

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD
MINUTES
May 9, 2007 - 7:00 PM**

A. ROLL CALL

ABSENT

William Apperson
Henry Lindsey
John Hughes
Larry Waltrip
David Gussman

OTHERS PRESENT

County Staff

B. MINUTES – The April 11, 2007 minutes were approved as presented.

C. PUBLIC HEARINGS

1. CBE-07-015 – Ronald Nervitt – 108 Seven Oaks

Mr. Pat Menichino presented the following case:

Project Summary and Description

Ronald and Lois Nervitt, 101 Stone Bridge Drive, Williamsburg, VA, applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the construction of a single-family residence, deck and a lap swimming pool, totaling 7034 sqft of impervious area.

The lot was recorded in 1997 after adoption of the Ordinance but prior to 2004 when the Ordinance requirements related to the determination of perennial flow were changed requiring that perennial water bodies be identified based on a field evaluation. After a field evaluation, the lake located behind this lot was determined to be a water body with perennial flow, requiring that a 100-foot RPA buffer be established around this feature. This 100-foot RPA buffer encompasses approximately 95% of the lot.

According to provisions of the Ordinance, when application of the buffer results 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;
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."

The residence, deck, and lap swimming pool are proposed within the seaward 50-foot buffer and cannot be approved administratively. The applicants have chosen to request an exception for these structures from 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 RPA. 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 construction of a single-family dwelling, deck, and patio.

The WQIA proposes to mitigate for the impacts to the RPA by planting 18 native trees, 36 native understory trees, and 54 native shrubs in the RPA. This vegetation will be located around and to the rear of the proposed residence. The mitigation plan is in accordance with the standard mitigation requirements of the County. If the amount of plantings required exceeds the area within the RPA buffer available for planting, then as an option the applicant shall pay into a County approved environmental fund an amount equal to \$100.00 times the number of trees and shrubs required that cannot be planted on the property.

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 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

The applicant has requested that the Board act upon (6) six specific requests included within the exception request. Staff offers the following recommendations to the Board on those six requests:

1. Staff recommends the Board approve the RPA buffer encroachment for the proposed house and deck because the lot was created prior to the establishment of the RPA and encroachment into the buffer is unavoidable. This portion of the proposal does not confer any special privileges to the applicant, and the exception is not based on self-imposed conditions.
2. The clearing of utility easements for the purpose of individual service connections is authorized within the Ordinance as part of an authorized encroachment; therefore, separate Board approval is not required for utility easement clearing.
3. The Ordinance clearly prohibits staff from approving encroachments within the buffer for accessory structures or uses. The proposed infinity lap pool is considered an accessory structure and use. The Board has granted exceptions for encroachments into the buffer for accessory structures such as; storage buildings, patios, decks and retaining walls. The Board has never received an exception request for a proposed swimming pool within the buffer; therefore, a precedent does not exist for the pool. Staff believes that there is no difference in water quality impacts when comparing the impervious area of a storage shed and swimming pool within the buffer. However, maintenance and construction requirements for a swimming pool exceed those of other accessory structures approved by the Board. In addition, the use is not a passive recreation facility of the type permitted in the buffer by the Ordinance. Without supporting documentation to the contrary, the Board should conclude greater overall water quality impacts will be caused from a swimming pool within the buffer than other accessory structures.
4. The removal of dead diseased or dying trees from within a buffer is authorized within the Ordinance and is approved administratively through the Division; therefore, separate Board approval is not required.
5. The installation of sod is approved within the areas identified as "Limits of Clearing" as shown on plan sheet 1 of 2, submitted by the applicant. Mitigation planting areas are identified on plan sheet 2 of 2, submitted by the applicant. Any additional clearing requests can be reviewed and approved administratively through the Division.

6. If the Board approves this exception request, the approval shall transfer with the land. This approval shall become null and void if construction has not begun by May 9, 2008. An extension can be requested in writing at least 2 weeks prior to the expiration date.

Staff recommends approval of the proposed residence and deck with the following conditions:

1. Full implementation of the mitigation landscape plan submitted with the WQIA or if field conditions prevent the full implementation of the RPA mitigation plan, an alternate plan along with a contribution paid into a County approved environmental fund may substituted. The amount paid into the fund shall equal \$100.00 times the number of required trees and shrubs not able to be planted on the property.
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. The deck shall have 3 inches of gravel on filter fabric installed underneath.
4. 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.
5. This exception request approval shall become null and void if construction has not begun by May 9, 2008.

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. If the Board grants the exception, the proposed mitigation plan is in accordance with the standard mitigation requirements for impervious surfaces.

Mr. Lindsey asked if the transfer of an exception was something new and asked for further explanation.

Jennifer Lytle, Assistant County Attorney, explained that Chesapeake Bay Waiver Exceptions are granted on the property, they are usually good for one year, and transfer with the property.

