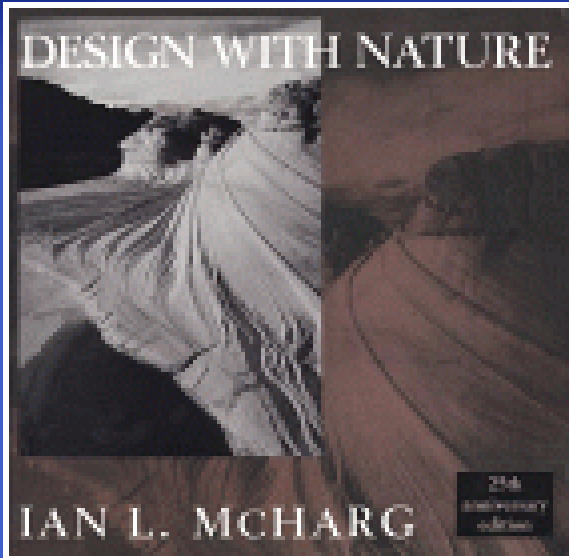
- Variance – often not the best answer
- Process can be time-consuming, expensive, and burdensome
- Before proceeding – ensure the variance is really necessary:
 - Are plans accurate
 - Do plans reflect site conditions
 - Are calculations (slopes, lot coverage, clearing, etc.) accurate?
- Are there alternatives that could meet the applicant's needs?

Creative Site Design



- Many Critical Areas sites have design constraints
- Problems result when they are ignored
- “Site design process” may not exist
- Property owner picks a design and then tries to make it fit on property
- If it doesn't – next step is to request a variance

Use Site Analysis and Creative Approach



- Concept first written about by Ian McHarg in “Design With Nature”
- Used layers of tracing paper to delineate site constraints and identify “optimal suitability”
- Geographic Information Systems and layer technology make the process easier, faster, and more accurate

