

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD  
MINUTES  
SEPTEMBER 13, 2006 - 7:00 PM**

**A. ROLL CALL**  
William Apperson  
Henry Lindsey  
David Gussman  
John Hughes  
Larry Waltrip

**ABSENT**  
None

**OTHERS PRESENT**  
County Staff

**B. MINUTES** – The July 12, 2006 Meeting, the July 12, 2006 Work Session and the August 23, 2006 Work Session minutes were approved as presented.

**C. PUBLIC HEARINGS**

**1. CBE-06-053 – Beatrice Gulbrandsen – 104 Dancy Place**

Mr. Pat Menichino presented the following case:

**Project Description:** Mr. Robert Ripley, Brantley & Ripley Construction LLC, on behalf of Mrs. Beatrice Gulbrandsen applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the construction of an accessory structure on the above referenced lot in the Kingsmill Subdivision. The lot is 25,700 sqft or 0.590 acres in size.

The accessory structure, a conservatory, is proposed to create approximately 623 sqft of impervious cover in the RPA consisting of the accessory structure and concrete sidewalk.

**Background:** The lot was recorded in 1989 prior to the adoption of the Ordinance and therefore, no RPA was present on the lot at recordation. In 2004, the Ordinance requirements related to the determination of perennial flow was changed requiring that perennial water bodies be identified based on a field evaluation. A field evaluation conducted for this project's building permit application identified a water body (Kingsmill Pond) with perennial flow on the rear of the lot requiring that a 100 ft RPA buffer be established on the lot, around Kingsmill Pond. This 100 ft RPA buffer encompasses about 45% of the lot.

The issue for the Chesapeake Bay Board (Board) to consideration is the 623 sqft RPA impact and impervious cover in the RPA associated with the construction of the conservatory and sidewalk in the RPA. 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, "items not considered part of a principal structure include pools, gazebos, patios, free-standing decks, garages, or storage sheds, etc.". The proposed conservatory and concrete walkway are considered accessory structures and cannot be approved administratively by the Manager but may be approved by the Board after a public hearing.

**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.

Mr. Ripley submitted a WQIA for this project that proposes to mitigate for the impacts to the RPA by planting 2 native trees and 5 native shrubs on the lot in a landscape bed within the RPA buffer to help filter nonpoint source pollution. The amount of mitigation proposed is below the standard requirements, but can be revised by the applicant to meet the requirements.

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:** Staff has reviewed and evaluated the proposed RPA encroachment and offers the following information to the Board for its consideration:

The proposed conservatory's overall dimensions are 35' long by 25' wide. The WQIA proposes to increase the impervious area within the RPA buffer and on the lot by 623 sqft because only 80% of the structure is within the buffer. Staff recognizes that adverse field conditions exist which prevent the applicant from relocating the detached accessory structure to an area that would create less RPA impact. However, Staff believes this request exceeds the "minimum necessary to afford relief".

At this time, Staff has no information that granting this exception will confer upon the applicant a special privilege denied to other property owners who are similarly situated, and no similar requests have been made to the Board.

The proposal to construct a conservatory that is a non-water dependant, detached accessory structure within the RPA buffer, is not in harmony or consistent with the intent of the regulations. The applicant has submitted a mitigation plan that is below the standard requirements and there are numerous impervious areas (decks, patios, walkways, staircases, brick retaining walls, etc.) already existing within the RPA buffer, which may be detrimental to water quality.

Staff finds that this exception request is based upon conditions or circumstances that are self-created and self imposed. The ability of the applicant to propose a conservatory attached to the principal structure and outside of the RPA buffer remains a viable option. The Ordinance provides for an administrative review and approval of proposed modifications or expansions to an existing principal structure within the RPA buffer.

In conclusion, for the above stated reasons, Staff cannot support the proposed exception request at this time.

If the Board considers granting the exception, Staff recommends the following conditions be imposed.

1. The landscape mitigation plan submitted with the WQIA must be revised to require 1 native canopy tree, 2 native understory trees, and 6 native shrubs.
2. The size of the trees planted shall be a minimum of 1-1/2 inch caliper and six to eight feet tall. The shrubs shall be 3-gallon size. All vegetation shall be native species approved by the Environmental Division.
3. 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.
4. Any new walkways or replacement walkways or patios proposed within the RPA buffer shall be constructed using non-interlocking brick pavers on a sand base instead of concrete.
5. This exception request approval shall become null and void if construction has not begun by September 13, 2007.

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.

Mr. Lindsey asked what the total square footage was for the numerous impervious areas already in the RPA buffer, on this property.

Mr. Hughes asked if the decks were permitted by the County and if they required an exception to the Ordinance.

Mr. Cook stated an exception would only have been required if the decks were built after Jan 1, 2004.

Mr. Apperson opened the public hearing.

A. Mr. Bob Ripley stated all of the existing decks and accessory structures were installed before 2000 and were permitted by the County. He provided the Board with a site plan for the proposed structure, a copy of the Kingsmill Subdivision Supplemental Declaration of Covenants and Restrictions, a June 29, 2006 letter and schematic drawings from Earthworks Consulting Engineers, and an April 11, 2006 letter from the Environmental Preservation Board of the Kingsmill Community Services Association (KCSA) (~~copy of documents~~). He referred to these documents to explain that the proposed location of the conservatory was due to existing sewer drains, storm drains and fill. The size and detachment of the proposed structure was based on restrictions by KCSA.

*copies of documents are in case file CBE-06-053*

Mr. Lindsey stated his objection to receiving the additional information at the last minute.

Mr. Hughes asked about the design of the proposed structure and suggested the use of rain barrels to capture the runoff.

Mr. Ripley stated it was designed to match the existing residence and would have an A-frame roof with gutters that would drain into riprap areas. He added that at least a third of the proposed structure would be replacing an existing concrete patio.

Mr. Hughes asked if this patio was indicated on any of the plans submitted to the Board.

Mr. Ripley stated it was not because the patio had already been removed.

All Board members agreed the applicant should supply a better mitigation plan and provide accurate square footage for the difference between the existing and proposed impervious cover in the RPA buffer.

Mr. Hughes made a motion that the public hearing for case CBE-06-053 be continued to October 11, 2006.

The motion was approved by a 5-0 vote.

