

**IN THE ST. MARY'S COUNTY BOARD OF APPEALS**

**VAAP NUMBER 19-1713**

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**KELLY PROPERTY**

**FIFTH ELECTION DISTRICT**

**VARIANCE REQUEST HEARD: NOVEMBER 10, 2022**

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**ORDERED BY:**

**Mr. Ichniowski, Mr. Bradley, Ms. Delahay,  
Mr. Miedzinski, and Mr. Richardson**

**ENVIRONMENTAL PLANNER: STACY CLEMENTS**

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**DATE SIGNED: Dec 8, 2022**

### **Pleadings**

Scott & Christina Kelly (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer to construct a swimming pool.

### **Public Notification**

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on October 21, 2022 and October 28, 2022. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before October 26, 2022. The agenda was also posted on the County’s website on November 2, 2022. Therefore, the Board of Appeals (“Board”) finds and concludes the variance requests’ notice requirements have been met.

### **Public Hearing**

A public hearing was conducted at 6:30 p.m. on November 10, 2022 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were duly sworn, the proceedings were recorded electronically, and the following was presented about the variance requested by the Applicants.

### **The Property**

The subject property consists of unimproved and unaddressed property adjacent to 40359 Beach Road, Mechanicsville, Maryland (“the Property”). The Property is 1.22 acres, more or less, is zoned Residential Neighborhood Conservation (RNC), has Limited Development Area (“LDA”) and Buffer Management Overlay (“BMO”) Critical Area overlays, and is found at Tax Map 5A, Grid 2, and Parcel 56.

### **The Variance Requested**

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to construct a swimming pool.

### **St. Mary's County Comprehensive Zoning Ordinance**

CZO § 71.8.3 requires there be a minimum 100-foot buffer (“the Buffer”) landward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands. No new impervious surfaces or development activities are permitted in the 100-foot buffer unless an applicant obtains a variance. CZO § 71.8.3(b)(1)(c).

### **Departmental Testimony and Exhibits**

Stacy Clements, an Environmental Planner for the St. Mary's County Department of Land Use & Growth Management (“LUGM”), presented the following evidence:

- The subject property (“the Property”) is unimproved property adjacent to 40359 Beach Drive in the Golden Beach Subdivision. Previously Lots 445 & 446, the lots were combined into a single parcel. The Property is maintained as lawn.
- The proposed development will consist of a swimming pool and pavilion within an area of pavers.
- The Property is partially constrained by the Critical Area Buffer, which is established a minimum of 100-feet landward from the mean high-water line of tidal waters and tidal wetlands.
- A total of 4,400 square feet of permanent disturbance is proposed to construct a 24' x 48' swimming pool and 10' x 20' pavilion within 55' x 80' pavers.
- The Property is in an established Buffer Management Overlay District per CZO Section 41.7. Per CZO Section 41.7.4.a(7)(c), new structures accessory to a

residential use may be permitted in the Buffer if the proposed new impervious coverage comprises 500 feet or less within 50 feet of the water and 1,000 square feet in the entire buffer on the Property. Applicants propose more than 1,000 square feet of impervious coverage.

- The Maryland Critical Area Commission (“CAC”) provided a comment letter dated October 7, 2022 (Attachment # 4). CAC opposes the requested variance for the reasons stated in its letter.
- A text amendment to the CZO, deleting a section of the CZO that barred applicants from requesting variances for private, non-commercial swimming pools, was recently passed. The remaining accessory standards still apply.
- If approved, Applicants would be required to plan 13,200 square feet of mitigation plantings. A planting agreement and plan will be required prior to the issuance of the building permit.
- As less than 5,000 square feet of total soil disturbance is proposed, this project is exempt from Stormwater Management review and review by the St. Mary’s County Soil Conservation District.
- If the variance is granted, it shall lapse one year from the date of the grant of the variance if the Applicant has not attained a building permit.
- Attachments to the Staff Report:
  - #1: Standards Letter
  - #2: Critical Area Buffer & Tidal Wetland Map
  - #3: Site Plan
  - #4: Critical Area Commission Letter of October 7, 2022

