

PROTOCOL

LANDING AND ROAD ENDING ACQUISITIONS

**Beale, Davidson, Etherington & Morris, P.C.
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TABLE OF CONTENTS

	<u>Page</u>
Executive Summary	1
A. Background of Issue	
• Introduction	4
• Purpose of transfer of title or control	5
• Statutory creation and authorization of the Authority	5
• Byrd Road Act and predecessor statutes	7
• Prescriptive easements and other property rights	10
B. Methods of Determination of Property Rights	
• Title search	13
• VDOT files and inventory records	15
• Site visits	17
• Other sources	18
C. The Public's Right of Access (Ingress and Egress) at Each of the Five Designated Landings	
• Roane Landing	21
• Lower Guinea Landing	29
• Ferry Landing	33
• Chain Ferry Landing	39
• Byrd's Bridge	45
D. Acquisition Options	
• Discontinuance	49
• Deed from VDOT	51
• Permit from VDOT	53
• Eminent Domain	55
• Potential legislative action	56
E. Acquisition Options and Issues at the Five Designated Landings	
• Roane Landing	58
• Lower Guinea Landing	59
• Ferry Landing	61
• Chain Ferry Landing	62
• Byrd's Bridge	63

F.	Legal Instruments Needed to Effect Transfer of VDOT's Fee Simple Rights	65
G.	Recommendations for Future Studies	67
H.	Attachments	
	• List of Attachment	69

EXECUTIVE SUMMARY

This Protocol constitutes the final report of Beale, Davidson, Etherington & Morris, P.C. to the Middle Peninsula Chesapeake Bay Public Access Authority (the "Authority") pursuant to the 2005 Virginia Coastal Resources Management Program Grant. Title searches were performed for all five designated landings. VDOT's files and inventory records for each were examined, and each site was visited. Each landing has been analyzed in accordance with Virginia laws regarding public roads, landings and the public's right to use roads and landings.

Roane Point Landing is at the end of Route 630 in Mathews County, at the Piankatank River. 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. Mathews County and VDOT each believe that they own fee simple title to Roane Point Landing. 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. Nevertheless, VDOT owns a prescriptive easement in the landing. 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 a prior owner of the property.

Lower Guinea Landing is located at the end of Route 653 in Gloucester County. 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 to VDOT 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 it was given the deed.

Ferry Landing is located at the end of Route 663 in Essex County, at Piscataway Creek. VDOT owns fee simple title to all property bounded by Route 17, the centerline of Route 663 and Piscataway Creek. However, some of its property was purchased as a mitigation area and may not be used as part of the landing. In addition, VDOT 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. An adjoining landowner uses a part of the landing for access to his property.

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.

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 VDOT ever discontinued the road or 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, and it continues to be a VDOT road, even though it is no longer maintained.

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, an act reserved for the Commonwealth Transportation Board. Discontinuance of a road or landing means merely that VDOT has no further responsibility for maintaining the road. If VDOT's right to use the road or landing is based upon a prescriptive easement, its prescriptive easement will revert to the local governing body upon discontinuance. However, the public still has a right to use the road or landing unless and until the board of supervisors abandons the road or landing. Abandonment, which can only be done by the board of supervisors, extinguishes the public's right to use a road or landing.

VDOT can convey its title to roads and landings that have been abandoned, but has no statutory authority to convey roads and landings that have only been discontinued. VDOT has authority to grant a land use permit to the Authority for any road within the Secondary System of State Highways. Such a permit would not transfer title and would be revocable at will, but would avoid all complications of the discontinuance statute. There are several legislative actions which the Authority and its members may desire to pursue to allow VDOT to convey title to discontinued roads and landings or to otherwise transfer control of landings to the Authority.

BACKGROUND OF ISSUE

Introduction

This Protocol is being submitted pursuant to the contract dated March 10, 2006 between the Authority and Beale, Davidson, Etherington & Morris, P.C. The contract was entered pursuant to a Request for Proposals to investigate certain road terminus points in or near proximity to tributaries that could yield access to public waters, pursuant to a 2005 Virginia Coastal Resources Management Program Grant. This report is the Acquisition Protocol which is listed as Product No. 3 in the Grant.

