

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD**  
**MINUTES**  
**Wednesday August 14, 2013**

**A. ROLL CALL**

David Gussman - Chair  
John Hughes  
Larry Waltrip  
Roger Schmidt  
Louis Bott

**ABSENT**

William Apperson  
Charles Roadley

**OTHERS PRESENT**

County Staff (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 July 10, 2013 Board Meeting minutes were approved as written.

**The Chairman announced a change in the meeting agenda to hear Board Considerations prior to Public Hearings.**

**D. BOARD CONSIDERATIONS**

**1. CBV-13-010 – Napoleon – 1 Ensign Spence**

Michael Woolson, Senior Watershed Planner presented this appeal stating that Mr. Jay Napoleon, residing at 1 Ensign Spence, in the Hampton Key section of the Kingsmill subdivision, filed an appeal of the Chesapeake Bay Preservation Ordinance Notice of Violation requirements, dated June 12, 2013. The Notice of Violation required the removal of the retaining wall, as no records of approvals could be found in County records for the placement of this accessory structure within the resource protection area.

On or about May 20, 2013, staff became aware of the unauthorized retaining wall. Staff investigated and as a result documented a violation of the County's Chesapeake Bay Preservation Ordinance. Staff met with the Mr. Napoleon regarding this issue on June 19, 2013 to discuss the issue.

Historical Background Information

The house was built in 2003. At that time, there was no regulatory RPA on the property, therefore the house and all improvement at that time did not require any administrative or Chesapeake Bay Board approvals. This designation was changed after the revised Ordinance was adopted by the BOS (effective date of January 1, 2004). Notices were sent out to all property owners affected by the change in the Ordinance on January 4, 2007.

The Napoleon's had planned on building a retaining wall with the original home but it was not constructed at that time. Over time, lawn maintenance had become a problem due to the unstable nature of the slopes near the house.

Staff Guidance and Recommendations

Staff has reviewed the appeal and violation documents and offers the following information for the Board's consideration.

1. Mr. Napoleon is the current property owner.
2. The Chesapeake Bay Preservation Ordinance Sections 23-7 and 23-10 require that authorization and a plan of development be reviewed and approved by the County prior to activities within RPA's.
3. Mr. Napoleon is not challenging the following facts in this case:
  - a. No plan of development or RPA buffer modification plan was submitted to the County for review and approval as is required by the Ordinance.
  - b. That a violation of the County's Chesapeake Bay Ordinance resulted from the above referenced activities that occurred on the property.
4. 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 (property owner) unless it finds:

1. The hardship is not generally shared by other properties in the vicinity; and
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's guidance to the Board on deciding this matter is as follows:

1. The hardship is shared by other properties immediately adjacent to the appellant's property as well as numerous other properties within Kingsmill subdivision that have RPA components located on them.
2. The granting of the appeal in this case may not adversely affect the Chesapeake Bay, its tributaries and other properties in the vicinity, as a potential source of sediment (unstable steep slope) has been eliminated. Mr. Napoleon has plans to replant the area below the wall and existing tree line and allowing the area to return to a more natural state.
3. The appellant's contractor in fact caused the hardship through an unauthorized activity thereby the hardship is self-imposed.

Should this Board find in favor of staff, the Board should deny the appeal and require that the retaining wall be removed and the area restored.

Should the Board find in favor of the appellant, the Board should require that a retaining wall application come before them for review and discussion.

The appellant was requesting that this Board overturn Staff's Notice of Violation (NOV) requiring removal of the retaining wall from the RPA.

Mr. Woolson then displayed photographs of the property and the subject retaining wall.

Mr. Bott asked if a land disturbing permit was issued for the retaining wall.

Mr. Waltrip asked if the yard existed before the wall was installed and when the wall was installed.

Mr. Woolson stated no land disturbing permit was issued for the wall, it was installed in the past six months and the area was now stabilized. He reiterated that the yard was installed prior to the 2004 revision of the ordinance.

Mr. Hughes asked what would happen if the Board upheld Staff's NOV.

Mr. Woolson explained the NOV required removal of the wall returning the area to its previous condition. Therefore it would be re-sloped and the grass lawn would be re-established.

Mr. Hughes and Mr. Waltrip asked if the appellant could then apply to have the wall re-built.

Mr. Woolson stated that would be an unusual case.

Mr. Scott Thomas, Engineering and Resource Protection Director, explained that a condition of granting the appeal was that the owner submit an application for an after-the-fact approval to be considered by this Board at an advertised public hearing. In this case Mr. Napoleon has done this proactively, hoping the Board would grant his appeal. Should the Board deny this appeal, the NOV must be upheld requiring removal of the wall, replanting for stabilization and if necessary a civil charge and/or a restoration agreement. After all the requirements of the NOV are satisfied, Mr. Napoleon could then submit a new application for installation of a new retaining wall.

All Board members agreed that requiring removal of the wall would be more detrimental to the RPA buffer.

Mr. Bott asked if there was any way to uphold the NOV (deny the appeal) and not require removal of the wall.

Mr. Woolson stated this was not an option. If the appeal is denied the wall must be removed.

Lola Perkins, Assistant County Attorney, advised the chairman to ask the appellant if he wished to comment.

Mr. Gussman stated it was not a public hearing but asked Mr. Napoleon if he wished to address the Board at this time.

A. Mr. Napoleon stated the wall was installed because the area had a very steep slope and was difficult to maintain. The area above this wall has been replanted and is now stabilized. The area below will no longer be a maintained lawn and will remain natural with native plantings.

Mr. Hughes made a motion to adopt the resolution to grant the appeal of case CBV-13-010 at 1 Ensign Spence, Parcel ID 5021100053.

