

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 19-0222

BRIAN & JESSICA METCALF

SIXTH ELECTION DISTRICT

DATE HEARD: June 13, 2019

ORDERED BY:

**Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: July 11, 2019

PLEADINGS

Brian & Jessica Metcalf, the applicants, seek a variance (VAAP # 19-0222) to: 1) disturb the critical area buffer; to reconstruct a house on property with a street address of 44717 Smiths Nursery Road, Hollywood, Maryland 20636.

PUBLIC NOTIFICATION

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on May 29, 2019 and June 5, 2019. The hearing notice was also posted on the property. 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 (200) 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 Friday, June 6, 2019. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

FINDINGS

A public hearing was conducted at 6:30 p.m. on June 13, 2019, 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 with regard to the proposed variance requested by the applicants.

The Property

That the applicants own the subject property located at 44717 Smiths Nursery Road, Hollywood, Maryland 20636. It is located in the Rural Conservation District (RPD) and is known as Grid 4 in Parcel 489 on Tax Map 27. This waterfront lot on Cuckold Creek is designated in the Chesapeake Bay Critical Area as Limited Development Area (LDA).

The Proposed Work

The applicants propose to reconstruct a single-family dwelling with a garage, a patio, sidewalks, a shed, and a driveway for a total of 6,670 square feet of lot coverage, which is 5 feet less than the existing lot coverage as shown on the site plan admitted into evidence at the hearing as Attachment 3 of Exhibit 2. The new lot coverage will be comprised of a 2,706 square foot single family dwelling with attached garage, 2,289 square feet of driveway, and 608 square feet of sidewalks, 875 square feet of patio, and 192 square feet shed, which represents 16.18% percent of the Property. The allowed amount of lot coverage on a property of this size is 15%.

The St. Mary's County Comprehensive Zoning Ordinance

§ 71.8.3 of the St. Mary's County Comprehensive Zoning Ordinance requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands; and § 71.8.3.a stipulates that the 100-foot buffer shall be expanded beyond 100 feet to include slopes of 15% or more and is to be expanded by the greater of four feet for every 1% of slope or to the top of the slope and

shall include all land within 50 feet from the top of the slopes. Title 27 of the Code of Maryland Regulations (COMAR) Section 27.01.01 (B) (8) (ii) states a buffer exists "to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance." § 71.8.3.b.1.c of the St. Mary's County Comprehensive Zoning Ordinance authorizes disturbance to the buffer for new impervious surfaces and development activities by variance. The applicants are proposing to reconstruct a single-family dwelling with a garage, a patio, sidewalks, a shed, and a driveway which will not create any new lot coverage in the critical area.

The Variance Requested

The applicants require a critical area variance from the prohibition in § 71.8.3 against disturbing the buffer to allow the reconstruction of the reconstruct a single-family dwelling with a garage, a patio, sidewalks, a shed, and a driveway as shown on the site plan admitted into evidence at the hearing as Attachment 3 of Exhibit 2.

The Evidence Submitted At The Hearing

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 (the "Property") is a grandfathered lot in the Critical Area of St. Mary's County because it was recorded in the Land Records of St. Mary's County prior to the adoption of the Maryland Critical Area Program on December 1, 1985.

- The Property fronts Cuckold Creek and is constrained by the Critical Area Buffer (the "Buffer"). The Critical Area Buffer (the "Buffer") is measured from the mean high water line of Cuckold Creek pursuant to COMAR 27.01.09.01.E(3).
- The existing soil types on the Property are Evesboro-Westphalia complex (EwE2) and Mattapex silt loam (MuA), according to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Evesboro-Westphalia complex are found on slopes of 20-45 percent and considered well drained and are moderately erodible. Mattapex silt loam soils are considered moderately well drained and are found on slopes of 0-2 percent. The area of disturbance consists entirely of Mattapex silt loam.
- According to the site plan provided by the Applicant, the Property proposes a single-family dwelling with a garage, a patio, sidewalks, a shed, and a driveway for a total of 6,670 square feet of lot coverage, which is 5 feet less than the existing lot coverage. The new lot coverage will be comprised of a 2,706 square foot single family dwelling with attached garage, 2,289 square feet of driveway, and 608 square feet of sidewalks, 875 square feet of patio, and 192 square feet shed, which represents 16.18% percent of the Property. The allowed amount of lot coverage on a property of this size is 15%.
- The Property is within Special Flood Hazard Area Zone X and AE-5 according to Flood Insurance Rate Map (FIRM) panel 182F. The proposed development is in unshaded X and is 39' from the Flood Hazard Zone.
- A private well and sewer will serve the Property.

