



PRO. EXHIBIT# 17
CASE: 2023-0101-V
DATE: 8/31/23

Variance Hearing for 1702 Vineyard Trail

1 message

Amie Chilcoat <Amie@longandfoster.com>
To: "zhcolb22@aacounty.org" <zhcolb22@aacounty.org>

Wed, Aug 30, 2023 at 4:12 PM

Dear Anne Arundel County Zoning,

I am a close (within 300 feet) neighbor to the 702 Vineyard Trail lot. I strongly oppose the variance being requested for this property. I have lived here for 20 years in close proximity to the lot. The dilapidated, condemned shed on this property has not been in use since I moved in. It has been missing a floor and a roof from since I moved here in 2004. Anne Arundel County Code states that since it has not been used in the last year, it is not considered a structure.

§ 18-13-201. Existing uses.

Uses on land in the critical area that were in existence on December 1, 1985 may continue, but intensification or expansion shall be in accordance with this Code and any use that ceases to exist for one year or more shall be subject to the provisions of this Code.

(Bill No. 4-05). This property has not been usable for YEARS! Ivan Sandrino was hired by the prior owner, David Simison, to put a fence around it because it was deemed unsafe and dangerous. There is not a sound floor and the roof is missing. Anne Arundel County Zoning condemned it recently. Mr. Bell has attempted to board up parts of this condemned shed but he has not been able to use the condemned shed. However, he has continued to illegally park his cars and junk outside of it. When considering this variance, it should be looked at as a lot with nothing on it since it has not been in use for over 20 years.. Even the tax record shows an unimproved lot.

Since The Bell's have bought the property, they have continued to park cars and trailers full of junk the entire time. Since applying for the variance, Mr. Bell has removed his cars. Neighbors and I have reported the cars illegally parked to the county zoning board for years now and the car would move and then always return. Parking without a residence is against Anne Arundel County Code. Article 18-4-106 and 18-2-204 C both address this violation the Bell's have been committing for the last several years.

18-4-106. Permitted, conditional, and special exception uses.

The permitted, conditional, and special exception uses allowed in each of the residential districts are listed in the chart in this section using the following key: P = permitted use; C = conditional use; SE = special exception use. A blank means that the use is not allowed in the district. Except as provided otherwise in this article, uses and structures customarily accessory to the listed uses also are allowed, except that guest houses as accessory structures are prohibited and outside storage as an accessory use is limited to the lesser of 10% of the allowed lot coverage or 500 square feet.

Article 18-2-204 (c) On a different lot. An accessory structure or use may not be located on a lot other than the lot on which a principal structure is located, except that:

- (1) a fence may be located on a lot without a principal structure;**
- (2) a private residential pier to serve a lot with a principal structure may be located on land owned by a homeowner's association that abuts the mean high-water line if an agreement is recorded among the land records that allows location and use of the pier on the land owned by the homeowner's association; and**
- (3) an accessory structure may be located on an unimproved lot abutting a lot improved by a principal structure, provided the lots are under common identical ownership and the accessory structure**

serves the lot with the principal structure for the exclusive use of the owner or the principal structure on the abutting lot. The Office of Planning and Zoning may require that a structure built pursuant to this subsection be removed as a condition of issuance of a building permit in the event a principal structure is to be constructed on the same lot as the accessory structure.

The applicants do not have a residence in Epping Forest. They live over a half a mile away. According to Anne Arundel County Code , you must have a residential dwelling for an accessory structure. Above Article 18-2-204 also applies to this.

(3) an accessory structure may be located on an unimproved lot abutting a lot improved by a principal structure, provided the lots are under common identical ownership and the accessory structure serves the lot with the principal structure for the exclusive use of the owner or the principal structure on the abutting lot. The Office of Planning and Zoning may require that a structure built pursuant to this subsection be removed as a condition of issuance of a building permit in the event a principal structure is to be constructed on the same lot as the accessory structure.

This lot is very important for our community. It is the entrance to our neighborhood. Disturbing this lot is a danger to our community. This lot is at the top of the watershed and in the critical area. Yes variances have been given in this unique neighborhood but ALWAYS with a residence. Allowing a non-accessory structure in the critical area with a 15% or more greater slope without a dwelling is a hazard and impacts the forest unnecessarily. § 17-8-201. Development on slopes of 15% or greater. The below article states clearly the reason in which you could make an exception. None of these reasons below apply in this case.

§ 17-8-201.

(a) Development in the LDA. Development in the limited development area (LDA) or in the resource conservation area (RCA) may not occur within slopes of 15% or greater unless development will facilitate stabilization of the slope; is to allow connection to a public utility; or is to provide direct access to the shoreline. All disturbance shall be limited to the minimum necessary.

The following statement "All disturbance shall be limited to the minimum necessary", should heavily apply in this case in which someone without a residence is seeking to construct a storage facility in a R1 district. This is an unbuildable lot. Why would we disturb the top of the watershed for someone storage shed that doesn't have a residence here?

In addition to being in the critical area with slopes of 15% or greater, the proposed shed goes against several of the bulk regulations. It is close to the street and does not meet the requirements of 40 feet from the front foot line.

§ 18-4-501. Bulk regulations.

Except as provided otherwise in this article, the following bulk regulations are applicable in an R1 District:

Minimum lot size

40,000 square feet

Maximum coverage by structures

25% of gross area

Minimum width at front building restriction line; for waterfront lots the building restriction line is measured from the rear lot line

125 feet

Minimum setbacks for principal structures:

Front lot line

40 feet

Article 18-2-204 (b) In front yard. Access ramps to accommodate a person under disability, driveways, paved or gravel at-grade surfaces, fences, noise barriers or noise walls, signs, walkways eight inches or less above grade, and walls may be located in the front yard. When a new principal structure is

constructed in an RA or RLD District, an existing barn may be retained in the front yard. Otherwise, an accessory structure may not be located in the front yard of a nonwaterfront lot. This article is clear that a shed /garage is not allowed in a front yard.

The Bell's proposed project is not an "in like kind "replacement of the structure that is there and condemned and shouldn't be considered.. It is larger, has a larger parking pad (which is illegal without a residence), has a proposed deck. Why would a garage /shed have a deck? Throughout my journey of researching this variance, I have had several neighbors state that at some point Mr. Bell has mentioned his intentions of potentially renting out this storage/garage. He has done this in the past with several of his other storage projects. Creating a commercial aspect is another concern, especially because it is the entrance to the neighborhood and we have children that go to the bus stop daily.

Mr. Bell has stated in his letter to neighbors that he plans to keep old tractors, cars, boats in this shed/garage. This is a safety hazard. With no dwelling attached to it, it is a major fire hazard. An unattended shed/garage with mechanical things like old boats and cars, tractors is unsafe and should not be considered. In addition, allowing a shed/garage with no residence with the intent to store old tractors, boats, and cars is a danger to our natural surroundings. Oil leaks, gas leaks and leaving junk around is not ideal for the top of the watershed.

There are three past similar variance hearings that have been denied which I have included to be referenced when considering this variance. They are attached to this email. These past variances deal with similar issues and each one was denied.

I appreciate your time and dedication to this matter. This is a very serious variance request. It has a huge impact on our neighborhood and how unbuildable lots are used in the future.

Sincerely,

Amie Chilcoat



Click here to view my testimonials

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3 attachments



Example.pdf
975K



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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER: 2021-0238-V

ERIC WINTERTON AND CHERYL WINTERTON

FIFTH ASSESSMENT DISTRICT

DATE HEARD: MAY 12, 2022

ORDERED BY:

DOUGLAS CLARK HOLLMANN
ADMINISTRATIVE HEARING OFFICER

PLANNER: SUMNER HANDY

DATE FILED: MAY 26, 2022

PLEADINGS

Eric Winterton and Cheryl Winterton, the applicants, seek a use variance (2021-0238-V) to allow an accessory structure (carport) on a lot without a principal structure and with less setbacks than required on property with a street address of 7413 Mulberry Road, Hanover, MD 21076.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's website in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 300 feet of the subject property was notified by mail, sent to the address furnished with the application. The applicants testified that the property was posted for more than 14 days prior to the hearing. Therefore, I find and conclude that there has been compliance with the notice requirements.

FINDINGS

A hearing was held on May 12, 2022, in which witnesses were sworn and the following evidence was presented with regard to the proposed variance requested by the applicants.

The Property

The applicants own the subject property which has 100 feet of frontage on the east side of Mulberry Road, 150 feet north of Hillcrest Road, Hanover. It is identified as Lot 18 of Parcel 356 in Block 24 on Tax Map 8 in the Timber Ridge subdivision. The property comprises 15,700 square feet and is zoned R2 -

Residential District. The site is currently undeveloped and does not have public or well water or public sewer or private septic systems.

The Proposed Work

The proposal calls to construct a carport measuring 20' by 41' by 14' as shown on the site plan admitted into evidence at the hearing as County Exhibit 2.

The Anne Arundel County Code

§ 18-4-106 lists the permitted, conditional and special exception uses allowed in residential zoning districts. Neither vehicle storage, parking, nor outside storage as a principal use are among the permitted uses in the R2 district; therefore, a use variance is required for the storage of a recreational vehicle within a carport.

The Variance Requested

The proposal requires a zoning use variance to the requirement of § 18-4-106 to allow the storage of a recreational vehicle within a carport in an R2 district as shown on County Exhibit 2.

The Evidence Submitted At The Hearing

Findings and Recommendations of the Office of Planning and Zoning (OPZ)

Sumner Handy, a zoning analyst with OPZ, presented the following:

- OPZ originally advertised this case as a variance to allow an accessory structure on a lot without a principal structure. Upon further consideration of this case, OPZ determined that, instead, a use variance would be required to allow the storage of a recreational vehicle within a carport. The proposed

structure and its use have not changed; only the specific variance required, as determined by OPZ.

- The applicants explain that the subject property failed a perc test in 2018 and therefore cannot be developed with a dwelling absent public sewer service. Sewer service is not yet available at this site. The lot is otherwise of sufficient area and width to allow development.
- The applicants intend to park their fifth-wheel recreational vehicle within the proposed carport. They explain that the property is currently undeveloped and is surrounded on three sides by fenced yards.
- The property is the subject of an open zoning compliance case (Case No. Z-2021-1207). This open compliance case is in regards to the parking of the fifth-wheel RV at the subject property. That compliance case will be resolved after the resolution of this variance application.
- The Health Department has no objection to the request so long as a plan is submitted and approved by the Health Department. The Department also noted a history of complaints at the subject property for overgrown grass and rodents.
- A use variance is subject to a greater burden of proof than more typical zoning variances, such as those to setback or height requirements. In order to approve a use variance, three criteria must be met: (1) the applicants must be unable to secure a reasonable return or make any reasonable use of their property; (2) the difficulties or hardships are peculiar to the subject property in contrast to other properties in the zoning district; *and* (3) the hardship is not the result of the

applicants' own actions. Per State tax records, these applicants purchased the subject property in March of 2021 - three years after the failed perc test cited by the applicants, and for a sum that appears to reflect the difficulty in developing this lot. Two other sales noted in the State tax record, in the years 2000 and 2004, are for similarly small dollar values that appear to reflect this difficulty. These relevant sale records, the failed perc test, and the fact of the lot's persistent undeveloped state suggest that the applicants paid the market price while aware of this property's development potential. Second, the hardship here - the inability to perc that inhibits the lot's development potential - is not peculiar to the subject property in the zoning district: many otherwise legal lots in the R2 district both lack public sewer service and do not perc and therefore experience some of the same challenges to development as in the case of the subject property.

- With regards to the third criterion specific to allowing a use variance, OPZ finds that the hardship is not the result of the applicants' own actions.
- For the granting of a zoning variance (a use variance is a type of zoning variance), a determination must be made that, because of unique physical conditions, there is no reasonable possibility of developing the lot in strict conformance with the Code, or, because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship in the development of the lot. A review of the 2017 County Water and Sewer Master Plan reveals that the

subject property is in the sewer Planned Service area. While the lot's location in the Planned Service area might seem to suggest a reasonable possibility of developing the lot in strict conformance with the Code (i.e., with a principal structure in service of an allowed principal use, once sewer service is available), in practice, this is not the case. New sewer service in an established neighborhood (such as the subject property's) is only installed if a majority of property owners in a community petition for such service and then agree to pay for it collectively. The timeframe from petition for service to sewer connection is measured in years, and there has not been even that initial petition covering the subject property as of the publishing of this report.¹ OPZ finds the lot's inability to perc and its lack of sewer service to comprise unique physical conditions that prevent a reasonable possibility of developing the lot in conformance with the Code.

- There is no evidence that the use would impair the appropriate use or development of any adjacent property, be contrary to acceptable clearing and replanting practices, or be detrimental to the public welfare.
- However, approval of the variance may alter the essential character of the neighborhood. A large stand-alone carport on a lot would be a unique occurrence in this neighborhood, especially as the applicants do not live near to the subject property such that the structure could conceivably be understood as

¹ OPZ reached out to the Department of Public Works Financial Services Division, which handles water and sewer petitions, and learned that that department engaged this neighborhood in conversations about sewer service in 2008, but no petition for service was ever filed.

“accessory” to some nearby principal structure. OPZ acknowledges that the inability of the lot to perc is a substantial challenge in developing the subject property, but the inability to perc is insufficient to justify a use variance that results in development that is not in-keeping with the prevailing pattern of development. And at 20' by 41', the carport could be reduced in size and so is not considered the minimum necessary to afford relief.

- With regard to the standards by which a variance may be granted as set forth under § 18-16-305 of the County Zoning Ordinance, OPZ recommends denial.

Other Testimony and Exhibits

The applicants testified that they purchased the subject property with plans to build a house on it for their family. Subsequently, they learned that the property didn't perc. Sewer is not scheduled. This has denied them the right to develop the site.

Not being able to build, the applicants wish to put “their property,” a recreational vehicle, on “their property.” They want to build an open carport to shelter the RV from the weather. They testified that there were at least 14 other recreational vehicles parked in the neighborhood and their proposed use would not alter the essential characteristic of the surrounding homes.

Most of the neighbors were opposed to granting the request to allow a use variance so that the applicants can park their RV on the subject property. Danelle Montevago pointed out that the other RVs in the neighborhood are parked on properties with homes on them. Donna Shoemaker, who said she lives to the rear

of the applicants' property, thought the proposed use and carport cover would be a prominent structure. Gina Watson agreed with Ms. Montevago and thought the use would "change the aesthetics of the neighborhood." Wayne Demby, on the other hand, testified that, even though the carport and RV would be in his "front yard," he was in favor of allowing the proposed use to go forward. He said "my name's not on that land; as far as I'm concerned, I'm in favor of it."

Other residents (Ann Jewer, Rosemary Hall, Rich Hanna, Gina Watson, and Craig Brown) submitted emails and letters in opposition to granting the variance. Craig Brown wrote that he is the President of the Timber Ridge Improvement Association, Inc., and submitted copies of covenants for the community that do not allow the proposed use.²

There was no other testimony taken or exhibits received in the matter. The Hearing Officer did not visit the property.

DECISION

Requirements for Zoning Variances

§ 18-16-305 sets forth the requirements for granting a zoning variance. Subsection (a) reads, in part, as follows: a variance may be granted if the Administrative Hearing Officer finds that practical difficulties or unnecessary hardships prevent conformance with the strict letter of this article, provided the

² This Office only has jurisdiction to enforce County law, not private covenants. Private covenants can only be enforced by citizens who must go to court to do so. Notwithstanding this, knowing what the community feels about a proposed variance to a County law provision is helpful in trying to reach a decision on the variance application.

spirit of law is observed, public safety secured, and substantial justice done. A variance may be granted only if the Administrative Hearing Officer makes the following affirmative findings:

- (1) Because of certain unique physical conditions, such as irregularity, narrowness or shallowness of lot size and shape or exceptional topographical conditions peculiar to and inherent in the particular lot, there is no reasonable possibility of developing the lot in strict conformance with this article; or
- (2) Because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship and to enable the applicant to develop the lot.

