

**IN THE ST. MARY'S COUNTY BOARD OF APPEALS**

**VAAP NUMBER 19-0165**

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**JOHN & LAURA SCHULTZ**

**THIRD ELECTION DISTRICT**

**DATE HEARD: May 16, 2019**

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**ORDERED BY:**

**Mr. Hayden, Mr. Brown, Mr. Ichniowski,  
Mr. Miedzinski and Ms. Delahay**

**ENVIRONMENTAL PLANNER: STACY CLEMENTS**

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**DATE SIGNED: June 13, 2019**

### **PLEADINGS**

John and Laura Schultz, the applicants, seek variances (VAAP # 19-0165) to: 1) disturb the critical area buffer; and 2) to reduce the front and side yard setbacks to construct a garage on property with a street address of 20650 Waterside Drive, Leonardtown, Maryland 20650.

### **PUBLIC NOTIFICATION**

The hearing notice was advertised in The Enterprise, a newspaper of general circulation in St. Mary's County, on May 1, 2019 and May 8, 2019. The hearing notice was also posted on the property. 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 (200) 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 on Wednesday, May 8, 2019. Therefore, the Board finds and concludes that there has been compliance with the notice requirements.

### **FINDINGS**

A public hearing was conducted at 6:30 p.m. on May 16, 2019, 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 with regard to the proposed variance requested by the applicants.

#### **The Property**

That the applicants own the subject property located at 20650 Waterside Drive, Leonardtown, Maryland 20650. It is located in the Rural Preservation District (RPD) and is known as Lots 26 & 27, Grid 13 in Parcel 46 on Tax Map 48. This waterfront lot on Breton Bay

is designated in the Chesapeake Bay Critical Area as Resource Conservation Area (RCA) and Buffer Management Overlay (BMO).

### **The Proposed Work**

The applicants propose to construct a garage for a total of 4,002 square feet of lot coverage as shown on the site plan admitted into evidence at the hearing as Exhibit 4. The new lot coverage will be comprised of a 750 sf garage and 340 sf of driveway for a total of 1,090 sf of proposed lot coverage. The applicants will be removing 1,063 sf of lot coverage which consists of an existing garage, carport, walkways, and parking. The total increase in lot coverage will be 27 square feet. The total lot coverage will be 26.63% percent of the Property. The allowed amount of lot coverage on a property of this size is 31.25%.

### **The St. Mary's County Comprehensive Zoning Ordinance**

§ 71.8.3 of the St. Mary's County Comprehensive Zoning Ordinance requires that there shall be a minimum 100-foot buffer landward from the mean high-water line of tidal waters, tributary streams and tidal wetlands; and § 71.8.3.a stipulates that the 100-foot buffer shall be expanded beyond 100 feet to include hydric soil types associated with the non-tidal wetlands present on the property and tidal wetlands present on the adjacent property. Title 27 of the Code of Maryland Regulations (COMAR) Section 27.01.01 (B) (8) (ii) states a buffer exists "to protect a stream, tidal wetland, tidal waters, or terrestrial environment from human disturbance." § 71.8.3.b.1.c of the St. Mary's County Comprehensive Zoning Ordinance authorizes disturbance to the buffer for new impervious surfaces and development activities by variance. The applicants are proposing to construct a garage which will create approximately 27 square feet of new lot coverage in the critical area after the removal of the existing carport and shed.

§ 32.1 of the St. Mary's County Comprehensive Zoning Ordinance requires that there shall be a required twenty-five (25)-foot front yard setback and fifteen (15)-foot side yard setback in the Rural Preservation District (RPD). The applicants are requesting a reduction in the front yard setback from twenty-five (25) to twenty-three (23) feet and reducing the side yard setback from fifteen (15) feet to two (2) feet.

#### **The Variance Requested**

The applicants require a critical area variance from the prohibition in § 71.8.3 against disturbing the buffer to allow the construction of the garage and variances to allow the reduction of the front and side yard setbacks as shown on Exhibit 4.

#### **The Evidence Submitted At The Hearing**

Stacy Clements, an Environmental Planner the St. Mary's County Department of Land Use and Growth Management (LUGM), presented the following evidence:

- The subject property (the "Property") is a grandfathered lot in the Critical Area of St. Mary's County because it was recorded in the Land Records of St. Mary's County prior to the adoption of the Maryland Critical Area Program on December 1, 1985.
- The Property fronts Breton Bay and is constrained by the Critical Area Buffer (the "Buffer"). The Buffer is measured from the mean high water line of Breton Bay pursuant to COMAR 27.01.09.01.E(3).
- The existing soil type on the Property is Othello fine sandy loam (On). According to the Natural Resources Conservation Service, U.S. Department of Agriculture, Web Soil Survey. Othello is considered poorly drained and are found on slopes of 0-2 percent.
- The Applicant proposes to construct a garage for a total of 4,002 square feet of lot coverage. The new lot coverage will be comprised of a 750 sf garage and 340 sf of

driveway for a total of 1,090 sf of proposed lot coverage. The applicator will be removing 1,063 sf of lot coverage which consists of an existing garage, carport, walkways, and parking. The total increase in lot coverage will be 27 square feet. The total lot coverage will be 26.63% percent of the Property. The allowed amount of lot coverage on a property of this size is 31.25%.

