Circuit Court for Anne Arundel County
Case No. C-02-CV-15-002402

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 80

September Term, 2017

DAVID VIEGLAIS, ET UX.

v.

MARYLAND DEPARTMENT OF NATURAL RESOURCES, ET AL.

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*Woodward,
**Eyler, Deborah S.,
Reed,
JJ.

Opinion by Woodward, J.

Filed: August 30, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

**Eyler, Deborah S., J., participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a retired, specially assigned member of this Court.

In the Circuit Court for Anne Arundel County, David and Christine Vieglais, appellants, sued the Maryland Department of Natural Resources ("DNR"), appellee, asserting a claim for breach of contract and seeking declaratory relief. Specifically, they asked the court to declare that their proposed plan to reconstruct an existing dwelling on their waterfront property, which is subject to a forest conservation easement held by DNR, was not in violation of that easement. The Chesapeake Bay Foundation, Inc., James Earl, Sylvia Earl, Sherwood Forest Company, and Sherwood Forest Club, Inc. (collectively "Intervenors"), appellees, successfully moved to intervene in the action.

After the circuit court granted summary judgment in favor of DNR on the breach of contract claim, a bench trial proceeded on the claims for declaratory relief. At the close of the Vieglaises' case-in-chief, the court granted a motion for judgment in favor of DNR and the Intervenors, declaring that the forest conservation easement barred the Vieglaises' land development plan.

The Vieglaises present three questions for review, [1] which we have consolidated and rephrased as:

> I. Did the circuit court err in its Order of Declaratory Judgment entered on February 28, 2017?

[1] As posed by the Vieglaises, the questions are:

> I. Did the Trial Court err in granting [the] Motion for Judgment in favor of Defendants and Intervenors?
>
> II. Did the Trial Court err in its Order of Declaratory Judgment entered on February 28, 2017?
>
> III. Did the Circuit Court err in granting [the] Motion to Intervene as to the Earls, The Sherwood Forest Club, Inc., and CBF?

II. Did the circuit court err or abuse its discretion by granting the motions to intervene?

For reasons set forth below, we affirm in part and reverse in part the declaratory judgment and decline to reach the second issue.

BACKGROUND

On May 18, 2011, the Vieglaises purchased a 28-acre parcel identified as Lot 3 in the Sahlin Farms subdivision ("Lot 3"). Lot 3 fronts on Hopkins Creek, a tributary of the Severn River. As we shall discuss, the Vieglaises proposed to construct a 2,400 square foot "environmentally progressive 'green' home" and a 900 square foot garage on Lot 3 along the shore of Hopkins Creek, near the site of a former dwelling that had burned down.

A. The Critical Areas Buffer

The General Assembly enacted the Critical Area Law in 1984. 1984 Md. Laws, Ch. 794. One legislative finding incorporated into the law provides that "[t]he shoreline and adjacent lands constitute a valuable, fragile, and sensitive part of this estuarine system, where human activity can have a particularly immediate and adverse impact on water quality and natural habitats[.]" Md. Code (1973, 2000 Repl.Vol.), § 8–1801(a)(2) of the Natural Resources Article ("NR"). In light of this and other legislative findings, the Critical Area Law has two purposes: (1) to "foster[] more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats," and (2) to implement the law cooperatively "with local governments establishing and implementing their programs in a consistent and uniform manner subject to State, and local leadership, criteria, and oversight." Md. Code (1973, 2012 Repl.Vol.), NR § 8-1801(b).

Consequently, the General Assembly established a Critical Area Commission and empowered it to adopt rules and regulations governing local programs. NR §§ 8-1803 & 8-1806(a)(1).

Pursuant to that authority, the Critical Area Commission promulgated COMAR 27.01.09.01.[2] As pertinent, that regulation defined "Buffer" to mean "an existing, naturally vegetated area, or an area established in vegetation and managed to protect aquatic, wetlands, shoreline, and terrestrial environments from man-made disturbances." COMAR 27.01.09.01A. Section C of the regulation directed that "[l]ocal jurisdictions shall establish a minimum 100-foot Buffer landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands." COMAR 27.01.09.01C(1). As we shall discuss in more detail, *infra*, development is highly restricted within the Buffer, but local jurisdictions were permitted to "request an exemption of certain portions of the Critical Area from the Buffer requirements[.]" COMAR 27.01.09.01C(2)–(8).

