

**NORTHAMPTON COUNTY
WETLANDS BOARD**
Minutes
November 16, 2011

This was the regular meeting of the Northampton County Wetlands Board held on Wednesday, November 16, 2011 in the Board Chambers located at 16404 Courthouse Road in Eastville, Virginia for the purpose of conducting regular business.

Those members present were Chair Marshall Cox, Vice-Chair Bowdoin Lusk, Mark Gates, Dot Field and John Chubb. The member absent was Nancy Wells Drury.

Also attending were Hank Badger with the Virginia Marine Resources Commission (VMRC), Melissa Kellam, Zoning Administrator/Agent to the Board; Katrina Hickman, Zoning Inspector/Enforcement Agent; and Kay Downing, Secretary to the Board.

The meeting was called to order at 10:30 a.m., and a quorum established.

All those wishing to speak at today's meeting were sworn in by the Chair.

Public hearing:

A VMRC 2011-1180: Joachim J. Buono has filed to construct a 6-foot wide by 450-foot long boardwalk with a 250 square foot cart turnaround to create access over the Resource Protection Area (RPA) as well as secondary and primary dunes from the existing house. The property is located at 2022 Bayview Point Lane in the Bay Ridge Subdivision with frontage on the Chesapeake Bay. The property is described as being Tax Map 104A, double circle 1, parcel 8A.

It is noted for the record that a field visit had been conducted to this property by those members present along with Ms. Hickman earlier in the day.

Mr. Dave Charlton, contractor for the applicant, was present to answer any questions. When asked, Mr. Charlton confirmed that the walkway would not intrude into the dunelet or hummock area if an adjustment in the angle of the walkway is made coming off the house.

Ms. Field and the Chair agreed that a revised drawing should be submitted showing the corrected alignment.

The Chair called for any other public comments. There being none the public portion of the hearing was closed.

Staff explained that buffer regulations prevent the turnaround portion of the walkway to be located within the buffer area even if it resulted in less impact to the dune. Only walkways are specifically allowed within the resource protection area buffer and not a turnaround which is basically considered a deck.

More discussion followed on avoidance of the hummock and Ms. Kellam noted that the Board's preference to preserve the hummock could possibly be implemented through the Bay Act and the Zoning Clearance application process in order to decrease impacts.

Action:

Motion was made by Mr. Chubb to approve the application as follows: (1) the walkway from the platform to the beach must follow the existing path; and (2) it is strongly recommended that the walkway, which begins at the rear of the house and was proposed to cut through a vegetated hummock within the 100-foot shoreline buffer, be redesigned to follow the existing path on the south end of the hummock, thereby avoiding disturbance of the hummock in any manner. Second to the motion was made by Mr. Gates and carried unanimously.

It is noted for the record that this approved permit as modified shall expire on December 1, 2012.

Old business

A. Continuance of VMRC 2011-1310: Wayne Galbraith has applied for a permit to construct a riprap revetment up to 6 feet wide with varying slope due to shoreline contours and will utilize fill where necessary. The property is located at 11381 Waterford Lane with frontage on Hungars Creek and is described as being Tax Map 39, double circle A, parcel 2 containing 5.64 acres.

Ms. Kellam explained that Mr. Galbraith, who was present, had submitted revisions as previously recommended by the Board.

Mr. Chubb questioned the use of Class I and Class II rock as being insufficient in weight and size for the project. However, Ms. Field expressed her opinion that the rock should be sufficient in size and weight due to the low energy wave action at this location.

Action:

Motion to approve the application as revised by the applicant on November 9, 2011, was made by Mr. Gates and seconded by Mr. Lusk. The motion carried unanimously.

Under other old business Mr. Granville Hogg addressed the Board once again concerning a previous violation at Kings Creek Landing Subdivision.

Ms. Kellam explained that the process of mitigation requires that the property owner be given an opportunity to appear before the Board. In this case, the landowners notified chose not to appear before the board but instead to complete the mitigation as previously recommended by

the Board. She stressed that the mitigation that was done was for the violation in the wetlands only and not in the buffer area which is outside the Board's jurisdiction. In this case, the landowners, being the Kings Creek Landing Property Owners Association (KCL POA), had chosen to mitigate the violation per the Board's previous recommendation.

