

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 21-1458

CHESELDINE-DICKERSON PROPERTY

SEVENTH ELECTION DISTRICT

DATE HEARD: May 11, 2023

ORDERED BY:

**Mr. Ichniowski, Mr. Bradley, Ms. Delahay,
Mr. Miedzinski and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: June 8, 2023

Pleadings

Jessica Faye Cheseldine Dickerson (“Applicant”) seeks a variance (VAAP # 21-1458) from Section 71.8.3 to disturb the 100’ Critical Area Buffer for a replacement house on an existing foundation.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on April 21, 2023 and April 28, 2023. The hearing notice was posted on the property by April 26, 2023. The file contains the certification of mailing to all adjoining landowners, even those located across a street. Each person designated in the application as owning land that is located within two hundred feet of the subject property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the County’s website on May 5, 2023. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on May 11, 2023 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented about the proposed variance requested by the Applicants.

The Property

Applicant owns the real property situate 37230 Gibson Road, Bushwood (“the Subject Property”). The Subject Property is in the Rural Preservation District (“RPD”) Zoning District, has a Limited Development Area (“LDA”) Critical Area overlay, and is identified at Tax Map 46, Grid 3, Parcel 65.

The Variance Requested

Applicant seeks a variance from St. Mary's County Comprehensive Zoning Ordinance ("CZO") Section 71.8.3 to disturb the 100' Critical Area Buffer for a replacement house on an existing foundation.

The St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires there be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams, and tidal wetlands. No new impervious surfaces or development activities are permitted in the 100-foot buffer unless an applicant obtains a variance. CZO § 71.8.3(b)(1)(c). CZO § 41.2. states that any use or structure within the Critical Area existing or established before March 27, 1990 may continue, and that if such a structure is lost to fire or other calamity it may be restored in accordance with CZO § 52.5. CZO § 52.5 states the structure may be restored "provided that appropriate approvals and permits are secured and the standards of this Ordinance are met insofar as possible."

Staff Testimony

Stacy Clements, an Environmental Planner for the St. Mary's County Department of Land Use and Growth Management ("LUGM"), presented the following evidence:

- The Subject Property is a 21,780 square foot lot situated on Whites Neck Creek. The proposed replacement of the existing house is fully within the 100' Buffer.
- The site plan depicts an in-kind replacement of a single-family structure lost to fire.
- Mitigation shall be required at a ratio of 1:1 for temporary disturbance within the Buffer. The Applicant proposed 2,140 square feet of buffer mitigation to meet these requirements, and a planting agreement and plan will be required prior to the issuance of the building

permit.

- The Maryland Critical Area Commission did not oppose the variance in the response letter dated August 27, 2021.
- The St. Mary's County Soil Conservation District and Stormwater Management exempted the site plan due to less than 5,000 square feet of soil disturbance.
- The Health Department has also approved the site plan.
- The following Attachments to the Staff Report were introduced:

#1: Standards Letter;

#2: Site Plan;

#3: Critical Area Commission Comments;

#4: Location Map;

#5: Zoning Map;

#6: Critical Area Map

Applicant Testimony and Exhibits

Applicant appeared before the Board in-person and offered testimony. The following items were among the evidence presented to the Board:

- The new house will be an in-kind replacement of an existing dwelling that previously burnt down.
- The same footprint and footers that exist will be utilized for the replacement dwelling.
- Aerial photographs of the site, before and after the fire, were shared with the Board.

Public Testimony

No members of the public appeared to offer testimony for or against the project.

Decision

County Requirements for Critical Area Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.4.1 sets forth six separate requirements that must be met for a variance to be issued for property in the Critical Area. They are summarized as follows: (1) whether a denial of the requested variance would constitute an unwarranted hardship; (2) whether a denial of the requested variance would deprive the Applicants of rights commonly enjoyed by other property owners in similar areas within the St. Mary's County Critical Area Program; (3) whether granting the variance would confer a special privilege on the Applicants; (4) whether the application arises from actions of the Applicants; (5) whether granting the application would not adversely affect the environment and would be in harmony with the Critical Area Program; and (6) whether the variance is the minimum necessary for the Applicants to achieve a reasonable use of the land or structures. Maryland Code Annotated, Natural Resources Article, § 8-1808(d)(2)(ii) also requires the Applicants to overcome the presumption that the variance request should be denied.

