

MINUTES

SPECIAL Commission Meeting

July 25, 2007

The meeting of the Marine Resources Commission was held at the Marine Resources Commission main office at 2600 Washington Avenue, Newport News, Virginia with the following present:

Steven G. Bowman	Commissioner
Ernest L. Bowden, Jr.)	
J. Carter Fox)	
J. T. Holland)	Associate Members
Wayne McLeskey)	
Richard B. Robins, Jr.)	
Kyle J. Schick)	
J. Edmund Tankard III)	
Carl Josephson	Sr. Assistant Attorney General
Jack Travelstead	Chief Deputy Commissioner
John M. R. Bull	Director-Public Relations
Katherine Leonard	Recording Secretary
Sunita Hines	Bus. Applications Specialist
Herbert Bell	Marine Police Officer
Mike Dobson	Marine Police Officer
Bob Grabb	Chief, Habitat Management Div.
Chip Neikirk	Environmental Engineer, Sr.
Jeff Madden	Environmental Engineer, Sr.
Randy Owen	Environmental Engineer, Sr.
Jay Woodward	Environmental Engineer, Sr.
Benjamin McGinnis	Environmental Engineer, Sr.
Justin Worrell	Environmental Engineer, Sr.
Elizabeth Gallup	Environmental Engineer, Sr.
Danny Bacon	Environmental Engineer, Sr.

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Virginia Institute of Marine Science (VIMS)
Lyle Varnell

Other present included:

D. L. Ferris	Charlie Coombe	Walter Karlan
Susan Karlan	Kay Wilson	Cheryl McLeskey
Karen W. Forget	Debra Williams	Christine Pasterczyk
Joel Rubin	Kandy Kaye	Bob Leavenworth
Christy Everett	Chris Moore	Relda Schick
Wally Damon, Jr.	Amanda Ackiss	Alyssa Cronch
Ann L. Ackiss	Susan Lyon	Nadine Hook
Grace Moran	R. J. Nutter	John Byrum
Mark Walker	John Spillane	Todd Solomon
Tim Scranic	Daphne Atkins	Walt Stone
Maureen Sigmund	Steve Kohler	Karl Mertig
Mike Wills	Douglas Groff	Ken Dierks
Bryce Northington	Guy Carmeli	Ellis W. James
Barbara Crawford	Mary E. Conner	Larry Conner
Ed Sanyter		

and others

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Commissioner Bowman called the meeting to order at approximately 9:35 a.m. Associate Member McConaugha was absent.

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Commissioner Bowman announced that Associate Member McLeskey wished to make a statement.

Associate Member McLeskey stated that he wanted to make a public disclosure and explained that he had originally owned, but had recently sold the property in this case. As a result, he was no longer involved in any way. He also said he did still own property in the vicinity of this project. He said he wrote a letter to the State Attorney General's office when he realized this would be coming before the Commission to inquire as to whether he had a conflict of interest. Even though the Attorney General's office decided that he could participate in the hearing as well as the final decision, he had decided he would not participate and would be excusing himself. He said that he wanted to assure that there would be no perception of conflict by the Commission in their making a decision in this appeal.

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APPROVAL OF AGENDA: Commissioner Bowman asked if there were any changes to the agenda. There were no changes.

Commissioner Bowman asked for a motion to approve the agenda. Associate Member Holland moved to approve the agenda. Associate Member Tankard seconded the motion. The motion carried, 7-0. The Chair voted yes.

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Commissioner Bowman swore in all VMRC and VIMS staff that would be speaking or presenting testimony during the meeting.

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3. CLOSED MEETING FOR CONSULTATION WITH OR BRIEFING BY COUNSEL

Commissioner Bowman asked for a motion to convene a closed meeting.

Associate Member Robins moved that the meeting be recessed and the Commission immediately reconvene in closed meeting for the purposes of consultation with legal counsel and briefings by staff members pertaining to actual or probable litigation, or other specific legal matters requiring legal advice by counsel as permitted by Subsection (A), Paragraph (7) of § 2.2-3711 of the Code of Virginia, pertaining to items:

Item 2. Sandler @ Indigo Bay, LLC, #06-2601

Associate Member Holland seconded the motion. The motion carried, 7-0.

