

BEFORE THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY

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In the Matter of an Application by *
Michael Scalia and Dina Scalia * Case No. BOA-19-12-0054
Requesting a Zoning Variance *
* * * * *

OPINION AND ORDER

Introduction

The matter before the Board of Appeals of Queen Anne's County ("Board") in this case is an application for a zoning variance filed by Mr. Michael Scalia and Ms. Dina Scalia ("Applicants"). The Applicants seek relief from the dual front-yard setback requirement applicable to corner lots in NC zoning districts.

On February 12, 2020, beginning at 5:00 p.m., the Board conducted a public hearing in the main meeting room adjunct to the Board's offices at 110 Vincit Street, Centreville, Maryland, to consider the Applicants' variance request. At the beginning of the hearing, the Board established all requirements were met governing (1) the filing of the variance application, and (2) notice of the February 12 public hearing. No one attending the public hearing objected to the Board exercising jurisdiction over the Applicants' case. Board members hearing the case were Mr. Kenneth R. Scott, Chairman; Mr. Howard A. Dean, Vice Chairman; and Mr. Craig W. McGinnes, Member.

Requested Relief

The Applicants request a variance from §18:1-19.E.(1)(c)[4][f][i] of the Code of Public Laws of Queen Anne's County, 1996 Edition ("Code") to reduce the required front-yard setback from 35 feet to 17 feet to construct a covered porch along the front of their home. The proposed porch will measure 8 feet, four inches in depth by 45 feet, ten inches in length. The 35-foot

front-yard setback is applicable to the Applicants' lot on two sides because the Applicants' lot is a corner lot abutting two streets. Along its south side, the lot abuts Oregon Road. Along its east side, the lot abuts Oak Street.

At its closest point, the proposed porch will be set back 17 feet from Oregon Road. The Applicants thus ask for a variance from the front-yard setback applicable to Oregon Road in the amount of 18 feet.

Variance Standards

The standards the Board must apply to the Applicants' variance request are set forth in § 18:1-121.B. of the Code. To grant the requested variance the Board must find:

1. Literal enforcement of Chapter 18:1 of the Code would result in unnecessary hardship or practical difficulty as the result of specified conditions;
2. Those conditions are peculiar to the property involved;
3. Those conditions are not the result of any action taken by the appellant;
4. The variance will not be contrary to the public interest; and
5. Evaluation of the alternatives proves a variance is required.

In addition, under the provisions of § 18:1-122.A. of the Code, the Board must find any variance granted is no greater than an amount minimally required to ameliorate the conditions and circumstances giving rise to any practical difficulty or unnecessary hardship.

Property and Neighborhood Description

The Applicants' lot is in the Fourth Election District of Queen Anne's County at 200 Oregon Road in the Stevensville area of the County ("Property"). The Property is designated as lot 2 and lot 4 in block H, of the Third Section of the Kent Island Estates subdivision. In turn, block H is designated as parcel 82 on sectional zoning map no. 70. The plat of the Third Section of Kent Island Estates is recorded in the plat records of Queen Anne's County in plat book TSP 1, page 6.

The Property is zoned NC-20, Neighborhood Conservation. The Property is not in the Chesapeake Bay Critical Area. NC-20 zoning provides for an average residential lot size of 20,000 square feet. The NC-20 district and other NC zoning districts “are intended to preserve the character, density, and scale of existing residential neighborhoods . . . and they allow for in-fill development to be compatible with the surrounding area.” *See* Code § 18:1-19.A.(1).

The Property contains about 21,600 square feet, which is just under a half-acre in size. The Property is rectangular in shape. The Property has 180 feet of frontage along the north side of Oregon Road and 120 feet of frontage along the west side of Oak Street. Access to the Property is from Oak Street.

The Property is improved with a one-story single-family home containing about 2,300 square feet of living area. Although cocked at a slight angle toward the intersection of Oak Street and Oregon Drive, the home generally faces Oak Street. The home has a deck along the rear. Other improvements include a detached garage situated about 10 feet north of the home and a paved driveway connecting the garage to Oak Street. The driveway has been widened to provide off-street parking along the north side of the garage. There is a private septic tank and drainfield located to the rear of the home. The yard behind the home is fenced.

The Property is basically flat; there are no steep slopes. The Property’s yards are mostly lawn, but the Property does contain two mature trees between the home and Oak Street, as well as some ornamental shrubbery.

The Applicants propose a one-story, covered porch addition to their home. The porch will run the entire length of the home (generally facing Oak Street), about 45 feet, 10 inches. The porch will be 8 feet, four inches in depth. The porch will be located outside the front-yard setback from Oak Street, but the southeast corner of the porch will be as close as 17 feet to the right-of-way of Oregon Road. The southeast corner of the Applicants’ existing home is itself located 19 feet from Oregon Road.

The neighborhood in which the Property is located consists of Section Three of Kent Islands Estates. The Chesapeake Bay borders the neighborhood along the west, with Tolson Creek and Virginia Road along the south, Roamancoke Road (Maryland Route 8) along the east, and Maryland Road and Price Creek along the north. Section Three of Kent Islands Estates is developed with single-family homes generally about the same size as the Applicants' home, with a few larger homes along the shorelines of Tolson Creek and the Chesapeake Bay. Kent Island Estates is in the lower third of Kent Island, about 6½ miles by road south of U.S. Route 50/301. Immediately to the north and south of the neighborhood are agricultural fields and woodlands.

Department of Planning and Zoning Recommendation

Mr. Harold Veasel, a zoning inspector with the County's Department of Planning and Zoning ("P&Z") represented P&Z during the public hearing. Mr. Veasel offered into evidence P&Z's staff report, which the Board admitted as P&Z Exhibit 1. As Mr. Veasel summarized the report and described the Applicants' proposal, he referred to a copy of the report, the variance site plan, and an aerial photograph of the Property projected onto a large screen visible to those attending the hearing.

Mr. Veasel testified the Property has two front yards because it is a corner lot. Thus, the Code requires a front-yard setback from both abutting streets. Kent Island Estates was platted in the 1950s. The Applicants' home was built in 1976. The front of the home faces Oak Street. The home's southern side is oriented toward Oregon Road at a slight angle. The angle puts the southeast corner of the home about 19 feet from Oregon Road. The Applicants' proposed porch would reduce this setback to 17 feet.

The proposed porch will be covered. It will extend along the entire front of the home, which is a distance of almost 45 feet. The porch will be a little over eight feet deep. Like the existing home, the angle of the porch vis-à-vis Oregon Road will place the porch closer to the road than the allowed 35 feet, in this case two feet closer than the existing home. In response to

a question from the Board, Mr. Veasel testified if the Property abutted another lot to the south, instead of Oregon Road, the yard in question would be considered a side yard. In such a situation, the setback would be 15 feet.

In conclusion, Mr. Veasel testified P&Z does not object to approval of the variance the Applicants seek.

Applicants' Presentation

Mr. Michael Scalia appeared before the Board to present the Applicants' case. Mr. Scalia testified the Applicants are in the process of enlarging their existing home. Part of the addition will be an apartment for Mr. Scalia's brother, who was in a car accident about 30 years ago. His brother is now 45 years old and because of his injuries will soon have to use a wheelchair full time. The new porch is being designed with eight feet of depth to allow easy wheelchair use.

Mr. Scalia testified the new improvements to the home will meet all setback requirements except for a corner of the proposed porch. At the southeast corner, the porch will be 17 feet from Oregon Road, which is only two feet closer than the existing home.

Testimony by Others

No one else appeared before the Board to testify or to ask questions about the Applicants' variance request.

Findings and Conclusions of the Board

Based on the testimony and exhibits provided by Mr. Veasel and Mr. Scalia, and duly considering the factors set forth in § 18:1-121.C. of the Code, the Board finds and concludes as follows.

I.

Unnecessary hardship or practical difficulty

Because of conditions associated with the Applicants' Property, the Board concludes literal enforcement of the front-yard setback requirement found in §18:1-19.E.(1)(c)[4][f][i] of

the Code, along the lot line abutting Oregon Road, would result in practical difficulty. As depicted by Applicants' Exhibit 4, the practical difficulty arises because of the location of the Applicants' home. The home's location was set when the home was built in 1976, which is about 20 years before the County adopted its current zoning regulations. Because the home predates current zoning regulations, the Board considers the home's location to be a physical feature of the Property as far as zoning setbacks are concerned.

