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RE: An Appeal from a Decision of the Administrative Hearing Officer	*	**BEFORE THE**
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	*	**COUNTY BOARD OF APPEALS**
	*	
	*	**OF ANNE ARUNDEL COUNTY**
ROBERT HARRIS, III	*	
	*	**CASE NO.: BA 14-24V**
Petitioner	*	**(2024-0020-V)**
	*	
	*	**Hearing Date: August 12, 2025**
	*	
	*	

MEMORANDUM OF OPINION

Summary of Pleadings

This matter is before this Board on remand from Circuit Court for Anne Arundel County in Case No. C-02-CV-24-002793. This is an appeal of the denial of a variance to allow an accessory structure (pool and patio) with less buffer than required, on property known as 658 Rock Cove Lane, Severna Park.

Summary of Evidence

Mr. Jerry Tolodziecki, the Petitioner's expert in civil engineering, oversaw the design of the site plan submitted with the building permit. He also prepared the variance application subject to this appeal. When he reviews a project, one of the first things he reviews is if the proposed development is compatible with the location. In the previous hearing they provided an aerial that reflected 13 neighboring properties with swimming pools. Upon further investigation for this, it was determined that nine of the 13 pools were developed after the adoption of the Critical Area regulations in 1988. He determined that three were constructed in the 2000s, four in the 1990s, and two in the late 1980s. He was able to find six building permits issued for the pools reflected including two pools constructed prior to the Critical Area Program's adoption. He is of the professional opinion that the evidence shows that a swimming pool in the Critical Area

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buffer is a right commonly enjoyed by others. Furthermore, the Petitioner would not receive a special privilege if this variance were granted. He believes the evidence shows that nine of the 13 pools were constructed after the adoption of the Critical Area Program.

Ms. Jennifer Esposito is a project manager for the Critical Area Commission. The Critical Area regulations do not permit an applicant to have a pool simply because a neighbor has it. The applicant would have to be deprived of some right that others are allowed to have under the Program. The applicant must also show that they would not be conferred a special privilege. The scope of review is also limited to similarly-situated properties, meaning that only development after the adoption of the Critical Area Program should be considered. The Critical Area Program was adopted on August 22, 1988. Therefore, any of the properties with pools predating the implementation of the Critical Area Program must be excluded. Any pools installed without a permit or otherwise illegally would not be sufficient for inclusion in the analysis. Based on her review of the evidence, denying the Petitioner's application does not deny him of the rights permitted to others within the Critical Area. No one has the right to develop or construct an improvement in the buffer unless they seek and meet all the requirements of a variance. This request is inconsistent with the law and regulations as the pools provided as justification do not conform with the Critical Area Program. From the research performed by the Critical Area Commission, none of the neighboring properties have lawfully obtained approval for a swimming pool within the expanded buffer since the implementation of the Program. The 12 original addresses fit into one of three categories: predates the Critical Area, is a buffer modified property and therefore has different development standards, or the property is outside of the buffer. The Critical Area Commission recommends denial of the Petitioner's application.

Ms. Sara Anzelmo works for the Office of Planning and Zoning ("OPZ"). The Code requires that there shall be a minimum 100-foot buffer landward from the mean high-water line

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of tidal water, tributary streams and tidal wetlands. She is familiar with the reference pools utilized by the Petitioner's expert. She personally reviewed all the available County aerial photos and building permits. The Critical Area law started August 22, 1988, and it is important to note that the 1988 aerials were flown in October of 1988. The County did not computerize permit records until 2002 so many of those records predating 2002 are not available for review. There was a rush of building permits for pools prior to the Critical Area law's implementation. The pool located at 459 Brickworks Lane was constructed between 2005 and 2007, however; the property is not waterfront, is outside of the buffer and steep slopes, and did not require a variance. The pool located at 656 Severn Road was constructed between the 1984 aerial and 1990 aerial. The 1988 aerial is not conclusive if the pool existed and we do not have a copy of the permit. The aerial looks like something may have been present in 1988, but you can see the pool clearly in the April 1990 aerial photograph. The pool at 655 Severn Road was constructed between 1984 and 1988 as reflected on the County's aerials and therefore predates the Critical Area law. The pool at 651 Severn Road was constructed between 2002 and 2005. There was a building permit issued for this pool on July 10, 2021, that contains a note that the permit was revised to move the pool out of the 100-foot buffer. The pool located at 625 Holly Ridge Road was constructed prior to the 1984 aerial. The pool at 614 Tower Bank Road was constructed prior to the 1990 aerial. The 1984 aerial was inconclusive and the first time it was clearly seen was in 1990 but given the circumstances in the County it is highly likely that it was approved prior to the change in the law. Similarly, the pool at 618 Tower Bank Road was first clearly depicted in the 1990 aerial. The pool at 624 Tower Bank Road was constructed between 1984 and 1988 as shown in the aerials. The pool at 670 Hendler Road was constructed before the 1984 aerial photograph. The pool at 678 Hendler Road was constructed between the 1988 and 1990 aerials. Any pool building permit that was submitted prior to the effective date of the Critical

