

**MINUTES OF THE ST. MARY'S COUNTY BOARD OF APPEALS MEETING
ROOM 14 * GOVERNMENTAL CENTER * LEONARDTOWN, MARYLAND
Thursday, September 11, 2003**

Present: Marie Underwood, Chairperson
George Allan Hayden, Sr., Vice Chair
Ronald C. Delahay, Sr., Member
Michael Hewitt, Member
Sandy Mriscin, Member
John B. Norris, III, County Attorney
Yvonne Chaillet, Planner III, LUGM
Theresa Dent, Environmental Planner, LUGM
Peggy Childs, LUGM Recording Secretary

A list of attendees is on file in LUGM. The Chair called the meeting to order at 7:00 p.m. For the record, all participants in all applications were sworn in by the Chair.

PUBLIC HEARINGS

VAAP #03-0686 – THOMAS RUTHENBERG

Requesting a Variance from Section 38.2.13 of Zoning Ordinance #90-11 to construct

a single-family dwelling and appurtenances and to clear vegetation within the Critical

Area Buffer. The property contains 9,609 square feet, is zoned RL (IDA Critical Area

Overlay), and is identified as TM 65, Lots 34-38 of the Piney Point Shores Subdivision.

Owner: James S. Brady

Present: Thomas Ruthenberg, Contract Purchaser

Legal Ad published in The Enterprise on 8/27/03 & 9/03/03

Property posted by staff on 8/23/03

#A-1 Certified Receipts of notification to contiguous property owners

The Applicant is requesting a variance from Section 38.2.13 of ZO #90-11 to allow construction of a single-family dwelling and appurtenances and the clearing of vegetation within the Critical Area Buffer. The grandfathered lots, which were created and recorded prior to the County's adoption of the Critical Area Ordinance, are so narrow that they are fully constrained by the Critical Area Buffer. The proposal will result in 1,637 square feet of new impervious surface within the Buffer to accommodate the dwelling, part of the stairway to access the first floor, and the driveway. Clearing is proposed but has been minimized for this construction. At their closest point, the improvements will be located approximately 46 feet from mean high water of the Potomac River.

The Applicant has revised the site plan and reconfigured the proposed footprint, resulting in a 733 square foot reduction in impervious surface area but placing the dwelling 6 feet closer to the shoreline. The letter received from the Critical Area Commission (CAC) states that reducing the footprint has increased the area for planting the required mitigation. It states that the Commission does not oppose the revised site plan but recommends the variance approval include a condition that the plantings be accomplished on-site. Staff finds that the applicant has met the Standards for Variance and recommends approval of the variance, subject to planting mitigation at a 3:1 ratio, and that the applicant supply the Land Use & Growth Management Office with the 10% calculation worksheet and best management practices for stormwater management on the site.

Mr. Hewitt asked why this application does not have to conform to the 15% impervious surface limitation? Ms. Dent explained that there are three designations in the Critical Area: RCA (Resource Conservation Area), LDA (Limited Development Area), and IDA (Intensely Developed Area). RCA and LDA properties have a 15%-25% impervious surface limitation, depending on the size of the lot. There is no specific limitation for IDA properties. The requirement is that the proposed development allow enough room around the structure for the required plantings. The 10% calculation requested in proposed condition #2 is part of the requirement for IDA properties that water quality must be improved by 10%.

Mr. Hayden moved to adopt the 9/11/03 Staff Report. Seconded by Mr. Hewitt and passed by 5-0.

Mr. Ruthenberg, of 44639 Belleview Court in Tall Timbers, said he concurs with the staff report, including the proposed conditions. He said his intent was to minimize the impact to the Critical Area, and he provided an engineered sediment and erosion control plan and conducted soil borings to make sure footers could be used. Mr. Ruthenberg provided a sketch of his proposed house, which will be built on piers; the first floor will consist of a parking garage, and living space will be located on the second and third floors. He said he participated in a sediment control training program to get a better understanding of the requirements and to see what he can do to mitigate for any runoff into the water, and he has an approved revetment and pier permit from the State.

