

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 19-0904

MATTHEW and KATE MOORE

FOURTH ELECTION DISTRICT

DATE HEARD: August 29, 2019

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: September 12, 2019

Pleadings

Matthew and Kate Moore, the applicants, seek a variance (VAAP # 19-0904) 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 applicants own the subject property located at 35335 Golf Course Drive, Mechanicsville, Maryland 20659. It is in the Residential Neighborhood Conservation District (RNC) and is known as Parcel 21, Grid 8 on Tax Map 16. 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 in § 72.3.1.c(2) against clearing in excess of 30% of any forest or developed woodland in the Critical Area to construct a 1,828 square foot single-family dwelling with a garage, 663 square feet of driveway, 54 square feet of sidewalk and 530 square feet of porches, 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 is constrained by the Critical Area Boundary (the "Boundary"). The Boundary is measured from the mean high-water line of Wicomico River pursuant to *COMAR 27.01.01.(18)(b)(iv)*.
- The existing soil types on the Property is Othello fine sandy loam (On), according to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Othello fine sandy loam is found on slopes of 0-2 percent, considered poorly drained and are slightly erodible.
- According to the site plan provided by the Applicant, the Property proposes a single-family dwelling with a garage, a porch, and a driveway for a total of 3,045 square feet of lot coverage. The new lot coverage will be comprised of an 1,828 square foot single family dwelling with attached garage, 663 square feet of driveway, and 54 square foot of sidewalk, and 530 square feet of porches, which

represents 22% percent of the Property. The allowed amount of lot coverage on a property of this size is 31.25%.

- The Property is within Special Flood Hazard Area Zone X according to Flood Insurance Rate Map (FIRM) panel 063F. The proposed development is in unshaded X and is more than 50' from the Flood Hazard Zone.
- The Property is served by public water and sewer.
- Approximately 11,931 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 100' Buffer but will clear 9,560 sf within the 1,000' Critical Area Boundary.
- 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 9,560 sf for a total of 28,680 square feet of mitigation plantings.
- Metcom approved the site plan on July 15, 2019. The St. Mary's Soil Conservation District (SCD) approved an erosion and sediment control plan on May 23, 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 22, 2019.
- The Maryland Critical Area Commission provided comments in the form of a letter, dated August 13, 2019. The Commission did not take a position for or against the proposed 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 June 28, 2019 from Matthew Moore;
 - #2: Critical Area Commission letter dated August 13, 2019;
 - #3: Site Plan;
 - #4: Location Map;
 - #5: Land Use Map;
 - #6: Zoning Map;
 - #7: Critical Area Map;
 - #8: Contour and Soils Map;

Applicants Testimony and Exhibits

The Applicants were represented at the hearing by Matthew Moore, co-applicant.

The following evidence was presented:

- The home is set back forty (40) feet from the street to match the other houses on the street;
- Mr. Moore corroborated the amounts of clearing and mitigation needed on the lot as presented by Staff;
- The applicants propose 2,355 square feet of mitigation on the site and 26,325 feet of mitigation off-site;

- Pictures of the lot were introduced showing how the lot is heavily forested;
- A diagram of the mitigation plan was introduced;
- A diagram for off-site mitigation plan was introduced. The plan is still under review;
- There is no way to build the proposed home on the property without clearing the forest or developed woodland.

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 applicants are 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 applicants' request to construct a single-family dwelling house would deprive the applicants 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 applicants 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 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 both an on-site and off-site 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 on-site and off-site 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 in accordance with Chapter 72 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 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.

ORDER

PURSUANT to the application of Matthew and Kate Moore, 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 applicants are 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 a single-family dwelling 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. 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: 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.