

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

**VAAP NUMBER 18-1958**

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**WILLIAM CHESSER, RICHARD CHESSER, and DEBORAH SCHULTZ T/C**

**NINTH ELECTION DISTRICT**

**DATE HEARD: December 19, 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: January 9, 2020**

### **Pleadings**

William Chesser, Richard Chesser, and Deborah Schultz T/C (“the Applicants”) seek a variance (VAAP # 18-1958) to disturb the Expanded Critical Area Buffer to construct a porch with stairs and add stairs to an existing porch on the subject property.

### **Public Notification**

The hearing notice was advertised in *The Enterprise*, a newspaper of general circulation in St. Mary’s County, on December 4, 2019 and December 11, 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 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 December 11, 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 December 19, 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 46006 OConnors Lane, Piney Point, Maryland 20674. It is in the Rural Preservation District (RPD) and is identified on Tax Map 69, Grid 2, Parcel 37, Lot 3. 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 § 71.8.3.a(1) of the St. Mary's Comprehensive Zoning Ordinance ("CZO") against development activities in the Expanded Critical Area Buffer to construct a porch with stairs and add stairs to an existing porch as shown on the site plan, which was admitted into evidence at the hearing as Attachment 3 of Exhibit 2.

### **The St. Mary's County Comprehensive Zoning Ordinance**

CZO § 71.8.3 requires that there shall be a minimum 100-foot buffer<sup>1</sup> landward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands. Moreover, section 71.8.3.a(1) provides that when hydric soils are contiguous with the 100-foot buffer, the buffer shall be expanded to include the hydric soils. No new impervious surfaces or development activities are permitted in the 100-foot buffer unless an applicant obtains a variance. CZO § 71.8.3(b)(1)(c).

### **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, 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.

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<sup>1</sup> Code of Maryland Regulations ("COMAR") § 27.01.01(B)(8)(a)(ii) defines a "buffer" as an area that "exists . . . to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance."

- The Property fronts St. George Creek and is constrained by the Critical Area Buffer (“the Buffer”), tidal wetlands, and hydric soils. The Buffer is established a minimum of 100-feet landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams. CZO § 71.8.3.
- The existing soil type on the Property, according to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey, is Othello silt loam (Ot), which is a hydric soil found on slopes of 0 to 2 percent. It is considered poorly drained and slightly erodible.
- The Property has an existing 1,165 sq. ft. house. The existing porch square footage is included with house square footage. The property also has 240 square feet of sidewalks, 2,194 square feet of driveway, and a 222 square foot shed. The Applicants are proposing a 395 square foot porch addition to the house and adding 560 square feet of stairs to access the existing and proposed porch. The entire Property is in the Expanded Critical Area Buffer.
- The proposed development is in AE 6 Flood Hazard Area and is located within a regulated Special Flood Hazard Area, according to Flood Insurance Rate Map (“FIRM”) panel 376F. The Applicants are proposing to raise the existing house above base floor elevation.
- The Property is served by private well and public sewer.
- Per Code of Maryland Regulations § 27.01.09.01, plant mitigation is required for development activities within the Buffer. A Buffer Management Plan will be required and approved prior to the issuance of a building permit for this project.
- The St. Mary’s County Health Department approved the site plan on October 6, 2019. The site plan was approved on September 3, 2019 by the St. Mary’s County Soil Conservation

District. 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 August 29, 2019.

- The Maryland Critical Area Commission provided a report on October 17, 2019. *See* Attachment 2.
- If the variance is granted, the Applicants must comply with § 24.8 of the CZO pertaining to lapse of variance. Variances shall lapse one year from the date of the grant of the variance, if the Applicants have not complied with § 24.8.
- The following Attachments to the Staff Report were introduced:
  - #1: Standards Letter of November 18, 2019 from William Chesser;
  - #2: Critical Area Commission letter dated October 17, 2019;
  - #3: Site Plan;
  - #4: Location Map;
  - #5: Land Use Map;
  - #6: Zoning Map;
  - #7: Critical Area Map;
  - #8: Contour and Soils Map; and
  - #9: Floodplain Map.

