2014

PHASE II

MIDDLE PENINSULA PLANNING DISTRICT COMMISSION

LAND AND WATER QUALITY PROTECTION IN MIDDLE PENINSULA

Virginia Coastal Zone MANAGEMENT PROGRAM

MIDDLE PENINSULA PLANNING DISTRICT COMMISSION

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The views expressed herein are those of the authors and do not necessarily reflect the views of the U.S. Department of Commerce, NOAA, or any of its subagencies.

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I. Executive Summary

Based on changing Federal and State regulations associated with Chesapeake Bay nutrient goals (i.e. Total Maximum Daily Loads (TMDL), onsite sewage disposal system (OSDS)/ alternative onsite sewage system (AOSS) management, stormwater management, and groundwater management), the Middle Peninsula Planning District Commission (MPPDC) staff continued to develop a rural pilot project that aimed to identify pressing coastal issues of concern relating to new federal and state regulations that ultimately necessitate local action and policy development in response.

Through direct locality assistance, providing regional guidance to the Middle Peninsula Planning District Commission, and coordinating a project committee of local government administrators and planners, MPPDC staff assisted in the development, assessment, and articulation of enforceable policy tools necessary to aid local decision making in response to water quality regulations. Therefore MPPDC staff worked with Middle Peninsula localities on a variety topics associated with water quality, including stormwater, OSDS, roadside ditches and outfalls, groundwater management, and water reuse.

First, with funding through the Virginia Department of Environmental Quality (DEQ) and the National Fish and Wildlife Foundation (NFWF), MPPDC staff worked with Middle Peninsula localities towards the development of a Virginia Stormwater Management Program (VSMP) to address new Virginia Stormwater Management regulations. Currently localities have submitted a draft VSMP ordinance, staffing and budget plan, and a draft administrative guidance manual that includes program policies and procedures. Second, MPPDC staff continued to seek the establishment of a regional sanitary sewer district to manage the temporal deployment of nutrient replacement technology for installed OSDS systems in Gloucester County. However with limited success, MPPDC staff continues to consider alternative policy options to move forward.

A new program element that was identified by local governments during Phase I of the Land and Water Quality Project (Grant #NA11NOS4190122 Task 94.02) included an analysis of the ownership, management, and oversight of stormwater ditches and the relationship to the secondary road system overseen by the Virginia Department of Transportation (VDOT). Initial

thoughts supported the idea that all ditches (roadside or parallel ditches and outfall ditches or perpendicular ditches) were under public ownership and therefore the responsibly of VDOT. As Phase II funds were used to hire a legal consultant to conduct a legal analysis of seven ditches parallel and perpendicular to VDOT right-of-ways (ROW) to help clarify the party responsible for maintaining roadside ditches, the findings were contrary to some of the original beliefs. It was found that in the majority of cases, that outfall ditches that run perpendicular to VDOT roads are the responsibility of private property owners (See Figure 1). Ultimately however the report found that the duty to keep ditches clear and maintained is determined by ditch-specific circumstances. This report generated additional questions for local governments that will be explored in upcoming projects.

Finally, during this project period, MPPDC staff continued to advance the idea of water reuse, linking the Hampton Road Sanitation District (HRSD) effluent discharges with a significant industrial user of ground water in the Middle Peninsula.

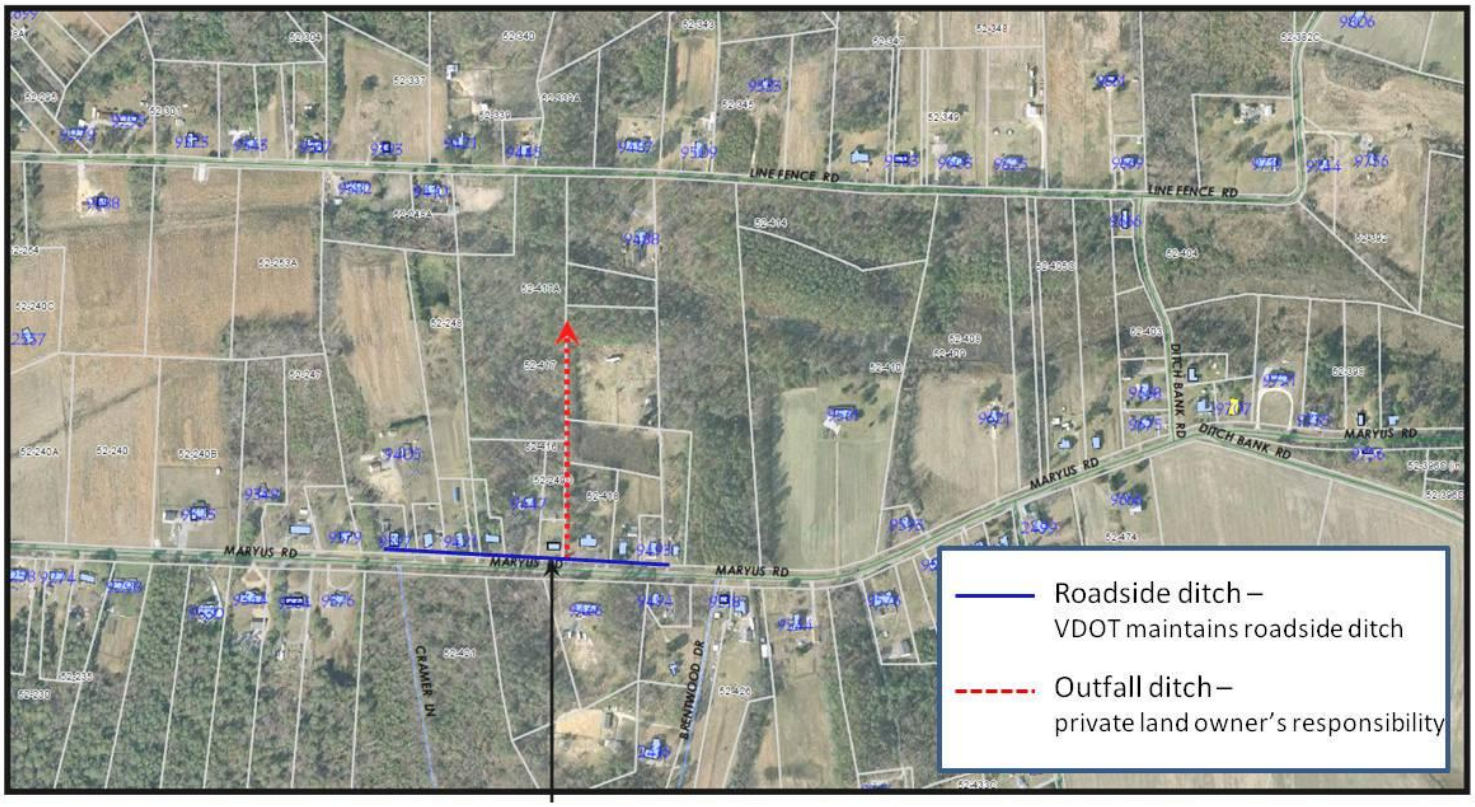

Figure 1: Maryus Road outfall example from the Roadside and Outfall Ditches report.

II. Introduction

To build on MPPDC staff efforts from Phase I of the Land and Water Quality Project (Grant #NA11NOS4190122 Task 94.02), additional progress has been made during Phase II of this project to research, inform and develop enforceable policy in response to changing Federal and State regulations associated with Chesapeake Bay nutrient goals. Therefore MPPDC staff, in partnership with Middle Peninsula localities, worked together to comprehensively address local implications of these regulations.

III. Product #1: Continuation of the Project Committee

MPPDC staff continued to directly assist localities and provide regional guidance to the Middle Peninsula Planning District Commission. In part, MPPDC staff convened local government administrator meetings and local planner meetings throughout the project period to continue the Watershed Implementation Plan (WIP) committee that was organized during Phase I of the Land and Water Quality Project (Grant #NA11NOS4190122 Task 94.02). The committee continued discussions on coastal issues concerning local rural governments relating to the Chesapeake Bay cleanup, new legislation that may cause local action (i.e. stormwater and groundwater area management expansion), and unintended consequences of the Phase II WIP. More specifically, MPPDC staff kept project committee members up-to-date on the progress made in development of a local/regional stormwater management program in response to new Virginia Stormwater Management Regulations. In addition, upon completion of the ditch ownership report under product #3, MPPDC staff reviewed the report with the Committee and discussed local implications.

MPPDC staff also met with representatives of Virginia DEQ at the Coastal Planning District Commission Meeting (November 26, 2013) to discuss state level WIP engagement strategies with local governments. DEQ staff apologized for the lack of state level outreach to impacted local governments and advised that DEQ staff should be outreaching more with local governments. To-date local governments have not received additional outreach regarding WIP engagement strategies/local responsibilities or expectations.

IV. Product #2: Continuation of Rural Government Assessment of Nutrient Loading

The MPPDC was awarded two grants for Middle Peninsula localities in the fall of 2012 to address new Virginia stormwater management program (VSMP) regulations. For Phase II, MPPDC project mangers coordinated and collaborated with the MPPDC stormwater project manager to comprehensively assess nutrient loading by our rural local governments and how it relates to federal and state water quality regulations and/or programs. Through this collaboration MPDPC staff were able to provide Middle Peninsula localities with current information from the state, particularly as stormwater regulations and the General Construction Permit were amended and adopted December 17, 2013 only a month prior to the preliminary VSMP deadlines. As reported to MPPDC staff by DEQ stormwater staff, state level budget cuts and staff reductions at DEQ Stormwater program office have delayed the arrival Phase II stormwater contracts ultimately delaying MPPDC staff's ability to assist localities. Originally Phase II contracts were expected in October 2013; however MPPDC staff just recently received the Phase II contact in January 2014.

While the development of local VSMPs have been a regional priority, during the course of this Phase II project, groundwater management area expansion into the Middle Peninsula and water reuse were also topics of interest. On July 16, 2013, MPPDC presented a talk (Please see Appendix A for Presentation Notes) to the State Water Commission on local government perspectives on the work of the General Assembly on mandated matters of local and regional water supply plans, expansion of the groundwater management area, water reclamation and reuse, and other indirect regulations and mandates that directly or indirectly impact water supply (quantity and quality)—stormwater, TMDL, and Chesapeake Bay clean up. The State Water Commission was established by the Virginia General Assembly to:

- Study all aspects of water supply and allocation problems in the Commonwealth, whether these problems are of a quantitative or qualitative nature; and

- Coordinate the legislative recommendations of all other state entities having responsibilities with respect to water supply and allocation issues.

Therefore this presentation was critical to the Commission's understanding of the implications of water management on local governments. As a result of this presentation Middlesex County Board of Supervisors took the initiative to adopt a resolution *Requesting that the Virginia Department of Environmental Quality Take Proactive Measures to Restore Artesian Head Pressure and Reduce High Chloride Concentrations in the Potomac Aquifer*. Middlesex County brought this resolution to the Middle Peninsula Planning District Commission for support and requested adopted by the Commission. Upon much discussion the Middle Peninsula Planning District Commission adopted the resolution as presented (See Signed Resolution in Appendix B). The adopted resolution was then passed along to DEQ for consideration. In response DEQ stated that "The Department of Environmental Quality (DEQ) has identified coastal plain groundwater management as an important agency priority. I [David Paylor, Director of DEQ] have already scheduled an initial briefing for Secretary Ward on this issue." (See Appendix C for full letter). In other efforts to advance the idea of the Potomac aquifer and water use, MPPDC staff in coordination with the HRSD engaged in discussions regarding reusing water treated effluent from HRSD facilities.

V. <u>Product #3: Unintended Consequences of Phase II WIP</u>

During project committee meetings with local government administrators and local planners, from November 2012 to February 2013, seven ditches parallel and perpendicular to the VDOT right-of-ways (ROW) were identified for analysis. In contract with John Morris of Beale, Davidson, Etherington and Morris, P.C., a legal analysis was conducted to determine ditch/outfall ownership, management, and oversight and the relationship to the secondary road system overseen by VDOT. In part each identified ditch was visited and photos were taken of the site. MPPDC staff compiled VDOT records and local government documentation to forward to the Legal Consultant to supplement the ownership and responsibility analysis of ditch maintenance. The report found that the duty to keep ditches clear and maintained is determined by ditch-specific circumstances. More specifically, *if the ditch was created by a single landowner or used to channel excessive water from a single landowner, that landowner*

*would be responsible for damages resulting from the ditch. If a party has a drainage easement for the ditch, that party would be responsible for maintaining the ditch. Jenkins v. County of Shenandoah, 246 Va. 467, 436 S.E.2d 607 (1993). Landowners have the ability to fend off water, but there are limits to that ability. As long as the water is going into a natural watercourse and does not improperly damage adjoining or downstream land, there is typically no liability or obligation to do anything further The difficult issue with most of these ditches is whether there is a duty to keep the water flowing. This is complicated by the fact that, in many of the outfall ditches, the water is not flowing very well at substantial distances from roadside ditches due to the lack of elevation change and a corresponding lack of flow in the natural watercourses. No party is responsible for such lack of flow if it has not taken some action that impedes that flow in the natural watercourse. However, if that flow has been impeded in an unreasonable manner, the party impeding the flow of water would be liable. F*or the full report please see Appendix D. MPPDC staff presented the report findings to MPPDC and action was taken to receive the report by the Commission on December 18, 2013. As a result of the report findings and ongoing ditch drainage discussions, Virginia State Delegate Keith Hodges drafted House Bill 528 to amend *§ 33.1-23.05*: **"Revenue-sharing" highway funds.** This drafted legislation would provide for use of so-called revenue-sharing highway funds for construction and maintenance of ditches and other drainage facilities and obtaining voluntary drainage easements or voluntary permission to enter private property. During the 2014 GA session HB 528 was introduced, but was stricken, after VDOT issued a letter of assurance that Middle Peninsula localities would have no problem addressing drainage issues impacting the transportation system as part of the VDOT Revenue Sharing program Tier 1 activity (Appendix E).

MPPDC staff also continued exploring the establishment of a regional sanitary sewer district to manage the temporal deployment of nutrient replacement technology for installed OSDS systems and assessment of land use implications associated with state regulations which make all coastal lands developable that was started during Phase I of this project. MPPDC staff attempted to facilitate discussions between Gloucester County and Virginia State Delegate Keith Hodges to find an agreeable solution to allow Gloucester County to require mandatory

sewer hookup as per § 15.2-2110. *Mandatory connection to water and sewage systems in certain counties.* However, disagreement persisted as per the legality of mandatory of hookup.

VI. Conclusion

As Federal and State water quality regulations tighten, there is a need for local governments to stay informed and adaptable to these changes. With Phase II funds, MPPDC staff was able to continue building local knowledge of land and water quality concerns impacting their communities, and begin to develop and implement policy tools to address local needs.

Project Outcomes:

1. Coordination of Local Government Administers and Local Planner to develop a local/regional Virginia Stormwater Management Program.

2. Report on Roadside and Outfall Drainage Ditches.
   a. This report will be used in a recently funded project through the National Fish and Wildlife Foundation to assess ditches in Mathews County.
   b. This report supported the drafting to HB 528.

3. Informed the State Water Commission of local government's perspective on mandated matters of local and regional water supply plans, expansion o the ground water management area, water reclamation and reuse, and other indirect regulations and mandates that directly or indirectly impact water supply (quantity and quality) – stormwater, TMDL, and other Chesapeake Bay Cleanup efforts.

4. Continued discussions to establish of a regional sanitary sewer district to manage the temporal deployment of nutrient replacement technology for installed OSDS systems in Gloucester County.

APPENDIX A:

Presentation to the State Water Commission

Thank you for the opportunity to offer comments on Local Government Perspective on matters related to Groundwater: Nature and Scope of Problem and Strategies for Management of the Resource

My comments (Lewie Lawrence) will be organized as follows:

- **Historic perspective (Lewie)** from Middle Peninsula rural coastal local governments who have recently pivoted from local government that gave little thought to any question of groundwater to being a regulated local government.