The Chair opened the hearing to public comment. Joe Gardner, of Piney Point, a contiguous property owner to this site, said the site is totally wetlands and the tide comes all the way up to the road. He said the current owner, Mr. Brady, tried to put a road in to this property 11 years ago and he was issued a citation and was required to remove it. Mr. Gardner said he has lived there for 22 years and, in big storms, there are 2 feet of water on the road, and he doesn't see how this property can be developed.

Mr. Delahay agreed with Mr. Gardner, adding he has never seen a wetlands built on until this one. Ms. Mriscin agreed, but pointed out that the Critical Area Commission doesn't seem to have a problem with it. Ms. Dent said

the entire lot is in the floodplain and the applicant will have to build to floodplain standards and obtain a certification that it meets the floodplain requirements. However, she said the property is *not* wetlands but is mapped as fast land. The Chair asked how the applicant can do the planting mitigation if the property is under water? Ms. Dent replied he will have to plant native species that will grow there.

Mr. Ruthenberg stated there is a grading plan that will elevate the home and the site. He said the Ordinance allows up to 650 cubic yards of fill and they will provide 511 cubic yards, and with the fill and the revetment they should be able to provide the mitigation. The Chair asked whether the fill will be applied across the entire lot or just around the house? Mr. Ruthenberg replied across the entire lot, in accordance with the law. Ms. Dent stated that the lot is at 2 feet now and the fill will bring it up to 3 feet.

Shirley Rock, of 45383 St. George's Avenue, said she likes the idea of having the property developed because she will be able to look over and see a nice house; however, she said all the drainage from the neighborhood goes past her house and through this lot into the creek. She said there is also a well on the property that has been there for years. Ms. Rock also said she thinks the road is a County road and the County should put a culvert over there. Ms. Dent replied that Mr. Ruthenberg has sediment and erosion control plan approval but he will have to show how he will re-route the water when he does his grading and will have to obtain Soil Conservation approval.

The Chair closed the hearing to public comment.

Mr. Hewitt moved that, having adopted the 09/02/03 Staff Report, making a finding that the Critical Area Standards for Variance and the objectives of Section 38.2.13 of ZO #90-11 have been met and that the Chesapeake Bay Critical Area Commission supports the application, a variance from Section 38.2.13 of the Ordinance to allow construction of a single-family dwelling and appurtenances and to clear woody vegetation within the Critical Area Buffer be approved, subject to the following conditions:

(1) The Applicant shall adhere to the requirements of the Planting Agreement,

requiring mitigation for the amount of approved impervious surface and clearing within the Buffer at a 3:1 ratio, in accordance with the Critical Area Ordinance requirements.

(2) The Applicant shall provide the LUGM office with the 10% calculation worksheet,

showing the best management practices for stormwater management on this site,

in accordance with the standards for the Critical Area IDA.

During discussion Mr. Hewitt said he agrees with the rest of the Board that it doesn't make sense to allow the house to be built, but the Critical Area Commission and the appropriate agencies have approved it, so he will go along with them. Ms. Mriscin suggested a condition about the drainage, but Ms. Dent said that will be addressed as part of the Soil Conservation approval and the Department of Public Works & Transportation (DPWT) will be involved also. The motion was passed reluctantly, as was stated by the members, by a vote of 5-0.

VAAP #02-2892 – JOE AND NANCY POTANKA

Requesting a variance from Section 38.2.13 of ZO #90-11 for “after-the-fact” approval of a single-family dwelling and clearing partially within the Critical Area Buffer; and from Section 38.2.9(b) to exceed the impervious surface limit of 15% in the IDA. The property contains 10.942 square feet, is zoned RNC (IDA Critical Area Overlay), and is located at 45233 Daniels Court in Hollywood; Tax Map 27, Block 17, Parcel 366; Lot 500-6 of Scotch Point Subdivision.

Present: Joe and Nancy Potanka, Owners
Jacquelyn Raley Meiser, Attorney for the Potankas
Bill Higgs, of Little Silences Rest, Inc.

Legal Ad published in The Enterprise on 8/27/03 & 9/03/03
Property posted by LUGM staff on 8/26/03

#A-1 Certified Receipts of notification to contiguous property owners

The applicants are requesting “after-the-fact” variance approval from Section 38.2.13 of the Ordinance to allow a single-family dwelling and clearing partially within the Critical Area Buffer. Because the applicant has proffered the removal of a section of the driveway and the deck and pool, the variance from Section 38.2.9(b) to exceed the impervious surface limit is no longer required.

