

IN THE MATTER OF	*	CASE NO. CAVR-24-7
ANTHONY GRILLO AND DEBRA MACALEER	*	VARIANCE REQUEST APPLICATION (Critical Area)

The Board of Appeals (the “Board”) held a hearing on February 3, 2025, which was continued on February 10, 2025, in the Bradley Meeting Room, Court House, South Wing at 11 N. Washington Street, Easton, Maryland to consider the application of Anthony Grillo and Debra Macaleer (the “Applicants”). Applicants requested a Critical Area variance for the property at 515 Tenant Circle, St. Michaels, Maryland (“Property”). Chairman Frank Cavanaugh, Vice Chairman Louis Dorsey Jr., Board Members Patrick Forrest, Jeff Adelman, Zakary Krebeck, and Board Attorney Lance Young were present. Board Secretary Christine Corkell and Planners Andrew Nixon and Elisa Deflaux appeared on behalf of the County.

STATEMENT OF THE CASE

The Applicants requested approval of a Critical Variance to construct a new swimming pool within the 77.56-foot Buffer Management Area setback.

SUMMARY OF TESTIMONY

The Applicants were represented by Brett Ewing of Lane Engineering, Inc. Attorney Brendan Mulaney, of the firm McAllister Detar Showalter & Walker appeared for Applicants during the February 10, 2025 hearing. The Applicant, Anthony Grillo, also provided testimony.

The Applicants seek to install a swimming pool in the same location as an existing impermeable concrete patio. Applicants contend that the location is the best and only reasonable location on the Property for a swimming pool because it would be the least impactful to the Property and the environment. The only other feasible location would require removal of several large trees. Using the location of the existing patio will allow Applicants to reduce impervious surface on the property by 150 sf within the buffer, by removing patio, and without removing trees.

The other potential location for a pool, which would not require a variance, is on the north side of the Property behind the garage. Constructing the pool in that location would increase the impervious surface on the Property.

Planner Andrew Nixon testified that the Property is in a modified buffer area. As he explained, the modified buffer area means that the collective subdivision is legally nonconforming.

The modified buffer allows the neighborhood of shoreline dwellings to exist without the need for a Critical Area variance for dwellings and structures that existed prior to the establishment of a Critical Area buffer.

Mr. Ewing addressed the criteria for granting a Critical Area variance. First, Mr. Ewing explained that an unwarranted hardship exists because of the Property's unique nonconformity. The residence was constructed prior to the Critical Area law and establishment of a buffer. The size and location of the Property are such that very little can be constructed or modified outside of the modified buffer. Requiring the Applicants to construct the pool behind the garage would result in a net increase of impervious surface on the Property, which is contrary to the goals of the Critical Area law.

Mr. Ewing stated that a literal interpretation of the Critical Area requirements would deprive the Property owners of rights commonly enjoyed by others in the same zoning district because swimming pools are commonly enjoyed by homes in the area, especially homes that are along the waterfront. Homeowners are not allowed to build within the buffer without a variance. The Applicants contend that other property owners would be entitled to a variance under the same circumstances because of the unique nonconformity of the property. By this same logic, the Applicants contend that the granting of a variance will not confer on the property owner any special privilege that would be denied to others in the zoning district. Further, the Applicants contend that they did not create the circumstances that created the need for a variance. The configuration of the property existed prior to the enactment of a Critical Area law and buffer.

Applicant's primary argument for the granting of a variance is that the installation of a swimming pool in the proposed location will benefit water quality and the environment by using existing impermeable space and reducing that impermeable space. Installing the pool behind the garage would require removal of mature trees and result in additional impermeable coverage on the property, which in turn would result in additional runoff into the waterway. Thus, the proposal is the minimum adjustment necessary to relieve the owner of unwarranted hardship while simultaneously achieving the goals of the Critical Area law; which is, among other things, to reduce impervious lot coverage within the Critical Area.

Applicants and Board members discussed whether using the patio space amounted to a permissible intensification of a nonconforming structure. When the hearing convened on February 10, 2025, Mr. Mulaney addressed that point. He clarified that the nonconforming status of the patio structure was irrelevant to the Applicant's variance request. The request for a pool in that location is not derived from the fact that the patio is a nonconforming structure. Rather, the request to install the pool in that location is merely for the purpose of installing the pool in the most logical location of the property while also obtaining a net reduction in impermeable lot coverage.

Mr. Mulaney further clarified the Applicant's position regarding unwarranted hardship. There is no other practical or reasonable location to install the pool because of the unique configuration of the Property. The Critical Area law was enacted when the Property already existed with approximately half of the improvements within that buffer area. The unwarranted hardship, combined with the fact that the project will reduce impacts to the Critical area warrant a

variance. Applicants contend that swimming pools are a residential use, which is allowed on residential zoned property.

The Critical Area Commission submitted a letter stating its position that installation of a swimming pool does not amount to an unwarranted hardship because it does not deny the owner of a significant use of the property. Mr. Mulaney addressed this argument by contending that prior Board opinions and court decisions have deemed denial of a swimming pool to be deprivation of a significant use of the property.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All Board members have visited the site and have utilized the onsite visitation to analyze whether denial of the variance would create an unwarranted hardship. The majority finds, considering all facts and inferences presented, that the Applicant will suffer unwarranted hardship if the variance is not granted.