The variance process for subsection (1) above is a two-step process. The first step requires a finding that special conditions or circumstances exist that are peculiar to the land or structure at issue which requires a finding that the property whereupon the structures are to be placed or use conducted is unique and unusual in a manner different from the nature of the surrounding properties. The second part of the test is whether the uniqueness and peculiarity of the property causes the zoning provisions to have a disproportionate impact upon the subject property causing the owner a practical difficulty or unnecessary hardship. "Uniqueness" requires that the subject property have an inherent characteristic not shared by other properties in the area. *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, 178 Md. App. 232, 941 A.2d 560 (2008);

Umerley v. People's Counsel for Baltimore County, 108 Md. App. 497, 672 A.2d 173 (1996); *North v. St. Mary's County*, 99 Md. App. 502, 638 A.2d 1175 (1994), cert. denied, 336 Md. 224, 647 A.2d 444 (1994).

The variance process for subsection (2) - practical difficulties or unnecessary hardship - is simpler. A determination must be made that, because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship, and to enable the applicant to develop the lot.

Furthermore, whether a finding is made pursuant to subsection (1) or (2) above, a variance may not be granted unless the hearing officer also finds that: (1) the variance is the minimum variance necessary to afford relief; (2) the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located, (3) substantially impair the appropriate use or development of adjacent property, (4) reduce forest cover in the limited development and resource conservation areas of the critical area, (5) be contrary to acceptable clearing and replanting practices required for development in the critical area, or (6) be detrimental to the public welfare.

Use Variances Versus Area Variances

To further complicate matters, zoning variances can be further divided into two categories: a variance to vary area requirements ("area variances"), such as setbacks or distance requirements, or to vary use restrictions ("use variances"). Area variances are needed when a property owner wants to build a structure closer

to a lot line than allowed or higher than permitted (a shed, a deck, a dwelling addition, for example). Use variances are needed to allow a use on a property that is not permitted by the Code (a truck and automobile repair and towing business in a residential district, for example).

In *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974), the Maryland Court of Special Appeals discussed the differences between “use variances” and “area variances.”

The Court of Appeals has recognized a distinction between a use variance, which changes the character of the zoned district, and an area variance, which does not. Use variances are customarily concerned with ‘hardship’ cases, where the land cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and a variance must be permitted to avoid confiscatory operation of the ordinance, while area variances are customarily concerned with ‘practical difficulty.’ *Loyola Loan Ass'n v. Buschman*, 227 Md. 243, 248, 176 A.2d 355, 358 (1961). Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:

- 1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make any reasonable use of his property. *Pem Co. v. Baltimore City*, 233 Md. 372, 378, 196 A.2d 879, 882 (1964); *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198, 202 (1957); see *Salisbury Bd. v. Bounds*, 240 Md. 547, 555, 214 A.2d 810, 815 (1965). Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting

a variance. *Daihl v. County Board of Appeals*, 258 Md. 157, 167, 265 A.2d 227, 232 (1970); *Salisbury Bd. v. Bounds, supra*, 240 Md. at 555, 214 A.2d at 814; *Marino v. City of Baltimore, supra*; *Easter v. City of Baltimore*, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).

2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners in the same district. *Burns v. Baltimore City*, 251 Md. 554, 559, 248 A.2d 103, 106 (1968); *Marino v. City of Baltimore, supra*; *Easter v. City of Baltimore, supra*.

3) The hardship was not the result of the applicant's own actions. *Salisbury Bd. v. Bounds, supra*; *Marino v. City of Baltimore, supra*; *Gleason v. Keswick Impvt. Ass'n*, 197 Md. 46, 50-51, 78 A.2d 164, 165-166 (1951).

Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 38-41, 322 A.2d 226-228 (1974).

Findings - Zoning Variance

Using the three criteria enunciated in the *Anderson* case quoted above, the requested use variance must be denied.

1. Inability to secure a reasonable return or make reasonable use of the property.

The applicants can make reasonable use of the property if the variance is denied. They wish to use it to store their RV, which is not permitted.

There was no evidence they couldn't use it for other permitted uses. Being unable to develop the property with a residence does not mean there are no other

reasonable uses of the property. The proposed use, therefore, would not meet the first requirement of the three *Anderson* criteria set forth above.

2. The difficulties or hardships peculiar to the property and in contrast to those of other property owners in the same district.

The hardship is caused by the inability of the applicants to obtain approval for a septic system that would allow the construction of a dwelling. This limitation is not imposed on other property owners in the district. However, that does not mean that the property can be developed as if it were classified as commercial. The proposed use does not meet the second requirement of the three *Anderson* criteria set forth above.

3. The hardship was not the result of the applicant's own actions.

The hardship is not the result of actions by the applicants. They didn't create the problem caused by the inability to obtain approval for a septic system that would allow the construction of a dwelling. However, they purchased the property charged with this knowledge. The purchase price reflects a residential lot that might not be developable like its neighbors. The inability to obtain approval for a septic system that would allow the construction of a dwelling should have been known before the applicants purchased the property. The proposed use does not meet the third requirement of the three *Anderson* criteria set forth above.

There is an additional reason the application must be denied. The proposed use *would* change the essential character of the neighborhood. This means that the

neighbors would bear the burden of the proposed use, if it were granted. Most of the neighbors did not think the use was appropriate. It isn't.³

ORDER

PURSUANT to the application of Eric Winterton and Cheryl Winterton, petitioning for a use variance to allow an accessory structure (carport) on a lot without a principal structure and with less setbacks than required on property with a street address of 7413 Mulberry Road, Hanover;

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this **26th day of May, 2022**,

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the application is **denied**.



Douglas Clark Hollmann
Administrative Hearing Officer

NOTICE TO APPLICANTS

Any person, firm, corporation, or governmental agency having an interest in this Decision and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals within thirty (30) days from the date of this Decision.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, or they may be discarded.

³ Variances are not determined by the yeas or nays of neighbors, although consent or opposition is a factor to be considered in weighing whether a variance should be granted.

CO. EXHIBIT#: 1
CASE: 2021-0238-V
DATE: ~~02/22/22~~
5/12/22

**FINDINGS AND RECOMMENDATION
OFFICE OF PLANNING AND ZONING
ANNE ARUNDEL COUNTY, MARYLAND**

APPLICANT: Eric & Cheryl Winterton

ASSESSMENT DISTRICT: 5

CASE NUMBER: 2021-0238-V

COUNCIL DISTRICT: 2

HEARING DATE: February 22, 2022
May, 12

PREPARED BY: Sumner Handy
Planner

SLA for SH

REQUEST

The applicants are requesting a use variance to allow the storage of a recreational vehicle within a carport at 7413 Mulberry Road in Hanover.

LOCATION AND DESCRIPTION OF SITE

The subject property has approximately 100 feet of road frontage on the east side of Mulberry Road, about 150 feet north of Hillcrest Road. The subject lands have an area of approximately 15,700 square feet. The site is identified as Lot 18 of Parcel 356, found in Block 24 of Tax Map 8 in the Timber Ridge subdivision. The subject property is zoned R2 - Residential District. The current zoning was adopted by the comprehensive zoning for the Fifth Council District, effective January 29, 2012.

The site is currently undeveloped and does not currently enjoy public or well water or public sewer or private septic systems.

APPLICANTS' PROPOSAL

The applicants seek to construct a carport measuring 20 feet by 41 feet and 14 feet in height.

REQUESTED VARIANCES

Section 18-4-106 of the Anne Arundel County Zoning Ordinance lists the permitted, conditional and special exception uses allowed in residential zoning districts. Neither vehicle storage, parking, nor outside storage as a principal use are not among the permitted uses in the R2 - Residential District; therefore, a use variance is required for the storage of a recreational vehicle within a carport.

FINDINGS

The Office of Planning and Zoning originally advertised this case as a variance to allow an accessory structure on a lot without a principal structure. Upon further consideration of this case, the Office of Planning and Zoning determined that, instead, a use variance would be required to allow the storage of a recreational vehicle within a carport. The proposed structure and its use

have not changed; only the specific variance required, as determined by the Office of Planning and Zoning.

The applicants explain that the subject property failed a perc test in 2018 and therefore cannot be developed with a dwelling absent public sewer service. Sewer service is not yet available at this site. The lot is otherwise of sufficient area and width to allow development.

The applicants intend to park their fifth-wheel recreational vehicle within the proposed carport. They explain that the property is currently undeveloped and is surrounded on three sides by fenced yards.

The property is the subject of an open zoning compliance case (case number Z-2021-1207). This open compliance case is in regards to the parking of the fifth-wheel RV at the subject property. That compliance case will be resolved after the resolution of this variance application.

The **Health Department** has no objection to the request so long as a plan is submitted and approved to the Health Department. The Department also noted a history of complaints at the subject property for overgrown grass and rodents.

A use variance is subject to a greater burden of proof than more typical zoning variances, such as those to setback or height requirements. In order to approve a use variance, three criteria must be met: (1) the applicants must be unable to secure a reasonable return or make any reasonable use of their property; (2) the difficulties or hardships are peculiar to the subject property in contrast to other properties in the zoning district; *and* (3) the hardship is not the result of the applicants' own actions. Per State tax records, these applicants purchased the subject property in March of 2021 - three years after the failed perc test cited by the applicants, and for a sum that appears to reflect the difficulty in developing this lot. Two other sales noted in the State tax record, in the years 2000 and 2004, are for similarly small dollar values that appear to reflect this difficulty. These relevant sale records, the failed perc test, and the fact of the lot's persistent undeveloped state suggest that the applicants paid the market price while aware of this property's development potential. Second, the hardship here - the inability to perc that inhibits the lot's development potential - is not peculiar to the subject property in the zoning district: many otherwise legal lots in the R2 district both lack public sewer service and do not perc and therefore experience some of the same challenges to development as in the case of the subject property.

With regards to the third criterion specific to allowing a use variance, this Office finds that the hardship is not the result of the applicants' own actions.

For the granting of a zoning variance (a use variance is a type of zoning variance), a determination must be made that, because of unique physical conditions, there is no reasonable possibility of developing the lot in strict conformance with the Code, or, because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship in the development of the lot. A review of the 2017 County Water and Sewer Master Plan reveals that the subject property is in the sewer Planned Service area. While the lot's location in the Planned Service area might seem to suggest a reasonable possibility of developing the lot in strict conformance with the Code (i.e., with a

principal structure in service of an allowed principal use, once sewer service is available), in practice, this is not the case. New sewer service in an established neighborhood (such as the subject property's) is only installed if a majority of property owners in a community petition for such service and then agree to pay for it collectively. The timeframe from petition for service to sewer connection is measured in years, and there has not been even that initial petition covering the subject property as of the publishing of this report.¹ This Office finds the lot's inability to perc and its lack of sewer service to comprise unique physical conditions that prevent a reasonable possibility of developing the lot in conformance with the Code.

There is no evidence that the use would impair the appropriate use or development of any adjacent property, be contrary to acceptable clearing and replanting practices, or be detrimental to the public welfare.

However, approval of the variance may alter the essential character of the neighborhood. A large stand-alone carport on a lot would be a unique occurrence in this neighborhood, especially as the applicants do not live near to the subject property such that the structure could conceivably be understood as "accessory" to some nearby principal structure. This Office acknowledges that the inability of the lot to perc is a substantial challenge in developing the subject property, but the inability to perc is insufficient to justify a use variance that results in development that is not in-keeping with the prevailing pattern of development. And at 20 feet by 41 feet, the carport could be reduced in size and so is not considered the minimum necessary to afford relief.

RECOMMENDATION

With regard to the standards by which a variance may be granted as set forth under Section 18-16-305 of the County Zoning Ordinance, the Office of Planning and Zoning recommends ***denial*** of a use variance to Section 18-4-106 to allow the storage of a recreational vehicle within a carport.

DISCLAIMER: This recommendation does not constitute a building permit. In order for the applicant(s) to construct the structure(s) as proposed, the applicant(s) shall apply for and obtain the necessary building permits, and obtain any other approvals required to perform the work described herein. This includes but is not limited to verifying the legal status of the lot, resolving adequacy of public facilities, and demonstrating compliance with environmental site design criteria.

¹ This Office reached out to the Department of Public Works Financial Services Division, which handles water and sewer petitions, and learned that that department engaged this neighborhood in conversations about sewer service in 2008, but no petition for service was ever filed.

For Office Use Only

CASE # 2021-0238-V

FEE PAID \$215

DATE 12/13/2021



For Office Use Only

ZONE R2

CRITICAL AREA: IDA LDA RCA

BMA: Yes No

NO. OF SIGNS 1

VARIANCE APPLICATION

Applicant(s): Eric + Cheryl Winterton
(Applicant must have a financial, contractual, or proprietary interest in the property)

Property Address: 7413 Mulberry Road, Hanover MD 21076

Property Location: 100 feet of frontage on the (N, S, E, W) side of Mulberry Road
(Enter Street Name)

150 feet (N, S, E, W) of (Nearest intersecting street) Hillcrest Road
(Enter Street Name)

12-digit Tax Account Number 5800-0874-7000 Tax District 5 Council District 2

Waterfront Lot: Y N Corner Lot: Y N Deed Title Reference 30268-319

Zoning District R2 Lot # 18 Tax Map 8 Block/Grid 24 Parcel 356

Area 15,700 (Sq Ft, or Acres) Subdivision Name Timber Ridge

Description of Proposed Project and Variance Requested (Brief, detail fully in letter of explanation)
Variance to allow for building a carport (secondary structure) without a primary structure. the lot does not perk.

The applicant hereby certifies that he or she has a financial, contractual, or proprietary interest in the property; that he or she is authorized to make this application; that the information shown on this application is correct; and that he or she will comply with all applicable regulations of Anne Arundel County, Maryland.

Applicant's Signature Owner's Signature Eric T. Winterton

Print Name Eric T. Winterton

Mailing Address 504 Trotters Ridge Way

City, State, Zip Severn, MD 21144

Work Phone 410-583-8622

Home Phone 410 551 6635

Cell Phone

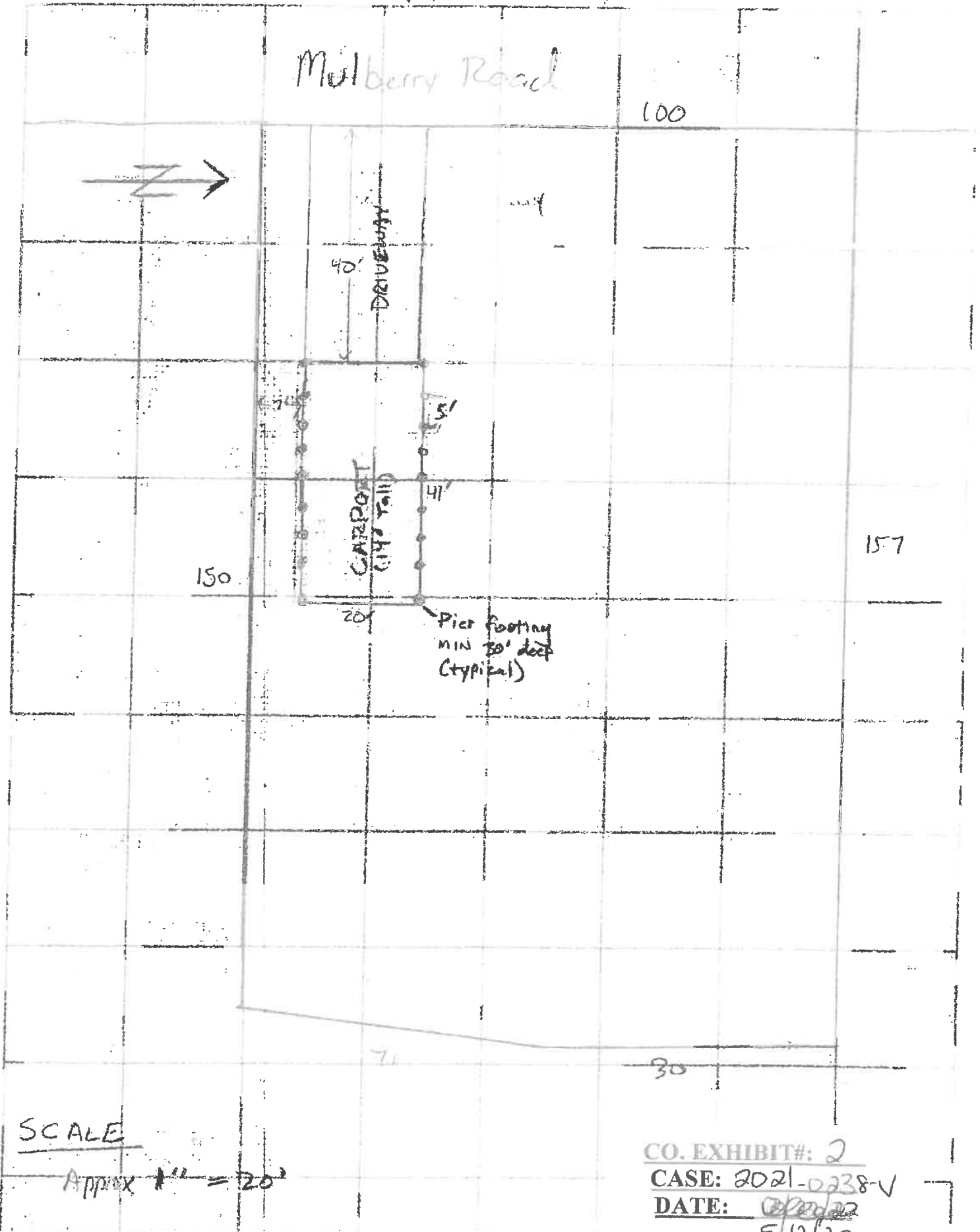
Email Address ewinterton@verizon.net

*** Below For Office Use Only ***

Application accepted by Anne Arundel County Office of Planning and Zoning: SAH 12/13/2021
Initials Date

Variance to allow an accessory structure (carport) on a lot without a principal structure and with less setbacks than required.

