

**WETLANDS BOARD
MINUTES**

APRIL 10, 2002 - 7:00PM

A. ROLL CALL ABSENT

Henry Lindsey	None
Larry Waltrip	
Philip Duffy	
David Gussman	
William Apperson	

OTHERS PRESENT

Darryl E. Cook, Secretary to the Board
Greg Dohrman, Assistant County Attorney
Ben Stagg, VMRC
Environmental Staff

B. MINUTES

The February 13, 2002 minutes were approved as presented.

C. OLD BUSINESS - None

D. PUBLIC HEARINGS

1. W-27-01; Bernard Baughan – 10124 Sycamore Landing Road

Mr. Mike Woolson presented the case stating that Mr. Bernard Baughan had applied for an after-the-fact wetlands permit to install two wooden groins to prevent erosion. The property is further identified as parcel (3-4) found on the James City County Real Estate Tax Map (7-2). The project site in question is located on the York River main stem.

Environmental Division staff visited the site on March 15, 2002 along with the representatives from VMRC and VIMS to discuss the project scope and potential impacts. It is the opinion of both the VIMS and VMRC personnel that the two groins are not built large enough to affect the beach in any significant fashion, either positively or negatively. The applicant has previously had a riprap revetment permitted and installed to prevent bank erosion on his property. There were historic groin structures in this location, with only several pilings remaining. The remainders of the structures were reconstructed in the same location.

It is the staff's recommendation that the Board approve this application, with the no conditions. However, the Board could recommend that the structure be removed in its entirety, only remove the vertical boards while keeping the pilings, pursue civil charges or any combination of these actions.

Mr. Waltrip asked if the groins were installed after the riprap revetment was installed.

Mr. Woolson responded that they were installed after completion of the riprap protection.

Mr. Waltrip asked if the work could be considered a repair since the groins were placed back in the same location where they existed prior to their deterioration.

Mr. Woolson responded that they possibly could be considered repair, however, nothing but a few pilings remained from the original structure.

Mr. Lindsey pointed out that the replacement groin was shorter than the original one.

Mr. Duffy asked if the riprap revetment that was recently installed on the property was permitted.

Mr. Woolson stated that it was permitted.

Mr. Duffy then made the point that the applicant was not unaware of the legal requirement regarding work in the wetlands.

Mr. Lindsay opened the public hearing.

A. Bernard Baughan, property owner, stated that the property had been in his family since 1947. The groins had been in place for 30 to 35 years but were destroyed during recent hurricanes. It was his opinion that the groins did help to prevent erosion. He pointed out that the riprap work protected the high bank from erosion but that there was still some erosion of the shoreline below the riprap. It was his opinion that the repair of the groin would help protect the beach and felt that the groins could be reinstalled without a permit, as they would be considered a repair item.

Mr. Duffy asked why he felt the groins work.

Mr. Baughan replied that the level of the beach had been raised since they were installed and that sand had been lost during the time the groins were not functional.

Mr. Duffy inquired again if the work could be considered a repair.

Mr. Stagg replied that VMRC considers the replacement of a structure that has been essentially demolished as these structures were as new construction rather than repair.

Mr. Gussman asked if Mr. Winall, the contractor who had installed the riprap revetment on his property, told Mr. Baughan that he would need a permit to install the groins?

Mr. Baughan stated that he did not tell him a permit would be required. Mr. Baughan pointed out that the groins showed as existing structures on the permit application drawings.

Mr. Duffy asked how many new pilings were installed.

Mr. Woolson stated that five new pilings were installed which represented about 1/3 of the number of pilings used for the groins.

Mr. Apperson felt that the work was done to protect the property and was consistent with what others had done in that area.

Mr. Duffy wondered if there was an education problem regarding wetlands regulations and what could be done about it.

As no one else wished to speak on the case, Mr. Lindsey closed the public hearing.

Mr. Duffy stated that he did not have a problem with what was done but was concerned about the precedent that might be set if people who did work without proper permits did not have any repercussions.

