

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-1460

WEBER

THIRD ELECTION DISTRICT

VARIANCE REQUEST HEARD: NOVEMBER 10, 2022

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: Dec 8, 2022

Pleadings

John, Jr. and Jamie Weber (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer to construct a sunroom.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on October 21, 2022 and October 28, 2022. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before October 26, 2022. The agenda was also posted on the County’s website on November 2, 2022. Therefore, the Board of Appeals (“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 November 10, 2022 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were duly sworn, the proceedings were recorded electronically, and the following was presented about the variance requested by the Applicants.

The Property

The subject property is located at 40345 Drury Lane, Leonardtown, Maryland (“the Property”). The Property is 2.06 acres, more or less, is zoned Rural Preservation District (RPD), has a Limited Development Area (LDA) Critical Area overlay, and is found at Tax Map 40, Grid 19, and Parcel 128.

The Variance Requested

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to

construct a sunroom.

St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires there be a minimum 100-foot buffer (“the Buffer”) 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).

Departmental Testimony and Exhibits

Stacy Clements, an Environmental Planner for the St. Mary's County Department of Land Use & Growth Management (“LUGM”), presented the following evidence:

- The Property consists 89,743 square feet, more or less, and contains an existing house, a portion of which extends into the Critical Area Buffer. It sits adjacent to Cherry Cove Creek.
- The proposed addition is fully within the 100' Buffer.
- Mitigation for the project would be required at a ratio of 3:1 for permanent disturbance (298 s.f.) and 1:1 of temporary disturbance (326 s.f.) within the Buffer. With credit for removing an existing walkway (160 s.f.), Applicants must provide 1,060 s.f. of mitigation plantings if the project is approved. A planting agreement and plan will be required prior to issuance of a building permit.
- In its response letter dated November 1, 2022, the Maryland Critical Area Commission did not object to the variance.
- The project is exempt from Soil Conservation District and Stormwater Management review as less than 5,000 square feet of total soil disturbance is proposed.

- The Health Department has approved the site plan.
- If the variance is granted, it will lapse one year from the date of the grant of the variance if the Applicant has not obtained a building permit.
- Attachments to the Staff Report:
 - #1: Standards Letter
 - #2: Location Map
 - #3: Zoning Map
 - #4: Critical Area Map
 - #5: Site Plan
 - #6: Critical Area Commission Letter

Applicants' Testimony and Exhibits

Applicants were represented by Austin Davis of W.M. Davis, Inc., the Applicants' builder, before the Board. The following evidence testimony was among that provided to the Board:

- The sunroom is an enclosure of space occupied by a pre-existing brick patio, which was damaged during removal of an existing tree and its roots. The patio was described as Mr. Davis as being "in fairly rough shape."
- The patio would be replaced with a turndown slab as a base, with the sunroom to be built using wood construction, 2 x 6 walls, and a hipped roof back to the existing roof.
- The pre-existing patio's footprint is 14' x 21'4" and will be replaced with a sunroom that, per Applicants' site plan, will measure 14' x 21'4"..
- An existing brick walkway has been removed and will not be replaced.
- An existing stoop at the back entrance door will remain.

Public Testimony

No members of the public appeared to offer testimony related to this matter.

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.¹ 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 the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors

¹ In a recent letter from the Critical Area Commission on another matter, the Critical Area Commission pointed out that the criteria of CZO § 24.4.1 differs from the criteria imposed in COMAR 27.01.12.04. Substantially similar in many respects, the Board identifies two criteria in COMAR 27.01.12.04 that it does not believe has any direct analogues in CZO § 24.4.1, those being COMAR 27.01.12.04.B(5) and (7). With respect to B(5), it is apparent to the Board, however, that the variance request does not arise from any conforming or nonconforming condition on any neighboring property. With respect to B(7), the Board believes that, by satisfying all other standards of the Critical Area Program and the Comprehensive Zoning Ordinance, and for the salutary effects of the proposed mitigation and other testimony brought before the Board, that the proposed project is in harmony with the Critical Area Program.

