

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD
MINUTES
October 14, 2009**

A. ROLL CALL

William Apperson – Chair
David Gussman
Richard Mason-Alternate
John Hughes
Larry Waltrip

ABSENT

Terence Elkins

OTHERS PRESENT

County Staff (Staff)

The responsibility of this Board is to carry out locally the Commonwealth policy to protect against and minimize pollution and deposition of sediment in wetlands, streams, and lakes in James City County, which are tributaries of the Chesapeake Bay.

B. MINUTES

The August 12, 2009 Board Meeting minutes were approved as written.

C. PUBLIC HEARINGS

1. CBV-09-013 APPEAL - Hines – 3657 Bridgewater

Mr. Menichino presented the following case:

Mr. Jeffery A. Hines (Lessee) residing at 3657 Bridgewater Drive, Mill Creek Landing, on behalf of Scott and Brandi Brand (Owners), filed an appeal to James City County's Chesapeake Bay Board (Board), for a Notice of Violation and administrative order issued by James City County Environmental staff(Staff), on July 28, 2009. The Notice of Violation required the execution of a Chesapeake Bay Restoration Agreement (Restoration Agreement) and restoration of the Resource Protection Area (RPA) with native plantings. Staff reviewed the unauthorized clearing and estimates the RPA impacts as approximately 5000 sqft. It is important to note that a large portion of these impacts are actually within wetlands which are considered part of the resource.

On June 22, 2009 Staff became aware of the unauthorized clearing following a complaint from a resident. Staff initiated an investigation and as a result documented a violation of the County's Chesapeake Bay Preservation Ordinance (Ordinance). Staff has met with the Owners and the Lessee several times to discuss resolving the violation. During these meetings, the owners appeared to be agreeable to entering into the restoration agreement but the Lessee was not.

Historical Background Information

On May 11, 2005 the Board granted an exception (CBE-05-029) to James Duguay of Performance Contracting, for construction of a single family residence within the RPA located on the above referenced property. That exception granted 8,652 sqft of disturbance within the RPA buffer, and 2,985 sqft of impervious area.

An extensive RPA Mitigation Planting Plan was required and approved by the Board, to offset the proposed Impacts. Because of the environmental features located on the property, such as wetlands, a major portion of the mitigation plantings had to be located on the side and in front of the proposed residence.

On March 21, 2006, Scott and Brandi Brand purchased the property and residence from Performance Contracting.

On January 4, 2007, James City County sent out standard RPA notification letters to property owners in the County, alerting them that RPA components may be located on their property. Scott and Brandi Brand, 3657 Bridgewater Drive, were included in that official notification.

On June 22, 2009, Staff became aware of the unauthorized clearing and grading, and documented the violation.

On July 14, 2009 staff met with the Owners and the Lessee to discuss the violation and a possible method of resolution. During that meeting the owner exhibited a willingness to execute a Chesapeake Bay Restoration Agreement, but the Lessee requested time to explore other options.

On July 28, 2009 separate notices of violation were sent to the Owners and to the Lessee.

Staff Guidance and Recommendations

Staff has reviewed the appeal and violation documents and offers the following information for the Board's consideration.

1. Mr. Jeffrey A. Hines is currently the lessee of the property and not the owner. In a statement submitted to the Board, Mr. Hines appears to offer the following information in support of the appeal:
 - He had no prior knowledge that a Chesapeake Bay Preservation Area was designated on the property.
 - The Owners authorized his clearing of native vegetation within the RPA and the establishment of a lawn.
 - That no disclosure was provided during the residential sale of the property.
 - That he would like to have a lawn in the backyard for his family.
2. The Chesapeake Bay Preservation Ordinance Sections 23-7 and 23-10 require that authorization and a plan of development be reviewed and approved by the County prior to activities within RPA.
3. Neither the Owners nor the Lessee have challenged the following facts in this case:
 - No plan of development or RPA buffer modification plan was submitted to the County for review and approval as is required by the Ordinance.
 - No authorization for the clearing and removal of native vegetation from within the RPA was requested from the County by either the Owners or the Lessee.
 - A violation of the County's Chesapeake Bay Ordinance resulted from the above referenced activities that occurred on the property.
4. 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's guidance to the Board on deciding this matter is as follows:

1. The hardship is shared by other properties immediately adjacent to the appellant's property as well as numerous other properties within Mill Creek Landing that have RPA components located on them.

