



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

PHONE: (302) 739-9000
FAX: (302) 739-6242

Secretary's Order No.: **2012-WS-0027**

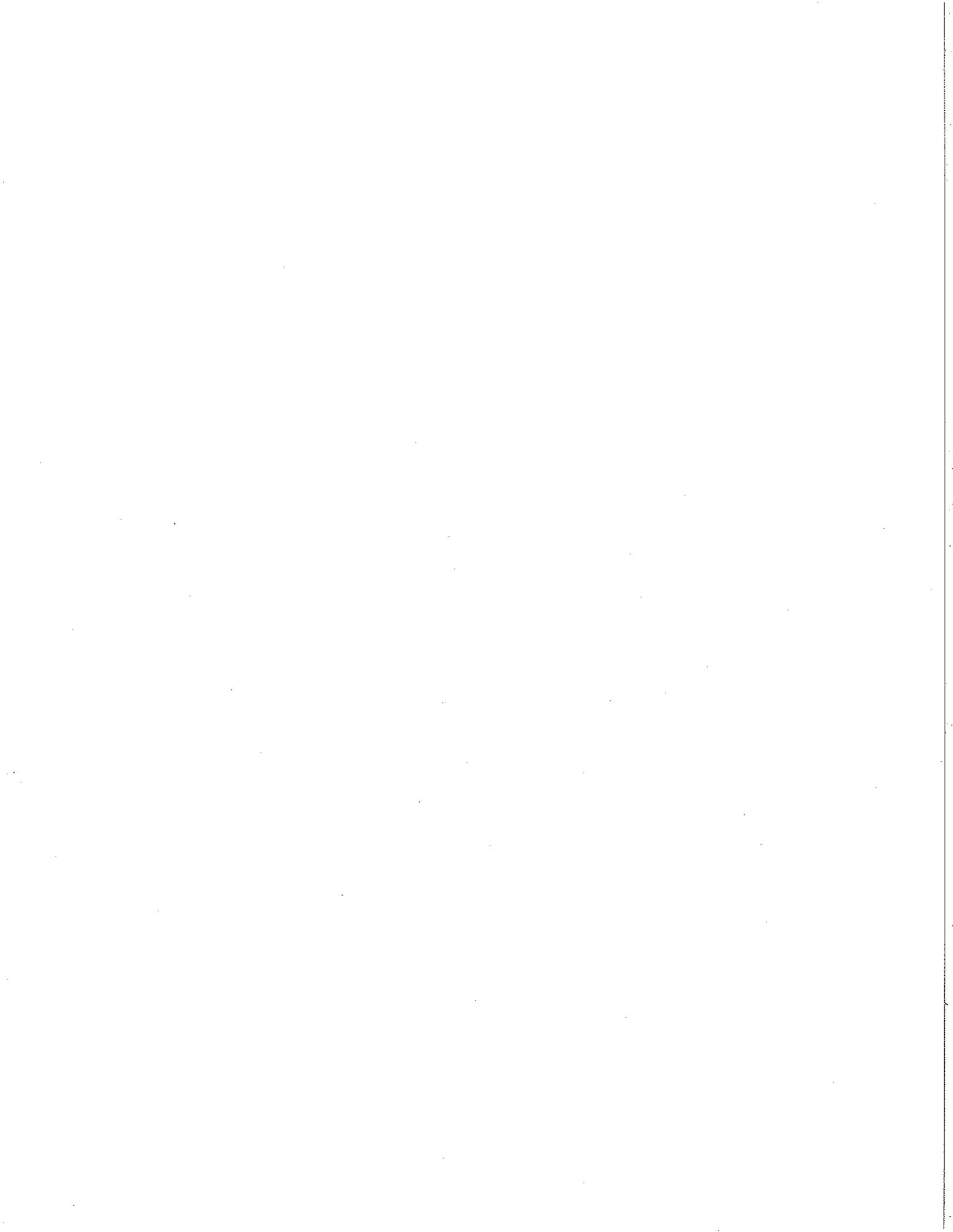
RE: Tower Shores Realty, LLC Applicant
For a Coastal Construction Permit for Construction
Seaward of the DNREC Building Line of a Duplex Dwelling with an
Eight-Foot Cantilevered Deck on Lot 84, Tower Shores,
Bethany Beach, Sussex County, Delaware

Date of Issuance: August 3, 2012

Effective Date: August 3, 2012

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control under 29 Del. C. §§8001 et seq., the following findings and conclusions are entered as an Order of the Secretary:

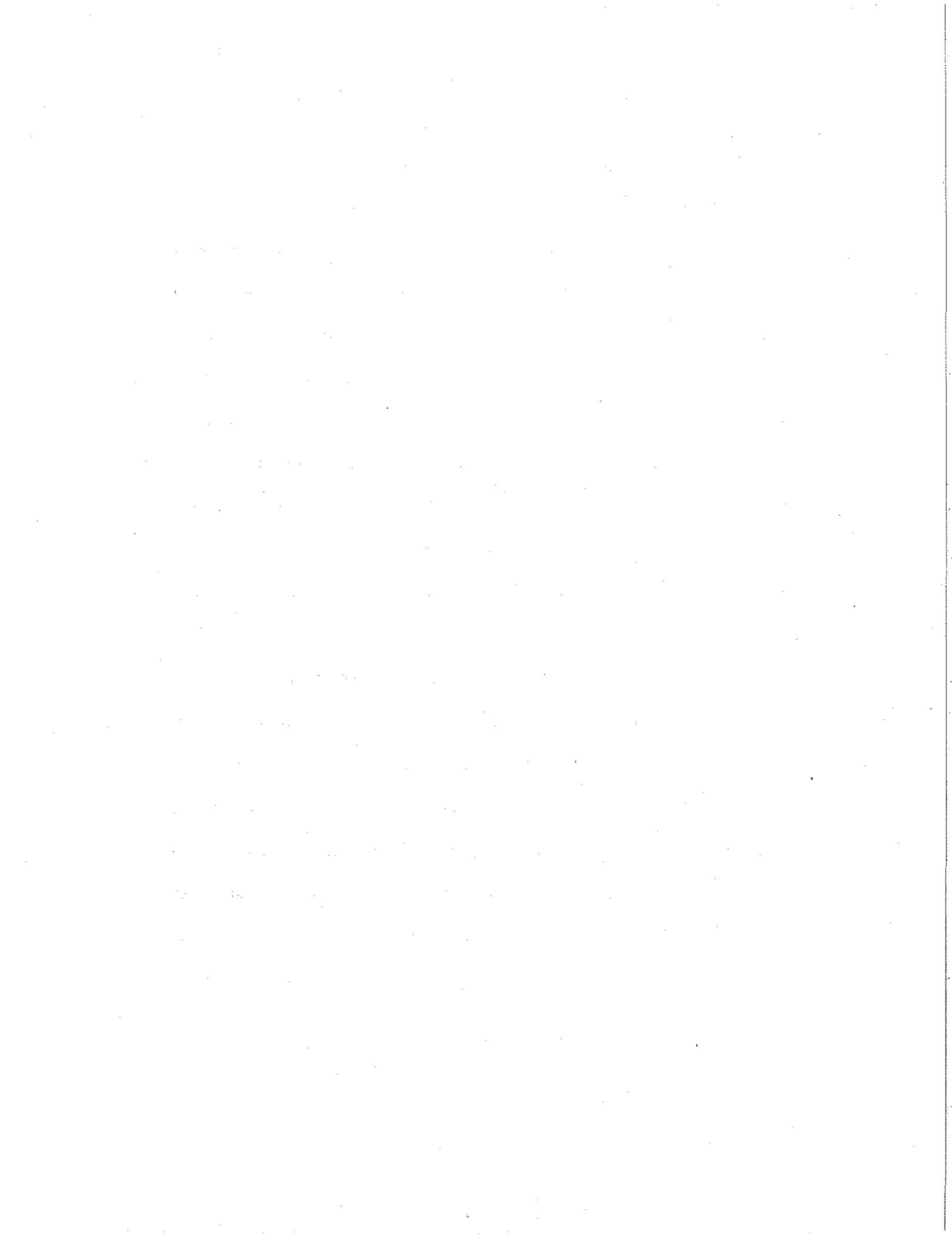
The Applicant, Tower Shores Realty, LLC, seeks a Coastal Construction Permit for Construction Seaward of the DNREC Building Line from the Division of Watershed Stewardship (previously known as the Division of Soil and Water Conservation), Shoreline and Waterway Management Section (hereinafter referred to as "DWS-SWMS"). The Applicant seeks to construct a duplex dwelling with an eight (8) foot cantilevered deck on Lot #84, Tower Shores, Bethany Beach, Sussex County, Delaware. The proposed project is subject to the requirements of Delaware's *Beach Preservation Act* (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches*, DNREC's *The Four Step Process (for Construction on Delaware's Atlantic Ocean and Delaware Bay Shorelines)*, and 7 Del.C., Chapter 60, and the



Department reviews all such permit applications (and proposed projects set forth within such applications) in the light of the aforementioned requirements.

