

Determining the “Value” of Previously Filled Subaqueous Lands in Virginia



English Common Law

Under English Common Law, a royal grant of land bounded by navigable waters (which meant tidal waters) conveyed no title to the subaqueous beds. It also conveyed only to the high water mark. This was the law until 1776.

The Rule of Decision

Among the ordinances passed by the General Convention at its meeting in Williamsburg on Monday May 6, 1776, the following appears in Chapter V:

And be it farther ordained That the common law of England,
*all statutes and acts of Parliament made in aid of the common
law prior to the fourth year of the reign of King James the First,
and which are of a general nature, not local to that kingdom,
together with the several Acts of the General Assembly of this
colony, now in force,* so far as the same may consist with the
several ordinances, declaration and resolutions of the General
Convention, shall be the rule of decision, and shall be considered
in full force until the same shall be altered by the legislative
power of this colony.”

Virginia Common Law

The portion pertaining to the acts of Parliament was repealed in 1792. The establishment of the Common law until altered by legislative power Has never been repealed and today that provision Appears in the Code (§1-200)

Virginia Common Law

§1-200 of the Code of Virginia. – The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

Ch 741 Acts of Assembly 1999

§28.2-1205.F

Directs the Commission to exercise its authority, consistent with the public trust doctrine as established in common law to protect the public right to the use and enjoyment of the subaqueous lands held in trust by the Commonwealth. Actions taken in conformance with the public trust are not to be considered an exercise of the police power.

Virginia History

1776 to 1779 - Grants could be made by a special act of the legislature

1779 - General Assembly set up a land office to issue patents for “waste and unappropriated land”. This phrase did not authorize the granting of the beds of navigable waters or lands covered by water.

Virginia History

1792 – General Assembly expressly prohibited the grant of the “bed of any river or creek in the eastern part of this commonwealth.”

1819 – General Assembly extended boundary of all riparian lands to the low water line.

Virginia History

1873 - Section 62-1 of the Virginia Code reinstated the prohibition against granting the beds and shores if they had not been previously been conveyed, but removed the requirement that they had been used as a common. This section is virtually the same one that remains today in §28.2-1200

The Commonwealth, therefore, owns the beds of navigable waters and cannot, by grant, patent or other means convey its title to private ownership. One who lawfully fills on state-owned subaqueous bottoms does not acquire title to the bottom filled, whether the fill is authorized by Commission permit, statutory authorization or a permanent easement. Title to the filled bottoms at all times remains in the Commonwealth. (Official Opinion of Attorney General Marshall Coleman dated December 21, 1981)

Absent a specific reservation of public rights in the filled area, fill that is lawfully placed on state-owned bottoms authorizes the riparian owner's exclusive private use of the filled area, including the filled bottoms. This exclusive right to use state-owned bottoms constitutes a compensable property interest, even though the title to the filled bottoms at all times remains in the Commonwealth.

The riparian property owner cannot acquire any compensable interest in bottoms which are filled unlawfully.]

Article XI, §3 of the VA Constitution (which affords special protection to the natural oyster beds defined by the Baylor survey) is the only section which contains any restriction upon the powers of the legislature to dispose of the tidal bottoms of the State and the waters above them.

[This constitutional provision is substantially the same provision as that appearing in Article XIII, §175 of the Constitution of 1902]

summary, the only mechanism whereby a property owner may acquire the underlying fee simple interest in lawfully filled land, is by virtue of an Act of Assembly.

This presentation will discuss the past and present mechanisms used to determine what the public should receive in the way of compensation for the property interest being conveyed.

Ch 201 Acts of Assembly 2006

General Assembly authorizes the Marine Resources Commission, on behalf of the Commonwealth, to convey 1.2 acres more or less to Jerry W. Ferguson, his successors and assigns, upon such terms and conditions as the Commission, with the approval of the Governor, shall deem proper.



1967



4/01

Commission Royalty Schedule

(eff. December 1, 2005)

Upland Creation (fill placement)

- Private \$1.00 / sq. ft.
- Commercial \$3.00 / sq. ft.
- Industrial \$5.00 / sq. ft.

