

**JAMES CITY COUNTY CHESAPEAKE BAY BOARD
MINUTES**

Wednesday September 10, 2014

A. ROLL CALL

David Gussman
John Hughes
William Apperson
Charles Roadley
Larry Waltrip

ABSENT

Charles Roadley
Larry Waltrip

OTHERS PRESENT

County Staff:

Michael Woolson, Senior Watershed Planner
Scott Thomas, Engineering and Resource Protection Division Director
Allison Kotula, Assistant County Attorney
Melanie Davis, Secretary to the Board

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 August 13, 2014 Board Meeting minutes were approved as written.
The August 18, 2014 Site Visit minutes were approved as written.

C. PUBLIC HEARINGS

1. CBE-15-004: Gilden/Newsom – 1584 Harbor Road - Public hearing continued from 8/13/14

Michael Woolson, Senior Watershed Planner presented the case for the benefit of the public and Board members who were not present at the previous meetings. He described the exception request for encroachment into the RPA to construct a new deck at 1584 Harbor Road in the Governor's Land subdivision. The changes from the previous request (case CBE-14-090) were replacement of all existing turf grass with native plantings and reestablishment of the drainage swale that would run under the proposed deck. Mr. Woolson explained that, as with previous cases in the Governor's Land marina, encroachment into to seaward RPA was also encroachment into a conservation easement dedicated to James City County which required and received approval from the James City County Planning Commission in May. In this case, the fifty foot seaward RPA was also the building set back line for this property. He described the construction of the deck, the existing and proposed reestablished drainage system and the proposed mitigation which exceeds the requirements for the approximately 500 square feet of impervious cover associated with this project. Because this additional deck is within seaward RPA and is more than the minimum necessary to afford relief, the exception request must be considered by this Board at a public hearing. Staff reviewed the proposal, determined the impacts to be moderate, and recommended approval with specific conditions.

Mr. Gussman asked what other local permits would be required and if any state or federal permit would be required.

Mr. Woolson responded the required local permits would be a building permit for the deck, a mechanical permit for the gas fireplace and possibly a plumbing permit associated with the hot tub. At this time, he was not aware of any state or federal permits required for this project.

Mr. Waltrip asked if the entire structure would be in the conservation easement established by Governor's Land.

Mr. Woolson explained this property was zoned R4 meaning the setback limits are established by the community. In other zonings the setbacks are established by the County. Therefore, should the Board approve this application it would be contingent upon the Governor's Land community approving encroachment over this rear setback.

Mr. Waltrip asked if the community home owners helped establish this setback and if the people who purchased these homes understood this setback could not be built on or used for any purpose.

Mr. Woolson stated he believed this setback was established by the developer prior to construction of the houses in this area. He could not speak for the homeowners but would assume they were aware of the restrictions.

Mr. Gussman continued the public hearing.

A. Mr. Don Newsom from Delightful Gardens Landscape Company believed it was Governor's Land position that decks were allowed to extend 12 feet over the setback line as he previously constructed two decks on this street with these same guidelines. He stated the drainage plan showed that the existing berms on this property were higher than the elevation closer to the house and the drainage system was already functioning well. In addition he would slightly raise the elevation and improve the drainage on the right side of the property. The only current runoff loss was at the existing sidewalk, a portion of which would be removed with this project. He added that because all of the existing turf grass in the RPA would also be removed, this property would be the only property in the marina in full compliance with the County requirements.

Mr. Roadley and Mr. Waltrip asked if the existing drainage system on the Harbor Road properties was periodically maintained. Mr. Roadley also asked about the stability of the slope with all the turf grass removed.

Mr. Gussman asked if any sheet flow or mulch washout occurred during storms.

A. Mr. Newsome stated he was not aware of any maintenance schedule however he assumed if the drains were not functioning correctly, Governor's Land maintenance would have been contacted by the homeowners. Regarding the removal of turf grass, he said that he would be using hardwood mulch, as it stayed put better than pine park mulch.

