

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 24-1624

REING PROPERTY

SIXTH ELECTION DISTRICT

DATE HEARD: March 13, 2025

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: April 10, 2025

Pleadings

Michelle A. Cerra Reing and Michael Patrick Reing (“Applicants”) seek after-the-fact variances (VAAP # 24-1624) from St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 41.5.3.i(1) to exceed lot coverage limits and Section 71.8.3 to disturb the 100’ Critical Area Buffer to replace a patio and decks.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 21, 2025 and February 28, 2025. The hearing notice was posted on the property by February 25, 2025. 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 by Wednesday, March 5, 2025. 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 March 13, 2025 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 Applicants.

The Property

Applicants own real property situate 44689 Three Coves Road, Hollywood, Maryland (“the Subject Property”). The Subject Property is in the Rural Preservation District zoning district (“RPD”), lies within a Limited Development Area (“LDA”) Critical Area overlay, and is identified

at Tax Map 27, Grid 9, Parcel 926.

The Variance Requested

Applicant seeks an after-the-fact variance from CZO § 41.5.3.i(1) to exceed lot coverage limits¹ and § 71.8.3 to disturb the 100' Critical Area Buffer to replace a patio and decks.

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). CZO § 41.5.3.i(1) establishes lot coverage limits of no more than 15% of the lot area for lots and parcels large than 0.5 acres in size. After-the-fact variances may be granted, but only after an Applicant has satisfied any criminal, civil, or administrative penalties assessed for any violation, knowing or unknowing, of the Critical Area program, prepared a restoration or mitigation plan to abate impacts caused by the violation, and undertaken to perform the abatement measures in such an approved restoration or mitigation plan. COMAR 27.01.12.06.B.

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 Property is a grandfathered lot in the Critical Area of St. Mary's County, since it was recorded in the Land Records of St. Mary's County at Plat Book 59 Page 94 on September 13, 2009 (Attachment 2), in accordance with the Maryland Critical Area Program adopted December 1, 1985. The existing single-family dwelling was built in 2007 according to Real

¹ Both the staff report and Applicants' presentation seem to agree that total lot coverage will be 16 square feet short of the maximum limit. That would appear to obviate the need for the lot coverage variance. However, as it was part of the original request we shall include it in this order.

Property Data, the Department of Assessments and Taxation.

- According to the site plan, this property is a 1.09-acre lot located on Three Coves Road in Hollywood and is adjacent to the tidal waters of Cuckold Creek.
- The Critical Area Buffer (the “Buffer”) is established a minimum of 100-feet landward from the mean high-water line of tidal waters and expanded for highly erodible soils and steep slopes (CZO 71.8.3). Therefore, the Property is constrained by the Buffer (Attachment 3).
- The Property, as it currently exists, has 8,568 square feet of lot coverage. The site plan (Attachment 4) proposes removing 1,462 square feet of unpermitted gravel pathways, and replacing unpermitted patio, steps and decks, while keeping a portion of the unpermitted driveway and shed. The total lot coverage for the parcel with the new construction is 7,106 square feet, a 1,462 square foot reduction in lot coverage.
- The Property, as determined by CZO 41.5.3, limits lot coverage to 15 percent of the lot area for lots and parcels that are larger than ½ acre. Thus, the lot coverage limit for this property is 7,122 square feet. After several revisions to the site plan, the Applicant is proposing to add 1,462 square feet of new lot coverage resulting in a total 7,106 square feet after removal 1,462 square feet of unpermitted lot coverage, which falls below the maximum lot coverage limit by 16 square feet, therefore a variance is not required for exceeding lot coverage limits.
- The Critical Area Commission responded on February 27, 2025. The Commission states “a variance to an after-the-fact variance request may not be issued until the applicant has complied with the after-the-fact variance procedures outlined in COMAR 27.01.12.06 including that the applicant has fully paid all administrative, civil, or criminal penalties,

has prepared a restoration or mitigation plan approved by the local jurisdiction, and has performed the required abatement measures. The site was determined to have 1,462 sf of unpermitted lot coverage and violation mitigation was accessed at a rate of 4:1 for a total of 10,300 square feet. The Applicant paid the violation penalty prior to the Board of Appeals hearing on March 13, 2025. Additionally, the Commission states that the applicant has the burden to prove each and every Critical Area variance standard, including the standard of unwarranted hardship (Attachment 8).

- Mitigation is required at a ratio of 4:1 for the violation mitigation, 3:1 for permanent disturbance within the Buffer (COMAR 27.01.09.01-2 Table H) and 1:1 for new lot coverage outside of the Buffer. The mitigation required is 13,234 square feet of mitigation plantings to meet these requirements. A planting agreement and plan will be required prior to the issuance of the building permit.
- The Department of Land Use and Growth Management approved the site plan for zoning requirements. The Health Department approved the site plan. An exemption was issued from the St. Mary's County Soil Conservation District or Stormwater Management as the proposal calls for less than 5,000 square feet of soil disturbance.
- The following Attachments to the Staff Report were introduced:
 - #1: Critical Area Standards Letter;
 - #2: Plat Book 59 Page 94
 - #3: Critical Area Map
 - #4: Site Plan;
 - #5: Location Map;
 - #6: Land Use Map;

