

BEFORE THE TALBOT COUNTY BOARD OF APPEALS

IN THE MATTER OF * CASE NO. CAVR-23-7
ZACHARY SMITH * VARIANCE REQUEST APPLICATION

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The Board of Appeals (the “Board”) held a hearing on August 14, 2023 in the Bradley Meeting Room, Court House, South Wing at 11 N. Washington Street, Easton, Maryland to consider the application of Zachary Smith (the “Applicant”). Applicant requested Critical Area and non-Critical Area variances for the property at 27908 Waverly Rd., Easton, Maryland (“Property”). Chairman Frank Cavanaugh, Vice Chairman Louis Dorsey, Jr., Board Members Paul Shortall, Jr., Jeff Adelman, Zakary Krebeck, and Board Attorney Lance Young were present. Board Secretary Christine Corkell and Assistant Planning Officer Bryce Yelton appeared on behalf of the County.

STATEMENT OF THE CASE

The Applicant, with his wife Holly Smith, wish to install a swimming pool on their Property. The Property is within the Critical Area and currently exceeds the maximum 15% lot coverage. The Property also has two sheds that are within required setbacks, which the Applicant did not place on the Property, but are needed by the Applicant. Therefore, two kinds of variances are at issue. First, a Critical Area variance is necessary to reconfigure lot coverage on the Property. Second, setback variances are necessary to allow the sheds to remain on the Property.

A Critical Area variance will certify that the existing lot coverage is 28% where a maximum of 15% is permitted by the ordinance. The variance will also permit the construction of an 864 square feet swimming pool and associated decking conditioned on the concurrent removal of 939 square feet of existing lot coverage. This will result in a net decrease in lot coverage existing on the Property.

The Applicant is also seeking non-Critical Area variances to permit two existing sheds to remain on current locations on the property. The sheds encroach on minimum setbacks. The first shed is within 3’ of a side property line where a minimum side yard setback of 25’ is required. The second shed is located within 17’ of a side property line and 9’ of a rear property line where a minimum setback of 25’ from each line is required.

SUMMARY OF TESTIMONY

The Board heard testimony from the Applicant Zachary Smith. The Smith family purchased their home in 2017. They hope to install a small in-ground pool on the Property to enhance the outdoor experience of the home. Most of the neighbors have swimming pools in their yards. The Property is within the Critical Area and, therefore, lot coverage may not exceed 15% without a variance. The property is small compared to other lots in the surrounding area. The home, which was built prior to the Critical Area law, is a single-floor home, which takes up more lot coverage than two- or three-story homes.

The current lot coverage is approximately 28%. The current configuration was not created by the Applicant. In order to install a swimming pool, the Applicant is proposing to decrease coverage by removing lot coverage in other areas of the Property. There is no clear record of when certain structures were placed on the Property in its current configuration. For this reason, it cannot be considered legally non-conforming.

The excess lot coverage is a violation of the Critical Area law and was brought to the county's attention by the Applicant. The County Code Enforcement Officer issued an abatement order for excess lot coverage within the Limited Development Area of the Critical Area. The Applicant paid the fine the day after the abatement letter was issued. The Applicant has also submitted a required restoration plan as required by Critical Area regulations.

The Applicant showed a site plan drawing with the location of the proposed location of the swimming pool. The Applicant considered whether it could be located anywhere else on the Property that is less intrusive to the Critical Area. The proposed location would not require the removal of any trees and is located on the only part of the Property that is not covered by shade or vegetative cover. The Applicant is proposing to remove impervious driveway as mitigation for the addition of a swimming pool.

The non-Critical Area variances are needed for two sheds that are on the Property. They were not placed there by the Applicant. The Property does not have a garage or basement so the sheds are essential for storage. Moving the sheds could damage them and would also require grading for the replacement location.

There is no opposition from neighbors for the placement of the sheds or the addition of a swimming pool. The Property itself, while in the Critical Area, is a landlocked property that does not have drainage ditches or drainage fields that divert water away from the Property.

Applicant offered the following points respective to the considerations required for the granting of a Critical Area variance:

1. There are special conditions that encumber the Property. It is less than one acre in size. The current minimum lot size in the zoning classification is two acres. A two-acre lot with a 15% lot coverage limitation poses significant restraints. Those restraints are greatly amplified with a lot half that size. The home was built in 1971 long before the limitation was placed on the Property. The home is also set back significantly from the street with a long driveway. The long

driveway creates even more lot coverage than most other properties. Collectively, these circumstances create a unique lot coverage constraint.

