



# County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

## Final Minutes

### Meeting of the Chesapeake Bay Exception Review Committee

September 1, 2021, 3:00 PM

Cisco WebEx Event #1-844-621-3956, Access Code 179 632 6994

#### Present

##### Committee:

Kenneth Lanfear, Edward W. Monroe, Jr., Dr. David Schnare, Elizabeth Martin, Som Govender, Amy Gould, Alexis Dickerson, Anne Kanter, Sue Kovach Shuman

##### County Staff:

Danielle Badra, Brandy Mueller, Camylyn Lewis, Nicola Mutesi, Keyona Green, Jerry Stonefield, Marc Gori

##### Public:

Daniel Moore, Virginia Department of Environmental Quality (DEQ)

#### Committee Members Not Present:

James Chesley

#### Call to Order

Meeting called to order by Chair Elizabeth Martin at: 3:00 PM

#### ERC Business

1. Motion made by Martin to establish each member's voice could be heard by every other member. Seconded (Lanfear) and approved 7-0.
  - a. Anne Kanter in McLean, VA representing At-Large
  - b. Dr. David Schnare in Burke, VA representing Springfield District
  - c. Kenneth Lanfear in Reston, VA representing Hunter Mill District
  - d. Som Govender in Clifton, VA representing Sully District
  - e. Amy Gould in Annandale, VA representing Braddock District
  - f. Elizabeth Martin on Stockton Parkway representing Mount Vernon District
  - g. Alexis Dickerson in Alexandria, VA representing Lee District
2. Motion made by Martin to conduct the meeting electronically through the dedicated video conferencing platform (Webex) with public access. Seconded (Schnare) and approved 7-0.



3. Motion made by Martin regarding continuity of government. Seconded (Kanter) and approved 7-0.
4. Sue Kovach Shuman acknowledged as joining the meeting from Fairfax representing Providence District. Martin confirmed that Shuman's voice could be heard clearly.
5. Review of the August 4, 2021, meeting minutes:
  - a. Motion made by Schnare to delay approval of the minutes until the next meeting as all committee members did not appropriately receive the minutes in advance. The motion was seconded (Lanfear) and approved 7-0.

### Topic 2: Proposed ERC Improvements

Action: Committee to vote on a standard template for generic draft motions to be posted to the ERC website. If agreed, staff would post templates to the ERC website. [Proposed templates](#) shared via the WebEx platform as further found on the ERC website, under the September 1 business meeting materials.

#### Discussion:

- Schnare is in support.
- Kanter agrees but brings forth concerns with Attachment A references to conditions for approval. The templates do not solve the issue of developing approval conditions. Suggests committee members decide what they prefer to do in advance of the meeting.
- Martin notes the committee will read out the reasons why during the meeting.
- Gould questions at what point the committee would look at staff's recommendations. Points to past instances where she has both agreed and disagreed with staff's recommendations.
- Schnare reviews the hearing procedures.
- Lanfear considers how this will work. Anticipates staff providing a written recommendation and motion comes through to approve or accept the approval template as filled out with these changes (x, y and z) including Attachment A and everything else and agrees the templates would be a good starting point. States the "reasons why" on the templates should come from staff's information within the Staff Report.
- Govender states the committee members should state the reasons why directly in the draft motions, using the information from the Staff Report as a reference.
- Kanter references past processes. Motion templates used to go to the ERC committee member for the specific district in which the case was held. That district member would complete the template using the staff report. If the committee as a whole wanted something done differently, it would be discussed and worked out during the public hearing.
- Schnare points to the discussion as the record of what the committee is thinking, at the time of the hearing, not in advance. That discussion is the basis of the finding. The finding is made by the motion. The reasoning for why the finding is made is in the

record, as supported by the discussion. Confirms past preparation of motion templates were coordinated by the ERC district member in which the case was proposed.

