

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD  
MINUTES  
MARCH 14, 2007 - 7:00 PM**

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

**ABSENT**  
William Apperson

**OTHERS PRESENT**

**B. MINUTES** – The February 14, 2007 minutes were approved as presented.

**C. PUBLIC HEARINGS**

**1. CBE-07-005 - Ann and Garland Gray – 202 The Maine**

Mr. Pat Menichino presented the following case:

**Project Description and Summary**

Ann and Garland Gray, 202 The Maine, applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with construction of a 250 sqft sand set brick paver patio, reconstruction of a segmental block retaining wall with steps, and construction of a kayak rack behind the single family principal structure on their lot in First Colony. The lot is 33,500 sqft or 0.766 acres in size.

The lot was recorded prior to the adoption of the Ordinance and there was no RPA present on the lot at the time of recordation. On August 6, 1990, the Ordinance went into effect establishing 100-foot RPA buffers around all water bodies with perennial flow. The James River is located at the rear of this property; therefore, there is a 100-foot RPA buffer landward of the river that encompasses about 30% of the lot.

The *Resource Protection Area: Buffer Area Encroachments* guidance document adopted by the state Division of Chesapeake Bay Local Assistance on September 16, 2002, states on page 5 that "items not considered part of a principal structure include pools, gazebos, patios, free-standing decks, garages, or storage sheds, etc." Therefore, the proposed items could not be approved administratively by the Manager and must be approved by the Board.

The issue for the Chesapeake Bay Board's consideration is the placement of 250 sqft of brick paver patio, a segmental block retaining wall, and a kayak rack in the RPA.

The existing segmental block retaining wall was installed years prior to Gray's ownership of the property. Recent storm events severely damaged the structural integrity of the wall and for stability reasons; the applicant is proposing to reconstruct the retaining wall slightly down slope from its present location.

The proposed sand set brick paver patio would enlarge an existing patio under an existing deck.

Other items for the Board's consideration are a kayak rack and a small quantity of riprap (< 100 sqft) to be placed as a shoreline structure maintenance item in an area of the upland shoreline.

**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 WQIA proposes to mitigate for the impacts to the RPA by planting 2 native trees and 4 native understory trees and 10 native shrubs to the rear of the house to help filter nonpoint source pollution. This mitigation plan exceeds typical mitigation requirements for similar impervious cover.

### **Board Action**

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**

Both the Ordinance and staff consider retaining walls as an accessory structure. Unfortunately, staff cannot support approval of this appeal as it involves impervious, accessory structures and use in the RPA. The Board has approved the construction of brick paver patios and segmental block retaining walls in the past.

Staff is not opposed to the Board granting the exception because the applicant contacted the Environmental Division prior to initiating any onsite work activity, an existing segmental block wall is presently in an advanced stage of failure, the proposed sand set brick paver patio will be constructed under an existing deck and the applicant has submitted an RPA mitigation plan that adequately addresses the proposed RPA impacts.

After reviewing this case, if the Board considers approval of this exception, staff recommends that the following conditions be included in the Board action:

1. Full implementation of the mitigation landscape plan submitted with the WQIA.
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. A continuous mulch planting bed will be created in the area above the proposed segmental block retaining wall where the proposed group mitigation plantings will be installed. A 3 to 4 inch deep mulch bed will be installed elsewhere around any individual proposed mitigation plantings.
4. 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.
5. This exception request approval shall become null and void if construction has not begun by March 14, 2008.

Mr. Lindsey opened the public hearing.

Mr. Lindsey asked if the entire proposed patio would be contained under the existing deck.

A. Mr. Garland Gray, property owner, stated a building permit might be obtained to expand the deck but in either case, the patio area would remain under the existing or expanded deck.

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

All Board members agreed the current condition of the wall and patio needs improvement.

Mr. Hughes made a motion to grant the exception for case CBE-07-005 with staff recommendations.

The motion was approved by a 4-0 vote.