B. Gail Gilden, the property owner and applicant, stated she had not seen any flooding, sheet flow or mulch wash out during recent storms. She added that the area would be heavily planted to prevent the mulch washout. She also responded to Mr. Waltrip's comments stating when they purchased this property they understood exceptions to the 50 foot RPA were permitted as other homes had structures in this area.

Mr. Hughes asked if there would be any change in the steps to the bulkhead.

A. Mr. Newsome stated they would only be replacing the existing steps because the existing wood was rotting.

C. Robert Donnelly, property owner at 1573 Harbor Road which across the street from the houses on the marina, said he purchased his house from an owner who was fined for removing vegetation in the RPA to create a view. He was therefore opposed to this exception unless he was also allowed to clear cut his property to create a view.

D. H. Ross Ford, 1608 Harbor Rd, stated the 50 foot RPA was in place when the harbor properties were developed and the County later increased the RPA to 100 feet which now includes the houses. He said the current drainage system sends the runoff into designated wetlands and only prevents runoff impact to the bulkhead and into the harbor. He also stated the only reason the Governor's Land Architectural Board allowed a 12 foot extension over the setback line was because the County approved it first. He stressed that this was a very serious matter of concern for the residents on Harbor Road. He submitted a copy and read the following comments for the record:

RE: James City County Code, Chapter 23, Chesapeake Preservation (Supp. No. 14.2-04) and considerations relating to the 50' buffer defined in the DEED OF EASEMENT FOR OPEN SPACE/MAJOR OPEN SPACE/BUFFER THE HARBOR AT TWO RIVERS, September 13, 1994. The fact that serious encroachments are in process in the 50' RPB buffer on Lots 20 (1584 Harbor Road aka Gilden/Newsom property) and Lot 22 (1592 Harbor Road aka Trickey property) have brought consternation among the majority of the other residents of the 17 properties in the Harbor community area along the bulkhead we have been prompted to review the James City County Code and other applicable documents relating thereto. The primary question being asked is why can these encroachments be allowed when for two decades any encroachments have been out rightly denied by James City County (JCC) and Governor's Land Foundation (GLF). It certainly appears this is a result of the appropriate representative parties not being familiar with the history of the Marina Village bulkhead front property 50' Buffer Resource Protection Area (RPA) in accordance with the requirements of the CBPA as provided in Chapter 23 of the county code or to the restrictions pursuant to the 1994 Deed of Easement.

Reviewing Chapter 23 of the code it appears that the most applicable sections relating to the incursion into the 50' Buffer RPA give clear direction that precludes the approval of the plans as submitted to the county by Delightful Gardens Landscape Co. In Sec. 23-7 Development criteria for resource protection areas. Subsection (c) (2) (a) and (b) address permitted buffer area encroachments. (c)(2)b 4 states that "The criteria in subdivision (c)(2)a of this section shall be met." The provisions of (c)(2)a 3 provides "The encroachment may not extend into the seaward 50 feet of the buffer area." Thus, clearly no encroachments are to be permitted in the 50' RPA buffer along the harbor front.

Chapter 23 in Sec. 23-14 provides that "Exceptions to the requirements of section 23-7 of this chapter may be granted provided that: "(2) Granting the exception will not confer upon the applicant any special privilege denied by this chapter to any other property owners similarly situated in the vicinity:" and "(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:" Over the past 20 years the 17 property owners along the harbor front have understood that no encroachments will be considered within the 50' RPA buffer. Furthermore, several owners were cited in 2007 by JCC environmental staff for encroachments into the RPA. Those encroachments were matters such as two short pilings with a decorative rope just inside the 50' RPA, the inclusion of roses vs. the approved plant material, bird houses on 2 ½ or 3 inch pipe poles, inappropriate grass, and mowing. While these matters were amicably resolved between the county environmental staff and the property owners we are unaware of any filing for an exception per se having heretofore been initiated for or by a harbor front property owner. In regard to (4) above noted there can be no question the exception is for a self-created or imposed matter. It is thus our opinion that in both cases (CBE-14-022 -1592 Harbor Road and CBE-15-004-1584 Harbor Road) there is a violation of the intent of the code by entertaining these specific exemption requests.

