

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

**VAAP NUMBER 21-0897**

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**MD 5 LAYDOWN AREA ON SEAL PROPERTY**

**FIRST ELECTION DISTRICT**

**VARIANCE REQUEST HEARD: JUNE 9, 2022**

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**ORDERED BY:**

**Mr. Bradley, Ms. Delahay, Mir. Miedzinski, Mr. Payne, and Mr. Richardson**

**ZONING ADMINISTRATOR: AMANDA YOWELL**

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**DATE SIGNED: July 14, 2022**

### **Pleadings**

The Robert L. Seal Living Trust & Elizabeth G. Seal Living Trust (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Sections 71.8.3 to disturb the Critical Area Buffer and 71.5.2 to disturb the Wetland Buffers due to temporary disturbance resulting from the construction trailer area and temporary laydown areas associated with the construction of MD 5 Point Lookout Road.

### **Public Notification**

The hearing notice was advertised in The Southern Maryland News, a newspaper of general circulation in St. Mary’s County, on May 20, 2022 and May 27, 2022. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before May 25, 2022. The agenda was also posted on the County’s website on June 1, 2022. Therefore, the Board of Appeals (“Board”) finds and concludes that there has been compliance with the notice requirements.

### **Public Hearing**

A public hearing was conducted at 6:30 p.m. on June 9, 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.

### **The Property**

The subject property is located off Point Lookout Road in Scotland, MD and can be found at Tax Map 73, Grid 16, Parcel 197 (“the Property”). The Property is 7.32 acres, more or less, is zoned Rural Preservation District (RPD), and has a Resource Conservation Area (RCA) Critical Area overlay.

### **The Variance Requested**

Applicant seeks a variance from CZO Sections 71.8.3 to disturb the Critical Area Buffer and 71.5.2 to disturb the Wetland Buffers due to temporary disturbance resulting from the construction trailer area and temporary laydown areas associated with the construction of MD 5 Point Lookout Road.

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

CZO § 71.8.3 establishes a minimum Critical Area Buffer 100-feet landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams. CZO § 71.5.2 requires there be a minimum 25-foot buffer preserved from the edge of wetlands and shall be expanded up to 100-feet to include areas of adjoining hydric soils.

### **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 Property is described as a 7.32-acre parcel of land located on Point Lookout Road in Scotland and is adjacent to the tidal waters of Tanner Creek.
- The Property is constrained by the Critical Area Buffer and by extensive tidal and non-tidal wetlands.
- Applicants' site plan proposes the temporary disturbance to place two construction trailers and three staging areas for the placement of equipment required for the MD Route 5 paving project. The temporary disturbances impact the tidal and non-tidal wetland buffers, which are expanded 100' for hydric soil types.

- LUGM reviewed the site plan for stormwater management and zoning and gave its approvals. The St. Mary's County Soil Conservation District and Metropolitan Commission have also approved the site plan.
- The Critical Area Commission reviewed the site plan and provided comments. In its comments, the Critical Area Commission stated it agrees with LUGM's determination of the required mitigation, and did not indicate it opposed the requested variance.
- COMAR 27.01.12.06 establishes the mandatory steps that must be followed to proceed with this variance request. The Applicant has been served a "notice of violation" and paid the appropriate fees. A mitigation plan has been approved by LUGM, and the Applicants have paid an appropriate fee-in-lieu. John Houser, an Assistant County Attorney, further testified the parties had executed a stet agreement to resolve the civil citations issued against Applicants, and that a notice to place the matters on the stet docket was filed with the St. Mary's County District Court. The stet agreement will be placed on the record on July 13, 2022.
- COMAR 27.01.09.01-2.H prescribes 4:1 mitigation for the unpermitted development that occurred in the Buffer, including the expanded portion. Because the property is under an active farm plan, a fee-in-lieu was accepted in place of plantings.
- Attachments to the Staff Report:
  - #1: Standards Letter
  - #2: Critical Area Buffer Map
  - #3: Wetland Report

- #4: Site Plan
- #5: Vicinity Map
- #6: CAC Response Letter dated March 18, 2002
- #7: ATF Variance Procedures
- #8: Farm Plan
- #9: Location Map
- #10: Zoning Map

### **Applicant's Testimony and Exhibits**

Applicants were represented before the Board by Kokosing Construction Company, represented by Michelle Keller, environmental scientist, and Jeff Walton, project manager. Applicants presented a slideshow which contained site plans, building plans, photographs of the site, and offered oral testimony. The following evidence and testimony was included in Applicant's presentation:

- The Property is located entirely within the Critical Area, and the portion of the Property bordering the roadway constructions contains wetlands, the 24-foot and 100-foot wetland buffers, and a portion of the Critical Area Buffer.
- The construction trailer and laydown areas are necessary to support the ongoing construction work on Maryland Route 5 Point Lookout Road, and the limits of the disturbance have been reduced to the greatest extent practicable to minimize impacts while meeting the project needs.
- Without this variance, roadway construction management and material staging cannot be accomplished.
- These disturbances will only be temporary, and no permanent disturbance will result

from this development.