According to the “as-built” site plan and the applicant’s letter of intent, the single-family dwelling was not constructed in the approved location, but partially within the Critical Area Buffer, at a distance of 81 feet from mean high water. The construction resulted in 782 square feet of new impervious surface and the clearing of 4,870 square feet of vegetation within the Buffer. Subsequent to the discovery of the violation, an accurate site plan was drawn that more clearly delineates the existing environmental features and driveway encroachment that impact the development envelope for this lot. If the original drawing had accurately depicted these things, the Health Department would have relocated the septic easement, forcing the structure closer to mean high water

and requiring a variance prior to construction. Considering the environmental features and encroachments and the fact that the Critical Area encumbers one-third of the recorded lot, staff states that it could have supported the pre-development variance request.

Based on these circumstances, staff finds that to deny the variance and require removal of the structure would result in a practical difficulty. Staff recommends approval of the variance, subject to applicant's adherence to the Planting Agreement and submission of an amended site plan complying with Health Department requirements for the septic reserve area and reducing the impervious surface to 7,579 square feet. Ms. Dent advised that the revised site plan was provided to her this evening, so that condition has been met. The revised plan will also be forwarded to the Critical Area Commission (CAC) and, based on the new information, Ms. Dent said she thinks they will support the variance also.

Mr. Hewitt said it looks like the septic easement has been redrawn narrower and longer to put the house into the 100-foot buffer. Ms. Dent replied that it was the Health Department who dictated the shape and location of the septic reserve area.

The Chair stated she knows from personal experience that, when you get a building permit, there is an inspection before the footers go in and another one after the footers go in, and you cannot proceed without those inspections. She said she had asked for someone from Inspections & Enforcement to come and explain to the Board how this house, and a house in a previous application before the Board a month ago, had passed inspection when they were constructed in the wrong location. Adam Knight, the County's Deputy Code Official, was unable to attend this meeting, but the Chair said she hopes we can address the issue that the County is approving structures that turn out not to be in the right place.

The Chair asked whose responsibility it is to prepare a site plan showing easements and mean high water correctly? Ms. Dent replied it is the responsibility of the applicant's engineer. Ms. Dent said stakes were placed that showed the development envelope and the limits of disturbance, but the footprint of the house was not staked. She said it has been suggested that whoever went out to put the footers in took the stakes marking the limits of disturbance for the stakes for the house, and drew from there.

Ms. Mriscin moved to accept the staff report; seconded by Mr. Hewitt and passed by 5-0.

Bill Higgs, of LSR, Inc, Professional Land Surveyor #10808, hired by the Potankas to do the "as-built" survey, said a lot of times plans are taken from approved subdivision plats and record plats and, in this case, the property was subdivided in 1983 and the plat is 20 years old. He said when he went out to the site he found the house to be located 173 feet from the rear property line instead of the 140 feet shown on the original site plan, and 81 feet from mean high water rather than the 125 feet shown; 10 feet of that is due to shoreline

erosion. Mr. Higgs said the driveway easement, which he thinks was recorded in a deed, was not shown on the record plat or on the original site plan, and the Health Department directed where the sewage easement was to be located. He said the calculations originally done for the impervious surfaces work but, when you take the existing house, the gravel driveway to the house, and the easement on the lot for the use of the adjacent property owner, that's where the problem came in.

Jackie Raley Meiser, Attorney for the Potankas, pointed out the following: 1) the site plan was drawn and approved based on 20-year old information, and 10 feet of shoreline has been lost since the 1983 subdivision plat was recorded; 2) Even if the original site plan had been correct, the applicant would still have required a variance for the house; 3) The Potankas knew they shared a driveway with the adjoining property owner but did not know the location or orientation of the easement related to their boundary lines - they believed it was across just one corner of their property but the easement is across the whole back section of their property.

Ms. Meiser said the Potankas relied on the professionals they hired and had no reason to believe the services were not performed correctly. At least one, and perhaps two County inspectors came out and passed the inspections. Now the Potankas have a house that is almost finished. Ms. Meiser said when the Potankas were made aware of the problem they went to Land Use & Growth Management and immediately complied with what they were told to do, and to not grant the variance when the house is nearly completed would absolutely impose an undue hardship on them.