The Board addresses the standards for a Critical Area variance set forth in the Talbot County Code, § 190-58.4.

1. *Special conditions or circumstances exist that are peculiar to the land or structure such that a literal enforcement of the provisions of this chapter would result in unwarranted hardship.*

A Critical Area variance is considered on the basis of whether the applicant has shown that there will be an “unwarranted hardship” without a variance. An unwarranted hardship means “without a variance, an applicant would be denied reasonable and significant use of the entire parcel or a lot for which the variance is requested.” Md. Code Ann., Nat. Res., § 8-1808(d).

The codified definition of unwarranted hardship was derived from Maryland Supreme Court precedent and those cases provide guidance in applying the standard. *Mastandrea v. North*, 361 Md. 107, 760 A.2d 677 (2000); *Belvoir Farms v. North*, 355 Md. 259, 734 A2d 227 (1999) and *White v. North*, 356 Md. 31, 736 A2d 1072 (1999). *White v. North, supra* at 1082 provides:

With the clarification of the unwarranted hardship standard made in *Belvoir Farms*, the issue is now whether Petitioners presented substantial evidence in respect to that unwarranted hardship standard, *i.e.*, whether the denial of their request... is a denial of a reasonable and significant use.

Prior to *Belvoir Farms*, the unwarranted hardship standard was often, erroneously, applied strictly against the property owner similar to an unconstitutional “taking” or eminent domain standard. The Court clarified that the standard should not be interpreted as strict:

It is important to note here that the purpose of a variance is

to protect the landowner's rights from the unconstitutional application of zoning law.... we reject the proposition that the unnecessary or unwarranted hardship standard is equal to the unconstitutional taking standard. If this were true, it would be a superfluous standard because the constitutional standard exists independent of variance standards.

Belvoir Farms, supra, at 240.

In *Mastandrea v. North*, the applicants sought to construct a brick pathway in the Critical Area to accommodate a disabled family member. The Supreme Court concluded that the family would be denied a reasonable and significant use of the waterfront of their property without the pathway.

In *White v. North*, supra, the applicant requested a variance to build a swimming pool in the Critical Area buffer over the objections of the Critical Area Commission. The Critical Area Commission, as it does in the instant case, argued that the Applicant already enjoyed reasonable use of this residential property (a residence) and, therefore no hardship could be found. The court concluded that the test should not be so stringent, instead, the test should be whether the hardship "can result from the denial of a reasonable and significant use. As further guidance to the administrative board, on remand, the court stated that the applicants did not have to satisfy every specific standard of the variance ordinance. Rather, they needed to merely show that the requirements were generally met. *Id.* at 50.

The Supreme Court revisited the issue of unwarranted hardship again after the definition was codified. *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 136 A.3d 866 (2016). The issue in *Assateague v. Schwalbach* was whether the inability to exercise the riparian right to have a pier that reaches navigable water is an unwarranted hardship. The property owner sought a variance of the Critical Area law to build a pier that reached navigable waters. The Court reiterated that the standard is distinguished from and less stringent than a taking standard. It also found that the new codified definition does not require the applicant to show a deprivation of all reasonable and significant use of actual property. The court summarized application of the standard as follows:

In summary, in order to establish an unwarranted hardship, an 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.

What is a reasonable and significant use of residential property? In *White v. North*, supra, the Whites sought to build a pool in the buffer, because their lot would not accommodate a pool outside of the buffer. They wanted a pool "to enjoy it". Other homes in the neighborhood had pools, and the Whites demonstrated that the pool would enhance water runoff on the property. The Critical Area Commission had argued that the Whites already had a reasonable and significant use of their property. (They had a home on it.) The Commission argued that a pool was a luxury and that a variance would grant them "special privilege," since the other pools in the neighborhood had not required variances. These arguments were rejected by the Supreme

Court. The Court made clear that the subject of consideration in a variance case is the proposed use, not the existing use - whether denying the proposed use would deny a reasonable and significant use of the property. If so, the Board could grant the variance.

The Court of Appeals, in *Assateague v. Schwalbach* determined that the property owner wishing to build a pier had demonstrated an unwarranted hardship. The court determined that “[t]he use of a pier or walkway to reach navigable water to exercise the riparian rights associated with the property is a significant use of the property.” It reasoned it was a significant use because the property was in a developed area with a boating community and there were conditions put on the construction by environmental agencies. The zoning board also considered the entire property and found that the pier utilized the most direct path to the navigable waters.

Following the guidance cited above regarding the unwarranted hardship standard, in conjunction with the applicable variance standards, the Board finds that the Applicant has satisfied the standards for granting the requested variances. As held by the Supreme Court of Maryland, denial of the right to have a swimming pool can result in significant and reasonable use of the Property. The Board finds that others, similarly situated within the zoning district, commonly have swimming pools.

