

## 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 statutes 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 the county 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 Commonwealth Transportation 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 each 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.

## Eminent Domain

The Commonwealth of Virginia, as a sovereign government, has the inherent power of eminent domain. State agencies (including VDOT), counties, cities and towns, and some other governmental entities and certain corporations, have been granted the power of eminent domain by delegation from the General Assembly. However, their power to condemn property is limited by the language and restrictions contained in the statutory authorization. *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937).

The Authority was not granted the power of eminent domain by the General Assembly. Therefore, it does not have the power to condemn property. Although counties have been granted the power of eminent domain with respect to property within their borders, Virginia Code § 15.2-1901, they cannot delegate their power of eminent domain to the Authority. *Ruddock v. Richmond*, 165 Va. 552, 178 S.E. 44 (1935), *cert. denied*, 298 U.S. 674 (1936).

Land that is already devoted to a public use cannot be acquired through a delegated power of eminent domain unless the legislation delegating the power clearly states or infers that such acquisition can take place. *Alexandria & Fredericksburg Railway Co. v. Alexandria & Washington Railroad Co.*, 75 Va. 780 (1881); *Richmond F. & P. R.R. Co. v. Johnston*, 103 Va. 456, 49 S.E. 496 (1905). The Supreme Court of Virginia has noted that there is considerable authority that this principal does not apply where the power of eminent domain is being exercised by an agency of the sovereignty itself, rather than by a public service corporation or a county or municipality. However, because the Court did not need to base its ruling on that issue, it did not express an opinion on that issue. *Bailey v. Anderson*, 182 Va. 70, 27 S.E.2d 914 (1943), *cert. denied*, 321 U.S. 799 (1944).

Counties have not been authorized to condemn property owned by any state agency, including VDOT. Counties can condemn areas needed for landings from private citizens, including any underlying fee property encumbered by a prescriptive easement. However, they cannot condemn property interests owned or possessed by VDOT as a method of acquiring landings.

### **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 Commonwealth Transportation 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 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 and its members 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 joins the wide part of 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, although it may be unwilling to do so because of the lack of statutory authorization to deed discontinued properties.

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. It would be difficult to expand the landing into the mitigation area, but that could be possible if the necessary EPA permits were obtained. However, the presence of the threatened plant will make it more difficult to obtain such a permit. Furthermore, additional areas in the property acquired by VDOT in 1990 may be in wetlands, which would have the same restrictions.

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. For that reason, 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 that 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 has a prescriptive easement in old Route 604. Although this road was effectively discontinued in the 1960s when it was replaced by the new road and bridge and VDOT ceased maintaining the road, there is no record that VDOT followed statutory procedures

to discontinue the road. VDOT is researching the lack of discontinuance and will likely discontinue the road. When that happens, the prescriptive easement will revert to the King & Queen County Board of Supervisors. Ironically, the Authority probably has less need of a discontinuance because a permit would probably give the Authority all rights it would ever need.

The most viable means of transfer of control to the Authority 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. VDOT will lose its prescriptive easement at Byrd's Bridge when it formally discontinues the old 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 clerks of court to affect the recordings 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. 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 and its members should seriously consider the legislative options outlined in Part D of this Protocol. Several major obstacles to the transfer of landings were discovered during this investigation and addressed in this Protocol. 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 “not required for public convenience” finding or to transfer control or title to the Authority similar to the transfer to the Department of Games and Inland Fisheries in Virginia 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, the dimensions of the landing, 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.