

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD  
MINUTES  
August 13, 2008 – 7:00 PM**

**A. ROLL CALL**

William Apperson  
David Gussman  
John Hughes  
Larry Waltrip

**ABSENT**

Henry Lindsey

**OTHERS PRESENT**

County Staff

**B. MINUTES**

The June 11, 2008 Board Meeting minutes were approved as written.

**C. PUBLIC HEARINGS**

**1. CBE-08-040 – Craig Peck – 28 Hampton Key**

Pat Menichino presented the following case:

**Project Summary and Description**

Mr. George Craig Peck requested an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for approximately 35 sqft of Resource Protection Area (RPA) impacts associated with an existing timber retaining wall 72 linear feet in length located behind his residence in the Kingsmill subdivision. The lot is 35,235 sqft or .81 acres in size.

The lot was recorded prior to the adoption of the Ordinance; therefore, there was no RPA represented on the lot at the time of recordation. The single-family residence on the lot was constructed in 1976. Following the Ordinance revisions in 2004, a pond adjacent to the rear of the property was evaluated as perennial thereby requiring a 100-foot RPA buffer at the rear of the property, encompassing .47 acres or about 55% of the lot.

Staff reviewed this application and offered the following information and guidance to the Board:

1. Staff and Ordinance consider retaining walls as accessory structures. Staff cannot administratively approved accessory structures within the RPA components.
2. Staff visited the project site and was unable to determine that an erosion problem existed in the rear yard prior to the installation of the wall.
3. Although staff does not believe this retaining wall was necessary to correct an erosion problem. The removal of this wall without an adequate restoration plan would create significant environmental impacts to the RPA components.
4. The applicant has applied for and received an after the fact building permit for the wall and the wall has been inspected and approved by the Code Compliance Division.
5. The RPA mitigation plantings installed by the applicant were not approved by the Division. Staff considers the mitigation and restoration of the project site to be inadequate.
6. The Board should consider imposing "Reasonable and appropriate conditions" which will prevent the exception from causing a degradation of water quality.

## **Background**

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 (WQIA)**

Under Section 23-14 of the amended Ordinance, a 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 and an "after the fact" mitigation-planting plan that proposes to mitigate for the impacts to the RPA with the installation of six non-native shrubs in the RPA. This vegetation is currently installed adjacent to the existing retaining wall to help filter nonpoint source pollution. Staff believes that mitigation plantings currently installed do not meet the County's requirements. In addition, the disturbed areas of the site have not been adequately stabilized.

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 criteria, as outlined in Section 23-14(c) of the Ordinance:

## **Recommendations**

Staff does not recommend approval of the exception at this time. Both the Ordinance and staff consider the retaining wall as an accessory structure and retaining walls should only be employed when a specific hardship has been demonstrated by the applicant. Staff believes that the retaining wall and associated land disturbance has not been properly mitigated for. Within Section 23-14 (c) (5) of the Ordinance, the Board may impose reasonable and appropriate conditions that prevent a degradation of water quality.

Staff offers the following information and comments for Board consideration:

1. If requested by the applicant, the Board could consider deferring action on this exception request until the November 12, 2008 board meeting. In the interim, the applicant could work with Staff to resolve the deficiencies identified in this report.
2. The applicant should re-submit an RPA mitigation plan depicting the species and locations for 12 additional **native** shrubs to be installed upslope of the existing retaining wall in planting beds consisting of 4-6" of wood mulch. Any upslope areas that are not currently stabilized must be stabilized with a vegetative cover by the applicant or his contractor.
3. The implementation of the re-submitted RPA mitigation plan shall be completed prior to October 31, 2008 and must be inspected by Staff prior to the November 12, 2008 Board meeting.
4. The applicant shall return to the Board on November 12, 2008 for final disposition of the exception request.

Mr. Apperson opened the public hearing.

**A.** Mr. Peck, owner, stated he installed the wall to prevent erosion and it was working, as staff was unable to determine an erosion problem. He asked for a deferral to work with the County to resolve the issues with the application.

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

Mr. Hughes made a motion to accept the applicants request for a deferral to November 12, 2008.

The motion to defer was approved by a 4-0 vote.

## **2. CBE-08-046 – Stuart Williams – 15 Bray Wood Road**

Pat Menichino presented the following case:

### **Project Summary and Description**

Stuart & Cynthia Williams, 15 Bray Wood Road, Williamsburg, Virginia, applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for approximately 728 sqft an encroachment into the RPA buffer, for the construction of two wood decks. The lot is located in Kingsmill and was recorded prior to the 1990 adoption of the Ordinance. Following the Ordinance revisions in 2004, a stream adjacent to the rear of the property was evaluated as perennial thereby requiring a 100-foot RPA buffer. The lot is 0.7 acres in size and the RPA buffer encompass approximately 45% of the lot or .335 acres. The proposed wood decks will encroach in the landward 50-foot RPA buffer.

