MIDDLE PENINSULA CHESAPEAKE BAY PUBLIC ACCESS AUTHORITY

MEMORANDUM

TO: MPCBPAA

FROM: Lewie Lawrence, Dir of Regional Planning

DATE: October 10, 2006

RE: October PAA Meeting

This announcement serves as notice to call a meeting of the Public Access Authority on Friday, October 13, 2006 at **11:00 a.m**. The meeting will be held in the MPPDC Board Room. Lunch will be provided.

An agenda and related materials will be emailed to you within the next few days. If you have any questions, you are welcome to call or e-mail me. I can be reached at 804-758-2311 or LLawrence@mppdc.com.

AGENDA

1. Welcome and Introductions
2. Approval of September 2006 minutes
3. Financial Report
4. Public Comment
5. Presentation on Browne Improvements to BFI/Allied General Manager Tim Schotsch
6. Review of Draft **LANDING AND ROAD ENDING ACQUISITIONS** report
7. Other Business
8. Chairman Observations
9. Next Meeting
10. Adjourn

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MIDDLE PENINSULA CHESAPEAKE BAY PUBLIC ACCESS AUTHORITY
MINUTES

September 22, 2006
Middle Peninsula Planning District Commission
Saluda, Virginia

1. Welcome and Introductions

The Middle Peninsula Chesapeake Bay Public Access Authority held its meeting in the Middle Peninsula Planning District Commission Board Room in Saluda, Virginia, at 1:00pm on September 22, 2006.

Chairman Whiteway called the meeting to order. Members and Alternates present were Terri Hale, King William County Assistant Administrator; Gary Allen, Essex County Administrator; Louise Theberge, Gloucester County Board of Supervisors; Trent Funkhouser, West Point Town Manager; and Jimmy Sydnor, Tappahannock Assistant Town Manager. Also present were Lewis Lawrence, Director of Regional Planning MPPDC; Jacqueline Shapo, NOAA Coastal Management Fellow; Kelly Price, DEQ Coastal Zone Management Program; and Sara Stamp, Regional Planner MPPDC.

2. Approval of April Minutes

Chairman Whiteway requested a motion to approve the April 2006 Minutes. Ms. Theberge moved that the Minutes be approved. Mr. Hale seconded the motion. Motion carried by unanimous vote.

3. Treasurer's Report

Chairman Whiteway requested a motion to approve the April 2006 Treasurer's Report. Mr. Allen moved that the Report be approved; Ms. Theberge seconded the motion. Motion carried by unanimous vote.

4. Public Comment

There were no public comments.

5. CELCP Update

Mr. Lawrence reported on the CELCP acquisition pieces: Haworth (167.19 acres – $152,000) and Dragon Bridge/Jackson Tracts (Department of Forestry original piece; 189.12 acres – $247,760; rejected by DOF and taken by PAA). The Nature Conservancy appraisals for Haworth, Dragon Bridge (2005), and Jackson (2003) were presented; however, appraisals are in the process of being updated for the current CELCP application checklists. TNC identified several tracts in Gloucester that are prime for acquisition. If DOF decides not to or is unable to encumber CELCP funds, then the PAA will have the opportunity but must act before October 2008. All CELCP monies must be spent June 2009.

a) Report on CELCP checklist: Ms. Shapo provided a report on the CELCP application checklists for the Haworth, Dragon Bridge, and Jackson Tracts. She has been coordinating with Andy Lacatell (TNC) regarding match documentation, State Historic Preservation Office (SHPO) clearances, and associated paperwork. She is looking to complete the checklists by late October, so they may be forwarded to the Coastal Zone Management Program and NOAA for review. Final approval of the checklists for these sites is expected in late November.

b) State Historic Preservation Office (SHPO) clearance: Ms. Shapo applied to the Department of Historic Resources for SHPO clearances for the three CELCP parcels, which the PAA is required to have on-file to complete any CELCP land acquisition. No archeological or historic sites were identified on the properties. SHPO clearance letters are expected to be received by October 1, 2006

c) Appraisal update: Ms. Shapo has been coordinating with Andy Lacatell (TNC) to obtain updated appraisals for the three CELCP parcels. Mr. Lacatell has said he will provide the new appraisals within the next 30 days.

6. VACO Insurance Program

a) **Annual costs – how do we pay for it?** The PAA's VACO insurance program premium ($1412) was paid with Coastal TA monies this year; however, this program is not a permanent solution. A discussion was held to decide which method was best to generate funds. Mr. Allen suggested that monies could potentially come from BFI grants, the Tourism Council, Virginia's River Country, or the General Assembly funding.

b) **Sign coverage**: For an additional $24/year, PAA structures and signage could be covered under the VACO policy. Chairman Whiteway requested a motion to approve the additional fees. Mr. Allen moved that the motion be approved; Ms. Theberge seconded the motion; motion carried by unanimous vote.

7. DCBLA Sign Proposal

Ms. Shapo reported on the Department of Conservation and Recreation – Chesapeake Bay Local Assistance Division mini-grant proposal that was submitted to DCR. The PAA has been attempting to secure these mini-grant funds from DCR since May 2006. The proposal requested $3,300, which will be used to procure and install 10 interpretive signs on the Browne Tract, educating the public about riparian buffers, water quality protection/enhancement, the Water Quality Improvement Act, Water Quality Improvement Fund, and the Chesapeake Bay Preservation Act. No match is required for this grant.

8. Browne Improvements

a) **Gravel**: Mr. Lawrence has been in communication with the Middle Peninsula Regional Security Center regarding continued maintenance of the Browne Tract by wards of the state. A discussion was held to determine if the PAA would like to have the inmates construct a gravel parking lot at the lower entrance to Browne as

well as move the front gate. The cost would be approximately $500. Chairman Whiteway requested a motion to approve parking lot construction and expenditure of the funds. Mr. Allen moved that the motion be approved; Ms. Theberge seconded the motion; motion carried by unanimous vote.

b) **Survey of hunters' preferences**: Ms. Shapo is designing a survey targeting the 64 hunters signed-up to hunt the Browne Tract. The general survey will contain questions on infrastructure, user friendliness, comparison of preferred sites, user conflicts, safety issues, etc. A discussion was held by the PAA about improvements to the survey and the overall safety of Browne during hunting season. It was suggested that a few copies of the survey be posted near the gate and also that a warning sign be attached to the entrance gate to warn non-hunters that hunting season is in effect. Additionally, it was suggested that orange safety vests be purchased and kept in weather-resistant boxes by both gated entrances, making other users visible to hunters.

c) **DOF spraying for tree growth**: DOF has begun spraying to encourage tree growth on their land parcels; however, the PAA does not want to spend money to have them spray the Browne Tract. DOF is managing solely for pine; however, the PAA will need first to construct an effective, accurate habitat management plan for the Browne Tract before permitting any silviculture practices, such as selective or sustainable harvesting.

d) **DOF Browne Tract bulldozing incident**: It appears that DOF, while marking the property division line, inadvertently bulldozed some of the iron fence surrounding the Browne Tract Cemetery. The PAA will need to have wards of the state repair the fence and clear the area of any downed trees before notifying DOF of the incident.

9. General Assembly Budget Bill-PAA Award

A $20,000 award has been set aside in the FY08 State Budget for ongoing support of the PAA. Mr. Lawrence held a discussion to determine which projects the monies should be allocated to. Suggestions included:

<u>Regional Projects</u> ($10,000)

a) $5,000 – PAA Capacity Building Strategies
b) $2,500 – General Assembly Study Committee VDOT Road Endings
c) $2,500 – Habitat Management Plan Development or Public Access/Wetlands Mitigation (Browne or CELCP)

<u>Local projects</u> ($10,000)

a) West Point – Glass Island Car Top Landing Improvements
b) West Point – Public Access Easement on Public Holdings
c) Public Access Infrastructure Improvements
    1. Gloucester (BeaverDam Park Holding – Public Access Improvements)
    2. King William (Deaton Tract – Public Access Improvements)
    3. Tappahannock (Prince Street – Public Access Improvements)
d) Mathews – TNC New Point Property Transfer/Public Access

e) Tappahannock – Public Access Legal Research
f) General Public Access Improvements

10. Barriers to Public Access update

In regards to the disputed VDOT road endings, research indicates that there are a number of prescriptive easements and fee simple parcels, as expected. The PAA will receive and comment on the Landing and Road Ending Acquisitions Report at the October 2006 meeting. The authority will also need to discuss this matter with Delegate Harvey Morgan, as a solution may need to be provided by the General Assembly.

11. Coastal Experience Website Project Update

A prototype of the Coastal Experiences Website will be complete in 30-45 days. Site testing is proposed for mid-November. Ms. Price informed the authority that the Coastal Zone Management Program has $43,000 available for public access portal pilot, which the program is looking to network with the website.

12. Probation Program Discussion

a) Assignment of one probationer to PAA holdings for site clean up

The possibility of obtaining a probationer, who would work solely on PAA projects (such as maintaining Browne Tract), was discussed. Mathews County is testing the validity of this system currently. Deputies and county staff have been sent to roads and sites probationers were told to clean to see if the job was completed. If this system is deemed successful by Mathews, PAA would like to replicate it, which may require going through the county. We will need to secure a method by which to check on probationers' work.

b) Local recreation improvement requests funneled through the PAA

It was suggested that proposals from our partners and other PAAs requesting assistance from inmates for recreational/public access improvements be submitted to the MPCBPAA instead of directly to county and regional jails. The PAA will then prioritize the proposals and submit them, decreasing the paper traffic and burden on the jail system.

13. Habitat and Management Principles Report for CELCP Holdings

The PAA has contracted with VHB to identify best management practices to meet different goals within the authority.

14. Working Waterfront Conference and Award Program

A three-day symposium will be held in Norfolk, VA in May 2007 and will serve as a catalyst to organize and share current ideas and sentiments regarding the growing impediments to boating and fishing access. Through presentations and panel discussions, attendees will learn about

local, state, and national-level initiatives designed to address issues of water access and water-dependent industries. The Working Waterways and Waterfronts 2007 Conference offers a unique opportunity for coastal zone, city and regional planners, public officials, resource agency staff, water-based enterprises (marinas, boat yards, etc.), academics, aquatic resource educators, fishery management professionals, and the fishing and boating industries to exchange ideas and develop potential collaboration strategies that address public access needs.

15. Other Business

a) Chesapeake Bay Restoration Fund Advisory Committee Grant: Ms. Shapo would like to submit a proposal by the October 1st deadline to request funding ($500) for institution of a permanent trail demarcation system on the Browne Tract. Monies would be used to paint blazes on the trees of all trails within the parcel. Volunteers and wards of the state would be required to complete the process. No match was required for this grant. Chairman Whiteway requested a motion to approve submission of the Restoration Fund grant proposal by Ms. Shapo. Ms. Theberge moved that the motion be approved; Mr. Allen seconded the motion. The motion was carried by unanimous vote.

b) Dragon Run initiatives of interest: Ms. Stamp discussed two upcoming projects of interest, including the development of 2-4 management plans for public and/or NGO conservation holdings in the Dragon Run Watershed, as well as the production of signage and code of conduct outreach efforts.

c) The possibility of a joint meeting with Northern Neck PAA in December was discussed. With input from the CZM Program, their and our development could be furthered.

16. Chairman's Observations

None

17. Next Meeting

The next meeting of the Middle Peninsula Chesapeake Bay Public Access Authority will be Friday, October 13, 2006 at 11:00am.

18. Adjourn

Chairman Whiteway requested a motion that the meeting be adjourned. Ms. Hale moved that the motion be approved; Mr. Sydnor seconded the motion. Meeting was adjourned.