Property Address 7413 Mulberry Road



SCALE

Approx 1" = 20'

CO. EXHIBIT#: 2

CASE: 2021-0238-V

DATE: 5/12/22

5/12/22

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2021-0112-V

JAMES H. EURICE

THIRD ASSESSMENT DISTRICT

DATE HEARD: NOVEMBER 9, 2021

ORDERED BY:

**DOUGLAS CLARK HOLLMANN
ADMINISTRATIVE HEARING OFFICER**

PLANNER: ROBERT KONOWAL

DATE FILED: DECEMBER 9, 2021

PLEADINGS

James H. Eurice, the applicant, seeks a use variance (2021-0112-V) to allow residential structures in a platted recreation area on property with frontage on the east side of Eagle Hill Road, 250 feet south of Bishop Road, Pasadena, MD 21122.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's website in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 300 feet of the subject property was notified by mail, sent to the address furnished with the application. The window for the posting of the property was held open until November 19, 2021. I find and conclude that there has been compliance with the notice requirements.

FINDINGS

A hearing was held on November 9, 2021, in which witnesses were sworn and the following evidence was presented with regard to the proposed variance requested by the applicant.

The Property

The applicant owns the subject property, which has 50 feet of frontage on the east side of Eagle Hill Road, 250 feet south of Bishop Road, Pasadena. It is identified on Parcel 346 in Block 19 on Tax Map 25 in the Eagle Hill subdivision. Parcel 346 contains 3.191 acres and is zoned RLD - Residential Low Density

District. This waterfront lot on the Magothy River is designated in the Chesapeake Bay Critical Area as resource conservation area (RCA), with a portion near the road designated as limited development area (LDA). A Magothy River tributary stream crosses the property and runs close to the western border. The property is impacted by steep slopes and wetlands.

The subject property is improved with two structures that have been used in the past as single-family detached dwellings.

The Proposed Work

The applicant is seeking a use variance that would allow residential structures in a platted recreation area.

The Anne Arundel County Code

§ 18-2-201 - Use Restrictions - reads as follows:

- (a) Consistency with law. A structure or lot may not be used, designed, constructed, or altered in any manner inconsistent with this Code.
- (b) Prohibited use. A use not specifically allowed in this article is prohibited.

The Variance Requested

The proposed residential use will require a zoning variance to the requirement in § 18-2-201 that a structure or lot may not be used in any manner inconsistent with the Code.

The Evidence Submitted At The Hearing

Findings and Recommendations of the Office of Planning and Zoning (OPZ)

Robert Konowal, a zoning analyst with OPZ, presented the following:

- *Background.* According to the applicant, the property was originally assumed by the Eagle Hill Community Association. Due to steep slopes and a heavily wooded area the waterfront area was found to be inaccessible except across an adjacent private property. A lawsuit was filed and an injunction issued prohibiting Eagle Hill lot owners from traveling over private property to access the subject property for recreation purposes. It was suggested that a new lot be created for Community Association use via a new adjacent plan of subdivision.
- In 2009, the Citrano-Huffard Property subdivision was recorded (Plat Book 296, folio 6-7) for the purpose of creating “a non-buildable recreation area to be transferred to the Eagle Hill Homeowners Association”. The subject property was exchanged by deed for the new Community Association lands as “a straight up swap” between the Community Association and the developer of the Citrano-Huffard Property subdivision. The subject property was then sold to the applicant who purchased the property with the intent of continuing to maintain and use the dwellings on the property for residential purposes. Because the property is platted as a Recreation Area rather than a buildable lot, the County will not issue a building permit for necessary repairs and has since initiated building code enforcement action against him.

- *Review of Use Variance.* The subject property is zoned RLD-Residential Low Density which does allow the use of the subject property for residential purposes. Thus a residential use of this RLD zoned property is not a prohibited use of these lands that requires a variance. Rather the ultimate use of the subject property is governed by the Eagle Hill Plan of Subdivision which is a separate recorded legal instrument that designates the land as a recreation area. A plan of subdivision may not be altered by a use variance or an area variance to Article 18. A use variance is therefore not the appropriate mechanism to effect the residential use of these lands but rather a Plan of Subdivision that revises the previously approved Eagle Hill Plan of Subdivision.
- The use variance is viewed by OPZ as an attempt to circumvent the subdivision process to create an additional buildable lot in this previously approved subdivision. The subject variance is sought simply for the reason that the applicant does not find the subdivision process convenient. The applicant states that the swapping of this property for another recreation area has left the subject property in “legal limbo”. Any perceived hardship in the use of these lands must be viewed as being self-created by the applicant’s own actions. It should also be noted that the continued use of the subject lands over the past 40 years for residential purposes was in violation of the approved subdivision that designated the use of these lands for recreational purposes.
- The Critical Area Commission advised that in order for a building permit to be issued for any further construction, the County needs to determine first,

whether there is a development right and, if so, the parcel needs to be designated as a legally buildable lot through the plat process (not through a use variance). Therefore, the Commission opposes this use variance request to allow the use of an existing dwelling and accessory structure on a property platted as a Recreation Area.

- The Commission does not believe that a use variance is the appropriate process to establish a development right on this lot based on existing Anne Arundel County land use and zoning procedures. In all other situations where a lot is not considered legally buildable, applicants in Anne Arundel are instructed to file a subdivision plat to establish a development right. Given the site is RCA, the Commission believes that should be the case here.
- The Commission noted that while the deeds indicate that the “straight-up swap” occurred, the prior owner, Mr. Huffard, did not make any attempt to amend the original 1979 plat to remove the designation of Rec. Area from the property at issue. Therefore, on the plat that existed before the Critical Area Law went into effect, the property is still considered the Rec. Area for the Eagle Hill subdivision. Neither the 1979 plat nor the deeds clearly identify whether there is a development right associated with this parcel.
- The Commission advised that if the Hearing Officer determines that a use variance is the appropriate process, the Hearing Officer must determine whether that use is consistent with the grandfathering and RCA density provisions of the critical area. The application materials did not demonstrate

that both cottages have been used continuously since the date of the County's program approval. Additionally, the waterfront cottage is described as uninhabitable. Based on this information and the applicable critical area provisions, the Commission does not believe that a use variance to establish a residential use in either cottage is in conformance with critical area law and the County program. Therefore, the Commission believes this use variance request should be denied. The applicant can use the interior cottage for recreational purposes per the recorded plat.

- Finally, the Commission stated no additional authorization should be granted allowing the further use of the waterfront cottage as it has not been used for more than 12 months as it has fallen into disrepair. The Anne Arundel County Code does not have provisions for in-kind replacement after the use has been discontinued for more than one year as per § 18-13-201 of the Code.
- The Health Department commented that a current Perc Application is not on file and has not been evaluated for an onsite sewage disposal system. The Health Department recommends denial of the request at this time.
- The Department of Recreation and Parks commented that the site is not contiguous to a park, trail or greenway.
- Based upon the standards set forth in § 18-16-305, under which a variance may be granted, OPZ recommends denial of a use variance to § 18-2-201(a) and (b) of the Code to allow the residential use of the subject property.

Other Testimony and Exhibits

The applicant was represented at the hearing by Eileen Powers, Esquire, who presented evidence through the applicant and Wayne Newton and Tim Brenza of Messick & Associates, the applicant's engineer, and Shep Tullier of Land Visions, Inc. Evidence was presented as to the history of the subject property and efforts by the applicant to be allowed to use it as residential property and to repair and renovate the existing structures on it.

Bonnie Garrett testified that she lives to the southeast of the subject property and questioned whether there was access to the property. She was not necessarily opposed to the improvements proposed by the applicant.

There was no other testimony taken or exhibits received in the matter. The Hearing Officer visited the property.

DECISION

Background

The subject property (Parcel 346) was created as part of a subdivision of land in 1979 (Plat Book 72 Folio 8) named Eagle Hill (the 1979 Plat). The 1979 Plat provided for 21 residential dwelling lots and Parcel 346. The 1979 Plat provided that Parcel 346 "is hereby dedicated to the recreation use of the residents" of Eagle Hill. It also provided that the lots in Eagle Hill would be subject to restrictive covenants recorded in the Land Records of Anne Arundel County (the Covenants).

Parcel 346 was deeded in trust to Anne Arundel County, which subsequently deeded it to the Eagle Hill Community Association, Inc. (HOA).

The lot owners in Eagle Hill had difficulty accessing Parcel 346. This resulted in litigation. Eventually, the HOA and certain parties (Huffard) decided to provide the HOA with a separate parcel of land for the recreational use of the Eagle Hill homeowners. This parcel contains 1.44 acres and was accessible from Eagle Hill Road. It was transferred to the HOA as a “straight-up swap” (sixth “WHEREAS” clause) in return for the HOA deeding Parcel 346 to Huffard. Huffard deeded Parcel 346 to the applicant.

The Structures on Parcel 346

Parcel 346 was improved with two structures when it was created in 1979. They are still on Parcel 346. The applicant has apparently repaired one of them (the upland dwelling); the second one at the shoreline appears to be beyond repair. The applicant wants to repair both structures and use them.

The record is bare of any provisions relating to the intended uses of the two structures on Parcel 346. The 1979 Eagle Hill Plat shows the two structures but there is no language on the Plat that refers to them. Also, the subsequent deeds make no reference to them.

The two structures may have been grandfathered at some point in time because it appears they were built before 1952. However, once Parcel 346 was created as a recreation area in 1979, the structures became nonconforming uses

because residential structures are not allowed on land dedicated to recreational use.

There is no evidence that any of the prior owners of Parcel 346 applied for nonconforming status for the two structures. The window to legalize them closed in 1980 or 1981. They are still illegal nonconforming structures on Parcel 346. For the purpose of this application, Parcel 346 must be considered, for all intents and purposes, as an undeveloped lot.

The Recreational Use Designation of Parcel 346

The dedication of Parcel 346 to the “recreation use of the residents” of Eagle Hill is still in effect. The HOA could have taken steps to amend the 1979 Plat to eliminate the restriction but has not done so.

The subsequent transfers of Parcel 346 do not include any language about Parcel 346 being dedicated to the “recreation use of the residents” of Eagle Hill, with the exception of a warning in the deed from the HOA to Huffard that the “use of the property for anything other than a recreation area or open space may require a plat amendment from Anne Arundel County.” In any event, a property designated on a plat for recreational use cannot be altered by deed. Therefore, the history of the deeds is of no help in deciding whether the requested variance should be granted.

The Applicant’s Request

The applicant purchased Parcel 346 with the restrictions contained on the 1979 Eagle Hill Plat still in effect. He seeks to use Parcel 346 for residential

purposes. It would seem that he needs to apply for an amendment to the 1979 Plat to remove the designation that the use of Parcel 346 is limited to recreational use by the Eagle Hill property owners. If the restriction were removed, Parcel 346 would be a buildable lot in the RLD district. However, the applicant has declined to make the effort. He believes that it is unlikely that an amendment to the 1979 Plat would be granted.

The use variance has been presented as a way to resolve the loss of rights the applicant claims he has suffered. However, for reasons set forth below, this avenue of relief is not available to the applicant.

Use Variances Versus Area Variances

Variances can be divided into two categories: a variance to vary area requirements (“area variances”), such as setbacks or distance requirements, or to vary use restrictions (“use variances”). Area variances are needed when a property owner wants to build a structure closer to a lot line than allowed or higher than permitted (a shed, a deck, a dwelling addition, for example). Use variances are needed when a property owner wants to use that is not permitted by the Code (a truck and automobile repair and towing business in a residential district, for example). In this case, the applicant seeks a use variance to allow him to use Parcel 346 for residential purposes.

The rules governing the granting of a use variance are set down in case law. In *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28,

322 A.2d 220 (1974), the Maryland Court of Special Appeals discussed the differences between “use variances” and “area variances:”

The Court of Appeals has recognized a distinction between a use variance, which changes the character of the zoned district, and an area variance, which does not. Use variances are customarily concerned with ‘hardship’ cases, where the land cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and a variance must be permitted to avoid confiscatory operation of the ordinance, while area variances are customarily concerned with ‘practical difficulty.’ *Loyola Loan Ass'n v. Buschman*, 227 Md. 243, 248, 176 A.2d 355, 358 (1961). Where the standard of undue hardship applies, the applicant, in order to justify the grant of the variance, must meet three criteria:

- 1) If he complied with the ordinance he would be unable to secure a reasonable return from or to make any reasonable use of his property. *Pem Co. v. Baltimore City*, 233 Md. 372, 378, 196 A.2d 879, 882 (1964); *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198, 202 (1957); see *Salisbury Bd. v. Bounds*, 240 Md. 547, 555, 214 A.2d 810, 815 (1965). Mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason for granting a variance. *Daihl v. County Board of Appeals*, 258 Md. 157, 167, 265 A.2d 227, 232 (1970); *Salisbury Bd. v. Bounds*, *supra*, 240 Md. at 555, 214 A.2d at 814; *Marino v. City of Baltimore*, *supra*; *Easter v. City of Baltimore*, 195 Md. 395, 400, 73 A.2d 491, 492 (1950).

- 2) The difficulties or hardships were peculiar to the property in question and contrast with those of other property owners

in the same district. *Burns v. Baltimore City*, 251 Md. 554, 559, 248 A.2d 103, 106 (1968); *Marino v. City of Baltimore*, *supra*; *Easter v. City of Baltimore*, *supra*.

3) The hardship was not the result of the applicant's own actions. *Salisbury Bd. v. Bounds*, *supra*; *Marino v. City of Baltimore*, *supra*; *Gleason v. Keswick Impvt. Ass'n*, 197 Md. 46, 50-51, 78 A.2d 164, 165-166 (1951).

Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 38-41, 322 A.2d 226-228 (1974).

However, before analyzing whether the facts in this case support the grant of a use variance, it must be noted that the applicant's complaint is not that Parcel 346 "cannot yield a reasonable return if used only in accordance with the use restrictions of the ordinance and a variance must be permitted to avoid confiscatory operation of the ordinance," *Loyola Loan Ass'n v. Buschman*, 227 Md. 243, 248, 176 A.2d 355, 358 (1961) (emphasis added), but that the dedication to recreational use prevents him from using the property for residential purposes. The actual restriction on the use of Parcel 346 is not one imposed by the Code; it is a restriction created by someone outside government, i.e., the original developer of Eagle Hill. Since a variance can only be granted to 'vary' the impact of a zoning restriction on a property, the application must be denied.

