

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 18-1924

TIMOTHY MURIS AND PAMELA HARMON

SEVENTH ELECTION DISTRICT

DATE HEARD: May 16, 2019

ORDERED BY:

**Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Ms. Delahay**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: June 13, 2019

PLEADINGS

Timothy Muris and Pamela Harmon, the applicants, seek a variance (VAAP # 18-1924) to disturb 2,334 SF in the critical area buffer to construct a single family dwelling unit with a driveway on property with a street address of 39015 Van Ward Road, Abell, Maryland 20606.

PUBLIC NOTIFICATION

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on May 1, 2019 and May 8, 2019. The hearing notice was also posted on the property. 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 (200) 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 on Wednesday, May 8, 2019. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

FINDINGS

A public hearing was conducted at 6:30 p.m. on May 16, 2019, 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 with regard to the proposed variance requested by the applicants.

The Property

That the applicants own the subject property located at 39015 Van Ward Road, Abell, Maryland 20606. It is located in the Rural Preservation District (RPD) and is known as Grid 8 in

Parcel 149 on Tax Map 47. This waterfront lot on St. Clements Bay is designated in the Chesapeake Bay Critical Area as limited development area (LDA).

The Proposed Work

The proposal calls for the construction of a single family dwelling unit with driveway for a total of 3,754 square feet of lot coverage. The new lot coverage will be comprised of a 2,110 sf house, 182 sf of sidewalks, 97 sf of porch, and 1,368 sf of driveway for a total of 3,754 sf of proposed lot coverage. The applicant will be removing 382 sf of lot coverage which consists of an existing parking. The total lot coverage will be 4.64% percent of the Property. The allowed amount of lot coverage on a property of this size is 15% as shown on the site plan admitted into evidence at the hearing as Exhibit 9.

The St. Mary's County Comprehensive Zoning Ordinance

§ 71.8.3 of the St. Mary's County Comprehensive Zoning Ordinance requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands; and § 71.8.3.a stipulates that the 100-foot buffer shall be expanded beyond 100 feet to include slopes of 15% or more and is to be expanded by the greater of four feet for every 1% of slope or to the top of the slope and shall include all land within 50 feet from the top of the slopes. Title 27 of the Code of Maryland Regulations (COMAR) Section 27.01.01 (B) (8) (ii) states a buffer exists "to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance." § 71.8.3.b.1.c of the St. Mary's County Comprehensive Zoning Ordinance authorizes disturbance to the buffer for new impervious surfaces and development activities by variance. The applicants are proposing to construct a single family dwelling unit with a driveway which will create approximately 2,334 square feet of permanent disturbance in the buffer.

The Variance Requested

The applicants require a critical area variance of 2,334 square feet from the prohibition in § 71.8.3 against disturbing the buffer to allow the construction of the proposed single family dwelling unit with driveway as shown on Exhibit 9.

The Evidence Submitted At The Hearing

Stacy Clements, an Environmental Planner for the St. Mary's County Department of Land Use and Growth Management (LUGM), presented the following evidence:

- The subject property (the "Property") is a grandfathered lot in the Critical Area of St. Mary's County because it was recorded in the Land Records of St. Mary's County prior to the adoption of the Maryland Critical Area Program on December 1, 1985.
- The Property fronts St. Clements Bay and is constrained by the Critical Area Buffer (the "Buffer") and tidal wetlands. The Critical Area Buffer (the "Buffer") is measured from the mean high water line of St. Clements Bay pursuant to COMAR 27.01.09.01.E(3) and expanded for tidal wetlands.
- The existing soil type on the Property is Keyport silt loam (KrA). According to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Keyport soil is considered moderately well drained and is found on slopes of 0-2 percent.
- The Applicants propose to construct a single family dwelling unit and driveway for a total of 3,754 square feet of lot coverage. The new lot coverage will be comprised of a 2,110 sf house, 182 sf of sidewalks, 97 sf of porch, and 1,368 sf of driveway for a total of 3,754 sf of proposed lot coverage. The applicate will be removing 382 sf of lot coverage

which consists of an existing parking. The total lot coverage will be 4.64% percent of the Property. The allowed amount of lot coverage on a property of this size is 15%.

- Part of the Property is within Special Flood Hazard Area Zone AE-8 & AE-6 according to Flood Insurance Rate Map (FIRM) panel 163F. The proposed development is in unshaded X and is 28' from the Flood Hazard Area.
- A private well and private septic will serve the Property.
- Approximately 57,586 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant plans to clear 382 square feet of the existing vegetation. In accordance with COMAR 27.01.09.01, mitigation is required at a ratio of three to one per square foot of the variance granted and at a ratio of one to one for the area of temporary disturbance.
- The St. Mary's Health Department approved the site plan on February 8, 2019. The Department of Land Use and Growth Management reviewed the site plan in accordance with storm water management requirements and approved the site plan on March 29, 2019. The Soil Conservation District approved the site plan on March 18, 2019 and the Health Department reviewed and approved the site plan on March 21, 2019.
- The Maryland Critical Area Commission does not oppose the variance and stated in their letter that "The Buffer has been expanded due to the presence of extensive tidal wetlands around the entire perimeter of the property. The Buffer expansion has significantly reduced the area available to build outside the Buffer. The lot cannot be developed without impacting the Buffer. Proposed lot coverage is 3,754 square feet or 4.6%. Construction of the house, porch, and walkway will result in 2,334 square feet of permanent Buffer disturbance."