Ms. Meiser said the Potankas have agreed to do away with the pool and the deck beside the pool, but would like to keep the deck around the house. They have agreed with the Planting Agreement and will plant the required mitigation to enhance the Buffer. She said the revised site plan which they submitted does not reflect the reduction in impervious surface, but that will be taken care of.

Questions by the Board included whether the easement is a legal easement and who made the Potankas aware that the house was constructed 30 feet from where it should have been? Ms. Meiser said there is a written easement, but she has not done a title abstract and cannot say whether it is recorded; however, the fact that it may not be recorded does not mean it isn't binding. As to the second question of who made the Potankas aware of the violation, she said Mr. Potanka went in to the LUGM office and applied for a pier permit on July 28th and was told by LUGM staff of the violation concerning the house.

Mr. Potanka pleaded with the Board for approval of the variance, saying no one from the County contacted him at all, that he turned himself in. He said this was all done through the person who submitted the permit application for him and it has put him in serious financial straits. He said he is just Joe Charlie trying to save himself some money and was his own general contractor.

He said he is a school teacher and this is his and his wife's dream house; they are not going to sell it, they are going to live there.

The Chair opened the hearing to public comment.

William Norris, a contiguous property owner, said he was notified that there was a violation of the 15 foot side yard setback requirement also and he was approached by someone to give permission for the Potankas to encroach into the setback. Ms. Chaillet replied that, after review, the Director of LUGM has determined that there is no violation of the side yard setback, which is actually 10 feet in the RNC zoning district, and the Potankas are 12.8' from the side property line.

Glenn Gass, the professional engineer hired by the Potankas to do the original plan, said he was watching the meeting on television and thought there were some things he needed to come over and talk to the Board, on the record, about. Mr. Gass said he did not work from the old subdivision plat but from a plan provided by Mr. Potanka and prepared by a professional land surveyor dated 1997, and from supplemental topography that was also provided by the owner.

Mr. Gass said he met with the Potankas several times in the evenings and tried to explain how the Critical Area works, to try to verify where the existing tree lines are, and other general information. He said he did not stake the house and couldn't get in to the area to stake the house because it was in January or February and there were 10-12 feet of blackberry bushes and snow and ice on the ground, they just did a rough envelope to get the Potankas started. He said he was not a party to the design of the building but had just enough data to get a broad outline of the house location; i.e., "a box on a box." He said he wasn't retained to do a boundary plat or a building stakeout; he helped with the Health Department easement and they actually had an approved Health Department easement. He said he did the other things that were germane to a Critical Area plan and everything that was reasonable to the point where a reasonable person would use it as a site plan basis. Mr. Gass said if there is another easement that would probably have been found under a title search but that wasn't the task; it was to get the site plan done. He did the plan and the house was in no way encroaching into the 100 foot Buffer. Subsequent to that, the owners embarked on a plan to do their lot.

Mr. Gass said he was asked why he put the building in the wrong place? He said he didn't put a building anywhere on the lot and he did not know who did the work out there. Mr. Gass provided for the record a packet of information containing a boundary line adjustment plat and a 1997 vicinity plat done by Nokleby Surveying, 1/09/03 Health Department approval and a letter signed by Wallace Abell and Bruce Beckett stating that Mr. Abell was present when the property was staked out by two individuals other than Mr. Vallandingham, who is Mr. Gass' field man, and that Mr. Vallandingham was in no way involved in the placing of the house built on the lot. The packet of information was entered into the record as Applicant's #A-2.

Mr. Hayden asked if there was enough room behind the house to put the septic easement in? Mr. Gass said his was a rough layout, just a first guess of how they were going to do things and not knowing exactly what the building was going to look like, and there were some other things the Potankas were looking at putting back there like a pool, some sheds and storage buildings, but there was probably 40-50 feet. He said the owner wanted him to stake the house but they were backed up 2-3 weeks, and the owner went somewhere else. Mr. Gass said when he did the site plan he put in extra room for the setbacks; e.g., 17 feet instead of 15 feet and 25 feet instead of 20 feet but, if there was an easement that is not shown on any documents, that would be beyond anything that you would find anyway.

