

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD  
MINUTES  
March 11, 2009 – 7:00PM**

**A. ROLL CALL**

**ABSENT**

William Apperson – Chair  
Larry Waltrip  
David Gussman  
John Hughes  
Terence Elkins

**OTHERS PRESENT**

County Staff

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

**B. MINUTES**

The February 11, 2009 Board Meeting minutes were approved as written.

**C. PUBLIC HEARINGS**

**1. CBE-09-061 – Kittelberger/Williamsburg Landscape – 1812 Cypress Isle**

Pat Menichino presented the following case:

**Project Summary and Description**

Colgate & Larry Kittelberger, 1812 Cypress Isle, Governor's Land, Williamsburg, VA, applied for an exception to the Chesapeake Bay Preservation Ordinance (Ordinance) for Resource Protection Area (RPA) impacts associated with the construction of two (2) brick paver walkways totaling approximately 195 linear feet. The brick pavers will be set in gravel and a permeable base, resulting in 933 sqft of impervious area. A mitigation plan has been provided along with the exception request for your review.

Staff offers the following guidance to the Board:

1. A previous administrative exception was granted to allow for sightline clearing in the two areas shown on the plan. No additional clearing or removal of vegetation is required for the installation of the (2) brick paver walkways. Mitigation plantings shown on the plan, adjacent to the walkways were required to offset for the sightline clearing that previously occurred. The mitigation for the approximate 950 sqft of impervious walkways is shown on left and right sides of the plan.
2. Brick paver walkways are considered accessory structures and according to the Ordinance are not eligible for administrative approval. Therefore, this exception request for the construction of approximately 195 linear feet of walkways within the 100 RPA buffer must be reviewed by the Board.
3. Staff evaluated and determined the proposed adverse water quality impacts caused by the proposed walkways to be minimal.

**Brief History**

The lot was recorded after the 1990 adoption of the Ordinance. The lot is located adjacent to the James River that requires a 100-foot RPA buffer. The lot is 1.82 acres in size and the RPA buffer encompasses approximately 55% of the lot or 1.00 acres.

### **Water Quality Impact Assessment (WQIA)**

Under Section 23-14 of the amended Ordinance, a WQIA must be submitted for any proposed land disturbing activity resulting from development or redevelopment within the RPA. The applicant has submitted a WQIA for this project that proposes to mitigate for the impacts to the RPA by planting (12) native understory trees and (9) native shrubs within the RPA buffer. The mitigation plan exceeds the typical RPA mitigation requirements of the County.

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 criteria outlined in Section 23-14(c) of the Ordinance:

### **Recommendations**

Staff recommends approval of the exception request for the proposed brick paver walkways with the following conditions:

1. Full implementation of the proposed mitigation plan shall 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 form of surety satisfactory to the County Attorney.
2. The size of the native trees shall be 1"-1 ½" caliper, 6"-7' tall and shrubs planted shall be a minimum of 3-5 gallon container size (18" to 36" tall). All vegetation shall be native species approved by the Environmental Division.
3. The brick paver walkways shall not be installed upon the sand beach area or within the area identified on the plan as shoreline maintenance easement. The applicant shall obtain additional approvals of all other regulatory agencies that may have jurisdiction, including a James City County Building Permit.
4. This approval shall become null and void if construction has not begun by March 11, 2010. An extension can be requested in writing at least 2 weeks prior to the expiration date

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. If the Board grants the exception, the proposed mitigation plan is in accordance with the standard mitigation requirements for impervious surfaces.

Mr. Hughes asked for and Mr. Menichino provided clarification of the 50 and 100-foot buffer demarcations.

Mr. Apperson opened the public hearing.

**A.** Aaron Williams, Williams Landscape and Design, described the permeable pavers that would be used for construction of the walkways.

Mr. Waltrip stated the demonstrations he had seen on these pavers were impressive for reducing run off.

Mr. Elkins asked if these pavers required maintenance.

**A.** Aaron Williams stated the maintenance was minimal.

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

Mr. Hughes stated it was a very good plan and the access to the water was done in a very responsible manner.

Mr. Elkins stated he was in agreement with staff's approval of the plan.

Mr. Hughes made a motion to adopt the resolution granting the Chesapeake Bay Exception for case number CBE-09-061 on tax parcel #4321400010.

The motion was approved by a 5-0 vote.

