

REPORT TO THE BOARD OF APPEALS
VARIANCE REQUEST DOCKET #1316

Petitioner/Applicant: Daniel Yates & Barbara Wall
Location: 12396 Neale Sound Drive
Cobb Island, MD 20645
Tax Map 90, Parcel 1
Lots 540-542, Section A, Cobb Island
Tax Identification: #05-006643
Election District: 5th
Zoning: RV, Village Residential Zone
LDZ, Limited Development Zone
Buffer Modification Area
Chesapeake Bay Critical Area

DESCRIPTION OF PROPERTY

Size of Property: approximately 15,257 square feet

CHARACTER OF NEIGHBORHOOD

The property is a waterfront residential property within the established Cobb Island Subdivision. The property is bordered by Neale Sound, to the north, and County right-of-way to the south and west. To the east, is a residential property.

SPECIFIC VARIANCE REQUESTED

The Applicant is requesting approval for approximately 2,033 square feet of driveway extension to be located within the Critical Area, in excess of lot coverage maximums provided for this location. To achieve this, the Applicant is requesting a variance from the following section of the Zoning Ordinance:

Section 297-132.G(8)(b), which reads:

...Lot coverage is limited to 25% of the parcel or lot if the parcel or lot is 1/2 acres or less in size and existed on or before December 1, 1985.

BACKGROUND

In 1989, the Charles County Chesapeake Bay Critical Area Program was adopted, including regulations limiting the amount of impervious surfaces/lot coverage on a property. The existing single family dwelling was completed in 2002. The plat of subdivision recorded in Land Records does not contain a date. However, it is evident from other records that this subdivision was created prior to the adoption of the Charles County Critical Area Program.

The shoreline along Neale Sound is currently designated as a Buffer Modification Area. Approximately half of the lot falls within the Critical Area Buffer, Buffer Modification Area.

In July of 2013, Planning staff became aware of a driveway extension, constructed on the property without County approvals. An inspection revealed that this driveway extension has resulted in a second access point from the Neale Sound Drive. Additionally, approximately 647 square feet of the driveway is located within the unimproved County right-of-way for Audrey Drive. As a result of the inspection, a Notice of Violation was issued. Since that time, Planning staff has been working with the property owners to resolve this matter.

At this time, it is apparent that the driveway extension results in a total of 42% lot coverage, in excess of the maximum lot coverage allowance of 25%. Prior to constructing the driveway extension, lot coverage on this property was approximately 28%. The Applicants purchased the property in 2011.

BOARD AUTHORIZATION - VARIANCES

The Board is authorized to grant variances under § 297-416 of the Zoning Ordinance. The following is an excerpt from § 297- 416 which outlines the findings and criteria to be used by the Board, which has been annotated with the staff findings in italics on each of the criteria.

(B) The Board is authorized to grant variances from the strict application of these regulations when, by reason of exceptional narrowness, shallowness, or shape of specific parcels of property or by reason of exceptional topographical conditions or other extraordinary situations or conditions of specific parcels of property, the strict application of the regulations of this Ordinance would result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of said property. However, the Board of Appeals shall not grant variances that will substantially impair the intent, purpose, and integrity of this Ordinance. This provision shall not be construed to permit the Board, under the guise of a variance, to change the permitted use of land.

Staff Finding: The shape, size, and layout of this property are consistent with other properties in the Cobb Island area.

(C) In addition to those general findings required in Subsection (B) above, variance requests shall not be granted unless the following criteria are met:

1. That special conditions or circumstances exist that are unique to the subject property or structure and that a strict enforcement of the provisions of this Ordinance would result in unwarranted hardship which is not generally shared by owners of property in the same land use classification.

Staff Finding: Planning staff is not aware of any other corner lots on the island with the same safety concerns. Likewise, Planning staff is not aware of any special conditions or circumstances on the property which make it unique.

Staff Finding: If the variance is denied, the Applicants may still use the property for the intended single family residential purpose. Therefore, the Board may find that a strict interpretation of the Ordinance would not result in an unwarranted hardship;

Staff Finding: All waterfront landowners on Cobb Island are required to request a variance for improvements that will result in an increase in lot coverage above the maximum allowance, prior to commencement of work.

