

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 22-2084

FERBER PROPERTY

SECOND ELECTION DISTRICT

VARIANCE REQUEST HEARD: December 8, 2022

ORDERED BY:

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

ENVIRONMENTAL PLANNER: Stacy Clements

DATE SIGNED: JAN 12, 2023

Pleadings

Kenneth and Dolores Ferber (“Applicants”) seek variances from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Schedule 32.1 for reduction of the mandatory front and side setbacks to replace an existing dwelling, from Section 51.2.4.c to reduce the 10-foot setback to 5-feet between the replacement house and an existing shed, and from Section 41.7.4.a(7)(a) for a new accessory structure to be closer to the water than the principal structure on the property.

Public Notification

The hearing notice was advertised in the *Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on November 18, 2022 and November 25, 2022. A physical posting was made on the property and all property owners within 200 ft. were notified by certified mail on or before November 23, 2022. The agenda was also posted on the County’s website on November 30, 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 December 8, 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 43850 Avon Way, Leonardtown, Maryland (“the Property”). The Property is approximately 6,250 square feet, more or less, is zoned Rural Preservation District, has Limited Development Area (“LDA”) and Buffer Management (“BMO”)

Critical Area overlays, and is found at Tax Map 61, Grid 1, and Parcel 249. It comprises Lot 18 of the Lanedon subdivision.

The Variance Requested

Applicants seek variances from CZO Schedule 32.1 for reduction of the mandatory front and side setbacks to replace an existing dwelling, from Section 51.2.4.c to reduce the 10-foot setback to 5-feet between the replacement house and an existing shed, and from Section 41.7.4.a(7)(a) for a new accessory structure to be closer to the water than the principal structure on the property.

St. Mary's County Comprehensive Zoning Ordinance

CZO Schedule 32.1 requires a 25' front setback and 15' side setbacks in the Rural Preservation District. Section 51.2.4.c states a detached accessory structure can be no closer than 10' to any other structure. Section 41.7.4.a(7)(a) states that in the Critical Area an accessory structure may be closer than the principal structure to the water or edge of tidal wetlands only if no other location exists for its placement, and that placement in a front or side yard subject to variance approval shall be preferred over placement in the Buffer.

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 contains a single-family dwelling and accessory structures.

According to SDAT, the existing home was built in 1957, prior to the adoption of zoning and subdivision regulations in St. Mary's County.

- Applicant proposes to remove the existing house and driveway to construct a new dwelling unit.

- Mitigation will be required at a ratio of 3:1 for permanent disturbance (180 s.f.) within the Buffer. The BMO additionally requires 2:1 mitigation for lot coverage (731 s.f.) located within the Buffer and 1:1 mitigation for new lot coverage outside the Critical Area Buffer (228 s.f.). The Applicant is providing 2,234 square feet of buffer establishment to meet these requirements, and a planting agreement and plan will be required prior to the issuance of the building permit.
- The Critical Area Commission sent a letter dated November 15, 2022. The Critical Area Commission's letter stated that it did not believe the 180 square foot deck complies with BMO standards, as "new structures accessory to a residential use may be permitted in the Buffer and may be located closer to the water than the principal structure on the property only if no other location exists for their placement; placement in a front or side yard subject to variance approval shall be preferred over placement in the Buffer."
- The site plan is currently under review by the Health Department.
- The project is exempt from stormwater management and soil conservation standards as less than 5,000 s.f. of soil disturbance is proposed.
- If a variance is granted, it shall lapse one year from the date of the grant of the variance unless a building permit is attained.
- Attachments to the Staff Report:
 - #1: Standards Letter
 - #2: Critical Area Standards Letter
 - #3: Site Plan
 - #4: Critical Area Letter

- #5: Location Map
- #6: Zoning Map
- #7: Critical Area Map

Applicants' Testimony and Exhibits

Steven Vaughn, LSR Land Surveying, 41605 Court House Drive, Leonardtown, Maryland presented testimony before the Board on behalf of Applicants. Applicants provided a slide show that included: maps of the property location, photographs of the site, and the site plan. The following evidence and testimony were included in Applicants' presentation:

- Applicant's lot is only 50' wide. The existing house is ensconced between two existing houses on other lots. The proposed house will be of a similar character as these two houses.
- The new house shall be partially within the Critical Area buffer and partially outside.
- The front of the existing house and the front of the proposed house will both be 22 feet away from the front property line.
- The proposed six-foot "double-decker" deck and porch will not extend any further than the stoop and step on the existing house. One half of the "double-decker" deck will extend from the second floor, and the remaining half shall be directly above it extending from the third floor.
- Applicant testified that placing the deck on the sides would leave the house only 4 feet away from the side property lines, and that to fully enjoy the amenity it would need to be placed on the rear of the house.
- Applicants believe they will be able to plant all mitigation on-site.
- Applicants do not believe there is any practicable ability to reconfigure the deck to

place it on the roadside of the house.