Associate Member Robins moved for the following:

WHEREAS, the Commission has convened a closed meeting on this date pursuant to an affirmative recorded vote and in accordance with the provisions of The Virginia Freedom of Information Act; and

WHEREAS, § 2.2-3712.D of the Code of Virginia requires a certification by this Commission that such closed meeting was conducted in conformity with Virginia law;

NOW, THEREFORE, the Commission hereby certifies that, to the best of each member's knowledge,

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- (i) only public business matters lawfully exempted from open meeting requirements under Virginia law, and
- (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting by the Commission.

Associate Member Holland seconded the motion. Commissioner Bowman held a Roll Call vote:

AYES: Bowden, Bowman, Fox, Holland, Robins, and Schick and Tankard.

NAYS: NONE

ABSENT DURING VOTE: McConaugha and McLeskey

ABSENT DURING ALL OR PART OF CLOSED MEETING: McConaugha and McLeskey.

The motion carried, 7-0.

Katherine Leonard, Recording Secretary

Commissioner Bowman disclosed at the outset of the hearing that he and other members of the board had ex parte communications during the past month or so, with both opponents and proponents in this case. Even though this had occurred, he felt that the Commission could still consider this case in an unbiased manner. He went on to explain that the hearing would be structured with the staff providing a presentation for 30 minutes, and the applicant and the City’s representative getting 30 minutes each, with all others following. He stated the applicant would be allowed time after that for rebuttal comments. He stated that this was not a public hearing, but a meeting to discuss only that which relates to the record of the Wetlands Board hearing and that no one but those in attendance at the Wetlands Board meeting would be allowed to address the issue.

Commissioner Bowman noted for the record that the board members were given ample opportunity to review the transcript, which was sent to them three weeks prior to this meeting.

SANDLER AT INDIGO BAY, LLC, #06-2601. Commission review, on appeal by the applicant, of the May 21, 2007, decision by the City of Virginia Beach Wetlands Board to deny a proposal to fill and impact approximately two acres of tidal wetlands associated with the construction of a 1,063 unit multi-residential community on property situated along Pleasure House Creek in the Ocean Park subdivision in Virginia Beach.

Mr. Justin Worrell, Environmental Engineer, Sr., gave the presentation with slides from the Wetlands Board hearing. His comments are a part of the verbatim record. Mr. Worrell explained that the opening slides and aerials were for orientation purposes and that staff felt it was not opening the record. Some poster size drawings prepared by the applicant were utilized for the presentation and what was not used was available for review by the board at their request.

Mr. Worrell explained that the subject site was located directly southwest of the Lesner Bridge and the City's Public Boat Ramp along Crab Creek. The entire shoreline of this 69-acre property is situated along Pleasure House Creek, a tributary to the Lynnhaven River. For the most part, Pleasure House Creek is very shallow and unnavigable for larger vessels. The waterway was, however, quite popular for kayaking, canoeing, crabbing, and fishing.

Mr. Worrell also explained that the undeveloped property included both tidal and nontidal wetlands and had an extensive history related to its use as the Lynnhaven Inlet dredged-spoils placement area. Although the majority of the property on the channelward side had been filled with dredged material, the canals and ditches that were excavated to aid in the dewatering of the site now contained fringing tidal wetlands. As such, tidal wetlands exist inside portions of the property well landward of the tidal fringe marsh situated along the shoreline of Pleasure House Creek.

Mr. Worrell stated that the Virginia Beach Wetlands Board considered this application at a public hearing on May 21, 2007. The project failed to garner the required number of affirmative votes according to Code, however, and the application was deemed denied.

Mr. Worrell said that staff received a letter of appeal on May 29, 2007, from Attorney John W. Daniel, II, on behalf of his client, Sandler at Indigo Bay, LLC. That appeal letter was considered timely under the provisions of Section 28.2-1311 (B) of the Code. The letter of appeal requested that the Commission *reverse* the decision of the Virginia Beach Wetlands Board based on the grounds that the Board failed to fulfill its responsibilities under the wetlands zoning ordinance and that the rights of the Applicants were prejudiced by errors of the Board. The appeal letter did not provide any specifics as to how the Board failed to fulfill its responsibilities, nor the errors that were alleged to occur.