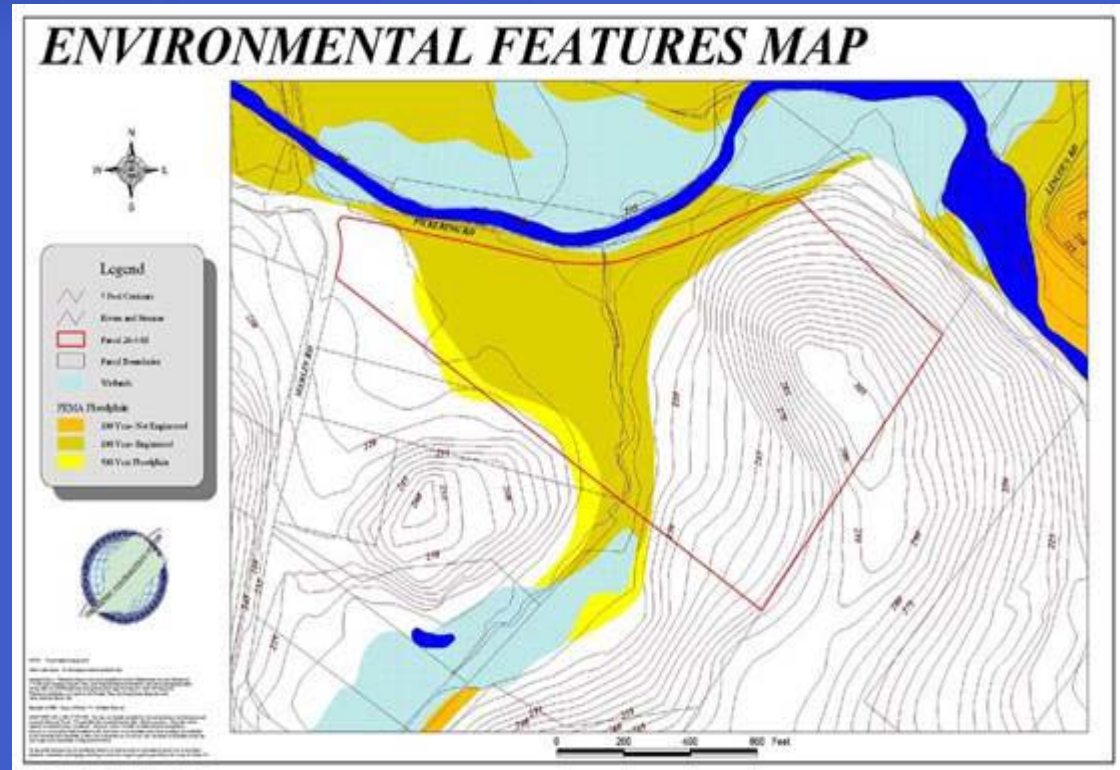
Site Design Process



- Analyze site to identify all constraints
- Identify “optimal suitability” or buildable area
- Design project to fit this area
- Explore alternatives
- Document options
- If constrained areas can't be avoided, minimize impacts
- Develop mitigation specific to site and design
- Present entire package

Graphic Illustration of Site Constraints

- Buffer
- Expanded Buffer
- Wetlands
- Steep slopes
- Hydric Soils
- Highly erodible soils
- Forest cover
- Significant plant and wildlife habitat