The word "landing" is used throughout to include all points where there is or may be access to a waterway from a public road. The use of the word "landing" is intended to include all situations in which the road is adjacent to a pier, a wharf or to the water itself. It is used throughout in the broadest sense possible. For the purposes of the analysis herein, the nature or form of access is irrelevant. What the report focuses on is the public's right of access to the water from the roadway and any historical use by the public of accessing the water from the roadway.

There are numerous references throughout the report to the Authority. It is recognized that the Authority is made up of several local governmental partners, which are its members. The local government members may prefer to obtain or retain control of certain landings. Therefore, many references to the Authority in this Protocol also apply to its local government members. For the sake of clarity, this Protocol simply refers to the Authority.

Purpose of Transfer of Title or Control

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 the 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.

Such evidence of a road going into the water is helpful to resolve any issue about whether a public's right to use a road extends all the way to the water. If there is a legal gap in the public's ownership's interests in the property between the end of a public roadway and the water, the road cannot be used as a landing without the purchase of additional property. In other words,

if the public's right to use the road is based on a prescriptive easement and the roadway was never worked by road officials all the way to the water, the prescriptive easement would not go to the water. That would create a gap in ownership which would prevent the Authority or its local government partners from being able to use the road as a landing without the purchase of the additional property.

However, the absence of physical proof on the ground that the road went into the water does not mean that the public does not have the right to use the road as a landing. If it can be established that the roadway has been maintained by road officials all the way to the water and there has been no abandonment of that right, the right to get to the water continues regardless of what may be on the ground between the end of any improved roadway and the water.

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 then 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 DESIGNATED LANDINGS

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 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, south and west were originally all part of the same tract of land. That tract is depicted in an April 1873 plat by G. W. Bohannon, 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 was 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 on the eastern side 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 to the east 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 south and west of the landing 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 $\frac{1}{4}$ 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 west of the eastern 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 appearance 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 that is 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. The Rohm property is in the Smith's chain of title.

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 1949 and 1950 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. At issue in the boundary line lawsuit 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 plat 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 appears to have 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. The mitigation area is essentially what is shown on the VDOT 1990 plat as "prop. edge of wetlands". (See Attachment 11). Robert Pickett, the District Environmental Engineer in VDOT's Fredericksburg District office, advises that there may be additional wetlands that existed prior to the condemnation which were not included within the lines drawn for the mitigation area. In order to make any disturbance or install any improvements in the mitigation area or in the wetlands, the Authority would have to comply with EPA guidelines and meet all state and federal requirements for environmental permits in wetlands areas. Mr. Pickett advises that there is an additional problem with obtaining a permit at this site. A particular threatened plant, which was located at this site prior to the construction project, is thriving in the mitigation area. The presence of that plant would complicate any efforts to obtain an EPA permit to take any action within the wetlands and the mitigation area at this site.

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, apparently 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 apparently 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. 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). However, a letter dated July 20, 1949 by Paul Hart indicates that a ferry was being operated there as early as 1875. 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 his death in 1971, 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. Those plats, including the plat that was recorded with the exchange of land between VDOT and the Harts, along with 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 likely 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 Ms. Walker 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 VDOT ever discontinued the road or 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, and it continues to be a VDOT road, even though it is no longer maintained.

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 $\frac{1}{4}$ 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 County's 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 award 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 current tax records list Jerry Richardson as the owner 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-eighths 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, as recorded 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 closest to Dragon Run 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 discontinuance or

abandonment and the Minute Books of the Board of Supervisors do not contain evidence of a discontinuance or 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. However, it has not been discontinued in accordance with statutory procedures. Therefore, it is still a VDOT road and VDOT continues to own the prescriptive easement

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).

The landing is presently blocked by fallen trees and similar debris. Therefore, it is unlikely that VDOT will pay for the road's maintenance. VDOT will probably initiate a discontinuance procedure for the road now that the absence of a formal discontinuance has been discovered. When that happens, the prescriptive easement will revert to King & Queen County.