



The Mount Vernon Council of Citizens Associations, Inc.

P.O. Box 203, Mount Vernon, VA 22121-9998

<http://www.mvcca.org>

Dear Supervisor Storck

September 14, 2022

Your assistance is once again requested regarding Living Shore Lines legislation and the Fairfax County Wetlands Boards policy. On July 28, 2022, we wrote to you about our members positions on this matter. Unfortunately, you were not able to secure a clause in the legislation to grandfather existing legally approved riprap or bulkheads. The County BOS indicated that the Wetlands Board would create a fair and equitable policy and procedures process regarding living shorelines.

We have reviewed that policy and find it lacking in several ways. Our resolution regarding this matter is attached and once again your constituents are seeking your help. We have forwarded this resolution to the Wetlands Board as per their request for comments.

The MVCCA is requesting this support at the request of our many members who live along our many waterways. These citizens believe that the current legislation and Wetlands Boards procedures can and do negatively impact them. Our resolution is attached.

Regards,

Katherine Ward

Katherine Ward
Cochair
MVCCA

Attachment:

MOUNT VERNON COUNCIL OF CITIZENS 'ASSOCIATIONS (MVCCA) E&R 2022-05
RESOLUTION IN SUPPORT OF HOUSE BILL 739 ON LIVING SHORELINES AND
COMMENT ON THE DRAFT WETLAND BOARD GUIDANCE

MOUNT VERNON COUNCIL OF CITIZENS 'ASSOCIATIONS (MVCCA) E&R 2022-05

RESOLUTION IN SUPPORT OF HOUSE BILL 739 ON LIVING SHORELINES AND
COMMENT ON THE DRAFT WETLAND BOARD GUIDANCE

WHEREAS, on January 26, and July 27, 2022, the MVCCA adopted resolutions in support of House Bill 739 on Living Shorelines, which supports grandfathering of existing shoreline stabilization structures to address the concerns of property owners with respect to the 2020 living shorelines law update.

WHEREAS, upon hearing concerns of property owners whose shoreline stabilization structures were installed in accordance with the laws in existence at the time of construction, Supervisor Storck requested that the Wetlands Board work with the Office of the County Attorney to revise the existing policy/guidance document on Living Shorelines to address multiple factors, and the August draft of the policy/guidance document stated that the Wetlands Board may consider these factors but provided no information as to how and when these factors would be considered.

WHEREAS, the draft policy/guidance is inconsistent in its description of the jurisdiction of the Wetlands Board, omits reference to the 1984 Attorney General opinion¹ (which has been used to guide wetlands board decisions in tidal Virginia) and does not describe the Virginia Institute of Marine Sciences 2020 decision support tool, which states that a bulkhead in a residential canal in need of replacement should be replaced with a bulkhead².

WHEREAS, comments by the various parties interpreting the 2020 law vary from “well maintained controls can continue to be maintained and repaired as needed” to “any new permit application will require a living shoreline unless best available science shows that living shorelines are not suitable,” the latter comment differing from other state statutes because it provides for no consideration of impacts to the property owner and can result in impacts to the property owner of well over \$100K.

WHEREAS, the August draft Wetlands Board Guidance fails to aid the applicant or guide the Wetlands Board in determining where living shorelines are not suitable and does not provide the clarity needed to address the concerns associated with the 2020 living shorelines legislation as it continues to deprive an applicant seeking to retain their existing sea wall or bulkhead of knowledge about how they can comply, and, as such, it establishes a legal vulnerability for enacting arbitrary and capricious policy;

¹ In 1984 Virginia Attorney General Gerald Baliles concluded “bulkheads are included within the word "facilities" in §3(h), and that the normal maintenance, repair or additions to a bulkhead would be permitted under that section if no further wetlands were covered.”

² Replace bulkhead with revetment landward of bulkhead. If navigation or infrastructure limits available space, replace bulkhead in the same alignment or landward. Enhance vegetation buffers where possible. See: <https://cmap2.vims.edu/LivingShoreline/DecisionSupportTool/ShorelineDST.html>

WHEREAS, in the absence of guidance to state where living shorelines are not suitable, there will be an expectation of employing living shorelines along all shorelines except for those that have been excluded from the requirement of this law, such as government properties, which include parks, various facilities and stormwater outflows.

WHEREAS, when property rights are acquired for the public good under the 5th and 14th Amendments to the U.S. Constitution, the property owner is compensated for an easement or outright purchase, but the 2020 law provides no compensation for the property owner and imposes significant costs and a loss of property value to the property owner.

WHEREAS, the Chesapeake Bay Agreement and associated documents signed by Virginia do not call for the level of creation of living shorelines that the 2020 law seeks.

WHEREAS, the draft guidance and 2020 law provide for the taking of property without compensation, which is in violation of the 5th and 14th amendments to the U.S. Constitution.

WHEREAS, while the MVCCA is supportive of the appropriate use of living shorelines to create habitat and improve water quality, the MVCCA is concerned that the legal vulnerabilities and the unfair burden placed on private waterfront property owners by the 2020 law will alienate property owners and deter them from efforts to improve the environment, fuel legal battles, be inconsistent with the One Fairfax policy, and slow progress in supporting environmental causes.

THEREFORE, BE IT RESOLVED that the MVCCA concludes that the proposed Wetlands Board guidance creates legal vulnerabilities resulting from 1) an arbitrary and capricious policy and 2) takings without compensation, which is in violation of the 5th and 14th Amendments to the U.S. Constitution.

BE IT FURTHER RESOLVED that the MVCCA finds that the guidance, and associated 2020 legislation, unreasonably place the burden of creating living shorelines on private property owners whose shoreline stabilization structures were constructed in accordance with the laws at the time of construction, which is in contrast to other environmental programs that either place responsibility for cleanup on polluting entities or share the responsibility for addressing environmental problems among the population through taxes that fund those programs.

BE IT FINALLY RESOLVED that the MVCCA requests that members of the Fairfax County delegation to the General Assembly provide a draft of legislation to be introduced during the next legislative session that reflects the changes outlined in House Bill 739 so that it will be reviewed by the Fairfax County Board of Supervisors and included in the Board's legislative package.

Approved MVCCA Board September 13, 2022