The aforementioned Regulations provide the criteria for evaluation of proposed projects to be constructed on Delaware's Atlantic Ocean and Delaware Bay Shorelines. Such criteria include, but are not limited to, the effect of the proposed construction on shoreline recession, beach erosion, flooding, potential damage to the parcel of real property that is the subject of the permit application, potential damage to any other parcel of real property, public lands, or personal property, and any comments received by the Division with regard to such pending permit applications. Furthermore, upon the granting of an application for a Coastal Construction Permit, such permit may, if determined necessary by the Secretary, include certain conditions to address comments and concerns expressed by the public regarding the effect of a proposed project upon the surrounding community.

In the present matter, the Applicant's proposed project is intended for Lot 84 in the community of Tower Shores. The Department notes in its review of this matter that Lot 84 was platted *prior* to the effective date of Delaware's *Regulations Governing Beach Protection and the Use of Beaches* (August 13, 1981), at which time the mapped DNREC Building Line became effective. Thus, despite the fact that Lot 84 is physically located completely seaward of the DNREC Building Line, Lot 84 is grandfathered as a buildable lot. In this present matter, the DNREC Building Line is located landward of the entire lot; therefore, it is physically impossible to construct landward of the building line on Lot 84.

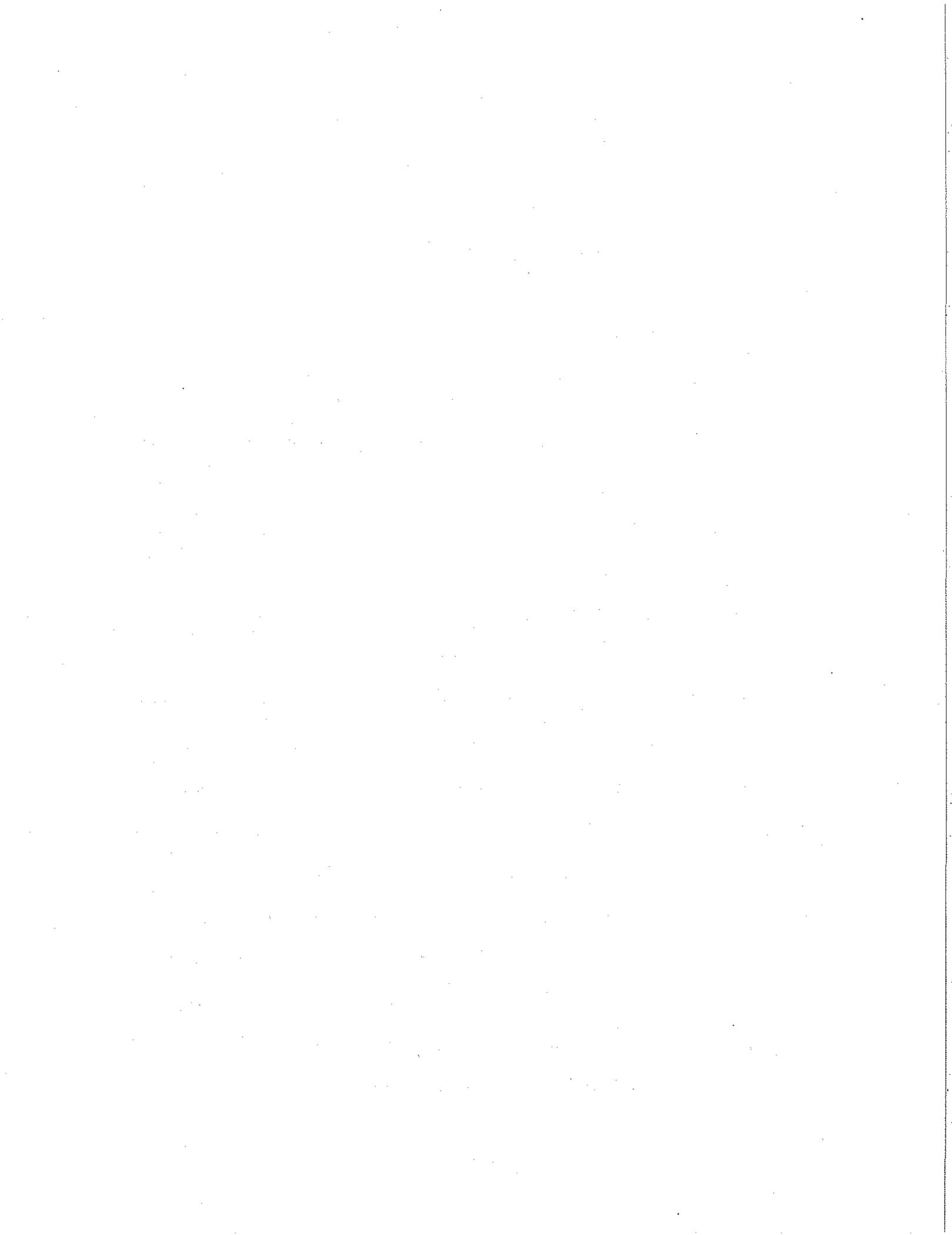


Since Lot 84 is grandfathered as a buildable lot, the Department's review of this project then turns to whether DNREC's aforementioned Four Step Process has been utilized by the Applicant with regard to the proposed construction project. The purpose of the Four Step Process is set forth in §6805(d) of Delaware's Beach Preservation Act, to wit:

If any structure proposed to be built in whole or in part seaward of the building line could reasonably be reduced in size or otherwise altered in order to eliminate or diminish the amount of encroachment over the building line, the Department shall require such reduction or alteration as a condition of granting the permit or letter of approval.

The Four Step Process (which has been utilized by the Department since 1996) has been found to minimize encroachment seaward of the Building Line. Thorough review of the Applicant's pending permit application in this matter by DWS-SWMS reveals that the proposed project does, in fact, meet the Four Step Process.

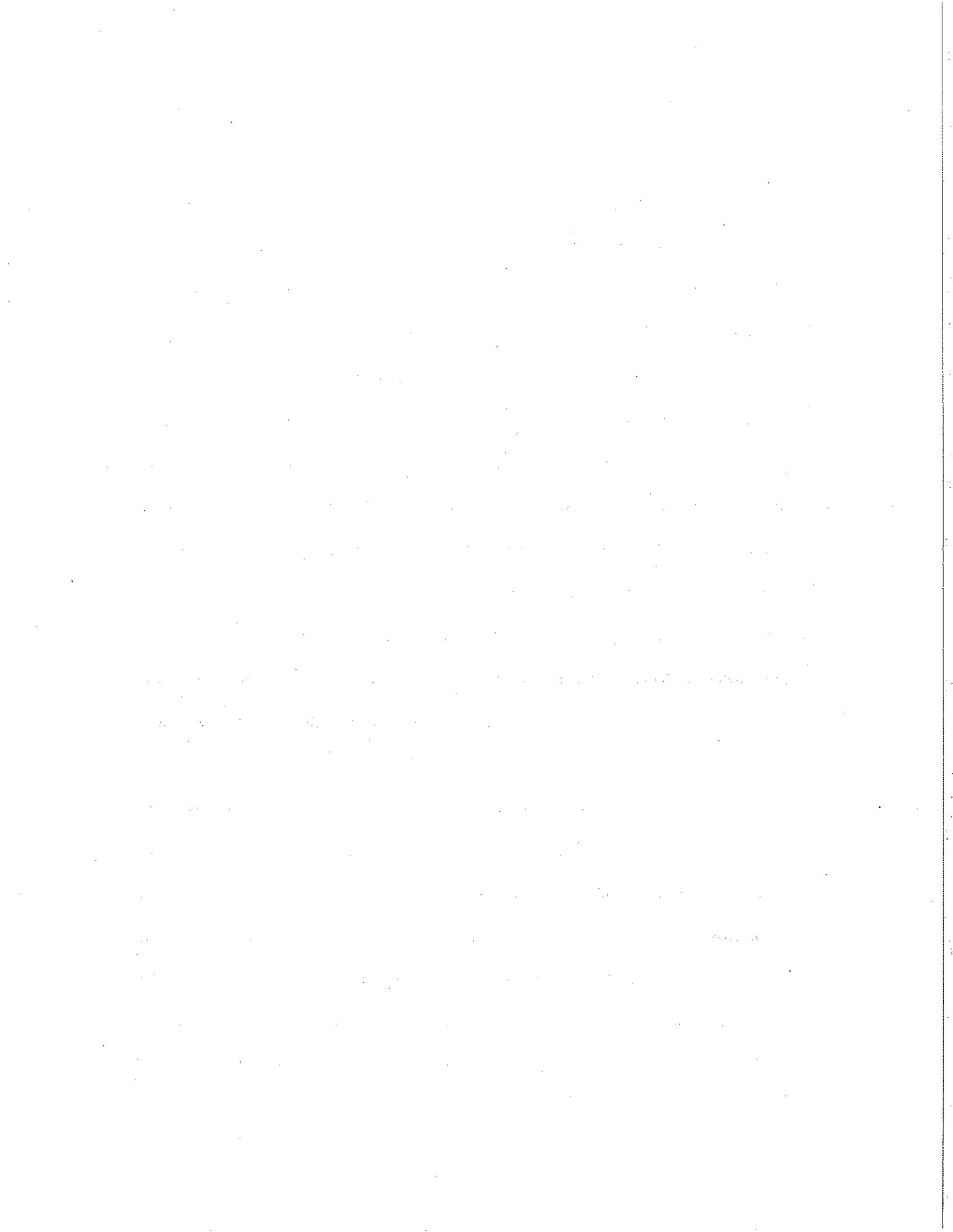
With regard to the proposed building's deck, the proposed eight foot deck will be cantilevered, and will not extend further seaward than the lawfully constructed deck on the immediately adjacent property. Additionally, in order to reduce the potentially hazardous condition of floating debris both during and after coastal storms, DWS-SWMS requires that all new construction seaward of the DNREC Building Line be located above Base Flood Elevation (BFE), with the exception of the piling foundation. The Applicant's plans show that the proposed dwelling will be located completely above BFE, with the exception of the foundation pilings. Lastly, the size of the proposed dwelling fits within the average square footage found using the Four-Step Process, and is in keeping with the neighborhood of Tower Shores. Thus, the Department believes that