- After Mr. Miedzinski expressed reservations about fire department access through the sides of the property, Applicants offered to move the wooden shed to the opposite side of the Property from its proposed location.

Public Testimony

The following members of the public appeared or submitted written testimony related to this matter:

- James Beauchamp, 43844 Avon Way

Mr. Beauchamp is the Applicant's next-door neighbor. He stated that the Health Department has required him to put a vehicular gate in the front of his yard. Mr. Beauchamp and Katherine Magruder also provided written comments ahead of the hearing, which are part of the record.

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 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 construction of a six-foot deck in the Critical Area buffer, a relatively modest and common amenity in St. Mary's County. Such an amenity would give Applicants the ability to use and enjoy the Property to the same extent as their neighbors, and the Board finds that denying them the ability to construct such an amenity would amount to an unwarranted hardship.

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 stated above, this manner of amenity is relatively common in St. Mary's County. The proposal is relatively modest and is, at the most, no larger than what such an amenity

would normally be, if not smaller.

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.

Fourth, the need for the variance does not arise from actions of the Applicants. The Applicants are constrained by the extreme narrowness of their lot and by the extent of the Buffer, which encompasses most of Applicants' property.

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, all the proposed mitigation can fit on site. Applicants stated all mitigation will be able to be placed on-site. .

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 physical features of the property, the geographical extent of the Buffer, and the limited physical size of the parcel. 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. As noted during the hearing, building the proposed deck on the side would greatly diminish the amenity's recreational value to Applicants and would only leave a setback of four feet on whichever side it is built upon. The Board also notes and agrees with concerns expressed by Applicant's neighbor that such a side or front-facing deck could impair neighbors' enjoyment of their own properties, insofar as it may be a greater intrusion upon privacy or have a negative effect upon their own property values. The Board also notes the Applicant's testimony that the proposed deck, if built on the rear, would extend no further than the currently existing step and stoop.

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.

For the same reasons as noted in its analysis of whether an unwarranted hardship has been found, the Board finds denial of this variance would constitute a practical difficulty for Applicants. Applicant’s request to build a common amenity that would provide great recreational value and enable fuller use of their property would constitute an unwarranted hardship if denied.

The second standard is that the conditions creating the difficulty are not generally applicable to other properties in the same zoning classification. Applicants’ need for a variance stems from the physical characteristics of this site, particularly their parcel’s extreme narrowness. Moreover, a great deal of the property is constrained by the Buffer, and the only side of the house completely unencumbered by the Buffer would be the front of the house.

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 – in this case, an outside deck - enjoyed by owners of other similarly situated properties. The proposed deck will be of a similar build, character, and quality as other structures found in this community, and Applicants ask for no more than what many of their fellow property owners in St. Mary’s County already have.

Fourth, the need for the variance does not arise from actions of the Applicants. As mentioned already, Applicants’ need for a variance stems from the particular physical characteristics of his property.

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; none did so. The Board also believes that the mitigation 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. The imposed condition of relocating the shed will alleviate the Board's concerns of ensuring emergency services will have access to the rear of the lot, if necessary.

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 features and footprints where it can and that what encroachments in the Buffer remain have been limited by the Applicants to the minimum necessary for them to achieve this reasonable and significant use of their property.

ORDER

PURSUANT to the application of the Kenneth and Dolores Ferber, petitioning for variances from CZO Schedule 32.1 for reduction of the mandatory front and side setbacks to replace an existing dwelling, from Section 51.2.4.c to reduce the 10-foot setback to 5-feet between the replacement house and an existing shed, and from Section 41.7.4.a(7)(a) for a new accessory structure to be closer to the water than the principal structure on the property; 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 the requested variances;

UPON CONDITION THAT, Applicants move the wood shed and the concrete pad to the south side of the site; 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: Jan 12, 2023


Daniel Ichniowski, Chairperson

Those voting to grant the amendment:

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

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.