## **2. CBE-06-055 – Marc & Shanni Roth – 108 Stoweflake**

Mr. Pat Menichino presented the following case:

**Project Description:** Mr. Robert Boyer, Michael Brown Builder on behalf of Marc and Shanni Roth, 108 Stoweflake, applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the installation of 225 sqft of sand set brick pavers. The residence is located adjacent to a perennial water body (pond) located in Fords Colony.

**Background:** The residence was constructed in 2005 after adoption of the Ordinance. 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 field evaluation was conducted for a pond, which the residence is adjacent to and it was determined that the pond is a water body with perennial flow requiring that a 100 ft RPA buffer be established around the pond. This 100 ft RPA buffer encompasses approximately 40% of lot.

The owners have submitted a plan, which proposes RPA encroachments through the installation of 225 sqft, non-interlocking brick paver pads within the 50 ft RPA buffer.

According to provisions of the Ordinance; when application of the buffer would result 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; and

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 "items not considered part of a principal structure include pools, gazebos, patios, free-standing decks, garages, or storage sheds, etc."

The proposed brick paver pads are considered an accessory use and could not be approved administratively. The applicants have chosen to request an exception from the Chesapeake Bay Board (Board).

The issue for the Board's consideration is the installation of 225 sqft of non-interlocking brick paver pads, within the 50 ft RPA buffer.

**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 applicants have 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 225 sqft of brick paver pads.

The WQIA proposes to mitigate for the impacts to the RPA by planting 3 native trees and 2 native shrubs in the RPA. This vegetation will be located to the right of the residence and at the limits of clearing to help filter nonpoint source pollution. This mitigation plan meets the typical mitigation requirements by planting one tree or three shrubs for each 100 sqft of impervious cover established.

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 applicants 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:** Building Code requires that a 3' x 3' landing be provided at the doorway entrance to structures. Staff supports the creation of landings in front of the doors but does not support the exception for the brick paver pads as they involve the creation of impervious, accessory structures within the RPA, and their size is beyond what is required by the building code. Both the Ordinance and staff consider brick paver pads as accessory structures and as an impervious surface. Staff has not given administrative approval for the creation of accessory structures in the RPA in the past. The Board did approve construction of similar paver pads (patios) in Ford's Colony, at 153 John Pott Drive, on May 11, 2005, at The Vineyards Clubhouse, on July 13, 2005, and at 2658 Jockeys Neck Trail, The Vineyards, on March 8, 2006.

If the Board grants the exception, the proposed mitigation plan is in accordance with the standard mitigation requirements for impervious surfaces. If approved, it should be conditioned on the following:

1. The mitigation for the proposed paver pads should be accomplished through the full implementation of the landscape plan submitted with the WQIA.
2. 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 satisfactory to the county attorney.
3. This exception request approval shall become null and void if construction has not begun by September 13, 2007.

Mr. Lindsey asked for clarification on the location of the paver pad patios.

Mr. Hughes asked if the submitted mitigation plan was acceptable.

Mr. Menichino stated one patio would be under the HVAC unit in the 50 ft RPA, the other two would be by the patio doors in the 100 ft RPA, and the mitigation plan meets the typical mitigation requirements.

Mr. Apperson opened the public hearing.

A. Mr. Jeff Clark, Mike Brown Builders, approached the Board and confirmed the size and location of the patios.

Mr. Apperson closed the public hearing.

Mr. Hughes stated that the applicants had done a good job with the mitigation plan.

Mr. Hughes made a motion that the Board approve case CBE-06-055 with staff recommendations

The motion was approved by a 5-0 vote.

The Board recessed at 7:40 and reconvened at 7:45.

### **3. CBE-05-068 Resubmitted - AES Consulting Engineers/Centex Homes – Marywood Subdivision**

Mr. Gussman referred to the County Code of Ethics and stated for the record, that although his wife dealt with Centex Homes on behalf of her employer, he did not feel this would be a conflict of interest and he would participate in the discussion and vote on the following case.

Mr. William Cain presented the following case:

**Project Description:** Mr. V. Marc Bennett, P.E., AES Consulting Engineers, Inc. has applied on behalf of Centex Homes, for an exception to the Chesapeake Bay Preservation Ordinance for impacts associated with the Marywood project. The project is generally located to the north of Kingswood and Druid Hills subdivisions, to the south of Hickory Sign Post Road, and to the west of the Riverside Medical Center and La Fontaine Condominiums.

For the purpose of constructing the necessary stormwater management facilities, sanitary sewer gravity main, and road infrastructure, Centex Homes is proposing 4.40 acres of total encroachment into the Resource Protection Area (RPA).

**History:** Centex Homes submitted the proposed plan of development for the Marywood development to the Planning Division in September 2004. The James City County Planning Committee approved the master plan for the development at the December 5, 2005, Planning Commission meeting after the plan preparer and applicant addressed all concerns pertaining to perennial stream locations, stormwater management requirements, erosion and sediment control objectives, and planning issues which stemmed from previous DRC meetings where the plan was originally deferred.

Environmental Division conditions for approval of the master plan consisted primarily of reducing impacts to environmentally sensitive areas. Plan modifications provided to address this requirement consisted of steeper cut and fill slopes, the relocation of the southernmost stormwater management basin, and a net decrease in the number of proposed lots.

A site-specific perennial stream evaluation revealed that multiple perennial streams existed on the parcel, all of which outfall to Lake Powell and ultimately to the James River through the Mill Creek tributary. As this plan of development was submitted after January 1, 2004, the project was not grandfathered from the revised Chesapeake Bay Preservation Ordinance and as a result, a Resource Protection Area (RPA) buffer of 100 feet has been imposed on both sides of the streams and contiguous wetlands. Due to site restrictions resulting from the RPA requirements, one of the stormwater management facilities, which will handle the majority of

stormwater runoff for the site, has been proposed for installation in the headwaters of the perennial stream. The location for construction of this basin as proposed will permanently inundate approximately 550+/- linear feet of the associated perennial stream and effectively relocate the RPA feature to the outfall of the proposed BMP.

Section 23-11 of the revised Ordinance states that "a Water Quality Impact Assessment (WQIA) shall be required for any proposed land disturbance in the RPA resulting from development or redevelopment activities." AES Consulting Engineers previously submitted a WQIA for the Marywood project and that case was heard at the March 8, 2006, Chesapeake Bay Board meeting. Though staff recommended approval at that time, the case was denied by the Board. The areas of encroachment presented to the Chesapeake Bay Board at this time result from impacts (clearing and grading) associated with an RPA utility crossing, and installation of a Best Management Practice including its dam embankment and discharge pipe in a perennial stream segment.

