

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

**ZAAP 18-00001405**

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**SEVEN POINTS AGRO CULTIVATION CENTER APPEAL**

**SEVENTH ELECTION DISTRICT**

**APPEAL HEARD: MAY 25, JULY 11, OCTOBER 26, 2023**

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**ORDERED BY:**

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

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**DATE SIGNED: DEC 14, 2023**

### **Nature of Action**

Anthony Damron, James Morris, Robert Allen Russel, Jr., Sergio Torres, Rose Ellen Guyther, Kimberly Gibson, Robert T. Brown, Sr., Victoria Brown, Nolan Smith, Rachael Hostetter, Christina Farr, Christopher Farr, Natasha Jones, and Russel Jones (collectively, “Appellants”) appeal an administrative determination by the St. Mary’s County Department of Land Use & Growth Management (“LUGM”) that installation of a new, expanded septic system at the Seven Points Agro Cultivation Center cannabis grow house (“the Facility”) did not constitute an illegal expansion or enlargement of a legally nonconforming use.<sup>1</sup>

### **Procedural History**

Appellants noted their appeal by written request to the Board on November 9, 2022. A hearing on a motion to dismiss filed by Blue Griz, LLC (“Applicant”), the owner of the Facility, was held on May 25, 2023 following which the Board voted against dismissing the appeal. The case’s merits, originally scheduled to be heard June 8, 2023 were heard on July 11, 2023 when Appellants presented their evidence and testimony, and on October 26, 2023 when Applicant presented its evidence and public testimony was taken. The Board voted to deny the appeal at the conclusion of the October 26, 2023 hearing. This written opinion and order follows.

### **Public Notification**

Public notice for the May 25, 2023 hearing on the motion to dismiss and June 8, 2023 merits hearing was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on May 5, 2023 and May 12, 2023. Further notice of the merits hearing was provided by physical postings made on the property and certified mailings to all property owners

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<sup>1</sup> Though the original Notice of Appeal stated a variety of alleged errors, appellants subsequently narrowed the scope of their appeal to only the “assertion that the Amended Site Plan authorizes the illegal expansion of a non-conforming use.” G. Macy Nelson Letter of June 14, 2023.

within 200' of the Property within required times. On June 8, 2023, Assistant County Attorney John Sterling Houser announced on the record that the parties had consented to bifurcating the merits hearing and continuing the matter to the July 11, 2023 and October 26, 2023 dates. An agenda for each hearing was additionally posted on the County's website prior to all hearing dates. Therefore, the Board of Appeals ("Board") finds and concludes all applicable notice requirements have been met.

### **The Property & Facility**

The Facility is located at 21416 Abell Road, Abell, Maryland 20606 ("the Property"). The Property is 26.38 acres, more or less, is zoned Rural Preservation District (RPD), is partially in the Critical Area and subject to a Rural Conservation Area (RCA) overlay, and can be found at Tax Map 47, Grid 1, Parcel 347. The Facility is a state-licensed greenhouse used for cultivation of cannabis.

### **Applicable Sections of the St. Mary's County Comprehensive Zoning Ordinance**

The St. Mary's County Comprehensive Zoning Ordinance ("CZO"), as amended by Ordinance No. 2022-30, prohibits Cannabis Growing Facilities in the RPD. CZO § 52.2.1 allows for continued operation of a use lawfully occupying a structure or site as of the effective date of any amendment to the CZO and deems it a legally nonconforming use. CZO § 52.3 generally prohibits expansion and/or enlargement of a legally nonconforming use unless certain criteria are met as set forth therein.

### **Staff Testimony and Exhibits**

John Sterling Houser, Assistant County Attorney, presented a staff report to the Board of Appeals that included the following testimony:

- The Property is a 26.38 acre parcel, more or less, that fronts Abell Road and

Gerard's Cove Road.