The motion to grant the appeal was approved by a 5-0 vote

## RESOLUTION

### GRANTING AN APPEAL ON JCC RE TAX PARCEL NO. 5021100053

WHEREAS, Mr. Jay Napoleon, (the "Applicant") has appeared before the Chesapeake Bay Board of James City County (the "Board") on August 14, 2013 appealing a Notice of Violation CBV-13-010 dated June 12, 2013, for an unapproved retaining wall in the Resource Protection Area (RPA), on property identified as JCC RE Tax Parcel No. 5021100053 and further identified as 1 Ensign Spence in the Hampton Key section of the Kingsmill subdivision (the "Property") and;

WHEREAS, the Board has listened to the arguments presented and has carefully considered all evidence entered into the record.

NOW, THEREFORE, following a public hearing, the Chesapeake Bay Board of James City County by a majority vote of its members FINDS that all of the following conditions have been met:

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.

THEREFORE, the Chesapeake Bay Board of James City County is granting the appeal filed by Mr. Jay Napoleon on June 23, 2013 and overturning the June 12, 2013 Notice of Violation issued by James City County Engineering and Resource Protection Division.

In granting this appeal, the following conditions are hereby imposed:

1. The owner is required to submit an exception request for the retaining wall to be considered by the Chesapeake Bay Board.

## C. PUBLIC HEARINGS

### 1. CBE-14-004: Napoleon – 1 Ensign Spence

Michael Woolson Senior Watershed Planner presented this case for an exception request submitted by Jay Napoleon, for encroachment into the Resource Protection Area (RPA) at 1 Ensign Spence in the Kingsmill subdivision, parcel No. 3220800015. The exception request was for approximately 120 square feet of retaining wall in the landward RPA Buffer. Mr. Woolson explained this exception request was a condition of the appeal previously granted by the Board. Staff recommended approval of this exception request with the conditions specified in the Resolution to Grant the Exception.

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

Mr. Schmidt made a motion to adopt the resolution granting the exception for Chesapeake Bay Board case CBE-14-004 at 1 Ensign Spence, Parcel No. 5021100053

The motion was approved by a 5-0 vote.

## RESOLUTION

### GRANTING AN EXCEPTION ON JCC RE TAX PARCEL NO. 5021100053

WHEREAS, Mr. Jay Napoleon, (the “Applicant”) has appeared before the Chesapeake Bay Board of James City County (the “Board”) on August 14, 2013 to request an exception to the use of the Resource Protection Area (the “RPA”) on a parcel of property identified as JCC RE Tax Parcel No. 5021100053 and further identified as 1 Ensign Spence in the Hampton Key section of the Kingsmill subdivision (the “Property”) as set forth in the application CBE-14-004 for a retaining wall; and

WHEREAS, the Board has listened to the arguments presented and has carefully considered all evidence entered into the record.

NOW, THEREFORE, following a public hearing, the Chesapeake Bay Board of James City County by a majority vote of its members FINDS that:

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 Chapter 23, Chesapeake Bay Preservation, of the James City County Code, to other property owners similarly situated in the vicinity.
3. The exception request will be in harmony with the purpose and intent of Chapter 23 of the James City County Code, 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.
5. Reasonable and appropriate conditions are hereby imposed, as set forth below, which will prevent the exception request from causing a degradation of water quality.
6. In granting this exception, the following conditions are hereby imposed to prevent this exception request from causing degradation of water quality:
  - 1) The applicant must obtain all other necessary federal, state, and local permits as required for the project.
  - 2) Surety of \$250 will be required in a form acceptable to the County Attorney's office.
  - 3) A mitigation plan showing the location and type of plant material to be installed must be submitted to the Engineering and Resource Protection Division for review and approval.
  - 4) This exception request approval shall become null and void if construction has not begun by August 14, 2014
  - 5) Written requests for an extension to an exception shall be submitted to the Engineering and Resource Protection Division no later than six weeks prior to the expiration date.

**E. MATTERS OF SPECIAL PRIVILEGE**

**1. Annual Report to the Board**

Scott J Thomas, Engineering and Resource Protection Director, presented the following information and updates to the Board:

- 1) Effective on July 1, 2013 regulatory programs previously managed by the Virginia Department of Conservation & Recreation (VA-DCR), including the state's Chesapeake Bay Act program, will be handled by the Virginia Department of Environmental Quality (VA-DEQ). Staff is tracking the transition activities.

**2) Fiscal Year 2013 – Annual Report**

Administrative and Board Chesapeake Bay Ordinance Exceptions and Wetlands Board cases:

**FY 2013 (period July 1, 2012 to June 30, 2013)**

|                      |     |
|----------------------|-----|
| WETLANDS BOARD       | 12  |
| CHESAPEAKE BAY BOARD | 25  |
| ADMINISTRATIVE       | 135 |

**FY 2012**


|                      |     |
|----------------------|-----|
| WETLANDS BOARD       | 6   |
| CHESAPEAKE BAY BOARD | 27  |
| ADMINISTRATIVE       | 170 |


- 3) Mr. Thomas thanked the Board for their service to the community and suggested a general work session after the first of the year to discuss any changes in the programs and procedures. All Board members were in agreement and thanked Staff for their work.
- 4) Mr. Hughes mentioned a phone call he received from a citizen regarding the possible spraying of herbicides around the small boat landing on Powhatan Creek and asked if Staff had been contacted.

Mr. Woolson stated he was contacted, visited the site and it did appear herbicides had been sprayed. He was working on contacting the parties involved as certain herbicides were not permitted around water resources.

#### **F. ADJOURNMENT**

The meeting adjourned at 7:50 p.m.

  
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David Gussman  
Chesapeake Bay Board Chair

  
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Melanie Davis  
Secretary to the Board