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. Applicants propose to build sunroom over the footprint of an existing patio. This is a common amenity, the deprivation of which would, the Board believes, amount to an unwarranted hardship. The existing patio is located entirely within the Critical Area Buffer and, should Applicants desire to make use of this existing footprint, are constrained to its dimensions and location.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Limited Development Area. As stated above, the amenity Applicants propose is one common to our County and to similarly situated properties as Applicants’.

Third, granting a variance to will not confer a special privilege upon Applicants. Applicants’ proposed work is of a quality and scale that may be commonly found in the Critical Area in St. Mary’s County, even among dwellings and decks constructed after St. Mary’s County’s adoption of its Critical Area program.

Fourth, the need for the variance does not arise from actions of the Applicants. The Applicants are constrained by the physical features of their lot and the footprint of the existing

house and patio.

Fifth, granting the variance would not adversely affect the environment. The Applicants will be required to mitigate the proposed development with a Buffer Management Plan. 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. Applicants' proposed work is also tailored to make use of the location of existing features, and the overall increased site coverage is modest.

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 Board of Appeals finds that the requested variance is the minimum necessary to achieve Applicants' intended reasonable use of the Property. As noted above, the Applicants are constrained by the existing location of the house, the physical features of the property, and the geographical extent of the Buffer.

County Requirements for Granting Variances

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 – Standard Variance Requirements

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. 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, setbacks,

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.

As noted in the Board of Appeals' discussion of the standards for granting a variance from Critical Area provisions, denial of this variance would constitute a practical difficulty. Moreover, the Property is constrained by its geographical location on the banks of Cherry Cove Creek. The existing patio is located within the Buffer.

The second standard is that the conditions creating the difficulty are not generally applicable to other properties in the same zoning classification. As noted above, Applicants' need for a variance stem from the particular physical characteristics of this site and the constraints posed by the location of an existing structure.

To the third standard, the purpose of seeking the variance is not "based exclusively upon reasons of convenience, profit or caprice." Rather, Applicants attempt to achieve a reasonable use of the Property enjoyed by owners of other similarly situated properties.

Fourth, the need for the variance does not arise from actions of the Applicants. Applicants' need for a variance stem from the physical characteristics of their Property, and their particular

development plan is oriented around an existing footprint of a legal, compliant structure.

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 were notified of the variance request and given an opportunity to speak on the matter; none availed themselves of the opportunity. The Critical Area Commission, in its response letter, did not raise an objection to the project.

Sixth, the proposed development will not increase the residential use of the property and the Board does not find that it will increase congestion or the risk of fire, endanger public safety, or substantially diminish or impair property values in the neighborhood.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan. The Board of Appeals notes that Applicants' request makes use of existing structures and footprints where it can, and that the Applicants ask for no more than what may commonly be found on other similarly situated properties..

ORDER

PURSUANT to the application of the John, Jr. and Jamie Weber, petitioning for a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer to construct a sunroom; 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, pursuant to CZO § 21.1.3.a and CZO § 24.8, that the Applicants are granted a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer to construct a sunroom;

UPON FURTHER CONDITION THAT, 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 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: DEC 8, 2022

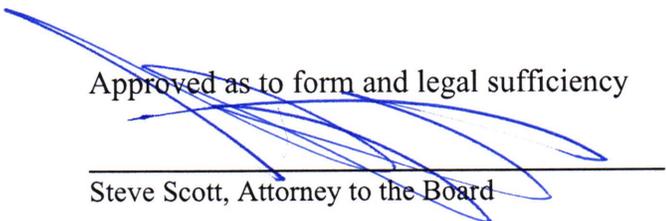

Daniel F. Ichniowski, Chairperson

Those voting to grant the amendment:

Mr. Bradley, Ms. Delahay, Mr. Ichniowski,
Mr. Miedzinski, Mr. Payne

Those voting to deny the amendment:

Approved as to form and legal sufficiency



Steve Scott, Attorney to the Board

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.