

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 19-0770

JOHN and ANDREA FLEURY

THIRD ELECTION DISTRICT

DATE HEARD: October 10, 2019

ORDERED BY:

**Mr. Hayden, Mr. Brown, Ms. Delahay,
Mr. Miedzinski and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: November 14, 2019

Pleadings

John and Andrea Fleury, the applicants, seek a variance (VAAP # 19-0770) to disturb the critical area buffer to build a new home on subject property.

Public Notification

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on September 25, 2019 and October 2, 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 Tuesday, October 8, 2019. 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 October 10, 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 about the proposed variance requested by the applicants.

The Property

The applicants own the subject property located at 21650 Ferny Hills Lane, Leonardtown, MD 20650. It is in the Rural Preservation District (RPD) and Residential

Neighborhood Conservation (RNC) District. It is identified on Tax Map 40, Grid 15, Parcel 87 and Farmstead 5. This lot is designated in the Chesapeake Bay Critical Area as Resource Conservation Area (RCA).

The Variance Requested

The applicants request a critical area variance from the prohibition in § 71.8.3.a.(1) against land disturbance in the expanded buffer to build a new home as shown on the site plan admitted into evidence at the hearing as Exhibit 2 of Attachment 3.

The St. Mary's County Comprehensive Zoning Ordinance

The St. Mary's County Comprehensive Zoning Ordinance ("SMCCZO") requires there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands. § 71.8.3. 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." No new impervious surfaces or development activities are permitted in the 100-foot buffer unless the applicant obtains a variance. § 71.8.3.b.1.c of the SMCCZO.

The Evidence Submitted at the Hearing by LUGM

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

- The subject property (the "Property") is not 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 on July 8, 2014 after the adoption of the Maryland Critical Area Program on December 1, 1985.

- The Property fronts Breton Bay and is constrained by the Critical Area Buffer (the "Buffer"), steep slopes, and severely erodible soils. The Buffer is established a minimum of 100-feet landward from the mean high-water line of tidal waters, tidal wetlands, and tributary streams (CZO 71.8.3) and is expanded to include contiguous steep slopes, hydric soils whose development or disturbance may impact streams, wetlands or other aquatic environments, and highly erodible soils [CZO 71.8.3.a.(1)].
- The existing soil types on the Property are Mattapex fine sandy loam (MtB2), Alluvial land (Aa), Croom gravelly sandy loam (CrD3), Evesboro-Westphalia complex (EwE2), and Kempsville fine sandy loam (KeD3) according to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Most of the development is within the Kempsville fine sandy loam soil type which is found on slopes of 10-15 percent, is considered well drained and severely erodible.
- According to the site plan provided by the Applicant, the Property proposes a single-family dwelling with a garage, porches, sidewalks, patio, a pool and a driveway for a total of 14,896 square feet of lot coverage. The allowed amount of lot coverage on a property of this size is 94,877 sf.
- The Property is within Special Flood Hazard Area Zone X and AE-6 according to Flood Insurance Rate Map (FIRM) panel 168F. The proposed development is in unshaded X and is more than 50' feet away from a regulated Special Flood Hazard Area.

- A private well and septic will serve the Property.
- Approximately 606,994 square feet of trees, shrubs, and other vegetation are on the Property. The Applicant plans to clear 38,390 sf of the existing vegetation within the Expanded Buffer.

In accordance with *COMAR 27.01.09.01-2.H*, mitigation is required for development located within the Expanded Critical Area Buffer. The permanent disturbance of 41,466 square feet is calculated at a ratio of three to one per square foot of the variance granted and at a ratio of one to one per square foot of the variance granted for the temporary disturbance of 3,250 square feet for a total of 127,648 square feet of mitigation plantings.

- The St. Mary's Health Department approved the site plan on August 2, 2019. The St. Mary's County Soil Conservation District (SCD) is currently reviewing an erosion and sediment control plan. The site plan is under review with The Department of Public Works and Transportation for stormwater management requirements due to more than 1,000 cubic yards of cut and fill quantities.

The Maryland Critical Area Commission provided a report on August 12, 2019 (see Attachment 2).

- If the variance is granted, the Applicant must comply with Section 24.8 of the Ordinance pertaining to lapse of variance. Variances shall lapse one year from the date of the grant of the variance, if the Applicant has not complied with Section 24.8.
- The following Attachments to the Staff Report were presented:

- #1: Standards Letter of August 15, 2019 from Steve Vaughan;
- #2: Critical Area Commission letter dated August 12, 2019;
- #3: Site Plan;
- #4: Location Map;
- #5: Land Use Map;
- #6: Zoning Map;
- #8: Contour and Soils Map;
- #9: Floodplain Map.

Applicants Testimony and Exhibits

The Applicants were represented by Wayne Hunt, Land Surveyor for Little Silences Rest, Inc. at the hearing. The following evidence was presented by Mr. Hunt:

- Photo's of the property were introduced;
- A diagram of the recorded plat was introduced;
- When the lot was recorded in 2014, a 200' Buffer was applied. The Buffer required no expansion at that time. A stream buffer was applied to the Property;
- In 2019 the Buffer expansion rules had not changed, but the interpretation of those rules had changed;
- The "re-interpretation" of the Buffer expansion rules has created a problem with the lot. The streams and buffers are now expanded for steep slopes, not just for the 200' buffer;
- Under the new interpretations of the Buffer expansion rules, it has created a new buffer boundary well beyond the buffer that was originally created;

- Under the new buffer interpretation, the home cannot be moved or located anywhere on the Property without being in the Buffer;
- The applicants are requesting the Board approve the site plan "as is" with the condition of no additional lot coverage beyond what is shown on the site plan.

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. 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 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 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 the case of *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals established the statutory definition for "unwarranted hardship" as used in the Critical Area law. The Court stated:

(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.

In this application the Board finds that denying the applicants' request to build a home on the Property would deprive the applicants of a use that would be "both significant and reasonable." Without a variance, a home cannot be built anywhere on the Property. The Board additionally finds, however, that no additional lot coverage beyond what is shown on the site plan is allowed.

Second, the property is almost completely enveloped in the 100-foot Critical Area Expanded Buffer. Other property owners with recorded lots that are constrained by similar conditions of 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 building a home, a right that is commonly enjoyed by other property owners in the Resource Conservation Area (RCA).

Fourth, the need for the variance does not arise from actions of the applicants. The County had originally approved the minor subdivision plat to create this lot in 2014.

At that time, the lot was approved by the County as showing a buildable area outside the Buffer.

Fifth, the critical area variance is the minimum necessary to afford relief to the applicants for them to build a home on the Property; and

Sixth, that the granting of the variance would not adversely affect the environment. The Board finds that Critical Area Planting Agreement, which is required, will alleviate any impacts to water quality due to the creation of impervious surface in the Critical Area. The Planting Agreement requires mitigation at a ratio of three to one (3:1) per square foot for the area of permanent disturbance and one to one (1:1) for the area of temporary disturbance.

The Board further finds 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 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.

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.

ORDER

PURSUANT to the application of John and Andrea Fleury, petitioning for a variance from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow them to disturb the Critical Area Buffer to construct a home; 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, that the applicants are granted a critical area variance from the prohibition in § 71.8.3.a.(1) against land disturbance to the expanded buffer to allow the construction of a home as shown on Applicants site plan. No additional lot coverage beyond what is shown on the site plan is allowed.

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 Department of Public Works and Transportation, 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: November 14, 2019


George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Ms. Delahay, 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. St. Mary's County may not issue a permit for the requested activity until the 30-day appeal period has elapsed (COMAR 27.01.12.07.C).

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.