

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-0320

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GEARY PROPERTY

THIRD ELECTION DISTRICT

VARIANCE REQUEST HEARD: SEPTEMBER 8, 2022

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ORDERED BY:

Mr. Bradley, Ms. Delahay,  
Mr. Miedzinski, Mr. Payne, and Mr. Richardson

ENVIRONMENTAL PLANNER: LEAH LANGFORD

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DATE SIGNED: October 27, 2022

### Pleadings

Daniel and Margot Geary (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer to construct deck and porch additions.

### Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on August 19, 2022 and August 26, 2022. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before August 24, 2022. The agenda was also posted on the County’s website on August 31, 2022. Therefore, the Board of Appeals (“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 September 8, 2022 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 Applicants.

### The Property

The subject property is located at 21910 Helen Lane, Leonardtown, Maryland 20650 (“the Property”). The Property is 39,582 square feet, more or less, is zoned Rural Neighborhood Conservation (RNC), has a Rural Conservation Area (RCA) Critical Area overlay, and is found at Tax Map 40, Grid 16, Parcel 198, Lot 10.

### The Variance Requested

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to

construct porch and deck additions.

### 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 Property consists of 39,582 square feet, more or less, and contains an existing house with a wood deck. It sits adjacent to Breton Bay.
- The Buffer extends 100' from the tidal waters of the mean high-water line of tidal waters and tidal wetlands, and all proposed additions are fully within the Buffer.
- Per the Applicants' site plan, Applicants propose 763 square feet of permanent disturbance and 204 square feet of temporary disturbance to create porch and deck additions to the waterfront side of the existing home.
- The site plan has been approved by all applicable county agencies. As less than 5,000 square feet of total disturbance is proposed, the project is exempt from stormwater management review by the Soil Conservation District.
- The Critical Area Commission sent a letter dated March 8, 2022. Its letter did not state the Critical Area Commission opposes this project.
- Mitigation to be performed if the variance is approved has been calculated as follow: 3:1 mitigation for 763 square feet of permanent disturbance resulting from

the porch and deck and 1:1 mitigation for 204 square feet of temporary disturbance resulting from porch and deck. In total, 2,493 square feet of mitigation will be required. A buffer management plan will need to be approved prior to final approval by LUGM.

- Attachments to the Staff Report:
  - #1: Standards Letter
  - #2: Location Map
  - #3: Zoning Map
  - #4: Critical Area Map
  - #5: Site Plan
  - #6: Critical Area Commission Letter of March 8, 2022

#### Applicants' Testimony and Exhibits

Applicants were represented by attorney Christopher Longmore, of Dugan, McKissick, & Longmore LLC, and through counsel presented testimony before the Board. The following evidence and testimony was included in Applicants' presentation:

- Applicants provided a slideshow, which contained pictures of the existing house and structures, as well as depictions of the proposed development.
- The proposed deck and additions will be dimensionally matched to the existing deck and porch coverage. The ultimate effect of the proposed additions will be to square up all sections of the porch and deck.
- Applicants note 18" square footings will be dug and poured by hand without equipment.
- No equipment will need to go behind the house and material will be carried by hand.

- The lot will, after development, remain significantly below the 25% impervious surface limit. Total coverage will not exceed 18.2% of the lot after proposed improvements are constructed. In total, only 34 square feet of net coverage will be added.

### **Public Testimony**

No members of the public appeared to offer testimony related to this matter. Letters were received from Cindy Ballard, Robert Ballard, Bruce Gentile, Karla Gentile, and Max Trap, all of whom are neighbors and live in close proximity to applicants. Each letter stated that its author is in favor of granting the variance.

### **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 proposed alterations will square off an existing porch and deck and will allow this accessory to have the full utility and practicality of typical structures.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Neighborhood Conservation and Limited Development Area. As stated above, Applicants' proposal will be to construct minor improvements to an existing feature, which will bring said feature to a level of use and practical benefit that other similarly situated property owners frequently and commonly enjoy. Decks and porches are among the most common of property improvements, even in the Critical Area. Applicants ask for no more than many property owners in St. Mary's County already enjoy. As depicted on the site plan, roughly half of the existing house is within the Buffer, including the entirety of its waterfront side. This Board accepts that a waterfront deck is a common feature in

St. Mary's County, and that a deck located elsewhere on the Property would not qualitatively be as useful or as beneficial as the proposed location of the deck and porch.

Third, granting a variance to will not confer a special privilege upon Applicants. It was noted in the previous paragraph that Applicants' proposed work is of a quality and scale that may be commonly found in the Critical Area in St. Mary's County, even among dwellings and decks constructed after St. Mary's County's adoption of its Critical Area program.

