

**MINUTES OF THE ST. MARY'S COUNTY BOARD OF APPEALS  
ROOM 14 \* GOVERNMENTAL CENTER \* LEONARDTOWN, MARYLAND  
Thursday, October 12, 2006**

Members present were George Allan Hayden, Chair; Greg Callaway, Vice Chair; Ronald Delahay; Wayne Miedzinski; and Gertrude Scriber. Department of Land Use and Growth Management (LUGM) staff present were Denis Canavan, Director; Phil Shire, Deputy Director; Yvonne Chaillet, Zoning Administrator; and Cindy Koestner, Recording Secretary. George Edmonds, Board of Appeals First Alternate, was also present. Christy Holt Chesser, County Attorney, and Colin Keohan, Deputy County Attorney, were present.

A sign-in sheet is on file at LUGM. All participants in this case were sworn in. The Chair called the meeting to order at 6:35 p.m.

**PUBLIC HEARINGS**

**ZAAP #06-30 – GRADING PERMIT FOR WOODS AT MYRTLE POINT SUBDIVISION  
Continued from September 14, 2006**

The Appellants are requesting an appeal of the decision by the Department of Public Works Director to issue grading permit #060-30 for Lots 3, 10, 11, 19, 20 and 54, which are part of Section 1, Phase 1 of Myrtle Point Subdivision. The property contains 42.37 acres; is zoned Residential Low-Density District (RL), Airport Environs Overlay District (AE); and is located on the west side of Patuxent Boulevard, approximately 1,600 feet north of its intersection with MD Route 4 in California, Maryland; Tax Map 34, Block 11, p/o Parcel 525, Lots 3, 10, 11, 19, 20 and 54.

Owner: PF Summers Myrtle Point L.L.C., Applicant  
Present: Christopher Longmore, Attorney for the Applicant; Douglas Clark Hollmann, Attorney for the Appellants; For the Department of Public Works & Transportation (DPW&T): George Erichsen, Director; and John Groeger, Deputy Director; For the Soil Conservation District (SCD): Bruce Young, District Manager

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| Public Testimony Exhibit 1: | Pictures of Mill Creek and the adjoining wetlands taken on 10/2/05 by local resident Kenneth Berry, which show sedimentation of the creek after a rainfall.                 |
| Public Testimony Exhibit 2: | Pictures of Mill Creek and the adjoining wetlands taken on 10/2/05 by local resident Kenneth Berry, which show sedimentation of the creek after a fire hydrant was flushed. |
| Public Testimony Exhibit 3: | Pictures taken of Mill Cove sedimentation on 9/5/06 by local resident Robert Willey.  |
| Public Testimony Exhibit 4: | Pictures taken of Mill Creek and surrounding area in 2006 by Kellie Gofus, local resident and named Appellant.  |
| Applicant's Exhibit 1:      | Comments prepared by Jim Gotsch, Loiederman Soltesz Associates, Inc., rebuttal witness for the Applicant.   |

Applicant's Exhibit 2:

Summary of closing remarks made by Christopher Longmore, Attorney for the Applicant.

The Chair opened the hearing to public comment.

Kenneth Berry, resident of Mill Cove Road, presented pictures into evidence of sedimentation in Mill Creek. He explained a fire hydrant was flushed on October 2, 2005 and was accidentally left on, causing a substantial amount of mud to wash into the creek. He displayed a large jar of brown water, which he testified was taken from the creek after this incident. Mr. Berry stated muddy water drains from the existing valleys of the Woods at Myrtle Point and flows directly into the creek every time it rains. Mr. Delahay asked for clarification the water flowing from the flushed fire hydrant was clean. Mr. Berry replied it was, but the water picked up sedimentation as it washed into the creek. Mr. Callaway asked if the water in the creek stays muddy. Mr. Berry replied no, it eventually clears up with the tide after a period of time. Mr. Hayden asked Mr. Berry where he lives in relation to the Woods at Myrtle Point. Mr. Berry replied he resides three quarters of a mile down the road.

