

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

**VAAP NUMBER 24-1718**

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**GARDNER PROPERTY**

**EIGHTH ELECTION DISTRICT**

**DATE HEARD: DECEMBER 12, 2024**

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**ORDERED BY:**

**Mr. Bradley, Mr. Loughran,  
Mr. Payne, and Mr. Richardson**

**ENVIRONMENTAL PLANNER: STACY CLEMENTS**

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**DATE SIGNED: January 9, 2025**

### **Pleadings**

Gregory Gardner and Richard M. Gardner (“Applicants”) seek a variance (VAAP # 24-1718) from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer to construct a covered front porch.

### **Public Notification**

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on November 22, 2024 and November 29, 2024. The hearing notice was posted on the property by November 27, 2024. 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 Friday, December 6, 2024. 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 12, 2024 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**

Applicants own real property situate 23704 Kingston Creek Road, California, MD (“the Subject Property”). The Subject Property consists of 2.34 acres, more or less, is in the Residential, Low-Density zoning district (“RL”), lies within a Limited Development Area (“LDA”) Critical

Area overlay, and is identified at Tax Map 35, Grid 7, Parcel 58.

### **The Variance Requested**

Applicants seek a variance from St. Mary's County Comprehensive Zoning Ordinance ("CZO") Section 71.8.3 to disturb the expanded Critical Area Buffer to construct covered front porch.

### **The 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 Buffer is to be expanded in the presence of highly erodible soils and steep slopes.

### **Staff Testimony**

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

- The Property contains a single-family dwelling with an attached deck and porch. According to the Department of Assessments and Taxation, the house was constructed in 1981, prior to the adoption of the Maryland Critical Area Program on December 1, 1985.
- The Property is a 2.34- acre parcel located on Kinston Creek Road in California and is adjacent to the tidal waters of the Kinston Creek.
- The Critical Area Buffer (the "Buffer") is established a minimum of 100-feet landward from the mean high-water line of tidal waters (CZO 71.8.3) and is expanded for the presence of highly erodible soils and steep slopes. Therefore, the Property is constrained by the expanded Buffer. (Attachment 2).

- The site plan (Attachment 3) proposes constructing an 8' x 12' (96 square foot) covered porch which impacts the 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 permanent disturbance within the Buffer (COMAR 27.01.09.01-2 Table H). The total mitigation required is 288 square feet of buffer 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 November 22, 2024. The Commission states that the applicant has the burden to prove each and every Critical Area variance standard, including the standard of unwarranted hardship (Attachment 7). It does not state that the Commission opposes the request.
- The Department of Land Use and Growth Management approved the site plan for zoning requirements. The Health Department approved the site plan. The project does not require site plan approval from the St. Mary's County Soil Conservation District or Stormwater Management as the proposal calls for less than 5,000 square feet of soil disturbance.
- The following Attachments to the Staff Report were introduced:
  - #1: Critical Area Standards Letter;
  - #2: Critical Area Map
  - #3: Site Plan;
  - #4: Location Map;
  - #5: Land Use Map;
  - #6: Zoning Map; and,

#7: Critical Area Commission Response

**Applicant Testimony and Exhibits**

Paul Shifflett from John Krause Construction presented telephonically on the Applicants' behalf. He presented a slideshow and answered questions from the Board. His remarks included, but were not limited to, the following points:

- The entire porch extension will amount to 96 square feet.
- The proposed development will have no effect on stormwater management.
- The proposed development will not affect nearby properties.
- The gutter system will not need to change as a result of the proposed development.
- The proposed development will increase the value of the home.
- There have been no objections, to Applicants' knowledge, to the request.

**Public Testimony**

No members of the public appeared to offer in-person testimony for or against the project. One written letter was received from Glenda Lytle, who stated she had no objection to the variance.

**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) 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 of this matter, the Board finds and concludes the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance.

First, the Board finds that denying the Applicants' request would constitute an unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Court of Appeals established the 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 Subject Property that would be both significant and reasonable. The request is to extend a front porch. This is a common improvement which enhances a property owner's use and enjoyment of the outdoors. Relocation is impossible without locating the house itself, which predates the Critical Area.

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 noted above, a covered porch is a common improvement.

Third, granting a variance will not confer a special privilege upon the Applicants. Applicants' proposed site plan has been subjected to a public hearing, held to the required standards, includes all required mitigation plantings, takes into account necessary environmental considerations, and conforms to the greatest extent it can to all applicable regulations. State law mandates that any property owner have a right to seek variances from their local Critical Area program. State law says the Board of Appeals may grant such a variance when a property owner carries its burden to justify grant of the requested variance.

Fourth, the need for the variance does not arise from the actions of the Applicant. The Applicant's proposal stems from the location of Applicants' home, which was fixed upon well prior to the advent of the Critical Area Program. The Board does not find in the record any suggestion the Applicants have contributed their present hardship.

Fifth, the need for the variance does not arise from any nonconforming feature on either the Subject Property or a neighboring property.

Sixth, granting the variance will not adversely affect the environment. The Applicant 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.

Finally, the Board finds, overall, that granting the variance is in the spirit of the Critical Area program. Applicants have availed themselves of their right to seek a variance and presented a site plan that proposes a reasonable and significant use that cannot be accomplished without some intrusion into the expanded Buffer. That intrusion has been minimized to the greatest extent practicable. The required mitigation will leave more plantings and green coverage on the lot than existed prior to this development proposal. As such, the Board finds the spirit and intent of the Critical Area program is preserved, and that the required balance between state law's mandate to allow reasonable variances in derogation from the Critical Area program on the one hand and continued protection and stewardship of the Chesapeake Bay and our environmentally sensitive resources on the other has been struck.

As a result of satisfying these standards and carrying their burden in doing so, 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.

Accordingly, we conclude the requested variance should be granted.

### **ORDER**

**PURSUANT** to Applicants' request for a variance from Section 71.8.3 to disturb the Critical Area Buffer to construct a covered front porch; and,

**PURSUANT** to the notice, posting of the property, and public hearing and in accordance



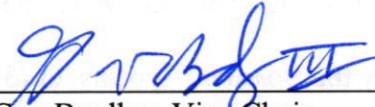
with the provisions of law, it is,

**ORDERED**, by the St. Mary's County Board of Appeals, pursuant to Comprehensive Zoning Ordinance § 24.3, that the Applicants are granted a variance from Section 71.8.3 to disturb the Critical Area Buffer to construct a covered front porch.

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.

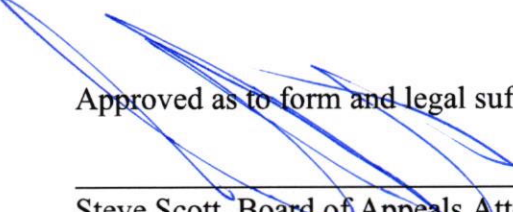
Date: 01/09/, 2024

  
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Guy Bradley, Vice Chair

Those voting to grant the variance:

Mr. Bradley, Mr. Loughran, Mr. Payne,  
And Mr. Richardson,

Those voting to deny the variance:

Approved as to form and legal sufficiency  
  
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Steve Scott, Board of Appeals Attorney

## **NOTICE TO APPLICANT**

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 Petition for Judicial Review with the Circuit Court for St. Mary's County within thirty (30) days of the date this order is signed. 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.