

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-1003

TIPPETT PROPERTY

SIXTH ELECTION DISTRICT

DATE HEARD: JANUARY 23, 2025

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: February 13, 2025

Pleadings

Thomas Nelson and La Donna Mary Tippet (‘‘Applicants’’) seek a variance (VAAP # 23-1003) from Comprehensive Zoning Ordinance § 71.8.3 and from Schedule 32.1 to reduce the side yard setback from 10 feet to 5 feet and to disturb the 100’ Critical Area Buffer to construct a porch and areaway.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on January 3, 2025 and January 10, 2025. Notice was physically posted on the property by January 8, 2025. Each person designated in the application as owning land located within 200’ of the property was notified by mail, sent to the address furnished with the application. Certification of the required mailings is included in the record. The agenda was posted on the County’s website on January 17, 2025. Therefore, the Board finds and concludes there has been compliance with the notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on January 23, 2025 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

Applicants own real property situate 24644 Tippet Lane, Hollywood, Maryland (‘‘the Subject Property’’). The Subject Property is in the Residential, Neighborhood Conservation (‘‘RNC’’) zoning district, has a Limited Development Area (‘‘LDA’’) Critical Area overlay, and is identified at Tax Map 27, Grid 12, Parcel 412.

The Variance Requested

Applicant seeks a variance from St. Mary's County Comprehensive Zoning Ordinance ("CZO") § 71.8.3 and from Schedule 32.1 to reduce the side yard setback from 10 feet to 5 feet and to disturb the 100' Critical Area Buffer to construct a porch and areaway.

The 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). Schedule 32.1 requires a 10' side yard setback for all principal structures in the RNC zoning districts.

Staff Testimony

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

- The Subject Property is a grandfathered lot in the Critical Area of St. Mary's County. It was recorded prior to adoption of the Maryland Critical Area Program on December 1, 1985.
- Per the State Department of Assessments and Taxation, the lot is 6,098 square feet in size, more or less. It is located on Tippett Road and is adjacent to the tidal waters of Cuckold Creek. It is improved by an existing dwelling SDAT reports was built in 1900, prior to the current zoning regulations of St. Mary's County.
- On October 12, 2023, the Applicants received a variance from the Board of Appeals authorizing them to disturb the Critical Area Buffer to replace a house. Applicants have

subsequently amended their plans to include a 4' x 13' areaway and a 5' x 15' porch, both of which impact the Buffer.

- A total of 381 square feet of buffer mitigation plantings will be required to meet the mitigation requirements of COMAR 27.01.09.01-2, Table H.
- In its letter of January 2, 2025, the Critical Area Commission did not state it opposes the requested variance.
- The following attachments to the Staff Report were introduced:

Attachment 1: Letter of Intent for Critical Area & General Standards

Attachment 2: Approved & Finalized Permit #23-1003

Attachment 3: Board of Appeals Order

Attachment 4: Critical Area Map

Attachment 5: Site Plan

Attachment 6: Critical Area Commission Response

Attachment 7: Location Map

Attachment 8: Land Use Map

Attachment 9: Zoning Map

Applicants' Testimony and Exhibits

Applicant Thomas Tippet, Jr. appeared before the Board of Appeals. He offered testimony that included a slideshow consisting of pictures that depicted the site, existing house, and renderings of what the replacement house will look like. His oral testimony included the following:

- This property has been in Mr. Tippet's family since the 1800s.

- The small size of the lot is due to Mr. Tippet's great-grandfather's choice to give each of his eight children a piece of the farm he owned on Cuckold Creek. Though a majority of the farm has been sold over the years, the eight original lots remain in the family.
- The lot is approximately 44' feet wide at its narrowest and 141' feet deep.
- Replacement of the original house was approved in the original variance. This second variance request is for approval of an areaway that is necessary to access the crawlspace of the house. It cannot be located outside of the Buffer because of the location of utilities. It closely mirrors the footprint of a "bumpout" on the original house and comprises just under 62 s.f. of coverage.
- The side porch is the main entrance from the house. It was not feasible to locate the entrance outside of the Buffer. It is covered to offer protection against the weather, and the porch would make the house handicap accessible in the likely event Mr. Tippet has to care for his father at the house.¹
- A letter addressing variance standards has been submitted by the Applicant and is part of the record.