- #5: Zoning Map
- #6: Ordinance No. 2022-24

### **Applicants' Testimony and Exhibits**

Applicant Christina Kelly appeared before the Board to offer testimony, joined by Chris Longmore of Dugan, McKissick, & Longmore, LLC as counsel. Also present and called to offer testimony was Barry Vukmer, a licensed surveyor. The following evidence testimony was among that provided to the Board:

- The Property consists of two grandfathered lots. Each lot could, if Applicants desired, be developed with a single-family residence.
- The total allowable lot coverage for grandfathered lots is 6,788 square feet; applicant is proposing only 4,400 square feet.
- There are few, if any, vacant lots left in the Golden Beach Community.
- Applicants described efforts they will put forth to make the pool as environmentally considerate as possible. Among these measures will be using a salt water system rather than a chlorine-based system, implementing a close system that does not have a backwashing system, and using pool equipment Applicants described as “standard,” which will be located either under or next to the pavilion.
- No fence will be positioned around the pool and it will be covered with an electric cover.
- All mitigation will be performed on-site. Applicants’ counsel pointed out that the unimproved lot, presently only grass, will be covered in 13,000 square feet of plantings.
- Applicants stated they will not develop the lot beyond this proposed project.
- Applicants, particularly Ms. Kelly, testified at length and in great detail about her recent

medical history. In September, 2021, Ms. Kelly suffered a fracture, had two major surgeries, spent two months in a wheelchair and housebound, and remains permanently disabled. Her therapist encouraged her to pursue aquatherapy as part of her recovery.

- Among the documents provided by Applicants are a letter from Ms. Kelly detailing her and her husband's recent medical history, and a letter dated 1/16/202 from Johns Hopkins Community Physicians from Valerie Nicole Owings, MD, related to Ms. Kelly's health. These documents, which include pictures, detail the injuries both Applicants sustained. Applicants stated they have been advised by their doctors that regular aquatic exercise would be a beneficial form of therapy for their conditions.
- Per CZO § 122(a)(3), pools may not be located be in the front or street side setback area.
  - Applicants further testified that Beach Road is heavily trafficked, and felt that locating the swimming pool within the front setback area could pose a safety risk.
  - In addition, Applicants testified that locating the swimming pool within the front setback area would raise privacy concerns.
- Mr. Vukmer testified that, in his experience, a pool is a much more passive use of a property than a single-family home. A pool will generate less runoff, and will generate no sewage nor fluid from vehicles. His opinion, on the whole, was that a pool would be a more environmentally friendly development than a single-family home.

#### **Public Testimony**

The following members of the public appeared to offer testimony about the proposal:

- Dale Antosh
  - Mr. Antosh appeared representing the Golden Beach Civic Association and has

lived in the neighborhood since approximately 2007-2008. He spoke in favor of their proposal. Mr. Antosh stated that the Applicants “went through a lot of trouble” to get the Property, and that they have maintained it impeccably since acquiring it. Mr. Antosh called attention to the steep dropoff of the cliffs on the edge of the Property. He stated that many property owners are building houses on the “small lots” in their neighborhood. He stated there were attempts, in the past, to build houses on the Property itself.

- Tara and Lance Johnson
  - Mr. and Mrs. Johnson appeared together, and are neighbors of the Applicants. They spoke in favor of the proposal. Mr. Johnson stated that they live directly across the street from the Applicants and moved in approximately two years prior to the Applicants. Mr. Johnson stated the Applicants have greatly improved the landscaping and grounds of their house, and described it as “very water runoff friendly.” Mrs. Johnson echoed her husband’s sentiments and stated that the Applicants take beautiful care of their house and the Property.

### **Decision**

#### **County Requirements for Critical Area Variances**

The St. Mary’s County Comprehensive Zoning Ordinance § 24.4.1 sets forth six separate requirements that must be met for a variance to be issued for property in the Critical Area. These criteria are substantially similar to the criteria of COMAR 27.01.12.04.<sup>1</sup> They are summarized as

