

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

**CASE NUMBER 2019-0078-V**

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**NEIL H. MACBRIDE AND CHRISTINA J. MACBRIDE**

SEVENTH ASSESSMENT DISTRICT

DATE HEARD: MAY 30, 2019

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ORDERED BY:

**DOUGLAS CLARK HOLLMANN**  
ADMINISTRATIVE HEARING OFFICER

PLANNER: **ROBERT KONOWAL**

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DATE FILED: **JUNE 13, 2019**

## **PLEADINGS**

Neil H. MacBride and Christina J. MacBride, the applicants, seek a variance (2019-0078-V) to allow an accessory structure (pool) with less setbacks and buffer than required on property with a street address of 985 Marzoff Road, Deale, MD 20751.

## **PUBLIC NOTIFICATION**

The hearing notice was posted on the County's website in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 300 feet of the subject property was notified by mail, sent to the address furnished with the application. Neil MacBride testified that the property was posted for more than 14 days prior to the hearing. There was no evidence to the contrary. Therefore, I find and conclude that there has been compliance with the notice requirements.

## **FINDINGS**

A hearing was held on May 30, 2019, in which witnesses were sworn and the following evidence was presented with regard to the proposed variance requested by the applicants.

### **The Property**

The applicants own the subject property which has 99 feet of frontage on the south side of Marzoff Road, 1,510 feet southeast of Deale Beach Road, Deale. It is identified as Lot 1 of Parcel 87 in Block 3 on Tax Map 78 in the New Deale

Beach subdivision. The property comprises 1.93 acres and is split-zoned R5-Residential District and OS-Open Space. This waterfront lot on Herring Bay is designated in the Chesapeake Bay Critical Area as resource conservation area (RCA). The subject property is currently developed with a 2½ story single-family dwelling with attached garage.

### **The Proposed Work**

The proposal calls for the construction of a 15' by 30' inground swimming pool on the west side of the existing dwelling as shown on the site plan admitted into evidence at the hearing as County Exhibit 2.

### **The Anne Arundel County Code**

§ 18-13-104(a) provides that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands. Specific development criteria apply as set forth in Article 17 of this Code and COMAR.

§ 17-8-301(b) prohibits new structures in the 100-foot buffer and expanded buffer, except for water dependent uses or shore erosion protection measures.

### **The Variance Requested**

The proposed work will require a critical area variance from the prohibition in § 17-8-301 to allow the applicants to disturb 450 square feet of the buffer in order to construct the proposed 15' by 30' inground pool as shown on County Exhibit 2.

### **The Evidence Submitted At The Hearing**

Robert Konowal, a zoning analyst with the Office of Planning and Zoning (OPZ), presented the following findings:

- OPZ finds that the subject site exceeds the minimum lot area and lot width requirements for a lot located in an R5 district. The lot is however significantly encumbered by tidal wetlands and their buffer. Furthermore, development of the subject property is constrained by the practical considerations of an existing developed lot (c. 1940) that predates critical area law.
- Notwithstanding these site conditions it does appear the applicants may with some modification to existing improvements, be able to accommodate a pool in the rear yard without the need for a variance. Even if it was to be found that there is a practical difficulty in locating a pool in accordance with the Code (i.e. in the rear yard) the applicants are considered to already have reasonable and significant use of the site that includes a dwelling of significant size, a circular driveway, patios and walkways. A swimming pool, especially one located in the 100-foot buffer is not a common feature of waterfront properties since the introduction of critical area law. Denial would not therefore cause hardship in the use of these lands.
- Since the variance is not considered to be warranted it cannot be considered to be the minimum necessary to afford relief. The applicants have not overcome the presumption that the specific development does not conform to the general

purpose and intent of the critical area law and have not evaluated and implemented site planning alternatives.