B. Sahlin Farms and the Forest Conservation Easement

In 1950, Oscar Sahlin acquired an approximately 297-acre tract of largely forested land on Hopkins Creek, called Sahlin Farms. On September 25, 2001, after Mr. Sahlin died, Carolyn Robbins, Personal Representative of the Estate of Oscar Sahlin ("Sahlin Estate"), granted DNR a forest conservation easement ("the FCE") over Sahlin Farms in

[2] All references to this COMAR regulation are to the 2004 version, which the parties agree is identical to the version in place when the forest conservation easement was executed.

consideration of the payment of $1.65 million by DNR. We set forth the pertinent terms of the FCE.

The recitals, which are incorporated into the FCE, state that the parties endeavor to "conserve[e] the dominant scenic, rural, woodland, natural, riparian, wetland characteristics of the Property, and, except as" permitted by the FCE, to "prevent[ ] the use or development of the Property for any purpose or in any manner that would conflict with maintaining [it] as a forest resource." The purposes of the FCE are "to preserve and protect the Conservation Values [incorporated into the FCE at Exhibit B] and the environment of the Property and to maintain permanently the forest on [it] by managing the Property and the forest in an ecologically sound manner." As pertinent, the "Conservation Values" include protection of the "Chesapeake Bay Critical Area shoreline and aquatic habitat[.]"

The FCE is a perpetual easement that runs with Sahlin Farms. It is enforceable by DNR against the Sahlin Estate and its successors and assigns.

Article II, entitled "Prohibited and Restricted Activities," contains two sections that are central to this appeal. Article II-G provides that "[n]o building, facility, means of access or other structure shall be constructed on the Property after the date of [the FCE] except" in four enumerated circumstances. Subsection II-G(2) permits construction "[t]o improve, repair, restore, alter, remodel, maintain or replace with structures of equivalent size or purpose *all existing structures* and other structures permitted under [the FCE] in this Article[.]" (Emphasis added). Subsection II-G(4) permits the construction of "eleven (11) single family residences pursuant to Article II-H herein." Article II-G closes with the following pertinent language:

> Notwithstanding anything contained herein to the contrary, no new structures shall be constructed within the 100 foot Resource Critical Areas Buffer of the State of Maryland (the "Critical Areas Buffer"). Existing structures may be improved, repaired, restored[,] altered, remodeled and maintained, but not expanded, within the Critical Areas Buffer.

As referenced above, Article II-H specifically authorizes the subdivision of Sahlin Farms into no more than eleven residential lots, designated as "Large Lots" and "Small Lots." Up to five Small Lots could be located on no more than a total of thirty total acres of the tract and, ultimately, would be excluded from the FCE. Six or more Large Lots[3] would be "located on the balance of the Property" and would not be excluded from the FCE.

The Large Lots include any subdivided lot that exceeds ten acres. The Large Lots each would "contain a five acre building envelope ('Building Envelope')" within which one single-family residence could be constructed. Pursuant to Article II-H(3)(b), if the location of the Building Envelopes on the Large Lots had not been determined by the time of the subdivision of Sahlin Farms, the successors to the Sahlin Estate would be obligated to provide DNR "with a map showing the proposed locations of the Building Envelopes prior to the beginning of any construction or application for necessary permit(s) for construction on the Large Lots, so that [DNR] can assess and comment on the proposed locations of the Building Envelopes." Upon a final determination of the location of a Building Envelope, the land within that envelope would be "free of the restrictions of [the FCE]" except as "specifically set forth in . . . Article II-H."

[3] The number of Large Lots was dependent upon the number of Small Lots because the total number of lots was not to exceed eleven.

Article II-H(6) reiterates the restrictions in the final section of Article II-G applicable to development within the Buffer:

> Nothing contained in Article II-H herein is intended to permit the construction of new or additional structures within the Critical Areas Buffer, except that Grantor may construct one pier for each single family building lot having frontage on Hopkins Creek and no existing pier. . . . **Existing structures may be improved, repaired, restored, altered, remodeled and maintained, but not expanded, within the Critical Areas Buffer.** Furthermore, in no event shall any such structures be allowed for use for residential or any other form of dwelling purposes after the construction of a new dwelling unit in the Building Envelope on the parcel on which such structures are located.

