

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

**VAAP NUMBER 22-1672**

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**RAFI PROPERTY**

**NINTH ELECTION DISTRICT**

**VARIANCE REQUEST HEARD: MARCH 9, 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: APRIL 13, 2023**

### **Pleadings**

Erin and Michael Rafi (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer and from Section 71.5.2 to disturb the expanded non-tidal wetland buffer to construct a single-family dwelling with a detached garage.

### **Public Notification**

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 17, 2023 and February 24, 2023. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before February 22, 2023. The agenda was also posted on the County’s website on March 3, 2023. Therefore, the Board of Appeals (“Board”) finds and concludes the variance request’s notice requirements have been met.

### **Public Hearing**

A public hearing was conducted at 6:30 p.m. on March 9, 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 variance requested by the Applicants.

### **The Property**

The property is 16983 Piney Point Road, Piney Point, MD and consists of 36,121 s.f., more or less, is zoned Rural Preservation District (“RPD”) and is found at Tax Map 66, Grid 19, Parcel 44 (“the Subject Property”). The portions of the Subject Property proposed for development lie within a Limited Development Area (“LDA”) Critical Area overlay.

### **The Variance Requested**

Applicants seek a variance from CZO § 71.8.3 to disturb the Critical Area Buffer and from § 71.5.2 to disturb the expanded non-tidal wetland buffer to construct a single-family dwelling with a detached garage.

### **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). 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

### **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 Subject Property is a 36,121 s.f. lot. MDE confirms it is impacted by non-tidal wetlands, and non-tidal wetland buffer is expanded for hydric soils to include much of the remaining lot.
- According to records from the State Department of Assessments and Taxation, the existing dwelling was built in 1996, prior to the current zoning regulations of St. Mary's County. Applicants propose removing this dwelling and constructing a replacement in the non-tidal wetland buffer.
- MDE has exempted the disturbance to the 25-foot non-tidal wetland buffer.
- The project is, additionally, impacted by the Critical Area Buffer. The lot lies on

the Potomac River and the Buffer is established 100' landward of the mean high-water line of tidal waters and tidal wetlands.

- If the variance is approved mitigation will be required at a ratio of 3:1 for permanent disturbance and 1:1 for temporary disturbance within the Buffer and 1:1 for reforestation of vegetation removed. The Applicant will receive a 1:1 credit for lot coverage removed. In total, required mitigation will amount to 15,873 s.f. of buffer mitigation plantings.
- The Critical Area Commission responded on December 29, 2022. Its letter is attached.
- LUGM approved the site plan for stormwater management and zoning requirements. The St. Mary's County Soil Conservation District, Health Department, and Metropolitan Commission have approved the site plan.
- Attachments to the Staff Report:
  - #1: General Standards Letter
  - #3: Critical Area Standards Letter
  - #3: Site Plan
  - #4: Location Map
  - #5: Zoning Map
  - #6: Critical Area Map
  - #7: Wetlands & Soils Map
  - #8: Critical Area Commission Response
  - #9: MDE Letter of Authorization

### **Applicants' Testimony and Exhibits**

Applicant Michael Rafi appeared before the Board in-person. The following evidence testimony was among that provided to the Board:

- The Rafis testified that they purchased the existing dwelling in July, 2021. Inspections showed a number of flaws with the existing structure and the Applicants determined building anew would be a better alternative than attempting to rehabilitate the existing house.
- Pursuant to the Critical Area Commission's comments, the new house will be located further away from the shore than the existing dwelling. The project will also result in an overall increase of 98 square feet of overall impervious cover, for a total of 5,249 square feet.

### **Public Testimony**

The following members of the public appeared to offer testimony related to the variance request:

- *Michael Salih, Piney Point*
  - Mr. Salih is an adjoining property owner. He supports the variance request and believes the Applicants will be "fantastic neighbors."

### **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. These criteria are substantially similar to the criteria of COMAR 27.01.12.04.<sup>1</sup> They are summarized as

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<sup>1</sup> The Board acknowledges COMAR 27.01.12.04 is the controlling authority regarding the standards by which the instant variance request must be governed. In the past, the Board has applied the standards of St. Mary's County's

follows: (1) whether a denial of the requested variance would constitute an unwarranted hardship (analogous to COMAR 27.01.12.04(1)); (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 (analogous to COMAR 27.01.12.04(2)); (3) whether granting the variance would confer a special privilege on the Applicants (analogous to COMAR 27.01.12.04(1)); (4) whether the application arises from actions of the Applicants (analogous to COMAR 27.01.12.04(4)); (5) whether granting the application would not adversely affect the environment and would be in harmony with the Critical Area Program (analogous to COMAR 27.01.12.04(6)); and (6) whether the variance is the minimum necessary for the Applicants to achieve a reasonable use of the land or structures (analogous to the hardship test of COMAR 27.01.12.04(1)).<sup>2</sup> 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.

First, the Board finds that denying the Applicants' request would constitute an unwarranted

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Comprehensive Zoning Ordinance. It is the Board's understanding this section of the CZO is in the process of being updated to reflect COMAR. As discussed at greater length in the body of this order, the Board's discussion in this order will use CZO 24.4.1 as an organizational aid. This will maintain consistency with past opinions and, more compellingly, it is how the Applicants were asked to prepare their standards letter. The Board does find that, except as noted in Footnote # 2, the criteria of CZO § 24.4.1 and COMAR 27.01.12.04 bear substantial similarity to each other, and that an analysis of the standards of one is, effectively, an analysis of the standards of the other.