- The critical area variance requested is not based on conditions or circumstances that are the result of actions by the applicants nor will the request reduce forest cover in the RCA that would be contrary to acceptable clearing and replanting practices, nor will it be detrimental to the public welfare.
- The granting of the variance will not adversely affect water quality or impact fish, wildlife or plant habitat. However, since the variance is not warranted approval would not be in harmony with the general spirit and intent of the Critical Area Program.
- Approval of the variance will not alter the essential character of the neighborhood as the improvement will not generally be visible from abutting properties. Approval of the variance would not negatively impact the use of any adjacent property as the improvement is located well enough away from structures on abutting properties so as to have no effect on the use or enjoyment of their lands.
- The Critical Area Team for the Development Division advised that the subject property is entirely in the expanded buffer. The variance required for the construction of a proposed pool cannot be considered to be the minimum necessary to afford relief and the applicants would not suffer unwarranted

hardship if the variance were denied. There is sufficient room outside the 100-foot buffer to tidal wetlands to locate a pool.

- The Critical Area Commission commented that the applicants currently have significant use of their property with a house, circular drive, gravel area, walkways and patios. The majority of the property is within the 100-foot buffer due to extensive tidal wetlands. Based on aerial photographs, some houses in the neighborhood have pools; however, the overall number is minimal, they are on properties that have bulkheads or are not waterfront, and most of them seem to have been installed prior to 1994. It is the Commission's opinion that a pool cannot meet the threshold of unwarranted hardship. Unwarranted hardship is defined as such "that without a variance, an applicant would be denied reasonable and significant use of the *entire* parcel or lot for which the variance is requested."
- The Department of Health indicated that they have evaluated the onsite sewage disposal system and well water supply system for the above referenced property and determined that the request does not adversely affect these systems. The Health Department has no objection to the request.
- With regard to the standards by which a variance may be granted as set forth under § 18-16-305 under the County Code, OPZ recommends that the variance be *denied*.

Neil MacBride and Christina MacBride were assisted at the hearing by Diane Schwallenberg of Schwallenberg Permit Expediting Service, LLC. They presented evidence that they wanted to construct a pool in an area of their property that is presently covered with gravel so that the pool will not add lot coverage to the property. They testified that there are other pools in their neighborhood in the buffer so they would not be granted a special privilege if the variance was approved. They said they can't build the pool in other areas of their property because of a propane tank and sewer easement in the rear yard. Finally, they said placing the pool where proposed would allow the inhabitants of the house to supervise people using the pool, which the family members like to use since there is little or no access to Herring Bay for swimming there.

There was no other testimony taken or exhibits received in the matter. The Hearing Officer did not visit the property.

## **DECISION**

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

§ 18-16-305(b) sets forth six separate requirements (in this case) that must be met for a variance to be issued for property in the critical area. They are (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, (3) whether granting the variance would confer a special privilege on the applicants, (4) whether the application arises from actions of the applicants, or from conditions or

use on neighboring properties, (5) whether granting the application would not adversely affect the environment and be in harmony with the critical area program, and (6) whether the applicants have overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), of the State law that the variance request should be denied.