(Emphasis added).

Article V incorporates certain exhibits, including Exhibit C, entitled "Inventory of Existing Structures." Exhibit C lists twelve "Dwellings" and numerous accessory structures, including one existing "[d]welling" located at "1429 River Road."

Article VI, Section F, provides that "[t]he provisions of this Forest Conservation Easement do not replace, abrogate or otherwise set aside any local, state or federal laws, requirements or restrictions applicable to the Property."

C. Subdivision of Sahlin Farms and the Sale of Lot 3

In December of 2008, DNR approved a plan to subdivide Sahlin Farms into eleven lots and, after approval from several government entities, a plat was recorded in August 2009 ("2009 Plat"). The 2009 Plat created four Small Lots and seven Large Lots. It did not establish Building Envelopes for the Large Lots. As pertinent, the 2009 Plat reflects that Lot 3 comprises just over 28 acres and that, of that total acreage, 19 acres fall within the "Critical Area." It is bordered to the north and south by two other Large Lots (Lots 2

and 4), to the east by Sahlin Farm Road, and to the west by Hopkins Creek. It was improved with a 1,093 square foot "existing home[]" near Hopkins Creek, but the "General Notes" on the 2009 Plat reflect that that structure was to be "converted to boathouse[]/storage facilit[y] in accordance with [a 2008 Variance Case]." That house was the "dwelling" listed in Exhibit C to the FCE with an address of 1429 River Road ("the Existing Dwelling"). *The Existing Dwelling was located entirely within the 100-foot Buffer*. By the time the 2009 Plat was recorded, however, the Existing Dwelling had burned down, leaving only its stone foundation.

Also in 2009, the Sahlin Estate recorded a Final Development Plan for the Sahlin Farms subdivision. The Final Development Plan depicted a "Proposed House" site on Lot 3 near its eastern border, adjacent to Sahlin Farm Road. Like the 2009 Plat, it showed the location of the Existing Dwelling, but noted that that house would be converted to a boathouse or storage facility.

In April 2010, the Vieglaises first visited Sahlin Farms subdivision and expressed an interest in purchasing Lot 3. Most of Lot 3 is heavily forested with the exception of a cleared area near Hopkins Creek, which contained the site of the Existing Dwelling, and an "agricultural pasture" near Sahlin Farm Road, which contained the site of the "Proposed House" on the Final Development Plan. The Vieglaises, however, planned to farm on the agricultural pasture near Sahlin Farm Road and to construct a single-family home at the site of the Existing Dwelling. They were given a copy of the FCE and met with Donald Van Hassent, a forester at DNR who administered the FCE, to discuss their questions.

In May 2011, the Vieglaises purchased Lot 3. In 2012, the Vieglaises sought DNR's "consideration and consent" relative to a grading permit that they had submitted to Anne Arundel County ("the County") proposing "construct[ion of] a dwelling within the 100-foot Buffer[.]" By letter dated July 18, 2012, Van Hassent, on behalf of DNR, advised the Vieglaises that their plan would "constitute a violation of the terms of the conservation easement" because it would amount to an expansion of a structure within the Buffer.

A little over six months later, Van Hassent reviewed "revised plans" submitted by the Vieglaises and came to the opposite conclusion. By letter dated February 28, 2013, he advised the Vieglaises that their plan to "rebuild and expand a dwelling, destroyed by fire, in the Buffer Exempt Area of [Lot 3]" within a designated five-acre building envelope "would not violate the Easement."

Two years later, DNR reversed course again. In a letter dated February 5, 2015, Van Hassent advised the Vieglaises that DNR had "reassessed the [FCE]'s applicability with regard to [Lot 3]" and had determined that the Final Development Plan for the Sahlin Farms subdivision had "conclusively established the building envelope for [Lot 3] . . . located along the edge of Sahlin Farm Road" and, pursuant to the FCE, the Vieglaises were thus prohibited from building outside of that envelope. The Vieglaises' plan would also "violate the [FCE]'s restriction prohibiting the construction of any new structures within the 100 foot critical area buffer." (Footnote omitted). The letter noted that, because the proposed single-family home was located outside the footprint of the Existing Dwelling, the proposed home was a "new structure" and, even if not a new structure, it was an

expanded structure. DNR took the position that this restriction applied even though the shoreline of Lot 3 was designated as "Buffer modified" by the County.

