

**IN THE ST. MARY'S COUNTY BOARD OF APPEALS**

**VAAP NUMBER 23-0453**

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**NOTTINGHAM PROPERTY**

**SEVENTH ELECTION DISTRICT**

**DATE HEARD: MAY 9, 2024**

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**ORDERED BY:**

**George Allan Hayden, Sr., Chair  
Guy Bradley, Vice Chair  
Ronald Payne, Sr., Member  
Rich Richardson, Member  
Rita Weaver, Member**

**ENVIRONMENTAL PLANNER: STACY CLEMENTS**

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**DATE SIGNED: June 27, 2024**

## **Pleadings**

Ellis Nottingham and Rebekah Nottingham (hereinafter “Applicants”) seek a variance from the St. Mary’s Comprehensive Zoning Ordinance, specifically § 71.8.3, to disturb the one-hundred foot (100’) Critical Area Buffer to construct a patio and deck with stairs and pavers.

## **Public Notification**

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, Maryland, on April 19, 2024, and April 26, 2024. A physical posting was made on the property and all property owners within 200-feet were notified by certified mail, on or before April 24, 2024. Additionally, the Agenda was also posted on the St. Mary’s County Government’s website on May 3, 2024. Therefore, the Board of Appeals (hereinafter “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 May 9, 2024, at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland 20650. All persons desiring to be heard were duly sworn, the proceedings were electronically recorded, and the following was presented about the proposed variance requested by the Applicants.

## **The Property**

The subject property is located at 20495 Waterloo Lane, Coltons Point, St. Mary’s County, Maryland (hereinafter “the Property”). Per Maryland’s Department of Assessments and Taxation (hereinafter “SDAT”), the Property is 19,252 square-feet; a survey provided by Applicants verified the correct area is 21,345 square feet. It is zoned ‘Rural Preservation District’ with a Limited Development Area Critical Area overlay, and can be found at Tax Map 46, Grid 22, Parcel 91, in the Seventh Election District.

### **The Variance Requested**

Applicants seek a variance from the St. Mary's Comprehensive Zoning Ordinance (hereinafter "CZO"), Section 71.8.3, to disturb the one-hundred foot (100') Critical Area Buffer for purposes of constructing a patio and deck with stairs and pavers.

### **The St. Mary's County Comprehensive Zoning Ordinance**

CZO § 71.8.3 requires that there be "a minimum 100-foot buffer landward from the mean high water line of tidal waters, tidal wetlands and tributary streams in the Critical Area." CZO § 71.8.3. It is further required that "no new impervious surfaces...or development activities...shall be permitted" within the 100-foot buffer, unless a variance is obtained. CZO § 71.8.3(b)(1)(c).

### **Staff Testimony**

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

- The 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 on December 1, 1985. The lot was reconfigured in 2003 with the recording of Plat Book 56, Page 43;
- According to SDAT, the Property is a 19,252 square-foot parcel located on Waterloo Lane in Coltons Point, adjacent to the tidal waters of the Potomac River. It consists of an existing dwelling built in 1974, prior to the current zoning regulations of the St. Mary's County;
- The Critical Area Buffer (hereinafter "Buffer") establishes a minimum 100-foot buffer landward from the mean high water line of tidal waters. CZO § 71.8.3. Therefore, the Property is constrained by the Buffer;
- The Amended Site Plan (hereinafter "Plan") proposes constructing a 248 square-foot deck, a 414 square-foot patio, and 18 square-feet of steppingstones and steps to the deck, all of

which impact the Buffer. Decks do not count towards lot coverage so long as they are constructed with gaps between the boards sufficiently spaced to permit rain to flow freely through them. The total lot coverage of the proposed construction is 6,559 square-feet;

