

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 23-2460

BAUMGARTNER PROPERTY

SIXTH ELECTION DISTRICT

DATE HEARD: October 10, 2024

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: November 14, 2024

The Variance Requested

Applicants seek a variance from St. Mary's County Comprehensive Zoning Ordinance ("CZO") Section 71.8.3 to disturb the 100' Critical Area Buffer to construct a deck with steps.

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. 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).

Staff Testimony

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 was recorded in the Land Records of St. Mary's County in Liber M.R.B 235 at Folio 38 on September 26, 1985 prior to the adoption of the Maryland Critical Area Program on December 1, 1985. The lot was reconfigured in 2008 with the recording of Plat Book 65 Page 93.
- According to the Maryland Department of Assessments and Taxation and Plat Book 65 Page 93 the Subject Property is a 1.14-acre parcel located on Little Creek Lane in Hollywood. The existing single-family dwelling was built in 1986.
- The Critical Area Buffer (the "Buffer") is established a minimum of 100-feet landward from the mean high-water line of the tidal waters of Nats Creek.
- The site plan proposes constructing a 650 s.f. deck with steps which, if built, will impact the 100' Critical Area Buffer.
- Mitigation is required at a ratio of 3:1 for permanent disturbance within the Buffer

(COMAR 27.01.09.01-2.H). The total mitigation required for this proposal is 2,100 square feet of Buffer plantings to meet these mitigation requirements. A planting plan and agreement will be required prior to the issuance of the building permit.

- The Critical Area Commission responded on September 6, 2024. The Commission states that the applicant has the burden to prove each and every Critical Area variance standard, including the standards of unwarranted hardship and is the minimum necessary to achieve reasonable use of land and structures.
- The Department of Land Use and Growth Management approved the site plan for zoning and floodplain requirements. The Health Department approved the site plan. The project is exempt from the St. Mary's County Soil Conservation District or Stormwater Management as the proposal calls for less than 5,000 square feet of soil disturbance.
- The following Attachments to the Staff Report were introduced:
 - #1: Critical Area Standards Letter;
 - #2: Deed Liber MRB 235, Folio 38
 - #3: Plat Liber 65, Folio 93
 - #4: Critical Area Map
 - #5: Site Plan;
 - #6: Critical Area Commission Response;
 - #7: Location Map;
 - #8: Land Use Map; and,
 - #9: Zoning Map.

Applicant Testimony and Exhibits

Presenting before the Board of Appeals were Applicant Cary Baumgartner and Mr. Richard

Gass. Mr. Baumgartner and Mr. Gass addressed the Board's question and offered oral testimony.

The Applicants' remarks included, but were not limited to, the following points:

- The original of the tract is exceptionally long and narrow and originally had a structure from the 1930s or 1940s that spread across the lines of both Tract 1 and Tract 2. This house burnt in 1984 or 1985 and was replaced by the current house, built on the same footprint as the original.
- In an effort to make the lot's shape "more regular," a Boundary Line Adjustment Plat was done combining Tract 1 and parts of Tract 2 to get the house on one parcel. This BLAP also had the effect of expanding the amount of water frontage on Tract 1.
- Mr. Baumgartner only has one point of access from his second floor as the house is currently configured. The proposed deck will provide a second point of access.
- The deck cannot be put on the other side of the house, as the Critical Area Commission appears to suggest, because of the steep drop-off on the other side of the house.
- The Applicants are making efforts to preserve one large oak tree that exists in the front yard, something further elaborated on in the Applicants' standards letter.
- A deck is a typical improvement for a waterfront homeowner.
- Accessory buildings have been removed from the property under the Applicants' ownership – namely, a tool and garden shed that was 9.25' x 12', a boathouse locker that was 6.3' x 6.3', and a pump house that was 4.2' x 4.2'.
- Mr. Baumgartner testified that the additional exit is necessary given his age and the conditions that present with his age.

Public Testimony

No members of the public appeared to offer in-person testimony for or against the project.