Jerry W. Ferguson

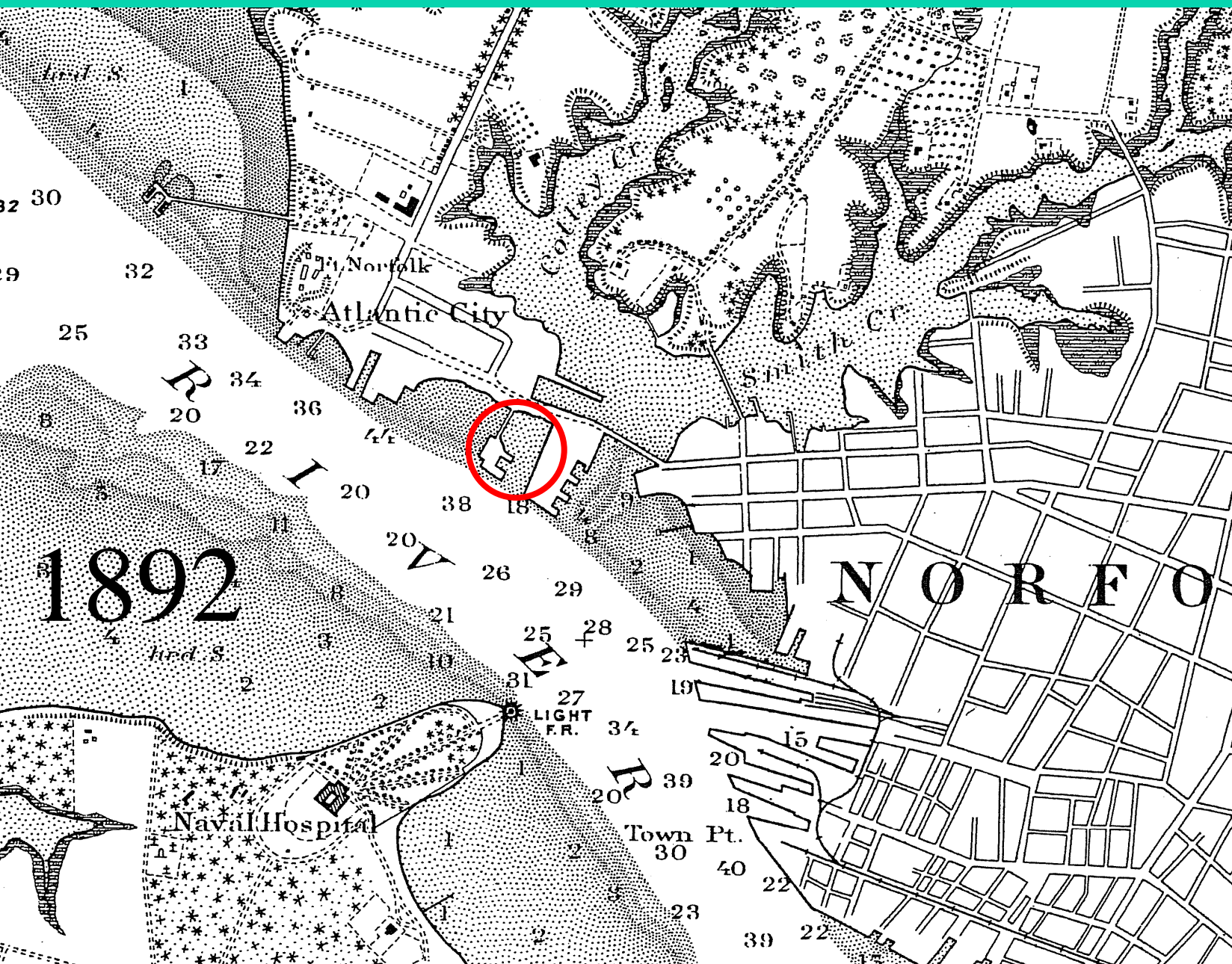
The Marine Resources Commission, at its meeting on July 25, 2006, approved the conveyance of a causeway and island located on approximately 1.2 acres (52,272 sq. ft.) of State-owned submerged land in the Rappahannock River at a rate of \$2.75 / sq. ft. for a total of \$143,748.00

Moon of Norfolk LLC

Ch 884 Acts of Assembly 2006

HB 1533 (as submitted) – Authorized the Governor to convey, *subject to such terms and conditions as are deemed proper* by the Marine Resources Commission, such rights, title and interest as the Commonwealth may have in a piece or parcel of subaqueous land ...

HB 1533 (as amended by the Governor) – Authorized the sale and conveyance of the property, *subject to such terms and conditions and the payment of fair market value considerations deemed proper* by the Marine Resources Commission, such rights title and interest as the Commonwealth ...