- Martin disagrees with Schnare's interpretation and believes the findings should include the reasons why in order to provide further explanation as to how the committee came to the indicated conclusion.
- Schnare points to issues of consensus on why the committee disagrees, say on the matter of special privileges.
- Further discussion occurs.
- Kanter makes a motion to remove the bullets "state reason why" from the motion template. Seconded (Schnare). Discussion (noted below). Six Nays (Monroe, Lanfear, Govender, Gould, Shuman, Martin). One Yes (Kanter). Two abstained (Schnare, Dickerson). Motion denied.
  - i) Lanfear agrees with the logic to provide the why behind the findings. Motions written in advance could be done by the member whose district the case resides in.
  - ii) Lewis shares some of the challenges for staff. Virtual forum provides more success for the recording and audible record, however, in previous years, challenges were presented regarding the audible recording (some information not being picked up, sometimes unable to hear who is speaking, to note what they are saying or who says it). Believes for purposes of the record and the minutes, it is important for the committee to clearly state the reasons for the findings/determination, using the stated reasons in the proposed template.
  - iii) Monroe requests the motion be restated. Kanter obliges and restates the above motion.
  - iv) Edward Monroe confirms his presence in the meeting, calling from Dranesville District.
  - v) Martin confirms his voice is heard by all other members.
- Martin makes motion to approve proposed templates for the use of the committee. Seconded (Lanfear). Discussion (with amendment to include Draft watermark on the templates). Approved 8-1 (Lanfear, Gould, Kanter, Govender, Dickerson, Monroe, Shuman, Martin approve). Schnare disapproves.

Question from Martin and Lanfear: Should we assign committee members in advance to investigate particular issues that arise with a case, and be prepared to report back to the committee in the hearing?

Discussion:

- Lanfear believes staff should evaluate the water quality impacts but in cases where the impacts differ between staff and the applicant, Lanfear states he would be willing to review and summarize those differences.
- Kanter explains the job of the committee is to rule on what is presented, not to come up with new numbers or data and not to present a third set of conditions.

- Shuman relies on the technical guidance from staff and the public hearing to discuss further and make decisions accordingly, keeping an open mind for the presentation. Gives an example of the committee having one idea in advance of the last hearing and changing minds during the hearing based on the findings presented.
- Martin believes an assignment of tasks could be useful in advance of the anticipated hearing to better discuss and bring forth during the hearing especially surrounding any noted discrepancies from the staff report and/or disagreements between staff and the applicant, in addition to the staff. Helps with seeking clarification and preparing better questions of staff and the applicant.
- Govender feels the committee is entering staff's territory. The committee evaluates these gray areas. The members should not be doing staff's work and should not ignore the laws. When there is a gray area, or when the authority is vague, it goes forth to the committee. Performing calculations is beyond the job of the committee members.
- Lanfear agrees with Govender. Staff serves as the expert to the committee but if the applicant has a different calculation and disagrees with staff, this needs to be flagged and further discussed during the meeting. The committee has to decide what to do.
- Govender mentions going to a 3<sup>rd</sup> party to evaluate the numbers in lieu of the committee doing the analysis.
- Schnare reviews the function of the committee which is not to present new facts but to evaluate the facts given. If a disagreement is found, as the fact finder, the committee decides which to use. The committee can defer should they wish for the experts to go back and look again, however providing assignments is beyond what the committee is asked to do. Bring individual expertise during the meeting, present questions and discussion accordingly and decide how to proceed.
- Dickerson recognizes they are a citizen board and expertise varies. The committee should not scrutinize the data presented by the experts but ensure the information is validated. Additional due diligence may be performed by inclined committee members but should use caution in advance of the hearing. Need to ensure equitable distribution and analysis for one district without another – doesn't see any restrictions but should be something members opt in if desired but shouldn't necessarily be formalized.
- Gould understands the concept of the expertise being an issue and the need for accurate evaluation of the calculations and analysis. Likes the idea of the tasking of assignments but understands that committee members also have other full-time jobs and obligations.

Other?