**Water Quality Impact Assessment:** The impacts to the RPA buffer and RPA features resulting from the current plan of development requiring administrative and board actions remain at 4.40 acres as was presented in the March 8<sup>th</sup> Chesapeake Bay Board meeting. The impacts remain associated with the construction of two road crossings (Impacts #1A and B), a stormwater management facility and its embankment (Impacts #2A and B), the outfall of a stormwater conveyance system (Impact #3), and a utility bridge (Impact #4). These impacts are presented in Section I of the WQIA. Encroachments associated with Impacts #1A and B and Impact #3, as stated in the WQIA, require only an administrative action where those associated with Impacts #2A and 2B, and Impact #4 will require Board action. With this being the case, the total impacts to components of the RPA requiring approval by the Board at this time is 3.22 acres. To mitigate for the both the proposed administrative and Board impacts, the following will be implemented into the associated plan of development:

- Preservation of over 9 acres of developable open space beyond that which is required under the James City County BMP Points Guidelines;
- Erosion control type 3 blanket matting will be applied to all cut and fill slopes throughout the site;
- Stilling basins to reduce turbulence at stormwater outfalls and downstream erosion will be provided at all BMP outfalls and the outfalls of stormwater conveyance systems not immediately discharging to a stormwater management basin;
- RPA restoration performed in accordance with the 2003 Chesapeake Bay Local Assistance Department Riparian Buffer Manual guidelines for all disturbed areas in the RPA except for BMP and roadway embankments and stormwater or utility easements. RPA restoration now totals 2.6 acres with the majority being in proximity to the basin;
- Rain barrels are to be provided on all downspouts at the rear of homes along Oxford Road and Collington Court.
- Treatment of approximately 39.16 acres of offsite stormwater runoff, the majority of which is currently uncontrolled discharge from currently developed upland areas;
- Additional plantings to increase BMP efficiency will be provided with BMP #1 in accordance with the 2003 Chesapeake Bay Local Assistance Department *Riparian Buffer Modification and Mitigation Guidance Manual* for areas between the 100-Year water surface elevation of the pond and the adjoining property lines and roadway rights-of-way;
- Conservation seed mix will be used on the slopes of all BMP embankments.
- A perpetual 15' principal building set back from the limits of the RPA will be applied on all lots containing RPA or in immediate proximity to the buffer.

A complete description of the mitigation measures is presented in Section III C of the Water Quality Impact Assessment for the Marywood Subdivision. In addition to the above items, the site has been modified and additional information provided in the revised WQIA at the Board's request. The applicant has provided an alternative site layout that reflects the development potential and impacts of the project without construction of the main stormwater basin BMP #1. Additionally, since the last hearing, the applicant has reduced the number of lots from 100 to 93, and reduced the length of the Braddock Road cul-de-sac. These measures have reduced the number of lots with portions located in the RPA reducing the potential for clearing in immediate proximity to the RPA.

AES acting on behalf of Centex Homes, has 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):

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 density of the development (93 lots on 115.27 acres), the preservation of 9 acres of open space allowing the project to achieve 11.4 BMP points exceeding the 10 point requirement for stormwater compliance, the treatment of 39 acres of uncontrolled offsite Kingswood runoff, and the restoration of the RPA that is not permanently impacted in accordance with the state's *Riparian Buffers Modification and Mitigation Guidance Manual*, staff does find 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 that the Chesapeake Bay Board approve the WQIA and the exceptions for the Marywood project. Furthermore, all recommendations listed therein 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 September 13, 2007. 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. Apperson opened the public hearing.

A. Mr. Greg Davis, Kaufman & Canoles, attorney for Centex Homes approached the Board and summarized the advantages of the proposed single BMP plan over an alternative multiple BMP plan that would not require approval from this Board. He emphasized the treatment of 39 acres of offsite runoff, a 100 ft buffer with a 3-tier planting plan around the BMP, the reduction and redesign of lots to move them farther from the RPA, the use of natural drainage ways to reduce clearing and preserve woodlands and the addition of rain barrels to capture runoff on some of the lots.

Mr. Lindsey recommended that the perpetual 15 ft principal building setback from the limits of the RPA be changed to a 'land disturbance' setback. He asked for the approximate total acreage of clear-cutting on the proposed plan, the difference in the amount of clearing and runoff between the two plans and asked if the proposed rain barrels would eliminate runoff into Lake Powell.

Mr. Davis stated the total acreage to be cleared could not be calculated because the homes had not been sited but the proposed plan provided for clearing to be approved by individual lots. He pointed out the alternative plan would require much more clearing and grading to facilitate the required storm water management.

B. Mr. Bob Kerr, Kerr Environmental, stated there would still be some runoff into the lake but the rain barrels would help to reduce the pollutant load 12% above what was required by the County.

Mr. Apperson asked how accurate the indicated amount of clearing was for each lot.

C. Mr. Jason Grimes, AES Consultants, stated the clearing indicated on the maps was as accurate as could be calculated without knowing the exact footprints for the specific homes. He addressed Mr. Lindsey's question stating there would be approximately 40 acres of cleared area with the proposed plan and this was a 25% reduction of clearing required with the alternative plan. He added that the BMP on the proposed plan was only 2.9 acres of the total 4.4 acres of impact to the RPA, which included the roadways. He also stated the alternative plan offered only 10 water quality points while the proposed plan offered more than 11 points.

Mr. Lindsey asked for a definition of the water quality points.

Mr. Cain described 10 points as capturing runoff from 100% of the site. He stated the proposed plan had additional points because they were dedicating an area of conservation easement that would remain undeveloped.

Mr. Waltrip asked if some trees might be left in the areas that were shown as being cleared.

Mr. Davis stated the County would be approving the limits of clearing for the project infrastructure and for each lot as part of the single-family building permit process. In addition, Centex Homes would not object to adding a restriction to prevent future homeowners from performing additional clearing.

Mr. Hughes asked what the County procedure was for approving the limits of clearing on approved plans.

Mr. Cain explained that once there is an approved plan for the subdivision, a land disturbing permit would be issued for the infrastructure only (roads, utilities and stormwater management). When applications are received for the development of the single-family lots, the limits of clearing would be set by the Ordinance, which states that clearing must be the minimum required for development, and by the requirements established at this meeting, which would be imposed onto each lot.