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<sup>1</sup> The Board acknowledges the Critical Area Commission’s statement in its letter that COMAR 27.01.12.04 that COMAR is the controlling authority regarding the standards by which the instant variance request must be governed. In the past, the Board has applied the standards of St. Mary’s County’s Comprehensive Zoning Ordinance without receiving this comment from the Critical Area Commission. It is the Board’s understanding that this section of the CZO is in the process of being updated to reflect COMAR. As discussed at greater length in the body of this order, the Board’s discussion in this order will use CZO 24.4.1 as an organizational aid. This will maintain consistency with past opinions and, more compellingly, it is how the Applicants were asked to prepare

follows: (1) whether a denial of the requested variance would constitute an unwarranted hardship (analogous to COMAR 27.01.12.04(1)); (2) whether a denial of the requested variance would deprive the Applicants of rights commonly enjoyed by other property owners in similar areas within the St. Mary's County Critical Area Program (analogous to COMAR 27.01.12.04(2)); (3) whether granting the variance would confer a special privilege on the Applicants (analogous to COMAR 27.01.12.04(1)); (4) whether the application arises from actions of the Applicants (analogous to COMAR 27.01.12.04(4)); (5) whether granting the application would not adversely affect the environment and would be in harmony with the Critical Area Program (analogous to COMAR 27.01.12.04(6)); and (6) whether the variance is the minimum necessary for the Applicants to achieve a reasonable use of the land or structures (analogous to the hardship test of COMAR 27.01.12.04(1)).<sup>2</sup> Maryland Code Annotated, Natural Resources Article, § 8-1808(d)(2)(ii) also requires the Applicants to overcome the presumption that the variance request should be denied.

#### Findings - Critical Area Variance

Upon review of the facts and circumstances, the Board finds and concludes the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

First, the Board finds that denying the Applicants request would constitute unwarranted

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their standards letter. The Board does find that, except as noted in Footnote # 2, the criteria of CZO § 24.4.1 and COMAR 27.01.12.04 bear substantial similarity to each other, and that an analysis of the standards of one is, effectively, an analysis of the standards of the other.

<sup>2</sup> The Board identifies two criteria in COMAR 27.01.12.04 that it does not believe have direct analogues in CZO § 24.4.1, those being COMAR 27.01.12.04.B(5) and (7). With respect to B(5), it does not appear to the Board – and the Critical Area Commission, in its letter, does not disagree – that the Applicants' variance request does not arise from any conforming or nonconforming condition on any neighboring property. With respect to B(7), the Board believes that, by satisfying all other standards of the Critical Area Program and the Comprehensive Zoning Ordinance, and for the salutary effects of the proposed mitigation and other considerations mentioned in the body of this order, that the proposed project is in harmony with the Critical Area Program.

hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Court of Appeals established the statutory definition for “unwarranted hardship” as it pertains to prospective development in the Critical Area:

[I]n 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 be accomplished elsewhere on the property without a variance.

*Id.* at 139. *Assateague Coastal Trust* requires the Applicants to first identify a use that would be significant. The Applicants’ proposed use is a non-commercial swimming pool. Swimming pools are common amenities across St. Mary’s County; they are, however, less commonly found in the Critical Area Buffer. A recent text amendment allowed property owners to petition for a variance to locate such pools in the Critical Area Buffer provided all other standards are met. This text amendment was reviewed by the Critical Area Commission and was ultimately passed by the Commissioners of St. Mary’s County unanimously. The instant case is the first request for a variance under this new regulation.

The Board finds that depriving Applicants of the right to build the proposed pool, in the instant case, amounts to denial of a reasonable and significant use of the property. The Applicants presented compelling evidence, specific to this situation, of the salutary health effects they expect building the proposed pool will bring them. St. Mary’s County is a rural county with more limited resources and venues for aquatherapy than a larger jurisdiction, a reality Ms. Kelly’s testimony touched upon; no evidence was presented of what more practicable alternatives there may be to her than this proposed pool.

Regarding objections to the siting of the proposed pool and the suggestion that the site plan could be reconfigured to eliminate or reduce intrusions into the Buffer, the Board finds compelling

the testimony of the Applicants regarding the infeasibility of intruding into the front yard setback buffer. Applicants correctly note the CZO applies the full front-yard setback to pools. On the question of which restriction the Applicants should seek a variance from – the prohibition on development in the Critical Area Buffer, or the prohibition on building within the front-yard setback – the Board finds compelling the testimony offered regarding the dangers and intrusions upon privacy that would be imposed upon Applicants if the pool is forced to be built closer to Beach Road. Accordingly, the Board also finds that the building the pool in its proposed location, outside the front-yard setback, is also the minimum necessary to achieve its fair and reasonable use.

