

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD
MINUTES
OCTOBER 11, 2006 - 7:00 PM**

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

ABSENT
William Apperson

OTHERS PRESENT
County Staff

B. MINUTES – The September 13, 2006 minutes were approved as presented.

Mr. Hughes made a motion that the Board rearrange the agenda and start with the Board Considerations.

The motion to rearrange the agenda was approved by a 4-0 vote.

D. BOARD CONSIDERATIONS

1. CBE-05-054 – Dale and Paige Sprenkle – 141 Riverview Plantation

Mr. Pat Menichino stated Mr. and Mrs. Sprenkel requested a one-year extension for the RPA exception granted by the Board last year. Due to delays in finalizing their house plans, work has not begun on the project. Staff supports a 1-year extension of the exception and all of the approved conditions required with the exception apply to the extension. The new expiration date shall be November 9, 2007.

Mr. Lindsey made a motion to accept the extension request for case CBE-05-054.

The motion was approved by a 4-0 vote.

C. PUBLIC HEARINGS

1. CBE-04-040 C. E. Newbaker Surveying and Planning - Michelle Point

Mr. Hughes stated he understood the applicant was requesting a deferral on this case.

Mr. Michael Ware, co-owner of the Michelle Point property, requested a deferral because the final permits have not been received from the Department of Conservation & Recreation (DCR).

As this was an advertised public hearing, Mr. Hughes opened the public hearing.

No one wished to comment on the case at this time.

Mr. Lindsey made a motion that the public hearing for case CBE-04-040 be continued to November 8, 2006.

The motion was approved by a 4-0 vote.

2. CBE-06-062 Performance Contracting – 2844 Castling Crossing

Mr. Pat Menichino presented the following case:

Project Description: Performance Contracting applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the construction of a single-family principal structure on the above referenced lot in Lake Powell Forest. The lot is 6127 sqft or 0.140 acres in size.

The principal structure is proposed to create approximately 2197 sqft of impervious cover in the RPA consisting of the principal dwelling and portions of the concrete driveway and sidewalks. There will be a total disturbance of 6127 sqft in the RPA or 100% of the lot to allow for the construction of the dwelling.

Background: The lot was recorded in 1999 after adoption of the Ordinance but there was no RPA present on the lot at recordation. However, 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 conducted for this project's building permit application identified a perennial water body adjacent to the rear of the lot requiring that a 100 ft RPA buffer be established on the lot around the water body. This 100 ft RPA buffer encompasses all of the lot.

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;
3. The encroachment may not extend into the seaward 50 feet of the buffer area, and
4. The lot or parcel was created as a result of a legal process in conformity with the county's subdivision regulations.

In this case, it is necessary to encroach into the seaward 50 feet of the buffer in order to obtain a reasonable building area and therefore the exception request must be processed by the Chesapeake Bay Board (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 RPA. Performance Contracting submitted a WQIA for this project. The issue before the Board is the 6127 sqft RPA impact (clearing and grading) and creation of 2197 sqft of impervious cover in the RPA associated with the construction of the principal structure.

The WQIA proposes to mitigate for the impacts to the RPA by planting 6 native canopy trees, 12 native understory trees, and 18 native shrubs on the lot in 585 sqft of enhanced landscape beds on the lot in the RPA to help filter nonpoint source pollution.

The Board is to determine whether or not the proposed development is consistent with the spirit and intent of the Ordinance and make a finding based upon the following criteria, as outlined in Section 23-14(c) of the Ordinance:

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 recommends approval of the exception as the lot was created prior to the establishment of the RPA requirement. The house cannot be relocated on the lot to minimize the encroachment in the buffer. The project does not confer any special privileges to the applicant, and the exception is not based on self-imposed conditions. Staff recommends approval with the following conditions:

1. Full implementation of the landscape plan submitted with the WQIA shown on sheets 3 and 4 of the site plan.
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. 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. This exception request approval shall become null and void if construction has not begun by October 11, 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 commented that there was no alternative location for the house.

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

Mr. Lindsey made a motion the Board approve case CBE-06-062 with staff recommendations.

The motion was approved by a 4-0 vote.

