



2016

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Recommended Citation

Brown, Michael Louis (2016) "Recent Development: Assateague Coastal Trust, Inc. v. Schwalbach: An Applicant Must Satisfy the "Unwarranted Hardship" Standard to be Granted a Variance; the Variance Must Have No Adverse Impact on the Environment and Conform to the Purpose of the Critical Area Program," *University of Baltimore Law Forum*: Vol. 47 : No. 1 , Article 6.
Available at: <http://scholarworks.law.ubalt.edu/lf/vol47/iss1/6>

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RECENT DEVELOPMENT

ASSATEAGUE COASTAL TRUST, INC. V. SCHWALBACH: AN APPLICANT MUST SATISFY THE “UNWARRANTED HARDSHIP” STANDARD TO BE GRANTED A VARIANCE; THE VARIANCE MUST HAVE NO ADVERSE IMPACT ON THE ENVIRONMENT AND CONFORM TO THE PURPOSE OF THE CRITICAL AREA PROGRAM.

By: Michael Louis Brown

The Court of Appeals of Maryland held that the Worcester County Board properly applied the “unwarranted hardship” standard and correctly granted a variance under local critical area law. *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 140, 136 A.3d 866, 882 (2016). The court held that the variance would not have an adverse impact on the environment and the development was in conformity with the Critical Area Program’s purpose and intent. *Schwalbach*, 448 Md. at 143-44, 136 A.3d at 883.

Roy T. Schwalbach (“Schwalbach”) owned waterfront property in a community where piers and boating were common. In order to reach navigable water next to his property, Schwalbach sought a variance from a Worcester County ordinance that limited the length of piers to 100 feet. The variance was granted by the Worcester County Board of Zoning Appeals (the “Board”). In a written decision, the Board determined that Schwalbach would not be able to reach navigable water without the variance. Furthermore, the Board noted that the environmental impact would be mitigated, because Schwalbach’s permits were issued under the condition that he would fulfill specific planting requirements.

Assateague Coastal Trust (“ACT”), an environmental advocacy group, filed a petition for judicial review of the Board’s decision in the Circuit Court for Worcester County. After the circuit court affirmed the decision of the Board, ACT appealed to the Court of Special Appeals of Maryland. The court of special appeals affirmed the decision of the circuit court. On appeal to the court of appeals, ACT raised several arguments: (1) Schwalbach failed to show that without a variance he would be denied all reasonable use of his property; (2) Schwalbach failed to show that the variance would not have an adverse environmental impact; and (3) the Board did not state that Schwalbach rebutted the presumption of non-conformity with Critical Area law.

The Court of Appeals of Maryland began its analysis by clarifying the “unwarranted hardship” standard. *Schwalbach*, 448 Md. at 139, 136 A.3d at 881. In doing so, the court first analyzed case law to determine what one must show to meet the standard. *Id.* at 129, 136 A.3d at 875. In *Belvoir Farms*, the court held that the county board applied an incorrect definition of “unwarranted hardship”. *Id.* at 129, 136 A.3d at 875-76 (citing *Belvoir*

Farms Homeowners Ass'n, Inc. v. North, 355 Md. 259, 734 A.2d 227 (1999)). The court remanded the case and defined “unwarranted hardship” as the “denial of reasonable and significant use of the property.” *Id.* at 130, 136 A.3d at 876 (quoting *Belvoir Farms*, 355 Md. at 282, 734 A.2d at 240).

In *White*, the court ordered that the decision regarding a homeowner’s variance for an in-ground pool be remanded to the board of appeals with instructions that the standard defined in *Belvoir Farms* be applied. *Schwalbach*, 448 Md. at 130, 136 A.3d at 876 (citing *White v. North*, 356 Md. 31, 736 A.2d 1072 (1999)). The court stated that the applicant did not have to show that all of the requirements were met in order for the variance to be granted. *Schwalbach*, 448 Md. at 130, 136 A.3d at 876. “Rather, the applicants needed only to show whether the requirements were ‘generally met.’” *Id.* at 130, 136 A.3d at 876. Lastly, the court held that a board may consider the existence of neighbors’ pools that pre-dated the Critical Area regulations and legally did not conform to those regulations. *Id.*

In *Mastandrea*, the court addressed a lower court’s decision to overturn a variance for a brick pathway granted to a homeowner. *Schwalbach*, 448 Md. at 131, 136 A.3d at 877 (citing *Mastandrea v. North*, 361 Md. 107, 760 A.2d 677 (2000)). The court referred to the definition of “unwarranted hardship” stated in *Belvoir Farms*, adding that when determining if a hardship exists a board does not have to consider the “entire” property. *Schwalbach*, 448 Md. at 131, 136 A.3d at 877.

