

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD  
MINUTES  
June 11, 2008 7:00 PM**

**A. ROLL CALL**

William Apperson  
David Gussman  
Henry Lindsey  
Larry Waltrip

**ABSENT**

John Hughes

**OTHERS PRESENT**

County Staff

**The James City County Wetlands Board meeting was opened concurrently with this Board meeting**

**B. MINUTES**

The May 14, 2008 Board Meeting minutes were approved as presented.

**C. PUBLIC HEARINGS**

**1. CBE-08-029 – Richard Costello – 10020 Sycamore Landing Road**

Pat Menichino presented the following case:

**Project Summary and Description**

Richard and Nina Costello, 10020 Sycamore Landing Road, Williamsburg, VA, applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with a proposed 20 linear ft retaining wall and the relocation of a brick paver walkway. These proposed improvements will result in an increase of 116 sqft of impervious area within the RPA buffer.

This exception request is for proposed accessory structures within the 100-foot RPA buffer and therefore must be processed by the Board after a public hearing.

**Brief History**

The lot was recorded prior to the 1990 adoption of the Ordinance that established a 100-foot RPA buffer on the lot. The lot is 0.35 acres in size and the RPA buffer encompasses approximately 50% of the lot or 0.18 acres

**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 the required information as outlined in the *James City County Water Quality Impact Assessment Guidelines*. The applicant has submitted a WQIA for this project but does not propose mitigation for the impacts to the RPA.

### **Recommendations**

The issue before the Board is the 116 sqft of impervious cover in the RPA associated with a retaining wall and walkway. The Board is to determine whether or not this is consistent with the spirit and intent of the Ordinance and make a finding based upon the criteria outlined in Section 23-14(c) of the Ordinance. Staff is not opposed to a Board action that would allow the retaining wall to remain in place.

If the Board votes to approve the exception request, then staff recommends the following conditions be incorporated into the approval:

1. The applicant must submit a RPA Mitigation Plan showing the locations of three native shrubs to be installed within the buffer.
2. The size of the shrubs shall be 3-5 gallon size. All vegetation shall be native species approved by the Environmental Division.
3. This exception shall become null and void, if the required RPA Mitigation Plan is not submitted to the Environmental Division, and if the three required shrubs are not installed within 60 days following Board action.

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 recommended RPA Mitigation Plan is in accordance with the standard mitigation requirements for impervious surfaces.

Mr. Apperson opened the public hearing.

Mr. Lindsey asked why the applicant had not proposed mitigation.

A. Richard Costello, property owner, stated the relocation of the walk was for wheel chair access and he thought the proposed plantings for the addition would be sufficient. However, he agreed to plan three additional shrubs but requested additional time so the walkway could be completed first and the plantings could be installed in the fall.

All Board Members agreed the additional time was a reasonable request.

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

Mr. Gussman made a motion to adopt the resolution granting the exception for tax parcel 07204000004 - Case CBE-08-029, with a change allowing 120 days for installation of mitigation plantings.

The motion was approved by a 4-0 vote.

**The Board then ammended the Agenda and heard the BOARD CONSIDERATIONS**

## **D. BOARD CONSIDERATIONS**

### **1. CBE-07-015 - Permit Extension – 108 Seven Oaks**

Pat Menichino stated Ron Nervitt, owner 108 Seven Oaks, requested an indefinite extension of the expiration date for Chesapeake Bay Board Exception CBE-07-015.

The Board may consider this request and find that special circumstances or hardships exist that may warrant an exception extension period of more than 1 year.

Staff advised the Board that a precedent could be established with the Board's decision.

The Environmental Division communicated with Mr. Nervitt, and advised him that staff would authorize approval of a one-year extension from May 9, 2008 to May 9, 2009.

The authorization of the Chesapeake Bay Exception extension by the Environmental Division is subject to review and confirmation by the Chesapeake Bay Board at its next meeting. All conditions stipulated within the original exception shall be applied to any extension granted by the Board.

**A.** Ron Nervitt stated economic reasons had prevented him from constructing the home and he felt it might be several years before the economic climate changes. In addition, he did not believe his proposal presented a significant impact to the RPA. He stated an indefinite extension would streamline the process and staff would not have to process an extension every year.

Mr. Gussman stated he agreed the impact to the RPA was minimal however, he did not feel the Board should set a precedent of granting indefinite exceptions. He explained that geographical conditions as well as adjacent property owners could significantly change over time. He was sympathetic to the applicant's arguments and suggested a 2-year extension for sufficient relief.

All other Board members agreed with Mr. Gussman's assessments.

Mr. Gussman made a motion to adopt a resolution granting a 2-year extension of the expiration date for Chesapeake Bay Board Exception CBE-07-015 to May 9, 2010.

The motion was approved by a 4-0 vote.

## **C. PUBLIC HEARINGS continued.**

### **2. CBV-08-003 – Appeal of Violation – Walker Ware IV – 5004 River Drive**

The Board and audience were advised that tonight's session was being video taped.

Staff presented the following case to the Board regarding the violations at 5004 River Drive:

Scott J. Thomas, Environmental Director, and Chesapeake Bay Board Secretary explained the process for determining resource protection areas (RPA). He provided a summary of the Chesapeake Bay Preservation Act (Act), Chapter 21 - Code of Virginia with specific reference to Section 10.1 regarding the authority of local governments. He also cited sections of the Chesapeake Bay Preservation Ordinance (Ordinance), Chapter 23 of the Code of James City County, regarding the development criteria for RPAs, performance standards, plan of development requirements, and water quality impact assessments (WQIA).

