

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 24-0709

GASS PROPERTY

SEVENTH ELECTION DISTRICT

DATE HEARD: July 11, 2024

ORDERED BY:

**Mr. Hayden, Mr. Bradley, Mr. Loughran,
Mr. Payne and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: July 25, 2024

Pleadings

Michael Kevin Gass and Jennifer F. Gass (“Applicants”) seek a variance (VAAP # 24-0709) from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the 100’ Critical Area Buffer to construct a new deck with steps.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on June 21, 2024 and June 28, 2024. The hearing notice was posted on the property by June 26, 2024. The file contains the certification of mailing to all adjoining landowners, even those located across a street. Each person designated in the application as owning land that is located within two hundred feet of the subject property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the County’s website on July 5, 2024. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on July 11, 2024 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented about the proposed variance requested by the Applicants.

The Property

Applicants own real property situate 20485 Waterloo Lane, Coltons Point, Maryland (“the Subject Property”). The Subject Property is in the Rural Preservation Zoning District (“RPD”), has a Limited Development Area (“LDA”) Critical Area overlay, and is identified at Tax Map 46, Grid 22, Parcel 91, Lot 5000-7 of the Waterloo Shores subdivision.

The Variance Requested

Applicants seek a variance from St. Mary's County Comprehensive Zoning Ordinance ("CZO") Section 71.8.3 to disturb the 100' Critical Area Buffer to construct a new deck with stairs.

The St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires there be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands. No new impervious surfaces or development activities are permitted in the 100-foot buffer unless an applicant obtains a variance. CZO § 71.8.3(b)(1)(c).

Staff Testimony

Stacy Clements, an Environmental Planner for the St. Mary's County Department of Land Use and Growth Management ("LUGM"), presented the following evidence:

- The Subject Property was recorded in the Land Records of St. Mary's County at Plat Book 4, Page 72 prior to the adoption of the Maryland Critical Area Program. The lot was reconfigured in 2022 with the recording of Plat Book 80, Page 19.
- Per the State Department of Assessments and Taxation, the Subject Property is 40,590 square feet in size. It is adjacent to the tidal waters of the Potomac River. It consists of an existing dwelling built in 2023, in accordance with the current zoning regulations of St. Mary's County and a boathouse that was constructed prior to the current zoning regulations.
- The Property is constrained by the Buffer, as shown on Attachment 4.
- Applicants propose constructing a deck with steps, of which 509 s.f. of the proposed deck would impact the Buffer. Decks are not counted towards lot coverage on the condition

they are constructed with gaps between the boards to allow rain to flow freely through. The total lot coverage for the lot with the new construction will be 4,505 s.f.

- A variance is required to approve the site plan.
- If approved, mitigation would be required at a ratio of 3:1 for permanent disturbance within the Buffer. The total mitigation required would amount to 1,530 square feet of Buffer plantings. A planting plan and agreement will be required prior to the issuance of any building permit.
- The Critical Area Commission's ("CAC") response is included as Attachment 8.
- The Department of Land Use & Growth Management ("LUGM") approved the site plan for zoning and floodplain requirements. The Health Department approved the site plan. The project does not require site plan approval from the St. Mary's County Soil Conservation District nor stormwater management approvals as the proposal calls for less than 5,000 square feet of soil disturbance.
- If a variance is granted but a building permit is not issued, the variance will lapse one year from the date of the grant.
- The following Attachments to the Staff Report were introduced:
 - #1: Critical Area Standards Letter;
 - #2: Plat Book 4, page 72;
 - #3: Plat Book 80, Page 19;
 - #4: Critical Area Map;
 - #5: Site Plan;
 - #6: Location Map;
 - #7: Zoning Map;

#8: Critical Area Commission Response.

Applicant Testimony and Exhibits

Jennifer Gass appeared before the Board with her minor son, Aiden Gass. Mrs. Gass presented a slideshow depicting the site plan and photos of her home, and her testimony included the following:

- Applicants are “significantly restrained” by the Buffer and a substantial portion of it falls within the Buffer, and the Applicants’ BAT system closes off much of the area unconstrained by the Buffer to further development.
- Asked by Mr. Bradley for a response to CAC’s suggestion that the deck be reduced in size, Mrs. Gass said that the size of the deck is necessary to support family events, and that Mr. Gass is one of ten children. She said older members of the family, in particular, would avail themselves of the deck because moving on grass with walkers could be difficult.
- Mrs. Gass said her next-door neighbors had a deck and that other neighbors had recently gone through the variance process, although she did not know the exact size of those decks.
- Asked by Mr. Hayden for a response to CAC’s suggestion the deck be relocated, Mrs. Gass said the location of the BAT system forestalled relocation of the deck further away from the Buffer. Mrs. Gass did say the steps could be reconfigured to be located outside of the Buffer, however, and was open to moving the steps to the other side.
- Asked by Mr. Loughran why the Applicants did not plan for construction of deck when submitting initial site plans for the house, Mrs. Gass said the deck was an after-thought. She also volunteered that the existing boat house on the property would have to be removed and that losing that area meant having a deck would be even more critical to give the family a place to congregate.

- Asked by Mr. Richardson how the deck would be accessed, Mrs. Gass said the house could be accessed from the house and from the existing covered patio.

Public Testimony

No members of the public appeared to offer testimony for or against the project.