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 jurisdiction's 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) 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 of this matter, 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

hardship. In *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), the Court of Appeals established the 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 Subject Property, throughout the Subject Property, that would be both significant and reasonable. As stated by the Applicants and recognized by this Board, decks are commonplace improvements that greatly enhance a property owner’s ability to use and enjoy his or her property. Above and beyond these typical considerations, the Baumgartners also elaborated upon an additional benefit the proposed deck would that is particularized to their existing residence: providing a secondary point of exit from the second floor, a safety consideration the Board finds compelling. Mr. Gass elaborated on why topographical features of the other side of the house make it impossible to construct the proposed deck on the other side of the house. We find the record supports the assertion that it is not possible to achieve this significant and reasonable use of the Property elsewhere on the Subject Property.

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. As Mr. Gass noted, and this Board takes judicial notice of from prior variance hearings, decks are common amenities, even when located on parcels constrained by the Buffer. The proposed deck is of the same character as decks other similarly situated property owners enjoy

and that this Board has approved before, nor is its size or character out of scope considered against a "common" deck.

Third, granting a variance will not confer a special privilege upon the Applicants. Applicants' proposed site plan has been subjected to a public hearing, held to the required standards, includes all required mitigation plantings, environmental considerations, and conforms to the greatest extent it can to all applicable regulations. State law mandates that any property owner have a right to seek variances from their local Critical Area program and may receive such a variance when they meet their high burden of proof. We conclude they have.

Fourth, the need for the variance does not arise from the actions of the Applicant. The Applicant's proposal stems from the location of Applicants' home and the configuration of their lot, which Mr. Gass testified was fixed upon well prior to the advent of the Critical Area Program. The Board does not find in the record any suggestion the Applicants have contributed in their own right to their hardship.

Fifth, the need for the variance does not arise from any nonconforming feature on either the Subject Property or a neighboring property.

Sixth, granting the variance will not adversely affect the environment. The Applicant will be required to mitigate the proposed development with an approved planting plan established on-site (per COMAR 27.01.09.01) as part of the Building Permit process. 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 also elaborated on steps they took to act as good stewards of the property both before and during the development

of this proposal, such as removing unnecessary lot coverage and taking apparent pains to preserve one prominent oak tree the deck could impact.

Finally, the Board finds, overall, that granting the variance is in the spirit of the Critical Area program. Applicants have availed themselves of their right to seek a variance and presented a site plan that identifies a reasonable and significant use that cannot be accomplished without some intrusion into the Buffer. That intrusion has been minimized to the greatest extent practicable. The required mitigation will leave more plantings and green coverage on the lot than existed prior to this development proposal. As such, the Board finds the spirit and intent of the Critical Area program is preserved, and that the required balance between the state law's mandate to allow reasonable variances in derogation from the Critical Area program on the one hand and continued protection and stewardship of the Chesapeake Bay and our environmentally sensitive resources on the other has been struck.

As a result of satisfying these standards and carrying their burden in doing so, 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.

Accordingly, we find the requested variance should be granted.

ORDER

PURSUANT to Applicants' request for a variance from Section 71.8.3 to disturb the 100' Critical Area Buffer to construct a deck with steps; 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 Comprehensive Zoning Ordinance § 24.3, that the Applicants are granted a variance from Section 71.8.3 to disturb

the 100' Critical Area Buffer to construct a deck with steps.

The foregoing variance is subject to the condition that the Applicants shall comply with any instructions and necessary approvals from the Department 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: November 14, 2024



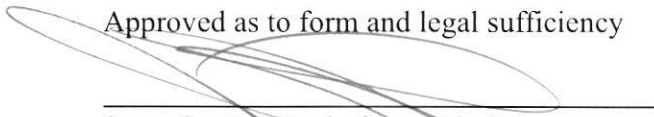
George Allan Hayden, Chairman

Those voting to grant the variance:

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

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 Petition for Judicial Review with the Circuit Court for St. Mary's County within thirty (30) days of the date this order is signed. 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.