

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-1756

BRABHAM & PORTERFIELD PROPERTY

THIRD ELECTION DISTRICT

VARIANCE REQUEST HEARD: FEBRUARY 22, 2024 and MARCH 28, 2024

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: May 9, 2024

Pleadings

Ralph Brabham and Andrew Porterfield (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer, Section 41.7.4(5) for development closer to the water than the principal structure on the adjacent property, Section 41.7.4(7)(c) for an area of impervious coverage for all accessory structures exceeding 1,000 square feet, and Section 51.3.122 to reduce the required pool setback from 10 feet to 7 feet to install a replacement pool with a patio and deck.¹

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 2, 2024 and February 9, 2024. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before February 6, 2024. The agenda was also posted on the County’s website on February 16, 2024. 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 February 22, 2024 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. The February 22 hearing was continued to March 28, 2024 after a partial presentation of the Applicants’ testimony, where all persons desiring to be heard were again duly sworn, and proceedings were recorded electronically. The following was presented about the variance across the two hearing dates.

The Property

¹ Subsequent modification of the proposed site plan by Applicants obviated the need for a variance from Section 51.3.122.

The subject property (hereinafter “the Property”) is situate 42115 White Point Beach Road, Leonardtown, MD 20650 and consists of 20,000 square feet, more or less. It is zoned Rural Preservation District (“RPD”), has a Limited Development Area (“LDA”) Critical Area overlay, is entirely within a Buffer Management Overlay (“BMO”), and is found at Tax Map 56, Grid 1, Parcel 43.

The Variance Requested

Applicants seek a variance Section 71.8.3 to disturb the Critical Area Buffer, Section 41.7.4(5) for development closer to the water than the principal structure on the adjacent property and Section 41.7.4(7)(c) for an area of impervious coverage for all accessory structures exceeding 1,000 square feet.

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. Generally, 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). Within BMOs, certain development activities can be allowed in the Buffer without a variance if specified standards are met. CZO § 41.7.4. In-ground pools require a setback of at least 10 feet from any property line. CZO § 51.3.122.a(2).

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 is Lot 3 of the William P. O’Brien Subdivision, also known as White Point, and may be found among the Land Records of St. Mary’s County at Plat Book 1, Page 442. The subdivision was recorded on April 16, 1935, five

decades prior to the adoption of the Critical Area program.

- According to the State Department of Assessments and Taxation, the property consists of 20,000 square feet located on White Point Beach Road and is adjacent to the tidal waters of the Potomac River. It is improved by a dwelling built in 1927, prior to the adoption of a comprehensive zoning ordinance by St. Mary's County.
- The Property is constrained by the Buffer.
- The Applicants propose replacing an existing pool and constructing a new patio and deck, which impacts the 100' Critical Area Buffer.
- The proposed patio will be built closer to the water than the principal structures on both adjacent properties.
- In total, the plan proposes 1,800 square feet of impervious coverage for all accessory structures on the Property.
- Mitigation will be required at a ratio of 2:1 for new impervious surface within the Buffer. The total mitigation required will be 498 square feet of Buffer mitigation plantings. A planting agreement and plan will be required prior to the issuance of the building permit.
- The Critical Area Commission provided a response letter dated January 16, 2024. The Critical Area Commission opposes the requested variance. Among other things, the Critical Area Commission believes the Applicant can "easily redevelop" within the existing BMO standards and avoid the need for a variance entirely, and that the Critical Area Commission has never considered a pool and patio structure in the Buffer to be "reasonable and significant use of a property."

The Critical Area Commission does not believe the Applicants can demonstrate denial would constitute an unwarranted hardship.

- The Soil Conservation District and St. Mary's County Health Department have both approved the proposed project.
- Attachments to the Staff Report:
 - #1: Critical Area Standards Letter
 - #2: General Standards Letter
 - #3: Plat Book 1 Page 442
 - #4: Critical Area Map
 - #5: Site Plan
 - #6: Location Map
 - #7: Zoning Map
 - #8: Critical Area Commission Response

Applicants' Testimony and Exhibits

Applicants appeared before the Board in-person. They were joined via Zoom by Ryan Moody and Nick Wittkofski from Moody Graham, a landscape architecture firm. Applicants presented a slideshow that included pictures of site conditions, site plans depicting proposed development, and other material. The following evidence testimony was among that provided to the Board:

- The Applicants presented a modified plan at the March 28 hearing that developed some changes in response to the Critical Area Commission's letter.
- The Applicants will make an in-kind replacement of the existing, grandfathered pool.
- Mr. Moody showed the location of the existing pool and highlighted the concrete deck

and stairs adjacent to it. He also highlighted an existing wellhead in the side-yard and an existing septic field in the front yard.

