

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 19-1305

THOMAS AND REBECCA MCCLAY

SIXTH ELECTION DISTRICT

DATE HEARD: September 12, 2019

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: October 10, 2019

Pleadings

Thomas and Rebecca McClay, the applicants, seek a variance (VAAP # 19-1305) to disturb the critical area buffer to replace two decks on subject property.

Public Notification

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on August 28, 2019 and September 4, 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 Monday, September 9, 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 September 12, 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 43762 Kirksted Road, Hollywood, Maryland 20636. It is in the Rural Preservation District (RPD) and is known

as Grid 18 in Parcel 286, Lot 4 on Tax Map 20. 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 § 71.8.3 against disturbing the buffer to replace two (2) decks 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 or 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 the St. Thomas Creek and is constrained by the Critical Area Buffer (the "Buffer"), highly erodible and hydric soils, steep slopes, and tidal wetlands. The Buffer is measured from the mean high-water line and tidal wetlands of St. Thomas Creek pursuant to *COMAR 27.01.09.01.E(3)*.
- The existing soil types on the Property are Tidal Marsh (Tm) and Evesboro-Westphalia complex. According to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Tidal marshes are considered very poorly drained, slightly erodible and found on slopes of 2-5 percent. Evesboro-Westphalia complex is considered well drained and moderately erodible.
- According to the site plan provided by the Applicant, the Property has an existing single-family dwelling, walkway, decks, shed, and driveway for a total of 8,092 square feet of existing lot coverage. The Applicant will remove 265 sf of walkways, 622 sf of decks, and 64 sf of stairs. The new lot coverage is comprised of a 1,036-sf deck, 220 sf of walkways, and 64 sf stairs. The total lot coverage for the property is 8,047 (decks are not included in lot coverage calculations). The allowed amount of lot coverage on a property of this size is 10,667 sf.
- Part of the Property is within Special Flood Hazard Area Zone X and AE – 5 according to Flood Insurance Rate Map (FIRM) panel 177F. The development is in unshaded X and is more than 50' from the Flood Hazard Area.

- A private well and septic serves the Property.
- Approximately 64,648 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant cleared 0 square feet of the existing vegetation.
- 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 disturbance of 1,320 sf for equals of 3,960 square feet, minus the credit of 951sf of Lot Coverage removed for a total of 3,009 sf of mitigation plantings.
- The Health Department approved the site plan on July 10, 2019. The St. Mary's Soil Conservation District is currently reviewing the plan. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on June 26, 2019.
- The Maryland Critical Area Commission was provided notification of the variance on August 16, 2019. The Commission does not oppose the 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 presented:
 - #1: Standards Letter of August 9, 2019 from Thomas and Rebecca McClay;
 - #2: Critical Area Commission letter dated September 3, 2019;

- #3: Site Plan;
- #4: Location Map;
- #5: Land Use Map;
- #6: Zoning Map;
- #8: Contour and Soils Map;
- #9: Floodplain Map.

Applicants Testimony and Exhibits

The Applicants represented themselves at the hearing. The following evidence was presented by the Applicants:

- The applicants have lived in St. Mary's County since 1989 and purchased the current home in 2003;
- The same decks which they wish to replace were present in 2003;
- The applicants identified 3 goals for the variance: 1/ Eliminate the easement problem of the current deck crossing the neighbor's property line; 2/ Replace the existing deck which is deteriorating; and 3/ Increase the safety of the deck by expanding the side deck walkway;
- When the applicants bought the property, their neighbor had to sign an easement regarding the deck crossing the property line in order to complete the closing on the property;
- The deck protruding across the property line will be a continuing problem when they sell the property unless they fix the problem;
- They want to make the walkways wider – approximately 8 feet wide;

- The concrete landing pads are wobbly and need replacing with decking;
- The applicants wish to extend the bottom deck;
- The only way to enter the house is across the decks;
- The applicants also wish to replace existing pavers with decking;
- The applicants introduced pictures of the existing deck showing the problems they wish to address;
- The applicants also introduced diagrams showing how the new decks would be built and how new construction would resolve the problem of the area crossing the neighbor's property line.

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 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 replace two existing decks 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 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 replacing two decks, 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 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 replace two decks 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 Thomas and Rebecca McClay, 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 replace two (2) decks; 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 two (2) decks 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: October 10, 2019

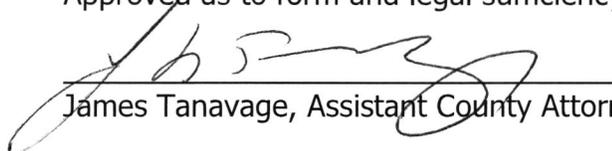

George A. Hayden, Chairman

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.

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.