#### **Applicants Testimony and Exhibits**

The Applicants appeared in person before the Board. The following evidence was presented:

- The existing home on the Property was built in 1890, and the Applicants have used the

home for seven generations;

- The Applicants are “trying to save the family house”;
- The existing porch was damaged by a hurricane in 1933, and the Applicants are now able to afford to construct a new porch after previously spending money to place riprap;
- The Applicants presented pictures of the Property, including photographs of the original home, the front of the house, and damage to the foundation.

### **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 would 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. Maryland Code Annotated, Natural Resources Article, § 8-1808(d)(2)(ii) also requires the Applicants to overcome the presumption 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.

Several factors support this decision.

First, the Board finds that denying the Applicants' request would constitute unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Court of Appeals established the statutory definition for "unwarranted hardship" as it pertains to prospective development in the Critical Area:

[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.

*Id.* at 139. Here, the Applicants have demonstrated that, absent the variance, they would be denied a use of the Property that would be both significant and reasonable. Specifically, the Applicants seek a variance to add stairs to the existing south porch and a variance to construct a porch with stairs on the east side of the Property. As for the south porch, the Applicants have obtained a permit to raise their home above the flood plain. As a result of the raise, however, the Applicants are now unable to access their home from the south porch unless the stairs are extended further into the Critical Area. In contrast, the east porch and stairs were partly destroyed during the 1933 hurricane. Given that a variance would be required to construct steps to the remaining east porch, the Applicants seek a variance to restore the east porch and stairs to their original size before they were destroyed.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District. The entire Property is contained in the Expanded Critical Area Buffer, and the lot was created before the adoption of the Critical Area Program. As a result, strictly interpreting the Critical Area provisions would prohibit the Applicants from constructing a porch with stairs and adding stairs to an existing porch.

In contrast, other property owners with recorded lots constrained by similar conditions and the Critical Area provisions of the CZO may file for a variance and seek relief from the regulations.

Third, the property is a recorded, grandfathered lot in an existing community, and granting the variance will not confer any special privileges to the Applicants that would be denied to others.

Fourth, the need for the variance does not arise from actions of the Applicants. Rather, the necessity for the east porch derives in part because it was damaged in the 1933 hurricane. Furthermore, this recorded lot predates the St. Mary's County's Critical Area Program.

Finally, granting the variance would not adversely affect the environment. The Board finds that the required Critical Area Planting Agreement will alleviate any impacts to water quality due to the creation of impervious surfaces 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 for the disturbance inside the Expanded Critical Area Buffer in accordance with Chapter 24 of the Ordinance. Here, 5,195 square feet of mitigation is required.

The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, all of which should contribute to improved infiltration and reduction of non-point source pollution leaving the site. For these reasons, the Board finds that granting the variance to construct a porch with stairs and add stairs to an existing porch in the Critical Area will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area. Moreover, the Board finds that granting the variance will be in harmony with the general spirit and intent of the Critical Area Program.

As a result, the Applicants have also overcome the presumption in § 8-1808(d)(2)(ii) of the Natural Resources Article that the variance request should be denied.

Finally, the Critical Area variance is the minimum variance necessary to afford relief.

Given that the Applicants received a permit to raise their home above the flood plain, the Applicants would be unable to access their porch without a variance.

**ORDER**

PURSUANT to the application of William Chesser, Richard Chesser, and Deborah Schultz T/C, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow them to disturb the Expanded Critical Area Buffer to construct a porch with stairs and add stairs to an existing porch; and

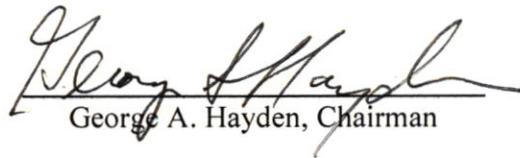
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

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.a(1) against disturbing the Expanded Critical Area Buffer to allow the Applicants to construct a porch with stairs and add stairs to an existing porch as shown in the 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: January 9, 2020

  
George A. Hayden, Chairman

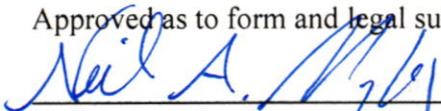
Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Ms. Delahay, Mr.

Miedzinski, and Mr. Richardson

Those voting to deny the variance:

Approved as to form and legal sufficiency

  
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Neil A. Murphy, Deputy 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, St. Mary's County Comprehensive Zoning Ordinance § 24.8 provides that a variance shall lapse one year from the date the Board of Appeals granted the variance 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; (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.