### **Public Testimony**

No members of the public appeared to offer testimony related to this matter.

### **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. They are summarized as follows: (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 in similar areas within the St. Mary's County Critical Area Program; (3) whether granting the variance would confer a special privilege on the Applicants; (4) whether the application arises from actions of the Applicants; (5) whether granting the application would not adversely affect the environment and would be in harmony with the Critical Area Program; and (6) whether the variance is the minimum necessary for the Applicants to achieve a reasonable use of the land or structures. 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

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. Here, Applicants have sufficiently demonstrated that, absent the variance, they would be denied a use of the Property that would be both significant and reasonable. Applicants seek to use their property as a temporary staging area for an ongoing construction project on the adjacent state highway. This is not a use customarily encountered by this Board, but is nevertheless clearly a substantial and significant use of Applicants’ property – and, from Applicants’ testimony, a vital use in the eyes of Applicant’s agents, who are directly engaged in the construction project.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Resource Conservation Area. At its heart, Applicants seek a right to set-up a temporary construction trailer and storage material areas. The Board stresses that these uses are temporary and required if Applicants’ agent is to participate in the construction project. Insofar as a similarly situated homeowner would have a right to temporary on-site or near-site storage of materials for a compliant construction project, Applicants seek only that right.

Third, granting a variance to will not confer a special privilege upon Applicants. As noted above, the requested variance is for a temporary condition. Granting this variance does not ratify a permanent alteration or development of Applicants’ lands. No lasting special privilege will be conferred upon Applicants by granting this variance.

Fourth, the need for the variance does not arise from actions of the Applicant. The Applicants' are constrained by the physical features of their lot. As noted by Ms. Keller, the Property near the roadway is severely constrained by the Critical Area and Wetlands buffers. This is not the fault of the Applicants.

Fifth, granting the variance would not adversely affect the environment. The Applicant will be required to mitigate the proposed development with an approved planting plan established on-site (per COMAR 27.01.09.01) as part of the Building Permit process. The plantings are intended to offset any negative effects and provide improvements to water quality along with wildlife and plant habitat. The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, all of which should contribute to improved infiltration and reduction of non-point source pollution leaving the site. In this case, Applicants will pay a fee-in-lieu, said fees to be used by the County to perform plantings and other mitigation-related activities elsewhere in the Critical Area.

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

Finally, the Board of Appeals finds that the requested variance is the minimum necessary to achieve Applicants' intended reasonable use of the Property. As noted previously, Applicants are only seeking temporary use of areas of the Property immediately adjacent to the roadway where construction will be performed.

#### 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 Applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

First, the Board finds that strictly interpreting the CZO would result in practical difficulty

due to the particular physical surroundings of the Property. § 24.3(1). 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.

Here, the Applicant has demonstrated that, were the Board of Appeals to strictly interpret the CZO, the particular physical surroundings of the property would result in practical difficulty for the Applicant. The expanded Critical Area and Wetlands buffers constrain almost the entirety of the Property, limiting avenues for development on the Property were the CZO’s provisions strictly and rigidly enforced. Based upon the conditions shown on Applicant’s site plan and what can be observed from images of the Property provided during Applicant’s presentation, it is impracticable for Applicants to place these temporary developments elsewhere.

Second, the circumstances present in this matter are not generally applicable to other similarly situated properties. As noted in the paragraph above, the Property is almost entirely

constrained by the buffers, and the need for the variance is being driven by the particular construction activity taking place upon Maryland Route 5. Such conditions are not generally present in this County.

Third, the purpose of seeking the variance is not “based exclusively upon reasons of convenience, profit or caprice.” Rather, Applicants are carefully tailoring their requested variance to allow only for what will be minimally necessary to achieve the reasonable use of the property..

Fourth, the need for the variance does not arise from actions of the Applicant. As noted previously, the variance is required as a result of this Property’s physical characteristics.

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 have been notified of the variance request to provide them with an opportunity to speak on the matter. None have spoken against the project.

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.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan.

### **ORDER**

PURSUANT to the application of the Robert L. Seal Living Trust and Elizabeth G. Seal Living Trust, petitioning for a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer and Section 71.5.2 to disturb the wetland buffers for temporary disturbance resulting from a construction trailer and temporary laydown areas associated with the construction of Maryland Route 5 Point Lookout Road; 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 § 24.8, that the Applicant is granted a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer and Section 71.5.2 to disturb the wetland buffers for temporary disturbance resulting from a construction trailer and temporary laydown areas associated with the construction of Maryland Route 5 Point Lookout Road;

UPON 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 the 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: July 14, 2022

David Wayne Miedzinski  
David Wayne Miedzinski, Chairperson

Those voting to grant the amendment:

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

Those voting to deny the amendment:

Mr. Payne

Approved as to form and legal sufficiency

Steve Scott, Board of Appeals Attorney

**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 Circuit Court for St. Mary's County. 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.