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Steve Whiteway

Revenue and Expenditure Report by Project

Middle Peninsula Planning District Commission

Period 07/01/06 to 09/30/06

Project Code & Description	Budget	Prior Year	Current	YTD	Proj Tot	Un/Ovr	% Bud

Revenue and Expenditure Report by Project

Run Date: 10/10/2006
Run Time: 2:02:10 pm

Middle Peninsula Planning District Commission

Period 07/01/06 to 09/30/06

Project Code & Description	Budget	Prior Year	Current	YTD	Proj Tot	Un/Ovr	% Bud
32001 PAA Brown /BFI				**Project Period** 07/31/2004	**to** 06/30/2010		
Revenues							
43010 MPDSB SAG	5,000.00	5,000.00	0.00	0.00	5,000.00	0.00	100.00%
44010 MPLT/BFI Award	37,500.00	19,894.75	0.00	17,605.25	37,500.00	0.00	100.00%
44900 Miscellaneous Income	1,661.00	1,661.00	0.00	0.00	1,661.00	0.00	100.00%
Revenues	44,161.00	26,555.75	0.00	17,605.25	44,161.00	0.00	100.00%
Expenses							
53100 Equipment	4,557.65	4,557.65	0.00	0.00	4,557.65	0.00	100.00%
54500 Lodging/ Staff Expens	0.00	686.65	0.00	-686.65	0.00	0.00	0.00%
54900 Travel Expense Other	1,133.15	1,133.15	0.00	0.00	1,133.15	0.00	100.00%
56400 Consulting/Contractura	16,937.55	500.00	0.00	-500.00	0.00	16,937.55	0.00%
56600 Construction	16,175.30	16,175.30	0.00	0.00	16,175.30	0.00	100.00%
57400 Public Officials Insura	4,915.00	3,503.00	0.00	1,412.00	4,915.00	0.00	100.00%
57500 Miscellaneous Other	0.00	0.00	100.00	100.00	100.00	-100.00	0.00%
Expenses	43,718.65	26,555.75	100.00	325.35	26,881.10	16,837.55	61.49%
Project Revenues:	44,161.00	26,555.75	0.00	17,605.25	44,161.00	0.00	100.00%
Project Expenses:	43,718.65	26,555.75	100.00	325.35	26,881.10	16,837.55	61.49%
Project Balance:	442.35	0.00	-100.00	17,279.90	17,279.90		

PROTOCOL

LANDING AND ROAD ENDING ACQUISITIONS

Beale, Davidson, Etherington & Morris, P.C.
September 25, 2006

PAGE NUMBERS ARE NOW OFF- LEWIE INSERTED SOME COMMENTS

TABLE OF CONTENTS

Lewie Comments- I am asking John Morris to include a terminology/concept page. The reading gets very confusing since the terms mean something different to each agency

Terminology

Term	Agency	Definition
Public Landing	VDOT	
Public Landing	Va State Code	
Public Landing	VDGIF	
Public Landing	Local Givt	
Dock		
Wharf	State Code	
Dock		
Road Ending/ Road Beginning		
Ramp		

Concepts

- Landing that is not recognized as a landing by VDOT
- County created Public Landing
- Where does the road begin
- Road ending versus road begining

Lewie Comments- I have questions and issues on several items within the document, so please remember this is a draft. For example: page 14, bottom (red text)–I do not believe the presence or absence of pavement has any bearing on the meets and bound legal description of the property. Clarification is needed. There are several paragraphs that need more clarification.

BACKGROUND OF ISSUE

Purpose of Transfer of Title or Control

The Middle Peninsula Chesapeake Bay Public Access Authority (the "Authority") identified over 300 roadways that run to or near waterways in seven localities within the Middle Peninsula: Essex County, Gloucester County, King & Queen County, King William County, Mathews County and the Towns of Tappahannock and West Point. Many, but not all, of these roadways have been landings. There is a considerable sentiment within the governing bodies of these localities that their citizens be able to use these roadways and landings to access waterways for recreational or commercial purposes.

In order to assure the public's ability to use the landings and to maximize their potential, the Authority needs to have control over the road endings or landings. Therefore, the Authority and the local governments believe it is in the best interest of the Middle Peninsula that the Authority own the fee simple title to the property. In the event that it is not possible to obtain fee

simple title, it is preferable and advisable for the Authority to obtain possession of sufficient title to be able to assure the public's use of the facilities and to maintain control over them.

Statutory Creation and Authorization of the Authority

In 2002, the General Assembly of Virginia enacted the Middle Peninsula Chesapeake Bay Public Access Authority Act which created the Authority. Virginia Code § 15.2-6600 through 15.2-6625; 2002 Acts of Assembly, Chapter 766 (the "Act"). Pursuant to that Act, the Authority was charged with the duty of identifying land, either owned by the Commonwealth or private holdings, that could be secured for use by the general public as a public access site. It was further charged with researching and determining the ownership of all identified sites, determining the appropriate public use levels of such identified access sites, developing appropriate mechanisms for transferring title of the Commonwealth or private holdings to the Authority and developing appropriate acquisition and site management plans for public access uses. Furthermore, it was charged with determining which holdings should be sold to advance the mission of the Authority and performing other duties required to fulfill the mission of the Authority.

The Authority was granted a number of powers, including the power to acquire, establish, construct, enlarge, improve, maintain, equip, operate and regulate public access sites that are owned or managed by the Authority. (Va. Code § 15.2-6606). The Authority is authorized to construct, install, maintain and operate facilities for managing access sites and for determining the fees, rates and charges for the use of its facilities. The Authority may own, purchase, lease, obtain options upon, acquire by gift, grant or bequest or otherwise acquire any property, real or personal, or any interest therein and in connection therewith to assume or to take subject to any indebtedness secured by such property.

Pursuant to the Act, most of the eligible jurisdictions took the necessary actions to create and then to join the Authority. As set forth above, the Authority consists of five of the six counties of the Middle Peninsula and the Towns of Tappahannock and West Point.

This study was commissioned to help the Authority identify the type of obstacles to the accomplishment of these goals, to determine solutions to those obstacles and to create a document to help guide future investigations. The Authority selected five of the potential landing sites to be investigated. (See Attachment 1). Each site was selected because it represented a broad range of landings in the Middle Peninsula. This Protocol therefore addresses issues that will be common to many of the potential landings in the Middle Peninsula.

Byrd Road Act and Predecessor Statutes

The Secondary System of State Highways was created in 1932 with the enactment of the Byrd Road Act of 1932. (1932 Acts of Assembly, ch. 415). The Byrd Road Act transferred to the Virginia Department of Highways, now the Virginia Department of Transportation ("VDOT"), the control of all non-primary highways and landings in Virginia for the purpose of relieving counties and certain cities and towns of the obligation of maintenance and improvements of such roads and landings. Included within the Secondary System of State Highways were "all of the public roads, causeways, bridges, landings and wharves in the several counties of the State as of March 1, 1932, not included in the State highway system." Landings and wharves continue to be part of the Secondary System of State Highways. Va. Code § 33.1-67. The Byrd Road Act removed all control, supervision, management and jurisdiction over such roads and landings from the boards of supervisors. See Va. Code § 33.1-69.

In the months that followed the enactment of the Byrd Road Act, VDOT inventoried the streets and roads for which it had become responsible. It determined which roads and how much of the roads would be subject to state maintenance. Where the condition of a road was either (a) too costly to repair and maintain, (b) inconvenient in some other way, or (c) there was insufficient public service to warrant the public expense required to maintain those portions, VDOT fixed the location for the end of maintenance. As a practical matter, those portions of roads that were beyond the end of state maintenance did not become part of what is now considered the Secondary System of State Highways.

Nevertheless, VDOT's decision not to maintain all or portions of original roadway corridors did not operate to cease their status as public roads. It merely constituted an administrative decision discontinuing VDOT's jurisdiction. Those roads not taken into the Secondary System of State Highways were left under the jurisdiction of the respective local governing body.

Throughout the Commonwealth, there are many public roads that are not actively maintained by VDOT as a result of those early administrative decisions as well as by later decisions adjusting VDOT's maintenance logs. However, unless those roads have been formally abandoned, they remain available for public use. The fact that VDOT does not actively maintain them does not extinguish the public's right to use them.

The Byrd Road Act did not in and of itself create any public roads. Another portion of the Code of Virginia establishes certain presumptions as to the existence of public roads:

> When a way has been worked by road officials as a public road and is used by the public as such, proof of these facts is *prima facie* evidence that the same is a public road. And when a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of twenty years, proof of those facts shall be *conclusive* evidence that the same is a public road. In all such cases, the center

> of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way and in the absence to proof to the contrary the width shall be presumed to be thirty feet. (Va. Code § 33.1-184) (emphasis added).

This section of the Virginia Code has far reaching implications for the road endings and public landings which are the subject of this study. Once a roadway has been regularly and periodically worked by road officials as a public road and used continuously by the public as a public road for a period of 20 years, it is *conclusively* established as public road. Because the legislature uses the phrase "conclusively", the presumption that it is a public road cannot be rebutted. This is significant because a right of the public cannot be extinguished by a mere lack of use. *Basic City v. Bell*, 114 Va. 157, 76 S.E. 336 (1912).

The Supreme Court of Virginia has adopted an ancient maxim of the common law that "once a highway, always a highway", unless it is abandoned or vacated in the due course of law. *Bond v. Green*, 189 Va. 23, 52 S.E.2d 169 (1949). One of the parties in *Bond v. Green* contended that proof that the road was maintained for a number of years by private parties, and not by the public, established an abandonment of the road as a public way. The Court did not agree. Therefore, once a public road has been created by formal action of the county or state or by the means described in Virginia Code § 33.1-184, it remains a public road until formal action is taken to abandon it. Furthermore, abandonment cannot take place unless it is done by the local governing body. *Ord v. Fugate*, 207 Va. 752, 152 S.E.2d 54 (1967). The failure of VDOT to maintain the road or to include it on state maps is irrelevant to the determination of whether it is a public road.

Section 33.1-184 is also significant because it establishes the width of these public roads. The last sentence that is quoted above creates a rebuttable presumption that the width of all such roads is 30 feet. This presumption applies whether the road has been taken into the Secondary

System of State Highways for maintenance or not. It also applies even if the road officials fail to use all 30 feet. *Norfolk & Western Railway Co. v. Faris*, 156 Va. 205, 157 S.E. 819 (1931).

Each of the five landings or road endings that were the subject of the study was accepted into the Secondary System of State Highways and was reflected on state highway maps for periods of more than 20 years. Therefore, each is *conclusively* established as a public road and each *presumptively* has a width of 30 feet.

This 30 foot presumption is frequently attributed to the Byrd Road Act of 1932. However, it was not in the Byrd Road Act. Instead, it was already the law in Virginia. The 30 foot right-of-way of public roads goes back to at least 1785. Section 6 of Chapter 75 of the Virginia Code of 1785 provided that every road shall be "30 feet wide at the least". (See Attachment 2). That 30 foot width provision has been reenacted regularly over the last 220 years. (See for example, 1819 Code of Virginia, Vol. 2, Chapter 236, § 7, page 235; 1860 Code of Virginia, Chapter 52, § 5, page 298; 1874-1875 Acts of Assembly, Chapter 181, page 177; 1908 Acts of Assembly, Chapter 388, page 674; Virginia Code of 1919, § 2015; 1928 Acts of Assembly, Chapter 159, § 31, page 580).

If a road had been an old turnpike, its right-of-way could be as wide as 60 feet (1816-1817 Acts of Assembly, Chapter 38, page 41). However, if a turnpike had been abandoned and a county took over the roadway, the county would only get a 30 foot right-of-way unless it exercised dominion over more than 30 feet. *Danville v. Anderson*, 99 Va. 662, 53 S.E.2d 793 (1949).

Prescriptive Easements and Other Property Rights

There are several ways a roadway or road corridor can become a public road. A road corridor can become a public road by being purchased by a county or VDOT through deed or the

exercise of the power of eminent domain. As set forth in the last section, the Code of Virginia creates a presumption that a roadway is a public road when it has been worked by road officials and/or used by the public for a period of 20 years. The property interest that results from this presumption is a prescriptive easement.

The prescriptive easement for public roads is different from prescriptive easements between private parties. In Virginia, a prescriptive easement between private parties arises where the land of another has been used for a period of 20 years. The use of the land has to be adverse, under claim of right, exclusive, continuous, uninterrupted and with the knowledge and acquiescence of the owner of the underlying land. It is very similar to adverse possession of land. "When the user of a way over another's land clearly demonstrates that his use has been open, visible, continuous and exclusive for more than 20 years, his use is presumed to be under a claim of right." *Umbarger v. Philips*, 240 Va. 120, 124, 399 S.E.2d, 198, 200 (1990); *Chaney v. Haynes*, 250 Va. 155, 158-159, 458 S.E.2d 451, 453 (1995). However, the width of the easement is limited to the character of the use during the prescriptive period. *Martin v. Moore*, 263 Va. 640, 561 S.E.2d 672 (2002). Furthermore, an individual trying to establish such a prescriptive easement is subject to a heavy burden of proof. There are also a number of defenses which can defeat a prescriptive easement.

On the other hand, a prescriptive easement obtained by the public pursuant to Virginia Code § 33.1-184 is not rebuttable when the way has been regularly or periodically worked by road officials as a public road and used by the public as a public road continuously for a period of 20 years. No other evidence is required to establish its existence. The width is presumed to be 30 feet. Therefore, the burden of proof to establish a prescriptive easement for a public roadway is significantly less than for a private easement.

