

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 18-1109

MICHAEL NOWOTNY

SIXTH ELECTION DISTRICT

DATE HEARD: September 12, 2019

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: October 10, 2019

Pleadings

Michael Nowotny, the applicant, seek a variance (VAAP # 18-1109) to disturb the critical area buffer to construct two decks and a basement entryway on subject property.

Public Notification

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on August 28, 2019 and September 4, 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 Monday, September 9, 2019. 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 September 12, 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 about the proposed variance requested by the applicants.

The Property

The applicants own the subject property located at 26442 Peninsular Drive, Hollywood, Maryland 20636. It is in the Residential Neighborhood Conservation District

(RNC) and is identified on Tax Map 20B, Block K, Lots 12 & 13. This lot is designated in the Chesapeake Bay Critical Area as Limited Development Area (LDA).

The Variance Requested

The applicants request a critical area variance from the prohibition of § 71.8.3.b. of the St. Mary's Zoning Ordinance against development activities in the buffer to construct two decks and a basement entryway as shown on the site plan admitted into evidence at the hearing as Exhibit 2 of Attachment 3.

The St. Mary's County Comprehensive Zoning Ordinance

The St. Mary's County Comprehensive Zoning Ordinance ("SMCCZO") requires there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands. § 71.8.3. 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." No new impervious surfaces and development activities are permitted in the 100-foot buffer unless the applicant obtains a variance. § 71.8.3.b.1.c of the SMCCZO.

The Evidence Submitted at the Hearing by LUGM

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 the Cole Creek and is constrained by the Critical Area Buffer (the "Buffer") and tidal wetlands. The Buffer is measured from the mean high-water line of Cole Creek and tidal wetlands pursuant to *COMAR 27.01.09.01.E(3)*.
- The existing soil types on the Property are Evesboro-Westphalia complex (EwE2) and Mattapex fine sandy loam (MtA). According to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Evesboro-Westphalia complex is considered moderately well drained, moderately erodible and found on slopes of 20-45 percent. Mattapex fine sandy loam is consider moderately well drain, slightly erodible and found on slopes of 0-2 percent.
- According to the as-built plan provided by the Applicant, the Property has constructed a single-family dwelling unit and driveway for a total of 3,240 square feet of lot coverage. The new lot coverage is comprised of a 46-sf areaway(existing) and 160 sf of disturbance for two decks. The total lot coverage for the property is 3,286 (decks are not included in lot coverage calculations). The allowed amount of lot coverage on a property of this size is 5,445 sf.
- Part of the Property is within Special Flood Hazard Area Zone VE-6 according to Flood Insurance Rate Map (FIRM) panel 114F. The development is in unshaded X and is more than 50' from the Flood Hazard Area.
- A private well and private septic will serve the Property.

- Approximately 15,150 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant cleared 0 square feet of the existing vegetation.
- In accordance with the St. Mary's County Comprehensive Zoning Ordinance Section 72.3.3.a(2)(c), mitigation is required at a ratio of three to one per square foot of the variance granted for the disturbance of 206 sf for a total of 618 square feet of mitigation plantings.
- The St. Mary's Health Department received the site plan for review on July 16, 2019. The St. Mary's Soil Conservation District approved it on July 22, 2019. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and waived the site plan on June 22, 2019.
- The Maryland Critical Area Commission was provided notification of the variance on August 16, 2019. The Commission does not oppose the variance, but a Buffer Management Plan must be approved before the granting of the variance.
- If the variance is granted, the Applicant must comply with Section 24.8 of the Ordinance pertaining to lapse of variance. Variances shall lapse one year from the date of the grant of the variance, if the Applicant has not complied with Section 24.8.
- The following Attachments to the Staff Report were introduced:
 - #1: Standards Letter of July 23, 2019 from Michael W. Nowotny;
 - #2: Critical Area Commission letter dated August 30, 2019;
 - #3: Site Plan;

- #4: Location Map;
- #5: Land Use Map;
- #6: Zoning Map;
- #7: Critical Area Map;
- #8: Contour and Soils Map;
- #9: Floodplain Map.

Applicants Testimony and Exhibits

The Applicant represented himself at the hearing. The following evidence was presented by Mr. Nowotny:

- The house had been destroyed;
- The applicant was trying to rebuild the house to approximately the same size as previously;
- He "reluctantly" became the general contractor for the construction;
- The house is in line with the rest of the neighborhood;
- The applicant presented numerous pictures of the home, which were introduced as part of the record, which showed the basement entryway and the back of the home where the decks will be built;
- The previous home did not have a basement prior to being destroyed;
- The previous home had 1 deck which was larger than the proposed replacement deck;
- The proposed 2nd deck is new.

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. They are summarized as follows: (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 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 applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. There are a number of factors that support this decision. First, in the case of *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals established the statutory definition for "unwarranted hardship" as used in the Critical Area law. The Court stated:

(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.

In this application the Board finds that denying the applicant's request would deprive the applicant of a use that would be "both significant and reasonable."

Second, the property is almost completely enveloped in the 100-foot Critical Area Buffer and said lots were created before the Critical Area Program was started. 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 two decks and a basement entryway, a right that is commonly enjoyed by other property owners in the Limited Development Area (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 applicant that would be denied to others.

Fifth, the need for the variance does not arise from actions of the applicant. 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, the granting of the variance would not adversely affect the environment. The variance will be in harmony with the Critical Area Program. The

applicant has 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, which is required, will alleviate any impacts to water quality due to the creation of impervious surface in the Critical Area. The Board believes that the required plantings will assist in improving and maintaining the functions of the Critical Area. The Planting Agreement requires mitigation at a ratio of three to one (3:1) per square foot of the variance granted for the disturbance inside the Critical Area Buffer 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 two decks and a basement entryway in the Critical Area 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.

ORDER

PURSUANT to the application of Michael Nowotny, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow him to disturb the Critical Area Buffer to construct two decks and a basement entryway; 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, that the applicants are granted a critical area variance from the prohibition in § 71.8.3 against disturbing the buffer to allow the construction of two (2) decks and a basement entryway as shown on Applicants site plan.

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.

Date: October 10, 2019


George A. Hayden, Chairman

Those voting to grant the variance:

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

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. St. Mary's County may not issue a permit for the requested activity until the 30-day appeal period has elapsed.

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.