the Applicant has met the Department's requirements with respect to the size and design of the proposed construction project.

With regard to the public concerns voiced about potential damage to the dune, DWS-SWMS agrees that dunes are the first line of defense during coastal storms, and has made it known to the Applicant that they will allow no sand to be removed from Lot 84 during construction, and that no disturbance of the dune is to occur outside the footprint of the proposed structure. The Department also notes that, after the coastal storm that occurred in November 2009, the dunes in Tower Shores were significantly eroded. Since the dune took the brunt of the wave energy in that storm, all infrastructure and homes behind the dune were well protected. Since 2009, the dune (thanks to the due diligence of the community) has greatly recovered, and has actually increased in height and width. In fact, if the DNREC Building Line were drawn today by the definition in the Regulations using the topographic survey dated January 17, 2012, it would be located approximately 55 feet *further seaward* than it is currently mapped. Thus, the dune is now approximately 55 *wider* than it was in 1979 when DNREC initially mapped the Building Line.

The Department further notes that Tower Shores, like all of the North Bethany communities, has been receiving the benefits of the long shore transport of sands from the State and Federal beach nourishment projects that occur in Bethany Beach. Even with the erosion that occurred as a result of the November 2009 coastal storm, as a result of the community being in a position to receive drifting sands, the beach rebuilt by May of 2010 enough to allow the community to mechanically scrape sand from the beach to rebuild the dunes. Additionally, during the fall/winter/spring of 2010-2011, the

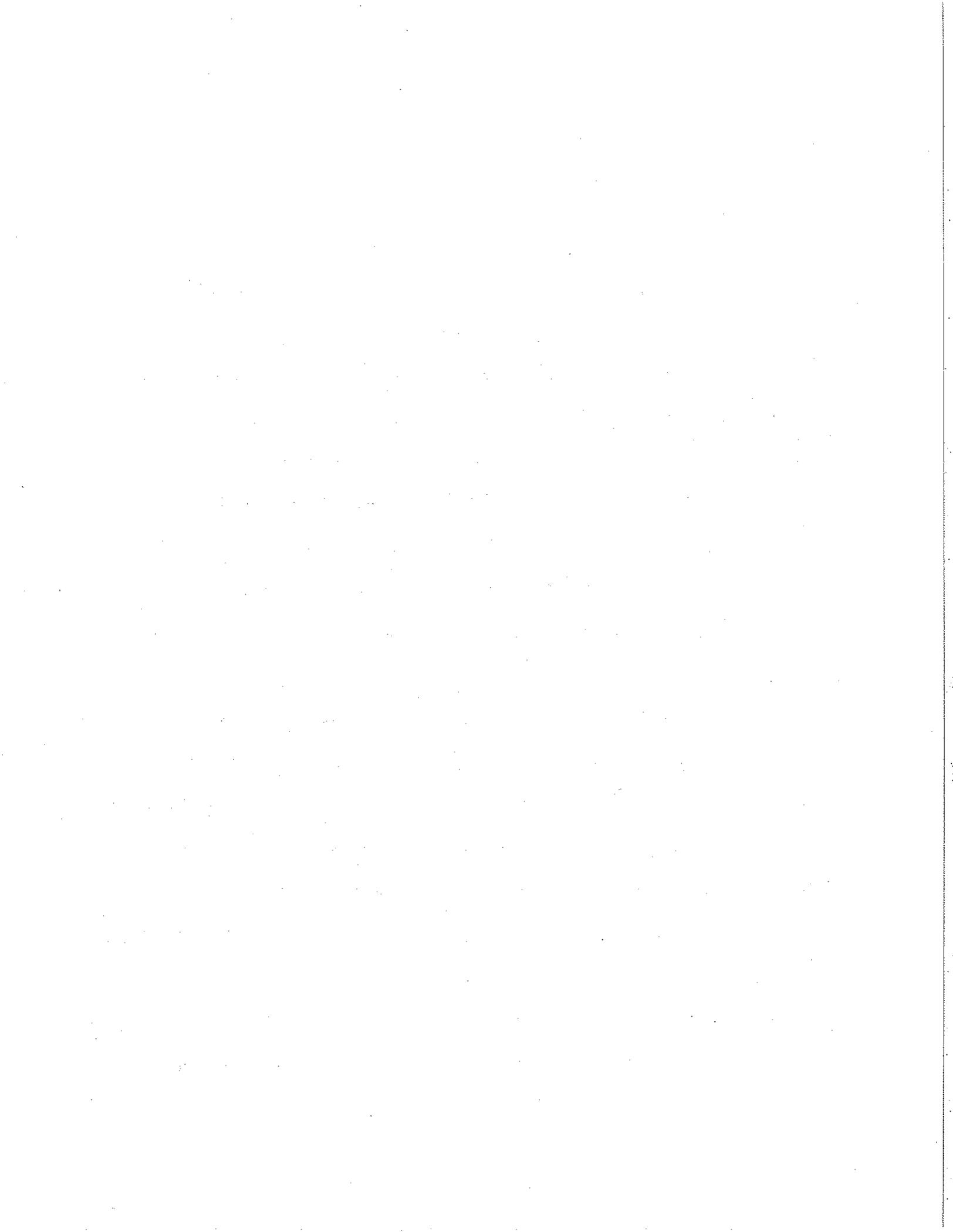


community made efforts to plant beach grass, and the dunes have grown to be effective protection barriers in the case of a threat of a coastal storm.

The DWS-SWMS agrees with the public comments received at the public hearing that stable dune vegetation is critical. Although some disturbance of the vegetated dune will occur within the footprint of the proposed dwelling, sixty feet of dune seaward of the proposed dwelling will remain untouched and fully vegetated.

