

**IN THE ST. MARY'S COUNTY BOARD OF APPEALS**

**VAAP NUMBER 22-0836**

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**GUNTOW PROPERTY**

**FOURTH ELECTION DISTRICT**

**VARIANCE REQUEST HEARD: December 8, 2022**

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**ORDERED BY:**

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

**ENVIRONMENTAL PLANNER: Stacy Clements**

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**DATE SIGNED: JAN 12, 2023**

### **Pleadings**

Janis and Wesley Guntow (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer to construct a house with a driveway.

### **Public Notification**

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on November 18, 2022 and November 25, 2022. A physical posting was made on the property and all property owners within 200 ft. were notified by certified mail on or before November 23, 2022. The agenda was also posted on the County’s website on November 30, 2022. Therefore, the Board of Appeals (“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 December 8, 2022 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were duly sworn, the proceedings were recorded electronically, and the following was presented about the variance requested by the Applicants.

### **The Property**

The subject property is located at 23750 Old Chaptico Wharf Lane (“the Property”). The Property is approximately 27,740 square feet, more or less, zoned Rural Preservation District (RPD), has a Limited Develop Overlay (LDA) Critical Area overlay, and is found at Tax Map 29, Grid 5, and Parcel 23.

### **The Variance Requested**

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to

construct a new three (3) story house with accessory apartment, attached garage, driveway, and porches.

### **St. Mary's County Comprehensive Zoning Ordinance**

CZO § 71.8.3 requires there be a minimum 100-foot buffer (“the 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).

### **Departmental Testimony and Exhibits**

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

- The Property consists of approximately 27,740 square feet in Maddox. The Property lies entirely within the Critical Area Limited Development Overlay (LDA) and contains an existing mound system and gravel driveway.
- The application proposes to build a new three (3) story house with accessory apartment, attached garage, driveway, and porches. The accessory apartment would be part of the house.
- The applicant is requesting a variance to construct a driveway partially inside the 100 ft. Critical Area Buffer.
- As the project proposes less than 5,000 s.f. of total soil disturbance, exemptions from stormwater management standards and review by the Soil Conservation District apply.
- The site plan is currently under review by the Health Department.
- Mitigation will be required at the ratio of 3:1 for permanent disturbance for 530

sq. ft. within the buffer. Additionally, 1:1 mitigation will be required for temporary disturbance (420 sq. ft.) and for the new lot coverage outside of the buffer (2,468 sq. ft.), for total mitigation of 4,478 sq. ft. for the proposed project.

- Mitigation is preferred within the buffer first. If there is no room within the 100 ft. buffer area, then it would go adjacent to the buffer on site. If there is no room on-site, then it could go off-site. The last resort would be fees in-lieu, but there must be absolutely no room for mitigation on-site.
- The off-site mitigation would have to be within the critical area. If it is RCA, it would have to be within the RCA. If its within the LDA, it would have to be within the LDA.
- A buffer management plan for on-site planting must be approved by the Department of Land Use and Growth Management (LUGM) prior to staff issuing a building permit.
- The Critical Area Commission provided a response letter dated May 10, 2022, requiring mitigation if the project is approved. In its letter the Critical Area Commission did not state it opposes the requested variance.
- Attachments to the Staff Report:
  - #1: Standards Letter
  - #2: Site Plan
  - #3: Critical Area Commission Response
  - #4: Location Map
  - #5: Zoning Map
  - #6: Critical Area Map

### **Applicants' Testimony and Exhibits**

Steven Vaughn, LSR Land Surveying, 41605 Court House Drive, Leonardtown, Maryland presented evidence testimony before the Board on behalf of Applicants. Applicants provided a slide show that included: maps of the property location, photographs of the site, and the site plan. The following evidence and testimony were included in Applicants' presentation:

- Applicants are requesting a variance to disturb the Critical Area buffer for 23750 Old Chaptico Wharf Lane in Maddox located on the Wicomico River..
- There is a 100 ft. buffer on both sides of the property; one side abuts the Wicomico River and the other, a tidal pond.
- Applicants are constructing a single-family dwelling with an accessory apartment inside of the building. The entire house, porches, steps, and stoops are all outside of the Buffer. The only encroachment into the Buffer is the proposed driveway.
- The Applicants are proposing a driveway to access the house from Old Chaptico Wharf Lane which is within the buffer and has been an existing road for a very long time. It serves all the lots on the peninsula.
- On the property exists a mound system that was installed and inspected more than 20 years ago. There was a site plan for the project, but the house was never built. The mound, septic system, and pump were already installed.
- The Health Department approved everything except for the testing of the pumping equipment in the mound pump pit. Health department regulations approve use of the 1500-gallon septic tank. Applicants intend to use that and not a BAT septic system.
- The only disturbances in the buffer would be the driveway, and temporary disturbance for construction of the porch.

- Applicants have the proposed planting requirements for mitigation on the site plan. There are clusters of trees and shrubs lining the buffer along the tidal pond side.
- Applicants can fit the mitigation on site.

### **Public Testimony**

No members of the public appeared or submitted written testimony related to this matter.

### **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 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. Applicants propose to build a house on an unimproved lot, a basic use the denial of which would constitute an unearned hardship. . The only encroachment into the Buffer is the proposed driveway on to Old Chaptico Wharf Lane. The Board notes Old Chaptico Wharf Lane is the only road leading to the proposed home, and denial of a driveway would deny Applicants practical use of their proposed home.. Additionally, the Board notes the testimony of the Applicants, and the pictures of the property provided by Applicants, and concludes that the driveway could not be reconfigured to rest entirely outside of the Buffer.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed by other similarly situated property owners in the Rural Preservation District and Limited Development Area. As stated above, the improvement of an unimproved lot with a family residence is a fundamental use, and the proposed driveway is necessary for Applicants to avail themselves of that use. The proposed project is of like size and character as other residences encountered in St. Mary’s County. With respect to the project’s encroachments into the Buffer, Applicants testified that Old Chaptico Wharf Lane, already in the Buffer, is the only road on the peninsula; all other properties attach to this road for ingress/egress to their properties. Driveways are fundamentally necessary property improvements, and there is no reasonable means to relocate

the driveway outside of the Critical Area Buffer..

Third, granting a variance to will not confer a special privilege upon Applicants. It was noted in the previous paragraph that Applicants' proposed work is of a quality and scale that may be commonly found in the Critical Area in St. Mary's County.

Fourth, the need for the variance does not arise from actions of the Applicants. The Applicants are constrained by the physical features of their lot and the placement of Old Chaptico Wharf Lane.

Fifth, granting the variance would not adversely affect the environment. The Applicants will be required to mitigate the proposed development with a Buffer Management Plan. 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. Applicants' proposed work is also tailored to make use of the location of existing features, and the overall increased site coverage is relatively modest. In addition, all the proposed mitigation can fit on site. Applicants stated all mitigation will be able to be placed on-site. .

As a result, the Applicants have 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 above, the Applicants are constrained by the physical features of the property, and the geographical extent of the Buffer. The Board is swayed by the testimony and evidence of Applicants that building solely outside the Buffer is not practicable and will not achieve the same significant and valuable use of the



Applicants' property that Applicants' neighbors enjoy of theirs. Applicants have made best efforts to place most of the construction outside of the Critical Area Buffer. Conditions imposed by this Board will reduce total encroachment into the Buffer to the minimum extent necessary for Applicants to achieve this use.

