

Chesapeake Bay Board

September 13, 2006

A. Roll Call

B. Minutes July 12, 2006

July 12, 2006 – Work Session

August 23, 2006 – Work Session

C. Public Hearings

1. CBE-06-053 – Beatrice Gulbrandsen – 104 Dancy Place

2. CBE-06-055 – Marc & Shanni Roth – 108 Stoweflake

3. CBE-05-068 – AES Consulting/Centex Homes – Marywood Subdivision

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WQIA for CBE-06-053 - 104 Dancy Place

Staff report for the September 13, 2006 Chesapeake Bay Board public hearing.

This staff report is prepared by the James City County Environmental Division to provide information to the Chesapeake Bay Board to assist them in making a recommendation on this assessment. It may be useful to members of the general public interested in this assessment.

Summary Facts

Applicant	Mrs. Beatrice Gulbrandsen
Land Owner	Same
Location	104 Dancy Place, Lot 131, Section 2, Southall Quarter
Tax Map	(50-1) (3-131)
Staff Contact	Patrick Menichino Phone: 253-6675

Project Description

Mr. Robert F. Ripley on behalf of Mrs. Beatrice Gulbrandsen, has applied for an exception to the Chesapeake Bay Preservation Ordinance for Resource Protection Area (RPA) impacts associated with the construction of an accessory structure on the above referenced lot in the Kingsmill Subdivision. The lot is 25,700 square feet or 0.590 acres in size.

The accessory structure, a conservatory, is proposed to create approximately 623 square feet of impervious cover in the RPA consisting of the accessory structure and concrete sidewalk.

Background

The lot was recorded in 1989 prior to the adoption of the Chesapeake Bay Preservation Ordinance. Therefore, there was no RPA present on the lot at recordation. However in 2004, the Ordinance requirements related to the determination of perennial flow were changed requiring that perennial water bodies be identified based on a field evaluation. A field evaluation conducted for this project's building permit application identified a water body (Kingsmill Pond) with perennial flow on the rear of the lot requiring that a 100 foot RPA buffer be established on the lot around Kingsmill Pond. This 100 foot RPA buffer encompasses about 45% of the lot.

The issue for the Chesapeake Bay Board's consideration is the placement of an accessory structure (conservatory) and concrete sidewalk in the RPA. The *Resource Protection Area: Buffer Area Encroachments* guidance document adopted by the state Division of Chesapeake Bay Local Assistance on September 16, 2002, states on page 5 that "items not considered part of a principal structure include pools, gazebos, patios, free-standing decks, garages, or storage sheds, etc." Therefore, the proposed conservatory and concrete walkway are considered accessory structures and can not be approved administratively by the Manager and may be approved by the Chesapeake Bay Board after a public hearing.

Water Quality Impact Assessment

Under Section 23-14 of the amended Ordinance, a water quality impact assessment (WQIA) must be submitted for any proposed land disturbing activity resulting from development or redevelopment within RPAs. Robert F. Ripley has submitted a WQIA for this project. The issue before the Chesapeake Bay Board is the 623 square foot RPA impact and impervious cover in the RPA associated with the construction of the accessory structure.

The WQIA proposes to mitigate for the impacts to the RPA by planting 2 native trees and 5 native shrubs on the lot in a landscape bed within the RPA buffer to help filter nonpoint source pollution. The amount of mitigation proposed is below the standard requirements, but can be revised by the applicant to meet the requirements..

The Board is to determine whether or not the proposed development is consistent with the spirit and intent of the Ordinance and make a finding based upon the following criteria, as outlined in Section 23-14(c) of the Chesapeake Bay Ordinance:

1. The exception request is the minimum necessary to afford relief;
2. Granting the exception will not confer upon the applicant any special privileges denied by this chapter to other property owners similarly situated in the vicinity;
3. The exception request will be in harmony with the purpose and intent of this chapter, and is not of substantial detriment to water quality;
4. The exception request is not based on conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels; and
5. Reasonable and appropriate conditions are imposed which will prevent the exception request from causing a degradation of water quality.

Recommendations

Staff has reviewed and evaluated the proposed RPA encroachment and offers the following information to the Board for its consideration:

The proposed conservatory's overall dimensions are 35' long by 25' wide. The WQIA proposes to increase the impervious area within the RPA buffer and on the lot, by 623 SF because only 80 % of the structure is within the buffer. Staff recognizes that adverse field conditions exist which prevent the applicant from relocating the detached accessory structure to an area that would create less RPA impact. Staff believes that this request exceeds the "minimum necessary to afford relief".

At this time Staff has no information that granting this exception will confer upon the applicant a special privilege denied to other property owners who are similarly situated, and no similar requests have been made to the Board.

The proposal to construct a conservatory that is a non-water dependant, detached accessory structure within the RPA buffer, is not in harmony or consistent with the intent of the regulations. The applicant has submitted an mitigation plan that is below the standard requirements. There are numerous impervious areas (decks, patios, walkways, staircases, brick retaining walls, etc.) already existing within the RPA buffer which may be detrimental to water quality.

Staff finds that this exception request is based upon conditions or circumstances that are self created and self imposed. The ability of the applicant to propose a conservatory attached to the principal structure and outside of the RPA buffer remains a viable option. The Ordinance provides for an administrative review and approval of proposed modifications or expansions to an existing principal structure within the RPA buffer.

In conclusion, for the above stated reasons, Staff can not support the proposed exception request at this time.

If the Board considers granting the exception, Staff recommends the following conditions be imposed.