2. The granting of the appeal in this case will adversely affect the Chesapeake Bay, its tributaries and other properties in the vicinity. Granting relief to the appellant resulting from a violation of the Ordinance and could result in similar unauthorized actions by other property owners in the vicinity. In addition, granting the appeal will all but eliminate any remaining natural RPA buffer resulting in the removal of any notable water quality function on the entire property and degradation of water quality in the tributaries to the Bay.
3. The appellant in fact caused the hardship through an unauthorized activity thereby the hardship is self imposed.

Staff contends that to be consistent with the purpose and intent of the Ordinance the Board should deny the appeal, and allow the Chesapeake Bay Restoration Agreement process established by the County to proceed.

Mr. Gussman asked if the Army Corp of Engineers and Department of Environmental Quality (DEQ) had been notified of the impact to the resource (clearing into the wetlands) as required under the state stormwater regulations.

Mr. Menichino stated they would be notified.

Mr. Mason asked if neighbors of the applicant were also sent the January 4, 2007 RPA notification letter.

Mr. Waltrip asked how the County knew if the notification was received.

Mr. Menichino stated the mailing list included several addresses on Bridgewater Drive and many others in the Mill Creek Landing subdivision. Staff kept track of letters returned by the post office and the letter mailed to Mr. and Mrs. Brand was not returned.

Mr. Hughes asked if the mitigation plantings required in the 2005 exception for the house had been completed.

Mr. Menichino stated they had.

Mr. Apperson opened the public hearing.

A. Brandi Brand, property owner, stated she and her husband purchased the home from Performance Contracting in March of 2006. They were told they received 30 trees and shrubs for landscaping but no specific disclosure of the RPA from the realtor or the builder on the appraisal or listing and they did not receive a survey when they purchased the home. She stated they knew there was a stream on the property but never investigated the possibility of an RPA as they had no desire to remove any of the trees. She stated they entered into a lease to own contract with Mr. Hines in December of 2008 and she then gave Mr. Hines permission to do landscaping and clean out the back yard. She stated Mr. Hines told her he had checked with contractors and neighbors about clearing the property and none of them informed him he needed permission from the County, She stated Mr. Hines did not disturb any of the landscaping installed by the builder and much of the vegetation that was removed was dead. She also did not remember receiving the RPA notification letter in January 2007.

Mr. Gussman stated the since she was in the mortgage business she should have been aware of the Chesapeake Bay Preservation Act and further the environmental disclosure in the contract for the house did state the development of the property may be covered by this Act.

A. Ms Brand stated the disclosure statement was pointed out to her this past July when she contacted the realtor. She felt this was a general disclosure statement and the RPA and wetlands should have been specifically disclosed. She stated this specific disclosure is now required but was not in 2006, when she purchased the property.

Mr. Mason stated a flood zone was indicated on the plat of the property and this should have alerted her to the possibility of the RPA. He also asked if she was agreeable to restoration of the disturbed area.

Mr. Hughes asked her if she had taken out flood insurance on the property.

A. Ms. Brand stated she did not receive a plat when she purchased the house and the house is not in a flood zone so no flood insurance was required. She stated she was willing to work with the County to restore the area.

B. Jeffery Hines, Lessee residing at 3657 Bridgewater Dr, stated he stopped work on the landscape when the violation was issued. He stated one neighbor has RPA signs on their property but there are none on this property. He also stated he would be willing to restore the area however he was upset to find out that he could not use half of the property for a yard and that this restriction was not disclosed sooner.

Mr. Hughes asked if County knew if any of the removed trees were dead.

Mr. Menichino displayed photographs of the property and stated at least some of the removed trees were alive.