Robert W. Paul, local resident, stated he testified at the September Board of Appeals meeting as an expert witness for the Appellants. He expressed concern over the detrimental impact the development in the area is causing to Mill Creek. He explained the property in question consists of highly erodible soils that wash into the creek and cause suffocation of fish and vegetation loss. Mr. Miedzinski asked Mr. Paul what he feels the developer can do differently to reduce the erosion into Mill Creek. Mr. Paul replied the best thing is to stop building because the soils do not support the type of development proposed for the area. The next best thing is to withdraw the grading permits for the six lots in question, due to their steep slopes. He explained there is not a lot the developer can do, other than stabilize the slopes and replant the disturbed areas, if the stormwater management methods are not working. Mr. Hayden inquired if the area would still experience sedimentation if left in a natural state. Mr. Paul replied yes, but removing vegetation and developing the property causes heavier sedimentation, which leads to greater damage to the environment. Mr. Hayden asked Mr. Paul to compare the Woods at Myrtle Point to past developments with similar erosion issues. Mr. Paul responded the damage in Mill Creek is worse than the damage he observed in the St. Mary's River watershed. Mr. Callaway asked if the erosion problem will be corrected once the lots are developed and replanted. Mr. Paul replied he believes the soils will still erode into Mill Creek and the amount of erosion post-development is dependent on the ability of the homeowners to maintain their yards and buffers. Mr. Edmonds asked how other developed lots in the area will differ from these six lots when they are also developed. Mr. Paul replied any new development adds impervious surfaces and the six lots in question are of greater concern because they are steep-sloped.

Raymond Dudderar, local resident, expressed concern the decision to allow development to continue at the Woods at Myrtle Point will cause significant damage to a creek that is already dying. He feels both the State and the County have been negligent in allowing the creek to reach its current condition, especially since they are allowing development on a site that is fragile and unstable. He explained development is needed, but only in the areas that can best support it and he asked that higher standards be employed in order to eliminate erosion and sedimentation damage to area waterways. Mr. Hayden asked Mr. Dudderar where he lives in relation to the property in question. Mr. Dudderar replied he resides 1.5 miles down the road on the shore of the Patuxent River.

Erik Janssen, President of the Potomac River Association (PRA), explained PRA met with the developer in 2003 and several times since, but the developer refused to change the design of the Woods at Myrtle Point. He commented he appreciates the Board hearing this case. Mr. Hayden asked Mr. Janssen if he is a contingent landowner. Mr. Janssen replied he is not.

Bob Lewis, resident of Park Hall, testified he was told by Mr. Erichsen after the September 14th meeting that the Woods at Myrtle Point was not examined on a lot-by-lot basis

for the grading permit; rather, it was divided into phases of four to six homes each. He questioned the reasons for including Article 4.4.3(h)(1) in the *Stormwater Management, Grading, Erosion and Sediment Control Ordinance* (Ordinance) if the County does not intend to regulate development on steep slopes or on a lot-by-lot basis.

Susie Henderson, resident of Mill Cove Harbor Road, read the following from Section 1.3 of the Ordinance: "(The purpose of this Ordinance is) to reduce the adverse affects of erosion and sediment deposits or other earthen materials on lands and within the watersheds of St. Mary's County." She then read from Section 1.5, Minimum Standards, as follows: "Should the interpretation and application of any requirements in this Ordinance be found to be in conflict with those imposed by other provisions of law, the more restrictive or higher standards shall prevail." Ms. Henderson explained the phrase "provided that" in Article 4.4.3(h)(1) of the Ordinance is restrictive and proves the six lots in question should not be developed because they did not meet the steep slope criteria prior to grading. She expressed concern a decision by the Board to allow development to continue on these six lots will set a precedent that will allow a developer to grade any land in the County until it meets the steep slope criteria in the Ordinance.

Robert Willey, local resident, stated he lives downstream from the Woods at Myrtle Point and he submitted pictures he took of the water on September 5, 2006 into evidence. He explained heavy rains cloud the water with sediment runoff, which is destroying the creek. He expressed concern there is not only a cost to area residents, but also to other people who enjoy the Mill Creek area waterways. Mr. Hayden inquired about the amount of rain that fell when the pictures were taken. Mr. Willey replied it takes a small amount of rain during a wet period to produce the mud flow shown in the pictures, and it only takes four to five inches during a dry period. Mr. Hayden asked if the pictures are of Mill Cove. Mr. Willey replied yes, some were shot from his pier and some were shot while traveling into the cove and headwaters. He explained his pictures show clean water flowing from Hollywood mixing with the muddy water flowing from the Woods at Myrtle Point.