1. The landscape mitigation plan submitted with the WQIA must be revised to require, 1 – native canopy tree, 2 – native understory trees and 6 – native shrubs.
2. The size of the trees planted shall be a minimum of 1-1/2 inch caliper (six to eight feet tall) and the shrubs shall be 3 gallon size. All vegetation shall be native species approved by the Environmental Division.
3. Implementation of the mitigation plan would be guaranteed through the provisions of the Ordinance contained in Sections 23-10(3)d. and 23-17(c) where

installation of the plant material is required prior to the certificate of occupancy or through a surety instrument satisfactory to the county attorney.

4. Any new walkways or replacement walkways or patios proposed within the RPA buffer shall be constructed using non-interlocking brick pavers on a sand base instead of concrete.
5. This exception request approval shall become null and void if construction has not begun by September 13, 2007.

All recommendations adopted by the Board must be incorporated into the site plans for the project, which then must be approved by the Environmental Division before construction can begin.

Staff Report Prepared by: _____
Patrick T. Menichino

CONCUR: _____
Darryl E. Cook

- Exception Approved with Staff Recommendations
- Exception Denied

William Apperson
Chairman,
Chesapeake Bay Board

Attachments:

WQIA for CBE-06-055 - 108 Stoweflake, Fords Colony

Staff report for the September 13, 2006 Chesapeake Bay Board public hearing.

This staff report is prepared by the James City County Environmental Division to provide information to the Chesapeake Bay Board to assist them in making a recommendation on this assessment. It may be useful to members of the general public interested in this assessment.

Summary Facts

Applicant	Marc and Shanni Roth
Land Owner	(same)
Location	108 Stoweflake, Fords Colony
Tax Map	(3-13) (9-50)
Staff Contact	Patrick Menichino Phone: 253-6675

Project Description

Mr. Robert Boyer of Michael Brown Builder on behalf Marc and Shanni Roth, of 108 Stoweflake, has applied for an exception to the Chesapeake Bay Preservation Ordinance for Resource Protection Area (RPA) impacts associated with the construction of a 225 sq. ft. sand set brick paver patio. The residence is located adjacent to a perennial water body (pond) located in Fords Colony.

Background

The residence was constructed in 2005 after adoption of the Chesapeake Bay Preservation Ordinance. In 2004, the Ordinance requirements related to the determination of perennial flow were changed requiring that perennial water bodies be identified based on a field evaluation. A field evaluation was conducted for a pond, which the residence is adjacent to and it was determined that the pond is a water body with perennial flow requiring that a 100 foot RPA buffer be established around the pond. This 100 foot RPA buffer encompasses approximately 40% of lot.

The owners have submitted a plan which proposes RPA encroachments through the installation of 225 sq. ft. of non-interlocking brick paver pads within the 50 foot RPA buffer.

According to provisions of the Ordinance; when application of the buffer would result in the loss of a buildable area on a lot or parcel recorded between August 6, 1990, and January 1, 2004, encroachments into the buffer may be allowed through an administrative process in accordance with the following criteria:

1. Encroachments into the buffer shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities.
2. Where practicable, a vegetated area that will maximize water quality protection, mitigate the effects of the buffer encroachment, and is equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel; and

3. The encroachment may not extend into the seaward 50 feet of the buffer area.
4. The lot or parcel was created as a result of a legal process in conformity with the county's subdivision regulations.

The *Resource Protection Area: Buffer Area Encroachments* guidance document adopted by the state Division of Chesapeake Bay Local Assistance on September 16, 2002, states on page 5 that "items not considered part of a principal structure include pools, gazebos, patios, free-standing decks, garages, or storage sheds, etc."

Therefore, the proposed brick paver pads are considered an accessory use and could not be approved administratively and the applicants have chosen to request an exception for the proposed brick paver pads from the Board.

The issue for the Chesapeake Bay Board's consideration is the installation of 225 sq. ft. of non-interlocking brick paver pads, within the 50 foot RPA buffer.

Water Quality Impact Assessment

Under Section 23-14 of the amended Ordinance, a water quality impact assessment (WQIA) must be submitted for any proposed land disturbing activity resulting from development or redevelopment within RPAs. The applicant has submitted a WQIA for this project. The mitigation plan contained within the WQIA offsets the proposed impervious cover impacts to the RPA buffer for the 225 sq. ft. of brick paver pads.

The WQIA proposes to mitigate for the impacts to the RPA by planting 3 native trees and 2 native shrubs in the RPA. This vegetation will be located to the right of the residence and at the limits of clearing to help filter nonpoint source pollution. This mitigation plan meets the typical mitigation requirements by planting one tree or three shrubs for each 100 square foot of impervious cover established.

The owners have submitted the required information as outlined in the *James City County Water Quality Impact Assessment Guidelines*. The Board is to determine whether or not the proposed development is consistent with the spirit and intent of the Ordinance and make a finding based upon the following criteria, as outlined in Section 23-14(c) of the Chesapeake Bay Ordinance:

1. The exception request is the minimum necessary to afford relief;
2. Granting the exception will not confer upon the applicant any special privileges denied by this chapter to other property owners similarly situated in the vicinity;
3. The exception request will be in harmony with the purpose and intent of this chapter, and is not of substantial detriment to water quality;
4. The exception request is not based on conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or

circumstances either permitted or non-conforming that are related to adjacent parcels; and

5. Reasonable and appropriate conditions are imposed which will prevent the exception request from causing a degradation of water quality.

