

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 20-0184

KHANNA PROPERTY

FIFTH ELECTION DISTRICT

DATE HEARD: JULY 13, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: Aug 10, 2023

Pleadings

Amit Khanna (“Applicant”) seeks a variance (VAAP # 20-0184) from Comprehensive Zoning Ordinance § 71.8.3 to disturb the 100’ Critical Area Buffer for a new residence, detached garage, breezeway, deck and porch.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on June 23, 2023 and June 30, 2023. The hearing notice was posted on the property by June 28, 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 July 7, 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 July 13, 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 Applicant.

The Property

Applicant owns real property situate 41953 Swans Court, Leonardtown (“the Subject Property”). The Subject Property is in the Rural Preservation District (“RPD”), has a Resource Conservation Area (“RCA”) Critical Area overlay, and is identified at Tax Map 49, Grid 19, Parcel 245, Lot 3.

The Variance Requested

Applicant seeks a variance from St. Mary's County Comprehensive Zoning Ordinance ("CZO") § 71.8.3 to disturb the 100' Critical Area Buffer for a new residence, detached garage, breezeway, deck and porch.

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 a 1.78 acre lot, more or less, on Flood Creek. The Buffer is established 100' landward of the mean high-water line of tidal waters and tidal wetlands. The proposed new residence, detached garage, breezeway, deck, and porch impact the Buffer.
- In total, the site plan proposes 6,311 square feet of new lot coverage.
- Mitigation will be required at the ratio of 3:1 for permanent disturbance within the Buffer and 1.5:1 for removal of tree canopy. The applicant will provide 45,800 square feet of mitigation plantings and \$16,852.00 of fees-in-lie-of-mitigation to meet these requirements. A planting agreement and plan shall be required prior to the issuance of a building permit.

- In its response letter the Critical Area Commission stated all standards must be met, and drew specific attention to the necessity of a detached garage and a breezeway in their letter dated June 29, 2023.
- The Department of Land Use & Growth Management's stormwater review, the St. Mary's County Soil Conservation District, and the Health Department have all approved the proposed site plan.
- 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 before the Board by Wayne Hunt, of Little Silences Rest, Inc.

He offered testimony that included the following:

- The Subject Property consists of 77,418 square feet, 60,972 square feet of which are in the Critical Area Buffer. The area outside of the Critical Area Buffer is encumbered by the required sewage reserve area and property setback lines. There is no room to construct a dwelling without seeking a variance.
- Numerous properties in the Critical Area have been developed in a similar fashion as the Applicant's proposal.
- The limits of disturbance have been limited as far as is feasible, and stormwater

management being provided is roughly 10% above the minimum requirements.

- The home will be roughly 2,000 square feet, the proposed garage will be a one-story, two-car garage, and the breezeway will be covered but unenclosed.

Public Testimony

No members of the public appeared to offer testimony in support of or against this request.

Decision

County 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 jurisdictions 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 Applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance.

The Board finds that denying the Applicant's request would constitute 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. Here, Applicant has sufficiently demonstrated that, absent the variance, they would be denied a use of the Property both significant and reasonable. Principally, Applicant seeks to construct a single-family home of relatively modest size and a detached two-car garage, with a breezeway connecting the two; these are common and improvement amenities, even among other properties impacted by the Critical Area Buffer. Constructing a single-family dwelling is a foundational use of one's own real property, and the detached garage is a practical improvement

that will greatly facilitate the owner's use and enjoyment of the parcel, and augment the single-family home. Mr. Hunt's testimony that roughly four-fifths of the Property is encumbered by the Critical Area Buffer and that remainder is impractical, if not outright impossible, for development of the proposed improvements was detailed and compelling. Consequently, the Board finds that denial of the variance would constitute an unwarranted hardship.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicant of a use of land or a structure permitted to others. As noted above, improvements such as those proposed by the Applicant are commonly enjoyed by other similarly-situated properties encumbered by the Buffer.

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.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the applicant. Rather, Applicant is constrained by the physical characteristics of his lot and the Buffer's heavy encumbrance of it.

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 heavily mitigated. As noted by staff, over 45,000 square feet of mitigation plantings will be required, and the Applicant will pay fees-in-lieu for whatever cannot be located on the Property. Those fees-in-lieu will pay for plantings elsewhere in the Critical Area Buffer in St. Mary's County. These plantings are meant

to mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer. Moreover, the Board notes the Applicant will be offering more than the minimum stormwater management for this site.

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 law, the regulations in this subtitle, and the local Critical Area program. In total, the Applicant has demonstrated that a variance is necessary to achieve the intended uses he proposes. There are no practical alternatives to make these improvements elsewhere on the Property.

Additionally, in satisfying each of the necessary criteria the Applicant has overcome the statutory presumption against granting a variance.

ORDER

PURSUANT to Applicant's request for a variance from § 71.8.3 to disturb the 100' Critical Area Buffer for a new residence, detached garage, breezeway, deck and porch, 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 § 71.8.3 to disturb the 100' Critical Area Buffer for a new residence, detached garage, breezeway, deck and porch.

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: Aug 10, 2023



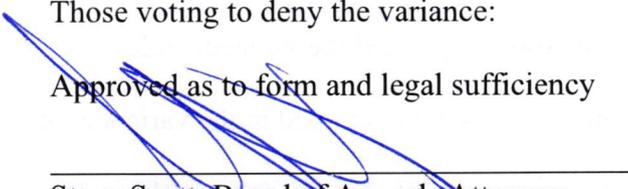
Daniel F. Ichniowski, Chairman

Those voting to grant the variance:

Mr. Ichniowski, Mr. Bradley, Ms. Delahay,
Mr. Payne, 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.