- Offer few words**(Lewie)**: **Evolution of Regulatory Framework and Middle Peninsula local governments**

- **Transition** to the **"what is the state of mind"** at the local level **(Lewie)**
    - **Lewie-** offer a few remarks on confusion at the local level on items related to regulating water
    - **Honorable Mr Pete Mansfield-offer a few word and PowerPoint slides about the problems and challenges facing Middlesex County and beyond**

- **Close: Dr Jim Pyne- Chief of the Hampton Roads Sanitation District Commission-Small Communities Division.**

<u>Historic Perspective (Lewie)</u>

The Middle Peninsula, Northern Neck and portion of Northern Virginia generally speaking paid little attention to the questions of water quantity and quality of groundwater.

- With the exception of King William County- already included in the GWMA area
    - MP Local governments heard tales of permit delays; DEQ staff shortages; lack of water etc
    - MP et al remained removed from ground water regulatory blanket

About a decade ago- Terry Wagner and Scott Bruce from DEQ approached Middle Peninsula local governments about saltwater intrusion into drinking water and introduced MP localities to some of the challenges related to Groundwater and the Chesapeake Bay impact creator.

Early 2000's Commonwealth experienced a significant drought-- Middle Peninsula localities, like much of the Commonwealth began to show "indicators" of problems—wells drying -- "More Awareness" was needed

GA Action

- 2003 Senate Bill 1221 Comprehensive water supply planning process
- 2005 Water Supply Plan regulations enacted
- Local and Regional water supply plan developed

More understanding at the local level, but MP et al still remained separated from a comprehensive regulatory blanket

DEQ - 2010 Forms "Water Supply Plan Advisory Committee" established by statute to assist DEQ in developing, revising, and implementing the State Water Resources Plan

*****2010 Critical TIME for local governments ***** Unrelated arrival of several important state and federal water programs intended to manage: confined & unconfined aquifers, and surface water.

<u>Local Government State of Mind</u> <u>(Lewie)</u>

CONCURENTELY-- 2010-2013 (Evolution of Regulatory Framework)

Increasing Confusion at the local level on items related to regulating water

2010 DEQ- discussing Expansion of the Ground Water Management Act Area and Water Reuse

2010 EPA- established Chesapeake Bay TMDLS

2010-2011 Development of local and regional water supply plans

2011- Local governments asked to respond to the Ches Bay WIP

2012 HB 1065 Consolidate Bill-- Erosion & Sediment Control, Stormwater, & Chesapeake Bay Preservation Acts; integration of programs

<u>Local Government chatter about water programs:</u>

Information flow is silent on-- response to Local/Regional Water Supply Plan submitted to SWCB?

State remains silent on local action/requirements under the Ches Bay WIP

Confusion with merger of DCR and DEQ for oversight of water programs

Reluctance at local level to embrace stormwater program AKA- "Local Water Police"

Comments expressed by local elected officials concerning new regulatory blanket for the management of ground water across the Middle Peninsula-

- GA needs to adequately fund DEQ Water Programs
- DEQ needs adequate staff to review/ issue permits in reasonable time
- DEQ needs resources to install monitoring wells across the expanded area to accurately model ground water
- Impact economic development opportunities
- Concerned that MP and NN water will be used to fill permit needs for existing permits already in the queue

- **Honorable Pete Mansfield: problems and challenges facing Middlesex County and beyond (few power point slides)**

- **Close: Dr Jim Pyne- Chief of the Hampton Roads Sanitation District Commission- Small Communities Division.**
    - **Offer a few comments about the water reuse from HRSD**
    - **Offer recommendation of further study by GA**

APPENDIX B:

Resolution to request DEQ Take Proactive Measures to Restore Artesian Head Pressure and Reduce High Chloride Concentrations in the Potomac Aquifer

MIDDLE PENINSULA PLANNING DISTRICT COMMISSION

Saluda Professional Center, 125 Bowden Street, P.O. Box 286, Saluda, VA 23149-0286
Phone: (804) 758-2311 FAX: (804) 758-3221
Email: pdcinfo@mppdc.com Webpage: www.mppdc.org

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.n. James H. Hudson, III

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Ms. Melinda Moran

Middlesex County
Hon. Elizabeth Hurd
Hon. Wayne H. Jessie, Sr.
Mr. Matthew Walker
(Vacant)

Town of Urbanna
Hon. Donald Richwine

Secretary/Director
Mr. Lewis L. Lawrence

RESOLUTION

Requesting that the Virginia Department of Environmental Quality Take Proactive Measures to Restore Artesian Head Pressure and Reduce High Chloride Concentrations in the Potomac Aquifer

Whereas, the most productive aquifers of the Virginia Coastal Plain are in the Potomac Formation; and

Whereas, the Potomac Aquifer is the largest source of fresh water in the Virginia Coastal Plain; and

Whereas, groundwater level field measurements for State Observation Well 216 in Westmoreland County, Virginia for the period of August 25, 1967 to December 31, 2011 show a continual long-term water-level decline and loss of artesian pressure; and

Whereas, pumping of water from the Potomac aquifers and from shallower aquifers has lowered ground-water levels substantially and changed the direction of ground-water flow over much of the region; and

Whereas, water levels are falling at a rate of approximately 2 feet per year in the Middle Potomac aquifer and simulated water density near the saltwater transition zone of the Virginia Coastal plain has illustrated an inland movement of saltwater, further degrading water quality within the Chesapeake Bay impact crater and across a large portion of the Middle Peninsula; and

Whereas, chloride intrusion has been noted in USGS reports and studies, and by the scientific community, the Department of Environment Quality and local residents of the Middle Peninsula; and

Whereas, land subsidence rates on the order of 0.05-0.06 in/yr (1.2-1.4 mm/yr) attributed to the postglacial forebulge collapse within the Chesapeake Bay region are further exacerbated by large industrial and domestic use groundwater withdrawals from the Potomac aquifer series occurring in the areas of Franklin, Suffolk and West Point, VA; and

Whereas, recent analysis of tide gauge data by the Virginia Institute of Marine Science reports RSL rise rates ranging from 0.11-0.23 in/yr (2.9-5.8 mm/yr; period: 1976-2007; 10 stations) within the Chesapeake Bay region, with a number of the values representing the highest rates reported along the U.S. Atlantic coast complicating groundwater management by the Virginia Department of Environmental Quality; and

Whereas, the failure to reduce overdraws of the Potomac Aquifer may jeopardize the health, welfare and future development of all counties currently drawing from said aquifer including those of the Middle Peninsula:

Now therefore be it resolved, that the Middle Peninsula Planning District Commission, created to promote the orderly and efficient development of the physical, social, and economic elements of the Planning District, requests the Commonwealth of Virginia, acting through its duly authorized agency, the Virginia Department of Environmental Quality and/or other state agencies, to take all appropriate action including but not limited to a review of regulations pertaining to groundwater withdrawals, increased education for the public, and utilization of water reuse planning, especially for areas with highest rates of groundwater removal, to reduce high chloride concentrations and loss of artesian head pressure in the Potomac Aquifer for the benefit of all those living in the region.

Chair	Nov. 20, 2013 **Date**

APPENDIX C:

Response to Potomac Aquifer Resolution from DEQ

COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
Street address: 629 East Main Street, Richmond, Virginia 23219
Mailing address: P.O. Box 1105, Richmond, Virginia 23218
Fax: 804-698-4019 - TDD (804) 698-4021
www.deq.virginia.gov

Molly Joseph Ward
Secretary of Natural Resources

David K. Paylor
Director

(804) 698-4020
1-800-592-5482

RECEIVED
FEB 6 2014
BY:

February 5, 2014

Mr. Lewis L. Lawrence
Executive Director
Middle Peninsula Planning District Commission
125 Bowden Street
P.O. Box 286
Saluda, VA 23149-0286

Dear Mr. Lawrence:

Thank you for your letter regarding the need for the Commonwealth to take additional actions to address coastal plain aquifer issues. Secretary Ward asked that I respond on her behalf. I can assure you that I appreciate the significance of this issue to local governments located in Virginia's Coastal Plain.

As you point out, the Potomac Aquifer is the most productive and preferred source of groundwater in the Virginia Coastal Plain. This aquifer continues to see long-term water declines, land subsidence associated with groundwater pumping, and saltwater intrusion into freshwater portions of the aquifer. The Department of Environmental Quality (DEQ) has identified coastal plain groundwater management as an important agency priority. I have already scheduled an initial briefing for Secretary Ward on this issue. As the Commonwealth develops responses for addressing this issue, we will consider all available options to achieve aquifer availability and productivity while minimizing the impact to our economy.

If you have further comments or questions, please contact Scott Kudlas at (804) 698-4456 or at scott.kudlas@deq.virginia.gov.

Sincerely,

David K. Paylor

DKP:ewf

APPENDIX D:

Roadside and Outfall Drainage Ditches Report

MIDDLE PENINSULA PLANNING DISTRICT COMMISSION

REPORT

ROADSIDE AND OUTFALL DRAINAGE DITCHES

John S. Morris, III
Beale, Davidson, Etherington & Morris, P.C.
Richmond, Virginia
September 3, 2013

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Exhibit 3: 1965 plat of the property behind 9455 Maryus Road, Gloucester County Plat Book 4, page 91

Exhibit 4: Aerial photograph of 2553 Guinea Circle Road

Exhibit 5: 1996 Plat of 2553 Guinea Circle Road, Gloucester County Plat Book 23, page 180

Exhibit 6: 1937 Plat of Cheek Property, Mathews County Deed Book 33, page 600

Exhibit 7: 1952 Plat of Eubank Property, Mathews County Plat Book 1, page 77

Exhibit 8: 1956 Plat of Cheek Property, Mathews County Plat Book 4, page 206

Exhibit 9: Section 2 of Chapter 34 of the Law of Virginia of 1705

Exhibit 10: Middlesex County Deed Book 80, page 450

Exhibit 11: Highway plan sheet for Route 33

Exhibit 12: Middlesex County Deed Book 87, page 527

Exhibit 13: Middlesex County Deed Book 353, page 773

ROADSIDE AND OUTFALL DRAINAGE DITCHES

I. PURPOSE

The purpose of this report is to analyze various legal and ownership issues associated with a handful of ditches along Virginia Department of Transportation ("VDOT") roads which have proven to be problematic at the local level. The report will set forth the general rules of law with regard to water flow from one property to another, the collection and distribution of the water in channels such as ditches, the responsibilities for the maintenance of such channels or ditches and the legal liabilities and responsibilities that result from excessive collection or flows of water created by the artificial courses of water or increases to natural courses of water. The report analyzes seven selected ditches and makes recommendations of methods of analyzing and resolving future problems related to similar circumstances.

II. LEGAL ANALYSIS

Virginia has adopted the modified common law rule with regard to surface water. Under this doctrine, surface water is a common enemy and each landowner may fight it off as best he can, provided he does so reasonably, in good faith and not wantonly and unnecessarily or carelessly so as to injury another's property. *Kurpiel v. Hicks*, 284 Va. 347, 731 S.E.2d 921 (2012), citing *McGehee v. Tidewater Railway Company*, 108 Va. 508, 62 S.E. 356 (1908).

Virginia recognizes at least two exceptions to the modified common law rule. One exception is that a landowner cannot collect surface water into an artificial channel or volume and pour it upon the land of another to his injury. *Seventeen, Inc. v. Pilot Life Insurance Co.*, 215 Va. 74, 205 S.E.2d 648 (1974). Another exception is that landowner cannot interfere with the flow of surface water in a natural channel or stream in such a manner as to cause injury to the land of another. *Mullins v. Greer*, 226 Va. 587, 311 S.E.2d 110 (1984); *McGehee v. Tidewater Railway Co.*, 108 Va. 508, 62 S.E. 356 (1908). While a landowner may turn surface water back on its neighbor, it cannot interfere with the flow of surface water in a natural channel. *Howlett v. City of South Norfolk*, 193 Va. 564, 69 S.E.2d 346 (1952). The following cases give examples of how these general rules have been applied.

In *Seventeen, Inc. v. Pilot Life Insurance Company*, 215 Va. 74, 205 S.E.2d 648 (1974), a landowner developed agricultural property into a shopping center. To facilitate the flow of the increased surface water, the landowner replaced an 18 inch pipe under an adjoining roadway with a 48 inch pipe. Even though there was a downstream drainage easement, the amount of water coming off the shopping center was so much greater than the runoff from the farm and the amount of water flowing through the 48 inch pipe was so much greater than the amount that would flow through an 18 inch pipe, the increased volume was deemed to be unreasonable.

In a similar case, a downhill landowner had a ditch through his property. At the end of the ditch, he had placed a 12 inch pipe under a roadway. That ditch was sufficient to hold the water from his land and the water that came naturally off a 26 acre tract above him. A new owner of the 26 acre tract erected large apartment houses and constructed streets. He also gathered the water running off his property into a two foot diameter pipe which ended a few

inches from the land of the downhill owner. Although the downhill owner had a ditch through his property, the increased amount of water and the concentration of that water caused extensive damage to his property and was deemed unreasonable. The downhill owner was entitled to damages as a result. *Third Buckingham Community, Inc. v. Anderson*, 178 Va. 478, 17 S.E.2d 433 (1941).

The construction of a road can create a natural dam if it is built higher than the surrounding land. The party that constructs the road may become liable for the interference with natural drainage if it does not install adequate culverts to take care of the surface water, causing water to accumulate on an adjoining lot. In *Raleigh Court Corporation v. Faucett*, 140 Va. 126, 124 S.E. 433 (1924), a culvert was placed under a road. However, it was placed at a depth 8 inches above the surface of an adjoining owner's lot. This caused up to 8 inches of water to stand on the plaintiff's lot whenever there was a heavy rain. The failure to properly install the culvert resulted in liability.

Once water is in a well defined channel, a property owner generally cannot interfere with its flow. *Howlett v. City of South Norfolk*, 193 Va. 564, 69 S.E.2d 346 (1952). Nevertheless, a landowner can change the course of a stream on its property. As long as the stream exits its property at the same point and no additional water is included, there is no liability on the owner. *Cook v. Seaboard Air Line Ry.*, 107 Va. 32, 57 S.E. 564 (1907). On the other hand, if, in rerouting the natural watercourse, additional water is placed on another landowner to that landowner's detriment, the rerouting of the watercourse will be deemed unreasonable. *Mullins v. Greer*, 226 Va. 587, 311 S.E.2d 110 (1984).

Municipalities and other governmental entities are not exempt from these rules. They have the same obligations as landowners when they construct public improvements, including streets, on property that they own or control. *Howlett v. City of South Norfolk*, 193 Va. 564, 69 S.E.2d 346 (1952). However, a municipality is not liable for damage caused by the flood of an artificial channel it created if the damage was due to an extraordinary rainfall. *City of Portsmouth v. Weiss*, 145 Va. 94, 133 S.E. 781 (1926). The court defined extraordinary rainfall to mean a rainfall that is so unusual and extraordinary that men of ordinary prudence would not have anticipated and provided for it. It does not mean a larger downpour of rain than had ever previously occurred.

This law has been consistently interpreted and applied since 1895. However, few cases have specifically addressed maintenance of ditches. In *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993), a county accepted the dedication of a drainage easement which it chose not to maintain. The Supreme Court held that the county's failure to maintain the drainage ditch did not absolve it of liability. When the county accepted the dedication of the easement, it "also accepted the burden of maintaining it in the manner necessary to protect the servient estates". *Jenkins v. County of Shenandoah*, 246 Va. at 471, 436 S.E.2d at 610.

The Supreme Court handed down another decision last year dealing with responsibility for maintenance of a ditch. *Livingston v. Virginia Department of Transportation*, 284 Va. 140, 726 S.E.2d 264 (2012), related to the relocation of Cameron Run, a natural stream, as part of the construction of the Capital Beltway in Fairfax County. Over a period of 35 years, significant

sediment accumulated in the relocated Cameron Run, but VDOT did not dredge the sediment. A significant storm produced "long periods of precipitation with high intensity downpours", causing the flow depth of Cameron Run to increase in less than two hours from just under 2 feet to almost 14 feet. That was the second highest water flow in Cameron Run in over 50 years, topped only by Hurricane Agnes. That storm caused the water in Cameron Run to overflow, damaging nearby property. The Court held that the reconstruction of the channel did not make VDOT an insurer in perpetuity against flood damage. However, it found that the new channel may have worked without flooding if it had been properly maintained. Therefore, VDOT was liable for the damage caused by its operation of the relocated Cameron Run, "including its failure to maintain" it.

