

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD  
JUNE 14, 2006 - 7:00 PM**

**A. ROLL CALL**

William Apperson  
John Hughes  
Larry Waltrip  
Henry Lindsey  
David Gussman

**ABSENT**

none

**OTHERS PRESENT**

County Staff

**B. MINUTES** – The May 10, 2006 minutes were approved as presented.

Mr. Menichino requested a change in the agenda.

Mr. Lindsey made a motion that the Board rearrange the agenda and start with the second item under Board Considerations.

The motion to rearrange the agenda was approved by a 5-0 vote.

**D. BOARD CONSIDERATIONS**

2. Mr. Gregory Davis - Marywood Subdivision – Request for a work session

Mr. Gregory Davis, Kaufman & Canoles, Attorneys for Centex Homes, approached the Board and stated that Centex Homes was requesting a work session with the Board members regarding the proposed Marywood Subdivision project. The purpose of the work session would be to provide information to the Board on a number of alternative proposals for the project. The alternative proposals would include changes in clearing and grading and changes in the number or location of stormwater management ponds. He stated that Centex Homes would be seeking guidance or comments from the Board in order to generate a new proposal for the Marywood subdivision.

The Board requested and Mr. Davis agreed that drawings of these alternative proposals be provided to the Board Members, Environmental Staff and interested members of the public, in advance of the work session.

All Board members agreed that they would meet at the proposed site. They also stated that the site should be clearly marked for them to review.

Mr. Gussman asked if the work session would be open to the public.

Ms. Jennifer Lyttle, Assistant County Attorney, stated that this would be an advertised public meeting and all interested parties could attend however, the Board did not have to accept public comment. She further stated that for advertising purposes, this work session should be scheduled no sooner than three weeks from the current date.

Mr. Hughes made a motion that the work session convene at the proposed Marywood site at 4:00 pm on July 12, 2006 for a tour of the property. The work session will recess and reconvene at 6:00 pm in the boardroom of Building C. If necessary, the work session will recess before 7:00 pm and reconvene after the scheduled public hearings for the Wetland and Chesapeake Bay Boards.

The motion was approved by a 5-0 vote.

The Kingswood pool was suggested as a possible meeting site. Staff will confirm this location and notify all Board members.

## C. PUBLIC HEARINGS

### 1. CBE-06-025 – KTR Construction/Mishoe – 121 Branscome Blvd

Mr. Menichino presented the case as follows:

**Project Description:** Kevin and Donna Mishoe, 121 Branscome Blvd. applied for an exception to the Chesapeake Bay Preservation Ordinance for Resource Protection Area (RPA) impacts associated with the construction of 1200 sqft of sand set brick paver patios, and a decorative retaining wall with steps behind a single family principal structure on the above referenced lot in Powhatan Shores. The lot is 18,392 sqft or 0.418 acres in size.

**Background:** The lot was recorded prior to the adoption of the Chesapeake Bay Preservation Ordinance. There was no Resource Protection Area (RPA) present on the lot at the time of recordation. On August 6, 1990, the Ordinance went into effect establishing 100-ft RPA buffers around all water bodies with perennial flow. The canal that is located at the rear of this property is a tidal body of water connected to Powhatan Creek. There is a 100-ft RPA buffer landward of the canal that encompasses about 90% of the lot.

The issue for the Chesapeake Bay Board's consideration is the placement of 1200 sqft of brick paver patios and a retaining wall 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 patios and wall cannot be approved administratively and must be approved by the Board.

**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 Mishoe's submitted a WQIA for this project that proposes to mitigate for the impacts to the RPA by planting 3 native trees and 6 native understory trees and 32 native shrubs to the rear and sides of the house, to help filter nonpoint source pollution. This mitigation plan exceeded the typical mitigation requirements by planting one tree or three shrubs for each 100 sqft of impervious cover established.

**Recommendations:** Staff does not recommend approval of the exception as it involves creation of an impervious, accessory structure or use in the RPA. Both the Ordinance and staff consider the brick paver as an impervious surface. Staff has not allowed the creation of accessory structures in the RPA in the past. However, the Board approved construction of similar brick paver 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.

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.

After reviewing this case, if the Board considers approval of this exception, Staff recommends that the following modifications and conditions be imposed.

1. The plan should be modified to relocate the proposed 8'-8" X 45' brick paver patio adjacent to the bulkhead, to a location further landward of the resource. A 6' wide brick paver walkway from the steps to the bulkhead would be acceptable to staff.
2. The RPA mitigation plan should be amended to relocate additional native plantings between the bulkhead and proposed impervious surfaces. This area should be kept as a low maintenance mulched native plantings area. The use of a high maintenance turf should not be allowed between the bulkhead and the proposed retaining walls.
3. Any proposed high maintenance turf areas should be limited in size and should drain away from the resource or be directed to planting areas for treatment.
4. The patio shall be constructed using a non-interlocking paver (a floating paver system).
5. Implementation 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.
6. This exception request approval shall become null and void if construction as not begun by June 14, 2007.