Fourth, the need for the variance does not arise from actions of the Applicants. The Applicants are constrained by the physical features of their lot. Additionally, Applicants' deck is tied to the location of Applicants' house, which was built prior to Applicants' ownership.

Fifth, granting the variance would not adversely affect the environment. The Applicants 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. Applicants' proposed work is also tailored to make use of the location of existing features, and the overall increased site coverage is modest. Finally, the Board notes the Applicants' proffer that use of heavy machinery to construct the improvements, if any, will be kept to a bare minimum.

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 Board of Appeals finds that the requested variance is the minimum necessary to achieve Applicants' intended reasonable use of the Property. As noted above, the Applicants

are constrained by the existing location of the house, the physical features of the property, and the geographical extent of the Buffer.

#### County Requirements for Granting Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.3 sets forth seven separate requirements that must be met for a variance to be issued:

- (1) Because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape, or topographical conditions of the property involved, strict enforcement of this Ordinance will result in practical difficulty;
- (2) The conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;
- (3) The purpose of the variance is not based exclusively upon reasons of convenience, profit, or caprice. It is understood that any development necessarily increases property value, and that alone shall not constitute an exclusive finding;
- (4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
- (5) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will not be changed by the variance;
- (6) The proposed variance will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and
- (7) The variance complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

*Id.*

Findings – Standard Variance Requirements

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 strictly interpreting the CZO would result in practical difficulty due to the particular physical surroundings of the Property. § 24.3(1). In *McLean v. Soley*, 270 Md. 208 (1973), the Maryland Court of Appeals established the standard by which a zoning board is to review "practical difficulty" when determining whether to grant a variance:

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

*Id.* at 214–15.

As noted in the Board of Appeals' discussion of the standards for granting a variance from critical area provisions, denial of this variance would constitute a practical difficulty. Moreover, the Property is constrained by its geographical location on the banks of Breton Bay. Unless

Applicants prefer to construct an entirely new porch elsewhere on their property – which would likely be a far greater impact than the minor work proposed today – Applicants are constrained to the footprint of the existing deck.

The second standard is that the conditions creating the difficulty are not generally applicable to other properties in the same zoning classification. As noted above, Applicants' need for a variance stem from the particular physical characteristics of this site and the constraints posed by the location of an existing home.

To the third standard, the purpose of seeking the variance is not "based exclusively upon reasons of convenience, profit or caprice." Rather, Applicants attempt to achieve a reasonable use of the Property that is enjoyed by owners of other similarly situated properties. The Board of Appeals does not find, and no evidence has been presented to support such a finding, that granting this variance would merely be a "convenience" to Applicants.

Fourth, the need for the variance does not arise from actions of the Applicants. As noted previously, Applicants need for a variance stem from the particular physical characteristics of their Property, and their particular development plan is oriented around existing structures that the Applicants did not themselves place, but which they reasonably intends to make full use of.

Fifth, the variance will neither detrimentally affect the public welfare, injure other properties or improvements, nor change the character of the district. The neighboring property owners were notified of the variance request and given an opportunity to speak on the matter; all who did spoke in favor of the proposal. Further, the Critical Area Commission, given an opportunity to comment upon the project, did not voice any objection or opposition to the requested variance.

Sixth, the proposed development will not increase the residential use of the property and

the Board does not find that it will increase congestion or the risk of fire, endanger public safety, or substantially diminish or impair property values in the neighborhood.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan. The Board of Appeals notes that Applicants' request makes use of existing structures and that the proposed work will not materially change the Property's overall impact upon the environment.

### **ORDER**

PURSUANT to the application of the Daniel and Margot Geary, petitioning for a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to construct deck and porch additions; and

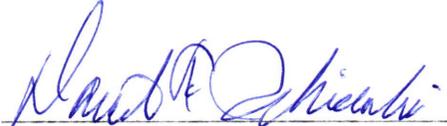
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 21.1.3.a and CZO § 24.8, that the Applicants are granted a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to construct deck and porch additions;

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: October 27 2022

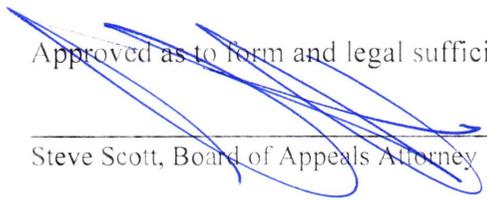
  
Wayne Miedzinski, Acting Chairperson

Those voting to grant the amendment:

Mr. Bradley, Ms. Delahay, Mr. Miedzinski,  
Mr. Payne and Mr. Richardson

Those voting to deny the amendment:

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.