- Govender notes committee members are serving their individual districts and should look at things from an outside point of view. Sometimes the facts are not what they should be, but they need to make judgements based on what is presented to them.
- Camylyn shares a noted challenge of the last hearing. Staff writes the report and includes recommended conditions which are limited to what is known at the time the report is written.

- Martin points to the ERC bylaws and the mention of allowing expert advice and legal counsel to the committee members to aid in making decisions.

Out of consideration of the allotted time left in the scheduled meeting and our invited guest from DEQ, the Clerk (Badra) recommends the Chair switch the proposed order of the next agenda topic to allow DEQ to go next. Martin agrees.

### Topic 3: DEQ Discussion: Serial Exceptions and Self-Created/Self-Imposed Criteria

In the case of a serial exception, staff has recommended assessing water quality (WQ) impacts compared to pre-development conditions (before the first exception).

- This might be an effective way to account for serial exceptions and ensure that WQ impacts are properly mitigated. Does it change the goalposts, unfairly holding property owners accountable for past encroachments when mitigation requirements may have changed? Does DEQ support this approach? If not, what does DEQ recommend in dealing with serial exceptions?
- What should be done if a previously approved water quality impact assessment (WQIA) is found to have errors so that WQ impacts were underestimated (and therefore mitigation was insufficient). Does DEQ support addressing past deficiencies when a subsequent exception request is submitted?
- Does granting serial exceptions confer a special privilege? Why, or why not?

DEQ Overview by Daniel Moore:

- Compliance review of the local program is performed every 5 years.
- Cites Virginia Beach program review as a recent example with a resulting finding and recommendations of their program. The city was in the habit of granting serial exceptions, “passing them out like candy.” As a result of the condition, DEQ worked with the city to improve their process and reduce the number of serial exceptions. Virginia Beach pointed to a contributing factor of military presence, noting it’s a fairly transient area – leading to new owners with new expectations. The majority of the properties plated were done so well before the Bay Act regulations were adopted. They also have a high percentage of water-front properties where there is very little buildable space on the parcel.
- To the extent that the committee has more specific questions, the City of Virginia Beach is agreeable to have direct communication with Fairfax County staff in how they manage the recommended conditions of DEQ’s referenced program audit and how they gain full compliance. Virginia Beach staff reports are exceedingly thorough and take significant time to produce due to the complexities of the issues.

Discussion:

- In the case of the recent second exception, staff recommended assessing past water quality impacts of pre-development conditions - does DEQ support?

- DEQ: Generally, yes. The county's regulations and comprehensive plan elements must meet state regulations. Local governments can impose stricter requirements via the Bay Act Program without DEQ direction. Believes there is a legal component to this potential question/regulation to see whether the county can legally require this information and if the lawyers would find this permissible.
- Govender: Could not find an existing rule to prohibit the applicant from doing what they did. The owner was in a tough spot and there was no legal aspect of the argument to prohibit them from doing what they were proposing.
- DEQ: Do we have the right to look at pre-development conditions and again, the answer is yes.
- Dickerson: Is that concept based on the historical record of the property of the individual owner? Do we reset every time there is a new owner?
- DEQ: When is a serial exception a serial exception? When you have one owner making multiple requests versus one property with different owners making their own individual requests.
- Schnare: Challenge is when conditions of the property suggest the need for a change which would require another exception. For example, owner builds a property and six months down the road needs an access to the house which allows for the care of an individual with these needs. These are individual and unique requests to be evaluated accordingly. Concept of serial exceptions should apply a reasonable exception standard.
- DEQ: Agrees with Schnare's point. The scenario they should avoid is multiple requests to go into the RPA over time and attempting to "game" the system. This is an easier call to make.
- Marc Gori, Assistance County Attorney: The committee's job is to apply the six criteria and consider whether an application applies all six criteria. The ones that are most challenging are minimum necessary to afford relief and self-created/imposed.
  - For the case of an owner coming in for a repeat exception for an improvement that they failed to acknowledge on the first request, you have to ask yourself whether it was self-created. References the previous case being put up for sale before asking for the turnaround for Amazon trucks.
    - Was this self-imposed? The committee did not think so and approved the request in lieu of requiring the owner to seek an additional option. Govender says there isn't a way they could disapprove the application – Gori does not agree believing there was criterion which could have been applied.
- Gori goes on to say seriality is not prohibited under the Ordinance so in reference to Virginia Beach – Gori asks Moore whether the issue was with the locality not applying the required criteria.
- DEQ: The high turnover of properties in Virginia Beach led to the issue.
- Gori: What was the city's issue in administering the regulations?
- DEQ: Believes this would be best discussed directly with the city's staff as he (Moore) has not been directly involved in their program review. Reminds everyone that the review

