

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP # 21-1062

Ho Property

NINTH ELECTION DISTRICT

DATE HEARD: February 10, 2022

ORDERED BY:

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

ENVIRONMENTAL PLANNER: LEAH LANGFORD

DATE SIGNED: MARCH 10, 2022

Pleadings

John Ho and Yvonne Le (“Applicants”) seek a variance (VAAP # 21-1062) to disturb the Critical Area Buffer (“the Buffer”) and to disturb the non-tidal wetland buffer to construct a new house.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on January 21, 2022 and January 28, 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, on or before January 26, 2022. 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 February 2, 2022. Therefore, the Board of Appeals (“Board”) finds and concludes the applicable notice requirements are met.

Public Hearing

A public hearing was conducted at 6:30 p.m. on February 10, 2022 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 Applicant.

The Property

The Applicant owns the unimproved property at 16431 Thomas Road, Piney Point, MD (“the Property”). The Property’s land use is Rural Preservation & Tidal Wetlands, is located in the Rural Preservation District (“PRD”) Zoning District, and is identified on Tax Map 69, Grid 8, Parcel 62. This lot is designated in the Chesapeake Bay Critical Area Buffer with a Resource

Conservation Area (“RCA”) Overlay.

The Variance Requested

The Applicant requests a Critical Area variance from § 71.8.3 of the St. Mary’s Comprehensive Zoning Ordinance (“CZO”) to disturb the Critical Area Buffer and from § 71.5.1.b.1 to disturb the non-tidal wetland buffer to construct a single-family dwelling.

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). Moreover, CZO § 71.5.1.b.1 requires that “[a] 25-foot buffer shall be preserved from the edge of non-tidal wetlands and shall be expanded up to 100 feet to include areas of adjoining hydric soils.” Similarly, development activities within the 100-foot non-tidal wetland buffer are not permitted unless an applicant obtains a variance. § 71.5.2.d.

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 (hereinafter “the Property”) is a 1.98-acre parcel of land located on St. George’s Island, adjacent to the tidal waters of the Potomac River. The Critical Area Buffer (“Buffer”) is established a minimum of 100-feet landward from the mean high-water line of tidal waters and wetlands. The Buffer is also expanded due to wetlands and hydric soils present on the property. CZO § 71.8.3. Therefore, it is constrained by the

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.”

Critical Area Buffer. See Ex. 2, Staff Report, Att. 2.

- Per the site plan, Ex. 2, Att. 3, the Applicant illustrates the permanent and temporary disturbance necessary to construct the proposed house, deck, and driveway. The proposed house impacts the Critical Area Buffer and Non-Tidal Wetland. Permanent and temporary disturbance in the Buffer requires a variance, as does disturbance to the wetland buffer.
- The Maryland Critical Area Commission provided a comment letter dated January 6, 2022, Ex. 2, Att. 4, which included the following statements: “We recommend that appropriate measures be taken to ensure the resiliency of the proposed improvements, as well as protection of the Buffer and wetlands. If the Board does grant this variance request, the required mitigation ratio is 3:1 for all permanent disturbance in the Buffer, 1:1 for all temporary disturbance, and an additional 1:1 ratio for the square footage of canopy coverage removed.”
- In accordance with COMAR 27.01.09.01-2 Table H, the applicant is required to provide mitigation at a ratio of 3:1 for permanent (6,908 s.f.) and 1:1 for temporary (5,138 s.f.) disturbances. A Major Buffer Management Plan for on-site planting will be required prior to the issuance of the building permit.
- CZO § 71.5.b.1 requires development to preserve a 25’ Non-tidal wetland buffer. A “Joint Federal/State Application for The Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland” has been filed with the Maryland Department of the Environment (“MDE”) and a copy of the MDE permit to disturb the wetlands will be required prior to the issuance of the permit for construction.
- The St. Mary’s County Soil Conservation District (“SCD”) has not yet approved the site plan. However, it is not uncommon for SCD to be the last approval due to its requirement

to receive six (6) sets of the final version of the site plan.

