

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

**VAAP NUMBER 19-0200**

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**GUY & CATHERINE FEYEN**

**THIRD ELECTION DISTRICT**

**DATE HEARD: August 29, 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: September 12, 2019**

### **Pleadings**

Guy and Catherine Feyen, the applicant, seek a variance (VAAP # 19-0200) to: clear more than 30% of existing forest or developed woodland to build a single-family dwelling.

### **Public Notification**

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on August 14, 2019 and August 21, 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 Thursday, August 22, 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 29, 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 applicant owns the subject property located at 22435 Archer Street, Leonardtown, Maryland 20650. It is in the Residential Neighborhood Conservation District (RNC) and is known as Parcel 100, Grid 11, Lot 4 on Tax Map 39. 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 prohibitions of § 72.3.1.c(2) of the St. Mary's Zoning Ordinance against clearing in excess of 30% of any forest or developed woodland in the Critical Area to construct a single-family dwelling with a garage, patios, sidewalks and a driveway, 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 "Critical Area" includes all water of and lands under the Chesapeake Bay and its tributaries to the head of tide as indicated on the State wetlands maps, and all State and private wetlands designated under Title 16 of the Environment Article; and all land and water areas within 1,000 feet beyond the landward boundaries of State or private wetland and the heads of tide designated under Title 9 of the Environment Article (41.1.1 of the St. Mary's Comprehensive Zoning Ordinance; "SMCZO"). No person shall develop, alter, or use any land for residential, commercial, industrial or institutional uses, nor conduct agricultural, fishery, or forestry activities in the St. Mary's County Critical Area except in compliance with the applicable provisions of this Ordinance. (41.1.3 of SMCZO).

If a project involves the alteration of forest, all forest cover removed must be mitigated pursuant to Section 72.3.5. Clearing in excess of 30 percent of any forest or developed woodland is prohibited. (72.3.c.(2) of SMCZO).

### **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 St. Clements Bay and is constrained by the Critical Area Buffer (the "Buffer"). The Buffer is measured from the mean high-water line of St. Clements Bay pursuant to *COMAR 27.01.09.01.E(3)*.
- The existing soil types on the Property is Woodstown sandy loam (WsB), according to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Woodstown sandy loam is found on slopes of 2-5 percent, considered moderately well drained and are slightly erodible.
- According to the site plan provided by the Applicant, the Property proposes a single-family dwelling with a garage, patios, sidewalks, and a driveway for a total of 5,406 square feet of lot coverage. The allowed amount of lot coverage on a property of this size is 5,445 sf.

- The Property is within Special Flood Hazard Area Zone X and AE-7 according to Flood Insurance Rate Map (FIRM) panel 162F. The proposed development is in unshaded X and is approximately 90' from the Flood Hazard Zone.
- A private well and sewer will serve the Property.
- Approximately 23,577 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant plans to clear 309 sf of the existing vegetation within the Buffer and 12,653 sf outside the Buffer for a total of 12,963 square feet of vegetative clearing.
- In accordance with *COMAR 27.01.09.01*, mitigation is required at a ratio of one to one per square foot of the variance granted for the disturbance of 309 square feet inside the Critical Area Buffer for reforestation and 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 clearing of 12,653 sf for a total of 38,268 square feet of mitigation plantings.
- The St. Mary's Health Department approved the site plan on July 3, 2019. The St. Mary's Soil Conservation District (SCD) approved an erosion and sediment control plan on July 8, 2019. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and approved the site plan on May 21, 2019.

- The Maryland Critical Area Commission provided comments in the form of a letter, dated August 20, 2019. The Commission acknowledged the lot is small and it would be difficult to develop the Property without exceeding the forest clearing limit.
- The Commission also noted it does not appear the property has room for the required mitigation plantings. The applicant can either identify an off-site location for mitigation planting or pay a fee-in-lieu to the County at the rate of \$1.50 per square foot for the required mitigation.
- 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 3, 2019 from Donald Estevez;
  - #2: Critical Area Commission letter dated August 20, 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 Guy Feyan, co-applicant, and Donald Estevez, Project Manager with VARC, LLC. The following evidence was presented:

- The lot is very small, but the owners would still like to build a home on the lot;
- The owners tried to get the house as narrow as possible as they did not want a 2<sup>nd</sup> floor on the home;
- The Property will need a septic system since there is not public water access;
- The owners did their best to keep the home as close to the road as possible in order to minimize the clearing of vegetation;
- The driveway was reduced in order to get under the lot coverage limit.

### **Decision**

#### **County Requirements for Critical Area Variances**

The St. Mary's County Comprehensive Zoning Ordinance § 24.4 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 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 applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. There are several 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 to construct a single-family dwelling house would deprive the applicant of a use that would be "both significant and reasonable."

Second, the property is constrained by the Critical Area Boundary and said lot was 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 applicant from constructing a single-family dwelling house, 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. Without the variance, the applicant will not be able to build a home on the property.

Furthermore, the granting of the variance would not adversely affect the environment. The Board finds that a Critical Area Planting Agreement, which is required, will alleviate impacts to water quality due to the creation of impervious surface in the Critical Area. Although the Property may not have room for all the required mitigation plantings, the required plantings that can be done on the Property will assist in improving and maintaining the functions of the Critical Area.

For these reasons, the Board finds the granting of the variance to build a single-family dwelling house 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 variance will be in harmony with the general spirit and intent of 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.

**ORDER**

PURSUANT to the application of Guy and Catherine Feyen, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow them to clear in excess of 30 percent of any forest or developed woodland in the Critical Area to construct a single-family dwelling house; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 12 day of September, 2019,

ORDERED, by the St. Mary's County Board of Appeals, that the applicant is granted a Critical Area variance from the prohibition in § 72.3.1.c.(2) against clearing in excess of 30 percent of any forest or developed woodland on the Property to allow the construction of the proposed single-family dwelling as shown on Applicant's site plan.

The foregoing variance is subject to the condition that the applicant 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. For the applicant to construct the structures permitted in this decision, he must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: September 12, 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.