The Board notes, too, the existing home generally faces Oak Street and access to the Property is derived from Oak Street. Thus, the yard between the home and Oak Street is functionally the Property's front yard, which makes the yard between the home and Oregon Road a functional side yard.

II.

Conditions must be peculiar to the Property

The Board concludes the foregoing conditions are peculiar to the Property. The Board finds the Property is peculiarly affected by a combination of the home's location and its status as a corner lot. Ordinarily, a lot 120 feet wide could accommodate a home up to 85 feet in length. Here, however, the existing home (which was 45 feet in length when built) was sited only 19 feet from Oregon Road.

The home also was built at an angle to the abutting roads so that it faces the intersection of Oak Street and Oregon Road. This angle creates an unusual problem for adding a porch to the front of the home because any addition is forced to be closer to Oregon Road than 35 feet, and, in this case, a porch eight feet deep must be two feet closer to the road than the existing home.

The fact the Property consists of two lots originally platted in the 1950s demonstrates the peculiar conditions affecting the Property. Even with the two lots combined, the existing home was sited almost entirely on one of the lots. The Board also notes that if the Property were not a corner lot, the proposed porch would meet the minimum side-yard setback.

III.

Conditions must not result from actions taken by the Applicants

The Board concludes the foregoing conditions are not the result of actions taken by the Applicants. The Applicants purchased the Property only about 18 months ago. The Applicants are not responsible for the platting of the Property nor the original location of the home.

IV.

The variance must not be contrary to the public interest

The Board concludes that granting the requested variance will not be contrary to the public interest. A reduced front yard for the proposed addition will have no adverse impact on Oregon Road because the porch will be set back only two feet closer to the road (at one corner) than the existing home. Adequate sight distance at the intersection will be maintained due to the home's angle facing the intersection and the setback of approximately 60 feet that will remain between the southeast corner of the porch and the intersection.

Moreover, Oregon Road is a local street that primarily serves the homes built along it. The basic grid pattern of this section of Kent Island Estates includes five other local streets that intersect with Romancoke Road, which means traffic into and out of the subdivision does not overburden any one local street.

Granting the requested variance will allow the Applicants to construct a needed porch along the front of their existing home. The covered porch will complement the other improvements the Applicants are making to their home and will provide the Applicants' family member who must use a wheelchair with what will effectively be a usable outdoor area. Furthermore, the porch will increase the value of the Property and, along with the Applicants' other improvements, will contribute to the revitalization of the neighborhood. An increase in the value of the Property will have a corresponding increase (even if incremental) in the value of other lots in Kent Island Estates.

Based on the foregoing considerations, and on the fact no one appeared before the Board to oppose the requested variance, the Board concludes the Applicants' proposal is not contrary to the public interest. Finally, in this case, the Board finds it significant the Department of Planning and Zoning does not object to approval of the requested variance.

V.

Evaluation of possible alternatives

The Board concludes an evaluation of possible alternatives establishes that the requested variance is required. The Property's corner lot status and the location of the existing home make it impossible to add a porch along the front of the existing home without a variance. In theory, the proposed porch could be pushed back from Oregon Road another 18 feet. But doing so would do nothing to change the setback of the existing home and would result in an odd-looking porch. Such a shorter porch also would not allow for convenient direct access from the home's existing front door. Therefore, the Board does not consider a shorter porch to be a reasonable alternative.

VI.

Minimum variance required

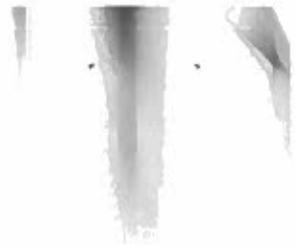
The Board concludes the requested variance is the minimum deviation from the provisions of Chapter 18:1 that would allow the Applicants to build a reasonably sized and compatibly designed covered porch as an addition to their existing home, especially considering the Kent Island Estates neighborhood in which the Property is located. As the Board previously found, adding a reasonably sized porch to the front of the existing home requires a variance. The proposed porch, despite its eight-foot depth, will be located only two feet closer to Oregon Road than the existing home. Reducing the porch's depth would result in a porch too narrow for wheelchair use, and, in any event, would not eliminate the need for a variance. Moving the porch farther from Oregon Road to eliminate the need for a variance is not reasonable given the

location and shape of the existing home. Such a shorter porch also would detract from the appearance of the home and the neighborhood generally.

For the foregoing reasons, the Board finds the Applicants have minimized the variance needed to add a reasonably sized and useful porch along the front of their home.

Decision

Based on the foregoing findings and conclusions, by a vote of three in favor and none opposed, the Board grants to the Applicants a variance from the provisions of § 18:1-19.E.(1)(c)[4][f][i] of the Code to reduce the required front-yard setback, applicable to the Property's lot line abutting Oregon Road, from 35 feet to 17 feet to construct an 8-foot, 4 inch by 45-foot, 10-inch covered porch along the front of the Applicants' home. The Applicants must construct the porch in substantial accord with the variance site plan (Applicants' Exhibit 4).

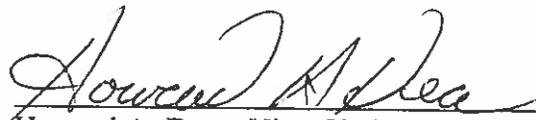


ORDER

For the reasons set forth in the foregoing Opinion, it is this 9th day of March, 2020, ordered that the variance requested for Michael Scalia and Dina Scalia, in Case No. BOA-19-12-0054, be granted.



Kenneth R. Scott, Chairman



Howard A. Dean, Vice-Chairman

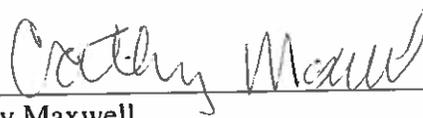


Craig W. McGinnes, Member

State of Maryland, County of Queen Anne's:

I HEREBY CERTIFY that the foregoing is a true and correct copy of the Opinion and Order of the Board of Appeals of Queen Anne's County in Case Number BOA-19-12-0054, for Michael Scalia and Dina Scalia, which Opinion and Order resulted from a public hearing conducted by the Board of Appeals on February 12, 2020 and that the minutes and a recording of the February 12, 2020 meeting are filed in the office of Board of Appeals.

Certified this 9th day of March, 2020 by:



Cathy Maxwell
Clerk to the Board of Appeals

BEFORE THE BOARD OF APPEALS OF QUEEN ANNE'S COUNTY

* * * * *

In the Matter of an Application by *
Thomas J. Tracy *
and * Case No. BOA-19-12-0056
Carol S. Tracy *
for a Critical Area Variance *
* * * * *

OPINION AND ORDER

Introduction

The matter before the Board of Appeals of Queen Anne's County ("Board") in this case is an application filed by Mr. Thomas J. Tracy and Ms. Carol S. Tracy ("Applicants") to vary regulations applicable to land in the Chesapeake Bay critical area.¹ Specifically, the Applicants seek a variance to disturb an expanded critical area buffer to construct a porch, deck, patio, and inground swimming pool on the waterside of their property.

On February 12, 2020, beginning at 5:15 p.m., the Board conducted a public hearing in the main meeting room adjunct to the Board's offices at 110 Vincit Street, Centreville, Maryland, to consider the Applicants' variance request. At the beginning of the hearing, the Board established all requirements were met governing (1) the filing of the variance application, and (2) notice of the February 12th public hearing. No one attending the public hearing objected to the Board exercising jurisdiction over the Applicants' case. Board members hearing the case were Mr. Kenneth R. Scott, Chairman; Mr. Howard A. Dean, Vice Chairman; and Mr. Craig W. McGinnes, Member.

¹The Chesapeake Bay critical area includes all land within 1,000 feet of tidal waters and tidal wetlands. See *Md. Ann. Code Nat. Res.* § 8-1807(a) (2019).

Requested Relief

The Applicants ask to vary the provisions of § 14:1-11, § 14:1-51.A. and § 14:1-51.B. of the Code of Public Laws of Queen Anne's County, 1996 Edition ("Code" or "County Code") to allow disturbance of and clearing and construction activity in the critical area buffer. Section 14:1-11 of the Code defines the buffer as:

a naturally vegetated area or vegetated area established or managed to protect aquatic, wetland shoreline, and terrestrial environments from man-made disturbances. In the Critical Area District, the minimum Buffer is a continuous area located immediately landward of tidal waters (measured from the mean high water line), tributary streams in the critical area, and tidal wetlands and has a minimum width of 100 feet. The Buffer shall be expanded beyond the minimum depth to include certain sensitive areas as per requirements established in . . . Chapter 14:1.