- Approximately 24,412 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant does not plan to clear any of the existing vegetation within the buffer or outside the buffer.
- In accordance with COMAR 27.01.09.01, mitigation is required at a ratio of three to one per square foot of the variance granted for the disturbance of 2,711 square feet inside the critical area buffer. For buffer establishment for additional lot coverage outside of the critical area buffer, 130 square feet of mitigation is required at the rate of 1:1 mitigation. A total of 2,841 square feet of mitigation is required.
- The St. Mary's Health Department approved the site plan on March 28, 2019. The St. Mary's Soil Conservation District (SCD) approved an erosion and sediment control plan on March 5, 2019. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on March 5, 2019.
- The Maryland Critical Area Commission provided comments in the form of a letter, dated May 17, 2019, which was admitted into evidence at the hearing as Attachment 2 of Exhibit 2. The Commission does not support the variance and would like to see the development moved back from the steep slopes to minimize impacts to the water quality and aquatic habitat.

Applicants Testimony and Exhibits

The Applicants were represented at the hearing by Barrett Vukmer, their surveyor, from Chesapeake Trails Surveying, LLC. Evidence was presented that the applicants' property was created by deed in 1950, constructed in 1954, and is currently improved with a house, shed, walkways and a driveway and also that:

- The proposed construction will remove the existing home and replace it with a modest single story home utilizing the existing driveway for access, the garage is to remain. The plan proposes the minimal amount of disturbance to remove the existing house and construct the new home.
- This lot was recorded by deed in 1950 and existed prior to the adoption of the Critical Areas Ordinance which established limitations for construction within the Maryland Critical Area Buffer. The proposed construction will decrease the overall coverage within the Buffer by 94 square feet and decrease the overall coverage by 5 square feet. The proposed house is modest and will consist of 2026 sq. ft. total coverage. The proposed construction will move the house approximately 2' away from the water than the existing house. If the critical areas ordinance had not been established, the proposed improvements would have met all requirements of the Zoning Ordinance and would be permitted. Strict enforcement of the Critical Area Provision of the Ordinance will result in unwarranted hardship to the owner of this property.
- There are numerous houses with equal or larger floor plans in the close community. The request for a modest single-family dwelling to replace the existing dwelling, while reducing lot coverage, is similar to properties in the immediate

area. In an attempt to meet Zoning Ordinance setbacks and the St. Mary's County Health Department requirements it would be difficult to build on this parcel without placing coverage within the buffer. Literal interpretation of the Critical Area Program would deprive the owner of the right to construct a replacement home on the property, thus depriving them of rights commonly enjoyed by the adjoining property owners.

- The granting of this variance will not confer any special privilege, but simply allow the owner to construct a replacement single-family residence similar to existing homes in the neighborhood.
- The total coverage will be slightly reduced by 5 square feet by the proposed construction and the coverage within the buffer reduced by 94 square feet. The granting of this variance will have no adverse impact on the fish, wildlife, or plant habitat within the critical area. The quality on fish, wildlife and plant habitat may be improved by the reduction of coverage and moving the improvements further from the water. The granting of this variance will be in harmony with the general spirit and intent of the Critical Area Program.
- The proposed replacement house is modest and the proposed coverage is below the existing coverage on the lot. Granting this variance would allow the owner to construct a single family replacement dwelling similar to others in the neighborhood and achieve a reasonable use of their land.
- This variance request is a direct result of the adoption of the critical area ordinance after establishment of this lot and is not the result of any action by the applicant.

DECISION

County Requirements for Critical Area Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.4 sets forth six separate requirements (in this case) that must be met for a variance to be issued for property in the critical area. They are: (1) whether a denial of the requested variance would constitute an unwarranted hardship, (2) whether a denial of the requested variance would deprive the applicants of rights commonly enjoyed by other property owners in similar areas within the St. Mary's County Critical Area Program, (3) whether granting the variance would confer a special privilege on the applicants, (4) whether the application arises from actions of the applicants, (5) whether granting the application would not adversely affect the environment and be in harmony with the critical area program, and (6) whether the variance is the minimum necessary for the applicants to achieve a reasonable use of the land or structures. State law also requires that the applicants overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), that the variance request should be denied.

