

BEFORE THE TALBOT COUNTY BOARD OF APPEALS

IN THE MATTER OF * CASE NO. CAVR-22-1
ROBERT LONG. * VARIANCE REQUEST APPLICATION
* * * * *

The Board of Appeals (the “Board”) held a hearing on July 11, 2022 in the Bradley Meeting Room, Court House, South Wing at 11 N. Washington Street, Easton, Maryland to consider the application of Robert Long (the “Applicant”). Mr. Long requested five variances at 33438 Tuckahoe River Road, Easton, Maryland. Chairman Frank Cavanaugh, Vice Chairman Louis Dorsey, Jr., Board Members Paul Shortall, Zakary Krebeck, Greg Gannon, and Board Attorney Lance Young were present. Brennan Tarleton, Acting Planning Officer for the Talbot County Planning and Zoning Division, Board Secretary Christine Corkell and Planner Elisa Deflaux appeared on behalf of the County.

STATEMENT OF THE CASE

The issue is whether the Board should grant variances, which are necessary for the Applicant Ronald Long, and his wife Anne Long, to make desired improvements on their property located at 33438 Tuckahoe River Road, Easton, MD 21601. Much of the property is in the Critical Area adjacent to Tuckahoe Creek. The residence was primarily constructed around 1965 prior to the Critical Area law.

The lot has a 15% lot coverage allowance and a 50’ front-yard setback, 25’ side and rear-yard setbacks, and 100’ tidal wetland setback (Base Buffer). The northern portion of the lot that is adjacent to Tuckahoe Creek contains areas of expanded buffers because it lies on steep slopes.

The Applicant requested variances of the expanded shoreline development buffer (beyond the base 100’ buffer) to:

(1) construct an addition to the front of the house, to include a new front porch entry with steps and reconfigured walkway, to replace the existing entry, steps and walkway, encroaching 101.6’ with the expanded shoreline development buffer;

(2) construct an addition on the eastern side of the house, to include exterior steps for entry and an interior mudroom, half bath and storage encroaching, 97.9’ within the expanded shoreline development buffer and for the same addition, requesting a non-critical area variance from the Eastern side yard setback of .6’ (7.2”), to reduce the side yard setback from 25’ to 24.4’;

(3) the addition of a cantilevered chimney to serve a proposed fireplace (exterior vented), encroaching 87.1’ within the expanded shoreline development buffer;

(4) the addition of an inground swimming pool, encroaching 24.5' within the expanded shoreline development buffer; and

(5) construct an addition of paver patio decking around the inground pool, encroaching 34.7' within the expanded shoreline development buffer.

SUMMARY OF TESTIMONY

Elizabeth Fink, a Land Planner at Fink, Whitten & Associates, appeared on behalf of the Applicant. Mrs. Fink testified that the Health department has seen the proposed plans for the property and has given its approval.

The Applicant requests a variance to accommodate a pool and surrounding decking because Anne Long suffers from a health condition that could benefit from water therapy in the pool. The Applicant submitted a letter from Anne's doctor, Kevin Douglas Tate, MD, indicating that Anne would benefit from water therapy in her home pool. The pool, which will be heated, will be able to be used therapeutically between, approximately, the months of April through November. The size of the proposed pool is modest.

Mrs. Fink addressed the location of the proposed pool and patio decking. Current plans place the pool and decking outside the back steps of the residence. She considered other parts of the property and concluded that the current proposed location is the only reasonable location to put a pool. The proposed location is flat, as opposed to another uphill area of the property that is burdened by slope. Additionally, the proposed pool will replace existing impervious material. Placing the pool in an uphill-sloped area of the property would result in disturbing soil and vegetation taking away permeable area without necessity.

The proposed stormwater mitigation for the property includes removing stone driveway that leads to Tuckahoe Creek. Mr. Shortall inquired whether removing the stone would destabilize the sloped area. Mrs. Fink opined that it could potentially cause instability to the slope. Mr. Long added that grass currently grows through the existing stone.

Emily Vainieri, Assistant Attorney General for the Critical Area Commission, provided testimony in opposition to a variance for the swimming pool and surrounding deck. She emphasized that the Critical Area Commission has its own variance standards, which differ slightly from the standards set forth in the County Code. She stated that the steep slopes on the instant property are not unique to this property. According to Mrs. Vainieri, the fact that other pools may have been permitted either legally or illegally within the same zone is not of importance. She cited the case of *Assateague v. Schwalbach* as the governing law regarding variances in the Critical Area. Under that Court of Appeals opinion, the applicant must demonstrate an unwarranted hardship. An unwarranted hardship means that without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which a variance is requested. An applicant has the additional burden of showing that the use cannot be accomplished elsewhere on the property. The Critical Area Commission considers the uphill, sloped area of the lot to be another part of the property for which a pool could be placed.

