

BEFORE THE TALBOT COUNTY BOARD OF APPEALS

IN THE MATTER OF * CASE NO. CAVR-24-3
DAVID AND KRISTA ROSS * VARIANCE REQUEST APPLICATION
(Critical Area)

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The Board of Appeals (the “Board”) held a hearing on April 1, 2024 in the Bradley Meeting Room, Court House, South Wing at 11 N. Washington Street, Easton, Maryland to consider the application of David and Krista Ross (the “Applicants”). Applicants requested a Critical Area variance for the property at 21211 Hickory Lane, Tilghman, 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 Planner Andrew Nixon appeared on behalf of the County.

STATEMENT OF THE CASE

The Applicants are the owners of two adjacent waterfront properties (lots 6 and 7) on Hickory Lane. Lot 6 is the subject of this variance request. The Applicants have also requested a variance for Lot 7. The properties are part of the Black Walnut Farm subdivision (“Subdivision”), which was subdivided in 1997. These lots are among several lots in the Subdivision that were developed to be residential waterfront lots.

The Applicants requested a variance to permit a residential construction within the 300’ expanded Shoreline Development Buffer including a 1,835 single family residence encroaching no closer than 199’ into the Buffer, including accessory structures such as outdoor shower and steps; a 648 sf pool encroaching no further than 180’ into the Buffer; a 1,512 sf pool patio encroaching no further than 193’ into the Buffer; and a 640 sf pool cabana encroaching no further than 150’ into the Buffer, with total proposed overage of 9,360 sf.

Lots 6 and 7 are peculiar for a couple of reasons. First, they were developed in an irregular shape where significant portions of each lot are wooded and do not face the Chesapeake Bay. However, the lots are taxed as waterfront lots because of the portion of the lots that do face the Bay. Second, these two lots have a more restrictive buffer than neighboring properties. They are the only lots in the subdivision that are within the Shoreline Development Expanded Buffer. This is because the lots contain “hydric soil” as designated by the United States Department of Agriculture (“USDA”). The USDA defines hydric soil as “a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part.”

The Applicants seek to construct homes and other amenities on the two lots a similar distance from the Bay as other homes in the Subdivision. Because the lots are in the expanded Buffer, they require Critical Area variances.

SUMMARY OF TESTIMONY

Brendan Mullaney, of McAllister Detar Showalter & Walker, LLC, appeared on behalf of the Applicant. Mr. Mullaney described the history of the Subdivision. It was created in 1997. It is zoned Village Residential in a Limited Development Area subject to the Shoreline Development Buffer. Lots 6 and 7 are the only lots in the Subdivision subject to a 300' expanded Buffer. Most other homes in the Subdivision have constructed homes that sit just outside the 100 foot Buffer. A lot immediately adjacent to the lots was improved with a residence around 2021 without the necessity of a variance because it has not been given the USDA hydric soil designation.

The Applicants seek to construct homes approximately the same distance as other homes along the same shoreline. The Applicant's plans for construction meet all other zoning requirements including bulk, height, and setbacks. The Lot will fall within the permitted lot coverage after completion of the proposed home and amenities.

The expanded Buffer designation of Lots 6 and 7 was created around 2010, which is more than a decade after the lots were subdivided for use as a waterfront residence.

Brett Ewing of Lane Engineering, LLC testified regarding the project. Mr. Ewing first addressed a recommendation of Talbot County Planning and Zoning staff concerning the shared access to Hickory Lane that Lots 6 and 7 require. It was recommended that the Applicants record a shared access agreement in the land records of Talbot County, which will be necessary if the lots are ever owned by different owners. Mr. Ewing states that such an agreement will be recorded as recommended.

Mr. Ewing also addressed the unique expanded Shoreline Buffer that burdens Lots 6 and 7. Although the USDA has designated the lots as containing hydric soil, it does not mean the lots are akin to a wetland. Lane Engineering has no concern with saturated soil on the property. It has worked with County staff for an extended period of time to design the location of the homes and amenities. They have also worked with staff and after extensive analysis have developed a plan that complies with the limitation of 30% tree canopy removal. The Applicants intend to pay a fee in lieu of mitigation for other mitigation that may be required.

The Applicants introduced an exhibit at the hearing, which demonstrates a pattern of development in the Subdivision. It demonstrates that the other homes in the Subdivision are aligned just outside of the 100' Critical Area Buffer.

Mr. Mullaney contends that the proposed location for the homes on Lots 6 and 7 are the only reasonable locations on the property to construct the homes. A letter from the Critical Area Commission suggests that there are portions of the lots further away from the Bay where a home

could be built. The homes that are proposed could not be built in those areas. A small, rectangular shaped home could potentially be placed in those areas but amenities around the home could not fit into those spaces. A well could only be constructed in the area within the Buffer.

Mr. Mulaney explained that the irregular shape of the lots, which provide a long narrow area on the back of the lots, was designed to achieve the necessary two acre minimum for the lots and to provide road access to Hickory Lane.