#7: Zoning Map; and,

#8: Critical Area Commission Response

Applicant Testimony and Exhibits

Applicant Michelle Reing appeared before the Board with Andrew Moore, from McHale Landscape Design, Inc. Also present with Applicant and Mr. Moore was Christopher Longmore, Esq., of Dugan McKissick & Longmore LLC. Mr. Moore presented a slideshow that included the Applicants' site plan, pictures of the property, and other information pertinent to the application. The evidence offered included, but was not limited to, the following:

- The Applicants purchased the property on October 1, 2020. Unbeknownst to them, numerous existing improvements – including a gravel driveway expansion, gravel walkways, a rear gravel patio, and wooden access steps leading to a pier – had been installed without receiving permits.
- Applicants contacted McHale Landscaping in September, 2022 to restore and stabilize the hillside behind their house. As part of this effort, many plantings were made at that, as more particularly described on Page 2 of the Applicants' presentation.
- In 2024, Applicants sought permitting to replace a portion of the gravel walkways with at-grade decking and to convert the rear gravel patio to stone pavers. During this process the Applicants first discovered that the previous improvements were unpermitted.
- Applicants will remove 1,462 square feet of unpermitted features, resulting in a final lot coverage of 7,106 square feet, within the maximum allowable coverage of 7,122 square feet.
- A 30' access easement across the northeast of the property is occupied by a neighbor's driveway, and not removable.

- Approximately 70% of the site is covered by a forested canopy.
- Applicants have supplied a bond check in the amount of \$14,460.00 and have signed the required Critical Area Planting Agreement.

Public Testimony

No members of the public appeared to offer in-person testimony for or against the project.

Decision

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 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)

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 of this matter, the Board finds and concludes the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance.

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 Court of Appeals stated "unwarranted hardship," as used in the Natural Resources Article, has the following meaning:

[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 Board concludes the Applicant has satisfied the standard of an unwarranted hardship. The Applicants seek to maintain and replace existing, albeit unpermitted, walkways, patios, and deck spaces on the waterside of the existing house. These improvements accentuate Applicants' outdoor use of the property, improve their recreational opportunities, and are of a nature and scale that are commonly seen before this Board. There is nothing unreasonable about the requested improvements in and of themselves. Because of the existing location of the house it is not feasible to locate these further outside the Buffer than they are being proposed. Accordingly, we find denial of these improvements would be an unwarranted hardship.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Limited Development Area. The improvements, as noted above, are commonplace, and Applicants'

presentation asserts that the many other properties in the neighborhood “have similar modest patios and deck spaces on the water side of their houses.”

Third, granting a variance will not confer a special privilege upon the Applicant. The right to ask for a variance to the Critical Area program’s strictures is required by law. Applicants’ proposed site plan has been subjected to a public hearing, held to the required standards, includes all required mitigation plantings, environmental considerations, and conforms to the greatest extent it can to all applicable regulations. Applicants carry a high burden of proof to meet before a variance can be granted. We cannot find any definition of “special privilege” in statute or case law to suggest that one has been conferred when an Applicant, in compliance with the procedural requirements noted above, meets that burden.

Fourth, the need for the variance does not arise from the actions of the Applicant or their predecessors in title. Despite the Board’s sympathies with the Applicants over their dilemma, the fact Applicants are forced to answer for the misdeeds of their immediate predecessors in title is not a factor the Board may consider: the hardship of removing them does not abrogate application of this standard. Had a variance been sought beforehand, though, we conclude that the Applicants would have satisfied this standard. The need for the variance, whether before or after the fact, stems from the physical and environmental constraints the Property exists under. Half of the lot is impacted by the Buffer, and Applicants demonstrated their ability to relocate outside the Buffer is severely curtailed by the 30’ access easement that must be preserved.

Fifth, the need for the variance does not arise from any nonconforming feature on either the Property or a neighboring property.

Sixth, granting the requested variance will 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). 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, 10,300 square feet of plantings will be required.

Finally, the Board finds, overall, that granting the variance is in the spirit of the Critical Area program. Applicants appear to have acted in good faith and to have been responsible and conscious stewards of the Property since they took ownership. State law mandates that they must be the ones to answer for the mistakes of another, which they have through the violation mitigation. The Board is not restrained, however, from granting an after-the-fact variance when Applicants satisfy the criteria for doing so. Here, we find Applicants have.

By satisfying these standards 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 Applicant's request for an after-the-fact variance from CZO § 41.5.3.i(1) to exceed lot coverage limits and § 71.8.3 to disturb the 100' Critical Area Buffer to replace a patio and decks; and,

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

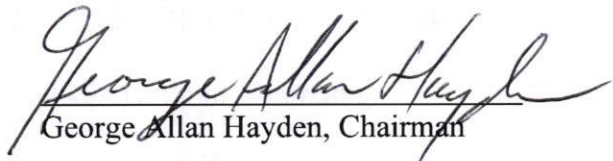
ORDERED, by the St. Mary's County Board of Appeals, pursuant to Comprehensive Zoning Ordinance § 24.3, that the Applicant is granted after-the-fact variances from Section 41.5.3.i(1) to exceed lot coverage limits and Section 71.8.3 to disturb the 100' Critical Area Buffer

to replace a patio and decks.

The foregoing variances are subject to the 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 10, 2025


George Allan Hayden, Chairman

Those voting to grant the variance:

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

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 Petition for Judicial Review with the Circuit Court for St. Mary's County within thirty (30) days of the date this order is signed. 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.