

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 19-1180

JAIME and DEBORAH ROSADO

SEVENTH ELECTION DISTRICT

DATE HEARD: October 10, 2019

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: November 14, 2019

Pleadings

Jaime and Deborah Rosado, the applicants, seek a variance (VAAP # 19-1180) to exceed lot coverage limits in order to construct a porch on the Property.

Public Notification

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on September 25, 2019 and October 2, 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, October 8, 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 October 10, 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 37211 Gibson Road, Bushwood, MD 20618. It is in the Rural Preservation District (RPD) and is identified on Tax Map 46,

Grid 9, Parcel 124. This lot is designated in the Chesapeake Bay Critical Area as Limited Development Area (LDA) Overlay.

The Variance Requested

The applicants request a critical area variance from the prohibition of § 41.5.3 to exceed the lot coverage limit in order to build a porch 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

Lot coverage means the percentage of a total lot or parcel that is occupied by a structure, accessory structure, parking area, driveway, walkway or roadway. Annotated Code of Maryland, Natural Resources, § 8-1802(a)(17). The St. Mary's County Comprehensive Zoning Ordinance requires the impervious surface limit on lots between 21,781-36,300 sq. ft. to be no more than 5,445 sq. ft. § 41.5.3.i(1).

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 is adjacent to Whites Neck Creek and is constrained by the Critical Area Boundary (the "Boundary"). The Critical Area Boundary (the "Boundary") is

measured from the mean high-water line of Whites Neck Creek pursuant to *COMAR 27.01.01.(18)(b)(iv)*.

- The existing soil types on the Property, according to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey are Sassafras sandy loam (SaaB), which is found on slopes of 2 to 5 percent, and is considered well drained and slightly erodible and Sassafras sandy loam (SaaC), which is found on slopes of 5 to 10 percent, and is considered well drained and moderately erodible.
- According to the site plan provided by the Applicant, the Property proposes a 12' X 30' screened porch for a total of 5,749 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 according to Flood Insurance Rate Map (FIRM) panel 143F. The proposed development is in unshaded X and is more than 50' feet away from a regulated Special Flood Hazard Area.
- A private well and septic serves the Property.
- Approximately 4,000 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant does not plan to clear existing vegetation.
- In accordance with *COMAR 27.01.09.01-1*, mitigation is required at a ratio of one to one per square foot of the variance granted for the redevelopment activity within the Critical Area Boundary for a total of 360 square feet of mitigation plantings.

- The St. Mary's Health Department approved the site plan on June 27, 2019. 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 June 25, 2019.
- The Maryland Critical Area Commission provided a report on October 1, 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 August 30, 2019 from Jaime and Deborah Rosado;
 - #2: Critical Area Commission letter dated October 1, 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 the co-applicant, Jaime Rosado, at the hearing. The following evidence was presented:

- Pictures of the property showing the home and existing porch were introduced;
- Pictures of the easements across the property were introduced;
- Pictures of the garages on the property were introduced;
- Pictures of the neighbor's homes, all which have porches, were introduced;
- Testimony from the co-applicant indicated the garages were already on the property when the home was purchased;
- The house and 2 garages on the Property were built in 1935, the shed on the Property was built around 2000;
- Mosquito's are a problem on the property and is the reason they wish to build a screened in porch;
- The asphalt easements on the property serve the neighbors but offer no benefit to the applicants.

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 applicants request to build a porch would deprive the applicant of a use that would be "both significant and reasonable." The evidence indicates neighboring property owners have similar porches in which the applicants wish to build. Accordingly, this use is reasonable for the Property.

The Board finds that a significant amount of impervious surface on the Property is from an easement which is essentially a roadway to neighbors' properties. This easement does not benefit the applicant's property in any way. Further, it would not be practical to require the applicants to remove this surface. As such, the Board finds this impervious surface should not be used against the applicants in the calculations for lot coverage.

The Board also finds the applicants should not be required to eliminate structures on the Property to reduce impervious surface area. The structures were built prior to the applicants purchasing the Property.

Second, the property is within the Critical Area Boundary and said lot was created before the Critical Area Program was started. Other property owners with recorded lots constrained by similar conditions of the Critical Area provisions can file for a variance and seek relief from the regulations. Therefore, denying the applicants a variance would deprive them of rights commonly enjoyed by other property owners in similar areas within the Critical Area Boundaries.

Third, strict interpretation of the critical area provisions would prohibit the applicants from constructing a porch, a right that is commonly enjoyed by other property owners in the Limited Development Area (LDA). In fact, many neighboring property owners have porches like the type the applicants wish to build. Granting a variance will not confer any special privilege on the applicants.

Fourth, the need for the variance does not arise from actions of the applicant. This property is a recorded, grandfathered lot in an existing community which predates the

St. Mary's County's Critical Area program. The applicants have taken no action which increased the area of impervious surfaces since they purchased the Property.

Fifth, the critical area variance is the minimum variance necessary to afford relief to the applicants to build a screened-in porch on the Property. The applicants cannot build the porch elsewhere on the Property without a variance.

Sixth, the granting of the variance would not adversely affect the environment. 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 Planting Agreement requires mitigation at a ratio of one to one (1:1) per square foot for the redevelopment activity within the Critical Area.

The Board further finds 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 a deck and exceed the lot coverage limit 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.

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 Jaime and Deborah Rosado, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow them to construct a porch and exceed the lot coverage limit by 304 square feet; 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 § 41.5.3 to exceed the lot coverage limit by 304 square feet to build a porch 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: November 14, 2019

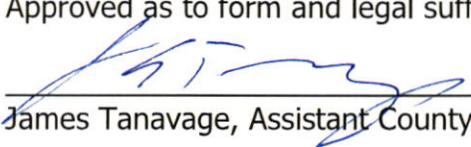

George A. Hayden, Chairman

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 (COMAR 27.01.12.07.C).

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.