- Section 71.8.3.b(1) of the CZO provides that development activity is impermissible in the Buffer unless the applicant obtains a variance;
- CZO §41.5.3 determines the amount of lot coverage (impervious surface) permitted on a lot. A lot or parcel similar in size to the Property can have 31.25% of lot covered with impervious surfaces. The Applicants' surveyor verified the observed lot size increase to the mean high-water line, which increased the lot size from 19,251 square-feet to 21,345 square-feet. The allowable lot coverage from the Property is 6,670 square-feet. The Property, as it currently exists, has 6,559 square-feet of lot coverage. The Applicants propose to remove 432 square-feet of gravel and construct a patio, steps, and steppingstones. The proposed calculated lot coverage is 6,559 square-feet. There is no net increase in lot coverage located within the Buffer and the Applicants remain below the 6,670 square-footage of allowable lot coverage. Therefore, no lot coverage variance is required;
- Mitigation is required at a ratio of 3:1 for permanent disturbance within the Buffer (COMAR 27.01.09.01-2.H). Buffer Establishment is required at a ratio of 1:1 for development outside of the Buffer (COMAR 27.01.06.01-1). The total mitigation required for this proposal is 1,496 square-feet of Buffer plantings to meet these mitigation requirements. A planting agreement and plan will be required prior to the issuance of the building permit;
- In a written correspondence, dated April 23, 2024, from the State of Maryland Critical Area Commission for Chesapeake and Atlantic Coastal Bays, advised LUGM that the

Applicants have the burden to prove each and every Critical Area variance standard, including the standard of unwarranted hardship;

- LUGM approved the site plan for zoning and floodplain requirements. The St. Mary's County Health Department approved the site plan. The project does not require site plan approval from the St. Mary's County Soil Conservation District or Stormwater Management 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 shall lapse one year from the date of its issuance. CZO § 24.8.1; and
- The following Attachments to the Staff Report (hereinafter "Staff Report") were introduced:
  - #1: Critical Area Standards Letter;
  - #2: Plat Book 4, Page 72;
  - #3: Plat Book 56, Page 44;
  - #4: Critical Area Map;
  - #5: Site Plan;
  - #6: Location Map;
  - #7: Zoning Map; and
  - #8: Critical Area Commission Response.

#### **Applicant Testimony and Exhibits**

Applicants were represented before the Board by Steve Vaughan (hereinafter "Mr. Vaughan"), a Maryland Professional Land Surveyor and Vice President of Little Silences Rest, Inc. He displayed a slideshow presentation and answered questions from the Board. The following evidence and testimony were in the Applicants' presentation:

- Mr. Vaughan testified that the majority of the Property is constrained by the Critical Area

Buffer, noting a very small portion of the Property not being restricted;

- Copy of Amended Site Plan (hereinafter “Plan”), where Mr. Vaughan explained that certain shaded areas on the Plan denotes existing gravel areas to be removed to ensure there is no net increase in impervious surface area in the Buffer. He stated that by keeping the existing and proposed lot coverage the same, he believed this to adhere to the purpose and intent of the CZO;
- Mr. Vaughan displayed photographs of the Property from various angles, including the Applicants’ residence from the roadside, the water-facing side of their home, close-ups of the house reflecting where the proposed deck and patio are to be built, as well as an aerial view; and
- It was confirmed by Mr. Vaughan that the tree located near the proposed deck would not be impacted by the proposed structure and the Applicants intend for it to remain;
- Mr. Vaughan described to the Board how numerous similarly constrained neighboring properties have been developed comparably to the Applicants’ proposal.

### **Public Testimony**

No members of the public appeared to offer testimony in support of, or against, this request.

### **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) also 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, the Board finds and concludes the Applicants are entitled to the relief requested. Several factors support this decision.

The Board finds that denying the Applicants' request would constitute unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Maryland Supreme Court (formerly "Maryland 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, the Applicants have sufficiently demonstrated that, absent the variance, they would be denied a use of the Property, both significant and reasonable. The Applicants seek to add a deck and patio with stairs and pavers, which are common improvement amenities. The proposed deck and patio will greatly facilitate the Applicants' use and enjoy of the parcel. The Applicants also demonstrated impediments and obstacles to relocating the proposed deck and patio, as relocating to the side of the house where the Critical Area Commission proposes it be relocated, *inter alia*, would not conform with the existing floor plan of the residence on the Property.