- The first permit application for a medical cannabis growing facility on the Property was submitted on July 11, 2018.
- At that time, no distinct use type existed in the CZO for cultivation of cannabis. Per CZO § 50.2 the County Planning Director determined Use Type 5 – Crop Production and Horticulture was the existing use type most substantially similar to the proposed use. Use Type 5 is permitted in the RPD.
- Following multiple plan revisions, LUGM approved the Seven Points Agricultural Building plans for Permit 18-1405 on October 27, 2021. Plans at that time depicted an existing “research facility” that had previously been built pursuant to Permit 19-0535, the Facility, and two greenhouses. A building permit for the Facility was then issued on November 18, 2021.
- On August 23, 2022, the Commissioners of St. Mary's County adopted Ordinance 2022-30, adopting specific use types for medical cannabis cultivation, processing, and dispensary facilities. Ordinance 2022-30 prohibits these uses from operating in the RPD, rendering the Facility a legally nonconforming use as of the effective date of the amendment, which was September 5, 2022.
- On September 13, 2022, the St. Mary's County Health Department approved a new sand mound septic system for the grow house.
- On October 11, 2022, LUGM approved amendment of Applicant's site plan on file at LUGM to show the approved second sand mound septic system. This was the only change to the site plan made at that time. Then-LUGM Director, Bill Hunt, issued a letter on October 17, 2022, giving notice of the approval and a



brief explanation of its context. A second letter was issued “in place of” the October 17 letter on December 19, which explained the decision with greater particularity, additional context, and corrected some misnomers in the October 17 letter.

- Following certification pursuant to CZO § 23.2 that any further stay would represent an imminent peril to property, LUGM issued a use & occupancy certificate on April 13, 2023 to the “grow house” upon successful completion of its final inspections. Simultaneously, an after-the-fact for an existing perimeter fence was issued. Appellants in this matter appealed both decisions on May 10, 2023. These appeals are separate and apart from the present matter and by consent of the parties are being held in abeyance pending resolution of this matter.

Attachments to the Staff Report:

- #1: Location Map
- #2: Site Plan Approved on October 27, 2021
- #3: Permit # 18-00001405
- #4: Site Plan Amended on October 11, 2022
- #5: Permit # 18-00001405
- #6: October 17, 2022 Letter from Director Hunt
- #7: December 19, 2022 Letter from Director Hunt

### **Appellants’ Testimony and Exhibits**

Appellants were represented before the Board by G. Macy Nelson, Esq. and Alex Votaw, Esq. both of the Law Office of G. Macy Nelson, LLC. At the Board’s July 11 hearing Appellants called witnesses to provide oral testimony, displayed videos and pictures, and presented exhibits.

Summaries of the witnesses called and their testimony are as follows:

- Kimberly Gibson
  - Ms. Gibson lives on Gerard's Cove Road at 38600 Pleasant Harbor Way, where she has lived since 2012. The property has been in her family since 1959 and her grandparents built the home she resides in.
  - Ms. Gibson shared pictures of the Facility and described the impacts, in terms of visuals, noise, and smell, it has imposed on her, her family, and her neighbors.
  - Ms. Gibson also shared concerns over whether the Facility poses any environmental impacts on nearby waterways.
- Anthony Damron
  - Mr. Damron lives at 21405 Canoe Neck Way, a property owned by his mother. He testified that the property has been in his family for 29 years. He shared pictures of his own childhood growing up on the water and of sharing it with his own children today.
  - Mr. Damron shared pictures from July and December 2022 and April, May, and June 2023 he stated showed runoff into Canoe Neck Creek from the Facility's grounds. He testified this runoff was silting in the creek and impairing water quality, as well as frustrating his ability to use and enjoy the creek. He also questioned whether the runoff from the Facility to the creek is why the creek had to be closed to commercial shell fishing.
- Joe Quinette
  - Mr. Quinette resides at 21726 Gerard's Cove Road. He stated he is concerned about possible runoff from the septic system and, if there ever was a problem, whether it

would affect water quality in the creek.