Kellie Gofus, local resident and named Appellant, stated she lives at the head of Mill Creek adjacent to the wetlands and she submitted pictures of the Mill Creek area into evidence. Ms. Gofus explained she measured the light penetration of the creek water before and after normal rains using an instrument called a "Secchi disk." She discovered the clear water depth averaged 28 inches of light penetration and the post-rain depth averaged seven inches of light penetration. Ms. Gofus explained she grows oysters for reef restoration and the average spat mortality of her oysters greatly increased this year. She stated the average spat mortality over six years is 30 percent; however, this year the average spat mortality spiked at 75 percent. She also noted the submerged grasses along the creek died and detached from the bottom of the creek after the June rains. Ms. Gofus expressed concern the problems in the creek appear to be a new trend due to the development in the area. Mr. Miedzinski asked how long the water takes to get back to the 28-inch visibility. Ms. Gofus responded around 24 hours. Mr. Hayden inquired about the average rainfall amount it takes to decrease light penetration in the creek to seven inches. Ms. Gofus replied it only takes a couple of inches of rain. Mr. Delahay asked how deep the creek is now, compared to what it used to be. Ms. Gofus replied the creek is only two to three feet deep at mean high tide and reminded the Board she used to have a 24-foot boat that she can no longer have because the creek is now too shallow. Mr. Hayden asked Ms. Gofus how long it has been since she had her 24-foot boat. Ms. Gofus replied it has been a couple of years.

Richard Huff, 25-year resident of Mill Creek, stated it only takes a couple of inches of rain to create a lot of mud in the creek and the bottom grasses around his pier died this year and floated to the top of the water. He feels this is due to lack of light in the water and noted in the past he could see the bottom of the creek, but now the water is not clear enough. He is frustrated because he can no longer kayak and canoe in the Mill Creek area. He expressed concern the creek has already experienced huge changes and will eventually die if development continues in the area; already the little fish that used to swim around his pier are disappearing. Mr. Delahay inquired about crabs in the creek waters. Mr. Huff responded there are not as many as there used to be, but this could be due to other factors.

The Chair closed the hearing to public comment.

The Chair opened the hearing to rebuttal testimony.

Mr. Erichsen stated DPW&T has no rebuttal testimony.

Mr. Longmore called Jim Gotsch, Loiederman Soltesz Associates, Inc., engineer for the Woods at Myrtle Point development and rebuttal witness for the Applicant. Mr. Longmore submitted a copy of comments prepared by Mr. Gotsch.

Mr. Gotsch referenced Daniel J. O'Leary's testimony from September 14th when Mr. O'Leary explained the process he used to calculate the steep slope areas of the lots. Mr. Gotsch explained Mr. O'Leary scanned a copy of the grading plan and digitized it to create a steep slope surface that was used to measure steep slope areas using computer software. Mr. Gotsch asserted this process added inaccuracy to Mr. O'Leary's final calculations. He further explained the developer's calculations utilized a 3-D mapping of the ground surface, based on contour lines, spot elevations and break lines, all of which were obtained through field topography. He explained Mr. O'Leary did not perform any fieldwork and did not ask the developer for any additional data; thus his steep slope calculations were not as accurate as those presented on the grading plans. Mr. Gotsch noted the engineers for the developer checked the calculations again after the September 14th meeting and came up with the same numbers. Mr. Hayden asked for further clarification as to why Mr. O'Leary's calculations were incorrect. Mr. Gotsch replied Mr. O'Leary did not have the most accurate information available and the process he used allowed for several errors. On the other hand, the developer's calculations were produced using the original file, along with detailed topographical data. Mr. Hayden asked if Mr. O'Leary could have obtained the same topographical data used by the developer without requesting it from the developer. Mr. Miedzinski pointed out development was already underway when Mr. O'Leary performed his calculations; thus, he would not be able to get the same data his own.