2. That strict enforcement of the provisions of this Ordinance would deprive the property owner of rights commonly shared by other owners of property in the area.

Staff Finding: If the variance is denied, the Applicants may still use the property for the intended single family residential purpose, consistent with the surrounding neighborhood. Therefore, Staff finds that a strict interpretation of the Ordinance would not deprive the property owners a right commonly shared by others.

3. That the granting of a variance will not confer upon an applicant any special privilege that would be denied to other owners of like property and/or structures within the same zone/land use classification.

Staff Finding: Under the Charles County Critical Area Program all waterfront lots less than ½ acre in size in the Limited Development Zone and Buffer Modification area are restricted to 25% lot coverage. Therefore, Staff finds that granting this variance will confer special privilege to the Applicant that would be denied to owners of like property.

4. That the variance request is not based upon conditions or circumstances which are self-created or self-imposed.

Staff Finding: The driveway was constructed without County approvals. A Notice of Violation was issued and the case remains open. The Applicants have advised that they assumed their contractor had obtained the required permit. After the construction was completed, they discovered that the contractor did not obtain the required approvals for the project. However, Staff finds that this request is based upon circumstances that were self-imposed.

5. That greater profitability or lack of knowledge of the restrictions shall not be considered as sufficient justification for a variance.

Staff Finding: The application does not fully address this criterion.

6. That the proposed variance is consistent with the Charles County Comprehensive Plan.

Staff Finding: The 2006 Comprehensive Plan states that “all development activity within the Critical Area must comply with specific criteria established by the Program.” As this project was constructed without permits and exceeds the lot coverage allowance, Staff finds that the proposed variance is not consistent with the Charles County Comprehensive Plan.

SPECIAL VARIANCE PROVISIONS IN THE CRITICAL AREA ZONE

(A) According to Section 416 (k) of the Ordinance, a variance will not be granted by the Board unless findings are made which demonstrate that:

1. Special conditions or circumstances exist that are peculiar to the land or structure which constitute or result in an unwarranted hardship as defined by this chapter;

Staff Finding: Planning staff is not aware of any other corner lots on the island with the same safety concerns. Likewise, Planning staff is not aware of any special conditions or circumstances on the property which make it unique.

Staff Finding: If the variance is denied, the Applicants may still use the property for the intended single family residential purpose. Therefore, Staff finds that a strict interpretation of the Ordinance would not result in an unwarranted hardship;

Staff Finding: All waterfront landowners on Cobb Island are required to request a variance for improvements that will result in an increase in lot coverage above the maximum allowance, prior to the commencement of work.

2. Literal interpretation of the Critical Area Program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas within the Critical Area;

Staff Finding: If the variance is denied, the Applicants may still use the property for the intended single family residential purpose, consistent with the surrounding neighborhood. Therefore, Staff finds that a literal interpretation of the Ordinance would not deprive the property owners a right commonly shared by others.

3. The granting of a variance will not confer upon an applicant any special privilege that would be denied other lands or structures;

Staff Finding: Under the Charles County Critical Area Program all waterfront lots less than ½ acre in size in the Limited Development Zone and Buffer Modification Area are restricted to 25% lot coverage. Therefore, Staff finds that granting this variance will confer special privilege to the Applicant that would be denied to owners of like property.

4. The variance request is not based upon conditions or circumstances which are the result of actions by the applicant, nor does the request arise from any condition conforming, on any neighboring property;

Staff Finding: The driveway was constructed without County approvals. A Notice of Violation was issued and the case remains open. The Applicants have advised that they assumed their contractor had obtained the required permit. After the construction was completed, they discovered that the contractor did not obtain the required approvals for the project. However, Staff finds that this request is based upon circumstances that were self-imposed.

5. The granting of a variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat within the Critical Area Zones, and the granting of the variance will be consistent with the spirit and intent of the County's Critical Area Program and associated ordinances as well as State laws and regulations adopted under Title 8, Subtitle 18, of the Natural Resource Article of the Annotated Code of Maryland and COMAR 27.01.11.