Under § 14:1-51.A. of the Code, with certain exceptions not relevant here, "[n]ew development activities, including clearing of existing natural vegetation, erection of structures, construction of new roads, parking areas or other impervious surfaces, and the placement of sewage disposal systems, are not permitted in the Buffer." Under § 14:1-51.B. of the Code, again with certain exceptions, "no natural vegetation shall be removed nor shall the slope of the land surface be altered in the Buffer."

The Applicants' lot is presently unimproved. The Applicants propose to build a single-family home on their lot. Because much of the lot is in the critical area buffer, as expanded due to the presence of tidal wetlands, the Applicants propose to site their new home at the edge of the expanded buffer. Thus, the yard on the waterside of the proposed home will essentially be all buffer. Nevertheless, along the waterside of their proposed home, the Applicants propose to attach to the home a 16-foot by 20-foot screened porch and a 16-foot by 16-foot deck. Adjacent to the waterfront side of the proposed porch and deck, the Applicants propose to construct an 18-foot by 28-foot inground swimming pool and at-grade patio decking around the pool.

Altogether, the proposed construction on the waterside of the home in the critical area buffer would result in about 1,080 square feet of permanent buffer disturbance, extending about

32 feet into the buffer at the point of maximum extension. An additional portion of the buffer would be temporarily disturbed during construction of the porch, deck, pool, and patio decking.

Variance Standards

The standards the Board must apply to the Applicants' variance request are found in Title 27 of the Code of Maryland Regulations ("COMAR") and Title 14:1 of the County Code.

In § 27.01.12.04, COMAR provides as follows.

A local jurisdiction may not grant a variance unless the local jurisdiction makes written findings based on competent and substantial evidence that:

A. In accordance with Natural Resources Article, §8-1808(d)(3)(ii), Annotated Code of Maryland, an applicant has overcome the presumption that the specific development activity for which the variance is required does not conform with the general intent of the local jurisdiction's program; and

B. The applicant has satisfied each of the following variance provisions:

(1) Due to special features of the site or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the local Critical Area program would result in an unwarranted hardship to the applicant;

(2) A literal interpretation of the local Critical Area program would deprive the applicant of a use of land or a structure permitted to others in accordance with the provisions of the local Critical Area program;

(3) The granting of the variance would not confer upon the applicant any special privilege that would be denied by the local Critical Area program to other lands or structures in accordance with the provisions of the local Critical Area program;

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

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

(6) The granting of the variance would not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's local Critical Area; and

(7) The granting of the variance would be in harmony with the general spirit and intent of the Critical Area law, the regulations in this subtitle, and the local Critical Area program.

Regarding the variance standards in § 14:1-66 of the County Code, the Board construes the legal effect of many of the Code's variance standards to be the same as, or equivalent to, the variance standards set forth in COMAR, even where the wording is slightly different. In explaining its findings and conclusions, the Board will combine its discussion of the Code standards with its discussion of the equivalent COMAR standards. Where COMAR or the Code sets forth variance standards that are not duplicative in the legal sense, the Board will explain its findings and conclusions for each such standard separately.

Under § 14:1-66 of the Code, the Board must be able to make the following findings to grant a critical area variance.

- A. A literal enforcement of this Chapter 14:1 would result in unnecessary hardship as the result of specified conditions, which hardship is not shared by owners of other property in the same development area;
- B. Those conditions are peculiar to the property involved;
- C. Those conditions are not the result of any action taken by the applicant;
- D. The variance will not be contrary to the public interest or the policies, goals and objectives of this Chapter 14:1 and the Queen Anne's County Critical Area Program;
- E. The variance will not confer upon an applicant any special privilege denied to other owners of like property and/or structures within the critical area;
- F. The variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the critical area;
- G. The variance is the minimum deviation from the provisions of this Chapter 14:1 that will make possible the reasonable use of land or structures; and
- H. The granting of the variance will be in harmony with the general purpose and intent of this Chapter 14:1 and the Queen Anne's County Critical Area Program and the variance shall not result in a use not permitted in the applicable development area or an increase in the applicable density limitations.

Property and Neighborhood Description

The lot involved in this variance application has an address of 141 Quail Run Drive in the Third Election District of Queen Anne's County, a little over a mile by road northwest of

Maryland Route 213 (South Liberty Street), in the Centreville area of the County (“Property”). The Property is designated as lot 10 in the subdivision known as Corsica Landing Estates. In turn, Corsica Landing Estates is designated as parcel 114 in grid 5 of sectional zoning map 35. The Property is zoned NC-1, Neighborhood Conservation. NC-1 zoning requires a minimum lot size of one acre. In general, NC zoning is “intended to preserve the character, density, and scale of existing residential neighborhoods.”

The Property is a waterfront lot and thus is in the critical area. The County’s critical area maps designate the Property as part of an LDA-Limited Development Area. Among other land uses, the LDA designation allows single-family residential development at densities established by the land’s underlying zoning.

The Property is 1.42 acres in size and unimproved. About 30% of the Property consists of tidal wetlands growing along the northeastern shore of the Corsica River roughly 2,000 feet southeast of Sycamore Point. In addition to tidal wetlands, a stand of mature trees grows in an “L” shape along the northern and eastern sides of the wetlands. The rest of the Property, including the buildable area outside the buffer, is cleared and mostly grassed.

Along the Corsica River, the Property has about 200 feet of gently curving shoreline. The Property also has approximately 213 feet of frontage along the west side of Quail Run Drive. Overall, the Property is rectangular in shape. The tidal wetlands adjacent to the Corsica River, however, bend northward just beyond the Property’s southern lot line. The bend in the wetlands results in wetlands and an expanded buffer that encompass nearly 75% of the Property, leaving a building envelope about 125 feet by 125 feet in the northern corner of the Property.

The Applicants propose to build a two-story single-family home, including an attached garage, within a footprint measuring about 50 feet by 80 feet. A private driveway will connect the garage and a proposed outdoor parking area with Quail Run Drive. The Applicants propose a private septic system and private well to serve the Property. The approved septic reserve area,

which is 10,000 square feet in size, is situated along Quail Run Drive between the road and the Applicants' proposed home. The septic reserve area requires the home and other proposed improvements to be set back 75 feet or more from Quail Run Drive toward the buffer.

The neighborhood in which the Property is located is a semi-rural area north of the town of Centreville. The Corsica River bounds the neighborhood to the west, Three Bridges Branch and Churchill Road to the south, Spaniard Neck Road to the east, and Alder Branch to the north. Land uses in the neighborhood include a mix of large-lot single-family homes, including Corsica Landing Estates, agricultural uses, and some forested land. The Centreville Community Church is situated in the far eastern corner of the neighborhood.

Most of the lots in Corsica Landing Estates are about an acre in size, with several larger lots (including the Property) that range up to about four acres in size. Most of the subdivision's lots are improved with single-family homes about the same size as the home the Applicants propose. Many lots support residential accessory structures, including inground swimming pools. Aerial photographs show 10 swimming pools on the waterside of lots located between the Corsica River and Quail Run Drive. Both lots with pools and lots without pools have waterside porches, decks, or patios.

Agency Recommendations

Mr. Joe Pippin, a zoning inspector with the County's Department of Planning and Zoning ("P&Z") represented the Department during the public hearing. Mr. Pippin offered into evidence P&Z's staff report, which the Board admitted as P&Z Exhibit 1. As he testified, Mr. Pippin projected a copy of the staff report, the Applicants' variance site plan, and an aerial photograph onto a large screen visible to those attending the public hearing.

Mr. Pippin described the Property and explained the Applicants' variance request. Much of Mr. Pippin's testimony mirrored his staff report. In pertinent part, as modified by the Board to include additional aspects of Mr. Pippin's testimony, the staff report states:

1. The proposed home will be outside the critical area buffer. The proposed porch, deck, and pool will be in the buffer, with the pool encroaching into the buffer by about 35 feet.
2. The property is allowed 6,760 square feet of lot coverage. The project proposes 6,716 square feet of lot coverage.
3. Davis and Associates Environmental Consulting, LLC prepared a Wetland Delineation Report for Kirby and Associates, Inc. to determine the extent of tidal wetlands and the critical area buffer.
4. In letter dated January 17, 2020 signed by Susan Makhoul, the State of Maryland Critical Area Commission states "allowance for a small deck and/or patio may be necessary. However, the inclusion of the pool does not meet the standard of unwarranted hardship and, therefore, should be denied." The letter also states, "The applicant has failed to meet five of the seven variance standards as described above; therefore, we oppose this variance."
5. The Applicants must comply with a Buffer Management/Establishment Plan approved by the Department of Planning and Zoning that will include 20 planting clusters in the expanded buffer.