Recommendations

Building Code requires that a 3 foot by 3 foot landing be provided at the doorway entrance to structures. Staff supports the creation of landings in front of the doors but doe’s not support the exception for the brick paver pads as they involve the creation of impervious, accessory structures within the RPA, and their size is beyond what is required by the building code. Both the Ordinance and staff considers brick paver pads as accessory structures and as an impervious surface. Staff has not given administrative approval for the creation of accessory structures in the RPA in the past. However, the Board did approve construction of similar paver pads (patios) in Ford’s Colony, at 153 John Pott Drive, on May 11, 2005, at The Vineyards Clubhouse, July 13, 2005, and at 2658 Jockeys Neck Trail, The Vineyards, on March 8, 2006.

If the Board grants the exception, the proposed mitigation plan is in accordance with the standard mitigation requirements for impervious surfaces. If approved, it should be conditioned on the following:

1. The mitigation for the proposed paver pads should be accomplished through the full implementation of the landscape plan submitted with the WQIA.
2. Implementation of the mitigation plan would be guaranteed through the provisions of the Ordinance contained in Sections 23-10(3)d. and 23-17(c) where installation of the plant material is required prior to the certificate of occupancy or through a surety satisfactory to the county attorney.
3. This exception request approval shall become null and void if construction has not begun by September 13, 2007.

Staff Report prepared by: _____
Patrick Menichino

CONCUR: _____
Darryl E. Cook

- Exception approved with Staff Recommendations
- Exception Denied

William Apperson
Chairman
Chesapeake Bay Board

Attachments:

CBE-05-068. Marywood Subdivision.

Staff report for the September 13, 2006 Chesapeake Bay Board public hearing.

This staff report is prepared by the James City County Environmental Division to provide information to the Chesapeake Bay Board to assist them in making a recommendation on this assessment. It may be useful to members of the general public interested in this assessment.

Summary Facts

Applicant	Mr. V. Marc Bennett, P.E. of AES Consulting Engineers, Inc.
Land Owner	Centex Homes
Location	North of Kingswood and Druid Hills subdivisions
Tax Map	(47-2) (1-47)
Staff Contact	William Cain, Phone: 253-6702

Project Description

Mr. V. Marc Bennett, P.E. of AES Consulting Engineers, Inc. has applied on behalf of Centex Homes, for an exception to the Chesapeake Bay Preservation Ordinance for impacts associated with the Marywood project. The project is generally located to the north of Kingswood and Druid Hills subdivisions, to the south of Hickory Sign Post Road, and to the west of the Riverside Medical Center and La Fontaine Condominiums.

For the purposes of constructing the necessary stormwater management facilities, sanitary sewer gravity main, and road infrastructure, Centex Homes is proposing 4.40 acres of total encroachment into the Resource Protection Area (RPA).

History

Centex Homes submitted the proposed plan of development for the Marywood development to the Planning Division in September, 2004. The James City County Planning Committee approved the master plan for the development at the December 5, 2005, Planning Commission meeting after the plan preparer and applicant addressed all concerns pertaining to perennial stream locations, stormwater management requirements, erosion and sediment control objectives, and planning issues which stemmed from previous DRC meetings where the plan was originally deferred.

Environmental Division conditions for approval of the master plan consisted primarily of reducing impacts to environmentally sensitive areas. Plan modifications provided to address this requirement consisted of steeper cut and fill slopes, the relocation of the southernmost stormwater management basin, and a net decrease in the number of proposed lots.

A site specific perennial stream evaluation revealed that multiple perennial streams existed on the parcel, all of which outfall to Lake Powell and ultimately to the James River through the Mill Creek tributary. As this plan of development was submitted after January 1, 2004, the project was not grandfathered from the revised Chesapeake Bay Preservation Ordinance and as a result, a Resource Protection Area (RPA) buffer of 100 feet has been imposed on both sides of the streams and contiguous wetlands. Due to site restrictions resulting from the RPA requirements, one of the stormwater management facilities, which will handle the majority of stormwater runoff for the site, has been proposed for installation in the headwaters of the perennial stream. The location for construction of this basin as proposed will permanently inundate approximately 550+/- linear feet of the associated perennial stream and effectively relocate the RPA feature to the outfall of the proposed BMP.

Section 23-11 of the revised Ordinance states that “a Water Quality Impact Assessment (WQIA) shall be required for any proposed land disturbance in the RPA resulting from development or redevelopment activities.” AES Consulting Engineers previously submitted a WQIA for the Marywood project and that case was heard at the March 8, 2006, Chesapeake Bay Board meeting. Though staff recommended approval at that time, the case was denied by the Board. The areas of encroachment presented to the Chesapeake Bay Board at this time result from impacts (clearing and grading) associated with an RPA utility crossing, and installation of a Best Management Practice including its dam embankment and discharge pipe in a perennial stream segment.

