

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP 20-2477

Bryner Property

EIGHTH ELECTION DISTRICT

DATE HEARD: April 8, 2021

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: May 13, 2021

Pleadings

John & Julie Bryner (“the Applicants”) seek a variance (VAAP # 20-2477) to disturb the Expanded Critical Area Buffer to raise the existing house out of the floodplain.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on March 19, 2021 and March 26, 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 March 31, 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 April 8, 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 23480 River Hill Court, Lexington Park, MD (“the Subject Property”). The Subject Property is in the Residential, Neighborhood Conservation (“RNC”) Zoning District and is identified on Tax Map 35A, Grid 17, Parcel 32. This lot is designated in the Chesapeake Bay Expanded Critical Area Buffer with an Limited Development Area (“LDA”) 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 raise the existing house out of the floodplain.

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. 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 for hydric and highly erodible soil conditions. 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, recorded in the Land Records on 12/06/1988 in Plat Book 30, Page 90. Ex. 2, Att. 2. According to the Maryland Department of Assessments and Taxation records, the single-family house was constructed in 1989, prior to the adoption of the current zoning and flood plain regulations in St. Mary's County. The existing house is currently in the Expanded Critical Area Buffer and is eligible for a Critical Area variance from the standards.
- The Subject Property is situated adjacent to the Patuxent River. The Critical Area Buffer

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."

is established a minimum of 100-feet landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams and expanded for hydric and highly erodible soil conditions up to 300-feet. CZO § 71.8.3. Therefore, it is constrained by the Critical Area Buffer (the “Buffer”).

- Per the site plan, Ex. 2, Att. 3, the Applicants illustrate the “temporary disturbance” necessary to raise the existing house. The existing house is entirely within the Expanded Critical Area Buffer. Temporary disturbance in the Buffer requires a variance.
- In accordance with COMAR § 27.01.09.01-2 Table H, mitigation is required at a ratio of 1:1 per square foot of the variance granted for temporary disturbance within the Critical Area Buffer. This proposal requires 2,300 sf of mitigation 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 December 4, 2020. Ex. 2, Att. 4.
- LUGM reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on September 4, 2020 due to less than 5,000 sf of disturbance. The St. Mary’s County Soil Conservation District also issued an exemption for less than 5,000 s.f. 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: Resubdivision of Lot 500-2, Section 1-C, Plat Book 30/90;

#3: Critical Area Commission comments dated December 4, 2020;

#4: Site Plan;

#5: Location Map;

#6: Critical Area Map;

#7: Soils Map.

Applicants Testimony and Exhibits

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

- The Subject Property is in the Town Creek Subdivision, and they Applicants moved to the Subject Property approximately 5 months ago.
- As the Subject Property is in the flood zone, any time it rains, water approaches their porch and enters their garage.
- Flood insurance only covers \$250,000 of damage.
- The Applicants aren't intending to expand the property; rather, they only want to raise it to prevent water damage.
- The Applicants have contracted with a specialty firm to raise their home.
- The Applicants are disturbing sand and grass, which will be mitigated with shrubs and more sand.
- Two site plans were submitted.
- The Applicants plan on living in their neighbor's in-law suite during construction.
- The Applicants plan on adding steps to reach the elevated home on the existing footprint.
- The Applicants will be adding a silt fence.
- A local home improvement contractor will be doing the foundation work.
- The plan is to begin construction during August.

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 Subject Property is constrained by the Critical Area Buffer due to the tidal waters of the Patuxent River and contiguous hydric and highly erodible soils.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the RNC and LDA. The Applicants propose to raise an existing house to meet the current Flood Protection Elevation standards.

Third, the Applicants' proposed improvement is intended solely for flood protection. The proposed improvement will not alter the existing footprint within the Buffer.

Fourth, the need for the variance does not arise from actions of the Applicants. Rather, the Applicants purchased the property in 2020 and applied for the permit to raise the house, which is below the current flood protection elevation. The house was constructed prior to the adoption of the current floodplain 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 December 4, 2020 letter to LUGM. Ex. 2. Att. 3. For these reasons, the Board finds that granting the variance to elevate the home 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 raise the existing house to minimize flood risk.

ORDER

PURSUANT to the application of John & Julie Bryner, 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 raise their existing house out of the floodplain; and

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

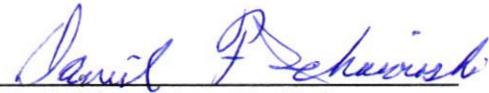
ORDERED, by the St. Mary's County Board of Appeals, that the Applicants are granted a Critical Area variance from the prohibition in CZO § 71.8.3.a(1) against disturbing the Expanded Critical Area Buffer to raise their existing house out of the floodplain.

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: MAY 13, 2021

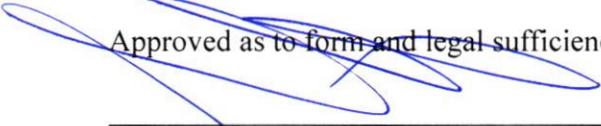

Daniel F. Ichniowski, Chairman

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.