

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-1308

THOMAS PROPERTY

SECOND ELECTION DISTRICT

VARIANCE REQUEST HEARD: MARCH 14, 2024

ORDERED BY:

**Mr. Hayden, Mr. Bradley, Mr. Payne,
Mr. Richardson, and Ms. Weaver**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: May 9, 2024

Pleadings

Suzanne and Michael Thomas (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 71.8.3 disturb the Critical Area Buffer (“the Buffer”) to construct an addition.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 23, 2024 and March 1, 2024. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before February 28, 2024. The agenda was also posted on the County’s website on March 8, 2024. 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 March 14, 2024 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 Applicants.

The Property

The subject property may be found at 18273 Herring Creek Road in Tall Timbers, Maryland (“the Property”). The Property is 12,500 square feet, more or less, is zoned Rural Preservation District (“RPD”), has a Limited Development Area (“LDA”) Critical Area overlay, and is found at Tax Map 61, Grid 20, Parcel 246.

The Variance Requested

Applicants seek a variance from CZO § 71.8.3 disturb the Critical Area Buffer to construct an addition.

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 (“the Buffer”). This buffer may be expanded in the presence of certain environmental features, such as hydric or highly erodible soils. CZO § 71.8.3.a(1). 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 a staff report and PowerPoint presentation that included the following testimony:

- The property is a grandfathered lot in the Critical Area. The lot was platted prior to adoption of the Critical Area program on December 1, 1985.
- According to the State Department of Assessments and Taxation, the property is a 10,000 square foot lot. It is located on Herring Creek Road and is adjacent to tidal waters of the Potomac River. It is improved by a dwelling built in 1924, prior to the adoption of a comprehensive zoning ordinance by St. Mary's County.
- The Buffer is expanded due to the presence of hydric soils, and impacts the Property.
- Applicants propose construction of a 16' x 23' covered porch and a 6' x 7' half-bath which will impact the expanded Buffer.

- The total mitigation required is 3,048 square feet of Buffer plantings to meet the project's mitigation requirements. A planting agreement and plan will be required prior to issuance of the building permit.
- A response letter from the Critical Area Commission was received on February 23, 2024. In its letter the Commission does not state it opposes the variance.
- The project has received zoning approvals from LUGM. The Health Department has approved the site plan. Because it proposes less than 5,000 square feet of cumulative disturbance it is exempt from Soil Conservation District and stormwater management review.
- Attachments to the Staff Report:
 - #1: Critical Area Standards Letter
 - #2: Plat Book 20, Page 186
 - #3: Critical Area Map
 - #4: Site Plan
 - #5: Location Map
 - #6: Zoning Map
 - #7: Critical Area Commission Response

Applicants' Testimony and Exhibits

Michael Thomas appeared before the Board via Zoom. Mr. Thomas presented a slideshow which contained photographs of the site and offered oral testimony. The following evidence and testimony was included in his presentation:

- Mr. Thomas showed a picture of the back of the existing dwelling, pointing out that the existing bathroom is located in a "bump-out." The dwelling has three bedrooms and

one bathroom. The proposed half-bath will be located adjacent to the bump-out. A covered porch will also be built.

- Applicants are not sure the two trees will need to be removed or not. Mr. Thomas said it will depend on whether the contractor thinks the root systems will interfere with the dwelling and hopes to keep the trees if possible. They are located approximately 20' from the house.
- There will be approximately three steps added to the enclosed screen porch. These are not depicted on the site plan.

Public Testimony

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

Decision

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 jurisdictions 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 Applicants are entitled to the requested relief.

The Board finds that denying the Applicants' request would constitute an 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, Applicants have sufficiently demonstrated that, absent the variance, they would be denied a use of the Property both significant and reasonable. Mr. Thomas' testimony was that there is only one existing full bath for the three-bedroom home. In light of that, an additional half-bath seems reasonable. The covered porch, a common amenity in other similarly situated properties, would be the only such amenity on the Property.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicants of a substantial use of land or a structure permitted to others. Single-family homes and covered porches are commonplace improvements to properties, even those properties located in the Buffer. As noted during the hearing, many neighboring properties are similarly developed with houses and improvements protruding even further into the Buffer as the Applicants' home. In all, the Applicants' proposal seems to be one that is typical for 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. Applicants avail themselves of their right to seek a variance and are hewing as close to the Critical Area program's strictures as may be reasonably expected of an Applicant in their position.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the Applicants. Rather, Applicants are constrained by the physical characteristics of their lot and its existing configuration. The existing home was built in 1924, six decades prior to enactment of the Critical Area program. The Board also notes that the proposed improvements shall be built no closer to the Potomac River than the existing dwelling.

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 3,000 square feet of mitigation plantings will be required. These plantings will help 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 Applicants have demonstrated that a variance is necessary to achieve their proposed use. That proposed use has been found to be one that is significant and reasonable. There are no practical alternatives to make these improvements elsewhere on the Property, and the overall net increase in lot coverage is within lot coverage limits. The impacts to the Buffer of redevelopment will be offset by the mitigation and other site improvements the Applicants shall make.

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

ORDER

PURSUANT to the application of Suzanne and Michael Thomas, petitioning for a variance from CZO § 78.3 to disturb the Critical Area Buffer to construct an addition; 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

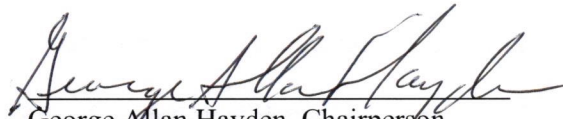
Applicants are granted a variance from CZO § 78.3 to disturb the Critical Area Buffer to construct an addition;

UPON CONDITION THAT, any steps to the proposed porch shall only be of the general character and placement as Applicants described in the hearing held on March 14; and,

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 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: May 9, 2024


George Allan Hayden, Chairperson

Those voting to grant the variance:

Mr. Hayden, Mr. Bradley, Mr. Payne, Mr. Richardson, and Ms. Weaver

Those voting to deny the variance:

Approved as to form and legal sufficiency



Steve Scott
Board of Appeals Attorney

NOTICE TO APPLICANTS

Within thirty (30) days from the date of this Order, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Petition for Judicial Review in the St. Mary's County Circuit Court. 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.