In response to a question from the Board, Mr. Pippin explained he calculated the 6,760 square feet of allowed lot cover from the Applicants' variance plan and the Wetland Delineation Report. The square footage figure is 15% of the stated lot size of 45,064 square feet. Mr. Pippin believes the figure cited in the January 17, 2020 letter from the Critical Area Commission, which is 6,670 square feet, inadvertently transposed the "7" and the "6". Mr. Pippin also described the extent of the buffer each proposed improvement will occupy as 320 square feet for the screened porch, 256 square feet for the deck, and 504 square feet for the inground swimming pool. The total is 1,080 square feet of permanent buffer disturbance.

Regarding lots in Corsica Landing Estates, Mr. Pippin testified there are 20 swimming pools in the subdivision, some on waterfront lots and some on interior lots. Mr. Pippin said he does not know if any of the existing waterfront pools are in the critical area buffer or whether they were constructed before or after the County adopted its critical area program. Corsica Landing Estates was platted in January 1982, which is prior to adoption of the County's critical area program. Later in the hearing, a question arose about the difference between the extent of

the tidal wetlands on the Property shown on the Applicants' variance plan versus the wetland boundary shown on the map included with the January 17, 2020 letter from the Critical Area Commission. Mr. Pippin told the Board the tidal wetlands boundary shown on the Applicants' plan comes from the Applicant's Wetland Delineation Report, which involved a field investigation of the Property. He believes the tidal wetlands boundary the Commission used was generated from aerial photographs.

In addition to Mr. Pippin's testimony and exhibits, the Board admitted into evidence the January 17, 2020 letter from Susan Makhoul, a Natural Resources Planner with the State of Maryland Critical Area Commission for the Chesapeake and Atlantic Coastal Bays (the "Commission"). In part, the letter states:

We are opposed to this variance request in part. Given the constraints of the Buffer on this lot, an allowance for a small deck and/or patio may be necessary. However, the inclusion of the pool does not meet the standard of unwarranted hardship and, therefore, should be denied.

* * *

The applicant can adequately develop this property by minimizing or redesigning the entire project in order to significantly reduce the amount of accessory structure in the Buffer. Allowing the applicant to develop the site as proposed does not meet the standard of unwarranted hardship, as the applicant can redesign the proposed development and have reasonable and significant use of the entire lot with a house, driveway, and reasonable outdoor amenity space of a deck or patio.

State law defines "unwarranted hardship" to mean that, without the requested variance, an applicant shall be denied reasonable and significant use of the entire parcel or lot. The applicant is clearly not being denied reasonable and significant use of the entire parcel or lot, in that they could accommodate a house, driveway, and accessory structures in a manner that greatly minimizes impacts to the Buffer. Furthermore, this office does not consider, and has not previously considered, a pool in the Buffer to meet the standard of unwarranted hardship, as it is not within the limits of reasonable and significant use of the lot. Therefore, denying this variance request would not result in an unwarranted hardship.

* * *

The granting of this variance would confer a special privilege upon the applicant. The Queen Anne's County Code and the Critical Area regulations place strict limits on disturbance to the Critical Area Buffer in order to meet the goals of the Critical Area law. Approval of this variance would grant the applicant a special privilege that

would be denied others within the Critical Area, as no individual is permitted to construct a pool in addition to a screened porch and deck/patio within the Buffer when there is the ability to minimize Buffer impacts by reconfiguring the proposed structures, including reducing the size of the house and garage, thereby locating the remaining structures outside of the Buffer. As noted above, an allowance for a small deck and/or patio may be considered by the Board given the constraints of the Buffer on the lot. This office has previously opposed similar variance requests from others; therefore, granting this applicant's request would absolutely confer upon the applicant a special privilege denied to others.

* * *

Ecologically sensitive areas such as the Critical Area Buffer are purposefully protected within the Critical Area regulations and the County's Critical Area program because of their importance in meeting the goals of the Critical Area law. The goals of the Critical Area law are to (1) minimize adverse impacts on water quality that result from development, (2) conserve fish, wildlife, and plant habitat, and (3) establish land use policies that accommodate development while recognizing that development adversely affects the first two goals. Granting a variance to allow the construction of a pool and portions of a screened porch and deck/patio within the Critical Area Buffer directly adjacent to tidal wetlands would not be in harmony with the spirit and intent of the Critical Area law.

The Board also admitted into evidence a memorandum dated February 12, 2020 from Ms. Amy G. Moredock. Ms. Moredock is a Principal Planner with P&Z assigned to critical area matters. In part, Ms. Moredock's memorandum states:

Special features do exist on this lot: The Critical Area Buffer occupies approximately 70 percent of the upland area (approximately 31,390 square feet). Of the remaining 13,674 square feet, the septic reserve area consumes 10,000 square feet. The buildable area of the site totals approximately 8% of the upland area. The SRA location is mandated by the Department of Environmental Health, as is the well location.

* * *

Residential development is a permitted use in this Zoning District and within the Critical Area program. The lot is located in the Corsica Landing Estates subdivision which was platted in 1982. Large single-family dwellings with pools, patios, and decks characterize this neighborhood with varying degrees of conformity and nonconformity with the Critical Area program, which was enacted after the subdivision was approved.

* * *

While an outdoor seating area, enclosed porch, and inground swimming pool may be contemplated as amenities, they are common to this neighborhood and many other similar waterfront subdivisions in the County and State. Twenty of the lots in this subdivision are improved by large single-family dwellings, outdoor seating areas, and

inground swimming pools. Ten of those lots are located along the waterfront surrounding the applicant's lot.

The applicant's proposal is not out of scale with the neighborhood and may be considered consistent in size and scope with neighboring configurations. These findings may be considered to substantiate that the applicant's proposal is reasonable and represents reasonable use of this lot in consideration of the special conditions of the property[.]

However, the applicant would not be denied reasonable use of his entire property should the Board deny the applicant the right to construct an inground swimming pool. In the same way that the conditions of the site create special conditions that limit development onsite, those same special conditions such as the proximity of wetlands and affiliated buffers on two sides of the lot may also limit the applicant's ability to fully develop all amenities common to the neighborhood.

* * *

Should the Board consider this application favorably, the staff recommends that the applicant install a deck which allow water to pass through freely (thereby not creating lot coverage), the patios be installed using porous materials, and the areas of coverage be treated by a comprehensive, formal stormwater management plan which addresses 10% water quality improvements onsite (which is a standard above the LDA requirements). In addition, the total area of lot coverage and buffer disturbance must be further mitigated by a Buffer Enhancement Plan, which totals three times the area of proposed disturbance.

* * *

If the Board is inclined to favorably consider the evidence presented by the applicant, exhibits, and staff comments, then it may be found that the application is in harmony with the spirit and intent of the law and program. The granting of the variance to include the construction of an inground swimming pool on this may exceed the spirit and intent of the reasonable use standard.

Applicants' Presentation

Mr. Thomas J. Tracy appeared to present the Applicants' case. Mr. Tracy and his wife, Carol, acquired the Property in October 2019.

Mr. Tracy told the Board he has great respect for the Chesapeake Bay. He has seen how regulations have improved the Bay's environment. Mr. Tracy testified he worked hard with his consultants to limit the size of the home the Applicants plan to build and to locate the home where environmental impacts would be minimized. Mr. Tracy walked the Board through five exhibits (cumulatively, Applicants' Exhibit 10) showing the Property and its environmental features. He noted the septic reserve area encompasses the first 75 feet of the Property from

Quail Run Drive. This leaves only a narrow space between the septic reserve area and the expanded buffer to site a home.

Regarding the expanded buffer, Mr. Tracy pointed out the buffer affects the Property on two sides, to the west and the south. Combined with the tidal wetlands, the expanded buffer and wetlands cover about 75% of the Property. Altogether, the buffer, wetlands, and septic reserve area restrict the possible location of a home and driveway to an exceptionally small portion of the Property. Mr. Tracy said if another location exists on the Property for a home, "We couldn't find it."

