

AN ORDINANCE TO AMEND CHAPTER 9.1 OF THE CODE OF THE CITY OF PORTSMOUTH, VIRGINIA (2006) BY AMENDING SECTIONS 9.1-2 THROUGH 9.1-4, 9.1-7, AND 9.1-9 THROUGH 9.1-13 THEREOF PERTAINING TO THE CHESAPEAKE BAY PRESERVATION AREAS OVERLAY DISTRICT.

BE IT ORDAINED by the Council of the City of Portsmouth, Virginia:

1. That Sections 9.1-2 through 9.1-4, 9.1-7, and 9.1-9 through 9.1-13 of the Code of the City of Portsmouth, Virginia (2006) be amended and reordained to read as follows:

Sec. 9.1-2. Purpose and intent.

(a) This chapter is enacted to implement the requirements of Code of Virginia, § 10.1-2100 et seq., the Chesapeake Bay Preservation Act. The intent of the city council and the purpose of the overlay district is to:

- (1) Protect existing high quality state waters;
- (2) Restore all other state waters to a condition or quality that will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them;
- (3) Safeguard the clean waters of the commonwealth from pollution;
- (4) Prevent any increase in pollution;
- (5) Reduce existing pollution; and
- (6) Promote water resource conservation in order to provide for the health, safety, and welfare of the present and future citizens of the city.
- (7) Control and regulate runoff at the source to protect against and minimize pollution and deposition of sediment in City wetlands and streams that are tributaries of the Chesapeake Bay.

(b) This district shall be in addition to and shall overlay all other zoning districts where they are applied so that any parcel of land lying in the Chesapeake Bay Preservation Area Overlay District shall also lie in one or more of the other zoning districts provided for by chapter 40, Zoning. Unless otherwise provided in this chapter, the review and approval procedures provided for in chapters 7, 11, 14, 33, 39 and 40 of this Code, and all other applicable ordinances shall be followed in reviewing and

approving development, redevelopment, and uses also regulated by this chapter.

(c) This chapter is enacted under the authority of 9 VAC 10-20 et seq., the Chesapeake Bay Preservation Area Designation and Management Regulations, and Code of Virginia, § 10.1-2100 et seq., Chesapeake Bay Preservation Act and Code of Virginia, § 15.2-2283.

Sec. 9.1-3. Definitions.

The following words and terms used in the overlay district have the following meanings, unless the context clearly indicates otherwise. Words and terms not defined in this chapter but defined in the zoning ordinance as set out in chapter 40 shall be given the meanings set forth therein.

Agricultural lands means those lands used for the planting and harvesting of crops or plant growth of any kind in the open; pasture; horticulture; dairying; floriculture; or raising of poultry and/or livestock.

Best management practice or ***BMP*** means a practice, or a combination of practices that is determined by a state or designated area-wide planning agency to be the most effective, practical means of preventing or reducing the amount of pollution generated by nonpoint sources to a level compatible with water quality goals.

Buffer area means an area of natural or established vegetation managed to protect other components of a resources protection area and state waters from significant degradation due to land disturbances.

Chesapeake Bay Preservation Area or ***CBPA*** means any land designated by the city council pursuant to Part III of the Chesapeake Bay Preservation Area Designation and Management Regulations, 9 VAC 10-20-70 et seq., and Code of Virginia, § 10.1-2107. A Chesapeake Bay Preservation Area shall consist of a Resource Protection Area and a Resource Management Area.

Construction footprint means the area of all impervious surface including, but not limited to, buildings, roads and drives, parking areas, and sidewalks and all land disturbances on the site including access areas necessary for construction of such improvements.

Development means the construction, or substantial alteration of residential, commercial, industrial, institutional, recreation, transportation, or utility facilities or structures.

Diameter at breast height or ***DBH*** means the diameter of a tree measured outside the bark at a point 4.5 feet above ground.

Dripline means a vertical projection to the ground surface from the furthest lateral extent of a tree's leaf canopy.

Highly erodible soils means soils (excluding vegetation) with an erodibility index (EI) from sheet and rill erosion to or greater than eight. The erodibility index for any soil is defined as the product of the formula $RKLS/T$, where K is the soil susceptibility to water erosion in the surface layer; R is the rainfall and runoff; LS is the combined effects of slope length and steepness; and T is the soil loss tolerance.

Highly permeable soils means soils with a given potential to transmit water through the soil profile. Highly permeable soils are identified as any soil having a permeability equal to or greater than six inches of water movement per hour in any part of the soil profile to a depth of 72 inches (permeability groups "rapid" and "very rapid") as found in the "National Soil Survey Handbook" of November 1996 in the "Field Office Technical Guide" of the U.S. Department of Agriculture Natural Resources Conservation Service.

Impervious cover means a surface composed of any material that significantly impedes or prevents natural infiltration of water into the soil. Impervious surfaces include, but are not limited to: roofs, buildings, streets, parking areas, and any concrete, asphalt, or compacted gravel surface.

Intensely developed area or **IDA** means a portion of a Resource Protection Area and a Resource Management Area designated by the where development is concentrated and little of the natural environment remains as provided for in Sec. 9.1-4(b)(3).

Land disturbance means any land change which may result in soil erosion from water or wind and the movement of sediments into state waters or onto lands in the state, including, but not limited to, clearing of vegetation, grading, excavating, transporting, and filling of land. Land change shall include but not be limited to any activity that causes, contributes to or results in the destruction, removal or covering of the vegetation upon such land including, but limited to, clearing dredging, filling, grading, or excavating. Land change shall not include minor activities such as home gardening, individual home landscaping, and home maintenance.

Nonpoint source pollution means pollution consisting of constituents such as sediment, nutrients, and organic and toxic substances from diffuse sources, such as runoff from agriculture and urban land development and use.

Nontidal wetlands means those wetlands other than tidal wetlands that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to Section 404 of the Federal Clean Water Act, in 33 CFR 328.3b.

Noxious weeds means weeds that are difficult to control effectively, including, but not limited to, Johnson Grass, Kudzu, and multiflora rose. A complete list is

contained in the Department of Conservation and Resources Division of Natural Heritage publication entitled *Invasive Plant Species of Virginia*.