Mr. Hogg, a resident of Butlers Bluff Subdivision, then addressed the Board as a private citizen for information purposes. He noted that he had not been notified about this meeting and was not prepared to address details of the matter.

Mr. Hogg noted that the October 3, 2011 letter from Katrina Hickman to the KCL POA had been rescinded. He then presented e-mails from Perry Lloyd Lipkins of Virginia Tech on how to eradicate phragmites as well as Robert Cole with the U. S. Army Corps of Engineers (USACOE) explaining that he could not attend today's meeting. Mr. Cole advised that if the Board has any questions regarding this situation or the Corps' authority then he should be contacted directly. Mr. Hogg related that Mr. Cole has visited the property and found no violation. Mr. Hogg noted that a dead wild cherry tree had been removed which is allowed even though it is unusual for cherry trees to be in wetland areas. Mr. Hogg also stated that he had contacted Shawn Smith with the Department of Conservation and Recreation concerning the removal of poison ivy, etc., from the buffer area.

Mr. Hogg presented photos of lots 16-22, 28 and 29, and the trail access for lot 18. He noted that the POA was in charge of maintaining vacant lots and that grasses were previously cut to the top of the bank and maintained by landscapers through contract agreements. He stated that some of the photos presented had been taken in the early 2000's.

At this point Mr. Lusk asked Mr. Hogg if his comments were related to the wetland violation specifically. Mr. Hogg replied not per se. However, he encouraged the Board to contact and discuss with both Hank Badger of VMRC and Robert Cole the situation where there are questionable borderline wetlands like where the cherry tree stump was located.

Ms. Kellam was asked by the Chair to address the Board's jurisdiction. Ms. Kellam stated that there are no wetlands violations on Mr. Hogg's properties. The wetlands violation had occurred specifically on the KCL POA property. According to the POA representative Mr. Hogg was unauthorized to do any work on that property. The violation was cited due to the change in the wetlands elevation caused by the ruts during removal of the dead tree. Ms. Kellam explained that the Board needs to decide if the wetlands violation as determined earlier is still considered valid and, if so, to affirm mitigation as well.

Ms. Kellam also stated that Mr. Hogg is speaking on the buffer issue as well as the wetland issue as a citizen. Staff has determined that he did unauthorized work within the buffer area and that the Board has no jurisdiction within that area. She explained that this matter is being revisited because staff had not properly notified the property owner, namely KCL POA, of their right to address this matter before the Board. The Board needs to take action again because

property owner notice was not given and to reaffirm decisions made at a previous meeting on this issue.

Ms. Hickman added that Robert Cole with the USACOE agreed that he did not acknowledge a violation at the time it occurred. However, the Department of Environmental Quality (DEQ) would have been contacted because it is a violation to remove tree stumps.

Mr. Hogg stated that the KCL POA had agreed to mitigate the wetland violation for economic reasons only. He then read from the heading of the County Zoning Clearance Application as follows, "Zoning Application is required when a project intends to change, add or expand the current use of a property and/or to construct or enlarge a building or structure." It was his opinion that this specific application did not apply to the work that he did at Kings Creek Landing. He stated that he had not changed, added or expanded the use of the property nor had he constructed or enlarged any structure. He then stated that he perpetrated the problem and he is either right or wrong in his assessment. It was his opinion that he had met the criteria of the VPI Extension Service and the USACOE in this matter. He also stated that he understood he had to face issues related to the wetlands area, the resource protection area and erosion and sediment control criteria. However, he was certain that a County Zoning Clearance Application was not required as the work he did does not meet the criteria for filing such an application. Mr. Hogg noted that his reputation was on the line and that he had complied with all criteria to the best of his knowledge.

Ms. Hickman stated her opinion that Mr. Hogg needs authorization to represent the KCL POA which he does not have. She noted that the zoning code stipulates that the Zoning Administrator must give approval for such work before it is done. The area where the violation occurred had not been maintained for the last 2 to 3 years based on Chris Schwab, the POA's treasurer, since the last maintenance contract expired in 2009. She stated that equipment or vehicle tracks were found in both the tidal and non-tidal wetlands which is illegal. After the former decision of the Board the KCL POA was amenable to planting the 9 shrubs to meet the mitigation recommendation of the Board and those plantings have already been installed.