- Robert Russell, Jr.
  - Mr. Russell resides at 21585 Gerard's Cove Road, where he has lived since 1990.
  - Mr. Russell testified that he and his family have used Canoe Neck Creek recreationally for swimming, fishing, and similar activities. He is worried about the impacts the Facility will have on the health and vitality of the creek.
  - Mr. Russell stated he received no notice prior to construction that the Facility would be built.
  - There is significantly more traffic on Gerard's Cove Road than ever before since the Facility has been constructed, with a steady stream of traffic every morning and a steady stream throughout the day, including delivery and septic trucks.
  - The Facility generates substantial noise.
- Thomas Heynie
  - Mr. Heynie resides at 38810 Collinwood Drive. He owns one 55 acre parcel 2,000 feet away from the Facility and another 4 acre parcel that is also approximately 2,000 feet away. He said one of these is used for a business and one is used as his home.
  - He boats and fishes on Canoe Neck Creek.
  - Mr. Heynie said he believed there was significant runoff generated by the construction of the facility.
  - He compared current site conditions to an industrial site and stated that people would have a hard time selling their homes and that property values would decline.
- Robert T. Brown, Sr.

- Mr. Brown lives at 38232 Palmer Road, Colton's Point, Maryland.
- Mr. Brown is a commercial fisher and has an 18-acre oyster lease at the mouth of Canoe Neck Creek. He has planted approximately 14 millions oysters on it in the last two years.
- Additionally, he catches gizzard shad in Canoe Neck Creek and sells it as part of his business.
- Mr. Brown is concerned that the mound system poses a risk to Canoe Neck Creek if it fails or otherwise contaminates the creek, which would impact his oyster lease and livelihood.
- Mr. Brown testified that the Maryland Department of the Environment ("MDE") told him that the pollution line in the creek has already, since the Facility became operational, moved further down the creek. He said this could lead to the creek becoming closed to fishing, even from his own lease. There was no documentation nor testimony from MDE provided to support or clarify this testimony.
- Victoria Brown
  - Ms. Brown lives at 38232 Palmer Road, Colton's Point, Maryland. She is married to Robert T. Brown, Sr.
  - Ms. Brown believes the second septic system will have a detrimental effect on the waters of Canoe Neck Creek, where she and her husband maintain an oyster lease. She thinks they have put more than 14 million oyster spat in Canoe Neck Creek and estimated it to be closer to 18 million. She said the going dollar cost of every million of spat on shell that goes into the creek is approximately \$4,300.
  - Canoe Neck Creek has been shut down by MDE twice already in 2023 as of the

date of the hearing. She stated she could not tell us why, and said she is worried over the possibility of additional sewer spills impacting her business. She stated that if the creek would be closed it would impact their lease and they would have to relocate the oysters to another lease, which Ms. Brown described as a labor-intensive, and therefore impliedly expensive, undertaking.

- She said there are other oyster leases in vicinity that would be similarly impacted as her and her husband's in such an event.
- She said the first she learned of the building going up at a citizens' meeting in the Seventh District Firehouse in February, 2022.
- Rose Ellen Guyther
  - Ms. Guyther lives at 38530 Pleasant Harbor Way off Gerard's Cove Way. She has lived at her home for 39 years.
  - Ms. Guyther enjoyed the quietness and the recreational opportunities afforded by Canoe Neck Creek prior to the Facility's arrival.
  - Ms. Guyther says that since the Facility's construction she has noticed significant noise and light impacts and is concerned about what will happen to the water in Canoe Neck Creek.
  - Ms. Guyther also showed the Board a video she took showing the Facility's site, prior to construction, showing the grounds inundated after a rain of approximately two inches.
  - Ms. Guyther also showed a video, taken within a month of the hearing, to demonstrate the noise generated by the Facility's air handlers. The video showed the noise to be audible from her house.

- The third and final video Ms. Guyther shared was taken from Gerard's Cove Road on one of her walks past the facility. She noticed the sound to be much less coming from behind the berm that abuts Abell Road and portions of Gerard's Cove Road.
- Ms. Guyther noted an article in the paper a few years ago wherein the prior owner of the Facility was quoted as saying he would employ approximately 125 people at the Facility.
- Ruth Morris
  - Ms. Morris lives at 21517 Gerard's Cove Road in Abell. She resides there with her husband and three teenage daughters.
  - The family enjoys many outdoor activities including use of their pool and practicing for the girls' sports. Prior to construction of the Facility the Property consisted of fields and did not impact these activities.
  - The Facility now impacts the Morris family's use and enjoyment of their own property. Ms. Morris' daughters meet their school bus at the end of Gerard's Cove Road, where it meets Abell Road. This requires them to walk past the Facility. Some of the employees at the Facility are "a little scary looking to them" and Ms. Morris is concerned for their safety.
  - She said there is much more traffic on the road now than prior to the Facility's construction. One morning while the school bus was stopped at the end of Gerard's Cove Road a Facility employee went by the stopped school bus, with its red lights on, without slowing down at all.
  - Some of the employees use Gerard's Cove Road for entry into the Facility, as do some delivery trucks. The trucks will sometimes back onto her driveway to turn

around.

