IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 24-0666

HALLGREN PROPERTY

SECOND ELECTION DISTRICT

VARIANCE REQUEST HEARD: November 14, 2024

ORDERED BY:

Mr. Hayden, Mr. Bradley, Mr. Payne,
Mr. Richardson, and Ms. Weaver

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: December 12, **2024**

Pleadings

Douglas Hallgren ("Applicant") seeks a variance from the St. Mary's County Comprehensive Zoning Ordinance ("CZO") Sections 41.5.3.i.(1) to exceed lot coverage limits and 71.8.3 to disturb the Critical Area Buffer for a replacement 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 25, 2024 and November 1, 2024. A physical posting was made on the property and all property owners within 200' were notified by certified mail on or before October 30, 2024. The agenda was also posted on the County's website on November 8, 2024. 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 November 14, 2024 at the St. Mary's County Governmental Center, 41770 Baldridge Street, Leonardtown, Maryland. All persons desiring to be heard were duly sworn, the proceedings were recorded electronically.

The Property

The subject property (hereinafter "the Property") is situate 17581 Whitestone Drive, Leonardtown, MD 20690. It consists of 1.42 acres, more or less. It is zoned Residential, Low-Density District ("RL"), has a Resource Conservation Area ("RCA") Critical Area overlay and is found at Tax Map 65, Grid 3, Parcel 312. It is lot 34 of the Landings at Piney Point subdivision.

The Variance Requested

Applicant seeks a variance from CZO Sections 41.5.3.i.(1) to exceed lot coverage limits and 71.8.3 to disturb the Critical Area Buffer for a replacement house.

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. Generally, 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). CZO Section 41.6.3 states that development activity within the RCA Overlay District shall conform to the site development standards for the LDA Overlay established in Section 41.5. CZO Section 41.5.3.i.(1) limits lot coverage of a lot in the LDA to 15 percent of the lot area for lots and parcels that are larger than a half-acre.

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 subject property (the "Property") was recorded in the Land Records of St. Mary's County at Plat Book 30 Page 129 (Attachment 2), after the adoption of the Maryland Critical Area Program on December 1, 1985. The existing single-family dwelling was built in 1994 according to Real Property Data, Maryland Department of Assessments and Taxation and was lost to fire on April 24, 2024.
- According to the site plan, this property is a 1.42-acre lot located on Whitestone Drive in Tall Timbers and is adjacent to the tidal waters of the Potomac River.
- 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). Therefore, the Property is constrained by the Buffer (Attachment 3).
- The Property, as it existed prior to the fire, had 12,006 square feet of lot coverage. The site plan (Attachment 4) proposes 6,461 square feet of house, porches, lanai,

pool and driveway, while removing 6,476 square feet of existing house, decks, patios, and asphalt driveway. The total lot coverage for the parcel with the new construction is 11,991 square feet.

- The Property, as determined by CZO 41.5.3, limits lot coverage to 15 percent of the lot area for lots and parcels that are larger than ½ acre. Thus, the lot coverage limit for this property is 9,334 square feet. The Applicant is proposing 11,991 square feet: an excess of 2,657 square feet of lot coverage.
- The site plan (Attachment 4) proposes constructing a house, porch, lanai, and a pool, which impacts the 100' 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 the variance and 1:1 for canopy removal (COMAR 27.01.09.01-2). The total mitigation required for this proposal is 10,164 square feet of 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 8, 2024. The Commission states "Maryland's Critical Area law provides that variances to a local jurisdiction's Critical Area program may only be granted if the Board of Appeals finds that an applicant has satisfied the burden to prove that the request meets each and every one of the variance standards under COMAR 27.01.12." and is opposed to the variance for the proposed pool impacting the 100' Critical Area Buffer (Attachment 8).
- The Department of Land Use and Growth Management has approved the site plan

for zoning and floodplain requirements. Additionally, the Health Department, Metcom and Soil Conservation District have also approved the site plan. The stormwater management plan is currently pending approval.

