

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-1484

OKONIEWSKI PROPERTY

NINTH ELECTION DISTRICT

VARIANCE REQUEST HEARD: JANUARY 12 AND MARCH 9, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: MAY 11, 2023

Pleadings

Debra and William Okoniewski (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer for an after the fact wood ramp and from Schedule 32.1 for a reduction of the mandatory front and side setbacks for an after the fact shed.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on December 23, 2022 and December 30, 2022. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before December 29, 2022. The agenda was also posted on the County’s website on January 4, 2023. The hearing held January 12, 2023 was continued on the record to March 9, a date certain. Therefore, the Board of Appeals (“Board”) finds and concludes the variance request’s notice requirements have been met.

Public Hearing

A public hearing was conducted at 6:30 p.m. on January 12, 2023 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland, and continued on the record to March 9, 2023 at the same time and location. 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 property is 45834 Patuxent Lane, California, MD and consists of 0.23 acres, more or less, is zoned residential Medium density (“RM”) and is found at Tax Map 35, Grid 1, Parcel 1 (“the Subject Property”). The portions of the Subject Property proposed for development lie within

a Limited Development Area (“LDA”) overlay and Buffer Management Overlay (“BMO”) of the Critical Area.

The Variance Requested

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer for an after the fact wood ramp and from Schedule 32.1 for a reduction of the mandatory front and side setbacks for an after the fact shed..

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). Schedule 32.1 requires a 25’ front setback and 10’ side yard setback for all structures in the RM.

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 Subject Property contains a single-family dwelling and accessory structures. According to the State Department of Assessments and Taxation the structure was built in 2022.
- The Applicant is seeking approval for an after-the-fact walk to the pier and a shed.
- The Applicant is requesting a 15’ reduction of the front yard setback to 10’ and a 9’ reduction of the west side yard setback to 1’.
- Walkways for access to an existing pier are permitted up to 3’ in width within the

Buffer per Section 71.9.8.j.

- Mitigation is required at a ratio of 3:1 for the walkway that is in excess of the three-foot wide riparian access permitted, and the approvable portion of the walkway within the Buffer and the shed are to be mitigated at a ratio of 1:1. The Applicants will be required to plant additional mitigation at a ratio of 4:1 for the development performed without the requisite permit or variance. In total, 1,520 s.f. of mitigation plantings will be required.
- The Critical Area Commission provided a letter dated October 18, 2022 responding to the variance request.
- The site plan has been approved by the Health Department and is exempt from Stormwater Management and Soil Conservation standards.
- Attachments to the Staff Report:
 - #1: General Standards Letter
 - #3: Critical Area Standards Letter
 - #3: Site Plan
 - #4: Critical Area Commission Letter
 - #5: Location Map
 - #6: Zoning Map
 - #7: Critical Area Map

Applicants' Testimony and Exhibits

Applicants were represented before the Board by Kevin Norris, Esq. The following evidence testimony was among that provided to the Board, including Applicant's slideshow, pictures, and survey depicting the Property, all of which have been entered as part of the record of

this proceeding:

- Approximately half of the lot is located within the 100' Buffer, and restricted by septic drain fields in the front yard and a driveway on one side of the property. The shed is located in the only area feasible given those constraints.
- The property is exceptionally narrow for lots typically found in the RM zoning district, and is heavily encumbered by the Critical Area buffer.
- Mr. Okoniewski is a disabled veteran with an 80% service-connected evaluation rating with the Veterans' Administration, progressing towards a 100% rating.
- The walkway is necessary for safe access to the pier for ambulatory devices as the Okoniewskis age in place at their residence.
- Deck boards are 42.5" wide, 6.5" inches above the minimum width of a handicapped accessibly walkway/ramp to the pier.
- Many sheds in the immediate environs of the Applicants' house are also in violation of the mandatory front and side setbacks.