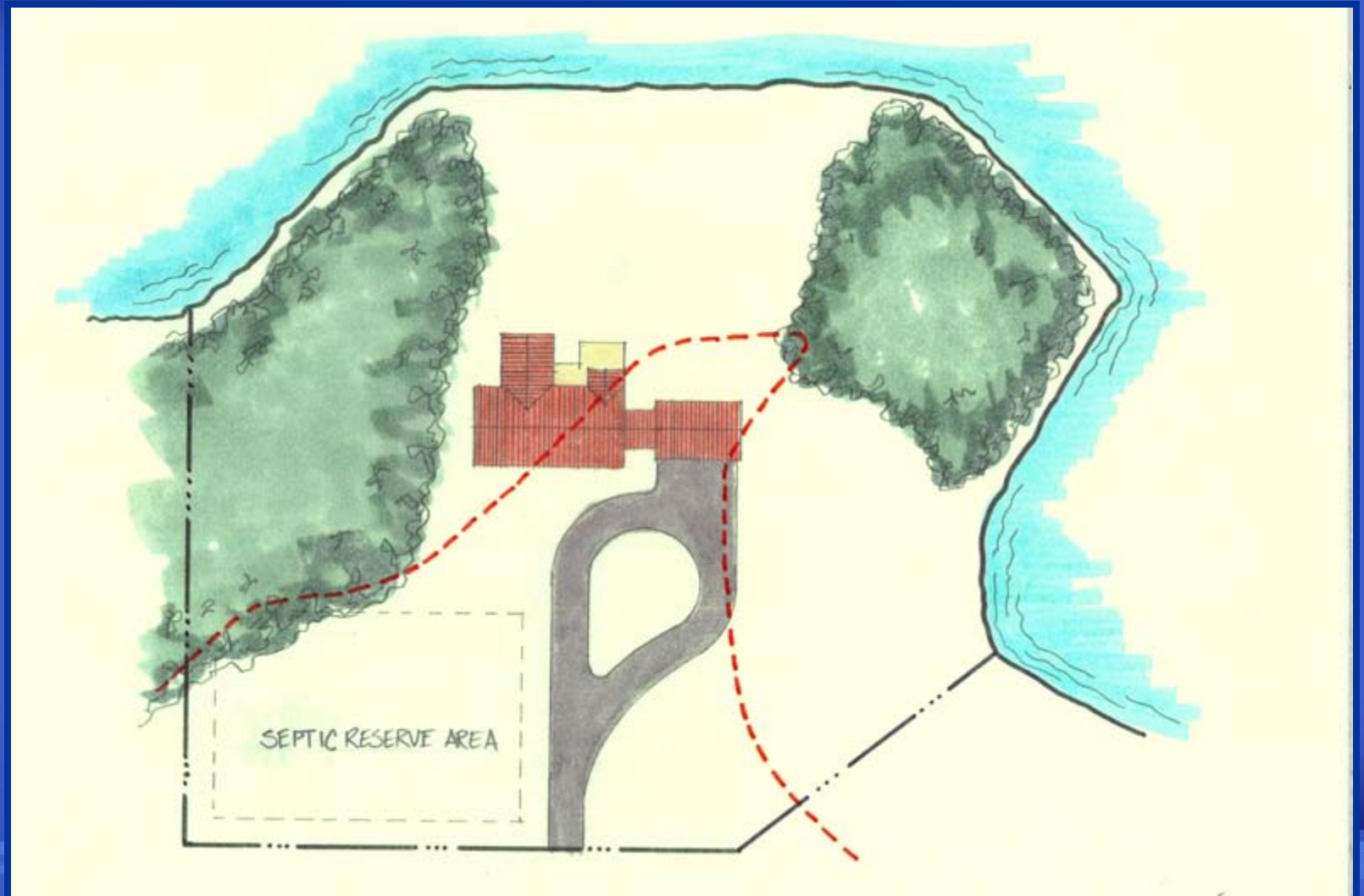


Process Often Works In Reverse

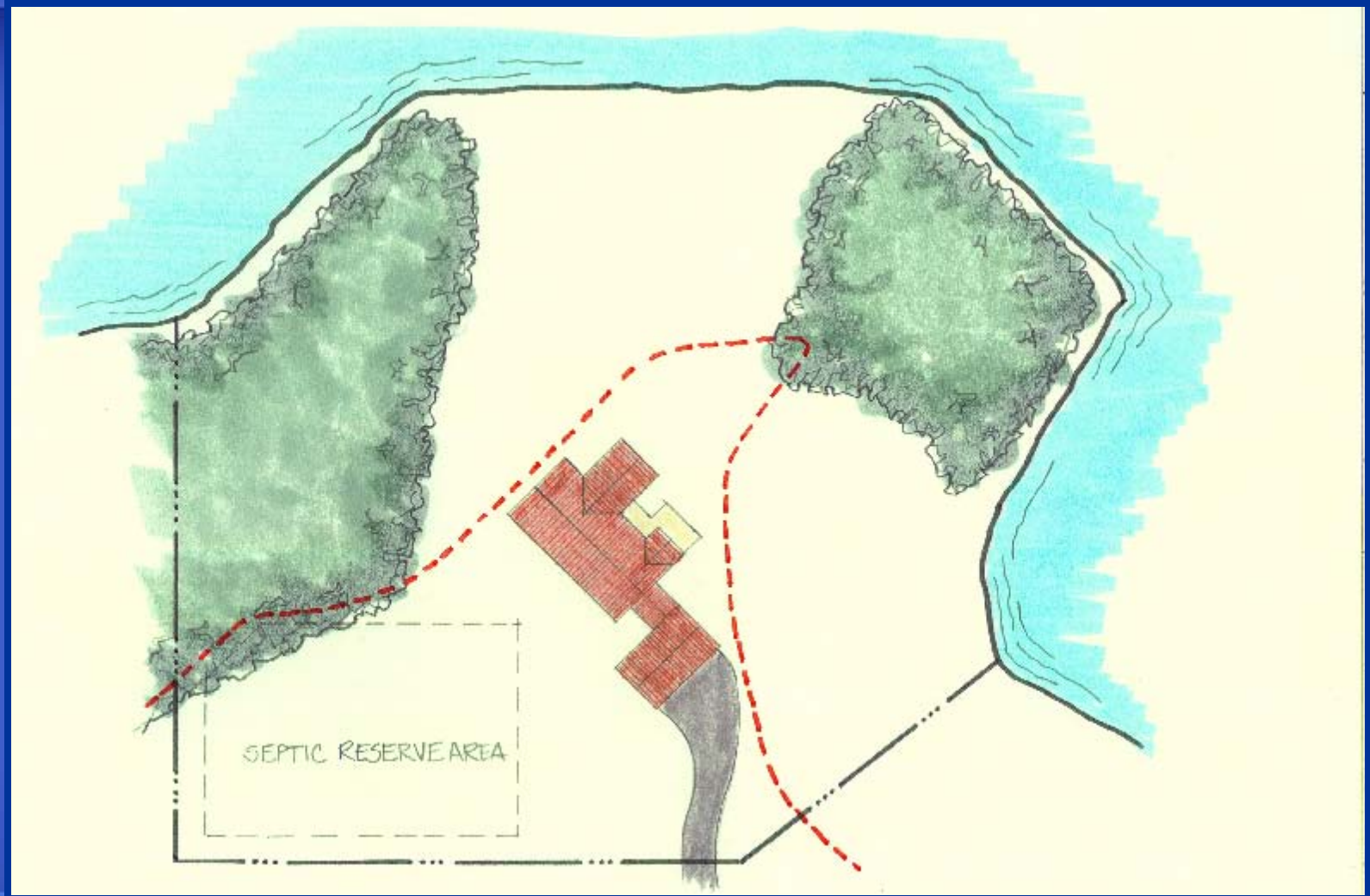


- Property owner selects a house plan
- Locates house on property