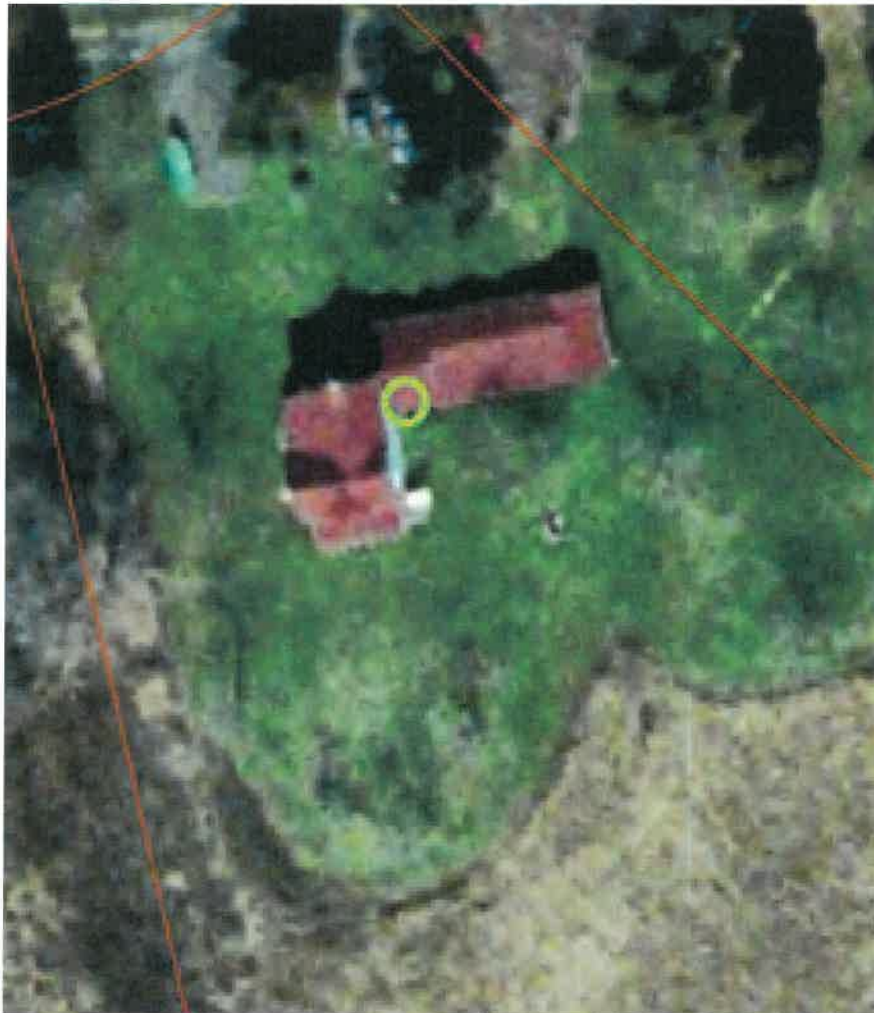
Provided that the applicants meet the above requirements, a variance may not be granted unless six additional factors are found: (1) the variance is the minimum variance necessary to afford relief; (2) the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located; (3) the variance will not substantially impair the appropriate use or development of adjacent property; (4) the variance will not reduce forest cover in the limited development and resource conservation areas of the critical area; (5) the variance will not be contrary to acceptable clearing and replanting practices required for development in the critical area; or (6) the variance will not be detrimental to the public welfare.

### **Findings – Critical Area Variance**

Upon review of the facts and circumstances, I find and conclude that the applicants are not entitled to relief from the Code. Requests for variances to allow pools in the buffer have been uniformly denied. See, for example, Case No. 2016-0096-V, which contains a discussion of pool cases since 1996. This is because a swimming pool, unlike a deck or a pier, is not an amenity that is needed for a property owner to enjoy waterfront property.

The applicants attempt to distinguish their situation from the line of cases noted above because the location of the proposed pool will be “over existing impervious gravel ... to keep the impervious coverage the same and minimally impact the buffer.” (County Exhibit 4 - Letter of Explanation.) This raises the question of when the graveled area the applicants want to use for the pool came into being.

The following aerial photographs answer this question. The first photograph shows the property in 1998.



The area to the left of the dwelling is now graveled. In 1998, it was vegetated and undeveloped.

The photograph below shows the property in 2005.



The property has been redeveloped. The area that is now graveled was apparently fenced and vegetated and looks like a garden.

The photograph below shows the property in 2010.



The garden has now acquired a number of structures inside it.

The applicants purchased the property on March 27, 2016. The following photograph taken in 2016 may show the work being done on the property after the applicants purchased it.



The above photograph shows that the graveled area/fenced area/garden was removed in 2016.

This is the latest aerial photograph of the property (2017).



The area where the applicants wish to place the pool is now fenced and graveled.

The applicants did not present any evidence that the lot coverage placed on the property after the garden area was cleared in 2016/2017 was allowed by a variance from this Office.

The above discussion shows that the graveled area is not grandfathered. The ground was vegetated in 1998 with what looks like grass. Layering the

ground with gravel does not provide a property owner with a ticket to build a pool in the buffer. Therefore, the application will be denied.