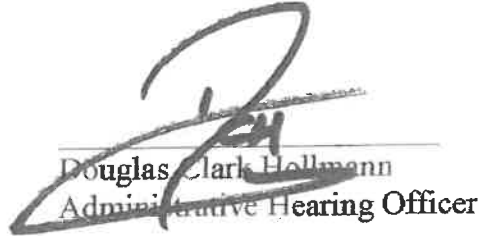
ORDER

PURSUANT to the application of James H. Eurice, petitioning for a use variance to allow residential structures in a platted recreation area on property with

frontage on the east side of Eagle Hill Road, 250 feet south of Bishop Road,
Pasadena;

PURSUANT to the notice, posting of the property, and public hearing and
in accordance with the provisions of law, it is this **9th day of December, 2021,**

ORDERED, by the Administrative Hearing Officer of Anne Arundel
County, that the application is **denied.**



Douglas Clark Hollmann
Administrative Hearing Officer

NOTICE TO APPLICANT

Any person, firm, corporation, or governmental agency having an interest
in this Decision and aggrieved thereby may file a Notice of Appeal with the
County Board of Appeals within thirty (30) days from the date of this Decision.

If this case is not appealed, exhibits must be claimed within 60 days of the
date of this Order, or they may be discarded.

**FINDINGS AND RECOMMENDATIONS
OFFICE OF PLANNING AND ZONING
ANNE ARUNDEL COUNTY, MARYLAND**

CO. EXHIBIT#: 1
CASE: 2021-0112V
DATE: 11/9/21

APPLICANT: James H. Eurice

ASSESSMENT DISTRICT: 5th

CASE NUMBER: 2021-0112-V

COUNCIL DISTRICT: 5th

HEARING DATE: November 9, 2021

PREPARED BY: Robert Konowal
Planner

REQUEST

The applicant is requesting a use variance to allow the residential use of property located on Eagle Hill Road in Pasadena.

LOCATION AND DESCRIPTION OF SITE

The subject site consists of 3.191 acres of land, more or less. It is located with 50 feet of frontage on the east side of Eagle Hill Road, 250 feet south of Bishop Road. The property is identified on Parcel 346 in Block 19 on Tax Map 25 in the Eagle Hill subdivision.

The property has been zoned RLD - Residential Low Density District since the adoption of comprehensive zoning for the Fifth Council District effective January 29, 2012.

This is a waterfront property located on the Magothy River entirely within the Chesapeake Bay Critical Area, classified primarily as RCA - Resource Conservation Area with a portion classified as LDA - Limited Development Area near the road. The property is not in a mapped Buffer Modified Area. A Magothy River tributary stream crosses the property and runs close to the western border. The property is impacted by steep slopes and wetlands.

The property is currently developed with two structures that have been used in the past as single family detached dwellings.

PROPOSAL

The applicant wishes to use the two existing structures on the subject property for recreation for residential purposes; namely a single family detached dwelling and an accessory structure for storage and recreation. The subject property is identified on the Eagle Hill Plan of Subdivision (1979) as a Recreation Area that was to be deeded to the future Community Association for this subdivision.

The applicant is seeking a use variance that would allow the use of the recreation area for residential purposes. The use variance would effectively create an additional buildable lot for residential purposes in the Eagle Hill subdivision.

REQUESTED VARIANCE

The applicant wishes to effect a use variance by varying Section 18-2-201. the use requirements of the Code which state that,

(a) Consistency with law. A structure or lot may not be used, designed, constructed, or altered in any manner inconsistent with this Code.

(b) Prohibited use. A use not specifically allowed in this article is prohibited.

FINDINGS

Background

According to the applicant, the property was originally assumed by the Eagle Hill Community Association. Due to steep slopes and a heavily wooded area the waterfront area was found to be inaccessible except across an adjacent private property. A lawsuit was filed and an injunction issued prohibiting Eagle Hill lot owners from traveling over private property to access the subject property for recreation purposes. It was suggested that a new lot be created for Community Association use via a new adjacent plan of subdivision.

In 2009, the Citrano-Huffard Property subdivision was recorded (Plat Book 296, folio 6-7) for the purpose of creating “a non-buildable recreation area to be transferred to the Eagle Hill Homeowners Association”. The subject property was exchanged by deed for the new Community Association lands as “a straight up swap” between the Community Association and the developer of the Citrano-Huffard Property subdivision. The subject property was then sold to the applicant who purchased the property with the intent of continuing to maintain and use the dwellings on the property for residential purposes. Because the property is platted as a Recreation Area rather than a buildable lot, the County will not issue a building permit for necessary repairs and has since initiated building code enforcement action against him.

Review of Use Variance

The subject property is zoned RLD-Residential Low Density which does allow the use of the subject property for residential purposes. Thus a residential use of this RLD zoned property is not a prohibited use of these lands that requires a variance. Rather the ultimate use of the subject property is governed by the Eagle Hill Plan of Subdivision which is a separate recorded legal instrument that designates the land as a recreation area. A plan of subdivision may not be altered by a use variance or an area variance to Article 18. A use variance is therefore not the appropriate mechanism to effect the residential use of these lands but rather a Plan of Subdivision that revises the previously approved Eagle Hill Plan of Subdivision.

The use variance is viewed by this Office as an attempt to circumvent the subdivision process to create an additional buildable lot in this previously approved subdivision. The subject variance is sought simply for the reason that the applicant does not find the subdivision process

convenient. The applicant states that the swapping of this property for another recreation area has left the subject property in “legal limbo”. Any perceived hardship in the use of these lands must be viewed as being self created by the applicant’s own actions. It should also be noted that the continued use of the subject lands over the past 40 years for residential purposes was in violation of the approved subdivision that designated the use of these lands for recreational purposes.

The **Critical Area Commission for the State of Maryland** advised that in order for a building permit to be issued for any further construction, the County needs to determine first, whether there is a development right and, if so, the parcel needs to be designated as a legally buildable lot through the plat process (not through a use variance). Therefore, the Commission opposes this use variance request to allow the use of an existing dwelling and accessory structure on a property platted as a Recreation Area.

The Commission does not believe that a use variance is the appropriate process to establish a development right on this lot based on existing Anne Arundel County land use and zoning procedures. In all other situations where a lot is not considered legally buildable, applicants in Anne Arundel are instructed to file a subdivision plat to establish a development right. Given the site is RCA, the Commission believes that should be the case here.

The Commission noted that while the deeds indicate that the “straight-up swap” occurred, the prior owner, Mr. Huffard, did not make any attempt to amend the original 1979 plat to remove the designation of Rec. Area from the property at issue. Therefore, on the plat that existed before the Critical Area Law went into effect, the property is still considered the Rec. Area for the Eagle Hill subdivision. Neither the 1979 plat nor the deeds clearly identify whether there is a development right associated with this parcel.

The Commission advised that if the Hearing Officer determines that a use variance is the appropriate process, the Hearing Officer must determine whether that use is consistent with the grandfathering and RCA density provisions of the Critical Area. The application materials did not demonstrate that both cottages have been used continuously since the date of the County’s program approval. Additionally, the waterfront cottage is described as uninhabitable. Based on this information and the applicable Critical Area provisions, the Commission does not believe that a use variance to establish a residential use in either cottage is in conformance with Critical Area law and the County program. Therefore, the Commission believes this use variance request should be denied. The applicant can use the interior cottage for recreational purposes per the recorded plat.

Finally, the Commission stated no additional authorization should be granted allowing the further use of the waterfront cottage as it has not been used for more than 12 months as it has fallen into disrepair. The Anne Arundel County Code does not have provisions for in-kind replacement after the use has been discontinued for more than one year as per Section 18-13-201 of the Code.

The **Health Department** commented that a current Perc Application is not on file and has not been evaluated for an on-site sewage disposal system. The Health Department recommends denial of the request at this time.

The **Department of Recreation and Parks** commented that the site is not contiguous to a park, trail or greenway.

RECOMMENDATION

Based upon the standards set forth in Article 18-16-305, under which a variance may be granted, the Office of Planning and Zoning recommends ***denial*** of a use variance to Section 18-2-201 (a) and (b) of the Code to allow the residential use of the subject property.

DISCLAIMER: This recommendation does not constitute a building permit. In order for the applicant to construct the structure(s) as proposed, the applicant shall apply for and obtain the necessary building permits, and obtain any other approvals required to perform the work described herein. This includes but is not limited to verifying legal lot status, resolving adequacy of public facilities, and demonstrating compliance with environmental site design criteria.

Larry Hogan
Governor
Boyd K. Rutherford
Lt. Governor



Charles C. Deegan
Chairman
Katherine Charbonneau
Executive Director

STATE OF MARYLAND
CRITICAL AREA COMMISSION
CHESAPEAKE AND ATLANTIC COASTAL BAYS

August 31, 2021

CO. EXHIBIT#: 8
CASE: 2021-0112V
DATE: 11/9/21

Ms. Sterling Seay
Anne Arundel County
Office of Planning and Zoning
2664 Riva Road, MS 6301
Annapolis, Maryland 21401

Re: #2021-0112-V; James Eurice
3.191 acres on Eagle Hill Road, Pasadena

Dear Ms. Seay:

I am writing to provide comment in regard to the variance case referenced above. The applicant is seeking a use variance to allow a residential dwelling and accessory structure on a property platted as a Recreation Area. The property is approximately 3.191 acres, and is designated mostly as Resource Conservation Area (RCA) with a small area near Eagle Hill Road designated as Limited Development Area (LDA). There are two existing buildings on the property: one is at the shoreline (waterfront cottage) and the other one is closer to the middle of the property (interior cottage). The applicant would like to use the interior cottage as a single-family detached dwelling and the waterfront cottage as a residential accessory structure. The roof of the waterfront cottage is in disrepair and the building is not habitable.

Our understanding is that in order for a building permit to be issued for any further construction, the County needs to determine first, whether there is a development right and, if so, the parcel needs to be designated as a legally buildable lot through the plat process (not through a use variance). Therefore, we oppose this use variance request to allow the use of an existing dwelling and accessory structure on a property platted as a Recreation Area.

For the Hearing Officer's consideration, I have outlined below the property history as we understand it, as well as related Critical Area concerns.

PLAT HISTORY

The plat of record for the property is dated June 29, 1979, and it shows the property as the Rec. Area for the Eagle Hill subdivision. The 1979 plat shows the two existing buildings that are the subject of this request. The "Recreation Dedication" on the 1979 plat¹ states the following:

"The recreation area shown hereon is hereby dedicated to the recreation use of the residents of this subdivision, and has been deeded to the Anne

¹ Plat Book 72, Pages 8-11, Plat Nos. 3783-3786

Arundel County Planning and Zoning Officer in trust for a future community association of this subdivision.”

There is also a deed, dated June 29, 1979², that granted the Planning and Zoning Officer of Anne Arundel County the recreation area in trust for the residents of the Eagle Hill subdivision until the area could be conveyed to the community association, which had not been created yet. In a deed, dated October 6, 1986³, the Planning and Zoning Officer of Anne Arundel County granted the Recreation Area to the newly created community association, known as Eagle Hill Community Association, Inc. In 2013, this parcel was part of a deed⁴ and a resubdivision plat⁵ whose purpose was to do a “straight-up swap” of the Rec. Area shown on the 1979 plat, for a new Recreation Area shown on the amended plat. The current applicant then purchased the property in 2014⁶.

While the deeds indicate that the “straight-up swap” occurred, the prior owner, Mr. Huffard, did not make any attempt to amend the original 1979 plat to remove the designation of Rec. Area from the property at issue. Therefore, on the plat that existed before the Critical Area Law went into effect, the property is still considered the Rec. Area for the Eagle Hill subdivision. Neither the 1979 plat nor the deeds clearly identify whether there is a development right associated with this parcel.

EXISTING STRUCTURES

As noted above, the 1979 plat indicates the two structures that are the subject of this use variance request. The structures are labelled as “existing buildings.” The application materials refer to these structures as cottages and state that the interior cottage is habitable, and the shoreline cottage is deteriorated and not habitable. No information was provided as to whether the structures have been used for residential purposes since the inception of the County’s Critical Area program.

PRELIMINARY CONSIDERATIONS

First, the County needs to determine whether there is a development right consistent with Critical Area grandfathering provisions. This is a 3.191 acre parcel located within the Resource Conservation Area (RCA) created in 1979 as a Rec. Area. COMAR 27.01.02.07B states that “a local jurisdiction shall permit a single lot or parcel of land that was legally of record on the date of program approval to be developed with a single family dwelling, if a dwelling is not already placed there, notwithstanding that such development may be inconsistent with the density provisions of the approved local program.” Additionally, per COMAR 27.01.02.07A and Anne Arundel County Code 18-13-201, “uses on land in the critical area that were in existence on December 1, 1985 may continue, but intensification or expansion shall be in accordance with this Code and any use that ceases to exist for one year or more shall be subject to the provisions of this Code.”

² Liber 3241, Folio 765

³ Liber 4210, Folio 746

⁴ Liber 25840, Folio 488

⁵ Plat Book 296, Pages 6-7, Plat Nos. 15332-15333

⁶ Liber 27915, Folio 399

Second, if the County determines that there is a development right, the parcel should be designated as a legally buildable lot through the plat process. Our office does not believe that a use variance is the appropriate process to establish a development right on this lot based on existing Anne Arundel County land use and zoning procedures. In all other situations where a lot is not considered legally buildable, applicants in Anne Arundel are instructed to file a subdivision plat to establish a development right. Given the site is RCA, we believe that should be the case here.

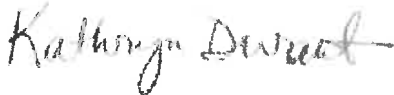
CONCERNS RELATED TO THE USE VARIANCE

If the Hearing Officer determines that a use variance is the appropriate process, the Hearing Officer must determine whether that use is consistent with the grandfathering and RCA density provisions of the Critical Area. The application materials did not demonstrate that both cottages have been used continuously since the date of the County's program approval. Additionally, the waterfront cottage is described as uninhabitable. Based on this information and the applicable Critical Area provisions, we do not believe that a use variance to establish a residential use in either cottage is in conformance with Critical Area law and the County program. Therefore, we believe this use variance request should be denied. The applicant can use the interior cottage for recreational purposes per the recorded plat.⁷

No additional authorizations should be granted allowing the further use of the waterfront cottage, as it has not been used for more than 12 months, and has a hole in the roof. The Anne Arundel County Code does not have provisions for in-kind replacement after the use has been discontinued for more than one year.

Thank you for the opportunity to provide comments. Please include this letter in your file and submit it as part of the record for the variance. Please notify the Critical Area Commission of the decision made in this case. If you have any questions or concerns please contact me at kathryn.durant@maryland.gov or (410) 260-3477.

Sincerely,



Kathryn Durant
Natural Resources Planner

File: AA 308-21

⁷ Based on Anne Arundel County Code 18-13-201, there should be no expansion or intensification of use for the interior cottage.

For Office Use Only

CASE # 2021-0112-V
FEE PAID 250.00
DATE 12/24/19



For Office Use Only

ZONE RL1
CRITICAL AREA: IDA ___ LDA ___ RCA X
BMA: Yes ___ No X
NO. OF SIGNS 2

VARIANCE APPLICATION

NOTE: This form can be downloaded to your computer and filled out utilizing Adobe Reader (or similar product). It can also be printed and filled out by hand.

Applicant(s): James H. Eurice
(Applicant must have a financial, contractual, or proprietary interest in the property)

Property Address: 3.191 acres Eagle Hill Road Pasadena, MD 21122

Property Location: 50 feet of frontage on the (E) side of Eagle Hill Road ;
(Enter Street Name)
250 feet (S) of (Nearest intersecting street) Bishop Road .
(Enter Street Name)

12-digit Tax Account Number 03-240-90022895 Tax District (5) Council District (5)

Waterfront Lot: Y N Corner Lot: Y N Deed Title Reference 27915/399

Zoning District RLD Lot # _____ Tax Map 25 Block/Grid 19 Parcel 346

Area 3.191 (Acres) Subdivision Name Eagle Hill

Description of Proposed Project and Variance Requested (Brief, detail fully in letter of explanation)

A variance to Anne Arundel County Code, Sec. 18-2-201, to allow the use of an existing dwelling and accessory structure on property platted as a Recreation Area in a manner inconsistent with the Code.

