

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 19-131-019

SMITH CREEK MARINE LLC

FIRST ELECTION DISTRICT

DATE HEARD: SEPTEMBER 10, 2020

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: September 24, 2020

Pleadings

Smith Creek Marine LLC (“the Applicant”) seeks a variance (VAAP Number 19-131-019) for development activity in non-tidal wetlands and the required wetland buffer and to clear more than 30 percent of the existing forest to construct a sand mound septic system on a vacant lot (“the Subject Property”).

Public Notification

The hearing notice was advertised in *The Enterprise*, a newspaper of general circulation in St. Mary’s County, on August 21, 2020 and August 28, 2020. The hearing notice was also posted on the Property. The file contains the certification of mailing to all adjoining landowners, including those located across a street. Each person designated in the application as owning land that is located within two hundred feet of the Subject Property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the County’s website on September 2, 2020. Therefore, the 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 September 10, 2020 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented about the proposed variance requested by the Applicants.

The Property

The Applicant owns the Subject Property, a 30,928 square foot vacant lot located on Wynne Road in Ridge, Maryland. The Subject Property is in the Rural Preservation District

("RPD") zoning district with a Resource Conservation Area ("RCA") Overlay and is identified on Tax Map 70, Grid 16, Parcel 88, Lot 7 of Wynne Acres.

The Variance Requested

The Applicant requests a variance from the Comprehensive Zoning Ordinance ("CZO") § 71.5.2.b. for development activity in non-tidal wetlands and the required wetland buffer and § 72.3.1.c.(2) to clear more than 30 percent of the existing forest to construct a sand mound septic system on the Subject Property.

The St. Mary's County Comprehensive Zoning Ordinance

Pursuant to CZO § 71.5.2.b:

A 25-foot buffer shall be preserved from the edge of non-tidal wetlands and shall be expanded up to 100 feet to include areas of adjoining hydric soils.

Pursuant to CZO § 72.3.1.c.(2):

If a project involves the alteration of forest, all forest cover removed must be mitigated pursuant to Section 76.3.5. Clearing in excess of 30 percent of any forest or developed woodland is prohibited.

The Evidence Submitted at the Hearing by LUGM

Harry Knight, Deputy Director for the St. Mary's County Department of Land Use and Growth Management ("LUGM"), presented the following evidence:

- The Subject Property is a vacant lot in the Critical Area, recorded in the Land Records of St. Mary's County in 1960. This was before the adoption of the Maryland Critical Area Program on December 1, 1985. Therefore, the lot is "grandfathered" and eligible for a variance. Ex. 2, Att. 2.
- The Property is zoned RPD with an RCA Overlay.
- The sand mound septic system will serve a restaurant, motel, and pier with multiple

slips.

- The site plan shows that the force main serving the septic will run down the St. Mary's County right-of-way, ending at Lot 7.
- The sand mound septic system will take up a large portion of the lot.
- The Maryland Department of Natural Resources ("DNR") Wildlife and Heritage Service provided a comment letter dated October 24, 2019. They determined there are no State or Federal records for rare, threatened or endangered species on the Property. Ex. 2, Att. 3.
- The Subject Property is comprised of hydric soils, according to the United States Department of Agriculture ("USDA") Natural Resources Conservation Service Web Soil Survey. The specific soil classifications are Othello fine sandy loam (On) and Othello silt loam (Ot).
- The Subject Property contains non-tidal wetlands which were field delineated. The 25 foot buffer is illustrated; however, due to the presence of hydric soils, the required buffer is expanded up to 100 feet pursuant to CZO § 71.5.2.b. As a result, the Subject Property is entirely encumbered by non-tidal wetlands and the required buffers. Ex. 2, Att. 4.
- The Maryland Department of the Environment ("MDE") provided a comment letter dated May 8, 2020. They acknowledged visiting the Subject Property on August 23, 2019 to confirm the field delineation. A payment into the MDE Nontidal Wetland Compensation Fund was deemed acceptable mitigation for the proposed permanent impacts to the wetlands. MDE expressed concern with the infiltration of wastewater; therefore, their final approval is "contingent on demonstrating that the proposed mound

system will effectively treat the expected nutrient and wastewater load for this specific project.” Ex. 2, Att. 5.

- The Property is 30,928 square feet. in area, including 6,392 square feet of existing forest. A site plan submitted in 2019 proposed clearing 100% of the existing forest on the Property. The site plan submitted with this variance application on June 29, 2020 has tables describing the same 100 percent of clearing, though the proposed limit of disturbance, illustrated on page 3, has been reduced, allowing 3,021 square feet, or 47 percent, of forest to remain. Notwithstanding these proposed changes, the proposed forest clearing is in excess of 30 percent and therefore requires a variance from CZO § 72.3.1.c.(2).
- The Maryland Critical Area Commission reviewed the June 29, 2020 version of the site plan and provided comments dated August 18, 2020. Ex. 2, Att. 6.
- Per CZO § 72.3.3.a.(2)(c), 3:1 mitigation is required for clearing more than 30 percent of existing vegetative coverage. The applicant is proposing to pay a fee in lieu to satisfy the required mitigation. St. Mary’s County’s adopted Schedule of Fees sets the “fee in lieu” at \$1.50 per square foot of required mitigation. Therefore, the maximum expected fee in lieu for this project is $3,371 \text{ square feet} \times 3 = 10,113 \text{ square feet} \times \$1.50/\text{square foot} = \$15,169.50$.
- The proposed sand mound septic system will provide off-site sewage disposal for an existing restaurant, motel, and commercial marina on another parcel, approximately 640 feet to the west of the Property. Therefore, the proposed off-site sand mound septic system is Use Type 98A. Utility, Minor, Private, per the CZO. The property to be served has an existing failing septic system. LUGM, St. Mary’s County Soil

Conservation District (“SCD”), and the local Environmental Health Department have yet to fully approve the plans. The St. Mary’s County Department of Public Works & Transportation has commented that the soil disturbance associated with septic system construction is exempt from Stormwater Management.

