

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 18-2469

SANDRA K. FRANZEN

SIXTH ELECTION DISTRICT

DATE HEARD: June 13, 2019

ORDERED BY:

**Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: July 11, 2019

PLEADINGS

Sandra K. Franzen, the applicant, seeks variances (VAAP # 18-2469) to disturb 9,971 Square Feet in the critical area buffer to construct a single family dwelling unit with a garage, porches, a deck, sidewalks, steps, areaway and a driveway for a total of 6,569 square feet of lot coverage and a variance to Section 72.3.1.c(2) for clearing more than 30% of the existing forest cover on property with a street address of 45300 Daniels Road, Hollywood, Maryland 20636.

PUBLIC NOTIFICATION

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on May 29, 2019 and June 5, 2019. 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 (200) 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 Wednesday, June 5, 2019. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

FINDINGS

A public hearing was conducted at 6:30 p.m. on June 13, 2019, 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 with regard to the proposed variance requested by the applicants.

The Property

That the applicants own the subject property located at 45300 Daniels Road, Hollywood, Maryland 20636. It is known as Grid 17 in Parcel 366 on Tax Map 27. This waterfront lot on Mill Creek is designated in the Chesapeake Bay Critical Area as limited development area (LDA).

The Proposed Work

The proposal calls for the construction of a single-family dwelling with a garage, porches, a deck, sidewalks, steps, areaway and a driveway for a total of 6,569 square feet of lot coverage. The new lot coverage will be comprised of a 3,284 square feet single family dwelling with attached garage, 2,723 square feet of driveway, and 181 square feet of sidewalks, a 102 square foot deck, and 278 square feet of porch, 45 square feet of steps and 58 square feet of areaway, which represents 14.9% percent of the Property. The allowed amount of lot coverage on a property of this size is 15% as shown on the site plan admitted into evidence at the hearing as Attachment 3 of Exhibit 2.

There is approximately 38,650 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant also proposes to clear 9,290 square feet of the existing vegetation outside of the buffer and 9,971 square feet inside the buffer for a total of 19,261 sf of vegetative clearing, which would be 44.2% of forest clearing on the property and exceed the 30% limit found in the Critical Area regulations.

The St. Mary's County Comprehensive Zoning Ordinance

§ 71.8.3 of the St. Mary's County Comprehensive Zoning Ordinance requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands; and § 71.8.3.a stipulates that the 100-foot buffer shall be expanded beyond 100 feet to include slopes of 15% or more and is to be expanded by the greater of four feet for every 1% of slope or to the top of the slope and shall include all land within 50 feet from the top of the slopes. Title 27 of the Code of Maryland Regulations (COMAR) Section 27.01.01 (B) (8) (ii) states a buffer exists "to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance." § 71.8.3.b.1.c of the St. Mary's County Comprehensive Zoning Ordinance authorizes disturbance to the buffer for new impervious surfaces and development activities by variance. The Applicant is proposing to construct a single-family dwelling with a garage, porches, a deck, sidewalks, steps, areaway and a driveway, which will create approximately 6,671 square feet of permanent disturbance in the buffer.

§ 72.3.1c(2) of the St. Mary's County Comprehensive Zoning Ordinance prohibits clearing in excess of 30% of any forest or developed woodland in Limited Development and Resource Conservation Areas of the Critical Area Overlay. The Applicant is proposing to clear forest coverage in the amount of 19,261 square feet (44.2% of the property) when the allowable amount of forest clearing is 11,595 square feet (30% of the property), hence the need for an area variance as to clearing lot coverage.

Variations Requested

The Applicant requires a critical area variance of 9,971 square feet from the prohibition in § 71.8.3 against disturbing the buffer to allow the construction of the proposed single-family dwelling with a garage, porches, a deck, sidewalks, steps, areaway and a driveway as shown on Attachment 3 of Exhibit 2.

The Applicant also requires a variance from § 72.3.1c(2) of the St. Mary's County Comprehensive Zoning Ordinance, which prohibits clearing in excess of 30% of any forest or developed woodland in Limited Development and Resource Conservation Areas of the Critical Area Overlay. The Applicant is requesting a variance of an additional 7,666 square feet of forest coverage clearing.