Plan of development means the process for site plan or subdivision plat review to ensure compliance with Code of Virginia, §10.1-2109 and this chapter, prior to any clearing or grading of a site or the issuance of a building permit.

Public road means a publicly owned road designed and constructed in accordance with water quality protection criteria at least as stringent as requirements applicable to the state department of transportation, including regulations promulgated pursuant to Code of Virginia, §10.1-560 et seq. (the Erosion and Sediment Control Law) and Code of Virginia, §10.1-603.1 et seq. (the Virginia Stormwater Management Act). This definition includes those roads where the Virginia Department of Transportation exercises direct supervision over the design or construction activities, or both, and cases where secondary roads are constructed or maintained in accordance with the standards of the city.

Redevelopment means the process of developing land that is or has been previously developed.

Resource management area or *RMA* means that component of the Chesapeake Bay Preservation Area that is not classified as the Resource Protection Area. An RMA includes land types that, if improperly used or developed, have the potential for causing significant water quality degradation or for diminishing the functional value of the Resource Protection Area as provided for in Sec. 9.1-4(b)(2).

Resource protection area or *RPA* means that component of the Chesapeake Bay Preservation Area comprised of lands adjacent to water bodies with perennial flow that have an intrinsic water quality value due to the ecological and biological processes they perform or that are sensitive to impacts which may result in significant degradation to the quality of state waters as provided for in Sec. 9.1-4(b)(1).

State waters means all waters, on the surface or underground, wholly or partially within or bordering the Commonwealth or within its jurisdictions, as defined in Section 10.1-560 of the Code of Virginia.

Substantial alteration means expansion or modification of a building or development that would result in a disturbance of land exceeding an area of 2,500 square feet in the RMA only.

Tidal shore or *shore* means land contiguous to a tidal body of water between the mean low water level and the mean high water level.

Tidal wetlands means vegetated and nonvegetated wetlands as defined in Code of Virginia, § 28.2-1300.

Water body with perennial flow means a body of water that flows in a natural or manmade channel year-round during a year of normal precipitation. This includes, but is

not limited to streams, estuaries, and tidal embayments and may include drainage ditches or channels constructed in wetlands or from former natural drainageways, which convey perennial flow. Lakes and ponds, into, out of, or through which a perennial stream flows, are a part of the perennial stream. Generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow.

Water-dependent facility means a development of land that cannot exist outside of the RPA and must be located on the shoreline by reason of the intrinsic nature of its operation. These facilities include, but are not limited to:

- (1) Ports;
- (2) The intake and outfall structures of power plants, water treatment plants, sewage treatment plants, and storm sewers, including outfalls for required stormwater management best management practices;
- (3) Marinas and other boat docking structures;
- (4) Beaches and other public water-oriented recreation areas; and
- (5) Fisheries or other marine resources facilities.

Wetlands means tidal and nontidal wetlands.

Sec. 9.1-4. Chesapeake Bay Preservation Area Overlay District Map; applicability.

(a) The boundaries of the district are hereby established as shown on the map sheet entitled "Chesapeake Bay Preservation Areas, Portsmouth, Virginia," dated September 25, 2009, which accompanies and, together with all explanatory material thereon, is hereby declared to be a part of this chapter, the said map sheet hereinafter being referred to as the Chesapeake Bay Preservation Area Map. Modifications to the RMA and the RPA shown on the map sheet must be approved by the Director of Planning and must be supported by documentation of the more accurate extent of the land and water features.

(b) The Chesapeake Bay Preservation Area Overlay District shall apply to all lands identified and designated as CBPAs by the city council, as shown on the Chesapeake Bay Preservation Area Map.

- (1) At a minimum the RPA shall include:
 - a. Tidal wetlands;
 - b. Nontidal wetlands connected by surface flow and contiguous to tidal wetlands or water bodies with perennial flow;
 - c. Tidal shores; and

d. A 100-foot vegetated buffer area located adjacent to and landward of the components listed in subsections a. through c. of this section, and along both sides of any water body with perennial flow.

(2) The RMA is defined as adjacent to the RPA and shall be composed of:

a. The 100-year floodplain (AE and VE zones) as identified on the Federal Emergency Management Agency Flood Insurance Rate Map dated September 25, 2009;

b. Nontidal wetlands not connected by surface flow to tidal wetlands, water bodies with perennial flow or other tidal waters;

c. Where the floodplain or nontidal wetlands exist outside of the RPA then the extent of these features delineate the RMA. If these features do not exist or do not extend at least 530 feet beyond the RPA, the RMA is 530 feet from the landward edge of the RPA.

(3) The intensely developed area (IDA) is an overlay of the RPA and the RMA as shown on the map entitled "Chesapeake Bay Preservation Areas, Portsmouth, Virginia dated September 25, 2009. Modifications to RMA and the RPA shown on the map must be approved by the City Council and must be supported by documentation of the more accurate extent of the land and water features. This area serves as a redevelopment area and shall have one of the following characteristics:

a. Development has severely altered the natural state of the area such that it has more than 50 percent impervious surface;

b. Public sewer and water systems, or a constructed stormwater drainage system, or both, have been constructed and served the area as of the original Chesapeake Bay Preservation Area Overlay Ordinance adoption date of September 1, 1990. (This condition does not include areas planned for public sewer and water or constructed stormwater drainage systems); or

c. Housing density is equal to or greater than ten dwelling units per acre.

(c) The Chesapeake Bay Preservation Area (CBPA) Map showing the general location of CBPAs should be consulted and, per section 9.1-9, a site-specific determination of the Resource Protection (RPA) shall be performed by persons contemplating regulated activities within the city.

(d) Portions of RPAs and RMAs designated by the city council as Intensely Developed Areas shall serve as redevelopment areas. Areas so designated shall comply

with all erosion and sediment control requirements and the performance standards for redevelopment in Section 9.1-10.

(e) If at least 25 percent of a lot, parcel, or development project lies within the boundaries of a CBPA, the entire lot, parcel, or development project shall comply with the requirements of this chapter.