3. CBE-06-066 Hallmark Builders/Michael and Patricia Collmeyer – 117 Ridge Crossing

Mr. Pat Menichino presented the following case:

Project Description: Mr. and Mrs. Collmeyer applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the construction of a single-family principal structure on the above referenced lot in Ford's Colony. The lot is 20,211 sqft or 0.464 acres in size.

The principal structure is proposed to create approximately 4354 sqft of impervious cover in the RPA consisting of the principal dwelling and portions of the concrete driveway and sidewalks. There will be a total disturbance of 6400 sqft in the RPA. Approximately 30% of the lot is to be cleared to allow for the construction of the dwelling.

Background: The lot was recorded in 1998 after the adoption of the Ordinance but there was no RPA present on the lot at recordation. However, 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 conducted for this project's building permit application identified a perennial water body adjacent to the rear of the lot requiring that a 100 ft RPA buffer be established on the lot around the water body. This 100 ft RPA buffer encompasses approximately 85% of the lot.

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;
3. The encroachment may not extend into the seaward 50 feet of the buffer area, and
4. The lot or parcel was created as a result of a legal process in conformity with the county's subdivision regulations.

In this case, it is necessary to encroach into the seaward 50 feet of the buffer in order to obtain a reasonable building area, and therefore, the exception request must be processed by the Chesapeake Bay 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 RPA. Hallmark Builders submitted a WQIA for this project. The issue before the Chesapeake Bay Board (Board) is the 6400 sqft RPA impact (clearing and grading) and creation of 4354 sqft of impervious cover in the RPA associated with the construction of the principal structure.

The WQIA proposes to mitigate for the impacts to the RPA by planting 11 native canopy trees, 22 native understory trees, and 33 native shrubs on the lot in the RPA to help filter nonpoint source pollution. The mitigation plan submitted with the WQIA shows a majority of the proposed plantings installed within existing natural areas that are already heavily forested. It may be necessary for the applicant and staff to develop an alternate RPA mitigation based on existing vegetation and field conditions located on this lot.

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 recommends approval of the exception as the lot was created prior to the establishment of the RPA requirement. The house cannot be relocated on the lot to minimize the encroachment in the buffer. The project does not confer any special privileges to the applicant, and the exception is not based on self-imposed conditions. Staff recommends approval with the following conditions:

1. Full implementation of the mitigation landscape plan submitted with the WQIA or if field conditions prevent the full implementation of the RPA mitigation plan, an alternate plan along with a contribution paid into a County approved environmental fund may substituted.
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. 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. This exception request approval shall become null and void if construction has not begun by October 11, 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 if there had been any discussion on an alternative mitigation plan.

Mr. Cook and Mr. Menichino referred to the notation on the submitted site plan and stated that the applicant would plant as much as possible on site and then make a contribution to an environmental fund for restoration of the buffer somewhere near the site.

Ms. Lytle, Assistant County Attorney, asked if the fund had been established.

Mr. Cook stated it had not.

Mr. Hughes opened the public hearing.

Mr. Lindsey asked Mr. Mike Carroll, Hallmark Builders, if the alternative mitigation plan was acceptable to the property owners.

Mr. Carroll stated it was.

Mr. Hughes asked if Mr. Carroll was aware of the letter from Mr. and Mrs. Cichaski, adjacent property owners at 113 Ridge Crossing, stating their concerns with runoff during and after construction.

Mr. Carroll stated he was not aware of the letter but had spoken with Mr. and Mrs. Cichaski, had given them his card, and was aware of their concerns. He added that he would use double rows of silt fence to control the runoff.

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

Mr. Lindsey stated the Board had no alternative because this was a recorded lot.

Mr. Gussman made a motion the Board approve case CBE-06-066 with staff recommendations.

The motion was approved by a 4-0 vote.

4. CBE-06-053 – Beatrice Gulbrandsen – 104 Dancy Place - continued from 9/13/06

Mr. Pat Menichino stated Mrs. Gulbrandsen was withdrawing the application because she received permission from the Kingsmill Community Services Association to attach the proposed structure to her principal dwelling.

