

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 18-2520

CHRISTOPHER and DAWN TURNER

SIXTH ELECTION DISTRICT

DATE HEARD: November 14, 2019

ORDERED BY:

**Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: December 12, 2019

Pleadings

Christopher and Dawn Turner, the applicants, seek a variance (VAAP # 18-2520) to disturb the critical area buffer to construct an addition to a home and expand a deck on subject property.

Public Notification

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on October 30, 2019 and November 6, 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, November 6, 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 November 14, 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 45258 Saint Cuthbert Farm Road, Hollywood, Maryland 20636. It is in the Rural Preservation District (RPD) and is identified on Tax Map 21, Grid 23, Parcel 114, Lots 6. This lot is designated in the Chesapeake Bay Critical Area as Resource Conservation Area (RCA) Overlay.

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 an addition to a home and expand a deck 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 before the adoption of the Maryland Critical Area Program on December 1, 1985.
- The Property fronts the Patuxent River and is constrained by the Critical Area Buffer (the "Buffer"). The Buffer is established as minimum of 100-foot landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams (CZO 71.8.3).
- The Property has an existing 700 sq. ft. house and a 475 sq. ft. deck. The Applicant is proposing a 720 sq. ft. addition to the house and replacing the existing deck with a 560 sq. ft. deck. Approximately 280 sq. ft. of the house addition is within the Buffer and all the deck is within the Buffer. The entire Property is in the 1000' Critical Area Boundary.
- The proposed development is in unshaded X and is more than 50' feet away from a regulated Special Flood Hazard Area, according to Flood Insurance Rate Map (FIRM) panel 182F.
- The Property is served by private well and septic.
- Per *COMAR 27.01.09.01*, plant mitigation is required for development activities within the Buffer. A Buffer Management Plan will be required and approved prior to the issuance of a building permit for this project.
- The St. Mary's County Health Department approved the site plan on October 24, 2019. The site plan was approved on September 3, 2019 by the St. Mary's

County Soil Conservation District. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and exempted the site plan from stormwater management regulations, due to less than 5,000 square feet of disturbance, on December 28, 2018.

- The Maryland Critical Area Commission provided a report on October 31, 2019 (see Attachment 2).
- 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 September 12, 2019 from Anita Sullivan;
 - #2: Critical Area Commission letter dated October 31, 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 Applicants were represented by Anita Sullivan and appeared in person before the Board. The following evidence was presented:

- The existing home on the Property is considered a one and a half story home;
- The existing deck will not be replaced; rather, the existing deck will be extended by 4 feet;
- The applicants may have to upgrade the existing deck if it's not up to current building codes;
- The applicants are also putting a shed on the Property. The shed will be located outside the Critical Area and is not part of the variance request;
- The addition to the home was moved outside the Critical Area as much as possible;
- The new decking, like the current deck, will not be considered an impervious surface;
- The applicants hope that all mitigation will be able to occur on site;
- The house was built in 1974. The applicants plan to retire in the home and are seeking to upgrade the home by expanding the master bedroom and kitchen area.

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, a significant portion of the Property is contained 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 an addition to their home and extending a deck, a right that is commonly enjoyed by other property owners in the Resource Conservation Area (RCA).

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 an addition to a home and extend a deck 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 Christopher and Dawn Turner, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow them to disturb the Critical Area Buffer to construct an addition to a home and extend a deck; 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 an addition to a home and extension of a deck 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: December 12, 2019


George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Mr. Richardson

Those voting to deny the variance:

Approved as to form and legal sufficiency



~~James Tanavage, Assistant County Attorney~~

David A. Weiskopf

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.