Water Quality Impact Assessment

The impacts to the RPA buffer and RPA features resulting from the current plan of development requiring administrative and board actions remain at 4.40 acres as was presented in the March 8th Chesapeake Bay Board meeting. The impacts remain associated with the construction of two road crossings (Impacts #1A and B), a stormwater management facility and its embankment (Impacts #2A and B), the outfall of a stormwater conveyance system (Impact #3), and a utility bridge (Impact #4). These impacts are presented in Section I of the WQIA. Encroachments associated with Impacts #1A and B and Impact #3, as stated in the WQIA, require only an administrative action where those associated with Impacts #2A and 2B, and Impact #4 will require Board action. With this being the case, the total impacts to components of the RPA requiring approval by the Board at this time is 3.22 acres. To mitigate for the both the proposed administrative and Board impacts, the following will be implemented into the associated plan of development:

- Preservation of over 9 acres of developable open space beyond that which is required under the James City County BMP Points Guidelines;
- Erosion control type 3 blanket matting will be applied to all cut and fill slopes throughout the site;
- Stilling basins to reduce turbulence at stormwater outfalls and downstream erosion will be provided at all BMP outfalls and the outfalls of stormwater

conveyance systems not immediately discharging to a stormwater management basin;

- RPA restoration performed in accordance with the 2003 Chesapeake Bay Local Assistance Department Riparian Buffer Manual guidelines for all disturbed areas in the RPA except for BMP and roadway embankments and stormwater or utility easements. RPA restoration now totals 2.6 acres with the majority being in proximity to the basin;
- Rain barrels are to be provided on all downspouts at the rear of homes along Oxford Road and Collington Court.
- Treatment of approximately 39.16 acres of offsite stormwater runoff, the majority of which is currently uncontrolled discharge from currently developed upland areas;
- Additional plantings to increase BMP efficiency will be provided with BMP #1 in accordance with the 2003 Chesapeake Bay Local Assistance Department *Riparian Buffer Modification and Mitigation Guidance Manual* for areas between the 100-Year water surface elevation of the pond and the adjoining property lines and roadway rights-of-way;
- Conservation seed mix will be used on the slopes of all BMP embankments.
- A perpetual 15' principal building set back from the limits of the RPA will be applied on all lots containing RPA or in immediate proximity to the buffer.

A complete description of the mitigation measures is presented in Section III C of the Water Quality Impact Assessment for the Marywood Subdivision. In addition to the above items, the site has been modified and additional information provided in the revised WQIA at the Board's request. The applicant has provided an alternative site layout that reflects the development potential and impacts of the project without construction of the main stormwater basin BMP #1. Additionally, since the last hearing, the applicant has reduced the number of lots from 100 to 93, and reduced the length of the Braddock Road cul-de-sac. These measures have reduced the number of lots with portions located in the RPA reducing the potential for clearing in immediate proximity to the RPA.

AES acting on behalf of Centex Homes, has submitted the required information as outlined in the *James City County Water Quality Impact Assessment Guidelines*. The Board is to determine whether or not the proposed development is consistent with the spirit and intent of the Ordinance and make a finding based upon the following criteria, as outlined in Section 23-14(c):

1. The exception request is the minimum necessary to afford relief;

2. Granting the exception will not confer upon the applicant any special privileges denied by this chapter to other property owners similarly situated in the vicinity;
3. The exception request will be in harmony with the purpose and intent of this chapter, and is not of substantial detriment to water quality;
4. The exception request is not based on conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels; and
5. Reasonable and appropriate conditions are imposed which will prevent the exception request from causing degradation of water quality.

Recommendations

Given the density of the development (93 lots on 115.27 acres), the preservation of 9 acres of open space allowing the project to achieve 11.4 BMP points exceeding the 10 point requirement for stormwater compliance, the treatment of 39 acres of uncontrolled offsite Kingswood runoff, and the restoration of the RPA that is not permanently impacted in accordance with the state's *Riparian Buffers Modification and Mitigation Guidance Manual*, staff does find that the WQIA and the project are consistent with the spirit and intent of the Ordinance and the criteria as outlined in section 23-14(c) of the James City County Code. Staff therefore recommends that the Chesapeake Bay Board approve the WQIA and the exceptions for the Marywood project. Furthermore, all recommendations listed therein are to be incorporated into the site plans for the project, which must then receive final approval by the Environmental Division. This exception request approval shall become null and void if construction has not begun by September 13, 2007. Any changes to the plan of development that would cause any deviation from the items listed in the WQIA, either in the form of increased impacts to components of the RPA or omission of mitigation requirements from the submitted plan of development, must be reviewed and approved by the Board.

William Cain;
Civil Engineer

CONCUR:

Darryl Cook;
Environmental Director

APPROVED:

William Apperson;
Chairman,
Chesapeake Bay Board

Attachment:

1. Water Quality Impact Assessment of proposed Site Improvements for the Marywood Subdivision (Revised August 2006).

MEMORANDUM

DATE: September 13, 2006
TO: The Chesapeake Bay Board
FROM: Patrick Menichino, Environmental Compliance Specialist
SUBJECT: Case: Chesapeake Bay Board Appeal – CBV-06-012 Bambi and Rob Walters, 5112 Shoreline Court

This staff report is prepared by the James City County Environmental Division to provide information to the Chesapeake Bay Board to assist them in making a recommendation on this assessment. It may be useful to members of the general public interested in this assessment.

Mr. and Mrs. Walters have filed an appeal to James City County's Chesapeake Bay Board on July 24, 2006, and as amended on August 16, 2006. The appeal lists four (4) specific items of appeal, they are as follows:

1. Request an appeal of recent enforcement of (a) resource protection area and (b) wetlands pursuant to section 404 as recently interpreted in Rapanos decision.
2. Request appeal to recently presented JCC Environmental Division's August 25, 2004 letter and review of Environmental Division's finding that our Property has been impacted by "unauthorized encroachments".
 - a. See Notice of Violation dated August 14, 2006 with a determination "that vegetation has been removed from within an area identified as a Resource Protection Area (RPA) buffer" and
 - b. See Notice of Violation dated August 14, 2006 with a determination unauthorized removal outside clearing limits;Request an appeal of JCC Environmental Division's July 24, 2006 requirement to submit buffer modification plan for review and approval to remove poison ivy, poison sumac, and poison oak.
3. Request review of Environmental Division's position that "regulatory status of the lake (Lake Powell) has not changed since 1990".