- Part of the Property is within Special Flood Hazard Area Zone AE-8 according to Flood Insurance Rate Map (FIRM) panel 281F. The proposed development is in unshaded X and is more than 50' from the disturbance.
- A private well and private septic will serve the Property.
- Approximately 7,600 square feet of trees, shrubs, and other vegetation cover the Property. The Applicant plans to clear 400 square feet of the existing vegetation inside of the expanded buffer. In accordance with COMAR 27.01.09.01, mitigation is required at a ratio of three to one per square foot for disturbance to the buffer and at a ratio of one to one for the area of tree canopy removed.
- The St. Mary's Health Department approved the site plan on February 8, 2019. The Department of Land Use and Growth Management reviewed the site plan in accordance with stormwater management requirements and exempted the site plan on January 30, 2019.
- The Maryland Critical Area Commission does not oppose the critical area variance and recommended in their letter that any required mitigation be placed on site in order to provide the greatest water quality and habitat benefits.

**Applicants Testimony and Exhibits**

The Applicants represented themselves and John Schultz testified at the hearing. Evidence was presented that the applicants' property is two parcels for a combined total of 15,028 square foot and also that:

- The original conveyance of this property was before the adoption of critical area regulations.
- The property is a grandfathered lot with existing structures located in an existing community constrained by zoning, health requirements and the critical area provisions.
- The expansion of the garage will grow the land area occupied by permanent structures from approximately 14% to 17% of the total lot size but increase the size of impervious surface only 22 sf, which is partly offset by removing a section of sidewalk next to the house. The street side of the structure will continue to be gravel to absorb any water runoff from the street, existing asphalt driveway and the garage. We intend to remove a flat roofed 340 sf carport to help with drainage. The lot absorbs water well and the addition of square footage due to structure will not create harm to the environment. Our weather station recorded over 50 inches of rain this past year and we never had puddling of water or runoff off of our property.
- The footprint of the structure is minimized with the intent to use as much vertical space as possible.
- Breton Beach development and our lot were originally subdivided in 1926 prior to any setback limits or critical area buffers. The existing one car garage has a nonconforming front property and lateral setback. The original garage, shown on a 1998 survey, was located just inside the property line and existed before the current house was built, as shown in the attached 1998 survey. Due to the narrowness of the lot, location of existing

septic and well systems, there is no other acceptable location for placement of the garage expansion.

- Lots along Waterside Drive have essentially the same space/location issues. Many residential structures do not meet the 15 foot lateral buffer as well as many detached structures are within the 25 foot setback.
- The location of the proposed garage is not for reasons of convenience, profit or caprice; but solely because there is not any other practical or available location it can be placed. The garage will not be used for business purposes or profit but solely private residential use.
- The location of this garage is consistent with existing properties in the neighborhood and will not change the character of the neighborhood or district, nor will it injure or degrade other properties. Public welfare will not be impacted as the vehicle doors will be accessed from the side of the structure onto my lot and not onto the street.
- Because the vehicle access to the garage will be on their property; public street access and use will not be impeded and thus not create any danger of fire or to public safety.

### **DECISION**

#### **County Requirements for Critical Area Variances**

The St. Mary's County Comprehensive Zoning Ordinance § 24.4 sets forth six separate requirements (in this case) that must be met for a variance to be issued for property in the critical area. They are: (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 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. State law also requires that the applicants overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), that the variance request should be denied.

The St. Mary's County Comprehensive Zoning Ordinance § 24.4 sets forth seven separate requirements (in this case) that must be met for a variance to be issued from the Ordinance. They are: 1) that strict enforcement of this Ordinance will result in practical difficulty; 2) that the conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification; 3) the request is not based exclusively upon reasons of convenience, profit, or caprice; 4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title; 5) It 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) It 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) that it complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

#### **Findings - Critical Area Variance**

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. There are a number of factors that support this decision. First, in *Assateague Coastal Trust, Inc. v. Roy T. Schwalbach, et al.*, 448 Md. 112, 2016, the Court of Appeals considered an appeal



claiming that a variance granted by the Worcester County Board of Appeals to allow a property owner to extend a pier across state-owned marshland from his property should not have been granted. The pier would be 80 feet longer than allowed by the Worcester County ordinance. The variance was granted. The Court of Appeals visited the history of the critical area law and efforts by the Legislature to amend and clarify the law. The Court grappled with the phrase "unwarranted hardship, " and asked if "an applicant [must] demonstrate a denial of all reasonable and significant use of the entire property, or must the applicant show a denial of a reasonable and significant use of the entire property?" (At page 14.) The Court concluded, on page 28, that:

In summary, in 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. (Emphasis added.)

In this application the Board finds that denying the applicants' request to construct garage would deprive the applicants of a use that would be "both significant and reasonable."