Planner Alex DeWeese also testified on behalf of the Critical Area Commission. Mrs. DeWeese stated that a variance for the pool and decking must be denied because the Applicant is not denied a reasonable and significant use of the property. She contends that the existing residence is, itself, a reasonable and significant use of the property and that adding a pool is merely and unnecessary amenity. Mrs. DeWeese contends that owning a pool within the Critical Area is not a right. She stated that granting a pool in the Critical Area would be granting a special privilege that is not given to other property owners and that allowing the pool would not be in harmony with the steep slopes, forested area, and tidal wetlands that burden the property.

Neither Mrs. Vainieri or Mrs. DeWeese have visited the property. Their contentions that a pool could be placed elsewhere are based on their review of site drawings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

While the Board is confronted with requests for several variances, the Critical Area variance that permits the construction of a pool and surrounding deck are the only requests opposed by the Critical Area Commission. There was no opposition for any of the requests by nearby property owners.

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 Court of Appeal 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 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 Court of Appeals 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 strenuous 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 Court of Appeals visited 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 Court of

Appeals. 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. The Board first addresses the standards set forth in COMAR 27.01.12.04:

(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.

The Board finds that denial of the requested variances, including the variance for a pool and surrounding deck, would deprive the property owner of a reasonable and significant use of the property. The property is a grandfathered residence that exists within the expanded Critical Area buffer due to steep slopes. The location of the residential dwelling, and immediate area surrounding the residential dwelling, are the areas best suited for the residence and its accessory structures. Pools are common within the same zoning district, and, in this case, a pool is especially necessary because the property owner has a medical condition that will benefit from regular water therapy in the pool.

The Board also finds that the pool cannot be reasonably located elsewhere on the property. The location suggested by the Critical Area Commission is on a sloped area of the lot that is currently covered with soil and vegetation that benefits stormwater runoff into the Tuckahoe Creek. As proposed by the Applicant, the pool will replace developed impervious area, which, once removed, will further improve stormwater runoff from the property.

(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.

The Board finds that a literal interpretation of the Critical Area requirements would deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district. The residential lot was subdivided and the residence was built before the Critical Area law and establishment of the expanded buffer. The improvements that the Applicant will make are reasonable improvements that would be enjoyed by many others within the same zoning district, including, but not limited to, the existence of a pool and surrounding deck.

(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.

The Board finds that granting the requested variances will not confer any special privilege. The additions to the home are primarily alterations to entryways. A swimming pool is also enjoyed by many other residents within the same zoning district. In this case, the property owner has a medical condition for which she will benefit from regular water therapy at her home. The Board finds that the Applicant's disability would further justify granting a variance for the pool.

(4) The variance request is not based upon conditions or circumstances that are the result of actions by the applicant.

The Board finds that the Applicant has not created the conditions or circumstances that result in the necessity for a variance.

(5) The variance request does not arise from any conforming or nonconforming condition on any neighboring property.

The Board has not received any evidence, nor does it find that the variance requests 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 jurisdiction's local Critical Area.

The Board finds that granting the variance requests will have minimal impact on fish, wildlife, or plant habitat within the Critical Area. The buffer is established to protect the Tuckahoe Creek, preserve the natural benefits of riparian ecosystems, and act as a water quality filter for the removal and reduction of sediment, nutrients, and toxic substances found in runoff. The requested variances maintain the residential dwelling within the same general footprint. The proposed installation of a pool and patio will replace existing impervious stone patio that, once replaced, will improve the permeability of that area. Placing the pool in the area proposed by the Critical Area Commission would replace existing soil and vegetation in that area.

The variance will not reduce overall forest cover, except as acceptable with the clearing and replanting practices of the Code. Additionally, the applicant will be required to address stormwater management for new construction.

(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.

The Board finds that the granting of the variance would be in harmony with the general spirit and intent of the Critical Area law and Critical Area program, for the same reasons set forth in subsection (6) above.

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 practical difficulty or unreasonable hardship in enabling the applicant to develop or use the property;

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 a grandfathered residence that exists within the expanded Critical Area buffer due to steep slopes.

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

The Board finds that the Applicant has not created the conditions or circumstances that result in the necessity for a variance.

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

The Board finds that the Applicant has worked closely with its Land Planner to submit a proposal that is cognizant of the applicable regulations and with modest proposals that the Board finds are reasonable and the minimum necessary to make improvements to the property.

