

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

**VAAP NUMBER 20-0810**

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**HEINSSEN PROPERTY**

**THIRD ELECTION DISTRICT**

**DATE HEARD: OCTOBER 8, 2020**

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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: October 22, 2020**

### **Pleadings**

Robert & Ruth Heinssen (“the Applicants”) seek a variance (VAAP # 20-0810) to disturb the Critical Area Buffer (the “Buffer”) and to encroach upon the 25-foot front setback to replace an existing house with a single-family dwelling less than minimum 25-foot setback from the front property line.

### **Public Notification**

The hearing notice was advertised in *The Enterprise*, a newspaper of general circulation in St. Mary’s County, on September 18, 2020 and September 25, 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 September 30, 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 8, 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 13,938 square foot property at 22128 Breton Street, Leonardtown, Maryland (the “Property”). The Property is in the Residential Neighborhood Conservation (“RNC”) zoning district with an Limited Developed Area (“LDA”) Overlay and is identified on

Tax Map 39A, Grid 19, Parcel 9, Lots 1–5 and Part of Lot 6, Section 30 in the St. Clements Shores.

### **The Variances Requested**

The Applicants request a variance from the Comprehensive Zoning Ordinance (“CZO”) § 71.8.3, to disturb the Critical Area Buffer and from Schedule 32.1 to encroach upon the 25-foot front setback to replace an existing house.

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

Pursuant to CZO § 71.8.3, “No new . . . development activities . . . shall be permitted in the 100-foot buffer, unless: . . . The applicant obtains a variance pursuant to Article 2.”

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

### **The Evidence Submitted at the Hearing by LUGM**

Harry Knight, Deputy Director for the St. Mary’s County Department of Land Use and Growth Management (“LUGM”), presented the following evidence:

- The Property is a grandfathered lot in the Critical Area of St. Mary’s County because it was recorded in the Land Records (sometime prior to 1939) before the adoption of the Maryland Critical Area Program on December 1, 1985. Therefore, the lot is “grandfathered” and eligible for a variance. Ex. 2, Att. 2.
- The Property is situated between St. Clements Bay and Breton Street. It is entirely constrained by the Buffer and tidal wetlands. Under CZO § 71.8.3, the Buffer is established a minimum of 100-feet landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams. There is an existing house.
- According to the site plan provided by the Applicants, the Property owner proposes a replacement single-family dwelling with sidewalks and steps, and a deck resulting in a total of 3,611 square feet of soil disturbance.

- The footprint of the site plan is approximately one foot different than the original structure.
- As the Property is located in the floodplain, the home will be constructed to floodplain standards. The home will be 10 feet above elevation, as the flood plain is at 7 feet, and floodplain standards require an additional 3 feet of elevation.
- In accordance with 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 1,791 square feet, totaling 5,373 square feet. The temporary disturbance of 1,820 square feet, requires 1:1 mitigation and 1.5:1 for the clearing of 20%–30% of developed woodland or 698 feet, resulting in 8,240 square feet of mitigation to be provided by on site plantings.
- Per CZO Schedule 32.1, the required front setback for the proposed house is 25 ft. The Applicants propose to replace the existing house using a nearly identical footprint but moving the house approximately 1 foot back from the front lot line.
- The existing house is approximately 18 feet from the nearest front lot line. 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 existing house has a “non-conforming” front setback. CZO § 52.3.2. states, “No nonconforming structure shall be moved unless required by law, or unless the movement (relocation) will result in the elimination of the nonconformity.” Therefore, a variance to reduce the front yard setback is required.
- The St. Mary’s Metropolitan Commission (“MetCom”) approved the site plan on June 18, 2020. The St. Mary’s Soil Conservation District approved on July 29, 2020. LUGM reviewed the site plan in accordance with stormwater management requirements and exempted the site plan from stormwater management regulations on March 27, 2020, as

the Applicants proposed less than 5,000 square feet of disturbance.

