

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 19-2437

PARRY PROPERTY

FIRST ELECTION DISTRICT

DATE HEARD: OCTOBER 29, 2020

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: November 12, 2020

Pleadings

Thomas and Virginia Parry (“the Applicants”) seek a variance (VAAP # 19-2437) to disturb the expanded Critical Area Buffer (the “Buffer”) to construct two decks and a variance to encroach into the front setback to construct a deck.

Public Notification

The hearing notice was advertised in *The Enterprise*, a newspaper of general circulation in St. Mary’s County, on October 9, 2020 and October 16, 2020. The hearing notice was also posted on the Property. The file contains the certification of mailing to all adjoining landowners, including 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 October 21, 2020. 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 29, 2020 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 a 11,250 square foot property at 14025 Cornfield Harbor Dr, Scotland, Maryland (the “Property”). The Property is in the Rural Preservation District (“RNC”) zoning district with a Limited Developed Area (“LDA”) Overlay and is identified on Tax Map 74, Grid 9, Parcel 108, Lot 4, Section 1 in the Cornfield Harbor Subdivision.

The Variances Requested

The Applicants request a variance from the Comprehensive Zoning Ordinance (“CZO”) § 71.8.3, to disturb the expanded Critical Area Buffer to construct 2 decks and from Schedule 32.1 to encroach 18 feet upon the 25-foot front setback to construct a deck.

The St. Mary’s County Comprehensive Zoning Ordinance

Pursuant to CZO § 71.8.3.b, “No new . . . development activities . . . shall be permitted in the 100-foot buffer, unless: . . . The applicant obtains a variance pursuant to Article 2.” CZO § 71.8.3.a.(1) adds, “The 100-foot buffer shall be expanded to include contiguous steep slopes, hydric soils whose development or disturbance may impact streams, wetlands or other aquatic environments, and highly erodible soils pursuant to Section 76.3.1”

Next, pursuant to CZO Schedule 32.1, the minimum front setback is 25 feet.

The Evidence Submitted at the Hearing by LUGM

Stacy Clements, Environmental Planner for the St. Mary’s County Department of Land Use and Growth Management (“LUGM”), presented the following evidence:

- The existing house is approximately 18 feet from the nearest front lot line and therefore within the 25-foot front setback. The CZO defines the Front Lot Line as “That boundary of a lot that is along an existing or dedicated public street, or, where no public street exists, is along a public way”. Therefore, the house has a “non-conforming” front setback due to its existence at the time the CZO was adopted.
- The Applicant is proposing to construct a 12-foot by 36-foot deck on the front of the existing house located on Lot 4 of Cornfield Harbor Subdivision (Attachment 2). Per Schedule 32.1 of the CZO, the required front setback for the lots within the RPD is 25 feet. The house already encroaches upon the front setback by an

approximate 6 feet. Since the house was constructed in 1956, prior to the setback requirements of the current ordinance, any addition to the front of the house would require a setback variance.

- The subject property (hereinafter the “Property”) is a grandfathered lot in the Critical Area of St. Mary’s County because it was recorded in the Land Records on June 24, 1954 in Plat Liber 2 Folio 66 (Attachment 2), before the adoption of the Maryland Critical Area Program on December 1, 1985. Therefore, the lot is “grandfathered” and eligible for a Critical Area variance.
- The Property is situated between the Potomac River and the tidal wetlands of Point Lookout Creek. Thus, it is entirely constrained by the Critical Area Buffer (the “Buffer”). The Buffer is established a minimum of 100-foot landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams pursuant to CZO § 71.8.3.
- According to the site plan provided by the Applicants, the Property owner proposes to add a 12-foot by 36-foot deck to the front of the existing house and a 12-foot by 15-foot deck to the back of the house. The Applicant is also proposing to remove 105-square feet of concrete sidewalks and pads, resulting in a total of 1,234 sf of soil disturbance.
- In accordance with the CZO § 72.3.3.a(2)(c), mitigation is required at a ratio of 3:1 per square foot of the variance granted for permanent disturbance within the Critical Area Buffer of 636 square or 1,908 square feet. A 1:1 ratio is applied to the temporary disturbance of the site or 598 square feet. Therefore, the total 2,506 square feet of required prior to the issuance of a building permit.