The applicants cite Case No. 2016-0149-V in support of their request. In that case, a critical area variance was granted to allow a property owner to construct an exercise swimming pool within the footprint of an existing fish pond. However, that decision was reversed by the Board of Appeals in BA 38-16V.

The facts in this case are different. The area where the applicants wish to place the pool was originally grassed. The area was later fenced-in but cleared in 2016. By 2017, a replica of the fenced-in area was back. It is the presence of the fenced-in area that supports, the applicants believe, their application for a pool within the 100-foot buffer. But the lot coverage in the fenced-in area is a recent arrival and has never been approved for a variance to allow the placement of lot coverage within the 100-foot buffer.

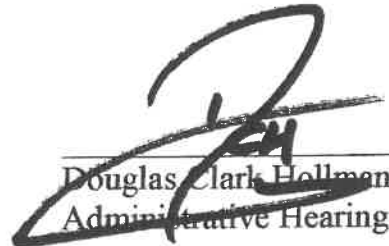
The jurisdiction of this Office is limited to what is presented to it, which is a request for a critical area variance to allow the applicants to construct the proposed pool in the 100-foot buffer. The request will be denied.

### **ORDER**

PURSUANT to the application of Neil H. MacBride and Christina J. MacBride, petitioning for a variance to allow an accessory structure (pool) with less setbacks and buffer than required on property with a street address of 985 Marzoff Road, Deale; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this **13th day of June, 2019**,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the application is **denied**.



Douglas Clark Hollmann  
Administrative Hearing Officer

### **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.

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

**CO. EXHIBIT#:** (

**CASE: 2019-0078-V**

**DATE: 5/30/19**

**FINDINGS AND RECOMMENDATION  
OFFICE OF PLANNING AND ZONING  
ANNE ARUNDEL COUNTY, MARYLAND**

**APPLICANT:** Neil & Christina MacBride

**ASSESSMENT DISTRICT:** 7<sup>th</sup>

**CASE NUMBER:** 2019-0078-V

**COUNCILMANIC DISTRICT:** 7<sup>th</sup>

**HEARING DATE:** May 30, 2019

**PREPARED BY:** Robert Konowal  
Planner

**REQUEST**

The applicants are requesting Variances to allow an accessory structure (in-ground swimming pool) with less setbacks and buffer than required at 985 Marzoff Road in the subdivision of New Deale Beach, Deale.

**LOCATION AND DESCRIPTION OF SITE**

The subject property has approximately 100 feet of frontage on the south side of Marzoff Road, 1510 feet southeast of Deale Beach Road. The site is shown on Tax Map 78, Block 3, as Parcel 87, Lot 1 and is zoned "R5-Residential District" and "OS-Open Space District". These lands have an area of 1.93 acres. The current zoning was adopted by the Comprehensive zoning for the Seventh Council District October 7, 2011.

These lands have water frontage on Herring Bay and are located in the Chesapeake Bay Critical Area and designated "RCA-Resource Conservation Area". The site is not located in a buffer modification area.

The property is currently improved with a 2½ story single family detached dwelling with attached garage.

**APPLICANT'S PROPOSAL**

The applicants are proposing to construct a 15-foot by 30-foot in-ground swimming pool on the west side of the existing dwelling.

**REQUESTED VARIANCE**

Section 18-13-104. of the Anne Arundel County Zoning Ordinance requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands. The applicants are seeking a variance to disturb 450 sf of the 100-foot buffer to tidal wetlands to allow the construction of a 15-foot by 30-foot in-ground pool.

## FINDINGS

This Office finds that the subject site exceeds the minimum lot area and lot width requirements for a lot located in a R5 District. The lot is however significantly encumbered by tidal wetlands and their buffer. Furthermore, development of the subject property is constrained by the practical considerations of an existing developed lot (c. 1940) that predates Critical Area Law. Notwithstanding these site conditions it does appear the applicant may with some modification to existing improvements, be able to accommodate a pool in the rear yard without the need for a Variance. Even if it was to be found that there is a practical difficulty in locating a pool in accordance with the Code (i.e. in the rear yard) the applicant is considered to already have reasonable and significant use of the site that includes a dwelling of significant size, a circular driveway, patios and walkways. A swimming pool, especially one located in the 100-foot buffer is not a common feature of waterfront properties since the introduction of Critical Area Law. Denial would not therefore cause hardship in the use of these lands.