The Chesapeake Bay Preservation Ordinance

The original ordinance was adopted by the James City County Board of Supervisors on August 6, 1990. It was titled Ordinance Number 183 and added to the County Code as: Chapter 19B, Chesapeake Bay Preservation.

As amended this ordinance is now titled: Chapter 23, Chesapeake Bay Preservation.

Summary of Facts

Mr. and Mrs. Walters purchased building lot 58, commonly known as 5112 Shoreline Court, from Boyd Corporation in 2003, and have maintained continuous possession and control of the property.

In 2004, Mr. and Mrs. Walters contracted with Lyerly L, Builder (the builder), for the construction of a new single family residence on lot 58, 5112 Shoreline Court.

Patrick Menichino visits lot 58, 5112 Shoreline Court meets with the owner and at their request he flagged the limits of clearing and the 100 ft. RPA buffer line on the lot. Patrick observes land disturbance and a noticeable lack of vegetation within an area of the 100 ft buffer.

Mr. and Mrs. Walters attend a meeting at the Division to discuss a resolution of the issues related to the RPA and limits of clearing on the property. The Walters agree to provide for the planting of trees and shrubs in the area of the clearing limits shown on the approved plan and located on the south side of the lot.

Mrs. Walters emails Darryl Cook, Environmental Director and requests the specifics of the alleged Chesapeake Bay Ordinance Violations. She also requests that a copy of the violation information be given to her assistant.

On August 14, 2006, Mr. and Mrs. Walters, of 5112 Shoreline Court Williamsburg VA. are issue two (2) Chesapeake Bay Ordinance Notices of Violation (NOV) by Division Staff. The NOV was issued, because unauthorized encroachments into areas designated on an approved development plan for 5112 Shoreline Court had occurred.

The unauthorized encroachments into areas designated to be preserved constitutes a violations of the Chesapeake Bay Preservation Ordinance and has resulted in the disturbance to the existing ground cover, and understory vegetation.

Description of 5112 Shoreline Court

In 1999 a subdivision known as Lake Powell Pointe, Phase 2, was recorded. Lot # 58 of that subdivision, was assigned a street address of 5112 Shoreline Court This lot is immediately adjacent to a body of water known as Lake Powell. (see attachment # 1) Lake Powell was identified as a Resource Protection Area (RPA) with the adoption of James City County's Chesapeake Bay Ordinance by the Board of Supervisors, on August 8, 1990.

5112 Shoreline Court is a 1.8 acre lot in size, it has approximately 490 linear ft. of shoreline on Lake Powell. There is a RPA buffer that extends 100 ft landward of the edge of the Wetlands that is contiguous to the lake.

A single family residence that has been constructed on the lot. There is also a swimming pool in the rear yard and a split rail fence that was installed within the RPA buffer. (see photo # 6)

Chronology of Important Events for 5112 Shoreline Court

February 2, 2004

Prior to the submission of a building permit application to the County, the owners of 5112 Shoreline Court, Mr. and Mrs. Walters, request a Zoning Variance to allow for the

front setback requirement to be reduced. The owners state that the reason for the request is a “hardship” caused by the location of the 100’ RPA in their rear yard.
(see attachment # 2)

August 4, 2004

Prior to the submission of a building permit application to the County, Environmental Division (Division) staff person Molly Roggero, meets with Irvin Lyerly (the builder) to review a request to remove 34 trees damaged during Hurricane Isabel from the RPA.

August 10, 2004

Molly Roggero approves the request to remove approximately 34 storm damaged trees and issues the form letter granting approval. (see attachment # 3)

August 13, 2004

Prior to the issuance of a building permit, Mr. and Mrs. Walters submit a letter to Darryl Cook, requesting an exception to the Chesapeake Bay Ordinance to allow for the expanded clearing of trees and shrubs at 5112 Shoreline Court to allow for a larger back yard. In the letter Mrs. Walters states that “we have three small boys...and would like to have enough of a cleared backyard to play baseball, soccer, and other sports without having to navigate through trees in the mitigated area”. (see attachment # 4)

August 25, 2004

Darryl Cook sends a response letter to Mr. and Mrs. Walters denying their request for additional encroachments into areas designated to be preserved. Darryl’s letter also discusses a requirement for mitigation plantings within the RPA buffer. (see attachment # 5)

August 25, 2004

The Division reviews and approves a revised site plan for the Walter’s proposed single family dwelling located at 5112 Shoreline Court as part of the building permit process. The revisions to the site plan were noted on the plan by staff and agreed to by the builder. These revisions noted on the plan, reduce the amount of clearing proposed on the property. (see attachment # 6)

August 25, 2004

Code Compliance issues the building permit to the builder, for a single family residence at 5112 Shoreline Court, and shortly thereafter construction begins. (see attachment # 7)

December 16, 2004

The builder sends an email to the owners responding to their requests to remove trees from the RPA and Lake. The builder states that “ I certainly didn’t intend to clear the

lake. The site is more than adequate and much cleaner than it would have been without a hurricane”. (see attachment # 8)

November 17, 2005

Mrs. Walters writes a letter to the Lake Powell Point HOA requesting a variance, to allow for the installation of a split rail fence in the rear yard. Mrs. Walters states that: “a portion of the fence (approximately 330-400 yards) is in the RPA area”. Mrs. Walters also submits a site plan showing the location of the proposed fence. (see attachment # 9)

November 30, 2005

Code Compliance issues a building permit for a swimming pool including a fence, at 5112 Shoreline Court. No additional clearing, RPA encroachments, or modifications to the original approved plan are approved by the Division, for the installation of this pool. The installation of pool is within the limits of clearing shown on the original house site plan. The plan showing the location of the split rail fence was not submitted to the Environmental Division. Fences are permitted within RPA as long as no additional clearing is proposed, therefore a formal review and approval is not required for the fence.

