

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP # 18-2361

Dent Property

SECOND ELECTION DISTRICT

DATE HEARD: June 10, 2021

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: August 12, 2021

Pleadings

Anita Dent (“the Applicant”) seeks a variance (VAAP # 18-2361) to disturb the Critical Area Buffer (“the Buffer”) and to disturb the non-tidal wetland 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 May 21, 2021 and May 28, 2021. The hearing notice was also posted on the Property. 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 two hundred feet of the subject property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the County’s website on June 2, 2021. 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 June 10, 2021 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

The Applicant owns the improved property at 45971 Shanty Point Lane, Piney Point, MD (“the Property”). The Property is in the Rural Preservation District (“PRD”) Zoning District and is identified on Tax Map 69, Grid 2, Parcel 182. This lot is designated in the Chesapeake Bay Critical Area Buffer with a Limited Development Area (“LDA”) Overlay.

The Variance Requested

The Applicant requests a Critical Area variance from § 71.8.3 of the St. Mary's Comprehensive Zoning Ordinance ("CZO") to disturb the Critical Area Buffer and from § 71.5.2.b to disturb the non-tidal wetland buffer to construct a single-family dwelling.

The St. Mary's County Comprehensive Zoning Ordinance

CZO § 71.8.3 requires that there shall be a minimum 100-foot buffer¹ 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). Moreover, CZO § 71.5.2.b requires that "[a] 25-foot buffer shall be preserved from the edge of non-tidal wetlands and shall be expanded up to 100 feet to include areas of adjoining hydric soils." Similarly, development activities within the 100-foot non-tidal wetland buffer are not permitted unless an applicant obtains a variance. § 71.5.2.d.

The Evidence Submitted at the Hearing by LUGM

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

- The subject property (hereinafter the "Property") is a parcel of record and grandfathered per deed recorded at Liber DBK 151, Page 285, Ex. 2, Att. 2, in the Land Records of St. Mary's County on June 6, 1969. It is therefore eligible for a Critical Area variance.
- The Property is situated near St. George Creek. The Buffer is established a minimum of 100-foot landward from the mean high-water line of tidal waters and wetlands. The Buffer is also expanded due to wetlands present on the property. CZO § 71.8.3. Therefore, it is

¹ Maryland Code of Maryland Regulations § 27.01.01(B)(8)(a)(ii) defines a "buffer" as an area that "exists . . . to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance."

constrained by the Critical Area Buffer. Ex. 2, Att. 3.

- Per the site plan, Ex. 2, Att. 4, the Applicant illustrates the permanent and temporary disturbance necessary to construct the proposed house, deck, and driveway. The proposed house impacts the Critical Area Buffer and Non-Tidal Wetland. Permanent and temporary disturbance in the Buffer requires a variance, as does disturbance to the wetland buffer.
- The Maryland Critical Area Commission provided a comment letter dated April 30, 2020, Ex. 2, Att. 5, which included the following statements: “We support any and all efforts to minimize the area of proposed Buffer disturbance while still allowing the applicant reasonable use of the property. If the Board does grant this variance request, the applicant must provide mitigation in accordance with COMAR 27.01.09.01-2.H: 3:1 for permanent Buffer disturbance and 1:1 for temporary Buffer disturbance.”
- In accordance with COMAR 27.01.09.01-2 Table H and 27.01.09.01.I., which allows a deduction from mitigation of 1:1 area of lot coverage removed if the lot coverage existed prior to 1990 and the area is stabilized. Therefore, the applicant is required to provide 8,380 sf of plantings to meet these requirements. A planting agreement and plan will be required prior to the issuance of the building permit.
- CZO § 71.5.2 requires development to preserve a 25’ Non-tidal wetland buffer. A “Joint Federal/State Application for The Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland” has been filed with the Maryland Department of the Environment (“MDE”) and a copy of the MDE permit to disturb the wetlands will be required prior to the issuance of the permit for construction.
- LUGM reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on November 28, 2018 due to less than 5,000 sf of disturbance.

The St. Mary's County Soil Conservation District ("SCD") also issued an exemption for less than 5,000 sf of disturbance on November 28, 2018.

- If the variance is granted, it shall lapse one year from the date of the grant of the variance, if the Applicant has not obtained the building permit, per CZO § 24.8.1.
- The following Attachments to the Staff Report were introduced:
 - #1: Standards Letter of Intent;
 - #2: Liber DBK 151, Page 285 (Deed);
 - #3: Critical Area Buffer Map;
 - #4: Site Plan;
 - #5: Critical Area Commission Comments;
 - #6: Wetland Map;
 - #7: Mieko Camp of MDE Letter
 - #8: Zoning Map

Applicant Testimony and Exhibits

Steve Vaughan appeared before the Board on behalf of the Applicant. The following evidence was presented:

- The Applicant presented a slide show with photographs of the site, including aerials and photographs from the roadway.
- The three existing structures on the parcel total 760 sf. The total lot size on this parcel is 24,024.09 square feet or .551 acres. The proposed structure and drive total area is 2,502 sf.
- There are parcels in the area that have built garages similar to the one proposed.
- Moreover, as the property had laid abandoned since the early 1970s, when the Applicants

move to the property full time in 2022, their improvements will bring value to the area and clean up the appearance that exists there today.

