

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-1210

NORRIS PROPERTY

THIRD ELECTION DISTRICT

VARIANCE REQUEST HEARD: OCTOBER 12, 2023

ORDERED BY:

Mr. Ichniowski, Mr. Bradley, Mr. Miedzinski, Mr. Payne, and Mr. Richardson

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: Nov 9, 2023

Pleadings

Kimberly Norris (“Applicant”) seeks a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 71.5.2.b to disturb the non-tidal wetland buffer (“the Wetland Buffer”) and from CZO § 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on September 22, 2023 and September 29, 2023. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before September 27, 2023. The agenda was also posted on the County’s website on October 6, 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 October 12, 2023 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 proposed amendment requested by the Applicant.

The Property

The subject property is located at 41071 Lake & Breton View Drive, Leonardtown, MD 20650 (“the Property”). The Property is 26,000 square feet, more or less, is zoned Residential, Neighborhood Conservation (“RNC”), has a Limited Development Area (LDA) Critical Area overlay, and is found at Tax Map 40A, Grid 16, Parcel 3. It is Lot 274 in Section 2 of the Society Hill Subdivision.

The Variance Requested

Applicant seeks a variance from the St. Mary's County Comprehensive Zoning Ordinance ("CZO") Section 71.5.2.b to disturb the non-tidal wetland buffer ("the Wetland Buffer") and from CZO 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house.

St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.5.2 requires there be a minimum 25-foot buffer preserved from the edge of non-tidal wetlands and shall be expanded up to 100-feet to include areas of adjoining hydric soils. CZO § 72.3.1.c(2) prohibits clearing in excess of 30 percent of any forest or developed woodland.

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 26,000 s.f., more or less, and is impacted by an MDE-mapped non-tidal wetland. Geo-Technology Associates, Inc. ("GTA") confirmed the wetlands' presence.
- The non-tidal wetland buffer is expanded to include hydric soils up to 100 feet.
- Applicant proposes to construct a two-story house within the non-tidal wetland buffer.
- All 26,000 square feet on the property are covered with existing trees, shrubs, and other vegetation. Applicant proposes clearing 10,814 s.f., or 41%, of the lot in her proposed development.
- Mitigation will be required at the ratio of 3:1 for a total of 32,442 square feet of plantings. Applicant proposes 3,800 s.f. of mitigation plantings on-site and the remainder to be planted at an approved location off-site.

- LUGM, the Metropolitan Commission, the and the Soil Conservation District are currently reviewing the project. The Health Department has approved the project and Stormwater Management review has been completed and approved.
- In its response of October 3, 2023, the Critical Area Commission did not object to the requested variance.
- Attachments to the Staff Report:
 - #1: General Standards Letter
 - #2: Critical Area Standards Letter
 - #3: Non-Tidal Wetlands Map
 - #4: GTA Wetland Report & Delineation
 - #5: Site Plan
 - #6: Location Map
 - #7: Zoning Map
 - #8: Critical Area Commission Response

Applicant's Testimony and Exhibits

Applicant was represented before the Board by Wayne Hunt of Little Silence's Rest, Inc., the Applicant's surveyor. Mr. Hunt presented a slideshow which contained site plans, building plans, photographs of the site, and offered oral testimony. The following evidence and testimony was included in his presentation:

- The Property is forested in a manner typical for an undeveloped, forested lot.
- Mr. Hunt presented and read aloud the Applicant's general standards letter and Critical Area standards letter.

Public Testimony

No members of the public appeared to offer testimony related to this matter.

Decision

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 Applicant is 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. § 24.3(1). 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.

Here, the Applicant possesses a lot almost entirely impacted by the expanded wetland buffer. The Board finds compelling and accepts Applicant’s assertion that there is no sufficient

room to construct a reasonably-sized house, driveway, and septic system without impacting the non-tidal wetlands buffer.

Second, the circumstances present in this matter are not generally applicable to other similarly situated properties. As noted in the paragraph above, the Property is almost entirely constrained by the non-tidal wetlands buffer. Such conditions are not generally present on the typical parcel.