## **2. CBE-06-071 – Williamsburg Environmental Group/Huckaby - 3 West Circle**

Mr. Pat Menichino presented the following case:

### **Project Description and Summary**

Williamsburg Environmental Group on behalf of Mr. Frank Huckaby, applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the filling and grading of approximately 10,890 sqft in the RPA buffer and for the construction of approximately 110 linear feet of retaining wall within the seaward 50 foot RPA buffer, on the above referenced lot, located in First Colony.

This request is being presented to the Chesapeake Bay Board (Board) with substantial revisions to the original application presented on November 8, 2006. These revisions were made to reduce overall impacts on the RPA buffer and to address the environmental concerns raised by the Board, members of the public and staff.

The lot was recorded in the 1970s prior to the adoption of the Ordinance; therefore, there was no RPA present on the lot at recordation. However, on August 6, 1990, the Ordinance went into effect establishing 100-foot RPA buffers around all water bodies with perennial flow. Under the provisions of the Ordinance in effect at that time, perennial water bodies were identified as a solid blue-line stream on the USGS 7-1/2 minute topographic quadrangle maps (scale 1:24000). The James River and the adjacent, connected wetlands on this property were identified as perennial water bodies on the quad map and a 100-foot RPA buffer was placed on the lot. This buffer encompasses about 99% 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 prior to August 6, 1990, 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.

The *Resource Protection Area: Buffer Area Encroachments* guidance document adopted by the state Division of Chesapeake Bay Local Assistance on September 16, 2002, states on page 5 that "items not considered part of a principal structure include pools, gazebos, patios, free-standing decks, garages, or storage sheds, etc."

The proposed retaining wall could not be approved administratively and the owners have chosen to request an exception to the Ordinance from the Chesapeake Bay Board. The owners are also requesting an exception for the proposed fill and grading required for a future single-family residence.

The issues for the Board's consideration are the placement of 110 linear feet of retaining wall and the grading and filling of 10,890 sqft within the 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 applicant has submitted a WQIA for this project. The mitigation plan contained within the WQIA offsets the proposed impervious cover impacts of 113 sqft and the 10,890 sqft of impact to the RPA buffer.

The WQIA proposes to mitigate for the impacts to the RPA by planting 53 native canopy trees, 106 understory trees, and 159 native shrubs in the RPA. This vegetation will be located around the lot and adjacent to the retaining wall to help filter nonpoint source pollution. This mitigation plan exceeds the typical mitigation requirements by planting one canopy tree, two sub canopy trees, and three shrubs for each 400 sqft of impact.

The applicant 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) 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**

In the past, staff has not recommended approval or creation of an impervious, accessory structures or uses in the RPA. Both the Ordinance and staff consider the retaining wall as an accessory structure. Staff has not administratively allowed the creation of accessory structures in the RPA. However, the Board has approved the construction of retaining walls within the buffer in the past and in this case, the retaining wall will reduce clearing and buffer impacts, and save some of the existing vegetation.

It is staff's opinion that the applicant has submitted a WQIA and mitigation plan that exceeds other plans approved by the Board. It addresses the water quality impacts associated with the proposed retaining wall and fill.

Staff recommends that the Board grant the applicant's exception request for the following reasons:

1. The applicant and his consultant have worked with staff to reduce the proposed RPA buffer impacts to a level that is consistent with other residential exceptions previously granted by the Board.
2. The applicant and his consultant have revised the RPA mitigation plan and increased the quantity of proposed native plantings. These proposed plantings now include 53 canopy trees, 106 understory trees, and 159 shrubs designed to restore the buffer and to enhance the water quality function of the buffer.
3. The proposed retaining wall will actually reduce the amount of grading required within the RPA buffer resulting in less buffer impacts.

If approved, the exception should be conditioned on the following:

1. An onsite preconstruction meeting will be held with the County prior to any land disturbance activities.
2. The applicant, contractor, or landowner shall provide project monitoring with reports submitted to the County on a weekly basis to insure compliance with all environmental regulations, the approved plans and specifications, and other County requirements during the construction phase of this project.
3. Full implementation of the landscape plan submitted with the WQIA. Implementation will be guaranteed through a surety satisfactory to the Division and the County Attorney.
4. The applicant shall obtain all necessary permits and approvals from other agencies that have regulatory authority over the proposed construction, including a building permit.
5. This exception request approval shall become null and void if construction has not begun by March 14, 2008.

