

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-0992

SCHLUETER PROPERTY

SIXTH ELECTION DISTRICT

VARIANCE REQUEST HEARD: OCTOBER 27, 2022

ORDERED BY:

**Mr. Bradley, Ms. Delahay, Mr. Ichniowski,
Mr. Miedzinski, and Mr. Payne**

ENVIRONMENTAL PLANNER: LEAH LANGFORD

DATE SIGNED: Nov 10, 2022, 2022

Pleadings

Jay and Janet Schlueter (“Applicants”) seek a variance from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the Critical Area Buffer to improve a single-family home with porch and deck additions.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on October 7, 2022 and October 14, 2022. A physical posting was made on the property and all property owners within 200’ were notified by certified mail on or before October 12, 2022. The agenda was also posted on the County’s website on October 20, 2022. 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 October 27, 2022 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 subject property is located at 25286 Grande Vue Lane, Hollywood, MD 20636 (“the Property”). The Property is 43,966 square feet, more or less, is zoned Rural Preservation District (RPD), has a Limited Development Area (LDA) Critical Area overlay, and is found at Tax Map 21, Grid 23, and Parcel 111.

The Variance Requested

Applicants seek a variance from CZO Section 71.8.3 to disturb the Critical Area Buffer to

improve a single-family home with porch and deck additions.

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).

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 Property consists of 43,966 square feet, more or less, and contains an existing house, a portion of which extends into the Critical Area Buffer. It sits adjacent to the Patuxent River.
- The Buffer extends 100' from the tidal waters of the mean high-water line of tidal waters and tidal wetlands, and is expanded owing to the presence of steep slopes. The proposed development is outside of the expansion required for steep slopes, and a corrected Buffer delineation is required before this proposal may be approved.
- Applicants propose to remodel the existing structure, a portion of which extends into the Buffer. The proposed second-floor addition, covered porch, and steps would further encroach into the Buffer in a total amount of 742 square feet.
- Planting mitigation will be required for development activities within the Buffer, and an approved Buffer Management Plan will be required before issuance of a building permit for this project. A total of 3,114 square feet of mitigation

plantings will be required.

- The Critical Area Commission provided a response letter dated September 8, 2022.
- Attachments to the Staff Report:
 - #1: Standards Letter of September 8, 2022
 - #2: Location Map
 - #3: Zoning Map
 - #4: Critical Area Map
 - #5: Site Plan
 - #6: Site Plan Detail
 - #7: Critical Area Commission Letter of September 8, 2022

Applicants' Testimony and Exhibits

Applicant Jay Schlueter presented evidence testimony before the Board, and was accompanied, from time to time, by James Hennon, his builder. Applicant provided a slide show that included pictures of the existing house and depicted the proposed improvements. The following evidence and testimony was included in Applicants' presentation:

- The existing house on the property was built in 1974, and was only recently purchased by Applicants.
- Existing decks and porch – which would be either removed or covered in the proposed development – already encroached into the Buffer.
- Extensive vegetation on the eastern side of the home would preclude views or the scenic value of the porch if reconfigured to be located, in whole or in part, on that side of the house.

- Mr. Hennon testified that laying down the porch over the existing airway will improve the efficiency of the existing structure, and prevent water seepage into the house.
- Applicant indicated his willingness to shorten the width of the center steps providing ingress and egress from the porch, and to relocate the western sidesteps entirely located in the Buffer to the east side, where they would be entirely outside the Buffer.

Public Testimony

No members of the public appeared to offer testimony related to this matter. A letter was received from neighboring property owners, Bill McKissick and Michele Snyder, who indicated they supported the requested variance. Mr. McKissick stated that he was familiar with the configuration of the Schlueter's property and felt it would be difficult to imagine how the proposed porch could be reconfigured such that the Schlueters would be able to enjoy it in the same manner as their neighboring properties.

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 the Applicants are entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

First, the Board finds that denying the Applicants 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. Applicants propose to build a covered porch and deck, an abundantly common improvement on many homes, including this in the Critical Area. The Board notes that a portion of the proposed improvements extends into the Critical Area buffer; it also notes that a portion of the existing structure itself extends into the Critical Area. The proposed improvements are built flush to the existing features of the home. Additionally, the Board notes the testimony of the Applicants, the letter from Mr. McKissick and Ms. Snyder, and the pictures of the property provided by Applicants, and concludes that the porch, reconfigured to rest entirely outside of the Buffer, is not a practicable alternative to the proposed location.

Second, denying the variance would deprive the Applicants of rights commonly enjoyed

by other similarly situated property owners in the Rural Preservation District and Limited Development Area. Applicant and the neighboring property owners' letter indicate that a porch in the configuration proposed by Applicants is commonly enjoyed by other property owners in the vicinity – and, as noted by this Board previously, decks and porches are among the most common of property improvements, even in the Critical Area. Applicants ask for no more than what many property owners in St. Mary's County already enjoy. As depicted on the site plan, the northwestern corner of the existing home is located within the Buffer. This Board accepts that a waterfront porch is a common feature in St. Mary's County, and that a deck located elsewhere on the Property would not qualitatively be as useful or as beneficial as the proposed location of the deck and porch.