Staff Finding: As the driveway expansion was installed without County approvals, Staff was unable to apply sediment and erosion control and/or stormwater management requirements to the project. Although Staff recommends denial of the request, should the variance be approved, the applicant will be required to obtain a permit and address stormwater management.

Staff Finding: Mitigation in the amount of 3:1 is required for the driveway, whether the variance is approved or not, per Section 297-135, Zoning Ordinance. These native plantings will mitigate the potential impacts upon water and habitat quality resulting from the new paved area.

6. The Board shall further find that the granting of the variance will be in harmony with the general purpose and intent of this chapter, shall not result in a use not permitted in the zone in which the property subject to variance is located and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

Staff Finding: A driveway is consistent with residential uses permitted in the area. However, the new improvements constitute a second access point, which would not be permitted for similar lots of this width, per the County Road Ordinance. The granting of this variance cannot provide an approval contrary to the Road Ordinance.

Staff Finding: A portion of this driveway is located within the County right-of-way for Audrey Drive. The granting of this variance cannot provide an approval for construction on County lands or interfere with County right-of-way.

(B) The Board shall find that the reasons set forth in the application justify the granting of the variance and that the variance is the minimum variance that will make possible the reasonable use of land, buildings or structures. In making this determination for variance requests in a Critical Area Zone, the Board shall consider the following as tantamount to a minimum variance

Staff Finding: Critical Area Commission staff have stated that this application does not represent the minimum variance necessary to provide access to the property. They recommend denial of the variance. They also indicate they could support some driveway improvements, recommending removal of 1,600 square feet of the 2,033 square feet of the expanded driveway on the property. This recommendation would allow a back-up area on the lot, but not a 2nd entrance point. Additionally, this recommendation would reduce lot coverage from 42% to 39%. An exhibit illustrating this recommendation is included with this report.

Staff Finding: Planning staff provided a copy of the Critical Area Commission's recommendation to the Applicant upon receipt. The Applicant directed Planning staff to process the original layout, rather than providing an amended plan.

1. That the granting of a variance to the yard and/or Buffer requirements results in new structures or lot coverage being located as far back from mean high water, tidal wetlands or tributary streams in the Critical Area as is feasible.

Staff Finding: The driveway extends into the Critical Area Buffer Modification Area, but is no closer to mean high water than the existing single family dwelling.

2. That the applicant takes steps to mitigate impacts, insofar as possible, including:
 - a. Reforestation on the site to offset disturbed forested or developed woodlands on at least an equal area basis;

Staff Finding: Mitigation in the amount of 3:1 is required for the driveway, whether the variance is approved or not, per Section 297-135, Zoning Ordinance. A planting plan, prepared by Wentworth Nursery Inc. has been presented for consideration by the Applicant. This plan provides 7,000 square feet of plantings, to mitigate the potential impacts upon water and habitat quality resulting from the new paved area.

- b. Afforestation of areas of the site so that at least 15 percent of the gross site is forested; and,

Staff Finding, Upon implementation of the planting plan, the property will contain approximately 77% forest/vegetative cover, in excess of this requirement.

c. Implementation of any mitigation measures which relate to Habitat Protection Areas as delineated in the Charles County Critical Area Program and as required by State and/or County agencies.

Staff Finding: Mitigation in the amount of 3:1, inside of the Buffer Modification Area, a designated habitat protection area, is required for the driveway, whether the variance is approved or not, per Section 297-135, Zoning Ordinance. A planting plan, prepared by Wentworth Nursery Inc. has been presented for consideration by the Applicant. This plan provides 7,000 square feet of plantings, to mitigate the potential impacts upon water and habitat quality resulting from the new paved area.

(C) Granting of the variance will be in harmony with the general purpose and intent of the Zoning Ordinance and shall not result in a use prohibited in the zone in which the property subject to the variance is located and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

Staff Finding: A driveway is consistent with residential uses permitted in the area. However, the new improvements constitute a second access point, which would not be permitted for similar lots of this width, per the County Road Ordinance. The granting of this variance cannot provide an approval contrary to the Road Ordinance.

