

**BEFORE THE TALBOT COUNTY BOARD OF APPEALS**

APPEAL OF \* FINDINGS AND DECISION  
PAUL CURTIS STOKES, III. \* Appeal No. 23-1746

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The Talbot County Board of Appeals (the “Board”) held a hearing on December 18, 2023 in the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland to consider the Appeal of Paul Curtis Stokes, III.

The Appellant is the owner of property adjacent to 7829 Church Neck Rd., St. Michaels, Maryland (“Property”). The Property is owned by James L. Lancaster and Maya P. Lancaster (“Respondents”). Appellant challenges the decision of the Talbot County Planning and Zoning Planning Officer to grant a minor variance for the purpose of permitting a 603 square foot screened porch addition to an existing nonconforming structure on the Property.

Voting Board Members present for this hearing were Chairman Frank Cavanaugh, Vice Chairman Louis Dorsey, Jr., Paul Shortall, Jr., Jeff Adelman, and Zakary Krebeck.

**STATEMENT OF THE CASE**

This matter is brought forth under Talbot County Code, §§ 190-54.6 and 190-58.2(C), which provides that a decision of the Planning Officer to grant a minor variance may be appealed to the Board of Appeals. This Board’s review of the Planning Officer’s decision is to assure that the decision is in conformance with law and supported by substantial evidence. Talbot County Code, § 20-19; *Monkton Preservation Ass’n v. Gaylord Brooks Realty*, 107 Md. App. 573, 580 (1995).

On July 5, 2023, the Talbot County Planning Commission conducted a public hearing that considered the application of Respondents to obtain a minor variance for the Property. As set forth in Article VII of the Talbot County Code, § 190-58-2(B), the Planning Commission shall make a recommendation to grant a minor variance for a minor expansion of a nonconforming structure within the Critical Area. The Planning Commission voted unanimously to recommend the minor variance on the basis that the request met all of the standards for a Critical Area variance.

By decision dated August 16, 2023, the Planning Officer granted the minor variance. The written decision found that:

1. The screened porch will result in approximately 422 square feet of new lot coverage within the Shoreline Development Buffer.
2. The screened porch will encroach no further into the Critical Area Buffer than the existing nonconforming structure.

3. The addition will be located approximately 85 feet from the Mean High Water Line (“MHWL”) at its closest point, while the existing structure is 69 feet from the MHWL at its closest point and 40 feet from tidal wetlands.

The Planning Officer’s decision states that it is based on the information provided to him by the Property owners/applicants. The record of information considered by the Planning Officer includes a staff report made by the Talbot County Office of Planning and Zoning.

Appellant contends that the Planning Officer had insufficient evidence in the record to make the determination to grant the variance.

All Board of Appeal members visited the Property prior to the hearing.

This Board must determine whether the grant of a minor variance was supported by substantial evidence and was not based on an erroneous interpretation of the law.

### **SUMMARY OF ARGUMENTS**

The Appellant was represented by attorney Mark F. Gabler who submitted a Pre-Hearing Statement and provided oral argument. The Respondent was represented by attorney Zach A. Smith who submitted a Pre-Hearing Statement and provided oral argument. A summary of the respective arguments are as follows.

#### **Appellant’s Arguments**

The Appellant argues that the record is void of the necessary findings to uphold the grant of a minor variance.

Among the standards for granting a variance in the Critical Area is that “[s]pecial 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.” Talbot County Code § 190-58.4(A)(1). Appellant makes two arguments in this regard.

First, Appellant argues that there is no discussion or evidence on the record for which the Planning Officer could determine that the Property owners would suffer an unwarranted hardship if the variance were not granted. The Planning Commission discussed the fact that the home on the Property is legally nonconforming but did not explain in its recommendation how that fact amounts to an unwarranted hardship. The Planning Officer’s decision lacks specific discussion on what is an unwarranted hardship. The staff report relied upon by the Planning Officer discusses the criteria of unwarranted hardship and establishes facts indicating that any addition on the nonconforming home would require a variance because of its configuration on the property.

Second, Appellant argues that the Property owners could not demonstrate an unwarranted hardship even if the reasons for it were articulated better by the Planning Officer. The Property already has multiple outside amenities. It has an existing screened porch, a deck, and a balcony.

Therefore, the granting of a variance for an additional outdoor amenity does not amount to relief for an unwarranted hardship.

Appellant also contends that the variance should not have been granted because there is insufficient evidence that the Property owners would be deprived of any rights. Pursuant to the Talbot County Code, a variance may be granted where “[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.” Talbot County Code § 190-58.4(A)(2).

There is no evidence on the record, according to Appellant, that others similarly situated have been granted a screened porch under the circumstances. Appellant further contends that the existence of a screened porch already attached to the home is evidence that there is no deprivation of a right. In other words, the argument focuses on what is necessary, as opposed to desired.