Mr. Apperson opened the public hearing.

A. Mr. Ronald Nervitt, property owner, asked the Board to grant the entire exception request. He disagreed with the finding of perennial flow associated with the pond. He stated the pond was a BMP created to collect runoff from adjacent properties, including the St. Andrew's Village Subdivision, D J Montague School and neighboring golf courses. He wanted to know what was being protected by imposing an RPA on the 3 remaining lots around the BMP. He also stated the proposed lap pool was for medical and health purposes.

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

Mr. Gussman asked if the BMP had an outfall structure that would discharge in to the state waterways.

Mr. Cook stated there was an outfall and it was staff's position there was perennial flow into the pond from two upstream ponds. He added that by definition in the Ordinance, if there was perennial flow through a pond a 100-foot RPA buffer had to be established around the pond.

A. Mr. Nervitt stated he disagreed with staff's position and suggested that some further analysis should be done on the establishment of RPA buffers around BMPs.

Mr. Hughes stated the Chesapeake Bay Board could not change the determination of the RPA buffer.

All Board Members agreed the house and deck could be permitted but they did not want to set precedence for permitting swimming pools in the 50-foot RPA buffer.

Mr. Waltrip stated the applicant could move the house forward or eliminated some of the deck and position the proposed pool out of the 50-foot RPA buffer. He asked if the applicant could then request another exception.

Jennifer Lytle, Assistant County Attorney, stated a new application could be submitted.

Mr. Hughes made a motion to grant the exception for case CBE-07-015 with staff recommendations for the house and deck only.

The motion was approved by a 5-0 vote.

2. CBE-07-019 – Gary Little - 7578 Vincent Drive

Mr. Pat Menichino presented the following case:

Project Summary and Description

Mr. Gary Little appealed an administrative order and applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the construction of approximately 100 linear feet of timber retaining wall and the installation of 1200 sqft of fill on the above referenced lot in Hunters Creek. The lot is 68,077 sqft or 1.565 acres in size.

The lot was recorded prior to the adoption of the Ordinance. Therefore, there was no RPA present on the lot at the time of recordation. The single-family residence on the lot was constructed in 1987. In 2004, a stream behind this lot was determined to have perennial flow requiring that a 100-foot buffer be established adjacent to the stream. This 100-foot RPA buffer, encompasses about 60% of the lot.

According to provisions of the Ordinance, when application of the buffer results in the loss of a buildable area on a lot or parcel recorded before August 6, 1990, 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.
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 retaining wall could not be approved administratively and the applicants have chosen to request an appeal and exception from 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 applicant has submitted a plan for this project, which includes a mitigation plan to offset the proposed impacts to the RPA buffer for the retaining wall and fill.

That plan proposes to mitigate for the impacts to the RPA by planting 6 native trees and 50 native shrubs in the RPA. This vegetation will be located to the rear of the residence adjacent to the proposed retaining wall to help filter nonpoint source pollution. This mitigation plan exceeds the typical mitigation requirements of planting one tree or three shrubs for each 100 sqft of impervious cover established.

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 this application. Staff cannot support the installation of 100 linear feet of retaining wall and associated fill for the following reasons:

1. The Ordinance considers retaining walls as an accessory structure.
2. Staff has visited the project site and was unable to determine that an erosion problem existed in the rear yard that would warrant the installation of the proposed 100 linear feet of retaining wall and related fill.
3. Staff has acknowledged existing erosion problems by the driveway and adjacent to the house but not in the RPA.

Staff has not allowed the creation of accessory structures in the RPA in the past. However, the Board did approve construction of similar structures in Stonehouse at 2929 Leatherleaf Drive, and at 101 Spring Branch in Settlers Mill.

After reviewing this case, if the Board denies the appeal and exception request, then an RPA restoration plan should be required. 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 limit the installation of retaining walls to areas where the applicant can clearly demonstrate that an erosion problem exists. Staff has not determined that an erosion problem exists across the entire back portion of the property. An erosion problem does exist in the area of the driveway.
2. The RPA mitigation plan is acceptable to staff and may be modified if the Board reduces the amount of retaining wall.
3. 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.
4. This exception request approval shall become null and void if construction has not begun by May 9, 2008.

Mr. Hughes asked if construction of the retaining wall had been stopped.

Mr. Menichino stated a Notice of Violation had been issued and Mr. Little had been cooperative.

Mr. Apperson opened the public hearing.

A. Gary Little, property owner, stated he was not aware of the RPA when he brought in the fill or began construction on the retaining wall. He became aware of the RPA when he applied for a permit to build the deck. He stated there was considerable erosion on the side of the house and felt there was a potential for additional erosion on his property. He stated he had put considerable expense into this project and felt in would ultimately minimize the impact to the RPA from the erosion on his.