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Area Program, regardless of if it was issued prior to that date, is not subject to the Critical Area regulations. From OPZ's review, all but two of the 12 pools originally listed predated computerized permit records. The two pools that were constructed in the early 2000s were reviewed in accordance with Critical Area regulations and determined to be in compliance with the regulations and were issued building permits. Six of the other 10 pools can be seen clearly on the October 1988 aerials, if not earlier. Any pool seen in October 1988 certainly submitted their building permit application prior to the deadline. The other four pools can be seen clearly on the April 1990 aerials. As most of the pools were likely approved prior to the enactment of the Critical Area laws the granting of a variance would confer on the Petitioner a special privilege. The granting would also allow the Petitioner something that is not permitted in the Critical Area and was not permitted in any of the 12 pools that the County was asked to compare. Therefore, OPZ recommends denial.

Mr. Jerry Tolodziecki testified on rebuttal that his research reflects the pool at 614 Tower Bank Road being built sometime around 1995 after the change in the law. He recalls how different the permit process was 30 years ago. It was not uncommon for a permit to be reviewed and approved within 24 hours of submission. He believes that it was not impossible to get a permit approved in August and have a pool constructed by October.

All testimony was stenographically recorded and the recording is available to be used for the preparation of a written transcript of the proceedings.

Findings and Conclusion

Pursuant to the Order of the Circuit Court for Anne Arundel County in Case No. C-02-CV-24-002793 dated April 15, 2025, this matter was remanded to this Board to consider additional evidence regarding the reference pools previously utilized by the Petitioner to support

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his variance application so that we may reconsider the criteria in sections 3-2-207(b)(2)(i)[1] and 3-2-207(b)(3). As the Court's Remand Order was only in part, we will focus our attention only to those indicated criteria and incorporate and ratify our previous findings for all other criteria.

Variances to the Critical Area Program require that the Petitioner satisfy an extensive list of requirements set out in the Code, which are exceptionally difficult to overcome. § 3-2-207. An applicant for a variance to the Critical Area Program must meet each and every one of the conjunctive variance requirements of the Code. See, *Id.* If an applicant fails to meet even one of the criteria, the request must be denied.

The Petitioner must establish that "[a] literal interpretation of COMAR, 27.01, Criteria for Local Critical Area Program Development or the County's critical area program and related ordinances will deprive the applicant of rights commonly enjoyed by other properties in similar areas as permitted in accordance with the provisions of the critical area program within the critical area of the County." *Id.* § 3-2-207(b)(2)(i). The Petitioner is proposing a modest-sized swimming pool and patio approximately 108 feet from the water's edge. The Petitioner's expert civil engineer provided testimony and documentary evidence that we find highly credible. In particular we rely on Petitioner's Exhibits 9, 10, and 11. Petitioner's Exhibit 9 reflects the site tabulations and the neighborhood aerial similar to Petitioner's Exhibit 3 previously relied upon. Of the original 13 properties[2] nine reflect pools that were constructed in 1988 or later. The Petitioner's Exhibit 10 is an array of aerials produced from the County's GIS tool showing aerial images when the pools were constructed and prior to construction. The Petitioner's Exhibit 11 also shows Google Earth images dating back to 1994 depicting approximately seven of the pools

[1] We note that in our previous opinion we reference Anne Arundel County Code § 3-1-207 which due to a realignment of the Code provisions can now be found at § 3-2-207 which we rely upon today.
[2] Petitioner's Exhibit 3 reflected 12 properties with pools, however; the 13th pool referenced here as 650 Rock Cove Lane was depicted on Petitioner's Exhibit 3 but not specifically included in the site tabulation. As it was included in the previous exhibit this Board deemed it appropriate to include.