Ms. Meiser said she is not here to try and indicate who caused the problem; the fact is that the problem was caused without the Potankas knowing about it. She said she has spoken with the Potankas, with Mr. Gass and with the excavator and got varying stories about how it all happened. She said they don't know who staked it or if it was staked incorrectly, they only know the problem was brought about without the knowledge or contribution of the Potankas.

Mr. Potanka told the Board he thought he hired Mr. Gass' man to stake the property and he thought that was what they agreed to. He said there were four stakes out there, but he can't attest that Mr. Gass' man did it because he didn't see it. He was under the impression that where the stakes were was his house site, and once he saw the four corners he contacted his excavator to come out and dig.

At this time, the Chair closed testimony and the Board deliberated. Ms. Mriscin said staff says the only place the house can go is where it is but we have a CAC letter that is dead set against the granting of the variance. She said she thinks we should sent the new information to the CAC and wait for their comments. Mr. Hewitt said he doesn't like after-the-fact approvals but Mr. Potanka has put out a lot of money and is not trying to hurt anyone or knowingly tried to circumvent the Critical Area law, and to make him tear the house down would be too much of a hardship. He said this house is almost ready to move into and to make him tear it down or wait for CAC comments is a waste of time because he doesn't think the house can be moved out of the Critical Area. Mr. Hayden agreed with Mr. Hewitt but the Chair stated she thinks we need to ask the CAC to take another look. She said she would also like to make a recommendation to LUGM to fix the inspections process.

Ms. Mriscin moved to continue the application to the next meeting, on October 9th, pending a response from the Critical Area Commission, in writing, based on the new information. The motion was seconded by Mr. Delahay and passed by a vote of 3-2. Mr. Hewitt and Mr. Hayden voted against the motion.

Mr. Hewitt will be out of town for the next meeting and an Alternate will be asked to review the video tape and attend the October 9th meeting. County Attorney John Norris said it is also important for the

witnesses who testified tonight to be at the continued hearing on October 9th in case there are follow-up questions by the Board members. The Chair asked that all the witnesses attend the October 9th meeting.

CUAP #03-135-003 – OMNIPOINT (T-Mobile at Hollywood VFD)

Requesting conditional use approval, pursuant to Chapter 25 of ZO #Z-02-01, to

Construct a 120-foot monopole cellular communication tower to replace an existing

100-foot lattice tower. The property contains 41.01 acres, is zoned RPD, and is

located at 24801 Three Notch Road in Hollywood; TM 26, Blk 11, P 318 / 421.

Owner: Hollywood Volunteer Fire Department

Applicant: Omnipoint Communications (T-Mobile)

Present: Attorney Amy Cavero and representatives of T-

Mobile

Legal Ad published in The Enterprise on 8/27/03 & 9/03/03

Property posted by staff on 8/26/03

#A-1 Certified Receipts of notification to contiguous property

owners

The proposed tower will replace an existing 100-foot lattice communication tower located on a 41-acre site owned by the Hollywood Volunteer Fire Department. The site is located along the west side of MD 235 approximately 1,000 feet north of the MD 245 intersection. A two-story fire station and small storage buildings occupy the site. Access to the tower will be by way of a new 12-foot wide gravel road leading from the existing asphalt parking lot. The 60' X 80' lease area is located approximately 700 feet from MD 235 and is surrounded on three sides by a mature forest.

The existing lattice tower will be replaced with a 120-foot monopole tower that can be extended to 199 feet; however, this application is for only a 120-foot tower. If a need for additional carriers occurs, additional conditional use approval from the Board of Appeals must be obtained for the extended tower. The replacement tower will be constructed approximately 320 feet from the existing tower. The new tower will accommodate two carriers in addition to T-Mobile, plus R.E.A.C.T. and St. Mary's County equipment. A 10' X 20' concrete pad will be constructed at the base of the tower for T-Mobile's and the additional carriers' associated radio equipment. A 6' high opaque wood fence will be constructed around the equipment and tower.

A Right of First Refusal notice was sent to various County and State agencies. No one has expressed a desire to co-locate on the tower at this time; however, the Director of Emergency Operations for St. Mary's County indicates that the County may have a future need and recommends that the

second position on the tower be reserved in perpetuity for County communications equipment.