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

Mr. Lindsey stated he did not see erosion on either side of the wall when he visited the site and did not see any need for the wall to continue beyond the area of erosion.

Mr. Hughes stated the purpose of the wall might just be for a level yard but, regardless of its purpose, the wall is an accessory structure in the 100-foot RPA and in the past, the Board had granted exceptions for accessory structures in the 100-foot RPA.

Mr. Waltrip stated that grading the fill at a 2 to 1 slope would also create a yard and resolve the potential for erosion. He also stated his concern with the structure of the retaining wall and its ability to contain the fill. He asked if the applicant was required to obtain a building permit for the wall.

Mr. Menichino stated the Board was acting on allowing an accessory structure, a retaining wall, in the RPA and it would not necessarily be the existing wall. The applicant will be required to apply for a building permit and the proposed wall will need to meet County code.

A. Mr. Little confirmed that the existing wall would be removed or modified to meet the specifications required by the County.

Mr. Waltrip asked if the applicant could be given some time to work with the County and present the Board with an exception request that included information on the construction of the retaining wall.

Mr. Hughes made a motion the public hearing be reopened.

The motion was approved by a 5-0 vote.

Mr. Hughes made a motion to continue the public hearing on case CBE-07-019 to the next Board meeting so the applicant could present a proposed retaining wall that was acceptable to the County Code Compliance Division.

The motion was approved by a 5-0 vote.

3. CBE-07-017 – HHHunt/Williamsburg Environmental Group - Mason Park

Mr. Michael Woolson presented the following case:

Project Description

Ms. Toni Small applied on behalf of HHHunt Communities for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for impacts associated with the Mason Park residential project. The project involves the construction of 15 single-family residential units and assorted infrastructure, including roads, driveways, and stormwater BMPs. The project is situated within the tidal mainstem of Powhatan Creek, southeast of Jamestown Road, and southwest of the Landfall subdivision.

For the purposes of constructing the project, 0.14 acres of on-site RPA buffer and 0.09 acres of off-site RPA will be impacted for the installation of a sanitary sewer bridge and stormwater BMP outfall. Of the total 0.23 acres of RPA impact, 0.16 acres is related to the sanitary sewer (0.09 acres off-site and 0.07 acres on-site) and 0.07 acres is related to the stormwater BMP outfall. The sanitary sewer RPA impact is in the jurisdiction of the Chesapeake Bay Board to approve, while the stormwater BMP outfall will be processed administratively.

History

HHHunt Communities, Inc. proposes to construct the project known as Mason Park, which will have 0.23 acres of permanent RPA impact due to the construction of a sanitary sewer connection and a stormwater BMP outfall. The applicant has undergone a detailed and extensive rezoning process, which has been approved by the Planning Commission (8-7-06) and the Board of Supervisors (10-10-06).

Water Quality Impact Assessment

The Ordinance in Section 23-11 states, "a Water Quality Impact Assessment (WQIA) shall be required for any proposed land disturbance in the RPA resulting from development or redevelopment activities". The attached WQIA presents the impacts to the RPA buffer and wetlands resulting from the plan of development and the offsetting mitigation measures. The impact is associated with the construction of a sanitary sewer bridge and a stormwater management facility and its outfall into the RPA. To mitigate for the proposed impacts, the following will be implemented into the associated plan of development:

- Site stormwater quality management exceeding the County standards for minimum pollutant removal requirements; and
- Use of a coastal plains seed mix within the utility easement outside of all wetland areas; and
- Use of a wetland seed mix within the utility easement within the disturbed wetland areas; and
- Placement of orange safety fence around the limits of disturbance within the RPA and all wetland systems; and

- Additional conservation areas adjacent to the regulatory RPA, placed within a conservation easement dedicated to James City County in the amount of 0.6 acres at a ratio of 2.6:1.

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 mitigation measures and the compact nature of the development (utilizing Low Impact Development techniques), staff finds 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 to the Chesapeake Bay Board that they approve the WQIA and the exceptions for the project known as Mason Park. Furthermore, all recommendations listed in the WQIA 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 May 9, 2008. 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.

Mr. Hughes asked if part of the sewer connection was on an adjacent property and if there was an application for the RPA encroachment on that property. He also asked if the stormwater outfall was to be considered by the Board.

Mr. Woolson stated the offsite encroachment was included with this application. A letter from the adjacent property owner granted permission for use of the property by the applicant. He advised the Board that permission for the stormwater outfalls would be decided administratively.

The Board asked for guidance from Jennifer Lyttle, Assistant County Attorney, regarding the encroachment on the adjacent property.

Ms. Lyttle explained that in considering the application from HHHunt, the Board could grant the exception for the encroachment on both properties. If the adjacent property owner did not grant the right of access on his property then it could not be developed.

