

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 20-1247

BAKHAJE

NINTH ELECTION DISTRICT

VARIANCE REQUEST HEARD: SEPTEMBER 8, 2022

ORDERED BY:

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

ENVIRONMENTAL PLANNER: LEAH LANGFORD

DATE SIGNED: October 27, 2022

Pleadings

Payam Bakhaje (“Applicant”) seeks a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer and Section 71.5.2 to disturb the non-tidal wetland buffer to construct a single-family home.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on August 19, 2022 and August 26, 2022. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before August 24, 2022. The agenda was also posted on the County’s website on August 31, 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 September 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 Applicant.

The Property

The subject property is located at 16242 Thomas Road, Piney Point, Maryland 20674 (“the Property”). The Property is 2.07 acres, more or less, is zoned Rural Preservation District (RPD), has in part a Rural Conservation Area (RCA) Critical Area and in part a Limited Development Area (LDA) Critical Area overlay, and is found at Tax Map 69, Grid 9, Parcel 76.

The Variance Requested

Applicant seeks a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer

and from CZO Section 71.5.2 to disturb the non-tidal wetland buffer to construct a single-family home.

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 2.07 acres, more or less, and sits adjacent to Island Creek.
- The Buffer extends 100' from the tidal waters of the mean high-water line of tidal waters and tidal wetlands, and in this case must be expanded due to the presence of non-tidal wetlands. The proposed house is fully within the expanded Buffer.
- A 35-foot non-tidal wetland buffer must be preserved, and Maryland Department of the Environment must issue a permit approving disturbance to the wetlands before a building permit can be issued.
- Per the Applicant's site plan, Applicant proposes 4,656 square feet of permanent disturbance and 3,336 square feet of temporary disturbance to complete this project.
- The site plan has been approved by all applicable county agencies. As less than 5,000 square feet of total disturbance is proposed, the project is exempt from

stormwater management review by the Soil Conservation District.

- The Critical Area Commission sent a letter dated July 27, 2022. Its letter did not state the Critical Area Commission opposes this project.
- Mitigation to be performed if the variance is approved has been calculated as follow: 3:1 mitigation for 4,656 square feet of permanent disturbance resulting from the construction and 1:1 mitigation for 3,336 square feet of temporary disturbance. In total, 10,767 square feet of mitigation will be required. A planting agreement and plan will need to be approved prior to final approval by LUGM.
- Attachments to the Staff Report:
 - #1: Standards Letter
 - #2: Location Map
 - #3: Zoning Map
 - #4: Critical Area Map
 - #5: Site Plan
 - #6: Critical Area Commission Letter of July 27, 2022
 - #7: Boundary Line Adjustment Plat

Applicant's Testimony and Exhibits

Applicant was represented by Steve Vaughn, Professional Land Surveyor, of Little Silences Rest, Inc. The following evidence and testimony was included in Applicant's presentation:

- Applicant provided a slideshow, which contained depictions of the parcel's location, site plans showing the contemplated improvements, and pictures of the existing site

conditions.

- A previous variance for this request was granted the prior year. The reason for this variance request is to amend the location of the house's proposed construction to a location with more suitable soil.
- A boundary line adjustment plat will add approximately 12,000 square feet of land to the parcel.

Public Testimony

No members of the public appeared to offer 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 Applicant 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 Applicant; (4) whether the application arises from actions of the Applicant; (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 Applicant to achieve a reasonable use of the land or structures. 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. Several factors support this decision.

First, the Board finds that denying the Applicant's 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, Applicant has sufficiently demonstrated that, absent the variance, they would be denied a use of the Property that would be both significant and reasonable. Applicant seeks to build a home, a significant use. The Board notes the physical constraints of this property, and has received no compelling evidence demonstrating it is practicable to build a suitable home outside the Buffer.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the Rural Neighborhood Conservation and Limited Development Area. As stated above, Applicant's proposal will be to construct a single-family home. This is among the most basic of uses for a lot, and is, perhaps, the most commonly enjoyed right of other similarly situated property owners across St. Mary's County.

Third, granting a variance to will not confer a special privilege upon Applicant. As noted already, Applicant's request is for a single-family home of like character, nature, size, value, and use as may be commonly encountered among waterfront homes in St. Mary's County.

Fourth, the need for the variance does not arise from actions of the Applicant. It has been noted previously that Applicant's parcel is severely constrained by the physical constraints of the Property.

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 Applicant's intended reasonable use of the Property. As noted above, the Applicant is constrained by the physical features of the parcel and the geographical extent of the Buffer and wetlands.

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.

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 bank of Island Creek.

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, Applicant’s need for a variance stems from the particular physical characteristics of this site.

To the third standard, the purpose of seeking the variance is not “based exclusively upon reasons of convenience, profit or caprice.” Rather, Applicant attempts to achieve a reasonable use of the Property that is enjoyed by owners of other similarly situated properties. The Board of Appeals does not find, and no evidence has been presented to support such a finding, that granting this variance would merely be a “convenience” to Applicant.

Fourth, the need for the variance does not arise from actions of the Applicant. As noted

previously, Applicant's need for a variance stem from the particular physical characteristics of the Property.

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; all who did spoke in favor of the proposal. Further, the Critical Area Commission, given an opportunity to comment upon the project, did not voice any objection or opposition to the requested variance.

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 Applicant's request makes use of existing structures and that the proposed work will not materially change the Property's overall impact upon the environment.

ORDER

PURSUANT to the application of the Payam Bakhaje, petitioning for a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer and CZO Section 71.5.2 to disturb the non-tidal wetlands buffer to construct a single-family home; and

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

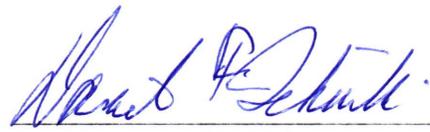
ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO Section 21.1.3.a and CZO Section 24.8, that the Applicant is granted a variance from CZO Section 71.8.3 and CZO

Section 71.5.2 to disturb the Critical Area Buffer to construct a single-family home;

UPON FURTHER 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 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: October 27, 2022



Daniel Ichniowski, Chairperson

Those voting to grant the amendment:

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

Those voting to deny the amendment:

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.