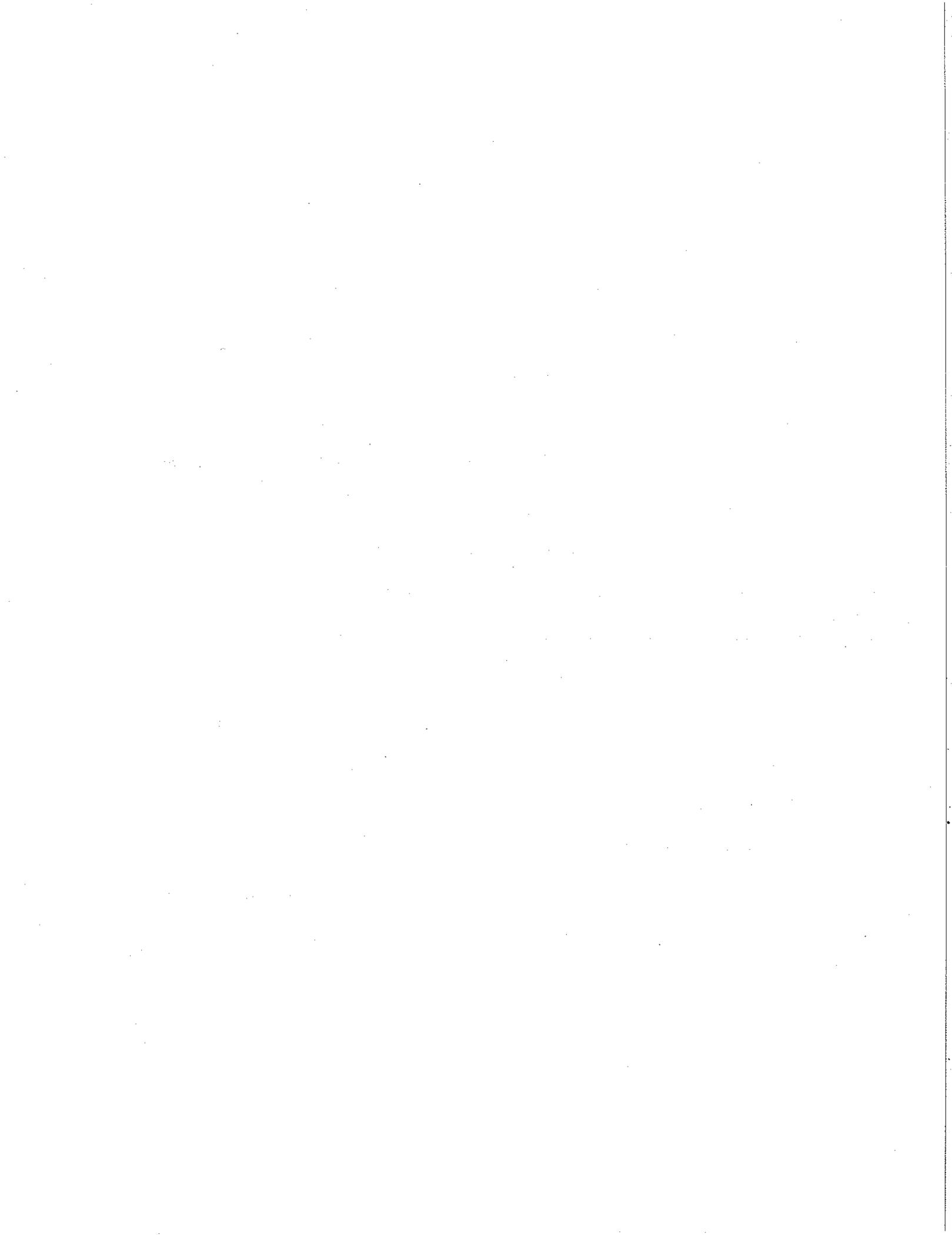
With regard to the concerns voiced by the public regarding the Applicant's proposed project being compliant with Sussex County Code and/or the guidelines set forth by FEMA, the Department notes that such guidelines are enforced by Sussex County, which is a member of the National Flood Insurance Program (NFIP). Sussex County Planning and Zoning is responsible for enforcing the NFIP regulations. The Department works closely with Sussex County in such permitting processes, and all structures permitted by DNREC are compliant with both DNREC and Sussex County requirements.

A duly noticed public hearing was held on June 7, 2012, at the DNREC Lewes Field Facility, located at 901 Pilottown Road, Lewes, Delaware. Representatives from the Department, as well as the Applicant, were in attendance at this hearing, and the Applicant offered a brief presentation summarizing his proposed project to develop the record. Members of the public also attended said hearing, and comments were received by the Department at that time. Subsequent to that public hearing, Hearing Officer Lisa A. Vest requested the Division of Watershed Stewardship (previously known as the Division of Soil and Water Conservation), Shoreline and Waterway Management Section (hereinafter referred to as "DWS-SWMS") provide her with a Technical Response



Memorandum (TRM) to formally address the public comments and concerns raised in this matter. The requested TRM, dated July 2, 2012, along with a Supplemental Technical Response Memorandum (STRM), dated July 10, 2012, which was generated to provide additional clarity (and to further define some of the terms set forth in the initial TRM), were provided to Hearing Officer Vest, incorporated into the public hearing record generated in this matter, and addressed thoroughly in the Hearing Officer's report dated July 17, 2012 ("Report"). That Report, which is appended hereto and incorporated herein, recommended issuance of the Coastal Construction Permit, subject to the standard and reasonable conditions in such a permit that are included to protect Delaware's precious environment.

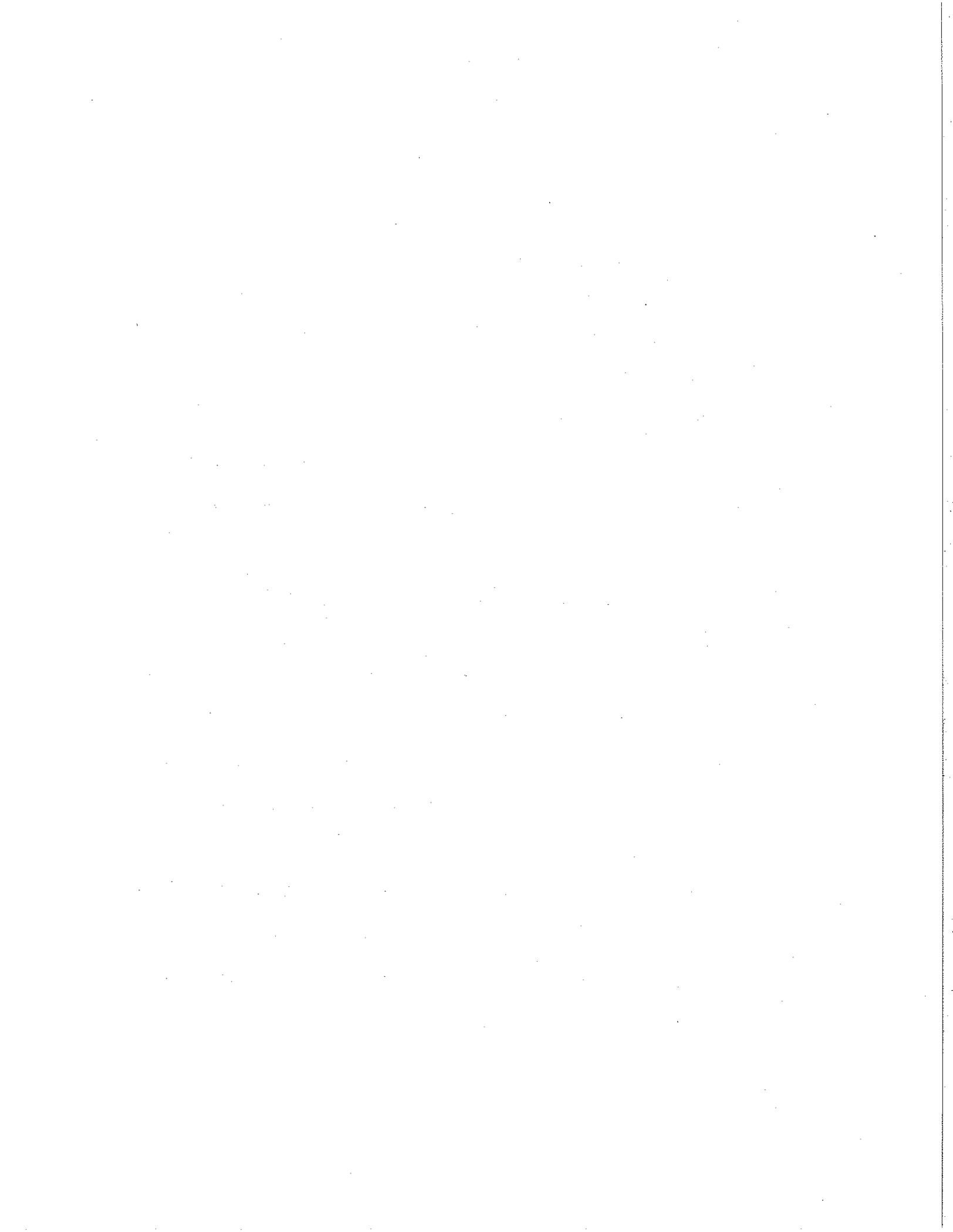
I find and conclude that the record developed in this matter supports approval of issuing the Applicant a Coastal Construction Permit Application for Construction Seaward of the DNREC Building Line from Tower Shores Realty, LLC, as recommended in the aforementioned Report. Based on the record, and the technical expertise of the Department's personnel who assisted in this application, the record supports approval of Tower Shores Realty, LLC's Application for a Coastal Construction Permit Application for Construction Seaward of the DNREC Building Line, as consistent with the requirements of the Delaware *Beach Preservation Act* (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches*, DNREC's *The Four Step Process (for Construction on Delaware's Atlantic Ocean and Delaware Bay Shorelines)*, and 7 Del.C., Chapter 60.



