

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

VAAP NUMBER 24-2192

SAULER PROPERTY

THIRD ELECTION DISTRICT

DATE HEARD: February 13, 2025

ORDERED BY:

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

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: March 13, 2025

Pleadings

Elizabeth & Jason Sauler (“Applicants”) seek a variance (VAAP # 24-2192) from the St. Mary’s County Comprehensive Zoning Ordinance (“CZO”) Section 71.8.3 to disturb the 100’ Critical Area Buffer to construct a deck.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on January 24, 2025 and January 31, 2025. The hearing notice was posted on the property by January 29, 2025. The file contains the certification of mailing to all adjoining landowners, even those located across a street. Each person designated in the application as owning land that is located within two hundred feet of the subject property was notified by mail, sent to the address furnished with the application. The agenda was also posted on the County’s website by Friday, February 7, 2025. Therefore, the 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 February 13, 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 Applicants.

The Property

Applicants own real property situate 40026 Ben Morgan Road, Leonardtown, MD (“the Subject Property”). The Subject Property is in the Rural Preservation zoning district (“RPD”), lies within a Limited Development Area (“LDA”) Critical Area overlay, and is identified at Tax Map 39, Grid 18, Parcel 118.

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.

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 (the "Property") was recorded in the Land Records of St. Mary's County per deeds DJB 6310 page 417, DJB 5439 page 409, DJB 5384 page 262, JWW 3978 page 98, JWW 3978 page 104, JWW 3686 page 183, MRB 404, page 325, and CBG 45 page 288 (Attachment 2), prior to the adoption of the Maryland Critical Area Program on December 1, 1985. According to Real Property Data, Maryland Department of Assessments and Taxation, the existing house was built in 1930.
- The property is a 1.13-acre lot located on Ben Morgan Road in Leonardtown and is adjacent to the tidal waters of Combs Creek.
- The site plan (Attachment 4) proposes a 20-foot diameter deck with steps, which impacts the 100' Critical Area Buffer. The CZO states in Section 71.8.3.b(1) that a development activity is not permitted in the Buffer unless the Applicant obtains a variance. The proposal results in 332 square feet of lot coverage impacting the Buffer.

- Mitigation is required at a ratio of 3:1 for the variance (COMAR 27.01.09.01-2 Table H). The total mitigation required for this proposal is 996 square feet of plantings to meet these mitigation requirements. A planting agreement and plan will be required prior to the issuance of the building permit.
- The Critical Area Commission responded on January 2, 2025. The Commission states that the applicant request does not meet all of the Critical Area variance standards, including that of unwarranted hardship. (Attachment 8).
- The Department of Land Use and Growth Management has approved the site plan for zoning and Floodplain requirements. Soil Conservation District and the Health Department have approved the site plan. The site plan is exempt from the stormwater management requirements due to less than 5,000 square feet of soil disturbance.
- The following Attachments to the Staff Report were introduced:
 - #1: Critical Area Standards Letter;
 - #2: Deeds
 - #3: Critical Area Map
 - #4: Site Plan;
 - #5: Location Map;
 - #6: Land Use Map;
 - #7: Zoning Map; and,
 - #8: Critical Area Commission Response

Applicant Testimony and Exhibits

Applicant Elizabeth Sauler presented before the Board. Mrs. Sauler presented a slideshow that included the site plan, pictures of the property, and other information pertinent to the

application. Towards the end of the Board's questions Mrs. Sauler was joined by Andrew Samworth, her brother. The testimony she offered included, but was not limited to, the following points:

- The existing house was originally built as an oyster shucking house approximately 100 years ago. It retains its original exterior construction.
- The Applicants wish to build a 20" diameter round deck. It will be a wooden deck with space between slats to allow water to flow through.
- Above ground pavers will be used to minimize soil disturbance.
- There will be sufficient space between the deck and property lines to maintain privacy.
- No trees will need to be cleared for the proposed deck.
- Native plants will be placed around the deck area.
- The deck will "expand enjoyment of land and views of water to back of property that is currently not being utilized"
- Attaching the deck would be impractical for the following reasons:
 - The home is at ground level, possesses an original screened-in porch, has an outdoor shower, and has landscaping around it. These existing features would make it difficult to add a deck of sufficient size to the home.
 - Adding a deck would compromise the historic integrity of the existing home
- The home's septic field takes up almost the entirety of the area of the Subject Property that is not located within the Buffer, and Applicants were advised not to place any weight-bearing improvement in that area.
- Asked by a Mr. Bradley to respond to the Critical Area Commission's letter, Mrs. Sauler said she understood the concerns raised, is more than willing to mitigate the proposed deck,

and would disturb the property as minimally as possible.