Mr. Worrell stated that in keeping with the time frames specified in the Code, staff set the Commission review of the appeal for the June 27, 2007 meeting. On June 8, 2007, however, staff received a second letter from Mr. Daniel requesting a continuance of the

Commission review from the June 27th meeting to the July 24th meeting. On behalf of his client, he also agreed to waive their right to a hearing within the 45 days specified in the Code.

Mr. Worrell said that at its May 21, 2007, public hearing, the Board began by receiving a staff briefing that included pictures and plan-view drawings of the project. They also reviewed the written comments provided by the City's Planning Department and the Virginia Institute of Marine Science (VIMS). Attorney R.J. Nutter and the applicant's consultants (Kimley-Horn and Associates, Inc.) presented their request to fill and impact existing tidal wetlands in conjunction with the proposed development. Approximately 30+ citizens spoke in opposition to the proposal.

Mr. Worrell noted that the Planning Department staff recommended approval of the proposal with several conditions, some of which included the submittal of a vegetated wetlands monitoring plan and the submittal of revised drawings delineating mean low water (mlw), mean high water (mhw), and corrected tidal and cross-sectional elevations. The VIMS evaluation addressed numerous issues they felt warranted careful consideration by the Board. These issues included the lack of an economic analysis justifying the level of build-out, the need for specific erosion and sediment control structures, potential impacts to avian habitat, the design of specific floodways, and the potential impacts of the proposed bulkhead and piers.

Mr. Worrell said that Mr. Nutter and the consultants from Kimley-Horn characterized their proposal as a means to improve existing site conditions while still allowing the owners to develop their private property and provide much needed high quality housing to the area. They justified the necessity of impacts to what they deemed were "lower quality and manmade or man-altered wetlands" by focusing on the predicted stormwater improvements and the creation of additional tidal wetlands at an approximate 4:1 ratio.

Mr. Worrell explained that the applicants argued that the existing site lacked any stormwater treatment which allowed runoff from the entire Ocean Park neighborhood to empty directly into Pleasure House Creek and the Lynnhaven Inlet system. They emphasized that the proposed impacts to the existing tidal ditches would allow for the necessary stormwater retention and treatment for both the new development and the existing neighborhood. The applicants also noted that the majority of the tidal wetland impacts avoided the higher quality, existing fringe wetlands directly adjacent to Pleasure House Creek.

Mr. Worrell said that the applicants specifically highlighted the amount of new tidal wetlands that they proposed as compensation for the proposed impacts. They suggested that the new wetlands would not only be larger in quantity, but also of a higher functional value than those which existed. Furthermore, the applicants offered to establish a conservation easement over all existing and created tidal wetlands to ensure their survival and protection. This easement was offered in conjunction with an unsubstantiated claim

that the upland property owners also owned title to the submerged bottom of Pleasure House Creek by virtue of a prior King's Grant.

Mr. Worrell stated that several citizens and groups spoke in opposition to the proposal. Their central argument was that the proposal had not avoided the existing tidal wetlands resource. While many of the citizens generally opposed the development plan on principle alone, citing concerns such as increased traffic, visual impairments, and displacement of wildlife among other issues, others cited specific components of the proposal that failed to first avoid existing tidal resources. Numerous protestants specifically pointed to the Commission's *Wetlands Guidelines* (developed pursuant to Chapter 13 of Title 28.2 of the Code of Virginia) in arguing that the proposed impacts could occur to areas outside of the tidal wetlands, and that the applicants had not specifically proven the need for portions of the project to be located in tidal wetlands. The protestants also pointed to the Commission's *Wetlands Mitigation-Compensation Policy and Supplemental Guidelines*, (4 VAC 20-390-10 ET SEQ.), stating that the proposal failed to justify the necessity of tidal wetlands impacts, and that the applicants were attempting to justify the impacts with a large compensation plan. The opposition reminded the Board that large portions of the property on the Pleasure House Creek side were functional tidal wetlands in the past before the site was manipulated for dredged spoils storage and dewatering. They argued that those wetlands were still there and very much a part of the entire property; they've just been covered over time. They did not agree with the applicant's assessment that the proposed impacts were to "manmade or lower quality" wetlands.

