

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 25-0178

PORTNOY PROPERTY

SIXTH ELECTION DISTRICT

VARIANCE REQUEST HEARD: MAY 8, 2025

ORDERED BY:

**Mr. Hayden, Mr. Brown, Mr. LaRocco
Mr. Payne, and Ms. Weaver**

ENVIRONMENTAL PLANNER: AMANDA YOWELL

DATE SIGNED: June 12, 2025

Pleadings

Ralph I. Portnoy & Janice M. Portnoy (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 71.8.3 disturb the Critical Area Buffer (“the Buffer”) and the Expanded Critical Area Buffer (“the Expanded Buffer”) to replace a swimming pool deck, repair a retaining wall, and replace an additional 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 April 18, 2025 and April 25, 2025. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before April 23, 2025. The agenda was also posted on the County’s website on May 2, 2025. 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 May 8, 2025 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 proposed amendment requested by the Applicants.

The Property

The subject property is situate 26221 Fawn Lane, Hollywood, Maryland (“the Property”). The Property is 2.07 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 21, Grid 1, Parcel 5.

The Variance Requested

Applicants seek a variance from CZO § 71.8.3 disturb the Buffer and the Expanded Buffer to replace a swimming pool deck, repair a retaining wall, and replace an additional retaining wall.

St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires there be a minimum 100-foot 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). Moreover, the 100-foot buffer may be expanded in the presence of steep slopes and highly erodible soils.

Departmental Testimony and Exhibits

Stacy Clements, an Environmental Planner for the St. Mary's County Department of Land Use & Growth Management ("LUGM"), presented a staff report and PowerPoint presentation that included the following testimony:

- The subject property (the "Property") was recorded in the Land Records of St. Mary's County per Plat Book 47 page 63 recorded on January 15, 1999 (Attachment 2), after the adoption of the Maryland Critical Area Program on December 1, 1985. According to Real Property Data, Maryland Department of Assessments and Taxation, the existing home was built in 2024.
- The property is a 2.07-acre lot located on Fawn Lane in Hollywood and is adjacent to the tidal waters of the Patuxent River.
- The Critical Area Buffer (the "Buffer") is established a minimum of 100-feet landward from the mean high-water line of tidal waters and is expanded for the presence of steep slopes and highly erodible soils (CZO 71.8.3). Therefore, the

Property is constrained by the Buffer (Attachment 3).

- The site plan (Attachment 4) proposes the removal and replacement of the existing pool deck with a different footprint and the removal and repair of two existing retaining walls, all of which impact the 100' Critical Area Buffer. The CZO states in Section 71.8.3.b(1) that a development activity is not permitted in the Buffer unless the Applicant obtains a variance.
- Mitigation is required at a ratio of 3:1 for the variance (COMAR 27.01.09.01-2 Table H) and 1:1 for lot coverage outside the Buffer (COMAR 27.01.09.01-1 Table C). The proposal receives 1:1 credit for lot coverage removed, so that the total mitigation required for this proposal is 427 square feet of plantings to meet these mitigation requirements. A planting agreement and plan will be required prior to the issuance of the building permit.
- The Critical Area Commission responded on April 2, 2025. The Commission states that the applicant has the burden to prove each and every Critical Area variance standard, including the standard of unwarranted hardship, is met. (Attachment 8).
- The Department of Land Use and Growth Management has approved the site plan for zoning and floodplain requirements. The site plan is exempt from the stormwater management requirements due to less than 5,000 square feet of soil disturbance.
- Attachments to the Staff Report:
 - #1: Critical Area Standards Letter
 - #2: Plat Book 47 Page 63

- #3: Critical Area Map
- #4: Site Plan
- #5: Location Map
- #6: Land Use Map
- #7: Zoning Map
- #8: Critical Area Commission Response

Applicants' Testimony and Exhibits

Applicants were represented before the Board by Steve Vaughn, of Little Silence's Rest, Inc. Mr. Vaughn presented a slideshow which contained site plans, building plans, photographs of the site, and offered oral testimony. The following evidence and testimony was included in their presentation:

- The existing home was renovated in 2024.
- There will be a net decrease in lot coverage by approximately 300 square feet.
- None of the proposed improvements will be any closer to the water than existing improvements.

Public Testimony

No members of the public appeared to offer testimony in this matter. One letter was received from Kathleen and Louis Foltyn. Mr. and Mrs. Foltyn did not provide an address but described themselves as neighbors, and complained of inconveniences endured during the construction of other improvements on the Applicants' property.