Like any other easement, a prescriptive easement is a servitude upon the land owned in fee by another. Even though VDOT, the county or the general public does not own the fee simple title to the underlying land, the public has a right to use the road for all purposes for which the road was established or created. This would include using it as a landing as well as a roadway, if it has historically been used as a landing or a landing is consistent with its use as a road corridor to the water. The owner of the underlying fee continues to own the property, but has no right to use the property in any manner which interferes with the enjoyment by the public of the road or landing. Accordingly, the owner of the title to the land encumbered by a prescriptive easement cannot control the property or interfere with the public's use of the easement.

As set forth earlier, once a public road or landing is created by a prescriptive easement, it will remain a public road or landing until there is formal action taken by the Board of Supervisors to *abandon* the road or landing. As will be discussed in Part D, however, the *discontinuance* of a roadway or landing, whether by formal action or by failure to continue to maintain or use the roadway, does not extinguish the prescriptive easement. *Ord v. Fugate*, 207 Va. 752, 152 S.E.2d 54 (1967).

METHODS OF DETERMINATION OF PROPERTY RIGHTS

Title Search

Ownership interests in a road or landing cannot be determined without a title search. A title search involves a review of the deed and will records of a county or city to determine the owner of the subject land and any rights appurtenant to that land.

The county tax map is generally a good place to start a title search. It will indicate the person the county assessor believes owns the property. However, the tax map and the Commissioner of Revenue's records are not records of ownership; they are merely guides by which to begin the title search.

To determine title to a road or landing, deeds may need to be searched back to the creation of the road or landing or to the beginning of the county's records. Numerous other public records are available and need to be searched regarding the title of property. For example, when the owner of property dies, the real estate will either transfer by terms of his or her will or

by intestate succession. Therefore, will records are part of any title search. It is particularly important to take the title search back to the beginning of the road or landing if there has not been a recorded transfer of title to VDOT or the local governing body. All plats of adjacent properties should be analyzed, particularly any plats that depict the road or landing.

The land and will records of several counties in the Middle Peninsula have been destroyed at some point in time. In those counties, a search can only go back to the date of destruction of the records. As an example, King & Queen's records were burned in 1864. There are no deeds or wills prior to that date. Similarly, the records in Gloucester County prior to 1862 no longer exist.

This Protocol is not intended to set forth guidelines on how to properly conduct a title search. For a more thorough discussion of title examination requirements, the reader is referred to a Virginia Title Examiners' Manual by Sydney F. Parham, Jr.

Many roads and landings have been acquired in fee simple by VDOT or one of the counties. Any conveyance from a landowner to a county or VDOT or any record of a condemnation report in the county deed books should be examined to determine what property rights were acquired by the public agency and in what property. If VDOT or the county acquired fee simple title to the property, the title search may end there. However, the searcher should verify the source of the interest owned by the party from whom VDOT or the board of supervisors acquired the property.

Furthermore, condemnation records, including the state highway plat book referred to in a certificate of take or certificate of deposit, will establish the boundaries of the public acquisition. See, for example, Ferry Landing in Essex County. State highway plat books are among the records at county courthouses. They can be helpful even in instances in which the

subject roadway or landing is being replaced rather than being acquired. Byrd's Bridge is an example of such a circumstance. The highway plat book gives such information as location of the old road, the parties whom VDOT believed owned the land adjacent to the old road, the date of the project and the project number. Until that plat book was found, VDOT's records on Byrd's Bridge Road provided no information. This information allowed a focused search on the Board of Supervisor records to determine whether there had been an abandonment or discontinuance of the old road.

VDOT Files and Inventory Records

There is no one central location at VDOT that has all information regarding a road or a landing. The VDOT residency office will have a route file for each route in the residency and may have a landing file for each landing. The Saluda Residency is the residency for Mathews County, Gloucester County and King & Queen County. The Bowling Green Residency is the residency for Essex County and King William County. The information in the route files will range from containing nothing of relevance to containing deeds, plats and correspondence related to conveyances of the fee simple title to VDOT. The residency may also have the construction or right-of-way plans on file for changes made in the roadway in the vicinity of the landing. Those records frequently contain information regarding sources of title in the landing.

Additional files are maintained in the Fredericksburg District Office, particularly by the Right-of-Way Division. That office should be contacted for any information it may have. The district and residency offices may also have county maps going back to 1932, which can be helpful in establishing the age of the landing. In addition, the Fredericksburg Right-of-Way

Office will necessarily be involved in any conveyances of property by VDOT to the Authority. Therefore, it should be kept advised as to the findings regarding VDOT's title to the roads and landings.

VDOT also maintains an inventory of its secondary roads. Those records are under the management of Ken Smith, VDOT's Highway System Inventory Manager. He is located in the Asset Management Department in Richmond. Mr. Smith is an expert at VDOT on abandonments and discontinuances of secondary roads.

Among the records maintained by Mr. Smith is a November 1, 1934 memorandum from VDOT's Chief Engineer to all district engineers regarding public landings. The district engineers were instructed to prepare a record of every public landing that was turned over to VDOT and to take steps to have those landings surveyed with monuments set in the corners. A three page list of landings was created at that time. (See Attachment 3).

A similar but somewhat expanded list of landings in the Fredericksburg District was created in 1945. (See Attachment 4). At that time, VDOT noted that a number of landings had been surveyed with monuments set during the analysis of landings in 1934. However, VDOT was still unclear whether all the identified landings were in the State System of Secondary Highways. The resident engineers were charged with checking courthouse records to determine VDOT's maintenance responsibilities.

In 1977, VDOT considered conveying or transferring control of all landings to the Commission of Game and Inland Fisheries. VDOT ultimately decided not to do that, although the General Assembly enacted Va. Code § 33.1-69.1 in 1980 authorizing VDOT to transfer control of wharves and landings to the Department of Game and Inland Fisheries. While considering that request, VDOT compiled a list of public landings and wharves in the

Fredericksburg District that is almost identical to the 1945 list. (See Attachment 5). The landings that appear on the 1934, 1945 and 1977 lists are generally well documented. As a general rule, VDOT will have little or no information on landings that are not on those lists. Many of the landings are described on the 1945 and 1977 lists as "surveyed and monumented". There is not now and probably never was a single repository of those surveys. The note generally meant that VDOT had performed the survey and set monuments at that landing. The landing files of the Residency will generally have that survey and plat information regarding any such landing.

Site Visits

Each landing should be visited early in the process. The pictures provided by the Authority are helpful. However, a site visit will provide additional information that can guide the process or alert the investigator to problems that would not be apparent in VDOT's files or a title search.

An example of the importance of the site visit is Ferry Landing in Essex County. The title search revealed that VDOT owns the landing and most of the road leading to the landing. The title search also identified the adjoining landowners. However, the title search did not disclose that the only access of one adjoining landowner was the road and the landing. VDOT will not discontinue a road or any part of a road that is necessary to serve a landowner. If an owner's only access is through the landing, that issue will need to be addressed in any negotiations with VDOT.

If VDOT's only right-of-way is a 30 foot prescriptive easement, it is important to note the nature of the roadway and any physical conditions of the ground. The area should be examined

to see if there is evidence of any prior use as a landing. The title search may or may not establish whether the roadway goes to the water, particularly when it is not designated or described as a landing. The site visit may disclose physical evidence of the public use going into the water. As an example, a ramp which extends from the road into the water, such as at Chain Ferry Landing, would establish that the landing and/or roadway goes to the edge of the water. If there is a gap between the end of a public roadway and the water, the road cannot be used as a landing without the purchase of additional property.

Other Sources

If a deed is not found conveying fee simple title to VDOT, it may be important to review the minute books of the board of supervisors. This is particularly true of a landing or road whose acceptance into the secondary system is in doubt or which may have been abandoned.

For many years, counties regularly authorized the creation of public landings. The typical process involved a petition to the board of supervisors by the owners of the area to be created as a public landing. The landowners were required to donate the land for the landing itself. The deed books may not contain a deed to the county. However, the Board of Supervisor minute books stating that a deed was presented by the landowner and accepted by the county would be a record of fee simple ownership of the landing by the county even in the absence of a recorded deed.

The same process was followed for road extensions and road improvements. Landowners that wanted to extend a road to a waterway would have to petition the board of supervisors for approval. For many years, the boards of supervisors would appoint road

commissioners who would go out, determine the public necessity for the road and fix its location. Until about a century ago, the board would appoint men from the neighborhood to be responsible for constructing and then maintaining the roads. This would be evidence of a road worked by the public. In addition, particularly in the last century, the board of supervisors may have required a deed to the roadway. In that case, title to the roadway can be proven from a statement in the minute books that a deed was presented by the landowner and accepted by the board of supervisors.

The only way a public road can cease to be a public way is if it is abandoned by the board of supervisors. Abandonment of a roadway is not effective unless it is formally adopted by the board of supervisors. *Ord v. Fugate*, 207 Va. 752, 152 S.E.2d 54 (1967). The board of supervisors minute books must be consulted when roads are changed to determine if the old roadway was abandoned or discontinued. If it was abandoned, the public use is extinguished and the property reverts to the abutting landowners. The Authority can only obtain title by purchase from the landowners or by condemnation by the board of supervisors.

Whether the roadway was abandoned is critical to the determination of the Authority's options at Byrd's Bridge in King & Queen County. Route 604 was relocated in the 1960s. However, the Board of Supervisors never formally abandoned the old roadway. Therefore, the old roadway remains a public roadway. Even though the road is no longer used by the public, has become blocked by fallen trees, and is not maintained by VDOT or King & Queen County, it is still available to be used by the public for access to Dragon Run.

Historical societies and museums may be another source of information regarding a roadway. They may have articles, letters or other documents showing the use of a landing or the existence of a road or landing. These records do not carry the same weight as court records, but

they are useful in providing historical background of the landing's or road's use and in leading to other sources of information.

Another potential source is persons that live on or near a landing or roadway. This knowledge could be crucial to determine use by the public of the end of a roadway as a landing. Such testimony may be necessary to establish that a road has been used by the public for a period of at least 20 years.

THE PUBLIC'S RIGHT OF ACCESS AT EACH OF THE FIVE SITES

Roane Point Landing

Roane Point Landing is at the end of Route 630 in Mathews County, at the Piankatank River. Mathews County and VDOT each believe that they own fee simple title to Roane Point Landing. Its use and existence as a public landing is well documented. The earliest record of the site as a public landing is VDOT's 1932 map of the roads in Mathews County. However, no reference to the landing is contained in any deed prior to 1947. Indeed, the landing is not mentioned in a 1939 deed of the property. The underlying fee may have been acquired by the County or VDOT from the owner in the mid 1940s. However, no such deed was ever recorded. On the other hand, by the deeds and plats in their chain of title, the current owners on each side of the landing have disclaimed any ownership in the landing. The underlying fee to the landing may be owned by the heirs of C. Marvin Matthews.

The public landing and the properties to the east and west were originally all part of the same tract of land. That tract is depicted in an April 1873 plat by G. W. Bohannan, surveyor

(Land Book 2, page 172). Neither the landing nor Route 630 are shown on the plat and presumably did not exist. At that time, the property totalled 119.907 acres of land which had been owned by William H. Hobday, deceased. The tract was partitioned into one 30 acre tract and two almost 45 acre tracts. In 1886, 1889 and 1928, the portion of the property which surrounds the current landing was being conveyed as a 30 acre parcel of land. There is no reference in those deeds to a road or a landing. No plat was referenced in those deeds.

In 1939, the property which included what is now the landing was conveyed as 29.268 acres of land, based on an August 1939 plat by G. T. Hudgins recorded with the deed (Deed Book 35, page 384). The plat shows Route 630 cutting through the 29 acre tract. The plat does not show any public landing and the deed makes no reference to a public landing. The road was described on the plat as "30 foot highway to water", with an arrow pointing down the middle of the road into the river. The road is not a boundary line. It is the earliest plat which shows Route 630.

In 1941, there was an Order in a boundary line dispute between the owner of the 29.26 acre tract and the owner of a 6 acre tract to the south of the property. That Order referred to both the 1873 plat and the 1939 plat, but made no reference to the road or public landing. In 1946, a 3.352 acre parcel was conveyed out of the northwestern portion of the 29 acre tract.