Mr. Waltrip stated the proposal had obviously been scaled back from the one presented to the Board in November 2006.

Mr. Lindsey opened the public hearing.

**A.** Chuck Roadley, Williamsburg Environmental Group, representing the applicant stated he concurred with Staff's report and would answer any questions from the Board or public, regarding the application.

**B.** Darryl Rickman, 4 West Circle, spoke in opposition to the case because of the impact to the RPA, the detriment to water quality and the possibility that a single family home could be constructed in the upland or mainland portion of the lot, outside of the RPA. He presented the Board with a list of concerns, photographs, and drawings to support his arguments (~~copies attached~~). *to Copies in case file*

**C.** Noel Hume, 2 West Circle, spoke in opposition to the case because of the impact on the wetlands (specifically from the bridge) and in his opinion, the applicants lack of consideration for the neighbor's concerns.

Mr. Hughes stated the bridge was not under consideration by this Board.

**A.** Chuck Roadley stated that although the bridge was not under construction by the Board the applicant had reduced the surface elevation to 8 feet.

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

Mr. Gussman stated he did not feel the Board should grant this exception based on the following:

1. If there is a buildable area outside of the RPA, then the exception request is not the minimum necessary to afford relief.
2. Because the Board would not allow other property owners to add this much fill in the RPA, granting the exception would confer special privileges to the applicant.
3. The magnitude of this project will undoubtedly have impacts on water quality during and following construction.
4. Because a smaller home could be built, the circumstances are self-created and
5. Because the area is surrounded by the RPA buffer, future impacts and degradation of water quality would be unavoidable.

Mr. Hughes and Mr. Waltrip also stated their concern about the environmental impacts for a project of this magnitude.

Mr. Gussman made a motion to deny the exception for case CBE-06-071 because the proposal did not meet the criteria, as outlined in Section 23-14(c) of the Ordinance.

The motion to deny the exception was approved by a 4-0 vote.

### **3. CBV-06-007 APPEAL – Peter Paluzsay – 128 Shellbank Drive (continued from 2/14)**

Mr. Pat Menichino presented the following case:

Mr. Peter L. Paluzsay, property owner, requested an appeal to James City County's Chesapeake Bay Board (Board) on August 2, 2006. The appeal is requested that the Board overturn a County Administrative Order dated May 18, 2006, requiring removal of an unauthorized retaining wall and concrete rubble installed within the Resource Protection Area (RPA) buffer.

#### **Description of 128 Shellbank Drive.**

128 Shellbank Drive is a 3.75-acre parcel of land situated with 180 linear feet of frontage on the James River. A 100-foot RPA buffer extends landward into the property from the shoreline.

A single-family residence exists on the property; set back from the river and not within the buffer as defined above. The lot was recorded prior to the adoption of the Chesapeake Bay Ordinance (Ordinance).

#### **The Chesapeake Bay Preservation Ordinance**

The Ordinance, adopted by the James City County Board of Supervisors on August 6, 1990, titled Ordinance Number 183 of the County Code authorizes the County to regulate activities within RPA components. As amended this ordinance is now titled: Chapter 23, Chesapeake Bay Preservation.

#### **Summary of Facts**

Mr. Paluzsay is the owner of the property, commonly known as 128 Shellbank Drive, and has maintained continuous possession and control of the property since 1971.

On November 3, 2000, Mr. Paluzsay was issued a Chesapeake Bay Notice of Violation (NOV) resulting from unauthorized grading activity within the RPA buffer located at 128 Shellbank Drive. This resulted from exceeding the limits of work associated with a wetlands permit issued to repair a shoreline erosion problem.

In 2003, Mr. Paluzsay hired Stuart Usher, Landscape Solutions, to install approximately 180 linear feet of retaining wall within the 50-foot RPA buffer adjacent to the James River to address storm related erosion. Prior authorization for the construction of the retaining walls within the RPA buffer was not obtained from the Environmental Division as required by the Ordinance.

In 2006, Mr. Paluzsay authorized the dumping and placement of concrete rubble within the RPA buffer resulting in additional unauthorized encroachments in the buffer and within the James River tidal zone.