- Ms. Morris said that, in addition to visual, sound and light impacts, they can smell cannabis from their house. She testified that her daughters now recognize the scent of marijuana.
- Sarah Morris
  - Sarah Morris is Ruth Morris' daughter. She lives with her parents at 21517 Gerard's Cove Road. She is 13 years old.
  - She confirmed she has to walk along the Facility's fence line on Gerard's Cove road to catch her school bus. She does not feel safe given the people who choose to use the Facility's back entrance off Gerard's Cove Road.
  - Currently Sarah walks with her older sister but starting next year she will need to walk the road alone.
  - She thinks an expanded operation will yield greater traffic, which concerns her.
  - Sarah said it's "a little uncomfortable" to practice soccer outside because she is in sight of employees at the Facility. She also testified to times when she and her sisters would text each other about activity from cars and persons on Gerard's Cove Road they described as "creepy."
- Anna Morris
  - Anna is also Ruth Morris' daughter, and Sarah's older sister.
  - She repeated Sarah's testimony that they walk Gerard's Cove Road to catch their school bus and that the volume of traffic on the road causes them safety concerns.
  - Anna also testified that the volume of the air handlers can make it hard to hear approaching cars.

- While practicing field hockey Anna said there are also moments that make her feel uncomfortable. The night before the hearing, while outside practicing, a car came onto their driveway and turned around, and the incident alarmed Anna. Anna also testified that people very often come all the way down their driveway because their GPS routes them there.

Additionally, Appellants filed a memorandum of law prior to the motion to dismiss that included numerous exhibits. The memorandum and all accompanying exhibits were included as part of Exhibit 4 before the Board. No expert testimony, data, or material was provided to support or clarify the testimony of Appellants' witnesses.

#### **Applicant's Testimony**

The Applicant was represented before the Board by Stuart A. Cherry, Esq. of Rifkin Weiner Livingston LLC and Peter C. Hershey, Esq. of Rich & Henderson, P.C.. Applicant presented its case before the Board on October 26. Summaries of the witnesses called and testimony provided are as follows:

- Egan O'Keefe
  - Mr.O'Keefe is the vice-president of cultivation for Story Cannabis. His duties at the Facility include organizing the cultivation of its cannabis crop. He is familiar with the Facility and the grounds at the Facility. He stated that Blue Griz LLC is the owner of the Facility and Seven Points Agro is the operator. Both Blue Griz and Seven Points Agro are part of the Story Cannabis "family of companies."
  - Mr. O'Keefe said cannabis was first grown on the property in January, 2022 in the R&D facility on the backend of the property.
  - Construction of the Facility was performed by CMI. Construction of the facility



began in December, 2021 and the exterior was erected by spring, 2022. The entire cost of the Facility, including construction, labor, permitting, engineering, and equipment, amounts to approximately \$32,000,000.

- Mr. O’Keefe stated that many of the neighbor’s complaints about certain impacts during construction should cease now that construction has ended.
- There are six flowering rooms within the Facility. Mr. O’Keefe stated these rooms were always part of the building plans and floor plans and always intended to be part of the operation.
- Mr. O’Keefe said about 20,000-25,000 plants are now growing at the Facility at any given time. These plants are grown indoors because it is easier to control growing conditions and maintain consistent quality yields.
- Mr. O’Keefe said it would not be possible to effectively run the Facility with only 25 employees. If they were restricted to 25 employees they would only be able to use about 1/3<sup>rd</sup> of the building and lose approximately \$1,000,000 a week.
- Excess agricultural water is sent to a holding tank that is pumped out and hauled to a wastewater treatment plant. Eventually the Facility intends to install a recycling system that will use de-ionization technology to purify captured water and reuse it. This system was about 4-6 months away from being operational at the time of the hearing.
- Mr. O’Keefe has not seen surface-level discharge from the sand mound septic system.
- The septic sand mound system will be maintained as needed.
- The septic sand mound system passed all state inspections.