The first recorded reference to the landing is in a 1947 deed (Deed Book 42, page 308). That deed conveyed three parcels. Parcel 1 is the 29.268 acre tract. For some reason, the 3 acre 1946 outconveyance was not mentioned or excepted. The conveyance was expressly "made subject to the rights or interests of the State of Virginia, County of Mathews, the public, and all other persons, in and to the highways or road extending across the property to the water and to

the colored cemetery and **in and to the one-half (½) acre of land, more or less, at the end of the highway, set aside or used as a public landing."** The deed referenced the 1939 plat.

The next two sales of the property, in August and November, 1948 (Deed Book 43, page 510 and Deed Book 44, page 442, respectively) contain the same reference to the public landing. The August 1948 deed conveyed the property to C. Marvin Matthews. It was his first ownership of property in the immediate area of the landing. The November 1948 deed was a conveyance from Marvin Matthews to Brooks Lumber Co.

The first subdivision of the property adjacent to the public landing took place in December 1950, when Brooks Lumber Co. sold 4.993 acres of the tract back to C. Marvin Matthews. (Deed Book 46, page 441). Based on a plat (Plat Book 3, page 95) referenced in the deed, the property conveyed was west and north of Route 630, surrounded the public landing and ran along the Piankatank River. The description of the property in the deed routes it around the public landing. Therefore, the public landing was not conveyed with this deed. The parcel's boundary line is also on the west and northern edges of the road. Therefore, the 4.993 acre parcel did not go to the center line of Route 630.

The plat referenced in the deed is the first recorded plat to show the landing. It does not state the size of the landing, but gives the metes and bounds of the landing's northern and western boundaries, which adjoin the 4.993 acre tract. A note on the recorded version of the plat, in handwriting that does not match the rest of the plat, says "see DB 35/384 for plat of public landing." However, the public landing is not shown on the plat recorded at Deed Book 35, page 384.

Marvin Matthews subsequently repurchased the larger tract from Brooks Lumber Co. in 1952. (Deed Book 48, page 186). That deed specifically referenced the outconveyance of the

4.993 acres and contained the reference to the public landing that was in the 1947 and 1948 deeds. As of that date, unless the public landing had been sold in an unrecorded deed to the County, Mr. Matthews owned the underlying fee simple title to it.

Marvin Matthews owned the large remainder tract until 1984, when he sold a 6.87 acre portion of the tract adjoining the landing to Oliver L. Hitch. It is described as part of the real estate he purchased from Brooks Lumber Co. in 1952. This property is shown on a plat dated April 18, 1984 by Dawson & Phillips, P.C. (Plat Book 12, page 41). That plat, which was done by James Phillips, shows the western boundary of the 6.87 acre tract as State Route 630, with monuments along that line. Marvin Matthews still owned land to the south which was described as the grantor's remaining land. Because the property conveyed is based on the plat, the conveyance to Mr. Hitch does not include the public landing. Because the road and landing were outside the boundary of the 6.87 acre tract, they were either still owned by Marvin Matthews or had been previously conveyed by unrecorded deed or deeds.

The public landing is shown as outside of the property conveyed in 1984. The plat has a note by the public landing that says "approx. limits of public landing per sketch by VDH&T right-of-way property plat book page 145, dated July 1, 1944." The surveyor, James Phillips, has retired. Bay Design Group is the successor to Dawson & Phillips. There was nothing in his file for this plat at Bay Design Group to indicate what right-of-way property plat book page 145 was or to verify the date of July 1944. However, copies of a plat and right-of-way sheet on file at the Saluda Residency were in that file. Bay Design Group presumes the plat to be the plat referred to by Mr. Phillips.

The plat and VDOT right-of-way sheet are filed together at the Saluda Residency. (See Attachment 6). The plat shows the landing extending from an area slightly east of Route 630 and

running westerly for 208 feet, with a southern boundary 104 feet from the northern boundary. The northern boundary was the mean low tide. The right-of-way sheet states that the landing is shown on "R/W property plat book page 145" and that it was monumented. It also describes a land value on the half acre site of $150.00, beside a date of July 1, 1944. The "R/W property plat book" is not the same as the VDOT plat books on record at the courthouse. The VDOT Fredericksburg Right-of-Way Office advises that this designation refers to a plat book maintained years ago by VDOT which has been lost, misplaced or destroyed. Nevertheless, the document indicates that VDOT was going through an acquisition process. However, nothing was recorded at the courthouse in Mathews County.

Mr. Hitch owned the property until 2003 when he conveyed it to Elizabeth Lindsey Hitch Goodale, Anne Gordon Hitch Martin and Beverly Atwood Hitch Burtch, trustees of the qualified personal residence trust of Oliver L. Hitch. (Deed Book 302, page 101). Schedule A to that deed contains a metes and bounds description, describes the Philips plat and states that it was the same property conveyed to Oliver Hitch by Marvin Matthews in 1984. Significantly, it states that the western boundary line is the eastern boundary of Route 630. Therefore, the current owners and their predecessor are claiming that the Marvin Matthews conveyance in 1984 did not include any part of Route 630 or the landing.

The 4.993 acre parcel was always treated as a separate parcel, even though Marvin Matthews owned both tracts of land for several years. This parcel was not sold by Marvin Matthews until 1968. (Deed Book 80, page 186). It was subsequently subdivided in 2000. Jamie W. Callis got the 2.43 acres surrounding the landing. Elizabeth Ferry got the other 2.44 acres further west. A December 29, 1999 plat by Wayne E. Lewis was recorded for that subdivision. (Plat Book 23, page 151). On that plat, Mr. Callis' property boundary goes around

the public landing and along the inside edge of the roadway. The road is shown on the plat to be 30 feet wide and outside of this property. The landing is described on the plat as "County of Mathews 'Roane's Point Public Landing'".

Accordingly, Route 630 and the public landing are located on land that was owned at one point by Marvin Matthews. There is no record to show that he ever conveyed the fee simple title to the road or the landing. Therefore, the fee simple title to the road and the landing apparently continued to be owned by Marvin Matthews at the time of his death in 1990. In his will, he left a life estate to Mrs. Gary Walker and Mrs. Viola Waddell in the rest, residue and remainder of the real estate which he purchased in 1952 from Brooks Lumber Co. He then gave all remaining real estate in equal shares to those persons who would be entitled to receive the same according to the then present Virginia Statute of Descent and Distribution as heirs at law of G. W. Chisely, Jr. on the date of his death. (Will Book 19, page 215). Those heirs would appear to be the only persons who have a claim on the underlying fee to Route 630 and the public landing.

Mathews County has an unrecorded plat by Wayne Lewis dated March 12, 1999. (See Attachment 7). That plat describes the landing as the property of the County of Mathews. It contains a note that a plat on file at the VDOT Saluda Residency was used to fix the western property line shown on the plat. I met with Mr. Lewis. He indicated that the landing had been on the land books of Mathews County as County property for many years. The VDOT plat to which he referred is the unrecorded and undated plat from the Saluda Residency. He had no further basis for his statement on either of his plats that the landing was owned by the County of Mathews.

The Mathews County Board of Supervisors' Minute Book 3, which covers all Board of Supervisors meetings from April 17, 1936 to September 24, 1952, has no reference to Roane

Point or Route 630. There are many references to petitions to create public landings, but none were on Route 630 or on the Piankatank River. All of them were proposed to be ¼ acre in size. The procedure adopted by Mathews County in each such matter was to require the landowner to donate the land for both the road or road extension and the public landing. The petition was only approved if the landowner provided a deed acceptable to the Board of Supervisors. The Board would then approve the landing and accept the deed.

There were several references to landings or public landings in the indexes to Minute Books 2 and 4, but none were located at Roane Point. It is likely that some work was done to have this landing accepted as a public landing, but no one followed the formal process with the Board of Supervisors and the formal conveyance of the real estate was probably not done. A deed may have been delivered to Mathews County accounting for its belief that it owns the landing, but it was never recorded.

Based on all the title work and on VDOT's and the County's files and records, the landing would seem to have been created between 1939 and 1946, most likely in or about 1944. However, some form of public landing existed before 1939. The 1932 map of Mathews County published by VDOT shows Route 630, then known as Route 202, going to the water. At the water is the designation "Pub. landing". (See Attachment 8). It appears from that record that the public was using what is now Route 630 as access to the water and using the end of the road as a public landing prior to the time it was recognized in the deeds. It also appears that in the early 1940s someone took steps to formalize the public landing and VDOT placed a value on the property. However, the formalized steps were never completed.

Roane Point has been recognized as a public landing for almost 60 years. Mr. Mathews and his predecessors have recognized the public's right to the landing since 1947. Therefore, at the minimum, VDOT has a prescriptive easement in the landing.

It is unclear whether Marvin Matthews intended to retain ownership of the landing and Route 630. They were not described as owned by him when he sold the 6.87 acre tract in 1984. However, the language referring to the landing in the 1947, 1948 and 1952 deeds is written as if the landing were part of the property conveyed even though the public's right to use it was being recognized. The abutting landowners do not own the fee simple title to the landing or Route 630 because their deeds describe their property lines as ending on their side of the road and the landing. *Shaheen v. County of Mathews*, 265 Va. 462, 579 S.E.2d 162 (2003). Regardless of who has underlying rights in the property, the public has a right to use Route 630 and what is left of the half acre landing to use this property for access to the Piankatank River.

Based on the site visit, there is presently a large sandy turn around area near the end of Route 630. Based on rough measurements and the 1999 plat provided by the County, the road leading into that turn around area begins on the landing property, but quickly extends off the landing property. The rest of the landing's property is wooded down to the beach. By 1999, the depth of the landing ranged from approximately 50 feet to 62 feet, down from its "original" 104 feet, presumably as a result of encroachment by the Piankatank River. It is not known whether the 50 to 60 foot depth is sufficient for a turn around and parking area, given the sandy nature of the soil and the proximity to the water.

Someone has installed a fence approximately 150 feet east of the western end of the landing's property. The fence line goes into the wooded area at the beach. It is not clear whether the fence continues once it reaches the landing's property.

This landing is listed in a 1980 "Beach Inventory and Recreational Access Points of the Tidal Waters of the State of Virginia" by the Virginia Commission of Outdoor Recreation provided by Ken Smith of VDOT. (See Attachment 9). It states that the landing has one ramp and space for ten cars to park.

Lower Guinea Landing

Lower Guinea Landing is located at the end of Route 653 in Gloucester County. Based on the information available, VDOT owns a prescriptive easement in a 30 foot right-of-way which dead ends at the Severn River near the mouth of Long Creek. There apparently was a deed conveying the fee simple interest in a 40 foot right-of-way over the last approximately 700 feet at the end of the road. However, that deed was never recorded and it is likely that it was discarded when VDOT decided not to make the improvements for which the deed was given to VDOT.

Welford Industrial Corporation and WRS Land Trust each owns an undivided one-half interest in the parcels on either side of the road. (Deed Documents 02-9462, page 172 and 04-0942, page 51). Therefore, they each own an undivided one-half interest in the underlying fee simple title to Route 653 and the landing.

Prior to 1870, the parcels on each side of the road were part of a single tract owned by James Berry, Sr. Berry conveyed the 10 acre parcel on the western side in 1870 to Anderson Hogg. (Deed Book 2, page 309). That deed describes the property as being bounded on the east by the main road running to Long Creek. That remained the description of the eastern boundary of that tract in its chain of title until 1941, when the eastern boundary was described as the main road leading to Severn River. (Deed Book 71, page 382). Thereafter, it was described as bounded on the east by Route 653.

The 66 acres on the eastern side of the road were owned by the heirs of James Berry, Sr. until it was conveyed to Roland Shackelford in 1952. (Deed Book 92, page 401). The deed states that it was the unsold part of a tract of land conveyed to James Berry, Sr. before 1865 and that James Berry, Sr. died "many years ago", intestate and unmarried. It is not known when or from whom James Berry, Sr. bought the parcel of land that contained these parcels, but it was before 1862. All records of Gloucester County prior to August 23, 1862 were destroyed.

The parcels were re-united in 1956 when Ben Jacobs, who already owned an undivided one-half interest in the 66 acre tract, acquired the remaining one-half interest in the 66 acre tract from his co-owner, Frank Migliore, as well as the 10 acre tract from Migliore. (Deed Book 107, pages 231 and 233). In 1958, Ben and Mary Jacobs conveyed an undivided one-half interest in both tracts to Jack and Gertrude Rubin. (Deed Book 114, page 18).