### **Chronology of Important Events**

On May 12, 2006, Environmental Division staff visited 128 Shellbank Drive and determined that retaining walls, a staircase and concrete rubble had been installed within the RPA buffer. Staff photographed the property and the structures within the RPA. Staff later determined that authorization for the installation of the above-described structures was not obtained from the County as is required by the Ordinance.

On May 18, 2006, Mr. Paluzsay was sent a NOV by staff. The NOV describes and defines the violation and identifies the steps required to begin to resolve to violation. The NOV also required the removal of the unauthorized structures from within the RPA buffer.

On May 24, 2006, Mr. Paluzsay sent a letter to the Environmental Director responding to the NOV. In that letter, Mr. Paluzsay stated "after the hurricane we hired a contractor to replace the wooden retaining wall that was washed away by the storm". Mr. Paluzsay also stated, "The work being condemned by your office was performed by a licensed contractor" (Stuart Usher of Landscape Solutions) "who as far as I know acted within all applicable lawful and legitimate laws and regulations of this Commonwealth and the County."

On July 27, 2006, staff met onsite with Mr. Jason R. Barney of MSA P.C., an environmental consultant representing Mr. Paluzsay, to discuss the violation, the NOV, and the administrative order.

On August 9, 2006, Mr. Barney on behalf of Mr. Paluzsay filed an official appeal to the Chesapeake Bay Board.

On August 9, 2006, staff met again onsite with Mr. Barney of MSA P.C. to discuss the violation, the appeal process, and the steps necessary to resolve the matter.

On November 27, 2006, Mr. Paluzsay sent the Environmental Director a letter requesting "additional time of 60 days to make a submittal for your approval of what we propose to do to resolve the existing issues". The letter also stated, "We filed a formal appeal hoping that it would gain us sufficient time to convince Stuart Usher of Landscape Solutions that he created a serious problem by his irresponsible and negligent conduct and that he needed to do at James City County all that was necessary to alleviate the violations....."

On November 30, 2006, staff sent Mr. Paluzsay a letter indicating the conditions and requirements under which a 60-day extension would be granted by the County. The letter required that Mr. Paluzsay sign and return the letter to the Division. Mr. Paluzsay failed to sign and return the letter to the Division as required.

### **Response to the August 2, 2006, appeal of the administrative order dated: May 18, 2006**

Staff has reviewed the August 2, 2006, appeal filed by Mr. Paluzsay and offers the following response:

On August 9, 2000, Mr. Paluzsay, 128 Shellbank Drive, applied for and was granted a permit from the James City County Wetlands Board to allow for the construction of a 157 linear feet of new timber bulkhead and 70 linear feet of riprap revetment along the James River shoreline. During the construction process, it was determined that 2,350 sqft of unauthorized grading activity occurred on a slope within the RPA buffer and a NOV was issued to Mr. Paluzsay on November 3, 2000. Following the issuance of the NOV, numerous meetings and correspondence between the County and Mr. Paluzsay resulted in an agreement intended to resolve the Chesapeake Bay Ordinance violation. That agreement included a requirement that Mr. Paluzsay restore the 2,350 sqft of RPA buffer with native trees, shrubs and ground cover.

Given this history of previous enforcement actions, staff concluded that Mr. Paluzsay has a thorough knowledge and understanding of the County's Chesapeake Bay and Wetlands Ordinances, and of the County's permit process and requirements. Yet in 2003, Mr. Paluzsay hired Mr. Usher and authorized him to perform substantial work within the RPA buffer without the permits and approvals required by the County.

Therefore, staff believes that the May 18, 2006, administrative order requiring the removal of the unauthorized retaining walls and concrete rubble from within the RPA buffer located at 128 Shellbank Drive is consistent with the intent of the Ordinance and is warranted.