Mr. Gussman agreed that it was not a permitted activity but it had little if any adverse environmental impact and felt the permit should be granted.

Mr. Duffy questioned how the education level of the public could be raised.

Mr. Gussman stated that perhaps an article in the newspaper or the County's citizen newsletter, FYI, would be an appropriate method. He felt direct mailings would be expensive.

Mr. Menichino suggested that the action could be cited as a violation but that any penalty be waived.

Mr. Waltrip stated that the applicant has recently spent \$20,000 to protect the shoreline and did not support a penalty.

Mr. Lindsey pointed out that the VIMS report stated that there was no real environmental impact and although the owners should have known about the requirements, he was unsure how they would have known.

Mr. Gussman made a motion to approve case W-27-01 with staff's recommendations.

The motion was approved by a 5-0 vote.

2. W-28-01: Mary Stone -- 10120 Sycamore Landing Road

Mr. Mike Woolson presented the case stating that Mrs. Mary Stone had applied for an after-the-fact wetlands permit to install one wooden groin to prevent erosion. The property is further identified as parcel (3-3) found on the James City County Real Estate Tax Map (7-2). The project site in question is located on the York River main stem.

Environmental Division staff visited the site on March 15, 2002 along with the representatives from VMRC and VIMS to discuss the project scope and potential impacts. It is the opinion of both the VIMS and VMRC personnel that the groin is not built large enough to affect the beach in any significant fashion, either positively or negatively. The applicant has previously had a riprap revetment permitted and installed to prevent bank erosion on a portion of her property and a riprap revetment permitted for the remainder of her property. There was a historic groin structure in this

location, with only several pilings remaining. The remainder of the structure was reconstructed in the same location.

It is the staff's recommendation that the Board approve this application, with the no conditions. However, the Board could recommend that the structure be removed in its entirety, only remove the vertical boards while keeping the pilings, pursue civil charges or any combination of these actions.

Mr. Lindsey asked if there were any questions from the Board. As the case was nearly identical to the previous one, there were no questions.

Mr. Lindsey opened the public hearing.

A. Mrs. Mary Stone, property owner, said the property had been in her family since 1955. The groin was destroyed during a hurricane and after the groin was destroyed, the erosion of the bank became worse. Some relatives and she repaired the groin. She was told by people she felt were knowledgeable that the groin could be reinstalled because it was there before. She could remove the groin but felt that it was helping to protect the shoreline until she could have the riprap installed on the remainder of her property. She put it in out of ignorance of the law to protect her property; it was not her intent to purposely evade the law.

As no one else wished to speak on the case, Mr. Lindsey closed the public hearing.

Mr. Gussman felt the circumstances of this project were the same as the previous case.

Mr. Duffy made a motion to approve case W-28-01 with staff recommendations.

The motion was approved with a 5-0 vote.

E. NEW BUSINESS

1. W-23-01: Mary Stone – 10120 Sycamore Landing Road

Mr. Woolson presented the case stating that Mrs. Mary Stone had requested that Case No. W-23-01 be reopened for the express purpose of deleting permit condition #2, requiring surety for the existing bald cypress tree. The remaining original permit conditions would remain. The scope of the project remains the same, installation of 75 linear feet of riprap revetment and replacement of the pier and deck. The property is identified as parcel (3-3), found on the James City County Real Estate Tax Map (7-2) and the project site in question is located on the York River main stem.

Mr. Lindsey asked if a motion was necessary to reopen the case.

Mr. Woolson responded that one was necessary.

Mr. Gussman moved to reopen case W-23-01 for the consideration of condition #2 on the approved permit.

The motion was approved on a 5-0 vote.

Mr. Duffy questioned as to why the condition was being reconsidered.

Mr. Woolson stated that it was being reopened at the request of Mrs. Stone and that she could better explain her reasons for the request.

Mr. Lindsey asked if Mrs. Stone could be allowed to speak even though no formal public hearing was being held.

Mr. Dohrman stated that she could speak.