Public Testimony

Written letters or correspondence from the following individuals were received and entered into the record: Robert Bolton and Joanne Williams, Stacy Levinrad, James and Judith Schmidt, Henry and Linda Hwong, Tom Benefield, Carol Choporis, and Chris and Heidi Kaselemis. The following members of the public appeared to offer in-person testimony related to the variance request:

- *Joanne Williams, California*
 - Ms. Williams is an adjoining property owner who opposed the variance request. Among her testimony, Ms. Williams presented pictures of the development

showing silt fences and erosion which she alleged impacted her 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. These criteria are substantially similar to the criteria of COMAR 27.01.12.04.¹ They are summarized as follows: (1) whether a denial of the requested variance would constitute an unwarranted hardship (analogous to COMAR 27.01.12.04(1)); (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 (analogous to COMAR 27.01.12.04(2)); (3) whether granting the variance would confer a special privilege on the Applicants (analogous to COMAR 27.01.12.04(1)); (4) whether the application arises from actions of the Applicants (analogous to COMAR 27.01.12.04(4)); (5) whether granting the application would not adversely affect the environment and would be in harmony with the Critical Area Program (analogous to COMAR 27.01.12.04(6)); and (6) whether the variance is the minimum necessary for the Applicants to achieve a reasonable use of the land or structures (analogous to the hardship test of COMAR 27.01.12.04(1)).² Maryland Code Annotated, Natural Resources Article, § 8-

¹ The Board acknowledges COMAR 27.01.12.04 is the controlling authority regarding the standards by which the instant variance request must be governed. In the past, the Board has applied the standards of St. Mary's County's Comprehensive Zoning Ordinance. It is the Board's understanding this section of the CZO is in the process of being updated to reflect COMAR. As discussed at greater length in the body of this order, the Board's discussion in this order will use CZO 24.4.1 as an organizational aid. This will maintain consistency with past opinions and, more compellingly, it is how the Applicants were asked to prepare their standards letter. The Board does find that, except as noted in Footnote # 2, the criteria of CZO § 24.4.1 and COMAR 27.01.12.04 bear substantial similarity to each other, and that an analysis of the standards of one is, effectively, an analysis of the standards of the other.

² The Board identifies two criteria in COMAR 27.01.12.04 that it does not believe have direct analogues in CZO § 24.4.1, those being COMAR 27.01.12.04.B(5) and (7). With respect to B(5), it does not appear to the Board that the Applicants' variance request arises from any conforming or nonconforming condition on any neighboring property. With respect to B(7), the Board believes that, by satisfying all other standards of the Critical Area Program and the Comprehensive Zoning Ordinance, and for the salutary effects of the proposed mitigation and other considerations mentioned in the body of this order, that the proposed project is in harmony with the Critical Area Program.

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 with respect to the request for a variance from the provisions of the County's Critical Area program.

First, the Board finds that denying the Applicants' request would constitute an unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Supreme Court of Maryland³ 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. *Assateague Coastal Trust* requires the Applicants to first identify a use that would be significant. The Applicants constructed a walkway and a ramp that would provide access to an existing pier. The ability to use the pier is a significant and reasonable use, and the steep topography of the neighbors' shore makes it apparent that some manner of steps or path are necessary to reach the pier. Mr. Okoniewski presented reasonable and particularized evidence of a disability that limits his ambulation – and the looming prospect of more pronounced limitations likely to arise in the near future. The proposed walkway and ramp will allow access to the pier with the aid of ambulatory devices in compliance with the ADA. The Board finds that such

³ The Supreme Court of Maryland was then known as the Court of Appeals. An amendment to the Maryland Constitution renaming the Court of Appeals to the Supreme Court of Maryland was ratified in the 2022 election. Simultaneously, the Court of Special Appeals was renamed the Appellate Court of Maryland.

handicapped accessibility is reasonably necessary for Mr. Okoniewski and that deprivation of the walkway would amount to deprivation of Mr. Okoniewski's right of riparian access. Moreover, the Board finds that such riparian access is a right any similarly-situated property owner should expect to enjoy.