The applicant hereby certifies that he or she has a financial, contractual, or proprietary interest in the property; that he or she is authorized to make this application; that the information shown on this application is correct; and that he or she will comply with all applicable regulations of Anne Arundel County, Maryland.

Applicant's Signature [Signature] Owner's Signature [Signature]

Print Name James H. Eurice Print Name James H. Eurice

Mailing Address c/o 7 Old Solomons Island Rd 202 Mailing Address 365 Eagle Hill Road

City, State, Zip Annapolis, MD 21401 City, State, Zip Pasadena, MD 21122

Work Phone c/o Messick & Associates 410-266-3212 Work Phone _____

Home Phone _____ Home Phone _____

Cell Phone 443-463-1707 Cell Phone 443-463-1707

Email Address c/o engr@messickandassoicates.com Email Address jimeurice@yahoo.com

*** Below For Office Use Only ***

Application accepted by Anne Arundel County Office of Planning and Zoning: OO 6/3/21
Initials Date

Variance to USE variance to allow residential structures in a platted recreation area

MAGOTHY RIVER

MATCH LINE SEE SHEET 3

ANNE ARUNDEL COUNTY
FLOOD PLAIN
PASADENA, MD. 21122
D.R.# 27916039
T.A.#03-000-0002394
TM. 25 GR. 19 P. 345

JARRID ROSENBAUM
318 EAGLE HILL ROAD
PASADENA, MD. 21122
D.R.# 2449081
T.A.#03-000-0002315
TM. 25 GR. 19 P. 345 L. 18

KATHLEEN HARTMAN
287 EAGLE HILL ROAD
PASADENA, MD. 21122
D.R.# 2449081
T.A.#03-000-0010271
TM. 33 GR. 1 P. 6 L. 3

GENE & BONNIE
GARRETT TRUSTEE
285 EAGLE HILL ROAD
PASADENA, MD. 21122
D.R.# 2449081
T.A.#03-000-0010270
TM. 33 GR. 1 P. 6 L. 2

KATHLEEN HARTMAN
287 EAGLE HILL ROAD
PASADENA, MD. 21122
D.R.# 2449081
T.A.#03-000-0010271
TM. 33 GR. 1 P. 6 L. 3

GENE & BONNIE
GARRETT TRUSTEE
285 EAGLE HILL ROAD
PASADENA, MD. 21122
D.R.# 2449081
T.A.#03-000-0010270
TM. 33 GR. 1 P. 6 L. 2

DANIEL SCHMIDT
283 EAGLE HILL ROAD
PASADENA, MD. 21122
D.R.# 23332145
T.A.#03-000-14840299
TM. 33 GR. 1 P. 6 L. 4

DANIEL SCHMIDT
283 EAGLE HILL ROAD
PASADENA, MD. 21122
D.R.# 23332145
T.A.#03-000-14840299
TM. 33 GR. 1 P. 6 L. 4

SCALE: 1" = 40'

LEGEND	
	15 - 24% STEEP SLOPES
	25% STEEP SLOPES
	EXISTING PROP. LINE
	EXISTING CONTOUR
	EXISTING WETLAND
	EXISTING 100' BUFFER
	CBCA EXPANDED BUFFER
	EXISTING TREE LINE
	EXISTING ZONING RLD
	EXISTING ZONING O-S
	ZONING LINE

REVISION	DESCRIPTION	BY	DATE

MESSICK & ASSOCIATES*
CONSULTING ENGINEERS,
PLANNERS AND SURVEYORS
7 OLD SOLOMONS ISLAND ROAD, SUITE 202
ANNAPOLIS, MARYLAND 21401
(410) 266-3212 * FAX (410) 266-3502
email: engr@messickandassociates.com

* MESSICK GROUP INC. THE MESSICK AND ASSOCIATES

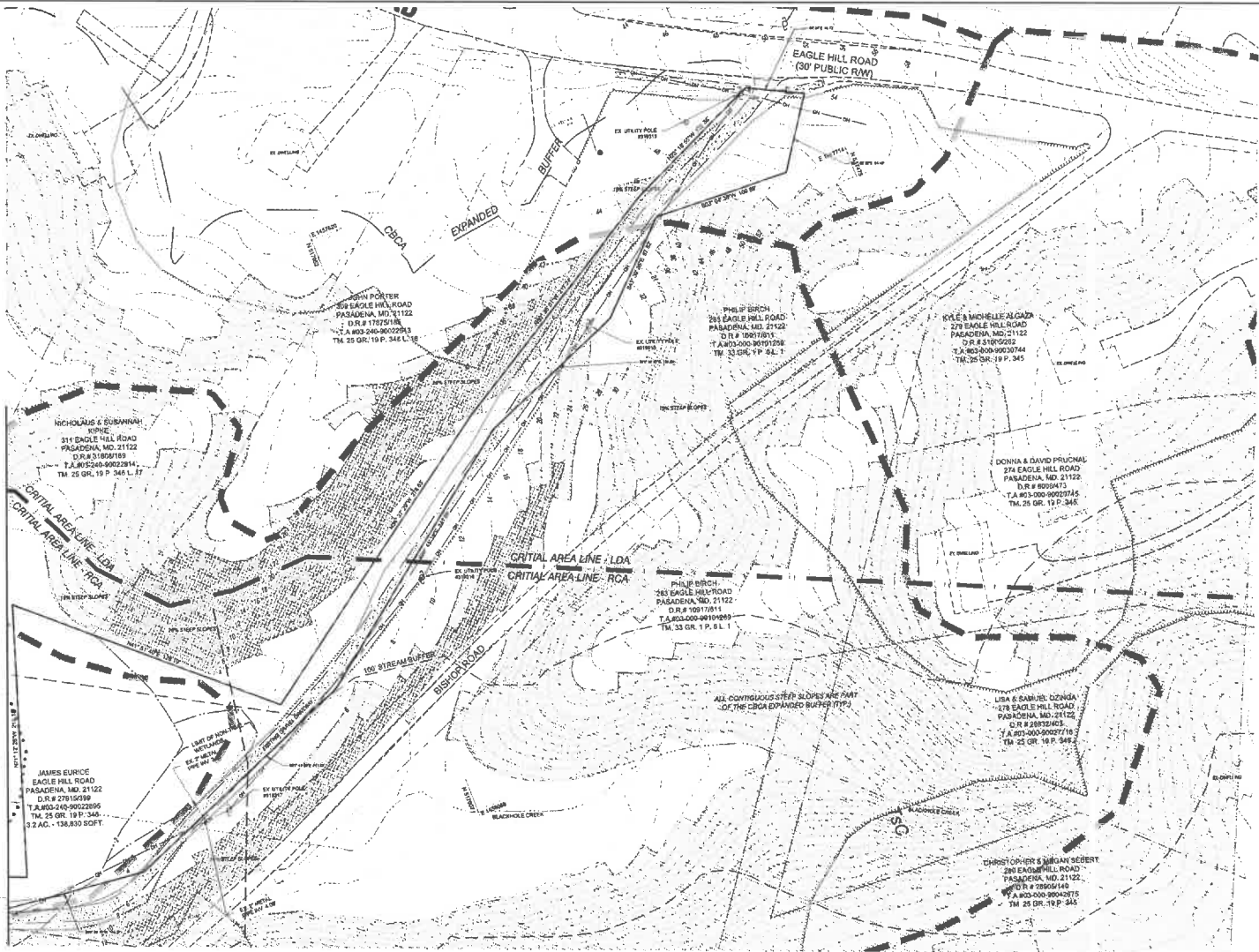


OWNER/DEVELOPER:
JAMES H. RUFFICE
365 EAGLE HILL ROAD
PASADENA, MD. 21122

ADMINISTRATIVE SITE PLAN			
EAGLE HILL ROAD PASADENA, MD			
TM. 25 GR. 19 P. 345 L. 18	TAX ACCOUNT: 03-240-0002394	ZONING: RLD & O-S	ANNE ARUNDEL COUNTY PASADENA, MARYLAND 21122
3185 ASSESSMENT DISTRICT	DATE: DECEMBER, 2019	SHEET: 2 OF 3	

DATE PLOTTED: 12/15/19 11:57 AM
 FILE: S:\19\191177\191177.dwg
 PLOTTER: HP DesignJet 5000 Series Plotter
 PLOTTING: 11/15/19 11:57 AM

MATCH LINE SEE SHEET 2



SCALE: 1" = 40'

LEGEND

- 15 - 24% STEEP SLOPES
- 25% STEEP SLOPES
- EXISTING PROP. LINE
- EXISTING CONTOUR
- EXISTING WETLAND
- EXISTING 100' BUFFER
- CBCA EXPANDED BUFFER
- EXISTING TREE LINE
- ZONING LINE
- EX. ZONING RLD
- EX. ZONING O-S

REVISION	DESCRIPTION	BY	DATE

MESSICK & ASSOCIATES*
CONSULTING ENGINEERS,
PLANNERS AND SURVEYORS

7 OLD SOLOMONS ISLAND ROAD, SUITE 202
ANNAPOLIS, MARYLAND 21401
(410) 266-3212 * FAX (410) 266-3502
email: engr@messickandassociates.com

* SERVICE GROUP INC. IS A MESSICK AND ASSOCIATES COMPANY



OWNER/DEVELOPER:
JAMES H. EURICE
305 EAGLE HILL ROAD
PASADENA, MD 21122

ADMINISTRATIVE SITE PLAN			
EAGLE HILL ROAD PASADENA, MD			
TM, 25 GRD, 19 PARCEL 346	TAX ACCOUNT: 63-240-9022895	ZONING: RLD & O-S	
3.0001 ASSASSINAT DISTRICT		JAMES PRINCE COUNTY PASADENA, MARYLAND 21122	
SCALE: AS SHOWN	DATE: DECEMBER, 2019	SHEET: 3 OF 3	

Downloaded from: https://www.digitallibrary.org/.../EagleHillRoadSitePlan.pdf

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

CASE NUMBER 2021-0045-V

SHADOW POINT, LLC

SECOND ASSESSMENT DISTRICT

DATE HEARD: JUNE 22, 2021

ORDERED BY:

**DOUGLAS CLARK HOLLMANN
ADMINISTRATIVE HEARING OFFICER**

PLANNER: SUMNER HANDY

DATE FILED: JULY 1, 2021

PLEADINGS

Shadow Point, LLC, the applicant, seeks a variance (2021-0045-V) to allow an accessory structure (two-story structure with rooftop deck) with less setbacks and buffer than required and with disturbance to slopes of 15% or greater (steep slopes) on property with a street address of 36 Shadow Point Court, Edgewater, MD 21037.

PUBLIC NOTIFICATION

The hearing notice was posted on the County's website in accordance with the County Code. The file contains the certification of mailing to community associations and interested persons. Each person designated in the application as owning land that is located within 300 feet of the subject property was notified by mail, sent to the address furnished with the application. Jamie Benoit testified that the property was posted for more than 14 days prior to the hearing. Therefore, I find and conclude that there has been compliance with the notice requirements.

FINDINGS

A hearing was held on June 22, 2021, in which the witnesses were sworn and the following was presented regarding the proposed variance requested by the applicant.

The Property

The applicant owns the subject property which has 36 feet of frontage on the south side of Shadow Point Court, 850 feet south of Poplar Point Road, Edgewater. It is known as Lot 9 of Parcel 462 in Block 19 of Tax Map 51 in the

Shadow Point subdivision. The property comprises 3.51 acres and is zoned R1–Residential District. This waterfront lot on the South River is designated in the Chesapeake Bay Critical Area as resource conservation area (RCA) and is located in a buffer modification area (BMA).

The site is currently developed by a dwelling, detached garage, gravel drive and turnaround, pool, pergola, pier, partial remains of a dilapidated cabana, and associated facilities. The site is served by private well water and septic systems.

The Proposed Work

The proposal calls to remove the remains of a dilapidated cabana structure and to construct a new two-story structure with rooftop deck as shown on the site plan admitted into evidence at the hearing as County Exhibit 2. The proposed development is within the 100-foot buffer to the mean high-water line and requires critical area variances to disturb the buffer and steep slopes. Actual disturbance would be determined at permitting. The proposed new structure would be located 30 feet from the front lot line.

The Anne Arundel County Code

§ 18-13-104(a) requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands. § 17-8-301 provides that development on properties containing buffers shall meet the requirements of Title 27 of the State Code of Maryland (COMAR). § 27.01.01(B)(8)(ii) of COMAR states a buffer exists “to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance.”

§ 27.01.09 E(1)(a)(ii) of COMAR authorizes disturbance to the buffer for a new development activity or redevelopment activity by variance.

§ 17-8-201(a) stipulates that development in the RCA may not occur within slopes of 15% or greater. All disturbance shall be limited to the minimum necessary.

§ 18-4-501 sets forth the bulk regulations for development in an R1 district. Accessory structures must be located at least 50 feet from the front lot line.

The Variances Requested

The proposal calls for the following variances:

1. A critical area variance from the prohibition in § 17-8-301 against disturbing the buffer to allow the applicant to construct a new two-story structure with rooftop deck as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting; and
2. A critical area variance from the prohibition in § 17-8-201(a) against disturbing steep slopes to allow the applicant to construct a new two-story structure with rooftop deck as shown on County Exhibit 2, with the actual disturbance to be determined at the time of permitting; and
3. A zoning variance of twenty (20) feet to the 50-foot front setback requirement of § 18-4-501 to allow the new two-story structure with

rooftop deck to be constructed as close as 30 feet from the front lot line as shown on County Exhibit 2.¹

The Evidence Submitted At The Hearing

Findings and Recommendations of the Office of Planning and Zoning (OPZ)

Sumner Handy, a zoning analyst with the OPZ, presented the following findings:

- The subject site is of sufficient size for lots in the R1 district, exceeding both the minimum width requirement at the building restriction line and the minimum area requirement. A review of County aerial imagery reveals a waterfront neighborhood where much of the coast line is encumbered by steep slopes. The neighborhood consists of mostly substantial dwellings, many - if not all of which - enjoy water access amenities in the form of piers. Cabanas built into slopes do not appear to be a common feature of the area; the closest analog seems to be a substantial detached deck along the water at 2808 Deepwater Trail, about 1,000 feet, as the crow flies, east northeast from the subject property. There have been few variances in the area in recent years granting the right to disturb slopes of 15% or greater or to build within the buffer. In Case No. 2004-0357-V, at 39 Poplar Point Road, the applicants were permitted to construct a pool and patio in slopes of 15% or greater, but were not granted (and did not seek) the right to disturb the buffer. In Case No. 1998-

¹ Mr. Gillespie, the applicant's engineer, testified that recent survey work has established that the shoreline has moved since the May 2021 site plan was submitted and the variance to the front setback has been reduced to 20 feet because the proposed structure will be located 30 feet from the shoreline.

0092-V, at 2807 Deepwater Trail, the applicants sought and were granted a variance to disturb the buffer for the construction of an addition to the principal dwelling; according to that decision, the dwelling addition extended 10 feet into what is now a mapped BMA.²

- The applicant explains that the allowable lot coverage at this location is 22,985 square feet and that the current lot coverage is 28,221, for an overage of 5,236 square feet, requiring a 10% net reduction in lot coverage of 524 square feet. The allowable lot coverage, then, is the current lot coverage, 28,221 square feet, less the required reduction, 524 square feet, to reach 27,697 square feet. The proposal does not quite reach this reduction, coming in at 28,191 square feet. Therefore, a modification to the coverage reduction requirement would be required.
- The applicant's letter explains that Hurricane Isabel caused damage to the shoreline that makes the existing cabana unusable as it now periodically floods, and the shoreline requires extensive maintenance of restoration efforts and plantings. The letter explains that those conditions make necessary the placement, in a different location, of a new cabana, and that a portion of the proposed cabana will be used to store materials required to maintain the damaged shoreline. The applicant asserts that denial of the variance will cause the applicant to lose its preexisting accessory structure and would further deny

² Instructive here, when considering the variance granted in Case No. 1998-0092-V, may be the Administrative Hearing Officer's discussion in Case No. 2020-0182-V and others of *Becker v. Anne Arundel County*, which discusses differences in the application of critical area variance law and variance criteria for cases prior to 2002 and the application thereof since.

the right to construct the equipment storage needed for the shoreline restoration.