Mrs. Stone, the property owner, stated that she had worked many years to protect the cypress tree that was the subject of condition #2. Although she agreed that the tree should be protected and preserved, she just learned of the permit condition requiring \$10,000 surety last Friday, April 5, and said that she did not have the financial resources to post the surety and pay the contractor for the work.

Mr. Lindsey pointed out that the condition was there only to protect the tree.

Mr. Waltrip stated that with proper supervision the contractor should be able to protect the tree.

After much discussion, it was decided that it would be acceptable to amend the condition to delete the surety requirement and instead require that replacement trees be planted in the event the tree dies or is removed.

Mr. Duffy made a motion to amend and replace permit condition #2 with the following wording developed by the Mr. Dohrman:

The contractor shall not, under any circumstances, remove any bald cypress trees. If the existing bald cypress tree dies within one year after completion of construction, the landowner will replace the dead tree with two 2 1/2" caliper bald cypress trees. The replacement trees will have a guaranteed survival time of three years after planting. The Environmental Division has on record the existing damage to the bald cypress next to the existing pier and will not hold the contractor accountable for that damage.

The motion was approved on a 5-0 vote.

2. David Garrity – 5500 North Mallard Run: Appeal of Chesapeake Bay Determination

Mr. Cook presented the case stating that Mr. David Garrity, owner of 5500 North Mallard Run, had requested a waiver from the Chesapeake Bay Preservation Ordinance provision regarding the 100-foot Resource Protection Area (RPA) buffer. The request was to allow an encroachment into the buffer for the construction of an in-ground 16'x32' swimming pool and an associated three-foot wide apron (deck) around the pool perimeter, and the enclosure of an existing deck for conversion into a sunroom.

The majority of the lot, which was platted in 1987 prior to the adoption of the Ordinance, is located within the 100 foot buffer. On June 2, 1999, a waiver from the RPA provisions was granted for the construction of the existing house and deck.

Mr. Garrity's waiver request was partially granted allowing the conversion of the deck to a sunroom but not allowing the swimming pool. Mr. Garrity is appealing the decision regarding the pool to the Wetlands Board. Mr. Garrity's waiver request, the response to his request, his appeal letter, and the appropriate plans are attached to the memo in the Board's package.

The basis for the decision is the Ordinance provisions in Section 23-12 that establish the parameters for the granting of waivers to allow for beneficial use of property platted prior to October 1, 1989. Item (1) states that *waivers granted shall be the minimum necessary to provide for buildable area or practical beneficial use*. Item (2) states that *facilities, to the extent practical, which are not water-dependent shall be located outside of a RPA*. Water-dependent facilities are defined as boat docking structures, marinas, marine resource facilities, and other similar structures. Further guidance was obtained from Section 23-9(c)(2) that relates to modifications of the buffer. Item(a) of that section states that *modifications to the buffer area shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities*. In addition, item (c) requires that *in no case shall the reduced portion of the buffer area be less than 50 feet in width*.

Based on these provisions, the swimming pool in the buffer was denied. It is not a water-dependent facility, it is not part of the principal structure, and it is located almost entirely in the 50-foot buffer. In addition, impacts to the buffer were also considered. The installation of the pool will result in the removal of a minimum of three trees. Due to their close proximity to the pool, it is very likely that 3 to 4 more trees will have to be removed. To gain access for heavy equipment to the pool site will also very likely result in additional tree removal. All of the trees that will be removed are in the RPA. Finally, the site of the pool has a moderate degree of slope requiring grading of areas outside the pool and deck area to allow for their installation that will result in additional disturbance and removal of vegetation in the RPA. The conversion of the deck was approved because it is part of the principal structure and no further encroachment into the buffer is necessary.

Mr. Garrity is appealing the decision based on Section 23-17 of the Ordinance, which designates the Wetlands Board as the appellate body. The written appeal dated March 31, 2002, is attached to the memo in the Board's package. The appeal requests permission to construct the pool as shown on the plans. In making its decision, Section 23-17(b) contains the following three conditions to be considered by the Board when making its decision:

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 is available to answer questions related to this appeal.

