

**JAMES CITY COUNTY WETLANDS BOARD
MINUTES
May 14, 2008**

A. ROLL CALL

John Hughes - Chair
Larry Waltrip - Vice Chair
Henry Lindsey
William Apperson
David Gussman

ABSENT

OTHERS PRESENT

County Staff

B. MINUTES

The April 9, 2008 Board Meeting minutes were approved as presented.

C. PUBLIC HEARINGS - none

D. BOARD CONSIDERATIONS

1. Show Cause Hearing - W-09-08 - 5004 River Drive- Walker Ware IV, owner

Leo Rogers, County Attorney for James City County, presented the case and stated the purpose of the hearing was for the Wetlands Board (Board) to consider the following issues:

- The existence of wetlands on the property at 5004 River Drive and;
- The existence of wetlands violations on the property that would warrant the issuance of a Notice to Comply, to the property owner.

The purpose of the Notice to Comply would be to give the owner an opportunity to bring the property into compliance with the law and the order of this Board. He also requested the Board set a date for a restoration hearing. The purpose of this hearing would be for the Board to issue a Restoration Order if the owner has not met the requirements of the Notice to Comply.

A brief history of the 1992-1997 wetlands violation for the same owner and property was provided and the following documents from that case were introduced:

- January 1993 Case Decision
- January 1993 Restoration Order and Agreement
- July 1995, Federal Court Order

In November 1997, after final inspection by the County and State, it was determined the wetland areas on this property had been successfully restored in accordance with the requirements of the Federal Court Order.

Leo Rogers advised the Board of the following new alleged violations from May 23, 2002 and February 24, 2006:

- Placement of riprap rubble within the jurisdictional wetlands at 5004 River Drive.
- Filling and grading within the jurisdictional wetlands at 5004 River Drive.

Enforcement for these violations was first sought in the State Court where the judge advised the matter would be better handled by the Federal Court.

The Federal Court ruled the original case was closed with the completion of restoration and Walker Ware should be treated as any other property owner requiring a Wetlands Permit for the activities in the jurisdictional wetlands.

The following witnesses were sworn in by John Hughes, Wetlands Board Chairman:

Scott J. Thomas, PE, Environmental Director
Patrick T. Menichino, Environmental Compliance Specialist, and Wetlands Board Secretary
Kim Hazelwood, James City County, GIS Supervisor
Bernard M. Farmer, PE, Capital Projects Administrator
Darryl Cook, PE, County Engineer
Thomas Reid, 5010 Holly Lane, James City County
Dr. James E. Perry, PHD, Virginia Institute of Marine Science (VIMS)

A PowerPoint presentation (presentation) was given by County staff, regarding the existence of wetlands and the alleged violations at 5004 River Drive. The presentation included the following testimony:

A. Scott Thomas, provided information regarding the role of the Environmental Division, the tidal wetlands in James City County, and the wetlands regulations as outlined in the Code of Virginia and the Code of James City County. He also described the recent Notices of Violation that were delivered to Walker Ware.

B. Darryl Cook, who served as the Environmental Director from 1997 to 2007, briefly described the 1992 – 1997 wetlands violation and restoration on Walker Ware's property at 5004 River Drive. He then validated the following documents and photographs in the presentation:

- The May 22, 2002 letter he sent to Walker Ware regarding the placement of riprap stone in the wetlands and Resource Protection Area (RPA) at 5004 River Drive and photo of the same.
- The February 7, 2003 memorandum to Walker Ware requesting removal of this stone and Walker Ware's written agreement to remove it.
- The March 3, 2006 letter to Walker Ware regarding unauthorized filling and grading in the wetlands and RPA at 5004 River Drive.
- The March 17, 2006 letter to Walker Ware specifying the allowable dimensions of the road.
- The January 23, 1995 letter from Robert G. Winters, Walker Ware's attorney for the 1995 court case, which specified the dimensions of the permissible roadway.

Leo Rogers asked Darryl Cook if during his service as Environmental Director from 1997 to 2007, he was involved in the restoration order at 5004 River Drive. He asked if any permit applications had been received from Walker Ware for the placement of fill in the wetlands, the maintenance on the path, or the grading of the area down by the pier, at 5004 River Drive. He also asked Darryl Cook if he had measured the width of the path in 2006 or 2007.

B. Darryl Cook stated he served as the county representative during the site review by Dr. Perry for the 1995 restoration order and during his service as Environmental Director, no permit applications had been received for the activities in question. He stated the width of the path in 2006 was at least 22 feet.

Mr. Hughes asked if the elevation of the road had been determined in 2006 or 2007.

Darryl Cook stated fill had been added but the elevation had not been determined.