January 13, 2006

Mr. and Mrs. Walters hire an outside contractor (Amazing Tree Service) to remove additional trees in the RPA and Lake, which the builder refused to remove.

January 13, 2006

Mrs. Walters contacts Environmental Inspector Joe Buchite by fax and requests permission to continue storm damaged tree removal and the removal of an additional tree. (see attachment # 10)

January 20, 2006

Joe Buchite visits the site finds Amazing Tree Service clearing trees and in the process damaging the understory vegetation. Joe talks with the contractor and warns him not damage the understory. Joe also determines that their request to remove other trees is unwarranted and denies the Walters request. (see attachment # 11)

March 6, 2006

Code Compliance issues a building permit for an accessory structure (retaining wall). No additional clearing or RPA encroachments are approved by the Division, for the installation of the retaining wall.

June 19, 2006

Patrick Menichino, of the Division visited 5112 Shoreline Court and met with Mrs Walters. He discussed the RPA buffer with Mrs. Walters and he observed what appear to

be RPA buffer encroachments as well as an encroachment into an area designated to be protected on the approved clearing plan. Mr. Menichino asks Mrs. Walters to have her surveyor flag or stake the approved limits of clearing and the RPA buffer on the property. Mrs. Walters tells Mr. Menichino that they really don't want to spend the money to have the surveyor come out to their property again. Mr. Menichino agrees to mark the RPA in the field, to save the Mr. and Mrs. Walters the expense of a surveyor. Mr. Menichino marks the RPA buffer and determines that encroachments have occurred. He does not issue a Chesapeake Bay Violation notice because he believes that the Mr. and Mrs. Walters will cooperate to resolve the issues.

June 26, 2006

Mr. and Mrs. Walters attend a meeting at the Division to discuss a resolution of the issues related to the RPA and limits of clearing on the property. The Walters agree to provide for the planting of trees and shrubs in the area of the clearing limits shown on the approved plan and located on the south side of the lot.

July 3, 2006

Patrick Menichino receives an email from Mrs. Walters requesting permission to remove two dead oak trees and a pine tree with a dead top.

July 7, 2006

Patrick Menichino visits 5112 Shoreline Court and evaluates Mrs. Walters tree removal requests. He determines that one (1) 24" dia. oak tree is dead and he approves its removal from the buffer. He does not approve the removal of the second oak tree because it is still substantially alive and is at least 100 LF from the principal dwelling. He advises Mrs. Walters that she can have a certified arborist inspect the oak tree and submit his report to the County for review. Mrs. Walters is unable to locate the pine tree with the dead top on her property, so no action is taken on that request.

July 10, 2006

Mrs. Walters emails Patrick Menichino requesting information on types of RPA buffer plants that won't attract dangerous pests, the removal of Poison Ivy, Sumac and Oak from the RPA, and the use of pesticides within the RPA buffer. (see attachment #12)

July 12, 2006

Patrick Menichino responds by email to Mrs. Walters's email of July 10. (see attachment # 13)

July 24, 2006

Mr. and Mrs. Walters send a letter requesting an appeal to members of the James City County Chesapeake Bay Board. The request letter lists four (4) items that the Walters would like to appeal.

August 8, 2006

Mrs. Walters sends an email to the Division requesting that Notices of Violations be issued by the Division concerning the unauthorized encroachments at 5112 Shoreline Court.

August 8, 2006

Mr. Walters sends an email to Patrick Menichino concerning replanting within the RPA buffer. Mr. Walters states: "I understand that as a representative of the JCC Environmental Division, your position is that there has been a disturbance of some of the platted RPA within our yard. Disturbance has resulted from damage done by Hurricane Isabel and subsequent, approved clearing of hurricane related debris". (see attachment # 14)

August 9, 2006

Patrick Menichino talks with the former builder concerning the clearing limits. The builder states that it was always the goal of the owners to have a bigger back yard without trees and to expand their view of the lake. The builder states that he refused to remove the trees in the December 2004 request because of the additional cost and because he recognized that a lot of damage would be done to the RPA buffer.

August 14, 2006

Following consultation with Assistant County Attorney Jennifer Lyttle, Patrick Menichino issues two (2) Chesapeake Bay Notices of Violations to Mr. and Mrs. Walters. The separate violations cite an encroachment into the RPA buffer and the unauthorized encroachment of an area designated to be preserved on the approved site plan. (see attachment # 15)

Staffs Response to the August 16, 2006 Appeal

Staff has reviewed the August 16, 2006 appeal filed by Mr. and Mrs. Walters and offer the following responses to appellants appeal items 1-4.

- 1. Request an appeal of recent enforcement of (a) resource protection area and (b) wetlands pursuant to section 404 as recently interpreted in Rapanos decision.***

The Rapanos decision was handed down by the U.S. Supreme Court. The case involved the U.S. Army Corps of Engineers asserting jurisdiction over so-called isolated wetlands under the Clean Water Act. This case centered on the question of whether the Corps has jurisdiction over wetlands that abut non-navigable tributaries of navigable waters. The U.S. Supreme Court chose to remand the case back to the lower courts.