Mr. Duffy asked what item 1 on the second page of the memo meant where it states that *the hardship is not generally shared by other properties in the vicinity*.

Mr. Cook stated it was his opinion that this meant that other properties within Resource Protection Areas (RPA) have not been granted permission to install swimming pools, that there was no precedent for the granting of a waiver.

Mr. Lindsey asked if permission had been granted to others for pools in the RPA.

Mr. Cook stated that there was one pool allowed several years ago. It had some differences from the current case such as it was placed in an already established yard that did not require the clearing of trees or other vegetation. However, the Chesapeake Bay Local Assistance Department in reviewing the matter deemed that it was an inappropriate waiver and no waivers for pools have been granted since that time.

Mr. Lindsey requested if anyone in the audience cared to address the Board on this case.

Mr. Garrity stated that he was there to answer any questions and that Mr. Ray Dinger from Anchor Pools was also present to answer questions. He purchased the property in this neighborhood specifically because it allowed pools to be installed on individual lots whereas some other subdivisions did not because they had a neighborhood pool. If he knew that there was a restriction on the lot due to the RPA, he would not have bought the lot.

Mr. Dinger stated that Mr. Garrity had chosen an ozone type of disinfection system for the pool so the pool would not have any discharge of chlorine. The swimming pool also had walls that were 1/8-inch thick steel so there was no concern about failure or rupture of the pool. Anchor Pools, to his knowledge, had no failures of that type. He also confirmed that three trees would be removed for the pool and another one would be removed for construction access.

No one else wished to speak on the case.

Mr. Gussman stated that the question was not the type of pool to be installed but rather was it appropriate to put it in the buffer. The buffer is there to protect the Chesapeake Bay and its tributaries and although this would have a relatively small impact by itself, the cumulative impact would be detrimental to the Bay. If this pool were allowed in the 50-foot buffer, it would set a precedent for them to allow other pools in the buffer. He stated for these reasons, it should be denied.

Mr. Lindsey agreed and felt that they would actually be breaking the law to allow the pool given the restrictions in the Ordinance.

Mr. Duffy felt it was an unfortunate situation, as Mr. Garrity appeared to be unaware of the restriction but that it should not be allowed. He then made a motion to deny the granting of a waiver thereby upholding the Environmental Director's determination.

The motion to deny the granting of a waiver for the installation of a swimming pool in the RPA at 5500 North Mallard Run was approved 5-0.

F. MATTERS OF SPECIAL PRIVILEGE

It was decided that a resolution should be passed recognizing and thanking Mr. John Hughes for his service on the Wetlands Board. Mr. Hughes was not reappointed to the Board at the end of his third 5-year term.

Mr. Lindsey wanted to know if Landfall at Jamestown had come forward with information relating to the stormwater outfall into Powhatan Creek that may have been installed in violation of the Wetlands Ordinance.

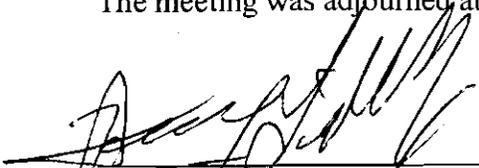
Mr. Cook stated that there has been no further information from the developer. The subdivision plan showed no impacts to wetlands for the installation of the storm drain pipe in question and the developer was going to have his engineer determine if the pipe was installed correctly. We have not heard any results of that determination. He stated that he will make contact with the developer and if no action has been taken, the County will cite them for a wetlands violation and make them prove that no violation occurred.

G. ADJOURNMENT

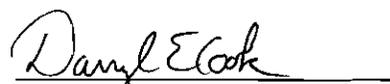
Mr. Duffy made a motion to adjourn.

The motion was approved by a 5-0 vote.

The meeting was adjourned at 8:55 PM.



Henry Lindsey
Chairman



Darryl E. Cook
Secretary