Mr. Gotsch stated five of the six contested lots are not in violation because they consist of 30 percent or more area that is sloped less than 15 percent. He noted Lot 20 contains a high percentage of steep-sloped area because only a small portion of the lot will be developed, while the rest will remain forest conservation area. He further noted there will be fingers of forest conservation area between the lots, which will act as a filtering measure. Mr. Gotsch explained the goal is to decrease erosion and save trees; however, the developer can clear additional trees to get the steep slope percentages well under 70 percent. He further explained the developer can also redraw the lot lines to reconfigure the lots until they are under 70 percent steep sloped. Mr. Gotsch noted the perimeter sediment controls will be removed and other Best Management Practices (BMPs) will be installed when the houses are built. This is because the area experiences additional runoff during construction while the earth is bare; but, the amount of runoff from the development will decrease once the houses are complete. Mr. Gotsch explained the amount of water captured by the BMPs is equivalent to the amount of water captured by wooded land.

Mr. Hollmann asked Mr. Gotsch to confirm Mr. O'Leary's calculations are incorrect. Mr. Gotsch replied Mr. O'Leary's calculations are not as accurate as the developer's calculations. Mr. Hollmann inquired about Appellants' Exhibit Five from September 14th: a copy of the table from the grading plan listing pre-development and post-development steep slope areas. Mr. Gotsch stated he prepared the data in this table. Mr. Hollmann asked Mr. Gotsch to read the steep slope percentages for each of the six lots prior to development. Mr. Gotsch read the percentages as follows: Lot 11 at 82 percent steep slopes, Lot 3 at 92 percent, Lot 20 at 87 percent, Lot 19 at 73 percent, Lot 10 at 82 percent and Lot 54 at 78 percent.

Mr. Erichsen asked Mr. Gotsch to clarify the developer can redraw some of the lot lines until the lots meet the steep slope criteria on an individual basis. Mr. Gotsch replied that is

correct, except Lot 20. He explained Lot 20 will be over 70 percent steep sloped even if the lines are redrawn; however, he stressed the majority of Lot 20 will remain in a natural state and only a small portion of this lot will be developed. Mr. Hayden questioned how the developer can redraw any lot lines after a plat is recorded. Mr. Gotsch responded the developer does not prefer to redraw the lot lines in this case; but, a developer can file a boundary line adjustment plan to change the lot lines.

The chair closed the hearing to rebuttal testimony.

Mr. Hayden asked Mr. Young to comment on the best method to hold highly erodible soils in place after a development is complete. Mr. Young responded existing vegetation is preferred to stabilize a site; however, SCD requires the developer to place two inches of top soil, seed, mulch, fertilizer and lime to grow a well established grass or cover. Mr. Erichsen added some of the perimeter sediment control devices in this project are oversized and each lot will require additional sediment control devices with each building permit. Mr. Hayden inquired about the removal of the perimeter control devices when the development is complete. Mr. Young replied they are temporary structures that are designed for sites in the construction phase under a disturbed and graded condition. He explained the perimeter controls cannot remain in place post-construction because they are designed to concentrate water flow to certain areas and the developed lot is designed to allow sheet flow of water. He added the Woods at Myrtle Point will have some permanent diversion dykes in place to divert water away from the areas where there are existing gully heads, especially since these sites were already eroding pre-development. Mr. Young explained the developer is responsible for cleaning and maintaining the temporary perimeter controls after every rain event to ensure they work properly. He added MDE is responsible for inspecting the perimeter controls.

Mr. Erichsen noted DPW&T relies on SCD to make recommendations and approval of a sediment control plan before any grading permit can be issued. Mr. Hayden asked Mr. Young why all of the mud is running into the creek if these sediment control devices are working properly. Mr. Young explained MDE requires sediment control devices contain the runoff of a one to two year rain event. He further explained two inches of rain over several hours will exceed that capacity, thus causing failure of sediment control devices. MDE chose a one to two year rain event because installing devices designed to capture larger amounts of water is expensive and larger areas of land have to be cleared. Mr. Young noted a sediment basin is the most effective sediment control device; yet it will only trap up to 90 percent of the sediment in the runoff. A sediment trap captures up to 75 percent and other controls only capture around 50 percent. Mr. Hayden asked for clarification on what types of controls are in place at the Woods at Myrtle Point. Mr. Young replied earth dykes, sediment basins, sediment traps and super silt fence are all being utilized at this site. He explained this development is required to utilize larger devices to trap sedimentation during normal one to two year rain events as well as heavier rain events; however, they will not work properly if they are not cleaned out and maintained after each rainfall. Mr. Erichsen added failures are not realized until after a grading permit has been issued.