## **2. CBV-09-006 – APPEAL- Drummond – 165 Indian Circle cont from 12/10/08 and 2/11/09**

Pat Menichino presented the following memo to the Board:

Mr. George F. Drummond, 165 Indian Circle, filed an appeal to James City County's Chesapeake Bay Board on October 28, 2008. Mr. Drummond was appealing a Notice of Violation and an administrative order issued by the County on October 21, 2008. The Notice of Violation ordered the removal of unauthorized fill, concrete driveway, and retaining wall installed within the Resource Protection Area (RPA) buffer located on his property. Staff reviewed the unauthorized encroachments and estimated the following RPA impacts: concrete driveway - 500 sqft, fill - 800 sqft, and retaining wall - 55 linear feet.

On February 11, 2009, the Board was presented case CBV-09-006, an appeal by Mr. George F. Drummond requesting relief from the administrative order issued by the County. Mr. Lambert B. Logan from Technical Services Group on behalf of Mr. Drummond requested and the Board granted a deferral of the case until March 11, 2009.

Staff met with Mr. Drummond and his consultant onsite to review the existing conditions and encroachments. Following that meeting a proposed mitigation plan was developed and submitted to the Environmental Division (Division) on February 27, 2009 for consideration by the Board on March 11, 2009.

Staff reviewed the mitigation proposal and offered the following information to the Board for consideration:

1. The original administrative exception granted by the Division allowed up to 400 sqft of new concrete driveway pad to be installed to service the new attached garage. This exception also required the removal of approximately 175 sqft of existing concrete drive.
2. The new mitigation plan offers to remove 250 sqft of existing concrete driveway now shown and identified as "Area 1 – Concrete Demo". This is the same area identified in the original exception proposal as 175 sqft. The net result will be 75 sqft of additional concrete removed. Staff originally estimated that approximately 500 sqft of unauthorized concrete pad was installed so there would still be a net increase of 425 sqft of unauthorized concrete remaining.
3. A second area shown and identified on the new mitigation plan as "Area 2 – Concrete Demo 215 SF" is not presently proposed for removal. If "Area 2" were to be removed a further reduction in unauthorized impervious area would result in a minimal net increase of 210 sqft overall (425 – 215 = 210).
4. The original exception required the installation of a 100 sqft bio-retention/rain garden planted with native plants and the installation of (6) native canopy trees, (12) native understory trees and (18) native shrubs within the RPA buffer to offset for the water quality impacts generated by the authorized impervious areas. The new mitigation plan proposes an increase of onsite bio-retention/rain gardens to offset any adverse water quality impact from additional impervious areas not previously treated. Approximately 930 sqft of bio-retention/rain gardens are now proposed vs. 100 sqft originally required, resulting in a net increase of 830 sqft.
5. The 55 linear feet of unauthorized retaining wall is proposed to remain in place. It will be incorporated into a bio-retention facility shown and identified as "BIO AREA 2" on the new mitigation plan.
6. The approximate 800 sqft of unauthorized fill is proposed to remain in place.
7. The increase in bio-retention areas (830 sqft) if properly installed, will have a beneficial effect on water quality on this property.

Section 23-17(b) Appeals; states: 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 of 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.

Should the board vote to grant the appeal, staff offered the following recommendations and guidance for the Board's consideration.

1. The linear nature of bio-retention "Area 1" requires an increase in the number of native plantings for adequate vegetative absorption. The number of plants required for bio-retention areas should equal one native plant for each 10-20 sqft of bio-retention area. The size of plant material should be 3-5 gallon container size shrubs and trees 6-7 feet in height.
2. The removal of the concrete pad identified as "Area 2 – Concrete Demo- 215 SF" should be required as part of the proposed mitigation plan. A layer of 4" deep gravel may be installed in lieu of this concrete pad.
3. A revised "Mitigation & Restoration Plan, for 165 Indian Circle", incorporating the above changes must be submitted to the Division for approval within 30 days of Board approval.
4. A Chesapeake Bay Restoration Agreement must be executed, along with surety in the amount of \$4,000.00 submitted to the County in a form acceptable to the County Attorney, to guarantee the full implementation of the "Mitigation & Restoration Plan for 165 Indian Circle".

Mr. Gussman asked for clarification on the location of the original 175-sqft pad to be removed and the location of the approved 400 sqft of concrete.

Mr. Menichino pointed to an area on the right side of the displayed site plan and stated staff had estimated this concrete pad to be 175 sqft but the applicant described it as 250 sqft and agreed to remove it in the new plan. He also pointed to the large concrete area by the garage and stated the applicant had installed approximately 500 sqft more than the approved 400 sqft. To clarify, he displayed a site plan that showed the excess concrete and the retaining wall.

Mr. Elkins asked if the retaining wall would have been needed if the original plan had been followed.