- At its highest point, the deck will be only one or two feet high.
- Mr. Samworth described the land as having “a gentle slope,” in response to a question posed by Mr. Payne.

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. Contra the Critical Area Commission's statement that "unwarranted hardship" means "an applicant shall be denied reasonable and significant use of the entire parcel or lot," Maryland's Court of Appeals, in *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach*, 448 Md. 112 (2016), stated "unwarranted hardship" to mean the following:

[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.

The central contention opponents of the property owner's proposed improvements made in *Schwalbach* is the same contention made by the Critical Area Commission in the case before us: the applicant must be "required to prove that without the variance he could not make *any* reasonable and significant use of his property." *Id.*, 127 (emphasis in the original). The Court of Appeals rejected that contention then, the statutory definition of "unwarranted hardship" has not since changed, and the Board finds that *Schwalbach* remains good law today. Illuminating is the Court of Appeals' robust discussion of the history of Natural Resources Article § 8-1808(d)(1), which the Board attempts to summarize succinctly with the following from that opinion: "The

General Assembly clearly preferred the standard applied by the local board – whether an applicant would be denied “a reasonable and significant use of the ‘entire’ lot.” *Id.*, 139 (quoting *Lewis v. Department of natural Resources*, 377 Md. 382, 420 (2003) (emphasis in the original)).

Accepting the Court’s directive to consider whether “a” use of the property, reasonable and significant, will be denied absent the grant of a variance, the Board concludes such a use would be. The “use” in question is a detached deck of modest size and character to be employed for a family’s personal recreation and enjoyment of their property. Decks are commonplace improvements that greatly enhance a property owner’s ability to use and enjoy his or her property, and this Board is not unfamiliar with variance requests for constructing them within the Critical Buffer. Mrs. Sauler laid out compelling reasons why the proposed deck cannot be located outside the Buffer: the majority of her property is constrained by the Buffer and what little area is not is reserved for the home’s septic field. We find that the proposed deck in this matter is detached, versus attached, to be irrelevant to the final analysis. The detached deck appears to be of the same general size and character as an attached deck would be expected to be and will be used for the same general purposes. Whether the deck will be attached or detached seems to the Board to be a distinction without a difference, so long as the detached deck can satisfy the same criteria for a variance as an attached deck.

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 noted above, and as this Board takes notice of from its 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. The right to ask for a variance to the Critical Area program's strictures is required by law. 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. Applicants carry a high burden of proof to meet before a variance can be granted. We cannot find any definition of "special privilege" in statute or case law to suggest that one has been conferred when an applicant, in compliance with the procedural requirements noted above, meets that burden.

Fourth, the need for the variance does not arise from the actions of the Applicants or their predecessors in title. Applicants are primarily constrained by two things: the Buffer's large impacts on their Property and the location of their existing home, built approximately five decades before the advent of the Critical Law program. The home's original builders could not have foreseen the difficulty its location would pose for future expansion under the Critical Area program. The Buffer covers a majority of the Subject Property and, as noted above, the portion outside the Buffer is reserved for the house's septic field.

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 requested 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. These plantings would not be performed without grant of the variance. It is also apparent Applicants have taken care to fashion a proposal that is tailored to create as little disturbance as possible. No trees or existing vegetation will be cleared for construction of the deck, space will be left within the slats to allow rain water to slip through, and plantings will be made near to the impacted area. The Board accepts Applicants' statement that building closer to the house would appear to cause more temporary disruption in the Buffer than building in its proposed location.

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 intrusion into the Buffer. That intrusion has been minimized to the greatest extent practicable. The required mitigation will leave more vegetative coverage on the lot than existed prior to this development proposal. The Applicants have demonstrated to the Board that they have been as sensitive to Critical Area's programs goals as may be reasonably expected, and that their commitment to acting as stewards of both their local environment and of a property that contributes to the County's rich historical heritage is genuine. Accordingly, the Board finds the spirit and intent of the Critical Area program are preserved by granting this variance and that balance between allowing reasonable variances from the Critical Area program's strictures on the one hand and continued protection and stewardship of the Chesapeake Bay and our environmentally sensitive resources on the other has been struck.

By satisfying these standards 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; and,

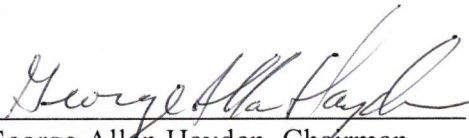
PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is,

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.

The foregoing variance is subject to the condition that the 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: March 13, 2025


George Allan Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Bradley, Mr. Brown,
Mr. Payne, 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.