Mr. Davis stated the plan was now only 93 lots and there were significant reductions to the impacts on Lake Powell from the plan submitted in March 2006. He stated the Board should not set a precedence of not allowing BMPs in the RPA. He stressed the criteria outlined in section 23-14 of the Ordinance and stated the proposed plan minimizes runoff, is not of substantial detriment to water quality and imposes reasonable conditions in keeping with the policies of the Ordinance. He added that the Board's decision should not be based on public support but on the requirements of the Ordinance.

Mr. Apperson requested that clearing for the utilities and roads be limited to the utility and road right-of-ways.

Mr. Davis stated this condition was already imposed on the site plan approval and the Board could also make this a condition of approval.

Mr. Lindsey asked if this project would increase pollution into Lake Powell.

Mr. Kerr stated the proposed plan was reducing the offsite pollution runoff by 90% and would create less runoff than the alternative plan that did not require approval from this Board.

D. Shereen Hughes, 103 Holly Rd, spoke in opposition to the case. She advised the Board that she was on the Planning Commission but had recused herself from voting on this case because of her involvement as a private citizen and her environmental concerns about this project. She stated the proposed plan still had disturbance of a perennial stream, and a BMP in the RPA buffer and findings 1 and 4 in Section 23-14(c) of the Ordinance were not met. She felt the amount of clearing on the proposed plan was underestimated and the amount of clearing on the alternative plan was overestimated. She believed the proposed plan was not capturing the majority of the runoff from the new development and the pollution in the offsite runoff from the Kingswood subdivision had not been measured. She stated most of the lots in Kingswood were wooded and un-manicured, and they were farther away from the RPA buffer. She also stated an exception should not be granted based on the treatment of offsite runoff.

E. Tony Opperman, 108 Spring Rd, spoke in opposition to the case. He also referred to item 4 in Section 23-14(c) of the Ordinance, stating that because there was at least one alternative plan the exception request was based on conditions that were self imposed. In addition, he felt the Board should not set a precedence of allowing disturbance in the RPA.

F. Rosemary Stimson, 104 Oxford Circle, spoke in opposition to the case because of the impact on the environment.

G. Jim Waldek, 102 N Sulgrave Ct, spoke in opposition to the case because of the traffic patterns.

Mr. Lindsey reminded Mr. Waldek that this was not relevant to the decisions of this Board.

H. Charles Raisner, 118 Spring Rd, spoke in opposition to the case because of the impact on Lake Powell.



I. Bryan Watts, 109 Braddock Rd, spoke in opposition to the case because of the impact on Lake Powell.

J. Roark Mulligan, 105 N Sulgrave Ct, spoke in opposition to the case because of the amount of clearing and the size of the proposed lots.

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

Mr. Gussman stated he was still concerned with the impact to water quality because of the BMP in the RPA and was therefore opposed to this plan.

Mr. Lindsey agreed with Mr. Gussman. He stated because there were other options for this development, the request did not meet criteria 1 and 4 as outlined in Section 23-14(c) of the Ordinance. The exception request was not the minimum necessary to afford relief and was based on conditions or circumstances that were self-imposed.

Mr. Hughes agreed with Mr. Lindsey and stated his opposition due to the impact on water quality.

Mr. Waltrip stated he was in favor of the exception because the property was going to be developed and he felt the proposed plan provided some environmental control.

Mr. Hughes made a motion the Board deny the exception for case CBE-05-068.

The motion to deny the exception was approved by a 4-1 vote.

AYE: Gussman, Lindsey, Hughes, Apperson (4). NAY: Waltrip, (1).

The Board recessed at 9:10 and reconvened at 9:15

#### **4. CBV-06-012 APPEAL – Robert and Bambi Walters – 5112 Shoreline Court**

Mr. Pat Menichino presented the Board with binders of additional information the applicants dropped off at the Environmental Division earlier in the day. The corresponding index sheets and the revised appeal request document are ~~attached~~. Mr. Menichino outlined the following case with a power point presentation:  
*in the case file*

Mr. and Mrs. Walters filed an appeal to James City County's Chesapeake Bay Board on July 24, 2006, and amended it on August 16, 2006. The appeal lists the following four (4) specific items of appeal:

1. Request an appeal of recent enforcement of (a) resource protection area and (b) wetlands pursuant to section 404 as recently interpreted in Rapanos decision.
2. Request appeal to recently presented JCC Environmental Division's August 25, 2004 letter and review of Environmental Division's finding that our property has been impacted by "unauthorized encroachments".
  - a. See Notice of Violation dated August 14, 2006 with a determination "that vegetation has been removed from within an area identified as a Resource Protection Area (RPA) buffer" and
  - b. See Notice of Violation dated August 14, 2006 with a determination unauthorized removal outside clearing limits;Request an appeal of JCC Environmental Division's July 24, 2006 requirement to submit buffer modification plan for review and approval to remove poison ivy, poison sumac, and poison oak.
3. Request review of Environmental Division's position that "regulatory status of the lake (Lake Powell) has not changed since 1990".

**The Chesapeake Bay Preservation Ordinance (Ordinance):** The original ordinance was adopted by the James City County Board of Supervisors on August 6, 1990. It was titled Ordinance Number 183 and added to the County Code as Chapter 19B, Chesapeake Bay Preservation. As amended, this ordinance is now titled: Chapter 23, Chesapeake Bay Preservation.

**Summary of Facts:** Mr. and Mrs. Walters purchased building lot 58, 5112 Shoreline Court, from Boyd Corporation in 2003, and have maintained continuous possession and control of the property. In 2004, Mr. and Mrs. Walters contracted with Lyerly L, Builder (the builder), for construction of a new single-family residence on lot 58, 5112 Shoreline Court.

Patrick Menichino visited 5112 Shoreline Court, met with the owner, and at their request flagged the limits of clearing and the 100 ft RPA buffer line on the lot. Mr. Menichino observed land disturbance and a noticeable lack of vegetation within an area of the 100 ft buffer.

Mr. and Mrs. Walters attended a meeting at the Environmental Division (Division) to discuss a resolution of the issues related to the RPA and limits of clearing on the property. The Walters agreed to provide for the planting of trees and shrubs in the area of the clearing limits shown on the approved plan, located on the south side of the lot. Mrs. Walters emailed Darryl Cook, Environmental Director and requested the specifics of the alleged Chesapeake Bay Ordinance Violations. She also requested that a copy of the violation information be given to her assistant.