Mr. Worrell explained that Mr. David O'Brien from VIMS also spoke during the hearing at the Board's request. He expressed concerns that portions of the proposal may essentially interrupt the transition of wetlands into the upland buffer, and that these buffers are integrally related to the survival of the wetlands. Mr. O'Brien acknowledged that the proposed stormwater improvements and treatment would be beneficial, but pointed out that nitrogen should be specifically targeted for removal in an estuarine environment. Finally, Mr. O'Brien advised that the proposed impacts should be evaluated on their own merits regardless of the size and scope of the tidal wetlands creation and stormwater improvements.

Mr. Worrell stated that at the conclusion of all presentations and public statements, the seven-member board collectively and individually voiced their concerns and opinions. Members supporting the proposed development cited their satisfaction with the overall benefits of the stormwater quality improvements and sizeable compensation component, along with the rights of the applicants to develop their private property. Members not supporting the proposal questioned whether the applicants really had tried to avoid the tidal wetlands resource. They cited the "Specific Criteria" for approval in the Commission's *Wetlands Mitigation-Compensation Policy*, stating that the applicants did not clearly demonstrate why certain components of the project needed to occur in tidal wetlands. Along those lines, members also questioned the water dependency of the

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proposed impacts. With regard to the stormwater issues discussed, they questioned whether a new development was the appropriate solution to the existing stormwater problems arising from the Ocean Park subdivision. Members stated that the City's failure to address those issues in the past should not now justify the construction of a development in tidal wetlands just because they would be treating existing and new stormwater. Concerns related to the actual success of proposed wetlands and how stormwater problems relate to future wetlands impacts were also raised. The board chairman also cited the very purpose of the Board, which was "to prevent the destruction and despoliation of tidal wetlands," according to the Model Wetlands Ordinance as specified in Chapter 13 of Section 28.2 of the Code of Virginia.

Mr. Worrell said that following the hearing and further discussion by the board members, a motion was made and seconded, to approve the proposed impacts with on-site compensation and additional conditions that the bulkhead component be removed, nitrogen fertilizer application be prohibited for the future development, and conservation easements be established over the tidal wetlands and subaqueous bottom. That motion only garnered three (3) affirmative votes. The remaining four (4) members voted no. Therefore, in keeping with the provisions of Section 28.2-1302(7) of the Code of Virginia, which specifically require an affirmative vote of four (4) members of a seven-member board, the application was deemed to be denied.

Mr. Worrell noted that Section 28.2-1313 of the Code of Virginia stated that the Commission shall modify, remand or reverse a decision of the board if:

1. The wetlands board, in reaching its decision, failed to fulfill its responsibilities under the wetlands zoning ordinance; or
2. The substantial rights of the appellant or the applicant have been prejudiced because the findings, conclusions, or decisions of the board are:
 - a. In violation of constitutional provisions;
 - b. In excess of statutory authority or jurisdiction of the wetlands board;
 - c. Made upon unlawful procedure;
 - d. Affected by other error of law;
 - e. Unsupported by the evidence on the record considered as a whole; or
 - f. Arbitrary, capricious, or an abuse of discretion.

Mr. Worrell further noted that under Section IV Criteria for Alterations of Wetlands of the *Wetlands Guidelines*, promulgated by this Commission, the following alterations of the shoreline are ordinarily not justified:

"For purposes or activities which can be conducted on existing fastlands and which have no inherent requirement for access to water resources," and, "When there are viable alternatives which can achieve the given purpose without adversely affecting marshes..." Furthermore, the Guidelines stress that "high density development in or immediately adjacent to wetlands is discouraged." As such, the Board's decision to deny the proposal

based on the undocumented need for the project elements to be located in tidal wetlands appears consistent with the Wetlands Guidelines.

