

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-0834

MELLEN PROPERTY

SEVENTH ELECTION DISTRICT

VARIANCE REQUEST HEARD: JANUARY 11, 2024

ORDERED BY:

**Mr. Hayden, Mr. Bradley, Mr. Payne,
Mr. Richardson, and Ms. Weaver**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: February 8, 2024

Pleadings

Richard and Erika Mellen (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 71.8.3 disturb the Critical Area Buffer (“the Buffer”) to construct a replacement home.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on December 22, 2023 and December 29, 2024. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before December 27, 2023. The agenda was also posted on the County’s website on January 5, 2024. 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 January 11, 2024 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 proposed amendment requested by the Applicants.

The Property

The subject property may be found at 38035 Beach Road in Colton’s Point, Maryland (“the Property”). The Property is 1.2 acres, more or less, is zoned Residential Neighborhood Conservation (“RNC”), has a Limited Development Area (“LDA”) Critical Area overlay, and is found at Tax Map 53A, Grid 5, Parcel 1.

The Variance Requested

Applicants seek a variance from CZO § 71.8.3 disturb the Critical Area Buffer to construct a replacement house.

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 (“the Buffer”). 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 a staff report and PowerPoint presentation that included the following testimony:

- The Property is a grandfathered lot in the Critical Area. It was recorded prior to the adoption of the Critical Area Program on December 1, 1985.
- Per the Maryland Department of Assessments and Taxation, the Property is a 1.2 acre parcel. It is located on Beach Road and is adjacent to the tidal waters of the Potomac River and Dukehart's Creek. It consists of an existing dwelling built in 1920, prior to the adoption of local zoning regulations.
- The Property is encumbered by the Buffer as shown on the staff report's Critical Area Map.
- The site plan proposes removing an existing dwelling and constructing a replacement. The proposal impacts the Buffer.
- If approved, mitigation will be required at a ratio of 3:1 for permanent disturbance

within the Buffer and 1:1 for new lot coverage outside of the Buffer. The Applicant will additionally receive 1:1 credit for lot coverage removed. Mitigation required for this project would amount to 5,452 square feet of plantings. A planting agreement and plan will be required prior to the issuance of any building permit.

- The Critical Area Commission's ("CAC") response letter of November 6, 2023 states that it appears the Applicant can reconfigure some of the improvements to move them outside of the Buffer. Accordingly, the CAC believes an unwarranted hardship cannot be found for the project as presented in its current form.
- Approvals have been received from LUGM for zoning, stormwater management, and floodplain reviews. Approvals from the Soil Conservation District and Health Department are still required.
- Attachments to the Staff Report:
 - #1: Critical Area Standards Letter
 - #2: Critical Area Map
 - #3: Site Plan
 - #4: Location Map
 - #5: Zoning Map
 - #6: Critical Area Commission Response

Applicants' Testimony and Exhibits

Applicants were represented before the Board by Jeffrey Nieman, a licensed surveyor from Linear Surveys, Inc. Mr. Nieman presented a slideshow which contained site plans, building plans, photographs of the site, and offered oral testimony. The following evidence and testimony was

included in his presentation:

- The subject property is 1.21-acres and is improved by a residential building constructed in 1920.
- The project will include the removal of the existing dwelling, two sheds, and a septic tank. Applicants propose replacing these improvements with a new dwelling, a new BNR septic tank, and replacement of piping within the existing drain fields. In total, this will require 6,417 s.f. of site disturbance within the Buffer.
- Mr. Nieman stated the existing home is not suitable for year-round habitation and is in poor repair; it lacks insulation and has a crumbling foundation.
- The new house foundation will fall on the same wall line as the existing house, with the exception of the proposed covered porch. At the same time, the house will be moved 6' to the southeast out of the Buffer.
- None of the 15% slopes on the Property will be disturbed.
- A single cistern in the front yard will satisfy stormwater management needs.
- In total, there will be a net increase of 129 s.f. of impervious surface coverage within the Buffer. Total proposed disturbance will be 6,417 s.f. Total square footage of the new house and garage will be 2,507 s.f. compared to 1,864 s.f. for the existing house.
- Regarding the apparent discrepancy between the total net coverage increases in the Critical Area Commission's letter and his presentation, Mr. Nieman reaffirmed his calculations. Ms. Clements said the CAC's letter must be a 'typo.'
- An additional driveway on the property noted by Mr. Payne was described by Mr. Nieman as an easement benefitting the property owners on nearby Dukehart's Island and cannot be removed.