#### County Requirements for Granting Variances

The St. Mary's County Comprehensive Zoning Ordinance § 24.3 sets forth seven separate requirements that must be met for a variance to be issued:

- (1) Because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape, or topographical conditions of the property involved, strict enforcement of this Ordinance will result in practical difficulty;
- (2) The conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;
- (3) The purpose of the variance is not based exclusively upon reasons of convenience, profit, or caprice. It is understood that any development necessarily increases property value, and that alone shall not constitute an exclusive finding;
- (4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
- (5) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will not be changed by the variance;
- (6) The proposed variance will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and

(7) The variance complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

*Id.*

Findings – Standard Variance Requirements

Upon review of the facts and circumstances, the Board finds and concludes that 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 strictly interpreting the CZO would result in practical difficulty due to the particular physical surroundings of the Property. In *McLean v. Soley*, 270 Md. 208 (1973), the Maryland Court of Appeals established the standard by which a zoning board is to review “practical difficulty” when determining whether to grant a variance:

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

*Id.* at 214–15.

As noted in the Board of Appeals’ discussion of the standards for granting a variance from

Critical Area provisions, denial of this variance would constitute a practical difficulty. Moreover, the Property is constrained by its geographical location on the banks of the waters. The existing property is surrounded on both sides by the Buffer, and the proposed improvements are the only option for ingress/egress to the main road, which is already located within the Buffer.

The second standard is that the conditions creating the difficulty are not generally applicable to other properties in the same zoning classification. As noted above, Applicants' need for a variance stem from the physical characteristics of this site and the constraints posed by the location of existing property.

To the third standard, the purpose of seeking the variance is not "based exclusively upon reasons of convenience, profit or caprice." Rather, Applicants attempt to achieve a reasonable use of the Property – in this case, a home - enjoyed by owners of other similarly situated properties. As noted previously, Applicants' testimony in the record supports the view that their home and driveway will be of the same form and function as enjoyed by adjoining property owners. The Board has found – in this case and in the past – that a home is a common, valuable, and significant improvement to an unimproved lot.

Fourth, the need for the variance does not arise from actions of the Applicants. Applicants' need for a variance stem from the particular physical characteristics of their property and their particular development plan is oriented around an existing septic mound home that the Applicants did not themselves place.

Fifth, the variance will neither detrimentally affect the public welfare, injure other properties or improvements, nor change the character of the district. The neighboring property owners were notified of the variance request and given an opportunity to speak on the matter; none did so. The Board also believes that the conditions imposed will alleviate possible impacts upon

environmental quality owing to encroachment in the Buffer, and further notes that the proposed development will also result in the elimination of other encroachments in the Buffer.

Sixth, the proposed development will not increase the residential use of the property and the Board does not find that it will increase congestion or the risk of fire, endanger public safety, or substantially diminish or impair property values in the neighborhood.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan. The Board of Appeals notes that Applicants' request makes use of existing features where it can and that what encroachments in the Buffer remain have been limited by the Applicants to the minimum necessary for them to achieve this reasonable and significant use of their property.

### **ORDER**

PURSUANT to the application of the Janis and Wesley Guntow, petitioning for a variance from CZO § 71.8.3 to disturb the Critical Area Buffer to construct a house with a driveway; 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 § 21.1.3.a, and CZO § 24.8, that the Applicants are granted a variance from CZO Section 71.8.3 to construct a house with a driveway;

UPON FURTHER CONDITION THAT, Applicants 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 Applicants 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: JAN 12, 2023

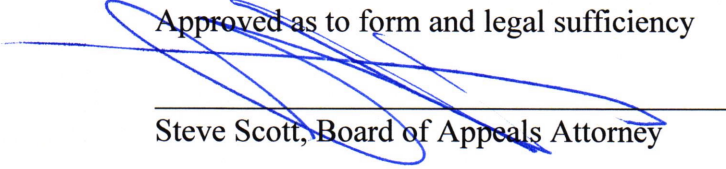
  
Daniel Ichniowski, Chairperson

Those voting to grant the amendment:

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

Those voting to deny the amendment:

Approved as to form and legal sufficiency

  
Steve Scott, Board of Appeals Attorney

### **NOTICE TO APPLICANTS**

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.