On August 14, 2006, Mr. and Mrs. Walters, 5112 Shoreline Court were issued two (2) Chesapeake Bay Ordinance Notices of Violation (NOV) by Division staff. The NOV's were issued, because unauthorized encroachments into areas designated on an approved development plan for 5112 Shoreline Court had occurred. These unauthorized encroachments resulted in disturbance to the existing ground cover, and understory vegetation and constituted violations of the Ordinance.

**Description of 5112 Shoreline Court:** In 1999 a subdivision known as Lake Powell Pointe, Phase 2 was recorded. Lot # 58 of that subdivision was assigned a street address of 5112 Shoreline Court. This lot is immediately adjacent to a body of water known as Lake Powell. Lake Powell was identified as a Resource Protection Area (RPA) with the adoption of James City County's Chesapeake Bay Ordinance by the Board of Supervisors, on August 8, 1990. 5112 Shoreline Court is 1.8 acres in size; it has approximately 490 linear ft. of shoreline on Lake Powell. A RPA buffer extends 100 ft landward of the edge of the wetlands that are contiguous to the lake. A single-family residence was constructed on the lot with a swimming pool in the rear yard. There is also a split rail fence installed within the RPA buffer.

#### **Chronology of Important Events for 5112 Shoreline Court:**

##### **February 2, 2004**

Prior to the submission of a building permit application to the County, Mr. and Mrs. Walters, requested a Zoning Variance to allow the front setback requirement to be reduced. They stated the reason for the request as a "hardship" caused by the location of the 100 ft RPA in their rear yard.

##### **August 4, 2004**

Prior to the submission of a building permit application to the County, Division inspector, Molly Roggero met with the builder to review a request to remove 34 trees damaged during Hurricane Isabel from the RPA.

##### **August 10, 2004**

Molly Roggero approved the request to remove approximately 34 storm-damaged trees and issued the form letter granting approval.

##### **August 13, 2004**

Prior to the issuance of a building permit, Mr. and Mrs. Walters submitted a letter to Darryl Cook, requesting an exception to the Ordinance for the expanded clearing of trees and shrubs at 5112 Shoreline Court to allow for a larger back yard. In the letter, Mrs. Walters stated, "we have three small boys... and would like to have enough of a cleared backyard to play baseball, soccer, and other sports without having to navigate through trees in the mitigated area".

##### **August 25, 2004**

Darryl Cook sent a response letter to Mr. and Mrs. Walters denying their request for additional encroachments into areas designated to be preserved. Darryl's letter also discussed a requirement for mitigation plantings within the RPA buffer.

##### **August 25, 2004**

The Division reviewed and approved a revised site plan for the Walter's proposed single-family dwelling located at 5112 Shoreline Court as part of the building permit process. The revisions to the site plan were noted on the plan by staff and agreed to by the builder. These noted revisions reduced the amount of clearing proposed on the property.

##### **August 25, 2004**

Code Compliance issued the building permit to the builder, for a single-family residence at 5112 Shoreline Court, and shortly thereafter construction begins.

##### **December 16, 2004**

The builder sent an email to Mr. and Mrs. Walters responding to their request for removal of trees from the RPA and Lake. The builder stated, "I certainly didn't intend to clear the lake. The site is more than adequate and much cleaner than it would have been without a hurricane".

November 17, 2005

Mrs. Walters wrote a letter to the Lake Powell Point HOA requesting a variance, to allow for the installation of a split rail fence in the rear yard. Mrs. Walters stated, "A portion of the fence (approximately 330-400 yds) is in the RPA area". Mrs. Walters also submitted a site plan showing the location of the proposed fence.

November 30, 2005

Code Compliance issued a building permit for a swimming pool and a fence, at 5112 Shoreline Court. No additional clearing, RPA encroachments, or modifications to the original approved plan are approved by the Division, for the installation of this pool. The installation of pool is within the limits of clearing shown on the original house site plan. The plan showing the location of the split rail fence was not submitted to the Environmental Division. Fences are permitted within RPA as long as no additional clearing is proposed, therefore a formal review and approval is not required for the fence.

January 13, 2006

Mr. and Mrs. Walters hired an outside contractor (Amazing Tree Service) to remove additional trees in the RPA and Lake, which the builder refused to remove.

January 13, 2006

Mrs. Walters contacted Environmental Inspector Joe Buchite by fax and requested permission to continue storm damaged tree removal and the removal of an additional tree.

January 20, 2006

Joe Buchite visited the site found Amazing Tree Service clearing trees and in the process damaging the understory vegetation. Joe spoke with the contractor and warned him not to damage the understory. Joe also determined that the Walters' request to remove other trees was unwarranted and denied the request.

March 6, 2006

Code Compliance issued a building permit for an accessory structure (retaining wall). No additional clearing or RPA encroachments were approved by the Division, for the installation of the retaining wall.

June 19, 2006

Patrick Menichino visited 5112 Shoreline Court and met with Mrs. Walters. He discussed the RPA buffer with her and observed what appeared to be RPA buffer encroachments as well as an encroachment into an area designated to be protected on the approved clearing plan. Mr. Menichino asked Mrs. Walters to have her surveyor flag or stake the approved limits of clearing and the RPA buffer on the property. Mrs. Walters told Mr. Menichino that they really did not want to spend the money to have the surveyor come out to their property again. Mr. Menichino agreed to mark the RPA in the field, to save Mr. and Mrs. Walters the expense of a surveyor. Mr. Menichino marked the RPA buffer and determined that encroachments had occurred. He did not issue a Chesapeake Bay Violation notice because he believed that Mr. and Mrs. Walters would cooperate to resolve the issues.

June 26, 2006

Mr. and Mrs. Walters attended a meeting at the Division to discuss a resolution of the issues related to the RPA and limits of clearing on the property. The Walters agree to provide for the planting of trees and shrubs in the area of the clearing limits shown on the approved plan and located on the south side of the lot.

July 3, 2006

Mr. Menichino received an email from Mrs. Walters requesting permission to remove two dead oak trees and a pine tree with a dead top.

July 7, 2006

Mr. Menichino visited 5112 Shoreline Court and evaluated Mrs. Walters' tree removal request. He determined that one (1) 24" dia. oak tree is dead and he approved its removal from the buffer. He did not approve the removal of the second oak tree because it is still substantially alive and is at least 100 LF from the principal dwelling. He advised Mrs. Walters that she could have a certified arborist inspect the oak tree and submit his report to the County for review. Mrs. Walters was unable to locate the pine tree with the dead top on her property, so no action was taken on that request.