The Rubins and the Jacobs apparently executed an omnibus deed to VDOT in 1975. On May 6, 1975, VDOT wrote a letter to the Jacobs and Rubins stating that it would improve Route 653 with a wider roadway, improved site distances, a hard surface and much improved drainage if it received fee simple title to a 40 foot roadway. A follow-up letter was sent to the Jacobs and the Rubins on May 20, 1975. There is a handwritten note in VDOT's file at the Saluda

Residency that it had received the omnibus deed from the Rubins and the Jacobs, but not from the other landowners along Route 653. Jimmy Street of VDOT's Fredericksburg Right-of-Way Office recognized the handwriting as that of Len Orem, a long time and current VDOT right-of-way agent. Mr. Orem does not recall the particular deed. However, the improvements that were mentioned in the letters to the Rubins and Jacobs were never made. Based on its practice, VDOT would not have recorded the deed because the purpose for which the deed had been delivered to VDOT was not going to be fulfilled. The most likely reason that the improvements were not made is that at least one other owner along Route 653 failed or refused to sign the omnibus deed. In any event, the omnibus deed was never recorded. A similar omnibus deed signed by Ben and Mary Jacobs is recorded in Gloucester County. However, that deed was for improvements to Route 651, not Route 653. The Jacobs owned property adjoining both roads.

Minute Books 18 and 19 of the Board of Supervisors covering the beginning of 1974 until June 1978 make only one reference to Route 653. On January 20, 1975, the Board was given information on proposed improvements to several roads. Among the roads being considered was Route 653. The VDOT resident engineer said he would take appropriate actions. (Board of Supervisor Minute Book 18, page 511). It is presumed that the letters written in May 1975 were part of the appropriate actions being taken and that the improvements were never made because they did not get all of the property conveyances.

The most recent recorded plats showing Route 653 where it joins the Severn River are two plats by R. F. Heywood dated May 30, 1955. (See Attachment 10). The plat of the tract of land to the east depicts the road as going to the Severn River, although it is not clear if it goes to the edge of the water. It shows a pin at the end of the metes and bearings line 100 feet from the low water line. (Plat Book 1, page 353.) The plat of the tract of land to the west of Route 653

appears to show the road going to the edge of the water, but that is also not clear. It shows a pin, presumably on the west side of the road, that is also 100 feet from the low water line. (Deed Book 104, page 137.)

Route 653 appears on the 1932 and 1935 VDOT maps of Gloucester County, with the road designated at that time as Route 217. It is not described as a landing, even though the end of several other roads have a designation of landing. Route 653 and Lower Guinea Landing are not listed in the 1934, 1945 or 1977 VDOT inventories of public landings.

The site visit to the area established that the last approximately quarter mile of Route 653 is a gravel road. There are no residences along that portion of the road. The area on each side of Route 653 is mainly a marsh. The road becomes indefinite as it approaches the water. It is not paved into the water. However, it has the appearances of a roadway leading to the edge of water. An area adjacent to the water has been used as a turnaround.

Charles Stubblefield, the former Commissioner of Revenue of Gloucester County, lives on Route 653, not far from its intersection with Route 652. He recalls playing at the end of the road when he was young. It was called Hogg's Landing or Bill Hogg's Landing in the 1940s and 1950s. Only work boats used the landing. He believes the gravel road is only one lane wide and the marshy areas beside the road would prevent two vehicles from passing.

Based on the above, VDOT owns a prescriptive easement in a 30 foot right of way that extends to the Severn River and has been used as a landing in the past. Based on that prescriptive easement, the public has the right to use Route 653 to get access to the water. However, the public's use is limited to the 30 foot width of the easement.

Ferry Landing

Ferry Landing is located at the end of Route 663 in Essex County, at Piscataway Creek. VDOT documents in 1934 and in 1988 also refer to this landing as Bohannon's Wharf and Bohannon's Landing, respectively. The 1945 and 1977 VDOT lists refer to this as "Ferry Bridge or Bohannon's Landing". (See Attachments 3, 4 and 5). VDOT owns fee simple title to all property bounded by Route 17, the centerline of Route 663 and Piscataway Creek. It appears to have fee simple title to the public landing area and to 15 feet beyond the centerline of Route 663 for the first approximately 150 feet going from Piscataway Creek toward Route 17. The owners of the parcels adjoining Route 663 from Hilltop Lane down toward Piscataway Creek own the underlying fee simple title on their side of the center line of Route 663 except for the last approximately 150 feet. VDOT has a prescriptive easement in that part of Route 663. The boat landing is approximately 125 feet wide at the creek.

VDOT owns enough area in fee simple at the public landing to permit a conveyance to the Authority without worrying about the ability to convey the prescriptive easement. The Authority may not even desire to control the part of Route 663 subject to the prescriptive easement. However, the landowner at the bottom of the hill, Gregory Jones, relies on the public landing area for access to his property. Mr. Jones' need for access could complicate any discontinuance by VDOT or conveyance to the Authority. It will be necessary to make sure he continues to have access to his property. There also appear to be other landowners along Piscataway Creek who use Mr. Jones' driveway for access.

Based on Certificate of Take No. C-37081 recorded on April 5, 1990, VDOT owns all property north of Route 663 to Route 17 and to Piscataway Creek. (Deed Book 178, page 167) The Certificate of Take took all of the property owned by Glenn A. Smith, Merry R. Smith and Christine B. Smith, the parties who owned the property on the north side of Route 663. The tract totaled approximately 3.34 acres. The condemnation included acquisition up to the center line of Route 663 most of the road's distance. The take did not include the area at the top of the hill where Route 663 connects with Route 17, apparently because VDOT already owned that land. It also did not follow the centerline when it got to the landing as it neared Piscataway Creek, apparently for the same reason.

The landing was apparently acquired by VDOT in a 1931 condemnation of the property of the heirs of Harry Rohm's estate. The Certificate of Take was not recorded and the Clerk's Office could not find the condemnation case file. There was no plat recorded by VDOT with respect to the take. The only record of the condemnation case is an order approving the report of the commissioners and the report of the commissioners itself, both of which were recorded on

October 18, 1935. (Deed Book 81, page 116). The heirs were paid $100.00 for the property. The land taken was 0.65 acres.

The acquisition by VDOT is referred to in a deed from Rosa Rohm, widow of Harry Rohm, to Ady Hyman in 1944. The deed recites the conveyances to Rosa Rohm by the other heirs of Harry Rohm and notes that 0.65 of an acre of this land was condemned by the State Highway Commissioner in 1931. (Deed Book 85, page 161). Because the deed did not except that acreage from the sale, it is possible that the owners were contending that VDOT only acquired a prescriptive easement in the landing in the condemnation.

The only other recorded reference to the landing is VDOT's plat for the 1990 condemnation of 3.34 acres from Glenn and Merry Smith. (See Attachment 11). That plat has a numeral one inside a hexagon in the middle of the landing area. The note for that symbol refers to the order approving the commissioner's report in the 1931 condemnation. No boundary line is placed around the landing and it is not clear whether that condemnation went to the centerline of the old road or beyond. The area depicted in the plat for the landing shows frontage on Piscataway Creek of about 125 feet.

There are two parcels which border the south side of Route 663 below its intersection with Hilltop Lane. The lower tract adjoining Route 663 at the Ferry Landing is Tax Parcel 45-22. Its current owner is Gregory W. Jones. Mr. Jones inherited this property from his father, J. Stanley Jones, III, through his father's will. (Will Book 47, page 312).

A 1971 deed in Mr. Jones' chain of title has a metes and bounds description. The description references the line running along the low water mark of Piscataway Creek "to the public landing". It then adjoins the public landing 62.3 feet to a Virginia Highway Department marker, then along the landing another 95.4 feet to another Highway Department marker and

finally 20 feet to the center of the old public road. Accordingly, their property does not go to the center line of Route 663 for the last 157.7 feet going down to the water. It is unknown how much the low water mark has changed since the plat was drawn in 1950. The boundary line then follows the center of the old public road leading from Tappahannock to Dunnsville (Route 663) for 63 feet. The deed references a 1950 plat (Deed Book 106, page 251) which was approved by the Court in a boundary line dispute between his grandfather, James S. Jones, Jr., and the neighbor to the east, George Parker (Tax Parcel 45-21). That plat also shows the road northeast of the boundary line between the Jones tract and the public landing for the lower 152 feet of the boundary line.

The property between Hilltop Lane and Mr. Jones' property was formerly owned by George W. Parker. In 1949 and 1950 there was a lawsuit between James S. Jones, Jr. and George W. Parker and his wife. At issue was the boundary line between the Jones tract and the Parker tract. After a jury trial, the Court approved the boundary line based on the plat referenced above. The court order references "the road which now leads into the residence of said Jones, from the old Piscataway Bridge now out of existence, to the old public road leading from said bridge spot to Dunnsville." The common boundary line ends at the center line of what is now Route 663.

The Parker tract has since been divided into two parcels pursuant to a partition of the property by the heirs of Franklin Parker, Jr. A one acre tract, now tax parcel 45-21B, was conveyed to Mitchell Wayne Parker. That is the portion of the property closest to the public landing. The remainder of Tax Parcel 45-21 is owned by three children of Franklin Parker, with a life estate to his widow, Barbara C. Parker. A 1998 plat recorded with the partition deed (Deed Book 231, page 800) shows the public landing line offset from the centerline of Route 663. It

also shows the 20 foot offset from the centerline of the road in the same location as the 1950 plat. The 1998 plat claims that the 95.4 feet from the offset line toward the Creek is owned by Mitchell Parker whereas the court-approved boundary line agreement deed from 1950 showed that portion of the property as being owned by Mr. Jones. The 1998 plat does not purport to go to the water. Rather, the line bends to the southeast, presumably being the edge of the Jones property where his driveway is located.

Mr. Jones, through the conveyances of his property and the 1971 plat, has implicitly agreed to VDOT's ownership of the landing up to the VDOT monuments shown on VDOT's 1990 plat. *Shaheen v. Mathews*, 265 Va. 462, 579 S.E.2d 162 (2003). VDOT therefore probably has fee simple title to the entirety of the landing area.

The site visit showed that Route 663 begins at Route 17 as a two lane hardtop road. However, it becomes a one lane gravel road approximately the last two-thirds of its distance. The break in the hard surface to gravel occurs at Hilltop Lane, a private road going off to the left or southwest. Route 663 goes to the water. There is a turn around area to the left of the road at the end of the road by Mr. Jones' driveway.

Route 663 serves as access to the property of Mr. Jones and probably others. Their driveway begins in the turn around area near the Creek. The driveway is shown on the 1990 VDOT plat (see Attachment 11). Mr. Jones has no access other than Route 663 and needs all but the last few feet of the landing for access. There is a power line running down Route 663 which serves the Jones property and other properties along the Piscataway Creek to the west.

The north side of Route 663 is undeveloped. However, not all of this area can be used for the purposes of a public landing. VDOT condemned the property of the Smiths to use it as a mitigation site. Based on federal and state regulations, the mitigation area cannot be used for any

purpose. The mitigation area is essentially what is shown on the VDOT 1990 plat as "prop. edge of wetlands". (See Attachment 11).

The deeds to the properties around the landing make a number of references to the landing itself. A 1946 deed in the Jones chain of title describes its eastern boundary as "the old main County road leading to the foot of the old wood bridge". (Deed Book 86, page 324). When Harry Rohm bought the property on the other side of the road in 1929, the property was referred to as "club property at Piscataway Creek". The grantor, Deane Hunley, operated a store on part of the property not conveyed. The VDOT 1990 plat shows the remains of an old store (Deed Book 76, page 200), but it is not known if that was the store run by Mr. Hunley.

In approximately 1986, VDOT, in cooperation with the Virginia Marine Resources Commission, directed the Fredericksburg District to fabricate and install signs at about fifty locations for public landing sites. This was one of the landings for which a sign was to be installed. However, the resident engineer in Bowling Green, H. H. Shockey, noted on several occasions that this was not a suitable location. He advised the District that he would not put a sign at Ferry Bridge Landing.

The public landing was also the subject of a 2004 case between *Paul Copeland, et al. v. Virginia Marine Resources Commission, Essex County Wetlands Board and Charles W. Davis*, Chancery No. CH04000025. The petitioners appealed a Marine Resources Commission permit or ruling allowing Mr. Davis to construct a boat ramp at a development along Piscataway Creek. One of the issues raised by the petitioners before the Virginia Marine Resources Commission was that Ferry Landing represented a boat launching facility in close proximity to Mr. Davis' project which negated the necessity for the installation of a boat ramp. Mr. Davis testified that Ferry Landing was either not available or not suitable. The Commission apparently agreed with

Mr. Davis. Nothing in the case has any bearing on the title of or public's right to use Ferry Landing.