1892

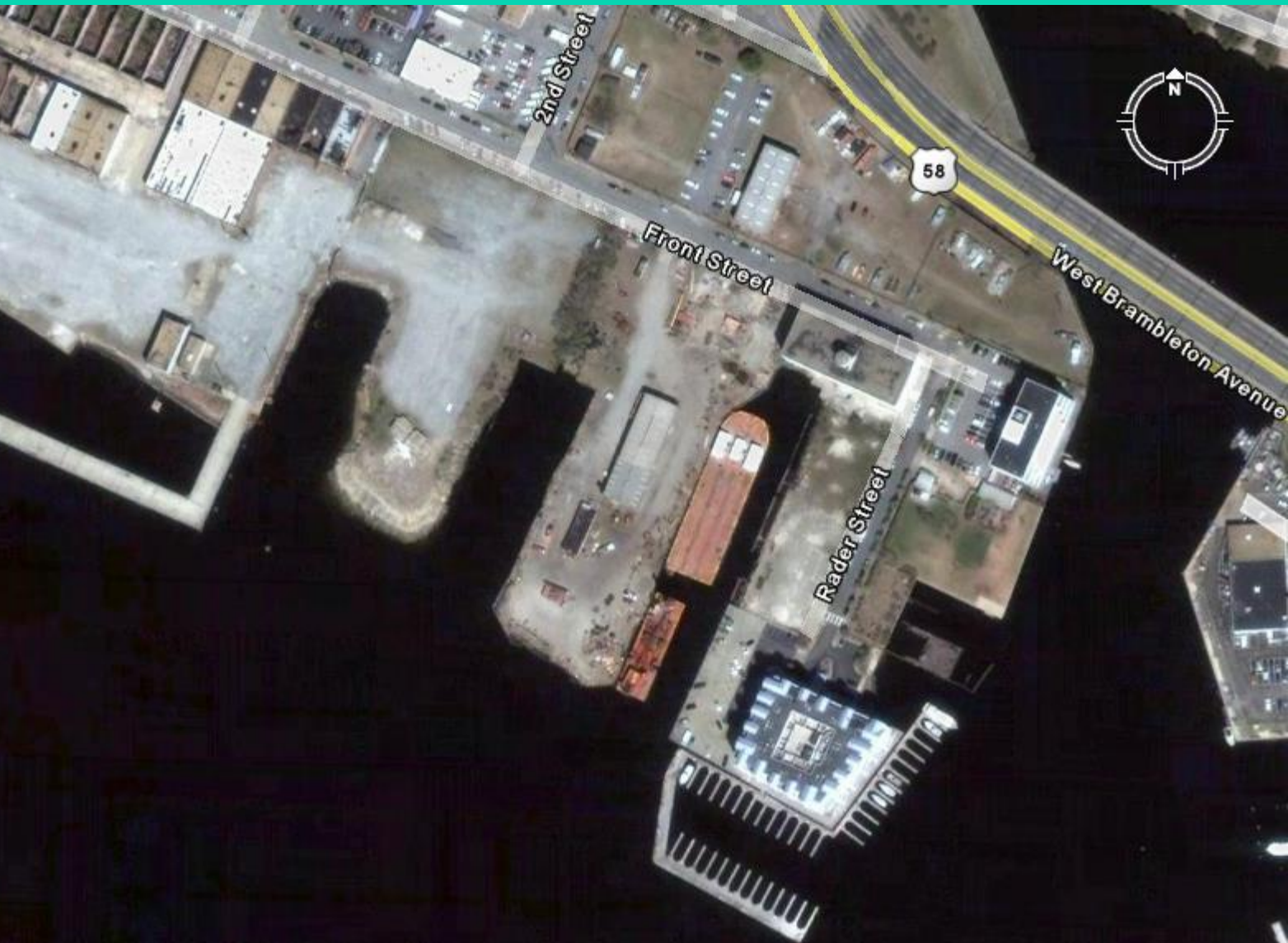
Norfolk
Atlantic City

NORFOLK

Naval Hospital

LIGHT
F.R.

Town Pt.