Mr. Menichino stated it was staff's opinion the wall would not have been needed with the approved 400 sqft. He stated the proposal the applicant was now offering was for removal of only the small 250-sqft pad and additional mitigation in bio-retention areas to offset the remaining impervious areas.

Mr. Waltrip stated he believed the bio-retention ponds would work well for this project.

**A.** George Drummond, applicant, stated he requested the deferral at the first meeting because he had not been aware of the contents of the memorandum to the Board that he felt attacked his character and was biased against him. He stated he had always been trying to follow the required procedures. He then presented the following chronological history of events to the Board:

- March 2004 – Prior to purchase of home, visited Code Compliance for requirements to build a garage and driveway.
- May 2004 – Closed on purchase of home.
- September 2004 – Obtained first set of plans and material list from Home Depot.
- October 2004 – Called Miss Utility for inspection prior to excavation.
- April 2005 – Visited Code Compliance to obtain a permit for the driveway and was informed a permit and drawings were not required. He was advised to check with the Zoning Department. They stated he could build up to property line.
- May 2005 – Started construction of driveway.
- October 2005 – Driveway was completed.
- August 2006 – Called Miss Utility to re-inspect property prior to excavation.
- October 2005 – Visited Code Compliance to obtain a building permit for patio enclosure and garage and was required to order a soil test for garage and patio enclosure prior to issuance of permit.
- November 2005 – Applied for building permit and was advised the Environmental Department would have to inspect the property. Received an ok on permit for the patio but was advised a permit for the garage would have to be approved by Chesapeake Bay Board at a public hearing. Filed an application for and paid hearing fee.
- December 2006 – Inspector from Environmental Department came out to inspect the patio enclosure and stated if garage was attached to the house it would not have to be approved by the Chesapeake Bay Board. Because the house was built in 1974, approval for an attached garage could be handled in-house. I withdrew application to the Chesapeake Bay Board on advice from the Environmental Inspector.
- February 11, 2008 – Applied for a permit for garage. Plan was approved by Code Compliance, Zoning, and Environmental for a 1,624 sqft garage (28' X 58').

- Approximately February 15, 2008 – Voluntarily downsized garage to 960 sqft (24' X 40') due to appearance on lot after staking out corners.
- Prior to February 20, 2008 – Received call from Code compliance stating an issued existed from Environmental regarding by permit. I agreed to meet with Tom Coghill from Code Compliance and Scott Thomas and Patrick Menichino from Environmental.
- Approximately February 20, 2008 – Meeting was held. The issue was my existing driveway. Environmental stated they had not been aware of the driveway. I stated the driveway had been in existence for approximately 3 years and existed prior to the permit for the patio enclosure. Environmental was aware of it because they inspected the patio enclosure.
- After a heated discussion I was informed I would have to tear up the existing driveway, be issued a code violation and the approved permit for the garage would be revoked. To resolve the issue, under duress, I agreed to a mitigation plan to avoid future problems.
- February 21, 2008 – Signed agreement for mitigation and called Miss Utility for inspection.
- October 20, 2008 – Called for framing inspection. Inspector informed me I qualified for a final inspection of the garage but approval would have to come from Environmental prior to the final inspection. The inspector noticed the retention facility (retaining wall) and stated I needed a permit for construction unless the grade was 2 feet or less.
- He suggested I call Environmental to see if they would agree to evening out the grade with rip-rap because it had been done in other situations. I called Environmental and explained the situation to Mr. Menichino. He stated he could meet with me late in the afternoon. I gave him my cell number and asked that he call me prior to visiting the property due to my wife's illness.
- Within 1 ½ hours Mr. Menichino and Mr. Thomas came by to inspect the property without calling me to be present during the inspection.
- October 22, 2008 – Received a certified letter dated October 21, 2008 regarding code violations.

He stated the size of the area outside the garage was increased because he needed enough room to turn a vehicle around and he installed the retaining wall as the bio-retention facility to prevent erosion. He stated he had every intention of completing the mitigation but thought it did not have to be completed until 30 days after he received the certificate of occupancy (CO) on the garage. He also felt the \$4,000 surety requirement was excessive and asked the Board to remove this condition.

**B.** Lambert Logan, P.E. with Technical Services Group, stated he had prepared the proposed mitigation plan and it greatly increased the amount of impervious area being treated.

Mr. Waltrip asked if the Technical Services Group was involved when the initial mitigation plan was created or if Mr. Drummond made the decisions himself. He also asked about the change in square footage of the garage and driveway.