Mr. Tracy testified that, in designing and siting the home, the Applicants attempted to balance environmental protections with their ability to enjoy a home that would be compatible and comparable with other homes in Corsica Landing Estates. Ms. Tracy and he want to be good stewards and good neighbors. Mr. Tracy pointed out the Property is one of the larger lots in the community, but the Applicants are proposing a home that is equal in size to other homes in the community.

Concerning the extent of tidal wetlands on the Property, Mr. Tracy testified he recently asked Kirby and Associates to reconfirm the boundaries of the tidal wetlands they originally delineated in August 2019. In a January 17, 2020 report (Applicant's Exhibit 6), Kirby and Associates confirmed the previously delineated boundary. As part of their work, the consultants examined drainage patterns, vegetative communities, and debris piles formed by tides.

Because of the Property's limited building area, the Applicants must use a small portion of the buffer for a screened porch and deck. These features are important to the Applicants—just as they are important to other waterfront owners—to be able to enjoy the river, its breezes, and views. Mr. Tracy testified the Applicants also propose a modest inground swimming pool on the waterside of the home because there is no room for a pool elsewhere on the Property. In addition, other homes on Quail Run Drive have swimming pools along the waterfront about the

same size as (or larger than) the pool the Applicants propose. Mr. Tracy told the Board swimming pools are common in Corsica Landing Estates.

Presentations by Others

Mr. Frank DiGialleonardo appeared before the Board to oppose the requested variance on behalf of the Corsica River Conservancy (the "Conservancy"). Mr. DiGialleonardo is President of the Conservancy. He told the Board the Conservancy is a volunteer organization that has spent 15 years working with government agencies and stakeholders to protect and improve the Corsica River watershed and its environment. In 2006, the State designated the river's watershed as the first watershed targeted for restoration and water quality improvement. Despite the many homes built in the watershed over the last 15 years, the State and Conservancy's efforts have begun to meet with some success.

The Conservancy views compliance with environmental regulations as part of being a good steward of the land. Mr. DiGialleonardo explained there is a direct relationship between the percentage of impervious surfaces and adverse impacts to water quality. Since a 2006 study, impervious cover in the Corsica River watershed has increased from 3.6% to 5.4%, which is near the tipping point for significant adverse impacts to the watershed.

Mr. DiGialleonardo testified the Conservancy opposes the requested variance for the same reasons stated in the Commission's January 17, 2020 letter. Mr. DiGialleonardo testified he has lived in the neighborhood for 25 years. He is not aware of any swimming pool variances approved during that time. Mr. DiGialleonardo testified he talked to several lot owners with swimming pools. None of them needed a variance, but several owners said they had to move their pools farther from the water than originally planned. Mr. DiGialleonardo noted he lives on a waterfront lot and does not have a swimming pool.

Ms. Cheryl Huyck appeared as the next witness. Ms. Huyck testified she lives in Corsica Landing Estates along the waterfront. She does not have a swimming pool on her lot. Ms.

Huyck told the Board she has many spent volunteer hours working to improve the health of the Corsica River.

Ms. Huyck testified Corsica Landing Estates was platted before critical area regulations were put in place. Some of the homes and other improvements along the waterfront do not fully comply with current regulations, and thus could not be built as they exist today. Ms. Huyck testified she examined the Board of Appeals' agendas for the last four years to see if there have been similar variances. She did not find any critical area variance that involved a swimming pool in the buffer. Ms. Huyck also testified she talked to the lot owner who constructed the last swimming pool built in the neighborhood. That neighbor said he did not ask for a variance. Instead he reduced the size of the pool to stay out of the buffer.

Mr. Nick Kelly appeared as the next witness. Mr. Kelly is a Regional Program Chief with the Critical Area Commission. Mr. Kelly introduced the Commission's legal counsel, Assistant Attorney General Emily Vainieri, Esquire. Mr. Kelly indicated he was substituting at the hearing for Ms. Susan Makhlof, who could not attend. Mr. Kelly also indicated the Commission is now satisfied with the Applicants' tidal wetlands boundary as delineated by Kirby and Associates.

As a preliminary matter, Mr. Kelly told the Board he had visited the Property just prior to the hearing. He saw a large area from which it appeared vegetation was recently removed. Mr. Kelly inquired whether the Applicants had obtained permits for the work. In response, Mr. Pippin testified the clearing work was authorized under a sediment control permit. The work was undertaken to correct an erosion problem on the Property. Mr. Pippin said the work included planting canopy trees to mitigate for the disturbance.

Mr. Kelly told the Board the Commission opposes the Applicants' variance. He highlighted several portions of Ms. Makhlof's January 17, 2020 letter. Mr. Kelly testified the goals of the critical area program include accommodating some development, which the

Commission recognizes may have water quality impacts. But the Commission has always opposed variances for swimming pools in the buffer. Pools are luxuries, not necessities. Thus, a variance to allow a pool in the buffer would be a special privilege. In every case Mr. Kelly has seen, including the present case, the property owner can achieve reasonable and significant use of land without constructing a swimming pool in the buffer.

In the present case, the Commission's opposition is primarily to the proposed swimming pool. If the Board believes the Applicants have satisfied all the variance criteria, the Commission would not object to a variance for the screened porch and deck. Mr. Kelly noted the screened porch would be considered impervious because it will have a roof. If the proposed deck will not be roofed, and if it will have gaps between the surface boards to allow water to drain through the deck, then the deck would be considered pervious. Even so, a pervious deck would still need a variance to be built in the buffer.

Findings and Conclusions of the Board

The Board concludes the evidence in this case justifies approval of a modified variance that does not include the proposed inground swimming pool. As the Board will discuss later in this opinion, based on the testimony and exhibits presented, the Board concludes the Applicants have overcome the negative presumption that a portion of the specific development activity for which the variance is required (the proposed screened porch and deck) does not conform with the general intent of COMAR's critical area regulations and the County's Critical Area Program, including Chapter 14:1 of the Code. But the Board also concludes the Applicants have not overcome the negative presumption for the rest of the specific development activity they propose (the inground swimming pool).

Regarding the variance criteria, the Board will begin by addressing the threshold standard of unwarranted (or unnecessary) hardship. The Board views the hardship standard in COMAR § 27.01.12.04(B)(1) and in County Code §§ 14:1-66.A. and B. to be the same. Thus, the Board

will address the two hardship standards together.² Similarly, the Board will address together other COMAR and County Code variance standards the Board views as legally equivalent. The Board will address separately COMAR variance standards that are not in the County Code and the Code's minimum-deviation standard that is not in COMAR.

I.

COMAR § 27.01.12.04(B)(1)

Due to special features of the site or special conditions or circumstances peculiar to the applicant's land or structure, a literal enforcement of the local Critical Area program would result in an unwarranted hardship to the applicant.

County Code § 14:1-66.A. and B.

A. A literal enforcement of this Chapter 14:1 would result in unnecessary hardship as the result of specified conditions, which hardship is not shared by owners of other property in the same development area; and

B. Those conditions are peculiar to the property involved.

The Board concludes strict application of the buffer requirements in § 14:1-11, § 14:1-51.A. and § 14:1-51.B of the Code deprives the Applicants of a reasonable and significant use of the entire Property because of special circumstances and conditions peculiar to the Property. The evidence establishes that the Property is unusually affected by a combination of tidal wetlands, an expanded critical area buffer, and the location of soils suitable for use as a septic reserve area.

The Property is platted as 1.42 acres in size. Tidal wetlands, however, are present on approximately 16,800 square feet (or about 27.2%) of the Property along the Property's Corsica River frontage. Thus, tidal wetlands reduce the effective size of the property from 1.42 acres to

²COMAR uses term "unwarranted hardship." The County Code uses the term "unnecessary hardship." In general, the Board construes these terms to mean the same thing. *See Belvoir Farms Homeowners Assn. v. North*, 355 Md. 259, 275-82 (1999) (addressing unnecessary hardship, unwarranted hardship, and "similar manifestations," and holding the terms have the same meaning). Additionally, State law presently defines unwarranted hardship as follows: "[U]nwarranted hardship, means that, without a variance, an applicant shall be denied reasonable and significant use of the entire parcel or lot for which the variance is requested." *Md. Ann. Code*, Nat. Res. § 8-1808(d)(1) (2019); COMAR 27.01.12.01. The Board will apply this state-law definition in its analysis.