C. Patrick Menichino described his involvement in the notification and enforcement procedures for the alleged violations at 5004 River Drive. He also validated the documents and photographs in the presentation. He stated environmental compliance inspections were mandated by the Commonwealth of Virginia and enforcement actions only occur when voluntary compliance cannot be obtained. He stated the activities of concern were the impacts to the wetlands caused by the stock piling of riprap rubble, expansion of the pathway to the pier and the turn-around area adjacent to the pier. He stated that at the July 7, 2006 meeting between Walker Ware and County staff, Walker Ware was advised to submit plans and permit applications for the proposed activities and as of this date that had not been done.

Mr. Hughes asked if any additional gravel had been added since 2006.

C. Pat Menichino stated work continued on the path after the July 7, 2006 meeting.

Leo Rogers asked Pat Menichino what documents were reviewed to determine the existence of wetlands at 5004 River Drive.

C. Pat Menichino stated the original court documents, GIS mapping, and previous Wetlands Board documents from 1993.

Leo Rogers asked and Pat Menichino agreed these documents included the March 11, 1993 determination from the Army Corps of Engineers (Army Corp) and the August 17, 1994 determination from the United States Environmental Protection Agency (EPA). These documents were submitted to the Wetlands Board as **County Exhibit 1** and **County Exhibit 2** respectfully.

Mr. Hughes asked if Walker Ware and his council were aware of these documents.

Leo Rogers stated the documents were addressed to Walker Ware.

Leo Rogers also asked the Board to refer to page 4 of the 1995 Federal Court Order, which stated there were jurisdictional wetlands on the property up to an elevation of 2.95 feet above mean sea level.

Timothy Murphy, attorney for Walker Ware, stated that during the March 17, 2008 hearing, the Court ruled the 1995 Court Order did not include the cross section diagram referenced by the County nor did it specify the width of the road. He asked Pat Menichino if he recalled specific comments made by Judge Bradberry, during that hearing.

C. Pat Menichino replied that he did not recall the comments verbatim.

D. Kim Hazelwood described the Geographical Information Systems (GIS) photographs in the presentation that depicted changes on the property at 5004 River Drive, from 2002 to 2007. At Leo Rogers' request, she specifically referred to the change of road width from 10 feet in 2002 to 20 feet and 75 feet near the pier in 2007. She estimated an increase of 10,650 sqft.

Timothy Murphy asked Kim Hazelwood if the 2007 photo was taken after recent maintenance and if she knew there was grass growing up through the gravel at all times.

D. Kim Hazelwood stated she could not answer these questions.

Leo Rogers objected stating there was no testimony regarding maintenance and the questions were outside the scope of Kim Hazelwood's knowledge.

As the witness was not available, Leo Rogers introduced a December 19, 2007 *De Bene Esse* deposition from Ronald Rothwell, 588 River Drive, regarding his observations of the property at 5004 River Drive, as **County Exhibit 3**. Staff's presentation included the corresponding video Ronald Rothwell taped in July 2006, which showed the dumping and spreading of gravel on or near the road and pier area at 5004 River Drive.

Leo Rogers advised the Board this video was date stamped July 22, 2006, after the meeting on July 7, 2006 when Walker Ware was advised to stop work and submit plans and applications for permits to conduct activity in the wetlands.

E. Thomas Reid stated he lives in the Cypress Point Subdivision and maintains Ronald Rothwell's property at 588 River Drive. He stated he was also familiar with 5004 River Drive and had observed both properties since the 1970's.

Leo Rogers displayed and introduced two aerial photographs of 5004 River Drive. One was dated 1986 (**County Exhibit 4**) and the other was dated 1994 (**County Exhibit 5**). He asked Thomas Reid if these photos accurately depicted the appearance of the road and the area around the pier in the indicated years.

E. Thomas Reid stated the photos were accurate to his recollection. He stated he had seen the tide up to the telephone pole shown in the photos and diagrams of Walker Ware's property. He also stated that in recent years, he observed siltation runoff from Walker Ware's property into the wetlands on Ronald Rothwell's property and into the Chickahominy River.

Timothy Murphy objected to the purpose of Thomas Reid's testimony regarding the runoff from Walker Ware's property.

Leo Rogers stated the unchecked runoff across Ronald Rothwell's property into the river constituted a wetland's violation.

F. Bernard Farmer stated his education, training, background, and experience in delineating wetlands. As the Director of Code Compliance in 1993, he pursued the violation and provided staff support to the Wetland's Board and legal council during the 1993 – 1995 wetlands violation at 5004 River Drive. He identified three aerial photographs from December 8, 1992, depicting the placement of fill in the wetlands at 5004 River Drive. The photographs were introduced as **County Exhibits 6a, 6b, and 6c**.