Findings - Critical Area Variance

Upon review of the facts and circumstances, the Board finds and concludes the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

First, the Board finds that denying the Applicants' request would constitute unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Court of Appeals established the statutory definition for "unwarranted hardship" as it pertains to prospective development in the Critical Area:

[I]n order to establish an unwarranted hardship, the applicant has the burden of demonstrating that, without a variance, the applicant

would be denied a use of the property that is both significant and reasonable. In addition, the applicant has the burden of showing that such a use cannot be accomplished elsewhere on the property without a variance.

Id. at 139. Here, Applicants have sufficiently demonstrated that, absent the variance, they would be denied a use of the Property that would be both significant and reasonable. A single-family residence is a common and elementary improvement on a parcel. Moreover, this particular parcel is completely constrained by the Critical Area Buffer. There is no means to locate the proposed improvement outside of the Buffer. Lastly, the Board notes that, in this case, the particular use is augmented by the fact that this is the restoration of a previous use lost to fire. Applicant asks for no more than an in-kind replacement that the Comprehensive Zoning Ordinance entitles her to upon a demonstration that the Ordinance has been complied with as far as possible.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Limited Development Area. Applicant seeks to build a home that is of similar size and character as surrounding homes, many of which have been built since adoption of the Critical Area program. This Board finds that the right to construct a dwelling suitable for habitation is a commonly enjoyed right of property owners who own lots similar to that of the Applicant.

Third, granting a variance will not confer a special privilege upon the Applicant. Applicant's proposed site plan asks for a relatively modest dwelling, and includes all required mitigation plantings, environmental considerations, and, aside from the need for this variance, complies with all applicable regulations. Regarding whether grant of the variance alone constitutes a special privilege, it was noted in the previous paragraph that Applicant's proposed development is of an intensity and character that may commonly be found in the Critical Area in St. Mary's County, even among dwellings constructed after St. Mary's County's adoption of its Critical Area

program.

Fourth, the need for the variance does not arise from actions of the Applicant. The Applicant's proposal revolves around making use of an existing footprint the selection of which was not the Applicant's.

Fifth, granting the variance would not adversely affect the environment. The Applicant will be required to mitigate the proposed development with an approved planting plan established on-site (per COMAR 27.01.09.01) as part of the Building Permit process. The plantings are intended to offset any negative effects and provide improvements to water quality along with wildlife and plant habitat. The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, all of which should contribute to improved infiltration and reduction of non-point source pollution leaving the site.

As a result, the Applicant has also overcome the presumption in § 8-1808(d)(2)(ii) of the Natural Resources Article that the variance request should be denied.

Finally, the Board of Appeals finds that the requested variance is the minimum necessary to achieve Applicants' intended reasonable use of the Property. As noted previously, Applicants are making use of an existing and legal footprint and footers, and the contemplated house will not extend beyond the existing foundation.

ORDER

PURSUANT to Applicant's request for a variance from CZO Section 71.8.3 to disturb the 100' Critical Area Buffer for a replacement house on an existing foundation; and,

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is,


ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 24.3, that the

Applicant is granted a variance from Section 71.8.3 to disturb the 100' Critical Area Buffer for a replacement house on an existing foundation.

The foregoing variance is subject to the condition that the Applicant shall comply with any instructions and necessary approvals from the Office of Land Use and Growth Management, the Health Department, and the Critical Area Commission.

This Order does not constitute a building permit. In order for the Applicant to construct the structures permitted in this decision, they must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: JUNE 3, 2023

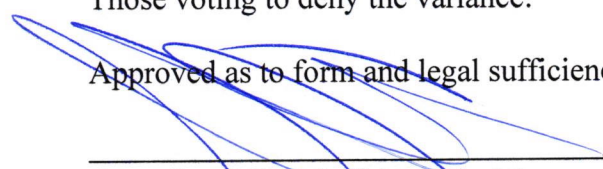

Daniel F. Ichniowski, Chairman

Those voting to grant the variance:

Mr. Ichniowski, Mr. Bradley, Ms. Delahay,
Mr. Miedzinski, and Mr. Richardson

Those voting to deny the variance:

Approved as to form and legal sufficiency


Steve Scott, Board of Appeals Attorney

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals. St. Mary's County may not issue a permit for the requested activity until the 30-day appeal period has elapsed.

Further, St. Mary's County Comprehensive Zoning Ordinance § 24.8 provides that a variance shall lapse one year from the date the Board of Appeals granted the variance unless: (1) A zoning or building permit is in effect, the land is being used as contemplated in the variance, or regular progress toward completion of the use or structure contemplated in the variance has taken place in accordance with plans for which the variance was granted; (2) a longer period for validity is established by the Board of Appeals; or (3) the variance is for future installation or replacement of utilities at the time such installation becomes necessary.

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