

Middlesex County Board of Supervisors



ORDINANCE

At a meeting of the Middlesex County Board of Supervisors held on August 4, 2020 at 3:00 p.m. electronically: On a motion duly made by Supervisor Mansfield, and seconded by Supervisor Koontz, the following Ordinance was adopted by the following vote:

Wayne H. Jessie, Sr.	Aye
Peter W. Mansfield	Aye
John B. Koontz, Jr.	Aye
Reginald Williams, Sr.	Aye
Lud Kimbrough	Aye

AN ORDINANCE AMENDING THE MIDDLESEX COUNTY WETLANDS ZONING ORDINANCE

WHEREAS, effective July 1, 2020, pursuant to Virginia Code Section 28.2-1302, wetlands zoning ordinances are to be amended to: (1) require that an application for use or development of any wetlands include a “statement indicating whether use of a living shoreline as defined in § 28.2-104.1 for a shoreline management practice is not suitable, including reasons for the determination”; and (2) require wetlands boards to preserve and prevent the despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetlands preservation “and any standards set by the Commonwealth in addition to those identified in § 28.3-1308 to ensure the protection of shorelines and sensitive coastal habitats from sea level rise and coastal hazards, including the provisions of guidelines, and minimum standards promulgated by the Commission pursuant to § 28.2-1301 of the Code of Virginia;” and

WHEREAS, the Middlesex County Wetlands Zoning Ordinance has not been updated in accordance with state code provisions since 1995, making additional amendments to the ordinance appropriate.

WHEREAS, a duly advertised public hearing was held on August 4, 2020 to receive public comment regarding this ordinance amendment; and

NOW, THEREFORE, BE IT ORDAINED by the Middlesex County Board of Supervisors this 4th day of August 2020, that the Middlesex County Wetlands Zoning Ordinance adopted December 20, 1995 is hereby amended and reenacted as follows:

Section 1. The governing body of Middlesex County, Virginia, acting pursuant to Chapter 13 of Title 28.2 of the Code of Virginia adopts this ordinance regulating the use and development of wetlands. This ordinance shall be known and may be cited as the Middlesex County Wetlands Zoning Ordinance.

Section 2. As used in this ordinance, unless the context requires a different meaning:

- (a) "Back Bay and its tributaries" means the following, as shown on the U. S. Geological Survey Quadrangle Sheets for Virginia Beach, North Bay, and Knotts Island: Back Bay north of the Virginia-North Carolina state line; Capsies Creek north of the Virginia-North Carolina state line; Deal Creek; Devil Creek; Nawney Creek; Redhead Bay, Sand Bay, Shipp's Bay, North Bay, and the waters connecting them; Beggars Bridge Creek; Muddy Creek; Ashville Bridge Creek; Hells Point Creek; Black Gut; and all coves, ponds and natural waterways adjacent to or connecting with the above-named bodies of water.
- (b) "Commission" means the Virginia Marine Resources Commission.
- (c) "Commissioner" means the Commissioner of Marine Resources.
- (d) "Governmental Activity" means any or all of the services provided by this County to its citizens for the purpose of maintaining this County, including but not limited to such services as constructing, repairing and maintaining

roads; providing sewage facilities and street lights; supplying and treating water; and constructing public buildings.

- (e) "Nonvegetated wetlands" means unvegetated land lying contiguous to mean low water and between mean low water and mean high water, including those unvegetated areas of Back Bay and its tributaries and the North Landing River and its tributaries subject to flooding by normal and wind tides but not hurricane or tropical storm tides.
- (f) "North Landing River and its tributaries" means the following, as shown on the United States Geological Survey Quadrangle Sheets for Pleasant Ridge, Creeds, and Fentress: the North Landing River from the Virginia-North Carolina line to Virginia Highway 165 at North Landing Bridge; the Chesapeake and Albemarle Canal from Virginia Highway 165 at North Landing Bridge to the locks at Great Bridge; and all named and unnamed streams, creeks, and rivers flowing into the North Landing River and the Chesapeake and Albemarle Canal except West Neck Creek north of Indian River Road, Pocaty River west of Blackwater Road, Blackwater River west of its forks located at a point approximately 6400 feet due west of the point where the Blackwater Road crosses the Blackwater River at the village of Blackwater, and Millbank Creek west of Blackwater Road.
- (g) "Person" means any individual, corporation, partnership, association, company, business, trust, joint venture, or other legal entity.
- (h) "Vegetated wetlands" means lands lying between and contiguous to mean low water and an elevation above mean low water equal to the factor one and one-half times the mean tide range at the site of the proposed project in the county in question, and upon which is growing any of the following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), saltgrass (*Distichlis spicata*), black needlerush (*Juncus roemerianus*), saltwort (*Salicornia* spp.), sea lavender (*Limonium* spp.), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax

myrtle (*Myrica* sp.), sea oxeye (*Borrichia frutescens*), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), sea rocket (*Cakile edentula*), southern wildrice (*Zizaniopsis miliacea*), cattail (*Typha* spp.), three-square (*Scirpus* spp.), buttonbush (*Cephalanthus occidentalis*), bald cypress (*Taxodium distichum*), black gum (*Nyssa sylvatica*), tupelo (*Nyssa aquatica*), dock (*Rumex* spp.), yellow pond lily (*Nuphar* sp.), marsh fleabane (*Pluchea purpurascens*), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar's tick (*Bidens* sp.), smartweed (*Polygonum* sp.), arrowhead (*Sagittaria* spp.), sweet flag (*Acorus calamus*), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), or switch grass (*Panicum virgatum*).

- (i) "Vegetated wetlands of Back Bay and its tributaries" or "vegetated wetlands of the North Landing River and its tributaries" means all marshes subject to flooding by normal and wind tides but not hurricane or tropical storm tides, and upon which is growing any of the following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), black needlerush (*Juncus roemerianus*), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle (*Myrica* sp.), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), cattail (*Typha* spp.), three-square (*Scirpus* spp.), dock (*Rumex* sp.), smartweed (*Polygonum* sp.), yellow pond lily (*Nuphar* sp.), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar's tick (*Bidens* sp.), arrowhead (*Sagittaria* sp.), water hemp (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), or switch grass (*Panicum virgatum*).
- (j) "Wetlands" means both vegetated and nonvegetated wetlands.

(k) "Wetlands Board" or "board" means a board created pursuant to ~~Title~~ § 28.2-1303 of the Code of Virginia.

Section 3. The following uses of and activities in wetlands are authorized if otherwise permitted by law:

- (a) The construction and maintenance of noncommercial catwalks, piers, boathouses, boat shelters, fences, duck blinds, wildlife managements shelters, footbridges, observations decks and shelters and other similar structures; provided that such structures are so constructed on pilings as to permit the reasonably unobstructed flow of the tide and preserve the natural contour of the wetlands;
- (b) The cultivation and harvesting of shellfish, and worms for bait;
- (c) Noncommercial outdoor recreational activities, including hiking, boating, trapping, hunting, fishing, shell fishing, horseback riding, swimming, skeet and trap shooting, and shooting on shooting preserves; provided that no structure shall be constructed except as permitted in subdivision (a) of this section;
- (d) Other outdoor recreational activities, provided they do not impair the natural functions or alter the natural contour of the wetlands;
- (e) Grazing, haying, and cultivating and harvesting agricultural, forestry or horticultural products;
- (f) Conservation, repletion and research activities of the Commission, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries and other conservation-related agencies;
- (g) The construction or maintenance of aids to navigation which are authorized by governmental authority;

- (h) Emergency measures decreed by any duly appointed health officer of a governmental subdivision acting to protect the public health;
- (i) The normal maintenance and repair of, or addition to, presently existing roads, highways, railroad beds, or facilities abutting on or crossing wetlands, provided that no waterway is altered, and no additional wetlands are covered;
- (j) Governmental activity in wetlands owned or leased by the Commonwealth, or a political subdivision thereof; and
- (k) The normal maintenance of man-made drainage ditches, provided that no additional wetlands are covered. This subdivision does not authorize the construction of any drainage ditch.
- (l) The construction of living shoreline projects authorized pursuant to a general permit developed under subsection B of Va. Code § 28.2-104.1.

Section 4.

- (a) Any person who desires to use or develop any wetlands within this County, other than for the purpose of conducting the activities specified in Section 3 of this ordinance, shall first file an application for a permit directly with the wetlands board or with the Commission.
- (b) The permit application shall include the following: the name and address of the applicant; a detailed description of the proposed activities; a map, drawn to an appropriate and uniform scale, showing the area of wetlands directly affected, the location of the proposed work thereon, the area of existing and proposed fill and excavation, the location width, depth and length of any proposed channel and disposal area, and the location of all existing and proposed structures, sewage collection and treatment facilities, utility installations, roadways, and other related appurtenances or facilities, including those on adjacent uplands; a statement indicating

whether use of a living shoreline as defined in Va. Code § 28.2-104.1 for a shoreline management practice is not suitable, including reasons for the determination; a description of the type of equipment to be used and the means of equipment access to the activity site; the names and addresses of owners of record of adjacent land and known claimants of water rights in or adjacent to the wetland of whom the applicant has notice; an estimate of cost; the primary purpose of the project; any secondary purposes of the project, including further projects; the public benefit to be derived from the proposed project; a complete description of measures to be taken during and after the alteration to reduce detrimental offsite effects; the completion date of the proposed work, project, or structure; and such additional materials and documentation as the wetlands board may require.