Regarding the standards related to denial of rights commonly enjoyed by similarly situated property owners and the grant of special privileges, the Board does not find granting a variance to Applicants violates either standard. As stated above, this is the first request for a variance to permit a swimming pool brought under the recent text amendment. Accordingly, the Board has no points of reference it can make in its own history regarding similar requests. Yet, the revisions to the Comprehensive Zoning Ordinance clearly and explicitly enabled a request such as the instant one. Under the previous text of the CZO Applicants' request not be made at all; variances, in stark black and white text, could not be granted for swimming pools at all. The implication to the Board, then, is that there must be at least some instances in which a non-commercial swimming pool could be found to be a significant and reasonable use. In considering whether this is one such instance, the Board once more turns to, and finds persuasive, the unique position of the Applicants and their testimony regarding their particularized desire for a pool that might enable them to participate in aquatherapy. The Board finds that if the Applicants request a variance under the new text amendment, carry their burden of proof and persuasion, meet each and every standard of the

Comprehensive Zoning Ordinance and COMAR 27.01.12.04, and are accordingly granted a variance, that a special privilege has not been conferred, and that the Applicants have not been deprived of rights which would be commonly enjoyed by other similarly situated property owners.

Regarding whether the need for the variance arises from the actions of the Applicants, there is no testimony suggesting otherwise. Something that is also acknowledged in the Critical Area Commission's letter. Accordingly, the Board finds this standard met.

The Board finds that granting the variance would not adversely affect the environment. As Applicants note, a result of the proposed project will be 13,000 square feet of plantings on what would otherwise remain bare grass. There was no shortage of testimony concerning Applicants' stewardship of the Property or their home; Applicants' neighbors spoke glowingly of their maintenance of the existing yard and vegetation on both properties, and to Applicants' overall responsibility as homeowners. Mitigation is required by the Critical Area Program to offset and balance any potential effects of permissible development. That mitigation will be implemented in the instant project. Applicants detailed other steps they would take to make this pool as environmentally conscious as is feasible. Accordingly, the Board finds, on the whole, that the proposed development, properly mitigated, will not result in an overall adverse effect upon the environment.

Finally, the Board discusses whether this development can be in general harmony with the Critical Area Program. The Board finds it is. Applicants are correct to point out that it would be allowable, if this variance is denied, to build two single-family homes on the grandfathered lots that comprise on the Property. That is an outcome allowed by the Critical Area Program and state law. It was undisputed, and in the Board's view is incontrovertible, that such development would have far more environmental impacts than the proposed development. The Board acknowledges

that the ability to develop these hypothetical single-family homes is because the lots are grandfathered. Even so, it remains a fact that the Applicants could, if they so desired, develop two single-family homes on the Property. Rather than deny the variance and see two single-family homes built accordingly, the Board would immeasurably prefer to grant the instant variance and forestall any such development.

As a result of satisfying these standards, the Applicants have also overcome the presumption in § 8-1808(d)(2)(ii) of the Natural Resources Article that the variance request should be denied.

#### County Requirements for Granting Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.3 sets forth seven separate requirements that must be met for a variance to be issued:

- (1) Because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape, or topographical conditions of the property involved, strict enforcement of this Ordinance will result in practical difficulty;
- (2) The conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;
- (3) The purpose of the variance is not based exclusively upon reasons of convenience, profit, or caprice. It is understood that any development necessarily increases property value, and that alone shall not constitute an exclusive finding;
- (4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
- (5) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will

not be changed by the variance;

- (6) The proposed variance will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and
- (7) The variance complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

*Id.*

#### Findings – Standard Variance Requirements

Upon review of the facts and circumstances, the Board finds and concludes that the Applicants are entitled to relief from the St. Mary’s County Comprehensive Zoning Ordinance..

First, the Board finds that strictly interpreting the CZO would result in practical difficulty due to the particular physical surroundings of the Property. In *McLean v. Soley*, 270 Md. 208 (1973), the Maryland Court of Appeals established the standard by which a zoning board is to review “practical difficulty” when determining whether to grant a variance:

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be

observed and public safety and welfare secured.

*Id.* at 214–15.

