

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 21-1154

MATTINGLY PROPERTY

SEVENTH ELECTION DISTRICT

VARIANCE REQUEST HEARD: MARCH 10, 2022

ORDERED BY:

Mr. Ichniowski, Mr. Bradley, Mr. Miedzinski, Mr. Payne, and Mr. Richardson

ENVIRONMENTAL PLANNER: LEAH LANGFORD

DATE SIGNED: APRIL 14, 2022, 2022

Pleadings

Todd E. & Kelli D. Mattingly (“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 proposed additions to existing buildings, and for after-the-fact development activity in the 100-foot Critical Area Buffer (“Buffer”) that took place prior to Applicants’ ownership of the subject property.

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. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before March 2, 2022. The agenda was also posted on the County’s website on February 2, 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 March 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 amendment requested by the Applicant.

The Property

The subject property located at 20718 Clarence Gass Road, Avenue, MD 20609 (“the Property”). The Property is 3.48 acres, more or less, is zoned Rural Preservation District (RPD), has a Resource Conservation Area (RCA) Critical Area overlay, and is found at Tax Map 47, Grid 00, Parcel 312.

The Variance Requested

Applicant seeks a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to construct proposed additions (covered entries) to existing buildings, and for after-the-fact development activity in the 100-foot Critical Area Buffer (“Buffer”) that took place prior to Applicants’ ownership of the subject property.

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).

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 a 3.48-acre parcel located on Clarence Gass Road in Avenue, adjacent to the tidal waters of Back Creek.
- The Critical Area Buffer (“Buffer”) is established a minimum of 100-feet landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams. The entire property is constrained by this 100-foot Buffer.
- Applicants propose to cover two existing stoops, both of which lie within the Buffer. One addition shall be a 6’ x 18’ covered entry on to the Applicants’ existing house and one shall be 5’ x 8’ covered entry on the garage that contains an accessory apartment. Additional development depicted on the site plan falls outside the Buffer and does not need a variance for approval.

- Applicants also request an after-the-fact variance to legalize unauthorized lot coverage added by the Property's prior owners. This includes two "block picnic table areas," a fire pit, two wood decks, a bathroom addition to an accessory building, a porch added to the garage, a portion of the garage itself, and portions of the driveway and sidewalks to the house. See Exhibit 2, Attachment 4. Applicants did not know this development was unauthorized at the time they purchased the Property.
- Of this existing, unauthorized lot coverage, Applicants propose to remove 144 s.f. of Macadam, 160 s.f. of wood decking, and 48 s.f. of the block picnic tables.
- COMAR 27.01.09.01-2, Table H specifies 1,708 s.f. of mitigation for the unauthorized portions of the driveway installed previously, at a ratio of 7:1 (3:1 mitigation for permanent disturbance, 4:1 for the violation). There will also be mitigation, at a 3:1 ratio, for the proposed covered entries, for a total of 148 s.f. of plantings. There will be a required 17,491 s.f. of plantings, per COMAR 27.01.12.06.B(3) for Buffer disturbances.
- Other planting requirements include reforestation for removal of 936 s.f. of forest cover and 4,155 s.f. of Buffer establishment for new lot coverage outside the Buffer.
- The Maryland Critical Area Commission ("CAC") provided a comment letter dated January 7th, 2022, and supplemented with an additional letter on March 1, 2022. See Exhibit 2, Attachment 9. CAC opposes this variance request. Among other things, CAC believes that "there appears to be ample opportunity to reconfigure the extensive driveway areas to eliminate Buffer impacts and to

relocate the porch outside the Buffer,” and that Applicant, even without the additions proposed, would still have reasonable and significant use of their entire lot.

Applicant’s Testimony and Exhibits

The Applicants appeared in person before the Board, accompanied by Christopher Longmore as counsel. The following evidence was presented:

- Applicants purchased the property on February 28, 2020. It is undisputed that Applicants did not construct any of the excess lot coverage that is at issue in this matter, and that all development was present when Applicants purchased the property.
- Applicants believe they performed their due diligence in purchasing the property. Applicants worked through a realtor, the seller gave no notice of the alleged violation, and Applicants had no knowledge of the excess lot coverage until they applied for permitting for the covered entries this variance concerns.
- After multiple rounds of communication with the CAC, Applicants are submitting a site plan that includes the following reductions to lot coverage:
 - Removal of 216 s.f. of macadam
 - Removal of the “fire pit”
 - Removal of the block picnic tables
 - Removal of a portion of the driveway southwest of the accessory apartment/garage.
 - In total, 783 s.f. of lot coverage – which Applicants did not create – will be removed by Applicants
- Mitigation plantings would be performed as follows:
 - 1,708 s.f. of after-the-fact permanent disturbance mitigation, at a 7:1 ratio

- 148 s.f. of new permanent disturbance mitigation, at a 3:1 ratio
- 936 s.f. of reforestation at a 1:1 ratio
- 4,155 s.f. of buffer establishment at a 1:1 ratio
- In total, 17,491 s.f. of total plantings will be performed under Applicants' plan
- Applicant made the following statements regarding the additional actions requested by the CAC:
 - Removal of the concrete portion of the driveway will render access to the existing two car garage impossible.
 - Removing the porch from the accessory apartment/garage will structurally harm the building and, additionally, require significant reconstruction of the garage/accessory apartment.
 - Removing the macadam portion of the garage parking would prevent cars from entering and exiting the garage in a safe manner, particularly if required to plant there as well.
- Applicants believe the shape and nature of this Property significantly restrict available development on the Property, more so than typical waterfront lots constrained by the Critical Area. The Property is a "peninsula," with limited space for development.
- Denial of the after-the-fact variance would prohibit Applicants from full use and enjoyment of existing structures.
- The after-the-fact variance relates predominantly to driveway access to the accessory structures. These structures are "modest" and of a nature that is typical for lots of this area. Denial of the variance would, in effect, be denial of Applicants' ability to use these structures as intended, and would not confer a special privilege.