D. The Instant Litigation

Less than six months later, on July 31, 2015, the Vieglaises filed the instant lawsuit against DNR. In Count I, they asserted a claim for breach of contract, arguing that DNR had finally approved their proposed Building Envelope in its February 28, 2013 letter and unlawfully rescinded its approval in its February 5, 2015 letter. They sought specific performance of the 2013 approval. In Counts II through V, the Vieglaises requested declaratory relief. Specifically, the Vieglaises asked the court to:

> C. Enter an Order declaring that reconstruction of the historic structure on [Lot 3] does not violate the [FCE].
>
> D. Enter an Order declaring that relocating the historic structure on [Lot 3] does not violate the [FCE].
>
> E. Enter an Order declaring that expansion of the historic structure on [Lot 3] does not violate the [FCE].
>
> F. Enter an order declaring that using the reconstructed historic structure on [Lot 3] as a single-family home does not violate the [FCE].

On December 1, 2015, James Earl, Sylvia Earl, Sherwood Forest Company, Sherwood Forest Club, Inc., and the Chesapeake Rivers Association, Inc., t/a Severn Riverkeeper Program ("Chesapeake Rivers Association"), moved to intervene.[4] On

[4] The Earls live in the Bayberry Hill community in Crownsville, which is located across Hopkins Creek from Sahlin Farms. The two Sherwood Forest entities own property "within close proximity of the Sahlin Farms subdivision and [Lot 3.]" The Chesapeake Rivers Association is a nonprofit conservation organization that works to protect the Severn River.

December 11, 2015, the Chesapeake Bay Foundation, Inc. moved to intervene. DNR consented to intervention, but the Vieglaises opposed the motions. On March 16, 2016, the court issued an order granting the motions to intervene as to all Intervenors except the Chesapeake Rivers Association.[5]

DNR and the Intervenors moved for summary judgment on all counts. The circuit court granted summary judgment in favor of DNR and the Intervenors on Count I but denied it as to the remaining counts. The Vieglaises do not challenge that ruling in this appeal.

A bench trial commenced on the declaratory judgment counts on February 6, 2017. In their case, the Vieglaises called three witnesses: Christina Vieglais; Van Hassent, who was by then the director of State Forest Service at DNR; and Roy Little, a land development engineer who was accepted by the court as an expert in County land development and the County's Critical Area Program. Ms. Vieglais testified about the purchase of Lot 3 and her and her husband's plans for development of it. She explained that they planned to "[r]ebuild," "[r]epair," and "[i]mprove" the existing dwelling that had burned down, by "mov[ing] it back farther from the water and design[ing] it so that it was a net zero energy efficient house."

Van Hassent testified that he was DNR's representative in the negotiations that resulted in the FCE and, once it was executed, he administered it for DNR. In his view,

[5] The circuit court initially had granted the motions to intervene without a hearing, but subsequently granted the Vieglaises' motion for reconsideration and held a hearing on the motions.

the terms of the FCE prohibited the Vieglaises from "expand[ing] [the Existing Dwelling] outside the existing footprint" because it was located within the Buffer.

Little testified about the Vieglaises' development plan, the history of the Critical Area Program, and about the "[B]uffer exempt" areas of the County. He explained that in the early 1990s, the County mapped its shorelines using aerial imaging and "those areas that primarily had structures within that 100 feet were mapped as what they called [B]uffer exempt," and what is now called "Buffer modified." He opined that based upon his review of the County's Buffer exempt maps, the Existing Dwelling on Lot 3 was within the Buffer exempt area when the FCE was executed and remained designated as Buffer modified. On cross-examination, Little agreed with the characterization of the Buffer exempt areas as an "overlay over that 100-foot area." Little further acknowledged that the Vieglaises planned to have the original foundation of the Existing Dwelling "razed" and a new structure built partly within and partly outside the footprint of that dwelling.

At the close of the Vieglaises' case, DNR and the Intervenors moved for judgment on the remaining four counts. After hearing argument from all parties, the trial court ruled as follows:

> The plaintiffs seek four declaratory judgments, each of which have been expressed in the complaint in two alternative ways, in the counts and the final prayers. However, plaintiffs' counsel has conceded that . . . [they] only seek declarations pursuant to the final prayers.
>
> . . . [O]ne, that reconstruction of the historic structure on the Vieglais property does not violate the [FCE]. Two, that relocating the historic structure on the Vieglais property does not violate the [FCE]. Three, that expansion of the historic structure on the property does not violate the [FCE]. And, four, that using the reconstructed structure on the property as a single family home does not violate the [FCE].