All Board members and County staff agreed no discussion or decision was necessary.

Mr. Hughes closed the public hearing

5. CBV-06-012 APPEAL – Robert and Bambi Walters – 5112 Shoreline Court – continued from 9/13/06

Mr. Pat Menichino presented the following case:

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

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.

Board Action: Staff requests the Board in considering this appeal; follow the guidance provided within the Ordinance.

Section 23-17(b) Appeals;

(a) "An owner of property subject to an administrative decision, order, or requirement under this chapter may appeal by submitting a written application for review to the board no later than 30 days from the rendering of

such decision, order or requirement. The board shall hear the appeal as soon as practical after receipt of the application" and,

(b) "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;
3. The appellant acquired the property in good faith and the hardship is not self-inflicted.

Staff Recommendations: Mr. and Mrs. Walters have requested an appeal of (4) specific items to the Board. Section 23-17 of the Ordinance clearly limits the scope of the appeal to "administrative decisions, orders, or requirements under this chapter".

Staff asserts that appellants item # 1; "*Rapanos decision*" and item # 3 "*regulatory status of the lake has not changed since 1990*" are not eligible for appeal to this Board, because they are not the result of an administrative decision, order, or requirement under this chapter.

Staff asserts that appellants' item #2, "unauthorized encroachments" and #2 "requirement to submit a buffer modification plan" can be appealed to the Board.

Staff requests that the Board act upon only appellants' item # 2.

Staff believes that encroachments into areas designated to be preserved on the approved development plan for lot 58 have in fact occurred and contends that the Manager is clearly authorized under provisions of the Ordinance to require an RPA Buffer Modification Plan, for the removal of vegetation within the buffer.

Staff asserts that the appellants have not demonstrated that a hardship exists, or if one exists, it is "not generally shared by other properties in the vicinity". The appellants acquired the property in good faith and were aware of the RPA buffer located on lot 58 at the time of purchase. Staff believes that any hardship claimed by the appellants would be self-inflicted. Therefore, Staff requests that the Board deny their requests.

Following the September 13, 2006 Board meeting, Staff met with the appellants, and approved the removal of poison ivy, sumac and oak, from within the fenced area of the rear yard. Since a plan for the removal has been approved by the Division, the appellant should now formally withdraw their appeal of this item from the Board's consideration.

Mr. Menichino also referred to the October 11, 2006 letter, from Mr. Cook to the appellants that stated; based on observations of the plant material installed to date and the description of additional proposed landscaping, staff is satisfied that the violation relating to the "revised clearing limit" cited on August 14, 2006, has been resolved. Therefore, staff is rescinding that aspect of the enforcement action.

Mr. Hughes asked what issues were left to resolve this case.

Mr. Menichino stated staff was still waiting for the appellants to accept the requirements on the mitigation agreement for the RPA encroachment violation. He further stated Mr. and Mrs. Walters would also have to withdraw the remaining appeals.

Mr. Waltrip asked if recent changes in the water levels of Lake Powell had an impact on the RPA designation.

Mr. Menichino stated the area is still considered wetlands.

Mrs. Walters approached the Board and requested a continuance of this case until next month to allow her time to review the agreements.

Mr. Lindsey stated he was in favor of a continuance if it would help to resolve the issues.

Mr. Hughes made a motion to continue the public hearing for case CBV-06-012 to November 8, 2006.

The motion was approved by a 4-0 vote.

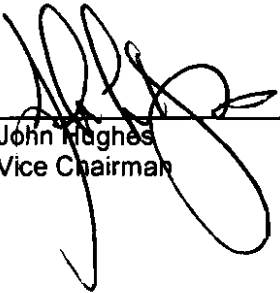
E. MATTERS OF SPECIAL PRIVILEGE – None

Mr. Lindsey reminded the Board members that the election of officers would be held at next months meeting.

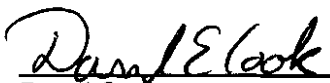
The Board members and staff discussed the emergency permit process and the impact recent storm events had on water quality.

G. ADJOURNMENT

The meeting adjourned at 7:35 PM.



John Hughes
Vice Chairman



Darryl Cook
Secretary