- (c) A nonrefundable processing fee shall accompany each permit application. The fee shall be set by the applicable governing body with due regard for the services to be rendered, including the time, skill, and administrator's expense involved.

Section 5. All applications and maps and documents submitted shall be open for public inspection at the office designated by the applicable governing body and specified in the advertisement for public hearing required under Section 6 of this ordinance.

Section 6. Not later than 60 days after receipt of a complete application, the wetlands board shall hold a public hearing on the application. The applicant, local governing body, Commissioner, owner of record of any land adjacent to the wetlands in question, known claimants of water rights in or adjacent to the wetlands in question, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries, the Water Control Board, the Department of Transportation and any governmental agency expressing an interest in the application shall be notified of the hearing. The board shall mail these notices not less than 20 days prior to the date set for the hearing. The wetlands board shall also cause notice of such hearing to be published at least once a week for two weeks prior to such hearing in the newspaper of general circulation in this

county. The published notice shall specify the place or places within this county where copies of the proposed may be examined. The costs of such publication shall be paid by the applicant.

Section 7.

- (a) Approval of a permit application shall require the affirmative vote of three members of a five-member board.
- (b) The chairman of the board, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. Any person may testify at the public hearing. Each witness at the hearing may submit a concise written statement of his testimony. The board shall make a record of the proceeding, which shall include the application, any written statements of witnesses, a summary of statements of all witnesses, the findings and decision of the board, and the rationale for the decision.
- (c) The board shall make its determination within 30 days of the hearing. If the board fails to act within that time, the application shall be deemed approved. Within 48 hours of its determination, the board shall notify the applicant and the Commissioner of its determination. If the board fails to make a determination within the 30-day period, it shall promptly notify the applicant and the Commission that the application is deemed approved. For purposes of this section, "act" means taking a vote on the application. If the application receives less than four affirmative votes, from a seven-member board or less than three affirmative votes from a five-member board, the permit shall be denied.
- (d) If the board's decision is reviewed or appealed, then the board shall transmit the record of its hearing to the Commissioner. Upon a final determination by the Commission, the record shall be returned to the board. The record shall be open for public inspection at the office as was designated under Section 5 of this ordinance.

Section 8. The board may require a reasonable bond or letter of credit in an amount and with surety and conditions satisfactory to it, securing to the Commonwealth compliance with the conditions and limitations set forth in the permit. The board may, after a hearing held pursuant to this ordinance, suspend or revoke a permit if the applicant has failed to comply with any of the conditions or limitations set forth in the permit or has exceeded the scope of the work described in the application. The board may, after a hearing, suspend a permit if the applicant fails to comply with the terms and conditions set forth in the application.

Section 9. In fulfilling its responsibilities under this ordinance, the board shall preserve and prevent the despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic development in a manner consistent with wetlands preservation and any standards set by the Commonwealth in addition to those identified in Va. Code § 28.2-1308 to ensure protection of shorelines and sensitive coastal habitats from sea level rise and coastal hazards, including the provisions of guidelines and minimum standards promulgated by the Commission pursuant to § 28.2-1301 of the Code of Virginia.

Section 10.

(a) In deciding whether to grant, grant in modified form or deny a permit, the board shall consider the following:

- (1) The testimony of any person in support of or in opposition to the permit application.
- (2) The impact of the proposed development on the public health, safety, and welfare; and
- (3) The proposed development's conformance with standards prescribed in § 28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia

(b) The board shall grant the permit if all of the following criteria are met:

(1) The anticipated public and private benefit of the proposed activity exceeds its anticipated public and private detriment.

(2) The proposed development conforms with the standards prescribed in § 28.2-1308 of the Code of Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia

(3) The proposed activity does not violate the purposes and intent of this ordinance or Chapter 13 (Title 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.

(c) If the board finds that any of the criteria listed in subsection (b) of this section are not met, the board shall deny the permit application but allow the applicant to resubmit the application in modified form.

Section 11. The permit shall be in writing, signed by the chairman of the board, or his authorized representative, and notarized. A copy of the permit shall be transmitted to the Commissioner.

Section 12. No permit shall be granted without an expiration date established by the board. Upon proper application, the board may extend the permit expiration date.

Section 13. No permit granted by a wetlands board shall affect in any way the applicable zoning and land use ordinances of this county or the right of any person to seek compensation for any injury in fact incurred by him because of the proposed activity.

Section 14. This ordinance shall be in full force and effect August 4, 2020.

A Copy Teste:

Matthew Walker

Matthew L. Walker, Clerk