Mr. Waltrip and Mr. Hughes asked for clarification on what the Board was to determine and what the next step would be if the Board denied the appeal.

Mr. Menichino stated the issue before the Board was the violation of the Ordinance by the unauthorized encroachment and removal of vegetation. The Board should be guided by the section of the Ordinance that deals with appeals. If the Board denied the appeal the next step would be for the Owner to enter into a Restoration Agreement with the County and submit of a plan for restoring the RPA.

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

Mr. Hughes stated that although there may have been a lack of disclosure when the property changed hands the concern of the Board was the unauthorized encroachment into the RPA and he believed the Board should deny the appeal so the owner could work with the County towards the restoration of the RPA.

Other Board members agreed and stated the applicants seemed willing to restore the RPA.

Mr. Hughes made a motion to adopt the resolution denying the appeal of Chesapeake Bay Board case number CBV-09-013 on tax parcel #3841760010.

The motion was approved by a 5-0 vote.

2. CBE-10-022 – Pope – 12 Mile Course

Mr. Menichino presented the following case:

Project Summary and Description

Ms. Carey Flannery, 12 Mile Course, on behalf of Mary and Larry Pope (Owners), applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for encroachment into the Resource Protection Area (RPA) buffer, for the construction of brick retaining walls totaling 300 LF in length, a 15' x 20' sand set brick paver patio, and the placement of approximately 3000 sqft of sand fill/backfill.

The issue before the Board is the addition of approximately 600 sqft of impervious area and approximately 3000 sqft of fill 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.

Background

The lot is located in the Kingsmill subdivision and was recorded prior to the 1990 adoption of the Ordinance. No RPA existed on the lot at the time of recordation. 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 feature at the rear of the lot was identified requiring that a 100 foot RPA buffer be established on the lot. This 100 foot RPA buffer encompasses about 70% of the lot.

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 and a detailed RPA Mitigation Planting Plan (Plan) for this project and proposes to mitigate for the impacts to the RPA by planting, (2) native canopy trees, (29) native shrubs, and (37) native ground cover in mulch planting beds to help filter runoff. The proposed plantings exceed the standard mitigation planting requirements of the County for impervious impacts. The proposed Plan will actually reduce the square footage of turf area currently existing onsite and therefore reduce the current encroachment into the RPA.

Recommendations

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

1. The retaining walls and patio are considered accessory structures and in accordance with Section 23-14 of the Ordinance, an exception must be processed by the Chesapeake Bay Board after a public hearing.
2. The retaining walls and proposed patio will encroach into the landward 50 foot RPA buffer.
3. The applicants have submitted an RPA Mitigation Planting Plan that exceeds the standard mitigation planting requirements of the County for impervious area.
4. The applicant's proposal will reduce the existing turf area on the property and therefore will reduce the overall encroachment into the RPA buffer.
5. Staff evaluated the potential adverse impacts of this proposal and determined them to be minimal.

If the Board votes to approve the exception request, Staff recommends 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 if required.
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. Full implementation of the RPA Mitigation Plan submitted with the WQIA and any additional Board mitigation requirements shall be guaranteed through the provisions of the Ordinance contained in Sections 23-10(3) d. and 23-17(c), a form of surety satisfactory to the County Attorney.
4. This exception request approval shall become null and void if construction has not begun by October 14, 2010, or all improvements including the required mitigation plantings are not completed by that expiration date.
5. Written requests for an extension to an exception shall be submitted to the Environmental Division no later than 2 weeks prior to the expiration date.

Mr. Apperson opened the public hearing.

A. Joe Flannery, residing at 12 Mile Course, stated the purpose of the project was to prevent further erosion on the property.

All Board members agreed the proposal was an excellent landscaping plan that actually reduced the impervious cover in the RPA.

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 Chesapeake Bay Board case number CBE-10-022 on tax parcel # 5040200012.

The motion was approved by a 5-0 vote.