Sec. 9.1-7. Required conditions.

(a) All development and redevelopment exceeding 2,500 square feet of land disturbance shall be subject to a plan of development process, including the approval of a site plan in accordance with the provisions of the zoning ordinance set out in chapter 40 or a subdivision plat in accordance with chapter 33.

(b) The city may allow development in RPAs upon approval only if it:

(1) Is water-dependent as listed in Sec. 9.1-10(c); or

(2) Constitutes redevelopment as listed in Sec. 9.1-10(c)

(c) A water quality impact assessment shall be required for any proposed land disturbance within RPAs and for any development within RMAs when required by the city engineer because of the unique characteristics of the site or intensity of development, in accordance with the provisions of Section 9.1-11(6).

Sec. 9.1-9. Interpretation of resource protection area boundaries.

(a) *Delineation by the applicant.* The site-specific boundaries of the RPA shall be determined by the applicant through the performance of an environmental site assessment, subject to approval by the director of planning and in accordance with section 9.1-11(2). A site-specific evaluation shall be conducted to determine whether water bodies on or adjacent to the development site have perennial flow. The Chesapeake Bay Preservation Area Map shall be used as a guide to the general location of RPAs.

(b) *Where conflict arises over delineation.* Where the applicant has provided a site-specific delineation of the RPA, the director of planning will verify the accuracy of the boundary delineation. In determining the site-specific RPA boundary, the director of planning may render adjustments to the applicant's boundary delineation, in accordance with section 9.1-11. In the event the adjusted boundary delineation is contested by the applicant, the applicant may seek relief in accordance with the provisions of section 9.1-11(9).

(c) *Final delineation shown on CBPA map.* When a delineation of a CBPA has been approved or established by the director of planning, the CBPA Map shall be amended to reflect that delineation.

Sec. 9.1-10. Performance standards.

(a) *Purpose and intent.* The performance standards establish the means to minimize erosion and sedimentation potential, reduce land application of nutrients and toxics, and maximize rainwater infiltration. Natural groundcover, especially woody vegetation, is most effective in holding soil in place and preventing site erosion. Indigenous vegetation, with its adaptability to local conditions without the use of harmful fertilizers or pesticides, filters stormwater runoff. Minimizing impervious cover enhances rainwater infiltration and effectively reduces stormwater runoff potential. The purpose and intent of these requirements are also to implement the following objectives: prevent a net increase in nonpoint source pollution from new development; achieve a ten percent reduction in nonpoint source pollution from development on previously developed land where the runoff was not treated by one or more water quality best management practices; and achieve a 40 percent reduction in nonpoint source pollution from agricultural uses.

(b) *General performance standards for development and redevelopment.*

(1) Land development, redevelopment, or disturbance shall be limited to the minimum area necessary to provide for the proposed use or development.

a. The submitted site plan shall indicate the limits of the proposed land disturbance, including areas for clearing or grading and shall be limited to the minimum area necessary to provide for the construction footprint. These limits shall be clearly shown on submitted plan and physically marked on the development site.

b. Ingress and egress during construction shall be limited to one access point.

(2) Indigenous vegetation shall be preserved to the maximum extent practicable consistent with the use or development proposed and in accordance with the Virginia Erosion and Sediment Control Handbook.

a. Existing trees over two inches in diameter at breast height (DBH) shall be preserved outside the construction footprint. Diseased trees or trees weakened by age, storm, fire, or other injury, as documented in writing to the director of planning by a landscape architect or a certified arborist who holds a current membership in either the International Society of Arboriculture (ISA), the Tree Care Industry Association, or the American Society of Consulting Arborists (ASCA), may be removed.

b. Other woody vegetation onsite shall be preserved outside the approved construction footprint.

c. Clearing shall be allowed only to provide necessary access, positive site drainage, water quality BMPs, and the installation of utilities.

(3) Prior to clearing or grading, suitable protective barriers, such as fencing of a type detailed in the Landscape Planting and Protection Manual, Portsmouth, Virginia shall be erected five feet outside of the dripline of any tree or stand of trees to be preserved. These protective barriers shall remain so erected throughout all phases of construction. The storage of equipment, materials, debris, or fill shall not be allowed within the area protected by the barrier.

(4) Land development, redevelopment or land disturbance which adds impervious cover shall minimize impervious cover to promote infiltration of stormwater into the ground consistent with the proposed use or development. Pervious surfaces where soil conditions and/or water table permit shall be used for any parking area, maneuvering aisle, or other low traffic driveway.

(5) Notwithstanding any other provisions of this chapter or exceptions or exemptions thereto, any land disturbing activity exceeding 2,500 square feet, including construction of all single-family houses, septic tanks, and drainfields, shall also comply with the requirements of chapter 11 of this Code (erosion and sediment control).

(6) Where the best management practices require regular or periodic maintenance in order to continue their functions, such maintenance shall be ensured through a maintenance agreement between the owner or developer and the city or some other mechanism that achieves an equivalent objective.

(7) All on-site sewage disposal systems not requiring a VPDES permit shall be pumped out at least once every five years, in accordance with the provisions of Section 38-312.

(8) For new construction a reserve sewage disposal site with a capacity at least equal to that of the primary sewage disposal site shall be provided, in accordance with section 38-313. This requirement shall not apply to any lot or parcel recorded prior to October 1, 1989, if such lot or parcel is not sufficient in capacity to accommodate a reserve sewage disposal site, as determined by the local health department. Building or construction of any impervious surface shall be prohibited on the area of all sewage disposal sites or on an on-site sewage treatment system, which operates under a permit issued by the state water control board, until the structure is served by public sewer.