- The request is not based upon actions of the Applicants. All unpermitted development that is the subject of the after-the-fact variance was created by prior owners, and the fact that it was unpermitted was not disclosed to Applicants.
- The mitigation plantings that will be required will improve the water quality, fish and wildlife habitat, or natural environment of the Critical Area. Plantings will leave the Property in a condition “much better” than the condition it is in at present.
- Applicants believe the requested variances are the minimum necessary to achieve a reasonable use of the property.

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. Applicants testified that denying the after-the-fact variance would effectively deny them safe access – and therefore, a significant use – of their garage and accessory structure. Applicants noted that these accessory structures are modest and typical for similar lots in the Critical Area. Based upon pictures and site plans provided by staff and Applicants, it appears the CAC's proposal would see the removal of roughly half the concrete portion of the Applicants' existing driveway in front of the garage parking bay, and the angle for ingress and egress of the garage would be quite sharp. Therefore, the Board of Appeals finds that denial of this variance would impose an unwarranted hardship upon Applicant.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Resource Conservation Overlay. Applicants seek, in summary, a ratification of existing driveways and

walkways which enable access to their accessory structures, and the addition of modest covered entryways to the buildings. These are not structures or building features atypical to similarly sited homes.

Third, granting a variance to will not confer a special privilege upon Applicants. Applicants' proposed site plan asks for the lot coverage that will be necessary for safe and sensible access to and from their accessory structures. Applicants note that removal of the existing porch would structurally compromise the garage. Moreover, Applicants have offered the removal of excess lot coverage that they feel can be given up without surrendering a reasonable and significant use of their property. Additionally, Applicants noted that they participated in a lengthy back-and-forth with the CAC to refine their site plan, and that while the CAC remains opposed to the current site plan, it is, nonetheless, the product of incorporating much of the feedback received from the CAC.

Fourth, the need for the variance does not arise from actions of the Applicant. The Applicants' primary issue in this matter is the existence of unpermitted excess lot coverage, and it is undisputed that the Applicants are not responsible for its development. Applicants appear to have acted with due diligence in securing the Property, and cannot be expected to have reasonably foreseen the discovery of this issue.

Fifth, granting the variance would not adversely affect the environment. The Applicant 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. In total, over 17,000 square feet of mitigation plantings will be performed – including mitigation intended to remedy the prior owner’s violation.

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.

Finally, the Board of Appeals finds that the requested variance is the minimum necessary to achieve the reasonable use Applicant pursues. As noted previously, Applicants testified that the existing lot coverage which they ask to retain is necessary to retain full, safe, and practical use of their driveways and garage, and to maintain the building’s structural integrity.

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 Applicant is 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.

Here, the Applicant has demonstrated that, were the Board of Appeals to strictly interpret the CZO, the particular physical surroundings of the property would result in practical difficulty for the Applicant. As Applicants noted the Property in question is peninsula-like and encumbered by the Critical Area, and the existing placement of the house and accessory structures leaves the Applicants with limited options on how and where to provide for their access. And to the second factor, these particular constraints are conditions not generally present on other parcels in the Rural Preservation District and the Resource Conservation Area overlay.

Third, the purpose of seeking the variance is not “based exclusively upon reasons of convenience, profit or caprice.” Rather, Applicant is attempting to make the best of a situation where they are greatly inconvenienced by the actions of prior owners of the Property, for which Applicants bear no fault. Applicants have engaged in good-faith discussions to bring their Property into compliance, and to only leave the minimum necessary amount of lot coverage.

Fourth, the need for the variance does not arise from actions of the Applicant. As noted previously, Applicants bear no responsibility or fault for the actions of their prior owners.

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 have been notified of the variance request to provide them with an opportunity to speak on the matter.

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. Vision 9, articulated in Chapter 3 of the requires that land and water resources be carefully managed to restore and maintain our living ecosystems. Applicants note the extensive mitigation they will be required to perform if this variance is granted, and noted that this Property will be left “better” as a result of these plantings. Without approval of this variance, Applicants will not be required to perform these plantings, and the Property may be left as-is. Accordingly, the Board of Appeals concurs that the environmental stewardship the Applicants’ planting agreement and buffer management agreement will impose upon them will benefit the Property and surrounding natural habitats.

ORDER

PURSUANT to the application of Todd E. & Kelli D. Mattingly, petitioning for a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to construct proposed additions to existing buildings, and for after-the-fact development activity in the 100-foot Critical Area Buffer that took place prior to Applicants’ ownership of the subject property; 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 Applicant is granted a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to construct proposed additions to existing buildings, and for after-the-fact development activity in the 100-foot Critical Area Buffer that took place prior to Applicants’ ownership of the subject property;

UPON CONDITION THAT, Applicants remove the lot coverage shaded in yellow on the site plan depicted on slide 20 of Applicants' presentation and perform the plantings required by Critical Area Planting Agreement 21-1154.

Additionally, the foregoing amendment is also subject to the following 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: April 14, 2022, 2022

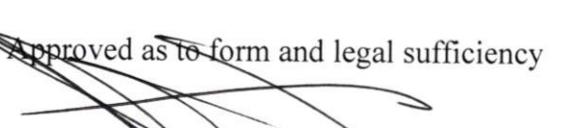

Daniel F. Ichniowski, Chairperson

Those voting to grant the amendment:

Mr. Ichniowski, Mr. Bradley, Mr. Miedzinski, Mr. Payne, Mr. Richardson

Those voting to deny the amendment:

~~Approved as to form and legal sufficiency~~

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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.