ATC Associates, on behalf of T-Mobile, submitted a Report of Findings to the Maryland State Historic Preservation Office (SHPO) regarding compliance with the National Historic Preservation Act. ATC's opinion is that there will be no impact to historic sites or to wildlife in the area and the response just recently received from SHPO concurs with that opinion.

Staff recommends approval, subject to conditions reserving the highest co-location position for the County's use and requiring a note on the final site plan stating that the maximum height of the tower shall be 120 feet and any extension of the tower above 120 feet shall require conditional use approval.

Ms. Mriscin asked why staff's recommendations do not include the recommendations of EEE Consulting, Inc., the County's tower consultant? Ms. Chaillet replied those recommendations are already requirements of the Zoning Ordinance with the exception of the one recommending a 50-foot treed buffer around the compound. She said staff cannot recommend that because it is not a requirement of the Ordinance; only the Board can impose that condition.

Ms. Cavero presented the site plan and location of the proposed tower, including a propagation map showing the need for additional wireless coverage at this location. She provided information attesting that the proposal is consistent with the Comprehensive Plan and meets both the County's tower criteria and conditional use criteria. The County's tower consultant, EEE Consulting, Inc., has reviewed the proposal and also finds it to be consistent with County requirements. She said they are moving the location of the new tower into a thicket of trees, whereas the existing tower sets a little more out in the open.

Mr. Hewitt asked why T-Mobile is not constructing a taller tower? Ms. Cavero said they are faced with a conundrum in this regard because the Ordinance requires that they prove the need for the height they are requesting, so they must ask for the minimum height. She said T-Mobile is willing to build a taller tower, that it would be better for them financially to construct a taller tower and get co-locators, but the Ordinance requires the minimum. If someone wants to co-locate on the tower they must come in and go through the conditional use process to have the tower extended.

Mr. Hewitt asked if T-Mobile would co-locate lower than 120 feet? Ms. Cavero replied they would not. Mr. Hewitt said then probably nobody else would either and that T-Mobile is stifling its competition. Ms. Cavero said everyone's system is configured differently. She said there are 6 licensed, FCC carriers that operate in St. Mary's County and some of them have almost no system built out here yet; it's largely a matter of timing because St. Mary's is so fast-growing. But she said it is the Ordinance that stifles the competition. She said it is very expensive to construct a tower with the necessary equipment, and if a carrier can get co-locators that pay monthly rent, it is to their best interest to do that. She said it's a difficult business decision to make but you don't want to

ask for a 199-foot tower when you're going to put your antennas at 150, and then be blamed for these tall towers. Ms. Chaillet said perhaps that is something that LUGM needs to consider in its review of the Ordinance. Ms. Cavero said she would be happy to help rewrite that portion of the Ordinance, if staff would like her help.

Ms. Mriscin asked how Ms. Cavero felt about EEE's suggested condition that a 50-foot buffer of trees be preserved around the facility through a perpetual conservation easement? Ms. Cavero said she thinks, legally, that encroaches on the property owner and is really expanding the lease area even though it is an easement, and she doesn't think it's necessary to do that.

The Chair opened the hearing to public comment. There were no comments.

Mr. Hayden moved that, having adopted the 09/02/03 Staff Report and making a finding that the Conditional Use standards and the objectives of Section 51.3.88 of ZO #Z-02-01 have been met, a conditional use to replace a 100-foot lattice tower with a 120-foot monopole tower be approved, subject to the following conditions:

(1) A note shall be placed on the final site plan indicating that the highest co-location

position on the monopole tower shall be reserved for the County's use. The co-location space shall be reserved in perpetuity or until the County expresses no interest in reserving the space.

(2) A note shall be placed on the final site plan indicating that the maximum height

of the tower shall be 120 feet. Extension to a height above 120 feet shall require Conditional Use approval by the Board of Appeals.

The motion was seconded by Ms. Mriscin and passed by 5-0.

MINUTES AND ORDERS APPROVED

August 14, 2003 Minutes
VAAP #03-1350 – Frankie Miller Order
CUAP #03-132-010 – Middleton Farm Extractive Industry
VAAP #03-132-010 – Middleton Farm Variance

ADJOURNMENT

The meeting was adjourned at 9:46 p.m.

Peggy Childs

Recording Secretary

Approved in open
session: October 9, 2003

Marie E. Underwood
Chairperson