oon of Norfolk LLC

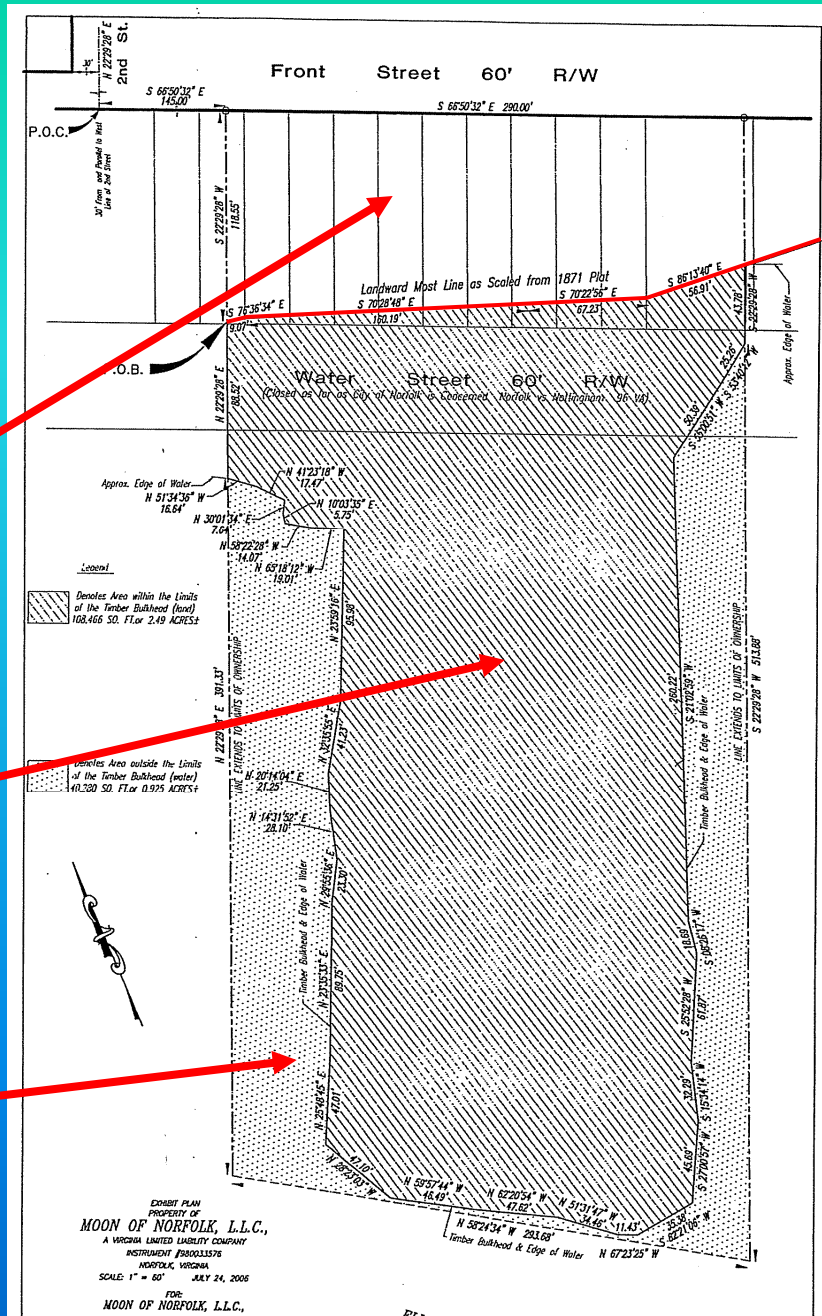


Moon of Norfolk

and landward of 1871 mlw
51 acres (22,215 sq ft)

Previously filled land
49 acres (108,466 sq ft)

filled subaqueous lands
25 acres (40,280 sq ft)



2006 Legislative Budget Amendment

Page 511, after line 43 insert:

§4-5.11 TRANSFER OF CERTAIN
SUBAQUEOUS LAND

Except for subaqueous lands that have been filled
prior to January 1, 2006, the Governor shall not sell
or convey those subaqueous lands identified by
metes and bounds in Chapter 884 of the Acts of
Assembly of 2006.

Ch 879 Acts of Assembly 2007

§28.2-1200.1.A

In order to fulfill the Commonwealth's responsibility under Article XI of the Constitution of Virginia to conserve and protect public lands for the benefit of the people, the Commonwealth shall not convey fee simple title to state-owned bottomlands covered by water.

Ch 879 Acts of Assembly 2007

§28.2-1200.1.B

The Commonwealth may convey fee simple title to specified parcels of state-owned bottomlands that have been “lawfully filled”. For the purpose of this section, lawfully filled means

- (i) Authorized by Statute
- (ii) Pursuant to Court Order
- (iii) Authorized or Permitted by State Officials after July 1, 1960
- (iii) Filled under apparent color of authority prior to July 1, 1960

Ch 879 Acts of Assembly 2007

§28.2-1200.1.C

Grantee shall compensate the Commonwealth in an amount commensurate with the property interest conveyed.

Equivalent to 25% of the assessed value (exclusive of any buildings and improvements).

Assessed value is the average of the local real estate tax assessments for the preceding ten years.

If no such assessments are available, then the value is calculated as the percentage, by square footage or acreage, that the specific parcel is of a larger parcel for which assessments are available.

Ch 879 Acts of Assembly 2007

§28.2-1200.1.D

If the Commission determines that unique circumstances exist, the Commission may allow the grantee to compensate the Commonwealth in an amount less than 25 percent of the assessed value of the specified parcel. Any such determination by the Commission shall be justified in writing and shall not be subject to judicial review.

Moon of Norfolk LLC

(illustrative example only)

Prior Procedure

108,466 sq ft

@ \$3.00 / sq ft

(commercial rate)

= \$325,398.00

@ \$5.00 / sq ft

(industrial rate)

= \$542,330.00

• New Procedure

Average Assessed Value of
land over last ten years

= \$597,410.00

25% Average Assessment

= \$149,352.50

Ratio filled to unfilled land

2.49 acres of 3 acres (83%)

Compensation Due

= \$123,962.58

Summary / Conclusion

The General Assembly has provided the Commission with guidance and a template to be used in determining the value of the property right being conveyed when title to previously filled public trust lands are conveyed to private parties. How that procedure will be used, and whether it will be accepted, remains to be seen.