

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

**VAAP NUMBER 23-0317**

---

**WALKER & KELLY PROPERTY**

**THIRD ELECTION DISTRICT**

**VARIANCE REQUEST HEARD: JANUARY 11, 2024**

---

**ORDERED BY:**

**Mr. Hayden, Mr. Bradley, Mr. Payne,  
Mr. Richardson, and Ms. Weaver**

**ENVIRONMENTAL PLANNER: STACY CLEMENTS**

---

**DATE SIGNED: February 8, 2024**

### **Pleadings**

Mark Walker and Mary Kathleen Kelly (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) § 71.8.3 disturb the Critical Area Buffer (“the Buffer”) to construct a replacement home.

### **Public Notification**

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on December 22, 2023 and December 29, 2024. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before December 27, 2023. The agenda was also posted on the County’s website on January 5, 2024. 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 January 11, 2024 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 proposed amendment requested by the Applicants.

### **The Property**

The subject property may be found at 21658 Joe Hazel Road, Leonardtown, Maryland (“the Property”). The Property is 2.03 acres, more or less, is zoned Rural Preservation District (“RPD”), has a Limited Development Area (“LDA”) Critical Area overlay, and is found at Tax Map 39, Grid 24, Parcel 351.

### **The Variance Requested**

Applicants seek a variance from CZO § 71.8.3 disturb the Critical Area Buffer to construct a replacement house.

### **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).

### **Departmental Testimony and Exhibits**

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

- The Property is recorded in the Land Records at Plat Book 74, Page 91 as a Boundary Line Adjustment Plat. It was recorded on September 16, 2016 after the adoption of the Critical Area program on December 1, 1985.
- Per the Maryland Department of Assessments and Taxation, the Property is a 2.03 acre parcel located on Joe Hazel Road in Compton and is adjacent to the tidal waters of Combs Creek. It is improved by a dwelling built in 1890, prior to the current zoning regulations of St. Mary's County.
- The Property is partially impacted by the Critical Area Buffer.
- Applicant's proposed project includes removal of the existing dwelling and construction of a replacement dwelling, which impacts the Buffer.
- If approved, mitigation will be required at a ratio of 3:1 for permanent disturbance

within the Buffer and 1:1 for new lot coverage outside of the Buffer.

Additionally, the Applicants will receive 1:1 credit for any lot coverage removed.

Total mitigation to be required is 4,118 s.f. of plantings. A planting agreement and plan will be required prior to the issuance of the building permit.

- The Critical Area Commission's ("CAC") response letter of November 14, 2023 opposes the variance request. The CAC believes impacts to the Buffer can be lessened or eliminated by relocating the replacement dwelling further out of the Buffer, which CAC believes the Applicants have the ability to do; accordingly, the Applicants cannot meet the definition of an unwarranted hardship.

Additionally, granting the variance would confer a special privilege upon Applicants, would be contrary to the Critical Area program's goal of improving water and habitat quality, and would be contrary to the overall spirit of the Critical Area program.

- LUGM approved the site plan for zoning, stormwater management, and floodplain reviews. The Health Department has approved the site plan. Site plan approval is still required from the Soil Conservation District.
- Attachments to the Staff Report:
  - #1: Critical Area Standards Letter
  - #2: Plat book 74, page 91
  - #3: Critical Area Map
  - #4: Site Plan
  - #5: Location Map
  - #6: Zoning Map

- #7: Critical Area Commission Response

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

Applicants were represented before the Board by Steve Vaughn, a licensed surveyor from Little Silences' Rest, Inc. Mr. Vaughn presented a slideshow which contained site plans, building plans, photographs of the site, and offered oral testimony. The following evidence and testimony was included in his presentation:

- Stormwater management requirements will be met by both rooftop and non-rooftop disconnects.
- On the whole, there will be a 63 s.f. increase to coverage inside the Buffer.
- The proposed house will be on the same wall line as the existing dwelling. The extra 63 s.f. will come from extending the covered porch all the way to the corner of the house.
- The Applicants would like to maintain the existing character of the property by keeping the driveway in its current location, as well as the existing house. The proposed house is larger than the current house but most of the increased square footage falls outside of the Buffer.
- When asked why the house was not located further outside the Buffer, Mr. Vaughn replied that Mr. Walker wished to keep the house centered with the existing driveway, just as the existing house is.
- The entire size of the proposed house will be approximately 2,400 s.f.. The existing house is 1,320 s.f. Mr. Vaughn repeated that most of the increased lot coverage would be outside of the Buffer.
- The sewer connections for both the cottage and the house would have to be moved if

the house were slid 'forward,' and a grinding pump would have to be moved as well. The parking area would also have to be reconfigured, which would increase the overall disturbed area.