Findings - Critical Area Variance

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. There are a number of factors that support this decision. First, in *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals

considered an appeal claiming that a variance granted by the Worcester County Board of Appeals to allow a property owner to extend a pier across state-owned marshland from his property should not have been granted. The pier would be 80 feet longer than allowed by the Worcester County ordinance. The variance was granted. The Court of Appeals visited the history of the critical area law and efforts by the Legislature to amend and clarify the law. The Court grappled with the phrase "unwarranted hardship, " and asked if "an applicant [must] demonstrate a denial of all reasonable and significant use of the entire property, or must the applicant show a denial of a reasonable and significant use of the entire property?" (At page 14.) The Court concluded, on page 28, that:

In summary, in 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. (Emphasis added.)

In this application the Board finds that denying the applicants' request to reconstruct a single-family dwelling with a garage, a patio, sidewalks, a shed, and a driveway would deprive the applicants of a use that would be "both significant and reasonable."

Second, the property is almost completely enveloped in the 100 foot Critical Area Buffer, encumbered by steep slopes and said lots were created before the Critical Area Program was started. Other property owners with recorded lots that are constrained by similar conditions and the Critical Area provisions of the Ordinance do have the opportunity to file for a variance and seek relief from the regulations.

Third, that the strict interpretation of the critical area provisions would prohibit the applicants from reconstructing a single-family dwelling with a garage, a patio, sidewalks,

a shed, and a driveway, a right that is commonly enjoyed by other property owners in the Limited Development Area (LDA).

Fourth, the property is a recorded, grandfathered lot in an existing community and the granting of the variance will not confer any special privileges to the applicants that would be denied to others.

Fifth, the need for the variance does not arise from actions of the applicants. Again, this recorded lot predates the St. Mary's County's critical area program.

Sixth, the critical area variance is the minimum variance necessary to afford relief.

Furthermore, that the granting of the variance would not adversely affect the environment. The variance will be in harmony with the Critical Area Program. The applicants have overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), of the State law that the variance request should be denied. The Board also finds that requiring the applicants to install a super silt fence during construction will help alleviate any concerns of adverse impacts.

The Board finds that Critical Area Planting Agreement, which is required, will alleviate any impacts to water quality due to the creation of impervious surface in the Critical Area. The Board believes that the required plantings will assist in improving and maintaining the functions of the Critical Area. The Planting Agreement requires mitigation at a ratio of three to one (3:1) per square foot of the variance granted for the disturbance inside the Critical Area Buffer in accordance with Chapter 24 of the Ordinance. There is also a 1:1 mitigation requirement for buffer establishment for additional lot coverage outside of the Critical Area Buffer.

The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, which should contribute to improved infiltration and reduction of non-point source pollution leaving the site. For these reasons, the Board finds that the granting of the variance to construct a garage in the Critical Area will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area, and that the granting of the variances will be in harmony with the general spirit and intent of the Critical Area program.

ORDER

PURSUANT to the application of Brian and Jessica Metcalf, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow them to disturb the Critical Area Buffer to reconstruct a single-family dwelling with a garage, a patio, sidewalks, a shed, and a driveway; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 11th day of July, 2019,

ORDERED, by the St. Mary's County Board of Appeals, that the applicants are granted a critical area variance from the prohibition in § 71.8.3 against disturbing the buffer to allow the reconstruction of the proposed a single-family dwelling with a garage, a patio, sidewalks, a shed, and a driveway as shown on Applicants site plan; and it is further

ORDERED, by the St. Mary's County Board of Appeals, that the applicants are granted the above critical area variance on the condition that the applicants' builder installs a super silt fence to construction.

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.

Furthermore, Attachment 3 of Exhibit 2, referenced in this decision, is incorporated herein as if fully set forth and made a part of this Order. The proposed improvements shown on Attachment 3 of Exhibit 2 shall be constructed on the subject property in the locations shown therein. The decision and order shall not prohibit the applicants from making minor changes to the facilities as presently shown on Attachment 3 of Exhibit 2 to adjust for changes made necessary by comments or requirements that arise during plan review or construction, provided those minor changes do not exceed the variances granted herein. The reasonableness of any such change shall be determined by the Office of Land Use and Growth Management.

Date: July 11, 2019


George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Mr. Richardson

Those voting to deny the variance:

Approved as to form and legal sufficiency


James Tanavage, Assistant County 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 Notice of Appeal with the County Board of Appeals.

Further, § 24.8 provides that a variance shall lapse one year from the date of the grant of the variance by the Board of Appeals 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; or 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.