

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-1084

MOORE & SCHULMEYER

FIRST ELECTION DISTRICT

VARIANCE REQUEST HEARD: NOVEMBER 9, 2023

ORDERED BY:

**Mr. Ichniowski, Mr. Bradley, Ms. Delahay,
Mr. Miedzinski, and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: DEC 14, 2023

Pleadings

James W. Moore III & Bonnie Schulmeyer (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 71.5.2.b to disturb the non-tidal wetland buffer (“the Wetland Buffer”) and from CZO § 71.8.3 disturb the Critical Area Buffer (“the Buffer”) to construct a house and driveway.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on October 20, 2023 and October 27, 2023. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before October 25, 2023. The agenda was also posted on the County’s website on November 3, 2023. Therefore, the Board of Appeals (“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 November 9, 2023 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were duly sworn, the proceedings were recorded electronically, and the following was presented about the proposed amendment requested by the Applicants.

The Property

The subject property is an unaddressed parcel located on Bay Forest Road in Lexington Park, Maryland (“the Property”). The Property is 42.86 acres, more or less, is zoned Rural Preservation District (“RPD”), has a Resource Conservation Area (RCA) Critical Area overlay, and is found at Tax Map 64, Grid 1, Parcel 5.

The Variance Requested

Applicants seek a variance from the St. Mary's County Comprehensive Zoning Ordinance ("CZO") § 71.5.2.b to disturb the Wetland Buffer and from CZO § 71.8.3 disturb the Critical Area Buffer to construct a house and driveway.

St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.5.2 requires there be a minimum 25-foot buffer preserved from the edge of non-tidal wetlands and shall be expanded up to 100-feet to include areas of adjoining hydric soils. CZO § 71.8.3 prohibits disturbance in the Critical Area Buffer absent a variance.

Departmental Testimony and Exhibits

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

- The Property consists of 42.86 acres, more or less, with a Maryland Department of the Environment ("MDE") mapped non-tidal wetland impacting the property. MDE accepted Little Silence's Rest's wetland delineation determination and the updated wetland delineation is shown on the site plan. The Wetland Buffer is expanded in this case to include hydric soils up to 100'.
- The Applicants propose to construct a two-story house with a garage in the Wetland Buffer.
- The property is adjacent to the Chesapeake Bay. A section of the driveway is proposed within the 100' Critical Area Buffer, which is expanded due to the presence of hydric soils.
- In total, Applicants will be responsible for planting 57,095 s.f. of mitigation plantings for all development sought as a part of this proposal.

- In its comment letter dated September 27, 2023 the Critical Area Commission did not state any objections to the variance request.
- The Department of Land Use and Growth Management Stormwater Management, the Health Department, and the Soil Conservation District are reviewing the site plan.
- Location maps show an existing road across the property servicing the United States Navy facility adjacent to the property. The proposed driveway will be built off that existing road.
- Attachments to the Staff Report:
 - #1: General Standards Letter
 - #2: Critical Area Standards Letter
 - #3: Non-Tidal Wetlands Map
 - #4: MDE Verification of LSR's Wetland Determination
 - #5: Site Plan
 - #6: Critical Area & Hydric Soils Map
 - #7: Location Map
 - #8: Zoning Map
 - #9: Critical Area Commission Response

Applicants' Testimony and Exhibits

Applicants were represented before the Board by surveyor Steve Vaughn of Little Silence's Rest, Inc. Mr. Vaughn presented a slideshow which contained site plans, building plans, photographs of the site, and offered oral testimony. The following evidence and testimony was included in his presentation:

- The entrance is the portion going through the Critical Area Buffer. Otherwise, Applicants have minimized disturbance to the Critical Area Buffer.
- The Applicants are proposing to perform stormwater management with a sheet flow to conservation area and are proposing to plant all required mitigation on-site.
- The site will be served with a mound septic system.

Public Testimony

No members of the public appeared to offer testimony related to this matter.

Decision

County Requirements for Granting Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.3 sets forth seven separate requirements that must be met for a variance to be issued:

- (1) Because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape, or topographical conditions of the property involved, strict enforcement of this Ordinance will result in practical difficulty;
- (2) The conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;
- (3) The purpose of the variance is not based exclusively upon reasons of convenience, profit, or caprice. It is understood that any development necessarily increases property value, and that alone shall not constitute an exclusive finding;
- (4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
- (5) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will

not be changed by the variance;

- (6) The proposed variance will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and
- (7) The variance complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

Id.

Findings – Standard Variance Requirements

Upon review of the facts and circumstances, the Board finds and concludes that the Applicants are entitled to relief from the St. Mary’s County Comprehensive Zoning Ordinance with respect to disturbance in the Wetland Buffer. Several factors support this decision.