Regarding whether the need for the variance arises from the actions of Applicants, Applicants are constrained by the natural conditions of the Subject Property and, in particular, the steep topography at the shoreline.

The Board finds that granting the variance would not adversely affect the environment. A total of 1,520 square feet of mitigation plantings will be required. Mitigation is required by the Critical Area Program to offset and balance any potential effects of permissible development. Accordingly, the Board finds the proposed development, properly mitigated, will not result in an overall adverse effect upon the environment.

On whether the proposed development proposes the minimum disturbance necessary to achieve the sought-after use, the Board finds that it is. The Board notes Applicants' testimony that the width of the deck barely exceeds the **minimum** width required under the Americans with Disabilities Act. Given the testimony presented by Applicants and Counsel, the Board agrees that it is not reasonable to expect or ask the Applicants to reduce the width of the walkway any further than what it is. Its location in the Buffer is unavoidable considering its purpose of providing riparian access.

Finally, the Board discusses whether this development can be in general harmony with the Critical Area Program. The Board finds it is. The Applicants, seeking a reasonable and significant use of their property, have presented a project that presents a minimal impact to the Critical Area Buffer.

As a result of satisfying these standards, 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.

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 standard variance, such as that required to grant the variance for the side setbacks, 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 not entitled to full relief from the requirements of Schedule 32.1. Though the Board finds that all standards are satisfied with respect to Applicants' request for a variance from the front setback requirements, the Board does not find them entitled to relief from the requested side yard setback.

Applicants must fulfill each and every one of the standards enumerated above; should one fail, the variance must be denied. The Board does not find that strict interpretation of the CZO would result in practical difficulty. CZO § 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 Board is not convinced that the difficulties Applicants would face if forced to relocate their existing shed to comply with the setbacks required by Schedule 32.1 are unnecessarily burdensome. The testimony of the Applicants was that such a change could be made. While the Board notes the Subject Property's narrowness and the Applicants' survey showing other similarly encroaching sheds, the Board cannot determine, given the Applicants' willingness to relocate the shed if so ordered, that Applicants would be denied all use of the shed or faced with unnecessary burdens if forced to relocate it.

Because the Applicants have failed to demonstrate they have met the first standard, the Board needs not, and does not, make any findings regarding the remaining standards with respect to the requested variance to the side yard setback. This aspect of the variance request with respect to Schedule 32.1 will be denied.

ORDER

PURSUANT to the application of Debra and William Okoniewski, petitioning for a variance from Comprehensive Zoning Ordinance Section 71.8.3 to disturb the Critical Area Buffer for an after the fact wood ramp and from Schedule 32.1 for a reduction of the mandatory front and side setbacks for an after the fact shed; 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 Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer for an after the fact wood ramp; and it is,

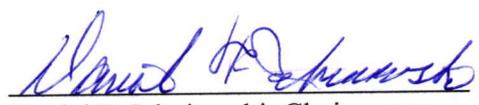
ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 21.1.3.a and CZO § 24.8, the Applicants are granted a variance from Schedule 32.1 for a reduction of the mandatory front setback for an after the fact shed;

ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 21.1.3.a and CZO § 24.8, the Applicants are denied a variance from Schedule 32.1 for a reduction of the mandatory side setback for an after the fact shed;

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 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.

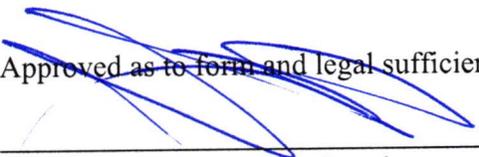
Date: MAY 11 , 2023


Daniel F. Ichniowski, Chairperson

Those voting to grant the amendment:

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

Those voting to deny the amendment:

Approved as to form and legal sufficiency:

Steve Scott, Attorney to the Board

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.