

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 20-1209

TRGINA PROPERTY

SEVENTH ELECTION DISTRICT

DATE HEARD: February 11, 2020

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: March 11, 2021

Pleadings

Raymond & Carol Trgina (“the Applicants”) seek a variance (VAAP # 20-1209) to disturb the Critical Area Buffer to construct a house addition with an areaway.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on January 22, 2021 and January 29, 2021. 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 February 3, 2021. 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 February 11, 2021 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 improved property at 22865 Grampton Road, Clements, MD (“the Subject Property”). The Subject Property is in the Rural Preservation District (“RPD”) Zoning District and is identified on Tax Map 31, Grid 20, Parcel 29. This lot is designated in the Chesapeake Bay Critical Area with a Resource Conservation Overlay (“RCA”) 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 Critical Area Buffer to construct a house addition with an areaway.

The St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires that there shall be a minimum 100-foot buffer¹ landward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands. 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 ("LUGM"), presented the following evidence:

- The Subject Property (hereinafter the "Property"), recorded in the Land Records on 09/09/1975 in Deed Book 235 Page 6 contains a single-family dwelling and a woodshed. Ex. 2, Att. 2. According to LUGM records, the house construction was permitted in 1980, prior to the adoption of the current zoning and subdivision regulations in St. Mary's County and before the adoption of the Maryland Critical Area Program on December 1, 1985. The Applicant then renewed the permit to build the house in 1985 and the Use and Occupancy Permit was issued in 1991. The existing house is entirely within the 100' Critical Area Buffer and is eligible for a Critical Area variance from the standards.
- The Property is situated adjacent to the Tomakokin Creek, a tributary of St. Clements Bay.

¹ Maryland Code of Maryland Regulations § 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 Critical Area Buffer is established a minimum of 100-feet landward from the mean highwater line of tidal waters, tidal wetlands, and tributary streams (CZO 71.8.3), in this case, it is tidal wetlands impacting the Property, therefore, it is constrained by the Critical Area Buffer (the “Buffer”).

- Per the site plan (Attachment 4) the Applicant is proposing to add a 552-sf addition and 47-sf areaway to the existing 909 sf house. The proposed addition is almost entirely within the 100’ Critical Area Buffer.
- 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 3:1 per square foot of the variance granted for permanent disturbance within the Critical Area Buffer of 599 sf or 1,797 sf. A 1:1 ratio is applied to the temporary disturbance of the site or 571 sf. Therefore, the total 2,368 sf of mitigation is to be provided by on site plantings. A planting agreement and plan will be required prior to the issuance of a building permit.
- The Maryland Critical Area Commission provided a comment letter dated August 12, 2020 (Attachment 3).
- Pursuant to Section 32.3.2 of the Ordinance, “Front, rear, and side setbacks on lots existing prior to the effective date of this Ordinance shall apply from the edge of road right-of-way and from any Sensitive Areas, as defined in Chapter 71.” The lot was in existence prior to the effective date of the current ordinance, has more than 15,000 sf of buildable area, and has on site water and septic, therefore, the existing house does not conform to the required setback from “sensitive areas” (the Buffer). Non-conforming structures, per CZO Section 52.3.3.e, proposing an “expansion or enlargement that exceeds 25 percent of the existing structure or use the enlargement or expansion must be approved by the Board of Appeals.

However, the total amount of expansion or enlargement allowed for any nonconforming use shall not exceed 50 percent.” The proposed addition is a 65 percent expansion; therefore, it can only be approved by Variance.

- The St. Mary’s County Health Department approved the site plan on November 24, 2020. St. Mary’s Soil Conservation District approved on July 16, 2020. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on July 14, 2020 due to less than 5,000 sf 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 Section 24.8.1.
- The following Attachments to the Staff Report were introduced:
 - #1: Standards Letter;
 - #2: Sheehan Subdivision, Plat Book 6/28;
 - #3: Critical Area Commission comments dated August 14, 2020;
 - #4: Site Plan;
 - #5: Location Map;
 - #6: Zoning Map;
 - #7: Critical Area Map;

Applicants Testimony and Exhibits

The Applicants appeared remotely via WebEx before the Board. The following evidence was presented:

- The Applicants presented photos of the property.
- The property was surveyed in 1957, which predates the Critical Area regulations from

which the Applicants seek a variance.