The Applicant's testimony is that they were unaware of the expanded Shoreline Buffer when purchasing the properties. The expanded Buffer is not apparent to a good faith purchaser. The expanded Buffer is not shown on the recorded plat for the property and Subdivision. It wasn't until Lane Engineering was commissioned to survey the property that it was discovered the lots stood alone within the Subdivision as having an expanded Buffer. Further, the property tax valuations assess the properties as buildable waterfront lots.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All Board members have visited the site and generally find that the proposed location for the project is the only reasonable location for the project. The Board finds that the Applicants will suffer an 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 Board finds that denial of the requested variance would deprive the property owner of a reasonable and significant use of the property. The property is assessed as a buildable waterfront lot. If the Applicants are not able to improve the lot as a buildable waterfront lot, they would lose a significant investment in the property.

The irregular shape of the lot is a condition that is peculiar to the land such that literal enforcement would result in unwarranted hardship. It may be mathematically possible to build a much smaller, irregularly shaped home on the back side of the property. The value of the property would be significantly and unduly diminished by doing so. It would not be feasible to construct typical outdoor amenities around the home and a well could only be placed in the

expanded Buffer area. In other words, it is not reasonable to improve the waterfront lot with a small, irregular shaped structure in the wooded, irregular shaped portion of the lot.

The lot was legal for waterfront development when it was subdivided and the only way to develop the lot, in this Board's opinion, is to develop it as the Applicants have proposed. The Board's conclusion in this regard is largely influenced by the Board Member's onsite visit to the property.

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.*

Lots 6 and 7 are the only lots in the Subdivision that have been designated with an expanded Buffer. Each of the Applicant's neighbors have improved their lots with homes just outside of the 100' buffer, which is what existed for Lots 6 and 7 when those lots were subdivided. The lots were subdivided so that they would be developed in accordance with this development plan. If denied a variance, Lots 6 and 7 would be denied the same rights enjoyed by every other waterfront lot in the Subdivision, as well as most other similarly situated lots within the same zoning district.

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. Other property owners within the same zoning district have homes outside of the 100' Buffer. The proposed projects meet all zoning standards for the Village Residential Zoning District.

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 Board finds that the lot was subdivided as a waterfront lot with designated area on the lot for a waterfront home. The expanded buffer designation was subsequent to the development of the lot and not apparent to the Applicants when purchasing the lot.

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 improvements will not encroach within the 100' Critical Area Buffer. The improvements will require mitigation and buffer establishment in accordance with the building permit. The Applicant intends to utilize a fee-in-lieu payment to satisfy the required mitigation. The project will also have to meet stormwater management requirements.

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

The project meets all other zoning requirements with the exception of its encroachment into the expanded Shoreline Buffer. The Board finds that encroachment into that Buffer is necessary to construct any residence in the area intended for development as anticipated by the development plan of the Subdivision.

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 criteria 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 prepared by Andrew Nixon.
8. Sign maintenance agreement.
9. Critical Area Commission Comments dated 3/13/24.
10. Independent Procedures Disclosure and Acknowledgement Form.
11. Aerial photos.
12. Elevation and Floor Plans.
13. Critical Area lot coverage computation worksheet.
14. Site Plan from Lane Engineering, LLC, Job. No. 210647.
15. Subdivision Plat for Black Walnut Farm.
16. Hearing Exhibit #1 – Subdivision exhibit.

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

1. The Applicants shall make an application to the Office of Permits and Inspections, and follow all rules, procedures, and construction timelines as outlined regarding new construction.

2. The Applicants shall commence construction of the proposed improvements within eighteen (18) months of the date of the Board of Appeals approval. 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.

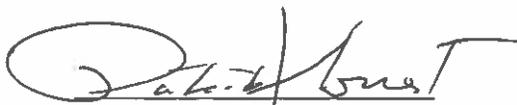
3. The Applicants shall comply with and address all Critical Area Commission comments and requirements, including the completion of a Buffer Management Plan that complies with Critical Area Law. The Applicants shall provide 3:1 mitigation for any permanent disturbance within the buffer and 1:1 mitigation for any temporary disturbance within the Buffer as a condition of variance approval or pay a fee in lieu of mitigation if planting is not practical. Also, as part of the Buffer Management Plan, the Applicants will need to provide mitigation for any tree removal associated with the project.

4. The Applicants will record, with coordination of the Office of Planning and Zoning, a shared use agreement with Lot 7, in the land records for Talbot County, that allows shared access between the two Lots for access to Hickory Lane.

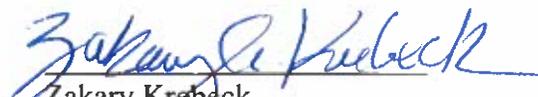
IT IS THEREFORE, this 29th day of April, 2024, **ORDERED** that the Applicant's requests for a variance is GRANTED.


Frank Cavanaugh, Chairman


Louis Dorsey, Jr., Vice-Chairman


Patrick Forrest


Jeff Adelman


Zakary Krebeck