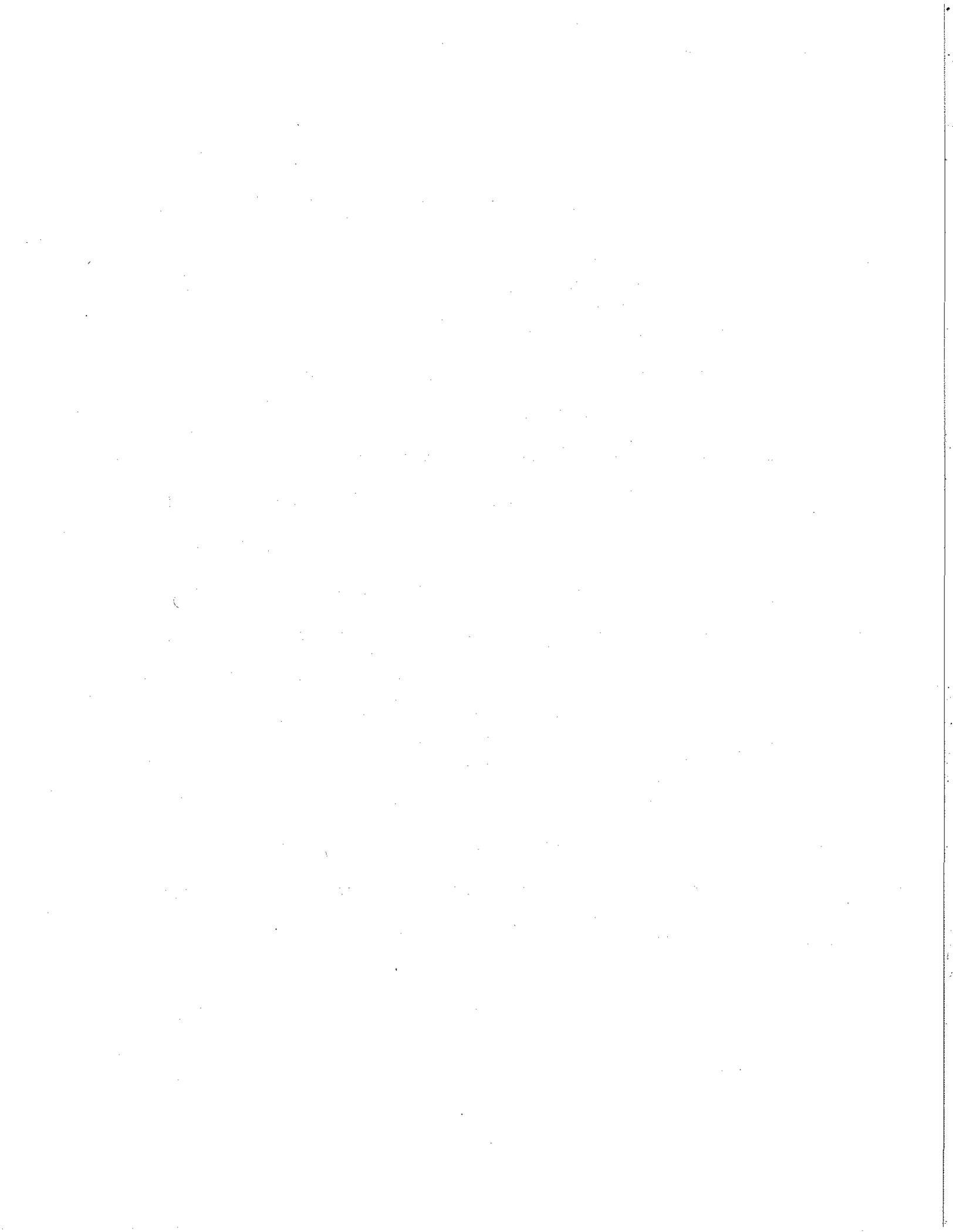
I find that the issuance of the aforementioned Coastal Construction Permit Application for Construction Seaward of the DNREC Building Line, along with reasonable permit conditions as set forth below, will allow this Applicant to construct a duplex dwelling with an eight (8) foot cantilevered deck on Lot #84, Tower Shores, Bethany Beach, Sussex County, Delaware, as proposed in its application. The design of the proposed project has met the regulatory criteria for such projects as set forth in Delaware's *Beach Preservation Act* (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches*, DNREC's *The Four Step Process (for Construction on Delaware's Atlantic Ocean and Delaware Bay Shorelines)*, and 7 Del.C., Chapter 60 .

Accordingly, I direct that a conditional permit be issued to the Applicant, and enter the following findings and conclusions:

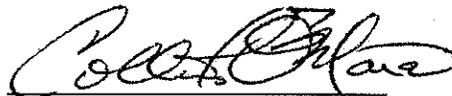
1. The Department has jurisdiction under its statutory authority to issue a Coastal Construction Permit Application for Construction Seaward of the DNREC Building Line to the Applicant, subject to reasonable permit conditions deemed appropriate and consistent by the Department in this matter;
2. The Department provided adequate and lawful public notice of the aforementioned Application of Tower Shores Realty, LLC, and of the public hearing held on June 7, 2012, and held said hearing to consider public comment on the application, in a manner required by the law and regulations;



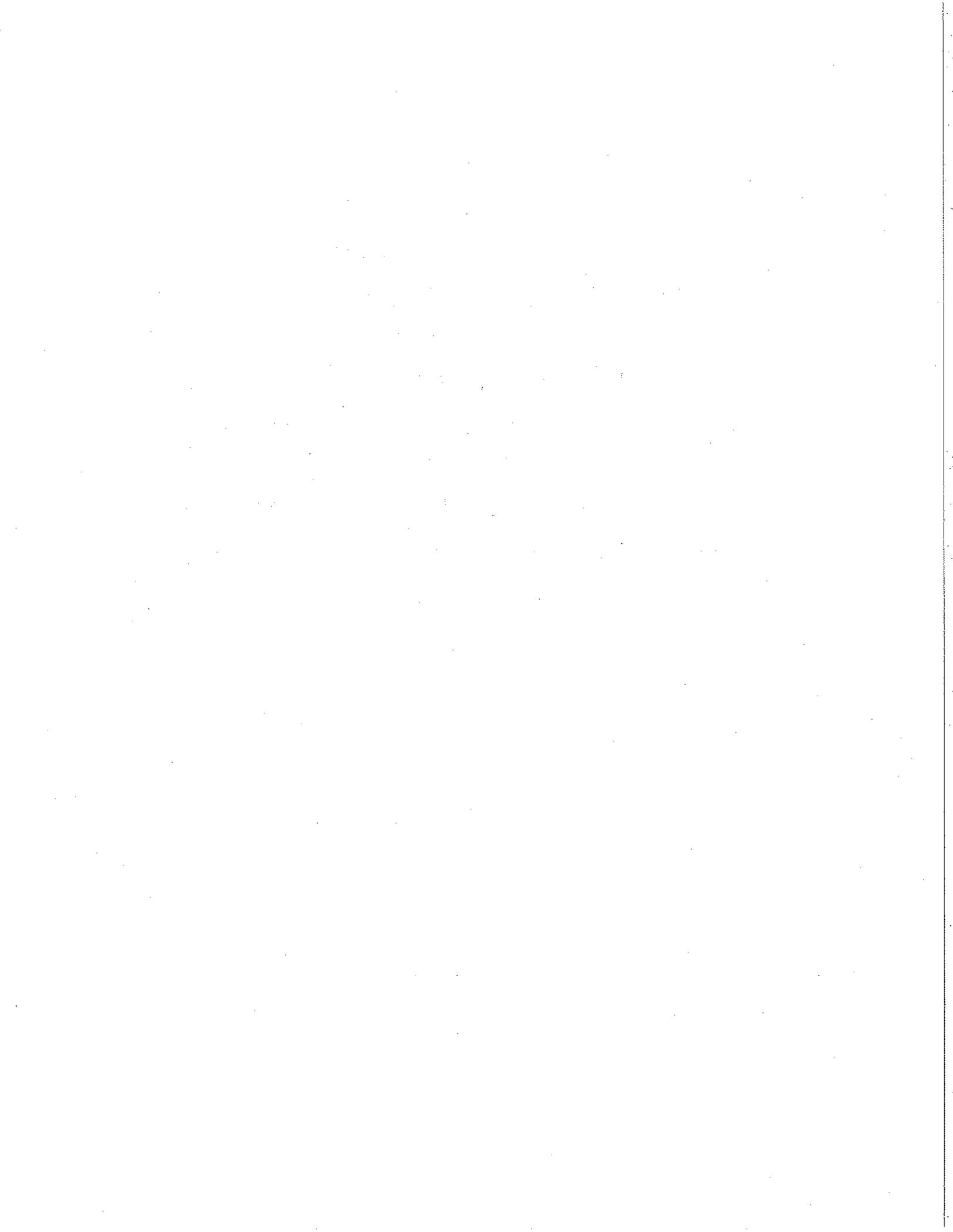
3. The permit approved by this Order will allow this Applicant to construct a duplex dwelling with an eight (8) foot cantilevered deck on Lot #84, Tower Shores, Bethany Beach, Sussex County, Delaware, as proposed in its application;
4. The Department has considered the factors required to be weighed in issuing such permits, and finds that the proposed use is both appropriate and reasonable at the proposed location, and that it should be permitted, with conditions, as set forth above;
5. The Department shall issue a permit to the Applicant, Tower Shores Realty, LLC, and said permit shall include all conditions consistent with the final Order and any other reasonable conditions that the Department includes in such permits, to ensure that Delaware's environment will be protected from harm, consistent with the aforementioned existing Delaware regulations governing such matters, to wit: (1) all structures constructed seaward of the DNREC Building Line must be above Base Flood Elevation, with the exception of lattice; (2) future construction of a roof or enclosure of the cantilevered deck is prohibited; (3) the area underneath the cantilevered deck shall remain open and free of obstructions, including lattice; (4) no sand may be removed from the lot; and (5) disturbance of the dune shall only take place within the footprint of the proposed dwelling;