- The Applicants are proposing the addition on the side of the house that is furthest from the water. The only access to the basement is through steps, but the addition will accommodate access to the basement.
- The expansion of the basement will not be a full basement.
- The Applicants ask to exceed what is allowed under the CZO, but the home is not very large. They are seeking an extra bedroom and bathroom for them to age in place as the Applicants grow older.

Decision

County General Standards for Granting a 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 – General Standards

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 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 Applicants have 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 Applicants. Specifically, the location of the existing house in relation to the setback from Sensitive Area constitutes the particular physical condition of the Subject Property.

Second, the specific physical conditions creating the practical difficulty are not generally found on other properties in the RPD and RCA. The specific condition, cited above, is not generally found on other properties with RPD zoning and RCA overlay, unless their houses were permitted prior to the adoption of the current zoning ordinance. creates a unique situation that restricts much of the development on the Property..

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 due to the setbacks from sensitive areas not being applicable during the time of construction. The Applicant is requesting to construct an addition onto the exiting house.

Fourth, the need for the variance does not arise from actions of the Applicants. Instead, the existing dwelling was permitted in 1980, renewed in 1985, prior to 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 neighboring property owners have been notified of the variance request to provide them with an opportunity to speak on the matter.

Sixth, The proposed addition will not increase the residential use of the property because it remains a single-family dwelling.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan. The Subject Property has already been developed for residential use. Moreover, Chapter 3, “A Growth Management Strategy,” of the

Comprehensive Plan, establishes a vision for community design, which includes encouraging owners of existing structures to maintain and retrofit the buildings and grounds, so they become attractive and energy efficient.

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 Subject Property is constrained by the Critical Area Buffer due to tidal waters and wetlands, and a variance is required to reasonably develop on the Subject Property. In fact, “the existing dwelling is located entirely within the 100-foot Buffer, and the majority of the proposed improvements are located within the 100- foot Buffer.” Ex. 2, Att. 3.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the RPD and RCA. The Applicant proposes to add a 552 square foot addition with a 42 square foot areaway to an existing house on an existing residential waterfront property, and similarly situated properties in this zoning district and overlay would be able to request a comparable variance.

Third, the Applicants proposed addition will bring the Property in line with living space square footage of neighboring properties.

Fourth, the need for the variance does not arise from actions of the Applicants. Rather, the Applicants purchased the property in 1975 and applied for the permit to build the house prior to the adoption of the current Critical Area regulations.

Next, granting the variance would not adversely affect the environment. The Applicants will be required to mitigate the proposed development with an approved planting plan established on-site (per COMAR 27.01.09.01) 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. 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. Further, the Maryland Critical Area Commission did not provide any objections to the project in its August 14, 2020 letter to LUGM. Ex. 2. Att. 3. For these reasons, the Board finds that granting the variance to construct an attached garage 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 achieve a reasonable use of the land, as the Applicants are proposing to construct an addition with an areaway for access.

ORDER

PURSUANT to the application of Raymond & Carol Trgina, 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 construct a house addition with an areaway; and

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

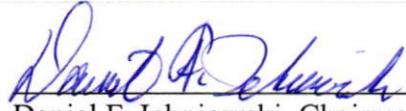
ORDERED, by the St. Mary's County Board of Appeals, that the Applicants are granted a Critical Area variance from the prohibition in § 71.8.3 against disturbing the Critical Area Buffer

to allow the Applicants to construct a house addition with an areaway.

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: MARCH 11, 2021


Daniel F. Ichniowski, Chairman

Those voting to grant the variance:

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

Those voting to deny the variance:

Approved as to form and legal sufficiency


Steve Scott, Board of Appeals 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.