2. Applicant contends that denial of the variance would deprive the Applicant's family of a right enjoyed by many others. Swimming pools are very common in the surrounding area and the Applicant merely wishes to enjoy the same privilege.

3. Applicant also contends that a special privilege will not be conferred upon the Property. Property owners, generally, have a right to reconfigure lot coverage. Applicant does not seek to expand lot coverage. Applicant is proposing to remove lot coverage in other areas so that the end result will be a net decrease in lot coverage.

4. The lot coverage and existing conditions were not created by the Applicant. The lot configuration pre-dates the Applicant's purchase of the Property in 2017.

5. The variances will not negatively affect water quality, in large part, because of the decrease in lot coverage. Under the law, there is no difference between a swimming pool and concrete coverage. They are both lot coverage. In reality, a swimming pool creates less stormwater runoff that affects the Chesapeake Bay and its tributaries.

6. The swimming pool that is proposed is small compared to pools on neighboring properties and is the minimum size for most in-ground swimming pools.

Bryce Yelton testified on behalf of the County. Mr. Yelton testified that although the violations were not created by the Applicant, an abatement order was issued and the Applicant has paid the penalty for a lot coverage violation. If a variance is not given for the sheds, the Applicant will have to come into compliance for those violations. A fully implemented abatement would not require a variance.

A letter from the Critical Area Commission ("CAC") cited the need for compliance with COMAR 27.01.09, which requires a restoration or mitigation plan. Applicant contends that the provision is not applicable because the Property is not within the Critical Area Buffer.

The Board also heard testimony from Kate Charbonneau who appeared on behalf of the CAC. The agency's position is more thoroughly outlined in its letter to the Board, which is part of the record. Mrs. Charbonneau acknowledged the restoration and mitigation required under COMAR 27.01.09 is not applicable here. She recommends a 1:1 mitigation for the added lot coverage. The CAC opposes the Critical Area variance because, it contends, all of the requirements are not met.

CAC recognizes the smaller size of the Property but argues that more effort can be made to eliminate impervious surface on the Property.

CAC states that a comparison should not be made to neighbor properties. Instead, a comparison should be made to other property owners that are seeking relief from the lot coverage

restriction. A 15% lot coverage restriction is based on studies that show a degradation of water quality when lots are permitted greater than 15% lot coverage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Board is charged with enforcing the Critical Area law. It is also charged with balancing the equities that sometimes require the granting of variances. All of the Board members have visited the site. The site-specific circumstances under review in this Application support the granting of variances.

The Property is small for a property that is burdened by a 15% lot coverage restriction. The house sits far from the street, which requires a longer than average driveway. The driveway takes up a considerable amount of the allowed lot coverage. The Applicant has made concessions to reduce the lot coverage in an effort to reconfigure the lot coverage. The Board finds that the reduction of coverage proposed by the Applicant is a good proposal.

The Property is not within the Critical Area Buffer and so mitigation is not required under COMAR 27.01.09. Mitigation would not be feasible. The Property is already adequately landscaped so that additional plantings would not be beneficial.

With regard to the non-Critical Area variances, the Board finds that the sheds were not placed on the Property by Applicant. The Board supports a variance because moving the sheds could result in the potential demise of the sheds and moving the sheds would require invasive grading. Additionally, moving the sheds toward the center of the Property would require additional lot coverage to access. The neighbors are not in opposition to the current placement of the sheds so there is no value in moving them.

In short, the Board finds the variance requests reasonable under the circumstances. The Board does not recommend any mitigation requirement under the circumstances.

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.*

The lot was created in 1969 prior to the Critical Area law. It is nonconforming in size at .86 acres. A 15% lot coverage restriction significantly constrains the Property. The RR zoning district requires a lot size of two acres with minimum lot width of 200'. With the current bulk requirements in place, it would be almost impossible to propose any addition or alteration on the Property without the need for a variance.

It should be noted that without a variance, the Applicant would be required to conform to the lot coverage restriction, which would be nearly impossible to do with the existing

configuration. The Applicant's reconfiguration, which will allow for the installation of a swimming pool, brings the lot closer to compliance.

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.*

The right to reconfigure lot coverage is a right commonly enjoyed by residents of Talbot County. The Applicant is reconfiguring lot coverage in a manner that reduces the net lot coverage. The reconfiguration will allow Applicant's family to install a swimming pool, which is commonly enjoyed by other property owners in the surrounding area.