Public Testimony

The following members of the public appeared to offer testimony connected to this case:

- *John Gregory Tippet*
 - Mr. Tippet was raised in the house due east of the Applicants' house. He said the family, who have remained in the original subdivision, "love what is going on down

¹ At the hearing the prospect of granting Mr. Tippet an additional allowance over what was requested, for the purpose of facilitating his father's access in light of potential mobility issues, was discussed. The Board also received information that the Americans With Disabilities Act may require such an allowance in the future. As reflected in the order, the Board chooses to grant Mr. Tippet now, as a part of this variance request, authorization to construct a porch that would facilitate ADA access in the future.

there” and had no problem with the variance request. He stands to inherit the property impacted by the side yard setback and has no objections.

Written testimony was received from Tippet family members, Joan Tippet Dalton and Barbara Tippet, who wrote in support of the proposed variance. Both letters are included in the record.

Decision

County Requirements for Critical Area Variances

COMAR 27.01.12.04 requires the Applicants 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 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.

The Board finds that denying the Applicants' request would constitute an 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, Applicants have sufficiently demonstrated that, absent the variance, they would be denied a use of the Property both significant and reasonable. Applicants originally sought to construct a replacement dwelling of relatively modest size and now seek to expand that prior authorization with an areaway and covered porch. Mr. Tippett adequately explained that both are necessary improvements to the dwelling whose placement in the Buffer is inescapable. The

prohibitively small size of the lot and the constraints posed by the Buffer, which covers a majority of the Subject Property, would in and of themselves render building outside the Buffer highly impracticable, if not outright impossible. We find his testimony sufficient to establish an unwarranted hardship as defined by Maryland law.

Similarly, the Board finds literal interpretation of the local Critical Area program would deprive Applicant of a use of land or a structure permitted to others. The improvements brought forward in this variance request are necessary, appropriately sized to the house, and are of a similar character as improvements commonly enjoyed by other similarly-situated properties encumbered by the Buffer.

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 in accordance with the provisions of the local Critical Area program. To the extent that Applicants' lot and house are given some latitude because they are legally nonconforming, it was established to the Board's satisfaction the lot was established and the existing structure built well prior to implementation of the Critical Area Program in 1985 and are, therefore, properly and legally grandfathered. Applicants ask for no more than a similarly situated property owner would be entitled.

Fourth, the variance request is not based upon conditions or circumstances that are the result of actions by the applicant. Rather, Applicants are constrained by the physical characteristics of their lot, its exceptionally small size, and the Buffer's constraints upon the lot.

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. As noted by Applicants, overall lot coverage will reduce, if ever so slightly. Beyond that, when development is permitted in the Critical Area Buffer it must be mitigated. As noted by staff, several hundred more square feet of mitigation plantings will be required before these small improvements can be approved. These plantings are meant to mitigate the adverse effects of development and will improve floral and fauna habitat in the Critical Area Buffer.

Lastly, by satisfying the above criteria the Board finds that granting of the variance will comply with the seventh factor and 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 uses they propose.

Additionally, in satisfying each of the necessary criteria the Applicant has overcome the statutory presumption against granting a variance to our local Critical Area program laws.

County Requirements for Granting Variances

The variance request for the side yard setback is governed by separate standards. 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 in the form of the requested variance to reduce the size of the side yard setback.

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.

This standard is less burdensome than that of an “unwarranted hardship.” Incorporating our analysis of the Critical Area variance as thought fully set forth herein, we find that the Applicant does establish sufficient evidence to support the finding of a practical difficulty as well. There is little additional impact, if any, on adjacent properties than that posed by the replacement house that has already been approved. Accordingly, we believe substantial justice to the neighborhood can be achieved and that the goals of the zoning ordinance shall not be vitiated by grant of this variance.

To the second standard, the conditions creating the difficulty are not generally applicable to other similarly situated properties. As noted above, the need for the variance stems from the particular configuration of the lot. These constraints are not typical and stem from design decisions made at the time of the original subdivision.