

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-1666

BRETON BAY LANDINGS HOMEOWNER ASSOCIATION PROPERTY

THIRD ELECTION DISTRICT

DATE HEARD: January 12, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: February 9, 2023

Pleadings

The Breton Bay Landings Homeowners Association (“the Applicants”) seeks a variance (VAAP # 22-1666) to disturb the Critical Area Buffer to construct a retaining wall.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on December 23, 2022 and December 30, 2022. 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 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 January 4, 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 January 12, 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

The Applicants own the property consisting of the Open Space parcel for Section 2 of the Breton Bay Planned Unit Development (“the Subject Property”). The Subject Property is in the Residential Neighborhood Conservation (“RNC”) Zoning District and is identified on Tax Map 40, Grid 19, Parcel 203, Breton Bay Planned Unit Development, Section 2, Open Space. This lot is designated in the Chesapeake Bay Critical Area with a Limited Development Area (“LDA”)

Overlay.

The Variance Requested

The Applicants request a Critical Area variance from the prohibition of § 71.8.3 of the St. Mary's Comprehensive Zoning Ordinance ("CZO") against development activities in the Critical Area Buffer in order to construct a 100' retaining wall with a 20' by 20' rain garden.

The St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires that there shall be a minimum 100-foot buffer¹ 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).

The Evidence Submitted at the Hearing by LUGM

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 unaddressed 3.29 acre parcel, more or less, which is identified as Tax Account ID # 1903044866. It constitutes the Open Space parcel for Section 2 of the Breton Bay Planned Unit Development.
- The Applicants propose to construct a 100' retaining wall with a 20' x 20' rain garden to control rooftop drainage and prevent further erosion, as depicted on Applicants' site plan.
- The Critical Area Commission has reviewed the plan and sent a letter dated September 19, 2022. The letter may be found as Attachment #4. The Critical Area Commission did not state it opposes the requested variance, but noted that all standards must be met and that

¹ Maryland Code of Maryland Regulations § 27.01.01(B)(8)(a)(ii) defines a "buffer" as an area that "exists . . . to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance."

the Board of Appeals must find the proposed retaining wall “is the only method to stabilize the slope.”

- The plan is exempt from Stormwater Management standards 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: Plat Book 30, Page 115

#3: Site Plan

#4: Critical Area Commission Letter

#5: Location Map

#6: Zoning Map

#7: Critical Area Map

Applicants Testimony and Exhibits

The Applicants were represented by Lori Jameson and Francis Staebler, members of the Breton Bay Landings Homeowners Association. The following was included among the evidence Applicants presented:

- The Applicants presented a slideshow that included descriptions, site plans, and photographs of the Subject Property.
- The Breton Bay Landings Homeowners Association was built between 1990-1991 and consists of 64 houses and 34 townhouses.
- Ongoing water drainage and erosion problems could cause structural damage to townhouse properties if the issue is not corrected.
- Four trees will need to be cut to build the retaining wall; stumps will be left in place to

avoid soil disturbance.

- The 100' x 6' retaining wall will be built with fill in dirt from the retaining wall to foundation. Grass seed covered with hay will be laid down.
- Drainpipes from downspouts will be run underground to the proposed rain garden; there will be a total of 4 drainpipes on the backside row of townhomes and 3 drainpipes on the water side row of townhomes.
- The 20' x 20' rain garden will be placed over a current barren dirt spot, with no additional clearing needed.
- Applicants believe the proposed project will stem stormwater runoff into Cherry Cove, prevent additional erosion, and prevent structural damage to the townhomes.

Public Testimony

The following members of the public appeared before the Board in-person and presented testimony:

Aimee Hayes

Ms. Hayes is a member of the homeowners association. She stated the proposed retaining wall will be of benefit, is necessary for the neighborhood, and thanked the members of the homeowners association who had worked to develop the proposal and bring it before the Board.