- Applies for permit
- Finds out about site constraints
- Goes “back to the drawing board” or applies for a variance

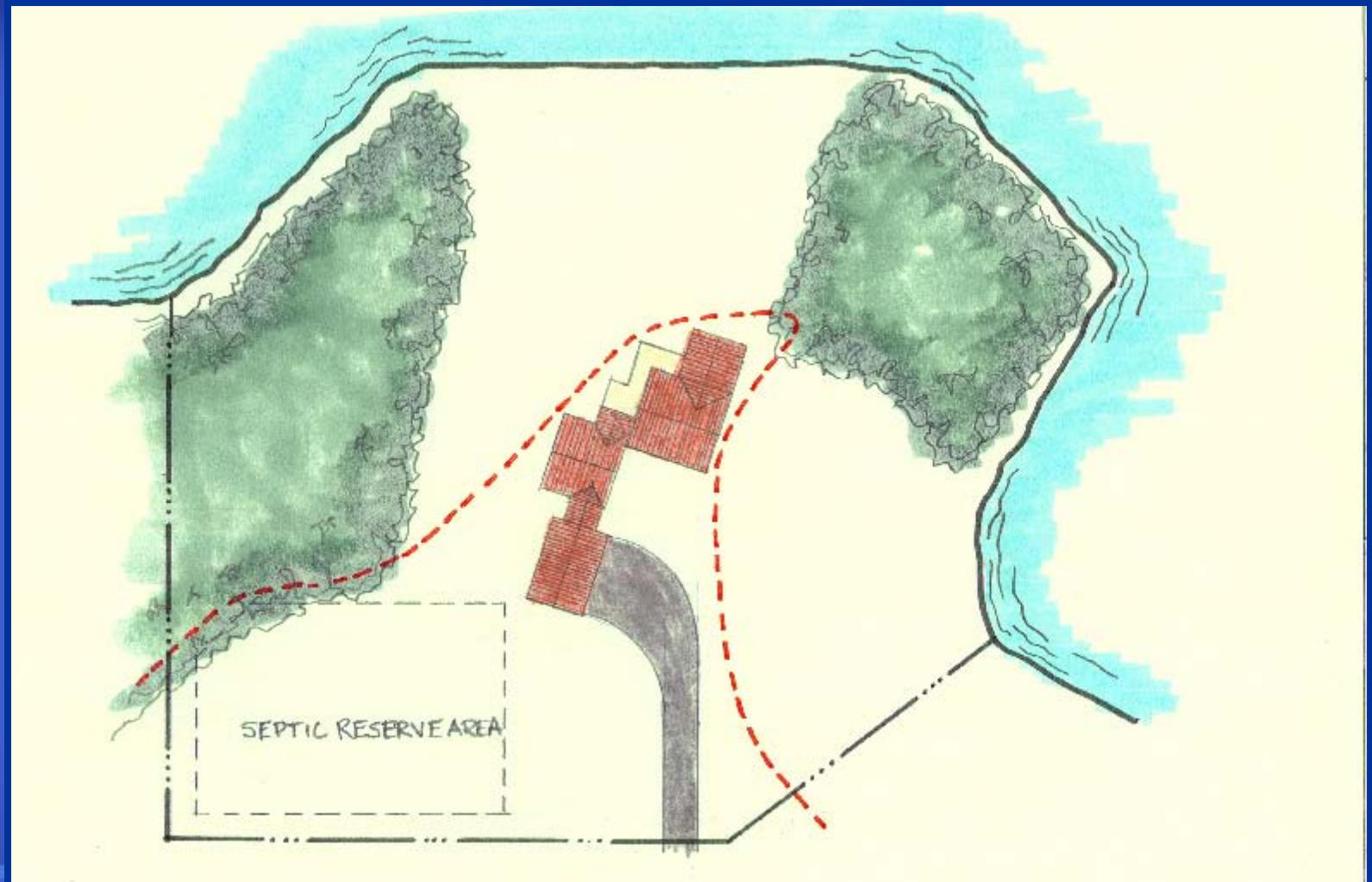
Design Project to Fit the Buildable Area