6. The Department has carefully considered all the statutory factors to be considered in making a decision on this permit application, and those required to be considered under existing Delaware regulations regarding such matters, to wit, the requirements of the Beach Preservation Act (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches*, DNREC's Four Step Process, and 7 Del.C., Chapter 60;
7. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary; and
8. The Department shall serve and publish its Order on all affected persons in a manner consistent with the service and publication of Secretary's Orders.



Collin P. O'Mara,
Secretary



HEARING OFFICER'S REPORT

**RE: Tower Shores Realty, LLC Application
for a Coastal Construction Permit for Construction
Seaward of the DNREC Building Line of a Duplex Dwelling with an
Eight-Foot Cantilevered Deck on Lot #84, Tower Shores,
Bethany Beach, Sussex County, Delaware**

**Lisa A. Vest
Hearing Officer**

July 17, 2012

I. Background Findings:

A public hearing was held on Thursday, June 7, 2012, at 6:00 p.m. at the DNREC Lewes Field Facility, located at 901 Pilottown Road, Lewes, Delaware, in order for the Department to receive public comment concerning a Division of Watershed Stewardship (previously known as the Division of Soil and Water Conservation), Shoreline and Waterway Management Section (hereinafter referred to as "DWS-SWMS") Coastal Construction Permit Application for Construction Seaward of the DNREC Building Line from Tower Shores Realty, LLC (hereinafter referred to as "Applicant"). The Applicant seeks to construct a duplex dwelling with an eight (8) foot cantilevered deck on Lot #84, Tower Shores, Bethany Beach, Sussex County, Delaware. The proposed project is subject to the requirements of Delaware's *Beach Preservation Act* (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches* (hereinafter referred to as "Regulations"), DNREC's *The Four Step Process (for Construction on Delaware's Atlantic Ocean and Delaware Bay Shorelines)*, and 7 Del.C., Chapter 60, and the Department reviews all such permit applications (and proposed projects set forth within such applications) in the light of the aforementioned requirements.

The Department has the authority to issue Coastal Construction Permits, pursuant to Delaware's aforementioned *Beach Preservation Act*, the Department's Regulations, and 7 Del. C., Chapter 60. These Regulations provide the criteria for evaluation of proposed projects to be constructed on Delaware's Atlantic Ocean and Delaware Bay Shorelines, and state that the DWS-SWMS, when considering Coastal Construction Permits, shall "...take into account the geology, geomorphology, meteorology, and

hydraulics of the area”.¹ In addition to these general categories, DWS-SWMS shall also take into consideration any other relevant information relating to this permitting matter, including, but certainly not limited to, the effect of the proposed construction on shoreline recession, beach erosion, flooding, potential damage to the parcel of real property that is the subject of the permit application, potential damage to any other parcel of real property, public lands, or personal property, and any comments received by the Division with regard to such pending permit applications². In rendering its decision on requests for permits and letters of approval pursuant to these Regulations, the DWS-SWMS shall make a determination regarding the potential adverse effects of the proposed structure, and, if it is the opinion of the Department that the potential for damage to the beach seaward of the Building Line is increased as a result of the proposed structure, then the DWS-SWMS may require the Applicant to take mitigating measures to reduce such damage potential. Furthermore, upon the granting of an application for a Coastal Construction Permit, such permit may, if determined necessary by the Secretary, include certain conditions to address comments and concerns expressed by the public regarding the effect of a proposed project upon the surrounding community³.

This project was placed on the standard 20-day public notice beginning with the Department’s letters to landowners of the community (dated February 23, 2012), and notices in both the Delaware State News and the News Journal on February 26, 2012. During the public notice period, the Department received numerous letters of objection to the project, several of which formally requested a public hearing. Subsequently, the

¹ See Regulations, Section 2.10, *General Permit Considerations*.

² See Regulations, Section 5.03, *Specific Information to be Examined by the Division; Investigatory Authority of the Division and its Agents; Authority of Division to Require Special Conditions or Modifications*.

³ See Regulations, Section 4.07, *Mitigating Measures*.

Department held a public hearing in Lewes, Delaware, on June 7, 2012, in response to the comments received, and to address concerns expressed by individuals potentially affected by the project. Public comment was also received by the Department at the time of the hearing itself, all of which will be addressed below. Proper notice of the hearing was provided as required by law.

II. Summary of Record:

A. Department Presentation:

At the time of the hearing on June 7, 2012, Jennifer Luoma, Environmental Scientist with DNREC's DWS-SWMS, represented the Department with regard to this pending permit application matter. Ms. Luoma introduced twelve (12) exhibits to be submitted into the formal hearing record regarding this permitting hearing, which were then entered into the record by this Hearing Officer as Department's exhibits A-L. Included within those Departmental exhibits was a copy of the Applicant's formal application and plans submitted to DNREC, copies of the legal notices regarding the holding of this public hearing, copies of Delaware's *Beach Preservation Act* (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches* (hereinafter referred to as "Regulations"), DNREC's *The Four Step Process (for Construction on Delaware's Atlantic Ocean and Delaware Bay Shorelines)*, photographs of the proposed location of this proposed project, and copies of the public comment that had been received by the Department to date in this matter.

B. Applicant Presentation:

Subsequent to the Department having entered its exhibits into the record, the Applicant, Anthony Nerlinger, President of Tower Shores Realty, LLC, offered a brief presentation for the record in support of his pending permit application. Mr. Nerlinger noted that, in response to the letters of concern that were received by the Department following the public notice of this permit application, a letter was written back to the Department addressing those concerns. He further noted that, as stated in his response letter, everything that the Department has requested of the Applicant with regard to this proposed project has already been submitted. It is the Applicant's belief that he has met the requirements of DNREC's Four Step Process, as well as all requirements for construction seaward of the DNREC Building Line, including, but not limited to, all site engineering, surveying, and height elevation requirements.

It is the opinion of Mr. Nerlinger that the biggest misconception of the public concerning his proposed project is what is happening with the sand at the construction site. The Applicant stated that both DNREC and the National Flood Insurance Program maintain that, while sand can be *moved around* underneath a building, sand cannot be moved *from underneath* a building. He states that his project will cause sand to be moved around during the construction process, however, all of the sand currently on Lot 84 will remain underneath the proposed structure.

The Applicant also understood the concerns of the public with regard to the dune directly in front of the property at issue, specifically, concerns that the dune will be altered and compromised (or possibly even destroyed), thus increasing the potential damage to structures behind that dune. Mr. Nerlinger advised that not only will the dune

not be altered as a result of this proposed construction project, he will do everything he can to maintain all of the vegetation that currently exists at that property. He further notes that the dune in front of the property at issue with his application is “three times greater than any other dune in Tower Shores”, and it is his intent to maintain that dune and ensure that it stays there for the continued benefit of the Tower Shores community.

Lastly, to clarify the concerns surrounding this proposed project for both the Department and the public, Mr. Nerlinger confirmed that, at its lowest point, the sand underneath the house is still at least one foot above the base level elevation, pursuant to the Department’s Regulations pertaining to such construction.