Mr. Hayden asked if overlot grading is a better practice than single-lot grading. Mr. Young replied overlot grading is required in this case because it provides more room for installation of the perimeter controls and ensures more sediment is trapped; whereas, single-lot grading utilizes silt fence around each separate lot and results in a higher amount of sediment runoff. Mr. Hayden asked if Article 4.4.3(h)(1) only applies to single-lot development and not to multi-lot developments. Mr. Erichsen responded the development in this case is viewed as one entire parcel with one overlot grading plan and the houses will be constructed under individual building permits. Mr. Edmonds asked if approving a grading permit for a larger portion of land allows greater control. Mr. Young responded yes, the disturbance area is limited and the sedimentation is better managed. He noted the sediment controls utilized in this development are not practical for a parcel that is developed on a lot-by-lot basis. Mr. Erichsen explained sediment runoff can be controlled better in developments consisting of contiguous lots owned by one developer, where that developer is doing all of the work.

Mr. Hayden asked who makes the decision to allow the developer to start work on the next set of lots. Mr. Young replied MDE inspects the developed lots to ensure they are stabilized with well established grass and then MDE makes the decision to allow the developer to move on. Mr. Hayden asked if the same overlot grading measures would be used if the six contested lots were removed from the development. Mr. Erichsen responded yes. Mr. Delahay asked if the developer can sod a set of lots in order to move on to the next set of lots sooner. Mr. Young responded yes, sodding the lots is legal and allows the developer to complete a set of lots faster.

The Chair asked for closing remarks.

Mr. Erichsen clarified the County is concerned about development runoff, sediment control and water quality maintenance. He explained DPW&T issued the grading permit on the parcel as a whole because an overlot grading plan is required for the Woods at Myrtle Point. He stressed the property meets the steep slope requirements set forth in Article 4.4.3(h)(1) when viewed as a total parcel. He reminded the Board the lot lines can be redrawn to bring five of the six lots into compliance on an individual lot basis.

Mr. Longmore submitted notes of his closing arguments into evidence. He reminded the Board the burden of proof to show the action taken by Mr. Erichsen was "erroneous, illegal, unconstitutional, arbitrary or capricious" rests on the Appellants. He argued the Board must find Mr. Erichsen's decision to issue the grading permit was erroneous under the current Ordinance and there was no information he could have relied on when making this decision. He noted Mr. Young and Mr. Erichsen are the experts in this area and are the individuals who make decisions every day based on an interpretation of the entire Ordinance and based on a full development application. Mr. Longmore highlighted the language in Article 4.4.3(h)(1), which states "lot or parcel," and explained the Board must rely on Mr. Erichsen's interpretation of this wording. Mr. Longmore stressed Mr. Erichsen applied the standards to the entire parcel and there has been no testimony the property does not meet these standards when viewed as an entire parcel. Mr. Longmore also highlighted Article 4.12(5)(a), which gives the Director the ability to "improve any existing grading to meet the standards under this Ordinance for new grading and for erosion and sediment control." In other words, the grades can be improved or changed by requirement of the Director. Mr. Longmore stated the Ordinance must be applied as a whole and not just in pieces. He concluded there is substantial evidence that the measures taken are in the best interest of the land, mainly applying sedimentation control measures on an overlot basis for greater control over sediment runoff. He added the Board cannot find the Director's decision was in error based solely on the evidence of any discoloration of the water in Mill Creek.

Mr. Hollmann argued the Board must focus solely on the six lots in question as they existed prior to any development. He noted, even if Mr. O'Leary's calculations were not correct, the steep slope percentages of the six lots prior to development are all over 70 percent and are all clearly listed in the developer's plans. He pointed out overlot grading is a good policy and can still be utilized on the parcel without developing the six lots in question. Mr. Hollmann explained a lot that is more than 70 percent steep-sloped cannot be built on and cannot be graded until it is compliant for development; otherwise, Article 4.4.3(h)(1) would not have any meaning and would be void. He explained the words "lot or parcel" are not enough to issue a grading permit on the parcel as a whole, because those words are followed by the phrase: "upon which the principal structure is to be situation." Mr. Hollmann asserted each lot must be viewed individually because each lot will contain a principal structure.

Mr. Hayden asked for Board comments.

Mr. Edmonds commented he feels Mr. Erichsen believed his decision was correct and he had all the information he needed to make that decision.

