

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

ZAAP NUMBER 23-2707

KATZENBERGER APPEAL

EIGHTH ELECTION DISTRICT

DATE HEARD: FEBRUARY 22, 2024

ORDERED BY:

**Mr. Hayden, Mr. Bradley,
Mr. Payne, Mr. Richardson, and Ms. Weaver**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: May 9, 2024

Pleadings

Frank and Kathi Katzenberger (“Appellants”) appeal the decision of the Director of Land Use and Growth Management (“Planning Director”) to approve Permit Number 23-2707 for a retaining wall.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 2 and February 9, 2024. The hearing notice was additionally physically posted on the Property. The file contains the certification of mailing to all adjoining landowners, including those located across a street. Each person designated in the application as owning land that is located within two hundred feet of the Subject Property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the St. Mary’s County website on February 16, 2024. Therefore, the Board finds and concludes that there has been compliance with all notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on February 22, 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.

The Property

The permit pertains to land owned by Luis Alberto Ortiz (“Applicant”) at 22986 Shady Mile Drive, California, MD 20619 (“the Property”). Per the State Department of Assessments and Taxation, the Property comprises 1.11 acres, more or less, and can be found at Tax Map 35A, Grid 7, Parcel 52. The Subject Property is zoned Residential Neighborhood Conservation (“RNC”).

St. Mary's County Comprehensive Zoning Ordinance & Other Applicable Local Law

St. Mary's County Comprehensive Zoning Ordinance ("CZO") § 22.1.1 generally forbids development of any building, structure, or land unless a zoning permit has been issued by the Planning Permit. CZO § 61.7.4.a allows, *inter alia*, "fences or walls subject to applicable height restrictions" in the required yard setbacks. St. Mary's County Code §203-12.R105.2 exempts "retaining walls that are not over 4 feet" from meeting requirements of the St. Mary's County Building Code. St. Mary's County's Stormwater Management, Grading, Erosion and Sediment Control Ordinance §§ 3.3.1.b-c and 4.3.2 exempt any proposed development proposing less than 5,000 square feet of cumulative land disturbance from meeting any requirements of its stormwater management or erosion and sediment control provisions. "Cumulative disturbance" is defined as the "successive occurrences of development related soil disturbance on a Site since July 1, 2001."

Evidence Submitted at the Hearing by Staff

Stacy Clements, Environmental Planner, presented a staff report and PowerPoint presentation that included maps showing the general location of the property, the Applicant's site plan, and the issued permit. Jessica Andritz, Planning Director, Joseph Goldsmith, Inspections Supervisor, John Sterling Houser, Deputy County Attorney, and James Gotsch, Director of the Department of Public Works & Transportation, also gave testimony and presented evidence before the Board, all of which was recorded and may be found in the record. Included among the staff's testimony was the following:

- Development on the retaining wall began prior to application for any permit.

LUGM inspectors responded to a complaint by the Appellants that Applicant began constructing an unpermitted wall on their property line. A stop work order was initially posted and then lifted once Applicant had attained a permit.

- In his site plan, Applicant describes his retaining wall as being 1.5’ high by 118’ long.
- Per SDAT, the Property is improved by a house constructed in 1951. It also contains a driveway and garage that appear to have been on the property since at least 1964.
- Review of aerial photographs does not appear to depict more than 5,000 square feet of cumulative site disturbance since July 1, 2001.
- Mr. Houser provided a memorandum that stated, among other things, local exemptions for the requirement of stormwater management review are mirrored by the State in COMAR 26.17.02.05.
- Mr. Gotsch disagreed with the Applicant’s characterization of the improvement as a “retaining wall,” and said state law would consider it part of a stormwater management pond or a dam, and that it should be subject to additional regulations pertinent to stormwater management ponds and dams.

Evidence Submitted at the Hearing by the Appellants

Appellants appeared before the Board of Appeals and offered testimony in-person. They were joined by Steve Vaughn, from Little Silence’s Rest, Inc., who presented a slideshow.