July 10, 2006

Mrs. Walters emailed Mr. Menichino requesting information on types of RPA buffer plants that will not attract dangerous pests, the removal of poison ivy, sumac, and oak from the RPA, and the use of pesticides within the RPA buffer.

July 12, 2006

Mr. Menichino responded by email to Mrs. Walters's email of July 10.

July 24, 2006

Mr. and Mrs. Walters sent a letter requesting an appeal to members of the James City County Chesapeake Bay Board. The request letter lists four (4) items that the Walters would like to appeal.

August 8, 2006

Mrs. Walters sent an email to the Division requesting that Notices of Violations be issued by the Division concerning the unauthorized encroachments at 5112 Shoreline Court.

August 8, 2006

Mr. Walters sent an email to Mr. Menichino concerning replanting within the RPA buffer. Mr. Walters stated, "I understand that as a representative of the JCC Environmental Division, your position is that there has been a disturbance of some of the platted RPA within our yard. Disturbance has resulted from damage done by Hurricane Isabel and subsequent, approved clearing of hurricane related debris".

August 9, 2006

Mr. Menichino spoke with the builder concerning the clearing limits. The builder stated that it was always the goal of the owners to have a bigger back yard without trees and to expand their view of the lake. The builder stated that he refused the request to remove the trees in the December 2004 because of the additional cost and because he recognized that, a lot of damage would be done to the RPA buffer.

August 14, 2006

Following consultation with Assistant County Attorney Jennifer Lyttle, Mr. Menichino issued two (2) Chesapeake Bay Notices of Violations to Mr. and Mrs. Walters. The separate violations cite an encroachment into the RPA buffer and the unauthorized encroachment of an area designated to be preserved on the approved site plan.

**Staffs Response to the August 16, 2006 Appeal:**

Staff reviewed the August 16, 2006 appeal filed by Mr. and Mrs. Walters and offered the following responses to appellants appeal items 1-4.

**1. *Request an appeal of recent enforcement of (a) resource protection area and (b) wetlands pursuant to section 404 as recently interpreted in Rapanos decision.***

The Rapanos decision was handed down by the U.S. Supreme Court. The case involved the U.S. Army Corps of Engineers asserting jurisdiction over so-called isolated wetlands under the Clean Water Act. This case centered on the question of whether the Corps has jurisdiction over wetlands that abut non-navigable tributaries of navigable waters. The U.S. Supreme Court chose to remand the case back to the lower courts.

Staff asserts that Rapanos does not have any effect on Mr. and Mrs. Walters' appeal for the following reasons:

- A. Rapanos involves the Federal Clean Water Act, isolated wetlands and the U.S. ARMY Corps of Engineers' ability to assert jurisdiction. The Rapanos decision has no affect on local government's ability to enforce local environmental ordinances. The matter before the JCC Chesapeake Board is an appeal filed by the Walters under the County's Chesapeake Bay Preservation Ordinance.
- B. The appellant is requesting an appeal pursuant to section 404 as interpreted in Rapanos decision. That request is beyond the authorization given to the Board by the Ordinance. The Chesapeake Bay Preservation Ordinance, Section 23-17 limits the ability for appeals to "an owner of property subject to an administrative decision, order or requirement under this chapter", meaning Chapter 23, the Chesapeake Bay Preservation Ordinance.

**2. *Request appeal to recently presented JCC Environmental Division's August 25, 2004 letter and review of Environmental Division's finding that our property has been impacted by "unauthorized encroachments".***

Staff believes that unauthorized encroachments into areas designated to be preserved on the approved development plan for lot 58, have occurred. These encroachments resulted in the disturbance to the soil and natural ground cover, and caused a loss of understory vegetation within these areas.

Staff offers the following information in support of our findings:

- A. The Chesapeake Bay Preservation Ordinance, Section 23-9 (a) states:  
*Purpose and intent.* The performance standards establish the means to minimize erosion and sedimentation potential, reduce land application of nutrients and toxics, and maximize rainwater infiltration. Natural ground cover, especially woody vegetation, is most efficient in holding soil in place and preventing site erosion. Indigenous vegetation, with its adaptability to local conditions without the use of harmful fertilizers or pesticides, filters and infiltrates stormwater runoff. Keeping impervious cover to a minimum enhances rainwater infiltration and effectively reduces increases of stormwater runoff.

The intent of the ordinance is to preserve the "natural ground cover, especially woody vegetation". At 5112 Shoreline Court areas designated to be preserved on the development plan have had the natural groundcover and woody vegetation removed. Staff has provided photos of these areas for the Boards consideration.

- B. The Chesapeake Bay Preservation Ordinance, Section 23-10 (3) states:  
*Clearing plan.* A clearing plan shall be submitted in conjunction with site plan review or subdivision plan review. No clearing or grading of any lot or parcel shall be permitted without an approved clearing plan.

For existing single-family lots, a clearing line shown on the plat plan normally submitted as part of the building permit application shall satisfy clearing plan requirements. No clearing or grading shall occur on existing single-family lots until a complete building permit application is submitted. Clearing plans shall be prepared and/or certified by design professionals practicing within their areas of competence as prescribed by the Code of Virginia.

a. Contents of the plan:

1. The clearing plan shall be drawn to scale and clearly delineate the location, size, and description of existing and proposed plant material. All existing trees on the site, 12 inches or greater diameter at breast height (DBH), shall be shown on the clearing plan, or where there are groups of trees, the wood lines of the group may be outlined instead. The specific number of trees 12 inches or greater DBH to be preserved outside of the impervious cover and outside the groups shall be indicated on the plan. Trees to be removed and wood lines to be changed to create desired impervious cover, shall be clearly delineated on the clearing plan.
2. Any required buffer area shall be clearly delineated and any plant material to be added to establish or supplement the buffer area, as required by this chapter, shall be shown on the clearing plan.
3. Within the RPA buffer area, trees to be removed for sight lines, vistas, access paths, and BMPs, as provided for in this chapter, shall be shown on the plan. Vegetation required by this chapter to replace any existing trees within the buffer area shall also be shown on the clearing plan.
4. Erosion and sediment controls shall be provided as necessary and in accordance with chapter 8 of the County Code.

b. Plant specifications:

1. All plant materials necessary to supplement the buffer area or vegetated areas outside the impervious cover shall be installed according to standard planting practices and procedures.
2. All supplementary or replacement plant materials shall be living and in healthy condition. Plant materials shall conform to the standards of the most recent edition of the *American Standard for Nursery Stock*, published by the American Association of Nurserymen.
3. Where areas to be preserved, as designated on an approved clearing plan, are encroached, replacement of existing trees, and other vegetation will be achieved at a ratio of two planted trees to one removed. Replacement trees shall be a minimum 1-½ inches caliper at the time of planting.