C. Public Comment:

Following the Applicant’s presentation, the public hearing was then open to receive comment from members of the public. First to speak was Judy Marcus, who owns property with her husband at 29150 Ocean Road in the condominium known as Atlantis II, located landward of Lot 84. Mr. and Mrs. Marcus are very concerned about the potential for damage to both their property and other properties in Tower Shores if the Applicant’s proposed construction project is permitted by DNREC, and urge the Department to (1) deny the pending application; (2) retire Lot 84 as “unbuildable”; and (3) “justly compensate” the owner for his inability to utilize said lot.

It is the belief of Ms. Marcus that for the Department to even consider permitting development on Lot 84 would be “contradictory to its stated principles and mission”. She further believes that it is inconsistent of DNREC to even have an application for the process of construction to take place on a dune. Additionally, she states that FEMA guidelines prohibit the human alteration of sand dunes, unless it can be demonstrated that

such alteration will not increase potential flood damage. Ms. Marcus also states that the Applicant's proposed construction project would violate portions of Sussex County Code, and she questions "...the legality of one governmental agency knowingly violating the codes of another governmental body or agency, by their actions or by their permits."

Continuing on with her concerns related to this matter, Ms. Marcus notes that the Applicant states that on his application that "the primary dune will not be disturbed". She believes that statement to be "blatantly untrue and....misleading". According to Ms. Marcus, in Tower Shores there is no second line of dune that could be considered a secondary dune, there is only "primary dune", and, in her opinion, if this project is permitted by DNREC, "...plenty of primary dune material will be disturbed."

Ms. Marcus then references that DNREC permitted construction of the Four Winds condominium directly south of Lot 84 approximately 30 years ago. According to her, at that time the Department received letters from property owners in Tower Shores expressing similar concerns, i.e., that construction on those lots would result in the destruction of the dune. DNREC ultimately approved that construction, and allowed the developer to "flatten the lots to 13 feet above sea level, just one foot above the base flood elevation." It is Ms. Marcus' contention that, as a result of that construction thirty years ago, Atlantis II condominiums directly west of Four Winds is the most vulnerable building in Tower Shores, and has sustained damage over the years due to the lack of dune protection. Ms. Marcus further stated that "Four Winds has become the example of what not to do, and we would hope that DNREC has learned from its past mistake."

Continuing on with her concerns, Ms. Marcus believes that, if Lot 84 is to be developed, its location places 56 other homes on Cove and Ocean Roads directly in the path of storm surges and flooding damage. She states that DNREC must "...weigh where the greatest harm and greater liability lay if, by allowing one building, 56 homes are placed at risk." She further urges that DNREC must be "even more vigilant in its protection of the shore areas" in times of rising sea levels and greater frequency of stronger storms.

Lastly, Ms. Marcus states that they have concerns that, if DNREC allows this construction to proceed and, as a result of that construction, flooding and/or storm damage occurs, FEMA could possibly disqualify Tower Shores from participation in the National Flood Insurance Program. If this should occur, she asks what DNREC and the State of Delaware is prepared to do to compensate them as homeowners for their losses. For the record, a hard copy of Ms. Marcus' statement that was read into the record at the night of the hearing was marked by this Hearing Officer as "Marcus Exhibit Number 1".

Next to speak at the public hearing was Tim Collins, who spoke as a member and leader of the Tower Shores community. Mr. Collins wished to voice the concerns of the community, especially with regard to the potential for compromise of the dune and the possible flooding on Cove and Ocean Roads. He also wished to offer thanks to the Department, specifically, to Ms. Luoma, for her helping the community to safeguard and preserve the dunes in Tower Shores.

Laura Wesley was next to speak at the hearing. Ms. Wesley voiced opposition to the permit application of Mr. Nerlinger, stating that she believes the proposed size of the building, along with the destruction of both the dune and vegetation that holds it, would

be "very detrimental, both to the buildings around it and to the community". While Ms. Wesley has met Mr. Nerlinger, and believes that he is well intentioned with regard to his desire to protect the dune, she believes that he is proposing to build an "enormous house", and thinks that it will be "very difficult to preserve the dunes and the vegetation if he is permitted to go ahead with such a large building on such a unique piece of property".

Ms. Wesley further notes that the intensity of storms has increased in recent years, and the damage to the beach has been dramatic. The community has already spent thousands of dollars to replenish fencing, sand, and beach grass. The lot in question has mature shrubs that will be destroyed with this construction project, and nothing will hold the dune together in the way that those mature shrubs will. Also, while the Applicant states that they are interested in preserving the dunes and have said that they will set their house back from the front dune, she still believes that this project will destroy dunes that prevent damage to the community.

Lastly, Michael Emmett offered comment regarding the Applicant's proposed project. Mr. Emmett stated that he, too, has been a volunteer on the Board for Tower Shores for almost ten years, and has previously built structures within the community. He stated that he could not remember a time in the past when any member of the community had brought to the Board "any complaints or any concern about the dunes that are existing in Tower Shores or the lack thereof". Mr. Emmett additionally noted that no one has come to the Board "...to complain about how there is no dune in front of Four Winds, and about how the safety to the community is compromised and the fear of losing flood insurance". Furthermore, Mr. Emmett stated that, as a builder, it was his

opinion that the impact on Lot 84 would be "very minimal" with regard to the proposed construction project, and that the amount of sand that would need to be moved is "minimal, at best". He believes that the sand that does need to be moved can be located underneath the house, as stated by the Applicant in his presentation, and that there would still be enough space for parking to meet all of the requirements for this project.

Continuing on with his comments, Mr. Emmett noted for the record that he went with Mr. Nerlinger to meet with various people from the community over Memorial Day Weekend to discuss this project, and he stated that "people were quite surprised" when it was pointed out to them that "maybe four truckloads of sand will be moved underneath the house, not even off the property, and that the substantial dune that's untouched is probably the largest, if not the second largest, dune in the whole community." Mr. Emmett concluded his remarks by noting that he found it odd that people "...would complain about this little bit of a dune disturbance....[when] they don't complain about people taking and leveling the dunes in front of Four Winds after we rebuilt them."

After Mr. Emmett's remarks, Mr. Nerlinger wished to note on the record that, with regard to comments made about the size of the proposed construction project, the same building that the Applicant is proposing to construct on Lot 84 has been built at ten other places within the Tower Shores community.

Given the level of concern that was expressed at the time of the public hearing, this Hearing Officer left the record open for an additional week for the inclusion of any additional public comment that may have been desired to be given by members of the affected community. It should be noted that, at the time of the record closing one week

later on June 14, 2012, no additional comment had been received by the Department in this matter.

Subsequent to the close of the record with regard to public comment, the Department's DWS-SWMS reviewed this permit application in the light of (1) the requirements of Delaware's *Beach Preservation Act* (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches*, DNREC's *The Four Step Process (for Construction on Delaware's Atlantic Ocean and Delaware Bay Shorelines)*, and 7 Del.C., Chapter 60; (2) the exhibits entered into the formal hearing record in this matter, as noted above; and (3) the public comments that were received by the Department in this matter, and provided this Hearing Officer with a detailed and comprehensive Technical Response Memorandum (TRM), dated July 2, 2012, which addressed all issues raised by the public comment received by the Department with regard to this pending permit application. To provide additional clarity (and to further define some of the terms set forth in the TRM), DWS-SWMS provided a Supplemental Technical Response Memorandum (STRM), dated July 10, 2012. Both the TRM and the STRM have been formally incorporated into the public hearing record generated in this matter, and will now be discussed in detail herein.

D. Discussion/Departmental Review:

As noted previously, the aforementioned Regulations provide the criteria for evaluation of proposed projects to be constructed on Delaware's Atlantic Ocean and Delaware Bay Shorelines. Furthermore, these Regulations state that the DWS-SWMS, when considering Coastal Construction Permits, shall take into consideration not only the geological aspects of the area, but also consider any other relevant information relating to

this permitting matter, including, but certainly not limited to, the effect of the proposed construction on shoreline recession, beach erosion, flooding, potential damage to the parcel of real property that is the subject of the permit application, potential damage to any other parcel of real property, public lands, or personal property, and any comments received by the Division with regard to such pending permit applications. Furthermore, upon the granting of an application for a DWS-SWMS permit, such permit may, if determined necessary by the Secretary, include certain conditions to address comments and concerns expressed by the public regarding the effect of a proposed project upon the surrounding community.

In the present matter, the Applicant's proposed project is intended for Lot 84 in the community of Tower Shores. The Department points out in both of its Response Documents that Lot 84 was platted *prior* to the effective date of Delaware's *Regulations Governing Beach Protection and the Use of Beaches* (August 13, 1981), at which time the mapped DNREC Building Line became effective⁴. Thus, despite the fact that Lot 84 is physically located completely seaward of the DNREC Building Line, Lot 84 is grandfathered as a buildable lot. In this present matter, the DNREC Building Line is located landward of the entire lot; therefore, it is physically impossible to construct landward of the building line on Lot 84.