III. ANALYSIS OF EACH SELECTED DITCH

A. Gloucester County: Outfall ditch adjacent to 9455 Maryus Road and 9469 Maryus Road.

I visited all seven ditches on March 22, 2013. The specific ditch at issue at this location is an outfall ditch for the ditches on the north side of Maryus Road (State Route 649). It is located between 9455 and 9469 Maryus Road, which are owned by Joann Hall and Anthony and Jennifer Quintero, respectively. The water in the outfall ditch does not effectively drain. Instead, the outfall ditch is filled most of the time. According to Garrey Curry, Director of Public Works for Gloucester County, there is water in the roadside ditches all along Maryus Road almost year round, except in periods of drought. In March, all the ditches along that part of Maryus Road had standing water with algae in them. The water in the outfall ditch was not perceptibly moving at that time.

VDOT maintains the ditches along the road, but does not maintain the outfall ditch. The ditch in front of 9455 Maryus Road is about 5' wide. The centerline of Maryus Road is about 15' from the closest bank of the ditch and about 20' from the far side of the ditch. VDOT has a prescriptive easement in Maryus Road, which means that its right-of-way is only 30' wide (Va. Code § 33.1-184). Therefore, the roadside ditches are almost all entirely outside the right-of-way and the outfall ditch is outside of the right-of-way.

Based upon a diagram on an aerial photograph (Exhibit 1), the outfall ditch goes in a straight line northward along a property line dividing several parcels to a creek or watercourse. It is about 1,200 feet long. Although a line depicting the outfall ditch is drawn in a straight line on the aerial map, the image on the photograph appears to veer slightly away from the straight property boundary line.

A search of the titles to the properties that abut the outfall ditch did not disclose any easements. The properties on both sides of the outfall ditch at Maryus Road were part of a single parcel conveyed by B. A. and Cornelia Rowe to Armstead Hall in 1895. (Gloucester Deed Book 20, page 256). The Hall family divided the property among themselves, probably after Armstead's widow died in 1965. I could not find a plat showing the division. If there is an easement, it would have likely been created then.

The Hall descendants began selling the various parcels as they are shown today on the County's Tax Map in the late 1960s. A 1969 plat of the front part of the property at 9455 Maryus Road shows the ditch crossing the property diagonally from the southwest corner to near the northeast corner and then running northward along the boundary line of the more northern parcels. (Gloucester Plat Book 5, page 18; Exhibit 2). A 1981 plat of the property at 9469 Maryus Road shows "line in ditch" running along its boundary with the rear half of the 9455 Maryus Road property, but no reference to a ditch on the boundary line along the southernmost part of that property. (Gloucester Deed Book 240, page 355). That is consistent with the 1969 plat and indicates that the present outfall ditch as it leaves the roadside ditch was shifted from the southwest corner of 9455 Maryus Road to its southeast corner in or after 1981. Since that only affected the owner of 9455 Maryus Road and would not have added to the water in the ditch, no liability or change in responsibility occurred unless and except to the extent the ditch was moved onto the property of 9469 Maryus Road.

A 1965 plat of Tax Map Parcel 248, the property behind 9455 Maryus Road owned by George E. Schaeffer, III, shows the ditch line meandering back and forth across the property line going back to the watercourse. (Gloucester Plat Book 4, page 91; Exhibit 3). A 1979 plat of Tax Map Parcel 416, the property on the east side of the ditch immediately behind 9469 Maryus Road, makes no reference to any ditch along the property line. (Gloucester Deed Book 222, page 469). However, a 1974 plat of Tax Map Parcels 417 and 417A, the parcels behind Parcel 416, show "ditch" along the boundary line. (Gloucester Deed Book 217, page 292). Parcels 416, 417 and 417A are all owned by Jefferson and Rebecca Cullison.

All properties along the outfall ditch were owned by the Hall family from 1895 until at least 1965. Plats of almost all tracts adjoining the ditch expressly list the ditch as on or near the boundary line. Therefore, they have treated the outfall ditch as a natural watercourse.

The creek or watercourse into which the outfall ditch flows goes eastward towards Ditch Bank Road (State Route 1104) in a defined channel that begins at Route 216. There appear to be extensive wetlands on both sides of the watercourse on both sides of Ditch Bank Road. There was virtually no flow of water on either side of Ditch Bank Road in March, even though the culvert running under Ditch Bank Road did not appear to be clogged up. The roadside ditches on each side of the culvert had stagnant water within 30 feet of the culvert. Therefore, even if the watercourse was cleared from the beginning of the outfall ditch to Ditch Bank Road, there was nowhere for the water to go.

The creek or watercourse then continues eastward until it subsequently crosses Maryus Road approximately 2,100 feet east of Ditch Bank Road. There are two 24" to 30" culverts running under Maryus Road. There was a defined flow in the watercourse at that location in March, but the culverts could have easily handled much more water. The water going south from Maryus Road was a clear stream. There was standing water in the roadside ditches leading to that stream with some algae, but not nearly as much as in the ditches near 9455 Maryus Road.

I was advised that a person living on Ditch Bank Road southwest of the culvert had apparently pushed debris into the area of the watercourse. That act may have reduced the flow of water through the watercourse. I was advised that the water levels in the ditches along Maryus

Road are higher now than prior to the debris being pushed into the watercourse. I could not confirm the accuracy of that information. However, if action was taken that interfered with the flow of surface water in an actual channel such as this watercourse, that person could be liable for any damage caused by flooding of that channel. *Howlett v. City of South Norfolk*, 193 Va. 564, 69 S.E.2d 346 (1952). Such conduct could also violate Gloucester County Ordinance § 8.5-36(b) which provides that "Under no circumstance shall any use, activity, and/or development adversely affect the capacity of the channels or floodways of any watercourse, drainage ditch, or any other drainage facility or stream." Such action might have also violated EPA statutes and regulations.

Otherwise, the problem with the outfall ditch appears to be an act of nature rather than any lack of maintenance. Although the level of standing water in the outfall ditch and the roadside ditches on Maryus Road could have been increased in part by a clogged ditch or debris in the watercourse, the channel downstream from the Ditch Bank Road culvert was hardly moving with standing water in it.

Unless there is a significant blockage of that channel between Ditch Bank Road and the Maryus Road culvert, the primary cause of the lack of flow in the outfall ditch is the lack of change of elevation. The water level in Mobjack Bay appears to be not much lower than the water level in the watercourse, causing the slow movement of the water all the way back to 9455 and 9469 Maryus Road. The ability of any ditch to drain water is primarily dependent on elevation change. There is very little elevation change through this area. Therefore, the water will essentially stand still because there is nowhere for it to go.

Neither VDOT nor the County has a drainage easement in the outfall ditch. Therefore, neither has any right or responsibility to clear the outfall ditch. VDOT is responsible for clearing the ditches along the road because those ditches channel water from the road. However, cleaning those ditches would not reduce the level of water in the outfall ditch.

Therefore, except for the person who may have placed debris in the channel, there appears to be no person or entity responsible for the standing water in the outfall ditch.

B. Gloucester County: Outfall ditch adjacent to 2553 Guinea Circle Road

The problem with the outfall ditch at 2553 Guinea Circle Road (State Route 652) is that it backs up and floods Guinea Circle Road during periods of heavy rain. This outfall ditch is not well defined. In March, the culvert under the road was entirely underwater on both sides. There was a flow of water leading to the culvert on the other side of the road, so some water was moving. Nevertheless, the water on the outfall side was not visibly moving. The outfall ditch had much growth in it, but there was no visible debris deposited by anything other than the force of nature.

Outfall ditch is a misnomer at this location. Based on the County Tax Map, the water comes to Guinea Circle Road from the west by way of a natural stream. That watercourse continues east of the road. The watercourse is a clearly defined channel from Guinea Circle Road to well beyond Belvin Farm Road. (Exhibit 4).

Guinea Circle Road is a potential dam to the watercourse. Since VDOT's road cannot act as a barrier to the passage of water, it must have culverts adequately sized to allow the continued flow of water. Based on the lack of flow of water in the downstream (east) side of the culverts, the culverts do not appear to be undersized. They are not causing the outfall ditch to be full of water.

We did not walk along the outfall ditch from Guinea Circle Road. However, we did drive down Belvin Farm Road to the point at which the natural watercourse passes under the road. At that point, the watercourse was well defined and flowing well into and through a 24 inch pipe. Based on the level of the ice around the downstream side, it was probably low tide at the time of the site visit because the water had been at least 6 inches to 12 inches higher overnight. Therefore, the blockage, if any, is between Guinea Circle Road and Belvin Farm Road.

The watercourse on the east side of Guinea Circle Road follows a boundary line between the owners of Tax Map Parcels 108 and 31 on the south and east sides (Shell and Calvin French and Big OK Enterprises, respectively) and Parcels 8 and 13 on the north and west sides (Michael Pels and Ashley Ann Winebarger and Nikola and Vesne Janjic, respectively). That boundary line runs for almost half the distance from Guinea Circle Road to Belvin Farm Road following the meander of the watercourse.

There is only one plat in the chain of title of 2553 Guinea Circle Road, which is owned by Pels and Winebarger and located on the north side of the outfall ditch. The boundary line that follows the ditch is described in a plat as "line in stream." (Gloucester Plat Book 23, page 180; Exhibit 5). No plat was found for the property behind it, Parcel 53-13, but a 1952 deed in the chain of that title describes the property as bounded by a creek on the east. (Gloucester Deed Book 92, page 432).

On the south and east sides of the ditch, there are no references to the ditch, creek or stream in the chain of title of either Parcel 53-108 or Parcel 53-31 going back to at least 1940.

No language creating an easement was found in any of the deeds. However, based on the aerial photograph, the 1996 plat and the 1952 deed, this is a natural creek or stream. Therefore, this outfall ditch is a natural watercourse and no one has the obligation to maintain it.

It is possible that, if the watercourse were cleaned out between Guinea Circle Road and Belvin Farm Road, the water would flow faster and the outfall ditch would not remain full. However, because neither VDOT nor the County has any easement, they have no responsibility to maintain the ditch. Only the landowners on each side of the watercourse have the right to maintain it or otherwise clear it out. The landowners may not restrict the flow of water in a way to harm others, but they do not have an affirmative duty to clear or maintain it unless they do something that unreasonably increases the flow of water into it. Therefore, if the growth that clogs up the stream is natural and the adjoining owners have done nothing to cause that to occur or to become worse, they have no liability.

C. Gloucester County: Outfall ditch adjacent to 2763 Guinea Circle Road

The problem with the outfall ditch at 2763 Guinea Circle Road (State Route 652) is that it also backs up and floods Guinea Circle Road during periods of heavy rain. There are two culverts on the west side of the road across from 2763 Guinea Circle Road. There was flow coming into them from two different watercourses in March. On the east side, there was visible flow about 15 inches past the two pipes. The waterline was almost up to the top of the pipes. When Garrey Curry had been there two weeks earlier, the roadside ditch had much less water in it.

Outfall ditch is also a misnomer at this location. There are two defined watercourses flowing from the west to Guinea Circle Road which merge to become one watercourse east of the road. They appear to be natural channels. The outfall ditch is a continuation of that merged watercourse.

The watercourse flows through 2763 Guinea Circle Road, which is Tax Map Parcel 53-15 and owned by Steven J. Carter. This parcel was owned by A. J. Hogge at the time of his death in 1940. Hogge also died owning Parcel 53-3, which adjoins the larger watercourse on the western side of Guinea Circle Road and through which the smaller watercourse flows. There is no easement in the chain of title to 2763 Guinea Circle Road.

Guinea Circle Road is a potential dam where the two watercourses converge. Since VDOT's road cannot act as a barrier to the passage of water, it must have culverts adequately sized to allow the continued flow of water. Based on the amount of water on the downstream (east) side of the culverts, the culverts do not appear to be undersized.

There was a fair amount of debris to the left of the channel on the east side of the road that was left over from an earlier storm, an overflow of water across the road or someone's effort to clean out the ditch. However, that debris was not in the channel itself.

The blockage, if any, is downstream of Guinea Circle Road. It is possible that, if the downstream channel were cleaned out, the water would flow faster and the stream would not remain full. However, neither VDOT nor the County has a drainage easement down the watercourse so neither has any responsibility to maintain that ditch.

Unlike the first two ditches, this watercourse goes through a single parcel rather than along a boundary line between two parcels. Only the landowner has the right to maintain it or clear it out. The landowner may not restrict the flow of water in the watercourse through his property in a manner that harms others, including causing flooding of Guinea Circle Road or the property at 2763 Guinea Circle Road. However, he has no affirmative duty to clear it or otherwise maintain it. If the growth that clogs up the watercourse is natural, he has no liability. On the other hand, if he has done something to clog the watercourse or to otherwise impede the flow of water through the watercourse, he may have some responsibility to clear out the obstruction.

D. Gloucester County: Outfall ditch adjacent to 7479 Brays Point Road

According to Mr. Curry, there has not yet been a problem with the ditches along Brays Point Road, the culverts at 7479 Brays Point Road (Route 636) or the outfall ditch. However, his concern relates to future drainage from potential development of Woodville Park which could be collected in the roadside ditch and flow to the subject culverts and outfall ditch.

The outfall ditch appears to be a natural watercourse. In March, there was excellent flow into and out of the culvert at that location. There is a large headwall with two 36 inch pipes at the outfall ditch. We could see a flow going into the culvert. Although we could not see any obvious flow in the outfall ditch itself, the ditch appeared to be about 10 feet wide and fairly deep.

There are ditches along the north side of Bray's Point Road flowing toward the culvert. There was very little water in the ditch east of the culvert. Most of the water was coming down the road from Woodville Park and other properties to the west of the culverts. The subject outfall ditch was therefore carrying the Woodville Park water as well as water it has historically carried.

If the roadside ditch and the outfall ditch become overwhelmed by excess water, it will likely have been created by the development of Woodville Park or other properties along Brays Point Road. As with all owners, the County has the right to divert water from its property in a reasonable manner. Diverting it into the roadside ditch along Brays Point Road puts it into a channel, which is permissible. However, if its use of the property adds so much water that the channel cannot handle it and causes problems to landowners on the same side of the road or if it forces the water through the culverts under Brays Point Road in such a way as to damage property on the other side, the County could become liable under the rules set forth in *Kurpiel v. Hicks*, 284 Va. 347, 731 S.E.2d 921 (2012).

Accordingly, adding more water to the flow in the ditch would not in and of itself be a problem. However, an unreasonable amount of extra water could create liability on the County if the ditches and culverts cannot handle it.

E. Mathews County: Outfall ditch at end of Old Ferry Road

The problem at this location is that the beach is being eroded by the water that flows out of the outfall ditch beyond the end of State maintenance of Old Ferry Road (Route 633). The owners of the property to the north of Old Ferry Road, Christine and Mark Eubank, have recently improved the ditch from the end of State maintenance to the beach. Rather than flowing directly from the end of the ditch to the Bay, the water has cut a zigzagging channel across the beach.

Old Ferry Road ends about 150 feet short of the Chesapeake Bay. It terminates on the end of the asphalt, approximately 95 feet before the beach. That extra 95 feet consists of a graveled roadway which curves and extends to the right. It ends at a drop off at the edge of the beach. The State maintained asphalt roadway is approximately 10 feet wide.

Two large pylons have been placed in the sand. According to Sue Thomas, an Environmental Planner for Mathews County, the pylons were installed in the last two years by the Eubanks. The two pylons in the sand are approximately 30 feet from the bulkhead to the right. If the State maintained portion of the road were extended straight to the Bay, the taller left hand pylon would be in the 10 foot line of pavement, approximately a foot or two from the left hand side of it. The bulkhead and the two posts are not parallel to Route 633 and do not approximate a direct extension of the 30 foot right-of-way, although such a 30 foot right-of-way would pass through that area.

The road has been shown as a public road on plats of the properties south and north of the road since 1937 and 1952. (Mathews Deed Book 33, page 600 and Plat Book 1, page 77; Exhibits 6 and 7, respectively). The road was shown extending to or within 50 feet of the normal high water mark on those plats. They also showed the road as a straight line. A 1956 plat of the property south of the road, now owned by Edward and Evelyn Cheek, showed the southern edge of the roadway flaring somewhat more to the south, beginning at the approximate location of the current end of State maintenance. That plat described the area beyond what is now the end of State maintenance as "Reserved Beach". (Mathews Plat Book 4, page 206; Exhibit 8).