Mr. Worrell stated that the Board clearly stated that the applicants had not provided adequate justification for the actual impacts to occur in the tidal wetlands, nor was avoidance and minimization fully utilized as clearly stated in the Wetlands Guidelines. While staff acknowledged that the creation of approximately 6 acres of tidal wetlands would undoubtedly benefit the property, as well as provide additional stormwater treatment, that was not the core issue of this proposal and the ultimate Board decision. At issue was the necessity and justification of all tidal wetlands impacts, and the Board clearly stated that they did not feel the applicants provided that. Similarly, the Commission's *Wetlands Mitigation-Compensation Policy* required that all proposals must stand on their own merits and that "compensation should not be used to justify permit issuance." The *Policy* goes on to state that alternate siting must be included in mitigation, the proposal must clearly be water dependent, and must clearly demonstrate the need to be in wetlands and its overwhelming public and private benefits. The dissenting Board members raised these very issues throughout the hearing, questioning whether the proposal to create approximately 6 acres of tidal wetlands and to substantially treat stormwater passing over the property should be used to justify the initial project impacts. In the end, a majority of the board appropriately did not use the proffer of wetlands creation and stormwater improvements to justify the proposed wetland losses.

Mr. Worrell explained that in spite of the appellant's allegations, based on staff's review of the record, staff could not conclude that the Board failed to fulfill its responsibilities, or that the substantial rights of the applicant were prejudiced by a procedural error by the Board in hearing this matter. Accordingly, staff believed that their decision was well within the powers granted to the locality by Chapter 13 of Section 28.2 of the Code of Virginia and recommended that the May 21, 2007 decision of the Virginia Beach Wetlands Board be upheld. Should the applicants decide to reapply in a modified form, staff recommended they do so only after having received both local zoning and Chesapeake Bay Board approval, since decisions in those areas, or by the appropriate boards, may either further justify or decrease the amount of tidal wetlands impacted.

Associate Member Robins asked if the Board was justified when considering the buffer impacts and addressing Mr. Bensen's concerns, on page 102 of the transcript. Mr. Worrell explained that comments made by Mr. O'Brien of VIMS were that the buffers were necessary for the wetlands and he did not consider them inappropriate.

Associate Member Robins explained that according to the record the applicant argued the proposal was justified as to impacts to wetlands because of the storm water improvements. He said some do seem justified and asked which ones were not. Mr. Worrell stated he could not answer that question or summarize for the Board. He stated that the stormwater treatment was not a part of the original proposal but came about because of this proposed project.

Carl Josephson, Senior Assistant Attorney General and VMRC Counsel, asked staff about the orange areas which were beyond the Wetlands Board's authority. Mr. Worrell explained that this was a complicated situation. He said that there were existing wetlands on the fringes of Pleasure House Creek within the Wetlands Board's jurisdiction, which were altered by man and over time became tidal for whatever reason. He said that this was addressed by the City staff, VIMS, and somewhat by the Wetlands Board. He said it was not unusual for there to be some areas that are tidal wetlands that are not in the Wetlands Board jurisdiction, but were under the jurisdiction of DEQ and the Corps.

Associate Member Schick asked, was it discussed by the applicant regarding the interior areas and man-made alterations prior to 1971. Mr. Worrell stated, yes, it had been discussed somewhat at the Wetlands Board hearing, which is a part of the record. He said he was not an authority on this site and others on VMRC Habitat staff could better answer that.

Commissioner Bowman asked if the applicant or the representative for the applicant wished to address the Commission.

Mr. R. J. Nutter, Attorney for the applicant, was present and his comments are part of the verbatim record. Mr. Nutter stated that the Wetlands Board had erred, by a misapplication of the statutes. He said that new standards were put into Regulation on which VMRC staff and the Chesapeake Bay and Wetlands Boards had worked on for 6 months. He stated that the denial was detrimental to the area and to Hampton Roads. He said the VMRC staff and the Wetlands Board had both left out the other side of the issue. He said that in Section 28.2-1301 of the Code were the laws to protect not what wetlands are, but what they do. He requested a staff slide. He said that wetlands were not being lost, but they were restoring 4.5 acres and 6.09 of both types of wetlands. He said nowhere in the statutes does it say, "thou shall not touch any wetlands".

Mr. Nutter explained that in answer to the Associate Member's question, they must deal with the stormwater that crossed the wetlands, because it was required by law. He said this was a highly manipulated site impacting the quality of the wetlands present, as well as being studied by the Corps and the locality in the 1950's and 1960's. He said that the area had been filled, a berm had been built, and ditches had been dug for the purpose of dewatering the site, which had resulted from stormwater being pumped from the upland across the wetlands and into the river.