- If the variance is granted, it shall lapse one year from the date of the grant of the variance, if the Applicant has not obtained the building permit, per CZO § 24.8.1.
- The following Attachments to the Staff Report were introduced:
 - #1: Standards Letter from the Applicant
 - # 2: Wynne Acres Plat recorded 1960
 - # 3: DNR Wildlife and Heritage Service letter dated October 24, 2019
 - # 4: Wetland Impact Sheet
 - # 5: MDE letter dated May 8, 2020
 - # 6: Critical Area Commission letter dated August 18, 2020
 - # 7: Location Map
 - # 8: Zoning Map
 - # 9: Critical Area Map
 - # 10: Site plan

Applicants Testimony and Exhibits

The Applicants appeared via WebEx before the Board. The following evidence was presented:

- The Subject Property is covered by 6,932 square feet, or 22 percent, of forest.
- The Subject Property will be the site of the sand mound septic system that will be replacing the existing septic at Pier 450.

- Presently there are four 2,000 gallon holding tanks that are pumped weekly or bi-weekly during the high season, but this practice has become cost prohibitive.
- If the sand mound septic system fails, the Applicant will use the existing holding tanks until the sand mound septic system is repaired.
- Once built, there will be a slow, controlled flow from the existing septic to the sand mound, which is recommended by the Environmental Health Department to extend the longevity of the sand mound.
- The force main is maintained by the owner, and there is little maintenance of the sand mound septic system beyond mowing the grass.
- The Applicant will install a nitrogen removal system to treat the septic before it enters the sand mound.
- The site of the sand mound septic system has been tested and approved for an Innovative and Alternative (I&A) septic system.
- The non-tidal wetlands on the Subject Property have been field delineated by MDE.
- The Applicant has applied to MDE for a wetland disturbance permit. MDE has acknowledged the ability to pay a fee-in-lieu, but MDE is withholding approval until the plans are approved by the Environmental Health Department.
- As for mitigation, the Applicant intends to plant trees that are native to the coastal plain of Maryland.

Decision

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 of Fact and Conclusions of Law

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. 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, 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 unwarranted hardship

for the Applicant. Specifically, the Subject Property is entirely encumbered by the Critical Area and non-tidal wetlands, and any improvements to the property would require the Applicant to seek a variance. Absent a variance, the Subject Property would remain a vacant lot, as it has since 1960, the year in which it was recorded in the Land Records of St. Mary's County in 1960. As the Subject Property was recorded before the adoption of the Maryland Critical Area Program on December 1, 1985, it is "grandfathered" and eligible for a variance.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District. The Applicant is requesting to replace an existing failing septic system with an off-site sand mound septic system to serve the existing marina, motel, and restaurant, thus allowing the current commercial uses to continue operation. As stated in the previous paragraph, the Subject Property is eligible—as would similarly situated properties—for a variance due to the age of its recordation.

Third, the purpose of seeking the variance is not "based exclusively upon reasons of convenience, profit or caprice." Rather, as the Subject Property is constrained by the non-tidal wetlands and the required expanded buffers for hydric soil types, any improvements made on or to the Subject Property require a variance.

Fourth, the need for the variance does not arise from actions of the Applicants. Rather, the difficulty was created in part by physical characteristics of the Subject Property and the age of recording, which predates the existing zoning regulations. In fact, the property has been a vacant lot of Wynne Acres since 1960.

Fifth, the variance will neither detrimentally affect the public welfare, injure other properties or improvements, nor change the character of the district. The applicant will be required to mitigate the proposed development by paying appropriate fees in lieu, allowing plant and

wildlife habitat to be created elsewhere, and through three to one (3:1) per square foot of mitigation on the Subject Property. Furthermore, the proposed sand mound septic system should improve water quality when compared to the failing septic system it is proposed to replace.

Finally, granting the variance would not adversely affect the environment. Here, 3,021 square feet, or 47 percent, of the existing forest will remain. Further, the CZO requires mitigation at a ratio of three to one (3:1) per square foot of the variance granted for the disturbance inside the Critical Area in accordance with Chapter 24 of the Ordinance. The Board believes that the required plantings will assist in improving and maintaining the functions of the Critical Area. Moreover, there are no State or Federal records for rare, threatened or endangered species on the Property. Furthermore, the Applicant cannot obtain final approval from MDE until the Applicant “demonstrate[es] that the proposed mound system will effectively treat the expected nutrient and wastewater load for this specific project.” Finally, should the sand mound septic system fail, the Applicant intends to use the existing septic holding tanks until the sand mound is repaired.

ORDER

PURSUANT to the application of Smith Creek Marine LLC, petitioning for a variance from Comprehensive Zoning Ordinance § 71.5.2.b. for development activity in non-tidal wetlands and the required wetland buffer and § 72.3.1.c.(2) to clear more than 30 percent of the existing forest to construct a sand mound septic system on the Subject Property; 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, that the Applicants are granted a variance from CZO § 71.5.2.b. for development activity in non-tidal wetlands and required wetland buffer and CZO § 72.3.1.c.(2) to clear more than 30 percent of existing forest to construct a sand

mound septic system.

Additionally, the foregoing variance is also subject to the following condition that the 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: September 24, 2020


George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Ms. Delahay, Mr. Ichniowski
Mr. Miedzinski, and Mr. Richardson

Those voting to deny the variance:

Approved as to form and legal sufficiency


Neil A. Murphy, Deputy County 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 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.