Staff asserts that section (b) 3 is a provision of Chapter 23 and clearly shows that encroachments into areas designated to be preserved requires restoration of trees and other vegetation. Staff has provided photos of these areas for the Boards consideration.

C. The Chesapeake Bay Preservation Ordinance, Section 23-18 (a) states:

(a) Without limiting the remedies which may be obtained under this section, any person who violates any provision of this chapter or who violates, fails, neglects, or refuses to obey any variance or permit condition authorized under this chapter shall, upon such finding by the circuit court, be assessed a civil penalty not to exceed \$5,000.00 for each day of violation. Such penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the county for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas within the county, in such a manner as the court may direct by order.

Section 23-18 (a) states in part that "any person who violates any provision of this chapter.....".

That means that a violation of any provision of Chapter 23 is a violation of the Chesapeake Bay Preservation Ordinance.

Staff asserts that at 5112 Shoreline Drive there have been violations of the provisions of the ordinance.

B. The Chesapeake Bay Preservation Ordinance, Section 23-7 (c) states:

(c) *Buffer area requirements.* To minimize the adverse effects of human activities on the other component of RPAs, state waters and aquatic life, a 100-foot buffer area of vegetation that is effective in retarding runoff, preventing erosion and filtering nonpoint source pollution from runoff shall be retained if present and established during development where it does not exist. The buffer shall have three layers of vegetation comprised of native trees, shrubs, and ground covers. Where the buffer is being established, a buffer modification plan will be prepared that may incorporate existing vegetation. A list of acceptable native plants is available from the manager. A buffer area not less than 100 feet in width shall be located adjacent to and landward of other RPA components and along both sides of any water body with perennial flow. The full buffer area shall be designated as the landward component of the RPA. The 100-foot buffer area shall be deemed to achieve a 75 percent reduction of sediments and a 40 percent reduction of nutrients. All subdivision plats submitted for approval after August 6, 1990, shall clearly identify the boundaries of any RPA within the property. Such plat shall contain a statement that all existing vegetation within the RPA shall remain in its undisturbed natural state, except for vegetation weakened by age, storm, fire or other natural

cause. Developers shall install signs identifying the landward limit of the RPA. Signs shall be obtained, installed, and maintained in accordance with guidelines established by the manager.

In addition Staff believes that Section 23-7 (c) authorizes the Manager to require that a buffer be "established during development where it does not exist".

Section 23-7 (c) states, "The Buffer shall have three layers of vegetation comprised of native trees, shrubs, and ground covers".

Therefore the refusal of the Walters to submit a restoration or native planting plan to the Manager for RPA buffer areas located on lot 58, 5112 Shoreline Court, may constitute a violation of provisions of the Ordinance.

Staff has provided photos of these areas for the Boards consideration. (~~See attached photos # 1-5~~  
*Photos are in the case file*)

**3. Request appeal of JCC Environmental Division's July 24, 2006 requirement to submit a buffer modification plan for review and approval to remove poison ivy, poison sumac, and poison oak.**

Staff believes that Section 23-7 (c) – (1) Authorizes the Manager to require a buffer modification plan for the removal of vegetation from within a buffer. Section 23-7 (c) – (1) states:

*Permitted buffer modifications.* In order to maintain the functional value of the buffer area, existing vegetation may be removed upon approval by the manager of a buffer modification plan only to provide for reasonable sight lines, access paths, general wood lot management, and BMPs including those that prevent upland erosion and concentrated flows of stormwater, as follows:

- a. Trees may be pruned or removed as necessary to provide for sight lines provided, that where removed they shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion and filtering nonpoint source pollution from runoff.
- b. Access paths shall be constructed and surfaced to effectively control erosion;
- c. Dead, diseased, or dying trees or shrubbery, or noxious weeds may be removed based upon the approval of the manager, who may require a recommendation by a professional forester or arborist; and
- d. For shoreline erosion-control projects, trees and woody vegetation may be removed, necessary control techniques employed and appropriate vegetation established to protect or stabilize the shoreline and restore the function of the buffer in accordance with the best available technical advice and applicable permit conditions or requirements.

**4. Request review of Environmental Division's position that "regulatory status of the lake (Lake Powell) has not changed since 1990".**

In response to appellants appeal item number 4, Staff offers the following information for the Boards consideration:

The James City County Chesapeake Bay Ordinance (Chapter 19B) was adopted by the Board of Supervisors on August 6, 1990. Within the 1990, Ordinance is the following:

Section 19B – 3, Definitions:

Resource Protection Area (RPA) means that component of a CBPA comprised of lands at or near the shoreline that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may result in significant degradation to the quality of State Waters. RPAs shall include tidal wetlands, tidal shores, non-tidal wetlands connected by surface flow and contiguous to tidal wetlands or to tributary streams, and a 100-foot wide buffer area as identified in this Chapter, adjacent to and landward of other RPA components.

Tributary Stream means any perennial stream that is so depicted on the most recent U.S. Geological Survey 7-1-2 minute topographic quadrangle map (scale 1:24,000).

The tributary stream within Lake Powell is Mill Creek. The regulatory status of Lake Powell (RPA) was determined by the definitions within the 1990 Chesapeake Bay Preservation Ordinance as adopted by Board of Supervisors.)

In addition, Staff believes that the regulatory status of Lake Powell did not result from an administrative decision, order or requirement from the Manager, therefore appeal item number 4 cannot be appealed to the James City County Chesapeake Bay Board.

### **Board Action**

Staff requests that the Board in considering this appeal follow the guidance provided within the Ordinance. 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 Recommendations**

Staff believes that the RPA buffer and the limit of clearing located on lot 58, also known as 5112 Shoreline Court has been impacted by unauthorized encroachments.

Staff contends that the Manager is authorized under provisions of the Chesapeake Bay Ordinance to require replanting in the areas subjected to encroachments.

Staff contends that the Manager is authorized under provisions of the Chesapeake Bay Ordinance to require an RPA Buffer Modification Plan, for the removal of vegetation within the buffer.

Staff asks that the Board deny each of the appellant's appeals.