Mr. Miedzinski commented he appreciates the public testimony and he does not like to see the negative changes taking place in Mill Creek and the surrounding waters. He feels the County needs better measures to deal with these types of cases. He referenced Section 3.11.10 of the Ordinance and explained this section demonstrates these lots can be approved with an overlot grading plan, even though they do not meet steep slope standards on an individual lot basis.

Mr. Callaway commented Mr. Erichsen and Mr. Young have examined this case in both directions. He noted these individuals also live in the County and they deal with these situations on a daily basis. He feels they did the best job possible by viewing the property as a total parcel in order to try and contain more of the sedimentation, as opposed to allowing lot-by-lot development. He agreed the County needs better measures and clearer guidelines. He explained trust must be placed in those individuals who work in the County and also live in the County.

Mr. Delahay commented issuing the permit for the entire parcel and requiring the overlot grading plan was the correct decision.

Mr. Hayden commented he agrees with the rest of the Board but sympathizes with the residents on Mill Creek. He noted there was not enough information presented to find the decision in error. He commented some of the standards in the County are outdated and Mr. Erichsen made the best decision he could on the information he had. He explained he does not feel Mr. Erichsen stepped outside the guidelines, even though development of these six lots may not be the best thing for the community.

**Mr. Callaway moved that the Board adopt the staff comments of George Erichsen and John Groeger found in the Memorandum, dated September 11, 2006, and the public testimony given at the hearing on October 12, 2006, as their findings in this matter. The motion was seconded by Mr. Edmonds and passed by a 5-0 vote.**

**Mr. Callaway moved that the Board affirm the decision of the Director of Public Works to allow grading on Lots 3, 10, 11, 19, 20 and 54 pursuant to grading permit # 06-30, dated June 19, 2006, for the Woods at Myrtle Point, Section 1, Phase 1. The motion was seconded by Mr. Miedzinski and passed by a 5-0 vote.**

The Chair called a recess at 9:05 p.m.

The Chair called the meeting back to order at 9:10 p.m.

#### **ACTIONS TAKEN BY PLANNING DIRECTOR ON VARIANCE APPLICATIONS RECEIVED FOR ADMINISTRATIVE REVIEW**

**VAAP #06-1179** – Aist – 0.50 acres – The applicant is requesting a variance from Section 71.8.3 of the St. Mary's County Comprehensive Zoning Ordinance to disturb the expanded Critical Area Buffer and a variance from Section 71.7 of the Ordinance to disturb steep slopes and highly erodible soils to construct a patio and deck. **Variance approved with conditions.**

**VAAP #06-1126** – Ficalora – 9.35 acres (5.78 of which are tidal wetlands) – The applicant is requesting a variance from Section 71.8.3 of the St. Mary's County Comprehensive Zoning Ordinance to add new impervious surface in the expanded Critical Area Buffer to construct a deck. **Variance approved with conditions.**

**VAAP #05-2322** – Buckler – 11.08 acres – The applicant is requesting a variance from Section 71.7 of the St. Mary's County Comprehensive Zoning Ordinance to disturb steep

slopes to construct a septic system in the Critical Area. **Variance approved with conditions as modified by staff.**

**VAAP #06-0690** – McLaughlan – 3.36 acres – The applicant is requesting a variance from Section 71.8.3 of the St. Mary's County Comprehensive Zoning Ordinance to add new impervious surface in the Critical Area Buffer to construct a single-family dwelling and appurtenances. **Variance approved with conditions.**

#### **MINUTES AND ORDERS APPROVED**

Approval of the minutes of September 12, 2006 was deferred until the next meeting on November 9, 2006

The Board authorized the Chairman to review and sign the following orders:

**VAAP #06-1311 – Becker**  
**VAAP #06-0264 – Long**

#### **GENERAL DISCUSSION**

Ms. Chaillet asked the Board if they will be available to conduct a special meeting on Thursday, November 30, 2006 to help diminish the case load. The Board agreed to schedule the additional meeting, which will be held in Room 14 of the Governmental Center at 6:30 p.m.

#### **ADJOURNMENT**

The meeting was adjourned at 9:15 p.m.

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Cindy R. Koestner, Recording Secretary

Approved in open session: November 9, 2006

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George Allan Hayden  
Chairman