Specifically, the Property is unique. First, the Property is unique in that it is nonconforming. Approximately half of the improvements were within the buffer area prior to the enactment of Critical Area laws, such that a modified buffer was created within the subdivision. However, the Board further looks at the unique circumstances of the Property in that there is an impervious surface on it, a concrete patio, which the Applicants are willing to relinquish to bring the Property closer into compliance. Patios and pools are both enumerated accessory structures, and the Board finds that replacing the patio with another accessory structure is a common-sense solution to nonconforming lot coverage that warrants a variance. It is important to the Board’s decision that lot coverage is being reduced by this variance. There will be no further intrusion into the buffer.

The Board finds that it is not reasonable to require the Property owner to install the pool in an area behind the garage when doing so would create additional lot coverage, and requiring the removal of mature trees, which is antithetical to the purpose of the Critical Area law. Requiring the owners to do so would put an unwarranted hardship on the owners, and their neighbors, by creating additional lot coverage, reducing vegetation, and thereby increasing stormwater runoff effects to the detriment of the entire neighborhood.

2. *A literal interpretation of the Critical Area requirements will deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district.*

Swimming pools are common for homes in the zoning district and other waterfront homes within the County. The proposed location will maintain an existing footprint of an existing concrete patio.

3. *The granting of a variance will not confer upon the property owner any special privilege that would be denied to other owners of lands or structures within the same zoning district.*

The Board finds that granting the requested variances will not confer any special privilege. The Applicant has demonstrated that no better alternatives for the placement are available.

4. *The variance request is not based on conditions or circumstances which are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.*

The Board finds that the Applicants have not created the conditions or circumstances that result in the necessity for a variance. The lot has remained in its current configuration for decades and prior to the enactment of the Critical Area law.

5. *The granting of the variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat, and the granting of the variance will be in harmony with the general spirit and intent of the state Critical Area Law and the Critical Area Program.*

The Board finds this criterion most compelling in granting the variance. The Board finds that granting the variance will enhance water quality and habitat. Not granting the variance will require the Applicants to add impermeable lot coverage on the Property to the detriment of water quality and plant habitat. The Applicants would be required to remove mature trees in an alternate location on the Property.

6. *The variance shall not exceed the minimum adjustment necessary to relieve the unwarranted hardship.*

The Applicant's proposal for a swimming pool is designed to reduce lot coverage. Such would not be possible without consideration of pool size and location that minimize the effects of installing it.

7. *If the need for a variance to a Critical Area provision is due partially or entirely because the lot is a legal nonconforming lot that does not meet current area, width or location standards, the variance should not be granted if the nonconformity could be reduced or eliminated by combining the lot, in whole or in part, with an adjoining lot in common ownership.*

The Board finds that this criterion is not applicable.

Documents on Record

1. Application for a Critical Area variance.
2. Tax Map with subject property highlighted.
3. Notice of public hearing for advertising.
4. Newspaper confirmation.
5. Notice of public hearing with list of adjacent property owners attached.
6. Critical Area variance standards.
7. Staff Report.
8. Sign maintenance agreement/Sign Affidavit.
9. Critical Area Commission Comments dated 12/12/24.
10. Authorization letter.
11. Independent Procedures Disclosure and Acknowledgement.
12. Aerial photo.
13. Photos of Property (7).
14. Proposed Pool & Coping plan.
15. Request for Planning Officer, dated 5/3/21.
16. Critical Area Lot Coverage Computation Worksheet.
17. Variance Exhibit Plat, prepared by Lane Engineering, LLC.
18. Topographic Survey, prepared by Lane Engineering, LLC.

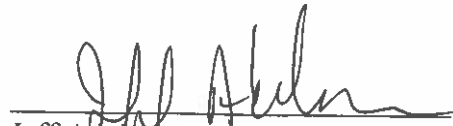
Mr. Krebeck moved that the Applicant be granted the requested variance subject to staff conditions and the motion was seconded by Mr. Forrest. Based upon the foregoing, the Board finds, by a 3-2 vote, that the Applicant's request for a variance is granted subject to the following conditions:

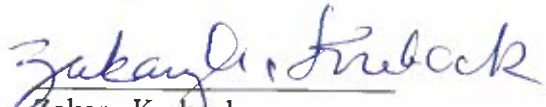
1. The Applicant shall commence construction of the proposed improvements within eighteen (18) months of the date of the Board of Appeals approval.
2. The Applicant shall comply with Critical Area law, including the completion of a Buffer Management Plan that complies with Critical Area Law. Also, as part of the Buffer Management Plan, the applicant will need to provide mitigation for any tree removal, if any, that is associated with the project.
3. This approval is only for the requested improvements and additions in this application and does not cover or permit any other changes or modifications. Items not specifically addressed in this application may require additional approvals.

IT IS THEREFORE, this 25th day of February 2025, **ORDERED** that the Applicant's requests for a variance is GRANTED.

Voting in Favor


Patrick Forrest


Jeff Adelman


Zakary Krebeck

Voting Against


Chairman, Frank Cavanaugh

Unavailable for Signature
Vice Chairman, Louis Dorsey, Jr.