As another matter supporting our concern of the encroachments into the 50' RPA buffer we wish to acknowledge the Deed of Easement of September 13, 1994 wherein is provided "2. No building shall be permitted on or lots platted within the Easement Property" And 3. No roads or other structures (Excluding utility lines, drainage facilities, paths and trail signs approved in accordance with Paragraph 4. below) shall be built or maintained on the Easement Property other than such road or structure approved in writing by the County Engineer and the Planning Commission. Any roads shall be generally as shown on the approved Master Plan for The Governor's land at Two Rivers.

Notwithstanding the foregoing, the Grantor may install within the portions of the Buffer on lots 13,14,15,16, 17, 18,19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29, subterranean portions of the Marina wall and bulkhead and may utilize such Buffers to repair and maintain such Marina wall and bulkhead (including, without limitation, the subterranean portions thereof) provided the Grantor restores, or causes to be restored, the surface of such Buffers to the extent disturbed by such maintenance and repair." Paragraph 5 Reflects on the natural condition of the Easement Property and the applicability of Exhibit "B" of five pages attached. A review of the plans attached as Exhibit "B" show that the only landscaping on the 50' RPA Buffer are specific plant materials, a walkway path from the bulkhead directly to the RPA line of 6', and a 8' width walkway of 40' on the bulkhead. No provision for the installation of lighting is shown within the landscaped areas.

An additional factor that is a primary consideration is that the rear setback line of the harbor properties is the 50' RPA buffer line. Sec. 24-2 Definitions of Accessory building or structure provides "A subordinate building or structure customarily incidental to and located upon the same lot occupied by the main use or building. No such accessory building or structure shall be used for housekeeping purposes. Garages or other accessory structures such as carports, porches, decks and stoops attached to the main building shall be considered part of the main building. Accessory buildings and structures located ten feet or less from the main structure shall be considered part of the main structure for the purpose of determining side and rear yards. (Refer to definition of "structure.") Therefore, the inclusion of decks within the RPA as shown on the plans appear to be in violation of the defined rear setback line.

Therefore, we as property owners on the Harbor at The Governor's Land at Two Rivers ask that the case before you (CBE-15-004) be denied and that the Chesapeake Bay Board initiate the reversal of its approval of case CBE-13-022 based on the submission of false supporting information.

Mr. Hughes asked Mr. Ford how long he had lived on Harbor Road and if he was the original owner. He asked if the property between his house and the marina were already graded and planted in turf grass.

- D.** Mr. Ford stated he had been a member of the Marina since December 1994 when the harbor was originally developed. He moved into the residence around March of 1997 and the lot was cleared and graded at that time.
- E.** Tom Wilkinson, 1580 Harbor Rd, objected to the exception for the same reasons expressed by Mr. Ford. He added that to grant this exception would adversely affect the economic resource of the other marina residents.
- F.** Sterling M. Nichols, adjacent property owner at 1612 Harbor Rd and also serving on the Board of the James River Association, objected to the exception based on the potential impact to the James River from runoff. In his opinion, even moderate impacts to the RPA are not acceptable. He also served on a citizen committee several years ago to study the RPA in James City County and he said they agreed encroachment into the 100 foot RPA would be acceptable if certain conditions were met but encroachment into the 50 foot RPA should not be allowed. He also believed the County required Governor's Land to establish the 50 foot conservation easement and all the plantings in that easement were required and approved by the County. He added that as a builder he was always required to show the setback lines on a permit application. In summary he referenced a Virginia Department of Environmental Quality (DEQ) document that stated encroachment into the 50 foot buffer was discouraged and the conservation easement for the marina reads, "grantor wishes to preserve portions of the property in its natural open state to improve the quality of stormwater runoff from the property" and "no building shall be permitted on lots platted within the easement property".