Staff asserts that Rapanos does not have any effect on Mr. and Mrs. Walters' appeal for the following reasons:

- A. Rapanos involves the Federal Clean Water Act, isolated wetlands and the U.S. ARMY Corps of Engineers' ability to assert jurisdiction. The Rapanos decision has no effect on local government's ability to enforce local environmental ordinances. The matter before the JCC Chesapeake Board is an appeal filed by the Walters under the County's Chesapeake Bay Preservation Ordinance.
- B. The appellant is requesting an appeal pursuant to section 404 as interpreted in Rapanos decision. That request is beyond the authorization given to the Board by the Ordinance. The Chesapeake Bay Preservation Ordinance, Section 23-17 limits the ability for appeals to "an owner of property subject to an administrative decision, order or requirement under this chapter", meaning Chapter 23, the Chesapeake Bay Preservation Ordinance.

2. *Request appeal to recently presented JCC Environmental Division's August 25, 2004 letter and review of Environmental Division's finding that our Property has been impacted by "unauthorized encroachments".*

Staff believes that unauthorized encroachments into areas designated to be preserved on the approved development plan for lot 58, have occurred. These encroachments resulted in the disturbance to the soil and natural ground cover, and caused a loss of understory vegetation within these areas.

Staff offers the following information in support of our findings:

- A. The Chesapeake Bay Preservation Ordinance, Section 23-9 (a) states:

(a) *Purpose and intent.* The performance standards establish the means to minimize erosion and sedimentation potential, reduce land application of nutrients and toxics, and maximize rainwater infiltration. Natural ground cover, especially woody vegetation, is most efficient in holding soil in place and preventing site erosion. Indigenous vegetation, with its adaptability to local conditions without the use of harmful fertilizers or pesticides, filters and infiltrates stormwater runoff. Keeping impervious cover to a minimum enhances rainwater infiltration and effectively reduces increases of stormwater runoff.

(see attachment # 16)

The intent of the ordinance is to preserve the "natural ground cover, especially woody vegetation". At 5112 Shoreline Court areas designated to be preserved on the development plan have had the natural ground cover and woody vegetation removed. Staff has provided photos of these areas for the Boards consideration.

(see attached photos # 1-5)

B. The Chesapeake Bay Preservation Ordinance, Section 23-10 (3) states:

(3) *Clearing plan.* A clearing plan shall be submitted in conjunction with site plan review or subdivision plan review. No clearing or grading of any lot or parcel shall be permitted without an approved clearing plan. For existing single-family lots, a clearing line shown on the plat plan normally submitted as part of the building permit application shall satisfy clearing plan requirements. No clearing or grading shall occur on existing single-family lots until a complete building permit application is submitted.

Clearing plans shall be prepared and/or certified by design professionals practicing within their areas of competence as prescribed by the Code of Virginia.

a. Contents of the plan:

1. The clearing plan shall be drawn to scale and clearly delineate the location, size and description of existing and proposed plant material. All existing trees on the site 12 inches or greater diameter at breast height (DBH) shall be shown on the clearing plan, or where there are groups of trees, the woodlines of the group may be outlined instead. The specific number of trees 12 inches or greater DBH to be preserved outside of the impervious cover and outside the groups shall be indicated on the plan. Trees to be removed and woodlines to be changed to create desired impervious cover shall be clearly delineated on the clearing plan.
2. Any required buffer area shall be clearly delineated and any plant material to be added to establish or supplement the buffer area, as required by this chapter, shall be shown on the clearing plan.
3. Within the RPA buffer area, trees to be removed for sight lines, vistas, access paths, and BMPs, as provided for in this chapter, shall be shown on the plan. Vegetation required by this chapter to replace any existing trees within the buffer area shall also be shown on the clearing plan.
4. Erosion and sediment controls shall be provided as necessary and in accordance with chapter 8 of the County Code.

b. Plant specifications:

1. All plant materials necessary to supplement the buffer area or vegetated areas outside the impervious cover shall be installed according to standard planting practices and procedures.
2. All supplementary or replacement plant materials shall be living and in healthy condition. Plant materials shall conform to the standards of the most recent edition of the *American Standard for Nursery Stock*, published by the American Association of Nurserymen.
3. Where areas to be preserved, as designated on an approved clearing plan, are encroached, replacement of existing trees and other vegetation will be achieved at a ratio of two planted trees to one removed. Replacement trees shall be a minimum 1-½ inches caliper at the time of planting.

Staff asserts that section (b) 3 is a provision of Chapter 23 and clearly shows that encroachments into areas designated to be preserved requires restoration of trees and other vegetation. Staff has provided photos of these areas for the Boards consideration. (see attached photo # 5)

B. The Chesapeake Bay Preservation Ordinance, Section 23-18 (a) states:

(a) Without limiting the remedies which may be obtained under this section, any person who violates any provision of this chapter or who violates, fails, neglects, or refuses to obey any variance or permit condition authorized under this chapter shall, upon such finding by the circuit court, be assessed a civil penalty not to exceed \$5,000.00 for each day of violation. Such penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the county for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas within the county, in such a manner as the court may direct by order.

Section 23-18 (a) states in part that “any person who violates any provision of this chapter.....”. That means that a violation of any provision of Chapter 23, is a violation of the Chesapeake Bay Preservation Ordinance.

Staff asserts that at 5112 Shoreline Drive there have been violations of the provisions of the ordinance.