Applicants Testimony and Exhibits

The Applicants were represented at the hearing by Wayne P. Hunt, the applicants' engineer, from Little Silences Rest, Inc. Evidence was presented that the applicants' property is an 80,962 square foot parcel and that 72,746 square feet is within the expanded critical area buffer, which is 90% of the lot area. The original conveyance of this property was before the adoption of critical area regulations. The property is a recorded lot in an existing community constrained by zoning, health requirements and the critical area provisions.

Neighbor's Testimony

A neighbor, Dr. Sophie Landsburg, submitted a letter into evidence and gave oral testimony that she was opposed to a home being constructed on the property. The main contention was that the private road, which the neighbors maintain, may be negatively impacted during the construction phase and that the neighbors would be subjected to dust and noise that is inherent with construction. There was no other testimony taken or exhibits received in the matter.

DECISION

County Requirements for Critical Area Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.4 sets forth six separate requirements (in this case) that must be met for a variance to be issued for property in the critical area. They are (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 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. State law also requires that the applicants overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), that the variance request should be denied.

Findings - Critical Area Variance

Upon review of the facts and circumstances, the Board finds and concludes that the applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. There are a number of factors that support this decision. First, in *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals considered an appeal claiming that a variance granted by the Worcester County Board of Appeals to allow a property owner to extend a pier across state-owned marshland from his property should not have been granted. The pier would be 80 feet longer than allowed by the Worcester County ordinance. The variance was granted. The Court of Appeals visited the history of the critical area law and efforts by the Legislature to amend and clarify the law. The Court grappled with the phrase "unwarranted hardship, " and asked if "an applicant [must] demonstrate a denial of all reasonable and significant use of the entire property, or must the applicant show a denial of a reasonable and significant use of the entire property?" (At page 14.) The Court concluded, on page 28, that:

In summary, in 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. (Emphasis added.)

In this application the Board finds that denying the applicants' request to construct a dwelling with a driveway in the critical area buffer would deprive the applicants of a use that would be "both significant and reasonable."

Second, the property is encumbered by the expanded buffer which necessitates the need for a variance. Other property owners with recorded lots that are constrained by similar conditions and the Critical Area provisions of the Ordinance do have the opportunity to file for a variance and seek relief from the regulations.

Third, that the strict interpretation of the critical area provisions would prohibit the applicants from constructing a single family dwelling, a right that is commonly enjoyed by other property owners in the LDA.

Fourth, the property is a recorded, grandfathered lot in an existing community and the granting of the variance will not confer any special privileges to the applicants that would be denied to others.

Fifth, the need for the variance does not arise from actions of the applicants. Again, this recorded lot predates the St. Mary's County's critical area program.

Sixth, the critical area variance is the minimum variance necessary to afford relief.

Furthermore, that the granting of the variance would not adversely affect the environment. The variance will be in harmony with the Critical Area Program. The applicants have overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), of the State law that the variance request should be denied.

The Board finds that Critical Area Planting Agreement and Planting Plan, which is required, will alleviate any impacts to water quality due to the creation of impervious surface in the Buffer. The Board believes that the required plantings will assist in improving and

maintaining the functions of the Buffer. The Planting Agreement requires mitigation at a ratio of three to one (3:1) per square foot of the variance granted in accordance with Chapter 24 of the Ordinance.

The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, which should contribute to improved infiltration and reduction of non-point source pollution leaving the site. For these reasons, the Board finds that the granting of the variance to construct a single-family dwelling in the Critical Area Buffer will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area, and that the granting of the variances will be in harmony with the general spirit and intent of the Critical Area program.

Lastly, the Board is cognizant of the neighbor's concern and believes that imposing a condition on the applicants that the private road be restored to its previously existing condition after the construction is completed will alleviate the concern.

ORDER

PURSUANT to the application of Timothy Muris and Pamela Harmon, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow a single family dwelling unit with driveway in the Critical Area Buffer ;

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 13th day of June, 2019,

ORDERED, by the St. Mary's County Board of Appeals, that the applicants are granted a critical area variance of 2,334 square feet from the prohibition in § 71.8.3 against disturbing the buffer to allow the construction of the proposed single family dwelling unit with driveway as shown on Exhibit 9; and it is further

ORDERED, by the St. Mary's County Board of Appeals, that the applicants are granted the above critical area variance on the condition that at the end of the construction the road will be restored to its existing condition prior to construction.

The foregoing variance is 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. Furthermore, Exhibit 9, referenced in this decision, is incorporated herein as if fully set forth and made a part of this Order. The proposed improvements shown on Exhibit 9 shall be constructed on the subject property in the locations shown therein. The decision and order shall not prohibit the applicants from making minor changes to the facilities as presently shown on Exhibit 9 to adjust for changes made necessary by comments or requirements that arise during plan review or construction, provided those minor changes do not exceed the variances granted herein. The reasonableness of any such change shall be determined by the Office of Land Use and Growth Management.

Date: June 13, 2019

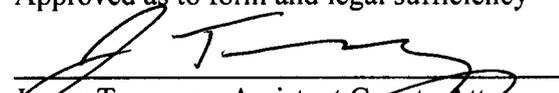

George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Ms. Delahay

Those voting to deny the variance:

Approved as to form and legal sufficiency


James Tanavage, Assistant County 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.

Further, § 24.8 provides that a variance shall lapse one year from the date of the grant of the variance by the Board of Appeals 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; or 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.