- The Facility uses a closed-loop system for all HVAC systems. The systems do not exchange outside air. Mr. O’Keefe believed this should effectively abate odors.
- Mr. O’Keefe said Gerard’s Cove Road should only be used “very, very rarely” and only to access the R&D Building. Employees are encouraged to use the entrance off Abell Road.
- Gary Jellick
  - Mr. Jellick is a soil scientist and the owner of Acorn Environmental. He works throughout the Mid-Atlantic but most of his work on septic systems occurs in Southern Maryland. He possesses a master’s degree in soil physics.
  - Mr. Jellick shared background on how septic sand mound systems are designed and how perc tests are performed.
  - Mr. Jellick was accepted as an expert witness in the field of soil science by the Board’s chair.
  - Mr. Jellick performed work on the Property. He walked the property and found a location he thought would pass the state test for a sand mound septic system. The location of the new septic sand mound system, in Mr. Jellick’s opinion, is the best on that property for such a system. He said it was generally among the best locations for such a system in that part of the County.
  - He was present when the Health Department performed the perc test. He stated the location passed all three perc tests the Health Department ran.
  - Mr. Jellick shared his opinion that soil conditions at the Property are appropriate for a sand mound septic system.

- Mr. Jellick clarified that the “tarp” Appellants noticed was a filter fabric that did not impact the perc test results because it was at the surface of the soil.
- When asked if he foresaw any way the sand mound septic system could negatively impact the nearby creek, Mr. Jellick stated “I don’t see how it could.” He described favorable topographical and soil features that lent themselves to choosing that location.
- Though he stated he did not know deep the groundwater table was in that area, he testified it could not be within four feet of the surface based on samples he took.
- Jay Hopson
  - Jay Hopson is a self-employed licensed civil engineer. His typical work involves land development engineering, mining plans, road plans, and similar activities. His work includes septic system design.
  - He has been working as a professional engineer for approximately 12 years and has been in the field for approximately 40 years.
  - Mr. Hopson was accepted as an expert witness in the field of professional engineering by the Board’s chair.
  - Mr. Hopson designed the septic system for the Facility. He explained different components of the septic system and how they function.
  - He stated the Facility’s septic system has a Best Available Technology (“BAT”) system.
  - Effluent that leaves the Facility goes into the BAT tank immediately beside the Facility. Within the BAT tank the effluent is separated from the solids, treated, and discharged into the pump pit.

- The BAT system installed at the Facility is on MDE's list of preapproved BAT systems.
- Once effluent reaches the pump chamber it is pumped into the sand mound through a force main. Controls exist to ensure the sand mound does not become overwhelmed or overburdened.
- The sand mound's capacity is 750 gallons. That capacity was determined by the Health Department based on the perc tests, with "a margin of safety built in." 750 gallons is approximately the equivalent of three homes.
- The sand mound has no surface level discharge and is more than 100 feet away from Canoe Neck Creek.
- It was always intended that the Facility have a second sand mound but its implementation was delayed because of the need for perc tests.
- The sand mound design was submitted to the Health Department in April, 2022.
- The septic system has alarms in place to signal any problem. It has at least a day's worth of excess capacity.
- The nearest wells are 500-600 feet away. Mr. Hopson believes the sand mound septic system poses no risk to them.
- There are 119 parking spaces depicted on the Facility's site plans, and that number of parking spots has appeared on "every" site plan submitted throughout the process.
- The second septic system serving the Facility was approved in October, 2022.
- Mr. Hopson stated there was no septic system serving the Facility prior to August, 2022. The existing septic system served only the R&D Facility. The existing

septic system would have needed to be tied into the Facility.