Rule 2-519 permits in a bench trial the Court to proceed to determine the facts and render a judgment against the plaintiff or decline to render judgment until the close of all evidence. In a bench trial the Court does not consider all evidence and inferences in the light most favorable to the party against whom the motion is made. Critical to a determination is an analysis of Article 2, Section G(4) of the FCE which states "notwithstanding anything contained herein to the contrary, no new structures shall be constructed within the 100-foot resource critical areas buffer of the State of Maryland, the 'critical areas buffer.' Existing structures may be improved, repaired, restored, altered, remodeled and maintained, but not expanded within the critical areas buffer."

The Court finds as fact that the plain language of this section is clear and unambiguous. The terms 100-foot resource critical area buffer [of] the State of Maryland refers to the Maryland state regulation that a 100-foot buffer shall be established from the mean high water line of tidal waters, tributary streams, and tidal wetlands. The subject property is adjacent to such a waterway.

The language of the section is without words of modification or limitation. It is silent as to any exemptions or exceptions to the 100-foot buffer requirement. It is the contextually clear intent of the parties to the FCE that such a 100-foot buffer restriction is an independent designation. This context is clear from the language concerning existing structures which places specific restrictions upon them. No reference to exemption sections of COMAR or any other laws or regulations is made. No Exhibits, drawings, or maps are appended to the FCE that express any intent to modify the 100-foot line.

The first clause of the first sentence of G(4)[6], "notwithstanding anything contained herein to the contrary," clearly refers to the entire FCE, and thus the buffer line restrictions are superior to the building envelope language in Article 2, Section H[,] as further evidenced by H(6), which unambiguously [s]tates that "nothing contained in Article 2, Section H herein is intended to permit construction of new or additional structures within the critical areas buffer."

The evidence before the Court is for a proposed redevelopment as reflected on Plaintiffs' Exhibit 58. The Court cannot and will not speculate as to any other redevelopment plan, and will not issue a blank check in that regard. The proposed redevelopment advanced by plaintiffs is either a new structure by virtue of the proposed razing of the remaining foundation and starting anew, or an existing structure as it overlaps the footprint of the remnants. In either event it is clear, even as conceded by plaintiffs' expert

[6] The language the court quotes actually appears in an unnumbered section of Article II-G, below Article II-G(4).

witness that the proposed redevelopment is partially within the 100-foot buffer.

A new structure at that location is clearly prohibited by the FCE. Improvement of an existing structure, if that is what is proposed, cannot expand to exceed nor move from the footprint of the old building. The broad prayers for declarations that reconstruction, relocation, and or expansion of the historic structure do not violate the FCE, must be qualified by the only evidence presented by plaintiffs as to the currently proposed redevelopment, which are in all three requested manners violative of the FCE.

The fourth prayer for a declaration that using the reconstructed structure as a single family home does not violate the [FCE] is also inappropriate as Article 6, Section F of the FCE provides that "the provisions of this forest conservation easement do not replace, aggregate, or otherwise set aside any local, state, or federal laws, requirements or restrictions applicable to property.["] Such restrictions include the limitation of use of the structure as a boat house/storage facility, as noted on both the record plat and final development plan, both placed into evidence. . . .

As such, all four declarations sought by the plaintiff must be denied and judgment is entered in favor [of] all defendants.

On February 28, 2017, the circuit court entered a written judgment, declaring:

For the reasons stated on the record, Defendants having made a Motion for Judgment, and the Court having granted said Motion, it is by the Circuit Court for Anne Arundel County, hereby

DECLARED that the proposed redevelopment of the waterfront home does violate Section II-G of the Easement; it is further

DECLARED that the proposed relocation of the home site slightly inland from the location of the burned structure does violate the Easement; it is further

DECLARED that the expansion and/or relocation of the structure within a five-acre building envelope does violate the terms of the Easement; it is further

DECLARED that the Easement does prohibit the use of the original structure, or any reconstruction or improvement thereof, as a single-family home.