Appellants’ testimony included the following:

- Appellants stated, as their grounds for appeal, that “Maryland’s Civil Law Rule” forbade LUGM from approving a permit that would have the effect of preventing the escape of water from higher land onto lower land.
- Appellants live adjacent to Applicant. They testified, and provided pictures showing water naturally flows from Appellants’ property to Applicant’s. They

testified the retaining wall would cause significant amounts of water to pool on their property.

- The pooled water could, in turn, damage root systems of many trees on the lower-lying portions of the Appellants' property, and these trees could in time have the potential to fall on Appellants' house, shed, fence, or garage depending on a given tree's location and the wind direction.
- Appellants contended installation of a drainpipe should have been required by the County prior to issuance of the permit. In the alternative, the Appellants suggested a simple swale or berm might meet the Applicant's desire to direct water away from Applicant's garage.
- Appellants requested the following relief from the Board:
 - The wall and foots to be removed and the land restored back to its natural grade.
 - That any fence the neighbor would put up in the future not restrict the water flow.
 - That if property damage occurs, the County will be responsible to pay for said damages.
 - That if trees fall, the cleanup costs and replacement costs of the trees and shrubs will be the County's responsibility.
 - Reimbursement of the costs of the appeal, at \$931.58.
 - That all of the above be resolved within 30 days after the appeal period.

Evidence Submitted at the Hearing by the Applicant

Applicant did not appear to offer any testimony before the Board. Applicant did, however,

provide a written statement that was made part of the record. In it Applicant stated the wall's purpose was preventing further water damage to his pre-existing garage. He additionally stated that Bruce Young, the St. Mary's County Soil Conservation District's District Manager, had been to the property and said that the wall is not jeopardizing the Appellants' property.

Public Testimony

The following members of the public provided testimony:

- Lisa Gould
 - Mrs. Gould is the Appellants' daughter. In response to earlier discussion about whether the "retaining wall" was correctly termed a retaining wall or a dam Mrs. Gould provided several common-use definitions.

Decision

The Board disagrees with Appellants' assertion that the Planning Director was required – or even allowed – to weigh, as part of the permitting process, Maryland's common law precepts related to management of surface water runoff between adjacent private properties. We find the Department of Land Use & Growth Management followed all applicable local laws in review and issuance of the subject permit. Our discussion follows.

Central to the Board's decision in this matter is the concept of jurisdiction. Put succinctly, the Board acts with only the same duties, powers and authority possessed by the Planning Director. CZO § 20.3.6.d; Land Use Article § 4-306(f)(2). It does not have the power to expand or restrict these powers in the name of equity or justice.

The uncontroverted testimony from the County's staff was that this wall – be it a 'retaining' wall or not – would be an improvement that is permitted-by-right. In other words, the County's staff testified the wall is an improvement a property owner would have a right to build provided it

complies with any applicable laws, codes, or regulations. It would not require public hearings. It would not require a weighing of the “public interest” or a finding that the improvement furthers the health, safety, and general welfare of the County. Processing an application would be limited to identifying the proper reviews to conduct and ensuring the application met any applicable standards.

The contention made by Appellants, to rephrase their argument, is that at least one required review was missed. Appellants contend the permit should have been denied because the County did not conduct a stormwater management review prior to approving it. Agreeing with Appellants was Mr. Gotsch, who testified that he believed the ‘retaining wall’ would be forbidden by state rules and regulations related to dams, ponds, and stormwater management devices.

The Board agrees with the Department of Land Use & Growth Management and the Office of the County Attorney, however, that stormwater review does not appear to have been required by any local law as a predicate for approval of this permit. The County’s Stormwater Management, Grading, and Erosion and Sediment Control Ordinance exempts projects from this ordinance in its entirety if they propose less than 5,000 square feet of cumulative disturbance since July 1, 2001. Stormwater Management, Grading, and Erosion and Sediment Control Ordinance § 3.3.1 and 4.3.2. County staff testified it appeared cumulative disturbance limits were well below this threshold.