Since Lot 84 is grandfathered as a buildable lot, the Department's review of this project then turns to whether DNREC's aforementioned Four Step Process has been utilized by the Applicant with regard to the proposed construction project. The purpose of

⁴ The term "Building Line" is defined in the Department's Regulations as "the line generally paralleling the coast, set forth on maps prepared by the Division with reference to the National Geodetic Vertical Datum (NGVD) and the Delaware State Plane Coordinate System, and based upon information provided by topographic survey." In the present matter, the Building Line is located as follows: along beaches extending from the Delaware/Maryland line to the tip of Cape Henlopen - 100 feet landward of the adjusted seawardmost 10-foot contour above NGVD.

the Four Step Process is set forth in §6805(d) of Delaware's Beach Preservation Act, to

wit:

If any structure proposed to be built in whole or in part seaward of the building line could reasonably be reduced in size or otherwise altered in order to eliminate or diminish the amount of encroachment over the building line, the Department shall require such reduction or alteration as a condition of granting the permit or letter of approval.

The Four Step Process (which has been utilized by the Department since 1996) has been found to minimize encroachment seaward of the Building Line. Thorough review of the Applicant's pending permit application in this matter by DWS-SWMS reveals that the proposed project does, in fact, meet the Four Step Process, as described in detail within the Department's aforementioned STRM.

With regard to the proposed building's deck, the initial TRM points out that the proposed eight foot deck will be cantilevered, and will not extend further seaward than the lawfully constructed deck on the immediately adjacent property. Additionally, in order to reduce the potentially hazardous condition of floating debris both during and after coastal storms, DWS-SWMS requires that all new construction seaward of the DNREC Building Line be located above Base Flood Elevation (BFE), with the exception of the piling foundation. The Applicant's plans show that the proposed dwelling will be located completely above BFE, with the exception of the foundation pilings. Lastly, per the initial TRM, the size of the proposed dwelling fits within the average square footage found using the Four-Step Process, and is in keeping with the neighborhood of Tower Shores. Thus, the Department believes that the Applicant has met the Department's requirements with respect to the size and design of the proposed construction project.

With regard to the public concerns voiced about potential damage to the dune, DWS-SWMS agrees that dunes are the first line of defense during coastal storms, and has made it known to the Applicant that they will require no sand to be removed from Lot 84 during construction, and that no disturbance of the dune is to occur outside the footprint of the proposed structure. The Department also notes that, after the coastal storm that occurred in November 2009, the dunes in Tower Shores were significantly eroded. Since the dune took the brunt of the wave energy in that storm, all infrastructure and homes behind the dune were well protected. Since 2009, the dune (thanks to the due diligence of the community) has greatly recovered, and has actually increased in height and width. In fact, DWS-SWMS notes in the initial TRM that, if the Building Line were drawn today by the definition in the Regulations using the topographic survey dated January 17, 2012, it would be located approximately 55 feet *further seaward* than it is currently mapped. Thus, the dune is now approximately 55 *wider* than it was in 1979 when DNREC initially mapped the Building Line.

The Department further notes in its STRM that Tower Shores, like all of the North Bethany communities, has been receiving the benefits of the long shore transport of sands from the State and Federal beach nourishment projects that occur in Bethany Beach. Even with the erosion that occurred as a result of the November 2009 coastal storm, as a result of the community being in a position to receive drifting sands, the beach rebuilt by May of 2010 enough to allow the community to mechanically scrape sand from the beach to rebuild the dunes. Additionally, during the fall/winter/spring of 2010-2011, the community made efforts to plant beach grass, and the dunes have grown to be effective protection barriers in the case of a threat of a coastal storm.

The DWS-SWMS agrees with the public comments received at the public hearing that stable dune vegetation is critical. Although some disturbance of the vegetated dune will occur within the footprint of the proposed dwelling, sixty feet of dune seaward of the proposed dwelling will remain untouched and fully vegetated.

With regard to the concerns voiced by the public regarding the Applicant's proposed project being compliant with Sussex County Code and/or the guidelines set forth by FEMA, the Department's initial TRM notes that the guidelines mentioned by Mrs. Marcus are enforced by Sussex County, which is a member of the National Flood Insurance Program (NFIP). Sussex County Planning and Zoning is responsible for enforcing the NFIP regulations. The Department further notes that it works closely with Sussex County in such permitting processes, and, should the Applicant's pending permit application be approved by the DNREC Secretary, the resulting permitted structure will be compliant with both DNREC and Sussex County requirements.

III. Conclusions and Recommendations:

Based on the record developed in the course of this hearing, it is my opinion that the record does warrant, and the Applicant has reasonably justified, the pending request for a DWS-SWMS Coastal Construction Permit, with certain permit conditions, to ensure continued protection of both the dune and beach, as well as the continued protection of existing structures which rely upon the dune for their protection during coastal storms in the community of Tower Shores, Bethany Beach, Sussex County, Delaware. As noted in the Department's aforementioned Response Documents, the Applicant's proposed project has met the DWS-SWMS's requirements for a Coastal Construction Permit for

construction of a dwelling seaward of the DNREC Building Line, and has designed said proposed project in a suitable manner for the proposed location.

For the reasons stated above, I hereby recommend that the Applicant's pending request for a DWS-SWMS Coastal Construction Permit, with certain permit conditions, for construction of a duplex dwelling with an eight-foot cantilevered deck on Lot 84 in Tower Shores, Bethany Beach, Sussex County, Delaware, be **granted**, with inclusion of the following *permit conditions* as set forth in the Department's STRM, to address comments and concerns expressed by the public regarding the potential effects of the proposed construction on both the dune and beach, as well as to ensure the continued protection of existing structures which rely upon the dune for their protection during coastal storms in the community of Tower Shores, to wit:

1. All structures constructed seaward of the DNREC Building Line must be above Base Flood Elevation, with the exception of lattice;
2. Future construction of a roof or enclosure of the cantilevered deck is prohibited;
3. The area underneath the cantilevered deck shall remain open and free of obstructions, including lattice;
4. No sand may be removed from the lot; and
5. Disturbance of the dune shall only take place within the footprint of the proposed dwelling.

I also recommend that the following findings be made with regard to this matter:

1. Proper notice of the hearing was provided, as required by law.
2. The Department has jurisdiction under its statutory authority to issue a Coastal Construction Permit to the Applicant, subject to reasonable permit conditions deemed appropriate and consistent by the Department in this matter;
3. The Department provided adequate and lawful public notice of the aforementioned Permit Application of Tower Shores Realty, LLC, and of the public hearing held on June 7, 2012, and held said hearing to consider public comment on the application, in a manner required by the law and regulations;
4. The permit approved by the Secretary's Order will allow this Applicant to construct a duplex dwelling with an eight-foot cantilevered deck on Lot 84 in Tower Shores, Bethany Beach, Sussex County, Delaware, as proposed in its application.;
5. The Department has considered the factors required to be weighed in issuing such permits, and finds that the proposed use is both appropriate and reasonable at the proposed location, and that it should be permitted, with conditions, as set forth above;

6. The Department shall issue a permit to the Applicant, Tower Shores Realty, LLC, and said permit shall include all conditions consistent with the final Order and any other reasonable conditions that the Department includes in such permits, to ensure that Delaware's environment will be protected from harm, consistent with the aforementioned existing Delaware regulations governing such matters, to wit: (1) all structures constructed seaward of the DNREC Building Line must be above Base Flood Elevation, with the exception of lattice; (2) future construction of a roof or enclosure of the cantilevered deck is prohibited; (3) the area underneath the cantilevered deck shall remain open and free of obstructions, including lattice; (4) no sand may be removed from the lot; and (5) disturbance of the dune shall only take place within the footprint of the proposed dwelling;
7. The Department has carefully considered all the statutory factors to be considered in making a decision on this permit application, and those required to be considered under existing Delaware regulations regarding such matters, to wit, the requirements of the Beach Preservation Act (7 Del.C., Chapter 68), Delaware's *Regulations Governing Beach Protection and the Use of Beaches*, DNREC's Four Step Process, and 7 Del.C., Chapter 60;

8. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary; and
9. The Department shall serve and publish its Order on all affected persons in a manner consistent with the service and publication of Secretary's Orders.

In addition, I recommend issuing the attached Secretary's Order to effectuate this purpose and adopting the Hearing Officer's findings and conclusions as expressed hereinabove.



LISA A. VEST,
Public Hearing Officer