The Vieglaises noted this timely appeal. We shall include additional facts as

necessary to the disposition of this appeal.

DISCUSSION

I.
Declaratory Judgment

"Unlike in a jury trial, a trial judge in a bench trial considering a Rule 2-519 motion for judgment 'is not compelled to make any evidentiary inferences in favor of the party against whom the motion for judgment is made.'" *Saxon Mortg. Servs., Inc. v. Harrison*, 186 Md. App. 228, 262 (2009) (quoting *Bricker v. Warch*, 152 Md. App. 119, 135–36 (2003)). Under these circumstances, our review of the circuit court's grant of a motion for judgment is governed by Rule 8-131(c). *Cattail Assocs., Inc. v. Sass*, 170 Md. App. 474, 486 (2006). Thus, we "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). We review the trial court's legal conclusions, such as its "construction or interpretation of a written contract[,]" *de novo*. *Cattail Assocs.*, 170 Md. App. at 486–87 (citation omitted).

As set forth by the Court of Appeals in *Maryland Agricultural Land Preservation Foundation v. Claggett*, 412 Md. 45, 62 (2009):

> In construing the language of a deed, the basic principles of contract interpretation apply. The grant of an easement by deed is strictly construed. The extent of an easement created by an express grant depends upon a proper construction of the conveyance by which the easement was created. The primary rule for the construction of contracts generally—and the rule is applicable to the construction of a grant of an easement—is that a court should ascertain and give effect to the intention of the parties at the time the contract was made, if that be possible.

(quoting *Miller v. Kirkpatrick*, 377 Md. 335, 351 (2003)) (quotation marks and citations omitted). The Court enunciated that

> the principles of deed construction require, moreover, consideration of "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution[.]" "[W]e must consider the deed as a whole, viewing its language in light of the facts and circumstances of the transaction at issue as well as the governing law at the time of conveyance."

Id. at 63 (quoting *Chevy Chase Land Co. v. United States*, 355 Md. 110, 123 (1999)) (internal citations omitted). If the language of a deed of easement is ambiguous, "the court will interpret the scope of the easement in favor of free and untrammeled use of the land." *Chevy Chase Land*, 355 Md. at 145 (footnotes and citations omitted) (quoting 7 *Thompson on Real Property* § 60.04(a), at 451 (Thomas ed. 1994)).

With these principles in mind, we turn to the four declarations made by the court construing the FCE. We begin with the first three declarations, which relate to the Vieglaises' plan for the Existing Dwelling. The court declared that the Vieglaises' proposed redevelopment, relocation, and/or expansion of the Existing Dwelling violates Article II-G of the FCE. As pertinent, Article II-G prohibits any construction on any lot in the Sahlin Farms subdivision after the execution of the FCE, except that an "existing structure" may be improved, repaired, restored, remodeled or replaced with "structures of equivalent size or purpose." It further permits, by reference to Article H, the construction of a single-family home on each Large Lot, within a five-acre Building Envelope that must be approved by DNR. Article II-G and II-H both make clear, however, that "no new structures shall be constructed" and "[e]xisting structures" may not be "expanded" "within the . . . Buffer."

There is no dispute that the Vieglaises' proposed development plan would expand the Existing Dwelling, more than doubling it in size. Also, there is no dispute that the footprint of the Existing Dwelling falls entirely within "100 feet landward from the mean high water line of [Hopkins Creek]" and that the footprint of the proposed relocated dwelling falls partially inside that radius. NR § 8-1801(a)(4).

The Vieglaises first contend that the court erred by ruling that Article II-G of the FCE prohibited their planned redevelopment, relocation, and expansion of the Existing Dwelling because "the area of Lot 3 surrounding the Dwelling" is not within the Buffer. They rely for this position upon Little's testimony at trial that the shoreline adjacent to their proposed development was designated by the County as "Buffer exempt" or "Buffer modified." Consequently, the Vieglaises maintain that the site of their planned development within Lot 3 was never part of the Buffer and thus is not subject to any provisions under the FCE that restrict building in the "Critical Areas Buffer."

DNR responds that the circuit court properly construed the term "Critical Areas Buffer" as used in the FCE to mean "the 100-foot Buffer landward of the tidal waters and wetlands" without "words of modification or limitation" and without "reference to exemption sections of COMAR or [any] other forms of regulations." Because Article II.G(4) of the FCE explicitly prohibits the construction of any "new structures" or the expansion of any existing structures within the Buffer, DNR maintains that the court did not err by granting its motion for judgment as to the first three requested declarations. We agree.