(9) For any development or redevelopment, stormwater runoff shall be controlled by the use of best management practices consistent with the

water quality protection provisions (4 VAC §3-20-20-71 et seq.) of the Virginia Stormwater Management Regulations and shall achieve the following:

a. For development, the post-development nonpoint source pollution runoff load shall not exceed the pre-development load, based on the following land cover conditions for the city: lots platted before April 5, 1994, shall utilize 41 percent, lots platted after April 5, 1994, shall utilize 19 percent for the Elizabeth River Watershed, 40 percent for the Western Branch Watershed, and 54 percent for the Southern Branch Watershed;

b. For redevelopment, the nonpoint source pollution load shall be reduced by at least ten (10) per cent of the existing load. The City Manager, or designee may waive or modify this requirement for redevelopment sites that originally incorporated best management practices for stormwater runoff quality control, provided that:

1. In no case may the post-development nonpoint source pollution runoff load exceed the predevelopment load; and

2. Best management practice facilities shall be in good working order and performing at the design levels of service. The City Manager shall conduct a review of the original structural design and the maintenance plans of such facilities. The execution of a new maintenance agreement may be required to ensure compliance with these requirements.

c. For sites within IDAs or other isolated redevelopment sites, the nonpoint source pollution load shall be reduced by at least ten percent;

d. For redevelopment, both the pre- and post-development loadings shall be calculated by the procedures outlined by the current Virginia Stormwater Management Handbook Manual. Calculations involving the percentage of site area under impervious cover shall be based upon the lot area landward of mean high water and wetlands. However, where the design data is available, the original post-development nonpoint source pollution loadings can be substituted for the existing development loadings; and

e. Stormwater management criteria for redevelopment shall apply to any redevelopment, whether or not it is located within an intensely developed area designated by the city.

(10) Prior to initiating grading or other on-site activities on any portion of a lot or parcel, all required federal, state, and local permits shall be

obtained and evidence of such submitted to the city engineer, in accordance with section 9.1-11.

(c) *Criteria RPAs.*

(1) *Allowable land uses in the RPA.* A water quality impact assessment in conformance with section 9.1-11(6) shall be submitted for all proposed land disturbances in the RPA. Land disturbances may be allowed only if one or more of the following conditions exist:

- a. It is a water dependent facility, which meets the following:
 1. It does not conflict with the comprehensive plan;
 2. It complies with the performance standards section of this chapter;
 3. Any nonwater-dependent component is located outside of the RPA; and
 4. Access to the water dependent facility will be provided with the minimum disturbance necessary. Where practicable, a single point of access will be provided.
- b. It constitutes redevelopment sited outside the IDA, and meets the following criteria:
 1. Will result in a no net increase in the amount of impervious cover;
 2. Will result in no further encroachment into the RPA; and
 3. Will conform to chapter 11 (erosion and sediment control) and chapter 31.1 (stormwater management) of this Code.
- c. It constitutes development or redevelopment within a designated intensely developed area.
- d. It is a new use according to subsection (c)(4) of this section (permitted encroachments into the buffer area).
- e. It is a road or driveway crossing, which meets the following:
 1. The city finds that there exists no reasonable alternative to aligning the road or driveway in or across the RPA;

2. The alignment and design of the road are optimized, consistent with other applicable requirements, to minimize encroachments in the RPA and adverse effects to water quality;

3. The design and construction of the road or driveway satisfy all applicable criteria of this chapter; including the submission of a water quality impact assessment; and

4. The proposal is reviewed in coordination with the site plan, subdivision and plan of development review processes.

f. It is a flood control or stormwater facility that drains or treats water from multiple development projects or from a significant portion of a watershed, which meets the following:

1. The location of the facility has been found to be the optimum location by the city;

2. The size of the facility is the minimum necessary to provide the necessary flood control, stormwater treatment or both;

3. The facility is consistent with chapter 31.1 (stormwater management) and has been approved as a Phase I modification of the city's Chesapeake Bay Program;

4. All applicable permits for work in and around state and federal waters have been obtained and received prior to construction;

5. Approval must be received from the city prior to construction; and

6. Routine maintenance may be performed on such facilities to assure that they continue to function as designed.

(2) *Exemptions in RPAs.* The following land disturbances in the resource protection area may be considered exempt:

a. Water wells;

b. Passive recreational facilities such as boardwalks, trails and pathways;
and

c. Historic preservation and archaeological activities, provided that they comply with the following:

1. The land disturbance undergoes an administrative review, pursuant to Section 9.1-10(c), prior to approval; and
2. Any land disturbance exceeding an area of 2,500 square feet shall comply with chapter 11 (erosion and sediment control) of this Code.

(3) *Buffer area requirements.* To minimize the adverse effects of human activities on the other components of resource protection areas, state waters, and aquatic life, a 100-foot buffer area of vegetation that is effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff shall be retained if present and established where it does not exist.

The buffer area shall be located adjacent to and landward of other RPA components and along both sides of any water bodies with perennial flow. The full buffer area shall be designated as the landward component of the RPA, in accordance with sections 9.1-4 and 9.1-11. Notwithstanding permitted uses, encroachments, and vegetation clearing as set forth in this section, the 100-foot wide buffer area is not reduced in width. The 100-foot buffer area shall be deemed to achieve a 75 percent reduction of sediments and a 40 percent reduction of nutrients.

(4) *Permitted encroachments into the buffer area.*

a. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded prior to October 1, 1989, the director of planning, after consulting with the city engineer, may allow encroachments into the buffer in accordance with the following criteria:

1. Encroachments into the buffer areas shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities;
2. Where practicable, a vegetated area equal to the area of encroachment into the buffer area shall be established elsewhere on the lot or parcel; and
3. The encroachment may not exceed into the seaward 50 feet of the buffer area.

b. When the application of the buffer area would result in the loss of a buildable area on a lot or parcel recorded between October 1, 1989, and March 1, 2002, encroachments may be allowed through the exception process described in section 9.1-12(c) in accordance with the following criteria:

1. The lot or parcel was created as a result of a legal process conducted in conformance with chapter 33 (subdivisions) of this Code;
2. Conditions or mitigation measures imposed through a previously approved exception shall be met;
3. If the use of a best management practice (BMP) was previously required, the BMP shall be evaluated to determine if it continues to function effectively and, if necessary, the BMP shall be reestablished or repaired and maintained, as required; and
4. The requirements set forth in subsections (4)a.1.--(4)a.3. of this section have been met.