Mr. Nutter explained that the Wetlands Board considered the water dependency of the project and had misunderstood they were not tidal areas, but cuts and ruts which were water dependent features. He said to comply with the ordinance of avoiding wetlands or valuable wetlands, only 14% was being impacted or 1.5 acres of wetlands. He utilized the poster board visual aids to show the area. He said that 80% were fragmented wetlands, no habitat was provided, no erosion control, and stormwater was being pumped through the applicant's property. He said the City failed to prevent the stormwater from

getting into the wetlands and was damaging the water quality. He said they would meet the criteria of the Statute and the Board had erred.

Mr. Nutter explained that the Board acted unlawfully when one of its members who opposed the project had not disclosed a conflict of interest. He said the Board member had been actively trying to acquire the land prior to its being sold. He said he should have abstained from participating because of this conflict of interest and the Wetlands Board had the option of having an alternate, which was available for this purpose.

Mr. Nutter said this was not a minor error. He said that the Board exceeded its jurisdiction, as set forth in Section 28.2-1302 of the Code of Virginia. He explained that the public –private benefits exceeded public-private detriments (putting back valuable wetlands, eliminating bad wetlands, treatment of the storm water), which conformed to the Code. He said they did not look at the past history of the man-made disturbances of the wetlands in 1972 and the fact that they would be providing new wetlands. He said this project would provide for the enhancement of economic development in the area.

Mr. Nutter said the Board Chairman was wrong in his statements, which were not supported by evidence.

Associate Member Robins stated that in Section 28.2-1303 of the Code there is a provision for the Chairman to replace someone in the case of absence with an alternate. Mr. Nutter responded that the Board member was responsible for excusing himself. He said it was the right of the applicant to receive a fair hearing with an impartial Board. He said this was not shown as being done, by the record.

Associate Member Tankard asked about the economic benefits for Hampton Roads. Mr. Worrell recommended that the board not address this at this hearing or the record needed to be opened. Mr. Nutter agreed that there was no economic data in the record.

Commissioner Bowman asked the City's representative to address the Commission.

Kay Wilson, Associate City Attorney, was present and her comments are a part of the verbatim record. Ms. Wilson said that Mr. Wayne Couch, Chairman of the Wetlands Board was also present. Ms. Wilson explained that on May 21, 2007 the Wetlands Board made a motion to approve the project with conditions, but it failed by a vote of 3-4, so therefore it was denied.

Ms. Wilson expressed her concerns with a memorandum from the appellant being included in the briefing packages mailed to the Commission's Associate Members. She read a letter from the City of Virginia Beach in which it said they felt the memo had biased the Commission and put the matter on an uneven playing field, which was a violation of the Administrative Process Act. Commissioner Bowman stated that her

objection was duly noted and asked her to continue. He also stated that he had received other information by various means.

Ms. Wilson stated that the Commission did get this information and the City felt that this opened the record, which they objected to the opening.

Ms. Wilson explained that the Board member in dispute had asked the City Attorney for an opinion and that letter was made a part of the record. They had determined that if there was no financial conflict in accordance to the Conflict of Interest Act, there was no need to disclose or abstain. She said there were no financial interests involved. She went on to say that even if there had been an abstention the motion still would not have passed.

Ms. Wilson stated that there had been no procedural error and the decision should be upheld. She said that the Wetlands Board had spent a lot of time and energy exploring all aspects, even making site visits. She said the Board had heard both sides.

Ms Wilson stated that in accordance with the 1972 Guidelines the Board was charged with protecting the wetlands. She said this was an intense housing development project and there was no violation of the Constitution. She stated the Wetlands Board Chairman and its members all understood their responsibilities and the laws. She explained that the City Wetlands Ordinance said the decision to grant the permit was at their discretion when the public-private benefits exceeded the public-private detriments and were of ecological significance.

Ms. Wilson said that the 6 acres of compensation were to be placed in the footprint of an old marsh, but wetlands were wetlands whether they had been manipulated or not. She said the Guidelines did not say altered shoreline justified allowing the project. She said it stated that just filling in for upland property was undesirable and was discouraged.