The Old Ferry Road ditch line follows generally the VDOT right-of-way leading up to the end of State maintenance. It could be within the 30 foot right-of-way because it appears to be within 10 feet of the edge of pavement. There is a culvert that runs under Sweet Gum Road, so that the water leading up to the riprap is largely coming from the runoff along Old Ferry Road. The ditch curves away from the right-of-way and the graveled road bed at the end of the VDOT right-of-way.

In 2012, the Eubanks improved that ditch beyond the end of State maintenance pursuant to a permit from the County. The plans submitted with the permit application show the proposed riprap well off the VDOT right-of-way. It indicates that the existing ditch was along the property line. The Eubanks installed riprap from adjacent to the end of State maintenance to the beach. At no location is the riprap on the VDOT property. The riprap has apparently cleaned the water because the water on the downstream side of the riprap looked quite clear and was flowing. Ms. Thomas stated that it was previously "dirty".

Rather than going straight to the Bay, the water has cut a channel in the sand after it flows out of the riprap portion of the ditch. It makes a 90 degree turn to the right at the larger of the two pylons. It runs to a jetty and then turns left towards the Bay. However, it cuts back horizontally to the left as it nears the Bay before angling into the Bay. The channel does not enter into a straight line extension of Old Ferry Road until well into the beach. All of the erosion of the beach is either on the Eubank property or on the straight line extension area.

According to Ms. Thomas, a nor'easter did substantial damage about 4 or 5 years ago, taking away much of the land along this area and washing out most of the sand. The fourth house going north on Sweet Gum Lane from Old Ferry Road actually fell into the water because it was undermined. She said that prior to the nor'easter the water from the ditch on the north side of Old Ferry Road went in a channel in a straight line to the Bay. The current curving channel

on the beach is new. She said there is much more sand on the beach here now than there had been. The jetties were put in to catch the sand and they are doing their job.

The straight line extension of Old Ferry Road is likely to be a prescriptive easement to the beach. While the name of the road might indicate that it is a former public landing, it is much more likely that the "old ferry" crossed Milford Haven at the other end of Old Ferry Road, where the Route 223 bridge is located. It is unlikely that there was a ferry across the Bay from the subject road ending. Instead, this was probably just the end of the road.

Based on the plats, this has been treated as a public road for many years. It was likely maintained by the County prior to the enactment of the Byrd Road Act, which transferred county control of public roads to VDOT's secondary road system. VDOT made early administrative decisions as to which roads and which parts of roads to include in its secondary system. The end of State maintenance marks the end of the portion of the road that VDOT apparently chose to accept into the system. However, failure to accept the rest of the road into the system did not eliminate the public's right to use the road. 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 30 foot presumption predates the Byrd Road Act of 1932 by 227 years. Section 2 of Chapter 34 of the Law of Virginia of 1705 provided that every road shall be "at least thirty foot broad". (Exhibit 9). That 30 foot width provision has been reenacted regularly over the last 300 years. (See for example, 1748 Laws of Virginia, Chapter 28, § 6; 1785 Code of Virginia, Chapter 75, § 6; 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).

Therefore, the public probably has a prescriptive easement in a 30 foot right-of-way running along a straight line extension of Route 633 past the end of State maintenance to the Bay. That line does not match the current graveled portion of the roadway. Even if there is no proof of public maintenance, the 1937 and 1952 plats reflect the public's right to use the extended roadway. The Eubanks and the Cheeks may own the underlying title up to the center line of the 30 foot prescriptive easement on their respective sides. However, no deed in their chains of title claims ownership of the prescriptive easement area.

VDOT's responsibility ends at the end of State maintenance. If VDOT never accepted the rest of the roadway for maintenance, it never became VDOT's responsibility. If VDOT has discontinued the rest of the roadway, it ceased to be VDOT's responsibility at the time of discontinuance. Under either circumstance, the public likely has access across the rest of the roadway as a prescriptive easement. To the extent the County chooses, it may maintain the rest of the road, but it has no duty to maintain roads or their ditches not in the State's secondary system pursuant to the Byrd Road Act.

Most of the water in the ditch, including the riprap portion, comes from Old Ferry Road. Since Old Ferry Road and the ditch line along the road predate its acceptance into the secondary system, the ditch was a natural channel when VDOT become responsible for the road. That would not relieve it of liability if it took action that unreasonably increased the flow of water into the ditch. However, there does not appear to be anything done by VDOT to increase the flow. The ditch was properly carrying water toward the next watercourse, the Bay.

It appears that the present erosion of the beach was created by the improvements made to the roadside ditch by the Eubanks. However, all damage from their improvement is either on property they own or on the prescriptive easement area. The former outfall ditch from the end of the roadside ditch went straight to the Bay, which made it a part of the natural channel and watercourse flowing from the end of the roadside ditch. Neither VDOT nor the County has any responsibility for doing anything to take the water from the end of the riprap improvement into the Bay.

F. Mathews County: Outfall ditch at Old Ferry Road, South Bay Haven Road and North Bay Haven Road intersection

The problem at this intersection is that at least one of the ditches frequently overtops its banks during and after a storm event. Therefore, the problem is primarily a flooding issue. None of the ditches were overflowing in March or August. The water at the northeast corner goes into a culvert that runs cater-corner across the road. It outlets into the ditch at the southwest corner. South Bay Haven Road goes toward Milford Haven Bay. The roadside ditch on the west side of the road turns away from the road not far from an inlet of that bay and takes the water toward the inlet.

There is no ditch at the northwest corner of Old Ferry Road where the Post Office is located. The water was not up to the top of the culvert in March. On the southwest corner, the ditches along both South Bay Haven Road and Old Ferry Road were not completely full, but they had much standing water with algae. The same situation occurred at the northeast corner and the ditches on North Bay Haven Road and Old Ferry Road.

The only perceptible flow in any of the ditches at that corner in March was at the first driveway on North Bay Haven Road. The water was flowing towards the intersection. That would indicate that the culvert was working. A sidewalk culvert on the northeast side of Old Ferry Road going towards the culvert looked completely covered on the upstream side, but there was very little water backed-up. This means that the debris was not preventing the flow of water in the ditch. While we were at the site in March, Ms. Thomas talked with Ms. Kendall, the

Postmaster at this Post Office. Ms. Kendall said that the road does not flood as often or as badly as it used to.

When I went back to the intersection on August 1, 2013, the ditches had no standing water in them, even though the prior two months had been very wet and it had been raining some during the day. Later that day, I went back to Gwynn's Island near the end of a sustained downpour. There was water standing in the southeast side ditch along Old Ferry Road between the intersection and the first driveway culvert. Otherwise, there was no water standing at any of the ditches on the south side of Old Ferry Road. There was also water standing in the northwest curve closest to the post office where there is no ditch. There was no water in the ditch line along Old Ferry on the north side, but there was water in the ditch on North Bay Haven Road through at least the first three driveway culverts. There was no perceptible flow at either end of the pipe under Old Ferry Road.

The problem at this intersection appears to be a lack of elevation change. When there is significant rain, such as the afternoon of August 1, the ditches will fill. I saw no evidence of improperly maintained ditches and culverts, with the exception of one culvert on the north side of Old Ferry Road which was not causing any problem. The water did not appear to back up going south on South Bay Haven Road. The ditches along that road were well maintained and the culverts were not full, so they were not impeding the flow of water in the ditches.

To the extent the ditches along South Bay Haven Road or the culvert under the intersection are causing flooding, VDOT is responsible for maintaining the ditches and culverts. On the other hand, to the extent the culverts under the private driveways and sidewalks are inadequate and causing flooding, the responsibility is likely on the landowner because those are his or her improvements. However, no one is responsible for flooding caused by extraordinary rainfalls. *City of Portsmouth v. Weiss*, 145 Va. 94, 133 S.E. 781 (1926).

As long as the water stays in the ditches, the ditches are doing their job. They eventually drain, as was evident on the morning of August 1. The next time the road floods, an engineer should examine the ditches and culverts between the intersection and the outfall ditch on South Bay Haven Road to the inlet to see if there is blockage along the way. If not, the problem is a lack of elevation change.

G. Middlesex County: Ditch behind YMCA on Route 33

VDOT has a drainage easement onto the subject property. A ditch was extended from the end of VDOT's easement to the rear of the subject property and into a pipe going onto the property of an adjoining owner, Doug McMinn. At some point, VDOT cleaned out the ditch, although it is not clear whether it cleaned just the VDOT ditch or the entire ditch to the pipe going onto Mr. McMinn's property. In either event, the cleaning out of the ditch increased the flow of water through the ditch and into the pipe. The increased volume/velocity of the water in the pipe caused damage to Mr. McMinn's property, leading him to dig up the pipe and effectively dam the end of the ditch. There have been several proposals about how to fix the problem, none of which have yet been realized.

The property is a 10 acre tract. It was purchased by the Middlesex County School Board in 1962 from Nellie and Robert McMinn. (Middlesex Deed Book 80, page 450; Exhibit 10). It is owned by the Middlesex County Board of Supervisors. The property is leased at no cost to the YMCA.

The first part of the ditch was constructed as part of improvements by VDOT to Route 33 in the late 1960s. VDOT acquired an easement for the ditch at that time. The easement is clearly delineated on the highway plan sheet running along the east side of the property inside the property line beginning at Route 33. (Exhibit 11).

At approximately the same time, the School Board decided to create a playing field in the northeast portion of the property. Before doing so, it needed to take care of excessive water. It therefore extended the ditch from the end of VDOT's easement to across the northern portion of the property. As part of that project, it obtained a 15 foot wide easement in 1967 from Nellie McMinn that allowed it to run the water in a pipe from the end of the ditch on the School Board's property 150 feet onto the McMinn property. Under express terms of the deed, the easement would last as long as the School Board was the owner of the property. (Middlesex Deed Book 87, page 527; Exhibit 12).

In 2002, the Middlesex School Board conveyed the property to the Middlesex County Board of Supervisors. (Middlesex Deed Book 353, page 773; Exhibit 13). Even though the School Board and the Board of Supervisors are both part of the Middlesex County government, they are separate legal entities and the clause in the deed automatically terminated the easement. Thereafter, the Middlesex County Board of Supervisors was channeling water and putting it onto the McMinn property without authorization.

After VDOT cleared out the ditch a couple of years ago, large storms would cause much greater volume and quantity of water to flow into and out of that culvert. When it exited the culvert, it caused significant scouring and other damage to Mr. McMinn's property. Mr. McMinn was not happy with that situation, so he removed the pipe and dammed the watercourse at the boundary line. The damming worked for Mr. McMinn's purposes because the area that had been over and beyond the pipe is now dry. A major storm could cause the water to go over the dam, but it would go in sheet form, not in a concentrated form. To the extent Mr. McMinn went onto the Board of Supervisors' property, he was trespassing and damaging public property. Otherwise, he was within his rights to do what he did.

Middlesex County, VDOT and Mr. McMinn worked out an easement arrangement to have the water channeled to a different area. That arrangement had problems related to elevations. In the end, the parties could not agree on all terms of the agreement. The parties are seeking to do a "green" project with the help of VIMS that would follow the old easement and be good for all parties.

There is some concern that children playing on the playground would play near the bank of the ditch and fall in. Orange fencing has been installed to screen it off. Based on my observation, the water is being held within the ditch line. It does not appear to have overflowed onto the McMinn property and so does not trigger any legal liability at this time. However, the

County has no place to send the water. If the "green" project does not work and the water ponds excessively at the rear of the property, the County may be required to do something that somehow captures and holds the water in a safer and more efficient manner.

To the extent the water in the ditch overflows onto Mr. McMinn's property, any damage resulting from the channeling of the water likely falls on the County, not VDOT. Because the deed of the easement from Mrs. McMinn to the School Board recites the School Board's desire to build a playground, it is assumed that the easement to VDOT would have adequately handled all water generated by VDOT and that the water from the road did not create the need for the extra easement. Therefore, the channeling done to the rear of the property was done by the School Board for the purpose of improving its property. The County inherited responsibility when it obtained the property. If the assumption about the adequacy of VDOT's easement is incorrect and highway runoff was the reason the additional easement was needed in the first place, VDOT could have some responsibility and may need to obtain an extension of its drainage easement.

IV. RECOMMENDATIONS FOR ANALYSIS OF FUTURE PROBLEMS

The duty to keep ditches clear and maintain them will be determined by the circumstances. If the ditch was created by a single landowner or used to channel excessive water from a single landowner, that landowner would be responsible for damages resulting from the ditch. If a party has a drainage easement for the ditch, that party would be responsible for maintaining the ditch. *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993).

Landowners have the ability to fend off water, but there are limits to that ability. As long as the water is going into a natural watercourse and does not improperly damage adjoining or downstream land, there is typically no liability or obligation to do anything further.

The difficult issue with most of these ditches is whether there is a duty to keep the water flowing. This is complicated by the fact that, in many of the outfall ditches, the water is not flowing very well at substantial distances from roadside ditches due to the lack of elevation change and a corresponding lack of flow in the natural watercourses. No party is responsible for such lack of flow if it has not taken some action that impedes that flow in the natural watercourse. However, if that flow has been impeded in an unreasonable manner, the party impeding the flow of water would be liable for any resulting damage. *Mullins v. Greer*, 226 Va. 587, 311 S.E.2d 110 (1984); *Howlett v. City of South Norfolk*, 193 Va. 564, 69 S.E.2d 346 (1952).

If the ditch is a natural watercourse or has been in existence for many years, it must be determined whether there has been an excessive increase in the amount of water going into it. For example, if a property that had previously been unimproved becomes improved with an extensive area of impermeable surface, such as multiple buildings, asphalt parking lots or a large road system, the party creating the excessive amount of water runoff may be responsible for an unreasonable increase in the water placed into the natural channel. Nevertheless, every landowner has the right to reasonably develop its property and to fend off water. Its only other limitation is that it cannot collect the water in a volume and pour it upon the land of another to

his injury, such as occurred in *Seventeen, Inc. v. Pilot Life Insurance Co.*, 215 Va. 74, 205 S.E.2d 648 (1974). That situation could occur on Brays Point Road, depending on how water is handled at the Woodville Park development and how extensive the development of Woodville Park may become.

If the problem is that a ditch has become clogged, it must be determined why the ditch is clogged. If the clogging is caused by natural growth in it, it is possible that no party is responsible. However, if a party created or relocated a channel on or along its property in such a manner that caused it to become clogged or handle less water, the party may have responsibility to maintain the ditch. *Livingston v. Virginia Department of Transportation*, 284 Va. 140, 726 S.E.2d 264 (2012). Therefore, VDOT may have a responsibility to keep roadside ditches clear of natural vegetation so that the flow of water is not impeded. However, if the water does not flow because of a lack of elevation change, VDOT would not be responsible for that standing water.

A party with a drainage easement over the property of another has the right to channel water into the easement. However, that party also has a duty to keep the easement area clean enough to allow the flow of water through the channel. *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993). If a party had an easement to flow water through the property of another and that easement terminates, as was the case with the School Board's easement onto the McMinn property, the former holder of the easement must then take steps to prevent the flow of the water onto the neighbor's land in any concentrated flow.

To determine the existence of an easement, one must examine the land records. Although certain easements can be implied or created by necessity, that rarely happens with regard to drainage easements. Most drainage easements are express and set forth in a recorded document such as a deed or plat.

No one is responsible for a ditch to the extent it is a natural channel. Most of the properties in Gloucester County along the outfall ditches at Maryus Road and Guinea Circle Road had plats or deeds which reflected the existence of the ditch. Designations like ditch, creek or stream indicate that such a ditch is a natural watercourse or has become one over the course of many years. Therefore, any adjoining landowner has the right to channel its water into that ditch, creek or stream so long as it does so in a reasonable manner.

In situations in which a ditch overflows and floods a road, like the two ditches at Guinea Circle Road and the ditch at South Haven Bay Road, further investigation is needed to determine the cause. If the cause is an unusually large storm that meets the Supreme Court's definition of an extraordinary rainfall, no one is responsible. *City of Portsmouth v. Weiss*, 145 Va. 94, 133 S.E. 781 (1926). If a road floods when water on the downstream side is below road level, then the culvert may be damaged or too small to handle water coming towards the culvert. If the water level on both sides of the culvert are at the same elevation, the problem is likely downstream or simply too much water in too short a period of time.