Mr. Gussman asked for clarification on staff's recommendation for plantings in the area identified as bio-retention area 1.

Mr. Menichino stated because of the linear nature of this bio-retention facility the proposed number of plantings was not sufficient to provide the necessary water quality therefore staff was requesting an increase in the number of plantings in this area.

**A.** Mr. Drummond stated he did not hire an engineer until after he received the Notice of Violation. He did not object to the additional plantings only to removal of the driveway turn around area. He displayed a copy of the original site plan and building permit and stated he wanted it on record that he received approval and a building permit for the larger garage on February 11, 2008. The size of the garage was then decreased by approximately 700 sqft and the driveway was increased by approximately 300 sqft not including the turn around.

Mr. Menichino advised the Board to consider that the violation being appealed was for the installation of excess concrete and a retaining wall not depicted on the site plan or corresponding administrative exception agreed to and signed by the applicant on February 21, 2008.

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

Mr. Elkins asked staff if the change in the size of the garage was significant.

Scott J Thomas, Environmental Director and Secretary to the Board, advised the Board that staff had reached an agreement with Mr. Drummond of February 21, 2008 to allow 400 sqft of unauthorized driveway to remain in place if he agreed to remove a shed, remove a 175 sqft section of concrete, and install a 10' X 10' bio-retention facility for mitigation. Only the shed has been removed and approximately 500 sqft of additional concrete and a retaining wall have been installed.

Mr. Gussman stated he felt the appeal should be granted with staff recommendations number 1- Additional plantings added to bio-retention, and number 3-Submittal of a revised "Mitigation & Restoration Plan within 30 days.

Mr. Hughes asked why the removal of the 250 sqft of concrete in area 1 was not in staff recommendations.

Mr. Menichino stated removal of this concrete was already in the applicant's proposal. If the Board wanted to specify removal of this concrete they should also specify installation of all the original plantings.

Mr. Elkins stated the original plan approved by staff and agreed to by the applicant offered a reasonable compromise between the desires of the applicant and the protection of the Chesapeake Bay. The applicant exceeded the provisions of this plan and therefore according to the Ordinance the hardship is self-inflicted and is shared by other property owners in the vicinity who might also encroach into the RPA for a similar purpose. He recommended granting the appeal only if all of staff's recommendations are included.

Mr. Apperson stated he agreed with Mr. Elkins comments and he supported staff's recommendations.

Mr. Hughes stated the extra concrete is already in place and the plan submitted by the applicant proposes more than the required treatment of this impervious area to offset any adverse impact to water quality. He suggested staff's recommendations be changed to require removal of the 250 sqft of concrete in area1.

Mr. Gussman made a motion to adopt the resolution granting the appeal for Chesapeake Board case number CBV-09-006 on Tax Parcel #5920200045 with the following conditions:

- The linear nature of bio-retention "Area 1" requires an increase in the number of native plantings for adequate vegetative absorption. The number of plants required for bio-retention areas should equal, 1 native plant for each 10-20 square feet of bio-retention area. The size of plant material should be shrubs 3-5 gallon container size and trees 6-7 feet in height.
- The removal of the concrete pad identified as "Area 1 – Concrete Demo- 250 SF" should be required as part of the proposed mitigation plan.
- Installation of mitigation plantings of 6 native canopy tree, 12 native understory trees, and 18 native shrubs specified and approved on February 21, 2008. The size of plant material should be shrubs 3-5 gallon container size and trees 6-7 feet in height.
- A revised "Mitigation & Restoration Plan, for 165 Indian Circle", incorporating all of the above conditions must be submitted to the Environmental Division for approval within 30 days of Board approval.

The motion was approved by a 3-2 vote.

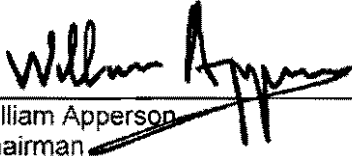
AYE: Gussman, Hughes, Waltrip (3). NAY: Elkins, Apperson (2)

#### **D. BOARD CONSIDERATIONS**

#### **E. MATTERS OF SPECIAL PRIVILEGE – none.**

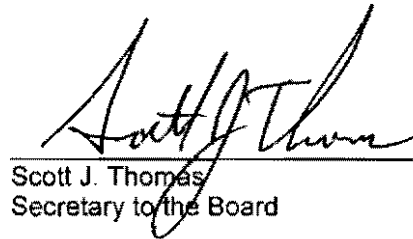
**F. ADJOURNMENT**

The meeting adjourned at 9:00 PM.



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William Apperson  
Chairman



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Scott J. Thomas  
Secretary to the Board