1.03 acres. Because of the tidal wetlands, in addition to the 100-foot buffer that affects most lots, the law requires the buffer on the Property to be expanded. In this case the buffer must be expanded about another 100 feet toward Quail Run Drive.

In addition, tidal wetlands encompass portions of the lot to the south, such that the critical area buffer must be expanded across that lot about 80 feet into the Property. Altogether, tidal wetlands and the expanded buffer cover about 75% of the Property. The area outside the expanded buffer roughly forms a square building envelope about 125 feet on each side.

But not all the 125-foot by 125-foot building envelope can be built on. A portion of the septic reserve area occupies about half the building envelope, closest to Quail Run Drive. (The rest of the reserve area extends to the south into the buffer.) The presence of soils along Quail Run Drive that are suitable for a septic reserve area leaves an area about 120 feet in width and 50 feet in depth for a home and associated improvements—a little less than 10% of the platted lot.

The unwarranted hardship the Applicants face also results from the fact Corsica Landing Estates was platted prior to adoption of the County's critical area program. When the Property was platted as a lot, an owner could have built on a much larger portion of the Property because the requirement for an expanded buffer did not exist. In this sense, the Property is equivalent to a grandfathered lot. Critical area regulations allow a higher percentage of lot cover for many grandfathered lots, but do not allow leeway for additional buffer impacts. Here, the Applicants will meet LDA impervious surface limits, but cannot strictly adhere to buffer regulations.

For the foregoing reasons, the Board concludes denial of a modified variance would result in an unwarranted hardship to the Applicants.

II.

COMAR § 27.01.12.04(B)(2)

A literal interpretation of the local Critical Area program would deprive the applicant of a use of land or a structure permitted to others in accordance with the provisions of the local Critical Area program.

The waterfront community in which the Property is located is characterized by one-acre-plus lots developed with sizable homes. Some of the homes along Quail Run Drive, or accessory structures associated with the homes, encroach into the 100-foot buffer. For example, aerial photographs in evidence show the lots at 113 and 213 Quail Run Drive have swimming pools (between the river and the homes on the lots) that are about 75 feet from the shoreline. A waterside swimming pool on the lot at 209 Quail Run Drive is about 45 feet from what appears to be wetlands. The home at 113 Quail Run Drive is about 75 feet from the shoreline. In addition, most waterfront homes along Quail Run Drive have porches, decks, or patios.

The Applicants' specific development proposal for a screened porch and deck involves 576 square feet of permanent disturbance, most of which would be in the expanded buffer.³ Although other porches and decks in the community appear to be outside the buffer, other lots along Quail Run Drive are not as affected by the critical area buffer as is the Property. Thus, a variance allowing a buffer encroachment on the severely affected Property for a modestly sized screened porch and deck is necessary to allow the Applicants to enjoy the same features enjoyed by most other lot owners along Quail Run Drive. Including a screened porch and deck on the waterside of a home is commonplace. The variance the Applicants request will modify buffer regulations in a way that merely puts the Applicants' Property on roughly an even footing with the use of other lots in the neighborhood and throughout the County's critical area.

Accordingly, the Board concludes a literal interpretation of the buffer regulations in the County's critical area program would deprive the Applicants of uses (which here are part of the proposed home on the Property) that the County's program affords to others.

³The Applicants did not provide the Board with specific figures for the proposed buffer disturbance. The Applicants' variance plan depicts the boundary of the expanded buffer as slightly in front of the waterside portion of the home from where the screened porch and deck would extend, making it appear that around 100 square feet of the 576 square feet of permanent disturbance associated with the two structures would be outside the buffer.

III.

COMAR § 27.01.12.04(B)(3)

The granting of the variance would not confer upon the applicant any special privilege that would be denied by the local Critical Area program to other lands or structures in accordance with the provisions of the local Critical Area program.

County Code § 14:1-66.E.

The variance will not confer upon an applicant any special privilege denied to other owners of like property and/or structures within the critical area.

The Board concludes that approval of a variance for the screened porch and deck will not confer upon the Applicants any special privilege. Locating a screened porch and deck partially in the expanded buffer on the waterside of a home is not a special privilege when a combination of circumstances and conditions causes the building envelope on the lot that will support the home to be reduced to about 10% of the lot. The variance the Applicants request for the porch and deck has the effect of partially offsetting the circumstances and conditions affecting the Property. Although use of the buffer would many times constitute a special privilege, in the Applicants' case locating the bulk of a modestly sized screened porch and deck in an expanded buffer that, in conjunction with tidal wetlands, encompasses 75% of the involved lot is a reasonable accommodation and not a special privilege. This is especially true when, as here, a mandated septic reserve area further limits the Property's building envelope.

IV.

COMAR § 27.01.12.04(B)(4)

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

County Code § 14:1-66.C.

Those conditions are not the result of any action taken by the applicant.

The evidence establishes the special circumstances and conditions giving rise to unwarranted hardship do not result from any actions attributable to the Applicants. The Applicants are not responsible for the presence of tidal wetlands, the impacts associated with a

large expanded buffer, nor the mandated location of the septic reserve area on the Property. Moreover, others platted the Property before the County adopted critical area regulations. Perhaps unfortunately, subdividers are not usually prescient enough to plat lots that are capable of meeting regulations not yet adopted.

V.

COMAR § 27.01.12.04(B)(5)

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

The Applicants' variance request arises from the unwarranted hardship created by strict application of the County's critical area buffer regulations to a Property platted before adoption of the County's critical area program and significantly affected by a large expanded buffer and the location of a required septic reserve area. Accordingly, conforming and nonconforming conditions on neighboring lots do not give rise to the variance the Applicants' request.

VI.

COMAR § 27.01.12.04(B)(6)

The granting of the variance would not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the jurisdiction's local Critical Area.

County Code § 14:1-66.C.

The variance will not adversely affect water quality or adversely impact fish, wildlife, or plant habitats within the critical area.

The proposed screened porch and deck will occupy 576 square feet of an expanded buffer that, together with tidal wetlands, covers approximately 46,300 square feet of the Property. The porch and deck thus represent a permanent impact on only 1.2% of the buffer. Stormwater runoff from this impacted area will be managed by roof drains on the porch and by gaps in the open deck, which will allow rainwater to drip to the soil below. Furthermore, because they will impact the buffer, the Applicants must obtain approval of, and implement, a buffer management plan that will include planting vegetation to improve water quality. County law also requires the Applicants to maintain sediment and erosion controls during construction.

The Board also finds it significant that the buffer impact associated with the porch and deck will be at the edge of the buffer, just next to the proposed home. Even if not disturbed, whatever habitat that may exist immediately along the waterside of the home will be of limited value because of the home's proximity. This is not to say such habitat would have no value. But the Applicant's proposal for an attached porch and deck will have less habitat impact than, for example, a detached gazebo of the same size located farther into the buffer.

The Department of Planning and Zoning has no objection to the variance. One of the standards P&Z examines is impact to water quality and habitat. In previous critical area variance cases, the Board has accepted Mr. Pippin's testimony addressing the water quality and habitat standard for variances. The Board infers from Mr. Pippin's report and testimony in this case that he is satisfied approval of a variance for the porch and deck will not adversely affect water quality or habitat.

For the foregoing reasons, and because after the porch and deck are built total impervious surfaces on the Property will not exceed the 15% limit applicable to LDA-designated lots, the Board concludes approval a variance for the screened porch and deck will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat.

VII.

COMAR § 27.01.12.04(B)(7)

The granting of the variance would be in harmony with the general spirit and intent of the Critical Area law, the regulations in this subtitle, and the local Critical Area program.

County Code § 14:1-66.D.

The variance will not be contrary to the public interest or the policies, goals and objectives of this Chapter 14:1 and the Queen Anne's County Critical Area Program.

County Code § 14:1-66.H.

The granting of the variance will be in harmony with the general purpose and intent of this Chapter 14:1 and the Queen Anne's County Critical Area Program and the variance shall not result in a use not permitted in the applicable development area or an increase in the applicable density limitations.