- If the variance is granted, it shall lapse one year from the date of the grant of the variance, if the Applicant has not obtained the building permit, per CZO § 24.8.1.
- The following Attachments to the Staff Report were introduced:
 - #1: Standards Letter of Intent;
 - #2: Critical Area Buffer Map;
 - #3: Site Plan;
 - #4: Critical Area Commission Comments;

Applicant Testimony and Exhibits

Steve Vaughan appeared before the Board on behalf of the Applicant. The following evidence was presented:

- The Applicant presented a slide show with photographs of the site, including aerials and photographs from the roadway and shoreline.
- The Property is 1.58 acres in size and has road frontage on Thomas Road, as well as a private way, Harm's Way.
- A site plan for development on the Property was submitted in 2005. That site plan required a variance and wetland permits, all of which were obtained, but the project was never commenced.
- There are parcels in the area that have built garages like that which we propose. They feel that with us moving to the island full time in 2022, that the development of this property which has laid abandoned since the early 1970's, will bring value to the area, and clean up the appearance that exist there today.
- The property is a recorded lot in an existing community constrained by zoning, health

requirements, and the critical area provisions other property owners under similar circumstances have or would have the opportunity to file for a variance and to seek relief for the regulations.

- The difficulty was not created by the Applicants nor their predecessors but is a result of the ordinances and regulations currently in place.
- The limit of disturbance has been kept to an absolute minimum. Sediment and Erosion Control will be in accordance with the current provision as detailed by MDE.
- The house has been sited so as to provide, to the greatest extent possible, a 50 feet distance between the house and the existing shoreline. To do so, the house had to be pushed into the edge of the wetlands.
- Applicants are in the process of attaining a wetlands permit and stormwater management plan. A 1,500 gallon cistern to collect runoff from the roof will be installed, as well as non-structural elements such as roof disconnects and other stormwater device management devices.
- The project will be connected to public sewer and a new well is proposed to be drilled. The existing well will be abandoned.
- Applicants are also requesting an RV stall to place in the existing gravel area southeast of the proposed house site. This will be for the Applicants to stay on the property while the house is under construction.
- The house will be elevated 3' over the 6' minimum elevation required for the floodplain.

Public Testimony and Exhibits

No members of the public appeared, either in-person or by teleconference, to provide testimony related to this request.

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 that the Applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

First, the Board finds that denying the Applicant's 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 Applicant has demonstrated that, absent the variance, he would be denied a use of the Property that would be both significant and reasonable. Specifically, the entirety of the Property falls within the Critical Area Buffer.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the RCA. The Applicant proposes to construct a house and driveway like others in the general vicinity of the Property and as may commonly be found in other properties across the RCA.

Third, the footprint of the house proposed by Applicants, as shown on the site plan, is consistent with the footprint of neighboring houses.

Fourth, the need for the variance does not arise from actions of the Applicant. Rather, the Applicant purchased the developed property in 2020.

Fifth, granting the variance would not adversely affect the environment. The Applicant will be required to mitigate the proposed development by planting approximately 30,000 s.f. of forest cover (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.

Sixth, the proposed development is the minimum necessary to achieve a reasonable use of the Property. Applicants seek only the right to build a new house and driveway.

For these reasons, the Board finds that granting the variance to construct the new house

will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area. Moreover, the Board finds that granting the variance will be in harmony with the general spirit and intent of the Critical Area Program.

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.

ORDER

PURSUANT to the application of John Ho and Yvonne Le, petitioning for a variance from CZO § 71.8.3 to disturb the Critical Area Buffer and from CZO § 71.5.1.b.1 to disturb the non-tidal wetland buffer to construct a new house; 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, that the Applicant is granted a Critical Area variance from CZO § 71.8.3 to disturb the Critical Area Buffer and from CZO § 71.5.2 to disturb the non-tidal wetland buffer to construct a new house.

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: MARCH 10, 2022

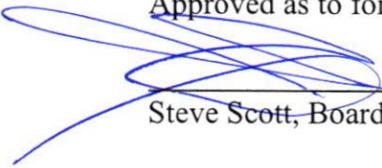

Daniel F. Ichniowski, Chairman

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.