Decision

County Requirements for Critical Area Variances

COMAR 27.01.12.04 requires an Applicant to meet each of the following standards before

a Critical Area variance may be granted:

- (1) Due to special features of the site or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the local Critical Area program would result in an unwarranted hardship to the applicant;
- (2) A literal interpretation of the local Critical Area program would deprive the applicant of a use of land or a structure permitted to others in accordance with the provisions of the local Critical Area program;
- (3) The granting of the variance would not confer upon the applicant any special privilege that would be denied by the local Critical Area program to other lands or structures in accordance with the provisions of the local Critical Area program;
- (4) The variance request is not based upon conditions or circumstances that are the result of actions by the applicant;
- (5) The variance request does not arise from any conforming or nonconforming condition on any neighboring property;
- (6) The granting of the variance would not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's local Critical Area; and
- (7) The granting of the variance would be in harmony with the general spirit and intent of the Critical Area law, the regulations in this subtitle, and the local Critical Area program.

Additionally, the Maryland Code Annotated, Natural Resources Article, § 8-1808(d)(2)(ii) also requires the Applicant 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 the requested relief.

The Board finds that denying the Applicants' request would constitute an unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 d. 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, Applicants have sufficiently demonstrated that, absent the variance, they would be denied a use of the Property both significant and reasonable. Applicants ask for the replacement or repair of existing improvements – one is a swimming pool, a significant and valuable enhancement of the Property, and the other two are retaining walls, necessary defenses against the natural erosion of the Property. All lie squarely within the definition of a use "significant and reasonable." The Property is heavily constrained by the Buffer and the Expanded Buffer, and the layout of the lot and placement of the existing home make relocation of the swimming pool so impracticable as to be unreasonable, and outright impossible for the retaining walls. Accordingly, we find that Applicants have demonstrated an unwarranted hardship.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicants of a substantial use of land or a structure permitted to others. Swimming pools, particularly replacement swimming pools, are not uncommon, even on similarly situated

properties, and retaining walls are common and necessary site protections on parcels with similar topography as the Property. On the whole, the Applicants' proposal seems to be of a character and nature as one might expect in the Limited Development Area.

To the third factor, the granting of the variance would not confer upon the applicant any special privilege that would be denied by the local Critical Area program to other lands or structures. Applicants avail themselves of their right to seek a variance and are hewing as close to the Critical Area program's strictures as may be reasonably expected. Their proposal will not be granted unless accompanied by required mitigation, which shall be significant for what are, in essence, in-kind replacements. Provisions for requesting and granting a variance are a necessary element of any local Critical Area program. Applicants have availed themselves only of their right to petition for such a variance and be given the chance to justify the request to the Board of Appeals, as any other similarly situated property owner has the right to do.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the Applicants. Rather, Applicants are constrained by the physical characteristics of their lot and its existing configuration.

Fifth, the variance request does not arise from any conforming or nonconforming condition on any neighboring property.

Sixth, the granting of the variance would not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's local Critical Area. When development is permitted in the Critical Area Buffer it must be heavily mitigated. As noted by staff, 427 square feet of mitigation plantings will be required, and the Applicants will perform all plantings on-site. These plantings will mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer. These plantings would not be required

unless the Property is redeveloped. The Applicants and Critical Area Commission both commented that the project would result in a net reduction of lot coverage.

Lastly, by satisfying the above criteria the Board finds that granting of the variance will be in harmony with the general spirit and intent of the Critical Area law, the regulations in this subtitle, and the local Critical Area program. In total, the Applicants have demonstrated that a variance is necessary to achieve the proposed use, which the Board finds to be significant and reasonable in nature. The impacts to the Buffer and Expanded Buffer of redevelopment will be offset by the mitigation and other site improvements that will be made.

Finally, in satisfying each of the necessary criteria the Applicants have overcome the statutory presumption against granting a variance.

Accordingly, we conclude the Applicants should be granted the requested relief.

ORDER

PURSUANT to the application of Ralph and Janice Portnoy, petitioning for a variance from CZO § 71.8.3 to disturb the Critical Area Buffer and Expanded Critical Area Buffer to replace a swimming pool deck, repair a retaining wall, and replace an additional retaining wall; and

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

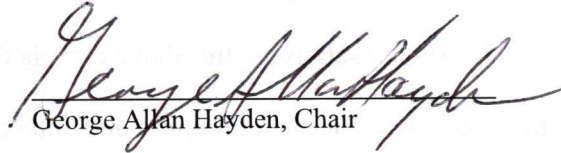
ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 24.8, that the Applicants are granted the requested variance;

UPON 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 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: June 12, 2025

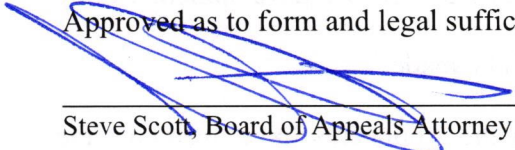

George Allan Hayden, Chair

Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Mr. LaRocco,
Mr. Payne, Ms. Weaver

Those voting to deny the variance:

~~Approved as to form and legal sufficiency~~


Steve Scott, Board of Appeals Attorney

NOTICE TO APPLICANTS

Within thirty (30) days from the date of this Order, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Petition for Judicial Review in the St. Mary's County Circuit Court. 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.