

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-0093

TAYLOR & YANNAYON PROPERTY

THIRD ELECTION DISTRICT

VARIANCE REQUEST HEARD: MARCH 9, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: APRIL 13, 2023

Pleadings

Leslie Taylor and Timothy Yannayon (“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 replace a brick walkway and patio, culvert, and a retaining wall.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 17, 2023 and February 24, 2023. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before February 22, 2023. The agenda was also posted on the County’s website on March 3, 2023. 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 March 9, 2023 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 variance requested by the Applicants.

The Property

The property is 21796 Rose Bank Road, Leonardtown, MD and consists of 2.53 acres, more or less, is zoned Rural Preservation District (“RPD”) and is found at Tax Map 40, Grid 19, Parcel 26 (“the Subject Property”). The portions of the Subject Property proposed for development lie within a Limited Development Area (“LDA”) Critical Area overlay.

The Variance Requested

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to

replace a brick walkway and patio, culvert, and a retaining wall.

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).

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 is a 2.53 acre lot on Cherry Cove Creek. The Buffer is established 100' landward of the mean high-water line of tidal waters and tidal wetlands. The proposed replacement brick walkway and patio, culvert, and retaining wall lie fully within the Buffer.
- The site plan illustrates a replacement retaining wall, yard inlet, culvert pipe, walkway, and patio (577 s.f.) fully within the Buffer. Additionally, a brick patio and pad are being removed (823 s.f.) with this proposal.
- Mitigation will be required at a ratio of 3:1 for permanent disturbance and 1:1 for temporary disturbance. Credit will be given for lot coverage removed. In total, Applicant will be required to provide 1,661 s.f. of mitigation plantings if the variance is granted.
- The Critical Area Commission stated its objection to the requested variance in its email dated January 24, 2023.
- The St. Mary's County Soil Conservation District exempted the site plan from

stormwater management review because it proposes less than 5,000 s.f. of soil disturbance. The Health Department approved the site plan.

- Attachments to the Staff Report:
 - #1: Standards Letter
 - #2: Site Plan
 - #3: Critical Area Commission Comments
 - #4: Location Map
 - #5: Zoning Map
 - #6: Critical Area Map

Applicants' Testimony and Exhibits

Applicants were represented by Steve Vaughn, a licensed surveyor affiliated with Little Silences Rest, Inc. The following evidence testimony was among that provided to the Board:

- Aerial photos showed the existing brick wall, patio, and walkway in a state of general disrepair. The walkway leads from the house to a wooden pier.
- All improvements proposed for redevelopment will be kept to their existing footprints and replaced in-kind as far as possible. On the whole, lot coverage will be reduced by the removal of some existing brick patio that will not be retained.
- The retaining wall will prevent further erosion. Currently, some existing rain events bypass the existing drain outlet. The topography of the Subject Property directs the water towards the outlet but it is not sufficient to capture all stormwater.

Public Testimony

No members of the public appeared to offer testimony about the proposal.

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, § 8-1808(d)(2)(ii) also requires the Applicants to overcome the presumption that the variance request

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.

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 an unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwabach*, 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' proposed use is replacement of an existing patio, walkway, culvert, and retaining wall with in-kind equivalents. These are common improvements; the Board also notes that the pictures and site plan make it clear that the walkway provides riparian access to the existing pier. The culvert also plays an essential role in addressing stormwater runoff on the Subject Property, and the retaining wall prevents erosion. Denying Applicants these improvements would amount to denial of reasonable and significant uses of the Property.

Regarding whether the need for the variance arises from the actions of Applicants, these improvements were built in their current location prior to the homeowner's acquisition of the

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.

Subject Property. The Board finds and accepts that Applicants' actions are forced by the natural topography of the Subject Property and not through their own actions.

The Board finds that granting the variance would not adversely affect the environment. The proposed redevelopment will prevent further erosion and help manage stormwater runoff. Additionally, the Board notes that the project will result in removal of overall lot coverage and the creation of roughly 1,600 s.f. of mitigation plantings. Mitigation is required by the Critical Area Program to offset and balance any potential effects of permissible development. Accordingly, the Board finds that the proposed development, properly mitigated, will not result in an overall adverse effect upon the environment.

Finally, the Board discusses whether this development can be in general harmony with the Critical Area Program. The Board finds it is. The Applicants have taken care to preserve existing footprints to minimize overall disturbance, will be removing overall lot coverage, and that the intended development will enhance erosion protections and stormwater management controls within the Critical Area.

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.

ORDER

PURSUANT to the application of Leslie Taylor & Timothy Yannayon, petitioning for a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer to replace a brick walkway and patio, culvert, and a retaining wall; 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 replace a brick walkway and patio, culvert, and a retaining wall;

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: APRIL 13, 2023

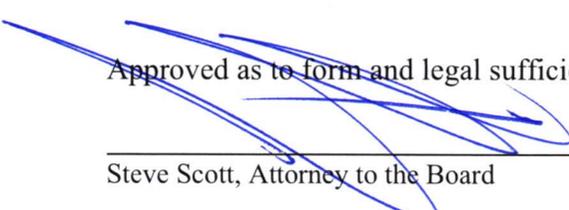

Daniel F. Ichniowski, Chairperson

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.