- The property is a recorded lot with an existing house/structure, in an existing community constrained by zoning, health requirements, and the critical area provisions.
- Other property owners under similar circumstances have or would have the opportunity to file for a variance and to seek relief for the regulations.
- The difficulty was not created by the property owners nor the predecessors but is a result of the ordinances and regulations currently in place.
- The limit of disturbance has been kept to an absolute minimum. Sediment and Erosion Control will be in accordance with the current provision as detailed by MDE.
- The request to build a garage in the disturbed area has been reduced as much as possible to the minimum size that we can reasonably use the land.
- The Applicant's history/heritage on St. George's Island dates to the late 1800's, to the Applicant's wife's father's grandfather. Captain Paul Davis was a waterman from St. George's Island and lived on the Island Creek.
- Hurricane Isabel September 2003 and Hurricane Ernesto 2006 caused major damage to the island and wiped away what remained of shanty Point.
- St. Mary's County Metropolitan Commission ("MetCom") grinder pumps were installed on the Island, including at the Property in 1994. Although the MetCom system was installed in 1994, neither sewer nor water was ever connected to the existing house structure.
- The Applicant purchased the property at in December 2008, but the house was uninhabitable. No utilities were connected to the property.

- When the Applicant purchased the Property, he immediately applied for a Marsh Creation permit in March 2009, which was installed by the end of 2009 to protect what remained of Shanty Point.
- The Applicant initially filed for a permit to remove the old building and build the new structure in June 2018. Currently the existing house, shed, and well house/structures are still standing.

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 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 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, the Applicant has demonstrated that, absent the variance, he would be denied a use of the Property that would be both significant and reasonable. Specifically, the Property is constrained by the Critical Area Buffer due to the tidal waters and wetlands of the St. George Creek.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners in the RNC and LDA. The Applicant proposes to construct a house and driveway like others in the neighborhood.

Third, The Applicant proposes to construct a house and driveway like others in the neighborhood.

Fourth, the need for the variance does not arise from actions of the Applicant. Rather, the Applicant purchased the developed property in 2016.

Next, 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. Further, the Maryland Critical Area Commission letter dated April 30, 2020 stated, “We support any and all efforts to minimize the area of proposed Buffer disturbance while still allowing the applicant reasonable use of the property. If the Board does grant this variance request, the applicant must provide mitigation in accordance with COMAR 27.01.09.01-2.H: 3:1 for permanent Buffer disturbance and 1:1 for temporary Buffer disturbance.” Ex. 2, Att. 5. For these reasons, the Board finds that granting the variance to construct the retaining wall will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area. Moreover, the Board finds that granting the variance will be in harmony with the general spirit and intent of the Critical Area Program.

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 Critical Area variance is the minimum variance necessary to achieve a reasonable use of the land. The Applicant is proposing to construct a house and driveway.

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.

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 has demonstrated that, were the Board of Appeals to strictly interpret the CZO, the particular physical surroundings of the property would result in practical difficulty for the Applicant. Specifically, the location of the of the non-tidal wetland constitutes the particular physical condition of this Property. Contrary to the wetland maps, a field visit determined the property is totally encumbered by non-tidal wetlands.

Second, the specific condition mentioned above is not generally found on other properties with RPD zoning and LDA overlay.

Third, the purpose of seeking the variance is not “based exclusively upon reasons of convenience, profit or caprice.” Rather, the Applicant is proposing a house and driveway with less than 5,000 sf of disturbance.

Fourth, the need for the variance does not arise from actions of the Applicant. Rather, the Property, according to the wetland maps, Ex. 2, Att. 6, is partially encumbered by non-tidal wetlands. However, Mieko Camp, a Natural Resources Planner for Nontidal Wetlands with MDE,

field verified as stated in her letter dated May 22, 2019 that the entire property is a non-tidal wetland. Ex. 2, Att. 7.

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.

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, as the Applicant is proposing a house and driveway with a minimal disturbance on the Property.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan because the Property has already been developed for residential use and Chapter 3, "A Growth Management Strategy," of the Comprehensive Plan, establishes a vision for community design, which includes encouraging owners of existing structures to maintain and retrofit the buildings and grounds, so they become attractive and energy efficient.

ORDER

PURSUANT to the application of Anita Dent, petitioning for a variance from CZO § 71.8.3 to disturb the Critical Area Buffer and from CZO § 71.5.2 to disturb the non-tidal wetland buffer to construct a single-family dwelling unit; 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, that the Applicant is granted a

Critical Area variance from CZO § 71.8.3 to disturb the Critical Area Buffer and from CZO § 71.5.2 to disturb the non-tidal wetland buffer to construct a single-family dwelling unit.

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: August 12, 2021

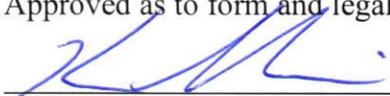

David W. Miedzinski, Vice Chairman

Those voting to grant the variance:

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

Those voting to deny the variance:

Approved as to form and legal sufficiency:


Kevin Norris, 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.