Creative Site Design



Creative Building Design

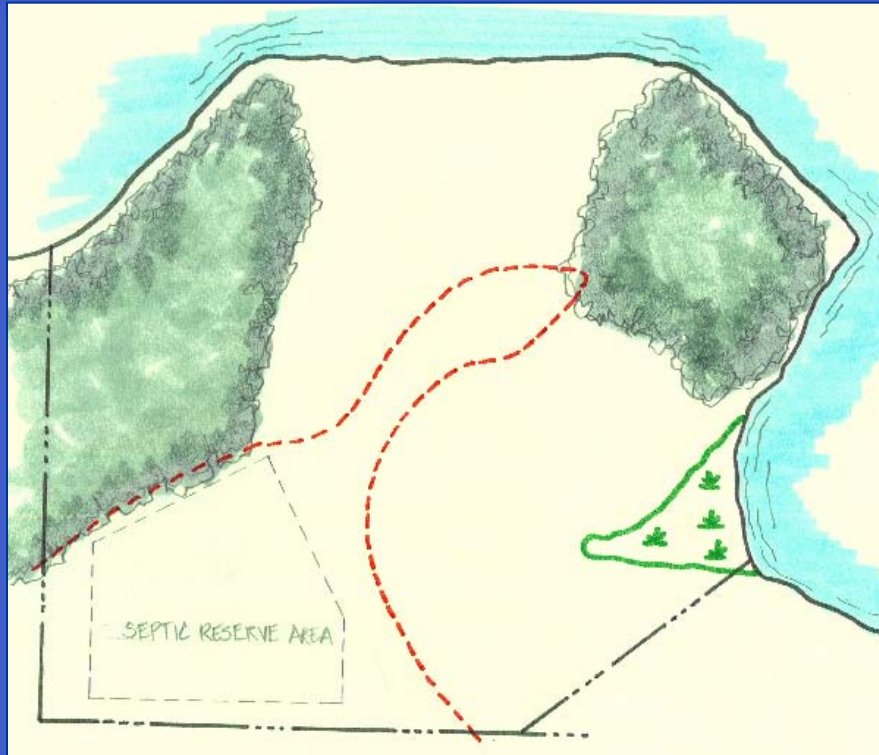


Use Professional Expertise

- Professional guidance from an architect, landscape architect, engineer, planner, or ecologist may be necessary
- Professionals have specialized training in addressing difficult sites
- Often provide ideas that result in better design, cost savings, and fewer adverse impacts