The provided RPA mitigation-planting plan proposes to mitigate for the RPA impacts by planting (4) native understory trees and (12) native shrubs in a planting beds to filter runoff. This plan meets the standard mitigation planting requirements of the County.

Staff evaluated the request for the two decks and determined them to exceed the "minimum necessary". Staff has not administratively approved the installation of multiple deck additions within the RPA in the past. The Board has granted exceptions for accessory structures within the RPA buffer.

Staff offers the following information as guidance to the Board concerning this application.

1. The applicants have applied for an exception to allow for the construction of two decks within the RPA buffer. The decks will be attached to the rear of the principle residence on the lot. The residence was constructed in 1978 and no RPA was represented on the lot at that time.
2. The applicants have submitted an RPA mitigation-planting plan that meets the standard mitigation planting requirements of the County. In addition, filter cloth and gravel will be installed under each deck to filter runoff and prevent erosion.
3. Staff evaluated the potential adverse impacts of this proposal and determined them to be minimal.

### **Brief History**

The lot was recorded before the adoption of the Ordinance, and no RPA was represented on the lot at that time. 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 perennial water body at the rear of the lot was identified requiring a 100-foot RPA buffer be established on the lot around the stream. This 100-foot RPA buffer encompasses about 45% of the lot.

According to provisions of Section 23-12; the Manager may grant administrative approval for the expansion to any structure in existence on August 6, 1990. In this case, the exception request is for multiple decks within the 100-foot buffer and the Manager has determined that the case does not qualify for an administrative waiver because the request exceeds the "minimum necessary" to afford relief. Therefore, in accordance with section 23-14 of the Ordinance, an exception must be processed by the Chesapeake Bay Board after a public hearing.

### **Water Quality Impact Assessment (WQIA)**

Under Section 23-14 of the amended Ordinance, 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 and proposes to mitigate for the impacts to the RPA by planting, (4) native understory trees, and (12) native shrubs, in the RPA on the lot to help filter nonpoint source pollution.

The issue before the Board is the addition of the 728 square feet of impervious area created by the installation of two decks within the RPA buffer. 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.

### **Recommendations**

Staff has evaluated the request for the two decks, and has determined them to exceed the "minimum necessary" as defined in Section 23-12 and 23-14 of the Ordinance and as such cannot be granted by administrative wavier. To be consistent with the ordinance requirements Staff cannot support the approval of this exception request for two decks.

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

1. The applicant must obtain all other permits required from agencies that may have regulatory authority over the proposed activities, including a James City County building permit.
2. Full implementation of the RPA Mitigation Plan submitted with the WQIA and any additional Board mitigation requirements must be completed prior to the issuance of the final certificate of occupancy or final inspection conducted by the Division of Code Compliance.
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 form of surety satisfactory to the County Attorney.
4. The size of the mitigation trees shall be 1 ½ caliper, and the shrubs shall be 3-5 gallon size. All trees and shrubs shall be native species approved by the Environmental Division.
5. This exception request approval shall become null and void if construction has not begun by August 13, 2009.

Mr. Gussman asked if this amount of decking was unusual for the area.

Mr. Hughes asked if administrative approval would be granted if the square footage were in one deck instead of two.

Mr. Menichino stated there were probably other dwellings in Kingsmill that had 728 square feet of decking and multiple decks. He stated that staff would probably always consider this amount of encroachment into the RPA for decks, as excessive.

Mr. Apperson opened the public hearing and as no one wished to speak, closed the public hearing.

Mr. Waltrip stated and other Board members agreed the decks could be necessary for egress at the back of the primary residence and the proposed mitigation was adequate.

Mr. Hughes made a motion to adopt the resolution granting the exception request for case CBE-08-046 with staff recommendations.

The motion was approved by a 4-0 vote.

### **3. CBE-09-007 – Larry Waltrip – 100 Lands End**

Mr. Waltrip recused himself from the following case because he was the applicant.

Pat Menichino presented the following case:

#### **Project Summary and Description**

Larry & Jean Waltrip are requested an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for approximately 155 sqft of Resource Protection Area (RPA) impacts associated with the construction of approximately 155 linear feet of concrete floodwall adjacent to their residence in Powhatan Shores. The lot is approximately 215,000 sqft or 5.00 acres in size.