must keep with the spirit and intent of the regulations, to the extent practical, a locality should have pretty significant limitations on what should be allowed to encroach into the RPA.

- Moore questions the committee for more information regarding the subject case for the turnaround.
- Moore asks whether conditions were imposed on the turnaround (e.g., permeable pavers).
- Schnare brings up the diversity of properties throughout the bay and not wanting strict legal requirements but instead limit to guidance.
- Martin: More guidance from DEQ is needed in the existing materials provided by the state.
- DEQ: Suggests rereading of the locality's Ordinance to better understand the intent and the role of the RPA and the committee's review, in relation to the bay and water quality requirements, specifically in reference to a pool comment made by the committee. He understands Virginia is a strong property right state, but the lack of a swimming pool is not negatively impacting one's ability to take advantage of their property. Moore agrees the guidance materials are outdated and need updating.
- Lanfear brings up owners or past owners who agree to mitigating conditions as part of their original exception and do not properly implement those conditions which are later identified during a subsequent request.
- DEQ asks about county's outreach and education efforts.
- Committee members mention the recent postcard effort lead by Mueller (staff) as well as limitations of RPA information at time of property sale.
- Govender: What is the threshold for a serial exception?
- DEQ: That decision is to be made by the governing body as the state does not have a calculation to address this or identify serial exception criteria.
- Kanter points to possible inconsistencies amongst other jurisdictions.
- Gori reminds the committee of their required assessment against the six required findings and criteria.
- Kanter takes self-imposed as an example. States there is no definition on application of self-imposed.
- DEQ: The process whereby you, as a group of individuals, hold discussion as a committee during the review of the proposal in the public meeting to arrive at the definition of self-imposed. The state cannot generate a gross general definition by what is meant of self-imposed. Moore asks the committee what a reasonable definition is to them of what is meant by "self-imposed". You are going to know what it is when you are going to see it, case-by-case.
- Martin presents an example of a second exception request where the applicant did not mitigate the condition requirements of the first exception and asks DEQ whether they can deny the new request outright and require the applicant correct the previously required mitigation before coming before them with the exception.

- DEQ notes the role of the state and the county's implementation of the local program. They will review and evaluate every five years but not delve into the day-to-day of each case.
- Monroe references the last application. It was brought up that it could have been self-imposed. The owners presented their case and mentioned the access issues along with the safety matter. The county's perspective included a requirement that in order to approve the request, the committee should account for an existing deck (constructed after the first exception) outside of the RPA.
- DEQ supports the summary of the past application to be viewed as self-created and self-imposed, considering the garage and courtyard space, regardless of number of cars owned by the applicant or the amount of guests invited at one point in time or another.
- Lanfear makes the point to not discuss judgements made in a past case/hearing.

In light of the time spent on the above two topics, Martin proposes to wrap up the meeting without completing the remaining agenda topics and discuss at a later date. The committee agrees.

Kanter requests staff print and mail the overall schematic of proposed projects when the staff report is posted online, allowing the committee members to review the WQIA in larger format. Badra agrees staff will coordinate this request going forward.

#### Adjournment

Motion from Lanfear to adjourn at 5:19PM. Seconded (Monroe). Approved 9-0.