(5) *Permitted modifications of the buffer area.* In order to achieve the functional value of the buffer, existing vegetation may be removed, subject to approval by the city planning director, only to provide for reasonable sight lines, access paths, general woodlot management, and best management practices, including those that prevent upland erosion and concentrated flows of stormwater, as follows:

- a. Trees may be pruned or removed as necessary to provide for reasonable sight lines and vistas, provided that where removed, they shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion, and filtering nonpoint source pollution from runoff.
- b. Any path shall be constructed and surfaced as to effectively control erosion.
- c. Dead, diseased, or dying trees or shrubbery and noxious weeds such as Johnson grass, kudzu and multiflora rose may be removed and thinning of trees may be allowed, pursuant to sound horticulture practice.
- d. For shoreline erosion projects, trees and woody vegetation may be removed, necessary control techniques employed, and appropriate vegetation established to protect or stabilize the shoreline in accordance with the best available technical advice and applicable permit conditions or requirements.
- e. Flower and/or vegetable gardens, or similar amenity as long as no brush and/or trees are removed from the RPA.

(6) *Buffer area requirements for intensely developed areas.* In the intensely developed area the director of planning may, after consulting with the city engineer, exercise discretion regarding whether to require the establishment of vegetation in the 100-foot wide buffer area. However, while the immediate establishment of vegetation in the buffer area may be impractical, consideration to

implementing measures that would establish vegetation in the buffer in these areas over time shall be considered in order to maximize water quality protection, pollutant removal and water resource conservation.

Sec. 9.1-11. Plan of development process.

Any land disturbance, development or redevelopment exceeding 2,500 square feet of land disturbance shall be accomplished through a plan of development process prior to any clearing or grading of the site or the issuance of any building permit, to assure compliance with all applicable requirements of this chapter.

Notwithstanding the provisions above, no clearing or grading of any lot or parcel shall be permitted without an approved clearing plan. For existing single-family lots, a clearing line shown on the plat plan normally submitted as part of the building permit application shall satisfy clearing plan requirements. No clearing or grading shall occur on existing single-family lots until a complete building permit application is approved.

(1) *Required information.* In addition to the requirements of the zoning ordinance set out in chapter 40, or the requirements of chapter 33, regarding subdivisions, the plan of development process shall consist of the plans and studies identified below. The following plans or studies shall be submitted, unless otherwise directed:

- a. A site plan in accordance with the provisions of the zoning ordinance set out in chapter 40 or a subdivision plat in accordance with the provisions of chapter 33;
- b. An environment site assessment;
- c. A landscaping plan;
- d. A stormwater management plan;
- e. An erosion and sediment control plan in accordance with the provisions of chapter 11; and
- f. A water quality impact assessment as necessary under the requirements of Section 9.1-11(f).

(2) *Environmental site assessment.* An environmental site assessment shall be submitted in conjunction with a preliminary site plan or preliminary subdivision plan approval for the purposes of determining the site-specific boundaries of the RPA.

- a. The environmental site assessment shall be drawn to scale and clearly delineate the following environmental features:

1. Tidal wetlands;
2. Tidal shores;
3. Nontidal wetlands connected by surface flow and contiguous to tidal wetlands or water bodies with perennial flow;
4. A 100-foot buffer area located adjacent to and landward of the components listed in subsections (2)a.1. through (2)a.3. of this section, and any water bodies with perennial flow; and
5. Other sensitive environmental features as determined by the city engineer.

b. Wetlands delineations shall be performed consistent with the procedures specified in the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, 1987.

c. The environmental site assessment shall delineate the site-specific geographic extent of the RPA.

d. The environmental site assessment shall be drawn at the same scale as the preliminary site plan or subdivision plat, and shall be certified as complete and accurate by a professional engineer or a certified land surveyor. This requirement may be waived by the city engineer when the proposed use of development would result in less than 5,000 square feet of disturbed area.

(3) *Landscaping plan.* A landscaping plan shall be submitted in conjunction with site plan approval or as part of subdivision plat approval. No clearing or grading of any lot or parcel shall be permitted without a prior approved landscaping plan. Landscaping plans shall be prepared and certified by design professionals practicing within their areas of competence as prescribed by the Code of Virginia.

a. *Contents of the plan.*

1. The landscaping plan shall be drawn to scale and clearly delineate the location, size, and description of existing and proposed plant material. All existing trees on the site two inches or greater DBH shall be shown on the landscaping plan. Where there are groups of five or more trees, stands may be outlined instead. The specific number of trees two inches or greater DBH to be preserved outside of the construction footprint shall be indicated on the plan. Trees to be removed shall be clearly delineated on the landscaping plan. The plan shall be consistent with chapter 36, article III of this Code.

2. Any required buffer area shall be clearly delineated and any plant material to be added to establish or supplement the buffer area, as required by this chapter, shall be shown on the landscaping plan.
3. Within the buffer area, trees to be removed for sight lines, vistas, access paths, and best management practices, as provided for in this chapter, shall be shown on the plan. Vegetation required by this chapter to replace any existing trees within the buffer area shall also be shown on the landscaping plan.
4. Trees to be removed for shoreline stabilization projects and any replacement vegetation required by this chapter shall be shown on the landscaping plan.
5. The plan shall depict grade changes or other work adjacent to trees, which would affect them adversely. Specifications shall be provided as to how grade, drainage, and aeration would be maintained around trees to be preserved.
6. The landscaping plan will include specifications for the protection existing trees during clearing, grading, and all phases of construction, consistent with such measures as described in the Landscape Planting and Protection Manual, Portsmouth, Virginia.

b. *Plant specifications.*

1. All plant materials necessary to supplement the buffer area or vegetated areas outside the construction footprint shall be installed in accordance with the specifications referred to in section 36-52(9).
2. All supplementary or replacement plant materials shall be living and in a healthy condition. Plant materials shall conform to the standards of the most recent edition of the American Standard for Nursery Stock, published by the American Association of Nurserymen.
3. Where areas to be preserved, as designated on an approved landscaping plan, are encroached, replacement of existing trees and other vegetation will be achieved at a ratio of three planted trees to one removed. Replacement trees shall be a minimum of one and one-half inches DBH at the time of planting.

c. *Maintenance.* The applicant shall be responsible for the maintenance and replacement of all vegetation as may be required by the provisions of this chapter. In buffer areas and areas outside the construction footprint, plant material shall be tended and maintained in a healthy growing

condition and free from refuse and debris. Unhealthy, dying, or dead plant materials shall be replaced during the next planting season, as required by the provisions of this chapter.