<sup>2</sup> The Board identifies two criteria in COMAR 27.01.12.04 that it does not believe have direct analogues in CZO § 24.4.1, those being COMAR 27.01.12.04.B(5) and (7). With respect to B(5), it does not appear to the Board that the Applicants' variance request arises from any conforming or nonconforming condition on any neighboring property. With respect to B(7), the Board believes that, by satisfying all other standards of the Critical Area Program and the Comprehensive Zoning Ordinance, and for the salutary effects of the proposed mitigation and other considerations mentioned in the body of this order, that the proposed project is in harmony with the Critical Area Program.

hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Supreme Court of Maryland<sup>3</sup> 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. *Assateague Coastal Trust* requires the Applicants to first identify a use that would be significant. The Applicants ask to construct a single-family dwelling. This is a basic and fundamental use of an unimproved property, the denial of which would amount to deprivation of a use both significant and reasonable that is commonly enjoyed by other similarly situated property owners.

Regarding whether the need for the variance arises from the actions of Applicants, Applicants are constrained by the natural conditions of the Subject Property.

The Board finds that granting the variance would not adversely affect the environment. The proposed redevelopment will see a marginal increase in overall lot coverage but will require over 15,000 square feet of mitigation plantings. Mitigation is required by the Critical Area Program to offset and balance any potential effects of permissible development. Accordingly, the Board finds the proposed development, properly mitigated, will not result in an overall adverse effect upon the environment.

On whether the proposed development proposes the minimum disturbance necessary to achieve the sought-after use, the Board finds that it is. The Board notes Applicants’ testimony that

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<sup>3</sup> The Supreme Court of Maryland was then known as the Court of Appeals. An amendment to the Maryland Constitution renaming the Court of Appeals to the Supreme Court of Maryland was ratified in the 2022 election. Simultaneously, the Court of Special Appeals was renamed the Appellate Court of Maryland.

the location of the house was moved to sit further from the shore than the existing dwelling in response to the Critical Area Commission's concerns. Given the topography of the lot and its overall encumbrance by the Critical Area Buffer, the Board finds no viable alternative than that proposed by the Applicants that would meaningfully lessen overall impacts of the project.

Finally, the Board discusses whether this development can be in general harmony with the Critical Area Program. The Board finds it is. The Applicants, seeking a reasonable and significant use of their property, have presented a project that carefully presents a minimal amount of impacts to the Critical Area Buffer.

As a result of satisfying these standards, the Applicants have also overcome the presumption in § 8-1808(d)(2)(ii) of the Natural Resources Article that the variance request should be denied.

#### 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 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. The expanded non-tidal wetlands and Critical Area Buffers constrain almost the entirety of the Property, limiting avenues for development on the Property were the CZO's provisions strictly and rigidly enforced. Based upon the conditions shown on Applicant's site plan and what can be observed from images of the Property provided during Applicant's presentation, it is impracticable for Applicant to build elsewhere. Nor, given the state of disrepair of the existing structure, is it practical or reasonable to consider requesting Applicants to limit themselves to use of the existing structure and footprint. The Board of Appeals was not offered, and does not see, any means by which a lesser variance than that requested would allow for the Applicant to achieve the same significant and reasonable use of the Property.

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 relevant buffers. Such conditions are not generally present.

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 not motivated by a desire to build in a more convenient or cost-effective location of his property.

Fourth, the need for the variance does not arise from actions of the Applicant. As noted previously, the variance is required as a result of this 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, and one appeared in person to testify in favor of it.

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 Applicants' new dwelling, once constructed, will be in harmony with its neighbors. Applicants noted that they have selected a builder who has built similar structures in the immediate neighborhood. Mitigation plantings required will be of benefit to the local wildlife habitats. Finally, Applicants' construction will not materially increase lot coverage beyond what is already present. 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.

**ORDER**

**PURSUANT** to the application of Michael & Erin Rafi, petitioning for a variance from

Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer and from § 71.5.2 to disturb the expanded non-tidal wetland buffer to construct a single-family dwelling with a detached garage; 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 § 21.1.3.a and CZO § 24.8, that the Applicants are granted a variance from Comprehensive Zoning Ordinance § 71.8.3 to disturb the Critical Area Buffer and from § 71.5.2 to disturb the expanded non-tidal wetland buffer to construct a single-family dwelling with a detached garage;

**UPON 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 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: April 13, 2023

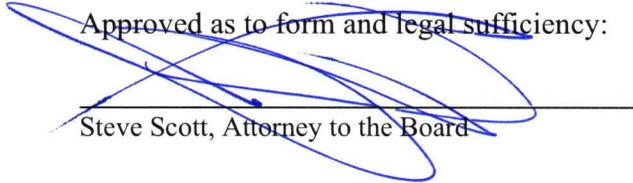
  
Daniel F. Ichniowski, Chairperson

Those voting to grant the amendment:

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

Those voting to deny the amendment:

Approved as to form and legal sufficiency:

  
Steve Scott, Attorney to the Board

### **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.