Since the Variance is not considered to be warranted it cannot be considered to be the minimum necessary to afford relief. The applicants have not overcome the presumption that the specific development does not conform to the general purpose and intent of the Critical Area Law and have not evaluated and implemented site planning alternatives.

The Critical Area Variance requested is not based on conditions or circumstances that are the result of actions by the applicants nor will the request reduce forest cover in the Resource Conservation Area that would be contrary to acceptable clearing and replanting practices, nor will it be detrimental to the public welfare.

The granting of the Variance will not adversely affect water quality or impact fish, wildlife or plant habitat. However, since the Variance is not warranted approval would not be in harmony with the general spirit and intent of the critical area program.

Approval of the Variance will not alter the essential character of the neighborhood as the improvement will not generally be visible from abutting properties. Approval of the Variances would not negatively impact the use of any adjacent property as the improvement is located well enough away from structures on abutting properties so as to have no effect on the use or enjoyment of their lands.

The **Critical Area Team for the Development Division** advised that the subject property is entirely in the expanded buffer. The variance required for the construction of a proposed pool cannot be considered to be the minimum necessary to afford relief and the applicant would not suffer unwarranted hardship if the variance were denied. There is sufficient room outside the 100' buffer to tidal wetlands to locate a pool.

The **Critical Area Commission for the State of Maryland** commented that the applicants currently have significant use of their property with a house, circular drive, gravel area, walkways and patios. The majority of the property is within the 100-foot Buffer due to extensive tidal wetlands. Based on aerial photographs, some houses in the neighborhood have pools; however,

the overall number is minimal, they are on properties that have bulkheads or are not waterfront, and most of them seem to have been installed prior to 1994. It is the Commission's opinion that a pool cannot meet the threshold of unwarranted hardship. Unwarranted hardship is defined as such "that without a variance, an applicant would be denied reasonable and significant use of the *entire* parcel or lot for which the variance is requested."

The **Anne Arundel Department of Health** indicated that they have evaluated the on-site sewage disposal system and well water supply system for the above referenced property and determined that the request does not adversely affect these systems. The Health Department has no objection to the request.

### **RECOMMENDATION**

With regard to the standards by which a Variance may be granted as set forth under Article 18-16-305. under the County Code, the Office of Planning and Zoning recommends that the Variance to disturb 450 sf of the 100-buffer to tidal wetlands to allow the construction of a 15-foot by 30-foot in-ground pool as shown on the attached site plan be ***denied***.

DISCLAIMER: This recommendation does not constitute a building permit. In order for the applicant(s) to construct the structure(s) as proposed, the applicant(s) shall apply for and obtain the necessary building permits and obtain any other approvals required to perform the work described herein. This includes but is not limited to verifying the legal status of the lot, resolving adequacy of public facilities, and demonstrating compliance with environmental site design criteria.

  
SPS/WREK

For Office Use Only

CASE # 2019-0078-V  
FEE PAID 250.00  
DATE 03 27 2019



For Office Use Only

ZONE Z5/OS  
CRITICAL AREA: IDA \_\_\_ LDA \_\_\_ RCA X  
BMA: Yes \_\_\_ No X  
NO. OF SIGNS 2

### VARIANCE APPLICATION

NOTE: This form can be downloaded to your computer and filled out utilizing Adobe Reader (or similar product). It can also be printed and filled out by hand.

