

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-1882

WHITTLES PROPERTY

FIRST ELECTION DISTRICT

VARIANCE REQUEST HEARD: FEBRUARY 9, 2023

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: _____, 2023

Pleadings

Sherry and Vincent Whittles (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer to build a replacement pool, pool house, and patio.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on January 20, 2023 and January 27, 2023. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before January 25, 2023. The agenda was also posted on the County’s website on February 2, 2023. Therefore, the Board of Appeals (“Board”) finds and concludes the variance request’s notice requirements have been met.

Public Hearing

A public hearing was conducted at 6:30 p.m. on February 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 variance requested by the Applicants.

The Property

The property is situate 49940 Elizabeth Drive, Dameron, MD 20628 and consists of 331.03 acres, more or less, is zoned Rural Preservation District (“RPD”) and is found at Tax Map 68, Grid 8, Parcel 76 (“the Subject Property”). The portions of the Subject Property proposed for redevelopment lie within a Resource Conservation Area (“RCA”) Critical Area overlay.

The Variance Requested

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area for a

replacement pool, pool house, and patio.

St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires there be a minimum 100-foot buffer (“the 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).

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 contains a single-family dwelling (principal structure) and accessory structures. The lot as a whole encompasses 331.03 acres and is adjacent to St. Jerome's Creek.
- The Critical Area Buffer is established a minimum of 100-feet landward from the mean high-water line of tidal waters. The attached Critical Area Buffer & Tidal Wetland Map show the extent of the Critical Area Buffer's coverage of the relevant area.
- The Applicants seek to replace their existing pool, pool house, and patio.
- Mitigation will be required at the following ratios:
 - 1:1 for temporary disturbance of 1,998 s.f.
 - 1:1 for forest clearing of 1,271 s.f.
 - 3:1 for impervious surface within the Critical Area Buffer of 2,264 s.f.
 - 1:1 for new impervious surface outside the Critical Area Buffer of 1,009 s.f.

- In total, 11,070 s.f. of mitigation would be required.
- The Critical Area Commission has reviewed the proposed plans and their response letter is attached. The Critical Area Commission’s letter does not outright state the Commission “opposes” the requested variance, but does include the Critical Area Commission’s opinion that an unwarranted hardship cannot be met.
- Attachments to the Staff Report:
 - #1: Critical Area Standards Letter
 - #2: Site Plan
 - #3: Critical Area Commission Letter
 - #4: Location Map
 - #5: Zoning Map
 - #6: Critical Area Map

Applicants’ Testimony and Exhibits

Applicants were represented before the Board by Steven Vaughn, a licensed surveyor with Little Silence’s Rest, Inc.. The following evidence testimony was among that provided to the Board:

- The existing pool, patio, and pool house were developed prior to implementation of the Critical Area program and its regulations. The Applicants desire to replace those structures “nearly in the same footprint.”
- The existing pool, patio, and pool house will be removed and replaced with a new pool, patio, and pool house. The new structures will be “no closer” to the water than the existing improvements.

- The pool house's location will be slightly reconfigured to meet current setback requirements in the Building Code.
- The existing swimming pool was 40' x 18', and the proposed pool will be 17' x 48'.
- The site meets the stormwater requirements for treating runoff from the proposed improvements.
- The impervious surface trading would have required an additional hearing before the Planning Commission. Moreover, the entire structure would have had to be pulled out in front of the house. The homeowners preferred to stay within the existing footprint.
- Asked how closely the proposed development is hewing to the existing footprint, Mr. Vaughn said the only reason it must deviate slightly is because of the updated building code requirements.
- Mr. Vaughn testified that, in total, square footage in the Buffer would be reduced by about 100 s.f..

Public Testimony

No members of the public appeared to offer testimony about the proposal.

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. These criteria are substantially similar to the criteria of COMAR 27.01.12.04.¹ They are summarized as

¹ The Board acknowledges COMAR 27.01.12.04 is the controlling authority regarding the standards by which the instant variance request must be governed. In the past, the Board has applied the standards of St. Mary's County's Comprehensive Zoning Ordinance. It is the Board's understanding this section of the CZO is in the process of being updated to reflect COMAR. As discussed at greater length in the body of this order, the Board's discussion in this order will use CZO 24.4.1 as an organizational aid. This will maintain consistency with past opinions and, more compellingly, it is how the Applicants were asked to prepare their standards letter. The Board does find that, except

follows: (1) whether a denial of the requested variance would constitute an unwarranted hardship (analogous to COMAR 27.01.12.04(1)); (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 (analogous to COMAR 27.01.12.04(2)); (3) whether granting the variance would confer a special privilege on the Applicants (analogous to COMAR 27.01.12.04(1)); (4) whether the application arises from actions of the Applicants (analogous to COMAR 27.01.12.04(4)); (5) whether granting the application would not adversely affect the environment and would be in harmony with the Critical Area Program (analogous to COMAR 27.01.12.04(6); and (6) whether the variance is the minimum necessary for the Applicants to achieve a reasonable use of the land or structures (analogous to the hardship test of COMAR 27.01.12.04(1)).² Maryland Code Annotated, Natural Resources Article, § 8-1808(d)(2)(ii) also 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, the Board finds and concludes the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