Leo Rogers asked Bernard Farmer to describe and identify the wetlands at 5004 River Drive and to explain how the 1993 Restoration Plan was developed.

F. Bernard Farmer stated the upper limits of the wetlands were determined to be at approximately 2.95 ft, just below the location of the telephone pole and his delineation was in agreement with the Virginia Institute of Marine Science (VIMS) delineation. He stated he participated in the drafting of the 1993 Restoration Plan, and created the drawing of the road cross section that was part of the final draft agreed upon by all parties.

Mr. Hughes referred to a property map in the County's proposal that showed two roads labeled "Existing Dirt Road" and "New Gravel Road". He asked which of these roads was now in question.

C. Patrick Menichino stated the road labeled "Existing Dirt Road" was eliminated during the original filling of the wetlands in 1992 and the Court ruled to allow him to re-create a path to the pier that was depicted on the map as a "New Gravel Road".

Timothy Murphy stated that although the County was referring to a "path" or a "trail" to the pier, the engineer who developed the plan labeled it a "road".

G. Dr. James Perry described his education, background and his current position. He described how he performed the wetlands delineation at 5004 River Drive in 1994 and verified the copy of his August 3, 1994 report submitted as **County Exhibit 7**. He stated the limits of the wetlands were determined to be at 2.95 feet elevation in 1994 and identified this area on the 2007 GIS photograph. He stated he was asked by the Court to inspect Walker Ware's property in 1997 to determine if additional planting or seeding needed to be done to restore the wetland vegetation. He stated in his letter to the Court that if left alone the wetlands would restore itself. He also stated the tidal wetlands in Hamptons Roads had increased since 1994 and therefore the limits on Walker Ware's property would now probably be closer to 3 feet elevation.

Leo Rogers then asked Dr. Perry to examine photos taken of Walker Ware's property on May 12, 2008 and state his opinion as to the current existence of wetlands at 5004 River Drive.

G. Dr. James Perry identified the plant material as obligate wetland species and stated in his opinion the jurisdictional wetlands at 5004 River Drive was the same as it had been in 1993.

The County concluded their presentation.

The Wetland Board took a short recess from 9:15 to 9:25

Timothy Murphy presented the Board with a notebook of documentation and photographs. He stated maintenance of the road at 5004 River Drive was exempt from the Wetlands Ordinance because the road predated the Ordinance. He presented photographs that showed the large parking area in existence prior to 1990 and the grass growing through the gravel that was not clear in the aerial photographs presented by the County.

Walker Ware, IV, owner, 5004 River Drive, was sworn in by John Hughes, Wetlands Board Chairman.

H. Walker Ware testified as to the accuracy of the dates on the photographs Timothy Murphy presented to the Board.

Timothy Murphy stated the photograph after Hurricane "Isabelle" was presented to show the reason for the subsequent maintenance on the road and the transcript of the court proceedings from March 17, 2008 was presented to document that the width and the diagram of the road were never included or specified in the 1995 Federal Court Order. He also presented copies of the counter claim lawsuit filed by Walker Ware against Pat Menichino, Darryl Cook, James City County Attorney's Office, James City County, and the Wetlands Board of James City County, for malicious prosecution. He also stated the statute of limitations as applicable to wetlands violations was one year and advised the Board that this would be used as a defense if they chose to prosecute Walker Ware for the violation.

Mr. Hughes asked Walker Ware why he had not removed the armor stone rubble the County asked him to remove in May of 2002.

H. Walker Ware stated it was too wet at the time of the request, his intent was to use the stone as riprap for shoreline stabilization, and he did not want to move it twice. He stated he had informed Darryl Cook of his intent and it had not been an issue for the last 5 years.

Timothy Murphy stated the Army Corp prohibited him from using the riprap as intended because of the 1995 Federal Court Order.

Mr. Lindsey asked Walker Ware if he had applied for a permit to install the riprap on the shoreline.

H. Walker Ware stated he had a permit from the Army Corp but because it was subject to the 1995 Federal Court Order, he did not pursue it further.

Mr. Hughes and Mr. Lindsey advised Walker Ware he would need a permit from this Wetlands Board before he could install the riprap or add fill to the wetlands.

H. Walker Ware stated he has only been maintaining the road and sometimes dirt needs to be added to keep dirt from going into the water.

Leo Rogers asked Walker Ware if he had ever applied for a Wetlands Permit from the James City County Wetlands Board, for work in the wetlands at 5004 River Drive.

H. Walker Ware stated he had a permit from 1995 to 1997 to remove the fill based on the Federal Court Order. He stated he would not apply for a permit to maintain the road because the road had been existence since at least 1860 and was exempt from the Ordinance. He stated the property was a marina with a sandwich stand in the 1960's and the road was in use at that time.

