

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-1699

ABBOTT PROPERTY

FIRST ELECTION DISTRICT

VARIANCE REQUEST HEARD: MARCH 9, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: APRIL 13, 2023

Pleadings

Robert Abbott (“Applicant”) seeks a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer for the expansion of an existing deck and patio.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 17, 2023 and February 24, 2023. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before February 22, 2023. The agenda was also posted on the County’s website on March 3, 2023. Therefore, the Board of Appeals (“Board”) finds and concludes the variance request’s notice requirements have been met.

Public Hearing

A public hearing was conducted at 6:30 p.m. on March 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 variance requested by the Applicant.

The Property

The property is situate 50705 Holly Point Road, Dameron, MD and consists of 31,363 s.f., more or less, is zoned Rural Preservation District (“RPD”) and is found at Tax Map 68, Grid 17, Parcel 63 (“the Subject Property”). The portions of the Subject Property proposed for development lie within a Resource Conservation Area (“RCA”) Critical Area overlay.

The Variance Requested

Applicant seeks a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer for

the expansion of an existing deck and patio.

St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires there be a minimum 100-foot buffer (“the 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).

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 Subject Property is a 31,363 s.f. lot situated on the Chesapeake Bay. The Buffer is established 100' landward of the Chesapeake Bay, and all proposed development lies fully within the 100' Buffer.
- The site plan proposes expansion of an existing deck and a new patio (1400 s.f.) within the Buffer. 3,600 s.f. of mitigation plantings will be required if the variance is approved.
- The Critical Area Commission stated its objection to the requested variance for the reasons stated in its letter of August 31, 2022, a copy of which is attached to the Staff Report.
- The St. Mary's County Soil Conservation District and LUGM exempted the site plan from stormwater management review due to less than 5,000 s.f. of soil disturbance.
- The Health Department approved the site plan.
- Attachments to the Staff Report:

- #1: Standards Letter
- #2: Site Plan
- #3: Critical Area Commission Comments
- #4: Location Map
- #5: Zoning Map
- #6: Critical Area Map

Applicant's Testimony and Exhibits

Applicant appeared before the Board in-person. The following evidence testimony was among that provided to the Board:

- Most of the Subject Property is encumbered by the Buffer. The portions that are not “contain the well and septic and therefore cannot be built on.”
- The Subject Property suffered significant land loss from “Hurricane Katrina in 2005.”
- The existing deck is 15 years old and beginning to deteriorate, and it needs to be replaced. The existing deck is “not big enough for our needs.” The present deck and patio consist of wood atop concrete.
- The current deck measures 12' x 18'.

Public Testimony

No members of the public appeared to offer testimony about the proposal.

Decision

County Requirements for Critical Area Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.4.1 sets forth six separate requirements that must be met for a variance to be issued for property in the Critical Area. These

criteria are substantially similar to the criteria of COMAR 27.01.12.04.¹ They are summarized as follows: (1) whether a denial of the requested variance would constitute an unwarranted hardship (analogous to COMAR 27.01.12.04(1)); (2) whether a denial of the requested variance would deprive the Applicant of rights commonly enjoyed by other property owners in similar areas within the St. Mary's County Critical Area Program (analogous to COMAR 27.01.12.04(2)); (3) whether granting the variance would confer a special privilege on the Applicant (analogous to COMAR 27.01.12.04(1)); (4) whether the application arises from actions of the Applicant (analogous to COMAR 27.01.12.04(4)); (5) whether granting the application would not adversely affect the environment and would be in harmony with the Critical Area Program (analogous to COMAR 27.01.12.04(6)); and (6) whether the variance is the minimum necessary for the Applicant to achieve a reasonable use of the land or structures (analogous to the hardship test of COMAR 27.01.12.04(1)).² 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 Applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

¹ The Board acknowledges COMAR 27.01.12.04 is the controlling authority regarding the standards by which the instant variance request must be governed. In the past, the Board has applied the standards of St. Mary's County's Comprehensive Zoning Ordinance. It is the Board's understanding this section of the CZO is in the process of being updated to reflect COMAR. As discussed at greater length in the body of this order, the Board's discussion in this order will use CZO 24.4.1 as an organizational aid. This will maintain consistency with past opinions and, more compellingly, it is how the Applicant was asked to prepare their standards letter. The Board does find that, except as noted in Footnote # 2, the criteria of CZO § 24.4.1 and COMAR 27.01.12.04 bear substantial similarity to each other, and that an analysis of the standards of one is, effectively, an analysis of the standards of the other.

² The Board identifies two criteria in COMAR 27.01.12.04 that it does not believe have direct analogues in CZO § 24.4.1, those being COMAR 27.01.12.04.B(5) and (7). With respect to B(5), it does not appear to the Board that the Applicant's variance request arises from any conforming or nonconforming condition on any neighboring property. With respect to B(7), the Board believes that, by satisfying all other standards of the Critical Area Program and the Comprehensive Zoning Ordinance, and for the salutary effects of the proposed mitigation and other considerations mentioned in the body of this order, that the proposed project is in harmony with the Critical Area Program.

First, the Board finds that denying the Applicant's request would constitute an unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Supreme Court of Maryland³ 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. *Assateague Coastal Trust* requires the Applicant to first identify a use that would be significant. The Applicant's proposed use is expansion of an existing deck and patio. These accessories are common recreational amenities which enhance the use of the Property, and the Board has approved variances for similar amenities in the past. Denying Applicant access to these amenities would amount to an unwarranted hardship, and Applicant testified that the existing deck, measuring 12' x 18', is too small and requires an expansion. The Board accepts the Applicant's testimony that building further away from the proposed location is impracticable on account of the existing location of Applicant's private well and septic system.

Regarding whether the need for the variance arises from the actions of the Applicant, the house was built prior to the homeowner's acquisition of the Subject Property. Further, the Applicant testified that natural forces had eroded the property's shoreline, further constraining conditions on his lot.

The Board finds that granting the variance would not adversely affect the environment. As Applicant notes, a result of the proposed project will be roughly 3,000 square feet of mitigation

³ The Supreme Court of Maryland was then known as the Court of Appeals. An amendment to the Maryland Constitution renaming the Court of Appeals to the Supreme Court of Maryland was ratified in the 2022 election. Simultaneously, the Court of Special Appeals was renamed the Appellate Court of Maryland.

plantings on areas that appear to be plain lawn at current. Mitigation is required by the Critical Area Program to offset and balance any potential effects of permissible development. That mitigation will be implemented in the instant project. Accordingly, the Board finds that the proposed development, properly mitigated, will not result in an overall adverse effect upon the environment.

Finally, the Board discusses whether this development can be in general harmony with the Critical Area Program. The Board finds it is. The Applicant states the location of existing well and septic preclude him from expanding his deck elsewhere, and that the existing deck must be replaced.

As a result of satisfying these standards, the Applicant has 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 the application of Robert Abbott, petitioning for a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer for the expansion of an existing deck and patio; 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 § 21.1.3.a and CZO § 24.8, that the Applicant is granted a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer for the expansion of an existing deck and patio;

UPON CONDITION THAT, Applicant 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 Applicant 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: APRIL 13, 2023


Daniel F. Ichniowski, Chairperson

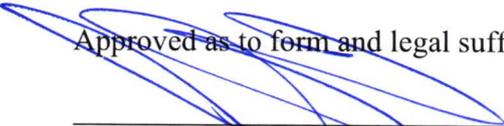
Those voting to grant the amendment:

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

Those voting to deny the amendment:

Mr. Miedzinski

Approved as to form and legal sufficiency:



Steve Scott, Attorney to the Board

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 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 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.