

The Problems

The Middle Peninsula Chesapeake Bay Public Access Authority (the “Authority”) was created in 2002 by the Middle Peninsula Chesapeake Bay Public Access Authority Act (§ 15.2-660, *et seq.*) to take over title and control of landings and other potential access sites in the Middle Peninsula so that they could be secured for use by the general public as public access sites. Among its duties were to develop appropriate mechanisms for transferring title from the Commonwealth or private holdings to the Authority. The Northern Neck Chesapeake Bay Public Access Authority Act was created in 2005 to perform the same function for the Northern Neck.

Most of the landings and sites that have been identified are the ends of roads within the Secondary System of Public Highways in which VDOT has either fee simple title or a prescriptive easement. The current statutory framework includes a roadblock to transferring those roads and landings to the Authority. Furthermore, VDOT’s title is not clear in a number of these roads, leading to situations in which a questionable fee simple title in VDOT could actually only be a prescriptive easement. Under the current statutory framework, those roads and landings could not be transferred to the Authority without running the risk of the public losing all rights to use those roads and landings.

All roads and landings within the State System of Secondary Highways and the State Highway System remain under VDOT’s jurisdiction until they are discontinued. Discontinuance, which is controlled by Virginia Code § 33.1-150, is an act reserved for the Commonwealth Transportation Board. It results from a determination by the Board that a road or landing no longer serves the public convenience to the extent that warrants its maintenance at public expense. Discontinuance of a road or landing means merely that VDOT will no longer be

maintaining the road. If VDOT already has fee simple title to the road or landing, it will continue to own the road or landing and the public will have the right to use the roadway or landing, but VDOT will have no maintenance responsibilities. If VDOT's right to use the road or landing is based on a prescriptive easement, the prescriptive easement will revert to the local governing body upon discontinuance. However, the public still has a right to use the road or landing and it remains a public roadway unless and until the board of supervisors abandons the road or landing. *Bond v. Green*, 183 Va. 23, 52 S.E.2d 169 (1949).

VDOT cannot discontinue a road unless it “deems such road, public landing or crossing is not required for public convenience”. It is this required finding which creates the need for the first legislation being proposed. The purpose of having a public landing discontinued is to allow the Authority to own and operate it as a public landing for the benefit of the public. Under that circumstance, it would be difficult for the Commonwealth Transportation Board to make a finding that the landing is no longer needed for the public convenience. Therefore, there is considerable question whether the process would result in a discontinuance. Accordingly, there is a serious question whether VDOT would be able to discontinue a road or landing and allow the fulfillment of the purpose of the Middle Peninsula and Northern Neck Chesapeake Bay Public Access Authority Acts.

The second problem is VDOT's ability to convey roads and landings to the Authority. Virginia Code § 33.1-154 authorizes VDOT to convey roads and landings that had been *abandoned* whose use is no longer deemed necessary by the Commissioner. However, it is silent as to whether VDOT has the same authority to convey roads and landings that it *discontinues*.

The Senior Assistant Attorney General in charge of all legal matters for VDOT indicated that this gap in the statute could prevent VDOT from conveying any landing it owns in fee

simple based solely upon a discontinuance. Although an argument could be made that VDOT has the authority to convey such a landing or road after discontinuance, there is no statute expressly giving that authorization. Presently, VDOT requires an abandonment of a road or landing before it will convey its fee simple title.

Abandonment, which is controlled by § 33.1-151, is significantly different from discontinuance. Abandonment is done by the local governing body, not VDOT. It extinguishes the public's right to use a public roadway or landing. If VDOT owns the fee simple title, VDOT will remain the owner, but the public will no longer have the right to use the roadway or landing. Va. Code § 33.1-153. If VDOT's rights were based on prescriptive easement, abandonment extinguishes the prescriptive easement and full control of the property reverts to the adjoining landowners. Therefore, the County as well as VDOT loses all interest in a prescriptive easement upon abandonment. **Therefore, no landing or road which the Authority wants to acquire can be abandoned if there is any chance that VDOT's right is based on prescriptive easement rather than fee simple title. Such an abandonment could result in the public losing all rights to use the road and landing and therefore defeat the purposes of the Middle Peninsula Chesapeake Bay Public Access Authority Act.**

Potential Legislative Action

First, it is recommended that a statute be created that would authorize VDOT to discontinue from its Secondary System of State Highways any roads or landings in the Middle Peninsula and Northern Neck which the Authorities desire to acquire, control and operate. The requirement that VDOT must find that the road or landing is not required for public convenience should be changed to require a finding that VDOT's control of the landing is not required for public convenience as long as the Authority is assuming that obligation.

Second, the Authority should also be granted rights similar to those provided to the Department of Game and Inland Fisheries (“DGIF”) in Virginia Code § 33.1-69.1. That statute authorizes the Commonwealth Transportation Board to transfer control, possession, supervision, management and jurisdictions over landings, wharves and docks in the Secondary System of State Highways to the DGIF, notwithstanding any other provision of law. It allows the transfer to be made by “lease, agreement or otherwise”. By including the phrase “notwithstanding any other provision of law”, § 33.1-69.1 avoids the complications with the discontinuance statute. To make it clear that the Authority could obtain also fee simple title by such transfer, the words “sell” and “deed” should be added to the list of methods of transfer of control.

Finally, either potential legislation or a separate section should authorize the conveyance by VDOT of discontinued roads and landings to the Authority, thereby curing the gap caused by Virginia Code § 33.1-154.