Second, the property is encumbered by narrow lot size and said lots were created before the Critical Area Program was started. Other property owners with recorded lots that are constrained by similar conditions and the Critical Area provisions of the Ordinance do have the opportunity to file for a variance and seek relief from the regulations.

Third, that the strict interpretation of the critical area provisions would prohibit the applicants from constructing a garage, a right that is commonly enjoyed by other property owners in the RCA.

Fourth, the property is a recorded, grandfathered lot in an existing community and the granting of the variance will not confer any special privileges to the applicants that would be denied to others.

Fifth, the need for the variance does not arise from actions of the applicants. Again, this recorded lot predates the St. Mary's County's critical area program.

Sixth, the critical area variance is the minimum variance necessary to afford relief.

Furthermore, that the granting of the variance would not adversely affect the environment. The variance will be in harmony with the Critical Area Program. The applicants have overcome the presumption in Natural Resources Article, § 8-1808(d)(2)(ii), of the State law that the variance request should be denied.

The Board finds that Critical Area Planting Agreement, which is required, will alleviate any impacts to water quality due to the creation of impervious surface in the Critical Area. The Board believes that the required plantings will assist in improving and maintaining the functions of the Critical Area. The Planting Agreement requires mitigation at a ratio of three to one (3:1) per square foot of the variance granted in accordance with Chapter 24 of the Ordinance. There is also a 1:1 mitigation requirement for canopy coverage removed.

The required plantings will improve plant diversity and habitat value for the site and will improve the runoff characteristics for the Property, which should contribute to improved infiltration and reduction of non-point source pollution leaving the site. For these reasons, the Board finds that the granting of the variance to construct a garage in the Critical Area will not adversely affect water quality or adversely impact fish, wildlife, or plant habitat within the Critical Area, and that the granting of the variances will be in harmony with the general spirit and intent of the Critical Area program.

**Findings – Development Standards Variance**

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. There are a number of factors that support this decision. First, In determining whether practical difficulties exist, the zoning board must consider three factors: 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; and 3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.<sup>1</sup>

Second, because of the exceptional narrowness of the lot, strict enforcement of the Ordinance would result in practical difficulty as well.

Third, that the conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification, because the neighborhood was created in 1926, well in advance of the St. Mary's County Zoning Ordinance and many surrounding properties have garages.

Fourth, that the request is not based exclusively upon reasons of convenience, profit, or caprice.

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<sup>1</sup> Montgomery County v. Rotwein, 169 Md. App. 716 (2006) quoting McLean v. Soley, 270 Md. 208, 214-15, 310 A.2d 783 (1973).

Fifth, that the alleged difficulty has not been created by the property owner or the owner's predecessors in title, because the time of the lot creation in 1926 predates the St. Mary's County Zoning Ordinance.

Sixth, it 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. As was stated earlier many homes in the neighborhood have accessory structures and they are not detrimental or injurious to the public at large.

Seventh, it 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.

Lastly, that it complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

### **ORDER**

PURSUANT to the application of John and Laura Schultz, petitioning for variances from the St. Mary's County Comprehensive Zoning Ordinance Critical Area Regulations to allow them to disturb the Critical Area Buffer to construct a garage as well as variances from the St. Mary's County Comprehensive Zoning Ordinance reduce the front and side yard setbacks for said garage; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is this 13<sup>th</sup> day of June, 2019,


ORDERED, by the St. Mary's County Board of Appeals, that the applicants are granted a critical area variance from the prohibition in § 71.8.3 against disturbing the buffer to allow the construction of the proposed garage as shown on Applicants site plan; and it is further

ORDERED, by the St. Mary's County Board of Appeals, that the applicants are granted a variance from the required twenty-five (25)-foot front yard setback to twenty-three (23) foot front yard setback and the fifteen (15)-foot side yard setback to five (5) foot side yard setback;

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. Furthermore, Exhibit 9, referenced in this decision, is incorporated herein as if fully set forth and made a part of this Order. The proposed improvements shown on Exhibit 9 shall be constructed on the subject property in the locations shown therein. The decision and order shall not prohibit the applicants from making minor changes to the facilities as presently shown on Exhibit 9 to adjust for changes made necessary by comments or requirements that arise during plan review or construction, provided those minor changes do not exceed the variances granted herein. The reasonableness of any such change shall be determined by the Office of Land Use and Growth Management.

Date: June 13, 2019

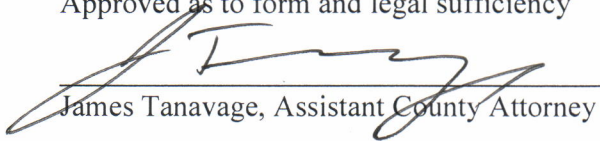
  
George A. Hayden, Chairman

Those voting to grant the variance:

Mr. Hayden, Mr. Brown, Mr. Ichniowski,  
Mr. Miedzinski and Ms. Delahay

Those voting to deny the variance:

Approved as to form and legal sufficiency

  
James Tanavage, Assistant County 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.

Further, § 24.8 provides that a variance shall lapse one year from the date of the grant of the variance by the Board of Appeals 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; or 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.