Mr. Lindsey asked if it was a violation of the Ordinance to start construction without a permit, and if this violation was subject to a civil penalty.

Mr. Menichino stated that it was a violation and at the Boards request, Staff could look into the assessment of a civil penalty to be reviewed by the James City County Board of Supervisors.

Mr. Hughes asked how the violation was discovered.

Mr. Menichino stated that it was discovered by an environmental inspector in the area. A stop work order was issued, and the owner was notified that an exception from the Chesapeake Bay Board would be required for accessory structures in the RPA.

Mr. Lindsey stated that he felt licensed contractors should be aware that they cannot begin construction without permits.

Mr. Hughes stated that unfortunately, civil penalties are charged to the homeowners not the contractors.

Mr. Apperson opened the public hearing.

A. Mrs. Mishoe, owner, stated that she was unaware that starting construction was a violation because she had received approval from the Homeowners Association and the project was under 2500 square feet.

The Board discussed the proposed plan and staff recommendations with Mr. and Mrs. Mishoe and the contractor, Mr. Jon Ribock, KTR Construction. It was agreed that the patio would not have to be relocated but that staff recommendations 2 – 6 would be required. They also discussed the use of filter cloth and river rock instead of all mulch around the native plantings.

The Board advised Mr. Ribock that as a licensed contractor in James City County, he should be aware of the requirements when working around water.

As no one else wished to speak, Mr. Apperson closed the public hearing.

Mr. Waltrip stated that he felt the homeowners had a right to improve their property and that without some type of landscaping the soil would continue to run-off into the canal.

Mr. Hughes made a motion that the Board approve case CBE-06-025 with staff recommendations 2 – 6 modified as follows:

2. The RPA mitigation plan should be amended to relocate additional native plantings between the bulkhead and proposed impervious surfaces. This area should be kept as low maintenance with mulched native plantings or river rock on filter cloth. The use of a high maintenance turf should not be allowed between the bulkhead and the proposed retaining walls.
3. Any proposed turf areas should drain away from the resource or be directed to planting areas for treatment.

The motion was approved by a 5-0 vote.

#### D. BOARD CONSIDERATIONS – Continued.

Due to a previous engagement, Mr. Gussman left the meeting at 8:40 pm.

##### 1. CBV-06-011 - Appeal - 105 Seven Oaks - Retaining Walls

Mr. Menichino presented the case as follows:

**Project Description:** Mr. Jeff Silva, Decorative Landscapes Inc., on behalf of the owners, applied for an appeal and exception to the Chesapeake Bay Preservation Ordinance for Resource Protection Area (RPA) impacts associated with the construction of a 680-sqft sand set brick paver patio and decorative block landscape retaining walls on the above referenced lot in Fords Colony. The residence is located adjacent to a perennial water body.

**Background:** 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 stream, which is located upstream of the property, and it was determined that the stream had perennial flow. The perennial flow determination was then established from that source downstream into the lake that is adjacent to the subject property. The designation of a perennial water body requires that a 100-ft RPA buffer be established around the lake. This 100-ft RPA buffer encompasses approximately 80% of the lot.

Through an administrative error by the County, a building permit was issued for the residence in September 2005 without the RPA being identified on the owner's approved building permit and site plan. A recent County inspection of the property revealed this error and Staff has attempted to remedy this mistake without placing unreasonable conditions on the owner. Staff has acknowledged to the owner that the RPA encroachments on their July 2005 site plan would be grandfathered, but any newly proposed additional encroachments would have to meet the requirements of the Ordinance.

The owners have submitted a new site plan that proposes additional RPA encroachments beyond those already grandfathered within the 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 issue for the Chesapeake Bay Board's consideration is the placement of a 680-sqft brick paver patio, several landscape retaining walls, a staircase, and 480 sqft of high maintenance turf, within the RPA buffer.

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."

The proposed patio and retaining walls could not be approved administratively and the owners were appealing the County's Administrative Order to remove the unauthorized structures. The owners were also requesting an exception from the Board, for the proposed patio, retaining walls, staircase, and turf area.

**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 owners have 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 patio (680 sqft).