The third primary contention is that granting of the variance conferred a special privilege to the Property owner. The Code provides that “[t]he granting of a variance will not confer upon the property owner any special privilege that would be denied by this chapter to other owners of lands or structures within the same zoning district.” Talbot County Code § 190-58.4(A)(3). It is the applicant’s burden to demonstrate this factor and, according to Appellant, the record is void of any such discussion.

These arguments all point to the contention that the Planning Officer’s decision must better articulate its reasons for meeting the variance requirements. It isn’t enough, according to Appellant, that the Planning Officer’s decision summarily determines that these factors are met based on the information provided to, and reviewed by, the Planning Officer.

### **Respondent’s Arguments**

The Respondent highlights the fact that the decision under review was for a “minor” variance, which the Code authorizes the Planning Officer to make administratively. Other variances require a decision by this Board. Respondent also contends that the Planning Officer’s decision was made based on findings set forth in the staff report and so his decision need not duplicate the same findings of fact.

The unwarranted hardship was demonstrated according to Respondent. The screened porch is proposed to face the waterfront. The existing screened porch does not have waterfront views and is prone to flooding.

The nonconforming status of the home is important because the Critical Area law created the need for a variance after the home already existed in its current configuration. A minor variance is all that is required, as opposed to a standard variance, because the addition will not result in any further encroachment into the Critical Area Buffer. There is no precedent, according to Respondent, that a structure cannot have two separate porches in violation of the unwarranted hardship standard.

## FINDINGS OF FACT AND LAW

The Board makes the following findings of fact and legal conclusions based on the evidence of record and arguments made by counsel of record in this matter. To begin, this Board is mindful of the deference that is typically afforded to the Planning Officer. As stated by the Appellate Court of Maryland:

An agency's decision must be reviewed in the light most favorable to the agency. *Courtney v. Board of Trustees*, 285 Md. 356, 362, 402 A.2d 885 (1979). A decision of an agency is *prima facie* correct and carries with it the presumption of validity. *Courtney*, 285 Md. at 362, 402 A.2d 885. A court will not reject a conclusion of an agency if "a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512, 390 A.2d 1119 (1978), quoting *Dickinson-Tidewater v. Supervisor*, 273 Md. 245, 256, 329 A.2d 18 (1974).

*Coscan Wash., Inc. v. Md-Nat'l Capital Park & Planning Comm'n*, 87 Md. App. 602, 626 (1991). This Board must determine whether there was substantial evidence before the Planning Officer to support his conclusions. *Riffin v. People's Counsel for Baltimore County*, 137 Md. App. 90, 93 (2001).

The Planning Officer is not required to articulate the reasons for his findings with absolute specificity. The law requires that there are sufficient facts in the record to support the decision that was made. The Maryland Supreme Court has determined that when an agency decision "refers to evidence in the record in support of its findings, meaningful judicial review is possible." *Critical Area Comm'n v. Moreland, LLC*, 418 Md. 11 (2010).

The Planning Officer's decision, in this matter, based his decision with reference to the staff report and the Planning Commission recommendation. The staff report, which is part of the record relied on by the Planning Officer, addresses the criteria that Appellant contends were not adequately addressed. The following are excerpts from that report:

The *Talbot County Code*, § 190-58, states that in order to grant a variance of the Critical Area Overlay District, the Planning Director must determine that the application meets the following criteria:

A. 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.

Analysis – The existing property is relatively flat and forested in the northern half of the property. The shoreline does not appear to have changed or eroded, based on the 1989 aerial photography. The house sits 69' at its closest point to the MHWL and is 40' from the tidal wetland fringe on the east side. As a result of the house placement, building an addition on the rear of the structure requires a variance. The

proposal will not encroach closer to the MHWL than the existing residence at 69' from MHWL and 40' from the tidal wetlands.

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

Analysis – The existing dwelling is located partially within the Buffer. Based on the shape of the lot and the presence of the 100' Buffer, there is only a small portion of the house on the western corner that could be expanded upon without the need for a variance. Staff believes the applicant's request is reasonable, and remains consistent with other variances that have been previously granted for waterfront properties in the RC zoning district.

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

Analysis – No special privilege is conferred to the property owners. The Minor Variance exists in the Zoning Ordinance to allow for the consideration to the expansion of nonconforming structures. Staff believes this request is consistent with this section, § 190-50.3.c. and does not confer upon the property owner any special privilege that would be denied to others in this zoning district. The applicants wish to add a modern entertainment space to their house built in 1970. To accomplish this, it appears they have placed the proposed addition in the only area of the existing dwelling that would not result in further encroachment into the Buffer than currently exists today. The proposal is also designed to avoid the need for an additional side yard setback variance.