Following this line of cases, the court then analyzed legislation that changed the application of the “unwarranted hardship” standard. *Schwalbach*, 448 Md. at 131, 136 A.3d at 877. In 2002, the legislature amended the Critical Area law to require that an applicant’s entire property be considered in determining the “unwarranted hardship” standard. *Id.* at 133, 136 A.3d at 878. Additionally, only development since the implementation of the local critical areas program could be used for comparison. *Id.* Lastly, the legislation established that an applicant must meet all of these standards in order to be granted a variance. *Id.*

The court proceeded to analyze the relevant legislation bearing on this case. *Schwalbach*, 448 Md. at 135, 136 A.3d at 879. In *Lewis*, a denial of a landowner’s variance to build a hunting camp was reversed, because the court found that it was improper for the board to consider the landowner’s ability to build his camp elsewhere on his island. *Schwalbach*, 448 Md. at 134, 136 A.3d at 878 (citing *Lewis v. Department of Natural Resources*, 377 Md. 382, 833 A.2d 563 (2003)). The court held this determination of the “unwarranted hardship” standard was applied too strictly. *Id.* In 2004, in response to *Lewis*, the General Assembly enacted the statutory definition of “unwarranted hardship,” by codifying the definition in section 8-1808(d)(1) of the Natural Resources Article. *Schwalbach*, 448 Md. at 135, 136 A.3d at 878-79. Additionally, the legislature instructed local jurisdictions that they must presume in assessing variance applications that a proposed development does not conform to the general purpose and intent of the Critical Area law. *Id.* at 136, 136 A.3d at 879. This instruction placed the

burden of proof and the burden of persuasion on an applicant to rebut the presumption. *Id.*

The court then applied the “unwarranted hardship” standard to the facts of this case. *Schwalbach*, 448 Md. at 139, 136 A.3d at 881-82. An applicant shows an “unwarranted hardship” by proving that without the variance, they would be denied a significant and reasonable use of their property. *Id.* at 139, 136 A.3d at 881. The applicant must also show the inability to place the development elsewhere on the property without a variance. *Id.* The court stated that the pier was a reasonable use in accordance with *Schwalbach*’s riparian rights given that his property was located in a heavily developed boating community. *Id.* Finally, the court determined that the Board correctly applied the standard by considering the entire property in making its decision, stating there were no other reasonable ways to reach the navigable water without the variance. *Id.*

The court then addressed ACT’s concerns that the development would have an adverse environmental impact. *Schwalbach*, 448 Md. at 140, 136 A.3d at 882. The court noted the requirements placed on *Schwalbach* by the Maryland Department of the Environment and the U.S. Army Corps of Engineers. *Id.* at 140-41, 136 A.3d at 882-83. These requirements included a particular amount of new plantings between the development and the marshland, and a width restriction of three feet placed on the pier. *Id.* at 140-42, 136 A.3d at 882-83. The court found that the Board correctly determined *Schwalbach*’s variance would not have an adverse impact on the environment, because he had to conform to these requirements. *Id.* at 142, 136 A.3d at 883.

Next at issue was whether the Board adequately found that the development conformed to the intent and purpose of the Critical Area Program. *Schwalbach*, 448 Md. at 142, 136 A.3d at 883. Although the Board did not explicitly state that *Schwalbach* rebutted the presumption of nonconformity, the facts showed otherwise. *Id.* at 144, 136 A.3d 884. In its decision, the Board indicated that *Schwalbach* had satisfied all standards in his application for a variance. *Id.* The court agreed with the circuit court in finding that *Schwalbach*’s variance conformed to the general purpose and intent of the Critical Area Program. *Id.*

In *Assateague Coastal Trust*, the Court of Appeals of Maryland clarified the “unwarranted hardship” standard while providing a guide on what an attorney must show in order to have a variance granted. This case demonstrates that there is a balance between environmental concerns and a property owner’s riparian rights. Practitioners should note that the standard to have a variance granted under Critical Area law may be difficult to meet, and even if met, the requirements attached to the variance may increase the cost of the development.