Mr. Apperson stated he remembered the sandwich stand and agreed that a road existed on the property. He asked Walker Ware if he could go on the property to measure the road and determine if it had been expanded.

H. Walker Ware stated he had no objection to any of the Board Members visiting his property but the County staff would need a warrant. He stated the road may be 22 ft wide but if it is, it has been that wide since 1980 and the width of the road should not be in question.

Leo Rogers advised the Board that Walker Ware stated he had never applied for wetlands permits for the projects identified in the photographs (Tabs 3 and 4) of the documentation Timothy Murphy submitted. He then summarized the following details for the Board:

- The property in question is wetlands as determined in 1993 by this Wetlands Board, the EPA, the Army Corp, VIMS, and James City County staff. It was also stated on page 4; paragraph 1 of the 1995 Federal Court Order and shown in the recent photographs of obligate wetlands species on the property that these wetlands exist up to an elevation of at least 2.95 feet.
- Page 6; paragraph 2 of the 1995 Federal Court Order refers to the "road cross-section plan attached to the original restoration plan" and the "restoration of the surface to the cross-section shown on the attached plan". This diagram permits a 12-foot wide road with an 18-inch crown.
- In January 2008, the State Court ruled it would be more appropriate for the show cause to be decided in Federal Court.
- In March 2008, the Federal Court ruled their jurisdiction in the show cause case ended in 1997 and that Walker Ware should be treated as any other citizen, if he needs a wetlands permit to widen the road, he should apply for such permit.
- The access path cannot be classified as a 'road' because there is no public access. Even if the path could be considered a 'road', the code of Virginia, chapter 28.2-1302; item 9 regarding the authorized maintenance of roads states: " provided that no waterway is altered and no additional wetlands are covered"
- The current unpermitted activity on the property includes a debris pile Walker Ware agreed to remove in 2002, fill along the access path in the wetlands, fill in the apparent parking area near the pier where the excavator was moving the dirt, and runoff from fill in upland areas.

He supplied the Board with draft copies and asked the Board to issue the Notice to Comply, requiring that Walker Ware remove the all of the fill in the wetlands. He also asked the Board to issue a Notice of Hearing approximately 30 days out, in order to issue a Restoration Order if the Notice to Comply is not followed.

Timothy Murphy stated the work on the road was done as authorized maintenance on an existing road and the statute of limitations had expired for upholding the 2002 violations.

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

Mr. Gussman stated he saw a lot of evidence of activities that would require a Wetlands Permit.

Mr. Lindsey stated he felt the area was obviously wetlands and Walker Ware had not applied for any permits for his activities in the wetlands.

Mr. Hughes stated the May 23, 2002 photograph depicted a pathway to the river and the August 22, 2006 photograph showed substantial improvement to that pathway as well as additional gravel at the pier. He stated these activities were done after the 1997 restoration was completed, so in his opinion, this would constitute illegal activity in the wetlands. However, he stated because the County had previously allowed a 12 ft wide road to the pier, the entire path should not need to be removed.

Mr. Apperson made a motion to defer the Board decision until the next Board meeting so the Board members could visit the site.

The motion to defer was denied by a 3-2 vote:

AYE: Waltrip and Apperson (2) NAY: Hughes, Gussman, and Lindsey (3)

The Board members briefly discussed the language that needed to be changed in the draft Notice to Comply allowing for a 12 ft wide access path to the pier.

Mr. Gussman made a motion the Board issue a Notice to Comply to Walker Ware. The Notice to Comply (copy attached) requires submittal of an approvable plan and schedule, by June 11, 2008, for removal of all fill, gravel, stone, etc. from the wetlands at 5004 River Drive with the exception of a maximum 12 ft wide pathway with a maximum 18-inch crown, to the existing pier.

The motion to issue the Notice to Comply was approved by a 5-0 vote.

Leo Rogers asked the Board to set a meeting date for the Restoration Order Hearing and to issue a Notice of Hearing to Walker Ware.

Mr. Hughes made a motion the Wetlands Board hold a meeting on Wednesday, June 25, 2008 at 7:00 pm to consider issuance of a Restoration Order for 5004 River Drive and that a Notice of Hearing be sent to Walker Ware, owner and his attorney, Timothy Murphy.

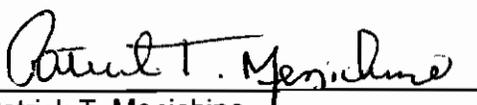
The motion to conduct a meeting to consider the Restoration Order and to issue the Notice of Hearing was approved by a 5-0 vote.

E. MATTERS OF SPECIAL PRIVILEGE – none

G. ADJOURNMENT

The meeting adjourned at 10:52 PM


Larry Waltrip
Vice-Chairman


Patrick T. Menichino
Secretary