The following members of the public submitted written testimony to the Board:

Gregory Penk

Mr. Penk has been an owner in the Breton Bay Landing townhouses since 1995 and a permanent resident since 2000. He described extensive shoreline erosion along the area of the townhouses. He supports the proposal and believes this is a “critical first step” to remediating the shoreline.

Decision

County Requirements for Critical Area Variances

The St. Mary's County Comprehensive Zoning Ordinance ("CZO") § 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 that 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, the Applicants have demonstrated that, absent the variance, they would be denied a use of the Property that would be both significant and reasonable. The Applicants described, and the pictures provided demonstrate, the Subject Property's current propensity for stormwater runoff erosion. Such erosion, left unabated, poses an environmental hazard to Cherry Cove and the environment, but also represents a danger to the structural integrity of the improved property in the homeowners' association. Deprivation of this real property would undoubtedly constitute an unwarranted hardship; it follows that the necessary disturbance to maintain those structures, if kept to a reasonable minimum, is warranted.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners like zoning districts and Critical Area overlays. The Applicant proposes to construct a retaining wall that will stem erosion. Maintenance and preservation of existing improvements is a common right.

Third, granting the variance will not confer any special privileges to the Applicants that would be denied to others. The use of retaining walls such as that proposed by Applicants is a common, and oftentimes necessary, measure to control erosion on properties.

Fourth, the need for the variance does not arise from actions of the Applicants. Applicants have little control over the volume of rainwater their properties receive, and there is nothing in the record before the Board that the erosion problems Applicants and public testimony described have been caused or exacerbated by the Applicants or any of the homeowners' association's members.

Next, granting the variance would not adversely affect the environment. As Applicants

noted, this development will result in a net decrease in stormwater runoff to Cherry Cove. In its letter the Critical Area Commission encouraged the Applicants to explore opportunities to maintain or expand existing vegetation, and specifically raised the possibility of installing a rain garden on-site; the Board finds the Applicants propose such a rain garden. The rain garden will reduce stormwater runoff and improve biodiversity at the site. For these reasons, the Board finds that granting the variance to construct the retaining wall will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area.

Moreover, the Board finds that by satisfying each of the variances above, granting the variance will be in harmony with the general spirit and intent of the Critical Area Program. As a result, the Applicants have also overcome the presumption in § 8-1808(d)(2)(ii) of the Natural Resources Article that the variance request should be denied.

Finally, the Critical Area variance is the minimum variance necessary to achieve a reasonable use of the land. The Applicants propose a retaining wall that they say, and the Board finds, is reasonably calculated to advance the Applicants' goal of reducing or eliminating stormwater runoff. The Applicants have taken care to minimize disturbances as best they can – such as locating the rain garden over existing bare dirt – and no reasonable alternative has been brought to the Board's attention. Therefore, the Board concludes based on the evidence presented that the proposed retaining wall is the minimum necessary to achieve the Applicants' objective.

ORDER

PURSUANT to the application of the Breton Bay Landings Homeowners Association, 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 in order to construct a 100' retaining wall with a 20' by 20' rain garden; and

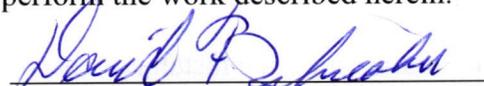
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

ORDERED, by the St. Mary's County Board of Appeals, pursuant to § 24.4, that the Applicants are granted a Critical Area variance from the prohibition in § 71.8.3 against disturbing the Critical Area Buffer in order to construct a 100' retaining wall with a 20' by 20' rain garden.

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.

Date: FEB 09, 2022 2023

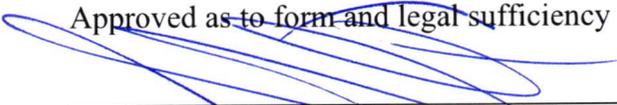

Daniel F. Ichniowski, Chairman

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 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.