### **Board Action**

Staff requests that the Board in considering this appeal, follow the guidance provided within the Ordinance. This guidance, found in 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. Further, 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**

Mr. Paluzsay's appeal requests after-the-fact approval to allow an existing retaining wall to remain in place. He is also requesting Board approval to modify the existing wall and install 60 linear feet of new proposed retaining wall within the RPA buffer. Both the Ordinance and staff consider retaining walls as an accessory structure. Staff has not in the past, and currently, cannot administratively approve the creation of accessory structures in the RPA. However, the Board has approved the construction of decorative block retaining walls in the past. The retaining wall construction plans submitted with the appeal appear to be consistent with other plans approved by the Board. Staff is not opposed to either the installation of this new section of retaining wall or the existing wall remaining in place.

A Chesapeake Bay Restoration Plan has been submitted as part of this appeal and proposes restoration plantings as mitigation for the proposed RPA encroachments. The plan as submitted proposes the installation of 45 Wax Myrtle, and 30 Inkberry shrubs, 3 Fringe Trees and 2 Sweet Bay Magnolias as mitigation and restoration. Staff believes that this revised plan is adequate and meets the Ordinance requirements for both quantity and species of the proposed plantings.

In addition, Mr. Paluzsay has through his attorney agreed to execute a civil charge agreement with the County and to pay a civil charge of \$2,000.00 to resolve the Ordinance violation.

Should the Board act to grant the appeal (staff would not be opposed), staff would respectfully request that the following recommendations be incorporated into the Board's action:

1. The broken concrete rubble placed within the buffer and inter-tidal zone must be removed and disposed of in a method that is acceptable to the County.
2. Approximately 170 linear feet of existing retaining wall already built, must be approved by the County's Code Compliance Division in order for it to remain in place.
3. Any action by this Board, granting approval for the installation of 60 linear feet of new retaining wall as shown on the plans is subject to a County review, approval, and permit issued by the County's Code Compliance Division.
4. Authorization from adjacent property owners must be obtained by the appellant prior to any work on adjacent properties. Any offsite work may be subject to additional County permits and approvals.
5. All areas within the RPA buffer proposed for grass must be established with only a native grass seed mix. Any future alteration or maintenance of vegetation within the RPA buffer will require a RPA buffer modification plan and written approval from the Environmental Division.
6. An RPA Restoration Agreement, with surety, in the amount of \$3,500.00 must be executed by the appellant to guarantee the implementation of the restoration planting plan.
7. The Appellant agrees to enter into a civil charge agreement and pay a civil charge of \$2,000.00 to the County. This civil charge agreement must be approved by the James City County Board of Supervisors.

Mr. Lindsey stated many emergency permits were readily granted for Hurricane Isabel damage and therefore found fault that this work was done without a permit.

Mr. Waltrip stated that regardless the damage was done by the hurricane and subsequent storms.

As the public hearing was already open, Mr. Lindsey asked if anyone wished to speak on the case.

A. Marina Phillips, Kaufman & Canoles, Attorney for the applicant, introduced James Brawley, LandMark Design and Danny Winall, Waters Edge Construction and stated they would answer any questions from the Board. She also stated that Mr. Paluzsay agreed to the conditions of the Restoration Agreement as outlined in the staff report and agreements had already been made with adjacent property owners.

Mr. Hughes stated that it appeared all of the County's requirements for the appeal were being met. He asked how long the surety for the Restoration Agreement would be held to guarantee the plantings.

Mr. Menichino stated the Board could require that it be held for one growing season or one year from completion of the plantings.

Mr. Hughes made a motion to grant the appeal for case CBV-06-007 with staff's recommendations and a condition that the surety be held for one year from planting.

The motion was approved by a 4-0 vote.

**D. BOARD CONSIDERATIONS - none**


**E. MATTERS OF SPECIAL PRIVILEGE**

There was a brief discussion regarding an article posted in the March 14, Virginia Gazette regarding the RPA and the restrictions it imposed on James City County residents. Darryl Cook and Leo Rogers, County Attorney, asked if one of the Board members would participate in a discussion regarding the County's rebuttal to the many fallacies in this article.

All Board members agreed that the Chairman, Mr. Apperson, would be the best representative for the Board.

**F. ADJOURNMENT**

The meeting adjourned at 8:33 PM.

  
Henry C. Lindsey  
Vice Chairman

  
Darryl Cook  
Secretary