D. The variance will not be contrary to the public interest and will not be a detriment to adjacent or neighboring properties;

The Board has not received any communications from adjacent or neighboring properties adverse to the Applicant's proposed variance request. The variance will not change the character of the neighborhood. The Board finds that the change is not contrary to public interest.

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

The Board finds that the variance request pertaining to the residential dwelling is minor and the minimum necessary to achieve the renovation plan. The Talbot County Office of

Planning & Zoning has analyzed the impacts to the property and has found, and the Board adopts the finding, that the development plan is the least impactful to the property.

Finally, 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 Board finds that denial of the requested variances, including the variance for a pool and surrounding deck, would deprive the property owner of a reasonable and significant use of the property. The property is a grandfathered residence that exists within the expanded Critical Area buffer due to steep slopes. The location of the residential dwelling, and immediate area surrounding the residential dwelling, are the areas best suited for the residence and its accessory structures. Pools are common within the same zoning district and, in this case, a pool is especially necessary because the property owner has a medical condition that will benefit from regular water therapy in the pool.

The Board also finds that the pool cannot be reasonably located elsewhere on the property. The location suggested by the Critical Area Commission is on a sloped area of the lot that is currently covered with soil and vegetation that benefits stormwater runoff into the Tuckahoe Creek. As proposed by the Applicant, the pool will replace developed impervious area, which, once removed, will further improve stormwater runoff from 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.*

The Board finds that a literal interpretation of the Critical Area requirements would deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district. The residential lot was subdivided, and the residence was built before the Critical Area law and establishment of the expanded buffer. The improvements that the Applicant will make are reasonable improvements that would be enjoyed by many others within the same zoning district, including, but not limited to, the existence of a pool and surrounding deck.

- 3. 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.*

The Board finds that granting the requested variances will not confer any special privilege. The additions to the home are primarily alterations to entryways. A swimming pool is also enjoyed by many other residents within the same zoning district. In this case, the property

owner has a medical condition for which she will benefit from regular water therapy at her home. The Board finds that the Applicant's disability would further justify granting a variance for the pool.

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 Applicant has not created the conditions or circumstances that result in the necessity for a variance.

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 that granting the variance requests will have minimal impact on fish, wildlife, or plant habitat within the Critical Area. The buffer is established to protect the Tuckahoe Creek, preserve the natural benefits of riparian ecosystems, and act as a water quality filter for the removal and reduction of sediment, nutrients, and toxic substances found in runoff. The requested variances maintain the residential dwelling within the same general footprint. The proposed installation of a pool and patio will replace an existing impervious stone patio that, once replaced, will improve the permeability of that area. Placing the pool in the area proposed by the Critical Area Commission would replace existing soil and vegetation in that area.

The variance will not reduce overall forest cover, except as acceptable with the clearing and replanting practices of the Code. Additionally, the applicant will be required to address stormwater management for new construction.

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

The entire developable area is within the expanded shoreline development buffer. The proposed design reduces the overall lot coverage by 3.6%. Further, regarding the pool, the Board finds that the location of the proposed pool will result in the least harmful impact to the property and Critical Area. It will occupy an area that currently is covered by impervious surface.

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.

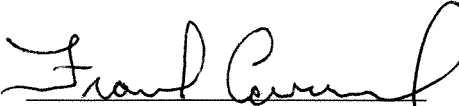
Based upon the foregoing, the Board finds, by a unanimous vote that the Applicant's requests for variances are granted. This approval is conditioned on removing of the gravel driveway only to the extent that it is recommended by the County Engineer.

The required variances consistent with the evidence presented to the Board of Appeals, subject to the following conditions:


1. Applicants shall make applications to the Office of Permits and Inspections, and follow all of the rules, procedures and construction timelines as outlined regarding new construction.
2. Applicants shall commence construction on the proposed improvements within eighteen (18) months from the date of the Board of Appeals' approval.

TALBOT COUNTY BOARD OF APPEALS


IT IS THEREFORE, this 1st day of August, 2022, **ORDERED** that the Applicant's request for the requested variances is GRANTED.



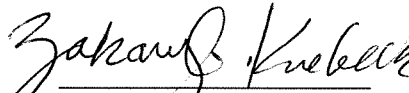
Frank Cavanaugh, Chairman



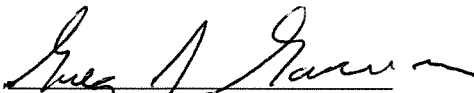
Louis Dorsey, Jr., Vice-Chairman



Paul Shortall, Member



Zakary A. Krebeck



Greg Gannon, Alternate