B. The Chesapeake Bay Preservation Ordinance, Section 23-7 (c) states:

(c) Buffer area requirements. To minimize the adverse effects of human activities on the other components of RPAs, state waters and aquatic life, a 100-foot buffer area of vegetation that is effective in retarding runoff, preventing erosion and filtering nonpoint source pollution from runoff shall be retained if present and established during development where it does not exist. The buffer shall have three layers of vegetation comprised of native trees, shrubs, and ground covers. Where the buffer is being established, a buffer modification plan will be prepared that may incorporate existing vegetation. A list of acceptable native plants is available from the manager. A buffer area not less than 100 feet in width shall be located adjacent to and landward of other RPA components and along both sides of any water body with perennial flow. The full buffer area shall be designated as the landward component of the RPA. The 100-foot buffer area shall be deemed to achieve a 75 percent reduction of sediments and a 40 percent reduction of nutrients. All subdivision plats submitted for approval after August 6, 1990, shall clearly identify the boundaries of any RPA within the property. Such plat shall contain a statement that all existing vegetation within the RPA shall remain in its undisturbed natural state, except for vegetation weakened by age, storm, fire or other natural cause. Developers shall install signs identifying the landward limit of the RPA. Signs shall be obtained, installed and maintained in accordance with guidelines established by the manager.

In addition Staff believes that Section 23-7 (c) authorizes the Manager to require that a buffer be “established during development where it does not exist”.

Section 23-7 (c) states, “The Buffer shall have three layers of vegetation comprised of native trees, shrubs, and ground covers”.

Therefore the refusal of the Walters to submit a restoration or native planting plan to the Manager for RPA buffer areas located on lot 58, 5112 Shoreline Court, may constitute a violation of provisions of the Ordinance.

Staff has provided photos of these areas for the Boards consideration.
(see attached photos # 1-5)

3. *Request appeal of JCC Environmental Division’s July 24, 2006 requirement to submit a buffer modification plan for review and approval to remove poison ivy, poison sumac, and poison oak.*

Staff believes that Section 23-7 (c) – (1) Authorizes the Manager to require a buffer modification plan for the removal of vegetation from within a buffer.

Section 23-7 (c) – (1) states:

Permitted buffer modifications. In order to maintain the functional value of the buffer area, existing vegetation may be removed upon approval by the manager of a buffer modification plan only to provide for reasonable sight lines, access paths, general wood lot management, and BMPs including those that prevent upland erosion and concentrated flows of stormwater, as follows:

- a. Trees may be pruned or removed as necessary to provide for sight lines provided, that where removed they shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion and filtering nonpoint source pollution from runoff.
- b. Access paths shall be constructed and surfaced so as to effectively control erosion;
- c. Dead, diseased, or dying trees or shrubbery, or noxious weeds may be removed based upon the approval of the manager, who may require a recommendation by a professional forester or arborist; and
- d. For shoreline erosion-control projects, trees and woody vegetation may be removed, necessary control techniques employed and appropriate vegetation established to protect or stabilize the shoreline and restore the function of the buffer in accordance with the best available technical advice and applicable permit conditions or requirements.

4. *Request review of Environmental Division’s position that “regulatory status of the lake (Lake Powell) has not changed since 1990”.*

In response to appellants appeal item number 4, Staff offers the following information for the Boards consideration:

The James City County Chesapeake Bay Ordinance (Chapter 19B) was adopted by the Board of Supervisors on August 6, 1990. Within the 1990 Ordinance is the following:

Section 19B – 3, Definitions:

Resource Protection Area (RPA) means that component of a CBPA comprised of lands at or near the shoreline that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may

result in significant degradation to the quality of State Waters. RPAs shall include tidal wetlands, tidal shores, nontidal wetlands connected by surface flow and contiguous to tidal wetlands or to tributary streams, and a 100-foot wide buffer area as identified in this Chapter, adjacent to and landward of other RPA components.

Tributary Stream means any perennial stream that is so depicted on the most recent U.S. Geological Survey 7-1-2 minute topographic quadrangle map (scale 1:24,000).

The tributary stream within Lake Powell is Mill Creek. The regulatory status of Lake Powell (RPA) was determined by the definitions within the 1990 Chesapeake Bay Preservation Ordinance as adopted by Board of Supervisors.
(see attachment # 17)

In addition Staff believes that the regulatory status of Lake Powell did not result from an administrative decision, order or requirement from the Manager, therefore appeal item number 4 can not be appealed to the James City County Chesapeake Bay Board.

Board Action

Staff requests that the Board in considering this appeal, follow the guidance provided within the Ordinance.

Section 23-17(b) Appeals; states that in rendering its decision, the Board shall balance the hardship to the property owner with the purpose, intent and objectives of the Ordinance. The Board shall not decide in favor to the appellant unless it finds:

1. The hardship is not generally shared by other properties in the vicinity;
2. The Chesapeake Bay, its tributaries and other properties in the vicinity will not be adversely affected; and
3. The appellant acquired the property in good faith and the hardship is not self-inflicted.

Staff Recommendations

Staff believes that the RPA buffer and the limit of clearing located on lot 58, also known as 5112 Shoreline Court has been impacted by unauthorized encroachments.

Staff contends that the Manager is authorized under provisions of the Chesapeake Bay Ordinance to require replanting in the areas subjected to encroachments.

Staff contends that the Manager is authorized under provisions of the Chesapeake Bay Ordinance to require an RPA Buffer Modification Plan, for the removal of vegetation within the buffer.

Staff asks that the Board deny each of the appellant's appeals.