- The Maryland Critical Area Commission provided a comment letter dated April 17, 2020. Ex. 2, Att. 3.
- If the variance is granted, it shall lapse one year from the date of the grant of the variance, if the Applicants have not obtained the building permit, per CZO § 24.8.1.
- The following Attachments to the Staff Report were introduced:
  - #1: Standards Letter
  - # 2: St. Clements Shores, Plat Book 1/90
  - # 3: Critical Area Commission Comments dated April 17, 2020
  - # 4: Site Plan
  - # 5: Location Map
  - # 6: Zoning Map
  - # 7: Critical Area Map

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

The Applicants appeared via WebEx before the Board, and their representative, Steven Vaughan, appeared in person. The following evidence was presented:

- The Property is on the corner of the St. Clements Shores Subdivision with tidal wetlands to the south.
- The proposed house is 41 square feet larger than the existing house, and the Applicants propose placing the living space over the existing porch to maximize the footprint.
- The original home was built in 1939, predating the Critical Area Regulations.
- A few shrubs and one tree will be removed, thus minimizing the levels of disturbance to the Critical Area Buffer.

- The home will be served by public water and sewer, and the Applicants will install flood vents.
- The Applicants are looking forward to returning to St. Mary's County and to living in this home during their retirement.

### **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 constrained by the Critical Area Buffer in the northern half of the property and tidal wetlands to the southern half. The Applicants seek to replace their modest home built in 1939 and only propose moving the footprint by one foot and adding only 41 additional square feet to the home.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District. Nearly half of Property is contained in the 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 replacing their home within an existing residential neighborhood.

Third, the home is on 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 subdivision in which the Property sits was created prior to 1939, long before the St. Mary's County's Critical Area Program.

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 1,791 square feet, totaling 5,373 square feet; the temporary disturbance of 1,820 square feet, requires 1:1 mitigation and 1.5:1 for the clearing of 20%–30% of developed woodland or 698 feet, for the result of 8,240 square feet of mitigation to be provided 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, 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 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 replace their modest home by adding only 41 square feet and by constructing sidewalks and a deck.

#### *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, set backs, 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 particular physical condition of this Property derives from the location of the existing house to the shoreline, and strict adherence to the 25-foot front setback would require deeper intrusion into the Sensitive Area, namely the Critical Area Buffer.

Second, the specific physical conditions creating the practical difficulty are not generally found on other properties in the RNC and LDA Overlay. The Property is within the 25-foot setback, a requirement that postdates the construction of the house and was created with the adoption of current zoning setbacks. On smaller lots created before the current regulations, the condition may apply, but for the remainder of the larger lots created before the current setback requirements, the practical difficulty is not present. 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, and the Applicant is requesting to construct a new residential home with a similar footprint.

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 1939, 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. Neither the RNC district nor the St. Clements Shores Subdivision will be adversely altered if the Board 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 house will not increase the residential use of the property, beyond that for which it was intended. In fact, the Applicants only propose adding an additional 41 square feet to the existing footprint.

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 1, Folio 90, and the Applicants seek to continue that use, albeit by replacing a home built in 1939. 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 Robert & Ruth Heinszen, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer and from Schedule 32.1 to encroach upon the 25-foot front setback to replace an existing house; and

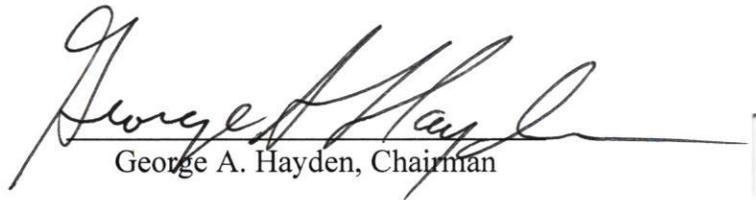
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

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 Critical Area Buffer and from Schedule 32.1 to encroach upon the 25-foot front setback to replace an existing house.

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: 10-22-20, 2020

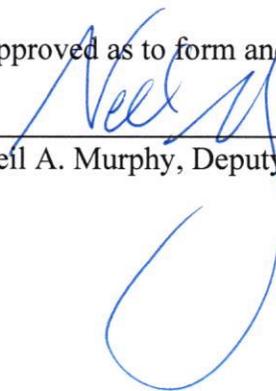
  
George A. Hayden, Chairman

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.