The WQIA proposes to mitigate for the impacts to the RPA by planting, 1 native understory tree and 25 native shrubs in the RPA. This vegetation will be located to the rear of the residence adjacent to the retaining walls and proposed patio to help filter nonpoint source pollution. This mitigation plan exceeds the typical mitigation requirements by planting one tree or three shrubs for each 100 sqft of impervious cover established. The mitigation plan will require revision so that only native plantings are proposed for mitigation.

Mrs. Hurley 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:** Staff does not recommend approval of the appeal and exception as it involves the creation of impervious, accessory structures, retaining walls and high maintenance turf within the RPA. Both the Ordinance and staff consider the brick pavers as an impervious surface. Staff has not allowed the creation of accessory structures in the RPA in the past. However, the Board did approve construction of similar brick paver 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 appeal and exception, the proposed mitigation plan is in accordance with the standard mitigation requirements and would be acceptable for the proposed use. If approved, it should be conditioned on the following:

1. A revised mitigation landscape plan be developed, submitted, and approved by the County that requires the installation of 1 native understory tree and 25 native shrubs, and the deletion from the plan of the proposed 480 sqft of turf area.
2. Implementation of the revised 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. The 680-sqft paver patio shall be constructed using a non-interlocking paver (a floating paver system). Information on the specific paver to be used needs to be submitted to the Environmental Division prior to beginning work.
4. This exception request approval shall become null and void if construction has not begun by June 14, 2007.

Mr. Hughes asked what was originally proposed for the slope on the property.

Mr. Menichino stated that it called for a gradual grade from the house to the pond. He added that there was a change in construction that raised the elevation of the house approximately 4 feet and created a steeper slope.

The Board inquired if anyone present wished to speak on the request.

A. Ms. Peggy Krapf, landscape designer for the project, approached the Board and stated that the site plan she received from the builder showed a retaining wall and no RPA buffer. She stated that when she contacted the County, she was told there was no RPA buffer associated with the pond.

Mr. Menichino stated that the County admitted their error of not identifying the RPA on the site plan. He added that the County approved site plan did not identify any retaining walls and the site plan Ms. Krapf received from the builder was not the plan approved by the County.

B. Mrs. Hurley, owner, stated that she thought the builder provided an authorized plan and that this was the plan she submitted when she applied for the pond buffer variance. She also added that the elevation of the house was raised because of the pond buffer.

C. Mr. Jeff Silva, contractor for the project, approached the Board and stated that he had applied for the building permit in April and learned that he needed a contractor's license. He hired an engineer, ordered materials, and started the job as soon as he passed the contractor's test in April, but could not apply for the building permit until May, when he actually received his license number.

Mr. Lindsey and Mr. Hughes both stated their concern that Mr. Silva had started the job without a contractor's license or a building permit.

Mr. Waltrip stated his belief that the owners were trying to improve their property and remedy the problem caused by the additional elevation of the house. He stated that he believed the pond was not tidal and that it was designed for run-off from the golf course.

Mr. Hughes agreed that the retaining walls were needed to have a usable lot and he did not believe the property owners should be penalized because the error was not their fault. He added that he also did not find the County at fault.

Mr. Apperson agreed with Mr. Hughes and added that the Board needed to make a decision that would protect the water quality without infringing on the property rights of the owners.

Mr. Lindsey and Mr. Hughes both stated their concern with granting an exception that might confer upon the applicant, special privileges denied to other property owners similarly situated in the vicinity.

At Mr. Lindsey's request, Mr. Menichino repeated staff recommendations. He added that staff would also recommend restoration of a disturbed area that was beyond the original limits of clearing and changing the landscape plan to use only native plants in the RPA.

Ms. Krapf stated that she thought she had done everything correctly based on the information she was given but would be willing to make any changes requested by the Board.

Mr. Hughes made a motion that the appeal of case CBV-06-011 be granted with staff recommendations and restoration of any disturbed areas beyond the original limits of clearing that were not addressed on the landscaping plan and use of only native plantings in the RPA.

Mr. Menichino added that the applicant would also need to submit documentation for another pond buffer variance due to additional impact from the added retaining walls.

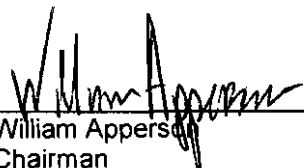
The motion was approved by a 4-0 vote

#### **E. MATTERS OF SPECIAL PRIVILEGE**

The Board and Staff held a brief discussion regarding administrative exceptions for small accessory uses within the RPA. It was suggested that the Board schedule a work session to discuss this proposed change to the ordinance as well as general policies and guidelines for case decisions.

#### **G. ADJOURNMENT**

The meeting adjourned at 9:20 PM.

  
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William Apperson  
Chairman

  
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Patrick Menichino  
Environmental Compliance Specialist