



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

September 4, 2015

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable S. Chris Jones
Member, House of Delegates
Post Office Box 5059
Suffolk, Virginia 23453-0059

Dear Delegate Jones:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire about the authority of the Suffolk Wetlands Board (the "Board") to permit public comment during meetings where public comment is not statutorily required.

Background

According to the materials you provided, the Board held a meeting to hear a progress report on a project it had previously permitted. The report was required by the conditions of the permit previously issued by the Board and pertained to the permittee's efforts at planting a vegetative buffer on the banks of the Nansemond River.

Following the report, the Board's chairman noted that members of the Nansemond River Preservation Alliance were present. He stated that he would like to hear from the public about the report. The Board was advised that there was no authority for it to allow public comments on the matter currently before it. The Board was further advised that, under state law, a wetlands board may take public comments only during public hearings for the review of a permit application, and not on any other occasion.

Applicable Law and Discussion

Every county, city, or town that enacts a wetlands zoning ordinance is required to create a wetlands board.¹ Section 28.2-1302 of the *Code of Virginia* sets forth the required terms of local wetlands zoning ordinances,² including public hearings for permit applications³ and for the suspension or revocation of a previously issued permit.⁴ Any person may testify at a public hearing.⁵ While the statute

¹ VA. CODE ANN. § 28.2-1303(A) (2011).

² Section 28.2-1302 (Supp. 2015).

³ *Id.* at § 6 ("Wetlands Zoning Ordinance").

⁴ *Id.* at § 8.

⁵ *Id.* at §§ (7)(B) & 8.

does not require public hearings for other actions of a local wetlands board, there are no circumstances or types of hearings where the statute bars or restricts a local board from receiving public comment.

Pursuant to this enabling legislation, Suffolk enacted a wetlands zoning ordinance, as part of its Unified Development Ordinance.⁶ The Suffolk ordinance adopts by reference the model ordinance set forth in the *Code of Virginia*, stating: “The wetlands Zoning Ordinance set forth in Code of Virginia § 28.2-1302, is hereby adopted as the Wetlands Zoning Ordinance of the City of Suffolk.”⁷

Thus, local enactment of the state statute means public comment must be allowed where the Board is considering issuing, revoking, or suspending a permit. It does not mean the Board may not receive public comment in other circumstances. I also note that it is common practice for the Chair of a deliberative body to permit comment by non-members.⁸

Finally, a wetlands board is a public body under the Virginia Freedom of Information Act (“FOIA”).⁹ The overall guiding principle of FOIA is open government, which includes free discussion with citizens:

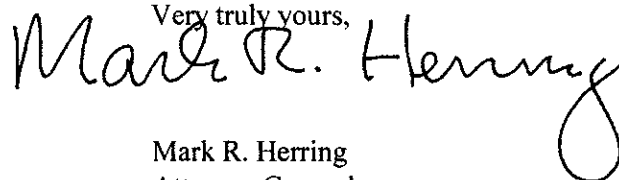
The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. . . . *This chapter shall not be construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.*¹⁰

Conclusion

Because there is neither a state law nor a local ordinance prohibiting the Board from receiving public comment where public comment is not required, because it is common practice for the Chair of a deliberative body to permit comment by non-members, and because of the overarching importance of open government and free discussion with citizens, as articulated by FOIA, it is my opinion that the Board may from time to time choose to permit public comment when public comment is not required.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

⁶ CITY OF SUFFOLK, VA., UNIFIED DEVELOPMENT ORDINANCE, § 31-418; *see also id.* at § 31-206 (establishing a City wetlands board).

⁷*Id.* at § 31-418.

⁸ *Robert's Rules of Order* notes the common practice of deliberative bodies allowing public comment from time to time, under the discretion of the presiding officer, even when it is not required: “Some bodies, especially public ones, may invite nonmembers to express their views, but this is done under the control of the presiding officer[,] subject to any relevant rules adopted by the body and subject to appeal by a member.” SARAH CORBIN ROBERT ET AL., *ROBERT'S RULES OF ORDER* 96-97 (11th ed. 2013).

⁹ *See* VA. CODE ANN. § 2.2-3701 (Supp. 2015) (defining the term “public body,” in part, as “any . . . board . . . of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns, and counties”).

¹⁰ Section 2.2-3700(B) (2014) (emphasis added).