

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-2528

BERND PROPERTY

THIRD ELECTION DISTRICT

DATE HEARD: May 11, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: June 8, 2023

Pleadings

Loretta Bernd (“Applicant”) seeks a variance (VAAP # 22-2528) from Section 71.8.3 to disturb the 100’ Critical Area Buffer to construct a new deck and add a landing and stairs to an existing deck.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on April 21, 2023 and April 28, 2023. The hearing notice was posted on the property by April 26, 2023. 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 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 May 5, 2023. Therefore, the 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 11, 2023 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 about the proposed variance requested by the Applicants.

The Property

Applicant owns real property situate 39666 Cecil Avenue, Leonardtown (“the Subject Property”). The Subject Property is in the Residential Neighborhood Conservation (“RNC”) Zoning District, has a Limited Development Area (“LDA”) Critical Area overlay, and is identified at Tax Map 39A, Grid 8, Parcel 9, Lots 13, 14, 15 & 16.

The Variance Requested

Applicant seeks a variance from St. Mary's County Comprehensive Zoning Ordinance ("CZO") Section 71.8.3 to disturb the 100' Critical Area Buffer to construct a new deck and add a landing and stairs to an existing deck.

The St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires there be a minimum 100-foot 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).

Staff Testimony

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 is an 8,000 square foot lot, more or less, situated on Cecil Creek.
- The proposed deck and new landing with stairs are fully within the 100' Critical Area Buffer.
- The site plan proposes an 18' x 22' deck and a 4' x 5' landing with stairs to access an existing porch, all within the 100' Critical Area Buffer.
- An existing 12' x 20' patio will be removed with this proposal.
- If approved, mitigation will be required at a 3:1 ratio for permanent disturbance and 1:1 for temporary disturbance within the buffer. The Applicant will be entitled for 1:1 credit for lot coverage removed. In total, the Applicant will be required to provide 50 square feet of buffer mitigation plantings and a planting agreement will be executed.

- The Maryland Critical Area Commission responded to the project in a letter dated February 16, 2023, and did not state its opposition to the project. Its letter noted that while allowable lot coverage is 2,500 square feet, the existing legally nonconforming lot coverage will be reduced from 3,108 square feet to 2,583 square feet.
- The St. Mary's County Soil Conservation District exempted the site plan from Stormwater Management review as it proposes less than 5,000 square feet of soil disturbance.
- The following Attachments to the Staff Report were introduced:
 - #1: Standards Letter;
 - #2: Site Plan;
 - #3: Critical Area Commission Comments;
 - #4: Location Map;
 - #5: Zoning Map;
 - #6: Critical Area Map

Applicant Testimony and Exhibits

Applicant was represented by Nicholas Capuano, her contractor, before the Board of Appeals. Mr. Capuano's testimony included the following:

- The existing improvements are dilapidated and in poor condition. Given Ms. Bernd's age, she is unable to safely navigate or rely upon these improvements and enjoy them in any degree.
- More specifically, Ms. Bernd's use of her home is now limited to its first floor. The proposed improvements will give her more access and fuller use to ground-level improvements.
- Additionally, Mr. Capuano shared CAD drawings of the proposed improvements and

summarized the standards letter submitted to the Board.

Public Testimony

No members of the public appeared to offer testimony for or against the project.

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. They are summarized as follows: (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 would 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. 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 relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

First, 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 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 that would be both significant and reasonable. The proposal amounts to a replacement of existing improvements – namely, a deck and stairs. These are common and basic improvements to a single-family residential home and enable a homeowner to achieve full use and enjoyment of their home’s curtilage. The proposal replaces what already exists, albeit it in a state of apparent disrepair, with in-kind substitutes that, on balance, will reduce overall lot coverage. The Board finds that there are no apparent practical alternatives for where such improvements may be otherwise relocated.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Limited Development Area. Applicant’s improvements are of similar size and character as those found at surrounding homes. This Board finds such improvements are a commonly enjoyed right of property owners who own lots similar to that of the Applicant.

Third, granting a variance will not confer a special privilege upon the Applicant. Applicant’s proposed site plan asks for a relatively modest set of improvements, and includes all required mitigation plantings, environmental considerations, and, aside from the need for this variance, complies with all applicable regulations. Regarding whether grant of the variance alone constitutes a special privilege, it was noted in the previous paragraph that Applicant’s proposed

development is of an intensity and character that may commonly be found in the Critical Area in St. Mary's County, even among dwellings constructed after St. Mary's County's adoption of its Critical Area program.

Fourth, the need for the variance does not arise from the actions of the Applicant. The Applicant's proposal revolves around the location of an existing, legally nonconforming home.

Fifth, granting the variance would not adversely affect the environment. The Applicant will be required to mitigate the proposed development with an approved planting plan established on-site (per COMAR 27.01.09.01) as part of the Building Permit process. The plantings are intended to offset any negative effects and provide improvements to water quality along with wildlife and plant habitat. The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, all of which should contribute to improved infiltration and reduction of non-point source pollution leaving the site.

As a result, 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.

Finally, the Board of Appeals finds that the requested variance is the minimum necessary to achieve Applicants' intended reasonable use of the Property. As noted previously, Applicants are making use of an existing and legal footprint and footers, and the contemplated house will not extend beyond the existing foundation.

ORDER

PURSUANT to Applicant's request for a variance from CZO Section 71.8.3 to disturb the 100' Critical Area Buffer to construct a new deck and add a landing and stairs to an existing deck;
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 § 24.3, that the Applicant is granted a variance from Section 71.8.3 to disturb the 100' Critical Area to construct a new deck and add a landing and stairs to an existing deck.

The foregoing variance is subject to the condition that the 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 the 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: JUNE 8, 2023

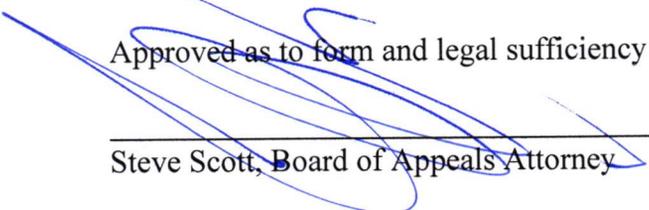

Daniel F. Ichniowski, Chairman

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 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.