The Evidence Submitted At The Hearing

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

- The subject property (the "Property") is a grandfathered lot in the Critical Area of St. Mary's County 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.
- The Property fronts Mill Creek and is constrained by the Critical Area Buffer (the "Buffer"). The Critical Area Buffer (the "Buffer") is measured from the mean high water line of Mill Creek pursuant to COMAR 27.01.09.01.E(3).
- The existing soil types on the Property are Keyport silt loam (KrB2) and Evesboro-Westphalia complex (EwD2), according to the Natural Resources Conservation

Service, U.S. Department of Agriculture, Web Soil Survey. Keyport silt loam complex are found on slopes of 2-5 percent and considered moderately well drained and are moderately erodible. Evesboro-Westphalia complex soils are considered well drained and are moderately erodible. They are found on slopes of 12-20 percent. The area of disturbance consists entirely of Keyport silt loam.

- According to the site plan provided by the Applicant, the Property proposes a single-family dwelling with a garage, porches, a deck, sidewalks, steps, areaway and a driveway for a total of 6,569 square feet of lot coverage. The new lot coverage will be comprised of a 3,284 square feet single family dwelling with attached garage, 2,723 square feet of driveway, and 181 square feet of sidewalks, a 102 square foot deck, and 278 square feet of porch, 45 square feet of steps and 58 square feet of areaway, which represents 14.9% percent of the Property. The allowed amount of lot coverage on a property of this size is 15%.
- The Property is within Special Flood Hazard Area Zone X and AE-5 according to Flood Insurance Rate Map (FIRM) panel 185F. The proposed development is in unshaded X and is 39' from the Flood Hazard Zone.
- A private well and sewer will serve the Property.
- Approximately 38,650 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant plans to clear 9,290 square feet of the existing vegetation outside of the buffer and 9,971 square feet inside the buffer for a total of 19,261 sf of vegetative clearing.

- In accordance with COMAR 27.01.09.01, mitigation is required at a ratio of three to one per square foot of the variance granted for the disturbance of 3,734 square feet inside the critical area buffer and 19,261 square feet for clearing more than 30% of existing vegetation. Buffer establishment for additional lot coverage outside of the critical area buffer requires 2,937 square feet of mitigation at the rate of 1:1. A total of 71,922 square feet of mitigation is required.
- The St. Mary's Health Department approved the site plan on April 23, 2019. The St. Mary's Soil Conservation District (SCD) approved an erosion and sediment control plan on May 10, 2019. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and approved the site plan on April 1, 2019.
- The Maryland Critical Area Commission provided comments and stated "If the Board does grant the variances, this office recommends including conditions requiring the applicant to provide stormwater management that meets the environmental site design (ESD) requirements of MDE's Stormwater Design Manual to address stormwater runoff from the proposed development. If the variance is granted, the applicant must provide mitigation at a 3:1 ratio for the Buffer disturbance, in accordance with St. Mary's County's Critical Area program. In addition, mitigation is required at a 3:1 ratio for clearing above 30% for the entirety of the existing forest cover cleared. Based on the information provided, we calculate the mitigation requirement for the Buffer disturbance to be 29,913 square feet and the mitigation requirement for the forest clearing to be 57,783

square feet; for a total mitigation requirement of 87,696 square feet. Please note that the applicant cannot receive a building permit until the Buffer Management Plan has been approved by St. Mary's County."

Applicants Testimony and Exhibits

The Applicants were represented at the hearing by Wayne P. Hunt, the applicants' engineer, from Little Silences Rest, Inc. Evidence was presented that the applicants' property is an 80,962 square foot parcel and that 72,746 square feet is within the expanded critical area buffer, which is 90% of the lot area. The original conveyance of this property was before the adoption of critical area regulations. The property is a recorded lot in an existing community constrained by zoning, health requirements and the critical area provisions.

Neighbor's Testimony

The neighbors, Philip and Jessica DeMarais, submitted a letter into evidence and Mr. DeMarais gave oral testimony that he was not opposed to a home being constructed on the property, but requested that a tree that borders the two lots be removed. There was no other testimony taken or exhibits received in the matter.

DECISION

County Requirements for Critical Area Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.4 sets forth six separate requirements (in this case) that must be met for a variance to be issued for property in the critical area. They are (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 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. State law also requires that the applicants overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), 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. There are a number of factors that support this decision. First, in *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals considered an appeal claiming that a variance granted by the Worcester County Board of Appeals to allow a property owner to extend a pier across state-owned marshland from his property should not have been granted. The pier would be 80 feet longer than allowed by the Worcester County ordinance. The variance was granted. The Court of Appeals

visited the history of the critical area law and efforts by the Legislature to amend and clarify the law. The Court grappled with the phrase "unwarranted hardship, " and asked if "an applicant [must] demonstrate a denial of all reasonable and significant use of the entire property, or must the applicant show a denial of a reasonable and significant use of the entire property?" (At page 14.) The Court concluded, on page 28, that:

In summary, in 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. (Emphasis added.)