The following residents also stated their objection to the exception request:

Ken McLennan, 1620 Harbor Road
Elaine Pierson, 1572 Harbor Road
Lee Thoet, 1568 Harbor Road
Boyd McKelvain, 1600 Harbor Road
Barbara McLennan, 1620 Harbor Road
Betsy McKelvain, 1600 Harbor Road
Dottie Nichols, 1612 Harbor Road

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

Mr. Gussman then commented that he was concerned with the project because of the comments from the citizens, because this was the seaward RPA, and because of the small distance between the proposed deck and the marina for treatment of runoff and impact to the water quality in the harbor. He was also concerned that runoff through the deck would go into the existing drainage system which discharged directly into the wetlands and was not filtered through a BMP. He felt granting this exception would confer upon the applicant special privileges denied to the other property owners in the area and this request was also for a self-imposed condition.

Mr. Hughes said if the exception request only consisted of the deck he would deny it however, this request included removal of the turf grass and restoration of the buffer which would ultimately improve water quality and be more beneficial to the Chesapeake Bay.

Mr. Apperson did not observe any functioning wetlands in the yards of the marina properties. He felt the fertilization of the existing turf grass was a detriment to water quality and therefore the removal of this turf grass and the proposed mitigation of native plantings would be an improvement to water quality. He also felt this was more a zoning or a homeowner's association issue rather than an issue for this Board.

Mr. Roadley agreed the removal of turf grass and the restoration of native plantings was the preferred buffer however; in his opinion this area was never a natural buffer. The natural buffer was destroyed when the marina was created. The 50 foot conservation easement was an accommodation added to create a protected, maintained area on these properties. He asked staff if the area across Harbor Road where the marina properties drained to was considered a wetland BMP.

Mr. Woolson stated it was a natural wetlands system.

Scott J. Thomas, Director of Engineering and Resource Protection and the bay act administrator for the County offered the following interpretation of the guidance from the state and language of the County Chesapeake Bay Preservation ordinance (the Ordinance):

1. In the state guidance, a project is self-created or self-imposed or not the minimum necessary to afford relief if it could it have been constructed somewhere else on the property outside of the RPA or it creates more impervious area than is the minimum required for its purpose.
2. Sec. 23-7(a) of the ordinance is the development criteria for the RPA that states what can be approved administratively by staff. If a request does not meet these criteria then it comes to the Board.
Sec. 23-7(c)(2)a and b permitted buffer encroachments is also guidance for administrative review. It is for lots platted prior to adoption of the ordinance now requesting construction of a house.

Mr. Thomas stated Staff could not deny an applicant form coming before the Board to seek relief from the ordinance and the exception requests should be based on the merits of the application. He stated the merits of this application was replacement of the turf grass with native vegetation but he agreed the marina was unique because the area was disturbed and most of the native vegetation removed before the homes were constructed.

Mr. Waltrip said he remembered the construction of the marina and believed the conservation easement and the setbacks were imposed for owners to not encroach into these areas for construction and to maintain the existing vegetation as much as possible. He believed this was the expectation of the majority of the marina owners when they purchased their property.

Mr. Hughes made a motion to adopt the resolution to grant the exception for Chesapeake Bay Board case CBE-15-004 at 1584 Harbor Road, Parcel ID #4310200020.

The motion to grant was denied by a 2-3 vote. (Aye: Mr. Hughes, Mr. Apperson)
(Nay: Mr. Roadley, Mr. Waltrip, Mr. Gussman)

The exception request was denied.