- Pictures showed the pool and concrete improvements in their current state of poor repair. Applicants stated the pool is visibly failing and provided a letter from Sunset Group that recommended demolition and complete replacement of the existing pool for a variety of reasons related to the existing pool's safety and structural integrity.
- Applicants changed the development proposal, considering the Critical Area Commission's comments. Applicants reduced the width of the pool to 37', which changes the previous side yard setback from 7' to 10', obviating the need for the side yard setback variance. This also makes the proposed pool slightly smaller than the existing pool.
- Additionally, the patio will be made of "permeable" pavers. If the various 'pervious' surfaces would not be considered lot coverage, there would be an overall decrease in lot coverage on the Property if the proposal is approved.
 - Staff did raise a concern that these may still be considered as lot coverage under the state's definition of lot coverage.
- The existing concrete stairs are proposed to be removed and replaced with floating wooden deck stairs. Applicants also proposed moving the stairs away from their present location to avoid interfering with an existing tree's root system.
- Applicants detailed, on Slide 14 of their presentation and during their oral remarks, why relocating the pool and other proposed improvements are not viable elsewhere. The front of the property is constrained by a septic field, front yard setback, existing propane tanks, a propane gas line, and a large structural root zone. The side yard is

constrained by a side yard setback and an existing well.

- Mitigation will be performed on-site. Applicants shared where they intend to place these plantings on the Property.
- Applicants stated, after a question from a Board member, that the pool has been professionally assessed and replacement was recommended. Applicants do not believe the existing pool can be salvaged.

Public Testimony

No members of the public appeared to offer testimony about the proposal. Written comments were received from the following prior to the hearing, all of which are included as part of the public record:

- John Wang, Leonardtown
 - Mr. Wang is a neighboring property owner. He wrote the Board with questions related to stormwater management, an issue involving property survey sticks, and concern about the placement of holly trees that satisfy a portion of the Applicants' mitigation.
- Victor DeFrancis, Leonardtown
 - Mr. DeFrancis lives two houses away from the property. He strongly supports the requested variance. He said the existing pool has been "derelict" for over a decade and that the Property is suffered from much deferred maintenance. He believes the proposed redevelopment is better than repairing the pool and that this project will be a net benefit to both the Property itself and the neighborhood in general.
- Suzanne and Dave Havrilla, Leonardtown

- Mr. and Mrs. Havrilla live adjacent to the Property on the parcel closest to the location of the existing and proposed pools. They strongly support the variance. They wrote that the existing pool is “in very rough shape” and that the new pool will be better because it will be further away from their property line, will have a new shell the safety of which is more certain, and will have an automatic pool cover, and the impermeable surface area of the existing pool and concrete deck causes greater runoff than the new pool and pervious improvements will generate.
- Eric McFadden, Leonardtown
 - Mr. McFadden lives three houses down from the Property and fully supports the variance. He believes replacement is a vastly superior option to repair and that the existing concrete deck is less environmentally friendly than the proposed pervious replacements.

Decision

COMAR 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 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 the requested relief.

The Board finds that denying the Applicants' request would constitute an 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. *Assateague Coastal Trust* requires the Applicants first identify a use that would be significant and reasonable. The Applicants' proposed use is redevelopment of an existing, legally nonconforming residential swimming pool. Swimming pools are common amenities across St. Mary's County, and the testimony before the Board was that this parcel has been improved by the existing pool for decades. The Board finds that depriving Applicants of the right to build an in-kind replacement would amount to denial of a reasonable and significant use of the property, and of a right commonly enjoyed by other similarly-situated property owners.

Applicants, once informed of the Critical Area Commission's objections, took the Commission's comments to heart and reappeared before the Board with an altered proposal that addressed, to the apparent maximum extent possible, the Commission's concerns. Applicants have reduced the overall size of the pool and reconfigured the layout and material of the other improvements. While the Board cannot, on the evidence before it, conclude these pervious deck and patio materials would not be deemed 'lot coverage' under relevant state regulations, the Board is prepared to accept Applicants' testimony they would be, at a minimum, an improvement over the existing concrete surface. Applicants also compellingly demonstrated why it is infeasible to relocate the pool further out of the Buffer: existing improvements and site features, including the existing septic field, wellhead, render building a like-sized pool in the front and side yard prohibitively impracticable, if not outright impossible.