The lot was recorded prior to the adoption of the Ordinance. There was no RPA represented on the lot at the time of recordation. The single-family residence on the lot was constructed in 1963. This 100-foot RPA buffer, located on the rear of the property, encompasses about 1.8 acres or about 30% of the lot.

Staff has reviewed this application and has determined that the installation of 155 linear feet of floodwall is proposed to prevent future property damage. Staff offers the following information and guidance to the Board:

1. Although the Ordinance considers retaining walls as an accessory structure, this wall is a freestanding structure and will not have fill placed behind it. The purpose of the wall is clearly to prevent flood damage to a single-family residence. The Board has approved retaining walls in the past when a specific need or purpose can be identified.
2. Staff visited the project site, met with the property owners, and determined that there is a significant risk of flooding that can result in property damage to the residence located on the property.
3. Staff evaluated the potential impacts caused by the 155 linear feet of wall and determined them to be minimal.
4. The applicant has submitted an RPA mitigation-planting plan that exceeds the County's requirements for impacts to RPA components.

#### **Background**

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 floodwall could not be approved administratively and the applicants have chosen to request an exception from the Board. In addition, based on discussions with the County's Deputy Zoning Administrator, staff has determined that this project would not require submittal to the Planning Division under the requirements of the Zoning Ordinance, Floodplain Area Regulations Overlay District.

#### **Water Quality Impact Assessment (WQIA)**

Under Section 23-14 of the amended Ordinance, a 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 applicant has also submitted a mitigation-planting plan that proposes to mitigate for the impacts to the RPA by planting (12) native shrubs in the RPA. This vegetation will be located adjacent to the seaward side of the proposed floodwall to help filter nonpoint source pollution.

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:

### **Recommendations**

Staff does not usually recommend approval of accessory structures within the RPA buffer. However, the installation of a floodwall designed to prevent property damage may be warranted in this case.

If the Board considers approval of this exception, staff recommends the following modifications and conditions are imposed:

1. Full implementation of the RPA mitigation-planting plan, requiring the installation of (12) native shrubs at the location shown on the plan. Any upslope areas disturbed during construction must be restored by the applicant or his contractor.
2. The size of the mitigation shrubs shall be 3-5 gallon size. All shrubs shall be native species approved by the Environmental Division.
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 form of surety satisfactory to the County Attorney.
4. The applicant must obtain all other approvals from regulatory agencies that may have jurisdiction over this project, including a James City County building permit.
5. A preconstruction meeting must be held onsite prior to the onset of work.
6. Erosion and sediment control measures may be required during construction of the floodwall.
7. This exception request approval shall become null and void if construction has not begun by August 13, 2009.

Mr. Apperson opened the public hearing.

Mr. Hughes asked what the wall would be constructed of and what would prevent water from coming around it.

**A.** Mr. Waltrip, owner, described the flooding that had occurred on his property during recent storms and stated he believed the wall would stop the water from coming into his home in future storm events. He stated the wall would be constructed of concrete with a floodgate and tied into to the higher elevation of the property to keep the water from coming around it.

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

Mr. Hughes made a motion to adopt the resolution granting the exception request for case CBE-09-007 with staff recommendations.

The motion was approved by a 4-0 vote.

### **D. BOARD CONSIDERATIONS**

All Board members agreed to authorize Scott Thomas to notify the James City County Board of Supervisors of the upcoming vacancy on the Chesapeake Bay Board as required in the bylaws. Henry Lindsey's term on the Board will expire on Oct 1, 2008 and he has stated he does not wish to continue to serve.

## E. MATTERS OF SPECIAL PRIVILEGE

Scott Thomas, Environmental Director, and Board Secretary presented the Board with the following information regarding the number of Wetlands and Chesapeake Bay exception requests for the past two fiscal years.

### FY 2008

WETLANDS BOARD	7
CHESAPEAKE BAY BOARD	39
ADMINISTRATIVE	113

### FY 2007

WETLANDS BOARD	9
CHESAPEAKE BAY BOARD	44
ADMINISTRATIVE	96

He also advised the Board that effective on September 1, 2008, the following change in processing fees would take place as adopted by the Board of Supervisors on May 27, 2008:

### PREVIOUS

ADMINISTRATIVE	NO CHARGE
BAY BOARD	\$ 100

### NEW

ADMINISTRATIVE	\$ 25
BAY BOARD	\$ 125

- Non-Refundable Processing Fees payable to Treasurer James City County
- FY2009-10 Budget Process
- Ordinance 183A-6 Adopted May 27, 2008

Mr. Apperson asked for a list of exception requests that would not be subject to the \$25 fee.

## F. ADJOURNMENT

The meeting adjourned at 7:45 PM.



David Gussman  
Vice Chairman



Scott J. Thomas  
Secretary