Third, the purpose of seeking the variance is not “based exclusively upon reasons of convenience, profit or caprice.” Rather, Applicant desires to build a home, a reasonable request, and Applicant’s site plan does not ask for anything extraordinary, excessive, or uncharacteristic of what may be found on similarly-situated properties. Applicant’s request is necessitated by the fact that the Property is encumbered by the Wetlands Buffer.

Fourth, the need for the variance does not arise from actions of the Applicant. As noted previously, the variance is required due to the Property’s physical characteristics.

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 have been notified of the variance request to provide them with an opportunity to speak on the matter. None have spoken against the project.

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 proposed building will be similar to already existing homes in the general neighborhood, and Applicant’s new dwelling, once

constructed, will be in harmony with her neighbors. Mitigation plantings required will be of benefit to the local wildlife habitats and help offset the development's impacts. For these reasons, the Board of Appeals finds that the variance, and the development it will facilitate, will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan.

County Requirements for Critical Area Variances

COMAR 27.01.12.04 requires an Applicant to meet each of the following standards before a Critical Area variance may be granted:

- (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.

Additionally, the Maryland Code Annotated, Natural Resources Article, § 8-1808(d)(2)(ii) also requires the Applicant 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 Applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance.

The Board finds that denying the Applicant's request would constitute unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwabach*, 448 d. 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, Applicant has sufficiently demonstrated that, absent the variance, they would be denied a use of the Property both significant and reasonable. Constructing a single-family dwelling is a foundational use of one's own real property. As noted by staff and Applicant the entirety of the lot is forested, and the lot is of a small size; limiting oneself to clearing only 30% of the 26,000 square feet for a reasonably-sized house, driveway, and septic system is not practicable.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicant of a substantial use of land or a structure permitted to others. As noted above, improvements such as those proposed by the Applicant are commonly enjoyed by other similarly-

situated properties within the Limited Development Area.

To the third factor, 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. Applicant avails herself of her right to seek a variance, and is hewing as close to the Critical Area program's strictures as may be reasonably expected of her proposal.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the applicant. Rather, Applicant is constrained by the physical characteristics of her lot and existing forest and vegetative cover.

Fifth, the variance request does not arise from any conforming or nonconforming condition on any neighboring property.

Sixth, 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. When development is permitted in the Critical Area Buffer it must be heavily mitigated. As noted by staff, over 32,000 square feet of mitigation plantings will be required, and the Applicant will pay fees-in-lieu for whatever cannot be located on the Property. Those fees-in-lieu will pay for plantings elsewhere in the Critical Area Buffer in St. Mary's County. These plantings are meant to mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer.

Finally, by satisfying the above criteria the Board finds that granting of the variance will 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. In total, the Applicant has demonstrated that a variance is necessary to achieve the intended uses he proposes. There are no practical alternatives

to make these improvements elsewhere on the Property.

Additionally, in satisfying each of the necessary criteria the Applicant has overcome the statutory presumption against granting a variance.

ORDER

PURSUANT to the application of Kimberly Norris, petitioning for a variance from CZO § 71.5.2.b to disturb the non-tidal wetland buffer (“the Wetland Buffer”) and from CZO § 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house; 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 § 24.8, that the Applicant is granted a variance from CZO § 71.5.2.b to disturb the non-tidal wetland buffer (“the Wetland Buffer”) and from CZO § 72.3.1.c(2) for clearing more than 30% of existing forest cover to construct a house.

UPON CONDITION THAT, 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 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: Nov 9, 2023



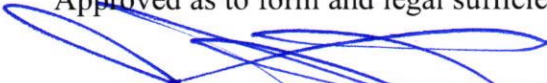
Daniel F. Ichniowski, Chairperson
By: David Wayne Miedzinski, Acting Chairperson

Those voting to grant the variance:

Mr. Ichniowski, Mr. Bradley, Mr. Miedzinski, Mr. Payne, and 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.