In this application the Board finds that denying the applicant's request to construct a single family dwelling unit with a garage, porches, a deck, sidewalks, steps, areaway and a driveway in the critical area a buffer and for a variance to Section 72.3.1.c(2) for clearing more than 30% of the existing forest cover on property would deprive the applicants of a use that would be "both significant and reasonable."

Second, the property is encumbered by the Critical Area Buffer and steep slopes which necessitates the need for a variance. Other property owners with recorded lots that are constrained by similar conditions and the Critical Area provisions of the Ordinance do have the opportunity to file for a variance and seek relief from the regulations.

Third, that the strict interpretation of the critical area provisions would prohibit the applicants from constructing a single family dwelling, a right that is commonly enjoyed by other property owners in the LDA.

Fourth, the property is a recorded, grandfathered lot in an existing community and the granting of the variance will not confer any special privileges to the applicants that would be denied to others.

Fifth, the need for the variance does not arise from actions of the applicants. Again, this recorded lot predates the St. Mary's County's critical area program.

Sixth, the critical area variance is the minimum variance necessary to afford relief.

Furthermore, that the granting of the variance would not adversely affect the environment. The variance will be in harmony with the Critical Area Program. The applicants have overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), of the State law that the variance request should be denied.

The Board finds that Critical Area Planting Agreement and Planting Plan, which is required, will alleviate any impacts to water quality due to the creation of impervious surface in the Buffer. The Board believes that the required plantings will assist in improving and maintaining the functions of the Buffer. The Planting Agreement requires mitigation at a ratio of three to one (3:1) per square foot of the variance granted in accordance with Chapter 24 of the Ordinance.

The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, which should contribute to improved infiltration and reduction of non-point source pollution leaving the site. For these reasons, the Board finds that the granting of the variance to construct a single-family dwelling in the Critical Area Buffer will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area, and that the

granting of the variances will be in harmony with the general spirit and intent of the Critical Area program.

Lastly, the Board is cognizant of the neighbor's concern and believes that imposing a condition on the applicant that the tree along the fence line be removed will alleviate the concern. The Board further believes that the limit of disturbance should be reduced by two thousand (2,000) square feet so that the overall disturbance to the Critical Area will be lessened.

ORDER

PURSUANT to the application of Sandra K. Franzen, petitioning for variances from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow construction of a single family dwelling unit with a garage, porches, a deck, sidewalks, steps, areaway and a driveway in the Critical Area Buffer and from Section 72.3.1.c(2) for clearing more than 30% of the existing forest cover on property;

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 11th day of July, 2019,

ORDERED, by the St. Mary's County Board of Appeals, that the applicant is granted a critical area variance of 9,971 square feet from the prohibition in § 71.8.3 against disturbing the buffer to allow the construction of the proposed single family dwelling unit with a garage, porches, a deck, sidewalks, steps, areaway and a driveway as shown on Attachment 3 of Exhibit 2; and it is further

ORDERED, by the St. Mary's County Board of Appeals, that the Applicant is granted a variance from Section 72.3.1.c(2) for clearing more than 30% of the existing forest cover on property; and it is further

ORDERED, by the St. Mary's County Board of Appeals, that the applicant is granted the above variance on the condition that that the limit of disturbance as shown on Attachment 3 of Exhibit 2 shall be reduced by two thousand (2,000) square feet.

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.

Furthermore, Attachment 3 of Exhibit 2, referenced in this decision, is incorporated herein as if fully set forth and made a part of this Order. The proposed improvements shown on Attachment 3 of Exhibit 2 shall be constructed on the subject property in the locations shown therein. The decision and order shall not prohibit the applicants from making minor changes to the facilities as presently shown on Attachment 3 of Exhibit 2 to adjust for changes made necessary by comments or requirements that arise during plan review or construction, provided those minor changes do not exceed the variances granted herein. The reasonableness of any such change shall be determined by the Office of Land Use and Growth Management.

Date: July 11, 2019

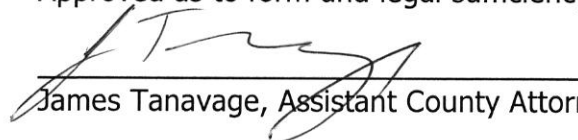

George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski and Mr. Richardson

Those voting to deny the variance:

Approved as to form and legal sufficiency


James Tanavage, Assistant County 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.

Further, § 24.8 provides that a variance shall lapse one year from the date of the grant of the variance by the Board of Appeals 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; or 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.