- The Critical Area Team comments that the existing construction does not constitute a structure today, but in fact the remains of a structure. To use its existence to justify a new structure that requires multiple environmental variances is not in compliance with the spirit and intent of the law. The current applicant has never had use of the remains as a structure and therefore suffered no loss when it was destroyed. There is a pergola at the top of the slope that is more than sufficient to provide shaded enjoyment for the owners. There is ample beach to enjoy in the area and more will accrete after the construction of the living shoreline. As for the need to store equipment to maintain the shoreline, the Critical Area Team does not approve maintenance sheds for living shorelines and would not support setting a precedent with this one. The applicant has indicated that the new structure will provide SWM while the existing one does not. If the ruins are not allowed to be replaced, SWM is not an issue. As for the debris that is washing into the river, that should be cleaned up with the shoreline project. None of the justifications that have been presented are sufficient to set a precedent such as this and allow a new building to be constructed in the slopes and buffer.
- The Critical Area Commission suggested that it does not appear that the proposed structure meets the standard of unwarranted hardship. The applicant has reasonable and significant use of the property without the proposed

accessory structure, as the property is currently improved with a dwelling, extensive driveway, detached garage, pool and patio, and pier. Furthermore, given that the remains of the existing structure will be completely removed, the proposed structure can easily be moved outside of the buffer, eliminating the need for a variance entirely.

- The Soil Conservation District stated that it will provide comments during sediment control review.
- The Health Department has determined that the proposed request does not adversely affect the onsite sewage disposal and well water supply systems, and has no objection to the request.
- For the granting of a critical area variance, a determination must be made as to whether, because of certain unique physical conditions peculiar to and inherent in the property, strict implementation of the County's Critical Area Program would result in an unwarranted hardship. In this case, the site is of sufficient area and width, and the buffer and steep slopes along the coast are not unique to this property: the buffer, of course, applies to all waterfront properties, and much of the immediate waterfront along this area in Edgewater is encumbered by steep slopes. Therefore, no unique physical conditions are present, and therefore no unwarranted hardship can arise from such conditions. It can be said here that, even if one concluded the existence of unique physical conditions at the subject property, the inability to construct the proposed cabana could not be understood as an unwarranted hardship in developing the

lot. The cabana should be understood as a convenience, and the proposal is not substantial and urgent.

- A literal interpretation of the County's Critical Area Program would not deprive the applicant of rights that are commonly enjoyed by other properties in similar areas, namely, the right to retain an existing structure. The applicant, however, does not acknowledge that the proposal is not "to retain [an] existing structure," but rather a proposal to remove a dilapidated structure (that was destroyed more than 17 years ago) and to construct a similar but new structure nearby. § 18-13-201 allows that uses in the critical area that were in existence on December 1, 1985, to remain, except that uses that ceased to exist for one year or more shall be subject to the provisions of the Code. The applicant states that the remaining structure was destroyed in 2003; more than a year has passed since its demolition, and so no grandfathering is in effect here. In any case, in-kind replacement, as defined in 17-1-101, "means the removal of a permanent structure and the construction of another permanent structure in the same location that is smaller than or identical to the original structure in use, footprint, area, height, width and length." The proposal does not meet this definition. (As such, § 18-2-303, which would have allowed for in-kind replacement of a destroyed structure [so long as a building permit was obtained within 18 months of destruction] does not apply.) Further, waterfront cabanas in the buffer and inlaid into steep slopes are not commonly enjoyed in the area.

- Granting of the requested critical area variances would likewise confer on the applicant a special privilege that would be denied by COMAR, Title 27. While the applicant's letter makes a statement to the contrary, no cogent "no special privilege" argument is made, again making false equivalence between the structure to be removed and the proposed structure.
- The applicant has satisfied the requirement that the requests are not based on conditions or circumstances that are the result of actions by the applicant, and that they do not arise from any condition relating to land or building use on any neighboring property. However, the first cabana, built in similar terrain - in the buffer and steep slopes - was irreparably damaged in Hurricane Isabel. The proposed cabana is located mere feet away from the existing dilapidated cabana.
- Building within the buffer and into steep slopes would adversely affect water quality and adversely impact fish, wildlife, or plant habitat within the critical area, and would not be in harmony with the general spirit and intent of the County's Critical Area Program. While the applicant argues the opposite, the applicant could merely remove the existing structure and provide mitigation, plantings, and appropriate stormwater management to improve water and habitat quality. A new cabana is not needed to achieve these goals. There are other suitable locations on this large property for an accessory structure suitable for entertaining and the storage of shore maintenance materials.

- The applicant has not overcome the presumption contained in Natural Resources Article 8-1808 of the State Code that the specific development does not conform to the general purpose and intent of the critical area law. The applicant has not evaluated and implemented site planning alternatives, in accordance with § 18-16-201(c) of the Anne Arundel County Code, given that the plans submitted during the pre-file review are identical to those submitted with this application package, despite comments during pre-file review that are also reflected in this report.
- For the granting of a zoning variance, a determination must be made that, because of unique physical conditions, there is no reasonable possibility of developing the lot in strict conformance with the Code, or, because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship in the development of the lot. While the proposal will not substantially impair the use or development of adjacent property, reduce forest cover in the LDA or RCA, or be contrary to clearing and replanting practices, the proposal fails to meet each of the other criteria applicable to all variance applications.
- The applicant's arguments in favor of this proposal seem to hinge on the County agreeing to the notion that the proposed cabana is a replacement of the existing, dilapidated structure. It is not, and in any case, in-kind replacement, as defined in § 17-1-101(57), is not permitted in the buffer or steep slopes.

- Therefore, the proposal may be understood to alter the essential character of the neighborhood. No other property in the vicinity has a two-story cabana with a rooftop deck inlaid into steep slopes, within the buffer, right at water's edge. As previously noted, the closest analog is a detached deck near the waterfront several properties east of this one. If one such cabana is approved, it would be unique to this property.
- And last, the proposal is not the minimum necessary to afford relief from the Code. The stated purposes of the proposed accessory structure are to house material used in the maintenance of the shoreline and to provide a space for outdoor entertainment. This property, at more than 3.5 acres, boasts plenty of space for the location of an accessory structure that can achieve the applicant's stated goals without the need for such extensive - if any - environmental and zoning variances.
- Based upon the standards set forth in § 18-16-305 of the Code under which a variance may be granted, this OPZ recommends denial of the requested variances.

Other Testimony and Exhibits

The applicant was represented at the hearing by Jamie Benoit, one of its principals. Mr. Benoit was assisted by Philip C. Dales, Esquire, of Liff Walsh, LLC. Evidence was presented through Mr. Benoit, Fred Sieracki, the applicant's architect, and Michael Gillespie of Bay Engineering, Inc., the applicant's engineer. The applicant is involved in restoring 900 linear feet of shoreline on the subject

property, which is probably the largest shoreline restoration on the South River. While the existing cabana was destroyed by storms, the applicant wishes to restore this structure but shift it away from the shoreline. It will be used as an essential part of shoreline restoration to store equipment, obviating the need to carry equipment up and down from the upper area of the property to the shoreline area where the work will be carried out.

The existing cabana cannot be rebuilt where it is located because it is close enough to the shoreline to flood in certain conditions. Accordingly, the location of the new structure has been shifted to the location shown on County Exhibit 2.

Various neighbors submitted letters in support of the applicant's proposed work.

There was no other testimony taken or exhibits received in the matter. The Hearing Officer did not visit the property.

DECISION

State Requirements for Critical Area Variances

§ 8-1808(d)(2) of the Natural Resources Article, Annotated Code of Maryland, provides in subsection (ii), that “[i]n considering an application for a variance [to the critical area requirements], a local jurisdiction shall presume that the specific development in the critical area that is subject to the application and for which a variance is required does not conform to the general purpose and intent of this subtitle, regulations adopted under this subtitle, and the requirements of the jurisdiction's program.” (Emphasis added.) “Given these provisions of the

State criteria for the grant of a variance, the burden on the applicant is very high.” *Becker v. Anne Arundel County*, 174 Md. App. 114, 124; 920 A.2d 1118, 1124 (2007).

In *Becker v. Anne Arundel County*, *supra*, 174 Md. App. at 131; 920 A.2d at 1128, the Court of Special Appeals discussed the history of the critical area law in reviewing a decision from this County. The court’s discussion of the recent amendments to the critical area law in 2002 and 2004, and the elements that must be satisfied in order for an applicant to be granted a variance to the critical area, is worth quoting at length:

In 2002, the General Assembly amended the [critical area] law. ... The amendments to subsection (d) provided that, (1) in order to grant a variance, the Board had to find that the applicant had satisfied each one of the variance provisions, and (2) in order to grant a variance, the Board had to find that, without a variance, the applicant would be deprived of a use permitted to others in accordance with the provisions in the critical area program. ... The preambles to the bills expressly stated that it was the intent of the General Assembly to overrule recent decisions of the Court of Appeals, in which the Court had ruled that, (1) when determining if the denial of a variance would deny an applicant rights commonly enjoyed by others in the critical area, a board may compare it to uses or development that predated the critical area program; (2) an applicant for a variance may generally satisfy variance standards rather than satisfy all standards; and, (3) a board could grant a variance if the critical area program would deny development on a

specific portion of the applicant's property rather than considering the parcel as a whole.

...

In 2003, the Court of Appeals decided *Lewis v. Dept. of Natural Res.*, 377 Md. 382, 833 A.2d 563 (2003). *Lewis* was decided under the law as it existed prior to the 2002 amendments (citation omitted), and held, *inter alia*, that (1) with respect to variances in buffer areas, the correct standard was not whether the property owner retained reasonable and significant use of the property outside of the buffer, but whether he or she was being denied reasonable use within the buffer, and (2) that the unwarranted hardship factor was the determinative consideration and the other factors merely provided the board with guidance. *Id.* at 419-23, 833 A.2d 563.

Notwithstanding the fact that the Court of Appeals expressly stated that *Lewis* was decided under the law as it existed prior to the 2002 amendments, in 2004 Laws of Maryland, chapter 526, the General Assembly again amended State law by enacting the substance of Senate Bill 694 and House Bill 1009. The General Assembly expressly stated that its intent in amending the law was to overrule *Lewis* and reestablish the understanding of unwarranted hardship that existed before being “weakened by the Court of Appeals.” In the preambles, the General Assembly recited the history of the 2002 amendments and the *Lewis* decision. The amendment changed the definition of unwarranted hardship [found in § 8-1808(d)(2)(i)] to mean that, “without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested.” (Emphasis added.)

The question of whether the applicant is entitled to the variance requested begins, therefore, with the understanding that, in addition to the other specific factors that must be considered, the applicant must overcome the presumption, “that the specific development in the critical area that is subject to the application ... does not conform to the general purpose and intent of [the critical area law].”³ Furthermore, the applicant carries the burden of convincing the Hearing Officer “that the applicant has satisfied each one of the variance provisions.”⁴ (Emphasis added.) “*Anne Arundel County’s local critical area variance program contains ... separate criteria. ...Each of these individual criteria must be met.*” *Becker v. Anne Arundel County, supra*, 174 Md. App. at 124; 920 A.2d at 1124. (Emphasis in original.) In other words, if the applicant fails to meet just *one* of these criteria, the variance is *required* to be denied.

In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals considered an appeal claiming that a variance granted by the Worcester County Board of Appeals to allow a property owner to extend a pier across state-owned marshland from his property should not have been granted. The pier would be 80 feet longer than allowed by the Worcester County ordinance. The variance was granted. The Court of Appeals visited the

³ § 8-1808(d) (2) (ii) of the Natural Resources Article. References to State law do not imply that the provisions of the County Code are being ignored or are not being enforced. If any difference exists between County law and State law, or if some State criteria were omitted from County law, State law would prevail. See, discussion on this subject in *Becker v. Anne Arundel County, supra*, 174 Md. App. at 135; 920 A.2d at 1131.

⁴ § 8-1808(d) (4) (ii).

history of the critical area law and efforts by the Legislature to amend and clarify the law. The Court grappled with the phrase “unwarranted hardship,” and asked if “an applicant [must] demonstrate a denial of *all* reasonable and significant use of the entire property, or must the applicant show a denial of *a* reasonable and significant use of the entire property?” (At page 14.) The Court concluded, on page 28, that:

In summary, in order to establish an unwarranted hardship, the 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. (Emphasis added.)

County Requirements for Critical Area Variances

§ 18-16-305(b) sets forth six separate requirements (in this case) that must be met for a variance to be issued for property in the critical area. They are (1) whether a denial of the requested variance would constitute an unwarranted hardship, (2) whether a denial of the requested variance would deprive the applicants of rights commonly enjoyed by other property owners, (3) whether granting the variance would confer a special privilege on the applicants, (4) whether the application arises from actions of the applicants, or from conditions or use on neighboring properties, (5) whether granting the application would not adversely affect the environment and be in harmony with the critical area program, and (6) whether the applicants have overcome the presumption in Natural

Resources Article, § 8-1808(d)(2)(ii), of the State law that the variance request should be denied.

Provided that the applicants meet the above requirements, a variance may not be granted unless six additional factors are found: (1) the variance is the minimum variance necessary to afford relief; (2) the granting of the variance will not alter the essential character of the neighborhood or district in which the lot is located; (3) the variance will not substantially impair the appropriate use or development of adjacent property; (4) the variance will not reduce forest cover in the limited development and resource conservation areas of the critical area; (5) the variance will not be contrary to acceptable clearing and replanting practices required for development in the critical area; or (6) the variance will not be detrimental to the public welfare.

Findings – Critical Area Variances

The Evidence

The evidence shows that the subject property contains 3.6 acres and is improved with a detached single-family dwelling containing 6,307 square feet of living space, a three-car detached garage, gravel drive and turnaround, in-ground swimming pool and pool surround, a pergola, a pier into the South River, and the partial remains of a cabana. The cabana was destroyed by storms. Some part of it remains but it floods under certain conditions.

The applicant wants to ‘rebuild’ the cabana in a better location, as shown on the site plan admitted into evidence as County Exhibit 2. The new structure will

be two-stories in height with a rooftop deck; part of it will be used for the storage of equipment and supplies to continue the ongoing shoreline restoration at the property.

The Right To Rebuild The Existing Cabana

The applicant claims that it has the right to rebuild the existing cabana. It does not. The existing cabana is a conditional use not allowed in the 100-foot buffer. It was destroyed by storms, possibly in 2003. The applicant (or a prior owner) did not apply for a permit to rebuild the cabana within 18 months of its destruction. § 18-2-303.⁵ The remains of the existing cabana are not grandfathered. The applicant does not have the right to rebuild it even in its existing location.

Therefore, the application is not to rebuild the existing cabana. It is an application to build a new structure 30 feet from the shoreline, in the buffer and steep slopes. The application must, therefore, be considered as if the existing cabana were not there.

The Six Requirements In § 18-16-305(b)

Looking at the six requirements in the Code for granting a critical area variance set forth above in § 18-16-305(b), I make the following findings:

Subsection (b)(1) - Unwarranted Hardship.

As explained in the *Assateague Coastal Trust* case discussed above, an unwarranted hardship is something that would deny a property owner a use of his

⁵ This eliminates any need to discuss whether the remains of the cabana still constitute a 'structure' within the meaning of § 18-1-101(143), although, since the applicant agrees that the cabana was 'destroyed,' the conclusion would probably be that it is no longer a 'structure.'

or her property “that is both significant and reasonable” and “which cannot be accomplished elsewhere on the property without a variance.” The applicant already has “significant and reasonable” use of its property. The need for a structure in which to store equipment and materials for restoring the shoreline can be accomplished elsewhere on the property without a variance.

The applicant contends that the proposed cabana⁶ should be allowed because it is needed for the storage of tools and materials for the shoreline restoration work that is ongoing. Such a need is not “significant and reasonable.” It can be carried out by storing tools and materials elsewhere outside the buffer, as suggested by the comment from the Department of Natural Resources (County Exhibit 8). A permanent structure to avoid having to transport tools and materials to the shoreline is not sufficient to overcome the prohibition against disturbing the 100-foot buffer.