Applicant(s): NEIL & CHRISTINA MACBRIDE

(Applicant must have a financial, contractual, or proprietary interest in the property)

Property Address: 985 MARZOFF ROAD, DEALE, MD 20751

Property Location: 99.9 feet of frontage on the ( S ) side of MARZOFF ROAD ;  
(Enter Street Name)  
1510 feet ( SE ) of (Nearest intersecting street) DEALE BEACH ROAD  
(Enter Street Name)

12-digit Tax Account Number 7000-0302-0500 Tax District ( 7 ) Council District ( 7 )

Waterfront Lot: Y  N  Corner Lot: Y  N  Deed Title Reference L-28293, F-216

Zoning District R-5/OS Lot # 1 Tax Map 78 Block/Grid 3 Parcel 87

Area 1.93 (Acres ) Subdivision Name NEW DEALE BEACH

Description of Proposed Project and Variance Requested (Brief, detail fully in letter of explanation)

CONSTRUCT 15'X30' INGROUND POOL WITHIN BUFFER

The applicant hereby certifies that he or she has a financial, contractual, or proprietary interest in the property; that he or she is authorized to make this application; that the information shown on this application is correct; and that he or she will comply with all applicable regulations of Anne Arundel County, Maryland.

Applicant's Signature [Signature] Owner's Signature [Signature]

Print Name NEIL MACBRIDE Print Name CHRISTINA MACBRIDE

Mailing Address 985 MARZOFF RD Mailing Address 985 MARZOFF RD

City, State, Zip DEALE, MD 20751 City, State, Zip DEALE, MD 20751

Work Phone \_\_\_\_\_ Work Phone \_\_\_\_\_

Home Phone \_\_\_\_\_ Home Phone \_\_\_\_\_

Cell Phone 703-241-1970 Cell Phone \_\_\_\_\_

Email Address NEIL.MACBRIDE@GMAIL.COM Email Address CNMACBRIDE@GMAIL.COM

\*\*\* Below For Office Use Only \*\*\*

Application accepted by Anne Arundel County Office of Planning and Zoning: [Signature] 03 27 2019

Variance to allow an accessory structure (pool) with less set backs than required and around buffer Initials [Signature] Date 03 27 2019