Decision

County Requirements for Critical Area Variances

COMAR 27.01.12.04 requires an applicant to meet each of the following standards before a Critical Area variance may be granted:

- (1) Due to special features of the site or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the local Critical Area program would result in an unwarranted hardship to the applicant;
- (2) A literal interpretation of the local Critical Area program would deprive the applicant of a use of land or a structure permitted to others in accordance with the provisions of the local Critical Area program;
- (3) The granting of the variance would not confer upon the applicant any special privilege that would be denied by the local Critical Area program to other lands or structures in accordance with the provisions of the local Critical Area program;
- (4) The variance request is not based upon conditions or circumstances that are the result of actions by the applicant;
- (5) The variance request does not arise from any conforming or nonconforming condition on any neighboring property;
- (6) The granting of the variance would not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's local Critical Area; and,
- (7) The granting of the variance would be in harmony with the general spirit and intent of the Critical Area law, the regulations in this subtitle, and the local Critical Area program.

Additionally, the Maryland Code Annotated, Natural Resources Article, §8-1808(d)(2)(ii) requires the Applicants to overcome the presumption that the variance request should be denied.

Findings - Critical Area Variance

Upon review of the facts and circumstances of this matter, the Board finds and concludes the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance.

First, the Board finds that denying the Applicants' request would constitute an unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Court of Appeals established the statutory definition for "unwarranted hardship" as it pertains to prospective development in the Critical Area:

[I]n order to establish an unwarranted hardship, the applicant has the burden of demonstrating that, without a variance, the applicant would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance.

Id. at 139. Here, Applicants have sufficiently demonstrated that, absent the variance, they would be denied *a use* of the Subject Property, throughout the Subject Property, that would be both significant and reasonable. As stated by the Applicants and recognized by this Board, decks are commonplace improvements that greatly enhance a property owner's ability to use and enjoy his or her property. The Gass family, in particular, stands to benefit from providing a sufficient area that members of their large extended family can use to congregate during family gatherings, and that many of these family members are mobility-impaired and not able to freely move about grass. Mrs. Gass demonstrated that repositioning the deck further outside the Buffer is not possible because of the location of the BAT system servicing the Subject Property.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Limited Development Area. As Mrs. Gass noted, and this Board takes judicial notice of from prior variance hearings, decks are common amenities, even when located on parcels constrained by the Buffer.

In particular, Mrs. Gass noted her immediate neighbors either have or will soon have decks of their own. The proposed deck is of the same character as decks this Board has approved before, and its size is not outrageous or grossly beyond what is necessary to sustain its reasonable and significant use.

Third, granting a variance will not confer a special privilege upon the Applicants. Applicants' proposed site plan has been subjected to a public hearing, held to the required standards, includes all required mitigation plantings, environmental considerations, and conforms to all applicable regulations. State law mandates that any property owner have a right to seek variances from their local Critical Area program and have a right to receive that variance when they carry their high burden of proof.

Fourth, the need for the variance does not arise from the actions of the Applicant. The Applicant's proposal stems from the location of Applicants' home and the configuration of their lot, and the Board does not find in the record any suggestion that Applicants sited their home in an unreasonable location.

Fifth, the need for the variance does not arise from any nonconforming feature on either the Subject Property or a neighboring property.

Sixth, granting the variance will not adversely affect the environment. The Applicant will be required to mitigate the proposed development with an approved planting plan established on-site (per COMAR 27.01.09.01) as part of the Building Permit process. The plantings are intended to offset any negative effects and provide improvements to water quality along with wildlife and plant habitat. The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, all of which should contribute to improved infiltration and reduction of non-point source pollution leaving the site.

Seventh, the Board finds that, on the whole, granting the variance is in the spirit of the Critical Area program. Applicants have availed themselves of their right to seek a variance and presented a site plan that identifies a reasonable and significant use that cannot be accomplished without some intrusion into the Buffer, that such intrusion has been minimized to the greatest extent practicable, and that all required mitigation will be performed. As such, the Board finds the spirit and intent of the Critical Area program is preserved, and that the required balance between state law's mandate to allow reasonable variances in derogation from the Critical Area program on the one hand, and continued protection and stewardship of the Chesapeake Bay and our environmentally sensitive resources on the other, has been struck.

As a result, the Applicants have also overcome the presumption in § 8-1808(d)(2)(ii) of the Natural Resources Article that the variance request should be denied.

ORDER

PURSUANT to Applicants' request for a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to construct a new deck with steps; and,

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is,


ORDERED, by the St. Mary's County Board of Appeals, pursuant to Comprehensive Zoning Ordinance § 24.3, that the Applicants are granted a variance from Section 71.8.3 to disturb the Critical Area Buffer to construct a new deck with stairs.

The foregoing variance is subject to the condition that the Applicants shall comply with any instructions and necessary approvals from the Office of Land Use and Growth Management, the Health Department, and the Critical Area Commission.

This Order does not constitute a building permit. In order for the Applicants to construct

the structures permitted in this decision, they must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: July 25, 2024


George Allan Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Bradley, Mr. Loughran, Mr. Payne, and Mr. Richardson

Those voting to deny the variance:

Approved as to form and legal sufficiency


Steve Scott, Board of Appeals Attorney

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Petition for Judicial Review with the Circuit Court for St. Mary's County within thirty (30) days of the date this order is signed. St. Mary's County may not issue a permit for the requested activity until the 30-day appeal period has elapsed.

Further, St. Mary's County Comprehensive Zoning Ordinance § 24.8 provides that a variance shall lapse one year from the date the Board of Appeals granted the variance unless: (1) A zoning or building permit is in effect, the land is being used as contemplated in the variance, or regular progress toward completion of the use or structure contemplated in the variance has taken place in accordance with plans for which the variance was granted; (2) a longer period for validity is established by the Board of Appeals; or (3) the variance is for future installation or replacement of utilities at the time such installation becomes necessary.

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