Accordingly, because the Applicants have met their burden of demonstrating replacement of a derelict, grandfathered pool is a significant and reasonable use of their property, and because they have compellingly demonstrated no viable alternatives are available for placement elsewhere

on the Property, the Applicants have demonstrated denial of this variance would amount to an unwarranted hardship.

Secondly, 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. Generally speaking, property owners of any stripe are constitutionally entitled to keep property improvements that were properly and legally permitted at the time of their construction. In-kind replacements of improvements in this category of vested rights are commonly granted. Moreover, the swimming pool itself is not an improvement that is atypical for St. Mary's County.

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 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 of an Applicant in their position. Even within the Buffer Management Overlay's relaxed restrictions Applicants still possess the right to seek a variance to allow development – and, if they satisfy the relevant standards, are entitled to receive one.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the Applicants. Rather, Applicants are constrained by the physical realities and preexisting layout of an undersized lot created five decades prior to the enactment of the Critical Area program. The existing home was built in 1927 and both it and the existing pool are legally nonconforming in their present configurations.

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 mitigated. Approximately six hundred square feet of mitigation plantings will be required for a project that appears to be a net improvement over existing site conditions, even if it may not amount to a straight reduction of overall lot coverage. These plantings will help mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer. The proposed improvements will replace a failing, derelict concrete swimming pool with a smaller, safer replacement; existing concrete surface areas will be replaced with new replacement surfaces that will be more pervious, and have less of an impact, than the existing concrete.

The Board also notes, as it has on a similar project in the past, that the proposed pool will be placed within a Buffer Management Overlay. BMOs exist in areas where the County and State have found that the Buffer is already so highly impacted by legal, preexisting development that it cannot continue to provide the functions for water quality and habitat protection it would elsewhere. See COMAR 27.01.09.01-9.A and CZO § 41.7.1. Consequently, rules related to development within BMOs are more permissive than those generally applicable to any development in the Buffer. While a variance is still required if development cannot satisfy these less restrictive rules, they are allowed.

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's laws and regulation and the local Critical Area program. In total, the Applicants have demonstrated that a variance is necessary to achieve their proposed. That proposed use has been found to be one that is significant and reasonable. There are no practical alternatives to make these improvements elsewhere on the Property, and lot coverage will remain within legal limits. The impacts to the Buffer of

redevelopment will be offset by the mitigation and other site improvements the Applicants shall make.

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

ORDER

PURSUANT to the application of Ralph Brabham and Andrew Porterfield, petitioning for a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer, § 41.7.4(5) for development closer to the water than the principal structure on the adjacent property, and § 41.7.4(7)(c) for an area of impervious coverage for all accessory structures exceeding 1,000 square feet to construct a replacement pool and patio; and

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

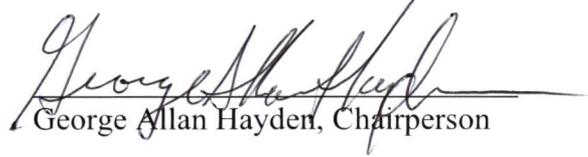
ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 21.1.3.a and CZO § 24.8, that Applicants are granted a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer, CZO § 41.7.4(5) for development closer to the water than the principal structure on the adjacent property, and CZO § 41.7.4(7)(c) for an area of impervious coverage for all accessory structures exceeding 1,000 square feet to construct a replacement pool and patio;

UPON CONDITION THAT, all lot coverage shall remain below the legal lot limit of 5,445 square feet,; and

UPON FURTHER 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 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: May 9, 2024

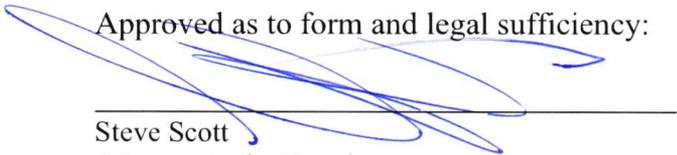

George Allan Hayden, Chairperson

Those voting to grant the amendment:

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

Those voting to deny the amendment:

Approved as to form and legal sufficiency:



Steve Scott
Attorney to the Board

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. 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.