3. CBE-10-023 – McCann/Southern Landscape – 5026 River Drive

Mr. Menichino presented the following case:

Project Summary and Description

Bill and Anne McCann applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the construction of a 5' wide staircase, a 20'x18' detached deck, an 8'x6' lower landing, and 65 linear feet of timber wood retaining wall at the rear of their property at 5026 River Drive. The staircase, deck, landing, and retaining wall will create approximately 573 sq ft of impervious cover in the RPA.

The issue for the Board's consideration is the 573 square feet of impervious area created by the proposed accessory structures within the seaward 50 foot 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.

Background

The property is located in the Cypress Point subdivision adjacent to Diascund Creek, a tributary to the Chickahominy River. The lot was recorded prior to the adoption of the Ordinance, and there was no RPA present on the lot at recordation. On August 6, 1990, the Ordinance went into effect establishing 100 foot RPA buffers around all water bodies with perennial flow. Diascund Creek was then identified as a perennial water body on the quad map and an RPA buffer was placed on the lot. The lot is 21,967 sqft or 0.505 acres in size. The 100 foot RPA buffer encompasses 0.284 acres or approximately 56% of the lot. There is an existing residence on the lot that encroaches into the 100-foot RPA buffer.

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 the RPA. The applicant has submitted a WQIA for this project and a detailed RPA Mitigation Planting Plan (Plan) that proposes to mitigate for the 573 sqft of impervious area by planting (3) native canopy trees and (10) native shrubs in planting beds to filter runoff from the impervious areas. This Plan generally meets the standard mitigation requirements of the County. No mature vegetation will be removed from the lot to allow for the placement of the proposed staircase, detached deck, lower landing, and retaining wall.

Recommendations

Staff has evaluated the adverse impacts associated with the proposed accessory structures and has determined them to be moderate.

The Board has, in the past, granted an exception request for a staircase and deck combination to provide access to the water. In that particular case, the Board did evaluate the size of the proposed deck, and required additional mitigation to offset for the adverse water quality impacts. Staff recommends the Board evaluate the need for the size of the deck proposed or consider a significant increase in onsite mitigation to offset the adverse water quality impacts.

Staff offers the following guidance to the Board:

1. The staircase is considered to be providing access to water and as such, is permitted. The proposed 18' x 20' wood deck and 8' x 6' lower landing are detached from the residence and

therefore should be considered as accessory structures. The retaining wall should also be considered as an accessory structure.

2. Staff considers the size of the proposed deck to be more than the minimum necessary to afford relief and the deck is proposed within the seaward 50 foot buffer.
3. The applicant has submitted a plan for mitigation that generally meets the County's typical planting requirements for impervious cover.
4. Staff evaluated the adverse water quality impacts caused by the additional 573 sqft of impervious area within the seaward 50 foot and considers them to be moderate.
5. Staff recommends the Board consider a reduction in the size of the proposed deck, or a significant increase in onsite mitigation to offset the adverse water quality impacts.

Should the Board vote to approve the exception, Staff recommends the following conditions be applied:

1. If required by the Board, revisions to the proposal and RPA Mitigation Planting Plan shall be submitted to the Environmental Division for review and approval.
2. Full implementation of the RPA Mitigation Planting Plan and additional Board mitigation requirements shall be guaranteed through the provisions of the Ordinance contained in Sections 23-10(3) d. and 23-17(c), a form of surety satisfactory to the County Attorney.
3. 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.
4. The deck and landing shall have 3 inches of gravel on filter fabric installed underneath.
5. This exception request approval shall become null and void if construction has not begun by October 14, 2010, or all improvements including the required mitigation plantings are not completed by that expiration date.
6. Written requests for an extension to an exception shall be submitted to the Environmental Division no later than 2 weeks prior to the expiration date.

Mr. Waltrip asked if this was the first exception request for landings that had come before the Board.

Mr. Menichino stated he was not aware of any detached decks in the seaward 50' buffer that had come before the Board.

Mr. Hughes asked if there was already work being done in the area. He also asked if additional mitigation had been discussed with the applicant.

Mr. Menichino stated this was part of the bulkhead replacement project previously approved by the Wetlands Board. He stated additional mitigation was at the discretion of the Board.