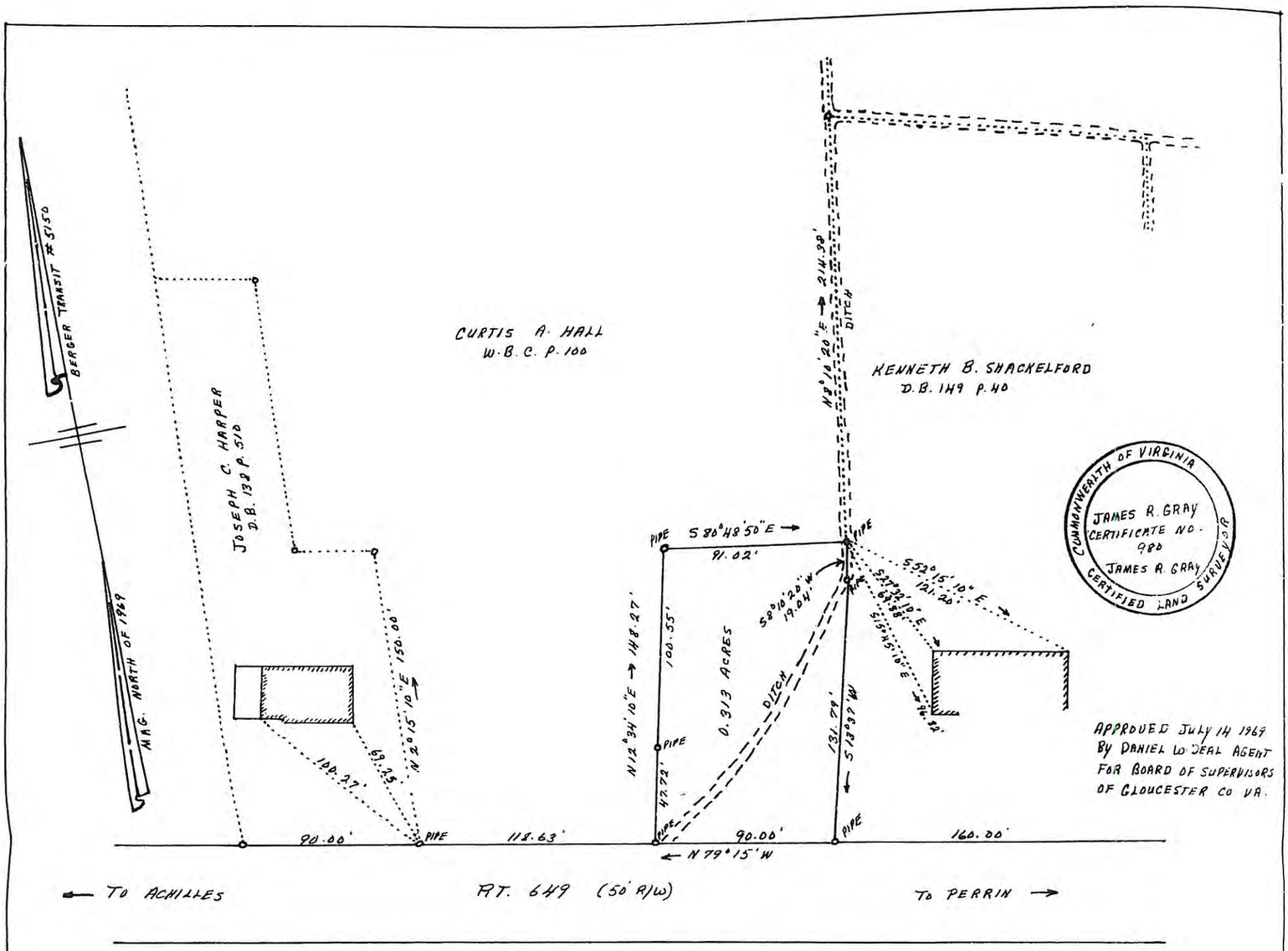
Approximate Outfall Ditch Location

9445 Maryus Rd.

EXHIBIT

1

P.B. 5, 18



PLAT OF 0.313 ACRES OF LAND
LOCATED IN ABINGDON DISTRICT OF
GLOUCESTER COUNTY, VIRGINIA. SURVEYED
AT THE REQUEST OF JERRY W. HALL.

JUNE 21, 1969

JAMES R. GRAY C.L.S.
HAYES, VIRGINIA

SCALE: 1" = 50'

F.B.L-11 P.11

A-52

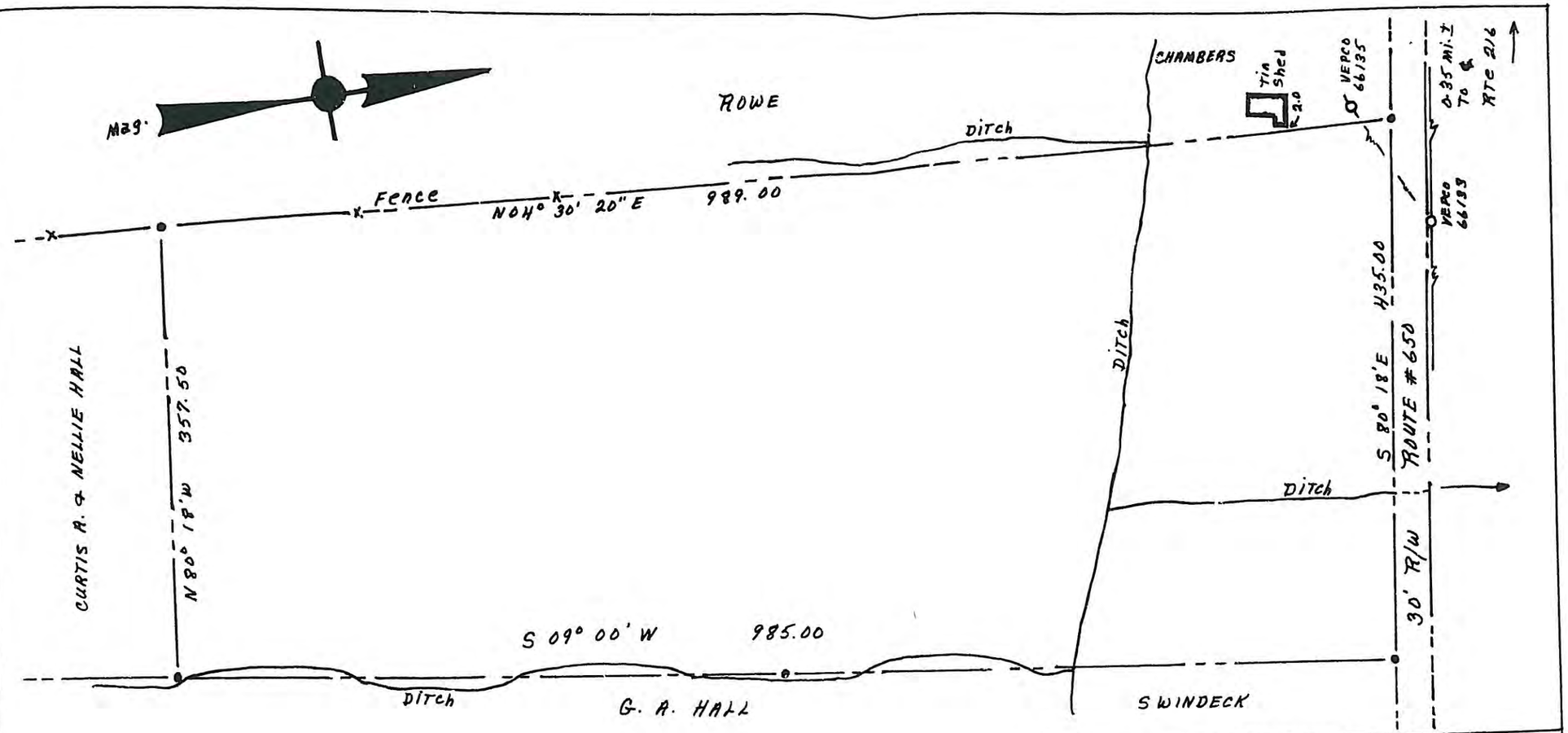
THIS PLAT WAS DELIVERED TO CLERK OF THE CIRCUIT COURT OF GLOUCESTER COUNTY, VIRGINIA, ON THE 16th DAY OF JULY 1969, ADMITTED TO RECORD AT 11:20 O'CLOCK A.M., WITH DEED FROM CURTIS A. HALL ET UX TO JERRY WAYNE HALL ET AL, WHICH DEED IS RECORDED IN DEED BOOK 154, PAGE 57.

TESTE:

CLERK.

EXHIBIT
2

P.B. 4, 91



NOTE: Iron pipes at all corners.
Bearings are clockwise.
AREA = 8.960 Acres.

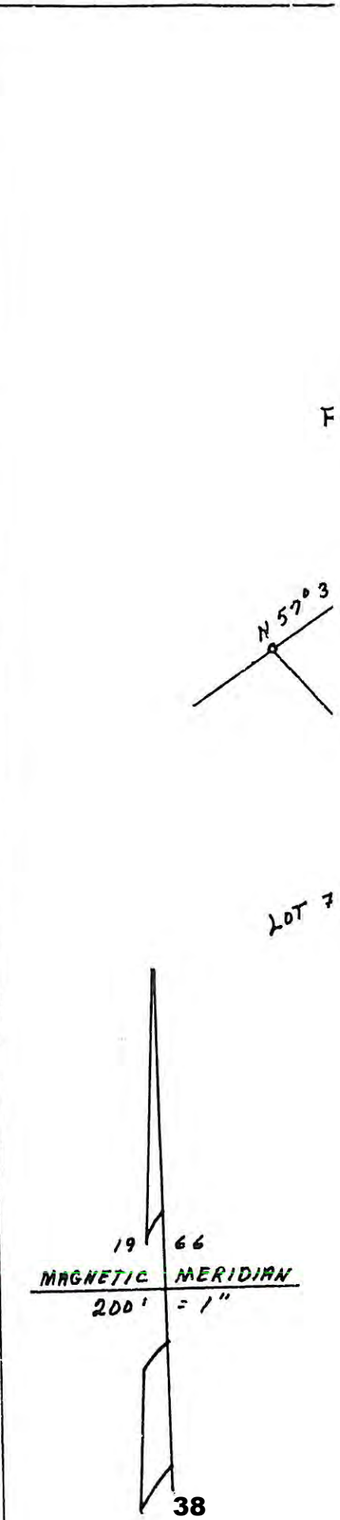
Stephen Stephens
STEPHEN STEPHENS
CERTIFIED LAND SURVEYOR, #828 + #130
116 WINSTON DR.
PHONE: CR 9-5462 - WILLIAMSBURG, VA.

PLAT of That part of:
ARMISTEAD HALL, Estate
property of:
CURTIS A. + NELLIE HALL
To be conveyed to:
WILLIAM G. + MARION M. SHIFFLETT
AND
JOSEPH E. + MARGARET L. BRITT
Scale: 1" = 100' NOV. 1965
ABINGDON DISTRICT, GLOUCESTER COUNTY, VIRGINIA
JOB #452

THIS PLAT, WAS DELIVERED TO THE CLERK OF THE CIRCUIT COURT OF GLOUCESTER COUNTY, VIRGINIA, ON THE 16th DAY OF OCTOBER 1967, ADMITTED TO RECORD AT 3:35 O'CLOCK P.M., WITH DEED FROM CURTIS A. HALL ET UX TO MARY DEES LOMBARD, WHICH DEED IS RECORDED IN DEED BOOK 147, PAGE 317.

TESTE:
[illegible] CLERK.

