

**IN THE ST. MARY'S COUNTY BOARD OF APPEALS**

**VAAP NUMBER 19-0062**

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**MARTHA AND RICHARD JOHNSON**

**SECOND ELECTION DISTRICT**

**DATE HEARD: August 8, 2019**

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**ORDERED BY:**

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

**ENVIRONMENTAL PLANNER: STACY CLEMENTS**

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**DATE SIGNED: 8-29, 2019**

### **Pleadings**

Martha and Richard Johnson, the applicants, seek a variance (VAAP # 19-0062) to: disturb the critical area buffer; to construct a deck with stairs and a concrete pad.

### **Public Notification**

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on July 24, 2019 and July 31, 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 Tuesday, August 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 August 8, 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 19026 Russell Road, Valley Lee, MD 20692. It is in the Rural Preservation District (RPD) and is known as Grid 4 in

Parcel 394 on Tax Map 61. This waterfront lot on Herring Creek is designated in the Chesapeake Bay Critical Area as Resource Conservation Area (RCA) overlay.

### **The Variance Requested**

The applicants require a critical area variance from the prohibition in § 71.8.3 against disturbing the buffer to construct an 80 square foot deck, 16 square feet of stairs and a 12 square foot concrete pad 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 that 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 Herring Creek and is constrained by the Critical Area Buffer (the "Buffer"). The Buffer is measured from the mean high-water line of Herring Creek pursuant to COMAR 27.01.09.01.E(3).
- The existing soil types on the Property are Woodstown sandy loam (WsC2), Sassafras sandy loam (SaB2 & SaA) according to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Woodstown sandy loam is found on slopes of 5-10% and considered well drained and are moderately erodible. Sassafras sandy loam soils are considered well drained and are found on slopes of 0-5%. The area of disturbance consists entirely of Woodstown sandy loam.
- According to the site plan provided by the Applicant, the applicants propose an 80 square foot deck, 16 square feet of stairs and a 12 square foot concrete pad. The Property has an existing 4,168 square foot single family dwelling home, 3,494 square foot pool, decks and walkways, 4,858 square feet of driveway, 720 square foot garage, a 1,632 square foot carport, a 300 square foot pool house and a 432 square foot shed not shown on the site plan. The total lot coverage for the Property will be 15,633 square feet or 14.93% post-development. The allowed amount of lot coverage on a property of this size is 15%.
- The Property is within Special Flood Hazard Area Zone X and AE according to Flood Insurance Rate Map (FIRM) panel 309F. The proposed development is in unshaded X and is 10' from the Flood Hazard Zone.
- A private well and sewer will serve the Property.

- Approximately 18,573 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant does not plan to clear any of the existing vegetation within the buffer or outside the buffer.
- 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 for the disturbance of 108 square feet inside the critical area buffer for a total of 324 square feet of mitigation required.
- The St. Mary's Health Department approved the site plan on March 15, 2019. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on May 13, 2019.
- The Maryland Critical Area Commission provided comments in the form of a letter, dated July 30, 2019. The Commission did not take a position for or against the proposed variance.
- The following Attachments to the Staff Report were presented:
  - #1: Standards Letter of July 2, 2019 from Christopher Longmore, Esq.;
  - #2: Critical Area Commission Comments dated July 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 Applicants were represented at the hearing by Christopher T. Longmore, Esq.

The following evidence was presented:

- The requested variance is to allow for stairs to access the area where the pool pump is located on the property;
- Currently, it is not safe to walk to the area of the pool pump, especially at night;
- Getting to the pool pump requires walking all the way around the pool to access the pump;
- Even with the additional construction, the property will still be under the 15% lot coverage limit;
- The requested variance is minimal in scope and meets the requirements of the SMCCZ factors for granting a variance in the Critical Area;

Co-Applicant Martha Johnson also testified:

- It is dangerous to walk at night to the area of the pool pump because of the slope of the property;
- The applicants plan to put a wood burning heater on the concrete pad so the pool can be used longer into the season.

### **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 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 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 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 applicants' request to construct an 80 square foot deck, 16 square feet of stairs and a 12 square foot concrete pad would deprive the applicants of a use that would be "both significant and reasonable."

Second, the property is almost completely enveloped in the 100-foot Critical Area Buffer, encumbered by wetlands 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 80 square foot deck, 16 square feet of stairs and a 12 square foot concrete pad, 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 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, 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 80 square foot deck, 16 square feet of stairs and a 12 square foot concrete pad 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 Martha and Richard Johnson, 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 80 square foot deck, 16 square feet of stairs and a 12 square foot concrete pad; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 29 day of August, 2019,

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 80 square foot deck, 16 square feet of stairs and a 12 square foot concrete pad 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: 8-29, 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.

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.