- Attachments to the Staff Report:
    - Attachment 1: Critical Area Standards Letter
    - Attachment 2: Plat Book 30 Page 129
    - Attachment 3: Critical Area Map
    - Attachment 4: Site Plan
    - Attachment 5: Location Map
    - Attachment 6: Land Use Map
    - Attachment 7: Zoning Map
    - Attachment 8: Critical Area Commission Response

Applicants' Testimony and Exhibits

Applicant was represented before the Board by Wayne Hunt, of Little Silence's Rest, Inc. Mr. Hunt presented a slideshow that included pictures of site conditions, site plans depicting proposed development, and other material. The following evidence testimony was among that provided to the Board:

- The Applicant lost the entirety of a pre-existing home by fire. Applicant wanted to include a "Florida-style pool" that would be completely screened in and surrounded by a structure sometimes referred to as a lanai.
- The proposed site plan represents Applicant's best effort to replace the existing home without creating any additional coverage in the Buffer. Applicant pulled "all" of the improvements back by 22-feet to reduce intrusions into the Buffer, and other locations

would involve more disturbance to the Buffer and would require the clearing of vegetation. Mr. Hunt testified that he believed the plan represented the least amount of intrusion into the Buffer.

- The previously existing house predates the Critical Area program by decades. Mr. Hunt provided a 1938 aerial photograph – the oldest aerial photographs publicly accessible through the County's GIS system – that shows the previous house existing at least that far back.
- Overall coverage in the Buffer will be reduced by 1,807 square feet.
- Stormwater management will also be improved as part of the new development. The previous house did not have any stormwater management.
- The pool will be located entirely on the existing footprint, which could otherwise be improved by a deck, roof, or other form of lot coverage if the Applicant had opted for strict in-kind replacement.

Public Testimony

No members of the public appeared to offer testimony related to the variance request. Written comments were received from Pam and Mark Darrah, neighbors the Applicant. They stated they had no objection to the requested variance.

Decision

COMAR 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 jurisdictions 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 Applicants are entitled to the requested relief.

The Board finds that denying the Applicants' request would constitute an 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. *Assateague Coastal Trust* requires the Applicant to first identify a use that would be significant and reasonable. The Applicant is proposing to replace a previous home lost to fire with a replacement home that includes a pool. The pool will be a part of the new structure; Mr. Hunt described that it will be completely enclosed and surrounded by walls that will attach to the home, what he called a "Florida-style pool." Homes and even swimming pools are common amenities across St. Mary's County. Since the recent refinement of the County's Critical Area program allowing Applicants the right to request variances to develop swimming pools this Board has seen several. What the Board sees before it in this matter are improvements of the same basic nature, scale, and character as it has seen in similar requests related to residential pools and single-family homes. The Board finds that depriving Applicants of the right to build the requested single-family home and attached pool would amount to denial of a reasonable and significant use of the property, and of a right commonly enjoyed by other similarly-situated property owners.

The Applicant has taken evident care, as explained by Mr. Hunt, to locate the pool in a place where it will do the least amount of harm. The pool will be built entirely over the remains of what had been a much larger house. Mr. Hunt's testimony was that relocation elsewhere would create more disturbance overall and necessitate the clearing of more vegetative cover than building over the existing footprint. Mr. Hunt also elaborated that the footprint has been moved as far back

from the shore as possible – an additional 22' over the previous home. The Board accepts the Applicant's assertions and evidence that these efforts represent the most they can do to minimize intrusion into the Buffer. Likewise, we do not find any obvious and reasonable avenues by which the Applicant could further reduce lot coverage.

Accordingly, because the Applicant has met its burden of demonstrating that the proposed development constitutes a significant and reasonable use of their property, and because he has compellingly demonstrated no viable alternatives are available for placement elsewhere on the Property, the Applicant has demonstrated denial of this variance would amount to an unwarranted hardship.