The proposed work would provide the applicants with a desirable addition to the subject property – a storage area for tools and materials while the shoreline restoration is ongoing and a two-story rooftop decked cabana at the shoreline once the restoration work is completed. The applicant’s desire to improve its property with the proposed structure in the critical area is, therefore, not a condition created by the property but the desire to upgrade it. Such action does not rise to the level

⁶ The label applied to a structure should not influence a decision as to whether a critical area variance should be granted. Whether the structure is used as a cabana, or, as the applicant contends, as a structure in which to store materials and tools needed for restoration work, it is still a structure in the 100-foot buffer.

of a hardship that warrants a variance from the critical area law, as the courts have recognized:

“It generally is not a hardship to be without a desired convenience or amenity on one’s property, because zoning restrictions are to be enforced in the absence of a ‘substantial and urgent’ need for a variance. *See, Belvoir Farms Homeowners Ass’n*, 355 Md. at 261, 734 A.2d 227. When a variance would be required to build within the critical area buffer, for example, the fact that a particular improvement would enhance the owner’s enjoyment of the property did not establish that it would be a hardship to continue using the property without the variance. *See, e.g., Citrano v. North*, 123 Md. App. 234, 717 A.2d 960 (1998) (fact that proposed deck created “pleasant amenity” did not create hardship); *North v. St. Mary’s County*, 99 Md. App. 502, 519, 638 A.2d 1175 (owner’s desire to build gazebo to read and view creek is not evidence of hardship), *cert. denied sub nom. Enoch v. North*, 336 Md. 224, 647 A.2d 444 (1994).

Chesley v. City of Annapolis, 176 Md. App. 413, 435, 993 A.2d 475, 488-489 (2007). (Emphasis added.)

Chesley is instructive. In that case, the Court of Special Appeals found that the request for a variance to allow a garage in a residential district that was closer to the front lot line than permitted was properly denied by the local zoning agency considering the request:

We conclude, therefore, that the Board drew an appropriate distinction between hardship and “mere inconvenience.” Whether this particular variance is necessary to avoid hardship is a question of fact for the Board. [Citation omitted.] We find substantial evidence in the

administrative record to support the Board's determination that the denial of a 27 ft. front yard setback variance would not be a "particular hardship" on the [applicants], given their undisputed current use of their front yard for loading and the evidence supporting the Board's conclusion that the garage would be a "mere convenience." *Chesley v. City of Annapolis, supra.*

Denying waterfront property owner a two-story structure with rooftop decks in the 100-foot buffer is not a hardship under the critical area law.

Therefore, I find that the applicant has **not met** the requirements of subsection (b)(1).

Subsection (b)(2) - Deprive Applicant of Rights

I find that the applicant would not be deprived of rights commonly enjoyed by other properties in similar areas as permitted in accordance with the provisions of the Critical Area Program, i.e., the right to construct a two-story structure with rooftop deck in the buffer and steep slopes. The many structures at the shoreline on nearby properties do not provide support for the current application. Even if evidence was presented that variances had been granted to allow such structures, which was not provided here, each application is different and must be considered on its own facts. Therefore, I find that the applicant has **not met** the requirements of subsection (b)(2).

Subsection (b)(3) - Special Privilege

I further find that the granting of the requested critical area variances would confer on the applicant a special privilege that would be denied by COMAR,

27.01, the County's Critical Area Program, to other lands or structures within the County's critical area. Therefore, I find that the applicant has **not met** the requirements of subsection (b)(3).

Subsection (b)(4) - Actions By Applicant Or Neighboring Property

I find that the requested critical area variances are not based on conditions or circumstances that are the result of actions by the applicant, including the commencement of development before an application for a variance was filed, and does not arise from any condition relating to land or building use on any neighboring property. Therefore, I find that the applicant has **met** the requirements of subsection (b)(4).

Subsection (b)(5) - Water Quality, Intent of Critical Area Program

The granting of the requested critical area variances may adversely affect water quality or adversely impact fish, wildlife or plant habitat within the County's critical area or a bog protection area. It will also not be in harmony with the general spirit and intent of the County's Critical Area Program. The critical area law clearly prohibits disturbance in the buffer. Therefore, I find that the applicant has **not met** the requirements of subsection (b)(5).⁷

Subsection (b)(7) - § 8-1808(d)(2)(ii) Presumption

In *Becker v. Anne Arundel County*, *supra*, 174 Md. App. at 133; 920 A.2d at 1129, the Court of Special Appeals discussed the presumption found in § 8-

⁷ Subsection (b)(6) relates to bogs which are not a factor in this decision.

1808(d)(2)(ii) of the Natural Resources Article: “The amendment also created a presumption that the use for which the variance was being requested was not in conformity with the purpose and intent of the Critical Area Program.”

I find that the applicant has not overcome the presumption contained in the Natural Resources Article, § 8-1808(d)(2), of the State law (which is incorporated into § 18-16-305 subsection (b)(7)) for the reasons set forth above. Therefore, I find that the applicant has **not met** the requirements of subsection (b)(7).⁸

Having failed to satisfy one or more of the requirements of § 18-16-305(b), the application must be denied.

Having denied the requested critical area variances, it is unnecessary to consider the zoning variance requested by the applicant, which is hereby denied.

ORDER

PURSUANT to the application of Shadow Point, LLC, petitioning for a variance to allow an accessory structure (two-story structure with rooftop deck) with less setbacks and buffer than required and with disturbance to slopes of 15% or greater on property with a street address of 36 Shadow Point Court, Edgewater; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this **1st day of July, 2021**, it is

⁸ Subsection (b)(8) relates to § 18-16-201 which sets out requirements for a pre-filing plan and administrative site plan, and other things not relevant here.

ORDERED, by the Administrative Hearing Officer of Anne Arundel County, that the application is **denied**.



Douglas Clark Hollmann
Administrative Hearing Officer

NOTICE TO APPLICANT

Any person, firm, corporation, or governmental agency having an interest in this Decision and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals within thirty (30) days from the date of this Decision.

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order, otherwise they will be discarded.

CO. EXHIBIT#: 1
CASE: 2021-0045-V
DATE: 6/22/21

**FINDINGS AND RECOMMENDATION
OFFICE OF PLANNING AND ZONING
ANNE ARUNDEL COUNTY, MARYLAND**

APPLICANT: Shadow Point, LLC

ASSESSMENT DISTRICT: 2

CASE NUMBER: 2021-0045-V

COUNCIL DISTRICT: 6

HEARING DATE: June 22, 2021

PREPARED BY: Sumner Handy
Planner

REQUEST

The applicant is requesting variances to allow an accessory structure (two-story cabana with rooftop deck) with less setbacks and buffer than required and with disturbance to slopes of 15% or greater on property located at 36 Shadow Point Court in Edgewater.

LOCATION AND DESCRIPTION OF SITE

The subject property consists of 3.51 acres of land and is located with 36 feet of frontage on the south side of Shadow Point Court, 850 feet south of Poplar Point Road. It is identified as Lot 9 of Parcel 462 in Block 19 of Tax Map 51 in the Shadow Point subdivision.

The property is zoned R1 – Residential District, as adopted by the comprehensive zoning of the Sixth Council District, effective October 7, 2011.

This waterfront lot lies entirely within the Chesapeake Bay Critical Area and is designated as RCA – Resource Conservation Area. A portion of the site is in a mapped Buffer Modification Area, though most of the shoreline is mapped as non-Buffer Modified (Buffer).

The site is currently improved by a detached dwelling, detached garage, gravel drive and turnaround, pool, pergola, pier, partial remains of a dilapidated cabana, and associated facilities. The site is served by private well water and septic systems.

APPLICANT'S PROPOSAL

The applicant proposes to remove the partial remains of a dilapidated cabana structure and to construct a new two-story cabana structure with rooftop deck near the site of the dilapidated one.

REQUESTED VARIANCES

Section 18-13-104(a) of the Anne Arundel County Zoning Ordinance requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands. Section 17-8-301 of the Subdivision Code states that development on properties containing buffers shall meet the requirements of Title 27 of the State Code of Maryland (COMAR). Section 27.01.01(B)(8)(ii) of COMAR states a buffer exists “to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance.” Section

27.01.09 E.(1)(a)(ii) of COMAR authorizes disturbance to the buffer for a new development activity or redevelopment activity by variance. In the case of the subject property, the proposed development is within the 100 foot buffer to the mean high-water line. The proposed development would necessitate a variance to disturb approximately 2,195 square feet within the buffer. Actual buffer disturbance would be determined at permitting.

Section 17-8-201(a) of the Code stipulates that development in the RCA - Resource Conservation Area may not occur within slopes of 15% or greater. The proposed redevelopment would necessitate a variance to disturb approximately 1,705 square feet slopes of 15% or greater. Actual steep slope disturbance would be determined at permitting.

Section 18-4-501 of the Code sets forth the bulk regulations for development in an R1 District. Accessory structures must be located at least 50 feet from the front lot line. The proposed structure would reach as close as 13.4 feet to the front lot line (mean high-water line), necessitating a variance of 37 feet.

FINDINGS

The subject site is of sufficient size for lots in the R1 district, exceeding both the minimum width requirement at the building restriction line and the minimum area requirement. A review of County aerial imagery reveals a waterfront neighborhood where much of the coast line is encumbered by steep slopes. The neighborhood consists of mostly substantial dwellings, many - if not all of which - enjoy water access amenities in the form of piers. Cabanas built into slopes do not appear to be a common feature of the area; the closest analog seems to be a substantial detached deck along the water at 2808 Deepwater Trail, about 1,000 feet, as the crow flies, east northeast from the subject property. There have been few variances in the area in recent years granting the right to disturb slopes of 15% or greater or to build within the buffer. In Case # 2004-0357-V, at 39 Poplar Point Road, the applicants were permitted to construct a pool and patio in slopes of 15% or greater, but were not granted (and did not seek) the right to disturb the buffer. In Case # 1998-0092-V, at 2807 Deepwater Trail, the applicants sought and were granted a variance to disturb the buffer for the construction of an addition to the principal dwelling; according to that decision, the dwelling addition extended 10 feet into what is now a mapped Buffer Modification Area.¹

The applicant explains that the allowable lot coverage at this location is 22,985 square feet and that the current lot coverage is 28,221, for an overage of 5,236 square feet, requiring a 10% net reduction in lot coverage of 524 square feet. The allowable lot coverage, then, is the current lot coverage, 28,221 square feet, less the required reduction, 524 square feet, to reach 27,697 square feet. The proposal does not quite reach this reduction, coming in at 28,191 square feet. Therefore, a modification to the coverage reduction requirement would be required.

The applicant's letter explains that Hurricane Isabel caused damage to the shoreline that makes the existing cabana unusable as it now periodically floods, and the shoreline requires extensive maintenance of restoration efforts and plantings. The letter explains that those conditions make

¹ Instructive here, when considering the variance granted in 1998-0092-V, may be the Administrative Hearing Officer's discussion in Case # 2020-0182-V and others of *Becker v. Anne Arundel County*, which discusses differences in the application of Critical Area variance law and variance criteria for cases prior to 2002 and the application thereof since.

necessary the placement, in a different location, of a new cabana, and that a portion of the proposed cabana will be used to store materials required to maintain the damaged shoreline. The applicant asserts that denial of the variance will cause the applicant to lose its preexisting accessory structure and would further deny the right to construct the equipment storage needed for the shoreline restoration.

The **Critical Area Team** comments that the existing construction does not constitute a structure today, but in fact the remains of a structure. To use its existence to justify a new structure that requires multiple environmental variances is not in compliance with the spirit and intent of the law. The current applicant has never had use of the remains as a structure and therefore suffered no loss when it was destroyed. There is a pergola at the top of the slope that is more than sufficient to provide shaded enjoyment for the owners. There is ample beach to enjoy in the area and more will accrete after the construction of the living shoreline. As for the need to store equipment to maintain the shoreline, the Critical Area Team does not approve maintenance sheds for living shorelines and would not support setting a precedent with this one. The applicant has indicated that the new structure will provide SWM while the existing one does not. If the ruins are not allowed to be replaced, SWM is not an issue. As for the debris that is washing into the river, that should be cleaned up with the shoreline project. None of the justifications that have been presented are sufficient to set a precedent such as this and allow a new building to be constructed in the slopes and buffer.

The **Critical Area Commission** suggested that it does not appear that the proposed structure meets the standard of unwarranted hardship. The applicant has reasonable and significant use of the property without the proposed accessory structure, as the property is currently improved with a dwelling, extensive driveway, detached garage, pool and patio, and pier. Furthermore, given that the remains of the existing structure will be completely removed, the proposed structure can easily be moved outside of the Buffer, eliminating the need for a variance entirely.

The **Soil Conservation District** stated that it will provide comments during sediment control review.

The **Health Department** has determined that the proposed request does not adversely affect the on-site sewage disposal and well water supply systems, and has no objection to the request.

For the granting of a Critical Area variance, a determination must be made as to whether, because of certain unique physical conditions peculiar to and inherent in the property, strict implementation of the County's Critical Area Program would result in an unwarranted hardship. In this case, the site is of sufficient area and width, and the buffer and steep slopes along the coast are not unique to this property: the buffer, of course, applies to all waterfront properties, and much of the immediate waterfront along this area in Edgewater is encumbered by steep slopes. Therefore, no unique physical conditions are present, and therefore no unwarranted hardship can arise from such conditions. It can be said here that, even if one concluded the existence of unique physical conditions at the subject property, the inability to construct the proposed cabana could not be understood as an unwarranted hardship in developing the lot. The cabana should be understood as a convenience, and the proposal is not substantial and urgent.

A literal interpretation of the County's Critical Area Program would not deprive the applicant of rights that are commonly enjoyed by other properties in similar areas, namely, the right to retain

an existing structure. The applicant, however, does not acknowledge that the proposal is not “to retain [an] existing structure,” but rather a proposal to remove a dilapidated structure (that was destroyed more than 17 years ago) and to construct a similar but new structure nearby. Section 18-13-201 allows that uses in the Critical Area that were in existence on December 1, 1985, to remain, except that uses that ceased to exist for one year or more shall be subject to the provisions of the Code. The applicant states that the remaining structure was destroyed in 2003; more than a year has passed since its demolition, and so no grandfathering is in effect here. In any case, in-kind replacement, as defined in 17-1-101, “means the removal of a permanent structure and the construction of another permanent structure in the same location that is smaller than or identical to the original structure in use, footprint, area, height, width and length.” The proposal does not meet this definition. (As such, Section 18-2-303, which would have allowed for in-kind replacement of a destroyed structure [so long as a building permit was obtained within 18 months of destruction] does not apply.) Further, waterfront cabanas in the buffer and inlaid into steep slopes are not commonly enjoyed in the area.

Granting of the requested Critical Area variances would likewise confer on the applicant a special privilege that would be denied by COMAR, Title 27. While the applicant’s letter makes a statement to the contrary, no cogent “no special privilege” argument is made, again making false equivalence between the structure to be removed and the proposed structure.

The applicant has satisfied the requirement that the requests are not based on conditions or circumstances that are the result of actions by the applicant, and that they do not arise from any condition relating to land or building use on any neighboring property. However, the first cabana, built in similar terrain - in the buffer and steep slopes - was irreparably damaged in Hurricane Isabel. The proposed cabana is located mere feet away from the existing dilapidated cabana.

Building within the buffer and into steep slopes would adversely affect water quality and adversely impact fish, wildlife, or plant habitat within the Critical Area, and would not be in harmony with the general spirit and intent of the County’s Critical Area Program. While the applicant argues the opposite, the applicant could merely remove the existing structure and provide mitigation, plantings, and appropriate stormwater management to improve water and habitat quality. A new cabana is not needed to achieve these goals. There are other suitable locations on this large property for an accessory structure suitable for entertaining and the storage of shore maintenance materials.

The applicant has not overcome the presumption contained in Natural Resources Article 8-1808 of the State Code that the specific development does not conform to the general purpose and intent of the Critical Area law. The applicant has not evaluated and implemented site planning alternatives, in accordance with Section 18-16-201(c) of the Anne Arundel County Code, given that the plans submitted during the pre-file review are identical to those submitted with this application package, despite comments during pre-file review that are also reflected in this report.