**IMPERVIOUS COVERAGE**

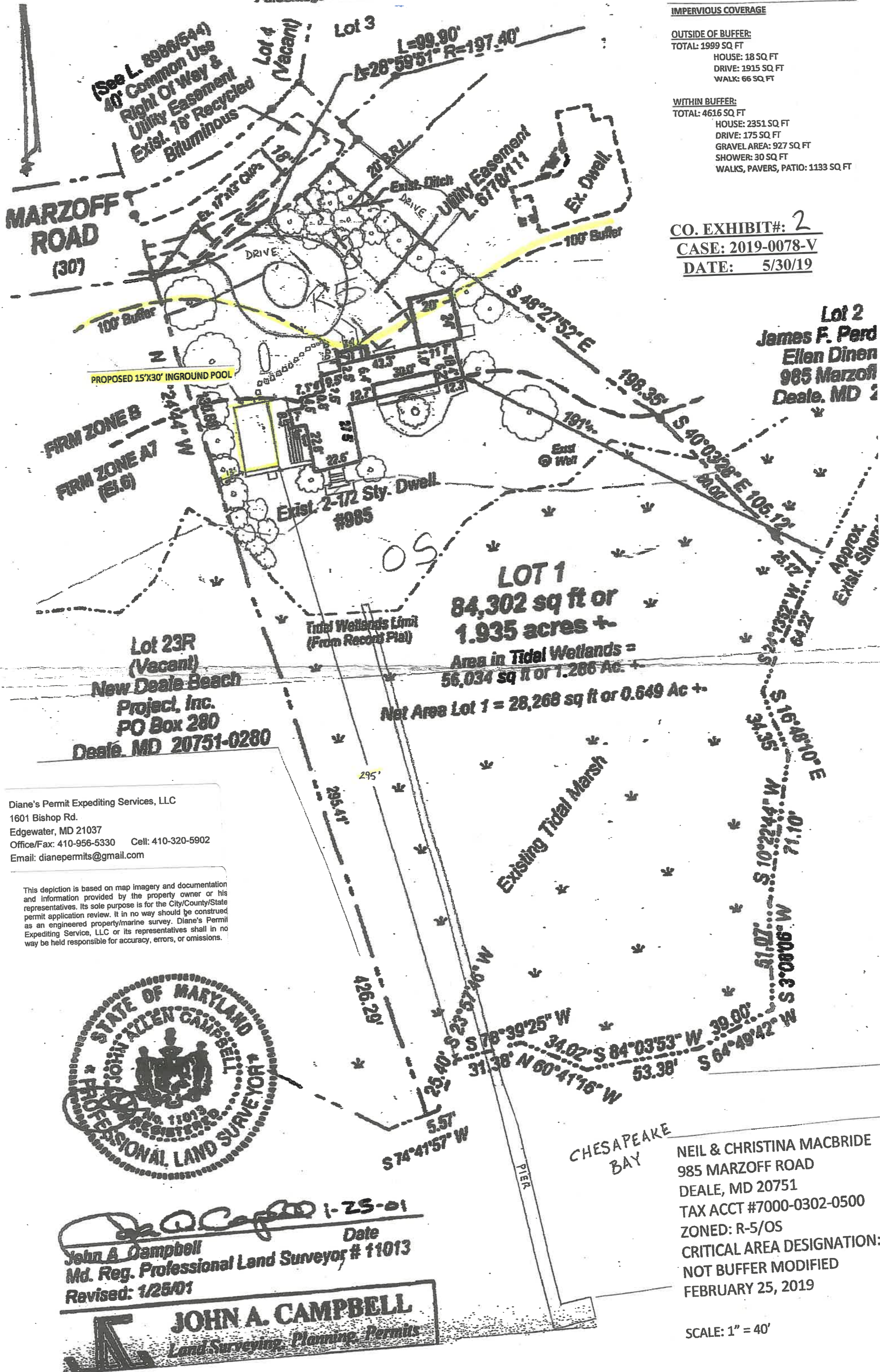
**OUTSIDE OF BUFFER:**

TOTAL: 1999 SQ FT  
HOUSE: 18 SQ FT  
DRIVE: 1915 SQ FT  
WALK: 66 SQ FT

**WITHIN BUFFER:**

TOTAL: 4616 SQ FT  
HOUSE: 2351 SQ FT  
DRIVE: 175 SQ FT  
GRAVEL AREA: 927 SQ FT  
SHOWER: 30 SQ FT  
WALKS, PAVERS, PATIO: 1133 SQ FT

**CO. EXHIBIT#:** 2  
**CASE:** 2019-0078-V  
**DATE:** 5/30/19



**Lot 2**  
James F. Perd  
Ellen Dinen  
985 Marzoff  
Deale, MD 2

**LOT 1**  
84,302 sq ft or  
1.935 acres +/-  
Area in Tidal Wetlands =  
56,034 sq ft or 1.286 Ac +/-

Net Area Lot 1 = 28,268 sq ft or 0.649 Ac +/-

**Lot 23R**  
(Vacant)  
New Deale Beach  
Project, Inc.  
PO Box 280  
Deale, MD 20751-0280

Diane's Permit Expediting Services, LLC  
1601 Bishop Rd.  
Edgewater, MD 21037  
Office/Fax: 410-956-5330 Cell: 410-320-5902  
Email: dianepermits@gmail.com

This depiction is based on map imagery and documentation and information provided by the property owner or his representatives. Its sole purpose is for the City/County/State permit application review. It in no way should be construed as an engineered property/marine survey. Diane's Permit Expediting Service, LLC or its representatives shall in no way be held responsible for accuracy, errors, or omissions.



*John A. Campbell*  
Date  
**John A. Campbell**  
Md. Reg. Professional Land Surveyor # 11013  
Revised: 1/25/01



CHESAPEAKE BAY

NEIL & CHRISTINA MACBRIDE  
985 MARZOFF ROAD  
DEALE, MD 20751  
TAX ACCT #7000-0302-0500  
ZONED: R-5/OS  
CRITICAL AREA DESIGNATION: I  
NOT BUFFER MODIFIED  
FEBRUARY 25, 2019

SCALE: 1" = 40'