Secondly, 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. Neither the proposed single-family home nor its attached swimming pool are improvements atypical for St. Mary's County, or for homes in the Rural Preservation District. It has barely been two full years since the County's Critical Area program was amended to allow property owners the ability to ask for variances to propose swimming pools in the Buffer; as noted above, this proposal is not of a scale or caliber markedly different than previous variances that have been granted.

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 his right to seek a variance and is hewing as close to the Critical Area program's strictures as may be reasonably expected. State law requires Applicants be furnished the *right* to ask for a variance from the local Critical Area program's structures. Applicant is afforded no greater privilege than that of requesting a variance and being given a fair opportunity to

demonstrate his request satisfies the standards for receiving one.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the Applicant. Applicant and tax records demonstrate that the Property has been improved by a dwelling for nearly a century, long before the development of the Critical Area program. That improvement was lost to fire in April 2024. Applicant seeks to redevelop that structure's existing footprint, as much as possible, for the proposed replacement dwelling. Applicant's design choices are driven by these realities.

Fifth, the variance request does not arise from any conforming or nonconforming condition on any neighboring property.

Sixth, the granting of the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdictions local Critical Area. Over ten thousand square feet of plantings will be required for a development project that will reduce overall lot coverage – and reduce by 1,807 square feet the amount of lot coverage in the Buffer itself – from what it was before the April 2024 fire. These plantings will help mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer. The Board of Appeals assigns particular weight to Applicant's efforts to reduce coverage in the Buffer, and we note CZO § 41.2.1 language with respect to an Applicant's right to restore a structure lost to fire. Applicant could, if Applicant so chose, replace the previous structure in-kind – a replacement that would result in more lot coverage and more coverage in the Buffer. We cannot help but conclude what Applicant offers in its stead is of greater benefit to the environment.

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's laws and regulation and the local Critical Area program. The Applicant has identified a significant and reasonable use; the

Applicant has proposed the least impactful means to create that use on his property; the Applicant has demonstrated to the Board's satisfaction that the proposal will leave the Property better off and more compliant with the Critical Area program after completion of this development than it was prior to the April 2024 fire. We acknowledge the Critical Area Commission's response letter. We cannot agree, however, that a swimming pool is a categorically unfit beneficiary of a variance request, as that letter seems to suggest. Neither can we agree that there is reasonable means to develop the pool elsewhere on the property, for the reasons Mr. Hunt elaborated upon. The impacts to the Buffer and Critical Area of the proposed replacement will be offset by the mitigation and other site improvements – such as furnishing comprehensive stormwater management on the Property for the first time in its history – that the Applicant shall make. By state law, a local Critical Area program *must* allow a property owner to make a variance requests, and when the Applicant produces sufficient evidence to overcome his strong burden of proof the Board of Appeals may grant the requested variance. We find granting the request before us, based upon the facts, circumstances, and mitigating factors presented by the Applicant at the hearing and in its standards letter, is in conformity with the goals of St. Mary's County's Critical Area program.

Finally, in satisfying each of the necessary criteria the Applicants have overcome the statutory presumption against granting a variance.

ORDER

PURSUANT to the application of Douglas Halgren for a variance from CZO Sections 41.5.3.i.(1) to exceed lot coverage limits and 71.8.3 to disturb the Critical Area Buffer for a replacement 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 § 21.1.3.a and CZO § 24.8, that Applicant is granted a variance from CZO Sections 41.5.3.i.(1) to exceed lot coverage limits and 71.8.3 to disturb the Critical Area Buffer for a replacement house.

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 Applicant to construct the structures permitted in this decision, he must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: December 17, 2024

Guy V. Bradley, III, Vice-Chairperson

Those voting to grant the amendment: Mr. Hayden, Mr. Bradley, Mr. Payne, Mr. Richardson, and Ms. Weaver

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 Circuit Court for St. Mary's County. 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.