

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

**VAAP NUMBER 22-2139**

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**TAYLOR PROPERTY**

**SIXTH ELECTION DISTRICT**

**DATE HEARD: January 12, 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: February 9, 2023**

### **Pleadings**

Karen Taylor (“Applicant”) seeks a variance (VAAP # 22-2139) to disturb the Critical Area Buffer for a replacement shed.

### **Public Notification**

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on December 23, 2022 and December 30, 2022. 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 January 4, 2023. Therefore, the 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 January 12, 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**

Applicant owns the real property situate 24620 Half Pone Point Road, Hollywood, Maryland (“the Subject Property”). The Subject Property is in the Rural Preservation District (“RPD”) Zoning District and is identified on Tax Map 27, Grid 12, Parcel 66. This lot is designated in the Chesapeake Bay Critical Area with a Limited Development Area (“LDA”) Overlay.

### **The Variance Requested**

The Applicant requests a Critical Area variance from the prohibition of § 71.8.3 of the St. Mary's Comprehensive Zoning Ordinance ("CZO") against development activities in the Critical Area Buffer in order to construct a replacement shed.

### **The St. Mary's County Comprehensive Zoning Ordinance**

CZO § 71.8.3 requires that there shall be a minimum 100-foot buffer<sup>1</sup> 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).

### **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 is a 1.97 acre lot, more or less, and sits at the mouth of Cuckold Creek on Half Pone Point. The entirety of the Subject Property lies within the Critical Area.
- The proposed replacement shed is fully within the 100' Buffer.
- The site plan proposes to replace an existing 116 s.f. shed with a new 8' x 12' replacement shed.
- Mitigation will be required at a ratio of 3:1 for permanent disturbance and 1:1 of temporary disturbance within the Buffer. In total, the Applicant will provide 576 s.f. of buffer establishment plantings if the project is approved. A planting agreement and plan will be required prior to the issuance of a building permit.

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<sup>1</sup> 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."

- The Critical Area Commission provided a letter dated October 25, 2022, and stated its objection to the requested variance. Specifically, the Critical Area Commission noted the existing shed is considered by the County to be legally nonconforming. The Critical Area Commission stated that “the mere convenience of constructing a replacement shed in the Buffer” is insufficient to establish unwarranted hardship.
- The plan is exempt from Stormwater Management by LUGM and the St. Mary’s County Soil Conservation District 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: Standards Letter;
  - #2: Site Plan
  - #3: Critical Area Commission Comments
  - #4: Location Map
  - #5: Zoning Mao
  - #6: Critical Area Map

**Applicant Testimony and Exhibits**

The Applicant appeared before the Board and offered testimony. Accompanying her was Mark Berman. The following items were among the evidence the Applicant presented:

- The Applicant purchased the Subject Property in 2021. She stated the existing shed is approximately “40-50” years old and houses the electrical service for Applicant’s pier.
- Applicant stated she does not want to move the existing shed because it already has a clearing and already has cinderblocks that can continue to be used as a foundation for a new shed.

- Applicant described the existing shed as a structure in disrepair, to the point it poses a safety hazard.
- If required to move new shed to a different location, Applicant noted it would be further from the pier and that she would be required to take down “a bunch” of trees.

### **Public Testimony**

No members of the public appeared to offer testimony, and no written testimony was received.

### **Decision**

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

The St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 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 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 proposes to replace a shed. The shed's primary function appears to be providing housing and sheltering the electrical service for the existing pier on Applicant's property. The Board finds that depriving Applicant of the ability to provide electrical service to the pier would deny her full use of the pier, and that this full use of the pier is significant and reasonable. Moreover, the Board also notes the Applicant's description of the shed as an old, failing structure that may constitute a safety hazard in the immediate future.

Second, denying the variance would deprive the Applicant of rights commonly enjoyed by other similarly situated property owners like zoning districts and Critical Area overlays. Electrical sheds and service buildings for piers are common in our County.

Third, granting the variance will not confer any special privileges to the Applicant that would be denied to others. As noted above, electrical sheds and service buildings adjacent or in close proximity to piers are common. Applicant asks for little more than what, in her standards letter, she says others on Half Pone Point already enjoy.

Fourth, the need for the variance does not arise from actions of the Applicant. Per records

from the State Department of Assessments and Taxation, Applicant purchased the Subject Property in 2021. Her testimony was that the pre-existing shed is decades old – although the Critical Area Commission notes, in its letter, that County staff were unable to locate any prior approval for the shed. If one assumes, as County staff did, that this shed must be treated as a legal nonconforming structure rather than a permitted one, it remains that the Applicant is not who placed the existing shed in its current location.

Next, granting the variance would not adversely affect the environment. Applicant will replace an existing shed – that may otherwise be allowed to go on existing in perpetuity – with a safer shed with a lower overall footprint. Applicant will be required to mitigate the proposed development with plantings. 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. Applicants’ proposed work is carefully tailored to make use of the location of existing features and limit disturbance. For these reasons, the Board finds that granting the variance will not adversely affect the existing water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area.

Moreover, the Board finds that by satisfying each of the standards above, granting the variance will be in harmony with the general spirit and intent of the Critical Area Program. As a result, the Applicant have 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 sought-after variance is the minimum variance necessary to achieve a reasonable use of the land. The Board notes that Applicant stated, without great elaboration, it

would be a “hardship” to remove the electrical service and move the electrical shed elsewhere on the property. The Board also acknowledges the importance of maintaining the integrity of the Critical Area Buffer, and the County and Critical Area Commission’s policy of limiting encroachments into the Buffer only to the minimum necessary. What the Board finds most compelling, in this instance, is how much proportionately greater disturbance and hardship will seem to result from requiring location outside the Buffer, versus allowing the replacement shed to be constructed in the existing shed’s location. Preparation of an entirely new site would require greater disturbance in the Critical Area. Though the existing location is in the Buffer, the proposal represents, in the Board’s opinion, the minimum and least intrusive means of granting the Applicant the significant and reasonable use of the electrical shed. Rather than allow the existing shed to go on in perpetuity, the Board believes granting this variance is an opportunity to minimize overall disturbance to the Critical Area, require the Applicant to perform mitigation that would otherwise go unperformed, and leave the Subject Property and the environmental and habitat value it provides in better shape than it is today.

**ORDER**

PURSUANT to the application of Karen Taylor for a variance from the St. Mary’s County Comprehensive Zoning Ordinance Critical Area Regulations to allow her to disturb the Critical Area Buffer for a replacement shed; 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 § 24.4, that the Applicant are granted a Critical Area variance from the prohibition in § 71.8.3 against disturbing the Critical Area Buffer in order to construct a replacement shed.

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: FEB 9, 2022 ~~2023~~

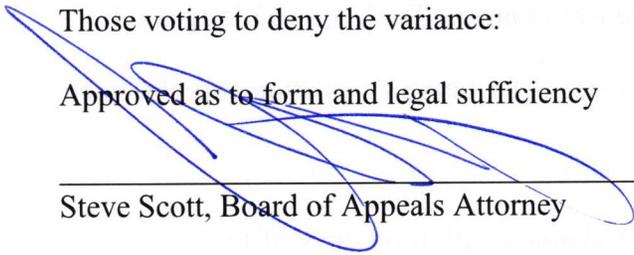
  
Daniel F. Ichniowski, Chairman

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.