

## M E M O R A N D U M

DATE: November 25, 2003

TO: The Board of Supervisors

FROM: Darryl E. Cook, Environmental Director

SUBJECT: Chesapeake Bay Preservation Ordinance

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The Chesapeake Bay Preservation Ordinance is being revised to bring it into compliance with the first major revision to the State Chesapeake Bay Preservation Area Designation and Management Regulations since the State law was adopted in 1989. The regulations became effective on March 1, 2002, and all local governments have until December 31, 2003, to amend their ordinances to ensure consistency with the revised regulations.

A work session was held with the Board of Supervisors on October 14, 2003, regarding the proposed amendments. As a result of that meeting, there were a few items for which the Board wanted more information and detail. This memo will present information on those items and questions, and also include discussion on some final amendments to address details that needed to be incorporated into the Ordinance before adoption. Below addresses the questions and concerns raised by the Board during the work session.

**Re-evaluation of Resource Protection Areas (RPA) based on a change in stream classification.** As the new regulations require an in-field determination of perennial stream flow, a question was raised as to what would happen if the stream classification changed over a period of years from perennial to intermittent or vice versa? In the case where a stream was determined to have been perennial at the time of development, an RPA would be established around that stream and this RPA line would be platted on any subdivision plats recorded for that development. In addition, properties adjacent to the stream would also be considered to have an RPA feature thereby becoming nonconforming with respect to the Chesapeake Bay Ordinance. This means that future development on those properties would have to conform to the Ordinance requirements to the extent possible. If years later, a plan of development was submitted for that same development or an adjacent parcel, and it was determined that the stream was now intermittent due to land use changes or other causes, then the properties with a platted RPA line could have a revised plat submitted removing the RPA line, and adjacent properties would no longer be considered nonconforming. If it were the reverse situation where a stream was originally determined to be intermittent and then at a later date, a determination was made as part of a plan of development review process that the stream was now perennial, then the property under review would have to establish an RPA line and adjacent properties would be considered to have an RPA feature and would have to comply with the Ordinance at time of their development.

**RPA Violation procedures during the construction process.** In James City County, violations of the RPA during construction are handled on a case-by-case basis depending on the nature and severity of the violation. Most of the violations do not occur during construction; rather they occur after the development process is complete and the homeowner takes possession. Generally, if the violation is relatively minor, the violation is handled through the certificate of occupancy process and replanting of encroached areas is accomplished. More serious violations have resulted in civil charges being assessed in addition to the replanting. Virginia Beach pursues violations of the RPA during construction through its Chesapeake Bay Board and civil charges are quite often assessed. York County uses the certificate of occupancy permit process to remedy violations but is considering using civil penalties. Newport News and Portsmouth handle these violations similar to York County but Portsmouth has also used stop-work provisions.

**Fees for Chesapeake Bay Board granted Exceptions.** Due to the public hearing and advertising requirements

for a Chesapeake Bay Board exception, a nonrefundable processing fee of \$100 per request needs to be assessed. This has been added in Section 23-15 which contains the items necessary for an exception request.

**What would be the composition of the Chesapeake Bay Board if it was not the Wetlands Board?** The Ordinance as currently written designates the Wetlands Board as the public hearing body for the newly required public hearing process for RPA exceptions. The Wetlands Board currently serves as the appellate body for individuals wishing to appeal administrative decisions made by the administrator of the Ordinance. If the Board does not wish to designate the Wetlands Board to serve in that capacity, there is some guidance from the State on the composition of such a board contained in a guidance document entitled *Exceptions*. This document, which was adopted by the Chesapeake Bay Local Assistance Board on September 16, 2002, presents guidance to local officials when considering exceptions to the regulations and Ordinances. In this document, it is presented that a balanced membership of a Board could include individuals with land use planning experience, engineers, real estate professionals, attorneys, and related professions along with citizen representation. It would also be advisable to include individuals with environmental and scientific experience and backgrounds. If the Board wishes to create a new board, it could be modeled after the Wetlands Board with five members appointed by the Board of Supervisors to terms of five years.

**Clearing Plan.** Section 23-10(3) contains language that prohibits the clearing or grading of single-family lots until the building permit is obtained. The language has been changed to read that “no clearing or grading shall occur on existing single-family lots until a complete building permit application is submitted.” This will remove an impediment to the ability to clear lots prior to issuance of a building permit. A future process will still need to be developed that can be administered by the resources available to the County before this clearing would actually be allowed but this change removes a legal impediment to the development of that process.

**Grandfathering/Vesting of Projects.** A policy has been developed that presents the proposed grandfathering/vesting provisions for projects with regard to the revised Ordinance. The external committee reviewed the proposal and was in agreement with the provisions. The policy is attached to a separate resolution as the recommended grandfathering/vesting policy for the Ordinance.

**Time Frames for acting on Exceptions and Waivers.** There are currently no time frames proposed in the Ordinance for acting on administrative waivers or exceptions. Section 23-16 of the Ordinance has been modified to state that the manager shall act on a complete application for an administrative waiver or exception within 21 calendar days of receipt or the request is deemed approved. Language has also been included in the same section to establish time frames for acting on Chesapeake Bay Board exceptions. The time frame of 60 days is based on the time frame contained in the Wetlands Ordinance. This process includes required times for advertisement of the public hearing.

**Separation of Structures from the RPA.** The staff proposal for a construction zone setback has been withdrawn at this time. It was not possible to reach consensus on this matter with the committee. Increased education of the public through information outreaches, and with notes on plats and signs in the field on all lots with an RPA feature that state no disturbance of the RPA being allowed will be used to try and address this issue. If this is unsuccessful in reducing or preventing violations, it may be necessary to come back to the Board with another proposal to address this issue.

With these modifications and the revisions presented to the Board in the October 14 work session, the Ordinance revisions are complete. It has been reviewed by staff at the Chesapeake Bay Local Assistance Department and based on their review, it has been informally determined to be consistent with the new regulations. After adoption, the Ordinance will need to be submitted to the Chesapeake Bay Local Assistance Board for a formal determination of its compliance with the new regulations.

Staff recommends adoption of the attached Ordinance.

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Darryl E. Cook

CONCUR:

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William C. Porter, Jr.

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Attachments