The record also contains an email from a representative of the Critical Area Commission opining that the variance request meets the standards for an unwarranted hardship subject to mitigation requirements required by the Critical Area law.

We find that a reasonable person could reach the conclusion of the Planning Officer, following a unanimous approval by the Planning Commission and a favorable recommendation from the Critical Area Commission, that a minor variance may be granted, based on the facts that are on the record. The facts demonstrate that the property is severely constrained with 90% of the structure being situated in the Critical Area Buffer. The proposed location avoids the need to request a setback variance.

Talbot County Code § 190-58.4(A)(1) would require the Planning Officer to consider the special conditions or circumstances of the Property that, with strict enforcement of the code, would result in an unwarranted hardship to the Property owner. 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 Supreme Court of Maryland visited the issue of unwarranted hardship in *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 stated that the standard is distinguished from and less stringent than a taking standard. It also found that the 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.

The staff report, in this matter sets forth the unique conditions of the Property. The staff report lists several conditions that limit the ability of the owners to construct any enhancement to the home. It is a home that was constructed prior to the Critical Area law. In that respect, the home is legally nonconforming. A structure is legally nonconforming when it was previously legal but is no longer conforming to the present day zoning ordinance. *Trip Assocs. v. Mayor & City Council*, 392 Md. 563, 573 (2003).

We find that a reasonable person could conclude that a legally nonconforming property burdened by the Critical Area Buffer requirements, which were not in existence at the time the structure was constructed, results in an unreasonable hardship when unable to construct a modest expansion to the structure. The record includes facts to demonstrate that the expansion will not

encroach any further into the Buffer or nearer to the MHWL. It is reasonable to conclude that there is an unreasonable hardship if the proposal otherwise complies with the Critical Area law but is denied due to strict enforcement of the County ordinance. As set forth in *White v. North*, other uses of the property should not be a determining factor in whether to conclude that the proposed use is a reasonable and significant use of the property.

Further, there are sufficient facts to find that the use cannot be accomplished elsewhere on the property without a variance. The facts demonstrate that the screened porch could not be added to any other part of the structure without also requiring a variance. The facts demonstrate that the proposed location will result in no further encroachment into the Buffer or closer to the MHWL.

The Board finds that a reasonable person could subjectively conclude that denial of the variance request would deprive the property owner of a right commonly enjoyed by other property owners. The Planning Officer has firsthand knowledge that many waterfront property owners in Talbot County enjoy views of their waterfront from screened porches. The law does not require that a structure or addition to a structure be a necessity in order to meet the unwarranted hardship standard. As described in *White v. North* above, it has been determined that the denial of a swimming pool could amount to an unwarranted hardship. It is not unreasonable for a waterfront property to include a screened porch area that faces the waterfront. That is a reasonable and significant use of a waterfront property.

The Board also finds that there are sufficient facts on the record to make the subjective determination that granting the minor variance will not confer a special privilege on the Property owner. The record reflects that the Property, in all respects, meets the criteria for a minor variance. The grant of a variance will not result in encroachment into a setback or exceed density requirements. Any other property owner could achieve the same result if they were to request a minor variance under the same conditions.

For these reasons, we decline to overrule the Planning Officer's decision and find that the decision is in conformance with law and supported by substantial evidence.

### **EVIDENCE ON THE RECORD**

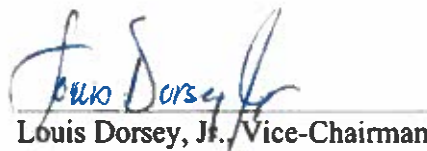
The Board accepted and considered the following documents as part of the record in this appeal:

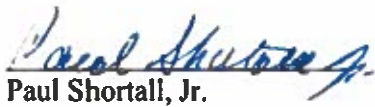
1. Application
2. Variance Narrative
3. Site Plan
4. Lot Coverage Calculations
5. Variance Summary
6. Elevation Drawings
7. Floor Plans

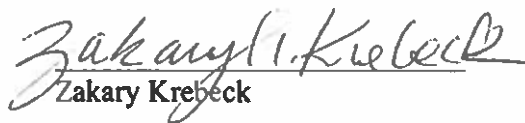
8. Staff Report
9. Planning Commission Decision Summary
10. Public Comment (Stokes 7-14-23)
11. Public Comment (Stokes 8-11-23)
12. CAC Comments
13. Notice of Application Approval
14. Planning Commission hearing recording.

**IT IS THEREFORE**, this 12<sup>th</sup> day of January, 2024, **RESOLVED** that the decision of the Planning Officer is **AFFIRMED**.

  
Frank Cavanaugh, Chairman

  
Louis Dorsey, Jr., Vice-Chairman

  
Paul Shortall, Jr.

  
Zakary Krebeck

Voting against the motion to uphold the Planning Officer's decision.

  
Jeff Adelman