(4) *Stormwater management plan.* A stormwater management plan shall be submitted as part of the plan of development process required by this chapter and in conjunction with site plan or subdivision plan approval.

a. *Contents of the plan.* The stormwater management plan shall contain maps, charts, graphs, tables, photographs, narrative descriptions, explanations, and citations to supporting references as appropriate to communicate the information required by this chapter. At a minimum, the stormwater management plan must contain the following:

1. Location and design of all planned stormwater control devices;
2. Procedures for implementing nonstructural stormwater control practices and techniques which can be described in narrative form;
3. Pre-development and post-development nonpoint source pollutant loadings with supporting documentation of all utilized coefficients and calculation; and
4. For facilities, verification of structural soundness, including a professional engineer or class IIIB surveyor certification.

b. *Site-specific facilities.* Site-specific facilities shall be designed for the ultimate development of the contributing watershed based on zoning, comprehensive plans, local public facility master plans, or other similar planning document.

c. *Engineering calculations.* All engineering calculations must be performed in accordance with procedures outlined in the current edition of the Virginia Stormwater Management Regulations and the corresponding Virginia Stormwater Management Handbook.

d. *Inspection and maintenance schedule.* The plan shall establish a long-term schedule for inspection and maintenance of stormwater management facilities that include all maintenance requirements and the identities of persons responsible for performing maintenance. If the designated maintenance responsibility is with a party other than the city, a maintenance agreement shall be executed between the responsible party and the city.

(5) *Erosion and sediment control plan.* An erosion and sediment control plan shall be submitted that satisfies the requirements of this chapter and is in accordance with chapter 11, in conjunction with site plan or subdivision plan approval.

(6) *Water quality impact assessment.*

a. *Purpose and intent.* The purpose of the water quality impact assessment is to:

1. Identify the impacts of proposed development, redevelopment or land disturbance on water quality and lands within RPAs and other environmentally sensitive lands;
2. Ensure that, where development, redevelopment, or land disturbance does take place within RPAs and other sensitive lands, it will be located on those portions of a site and in a manner that will be least disruptive to the natural functions of RPAs and other sensitive lands;
3. To protect individuals from investing funds for improvements proposed for location on lands unsuited for such development because of high ground water, erosion, or vulnerability to flood and storm damage;
4. Provide for administrative relief from the terms of this chapter when warranted and in accordance with the requirements contained herein; and
5. Specify mitigation which will address water quality protection.

b. *Water quality impact assessment required.* A water quality impact assessment is required for: (i) any proposed land disturbance, development, or redevelopment, within an RPA, (ii) any development in a RMA as deemed necessary by the city engineer due to the unique characteristics of the site or intensity of the proposed development. There shall be two levels of water quality impact assessments: a minor assessment and a major assessment.

c. *Minor water quality impact assessment.* A minor water quality impact assessment pertains only to development within an RPA, which causes no more than 5,000 square feet of land disturbance. Submission of a plan of development that demonstrates through the use of calculations provided for by subsection (4)a. of this section that the remaining buffer area and necessary best management practices will result in removal of no less than 75 percent of sediments and 40 percent of nutrients from post-development stormwater runoff shall be deemed to have satisfied the requirement for a minor water quality impact assessment. The following elements shall be included in the preparation and submission of a minor water quality assessment:

1. Site plan indicating the location of the components of the RPA, including the 100-foot buffer area;
2. Location and nature of the proposed encroachment into the buffer area, including: type of paving material, limits for areas of clearing or grading, location of any structures, drives for other impervious cover and sewage disposal systems or reserve drainfield sites; and
3. Type and location of proposed best management practice to mitigate the proposed encroachment.

d. *Major water quality impact assessment.* A major water quality impact assessment shall be required for any development which: (i) exceeds 5,000 square feet of land disturbance within an RPA; or (ii) is located in a RMA and is deemed necessary by the city engineer. The information required in this section shall be considered a minimum. The following elements shall be included in the preparation and submission of a major water quality assessment:

1. All of the information required in a minor water quality impact assessment, as specified in subsection (6)c. of this section;
2. A hydrogeological element that:
 - (i) Describes the existing topography, soils, hydrology and geology of the site and adjacent lands;
 - (ii) Describes the impacts of the proposed development on topography, soils, hydrology and geology on the site and adjacent lands;
 - (iii) Indicates the disturbance or destruction of wetlands and justification for such action;
 - (iv) Indicates the disruptions or reductions in the supply of water to wetlands, streams, lakes, rivers or other water bodies;
 - (v) Indicates the disruptions to existing hydrology including wetland and stream circulation patterns;
 - (vi) Indicates the source location and description of proposed fill material;
 - (vii) Indicates the location of dredge material and location of dumping area for such material;

- (viii) Indicates the location of and impacts on shellfish beds, submerged aquatic vegetation, and fish spawning areas; and
- (ix) Describes the proposed mitigation measures for the potential hydrogeological impacts which may include:
 - (A) Proposed erosion and sediment control concepts which may include minimizing the extent of the cleared area, perimeter controls, reduction of runoff velocities, measures to stabilize disturbed areas, schedule and personnel for site inspection;
 - (B) Proposed stormwater management system;
 - (C) Creation of wetlands to replace those lost; and
 - (D) Minimizing cut and fill.

3. A landscape element that describes the proposed measures for mitigation of the water quality and land impacts within CBPAs. Possible mitigation measures include:

- (i) Replanting schedule for trees and other significant vegetation removed for construction, in accordance with section 36-52 of the city Code.
- (ii) Demonstration that the design of the plan will preserve to the greatest extent possible any significant trees and vegetation on the site and will provide maximum erosion control and overland flow benefits from such vegetation.
- (iii) Demonstration that indigenous plants are to be used to the greatest extent possible.