For the granting of a zoning variance, a determination must be made that, because of unique physical conditions, there is no reasonable possibility of developing the lot in strict conformance with the Code, or, because of exceptional circumstances other than financial considerations, the grant of a variance is necessary to avoid practical difficulties or unnecessary hardship in the development of the lot. While the proposal will not substantially impair the use or development of adjacent property, reduce forest cover in the LDA or RCA, or be contrary to clearing and

2021-0045-V

replanting practices, the proposal fails to meet each of the other criteria applicable to all variance applications.

The applicant's arguments in favor of this proposal seem to hinge on the County agreeing to the notion that the proposed cabana is a replacement of the existing, dilapidated structure. It is not, and in any case, in-kind replacement, as defined in Section 17-1-101(57), is not permitted in the buffer or steep slopes.

Therefore, the proposal may be understood to alter the essential character of the neighborhood. No other property in the vicinity has a two-story cabana with a rooftop deck inlaid into steep slopes, within the buffer, right at water's edge. As previously noted, the closest analog is a detached deck near the waterfront several properties east of this one. If one such cabana is approved, it would be unique to this property.

And last, the proposal is not the minimum necessary to afford relief from the Code. The stated purposes of the proposed accessory structure are to house material used in the maintenance of the shoreline and to provide a space for outdoor entertainment. This property, at more than 3.5 acres, boasts plenty of space for the location of an accessory structure that can achieve the applicant's stated goals without the need for such extensive - if any - environmental and zoning variances.

RECOMMENDATION

Based upon the standards set forth in Section 18-16-305 of the Code under which a variance may be granted, this Office recommends *denial* of Critical Area variances to Section 17-8-301 to allow approximately 2,195 square feet of disturbance in the buffer and Section 17-8-201(b) to allow approximately 1,705 square feet of steep slope disturbance, and *denial* of a zoning variance to Section 18-4-501 of 37 feet to the front line setback.

DISCLAIMER: This recommendation does not constitute a building permit. In order for the applicant to construct the structure(s) as proposed, the applicant shall apply for and obtain the necessary building permits, and obtain any other approvals required to perform the work described herein. This includes but is not limited to verifying the legal status of the lot, resolving adequacy of public facilities, and demonstrating compliance with environmental site design criteria.

For Office Use Only
 CASE # 2021-0045-V
 FEE PAID 250
 DATE 3/12/2021



For Office Use Only
 ZONE R1
 CRITICAL AREA: IDA ___ LDA ___ RCA
 BMA: Yes No
 NO. OF SIGNS 2

VARIANCE APPLICATION

NOTE: This form can be downloaded to your computer and filled out utilizing Adobe Reader (or similar product). It can also be printed and filled out by hand.

Applicant(s): Shadow Point LLC
 (Applicant must have a financial, contractual, or proprietary interest in the property)

Property Address: 36 Shadow Point Court Edgewater, MD 21037

Property Location: 36 feet of frontage on the (S) side of Shadow Point Court ;
(Enter Street Name)
850 feet (S) of (Nearest intersecting street) Poplar Point Road .
(Enter Street Name)

12-digit Tax Account Number 2-719-90040590 Tax District (2) **Council District** (6)
 Waterfront Lot: Y N Corner Lot: Y N Deed Title Reference 32369/178

Zoning District R1 Lot # 9 Tax Map 51 Block/Grid 19 Parcel 462

Area 153,231 (Sq Ft.) Subdivision Name Shadow Point

Description of Proposed Project and Variance Requested (Brief, detail fully in letter of explanation)
Variance to raze an existing concrete foundation with walls located within the buffer and steep slopes
and replace the structure slightly further away from the shoreline

The applicant hereby certifies that he or she has a financial, contractual, or proprietary interest in the property; that he or she is authorized to make this application; that the information shown on this application is correct; and that he or she will comply with all applicable regulations of Anne Arundel County, Maryland.

Applicant's Signature [Signature] Owner's Signature [Signature]

Print Name Shadow Point LLC Print Name Shadow Point LLC

Mailing Address 36 Shadow Point Ct Mailing Address 36 Shadow Point Ct

City, State, Zip Edgewater, MD 21037 City, State, Zip Edgewater, MD 21037

Work Phone _____ Work Phone _____

Home Phone _____ Home Phone _____

Cell Phone 443 527 4782 Cell Phone 443 527 4782

Email Address shadowpointllc@gmail.com Email Address shadowpointllc@gmail.com

*** Below For Office Use Only ***

Application accepted by Anne Arundel County Office of Planning and Zoning: [Signature] 3/12/2021
Initials Date

Variance to allow for razing of structure and replacing with new structure further away from shoreline

GENERAL NOTES

- PROPERTY IS SHOWN ON THE MAP AS PARCEL 19, GRID 19, PARCEL 19, IN EIGHTH WARD, WASHINGTON COUNTY, MARYLAND.
- OWNER/PLANNING: SHADOW POINT, LLC
30 SHADOW POINT COURT
BOWWATER, MD 21037
- CONSULTANT: BAY ENGINEERING INC.
1981 WEA ROAD, SUITE 200
MANNING, MD 21778
OD FRAZIER, J. SAUTIN
444-881-8182
- EXISTING ZONING: R-8
- SITE ADDRESS: 30 SHADOW POINT COURT
BOWWATER, MD 21037
- SITE AREA IS 2.218 ACRES OR 133,291 SQ. FT.
- PROPERTY OUTLINES SHOWN HEREIN ARE AS SHOWN PER PLAT RECORDED @ PLAT BOOK 11, PAGE 44 ENTITLED "SHADOW POINT".
- EXISTING TOPOGRAPHY AND FEATURES SHOWN HEREIN WERE TAKEN FROM ANNE ARUNDEL COUNTY GIS TOPOGRAPHY AND FIELD SURVEY DATA RECORDED BY BAY ENGINEERING INC.
- THE SITE IS LOCATED WITHIN THE RICA RESOURCE CONSERVATION AREA OF THE CHESAPEAKE BAY CRITICAL AREA.
- THE PROPERTY DESCRIBED HEREIN IS LOCATED IN THE BLOOD HAZARD ZONES "C" AND "D" AND IS REGULATED BY THE RISK REDUCTION AND MITIGATION ACT ENACTED FEBRUARY 13, 2014 FOR BAY COUNTY AND DISTRIBUTED BY THE FEDERAL EMERGENCY MANAGEMENT AGENCY.
- THE SITE IS ZONED R-1

LEGEND

- PROPERTY LINE / RIGHT-OF-WAY
- EXISTING FENCE
- EXISTING DRIVEWAY
- EXISTING SPOT ELEVATION
- EXISTING ZONING DESIGNATION
- EXISTING UTILITY POLE AND ENGINEERED WIRE
- EXISTING PUBLIC SERVICE
- EXISTING DRIVEWAY
- EXISTING EDGE OF PAVEMENT
- EXISTING WOOD LINE
- EXISTING WELL
- BUILDING RESTRICTION LINE
- PROPOSED SPOT ELEVATION
- LIMIT OF DISTURBANCE
- REINFORCED BALT FENCE
- PROPOSED ADDITION
- PROPOSED CONC WALK

VARIANCE REQUEST

- 15-13-194. Buffer, expanded buffer, and buffer modification area.
 - Buffer. There shall be a minimum 100-foot buffer backward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands. Specific development criteria apply as set forth in Article 17 of the Code and COMAR.
 - Expanded buffer. Except as provided in subsection (c), the 100-foot buffer shall be expanded beyond 100 feet to include slopes of 15% or greater, residual wetlands, non-tidal wetlands of special State concern, and hydric soils or highly erodible soils. The buffer shall be expanded as follows:
 - If there are contiguous slopes of 15% or greater, the buffer shall be expanded by the greater of four feet for every 1% of slope or to the top of the slope and shall include all land within 50 feet of the top of the slopes.
 - If there are non-tidal wetlands, non-tidal wetlands of special State concern, hydric soils or highly erodible soils, the buffer shall be expanded in accordance with COMAR, Title 27.
 - Buffer modification area. There shall be a buffer modification area established on a map maintained by the Office of Planning and Zoning with respect to all or part of a lot created before December 1, 1985 on which the existing pattern of development permits the 100-foot buffer from performing its protective functions. In buffer modification areas, the buffer is not expanded, and specific development criteria apply as set forth in Article 17 of the Code and COMAR. (Bill No. 4-06; Bill No. 93-12; Bill No. 75-13)
 - 17-6-201. Development on slopes of 15% or greater.
 - Development in the LDA. Development in the limited development area (LDA) or in the resource conservation area (RCA) may not occur within slopes of 15% or greater unless development will facilitate stabilization of the slope, it to show connection to a public utility or to provide direct access to the shoreline. All disturbances shall be limited to the minimum necessary.

SITE TABULATIONS

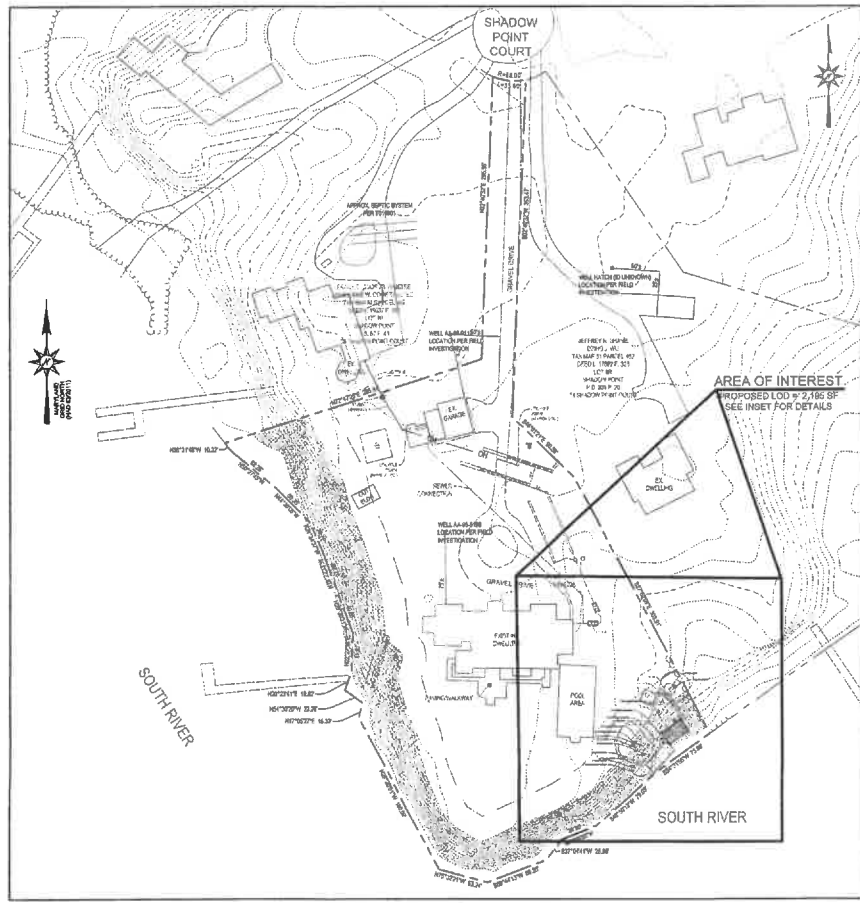
TOTAL AREA OF SITE = 163,211 SQ. FT.
 AREA OF DISTURBANCE = 2,198 SQ. FT.
 EX. LOT COVERAGE = 28,221 SQ. FT.
 ALLOWABLE LOT COVERAGE (15%) = 22,865 SQ. FT.
 10% REDUCTION = 20,031 SQ. FT. = 4,040 SQ. FT. = 898 SQ. FT.
 ALLOWABLE LOT COVERAGE PER 10% REDUCTION = 28,428 SQ. FT.
 EX. LOT COVERAGE (TO BE REMOVED) = 408 SQ. FT.
 PROPOSED LOT COVERAGE = 375 SQ. FT.
 TOTAL EX. AND PROPOSED LOT COVERAGE = 28,191 SQ. FT.

MITIGATION NOTE

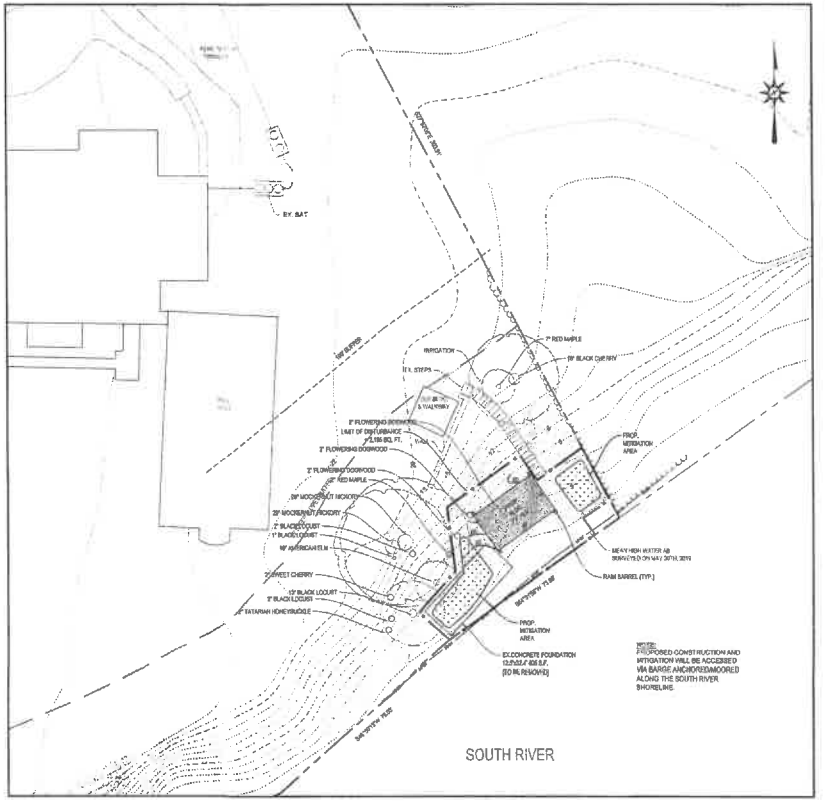
THE SITE WILL REQUIRE 2,198 SQ. FT. OF DISTURBANCE. THIS DISTURBANCE WILL REQUIRE MITIGATION AT A RATIO OF 1 TREE / 3 SHRUBS PER EVERY 300 SQ. FT. OF DISTURBANCE.



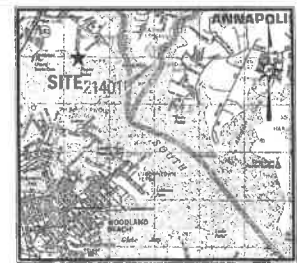
CALL BEFORE YOU DIG! MARYLAND LAW REQUIRES 48 HOURS NOTICE BEFORE PLANNED WORK TO MAINTAIN UNDERGROUND UTILITIES PRIOR TO EXCAVATION. M&E UTILITY: 1-800-337-7777



OVERALL SITE BOUNDARY PLAN
SCALE: 1" = 50'



INSET
SCALE: 1" = 20'



VICINITY MAP
SCALE: 1" = 2000'
COPYRIGHT ADG THE MAP PEOPLE
PERMITTED USE NO. 06301260

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 Engineers, Planners and Surveyors
 2008 Elm Road, Suite 100
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 410-267-2007
 www.bayengineering.com

Date: APRIL 2020
 Job Number: 11-8918
 Scale: AS SHOWN
 Drawn By: J. ELLIOTT
 Approved By: J. ELLIOTT
 Folder Reference: SHADOW POINT COURT

VARIANCE SITE PLAN
 GRADING PERMIT PLANS
 FOR THE
SHADOW POINT, LLC
 30 SHADOW POINT COURT
 BOWWATER, MD 21037
 TAX MAP PL. GRID 19, PARCEL 19, LOT 3 SHADOW POINT
 SECOND DISTRICT - ANNE ARUNDEL COUNTY - ZONE

Sheet No. 1 OF 1

PLOTTED: APR 20, 2020 - 4:44pm

F:\118-8918 SHADOW POINT COURT\Drawing Files\Grading\Permit\118-8918 VARIANCE PLAN.dwg OVERALL TOPIC



















