- The original site plan approved in October, 2021 was made by Mr. Hopson. In General Note 9 the anticipated flow was listed as 1,150 gallons per day. That is the same anticipated flow listed on the site plans amended in October, 2022. Mr. Hopson explained that there were always intended to be both a 400 GPD and a 750 GPD septic sand mound system. The 750 GPD system was meant to exclusively serve the Facility.
- Valdis Lazdins
  - Mr. Lazdins is a professional planner and landscape architect who previously served as Maryland Department of Planning's Assistant Secretary from 2019-2023 and as Howard County's Director of Planning and Zoning from 2015-2019.
  - Mr. Lazdins was accepted as an expert witness in the field of land use planning by the Board's chair.
  - Mr. Lazdins presented a slideshow presenting his opinion on why St. Mary's County's Ordinance 2022-30 conflicts with state legislation passed in 2023 that relates to local zoning power over cannabis operators.
  - Maryland's Cannabis Reform Act of 2023 prohibits counties from:
    - Establishing zoning or other requirements that unduly burden a cannabis licensee;
    - Imposing licensing, operating, or other fees or requirements on a cannabis licensee that are disproportionately greater or more burdensome than those imposed on other businesses with a similar impact on the area where the cannabis licensee is located.

- St. Mary’s County’s ordinance, in Mr. Lazdins’ opinion, unduly burdens cannabis licensees and imposes requirements more onerous than for other uses allowed in the Rural Preservation District with similar, or greater impacts.
- Mr. Lazdins noted that the county regulations treat cannabis differently than other crops and encourages cannabis licensees to operate in urban and industrial zones, rather than “traditional agricultural zones.”
- Mr. Lazdins stated that as Howard County’s Planning Director he determined cannabis should be treated like any other crop, similar to LUGM’s original determination.
- Mr. Lazdins pointed out that St. Mary’s County has a right-to-farm ordinance that gives a farmer a right to farm without being restricted by neighboring residential uses and areas.
- Mr. Lazdins gave examples of other hypothetical agricultural uses – such as large poultry farms or major equestrian buildings – that would be allowed in the Rural Preservation District that would be just as, if not more, burdensome than a cannabis grower.
- Leah Heise
  - Leah Heise is a cannabis industry consultant. Her work involves helping cannabis licensees optimize their facilities and operate “compliantly” with any applicable laws or regulations. She is also familiar with industry trends.
  - Ms. Heise stated that when states legalize cannabis one of the goals of starting up that industry is eliminating the illicit market. She stated that an express purpose of Maryland’s law was “eradicating” the illicit market, as stated by Del. C.T.

Wilson.

- The state’s legislation related to local zoning control over cannabis licensees was intended to remove burdensome local barriers or burdens to new cannabis licensees.
- Ms. Heise gave examples from other states of communities she believed were positively impacted by the introduction of cannabis-related businesses.
- She also stated that it is “incredibly difficult” for a cannabis operator to become profitable. As contributing factors she pointed to the federal tax rates and high state and local fees.

Applicants filed numerous pleadings with multiple accompanying exhibits, including a Motion to Dismiss and a Reply in Support of the Motion to Dismiss prior to the May 25 motions hearing, a Merits Hearing Memorandum of Law and Merits Hearing Memorandum on Protestants’ Lack of Standing. All pleadings, along with any accompanying exhibits, were reviewed and made part of the proceeding’s records.

### **Public Testimony**

The following members of the public appeared to offer in-person testimony about the appeal:

- Joseph Guyther
  - Mr. Guyther lives at 38530 Pleasant Harbor Way and is married to Rose Ellen Guyther. His remarks were that the focus of the proceeding should be on the 76 employees that will be allowed to work in the Facility if the septic system is permitted. He disputed Mr. O’Keefe’s testimony and suggested that Mr. O’Keefe’s constant exposure to the smells may have desensitized his senses. He also disputed

whether Mr. Lazdins' expertise leaves him qualified to make what was, Mr. Guyther thought, a legal conclusion. Mr. Guyther confirmed he can smell odors from the Facility at his house.