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being constructed sometime between 1994 and 2002. We believe this evidence is sufficient to demonstrate that pools were approved and constructed after the adoption of the Critical Area Program, thereby establishing a right commonly enjoyed by other properties in similar areas. We take pause with the County's Exhibit 6 and the inferences the County is requesting we make. One point of contention we have is the verifiability of the images included in the County's Exhibit 6, as contrasted with Petitioner's Exhibit 10, we are unable to more objectively decipher the date stamping on the photos without accepting the annotations provided by the witness for face value. Furthermore, we take issue with the implication that we must assume shadows on an image equate to proof that a pool preexisted the Critical Area Program. This is a leap we are unwilling to take. For these reasons we find that the Petitioner would be denied a right commonly enjoyed by other properties in similar areas and he has therefore met his burden regarding this criterion.

Likewise, the Petitioner must show that "[t]he granting of a variance will not confer on an applicant any special privilege that would be denied by COMAR, 27.01, the County's critical area program to other lands or structures within the County critical area, or the County's bog protection program to other lands or structures within a bog protection area." *Id.* § 3-1-207(b)(3). As stated above, we find that many other properties in the immediate area also enjoy swimming pools on the waterfront side of the property, many that we believe to be constructed after the implementation of the Critical Area Program. We find Mr. Tolodziecki's expert testimony to be compelling and with the information gleaned from Petitioner's Exhibits 9, 10, and 11 support his testimony. Therefore, we find that the Petitioner would not be conferred a special privilege by the granting of this variance.

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As the Petitioner has met his burden previously to all other criteria and further persuaded the Board of the remaining two criteria, we grant the Petitioner's application for a variance to the Critical Area Program to construct an accessory structure (pool and patio).

ORDER

For the reasons set forth in the foregoing Memorandum of Opinion, it is this 16th day of Oct., 2025, by the County Board of Appeals of Anne Arundel County, ORDERED, that the variance to permit 459 square feet of new lot coverage to accommodate the 16-foot by 32-foot swimming pool and to permit 154 square feet of apron/patio surrounding the swimming pool in the expanded buffer is hereby **GRANTED**.

Any appeal from this decision must be in accordance with the provisions of Section 604 of the Charter of Anne Arundel County, Maryland.

If this case is not appealed, exhibits must be claimed within 90 days of the date of this Order; otherwise, they will be discarded.

Any notice to this Board required under the Maryland Rules shall be addressed as follows: Anne Arundel County Board of Appeals, Arundel Center, P.O. Box 2700, Annapolis, Maryland 21404, ATTN: Deana L. Bussey, Clerk.

NOTICE: This Memorandum of Opinion does not constitute a building or grading permit and may be valid for a limited time period. In order for the applicant to construct or retain any structures allowed by this opinion, or to perform or retain any grading allowed by this opinion, the applicant must apply for and obtain the necessary building or grading permit and any other approval that may be required to perform the work described herein within the time allotted by law or regulation.

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COUNTY BOARD OF APPEALS
OF ANNE ARUNDEL COUNTY

Darrin Michael Jacobs, Chair

Lade R. Akinbolaji, Vice Chair

DocuSigned by:
Phillip Bissett
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Phillip D. Bissett, Member

James R. Estepp, Member

(William A. Dax, Member, did not participate in this appeal.)

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DISSENT

We believe the decision of the majority is an entirely indefensible opinion that abrogates our responsibility to protect the Critical Area and uphold the Critical Area law. The evidence presented demonstrates that the Petitioner's evidence included properties that are not appropriate comparisons to determine rights commonly enjoyed. Specifically, of the original 12, now 13, properties referenced, four were constructed prior to the enactment of the Critical Area Program. Whether this inclusion was intentional or the result of insufficient research and investigation on the part of the Petitioner ultimately undermines the credibility of his case. Further examination of the evidence reveals that each of the referenced pools can be excluded for valid reasons: some predate the Critical Area Program, others are located on buffer modified properties subject to different standards, and some are entirely outside of the Critical Area and therefore do not have the same restrictions at all. These distinctions are critical and should not be overlooked. On the merits, we find that the Petitioner has not met his burden of proof on the outstanding criteria for the requested variance. For these reasons, we would deny the variance and encourage the County and the Critical Area Commission to consider appealing the decision.

John R. Fury, Member

Anthony V. Lamartina, Member