Chain Ferry Landing

Chain Ferry Landing is on the Mattaponi River in King & Queen County at the end of Chain Ferry Road, Route 605. VDOT owns the fee simple title to all of the landing area and all of Route 605. However, the last 223 feet of Route 605 is only 20 feet wide as it approaches the Mattaponi River. The northernmost five feet of what would ordinarily be a 30 foot wide roadway is not part of the public road and VDOT does not even own a prescriptive easement to that five foot strip. The landing joins the Mattaponi River and there are no title issues which would prevent VDOT from conveying the landing to the Authority.

According to a record at the King & Queen County Historical Society Museum, the property was patented by Henry Fenton in 1649. The Historical Society has a list of owners and conveyances of the property over a period of more than 200 years. The Hart family, which

owned the entire area around the landing from prior to 1864 until recently, first owned the property in 1828 when it was conveyed to Vincent Hart, as a 260 acre tract. At the time it was known as Shepherd's Warehouse. It was conveyed to Robert Hart in 1845 as 288 acres. None of these deeds exist and cannot be verified because King & Queen County's records were burned in April 1864 by Union troops.

A ferry was officially sanctioned at the landing in 1890 by the Virginia General Assembly. However, a letter dated July 20, 1949 by Paul Hart indicates that a ferry was being operated there as early as 1875. In 1890, the legislature enacted a bill authorizing H. W. Bland and R. M. Hart to establish a ferry across the Mattaponi River from Shepherd's Warehouse. (1889-90 Acts of Assembly, Chapter 167, page 240). (See Attachment 12). The Historical Society has a photograph of the ferry in operation between 1907 and 1910. According to the Historical Society's records, the ferry stopped operating in 1916 when a bridge was built across the Mattaponi River.

All of the area encompassing the current landing was owned by R. V. Hart prior to 1864 when King & Queen County's records were destroyed. In a 1909 deed partitioning his property, R. V. Hart was said to have died "some years ago". (Deed Book 15, page 591). A number of years prior to 1909, his two children, R. M. Hart and Mary Alice Bland, informally divided the property. R. M. Hart received the property on the left-hand side of "the main road from Shackleford's to Shepherd's Warehouse", now Route 605. His share contained 105 acres. Mary Alice Bland received the property on the right-hand side of the same road, containing 97 ¼ acres. Both properties were bounded by the road, the public landing and the Mattaponi River. The 1909 deed formalized their division of their father's property. The landing was described in the deed as the "public landing at Shepherd's Warehouse."

Paul Hart, the adjoining landowner on the southern side of Route 605 from 1930 until after 1966, stated in a letter dated April 23, 1959 that the landing was established in the 1700s on 1/8 of an acre. He said that the County condemned additional property in 1875 for storage of lumber and wood. An earlier letter by Mr. Hart's, dated July 20, 1949, stated that his father had "given" the property to the County for business reasons and that the deed contained a reversionary clause in the event it ceased to be used for storage. However, he stated that the deed was destroyed in a fire at the courthouse. He seemed to have no proof other than the memories of certain residents. No records of any of these transactions are recorded in the King & Queen Courthouse. Mr. Hart's recollection seems faulty, since the fire at the Courthouse took place eleven years before the date given for the conveyance of the additional property. However, there may be some basis to the date because VDOT's files contain an 1875 plat showing the full area of the landing. (See Attachment 13).

Route 605 was described in a 1938 VDOT letter as an eight foot roadway running from "Route 33 to public landing at the Mattaponi River". In 1947, the Board of Supervisors decided to keep the landing as it was, even though the road had not been used for nearly twenty years and the public landing had been rarely used. In about 1950, the Board of Supervisors recommended that VDOT lease a portion of Chain Ferry Landing to Mr. Hart.

By the late 1950s, the Board of Supervisors was recommending that VDOT exchange properties with Mr. Hart to give Mr. Hart that portion of the land closest to his house and VDOT the portion of the land closest to Route 605. It also appears from a letter by the district engineer in 1959 that the portion of the roadway that went all the way to the river was not in the secondary system at that time. VDOT advised the Board of Supervisors that the Board needed to provide

whatever additional right-of-way was necessary to take the road to the river. A plat in VDOT's file indicates that the roadway to the water consisted of a 20 foot right-of-way at that time.

In August 1963, the Board of Supervisors recommended the property swap that ultimately took place between Mr. Hart and VDOT. (Board of Supervisors Minute Book 6, page 179). In November 1963, the Board of Supervisors concurred with the proposed exchange of property between VDOT and the Harts and authorized the County Attorney to join in any transactions necessary to complete the exchange. In the authorization, it noted that the portion of Route 605 going to the Mattaponi River was 20 feet in width. (Board of Supervisors Minute Book 6, page 187).

The exchange of property took place in 1966. By deed dated April 5, 1966, VDOT conveyed 23,171 square feet of the original public landing farthest from Route 605 to Mr. Hart in return for 22,964 square feet (0.527 acre) of property closest to Route 605. (Deed Book 57, page 526). As a result of that conveyance, the landing is approximately 140 feet wide between Route 674 and the Mattaponi River. The plat recorded with the deed shows the road running to the water. (Highway Plat Book 1, page 296). (See Attachment 14).

VDOT generated several plats showing possible configurations of the exchange of properties with the Harts. All of those plats show the last 223 feet of Route 605 going to the Mattaponi River as being a 20 foot right-of-way. Based on those plats, including the plat that was recorded with the exchange of land between VDOT and the Harts, and the record by the Board of Supervisors describing the right-of-way as 20 feet wide, would probably be sufficient to rebut the presumption in Va. Code § 33.1-184 that the right-of-way was 30 feet. The Code Section allows "proof to the contrary" to rebut the presumption and it is likely that this proof will meet that test.

The owners to the north have always treated the 20 foot strip as belonging to VDOT. Therefore, none of Route 605 is held by prescriptive easement, and VDOT owns the 20 foot right-of-way in fee simple in addition to owning the landing in fee simple.

The current owners of the property to the south are J. Grainger and Amy H. Gilbert. (Deed Book 212, page 266). In 2001, their predecessors in title, Robert Walton, asked VDOT to convey to them 0.40 acres of the landing. The Residency recommended the conveyance, but it did not take place. Because VDOT has fee simple title to sufficient property at the landing for improvements and parking, it is not anticipated that any property would be needed from the Gilberts.

The current owner of the property to the north is Kathleen H. Walker. She inherited the property in 1983 from her stepfather, William L. Bland, one of the children of Mary Alice Hart Bland. (Will Book 12, page 22). Mr. Bland, his brother, Hartwell Bland, and his sister, Kathleen B. Cottle, engaged in several transactions regarding the property their mother inherited. In the final transaction, William Bland ended up with a lot adjacent to the landing. (Deed Book 55, page 271). Two plats were prepared in 1949 and 1956 subdividing the property they inherited from their mother. The 1949 plat shows what is now Route 605 as 20 feet wide. It notes at least two cement boundary line markers. (Plat Book 3, page 24B). The 1956 plat does not state the width of Route 605. It shows one highway stone and two iron pipes, with a five foot offset between the stone and one of the pipes 243 feet from the low watermark. (Plat Book 4, page 3). That is approximately the location where the other plats show the 20 foot roadway becoming 30 feet wide. The final transaction which conveyed the lot closest to the landing to William Bland in 1959 tied the conveyance to the 1949 plat rather than to the 1956 plat.

Based on the site visit, the Walker property uses a portion of Route 605 for access. However, that property fronts on a private road, Osprey Lane, and there is no reason the Walkers could not use Osprey Lane for access. The 1949 plat and the 1956 plat created 30 foot private easements in the approximate location of Osprey Lane.

There is also a driveway onto the Gilbert property from Route 605. However, that property has a paved driveway from Route 674 and does not appear to use the entrance from Route 605 very often.

A ramp at the end of Route 605 goes into the water. In December 1969, when the Board of Supervisors acted on a request to name Route 605 Chain Ferry Road, it referred to the road's terminus at Chain Ferry as "on" the Mattaponi River. These facts, combined with the deed from Paul Hart, establish that the public landing has access to the river. This landing is listed in the 1980 "Beach Inventory and Recreational Access Points of the Tidal Waters of the State of Virginia" by the Virginia Commission of Outdoor Recreation. (See Attachment 9). It states that the landing has one ramp and space for ten cars to park.

Byrd's Bridge

Byrd's Bridge Landing has never been a landing. Instead, the subject property is the end of old Route 604 where it crossed Dragon Run from King & Queen County into Essex County. The road was relocated in about 1964 to its current location. When VDOT relocated the road, it purchased new land from the owner to the east of the old road. It did not acquire the property between the two roads. There is no record that the Board of Supervisors of King & Queen County ever abandoned the old road, other than a notation on a plat that is not signed by VDOT or the County. Therefore, VDOT continues to have a prescriptive easement in the old roadway, which is about 1,000 feet long.

The heirs of James Lipscomb own the property to the east of the road and the underlying fee to the eastern half of Route 604. James Lipscomb died in 1898, leaving a will. His will left

his real estate to his five children (Will Book 2A, page 25). When Route 604 was relocated, the portion leading to Dragon Run was moved onto the Lipscomb property. VDOT acquired by condemnation 1.10 acres, 0.25 acre of which had been encumbered by a prescriptive easement. The ¼ acre prescriptive easement did not include any of the prescriptive easement in what is now the old road. The proceeds were shared by twelve of his heirs in varying degrees of interest. The current tax records indicate that the real estate taxes are now being paid by Ms. Natalie Bazzell, 240 South Bayberry Lane, Upper Darby, Pennsylvania 19082. Several different people have paid the taxes on the property between 1964 and the present, some of whom are among the heirs who shared in the proceeds of the condemnation and all of whom lived in the Philadelphia area.

The title on the west side of the road is totally messed up. The property was originally part of a 95 acre tract which was 63 ½ chains, or 4,191 feet long, and shown on an 1870 plat. (Deed Book 3, page 6). (See Attachment 15). In the area of Dragon Creek, it showed a subdivision into two parcels, although it is not clear who received the portion of the property closest to Dragon Run. The tax records list the owner as Jerry Richardson and list his property as being all of the property adjacent to the old road on the west side. The tax records recite a 1988 deed which conveys property formerly owned by C. W. Oliver. (Deed Book 110, page 508). The Oliver property location is not clearly defined in the deeds and there is no plat of it. Furthermore, based on recorded deeds, Mr. Richardson only owns three-eights of an interest in Oliver's property.

Mr. Richardson seems to rely on a different source for his title. He recorded a boundary line plat which purported to identify the boundaries of 38 acres he acquired from Clara M. Richardson in 1984 at Deed Book 99, page 256. (Plat Book 13, page 67). (See Attachment 16).

His plat, to which he is bound, encompasses 34 acres. It places his property along the entirety of the old road, except that it does not run all the way to Dragon Creek. An approximately 200 foot wide strip of land between his northern boundary line and Dragon Run is shown on the plat to be outside his property and to be the property C. B. Newbill bought at Deed Book 7, page 87. Newbill bought 34 acres described as "near Bird's Bridge" from A. E. Hunley in 1879 (Deed Book 7, page 87). Newbill's property was deeded to Richard Cooke in 1885. (Deed Book 7, page 633). Richardson's 1984 deed from Clara Richardson purchased the property which Newbill had conveyed to Cooke in 1885, citing all of the interests purchased by Clara Richardson's deceased husband from the Cooke heirs.

Therefore, the land between Richardson's property and Dragon Run which Richardson claims that he does not own is land that is in his chain of title. He also does not own the complete interest in C. W. Oliver's property, on which the tax assessor based his ownership. The only recorded plats showing this property are the 1870 plat, Richardson's 1986 self-proclaimed boundary plat and the 1964 VDOT plat. VDOT's plat lists Cooke and Newbill as owners of separate parcels, even though Cooke's title derives from Newbill. Little significance should be given to VDOT's representation of the owners to the west of the old road because their property was not affected by the change in Route 604, except to the extent it impacted their access to Route 604.

The County tax maps are also unclear. They show a red line parallel to but not reaching Dragon Run as the northern boundary of Richardson's property. The area between his northern boundary and Dragon Run is not listed as being owned by anyone, except to the extent that it may be a part of the property to the west of Richardson. No one is being taxed on that strip of land. Therefore, it is unclear who owns this portion of the property to the west of the old road

and it is also unclear whether Richardson has clear title to the remainder of the property to the west and therefore to the underlying fee of the old Route 604.