Staff Finding: A portion of this driveway is located within the County right-of-way for Audrey Drive. The granting of this variance cannot provide an approval for construction on County lands or interfere with County right-of-way.

(D) In considering an application for variance, the Board of Appeals shall presume that the specific development activity in the Critical Area that is subject to the application and for which a variance is required does not conform with the general purpose and intent of the Natural Resources Article, Title 8, Subtitle 18, COMAR Title 27, and the requirements of the County's Critical Area Program.

Staff Finding: The Board may find the driveway extension conforms to the established uses for this Zone. However, the driveway extension does not conform to the requirements of the Natural Resource Article, Title 8, Subtitle 18, COMAR 27.

Staff Finding: Critical Area Commission staff have stated that this application does not represent the minimum variance necessary to provide access to the property. They recommend denial of the variance. They also indicate they could support some driveway improvements, recommending removal of 1,600 square feet of the 2,033 square feet of the expanded driveway on the property. This recommendation would allow a back-up area on the lot, but not a 2nd entrance point. Additionally, this recommendation would reduce lot coverage from 42% to 39%. An exhibit illustrating this recommendation is included with this report.

(E) If the variance request is based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, the County may consider that fact.

Staff Finding: The driveway was constructed without County approvals. A Notice of Violation was issued and the case remains open. The Applicants have advised that they assumed their contractor had obtained the required permit. After the construction was completed, they discovered that the contractor did not obtain the required approvals for the project. However, Staff finds that this request is based upon circumstances that were self-imposed.

(F) An applicant has both the burden of production and the burden of persuasion to overcome the presumption of nonconformance established in paragraph (D) above.

Staff Finding: The materials submitted by the Applicants do not address the requirement to overcome the presumption of nonconformance.

(G) Based on competent and substantial evidence, the Board shall make written findings as to whether the applicant has overcome the presumption of nonconformance established above.

Staff Finding: The materials submitted by the Applicants do not address the requirement to overcome the presumption of nonconformance.

Staff Finding: Under Natural Resources Article, Title 8, Subtitle 18, an applicant has the burden to overcome the presumption of nonconformance before approval of the request. Staff finds that since this application does not address the presumption of nonconformance, it does not meet the required County's variance standards.

Staff Finding: Critical Area Commission staff have stated that this application does not represent the minimum variance necessary to provide access to the property. They recommend denial of the variance.

(H) With due regard for the person's experience, technical competence, and specialized knowledge, the written findings may be based on evidence introduced and testimony presented by:

1. The applicant;
2. The County or any other Government Agency; or
3. Any other person deemed appropriate by the county.

Staff Finding: Correspondence submitted by the Applicants, the Chesapeake Bay Critical Area Commission, the Health Department, and the Charles County Codes, Permits & Inspection Services Division.

RECOMMENDATIONS: CONDITIONS OF APPROVAL

Planning Division staff does not support approval of the variance as submitted.

The Critical Area Commission staff does not support approval of the variance as submitted.

Should the Board find that it can approve this application or an amended version of this application, the Planning Division recommends the following Conditions of Approval, in order to adequately address all of the requirements of the Zoning Ordinance and County Code:

1. A bond will be required with the MIR permit for the driveway sufficient to meet planting, maintenance and monitoring costs to implement the planting plan prepared by Wentworth Nursery Inc. The plants will be required to be installed by **November 30, 2014**. Upon completion of planting, the Applicant will contact the Department of Planning and Growth Management for an inspection. A second inspection will occur at least one year after the initial inspection. Should any of the plants die and/or need to be replaced, the applicant will be responsible for replacement. The bond will be releasable upon approval of the inspection which reveals that the plants have survived at least two (2) consecutive years.
2. The Applicant shall provide a drawing which indicates the location of the existing well and any sewer improvements on the property prior to the approval of the MIR permit.
3. The Applicant shall address stormwater management under the MIR permit.
4. The Applicant shall demonstrate that they have obtained approval of the 2nd entrance point and any improvements within the right-of-way, prior to approval of any MIR Permit, or within 30 days of this order, whichever occurs first.

Prepared by Planning Staff Date: 03/11/2014

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