4. As part of any major water quality impact assessment submittal, the city engineer may require review by the Chesapeake Bay Local Assistance Division (CBLAD). Upon receipt of a major water quality impact assessment, the city engineer will determine if such review is warranted and may request CBLAD to review the assessment and respond with written comments. Any comments by CBLAD will be incorporated into the final review by the city engineer, provided that such comments are provided by CBLAD within 90 days of the request.

e. *Evaluation procedure.*

1. Upon the completed review of a minor water quality impact assessment, the city engineer will determine if the following criteria have been satisfied:

- (i) The proposed encroachment is necessary due to the inability to place improvements elsewhere on the site to avoid disturbance of the buffer area;
- (ii) Impervious surface is minimized;
- (iii) Proposed best management practices, where required, achieve the requisite reductions in pollutant loadings;
- (iv) Proposed mitigation measures, including the revegetation plan and site design, result in minimal disturbance to all components of the RPA, including the 100-foot buffer area; and
- (v) The development, as proposed, meets the purpose and intent of this chapter.

2. Upon the completed review of a major water quality impact assessment, the city engineer will determine if the proposed development is consistent with the purpose and intent of this chapter and that the following criteria have been satisfied:

- (i) Within any RPA, the proposed development is a water-dependent facility;
- (ii) The disturbance of any wetlands will be minimized and the applicant will provide a statement on the plans that Wetland Permits will be obtained prior to the issuance of any other permits or approvals;
- (iii) Proposed erosion and sediment control concepts are adequate to achieve the reductions in runoff and prevent off-site sedimentation;
- (iv) Proposed stormwater management concepts are adequate to control the stormwater runoff to achieve the required performance standard for pollutant control;
- (v) Proposed revegetation of disturbed areas will provide optimum erosion and sediment control benefits;

- (vi) The design and location of any proposed drainfield will be in accordance with the requirements of Section 9.1-10;
- (vii) The cumulative impact of the proposed development, when considered in relation to other development in the vicinity, both existing and proposed, will not result in a significant degradation of water quality; and
- (viii) The development, as proposed, is consistent with the purpose and intent of this chapter.

3. The city engineer shall require additional mitigation where potential impacts have not been adequately addressed. Evaluation of mitigation measures will be made by the city engineer based on the criteria listed in subsections (6)e.1. and (6)e.2. of this section.

(7) *Final plan.* Final plans for property within CBPAs shall be final plans for land to be subdivided or site plans for land not to be subdivided as required in the zoning ordinance.

a. Final plans for all lands within CBPAs shall include the following additional information:

- 1. The delineation of the PA boundary;
- 2. The delineation of required buffer areas;
- 3. All wetlands permits required by law; and
- 4. A maintenance agreement as deemed necessary and appropriate by the city engineer to ensure proper maintenance of best management practices in order to continue their functions.

b. Installation and bonding requirements.

- 1. Where buffer areas, landscaping, stormwater management facilities or other specifications of an approved plan are required, no certificate of occupancy shall be issued until the installation of required plant materials or facilities is completed, in accordance with the approved site plan.
- 2. When the occupancy of a structure is desired prior to the completion of the required landscaping, stormwater management facilities, or other specifications of an approved plan, a certificate of occupancy may be issued only if the applicant provides to the

city a form of surety satisfactory to the city attorney in an amount equal to the value of the remaining plant materials, related materials, and installation costs of the required landscaping or other specifications or maintenance costs for any required stormwater management facilities.

3. All required landscaping shall be installed and approved by the first planting season following issuance of a certificate of occupancy or the surety may be forfeited to the city.

4. All required stormwater management facilities or other specifications shall be installed and approved within 18 months of project commencement. Should the applicant fail, after proper notice, to initiate, complete or maintain appropriate actions required by the approved plan, the surety may be forfeited to the city. The city may collect from the applicant the amount by which the reasonable cost of required actions exceeds the amount of the surety held.

5. After all required actions of the approved site plan have been completed, the applicant must submit a written request for a final inspection. If the requirements of the approved plan have been completed to the satisfaction of the city engineer, such unexpended or unobligated portion of the surety held shall be refunded to the applicant or terminated within 60 days following the receipt of the applicant's request for final inspection. The city engineer may require a certificate of substantial completion from a professional engineer or class IIIB surveyor before making a final inspection.

(8) *Administrative responsibility.* Administration of the plan of development process shall be in accordance with the zoning ordinance set out in chapter 40 or chapter 33 regarding subdivisions.

(9) *Denial of plan, appeal of conditions or modifications.* In the event the final plan or any component of the plan of development process is disapproved and recommended conditions or modifications are unacceptable to the applicant, the applicant may appeal such administrative decision to the planning commission. In granting or denying an appeal, the planning commission must find such plan to be in accordance with all applicable ordinances and include necessary elements to mitigate any detrimental impact on water quality and upon adjacent property and the surrounding area and such plan meets the purpose and intent of the performance standards in this chapter. If the planning commission finds that the applicant's plan does not meet the above stated criteria, it shall deny approval of the plan.

Sec. 9.1-12. Nonconformities, exemptions and exceptions.

(a) *Nonconforming uses and noncomplying structures.* The lawful use of a building or structure located in a Chesapeake Bay Preservation Area which existed on September 1, 1990, and which is not in conformity with the provisions of this chapter may be continued in accordance with the provisions of the zoning ordinance. No change or expansion of use shall be allowed with the exception that:

(1) The director of planning may grant a nonconforming use and development waiver for principal structures on legal nonconforming lots or parcels to provide for remodeling and alterations to such nonconforming structures provided that the city engineer has certified that:

- a. There will be no increase in nonpoint source pollution load;
- b. Any development or land disturbance exceeding an area of 2,500 feet complies with all erosion and sediment control requirements of this chapter; and
- c. There shall be no expansion of the footprint of the nonconforming structure or use.