Ms. Wilson said that all the appellant had discussed were the wonderful compensations and that could not be used to justify approval of the permit. She said that the evidence had not proven that the Wetlands Board had erred and the matter had been fairly debated and acted on. She said the Commission should uphold the Wetlands Board decision.

Associate Member Robins asked about it not being a level playing field and Wetlands Board members actively lobbying and how that was not fair. Ms. Wilson explained that in the Conflict of Interest Act it said financial interest only caused there to be a conflict of interest. Associate Member Robins asked about whether the board was justified in considering the buffer issue. Ms. Wilson stated that the survival of the created wetlands required a buffer.

Commissioner Bowman noted that the Commission had seen the letter from the City Attorney and he felt an arbitrary decision had been made on the prior activities to the hearing. He said he also felt there was still a possible conflict. Ms. Wilson said that it

was not shown in the record that he was wrong. She said that Mr. McLeskey had abstained, but did not have to do so. She said she had a problem seeing the conflict. Commissioner Bowman stated that he felt it might have influenced the dynamics on the debate and influenced the board. Ms. Wilson said there would have been no replacement, even if he had abstained.

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The meeting was recessed when Commissioner Bowman announced a 10-minute break. The meeting was reconvened at approximately 12:14 p.m.

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Commissioner Bowman asked if there were others that attended the Wetlands Board meeting who wished to speak.

Mike Wells, Virginia Beach resident, was sworn in and his comments are a part of the verbatim record. Mr. Wells said he wished to clarify the purchasing group which the Wetlands Board member was involved in, which had raised concerns about the Board's decision. He said they were involved in a group that supported the City in their "2006 Open Space Fund". He said this was a group trying to raise money for the purchase of the property in February 2007, but it was sold before they could complete their effort.

Wally Damon, resident at Chesapeake Beach in Virginia Beach, was sworn in and his comments are a part of the verbatim record. Mr. Damon said he was opposed to the project, as it was not a small project. He stated this was a project that would have major impacts on the area. He said he utilized the water himself and he would like the area to be left alone and the development not be allowed. He said he had seen oysters and crabs in the area and this was the only area like this left in the United States. He asked the board to uphold the Wetlands Board decision to deny.

Daphne Atkins was sworn in and her comments are a part of the verbatim record. Ms. Atkins explained that this was an application that had been looked at for a long time, about 1 year. She said mistakes had been by the applicant. She stated that she was opposed for reasons stated in the Code and in the Guidelines. She said consideration must be given to the public-private benefits versus the public-private detriments and in accordance with the Guidelines which said creating upland property was undesirable. She stated that the disturbance already was irreversible and the Kings Grants they spoke of had not been shown.

Commissioner Bowman stated this was not a part of what the Commission was allowed to consider. Ms. Atkins said that in the record the applicant stated that this project could be made smaller and not even affect the wetlands.

Todd Solomon, resident of Shore Drive Community, was sworn in and his comments are a part of the verbatim record. Mr. Solomon said the board asked all the pertinent questions and discussed the regulations in order to make their decision. He explained one question was about the need to be in wetlands and the appellant in their statements made at the hearing, said the project could be made smaller. He also said that the mitigation regarding the wastewater treatment was not a reason for it to be approved. He said they agreed with the VMRC staff and the Wetlands Board that 28.2-1313 was not violated.

Larry Conner, President of the Civic League, was sworn in and his comments are a part of the verbatim record. Mr. Conner explained that the area was covered with trees and concrete was being put in. He stated allowing this project would kill the creek.

Commissioner Bowman asked if the appellant's attorney wished to provide rebuttal comments.

Mr. Nutter in his rebuttal stated that the Conflict of Interest statutes require a disclosure, which was not done and that undermined his client's rights. He said he agreed with the Commissioner that the Conflict of Interest Act applied to the one individual. He said that if no alternate could be appointed they would have objected and requested a deferral. As a result, he said his client was denied a full and impartial hearing. He said evidence was provided that man-made efforts worked, as well as natural. He said they avoided 86% of the wetlands area. He stated that the high quality wetlands were replacing low quality wetlands. He said stormwater treatment would affect the wetlands no matter how the property was developed. He said the opposition cited Sections 28.2-103 and 1301 regarding water dependence. He said the Chesapeake Bay Act addresses water dependence. He said that the Guidelines do not address water dependence and the Board looked at this as a shoreline when it was an upland ditch. He stated that the State statute overrides all regulations.