On page 1, the County's Critical Area Program ("Program") states: "[t]he objective of the . . . Program is to accommodate growth while protecting water quality and conserving habitat in the Critical Area." On page 8, the Program sets forth policies for development in LDA-designated areas, including (a) maintaining or improving the quality of runoff and groundwater entering the Bay and its tributaries, and (b) maintaining areas of natural habitat, while (c) accommodating low or moderate intensity development. As the Board just concluded, the Applicants' porch and deck proposal will not degrade water quality. The variance does not involve an increase in impervious cover over the 15% limit, only a small portion of the buffer will be affected, and the Applicants will provide mitigation as part of a buffer management plan. The Applicants' proposal also will not significantly decrease areas of natural habitat. The porch and deck will extend from an entrance into the home, at the very edge of the buffer, where human activity associated with the home will be comparatively robust. Finally, the Applicants' proposal is consistent with existing low-intensity development in the neighborhood.

Also relevant to the Applicants' variance request are policies for "grandfathered lots" on page 15 of the Program. A grandfathered lot is a lot created prior to June 1, 1984. Here, the Property was platted in January 1982. The Program's policies for grandfathered lots recognize owners of grandfathered lots may need to vary certain critical area requirements to establish or maintain a reasonable and significant use of their lots. A small buffer-disturbance variance for the screened porch and deck affords a reasonable accommodation to a grandfathered lot.

The Board further concludes approval of a variance for the porch and deck will be in harmony with the general spirit, purpose, and intent of COMAR and the County's Program. In addition, approval of such a variance will not be contrary to the public interest, nor will approval of the variance be contrary to the policies, goals, and objectives of Chapter 14:1 of the Code or other aspects of the Program. Approval of a variance for the porch and deck will accommodate only modest (but important and common) features associated with a proposed low intensity

residential use in a neighborhood consisting of relatively large residential lots mostly improved by sizable single-family homes and related accessory structures. Approval of a variance for the porch and deck also will accommodate reasonable development of a grandfathered lot that, for reasons previously given, otherwise would be unnecessarily and unfairly burdened by strict application of buffer regulations.

Policies for the buffer on page 42 of the Program identify the purposes of the critical area buffer. These purposes focus on removing potentially harmful runoff, minimizing adverse effects of human activities, and protecting plant, wildlife, and fish habitat. The buffer on the Property substantially exceeds the typical 100-foot buffer. Tidal wetlands to the west and south require the buffer to be expanded. The expanded buffer, coupled with the tidal wetlands, results in about 75% of the Property being non-buildable without a variance. The Applicants seek to use only 576 square feet of this expanded—and unusually expansive—buffer. Moreover, to implement a variance for the porch and deck, the Applicants will not have to remove mature trees and will not have to disturb wetlands. Thus, these important habitat areas will remain unaffected. In addition, the proposed construction will disturb only a small area of the buffer abutting the proposed home. At present, the proposed location of the home—including the porch and deck for which a variance is needed—is flat and devoid of significant vegetation. Thus, the small portion of the buffer to be disturbed for the porch and deck does not presently provide significant plant or wildlife habitat.

Regarding Chapter 14:1, the Code states in § 14:1-3 the primary purpose of the Chapter is to implement “the goals, objectives, criteria and standards set forth in [the] Queen Anne’s County Critical Area Program.” Section 14:1-6(A) states the overall intent of Chapter 14:1 “is to protect both individual property owners and the general public from adverse impacts which might otherwise be the result of a proposed development or activity within the critical area.” Similarly, § 14:1-6(A)(3) of the Code states Chapter 14:1 should be construed to “ensure a just

balance between the rights of the landowner and all owners who will be affected by that person's land use proposal." Finally, § 14:1-6(A)(4) states "Chapter 14:1 has been carefully designed . . . to avoid regulations that either sacrifice legitimate public goals, including the protection of adjoining property owners, or require undue limitations on the ability of property owners to use their land in manners consistent with the goals of the program."

Considering these purposes, the Board finds granting the Applicants a variance for the porch and deck will not weaken the protections Chapter 14:1 affords to the public. Other lots in the neighborhood support large single-family homes with porches, decks, and patios. As with these large lots, the Property's proposed improvements represent a low-intensity use. Allowing the Applicants to have a porch and deck on the waterside of the proposed home is thus consistent with the Property's LDA classification, which allows for the type of low-intensity residential development presently found in the neighborhood. Allowing the proposed porch and deck is also consistent with providing a reasonable accommodation to a grandfathered lot, as well as providing an appropriate balance recognizing the rights of all property owners in this critical area neighborhood. The Board finds a variance for the porch and deck will not adversely affect adjacent and nearby lots. The lot to the north is large and similarly improved. The lot to the south is unimproved; however, tidal wetlands separate the apparently buildable portion of this lot from the Property. In addition, both abutting lots are buffered by several mature trees.

The Board's examination of the policies, goals, and objectives of the Program and Chapter 14:1 of the Code leads the Board to conclude the Applicants' ability to reasonably use their Property, which is a grandfathered lot, would be limited beyond the goals and intent of the Program unless the Board grants a variance for the porch and deck. In the Board's view, approval of such a variance will help achieve pertinent policies, goals, and objectives of the Program and Chapter 14:1. The Applicants will be allowed a reasonable and significant use of their Property, the variance will not significantly affect abutting lots, the neighborhood's

character will not be altered, and the expanded buffer will remain fundamentally intact. The Board thus concludes approval of a variance for the porch and deck is in the public interest generally. For the same reasons, the Board concludes that granting a variance for the porch and deck will be in harmony with the general purpose and intent of the Program and the Program's primary implementation mechanism, Chapter 14:1 of the Code.

The Board also concludes a modified variance will not result in a non-permitted use in the LDA development area or an increase in LDA density limitations. Residential uses, including single-family homes, are allowed uses on LDA-designated land. The Applicants propose to build a single-family home on the Property. The proposed porch and deck are part of the proposed single-family home. Regarding density, the Applicants propose to build only one home on the 1.42-acre Property. Therefore, approval of the variance will have no effect on LDA use and density limitations.

VIII.

County Code § 14:1-66.G.

The variance is the minimum deviation from the provisions of this Chapter 14:1 that will make possible the reasonable use of land or structures.

The Applicants propose a porch and deck in the expanded buffer attached to a proposed single-family home. Because soils mandate the location of a septic reserve area adjacent to Quail Run Drive, the home must be sited immediately adjacent to the expanded buffer. The Board finds it would be unreasonable to compel the Applicants to alter the size and location of the proposed home to incorporate a porch and deck along the home's waterside outside the buffer. Generally, porches and decks on waterfront property are an important part of the residential use of the property. Like piers, such features are not luxuries. Enjoying river breezes and views are primary reasons many owners purchase waterfront lots.

The minimum-deviation standard does not require proof of an absolute minimum.⁴ Rather, the minimum-deviation standard involves determining whether the variance is crafted to ameliorate the circumstances that create unwarranted hardship in a way that makes possible a reasonable and significant use of the involved lot.⁵ The Board must determine reasonability of buffer variances on a case-by-case basis by examining (for buffer variances on LDA-designated lots) factors such as (1) the unusual conditions and circumstances affecting the Property, (2) the amount of variance requested, (3) the percentage of the lot in the buffer, (4) the overall size and shape of the lot, (5) the type, size, and location of existing and proposed improvements, (6) the size of other lots in the neighborhood, and (7) the type and size of other improvements in the neighborhood.

In this case, the expanded buffer encompasses an exceptionally large portion of the Property. In comparison, the amount of variance for the porch and deck is small. The porch and deck are modestly sized, compatible with other porches and decks in the neighborhood, and will not be located any farther toward the shoreline than similar improvements on some of the other lots in the neighborhood. Furthermore, a lot 1.42 acres in size ordinarily could accommodate the improvements the Applicants propose without the need for a variance. But the Property's size is effectively reduced to about a third of acre because of tidal wetlands and the expanded buffer. That one-third of an acre is further reduced by the necessity of providing a 10,000-square-foot (about .23 of an acre) septic reserve area. The septic reserve area also compels the Applicants to locate improvements closer to the expanded buffer than otherwise would be the case.

⁴See *Becker v. Anne Arundel County*, 174 Md. App. 114, 143, 920 A.2d 1118, 1135 (2007) (rejecting an argument the board of appeals applied "an absolute minimum" test, and suggesting that on remand the board would continue to apply the correct "minimum necessary" test).

⁵See *Becker*, 174 Md. App. at 144, 920 A.2d at 1136 ("The question of whether the variances were the minimum necessary must be considered . . . in the context of the purpose of the proposed construction, recognizing that appellants are entitled to build some type of reasonable structure.").