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

as noted in Footnote # 2, the criteria of CZO § 24.4.1 and COMAR 27.01.12.04 bear substantial similarity to each other, and that an analysis of the standards of one is, effectively, an analysis of the standards of the other.

² The Board identifies two criteria in COMAR 27.01.12.04 that it does not believe have direct analogues in CZO § 24.4.1, those being COMAR 27.01.12.04.B(5) and (7). With respect to B(5), it does not appear to the Board that the Applicants' variance request arises from any conforming or nonconforming condition on any neighboring property. With respect to B(7), the Board believes that, by satisfying all other standards of the Critical Area Program and the Comprehensive Zoning Ordinance, and for the salutary effects of the proposed mitigation and other considerations mentioned in the body of this order, that the proposed project is in harmony with the Critical Area Program.

Supreme Court of Maryland³ 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. *Assateague Coastal Trust* requires the Applicants to first identify a use that would be significant. The Applicants’ proposed use is redevelopment of an existing legally nonconforming residential swimming pool. Swimming pools are common amenities across St. Mary’s County, and the testimony before the Board was that this particular parcel has been improved by one for roughly six decades. The Board finds that depriving Applicants of the right to build the proposed replacement pool, pool house, and patio structure in the instant case, amounts to denial of a reasonable and significant use of the property, and of a right commonly enjoyed by other similarly-situated property owners.

Acknowledging the Critical Area Commission’s letter in which the Commission states the Applicants may have opportunity to relocate the pool and associated accessory structures outside the Critical Area Buffer, the Board also looks to, and weighs in the balance, the Applicants’ desire to avail themselves of the existing footprint. The Board accepts the Applicants’ testimony that the necessary departure from the existing footprint is an unavoidable consequence of a revised building code. Other than that, Applicants have stuck as close to the existing footprint as possible, keeping overall disturbances of the project to a minimum. Forcing relocation of the structures elsewhere would deprive the Subject Property of this benefit of redeveloping the existing space.

³ The Supreme Court of Maryland was then known as the Court of Appeals. An amendment to the Maryland Constitution renaming the Court of Appeals to the Supreme Court of Maryland was ratified in the 2022 election. Simultaneously, the Court of Special Appeals was renamed the Appellate Court of Maryland.

Regarding whether the need for the variance arises from the actions of the Applicants, there is no testimony suggesting otherwise. The existing footprint was fixed decades ago.

The Board finds that granting the variance would not adversely affect the environment. As Applicants note, a result of the proposed project will be roughly 11,000 square feet of mitigation plantings. Mitigation is required by the Critical Area Program to offset and balance any potential effects of permissible development. That mitigation will be implemented in the instant project. Applicants detailed other steps they would take to make this pool as environmentally conscious as is feasible. Accordingly, the Board finds, on the whole, that the proposed development, properly mitigated, will not result in an overall adverse effect upon the environment. Additionally, the Board notes that redevelopment requires bringing the property into compliance with existing stormwater management standards, which are not currently required with the existing structures because of their age.

Finally, the Board discusses whether this development can be in general harmony with the Critical Area Program. The Board finds it is. The Applicants will, on the whole, reduce overall coverage within the Buffer and have limited themselves, to the greatest extent practicable, of redeveloping only what they already have. Though acknowledging that Applicants asserted no general right to replace a legally nonconforming structure exactly as it is, the Board does find merit to the Applicants' assertion that relocating the project elsewhere to the Critical Area would, on the whole, result in a greater net disturbance than building the replacement structures over the existing footprint.

As a result of satisfying these standards, 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.

ORDER

PURSUANT to the application of Sherry and Vincent Whittles, petitioning for a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer to construct a replacement swimming pool, pool house, and patio; 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 § 21.1.3.a and CZO § 24.8, that the Applicants are granted a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer to construct a swimming;

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 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: _____, 2023

Daniel F. Ichniowski, Chairperson

Those voting to grant the amendment:

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

Those voting to deny the amendment:

Approved as to form and legal sufficiency:

Steve Scott, Attorney to the Board

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.