Mr. Gussman asked about the pier head displayed on the plan with the notation it would be moved landward.

Mr. Menichino stated he believed this was the deck proposed in the exception request before the Board.

Mr. Waltrip stated maybe there should be a maximum square footage for detached decks in the seaward 50' for the Board to use as a guide in this and future cases.

Mr. Menichino stated the Board would set precedence for detached decks by approving this exception request. He recommended the Board approve the exception as a staircase with landings to provide water access rather than as a detached deck.

Mr. Mason stated he thought the proposal might need more thought and that by granting the exception request the Board would be finding that the proposal was the minimum necessary to afford relief, did not confer any special privileges upon the Applicant, and was not based on self-imposed conditions.

Mr. Menichino agreed this was the proper criteria for the Board to consider.

Mr. Apperson opened the public hearing.

A. Mr. Bloxum with Southern Landscape, representing Bill and Anne McCann, stated the proposed retaining wall would be built where the land had faulted causing the failure of the bulkhead and that constructing this wall and leveling below it would stabilize the area taking pressure off of the rebuilt bulkhead. The proposed deck is replacement for a similar sized pier in the water that is less desirable due to high tides and boat traffic. He stated the owners were willing to install additional mitigation plantings and reduce the size of the proposed deck if so requested by the Board. Mr. Bloxum also displayed photographs of the failed bulkhead and the reconstruction that was necessary to repair it.

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

Mr. Gussman stated he had no problem with the stairs for the access to the water but felt it would be a bad precedence to allow for a detached deck of this size in the seaward 50' buffer.

Mr. Hughes agreed and stated the retaining wall in the exception request was needed.

Other Board members also commented that they were not in favor of the proposed deck.

Mr. Hughes asked if the applicant wanted to request a deferral of the Board's decision in order to redesign the proposed deck.

A. Mr. Bloxum stated the owner did not want to delay the project any further and asked if they could reduce the size of the deck for the Board's approval tonight.

Scott Thomas, Chesapeake Bay Board Administrator and Secretary to the Board, stated he understood the Board's struggle with setting precedence for the size of the deck however, each case needed to be considered individually. In this case the impact in the area of the deck would already be realized by construction of the wall.

Mr. Hughes asked if from an engineering point of view, Mr. Thomas agreed with the construction of the wall for stabilizing the slope.

Mr. Thomas stated it was reasonable based on the applicant's assessment of the soils and the impact on the bulkhead.

Mr. Menichino suggested the Board consider only the retaining wall at this time and the applicant re-submit an exception request for the stairs and landings to access the water as these could be approved administratively.

Mr. Gussman stated he would like to see the mitigation plan stay the same.

The Board took a brief recess to allow the owner to consider the suggestions.

Mr. Bloxum stated the owner wanted the Board to consider an exception request for the retaining wall only with the same mitigation planting.

Mr. Hughes made a motion to adopt the resolution granting the exception for the retaining wall only on Chesapeake Bay Board case number CBE-10-023 on tax parcel # 0930300004.

The motion was approved by a 5-0 vote.

D. BOARD CONSIDERATIONS

1. CBE-07-003 – Ironbound Road Regional BMP – Permit Extension

Mike Woolson, James City County Senior Watershed Planner, presented the extension request to the Board. The exception was initially granted in February 2007 and extended for 1 year in February 2008 to expire. He stated the additional extension was requested in January of this year however the January Board meeting was cancelled and due to staff oversight the extension request was not scheduled on the February 2009 meeting.

Mr. Hughes and Mr. Mason asked if the Board had the authority to grant an extension on a permit that had already expired.

Mr. Menichino stated the County Attorney was not present to advise the Board but it would seem reasonable that an extension could not be granted after an expiration date.

Mr. Woolson stated the County would resubmit the exception request.

E. MATTERS OF SPECIAL PRIVILEGE - none

F. ADJOURNMENT

The meeting adjourned at 9:18 PM.


David Gussman
Vice Chairman


Scott J. Thomas
Secretary to the Board