Commissioner Bowman asked for discussion or action.

Associate Member Schick explained that he understood that because of the size of the project there would be concerns. The core of the matter was the impacts on wetlands. He said the wetlands were altered by man and made dysfunctional and to preserve it must be made functional. He said the rights of the owner to develop were not considered and how citizens would benefit from it.

Associate Member Tankard read from Section 28.2-1313 of the Code and made a motion to uphold the Wetlands Board decision. Associate Member Robins asked if the discussion could be continued prior to making a motion. Commissioner Bowman ruled that the discussion would be continued and after that Mr. Tankard would be allowed to make the motion again.

Associate Member Robins stated that Mr. Tankard in his summary of the Code and what to look at would limit the impacts to the wetlands system. The applicant made efforts to preserve and avoid impacts to only that which was required for the water treatment. He said the Wetlands Board cannot separate the applicant's deals with its responsibility. He stated they went through the steps of the Code and considered the lowest value wetlands and compensation. He said that the stormwater treatment would improve water quality. He said that the direct impacts were on the East side where the buffer would limit impacts and create a balance. He said the applicant had done well by making good government deals with residual impacts. He said he agreed with Mr. Tankard there must be a solid record base in order to overturn the Wetlands Board decision. He said the Board considered the Code directly and had reasonable reasons for their decisions. He said he was concerned with the conflict of interest issue, therefore, prejudicing the rights of the applicant, but there was no way to replace him with an alternate. He said he felt the Commission must confirm the decision of the Wetlands Board.

Associate Member Fox stated that the applicant made a strong case and it was a very attractive project. He said even though he liked the project, the Code Section 28.2-1313 must be considered in order to analyze the decision of the Wetlands Board. He said he had been persuaded by staff and the record that the action of the Board was appropriate in considering the Code and all other things they must consider. He said he was also concerned with the conflict of interest issue, but he record showed that the individual did not try to influence the board at the meeting. He stated he hoped that an opportunity was available to modify the project and reapply. He said this decision was controlled by criteria in Section 28.2-1313 in the Code and the board did meet them.

Associate Member Schick stated the Wetlands Board did not consider all the evidence and was swayed by other information. He said they did not key in on the fact that the property did not have pristine wetlands. He said it was not shown in the record that the property needed help. He said that there were a lot worse proposals and he suggested overturning the Wetlands Board decision.

Commissioner Bowman he said the case was complicated and extreme discipline was needed to assure that they looked at the Code Section 28.2-1313. He said whether it is a good or bad project was not relevant unless the actions of the Board were not supported by the record. He said he was concerned with the level of the playing field even though it was not a violation of the law as pointed out. He said there was a lot of potential for this project and good things could come from it. He said there would be 1.5 acres impacted and 4.5 acres of enhancements. He said he felt that pursuant to Section 28.2-1313 (E), the decision of the Wetlands Board was not supported by the record.

Associate Member Tankard moved to uphold the Wetlands Board decision in accordance with Section 28.2-1313 of the Code. Associate Member Fox seconded the motion.

Associate Member Schick then made a substitute motion and moved that, in accordance with Section 28.2-1313 of the Code, the Commission find that the Wetlands Board decision was unsupported by the record and that the decision be overturned for the Sandler @ Indigo Bay project. Associate Member Holland seconded the motion.

Roll Call Vote on the substitute motion:

Bowden	Aye	McConaugha	Absent	Schick	Aye
Fox	No	McLeskey	Recused	Tankard	No
Holland	Aye	Robins	No	Chair	Aye

The substitute motion carried, 4-3. The Chair voted yes. Associate Members Fox, Robins, and Tankard all voted no. Associate Member McLeskey rescused himself from participation.

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There was no further business and the meeting was adjourned at approximately 1:04 p.m. The next regular Commission meeting will be held August 28, 2007.

Steven G. Bowman, Commissioner

Katherine Leonard, Recording Secretary