- The Maryland Critical Area Commission provided a comment letter dated February 13, 2020. Ex. 2, Att. 3.
- The St. Mary's County Health Department approved the site plan on December 17, 2019. St. Mary's Soil Conservation District approved on December 12, 2019. LUGM reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on November 26, 2019 due to less than 5,000 square feet of disturbance.
- If the variance is granted, it shall lapse one year from the date of the grant of the variance, if the Applicant has not obtained the building permit, per CZO § 24.8.1.
- The following Attachments to the Staff Report were introduced:
 - #1: Standards Letter
 - # 2: Cornfield Harbor, Plat Book 2/66
 - # 3: Critical Area Commission Comments dated February 13, 2020
 - # 4: Site Plan
 - # 5: Location Map
 - # 6: Zoning Map
 - # 7: Land Use Map
 - # 8: Critical Area & Wetlands Map
 - # 9: Critical Area Buffer Map
 - # 10: Soils Map

Applicants Testimony and Exhibits

The Applicants' representative appeared in person presented the following evidence:

- The home is 6.13 feet into the front yard setback.

- The modesty home was built in 1956. The proposed deck is 12 feet and will reduce the front yard setback to 7 feet. The distance from the deck to the roadway will be approximately 13 feet.
- Cornfield Harbor has a small gravel road with little traffic.
- The Critical Area and setback regulations were imposed after the construction of the home.
- There are no plans at this time to enclose the deck, as that would create a living space and would require appearance before the Board.

Decision

County Requirements for Granting Variances

Standards for a Critical Area Variance

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.

Standards for Granting a Setback Variance

The St. Mary's County Comprehensive Zoning Ordinance § 24.3 sets forth seven separate requirements that must be met for a variance to be issued:

- (1) Because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape, or topographical conditions of the property involved, strict enforcement of this Ordinance will result in practical difficulty;
- (2) The conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;
- (3) The purpose of the variance is not based exclusively upon reasons of convenience, profit, or caprice. It is understood that any development necessarily increases property value, and that alone shall not constitute an exclusive finding;
- (4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
- (5) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will not be changed by the variance;
- (6) The proposed variance will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and
- (7) The variance complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

Id.

Findings

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.

Critical Area Variance

Concerning the proposed variance to disturb the Critical Area Buffer, the Board first 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 Property is entirely encumbered by the expanded Critical Area Buffer, as it is constrained by tidal wetlands to the rear and Beach and Klej Loamy Sand hydric soils to the front. Granting a variance is necessary for any development on this Property.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District. The Applicants propose adding two decks—one deck on the front of the house and one deck on the back of the house—within an existing residential waterfront neighborhood. As a result, strictly interpreting the Critical Area provisions would prohibit the Applicants from similarly situated properties in Cornfield Harbor.

Third, the variance will not confer any special privileges to the Applicants that would be denied to others, as the Applicants' property is on a grandfathered lot and the proposed decks would provide continuity within the waterfront community of Cornfield Harbor, where many of the homes have front porches and decks.

Fourth, the need for the variance does not arise from actions of the Applicants. Rather, the Property is situated between the Potomac River and the tidal wetlands of Point Lookout Creek. Thus, it is entirely constrained by the Critical Area Buffer (the "Buffer"). The subdivision in which the Property sits was recorded on June 24, 1954, long before the St. Mary's County's Critical Area Program on December 1, 1985.