Third, granting a variance to will not confer a special privilege upon Applicants. It was noted in the previous paragraph that Applicants' proposed work is of a quality and scale that may be commonly found in the Critical Area in St. Mary's County, even among dwellings and decks constructed after St. Mary's County's adoption of its Critical Area program.

Fourth, the need for the variance does not arise from actions of the Applicants. The Applicants are constrained by the physical features of their lot and their predecessors-in-titles' decision whether to locate the existing house.

Fifth, granting the variance would not adversely affect the environment. The Applicants will be required to mitigate the proposed development with a Buffer Management Plan. 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 also tailored to make use of the location of existing features,

and the overall increased site coverage is relatively modest. In addition, some of the existing lot coverage proposed to be removed and replaced is located closer to the Patuxent River than proposed improvements. Finally, the Board notes the proffer that during construction care will be taken to keep staging materials on the landward side of the home, and that Mr. Hennon seems to take as light of a touch towards construction of the improvements as can be reasonably expected.

As a result, 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.

Finally, the Board of Appeals finds that the requested variance is the minimum necessary to achieve Applicants' intended reasonable use of the Property. As noted above, the Applicants are constrained by the existing location of the house, the physical features of the property, and the geographical extent of the Buffer. The Board is swayed by the testimony and evidence of Applicants that building solely outside the Buffer is not practicable and will not achieve the same significant and valuable use of the Applicants' property that Applicants' neighbors enjoy of theirs. Conditions imposed by this Board will reduce total encroachment into the Buffer to the minimum extent necessary for Applicants to achieve this use.

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 Applicants are 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. 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.

As noted in the Board of Appeals' discussion of the standards for granting a variance from Critical Area provisions, denial of this variance would constitute a practical difficulty. Moreover, the Property is constrained by its geographical location on the banks of the Patuxent. The existing home is located within the Buffer, and the proposed improvements are built flush to that existing footprint.

The second standard is that the conditions creating the difficulty are not generally applicable to other properties in the same zoning classification. As noted above, Applicants' need for a variance stem from the particular physical characteristics of this site and the constraints posed by the location of an existing home.

To the third standard, the purpose of seeking the variance is not "based exclusively upon reasons of convenience, profit or caprice." Rather, Applicants attempt to achieve a reasonable use of the Property enjoyed by owners of other similarly situated properties. As noted previously, Applicants and the only public testimony in the record support the view that a porch and deck

substantially identical to the configuration proposed by Applicants are already enjoyed by adjoining property owners. The Board has found – in this case and in the past – that a porch and deck are common, valuable, and significant improvements to a home.

Fourth, the need for the variance does not arise from actions of the Applicants. Applicants' need for a variance stem from the particular physical characteristics of their Property, and their particular development plan is oriented around an existing home that the Applicants did not themselves place.

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 were notified of the variance request and given an opportunity to speak on the matter; all who did spoke in favor of the proposal. The Board also believes that the conditions imposed will alleviate possible impacts upon environmental quality owing to encroachment in the Buffer, and further notes that the proposed development will also result in the elimination of other encroachments in the Buffer.

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 Board of Appeals notes that Applicants' request makes use of existing structures and footprints where it can, eliminates encroachments elsewhere, and that what encroachments in the Buffer remain have been limited by the Board to minimum necessary for Applicants to achieve this reasonable and significant use of their property.

ORDER

PURSUANT to the application of the Jay and Janet Schlueter, petitioning for a variance from CZO § 71.8.3 to disturb the Critical Area Buffer to improve a single family home with deck and porch additions; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

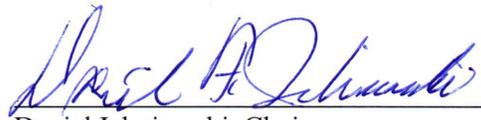
ORDERED, by the St. Mary's County Board of Appeals, pursuant to CZO § 21.1.3.a and CZO § 24.8, that the Applicants are granted a variance from CZO Section 71.8.3 to improve a single family home with deck and porch additions;

UPON CONDITION THAT, the steps be moved from the west side of the house to the east side of the house and the front steps be reduced to eight (8) feet wide; and,

UPON FURTHER 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: Nov 10, 2022

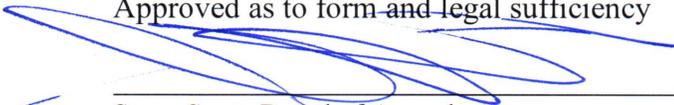

Daniel Ichniowski, Chairperson

Those voting to grant the amendment:

Mr. Bradley, Ms. Delahay, Mr. Ichniowski,
Mr. Miedzinski, Mr. Payne

Those voting to deny the amendment:

Approved as to form and legal sufficiency


Steve Scott, 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.