- Michelle Caracaus Long
  - Ms. Long resides at 38790 Van Ward Road in Abell, Maryland. Ms. Long asked several technical questions of the septic system and stated her concern about potential air pollution that may come from the Facility. She reiterated health and safety concerns and said she can smell the Facility every day and must now drive an alternate route rather than pass by the Facility.
- Steve Gibson
  - Mr. Gibson lives at 22070 Colton's Point Road in Bushwood. He said that St. Mary's County does not have any large chicken farms like Mr. Lazdins alluded to. He stated he can smell the Facility and that when he interacts with employees who have come off-shift at the Facility he can smell cannabis on them. He also shared safety concerns about the potential for diversion of inventory by employees. His son, daughter-in-law, and grandchildren live on the road and he says that when he goes by the Facility the noise and smell are horrendous.

In addition to in-person testimony the following written public testimony was received by the Board ahead of the public hearing:

- Bernadette Dameron
  - Ms. Dameron sent an email on June 7 voicing her opposition to approval of the mound system, which she said does not adhere to current governing rules.
- Tom Bailey



- Mr. Bailey wrote a letter received on June 13. He asked the Board to consider requiring the Applicant to install an “over capacity full sewage treatment plant that will address their current needs any future needs by this group,” and that doing so would benefit community members who could hook up to such a system if their private septic systems ever failed.
- Marcus Fairless
  - Mr. Fairless is the architect of record for the Facility. He sent a letter dated July 10, 2023, that reiterated that the County approved construction documents on October 27, 2021 that allowed “274 calculated occupants, 149 concurrent occupants and 125 actual occupants.” He provided definitions for each category of occupant.
- Anthony Dameron
  - Mr. Dameron, acting independently of his fellow appellants, emailed the Board on October 25, 2023 with a suggested motion and a request the Board of Appeals open an investigation into a 2019 criminal investigation. He also provided a copy of a consent order entered into between the Maryland Medical Cannabis Commission and Seven Points Agro-Therapeutics, LLC in 2021.

### **Decision**

Appellants’ original notice of appeal, and the various pleadings submitted by both parties in the months this matter has been pending, raise many points of contentions across varied fields of law. Appellants made clear through counsel, however, that they have narrowed their appeal to only one alleged error they wish to argue before the Board of Appeals: that allowing amendment of the Applicant’s site plan to reflect a second sand mound septic system approved by the St.

Mary's County Health Department amounts to an illegal expansion of a non-conforming use. See June 14, 2023 Letter from G. Macy Nelson. On that issue, the Board finds no error in LUGM's determination and rejects the pending appeal. A discussion of our reasoning follows.

The Board accepts that the Facility is, under present County law, a legally nonconforming use. A legally nonconforming use's continued use by Applicant is protected by County and Maryland law. See CZO § 52.2.1; *Trip Associates v. Mayor & City Council of Baltimore*, 329 Md. 563, 574 (2006) quoting *Amereihn v. Kotras*, 194 Md. 591, 601 (1950) ("Nevertheless, a 'nonconforming use is a vested right entitled to constitutional protection.'). Accompanying the right to continued maintenance of a nonconforming use is the vested right to complete a lawfully-permitted structure once substantial construction has been undertaken on it. See *Prince George's County v. Sunrise Dev. Ltd. P'shp*, 330 Md. 297, 312 (1993) ("[t]hat doctrine... rests upon the legal theory that when a property owner obtains a lawful permit, commences to build in good faith, and completes substantial construction on the property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations."), quoting *Prince George's County v. Equitable Trust Co.*, Md. App. 272, 278 (1979). Construction becomes "substantial" once it has progressed merely far enough that the public may be reasonably put on notice the land is being developed. See *Richmond Corporation v. Board of County Commissioners of Prince George's County*, 254 Md. 244, 255 (1969) ("... [the owner] must proceed under permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.').

What would not be constitutionally-protected – and what the County's Comprehensive Zoning Ordinance would generally prohibit, or at least tightly regulate – is the expansion or enlargement of a nonconforming use beyond the boundaries the use occupied at the time it was

rendered nonconforming, unless such an expansion or enlargement was approved pursuant to CZO § 52.3.3. CZO § 52.3; *Trip Associates*, 573. Appellants make the argument that allowing installation of a second septic sand mound system that will, both parties agree, greatly increase the productive capacity of the nonconforming use and the number of employees it can house amounts to such an expansion or enlargement. Maryland law has, however, consistently forbade local zoning laws prohibiting expansions or enlargements of nonconforming uses to be wielded against what Maryland courts have termed mere “intensifications” of a nonconforming use. *Id.* At 579 (... Maryland recognizes, and our cases have held, that an intensification of a nonconforming use is permissible, so long as the nature and character of that use is unchanged and substantially the same.) Such “intensifications” are those changes or modifications to a nonconforming use whose only effect is to increase the frequency, duration, or quantity of a nonconforming use and are permitted so long as the nonconforming use continues to use substantially the same facilities as before. *Jahnigen v. Staley*, 245 Md. 130, 137 (1967).