The Board of Supervisor's Record Books from February 1963 until October 1979 have no reference to either a discontinuance or an abandonment of the old road. VDOT's Right-of-Way Division in Fredericksburg has likewise reported that its files do not contain any reference to a discontinuance or abandonment. Richardson's 1986 plat has a notation along the old Route 604 that states "property line down center line of abandoned v.s.h.". (See Attachment 16). However, neither VDOT nor the County is a party to that plat and the notation has no legal significance.

If the road was abandoned by the County, neither VDOT nor the County would own anything to convey to the Authority. However, VDOT records reflect no abandonment and the Minute Books of the Board of Supervisors do not contain evidence of an abandonment for fifteen years after the project was completed. Therefore, the note on the plat appears to be incorrect.

Because VDOT is no longer maintaining the old road, it has been effectively discontinued. The prescriptive easement has therefore reverted to King & Queen County.

A 1937 letter by VDOT's resident engineer listing the public landings turned over to the Highway Department in 1932 did not include Byrd's Bridge or any other landing on Dragon Run. Route 604 was also not listed on the 1934, 1945 or 1977 VDOT lists of landings. (See Attachments 3, 4 and 5).

There is little area at the landing itself for a public landing or turn around area. VDOT no longer maintains the old roadway. The landing is presently blocked by fallen trees and similar debris. Therefore, VDOT will not pay for the road's maintenance. By effectively discontinuing the road, the prescriptive easement has reverted to King & Queen County.

ACQUISITION OPTIONS

Discontinuance

All roads and landings within the State System of Secondary Highways and the State Highway System remain under VDOT's jurisdiction until they are discontinued. Discontinuance is an act reserved for the Commonwealth Transportation Board. It results from a determination by the Board that a road or landing no longer serves the public convenience to the extent that warrants its maintenance at public expense. Discontinuance of a road or landing means merely that VDOT will no longer be maintaining the road. If VDOT already has fee simple title to the road or landing, it will continue to own the road or landing and the public will have the right to use the roadway or landing, but VDOT will have no maintenance responsibilities. If VDOT's right to use the road or landing is based on a prescriptive easement, the prescriptive easement will revert to the local governing body upon discontinuance. However, the public still has a right

to use the road or landing and it remains a public roadway unless and until the board of supervisors abandons the road or landing. *Bond v. Green,*183 Va. 23, 52 S.E.2d 169 (1949).

Abandonment is significantly different from discontinuance. Abandonment extinguishes the public's right to use a public roadway or landing. If VDOT owns the fee simple title, VDOT will remain the owner, but the public will no longer have the right to use the roadway or landing. Va. Code § 33.1-153. If VDOT's rights were based on prescriptive easement, abandonment extinguishes the prescriptive easement and full control of the property reverts to the adjoining landowners. Therefore, the County as well as VDOT loses all interest in a prescriptive easement upon abandonment. Therefore, no landing or road which the Authority wants to acquire should be abandoned if there is any chance that VDOT's right is based on prescriptive easement rather than fee simple title. However, as set forth subsequently, that will impact the Authority's ability to receive a deed from VDOT.

Abandonment can only be done by the local governing body. To be effective, the abandonment must be formally adopted and must therefore appear in the minute books of the board of supervisors.

Since 1950, procedures for abandonment and discontinuance have been codified by the legislature. Virginia Code § 33.1-150 governs discontinuance of roads and public landings in the Secondary System of State Highways. Virginia Code § 33.1-152.1 sets forth permissible uses by counties of discontinued roads. Virginia Code § 33.1-151 governs the procedure and consequences of abandonment of a road or public landing. Virginia Code § 33.1-152 provides an appeal to the Circuit Court of an order by the local governing body regarding an abandonment petition. It also provides that notice must be given to the Department of Game and Inland Fisheries before a landing can be abandoned. Virginia Code § 33.1-153 sets forth the effect of

abandonment. Pursuant to Virginia Code § 33.1-154, VDOT and the governing bodies of counties are authorized to convey the abandoned sections of roads or public landings under certain conditions. All of these statues provide notices either to the adjoining landowners or to the board of supervisors and place restrictions on the actions of VDOT and/or the board of supervisors.

In the event VDOT decides to discontinue a road or public landing, or receives such a request from the board of supervisors, it must issue notice of intent to discontinue maintenance of the road or public landing and a willingness to hold a public hearing at least 30 days prior to the effective date of the discontinuance. The notice must go to the board of supervisors and to all abutting landowners by registered letter. In addition, VDOT must notice the general public in a newspaper having general circulation in the county where the road or landing is located. If any party requests a hearing, VDOT must conduct a public hearing. The purpose of the hearing is to determine whether or not the road or public landing should be discontinued.

Regardless of whether a hearing is held, VDOT cannot discontinue a road unless it "deems such road, public landing or crossing is not required for public convenience". It is this required finding which may create the most difficulty in having control of a landing transferred from VDOT to the Authority.

The purpose of having a public landing discontinued is to allow the Authority to own and operate it as a public landing for the benefit of the public. Under that circumstance, it would be difficult for the Commonwealth Transportation Board to make a finding that the landing is no longer needed for the public convenience. Therefore, there is some question whether the process would result in a discontinuance. In addition, the hearing itself and any potential appeals would add to the time and expense involved with having the road and landing discontinued. Once the

road and landing are discontinued, VDOT would no longer maintain the road and landing. A discontinued road or landing is not eligible for VDOT funding.

Deed from VDOT

Once a road or public landing is discontinued, VDOT would be in a position to convey any fee simple interest it has in the property. VDOT would have no prescriptive easement to convey, because all prescriptive easements it had would have automatically reverted to the board of supervisors by operation of law as a consequence of the discontinuance. In all instances where VDOT discontinues a landing to enable a conveyance to the Authority, there should be no impediments to obtaining a deed from VDOT. VDOT would not likely go through the discontinuance process in order to turn over the landing to the Authority and then decide not to convey the property.

There is a gap in the statutory authority regarding conveyances of discontinued and abandoned roads and landings. Virginia Code § 33.1-154 authorizes VDOT to convey roads and landings that had been *abandoned* whose use is no longer deemed necessary by the Commissioner. However, it is silent as to whether VDOT has the same authority to convey roads and landings that it *discontinues*. This gap likely occurred either because the legislature presumed that VDOT would not discontinue roads in which it had a fee simple interest unless it planned to abandon them as well or because discontinuance did not eliminate the public's right to use the road or landing and it considered a conveyance of title to be inconsistent with the continuation of the public's right.

The Senior Assistant Attorney General in charge of all legal matters for VDOT indicated that this gap in the statute could prevent VDOT from conveying any landing it owns in fee simple based solely upon a discontinuance. Although an argument could be made that VDOT

has the authority to convey such a landing or road after discontinuance, there is no statute expressly giving that authorization. Presently, VDOT requires an abandonment of a road or landing before it will convey its fee simple title. Therefore, it is doubtful the Board would approve the conveyance in the absence of an abandonment.

This does not present a problem where there is no question that VDOT has fee simple title to the landing, such as at Chain Ferry Landing. However, in any other circumstance, the Authority would risk losing the right to use the property if the local board of supervisors abandoned the landing.

Permit from VDOT

A much simpler method of transferring control to the Authority would be by means of a land use permit from VDOT to the Authority. Obtaining a land use permit would be easier, more likely to succeed and financially more beneficial to the Authority than obtaining ownership. On the other hand, there are drawbacks to obtaining control only through a permit which must be considered.

Obtaining a land use permit to operate the public landing would be simpler, quicker and cheaper. There is a nominal fee for an application for a land use permit, which fee might be waived for the Authority. No public hearing is required, nor a finding that the road is no longer needed for public convenience. There is no limit to the uses or activities which can be allowed by a permit, so long as the uses are consistent with any prescriptive easement limitations. The permit could be drafted as open ended, so that it would not expire until VDOT revoked the permit. The road and landing would remain in VDOT's Secondary Road System. VDOT would

therefore continue to be responsible for maintenance of the road, relieving the Authority of potential maintenance expenses.

As long as the road and landing are in the Secondary System, there would be no need to prove fee simple title in VDOT. However, if VDOT does not have fee simple title, there could be some limitations on the methods to which the Authority could use the property. If VDOT only has a prescriptive easement, it cannot give a third party rights that VDOT does not have. In other words, if VDOT cannot conduct a particular activity on its prescriptive easement, a permit allowing the Authority to do so would not be legally effective. The Supreme Court of Virginia recently ruled that the public could not use a public road easement granted to a town to fish from a bridge abutment which was part of the easement. *Kirby v. Town of Claremont*, 243 Va. 484, 416 S.E.2d 695 (1992). However, that easement was created by a deed to the town, rather than by a prescriptive easement. The Supreme Court interpreted that express easement in a more limiting manner than it would have interpreted a prescriptive easement created by § 33.1-184. However, it illustrates that easements have some limitations. For that reason, the Authority might not have the legal authority to construct improvements or provide activities that are not consistent with the operation of a landing. However, as long as the "new" uses are incidental to enhancing the public's use and enjoyment of the landing, the additional burdens should be deemed acceptable.

It should be noted that the Authority would have the same limitations in the event of a discontinuance of a road in which VDOT only has a prescriptive easement. If the Authority became the "owner" of the prescriptive easement, it would still not be able to increase the burden on the servient estate by uses that were different from those which existed when the easement

was created. Therefore, the limitations on what the Authority could do under a permit are no different than the limitations on the Authority in the event of a discontinuance.

The downside to a permit is that a permit is revocable at will at any time by VDOT. Any improvements built at the landing, such as bathrooms and concession stands, would become VDOT's property if the permit was revoked. However, the only likely reason for a revocation of the permit would be that VDOT wanted to build a new road or relocate or expand its existing roads and needed this property for that project. Based on the locations and conditions of each of the five landings in this study, it is not likely that VDOT will be relocating or expanding nearby roads or building new roads through them in the foreseeable future. Accordingly, this is a remote possibility at best and the benefits of the permitting process far outweigh any potential risks.

Potential Legislative Action

The Authority and its members may wish to consider legislative action to cure some of the deficiencies in the discontinuance and conveyance process. One potential legislative solution would be to authorize VDOT to discontinue from its Secondary System of State Highways any roads or landings in the Middle Peninsula which the Authority desired to acquire, control and operate. Public notice might still be required to comply with due process considerations. However, the legislature could change the requirement that VDOT must find that the road or landing is not required for public convenience to a finding that VDOT's control of the landing is not required for public convenience as long as the Authority is assuming that obligation.

The legislature could also grant the Authority similar rights provided to the Department of Game and Inland Fisheries ("DGIF") in Virginia Code § 33.1-69.1. That statute authorizes the Transportation Commission Board to transfer control, possession, supervision, management

and jurisdictions over landings, wharves and docks in the Secondary System of State Highways to the DGIF, notwithstanding any other provision of law. It allows the transfer to be made by lease, agreement or otherwise. This statute was passed in 1980, shortly after the 1977 Inventory of Landings was created as part of a study whether to transfer the control of landings to DGIF. By the including the phrase "notwithstanding any other provision of law", § 33.1-69.1 avoids the complications with the discontinuance statute. It is unknown whether this statute has ever been used to transfer control of any such landings.

The Authority may wish to request the legislature to pass a similar statute giving VDOT authority to transfer control of landings in the Middle Peninsula to the Authority. To make it clear that the Authority could obtain also fee simple title by such transfer, the words "sell" and "deed" should be added to the new statute.

Either potential legislation should authorize the conveyances of discontinued roads and landings to the Authority, thereby curing the gap in Virginia Code § 33.1-154. Alternatively, the legislature could amend the permit process to prohibit VDOT from revoking a land use permit to the Authority. Some parameters would have to be addressed, such as whether improvements must be constructed before VDOT loses the right to revoke the permit or to prohibit the revocation until a certain number of years have passed. However, VDOT is more apt to object to legislation tampering with its permit process because it may be concerned about creating a bad precedent. VDOT might also take a more stringent look at a permit application that would not be revocable at will.

ACQUISITION OPTIONS AND ISSUES AT THE FIVE DESIGNATED LANDINGS

Roane Landing

VDOT's and Mathew County's ownership of this landing is in doubt. Therefore, the discontinuance, abandonment and § 33.1-154 sale of abandoned property should not be followed. Instead, the land use permit or the discontinuance process are the only safe options. The land use permit would be the quickest and cleanest method to transfer control and would continue to assure the use of VDOT funds to maintain Route 630. This could be done quickly and at minimal cost to the Authority. The Authority could then make all uses of the landing allowed by the permit, which can be made as broad as the Authority desired. Although VDOT would have the authority to revoke the permit at any time, that revocation seems extremely unlikely. The only reason the road would need to be enlarged or relocated in the foreseeable future would be if the landing drew a substantial amount of additional vehicles.