First, the Board finds that strictly interpreting the CZO would result in practical difficulty due to the particular physical surroundings of the Property. § 24.3(1). In *McLean v. Soley*, 270 Md. 208 (1973), the Maryland Court of Appeals established the standard by which a zoning board is to review “practical difficulty” when determining whether to grant a variance:

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Id. at 214–15.

Here, the Applicants possess a lot almost heavily impacted by DNR-mapped wetlands and the entirety of the site lies on hydric soils. Applicants limited their wetlands delineation investigation to only cover an area in reasonably close proximity to the access road, thereby minimizing potential impacts. The Board finds compelling and accepts Applicants’ assertion that there is no sufficient room to construct a reasonably-sized house, driveway, and septic system without impacting the non-tidal wetlands buffer in some fashion.

Second, the circumstances present in this matter are not generally applicable to other similarly situated properties. As noted in the paragraph above, the Property is almost entirely constrained by the non-tidal wetlands buffer and hydric soils. Such conditions are not generally present on the typical parcel.

Third, the purpose of seeking the variance is not “based exclusively upon reasons of convenience, profit or caprice.” Rather, Applicants desire to build a home, a reasonable request, and Applicants’ site plan does not ask for anything extraordinary, excessive, or uncharacteristic of what may be found on similarly-situated properties. Applicants’ request is necessitated by the fact that the Property is encumbered by the Wetlands Buffer.

Fourth, the need for the variance does not arise from actions of the Applicants. As noted previously, the variance is required due to the Property’s physical characteristics.

Fifth, the variance will neither detrimentally affect the public welfare, injure other properties or improvements, nor change the character of the district. The neighboring property owners have been notified of the variance request to provide them with an opportunity to speak on

the matter. None have spoken against the project.

Sixth, the proposed development will not increase the residential use of the property and the Board does not find that it will increase congestion or the risk of fire, endanger public safety, or substantially diminish or impair property values in the neighborhood.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan. The proposed building will be similar to already existing homes in the general neighborhood, and Applicants' new dwelling, once constructed, will be in harmony with her neighbors. Mitigation plantings required will be of benefit to the local wildlife habitats and help offset the development's impacts. For these reasons, the Board of Appeals finds that the variance, and the development it will facilitate, will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan.

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 jurisdictions 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 Applicant 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 relief from the St. Mary's County Comprehensive Zoning Ordinance.

The Board finds that denying the Applicants' request would constitute unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 d. 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 Property both significant and reasonable. Constructing a single-family dwelling is a foundational use of one's own real property and a driveway is a necessary improvement to facilitate use of the house. Applicants have also clearly done what they can to minimize impacts to both the Wetlands and Critical Area Buffers; the minor intrusion into the Critical Area Buffer is necessitated by the pre-existing road that the driveway will link to.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicants of a substantial use of land or a structure permitted to others. As noted above, improvements such as those proposed by the Applicants are commonly enjoyed by other similarly-situated properties within the Limited Development Area.

To the third factor, 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. Applicants avail herself of her right to seek a variance, and is hewing as close to the Critical Area program's strictures as may be reasonably expected of her proposal.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the applicant. Rather, Applicants are constrained by the physical characteristics of her lot and existing forest and vegetative cover.

Fifth, the variance request does not arise from any conforming or nonconforming condition on 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. When development is permitted in the Critical Area Buffer it must be heavily mitigated. As noted by

staff, over 56,000 square feet of mitigation plantings will be required, and the Applicants will perform all plantings on-site. These plantings are meant to mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer.

Finally, by satisfying the above criteria the Board finds that granting of the 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 the intended uses he proposes. There are no practical alternatives to make these improvements elsewhere on the Property.

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

ORDER

PURSUANT to the application of James W. Moore III and Bonnie Schulmeyer, petitioning for a variance from CZO § 71.5.2.b to disturb the Wetland Buffer and from CZO § 78.3 to disturb the Critical Area Buffer to construct a new house; 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 CZO § 24.8, that the Applicants are granted a variance from CZO § 71.5.2.b to disturb the Wetland Buffer and from CZO § 78.3 to disturb the Critical Area Buffer to construct a new house.

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: DEC 14, 2023

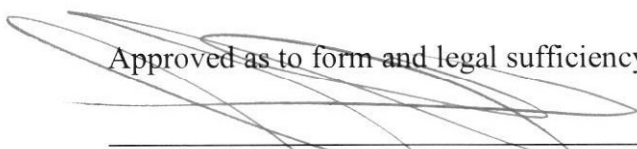


Daniel F. Ichniowski, Chairperson

Those voting to grant the variance:

Mr. Ichniowski, Mr. Bradley, Ms. Delahay,
Mr. Miedzinski, and Mr. Richardson

Those voting to deny the variance:


Approved as to form and legal sufficiency

Steve Scott, Board of Appeals Attorney

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 Petition for Judicial Review in the St. Mary's County Circuit Court. 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.