At this time Mr. Lusk asked for clarification about Mr. Cole's position. Ms. Hickman stated that it was her understanding that Mr. Cole could not make a decision on the wetlands violation because of the regeneration of the grasses that had occurred in the violation area. However, Mr. Cole could be presented with the original photos taken at the time when the violation was discovered in the wetlands.

Mr. Lusk then stated that the Wetlands Board cannot address Mr. Hogg's opinions or concerns in this matter since Mr. Hogg does not represent the POA. This wetlands violation must be addressed by the POA since that entity is the legal owner of the property.

Ms. Kellam stated that the Board can note that Mr. Hogg had no wetlands violations on his own property located within this subdivision.

Ms. Hickman stated that the POA agreed that a violation had occurred and also agreed to follow the recommended mitigation plan after being properly notified by staff.

When asked by the Chair, Ms. Hickman informed the Board that the mitigation plan to install 9 shrubs had been completed this past week by the POA.

Mr. Hogg asked the Board to consider that he did not create a violation on anyone else's property since he is a member of the POA. However, the Chair stated that the Board could not do that.

Mr. Hogg then stated that it would be expensive to get this matter adjudicated properly. It was his opinion that the POA had decided it was easier to mitigate than to spend money to have the violation determination overturned.

Mr. Chubb reviewed the events in chronological order for the benefit of all. It was his understanding that staff had determined that a violation had occurred at the Kings Creek Landing Subdivision; the Board had made a field inspection of the wetlands violation site only; that the Board had then determined that a wetlands violation had occurred as determined by staff; and that the KCL POA has not stated otherwise that a violation had taken place on the premises. Mr. Chubb then asked that the Board re-affirm its prior decision that a wetlands violation had occurred.

Ms. Field noted that she was absent from the meeting when the Board had made that determination. Mr. Lusk stated that a violation had technically occurred based on the photos and the field visit. It was his opinion that the wetlands violation may have been silly but that the Board recommended the minimum penalty possible in order to allow basic mitigation.

Mr. Badger asked if a civil charge had been filed. The Chair replied no, that one basic unit of mitigation was sought.

Motion was made by Mr. Chubb that the Board re-affirm its prior action taken on September 21, 2011. The motion was seconded by Mr. Gates and carried unanimously.

Mr. Hogg requested that the areas of violations be specifically and concisely identified as he plans to appeal to VMRC within 10 days.

Ms. Kellam understood that only people who have filed official applications can appeal a decision of the Board. However, Mr. Badger stated that any decision of the Board can be appealed to VMRC.

Mr. Hogg was then informed that the area of violation is described as being Tax Map 84I, double circle 1, Parcel A. Mr. Hogg stated that the POA may want to appeal the decision of the Board.

Mr. Lusk questioned if Mr. Hogg had the right to appeal because he is not the property owner specifically and has no wetlands violation on his own property.

Ms. Kellam noted that those who can appeal according to the code are the county, an applicant, a property owner, or at least 25 county leaseholders (as on a petition) if going before VMRC. Any appeal must be filed within 10 days of the Board's decision to VMRC. If not appealed to VMRC then an appeal can be filed to the court within 30 days of the Board's decision. She offered to assist Mr. Hogg in determining which type of appeal to file.

Mr. Hogg expressed his opinion that no violation has occurred; therefore, the decision of the Board should be appealed.

The Chair asked for clarification concerning appeals to the Circuit Court. Ms. Kellam noted that it was her understanding that an appeal can be filed to the court, but it cannot be determined what the court could do until the specific type of appeal is filed.

Ms. Hickman stated that according to staff at VMRC only appeals related to applications or permits are heard by the VMRC Commissioner. Mr. Badger referred to Code Section 28.2-1311 as well noting that the language does refer to applicant in dealing with appeals. Ms. Kellam concurred noting that Mr. Hogg is not an applicant as no application has been filed according to the interpretation of the county attorney.

At this point, Mr. Hogg specifically asked again for staff to identify what types of alleged violations had occurred at which specific locations. Ms. Kellam stated that she would give Mr. Hogg a complete copy of the official file for his information.