Therefore, the Board finds a variance for the proposed porch and deck reasonable, and not excessively, compensates for the Property's constraints. Other lots in the neighborhood are similarly sized and support similarly sized homes with porches, decks, and patios. Because most of these lots are not affected by tidal wetlands and an expanded buffer, a variance was not needed. The purpose of the Applicants' proposal is to build and live in a single-family home that maintains compatibility with the character of the neighborhood. In this context, and recognizing the Applicants are entitled to make reasonable and significant use of the Property, the Board finds a variance that will involve only 576 square feet of permanent disturbance in the large expanded buffer on the Property is an appropriately minimal deviation.

For the foregoing reasons, the Board concludes the requested variance is the minimum deviation from the provisions of § 14:1-11, § 14:1-51.A. and § 14:1-51.B. of the Code that will allow for a reasonable and significant use of the Property.⁶

IX.

COMAR § 27.01.12.04(A)

In accordance with Natural Resources Article, § 8-1808(d)(3)(ii), Annotated Code of Maryland, an applicant has overcome the presumption that the specific development activity for which the variance is required does not conform with the general intent of the local jurisdiction's program.

The Board concludes the Applicants have overcome the presumption that the specific development activity for which the porch and deck variance is required does not conform with the general intent of the Program. The Board finds the proposed development activity for the porch and deck *does* conform with the general intent of the County's Critical Area Program.

⁶Ordinarily, a plan for construction in the buffer should include a limits-of-disturbance line. The Applicants' variance plan, however, does not denote a disturbance limit or otherwise provide a measurement of the total disturbance (permanent and temporary) necessary to construct the proposed porch and deck. Recognizing that the Applicants will likely need to disturb land beyond the footprint of the porch and deck during the construction process, the Board will address the amount of disturbance with conditions.

The general intent of the County's Program is to protect the Chesapeake Bay and its tributaries, including improving water quality and enriching the important plant and wildlife habitat the Bay provides, while accommodating sensible development that allows landowners to use their properties in reasonable and significant ways. In this case, the Property is a grandfathered lot platted before the County adopted critical area regulations. The Applicants propose a single-family home that is consistent with the size and design of other homes in the neighborhood, including a screened porch and deck. Given the size of the Property, the impact of tidal wetlands, the large proportional size of the expanded buffer, and the reasonable size of the proposed porch and deck, the Board finds the specific development activity the Applicants propose for the porch and deck represents a level of human activity in the critical area, including the buffer, contemplated by the Property's LDA classification.

Moreover, because the Property was created prior to December 1, 1985, the Property is entitled to treatment as a grandfathered lot. The Program generally intends to accommodate reasonable development on grandfathered lots. This includes recognizing that strict application of critical area requirements adopted after a lot was platted may result in a hardship, depending on the circumstances inherent in the lot. Here, the specific development activity the Applicants propose for the porch and deck will have minimal impact on the buffer, with 576 square feet of permanent disturbance in a buffer that, coupled with tidal wetlands, occupies over an acre of the Property. Considering the special circumstances and conditions affecting the Property, and the mitigation the Applicants must undertake, the Board finds the variance needed for the proposed porch and deck falls within the Program's general intent for grandfathered lots.

Furthermore, as explained more fully in the preceding parts of this decision, the Board finds (1) the specific development activity the Applicants propose for the porch and deck on this grandfathered lot represents a reasonable and significant use of the Property, and (2) such proposed development activity will not detrimentally affect water quality or plant and riparian

wildlife habitat. These factors are two of the most important elements underlying the general intent of the County's Program. Accordingly, the Board concludes the specific development activity the Applicants propose for the porch and deck conforms to the general intent of the County's Program, and, therefore, the Applicants have overcome the presumption in COMAR § 27.01.12.04(A) to the contrary.

The Proposed Swimming Pool

The Board's approval of a modified variance does not extend to the proposed swimming pool. In this case, the Board is not persuaded by the evidence that a buffer-disturbance variance for the proposed swimming pool satisfies all variance standards. Although in the Board's view a swimming pool could be a reasonable and significant use of a waterfront lot, the Board is not persuaded strict application of buffer requirements deny the Applicants such a use—despite the special conditions and circumstances affecting the Property. The Applicants bear the burden of proof. The Board concludes the Applicants did not carry that burden for the proposed swimming pool. The Applicants did not, for example, establish why they could not locate the pool in the side yard (outside the buffer) just north of the proposed home by reducing the size of the proposed parking area. The Applicants' variance plan shows the northern side yard will be 39 feet wide. With a three-foot lot line setback and a six-foot offset from the home, there would be space for a 30-foot pool, which is two feet longer than the pool the Applicants propose.

Regarding placing a pool in the buffer, the Board is also not persuaded the proposed 18-foot by 28-foot pool is the minimum sized pool necessary to afford a reasonable and significant use to the Applicants. Balancing the special circumstances and conditions affecting the Property against potential buffer impacts associated with a swimming pool of the size proposed, the Board believes that if the Applicants were constrained to locate a pool in the buffer, the pool could be smaller and still constitute a reasonable and significant use.

Decision

Based on the foregoing findings and conclusions, by a vote of three in favor and none opposed, the Board grants a variance to disturb the expanded critical area buffer, including necessary clearing and grading activities, to construct a 16-foot by 20-foot screened porch and a 16-foot by 16-foot deck attached to the waterside of the single-family home the Applicants will build on the Property. The proposed porch and deck must be located on the Property in substantial accord with the Applicants' variance plan (Applicants' Exhibit 4). The variance is also subject to the following conditions:

1. All disturbance in the buffer must be confined to the land area immediately adjacent to the proposed home, porch, and deck; and the Applicants must minimize temporary disturbance in the buffer to the satisfaction of the Department of Planning and Zoning.
2. The Applicants must provide (A) mitigation at a ratio of 3:1 for all disturbances in the buffer, and (B) mitigation at a ratio of 1:1 for any canopy cover to be removed. Mitigation onsite must be placed to provide the greatest possible benefits to water quality and habitat, to the satisfaction of the Department of Planning and Zoning.
3. The Applicants must submit to the Department of Planning and Zoning, and obtain the Department's approval of, a Buffer Management Plan showing a limits-of-disturbance line, proposed disturbance and other impacts, and proposed mitigation—all in accordance with COMAR 27.01.09.01-3. Through plantings or other means, the Buffer Management Plan must include features that result in at least a 10% improvement in the quality of stormwater flowing from the Property's development envelope into the expanded buffer.
4. The Applicants must construct the deck with gaps in the surface boards approximately one-quarter inch wide so that (A) water will pass freely through the deck to the ground below and (B) the deck does not constitute an impervious surface.

Based on the foregoing findings and conclusions, the Board denies the requested buffer-disturbance variance for the proposed 18-foot by 28-foot inground swimming pool and at-grade patio decking around the pool.

* * * * *

The Board advises the Applicants that, as required by state law, the County cannot approve building permits or other permits to implement the variance the Board has granted until 30 days after the date of this decision.

CORRECTED ORDER

For the reasons set forth in the foregoing Opinion, it is this 13th day of July, 2020, ordered that a variance to disturb the critical area buffer for a screened porch and deck, as requested by Thomas J. Tracy and Carol S. Tracy, in Case No. BOA-19-12-0056, be granted subject to the conditions set forth in the Opinion. It is further ordered that a variance to disturb the critical area buffer for a swimming pool is denied.



Kenneth R. Scott, Chairman



Howard A. Dean, Vice-Chairman

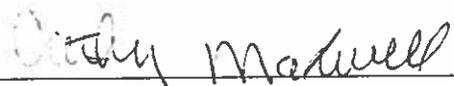


Craig W. McGinnes, Member

State of Maryland, County of Queen Anne's:

I HEREBY CERTIFY that the foregoing is a true and correct copy of the Opinion and Order of the Board of Appeals of Queen Anne's County in Case Number BOA-19-12-0056, for Thomas J. Tracy and Carol S. Tracy, which Opinion and Order resulted from a public hearing conducted by the Board of Appeals on February 12, 2020 and that the minutes and a recording of the February 12, 2020 meeting are filed in the office of Board of Appeals.

Certified this 13th day of July, 2020 by:



Cathy Maxwell
Clerk to the Board of Appeals