Next, granting the variance would not adversely affect the environment. Pursuant to Code of Maryland Regulations § 27.01.09.01, the Applicants will be required to mitigate the proposed development with an approved planting plan established on-site as part of the Building Permit process. The plantings are intended to offset any negative effects and provide improvements to water quality along with wildlife and plant habitat. Moreover, in accordance with the CZO § 72.3.3.a(2)(c), mitigation is required at a ratio of 3:1 per square foot of the variance granted for permanent disturbance of 1,908 square feet, totaling 5,724 square feet, and temporary disturbance of 598 square feet, requires 1:1 mitigation. In total, the Applicants must mitigate 2,506 square feet of mitigation by on site plantings. The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property. Moreover, temporary disturbance could also be reduced, thus minimizing the extent of mitigation required. For these reasons, the Board finds that granting the variance to replace an existing home in the Critical Area Buffer will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat. 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 of the required mitigation, 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. The

Applicant is proposing to construct two decks in a subdivision with homes that already contain these improvements.

Setback Variance

First, the Board finds that strictly interpreting the CZO would result in practical difficulty due to the particular physical surroundings of the Property. § 24.3(1). In *McLean v. Soley*, 270 Md. 208 (1973), the Maryland Court of Appeals established the standard by which a zoning board is to review “practical difficulty” when determining whether to grant a variance:

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Id. at 214–15.

Here, the Applicant has demonstrated that, were the Board of Appeals to strictly interpret the CZO, the particular physical surroundings of the property would result in practical difficulty for the Applicant. Specifically, the location of the existing house in relation to the front property line constitute the particular physical condition of this Property.

Second, the specific physical conditions creating the practical difficulty are not generally found on other properties in the RPD and LDA Overlay. The Property is within the 25-foot setback, a requirement that postdates the construction of the house. Consequently, granting a variance would alleviate the practical difficulty inherent in the specific physical conditions.

Third, the purpose of seeking the variance are not “based exclusively upon reasons of

convenience, profit or caprice.” Rather, the existing house has a non-conforming setback, the Applicants are requesting to construct a new deck to the front of the existing house, and any addition to the front of the house would require a setback variance.

Fourth, the need for the variance does not arise from actions of the Applicants. Instead, the difficulty was created in part by the age of the Property, which predates the existing zoning regulations. Specifically, the existing dwelling was built in 1956, which predates the current regulations of enforcing setbacks from sensitive areas.

Fifth, the variance will neither detrimentally affect the public welfare, injure other properties or improvements, nor change the character of the district. The house already encroaches upon the front setback by an approximate 6 feet and neither the RPD nor the Cornfield Harbor Subdivision will be adversely altered if the Board the grants the variance. Moreover, the neighboring property owners have been notified of the variance request to provide them with an opportunity to speak on the matter, though no public comments were received.

Sixth, the proposed deck will not increase the residential use of the property, beyond that for which the property was intended.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan. The Property was created for a residential use per Liber 2, Folio 66, and the Applicants seek to continue that use, albeit by constructing a deck in the front of a house. Ex. 2, Att. 7. Moreover, Chapter 3, “A Growth Management Strategy,” of the Comprehensive Plan establishes a vision for growth areas, which encourages residential development within current residential populations.

ORDER

PURSUANT to the application of Thomas and Virginia Parry, petitioning for a variance

from the St. Mary's County Comprehensive Zoning Ordinance § 71.8.3 to disturb the expanded Critical Area Buffer to construct two decks and from Schedule 32.1 to encroach upon the 25-foot front setback to construct a deck; and

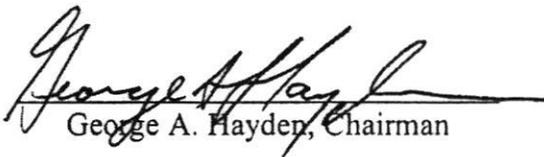
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

ORDERED, by the St. Mary's County Board of Appeals, that the Applicants are granted a variance from the St. Mary's County Comprehensive Zoning Ordinance § 71.8.3 to disturb the expanded Critical Area Buffer to construct 2 decks and from Schedule 32.1 to encroach upon the to encroach 18 feet into the 25 feet front setback to construct a deck with the condition that the front deck steps shall be inset within the 12-foot deck.

Additionally, the foregoing variance is also subject to the following 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: Nov. 12, 2020

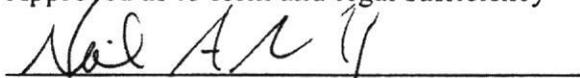

George A. Hayden, Chairman

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


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.