When asked by the Chair, Ms. Hickman explained that the violation consisted of going into the tidal wetlands with some sort of equipment and dragging the fallen tree out of the wetlands, thereby creating ruts which changed the elevation and ecology of the wetlands. The area of phragmites is located in non-tidal wetlands and not under the Board's jurisdiction. The downed tree was dragged along through property belonging to the POA and eventually pulled out of the wetlands through an opening shared by lots 19 and 20.

The Chair closed this matter from further discussion and called for a two-minute break.

New Business

The Board then considered new business. Mr. Badger requested that the Board return the questionnaire on the "general permit" information proposed by The Commonwealth.

As requested by the Agent to the Board Chair in her report the Board considered the following matter related to VMRC 2011-0375 as follows.

Discussion of Civil Charges related to VMRC 2011-0375 as filed by Karla Hehl for an after-the-fact permit for the removal of a failed bulkhead and construction of stone block and rip rap revetment approximately 500 feet long with 2 seventy-foot long returns to prevent flanking. The property is known as “Holly Bluff Island”, zoned C Conservation, and described as Tax Map 123, double circle A, parcel 2.

Ms. Kellam noted that the Board was provided information related to evaluation of civil charges plus a matrix to help determine the scope of infringement or violation from the Virginia Institute of Marine Science.

Mr. John Burdiss, agent for Ms. Hehl, was present and stated that his client was ready to address a civil fine related to the work that had occurred on her property. He did ask that the Board consider a fine below or at the range of the appropriate penalty given the fact that Ms. Hehl had done her best to alleviate issues that had occurred.

The Chair asked Mr. Burdiss if he or his client was aware of the cost required to actually re-install the project as it was originally intended and approved by the Board. Mr. Burdiss stated that he did not know but would assume that it would cost thousands of dollars.

Mr. Lusk asked if the 1992 matrix guidelines had been recently updated. Mr. Badger stated that VMRC had revised their regulations and that no locality can go over \$10,000 per violation.

At this time Mrs. Downing stated that Ms. Drury had sent an e-mail to state her opinion that if the Board decides to issue a civil charge it should be no less than \$3,000.

The Chair stated that much time and money has been spent doing inappropriate work on this property and then again when trying to correct what was done illegally or improperly. He then noted that the Board’s decision can be appealed to the Circuit Court.

Mr. Lusk reviewed the project noting that there have been numerous violations from the beginning including the type of rubble used and equipment issues. He added that the Board’s original decision on this project had been ignored unfortunately costing the property owner a great expense in the end. It was his opinion that a deterrent is needed to prevent this type of situation from reoccurring. Ms. Field concurred noting that this pattern or type of violation is unacceptable and that a civil fine must be appropriate to reflect what has occurred.

The Board then reviewed the civil charge matrix to determine the appropriate degree of environmental impact and deviation or non-compliance. It was noted that 4,950 square feet of inter-tidal wetlands area had been impacted from the project.

Upon motion by Ms. Field and second by Mr. Chubb, the Board imposed a civil charge of \$4,500.00 against Karla Hehl for illegal actions that occurred on “Holly Bluff Island” as determined by the degree of environmental impacts and the degree of deviation/non-compliance.

Statements from the public: none.

At this time Ms. Kellam reported that no new applications have been filed to date.

A report from Enforcement Agent, Katrina Hickman, revealed that new violations have occurred at Butler's Bluff Subdivision involving wetlands, the buffer and zoning codes. Due to the erosion in the area, the wetlands violation falls within the Board's jurisdiction. She stated that the property owner is in the process of completing a zoning clearance.

Ms. Kellam explained that a revetment was on the property before and in 2000 it was pulled upland beyond the Board's jurisdiction and then permitted through the land disturbance permit process.

Mr. Badger stated that photos reveal that the toe of the project is in the beach.

Ms. Hickman stated that stop work orders have been filed with the property owner.

As requested by a property owner, Ms. Hickman inquired if there was any issue with a private landowner repairing an existing dock with incorporated wash stands. Since the dock was considered a private, open-pile pier, it was determined that it could be maintained and used for private use only regardless of wash stands.

Consideration of minutes:

The minutes of the October 19, 2011 meeting were unanimously approved as submitted upon motion by Mr. Gates and second by Mr. Lusk.

Adjournment

There being no other business the meeting was adjourned at 11:45 p.m.

Chair

Secretary