As discussed, *supra*, pursuant to the Critical Area law, the Critical Area Commission promulgated regulations that govern the County's implementation of its Critical Area program. As it existed when the FCE was executed, COMAR 27.01.09.01C dictated the criteria that a local Critical Area program "shall use[.]" The first criterion instructed that the County "shall establish a minimum 100-foot Buffer landward from the mean high water line of tidal waters, tributary streams, and tidal wetlands." COMAR 27.01.09.01C(1). Other criteria regulated development, types of vegetation, agriculture, and deforesting within the Buffer. COMAR 27.01.09.01C(2)–(6). The minimum 100-foot Buffer "shall" be expanded "to include contiguous, sensitive areas, such as steep slopes, hydric soils, or highly erodible soils" if other criteria were met. COMAR 27.01.09.01C(7). Finally, the last criterion provided:

> (8) As part of the local Critical Area program to be submitted to the Commission, **local jurisdictions may request an exemption of certain portions of the Critical Area from the Buffer requirements** where it can be sufficiently demonstrated that the existing pattern of residential, industrial, commercial, or recreational development in the Critical Area prevents the Buffer from fulfilling the functions stated in §B of this regulation.[7] If an exemption is requested, local jurisdictions shall propose other measures for achieving the water quality and habitat protection objectives of the policies. These measures may include, but are not limited to, public education and urban forestry programs.

COMAR 27.01.09.01C(8) (emphasis added).

[7] Section B set out five "policies with regard to the Buffer" that local jurisdictions were to use to guide the development of their programs, including "[m]inimiz[ing] the adverse effects of human activities on wetlands, shorelines, stream banks, tidal waters, and aquatic resources" and "[p]rotect[ing] riparian wildlife habitat." COMAR 27.01.09.01B.

In sum, pursuant to criterion (1), the "minimum" "Buffer" "shall" include all land within 100 feet landward of the mean high water line of certain waterways, or further if expanded consistent with criterion (7). COMAR 27.01.09.01C(1) & (7). Once that Buffer is established, the County may request an exemption of certain portions of the shoreline from the "Buffer requirements," *i.e.*, the restrictions upon development and other activity within the Buffer. COMAR 27.01.09.01C(8). Thus, even if the location of the proposed redevelopment, relocation, and/or expansion of the Existing Dwelling is within the "Buffer exempt" or "Buffer modified" area, there is nothing in the regulation to support the Vieglaises' argument that such area is outside the Buffer itself. Indeed, it would be illogical for COMAR 27.01.09.01C(8) to provide for "an exemption of certain portions of the Critical Area *from the Buffer requirements*" if those portions were not part of the Buffer. (Emphasis added).

We conclude that the trial court did not err by construing the term "100 foot Resource Critical Areas Buffer" as used in the FCE to include all land that falls within 100 feet of the mean high water line of Hopkins Creek, even if the County designated that land as exempt from the requirements of the Buffer. The FCE does not make any reference to exemptions from the Buffer requirements and does not incorporate by reference the County's buffer exemption maps. This construction is also consistent with a stated purpose of the FCE to protect the shoreline and the aquatic habitat. By prohibiting new construction *and* expansion of existing structures within the Buffer, the FCE ensures that any disturbance caused by preexisting development within the Buffer will not be increased and discourages future lot owners from developing within the Buffer because to do so would

limit the improvements that they might make to an existing structure therein. In this way, the FCE facilitates the return of developed land within the Buffer to an undeveloped state. For all of these reasons, we hold that the restrictions upon development within the Buffer set out in Articles II-G and II-H(6) are applicable to Lot 3.

We now turn to the Vieglaises' alternative argument that, even if the Existing Dwelling is within the Buffer, they are permitted to replace, renovate, or rebuild it "without restriction by the FCE." The Vieglaises' proposed development would increase the size of the Existing Dwelling by over 1,000 square feet. They planned to raze the original foundation of the Existing Dwelling and remove it from Lot 3. They then planned to construct a dwelling that overlapped with, but was relocated, from the original footprint of the Existing Dwelling. We conclude that the clear and unambiguous language of Article II-G and II-H prohibits them from doing so.