Mr. Lindsey asked if the 34 damaged trees were in the 50 or 100 ft RPA buffer.

Mr. Menichino replied they were in both.

Mr. Hughes referred to the area of additional clearing that was denied by Mr. Cook and asked what the Board's concern was since this area was not in the RPA.

Mr. Cook stated it was an administrative decision based on Sec 23-9(b)(1) of the Ordinance, which states: Land disturbance shall be limited to the area necessary to provide for the proposed use or development.

Ms. Lyttle, Assistant County Attorney, confirmed this and stated the case was before the Board because Mr. and Mrs. Walters were appealing the administrative decision.

Mr. Lindsey asked what type of vegetation had been removed from this preserved area.

Mr. Cook stated the majority of it was understory vegetation.

Mr. Apperson asked if the line on the photographs accurately depicted the limits of clearing and the RPA buffer.

Mr. Menichino stated that it was approximate and the applicants had been given the opportunity to hire a surveyor to delineate the RPA.

Mr. Hughes asked what type and number of plantings would be required in a planting plan the County was requesting.

Mr. Menichino said he estimated the clearing in the RPA to be approximately 5000 sqft and the standard panting requirement and would be 12 trees, 24 understory trees, and 36 shrubs of native species.

Mr. Lindsey asked if a surety bond would be required with the planting plan.

Mr. Cook stated that because of the violations, a surety would be required. He added that the County had tried to work out an agreement with the applicants before the violations were issued.

Mr. Apperson agreed the documentation showed the County had attempted a compromise.

Mr. Apperson opened the public hearing.

A. Mr. and Mrs. Walters, owners, stated most of the documentation in the binders they submitted at this meeting, were duplications of documents already before the Board. However, the copy of the plat depicting the downed trees was important to demonstrate the extent of damage from Hurricane Isabel and the August 10, 2004 letter from Molly Roggero showed that the clearing was authorized. They stated it was not possible to

remove the damaged trees without the use of heavy equipment and therefore the clearing of the under story vegetation was unavoidable. They believe Mr. Menichino only presumed there was unauthorized clearing because he had not see the lot before the damaged trees were removed and therefore they should not be mandated to mitigate based on the presumption of a violation. They maintain there was no violation, and they will allow the existing understory to re-grow.

Mr. Apperson asked if they agreed with the indicated location of the 100 ft RPA buffer line on their property.

Mrs. Walters said it was the approximate location of the County identified 100 ft RPA line from the 1999 survey of the property. She stated this survey was based on a 1990 survey confirmed by the Corps of Engineers and has not been reconfirmed since 1995. However, she did feel the area depicted as RPA on the south side of the property was unreasonable.

Mr. Apperson asked Ms. Lyttle if the accurate location of the 100 ft RPA buffer was crucial to deciding this case.

Ms. Lyttle stated because the notice of violation was for encroachment into the RPA, it was necessary to know the approximate location of the 100 ft RPA line.

Mr. and Mrs. Walters stated that regardless of where the line is, they disagree that the encroachment or clearing was unauthorized.

Mr. Apperson stated the picture appeared to show clearing and a maintained yard on both sides of the indicated RPA line. He stated based on his experience with the Department of Forestry, if the area were left natural, it would be covered with tall weeds but added that he would have to visit the site to know for sure.

Mr. and Mr. Walters stated the August 10, 2004 letter, authorizing removal of the storm-damaged trees, did not say anything about replanting. In addition, the clearing they requested on August 13, 2004 was denied by Mr. Cook and they do not feel they should have to plant in that area of the buffer because the trees were never removed.

Mr. Cook advised the Board that Sec 23-9(b)(2)a of the Ordinance states: Upon approval by the manager, diseased trees or trees weakened by age, storm, fire or other injury may be removed; provided, that when such removal results in a 20 percent or greater reduction in existing tree canopy, a sufficient number of trees with a 1-1/2 inch caliper shall be planted to restore the full canopy.

Mr. Apperson stated and Ms. Lyttle agreed that Mr. Cook as the manager can require a replanting plan for restoration of the 100 ft RPA buffer when trees are removed either with or without authorization.

Mrs. Walters stated she wanted to address the jurisdiction for the RPA determination because the wetlands on her property were non-tidal. She also wanted to appeal the administrative decision that a garden could not be planted in an area that is not in the RPA.

The Board members acknowledged her right to question the RPA jurisdiction on her property.

Mr. Cook stated the administrative denial was not for planting a garden but for expanding the limits of clearing.

B. Mr. Ken Pettine, previous owner of 120 The Colony, spoke in favor of the applicants stating that he believed the area around Lake Powell was non-tidal wetlands because there was no water going over the dam.

Mr. Lindsey stated that although there was no water over the dam there was water coming into the lake from upstream.

C. Mr. Joe Swanenberg, 3026 The Point Drive, general contractor, stated he worked on the Walters' home and felt they were very conscientious of the environment and the location of the RPA. He also stated the downed trees were the cause of the land disturbance in the RPA.

D. Mr. Donald Topping, 2245 Lake Powell, stated he observed a continuous flow of water through the spillway into Lake Powell, from the upstream side.



All Board members agreed they would like to see the County and the applicants reach a compromise that would be acceptable to both sides.

Mr. Hughes added he did not feel any decisions could be made at this time because the applicants had introduced a package of information that none of the Board members had reviewed.

Ms. Lyttle stated the case could be continued so the Board members could review the additional information, visit the site to determine the condition of the understory vegetation and confirm the location of the 100 ft RPA buffer. In addition, the applicants and County could try to reach an agreement on the planting plan. If an agreement was reached before the meeting, the Walters could withdraw their appeal. If not, the Board could decide the case in October.

Mr. Apperson stated the public hearing would remain open and the applicants and others could speak again at the October meeting.

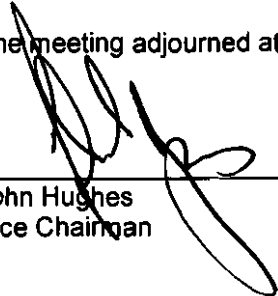
Mr. Lindsey made a motion that the public hearing for case CBV-06-012 be continued to October 11, 2006.

The motion was approved by a 5-0 vote.


**E. MATTERS OF SPECIAL PRIVILEGE – None**

**G. ADJOURNMENT**

The meeting adjourned at 10:35 PM.



\_\_\_\_\_  
John Hughes  
Vice Chairman



\_\_\_\_\_  
Darryl Cook  
Secretary