The lot coverage on the Property is comparable to that of a lot sized 1.63 acres. The surrounding lots and others like it in the RR zoning district are typically permitted with this amount of lot coverage as they are over the minimum lot size or exceed the 15% lot coverage as in this case.

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.*

Property owners, generally, have a right to reconfigure lot coverage. Applicant does not seek to expand lot coverage. Applicant is removing lot coverage in other areas so that the end result will be a net decrease in lot coverage.

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 Applicant purchased the Property in its current configuration. The violations on the Property were only brought to light because the Applicant, himself, reported the violations to the County. The Applicant has paid an abatement penalty for lot coverage violations that were not created by the Applicant.

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 proposed reconfiguration will result in less lot coverage, which will benefit water quality. Additionally, the property, while in the Critical Area, is landlocked and does not divert stormwater runoff into any ditch or drainage system that directly flows to the Critical Area Buffer. Additionally, the Property already has sufficient vegetative landscape.

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

The Critical Area variance will allow for the existing excess lot coverage and removal of 939 square feet of driveway in exchange for the construction of a new swimming pool with patio totaling 864 square feet. The Board finds that this is an acceptable compromise and reasonable reconfiguration that results in less of a lot coverage infraction.

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.

The Board next addresses the standards for a non-Critical Area variance set forth in the Talbot County Code, § 190-58.3.

- A. *Unique physical characteristics exist, such as unusual size or shape of the property or extraordinary topographical conditions, such that a literal enforcement of the provisions of this chapter would result in a practical difficulty or unreasonable hardship in enabling the applicant to develop or use the property.*

The lot is smaller and narrower than other lots in the RR zoning district and within the subdivision. The sheds were not put in their current location by the Applicant. Their placement is to line up with the existing driveway. The sheds could be moved to the center of the Property but, to do so, would require additional lot coverage to access. Further, moving the sheds could cause damage to the sheds.

- B. *The need for the variance is not based upon circumstances which are self-created or self-imposed.*

The Applicant did not place the sheds in their current location.

- C. *Greater profitability or lack of knowledge of the restrictions shall not be considered as sufficient cause for a variance.*

This variance is not for the purpose of greater profitability or lack of knowledge of the restrictions. The Applicant did not place the sheds in their current location.

- D. *The variance will not be contrary to the public interest and will not be a detriment to adjacent or neighboring property.*

Garage and shed structures are customary in Talbot County. The property to the south is screened by existing forest cover and Applicant's neighbors do not advocate for moving the sheds.

E. The variance shall not exceed the minimum adjustment necessary to relieve the practical difficulty or unreasonable hardship.

The practical difficulty is the expense of moving the sheds, the necessity to increase lot coverage to access the sheds, perform grading, and potentially damage the sheds. Moving the sheds will have no practical benefit, especially when neighbors are not adversely affected by their current location.

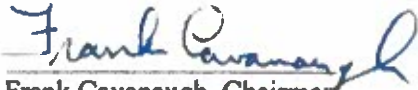
Documents on Record

1. Application for a Critical Area and Non-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 standards sheet.
7. Non-Critical Area variance standards sheet.
8. Staff Report.
9. Sign maintenance agreement.
10. Comments from Critical Area Commission.
11. Authorization letter.
12. Independent procedures disclosure and acknowledgement form.
13. Aerial photo.
14. Site plan.
15. Lot coverage calculations.
16. Photo of existing shed 1.
17. Photo of existing shed 2.
18. Letter from Michael Duell dated July 11, 2023 and copy of assessment of civil penalty.

Mr. Krebeck moved that the Applicant be granted the requested variances subject to staff conditions and consistency with Critical Area law. The motion was seconded by Vice Chairman Dorsey. 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 staff conditions:

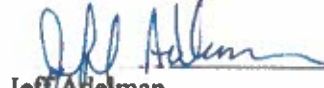
1. The Applicant shall commence construction of the proposed improvements within eighteen (18) months of the date of the Board of Appeals approval.
2. The Applicant shall comply with Critical Area Law.
3. The Applicant shall make application to the Office of Permits and Inspections for any after-the-fact building permits required for the site, and follow all rules, procedures, and construction timelines as outlined regarding new construction.
4. The Applicant shall make an application to the Office of Permits and Inspections, and follow all rules, procedures, and construction timelines as outlined regarding new construction.


IT IS THEREFORE, this 5th day of September, 2023, **ORDERED** that the Applicant's requests for a variance is **GRANTED**.


Frank Cavanaugh, Chairman


Louis Dorsey, Jr., Vice-Chairman


Paul Shortall, Jr.


Jeff Adelman


Zakary Krebeck