Similarly, the Board finds that literal interpretation of the local Critical Area program would deprive the Applicants of a substantial use of land, or a structure, permitted to others. Their proposal is of a nature and character typical for homes in St. Mary's County, even waterfront homes or those impacting the Buffer. In all, the Applicants' proposal appears to be one that is typical for similarly situated properties within the Limited Development Area.

To the third factor, the granting of the variance would not confer upon the Applicants any special privilege that would be denied by the local Critical Area program to other lands or structures. Applicants avail themselves of their right to seek a variance and are hewing as close to the Critical Area program's strictures as may be reasonably expected given the constraints present on their parcel. Their proposal will not be granted unless accompanied by the mitigation required by law. Provisions for requesting and granting a variance are a necessary element of any local Critical Area program. A variance is, by definition, a departure from at least one element of the local Critical Area program and each request must be considered on a case-by-case basis; the Board can find nothing in the record evincing that Applicants have received any special treatment or consideration that would not be conferred upon any other similarly situated property owner.

Fourth, the variance request is not based upon conditions or circumstances that are the



result of actions by the Applicants. Rather, the Applicants are constrained by the physical characteristics of their parcel and its existing configuration. The existing environmental conditions are part of the Property through no fault of the Applicants.

Fifth, the variance request does not arise from any conforming or nonconforming condition of any neighboring property.

Sixth, 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. Permitted development within the Critical Area Buffer must be heavily mitigated. As noted in the Staff Report, 1,496 square-feet of mitigation plantings will be required. These plantings will mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer. These plantings would not be required unless the variance is granted.

Lastly, by satisfying the above criteria, the Board finds that granting of this variance will 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. In total, the Applicants have demonstrated that a variance is necessary to achieve their intended use. The Applicants demonstrated obstacles to relocating the proposed structures from the Buffer, as well as there being no net increase in impervious surface area between the existing and proposed lot coverages. The impacts to the Buffer of development will be offset by the mitigation and other site improvements that will be made.

Finally, in satisfying each of the necessary criteria, the Applicants have overcome the statutory presumption against granting the variance.

**ORDER**

**PURSUANT** to the application of Ellis Nottingham and Rebekah Nottingham, petitioning for a variance from Section 71.8.3 of the St. Mary’s County Subdivision Ordinance (hereinafter “CZO”) to disturb the 100’ Critical Area Buffer to construct a patio and deck with stairs and pavers; and,

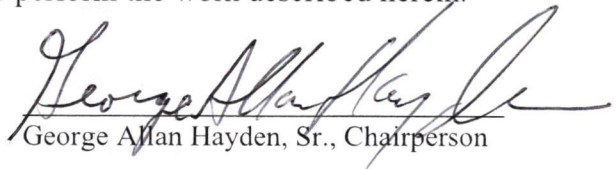
**PURSUANT** to the Notice requirements, posting of the property, and public hearing, and in accordance with the provisions of law, it is,

**ORDERED**, by the St. Mary’s County Board of Appeals, pursuant to CZO §24.8, the Applicants are granted a variance from CZO §71.8.3 to disturb the Critical Area Buffer to construct a patio, and deck with stairs and pavers;

**UPON CONDITION THAT**, 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: June 27, 2024

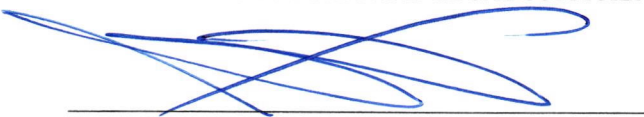
  
George Alan Hayden, Sr., Chairperson

Those voting to grant the variance:

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

Those voting to deny the variance:

APPROVED AS TO FORM AND LEGAL SUFFICIENCY

  
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Steve Scott, Esquire,  
Board of Appeals Attorney

## **NOTICE TO APPLICANTS**

Within thirty (30) 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. 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 (1) 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 sixty (60) days of the date of this Order; otherwise, they will be discarded.