If Unavoidable – Minimize Impacts



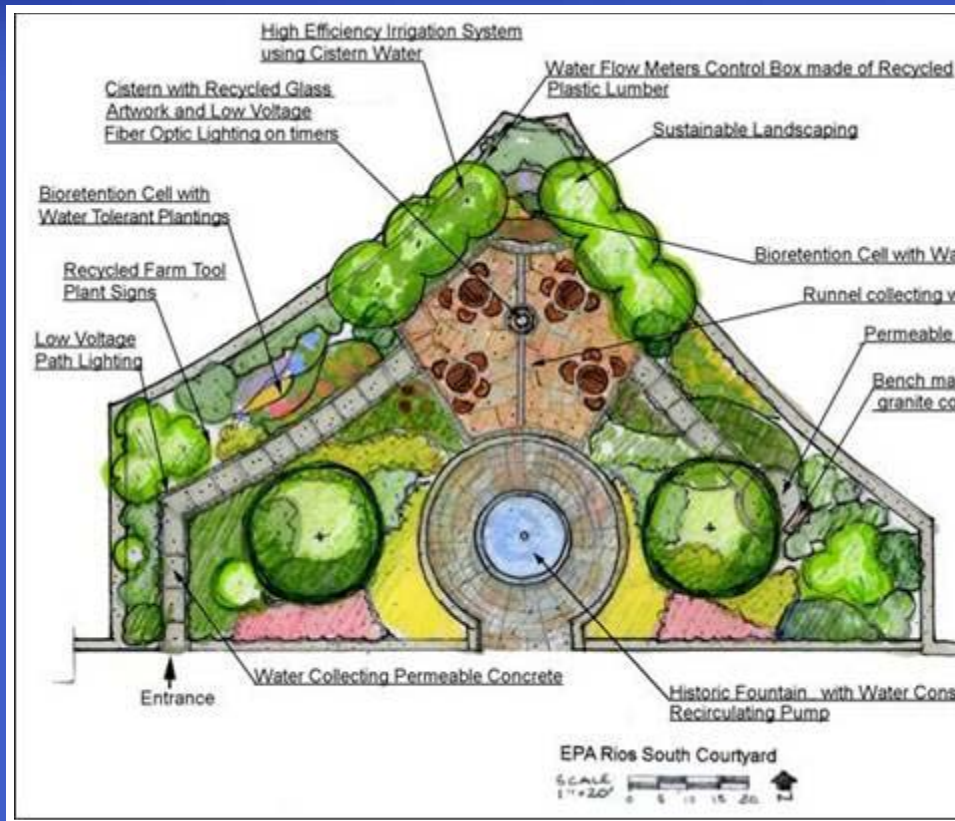
Mitigation Is Essential

- That the granting of a variance:
 - Will not adversely affect water quality
 - Will not adversely impact fish, wildlife, and plant habitat
 - Will be in harmony with the spirit and intent of the Critical Area Law and regulations
- All variances have adverse impacts – mitigation is required
 - Must be comprehensive
 - Must be substantive and provide actual resource benefits
 - Must be part of a plan submitted with variance application

Develop An Appropriate Mitigation Plan

- Conservation of habitat
- Water quality improvement
 - Treat stormwater
 - Use nitrogen removing septic systems
 - Minimize fertilizer and pesticide application by minimizing lawn area
- Improve and increase habitat
 - Create wetlands
 - Create living shorelines
 - Establish forest (more than just planting trees and shrubs)

Mitigation – Should Be on the Project Site



- Purpose of mitigation – offset adverse impacts
- Most effective when it is physically near the source of the impacts
- Design of mitigation plan – should be part of site design
- Out of sight – out of mind does not promote resource protection

Mitigation Must Provide Resource Benefits



Provides some benefits ...



Provides comprehensive water
quality and habitat benefits!

Staff and Applicant Coordination

- Planning staff qualified to help applicants avoid variances
- If variance is unavoidable, they can recommend designs that minimize impacts
- Can assist applicants in developing effective mitigation plans



Administrative Variance Process

- Specifically authorized in Annotated Code 8-1808 (c)(1)(ii)
- Can streamline process for applicants, local staff
- Can avoid burdensome and unpredictable BOA process



Use of Modified Buffer Areas

- Designed to address developed areas with grandfathered lots
- Acknowledge “pattern of development”
- Existing Buffer does not perform buffer functions
- Difficult or impossible to relocate structures, development, or disturbance outside the Buffer
- Areas must be officially mapped



Modified Buffer Areas: Emphasis is on Mitigation



- Local programs have varying provisions
- No variance but mitigation at 2:1 usually required
- Minimum shoreline setback recommended
- Water quality improvement and habitat creation or enhancement
- Can involve off-site practices or collection of fee-in-lieu

Creative Zoning Approaches

- Local governments have flexibility to explore alternatives
- Commission needs to be involved in the process
- Proposals must meet “spirit and intent” of the Program
 - Buffer trading
 - Lot coverage trading
 - Buffer expansion methodologies
 - Slope measurement techniques



Summary

- Many variance applications can be, and should be avoided through the site design process
- Site analysis should come first
- Project should be designed to fit the site
- If a variance is necessary – should be minimum necessary
- Applicant should properly address variance standards
- Mitigation should be multi-faceted and comprehensive to ensure “no adverse impacts”

For further information:
www.dnr.state.md.us/criticalarea/

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