### **Public Testimony**

No members of the public appeared to offered testimony in this matter.

### **Decision**

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

COMAR 27.01.12.04 requires an Applicant to 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 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 Applicants are entitled to the requested relief.

The Board finds that denying the Applicants' request would constitute an unwarranted hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 d. 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. Constructing a single-family dwelling is a foundational use of one's own real property, as is the replacement of an existing, but functionally obsolete, dwelling with a modern equivalent. The proposed replacement home is of the same nature and character as the existing home and, though there is a discrepancy in the record by how much overall lot coverage inside the Buffer would increase, even the maximal number of

194 square feet is a modest increase considering the overall size of existing development. Moreover, the Applicants demonstrated impediments and obstacles to relocating the house further out of the Buffer, among them a need to reconfigure the parking area, relocating a grind pump, and moving other necessary utilities. Resolving these – if they are fully resolvable at all - would increase overall disturbance of the project and disruptions to the environment.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicants of a substantial use of land or a structure permitted to others. Single-family homes are commonplace improvements to properties located in the Buffer. As the Board noted, it seems evident many of the neighboring properties have modern constructions on them of a similar nature and impact as the Applicants' proposed replacement house. In all, the Applicants' proposal seems to be one that is typical for similarly situated properties within the Limited Development Area.

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. Applicants avail themselves of their right to seek a variance and are hewing as close to the Critical Area program's strictures as may be reasonably expected of their proposal. Their proposal will not be granted unless accompanied by the mitigation required by law. Provisions for requesting and granting a variance are a necessary element of any local Critical Area program. A variance is, by definition, a departure from at least one plain element of the local Critical Area program and each request must be considered case-by-case; the Board can find nothing in the record evincing the Applicants have received any special treatment or consideration that would not be conferred upon any other similarly-situated property owner.

Fourth, the variance request is not based upon conditions or circumstances that are the



result of actions by the Applicants. Rather, Applicants are constrained by the physical characteristics of their lot and its existing configuration. The existing home was built in 1890, almost a century prior to enactment of the Critical Area program. Utilizing the existing home's footprint, which is desirable for both the Applicants and the environment, necessarily constrains the Applicants to the existing home's location.

Fifth, the variance request does not arise from any conforming or nonconforming condition on any neighboring 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. When development is permitted in the Critical Area Buffer it must be heavily mitigated. As noted by staff, over 4,100 square feet of mitigation plantings will be required, and the Applicants will perform all plantings on-site. These plantings will mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer. These plantings – as well as the stormwater management measures the Applicants will install – would not be required unless the Property is redeveloped.

Lastly, by satisfying the above criteria the Board finds that granting of the variance will 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 use they propose. The Applicants demonstrated concrete and physical obstacles to relocating the replacement house further away from the Buffer, and the overall net increase in lot coverage keeps the Property well within lot coverage limits. The impacts to the Buffer of redevelopment will be offset by the mitigation and other site improvements that will be made.

Finally, in satisfying each of the necessary criteria the Applicants have overcome the statutory presumption against granting a variance.

**ORDER**

**PURSUANT** to the application of Mark Walker and Mary Kathleen Kennedy, petitioning for a variance from CZO § 78.3 to disturb the 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,

**ORDERED**, by the St. Mary’s County Board of Appeals, pursuant to CZO § 24.8, that the Applicants are granted a variance from CZO § 78.3 to disturb the Critical Area Buffer to construct a replacement house;

**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.

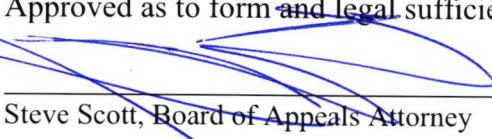
This Order does not constitute a building permit. In order for the Applicants to construct the structures permitted in this decision, they must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: February 8, 2024

  
George Allen Hayden, Chairperson

Those voting to grant the variance:  
Those voting to deny the variance:

Mr. Hayden, Mr. Bradley, Mr. Payne, Mr. Richardson, and Ms. Weaver

Approved as to form and legal sufficiency  
  
\_\_\_\_\_  
Steve Scott, Board of Appeals Attorney

## NOTICE TO APPLICANTS

Within thirty (30) days from the date of this Order, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Petition for Judicial Review in the St. Mary's County Circuit Court. 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.