Should the Authority desire to request discontinuance, the Authority and VDOT would need to determine what portion of Route 630 should be discontinued. The two logical points would be either where Route 630 enters the landing or at the water's edge so that some of the maintenance costs would be borne by VDOT.

A petition by the Mathews County Board of Supervisors would initiate VDOT's review of the road's discontinuance. VDOT would have to give notice to the abutting landowners and to the general public. If anyone requested a hearing, VDOT would have to hold a public hearing. It is impossible to gauge at this stage what type of objections or counter suggestions might be raised at a public hearing. However, VDOT would have to determine that the discontinued portion of the road and the public landing are no longer required for the public convenience. Given that the discontinuance is being requested because the landing is needed for the enhancement of the public convenience, there is a considerable question whether the Commonwealth Transportation Board could or would make that finding. If VDOT did make the necessary finding, the discontinuance would transfer VDOT's prescriptive easement to the Board of Supervisors. The Authority could then obtain a deed from the Board of Supervisors of whatever interest it has in the landing. Because VDOT believes it has fee simple title, VDOT should also provide a special warranty or quitclaim deed to the Authority to transfer whatever title it may have.

The landing originally was half an acre. Because of erosion, the size of the landing is down to 0.40 acres according to the survey of Mr. Lewis for the County in 1999. Based on the site inspection, much of that land is on a beach and may not be suitable for any improvements other than a boat ramp. The area where most of the parking occurs now is not on the landing property. The Authority would have no right to allow parking off the landing property.

Accordingly, the Authority would be limited in the number of improvements that could be made at this site.

Lower Guinea Landing

VDOT only has a prescriptive easement in Route 653 leading up to the Severn River. For that reason, a discontinuance followed by an abandonment and a sale pursuant to Virginia Code § 33.1-154 will not work because the abandonment would cause the easement to be extinguished and all rights to revert to the co-owners of the property.

There is no more than a 30 foot prescriptive easement in this location, and it is located in a marshy area. It would probably violate Federal wetlands laws to construction any improvements other than an extension of the boat ramp into the water and perhaps paving the entire 30 foot easement near the landing. However, that may not provide sufficient place for parking. The Authority would also need to address the issue of providing enough roadway to allow cars to pass in each direction.

A land use permit may be the best way to proceed with regard to this landing. Because the Authority may not be able to construct any improvements at this landing, it would not risk losing any investment by not obtaining the prescriptive easement itself. Furthermore, the land use permit would continue to assure the use of VDOT funds to maintain Route 653.

If VDOT discontinues the road, the prescriptive easement would revert to the Board of Supervisors. As a result, VDOT would have no interest to convey. However, VDOT and the Authority must determine at what point VDOT's maintenance of the road should end and therefore where the discontinuance would begin. There is no logical cutoff point other than the beginning of the gravel road past the last residence. However, that would impose on the Authority the duty to maintain a gravel road extending at least 700 feet. Furthermore, VDOT

would face the same dilemma regarding its finding that the road and landing are no longer necessary for the public convenience.

Once the road is discontinued, the prescriptive easement could be conveyed by Gloucester County to the Authority along with all responsibility to maintain a landing. However, neither Gloucester County nor the Authority could expand the landing beyond the 30 foot prescriptive easement unless it acquired further rights from the current owners, Welford Industrial Corporation and WRS Land Trust.

Ferry Landing

VDOT owns the fee simple title to the landing, to the northern half of the 30 foot right-of-way of Route 663 and to all of the property to the north of Route 663. It has only a prescriptive easement to the southern half of Route 663 until Route 663 reaches the landing. Much of the property owned by VDOT between Route 663 and Route 17 is protected as a mitigation area. However, not all of the property is in the mitigation area, and there is a possibility that the landing can be expanded somewhat using the property to the north that is not in the mitigation area.

The land use permit would be the quickest and cleanest method to transfer control. It would also continue to assure the use of VDOT funds to maintain Route 663. However, the drawbacks to the permit process are more relevant here than at the other landings.

Because this landing contains more property than any of the other landings, it may be the most desirable on which to build improvements. In addition, it is the closest landing to a major road. Therefore, the potential for a permit to be revoked is highest at Ferry Landing. However, the second Route 17 bridge over the Piscataway Creek was constructed in about 1988. It is unlikely that traffic will increase on Route 17 in the foreseeable future to the extent that Route 17

will be relocated or the bridges will need to be substantially widened. Even if that happens, it is unlikely that VDOT will want to go through the requirements that would be imposed on it to move the road into the mitigation area. Therefore, even though the risk seems higher, it is unlikely that VDOT will ever need this property for a Route 17 crossing over Piscataway Creek.

Should the Authority desire to request a discontinuance, the Authority and VDOT would need to determine what portion of Route 663 should be discontinued. They would have to take into consideration the needs of the abutting landowner for access. The titles have not been searched to verify that Mr. Jones has no easement across other properties to a public road. However, his property adjoined the landing and historically had access through it to the main road. It is unlikely he has any other legal access. Therefore, VDOT will not be able to discontinue Route 663 unless Mr. Jones and any other landowner who relies on the end of Route 663 for access is given an easement or a right to use that portion of the landing as a public road.

Mr. Jones' access situation will complicate determining where and how much of the property would be eligible for discontinuance. The most likely result would be to shift the current location of the end of Route 663 to the southern edge of the landing and leave it open as Route 663. VDOT would then continue to maintain the road all the way to Mr. Jones' driveway.

Chain Ferry Landing

VDOT owns the fee simple title to all of the landing and the end of Route 605. The only possible prescriptive easement is the five foot strip of land beyond the highway monuments at the north edge of what has historically been referred to as a 20 foot roadway. Because VDOT, through its own deeds and plats, has listed it as a 20 foot right-of-way, the legislative presumption of a 30 foot right-of-way would probably be successfully rebutted.

The property VDOT acquired from the Harts in 1966 consists of a little more than ½ acre. In addition, it already owned in fee simple an area almost as large. Accordingly, the total area of the landing is close to an acre. Route 605 is hard surfaced into the river, although the ramp needs extensive repairs. The landing is large enough to support improvements.

The land use permit would be the quickest and cleanest method to transfer control and would continue to assure the use of VDOT funds to maintain Route 605. This could be done quickly and at minimal cost to the Authority. The Authority could then make all uses of the landing allowed by the permit. Because VDOT owns the fee simple title to the landing, there would be no limit to the uses that could be permitted.

Having just built a new bridge across the Mattaponi River, it is inconceivable that VDOT would be planning a new Mattaponi River crossing in this location. Although there could someday be a desire to construct a bypass around West Point and this could be included in the bypass corridor, it is hard to conceive the circumstances that would lead to such an expenditure within the reasonably expected lifetime of any improvements that the Authority might desire to place at Chain Ferry Landing.

Should the Authority desire to have the road and landing discontinued, the Authority and VDOT would need to determine what portion of Route 605 should be discontinued. Two logical points would be the intersection of Route 605 with Route 674 or at a point past the driveway to the landowner to the north. It would also be logical to end state maintenance at the beginning of the 20 foot wide portion of the road, because that would give the abutting landowners access to Route 605.

Byrd's Bridge

VDOT only had a prescriptive easement in old Route 604. This road was effectively discontinued in the 1960s when it was replaced by the new road and bridge and VDOT ceased maintaining the road. Therefore, the prescriptive easement has already reverted to the King & Queen County Board of Supervisors.

Ironically, the Authority probably has less need of a discontinuance because a permit would probably have given the Authority all rights it would ever need. However, because discontinuance has probably already occurred, VDOT owns nothing on which to issue a permit. A land use permit obtained from VDOT would therefore not be valid.

The most viable means of transfer of control would be a formal discontinuance by VDOT coupled with a deed from King & Queen County conveying the prescriptive easement to the Authority. So that the prescriptive easement would not lapse, the conveyance should make clear that the roadway will continue to be available as a corridor for use by the public and set forth sufficient language to establish the public convenience and the Authority's governmental status.

LEGAL INSTRUMENTS NEEDED TO EFFECT TRANSFER OF VDOT'S FEE SIMPLE RIGHTS

No legal instruments would be needed to effect a transfer of rights from VDOT at Lower Guinea Landing or Byrd's Bridge Landing. VDOT never had anything other than a prescriptive easement at either landing, and has probably already lost the prescriptive easement at Byrd's Bridge by ceasing maintenance on the road. At Lower Guinea, VDOT still owns the prescriptive easement. However, it will not convey that prescriptive easement as long as the road is in the Secondary System of State Highways. Removing it from the Secondary System by discontinuance would cause the prescriptive easement to revert automatically to the Board of Supervisors, leaving it nothing to convey.

At the remaining landings, the Commonwealth Transportation Board would have to approve any transfer of its fee simple rights. That approval should be reflected in the minutes of

the Commonwealth Transportation Board. Those minutes would be necessarily created by VDOT.

VDOT is not likely to convey the property by any instrument other than a quitclaim deed. VDOT uses its own forms and prepares its own deeds. Therefore, it is unlikely that the Authority would be involved in drafting any deeds for the conveyance of these properties. Nevertheless, the Authority must review any proposed deeds to see that they satisfy the needs of the Authority.

For a transfer to be effective, the Authority must record the deeds from VDOT. The Authority should only incur nominal fees to the clerk of court to effect the recording because both VDOT and the Authority are governmental agencies.

Because VDOT would prepare the legal instruments, very little work would need to be done by the Authority once VDOT has agreed to convey its title in the landing. This assumes that all of the title work would have been done during the investigation of the landing, as was done on the five sites in this study. Governmental agencies do not normally obtain title insurance, and it is unlikely that a title insurance company would insure title owned by VDOT. However, if that were a desire of the Authority, it could be investigated. Title insurance would be an additional cost.

In conclusion, the costs to the Authority for effecting transfer of VDOT's fee simple title would be relatively small. They would likely be limited to reviewing VDOT's deed for sufficiency and accuracy and taking the steps to have it recorded.

RECOMMENDATIONS FOR FUTURE STUDIES

Prior to undertaking future studies, the Authority should seriously consider the legislative options outlined in Part D of this Protocol. Several major obstacles to the transfer of landings were discovered during and addressed in this study. Most of those obstacles would be resolved by granting VDOT the authority either to discontinue landings so that they can be transferred to the Authority without the required continuance finding or to transfer control or title to the Authority similar to the transfer to the Department of Games and Inland Fisheries in Va. Code § 33.1-69.1. Any potential legislation should also grant VDOT the authority to convey its title in a discontinued landing and/or road without requiring the road or landing to be abandoned.

If legislative changes are going to be made, that should be done before additional studies are performed. The analysis at each landing would be simpler because the investigation could

focus on the facts that must be addressed to make a landing eligible for conveyance of title or transfer of control to the Authority.

Furthermore, the Authority should decide whether it wishes to consider obtaining control of any landings or types of landings through land use permits. If so, most of the information obtained in this study would not be necessary. The major information to collect would be the width of the right-of-way and whether the road or landing went to the edge of the water. Whether VDOT owned the underlying fee simple title would be irrelevant.

When selecting the five landing sites for this initial study, the Authority sought to include sites that were likely to address different circumstances and situations. If there were other types of circumstances or situations that could not be included within this study, they should be addressed in the next study. Otherwise, it is recommended that the Authority choose those sites to which access would be most beneficial to the public.

LIST OF ATTACHMENTS

1. Map of all five landing sites
2. Section 6 of Chapter 75 of the Virginia Code of 1785
3. 1934 List of Landings
4. 1945 List of Landings
5. 1977 List of Landings
6. VDOT Plat and R/W Sheet regarding Roane Point Landing
7. Unrecorded plat of Roane Point Landing by Wayne Lewis dated March 12, 1999
8. VDOT 1932 map of Mathews County
9. 1980 Beach Inventory and Recreational Access Points of the Tidal Waters of the State of Virginia by the Virginia Commission of Outdoor Recreation
10. 1955 Heywood plats of Lower Guinea properties

11. 1990 VDOT plat at Ferry Landing
12. 1890 Act of Assembly establishing Chain Ferry
13. 1875 plat of Chain Ferry Landing
14. Plat of exchange of land between VDOT and Paul Hart at Chain Ferry Landing
15. 1870 plat at Byrd's Bridge
16. Boundary Survey for Jerry Richardson at Byrd's Bridge