RESOLUTION
DENYING AN EXCEPTION ON JCC RE TAX PARCEL 4310200020

WHEREAS, Mr. Don Newsom of Delightful Gardens, (the “Applicant”) and HTI Holdings Inc, (the “Owner”) has applied to the Chesapeake Bay Board of James City County (the “Board”) requesting an exception to the use of the Resource Protection Area (the “RPA”) on a parcel of property identified as JCC RE Tax Parcel No. 4310200020 and further identified as 1584 Harbor Road in the Governor’s Land at Two Rivers subdivision (the “Property”) as set forth in the application CBE-15-004 for the purpose of installing a deck; 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 on August 13, 2014 and continued to September 10, 2014, the Chesapeake Bay Board of James City County by a majority vote of its members FINDS that all of the following conditions have **NOT** been met:

1. The exception request is the minimum necessary to afford relief.
2. Granting the exception will not confer upon the Applicant special privileges not allowed 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 of substantial detriment to water quality.
4. The exception request is not based on conditions or circumstances that are self-created or self-imposed, and the request arises from conditions or circumstances either permitted or non-conforming that are related to adjacent parcels.
5. Reasonable and appropriate conditions can be imposed, which will prevent the exception request from causing a degradation of water quality.

D. BOARD CONSIDERATIONS – None

E. MATTERS OF SPECIAL PRIVILEGE

Mr. Gussman asked Staff to look into the citizen’s request for the Chesapeake Bay Board to consider reversing its approval of case CBE-13-022 (actually CBE-14-022) at 1592 Harbor Road which was granted in December of 2013.

Allison Kotula, Assistant County Attorney, gave a brief presentation on the purpose and types of conservation easements in James City County citing the applicable state and county codes.

Mr. Gussman asked how this Board should consider conservation easements that come before them.

Ms. Kotula said there was very little guidance on a formal process for this Board. Conservation easements, like in tonight's case, are agreements between the developer and the County and are monitored by the County Senior Watershed Planner, Michael Woolson and the Engineering and Resource Protection Division. Amendments or exceptions to these easements are also directed to Mr. Woolson for consideration.

Mr. Roadley asked if the Chesapeake Bay Board was a regulating agency of the County for conservation easements.

Ms. Kotula stated this Board would only consider conservation easements if they overlapped the RPA.

Mr. Apperson asked if there was written documentation regarding how an easement is managed and what can or cannot be changed on in easements.

Mr. Woolson stated there were provisions in each individual deed of easement and they have now been standardized for recent and future easements. He explained that he can consider encroachments into easements if allowable by the language of the specific deed however, should there be a request to vacate an easement, it would have to be considered by the Board of Supervisors.

Mr. Gussman said this Board then needs to be aware that without specific language in the deed, conservation easements offered as mitigation for impacts to the RPAs might be modified or vacated by a different authority.

Mr. Woolson said the County was trying to not place conservation easements on individual lots but was confining them to the common areas of the HOA to eliminate the conflict with individual property owners.

Mr. Hughes asked staff to include the deed of easement language for any future projects before that Board that included conservation easements.

Mr. Apperson asked if there was a no taxation clause on the conservation easement for tonight's case.

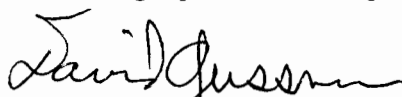
Mr. Woolson was not aware of the tax rate consideration for this easement or any natural open space or water quality easements as they are forms of stormwater BMPs. This would be a question for the tax assessor.

Mr. Waltrip asked the procedure for property owners who wish to have fallen trees removed from a drainage easements or wetlands.

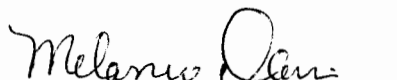
Mr. Woolson said they should contact the Engineering and Resource Protection Division for guidance.

F. ADJOURNMENT

The meeting adjourned at 9:12 pm



David Gussman
Chesapeake Bay Board Chair



Melanie Davis
Secretary to the Board