Article II-G(2) generally permits a Sahlin Farms property owner to "improve, repair, restore, alter, remodel, maintain, *or replace with structures of equivalent size or purpose all existing structures* . . ." (Emphasis added). The Existing Dwelling is an "existing structure[]" as it was designated on Exhibit C to the FCE. The limiting language in Article II-G and II-H governing development within the Buffer, however, eliminates the italicized language above permitting replacement of "all existing structures" and explicitly prohibits the construction of "new structures" or the expansion of existing structures. The court made non-clearly erroneous findings that the Vieglaises' proposed dwelling would be constructed "anew" after razing and removal of all parts of the original dwelling. This amounted to a replacement of the Existing Dwelling and/or the construction of a new

dwelling, neither of which is allowed within the Buffer. The proposed construction also amounted to an expansion of the Existing Dwelling (although some of that expansion was to occur outside of the Buffer), which also is prohibited within the Buffer by the express terms of the FCE.

For all of these reasons, the circuit court did not err by declaring that the Vieglaises' "proposed redevelopment of the waterfront home," their "proposed relocation of the home site," and the "expansion and/or relocation of the structure" violated the FCE.[8]

Finally, we turn to the fourth declaration. The circuit court declared that the FCE prohibited the Vieglaises from using "the original structure, or any reconstruction or improvement thereof, as a single-family home." The Vieglaises contend that the circuit court erred by so ruling. We agree.

DNR and the Intervenors took the position before the circuit court that the FCE, which was executed in 2001, incorporated restrictions upon development of Lot 3 that were included in the 2009 Plat and the Final Development Plan because Article VI, Section F of the FCE states that "[t]he provisions of this Forest Conservation Easement do not replace, abrogate or otherwise set aside any local, state or federal laws, requirements or restrictions applicable to the Property." As mentioned, the 2009 Plat and the Final Development Plan

[8] The Vieglaises ask this Court to "address the issue [of whether] the [Existing] Dwelling **can be restored or remodeled on its existing footprint.**" (Emphasis in original). We decline to do so. The Vieglaises did not request that relief in their complaint and the circuit court explicitly declined to address speculative plans that were inconsistent with the only development plans that were in evidence.

each included notations stating that the Existing Dwelling would be converted into a boathouse or a storage facility, *i.e.*, an accessory structure.

In our view, the FCE does not incorporate future zoning restrictions upon development of subdivided lots within its terms. Rather, the FCE states that it does not abrogate or replace any such restrictions. To the extent that the restrictions set forth in the 2009 Plat and the Final Development Plan prohibit the Vieglaises from constructing a single-family home in place of the Existing Dwelling, those restrictions are collateral to the restrictions imposed by the FCE. For that reason, we shall vacate the fourth declaration.

II.
Intervention

The Vieglaises argue that the circuit court erred by granting the motions to intervene. We decline to address this argument. As the Court of Appeals has explained:

> It has long been the policy in this State that [an appellate court] will not reverse a lower court judgment if the error is harmless. The burden is on the complaining party to show prejudice as well as error.
>
> Precise standards for determining prejudice have not been established and depend upon the facts of each individual case. Prejudice can be demonstrated by showing that the error was likely to have affected the verdict below; an error that does not affect the outcome of the case is harmless error. The focus of our inquiry is on the probability, not the possibility, of prejudice.

Flores v. Bell, 398 Md. 27, 33 (2007) (citations and footnote omitted). In the instant case, assuming *arguendo* that the circuit court erred or abused its discretion by granting the motions to intervene, the record does not reveal that the Vieglaises suffered any prejudice occasioned by the presence of the Intervenors in this litigation. Significantly, because the court granted judgment at the close of the Vieglaises' case, the Intervenors did not call any witnesses. The circuit court entered judgment against the Vieglaises based upon the plain

language of the FCE and the undisputed facts relative to their proposed plan to replace and/or expand the Existing Dwelling located within the Buffer. Accordingly, any error in granting intervention was harmless as a matter of law.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE THE FOURTH DECLARATION IN THE FEBRUARY 28, 2017 DECLARATORY JUDGMENT; COSTS TO BE PAID THREE-FOURTHS BY APPELLANTS AND ONE-FOURTH BY APPELLEES.