Mr. Woolson stated the mitigation requirements in the application covered the RPA encroachment on both properties.

Mr. Apperson opened the public hearing.

Mr. Waltrip asked for the height off the marsh of the proposed sewer bridge.

Mr. Hughes asked where the sewer bridge tied in offsite.

A. Toni Small, Williamsburg Environmental Group, stated the proposed sewer bridge would be 3 ½ to 4 feet off the marsh and the offsite pumping station was located on Williams Tankard Drive in the Landfall Subdivision.

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

Mr. Hughes stated his concern with the discharge from the stormwater outfall. He asked if this outfall was in the wetlands and if a permit would be required from the Wetlands Board.

Mr. Cook advised the Board that the Ordinance stated exceptions for encroachment by water dependent features would be decided administratively.

Mr. Woolson stated the applicant had applied for a permit from the Army Corp of Engineers but because the impacted area was non-tidal wetlands, a permit would not be required from the local Wetlands Board.

Mr. Gussman made a motion to grant the exception for case CBE-07-017 with staff recommendations.

The motion was approved by a 5-0 vote.

D. BOARD CONSIDERATIONS

1. CBE-06-071 - 3 West Circle - Special Committee Report

Mr. Menichino presented the report from the Special Committee appointed to review the facts and information pertaining to case CBE-06-071. (Copy attached). The Committee found that the March 14, 2007 decision on this case was based on inaccurate and incomplete information and recommended the denial be rescinded and the case reopened at the next Chesapeake Bay Board meeting on June 13, 2007.

2. CBE-06-071 - 3 West Circle - Motion to rescind the March 14, 2007 decision to deny the exception

Mr. Waltrip made a motion to adopt the committee report and the recommendation to rescind the decision on case CBE-06-071.

A. Mr. Marc Bennett, AES Consulting Engineers, asked what new information precipitated the motion to rescind the Board's March 14, 2007 decision.

Mr. Hughes stated that at the March 14, 2007 meeting, the Board was led to believe there would be room on the mainland portion of the 3 West Circle property to build the house. It was later discovered this information was not accurate.

Mr. Lindsey stated the Board had acted without a thorough knowledge of the facts.

Mr. Apperson asked for a vote on Mr. Waltrip's motion to adopt the committee report and rescind the decision on case CBE-06-071.

The motion was approved by 5-0 vote.

Mr. Hughes asked staff to include information on the approved Wetlands Board case for this property when preparing the Chesapeake Bay Board package for reconsideration of this case. He also suggested an investigation for the possibility of historical landmarks on the property.

B. Mr. Darryl Rickmond, adjacent property owner at 4 West Circle, stated that when he spoke at the March 14, 2007 meeting he did not mean to imply the same house could be built on the upland portion of the property but, a house with a footprint of approximately 1500 square feet could be built.

Mr. Apperson advised Mr. Rickman to present this information at the June 13, 2007 Board meeting.

E. MATTERS OF SPECIAL PRIVILEGE

The Board asked for guidance when considering cases that require approval from both the Wetlands and Chesapeake Bay Boards.

Jennifer Lyttle, Assistant County Attorney, suggested the decision be deferred on the first case until the second case is heard.

The Board requested that staff include the dual application information on all applicable Board cases.

Mr. Rickmond asked if information on Board cases was available to the public.

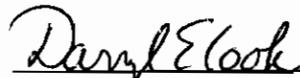
Ms. Lyttle stated that all information presented to the Board was in case files available for public inspection.

F. ADJOURNMENT

The meeting adjourned at 8:45 PM.



William L. Apperson
Chairman



Darryl E. Cook
Secretary

JAMES CITY COUNTY CHESAPEAKE BAY BOARD

SPECIAL COMMITTEE MEETING

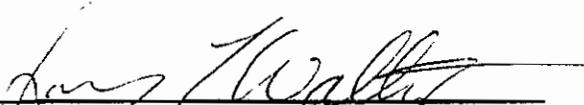
May 3, 2007 – 4:00 p.m.

Committee Members
Larry Waltrip, Chairman
John Hughes
David Gussman
Patrick Menichino

Committee Report and Recommendations to the Chesapeake Bay Board
May 9, 2007

The Committee appointed to review the facts and information pertaining to CBE-06-071 finds that the March 14, 2007 decision by the James City County Chesapeake Bay Board, denying the exception request of case number CBE-06-071, was based on inaccurate and incomplete information.

The Committee further finds that based on new information obtained and reviewed by the Committee, the denial of CBE-06-071 should be rescinded and the Chesapeake Bay Board should reopen Board deliberations of CBE-06-071 at the June 13, 2007 meeting.



Larry Waltrip, Committee Chairman