Public Testimony

The following members of the public appeared to present testimony:

Joseph and Rosemary Jarvis, 37995 Beach Road

- Mr. and Mrs. Jarvis reside at a neighboring parcel on Dukehart's Island. The only means of access to their property is through a the road easement that passes over the northern and western edges of the Mellon property. They stressed that this access is necessary and urged the Board to preserve their right to continue using the easement. Mr. and Mrs. Jarvis also submitted written comments prior to the meeting that are part of the record.¹

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

¹ A lengthy discussion was had between Mr. and Mrs. Jarvis, members of the Board, counsel to the Board, county staff, Mr. Nieman, and Mr. Mellon about Mr. and Mrs. Jarvis' access their home. While not ultimately relevant to the requested variance, the Board notes Mr. Mellon's statement he has no objections to continued use of any easement by Mr. and Mrs. Jarvis. The Board notes, as well, that the Mellons appear to have taken no adverse actions against any interest Mr. and Mrs. Jarvis' may have in the easement.

- 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 jurisdiction's 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 Applicants are entitled to the requested relief.

The Board finds that denying the Applicants' 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, Applicants have sufficiently demonstrated that, absent the variance, they would be denied a use of the Property both significant and reasonable. Constructing a single-family dwelling is a foundational use of one's own real property, as is the replacement of an existing, but functionally obsolete, dwelling with a modern equivalent. The proposed replacement home, including its attached garage and covered porches, is of the same nature and character as the existing home. And it is largely of the exact same extent: the Board finds compelling Mr. Nieman's description of the project as a 129 s.f. increase, overall, of lot coverage in the Buffer, versus the larger increases described in the Critical Area Commission's response letter. Applicants, working on a very limited space, appear to have done what they can to minimize impacts to the Buffer. Acknowledging that the vast majority of the parcel appears to be encumbered by the Critical Area Buffer, Applicants have shifted the replacement house six feet further out of the Buffer into the relatively small area of their parcel that is not encumbered by the Buffer. This will also allow the Applicants to largely keep the same foundation and footprint, as Mr. Nieman described. The Board does not find any readily available alternative was presented. Additionally, the Board notes the mitigation that will be performed and the replacement of the existing, presumably aged, septic tank with a modern replacement. Both are positive improvements that will benefit the environment and would not be implemented unless the project is approved.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicants of a substantial use of land or a structure permitted to others. Single-family homes, attached garages, and covered porches are commonplace improvements to properties, even those properties located in the Buffer. As noted during the hearing, many neighboring properties are similarly developed with houses and improvements protruding even further into the Buffer as

the Applicants' home. In all, the Applicants' proposal seems to be one that is typical for similarly situated properties within the Limited Development Area.

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. Applicants avail themselves of their right to seek a variance and are hewing as close to the Critical Area program's strictures as may be reasonably expected of their proposal.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the Applicants. Rather, Applicants are constrained by the physical characteristics of their lot and its existing configuration. The existing home was built in 1920, six and a half decades prior to enactment of the Critical Area program. Utilizing the existing home's footprint, which is desirable for both the Applicants and the environment, necessarily constrains the Applicants to the existing home's location. The Board also notes that it is impossible to consider asking Applicants to remove further lot coverage by reducing lot coverage contributed by the easement, as that easement is necessary for access to the three homes on Dukehart's Island.

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 5,000 square feet of mitigation plantings will be required, and the Applicants will perform all plantings on-site. These plantings will help mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer.

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 Applicants have demonstrated that a variance is necessary to achieve the intended use they propose. There are no practical alternatives to make these improvements elsewhere on the Property, and the overall net increase in lot coverage is within lot coverage limits. The impacts to the Buffer of redevelopment will be offset by the mitigation and other site improvements the Applicants shall make.

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

ORDER

PURSUANT to the application of Richard and Erika Mellen, petitioning for a variance from CZO § 78.3 to disturb the Critical Area Buffer to construct a replacement house; and

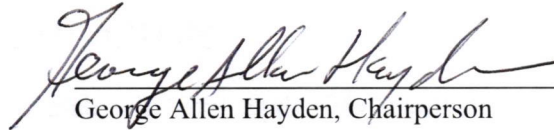
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is,

ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 24.8, that the Applicants are granted a variance from CZO § 78.3 to disturb the Critical Area Buffer to construct a replacement house;

UPON 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 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: February 8, 2024

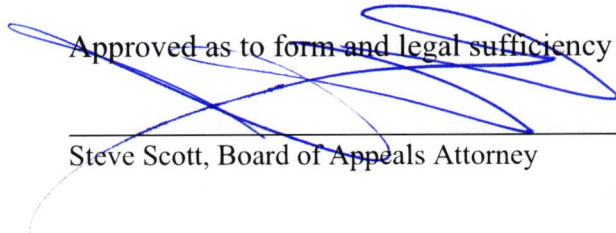

George Allen Hayden, Chairperson

Those voting to grant the variance:

Mr. Hayden, Mr. Bradley, Mr. Payne, Mr. Richardson, and Ms. Weaver

Those voting to deny the variance:

~~Approved as to form and legal sufficiency~~



Steve Scott, Board of Appeals Attorney

NOTICE TO APPLICANTS

Within thirty (30) days from the date of this Order, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Petition for Judicial Review in the St. Mary's County Circuit Court. 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.