

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

**VAAP NUMBER 20-1420**

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**HARTZER PROPERTY**

**SECOND ELECTION DISTRICT**

**DATE HEARD: December 17, 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: January 14, 2021**

### **Pleadings**

Phillip & Jesieryl Hartzler (“the Applicants”) seek a variance (VAAP # 20-1420) to disturb the Expanded Critical Area Buffer to construct an attached garage.

### **Public Notification**

The hearing notice was advertised in *The Enterprise*, a newspaper of general circulation in St. Mary’s County, on November 27 and December 4, 2020. 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 9, 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 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 improved property at 44940 Shore Drive, Tall Timbers, Maryland (“the Subject Property”). The Subject Property is in the Residential, Low Density (“RL”) Zoning District and is identified on Tax Map 65, Grid 4, Parcel 263, Lot 37. This lot is designated in the Chesapeake Bay Critical Area with an Intensely Developed Area (“IDA”) 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 in order to construct an attached garage.

### **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 slopes of 15% or more are within the 100-foot buffer, the buffer shall be expanded by four feet for every one percent of slope or to the top of the slope, whichever is greater. 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**

Harry Knight, Deputy Director of the St. Mary's County Department of Land Use and Growth Management, presented the following evidence:

- The Subject Property is a grandfathered lot in the Critical Area of St. Mary's County because it was recorded in the Land Records (on August 19, 1966 in Plat Book 6 page 28) 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 Subject Property is situated on St. George Creek in Tall Timbers. It is almost entirely constrained by the expanded 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

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<sup>1</sup> 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."

line of tidal waters, tidal wetlands, and tributary streams and expanded for hydric soil conditions up to 300-feet. CZO § 71.8.3. There is an existing house on the property.

- According to the site plan provided by the Applicants, a 22' x 27' (594 square feet) garage addition to a single-family dwelling is proposed, resulting in a total of 1,554 square feet 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 of 594 sf or 1,782 square feet. The temporary disturbance of 960 sf, which requires 1:1 mitigation and a 76 square feet credit for lot coverage removed and revegetated for a total of 2,666 sf of mitigation to be provided by on site plantings within the Buffer.
- The St. Mary's Soil Conservation District and St. Mary's County Health Department approved the plan on June 24, 2020. LUGM reviewed the site plan in accordance with stormwater management requirements and exempted the site plan from stormwater management regulations on June 23, 2020 due to less than 5,000 sf of soil disturbance. Floodplain approval is pending a non-conversion agreement.
- The Maryland Critical Area Commission provided a comment letter dated August 14, 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 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 Applicant presented photos of the property.
- The Applicants will be constructing the attached garage over the existing driveway. The garage will have storage space and a walkable area above.
- The project is exempt from stormwater management requirements because they are there will be fewer than 5,000 square feet of soil disturbance.
- Notwithstanding, because the Subject Property is in the IDA, the Applicants “must provide water quality benefits to provide a 10 percent reduction in pollutant loading from predevelopment levels.” CZO § 41.4.3.f. The Applicants are satisfying this requirement by adding rain gutters and spouts.

### **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 Property is constrained by the Critical Area Buffer, tidal wetlands, and hydric soils, and the Applicants seek a variance to construct an attached garage.

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 garage. 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 Sheehan's subdivision was recorded on August 19, 1966 in Plat Book 6 Page 28, prior to the adoption of the Critical Area Ordinance. Ex. 2, Att. 2.

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. Additionally, the Applicants will be adding rain gutters and spouts "to provide a 10 percent reduction in pollutant loading from predevelopment levels." CZO § 41.4.3.f. 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. Moreover, The St. Mary's Soil Conservation District and Health Department approved the plan on June 24, 2020. 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. The Applicants are proposing to construct an attached garage to an existing residential home, and the Board concludes that the variance ordered is the minimum necessary to achieve this purpose.

### **ORDER**

PURSUANT to the application of Phillip & Jesieryl Hartzler, 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 an attached garage; 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 attached garage 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 14, 2021

*Daniel F. Ichniowski*  
George A. Hayden, Chairman  
*Daniel F. Ichniowski, 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*  
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.