

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

**VAAP NUMBER 23-1003**

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**TIPPETT PROPERTY**

**SIXTH ELECTION DISTRICT**

**DATE HEARD: NOVEMBER 21, 2023**

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**ORDERED BY:**

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

**ENVIRONMENTAL PLANNER: STACY CLEMENTS**

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**DATE SIGNED: Nov 21, 2023**

### **Pleadings**

Thomas Nelson and La Donna Mary Tippet (‘‘Applicants’’) seek a variance (VAAP # 23-1003) from Comprehensive Zoning Ordinance § 71.8.3 to disturb the 100’ Critical Area Buffer to construct a single-family dwelling.

### **Public Notification**

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on November 3, 2023 and November 10, 2023.<sup>1</sup> Notice was physically posted on the property by November 6, 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 200’ of the property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the County’s website on November 17, 2023. Therefore, the Board finds and concludes there has been compliance with the notice requirements.

### **Public Hearing**

A public hearing was conducted at 6:30 p.m. on November 21, 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 Applicant.

### **The Property**

Applicants own real property situate 24644 Tippet Lane, Hollywood, Maryland (‘‘the

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<sup>1</sup> This matter was originally heard at a previous meeting of the Board held October 12, 2023. That night the Board of Appeals voted to grant the requested variance after a full hearing. Subsequently, it was discovered that some properties, owing to a technical error, did not receive the full notice required by Board of Appeals Rules of Procedure Rule 2-104(b)(1). Accordingly this matter was set to be heard again *de novo* after perfected notice was given.

Subject Property”). The Subject Property is in the Residential, Neighborhood Conservation (“RNC”) zoning district, has a Limited Development Area (“LDA”) Critical Area overlay, and is identified at Tax Map 27, Grid 12, Parcel 412.

### **The Variance Requested**

Applicant seeks a variance from St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 71.8.3 to disturb the 100’ Critical Area Buffer to construct a replacement house.

### **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 (“the Buffer”). 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).

### **Staff Testimony**

Stacy Clements, an Environmental Planner for the St. Mary’s County Department of Land Use and Growth Management (“LUGM”) presented a staff report, a PowerPoint presentation, and offered oral testimony that together included the following testimony:

- The Subject Property is a grandfathered lot in the Critical Area of St. Mary’s County. It was recorded prior to adoption of the Maryland Critical Area Program on December 1, 1985.
- Per the State Department of Assessments and Taxation, the lot is 6,098 square feet in size, more or less. It is located on Tippett Road and is adjacent to the tidal waters of Cuckold Creek. It is improved by an existing dwelling SDAT reports was built in 1900, prior to the current zoning regulations of St. Mary’s County.
- The house was improved upon with a 6’ x 11’ addition under Permit #91-1844, which was

finalized on April 30, 1997.

- A majority of the Subject Property is constrained by the Buffer.
- Applicant's site plan proposes removing the existing dwelling and attachment and constructing a replacement that will impact the Buffer.
- If approved, mitigation shall be required at the ratio of 3:1 for permanent disturbance within the Buffer and 1:1 for new lot coverage outside the Buffer. 1:1 credit will be given for any lot coverage removed. In total, the mitigation required for this project will be 2,197 square feet of Buffer mitigation plantings. A Buffer Management Plan must be approved by LUGM.
- In its response letter dated September 25, 2023 the Critical Area Commission did not oppose the requested variance, provided the existing dwelling is confirmed to be legally nonconforming.
- The Department of Land Use & Growth Management approved the site plan zoning requirements. The project is exempt from stormwater management and soil conservation district review as it proposes less than 5,000 s.f. of soil disturbance. The Health Department has approved the site plan.
- The following Attachments to the Staff Report were introduced:
  - #1: Critical Area Standards Letter & Pictures;
  - #2: Critical Area Map;
  - #3: Site Plan;
  - #4: Location Map;
  - #5: Zoning Map;
  - #6: Critical Area Commission Response

**Applicants' Testimony and Exhibits**

Applicant Thomas Tippet, Jr. appeared before the Board of Appeals. He offered testimony that included a slideshow consisting of pictures that depicted the site and existing house. His oral testimony included the following:

- This property has been in Mr. Tippet's family since the 1800s.
- The small size of the lot is due to Mr. Tippet's great-grandfather's choice to give each of his eight children a piece of the farm he owned on Cuckold Creek. Though a majority of the farm has been sold over the years, the eight original lots remain in the family.
- Contra SDAT, the existing house is a summer cottage built in 1950 for Mr. Tippet's aunt. She passed two years ago and title passed to Thomas Tippet, Sr. Applicants desire to take over ownership of the lot and build a replacement house that will be suitable for the Applicants' retirement.
- The lot is approximately 42' feet wide at its narrowest and 141' feet deep.
- The existing house has not been lived in for several years and is currently uninhabitable. Contractors have advised Applicants replacing the house will be much more economical than attempting to rehabilitate the existing structure. Specific problems include foundation issues that have created cracks in the walls and ceiling, a failing roof with several leaks, mold, rotted wood siding and trim, and other conditions evident from Applicants' pictures.
- The septic system was rebuilt in 2012 and is still viable, but its location prohibits relocating the replacement house further from the Buffer.
- The existing house is one-story and has approximately 1,250 square feet under roof, with

a footprint of 20' wide by 54' deep, excluding the 6' x 20' addition on the side. The proposed house will be two-stories tall with 1,000 square feet per floor and will measure 20' x 50'. It will be built almost completely within the footprint of the existing house.

- The only change to the footprint will be a minor shift of the southwest corner of the house to satisfy the minimum 10' property line setbacks. The existing and proposed footprints are evident on the pictures displayed.
- Total existing impervious surface lot coverage is approximately 1,450 s.f. and Applicant's proposal will not exceed this amount
- The immediate neighboring property owners, Mr. Tippett's aunts, are in support of the project as evidenced by their letters of support.
- The replacement house will be located no closer to Cuckold Creek than the existing structure
- A letter addressing variance standards has been submitted by the Applicant and is part of the record.

### **Public Testimony**

No members of the public appeared in-person to offer testimony related to the proposal. Written testimony was received from Tippett family members, Joan Tippett Dalton and Barbara & John Tippett, who wrote in support of the proposed variance. Both letters are included in the records of this proceeding.

### **Decision**

#### **County Requirements for Critical Area Variances**

COMAR 27.01.12.04 requires the Applicants 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 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.

The Board finds that denying the Applicants' request would constitute an 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 both significant and reasonable. Applicants seek to construct a replacement dwelling of relatively modest size. A single-family dwelling such as that proposed is a foundational use of one's own real property. The prohibitively small size of the lot and the constraints posed by the Buffer, which covers a majority of the Subject Property, would in and of themselves render building outside the Buffer highly impracticable, if not outright impossible. Beyond those considerations, Applicant's testimony was that the location of the existing septic system makes impacting the Buffer entirely unavoidable. It appears to the Board Applicants have no ability to construct this dwelling without encroaching into the Buffer. Denial of the variance would therefore amount to denial of the right to build such a house, which would therefore amount to an unwarranted hardship as defined by Maryland law.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicant of a use of land or a structure permitted to others. The house proposed by Applicants is of a size and character similar – and likely less impactful than – improvements commonly enjoyed by other similarly-situated properties encumbered by the Buffer.



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. To the extent that Applicants' lot and house are given some latitude because they are legally nonconforming, it was established to the Board's satisfaction the lot was established and the existing structure built well prior to implementation of the Critical Area Program in 1985 and are, therefore, properly and legally grandfathered. Applicants ask for no more than a similarly situated property owner would be entitled.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the applicant. Rather, Applicants are constrained by the physical characteristics of their lot, its exceptionally small size, and the Buffer's constraints upon the lot.

Fifth, the variance request does not arise from any conforming or nonconforming condition on any neighboring property. There is no ability to lessen the constraints upon Applicants' ability to make significant and reasonable use of their Property by curing any condition on an adjacent 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. As noted by Applicants, overall lot coverage will reduce, if ever so slightly. Beyond that, when development is permitted in the Critical Area Buffer it must be mitigated. As noted by staff, over 2,000 square feet of mitigation plantings will be required, amounting to almost a third of the size of the lot. These plantings are meant to mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer.

Lastly, by satisfying the above criteria the Board finds that granting of the variance will

comply with the seventh factor and 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 the intended uses they propose. There are no practical alternatives to build this replacement house 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 Applicants' request for a variance from § 71.8.3 to disturb the 100' Critical Area Buffer to construct a replacement house; and,


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

**ORDERED**, by the St. Mary's County Board of Appeals, pursuant to CZO § 24.3, that the Applicants are **GRANTED** a variance from § 71.8.3 to disturb the 100' Critical Area Buffer to construct a replacement house.

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: Nov 21, 2023

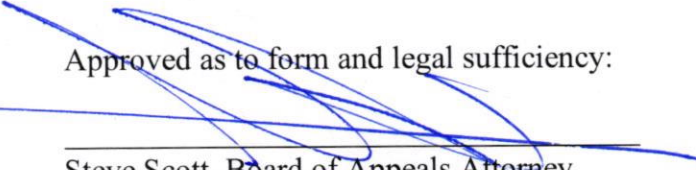
  
Daniel F. Ichniowski, Chairman

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.