EXHIBIT
3

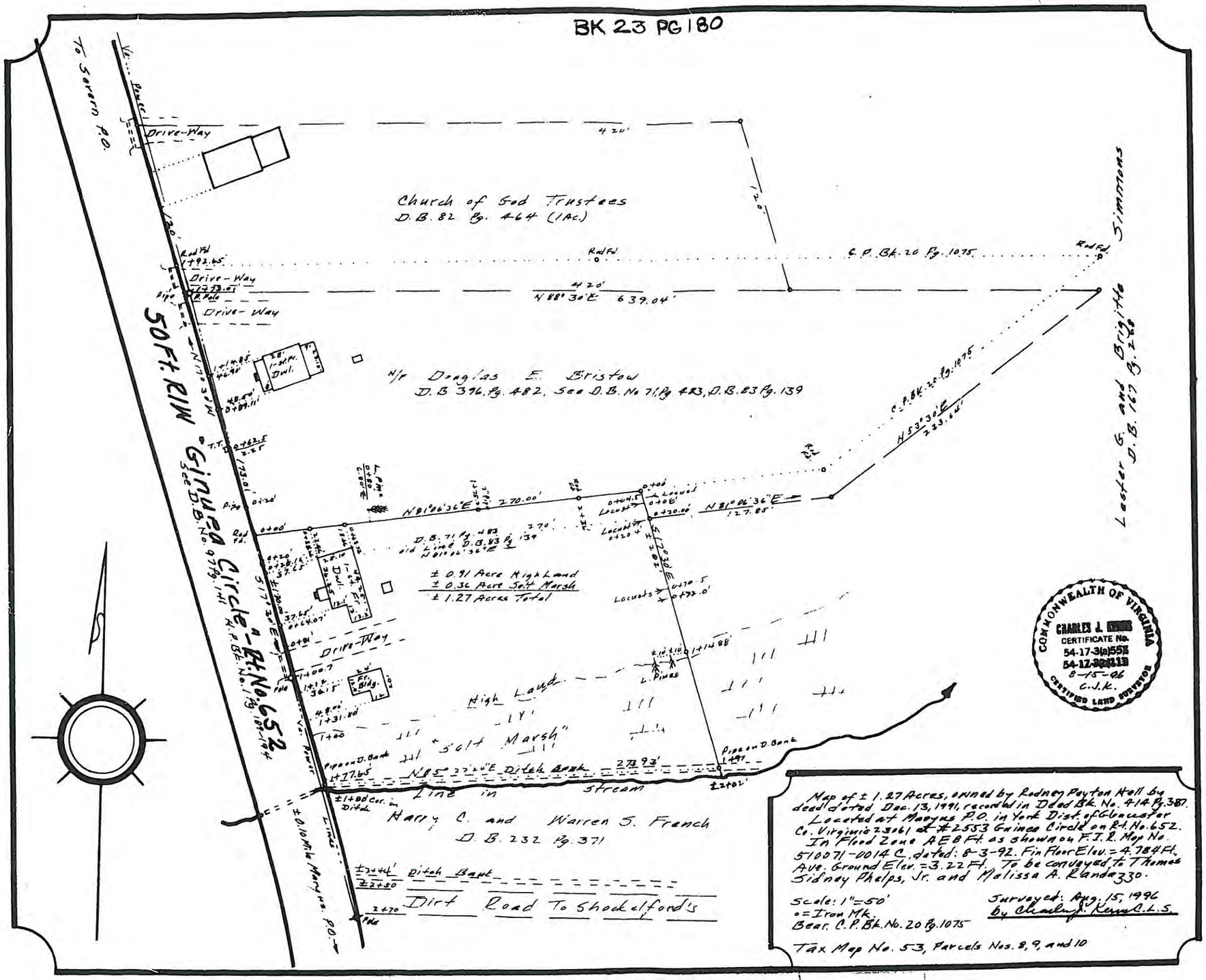


2553 Guinea Cir.

Approximate Outfall Ditch Location

EXHIBIT

4



EXHIBIT

5

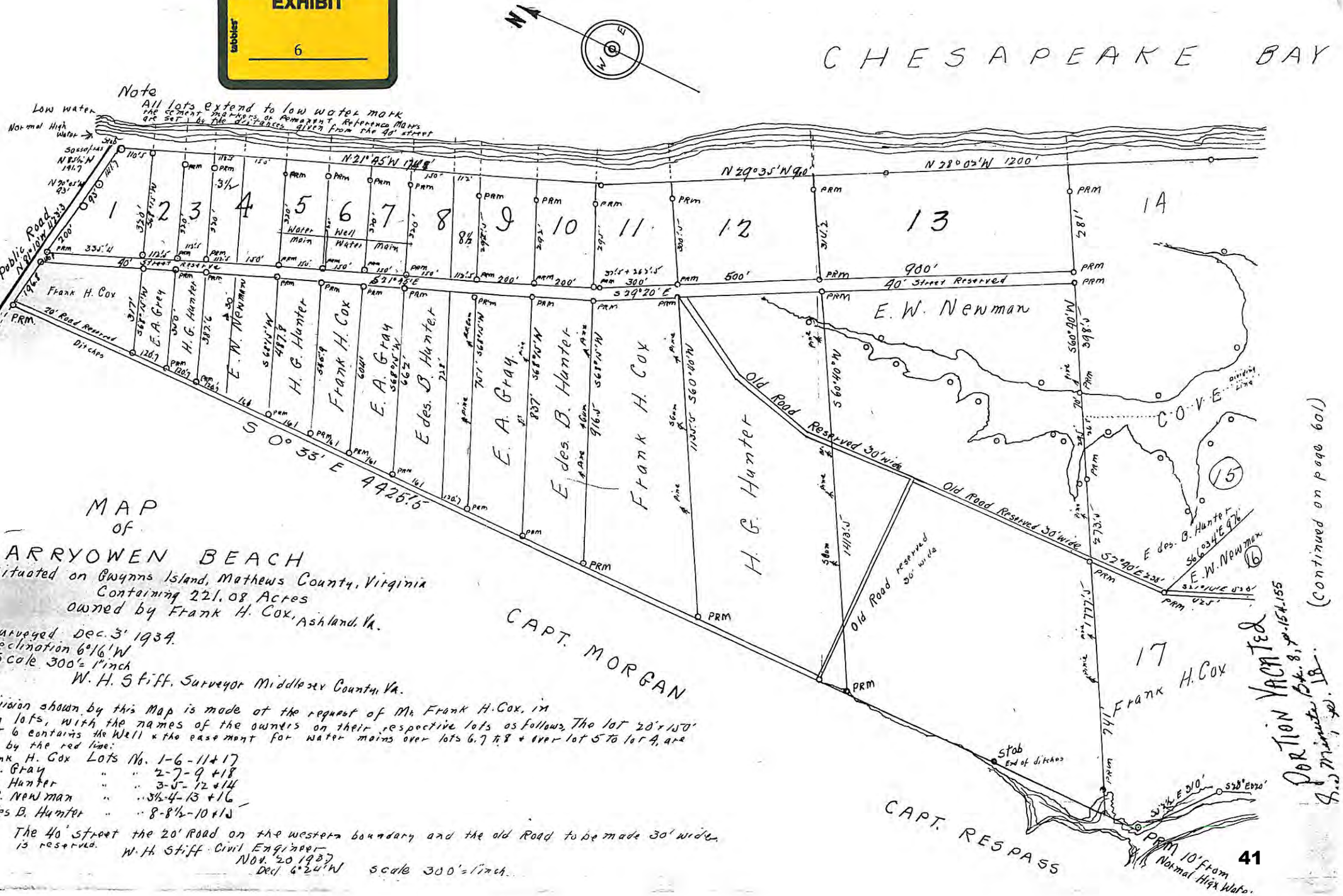
I certify that the plat(s) recorded with Instrument No. 96004139 was/were delivered to the Clerk of the Circuit Court of Gloucester County, Virginia, on the 19 day of AUGUST 19 96 at 3:16 o'clock P .m.

TESTE: CHARLES E. KING, JR., CLERK

Mathews Deed Book 23, p. 600

EXHIBIT

6



MAP
of
GARRYOWEN BEACH
Situated on Gwynns Island, Mathews County, Virginia
Containing 221.08 Acres
owned by Frank H. Cox, Ashland, Va.

Surveyed Dec. 3' 1934.
Declination 6°16'W
Scale 300' = 1" inch
W. H. Stiff, Surveyor Middlesex County, Va.

The division shown by this Map is made at the request of Mr. Frank H. Cox, in Twenty lots, with the names of the owners on their respective lots as follows. The lot 20'x150' on Lot 6 contains the Well & the easement for water mains over lots 6, 7 & 8 & over lot 5 to lot 4, are shown by the red line:

Frank H. Cox Lots No. 1-6-11 & 17
E. A. Gray " " 2-7-9 & 18
H. G. Hunter " " 3-5-12 & 14
E. W. Newman " " 3½-4-13 & 16
E des B. Hunter " " 8-8½-10 & 15

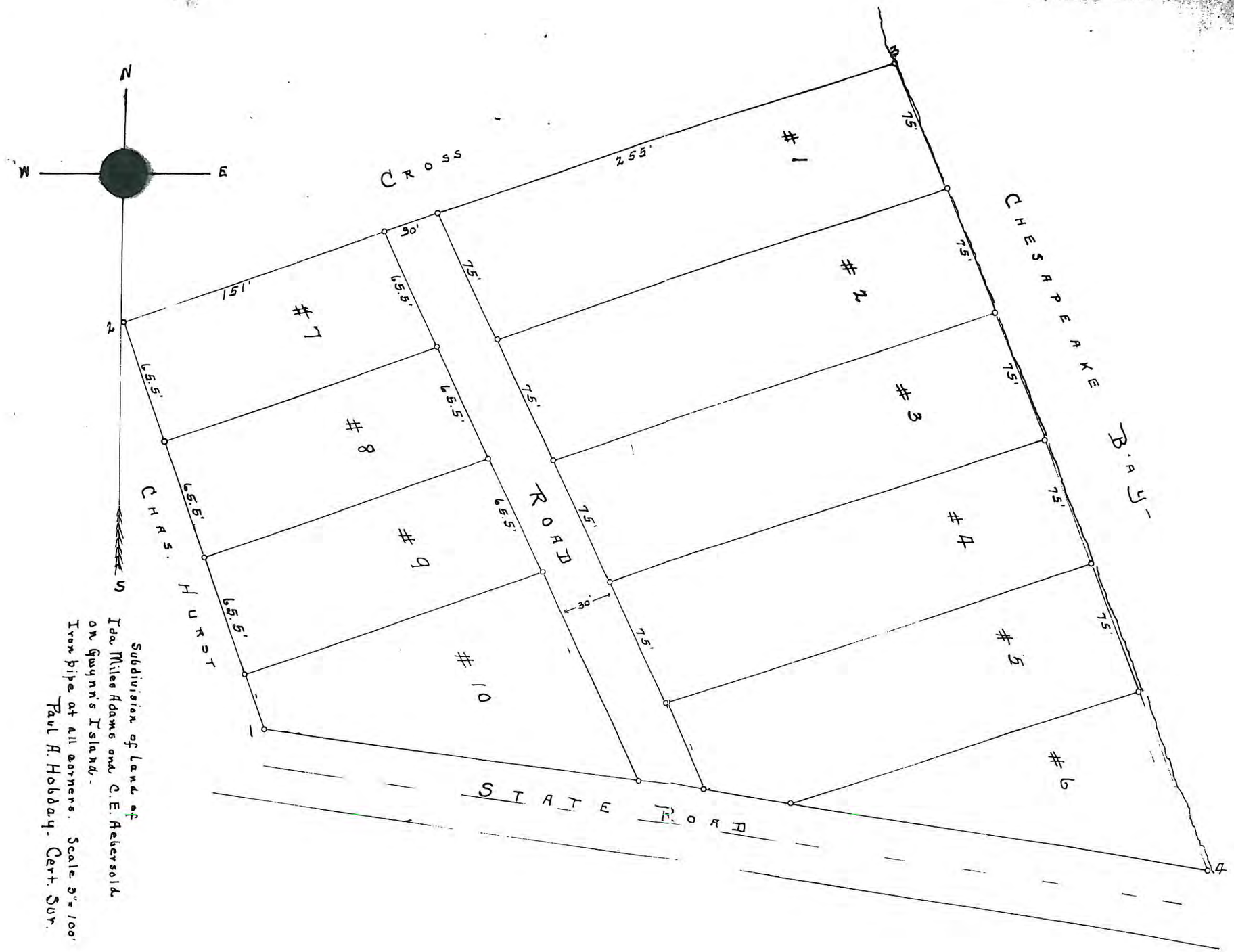
The 40' street the 20' Road on the western boundary and the old Road to be made 30' wide is reserved.

W. H. Stiff Civil Engineer
Nov. 20 1937
Decl 6°24'W scale 300' = 1" inch.

PORTION VACATED
Deed Bk. 8, pp. 154, 155
4.5 minutes, LB.

(continued on page 601)

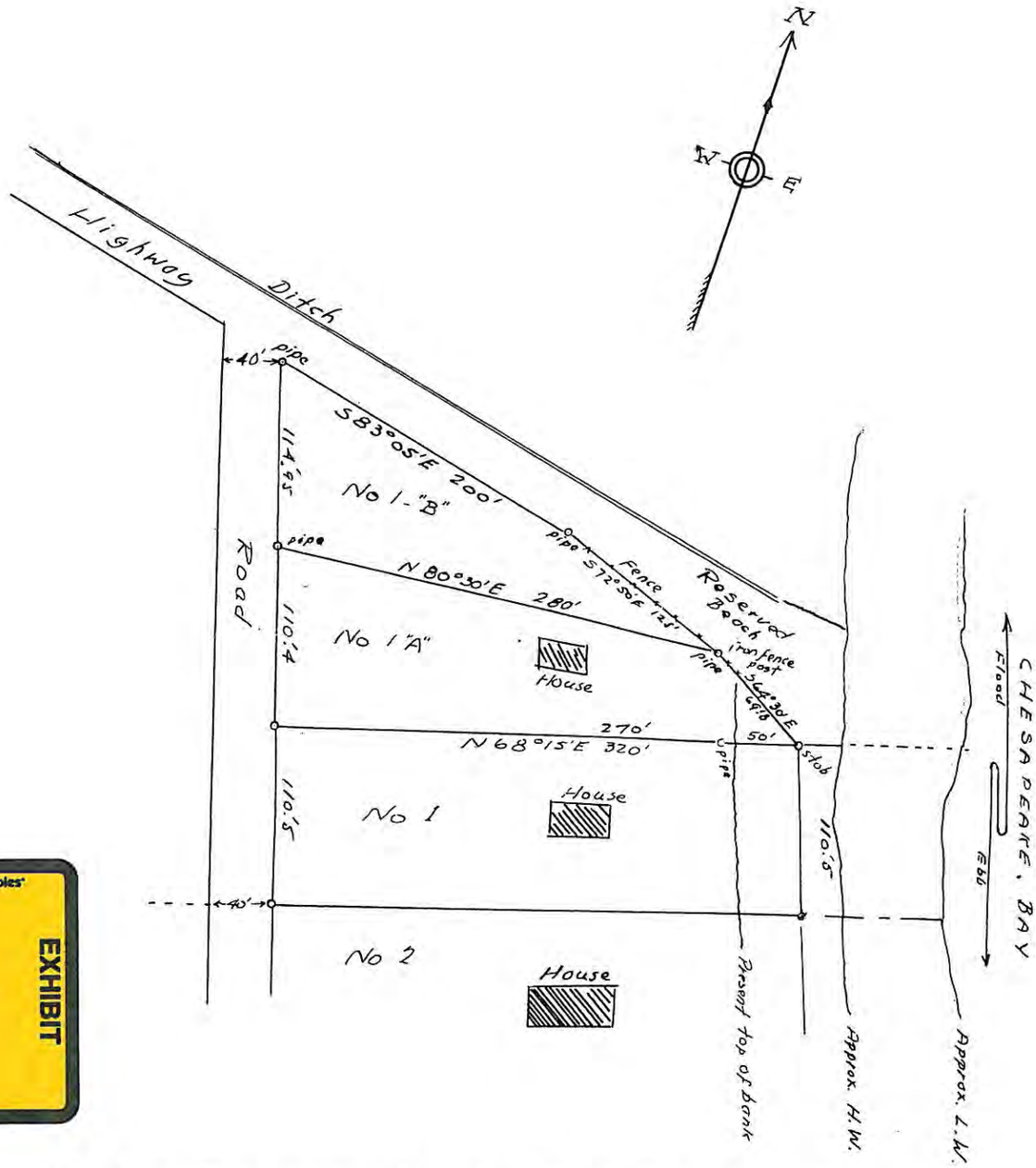
Mathews Plat Book 1, p. 77



Subdivision of Land of
Ida Miles Adams and C.E. Aebersold
on Gwynn's Island.
Iron pipe at all corners. Scale 3" = 100'
Paul A. Hobday. Cert. Sur.

EXHIBIT
7
42

Mathews
Plat Book 4, p. 206



The above Map represents Lots 1-"A" & 1-"B" owned by V. L. Robey, situated on the Chesapeake Bay Gwynns Island Mathews County, Virginia, and is the North Portion of Lot No 1 of the Gaingown Beach Subdivision D.B. 33-601 on is a division of Lot No 1 as shown by this Map. Lots 1-"A" & 1-"B" Extend to the beach Reserved for the Lots in said Subdivision that have No Water frontage for a bathing Beach. DB 44-132.133.

Surveyed March 9-23-1956.
Decl 6°50'W Scale 100' = 1" inch
W. H. Stitt
Civil Engineer

The above Plat is attached to and made a part of a Deed from Virgil Lee Robe and Celesta Heath Robey to Norman Douglas Davis and Elizabeth L. Davis recorded April 4, 1956, at 12 m. in Deed Book No. 54, page 496.

Teste: [signature]
Deputy Clerk.

tabbies EXHIBIT 8

Fees of sheriffs, for removal.

VI. *And be it further enacted,* That the fees due to the sheriff, for such removal of any prisoner, as aforesaid, from the county goal to the public goal, shall be after the rate of one hundred pounds of tobacco, for every twenty miles distance. And the fees to the said sheriff and keeper of the public goal, for keeping and dieting any prisoner in their goal, shall be five pounds of tobacco for each day, and no more.

For diet.

Repealing clause.

VII. *And be it further enacted,* That all and every other act and acts, and every clause and article thereof, heretofore made, for so much thereof as relates to any matter or thing whatsoever, within the purview of this act, is, and are hereby repealed, and made void, to all intents and purposes, as if the same had never been made.

CHAP. XXXIX.

An act for making, clearing, and repairing the highways, and for clearing the rivers and creeks.

I. FOR the more convenient travelling and carriage, by land, of tobaccos, merchandises, or other things within this dominion,

Public roads, how and where established.

II. *Be it enacted, by the governor, council, and burgesses, of this present general assembly, and it is hereby enacted, by the authority of the same,* That where the same is not already done, public roads shall be laid out by the surveyors of the highways, in their several precincts, in such places as shall be most convenient for passing to and from the City of Williamsburg, the court house of every county, the parish churches, and such public mills and ferries as now are, or hereafter shall be erected, and from one county to another; and that the highways already laid out, together with such as shall hereafter be laid out, by virtue of this act, shall, at all times hereafter, be kept well cleared from woods and bushes, and the roots well grubbed up, at least thirty foot broad: And if any person shall, at any time hereafter, fall any tree or trees into such highway, and shall not cut the same away again, within the space of forty eight hours after such falling; or shall make any fence into the highway, the person so offending, shall forfeit and pay, for every such offence, the sum of

Penalty for obstructing.

ten shillings current money, to the informer: To be recovered, with costs, upon information made to a justice of the peace of the county where the offence is committed.

May be altered.

III. *Provided nevertheless, and it is the true intent and meaning of this act,* That it shall be in the power of any county court, by their order, to direct the alteration of the public road, or the making of new roads, in such places as to them shall seem convenient. And for assistance to lay out and clear the highways, as aforesaid,

Who to work on.

IV. *Be it enacted,* That all male labouring persons that are tithable, shall, when thereunto required by the surveyors of the highways, assist the said surveyors in laying out and clearing the highways: And if any male labouring free tithable person, being so required, shall fail to go and assist therein; or if the master or owner of any labouring tithable person or persons being required to send such tithable person or persons to assist as aforesaid, shall fail to send accordingly, such free person shall, for such failure, forfeit and pay five shillings current money: And such master or owner, for every such tithable person as he fails to send, shall forfeit and pay five shillings like money, to the informer: To be recovered, with costs, as aforesaid.

Penalty for refusal.

Proviso.

