

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-1031

FARRELL PROPERTY

FIFTH ELECTION DISTRICT

VARIANCE REQUEST HEARD: NOVEMBER 9, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: DEC 14, 2023

Pleadings

Fred B. Pumphrey, Sr. (“Applicant”) seeks a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on October 20, 2023 and October 27, 2023. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before October 25, 2023. The agenda was also posted on the County’s website on November 3, 2023. 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 9, 2023 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 Applicant.

The Property

The subject property is located at 29939 Barger Drive, Mechanicsville, Maryland (“the Property”). The Property is 15,000 square feet, more or less, is zoned Residential, Neighborhood Conservation (“RNC”), has a Limited Development Area (LDA) Critical Area overlay, and is found at Tax Map 5A, Grid 1, Parcel 54. It is Lot 158 in Section 1 of the Golden Beach Subdivision.

The Variance Requested

Applicant seeks a variance from the St. Mary's County Comprehensive Zoning Ordinance § 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house.

St. Mary's County Comprehensive Zoning Ordinance

CZO § 72.3.1.c(2) prohibits clearing in excess of 30 percent of any forest or developed woodland.

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 of 15,000 s.f., more or less. It is a grandfathered lot in the Critical Area because it was recorded in the Land Records of St. Mary's County prior to the adoption of the Maryland Critical Area Program on December 1, 1985.
- Applicant proposes a two-story house with a garage and covered front porch.
- Approximately 11,046 s.f. of trees, shrubs and other vegetation cover the Property. Applicant plans to clear 7,364 s.f. of the existing vegetative cover.
- In accordance with CZO § 72.3.3.a(2)(c), mitigation will be required at a ratio of 3:1 per square foot of area impacted by the variance for the clearing. For a total of 7,364 s.f. of clearing at 3:1 ratio, 22,092 s.f. of mitigation planting is required. Applicant proposes planting 14,600 s.f. of plantings and performing the remaining 7,800 s.f. of plantings off-site, pending approval.
- The St. Mary's County Soil Conservation District, Health Department, and Stormwater Management have approved the site plan.

- In the Critical Area Commission’s response letter of October 20, 2023, the Commission did not state it objected to the requested variance.
- Attachments to the Staff Report:
 - #1: Critical Area Standards Letter
 - #2: Site Plan
 - #3: Planting Plan
 - #4: Critical Area Commission Response
 - #5: Location Map
 - #6: Zoning Map
 - #7: Critical Area Map

Applicant’s Testimony and Exhibits

Applicant was represented before the Board by surveyor Barry Vukmer of Chesapeake Trails Surveying. Mr. Vukmer presented a PowerPoint that displayed site plans and pictures of the lot’s current conditions. His testimony included the following:

- There are only two “significant trees” on the Property: a 29” oak and a quad maple roughly 45” in diameter. The remainder of the lot is only sparsely wooded. It will be impracticable to try and keep the oak, but the larger tree will be maintained.
- The site is heavily constricted by neighboring wells and septic systems. The only location the well can go is depicted on the site plan, with the house situated exactly 30 feet back. The house is set on the 25 foot building restricting line. Proximity to the septic prohibits the house from being located further back.

Public Testimony

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

Decision

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 Applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance.

The Board finds that denying the Applicant's request would constitute 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, Applicant has sufficiently demonstrated that, absent the variance, they would be denied a use of the Property both significant and reasonable. Constructing a single-family dwelling is a foundational use of one's own real property. As noted by staff and Applicant the entirety of the lot is forested, and the lot is of a small size; limiting oneself to clearing only 30% of the 15,000 square feet for a reasonably-sized house, garage, driveway, and septic system is not practicable.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicant of a substantial use of land or a structure permitted to others. Improvements such as those proposed by the Applicant are commonly enjoyed by other similarly-situated properties within 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 in accordance with the provisions of the local Critical Area program. Applicant avails himself of her right to seek a variance, and is hewing as close to the Critical Area program's strictures as may be reasonably expected of his proposal.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the applicant. Rather, Applicant is constrained by the physical characteristics of her lot and existing forest and vegetative cover.

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, 14,600 square feet of mitigation plantings will be required, and the Applicant will pay fees-in-lieu or perform offsite plantings for whatever cannot be located on the Property. Any fees-in-lieu collected will pay for plantings elsewhere in the Critical Area Buffer in St. Mary's County. These plantings are meant to mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer.

Finally, 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 Applicant has demonstrated that a variance is necessary to achieve the intended uses he proposes. There are no practical alternatives to make these improvements elsewhere on the Property.

Additionally, in satisfying each of the necessary criteria the Applicant has overcome the statutory presumption against granting a variance.

ORDER

PURSUANT to the application of Timothy Farrell, petitioning for a variance from CZO § 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house; 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 Applicant is granted a variance from CZO § 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house,

UPON CONDITION THAT, Applicant 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: DEC 14, 2023


Daniel F. Ichniowski, Chairperson

Those voting to grant the variance:

Mr. Ichniowski, Mr. Bradley, Mr. Miedzinski, Mr. Payne, 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.