

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 20-2039

BALLARD PROPERTY

THIRD 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

Robert & Cynthia Ballard (“the Applicants”) seek a variance (VAAP # 20-2039) to disturb the Critical Area Buffer to replace a wood retaining wall.

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 21901 Helen Lane, Leonardtown, MD (“the Subject Property”). The Subject Property is in the Residential, Neighborhood Conservation (“RNC”) Zoning District and is identified on Tax Map 40, Grid 16, Parcel 99, Lot 1. This lot is designated in the Chesapeake Bay Critical Area with an 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 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 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 contains a single-family dwelling with decks and a patio. According to the Tax Assessor, the house was constructed in 1999. The existing patio is entirely within the Critical Area Buffer.
- The Property is a grandfathered parcel in the Critical Area of St. Mary's County, it was recorded in the Land Records on 08/05/1991 in Plat Book 35 Page 1, before the adoption of the Maryland Critical Area Program on December 1, 1985. Ex. 2, Att. 2. Therefore, the lot is "grandfathered" and eligible for a Critical Area variance.
- The Property is situated on Breton Bay and is adjacent to tidal wetlands. Therefore, it is constrained by the Critical Area Buffer (the "Buffer"). The Buffer is established a

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."

minimum of 100-feet landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams per CZO § 71.8.3. 4. The Applicant applied for a patio and a pool in 2003 and again in 2005. Both pool permits were disapproved, per CZO § 51.3.122(3), as "...pools...shall be prohibited in the Critical Area Buffer. Variances for these structures cannot be granted." The Applicant then applied for a patio permit in 2011, which was approved at a Board of Appeals hearing for disturbance to the Critical Area Buffer. Ex 2, Att. 3.

- The Applicant is proposing to replace the existing wood retaining wall with one made of stone running parallel to the existing wall. Once the new wall is completed, the old wall will be removed. The purpose of keeping the old wall is to maintain stability of the soil supporting the existing patio and house foundation while the new wall is constructed. Staff supports using this sequence of construction to prevent erosion during the construction into the adjacent tidal wetlands and the tidal waters of Breton Bay. The proposed work is entirely within the Critical Area Buffer.
- 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 (stone wall) within the Critical Area Buffer of 48 sf or 144 sf. A 1:1 ratio is applied to the temporary disturbance of the site or 1,187 sf. Therefore, the total 1,331 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 January 11, 2021, in which they refer to, and oppose the approval of, a "proposed partially inground spa." Ex. 2, Att. 4. A "spa" is technically a "swimming pool" as defined in CZO Section

9, “Any structure intended for swimming or recreational bathing that contains water over 24 inches (610 mm) deep. This includes in-ground swimming pools and above-ground and on-ground hot tubs and spas.” As stated above, “Variances for these structures cannot be granted.” Therefore, the applicants removed the “spa” from their permit request.

- The St. Mary’s County Health Department approved the site plan on September 3, 2020. LUGM reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on December 31, 2020 due to less than 5,000 sf of disturbance.
- Removing the fence without first constructing a new fence and filling the space in between with soil could affect the stability of the house and soil.
- Building permits must be obtained to construct the wall, and the wall will be inspected upon construction.
- LUGM presented photos of the damage to the existing retaining wall and a rendering of the proposed stone retaining wall. Ex. 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 Applicants presented photos of the property.
- The Applicants built their home on the Subject Property in 1999 and have lived here since.
- The Applicants built a wooden retaining wall to level out the yard and make the space more useable
- Recently, the retaining wall has become less stable and has begun to slope outward. The Applicants tried to little avail to reinforce the wall, using timbers, concrete footers, and other means., but the wall is nearing its end.
- The Applicants proposed a professionally built stone wall to stabilize their stable yard. The new wall will be about the same length and width.
- To retain the integrity of the soil underlying the Subject Property, the Applicants will first construct the new retaining wall two feet forward and fill the space in between with soil.

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 due to tidal wetlands, and the Applicants seek a variance to stabilize the soil around their home.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the RNC and RCA. The Applicant proposes to replace a failing retaining wall with a new stone wall, thus providing stabilization to the patio and

foundation of the existing house. Maintenance and preservation of existing improvements is a common right.

Third, the Applicant's proposed replacement retaining wall will stabilize and preserve their patio and foundation, 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 Applicant built the house in 1999 with the wood retaining wall. Since then the wood has deteriorated—*see* Ex. 3—and the Applicant needs to replace it.

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. 4. For these reasons, the Board finds that granting the variance to construct the retaining wall 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 Applicant is proposing to replace an existing wood retaining wall with a stone wall to maintain the integrity of the patio and foundation.

ORDER

PURSUANT to the application of Robert & Cynthia Ballard, 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 replace a wood retaining wall; and

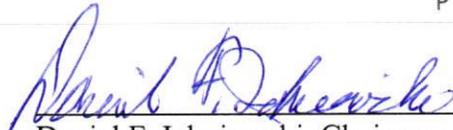
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

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 replace a wood retaining wall.

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



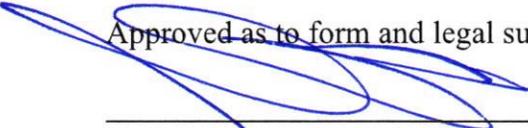
Daniel F. Ichniowski, Chairman

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.