V. *Provided nevertheless, and it is hereby enacted,* That any justice of the peace, to whom any information shall be made, of any such failure, shall have liberty, upon hearing the cause of the failure, to give judgment for the defendant, in case such cause appear to him to be reasonable: Which judgment shall be sufficient to acquit him from the forfeiture aforesaid.

Penalty on surveyors of roads.

VI. And, if any surveyor of the highways, shall fail to perform his duty, as the same is or shall be directed in this act, such surveyor shall forfeit and pay fifteen shillings current money, to the informer: To be recovered, with costs, as aforesaid.

Duty of surveyors.

VII. *And be it further enacted,* That every surveyor of the highways, shall have power, and be obliged, with the assistance aforesaid, to make bridges in all necessary places, within their respective precincts, which shall be at least ten foot broad, and level and passable: and also shall, from time to time, keep the same in good repair. And if it shall so happen, that there be

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EXHIBIT
9

Bridges, how erected.

occasion for a bridge over any place, where the surveyors, with the assistance aforesaid, cannot make it, then the county court shall have power, and be obliged, to covenant with some skilful workman for the making thereof: And also, they are hereby impowered to lay a county levy upon the poll, to pay for the same. And if such a bridge shall be wanting over any place, which lies between two or more counties, then the court of each county shall join in the agreement; and shall have power to lay a county levy, for the paiment thereof, proportionable to the number of tithables in each county: And every person having a plantation, is hereby directed and required to make a convenient passage for man and horse to go to his dwelling house, and from time to time to keep it in repair; upon pain of forfeiting and paying to the informer, for his neglect in making such passage, ten shillings current money; and also ten shillings for every six months such passage shall not be made, or being made, shall continue unrepaired: To be recovered, with costs, as aforesaid.

Roads to houses.

VIII. And, for the greater conveniency of such persons as inhabit upon plantations far distant from rivers and creeks,

Public landings, what deemed.

IX. *Be it enacted*, That all such landing places, as have store-houses, commonly called rolling-houses, built at or near them, or have heretofore been commonly used for bringing tobaccos unto, and to which there are plain roads already made, shall be held and accounted public landings: And the roads to such landings, or any other public landings hereafter to be appointed by the county courts, shall be kept in repair, sufficient for carts to pass to and from the same.

Surveyors of roads, when appointed.

X. *And be it further enacted*, That at some court, between the last day of April, and first day of August, yearly, the court shall appoint surveyors of the highways; and also, such persons, as to them shall seem most proper, to clear the rivers and creeks, within their respective precincts, from all trees, roots, or other things, which may be dangerous to any boat, sloop, or other vessel, passing up or down the same. And if any court shall fail to perform their duty herein, such court shall forfeit and pay two thousand pounds of tobacco, to him or them that will inform, or sue for the same: To be recovered, with costs. And if any person, so

Penalties.

appointed to clear the rivers and creeks, shall fail to perform his duty herein, some time in the months of March and October, yearly, he shall forfeit and pay the sum of fifteen shillings current money, to the informer: To be recovered, with costs, before a justice of the peace. And if any person shall fall any tree, into any river or creek, and not immediately clear the same away again, he shall forfeit and pay, for the first offence, ten shillings current money; and for every such offence after the first, fifteen shillings, of like money, to the informer: To be recovered, with costs, before a justice of the peace.

Falling trees into rivers or creeks.

XI. *And be it further enacted*, That if any person shall set, or cause to be set, a weir, in any river or creek, such person shall cause the stakes thereof to be taken up again, as soon as the weir becomes useless: And if any person shall fail of performing his duty herein, he shall forfeit and pay fifteen shillings current money, to the informer: To be recovered, with costs, before a justice of the peace.

Weirs, when to be removed.

XII. *And be it further enacted*, That all and every other act and acts, and every clause and article thereof, heretofore made, for so much thereof as relates to clearing, making, and repairing the highways, and for clearing the rivers and creeks, or any other matter or thing whatsoever, within the purview of this act, is and are hereby repealed, and made void, to all intents and purposes, as if the same had never been made.

Repealing clause.

CHAP. XL.

An act for regulating Ordinaries, and restraint of Tippling houses.

I. FOR regulating the abuses of ordinaries, and other houses of entertainment, and restraint of tippling houses,

II. *Be it enacted, by the governor, council and burgesses of this present general assembly, and it is hereby enacted, by the authority of the same*, That all persons whatsoever, retailing liquors, shall sell the same by sealed measures, and none other; and that all licensed ordinary-keepers, or keepers of houses for public entertainment, be provided therewith, viz. with gallon,

Sealed weights and measures, alone to be used.

45

Pg 450 DB 80

The said land was conveyed by Carlton M. Hobson, Sr., and Emma A. Hobson, husband and wife, to Worth S. Dunlap on the 10th day of April, 1953, which deed is of record in the Clerk's Office of the Circuit Court of Middlesex County, Virginia, in D.B. 67, page 46.

The Grantors Covenant that they have the right to convey the said land unto the Grantees: that they have done no act to encumber the said land; that the Grantees shall have quiet possession thereof free from all encumbrances; and, that they, the Grantors, will execute such further assurances of title as may be requisite.

WITNESS the following signatures and seals:

Worth S. Dunlap (SEAL)

Elizabeth W. Dunlap (SEAL)

STATE OF VIRGINIA

COUNTY OF MIDDLESEX, towit:

I, Jeffrey W. James, a Notary Public in and for the County aforesaid, in the State of Virginia, do hereby certify that Worth S. Dunlap and Elizabeth W. Dunlap, whose names are signed to the foregoing writing bearing date on the 8th day of September, 1962, have acknowledged the same before me in my County aforesaid.

Given under my hand this 8th day of September, 1962.

Jeffrey W. James, Notary Public

My Commission expires August 2, 1964.

Virginia to-wit:

In the Office of the Clerk of the Circuit Court for the County of Middlesex the 8th day of September, 1962, this deed was presented and, with the certificate annexed, admitted to record at 10:50 A.M. and had hereto affixed $5.00 in U. S. Revenue Stamps.

TESTE: Garland O. Reaves, CLERK.

345

State Tax.....NONE

.....

Nellie F. McHinn & Robert K. McHinn :
to :
Middlesex County School Board :
:

Verified

PB 91 - Pg 460

.....: THIS DEED, Made this 30th day of January, 1982, by and between Nellie F. McHinn and Robert K, McHinn, her husband, parties of the first part, and Middlesex County School Board, party of the second part:

WITNESSETH: That for and in consideration of the sum of Eight ($8,000.00) Thousand Dollars and other consideration deemed adequate at law, receipt of which is hereby acknowledged, the paid parties of the first part do sell, bargain and convey with General Warranty of title unto the party of the second part, the following described property, to-wit:

All that certain piece or parcel of land, lying in Pinetop Magisterial District of Middlesex County, Virginia, containing ten (10) acres, lying on the North side of Route #33, east of Hartfield and being more particularly described as follows:

Beginning at a set pipe on the right-of-way line from Route #33, thence N 84° 16' W a distance of 84.30 feet, to a point on the right of way line of a curve, thence 69.03 feet to a telephone pole (No. 297), thence N 5° 44' E a distance of 93.83 feet to a pipe, thence S 84° 16' E a distance of 680.55 feet to a pipe, thence

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EXHIBIT 10

dated September 21, 1961, which plat is recorded herewith as a part and parcel of this deed.

The property hereinconveyed is bounded on the East by the property of Payne, South by Route #33, West and North by other property of the grantors; and is a portion of that property acquired by Nellie W. French, now Nellie F. McKinn, by deed of The Bank of Middlesex and others dated March 25, 1937 and recorded in the Clerk's Office of Middlesex County, Virginia, in Deed Book 54, at page 171.

The grantors covenant that they are seized in fee simple of the said land: that they have a good and perfect right to convey an unencumbered fee simple title to the same to the grantees: that they have done no act to encumber the said land: that the grantees shall have quiet and peaceful possession of the said land, free from all encumberances: and that they will execute such further assurances of the said land as may be requisite.

Plat rec
Page 15

WITNESS THE FOLLOWING SIGNATURES AND SEALS:

Nellie F. McKinn (SEAL)

Robert K. McKinn (SEAL)

State of .....

County of .....

I, the undersigned a Notary Public, in and for the County aforesaid, in said State do certify that Nellie F. McKinn and Robert K. McKinn, her husband, whose names are signed to the foregoing deed bearing date the 30th day of January, 1962, have personally appeared before me and acknowledged the same before me in the County and State aforesaid.

Given under my hand this 20th day of February, 1962.

Maurice F. Timmons, Notary Public

My Commission expires on the 10th day of March, 1962.

CERTIFICATE OF APPROVAL

We, the undersigned attorneys, having been duly appointed by the Judge of the Circuit Court of Middlesex County, Virginia, as evidenced by an order, duly entered in Common Law Order Book 9, at page 460, to examine and approve title to the property being acquired by the School Board of Middlesex County, Virginia, do hereby certify that we have examined the title to the following property:

Ten Acres lying in Pinetop Magisterial District of Middlesex, Virginia, lying on the North side of Route #33 and being the same property which the school Board is acquiring from Nellie F. McKinn and Robert K. McKinn: being described as follows: Beginning at a set pipe on the right of way line from Route #33, thence N 84° 16' W a distance of 864.30 feet to a point on the right of way line of a curve, thence 49.93 feet to a telephone pole (No. 297), thence N. 5° 44' E a distance of 403.85 feet to a pipe, thence S 01° 36' E a distance of 608.45 feet to a set pipe, the place of beginning, and being more particularly described on a plat of survey prepared by Frank H. Miner, C.L.S., dated September 8, 1961, which plat is to be recorded herewith as a part and parcel of the deed.

And do further certify that we examined the records of the Clerk's Office of the Circuit Court of Middlesex County, as indexed, and have found the above described property to be free of all liens and encumberances of record.

Given under our hands this [illegible] day of [illegible]

DB. 80 Pg 452

Virginia to-wit:

In the Office of the Clerk of the Circuit Court for the County of Middlesex, thelith day of September, 1962, this deed was presented and, with the certificate annexed, admitted to record at 2:45 P.M. $8.80 in U.S. Revenue Stamps

TESTE: Garland O. Rivers, CLERK.

346

State Tax.....$16.00

C. Stanley Gray to Middlesex County School Board	**Verified**

THIS DEED, Made this 10th day of March, 19[illegible], between C. Stanley Gray, Single, party of the first part, hereinafter called the Grantor and Middlesex County School Board, party of the second part, hereinafter called the Grantee:

WITNESSETH: That for and in consideration of the sum of Three Thousand ($3,000.00) Dollars and other consideration deemed adequate at law, receipt of which is hereby acknowledged, the Grantor does grant and convey with General Warranty of Title, unto the Grantee, all of his interest in the following described property, to-wit

All that certain piece or parcel of land lying in the Town of Saluda, Saluda Magisterial District of Middlesex County, Virginia, containing 2.47 acres, beginning at a pipe at the Southeastern corner of the property of William Douglas Edwards, Jr. and Rachel Tackett Edwards, which corner is in the western boundary line of the property on which Middlesex High School is located, and which point is 3,[illegible] feet from the right of way line of U. S. Highway No. 17, thence S 21° 34' W a distance of 84.96 feet to a stake; thence S 11° 57' W a distance of 335.[illegible] feet to a stone in a fence line; thence N 71° 29' W a distance of 244.12 feet to a fence corner; thence N 03° 38' E a distance of 435.40 feet to a stake in a fence line; thence S 67° 30' E a distance of 303 feet to the place of beginning and being more particularly shown on a plat of survey prepared by Frank E. Miner, C.L.S., dated September 8, 1961, recorded as a part of this deed.

The property herein conveyed is bounded on the North by other property of C. Stanley Gray and the property of William Douglas Edwards, Jr. and Rachel Tackett Edwards; East by property of Middlesex County School Board; South and West by other property of C. Stanley Gray and is part of a larger tract of land that was deeded to Harold G. Gray and C. Stanley Gray By Blanche M. Saunders, Widow, on the 23rd day of September, 1944, which deed is of record in the Clerk's Office of the Circuit Court of Middlesex County Virginia, in D.B. 57, page 58, Harold G. Gray died intestate on the 12th day of October, 1954, and his interest in the residue of the aforementioned land was conveyed by James E. Gray and others, heirs at law of Harold G. Gray, to C. Stanley Gray, on the 8th day of February, 1955, which deed is of record in the aforementioned Clerk's Office in D.B. 70, page 45.

The hereinabove described real estate is a portion of the land conveyed by C. Stanley Gray, Single, to C. Stanley Gray and Josephine C. Gray, as joint tenants with the right of survivorship as at common law, on the 9th day of February, 1955 which deed is recorded in the Clerk's Office of the Circuit Court of Middlesex County Virginia, in D.B. 71, page 288. Josephine C. Gray having since died survived by

Mail to Middlesex Co. School Bd. Saluda, Va. 10/1/62

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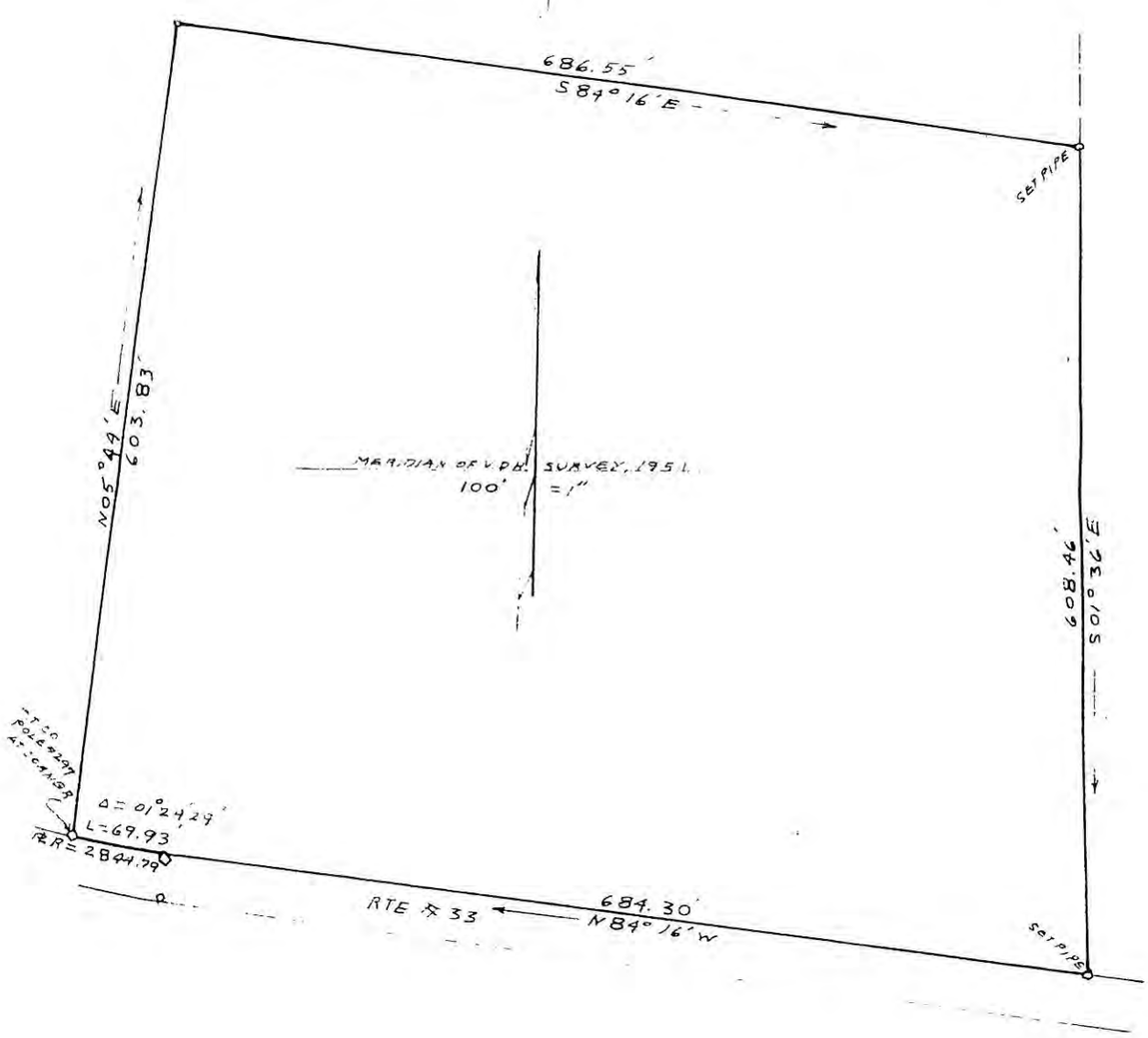
DB 80