As noted in the Board of Appeals’ discussion of the standards for granting a variance from Critical Area provisions, denial of this variance would constitute a practical difficulty. In this case, the Applicants have demonstrated denial of this variance would render an unnecessary burden upon their lives.

The second standard is that the conditions creating the difficulty are not generally applicable to other properties in the same zoning classification. As noted above, Applicants’ need for a variance stem from the geographical constraints of the Property, the nature of the development that would otherwise be permissible on the Property, and the Applicants’ own particularized needs.

To the third standard, the purpose of seeking the variance is not “based exclusively upon reasons of convenience, profit or caprice.” Rather, Applicants presented compelling and specific testimony as to their unique needs, particularly Ms. Kelly. The Applicants’ swimming pool, in this case, amounts to more than a purely recreational amenity.

Fourth, the need for the variance does not arise from actions of the Applicants. Applicants’ need for a variance stem from the physical characteristics of their Property and the specific character of Applicants’ situation.

Fifth, the variance will neither detrimentally affect the public welfare, injure other properties or improvements, nor change the character of the district. The neighboring property owners were notified of the variance request and given an opportunity to speak on the matter; all who did spoke in favor of the proposal.

Sixth, the proposed development will not increase the residential use of the property and

the Board does not find that it will increase congestion or the risk of fire, endanger public safety, or substantially diminish or impair property values in the neighborhood. Moreover, the Board feels that enforcing the front-yard setback is necessary to secure safety for the Applicants or and motorists.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan. As the Board stated in its discussion of whether or not the requested variance is in harmony with the spirit and intent of the Critical Area Program, the Board points, firstly, to what might otherwise be allowed on this Property. In addition, the Applicants have presented compelling individual testimony that establishes the significance of this particular use to Applicants. Given the burdensome mitigation requirements that will be imposed, the additional stewardship measures described by Applicants, and the factually specific nature of this case, the Board finds granting the requested variance will be in harmony with the Comprehensive Plan.

### **ORDER**

**PURSUANT** to the application of the Scott & Christine Kelly, petitioning for a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer to construct a swimming pool; and

**PURSUANT** to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

**ORDERED**, by the St. Mary's County Board of Appeals, pursuant to CZO § 21.1.3.a and CZO § 24.8, that the Applicants are granted a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer to construct a swimming;

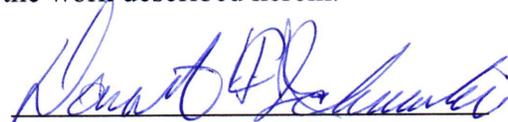
**UPON CONDITION THAT**, the swimming pool shall not be built within the front-yard

setback; and,

**UPON FURTHER CONDITION THAT**, Applicants shall comply with any instructions and necessary approvals from the Office of Land Use and Growth Management, the Health Department, and the Critical Area Commission.

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

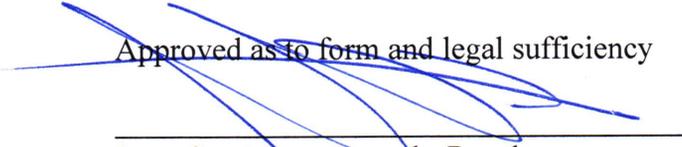
Date: Dec 8, \_\_\_\_\_, 2022

  
Daniel F. Ichniowski, Chairperson

Those voting to grant the amendment:

Mr. Bradley, Ms. Delahay, Mr. Ichniowski,  
Mr. Miedzinski, Mr. Richardson

Those voting to deny the amendment:

  
Approved as to form and legal sufficiency

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Steve Scott, Attorney to the Board

### **NOTICE TO APPLICANTS**

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals. St. Mary's County may not issue a permit for the requested activity until the 30-day appeal period has elapsed.

Further, St. Mary's County Comprehensive Zoning Ordinance § 24.8 provides that a variance shall lapse one year from the date the Board of Appeals granted the variance unless: (1) A zoning or building permit is in effect, the land is being used as contemplated in the variance, or regular progress toward completion of the use or structure contemplated in the variance has taken place in accordance with plans for which the variance was granted; (2) a longer period for validity is established by the Board of Appeals; or (3) the variance is for future installation or replacement of utilities at the time such installation becomes necessary.

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