Applying the above law to the facts of this case yields the following analysis: On November 18, 2021, a building permit was validly issued for the growhouse at issue in this case. That permit was issued pursuant to plans approved by the Department of Land Use & Growth Management on October 27, 2021 that stated, *inter alia*, the anticipated flow per day would be 1,150 gallons, and the project’s engineer explained it was always intended that there be two septic systems to serve the Property. Other indicia testified to during the hearings that indicate a second septic system was always planned – and, in fact, necessary for the operation of the permitted growhouse – are an amount of parking spots greatly in excess of what could serve an employee population possible on only the existing septic system and the economic infeasibility of operating the growhouse with only 25 employees, as testified to by the Facility’s cultivation manager. This is sufficient factual

predicate for the Board to reasonably conclude the second septic system was always intended to be an integral component of the permitted growhouse. Such may be, in and of itself, enough to establish a vested right to the second sand mound septic system.

Carrying the analysis to whether the second sand mound septic system constitutes an expansion and an enlargement or an “intensification,” the Board concludes, based upon Maryland’s consistent case law in this area, that the second sand mound septic system is, at most, an intensification.<sup>2</sup> Its installation only allows Applicant to do *more* within its existing growhouse, but not anything *different*. More employees may be under its roof and more crops may be able to be grown inside, but the physical dimensions of the growhouse are unchanged and no additional structure or building has been erected. That is Maryland’s definition of an “intensification” of a nonconforming use, versus “an enlargement or an expansion.” Accordingly, this Board must deny the appeal and find for the Applicant.

As noted in the opening of its discussion, a plenitude of other legal arguments, theories, and defenses were raised by the Applicant. The Board’s holding that the disputed development is, at most, an “intensification” of a nonconforming use is dispositive of the pending appeal. Embracing judicial restraint, it will go no further and decide no other issues than that at this time.

### **ORDER**

**PURSUANT** to an appeal by Anthony Damron, James Morris, Robert Allen Russel, Jr., Sergio Torres, Rose Ellen Guyther, Kimberly Gibson, Robert T. Brown, Sr., Victoria Brown, Nolan Smith, Rachael Hostetter, Christina Farr, Christopher Farr, Natasha Jones, and Russel Jones of an administrative determination by the St. Mary’s County Department of Land Use & Growth Management that installation of a new, expanded septic system at the Seven Points Agro

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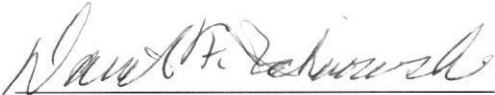
<sup>2</sup> For a broad and thorough review of Maryland’s cases on the subject, the Board refers to the long list of cases provided by Applicant in its Hearing Memorandum of Law at Pages 21-23.

Cultivation Center cannabis grow house did not constitute an illegal expansion or enlargement of a legally nonconforming use; and

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

**ORDERED**, by the St. Mary’s County Board of Appeals that the appeal be **DENIED**.

Date: DEC 14, 2023

  
Daniel F. Ichniowski, Chairperson

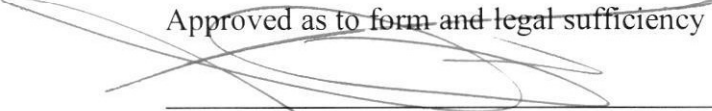
Those voting to deny the appeal:

Mr. Bradley, Mr. Ichniowski, Mr. Miedzinski, Mr. Richardson

Those voting to grant the appeal:

Ms. Delahay

~~Approved as to form and legal sufficiency~~

  
Steve Scott, Attorney to the Board

**NOTICE**

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 Petition for Judicial Review at the St. Mary's County Circuit Court.

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