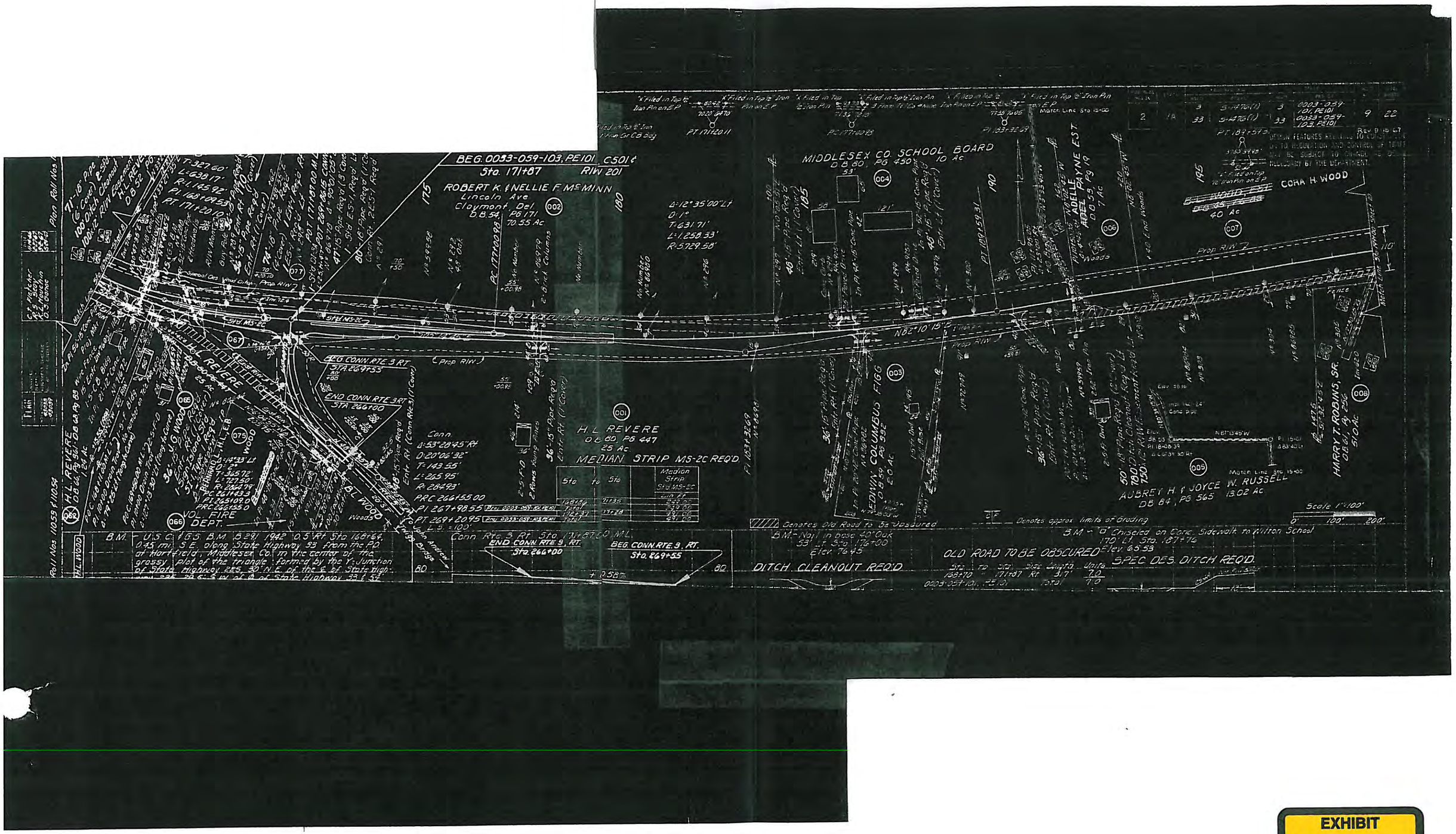
P9454



COMMONWEALTH OF VIRGINIA
FRANK E. MINER
CERTIFICATE NO.
727
CERTIFIED LAND SURVEYOR

SURVEY FOR CONVEYANCE OF 10.00 ACRES, BEING THE SOUTHEAST PORTION OF THE LAND OF MRS. NELLIE W. FRENCH ON THE NORTH SIDE OF RTE. 33 AT HARTFIELD IN PINETOP DISTRICT OF MIDDLESEX COUNTY, VIRGINIA.

R/R, CURVE, AND ALIGNMENT OF RTE. 33 ESTABLISHED BY ROAD BED.
SEPTEMBER 28, 1961 Frank E. Miner


BEG. 0033-059-103, PE101 C501 ℄
Sta. 171+87
RIW 201
ROBERT K. & NELLIE F. McMINN
Lincoln Ave
Claymont, Del.
D.B. 54, PG 171
70.55 Ac
MIDDLESEX CO. SCHOOL BOARD
D.B. 80, PG 450
10 Ac
CORA H. WOOD
40 Ac
ADELLE PAYNE EST
D.B. 53 Pg 19
7 Ac
H.L. REVERE
D.B. 80, PG 447
25 Ac.
MEDIAN STRIP MS-2C REQ'D
COLUMBUS FIGG
D.B. 59, PG 392
2.0 Ac
AUBREY H. & JOYCE W. RUSSELL
DB 64, PG 565
13.02 Ac
HARRY T. ROBINS, SR.
D.B. 61, PG 256
51.0 Ac
BEG. CONN. RTE. 3 RT.
STA. 269+55
END CONN. RTE. 3 RT.
STA. 266+00
Conn. Rte. 3 Rt. Sta. 171+67.00 M.L.
END CONN. RTE. 9, RT.
Sta. 266+00
BEG. CONN. RTE. 9, RT.
Sta. 269+55
DITCH CLEANOUT REQ'D
OLD ROAD TO BE OBSCURED
SPEC DES. DITCH REQ'D.
Scale 1" = 100'
0' 100' 200'

EXHIBIT

11

DB 87 pg. 527

Filed in Deeds of 7/2

Verified

. . . . . .

NELLIE MCMINN

AND

MIDDLESEX COUNTY SCHOOL BOARD

. . . . . THIS AGREEMENT TO CREAT AN EASEMENT, Made and entered into this 24th day of June, 1967, by and between NELLIE MCMINN, party of the first part, and MIDDLESEX COUNTY SCHOOL BOARD, party of the second part:

WITNESSETH: That for and in consideration of the sum of One ($1.00) DOLLAR, the party of the first part doth grant unto the party of the second part an easement as hereinafter described:

Said easement is to be fifteen (15) feet wide and one hundred fifty (150) feet long, and is to begin at a point in the northern line of the property upon which Wilton Elementary School is located and run in a northerly direction as agreed upon by the parties hereto.

This easement is granted for the purpose of enabling the party of the second part to provide proper drainage for the school play ground and is to revert back to the party of the first part should the property no longer belong to the second part.

This easement is an easement to allow the party of the second part to run pipes underground to carry off excess water. In this 150 feet area there are to be no open ditches and nothing shall be done to interfere with the party of the first part use of the land under which said pipes are to be.

WITNESS my signature and seal this 24th day of June, 1967.

Nellie McMinn (SEAL)

STATE OF VIRGINIA

COUNTY OF MIDDLESEX

I, Lewis Jones, Jr., a notary public in and for the county and state aforesaid, do certify that NELLIE MCMINN whose name is signed to the foregoing easement personally appeared before me and acknowledged the same this 24th day of June, 1967, in my county and state aforesaid.

Given under my hand this 24th day of June, 1967.

Lewis Jones, Jr., N. P.

My Commission expires: 5-24-1969

Virginia, to-wit:

In the Office of the Clerk of the Circuit Court for the County of Middlesex the 26th day of June, 1967 this deed was presented and, with the certificate annexed, admitted to record at 9:15 A.M.

Teste: Garland P. Revere Clerk

EXHIBIT

12

58-132

3484/
019 to
Soberick
12-9-02

THIS DEED IS EXEMPT FROM RECORDATION TAXES IMPOSED BY §§58.1-801 AND 58.1-803 OF THE CODE OF VIRGINIA, 1950, PURSUANT TO §58.1-811

THIS DEED OF GIFT made and entered into this 7th day of November, 2002 by and between **MIDDLESEX COUNTY SCHOOL BOARD**, a political subdivision of the Commonwealth of Virginia, Grantor, and **THE BOARD OF SUPERVISORS OF MIDDLESEX COUNTY, VIRGINIA**, Grantee, whose address is P.O. Box 428, Saluda, Virginia 23149;

WHEREAS, the Middlesex County School Board has declared the below described real property as surplus and no longer needs said property and;

WHEREAS, the Middlesex County School Board desires to convey said property to the County of Middlesex.

NOW THEREFORE in consideration of the foregoing the Grantor does hereby give, grant and convey with General Warranty and English Covenants of Title unto THE BOARD OF SUPERVISORS OF MIDDLESEX COUNTY, VIRGINIA and its successors, the following described real estate, to-wit:

All that certain piece or parcel of land, lying in Pinetop Magisterial District of Middlesex County, Virginia, containing ten (10) acres, lying on the North side of Route #33, east of Hartfield and being more particularly described as follows: Beginning at a set pipe on the right-of-way line from Route #33, thence N 84° 16' W a distance of 684.30 feet, to a point on the right of way line of a curve, thence 69.93 feet to a telephone pole (No. 297), thence N 5° 44' E a distance of 603.83 feet to a pipe, thence S 84° 16' E a distance of 686.55 feet to a pipe, thence S 1° 36' E a distance of 608.46 feet to a set pipe, the place of beginning and being more particularly described on a plat of survey prepared by Frank E. Miner, C.L.S. dated September 28, 1961, which plat is recorded in the Clerk's Office of the Circuit Court of Middlesex County; Virginia in Deed Book 80, page 454.

LAW OFFICES
DUSEWICZ AND SOBERICK, P.C.
2614 George Washington Mem. Hwy. / Post Office Box 388
Gloucester Point, Virginia 23062

EXHIBIT
tabbies
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The property herein conveyed is bounded on the East by the property of Payne, South by Route #33, West and North by property now or formerly of Nellie F. McMinn and Robert K. McMinn.

It being the same property conveyed unto Middlesex County School Board by deed dated January 30, 1962 from Nellie F. McMinn and Robert K. McMinn and recorded in the aforesaid Clerk's Office in Deed Book 80, page 450.

This conveyance is made subject to any easements, restrictions and reservations contained in the duly recorded deeds, plats and other instruments constitution constructive notice in the chain of title, which have not expired by a time limitation contained therein or have otherwise become ineffective, and to matters visible upon inspection.

In compliance with the provisions of §15.2-1803 of the Code of Virginia, 1950, as amended, this deed is in the form approved by Michael T. Soberick, County Attorney for the County of Middlesex, Virginia, and is accepted by him on behalf of the County of Middlesex, he having been authorized to so act on behalf of said County by a resolution duly adopted by the Board of Supervisors of said County at the meeting held on the 3rd day of December, 2002, which approval and acceptance is evidenced by the execution of this conveyance by the said Michael T. Soberick.

In Witness Whereof, the Middlesex County School Board, pursuant to a resolution duly adopted October 31, 2002, a copy of which is attached hereto and made a part hereof, has caused Richard J. Shores, Chairperson of the Middlesex County School Board to affix his signature and seal hereto.

MIDDLESEX COUNTY SCHOOL BOARD

By: Richard J. Shores (seal)
RICHARD J. SHORES, Chairman

Michael T. Soberick (seal)
MICHAEL T. SOBERICK
County Attorney for Middlesex County, VA

STATE OF VIRGINIA
COUNTY/CITY OF Middlesex, to-wit:

The foregoing instrument was acknowledged before me this 14th day of November, 2002 by Richard J. Shores, Chairman of Middlesex County School Board.

Lynn L. Dunlevy
Notary Public

My commission expires: 3-31-05

STATE OF VIRGINIA
COUNTY/~~CITY OF~~ Middlesex, to-wit:

The foregoing instrument was acknowledged before me this 3rd day of December, 2002 by Michael T. Soberick, County Attorney for Middlesex County, Virginia.

Marcia Smith Jones
Notary Public

My commission expires: 3-31-2003

BOOK 353 PAGE 776

RESOLUTION
DECLARING CERTAIN PROPERTY SURPLUS

WHEREAS, the Middlesex County School Board is the owner of certain real property currently used as Wilton Elementary School and more particularly described as follows:

All that certain piece or parcel of land, lying in Pinetop Magisterial District of Middlesex County, Virginia, containing ten (10) acres, lying on the North side of Route #33, east of Hartfield and being more particularly described as follows:

Beginning at a set pipe on the right-of-way line from Route #33, thence N 84 degrees 16 feet W a distance of 684.30 feet, to a point on the right of way line of a curve, thence 69.93 feet to a telephone pole (No. 297), thence N 5 degrees 44 feet E a distance of 603.83 feet to a pipe, thence S 84 degrees 16 feet E a distance of 686.55 feet to a pipe, thence S 1 degree 36 feet E a distance of 608.46 feet to a set pipe, the place of beginning, and being more particularly described on a plat of survey prepared by Frank E. Miner, C.L.S. and

WHEREAS, the Middlesex County School Board has acquired other real property and has relocated to Middlesex Elementary School to the nearly acquired real property and

WHEREAS, the Middlesex County School Board has no use for the above described real property and wishes to convey title to said property to the County of Middlesex,

NOW THEREFORE, BE IT RESOLVED, that the Middlesex County School Board hereby declares the aforesaid real property to be surplus property and

BE IT FURTHER RESOLVED, that the Chairperson of the Middlesex County School Board is hereby authorized to execute a deed of conveyance of said real property to the County of Middlesex, Virginia.

Executed by the Chairperson of the Middlesex County School Board on this 31st day October, 2002.

Richard J Shores
Chairperson
Middlesex County School Board

INSTRUMENT #020003484
RECORDED IN THE CLERK'S OFFICE OF
COUNTY OF MIDDLESEX ON
DECEMBER 9, 2002 AT 03:09PM
PEGGY W. WALTON, CLERK

Peggy Walton, Clerk

APPENDIX E:

VDOT's Response to House Bill 528

COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION
1401 EAST BROAD STREET
RICHMOND, VIRGINIA 23219-2000

January 13, 2014

The Honorable M. Keith Hodges
House of Delegates
Post Office Box 406
Richmond, Virginia 23218

Re: HB 528

Dear Delegate Hodges:

As a follow-up to your conversation with Jennifer DeBruhl, I am providing the following clarification of eligibility of drainage projects for Revenue Sharing program funds under Section 33.1-23.05 of the *Code of Virginia*. The current code language provides matching funds for the improvement, construction, reconstruction, or maintenance of roadways. This program provides funding for drainage improvements as an eligible item for funding under the Revenue Sharing program. By Code, first priority goes to improvement projects which accelerate an advertisement date either in the Department's Six Year Program or the locality's capital plan. Drainage projects which correct a roadway deficiency (i.e. address flooding concerns) and accelerate advertisement are categorized as priority one. Generic projects to perform ordinary maintenance activities (i.e. ditch cleaning) would be categorized as a priority three.

In our current application cycle (FY 15), we have received applications for 12 drainage projects and all 12 have been categorized as priority one based on their project description and advertisement schedule, including one from Mathews County. Based on our current budget, we expect all of these projects to be funded in the current cycle. Additionally, we will provide clarifying guidance regarding the eligibility of drainage projects for Revenue Sharing funding.

With regard to the proposed language on easements, the necessary authorizations are already provided under Section 33.1-89 of the *Code of Virginia* for VDOT administered projects and Section 33.1-75.3 of the *Code of Virginia* for County administered projects.

We do recognize the unique nature of the drainage issues on the Middle Peninsula and are committed to working with you, the Middle Peninsula Planning District Commission, and its member local governments on this issue.

Sincerely,

Richard L. Walton, Jr.
Chief of Policy