Pat Menichino, Compliance Specialist, described the Notice of Violation (NOV) of the Ordinance issued to Walker Ware on April 10, 2008 for unauthorized land disturbing activities and placement of fill, gravel stone and riprap armor stone in the RPA, at 5004 River Drive. He described the subsequent appeal request received from Timothy M. Murphy, Esq., on behalf of Walker Ware, precipitating this public hearing for review of the NOV by this Board.

Staff's presentation described the actions initiated from March 2006 thru March 2008, attempting to bring about environmental compliance on the property. Staff's presentation included photographs and documents depicting the following violations of the Ordinance:

- Mr. Ware did not request approval for proposed development within the RPA as required in Section 23-7(a).
- Mr. Ware commenced land disturbance in excess of 2,500 square feet without review and approval through the development review process as is required in Section 23-9(b)(4).
- Mr. Ware failed to comply with chapter 8 of the James City County Code as required in Section 23-9(b)(5).
- Mr. Ware did not obtain all required Wetland Permits prior to grading and other site activities as required in Section 23-9(b)(9).
- Mr. Ware failed to comply with the development review process prior to clearing or grading as is required in Section 23-10.
- Mr. Ware failed to submit a WQIA as required in Section 23-11.

Pat Menichino submitted a copy of the approved minutes from the May 14, 2008, Wetlands Board - Show Cause Hearing where the Wetlands Board acknowledged violations of the Wetlands Ordinance and issued a Notice to Comply to Walker Ware. He stated the wetlands were a component of the RPA.

Joe Buchite, Environmental Inspections Supervisor, stated he had visited the adjacent parcel on April 7, 2008. He validated the date and accuracy of the photographs in the presentation, depicting the runoff from Mr. Ware's property onto the adjacent property.

At Mr. Waltrip's request, staff indicated on the larger scale map of the property, the areas of erosion and runoff shown in the photographs.

Pat Menichino identified other properties with piers along the Chickahominy River. He advised the Board that in rendering their decision they should consider that none of these piers had 22-foot wide gravel access roads with cul-de-sacs and therefore Mr. Ware's hardship was not generally shared by other properties in the vicinity.

Staff requested the Board initiate the following actions that would be consistent with the Wetlands Board's actions:

- Deny the appeal request.
- Issue an order requiring removal of all fill material and complete restoration of the RPA.
- Instruct the County Attorney to pursue this matter, including civil penalties of \$5,000 per day, before the Williamsburg/JCC Circuit Court.

Mr. Lindsey asked if the removal of fill would include cleaning up the runoff onto adjacent properties.

Pat Menichino stated that was not being requested at this time.

Mr. Apperson opened the public hearing.

Timothy Murphy, attorney representing Walker Ware, stated he had not received advance notification of the allegations and charges and the presentation given by the County was not made available before this evening so he was not able to prepare for this hearing. He stated that regardless of what the Board said or did, they were going to court. He stated the County had presented violations to the Ordinance but the Act was more important and it did not authorize creation of a Chesapeake Bay Board. He stated the Act was created to protect the water not the RPA buffers and it contained a provision protecting vested rights of landowners. He stated the Army Corps of Engineers had visited the site before and after the road maintenance and found no violations of wetlands law. He stated that because the Board was a defendant being sued by Mr. Ware, it could not render an unbiased decision and he suggested the case be heard by the York County Wetlands Board. He then submitted a memorandum to the Wetlands Board outlining these and other arguments (see the 6/11/08 Wetlands Board Minutes).

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

Mr. Gussman stated the Board needed to be narrow in their consideration of the appeal and base its decision on the three requirements specified in the Ordinance. He did not believe the requirements had been met.

- The hardship is not generally shared by other properties in vicinity;
- The Chesapeake Bay, its tributaries, and other properties in the vicinity are being adversely affected, and
- The hardship was self-inflicted.

He stated the Board should deny the appeal.

Mr. Lindsey and Mr. Waltrip agreed with Mr. Gussmans comments.

Mr. Apperson stated he was particularly concerned with the adverse affects on adjacent properties.

Timothy Murphy asked for clarification on why the appeal was being denied.

The Board based their decision on the three criteria specified in the Ordinance as reiterated by Mr. Gussman.

Mr. Gussman made a motion to adopt a resolution denying the appeal for case CBV-08-003 and upholding the April 10, 2008 Notice of Violation. In addition the resolution will require removal of all fill material and the complete restoration of the RPA components and will instruct the James City County Attorney to pursue this matter including civil penalties of \$5,000 per day, before the Williamsburg/ JCC Circuit Court.

The motion was approved by a 4-0 vote.

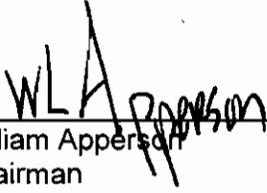
#### **D. BOARD CONSIDERATIONS**

#### **E. MATTERS OF SPECIAL PRIVILEGE - none**

Leo Rogers advised the Board that although the Ordinance was the only law applicable at this local level he would answer any questions the Board might have about the laws pertaining to the Chesapeake Bay Preservation Act.

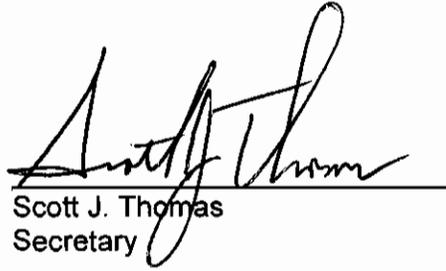
**F. ADJOURNMENT**

The meeting adjourned at 8:30 PM.



Handwritten signature of William Apperson in black ink, written over a horizontal line.

William Apperson  
Chairman



Handwritten signature of Scott J. Thomas in black ink, written over a horizontal line.

Scott J. Thomas  
Secretary