The County Attorney’s Office readily conceded that these exemptions in local law would be trumped by a prevailing state-level law and regulation, and the Board agrees. However, the same exemption appears to exist in state law as well. State regulations require counties to implement stormwater management ordinances, they also exempt developments that do not disturb over 5,000 square feet of land area from abiding by these ordinances. COMAR 26.17.02.05.B(2).

Critically, Appellants did not provide any citation or legal authority to support a contention that the stormwater management ordinances – or a similar regulation – apply in spite of this apparently blanket exemption. Suggestions were made that this ‘retaining wall’ may be more properly termed a pond or a dam. These suggestions, however, were unsupported by citation to a controlling regulation or authority.

What Appellants did cite to, repeatedly, were Maryland’s common law rules related to adjudication of surface water runoff disputes between neighbors is misplaced. Though incomplete, the Board believes the Appellants were substantially correct in their articulation of the rule, and Maryland’s courts have, for decades, supported the general rule that a lower-lying property owner may not unreasonably frustrate the natural flow of water onto his property.¹ See, e.g., *Battisto v. Perkins*, 210 Md. 542 (1956); *Biberman v. Funkhouser*, 190 Md. 424 (1948); *Mark Downs, Inc. v. McCormick Properties, Inc.*, 51 Md. App 171 (1982). But these are rules adopted and molded by Maryland’s courts to govern property disputes between private parties in a civil court, not the issuance of a permit. Issuance of that permit is predicated solely on whether that permit complies with applicable provisions of local codes. That the Appellants may have property rights of their own negatively impacted by issuance of a permit is not, in and of itself, grounds to deny a permit that otherwise conforms to any applicable local regulations, though it very well may be grounds, however, for Appellants to successfully maintain a private suit. These two avenues for relief are separate, however. As Maryland’s courts have opined, “[an] ordinance does not override or defeat whatever private rights exist and are legally enforceable, but neither it is controlled in its workings or effects by such rights.” *Perry v. County Board of Appeals*, 211 Md. 294 (1956). Wading into what appears to be exclusively the province of the courts is not within the Department’s or the

¹ The Appellants appear to omit that application of the general rule is not absolute and must be qualified by an examination of the “reasonableness of use” on both properties. *Battisto*, 456.

Board's power.

In summary, absent the identification of a prevailing state law or regulation that requires the stormwater management ordinance – or a similar regulation's – application in spite of the identified exemption, the Board finds the Planning Director's issuance of the challenged permit to be proper. Accordingly, the Board finds the Department – and, accordingly, the Board – without jurisdiction or power to deny the permit on the grounds stated by the Appellants.

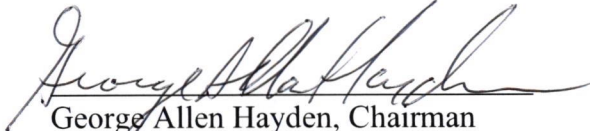
ORDER

PURSUANT to Frank and Kathi Katzenberger's appeal of the Planning Director's approval of a permit for a retaining wall; and

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

ORDERED, by the St. Mary's County Board of Appeals, that the Planning Director's decision regarding the approval of the subject permit is UPHELD.

Date: May 9, 2024

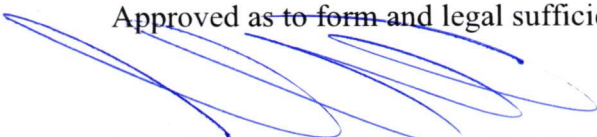

George Allen Hayden, Chairman

Those voting to uphold the decision:

Mr. Hayden, Mr. Bradley, Mr. Payne, Mr. Richardson, and Ms. Weaver

Those voting to reverse the decision:

Approved as to form and legal sufficiency



Steve Scott, Board of Appeals Attorney

NOTICE TO APPELLANT

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