(2) The director of planning may grant a nonconforming use and development waiver for principal structures on legal nonconforming lots or parcels to provide for expansion to such nonconforming structures provided that the city engineer has certified that:

- a. There will be no increase in nonpoint source pollution load;
- b. Any development or land disturbance exceeding an area of 2,500 feet complies with all erosion and sediment control requirements of this chapter; and
- c. The City Engineer has found the requirements under section 9.1-12(c)(3) have been met.

(3) An application for a nonconforming use and development waiver shall be made to and upon forms furnished by the zoning administrator and shall include for the purpose of proper enforcement of this chapter, the following information:

- a. Name and address of applicant and property owner;
- b. Legal description of the property and type of proposed use and development;
- c. A sketch of the dimensions of the lot or parcel, location of buildings and proposed additions relative to the lot line, and boundary of the RPA; and

d. Location and description of any existing private water supply or sewage system.

(4) A nonconforming use and development waiver shall become null and void 12 months from the date issued if no substantial work has commenced.

(5) It is not the intent of this chapter to prevent the reconstruction of pre-existing structures within CBPAs from occurring as a result of casualty loss unless otherwise restricted by the City Code.

(b) *Public utilities, railroads, public roads and facilities exemptions.* Construction, installation, operation and maintenance of electric, natural gas, fiber-optic and telephone transmission lines, railroads and public roads and their appurtenant structures in accordance with chapters 11 and 31.1 of this Code shall be found to be exempt.

(1) The exemption of public roads is further conditioned by:

a. The optimization of the road alignment and design, consistent with other applicable requirements to prevent or minimize encroachments into the RPA; and

b. The optimization of the road alignment and design that minimizes the adverse affects of water quality.

(2) The exemption for the construction, installation and maintenance of water, sewer, natural gas, underground telecommunications and cable television lines owned, permitted or both by the city or regional service authority are further conditioned that:

a. To the degree possible, the location of such utilities and facilities should be outside the RPA;

b. No more land shall be disturbed than is necessary to provide the proposed utility installation;

c. All such construction, installation and maintenance of such utilities and facilities shall be in compliance with all applicable state and federal permits and designed and conducted in a manner that protects water quality; and

d. Any land disturbance exceeding an area of 2,500 square feet complies with chapter 11 (erosion and sediment control) of this Code.

(c) *Exceptions.*

(1) An application for an exception to the requirements of section 9.1-10(c) shall be made in writing to the director of planning on a form provided by the director. The director of planning shall accept no such application unless accompanied by a nonrefundable fee in the amount as set forth in appendix A to this Code. The application shall identify the impacts of the proposed exception on water quality and on lands within the RPA through the performance of a water quality impact assessment, which complies, with the provisions of section 9.1-11(6).

(2) The director shall notify the adjacent property owners of such request, shall cause a sign to be posted on the property and shall cause to be published a legal notice of a public hearing in accordance with the zoning ordinance.

(3) The planning commission shall review the request for an exception and the water quality impact assessment and may grant the exception with such conditions and safeguards as deemed necessary to further the purpose and intent of this chapter, if the planning commission finds that:

a. Granting the exception will not confer upon the applicant any special privileges that are denied by this chapter to other property owners in the overlay district;

b. The exception request is not based upon conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or nonconforming that are related to the adjacent parcels;

c. The exception request is the minimum necessary to afford relief;

d. The exception request will be in harmony with the purpose and intent of this chapter, and not injurious to the neighborhood or otherwise detrimental to water quality or the public welfare; and

e. Reasonable and appropriate conditions are imposed which will prevent the exception request from causing a degradation of water quality.

(4) An application for an exception to the requirements any other sections of the Chapter except Section 9.1-10(c) shall be made in writing to the director of planning on a form provided by the director. The director shall review the request for an exception to these sections and the water quality impact assessment and may grant the exception with such conditions and safeguards as deemed necessary to further the purpose and intent of this chapter, if the director finds that:

- a. Granting the exception will not confer upon the applicant any special privileges that are denied by this chapter to other property owners in the overlay district;
 - b. The exception request is not based upon conditions or circumstances that are self-created or self-imposed, nor does the request arise from conditions or circumstances either permitted or nonconforming that are related to the adjacent parcels;
 - c. The exception request is the minimum necessary to afford relief;
 - d. The exception request will be in harmony with the purpose and intent of this chapter, and not injurious to the neighborhood or otherwise detrimental to water quality or the public welfare; and
 - e. Reasonable and appropriate conditions are imposed which will prevent the exception request from causing a degradation of water quality.
- (5) Any person aggrieved by a decision of the Planning Commission regarding the denial of a requested exception may appeal the decision to the Circuit Court of Virginia. The aggrieved party must file the appeal to the circuit court within 30 days from the date of such decision to appeal and notify the director of planning of the appeal.

Sec. 9.1-13. Enforcement.

(a) Any person who: (i) violates any provision of any such ordinance or (ii) violates or fails, neglects, or refuses to obey any final notice, order, rule, regulation, or variance or permit condition authorized by the City under such ordinance shall, upon such finding by an appropriate circuit court, be assessed a civil penalty not to exceed \$5,000 for each day of violation. Such civil penalties may, at the discretion of the court assessing them, be directed to be paid into the City treasury for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas therein, in such a manner as the court may direct by order, except that where the violator is the city itself or its agent, the court shall direct the penalty to be paid into the state treasury.

(b) With the consent of any person who: (i) violates any provision of this chapter or (ii) violates or fails, neglects, or refuses to obey any local governmental body's or official's notice, order, rule, regulation, or variance or permit condition authorized under such ordinance, the City may provide for the issuance of an order against such person for the one-time payment of civil charges for each violation in specific sums, not to exceed \$10,000 for each violation. Such civil charges shall be paid into the City treasury for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation Areas therein, except that where the violator is the city or its agent, the civil charges shall be paid into the state treasury. Civil charges shall be in lieu of any appropriate civil

penalty that could be imposed under subdivision 1 of this subsection. Civil charges may be in addition to the cost of any restoration required or ordered by the City.

2. That this ordinance shall take effect on September 25, 2009.

ADOPTED by the Council of the City of Portsmouth, Virginia at a meeting held on August 25, 2009.

Teste:

City Clerk