ABERDEEN CREEK HARBOR MASTER PLAN

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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 sub-agencies.

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Table of Contents

(Table of Contents Continued)

List of Maps

Figures

Introduction

Within Gloucester County, and in most coastal communities nationwide, the commercial seafood industry has had to adapt and shift as coastal land use and waterfront property ownership is altered. Historically, as epicenters of economic development, coastal communities were the location of strong fisheries and shipbuilding industries, as well as public access areas for recreational and commercial uses. However, as more and more people move toward the coast, the changing coastal dynamics and demographics ultimately threaten traditional and culturally significant working waterfront industries (i.e. commercial seafood). Jack Wiggins' Urban Harbor Institute's white paper titled "Preserving and Promoting a Working Harbor: The Experience of Gloucester, Massachusetts" articulates the true nature of the challenge faced by many coastal communities:

> *"Without economically viable waterfront business, property owners are unable, and lending institutions unwilling, to invest in capital improvements needed to maintain piers, wharves and other waterfront infrastructure"…."The viability of many businesses on the Gloucester (Mass) waterfront has been and remains tied to the health of the commercial fisheries."*

Coastal Gloucester, Virginia is very similar in this regard. Two local studies, the *York River Use Conflict Study*, in 2008 (NOAA Contract Number NA07NOS4190178 TASK 44), and *The Perrin River Commercial Seafood Harbor Master Plan*, in 2013 (Fisheries Resource Grants Program, http://www.vims.edu/research/units/centerspartners/map/frg/index.php), identified the need to manage various waterfront use issues and to protect the working waterfront. The studies provided recommendations that were unique to the location and character of working waterfront businesses as well as general recommendations that can be applied consistently throughout the industry. (Both studies can be found on the Middle Peninsula Planning District Commission website http://www.mppdc.com/ under "Reports"). *The Perrin River Commercial Seafood Harbor Master Plan* further identified the positive economic value of the working waterfront and the pressing need, identified through interviews with local watermen, for preserving and enhancing public access in the Middle Peninsula in Gloucester County, Virginia. Concurrently, a 2013 report to the Virginia Institute of Marine Science, *Middle Peninsula of Virginia Working Waterfront Infrastructure Inventory*, worked with localities, watermen, and citizens to develop a regional definition of Working Waterfronts for the Middle Peninsula of Virginia (Figure 1).

Another unique working waterfront location just off the upper York River in Gloucester County, Virginia is Aberdeen Creek. Aberdeen Creek provides seasonally critical access for landing, docking, and mooring in close proximity to the public and private oyster grounds and public crabbing grounds on the upper York River. Interviews with local watermen found that water access sites on the upper York River are vital to their businesses and that Aberdeen Creek is one of the few locations they use, have traditionally used, and want to continue to use.

The waterfront property on Aberdeen Creek is predominantly developed as single family residences, with the exception of a working waterfront area consisting of one public landing and one commercial property. While both of the working waterfront properties are in states of disrepair, they continue to be over utilized by commercial watermen during crab and oyster seasons (see Chapter 1).

The public landing has two piers and records show that the property was deeded in 1947 to government ownership specifically to be used as a public landing. However, determining what government entity owns the landing is complicated. Adjacent to the public landing is the commercial property, the former seafood processing facility, Gloucester Seafood, Inc. This property was used for processing long before Gloucester County adopted a zoning ordinance in 1984. Gloucester Seafood, Inc. maintained a business license until 2010, but they did not renew their business license after that year. The property was zoned single family residential when zoning was adopted and this zoning remained in place as part of the county-wide rezoning and zoning ordinance updates adopted in 1998. The zoning ordinance classified seafood processing as a use permitted only by special exception in certain zoning districts and not at all within the Single Family (SF-1) zoning district. Because the seafood processing use on this property was established prior to the enactment of the zoning ordinance and subsequent amendments, it was allowed to continue as a legally non-conforming use. However, pursuant to both state and local regulations, once a use ceases to exist for over two years, it no longer has vested rights to that non-conforming use. Therefore, when Gloucester Seafood, Inc. became inactive for more than two years (Figure 2), the legal nonconforming status of the property ceased. While the site is not actively used for seafood processing, it does retain much of the infrastructure that could be beneficial to working watermen.

With commercial watermen depending on sites such as those found on Aberdeen Creek, there is particular urgency for a master plan that assesses the needs of the commercial seafood industry, harbor management, and current and future infrastructure improvements for Aberdeen Creek, as well as other critical working waterfront areas within Gloucester County. A well designed and focused strategy for Aberdeen Creek will help to ensure that current and future commercial watermen have access to strategically local infrastructure and business support services to enhance and protect the important economic and cultural practices of the seafood industry in the county.

While there are potentially a myriad of steps associated with permitting a business on coastal waters, both at the federal (Army Corps of Engineers, Occupational Safety and Health Administration, etc.), state (Virginia Marine resources Commission, Virginia Department of Health, etc.), and local level, this report focuses on the issues and solutions at the local level that

are within the purview of local government to help facilitate the preservation of working waterfront businesses.

Local governments are granted powers to manage land use by the Virginia General Assembly. Local government dictates the permitted uses, which is the first and most important step in the process of establishing, reestablishing and continuing use of working waterfront businesses.

Figure 1

Source: Report to the Virginia Institute of Marine Science: *Middle Peninsula of Virginia Working Waterfront Infrastructure Inventory, 2013*

Regional Definition of Working Waterfronts

In the Middle Peninsula of Virginia, the term `working waterfront' means real property (including support structures over water and other facilities) that provides access to coastal waters to persons engaged in commercial fishing, recreational fishing businesses, boatbuilding, aquaculture, or other water-dependent, coastal-related business and is used for, or that supports, commercial fishing, recreational fishing businesses, boatbuilding, aquaculture, or other water-dependent, coastal-related business.

Public Landing on Aberdeen Creek 2013

Map A
Aberbeen Creek Master Plan Area
Gloucester County, Virginia

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MIDDLE PENINSULA PLANNING DISTRICT COMMISSION

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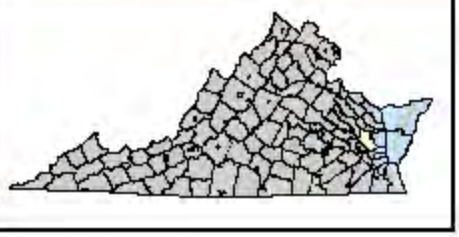
Virginia Coastal Zone MANAGEMENT PROGRAM



Chapter 1

Aberdeen Creek Property Information

Most of the waterfront properties around Aberdeen Creek consist of privately owned single family residences, with the exception of a small public landing and a deteriorating commercial seafood processing facility formerly known as Gloucester Seafood, Inc., both located at the end of Aberdeen Creek Road (Map B). The Commonwealth of Virginia recently acquired waterfront property on Aberdeen Creek for the future "Middle Peninsula State Park". Given that the Aberdeen Creek portion of the future park is upstream of the existing working waterfront area, has no existing infrastructure such as piers or ramps, and is not traditionally used by watermen, it is unlikely that the watermen can benefit from use of the park. However, the state park may become an important factor when the issue of dredging and spoil relocation from Aberdeen Creek arises in the future.

Public Property

Existing Infrastructure

The public landing is the only public property on Aberdeen Creek that has infrastructure for watermen. Public records show that the site, consisting of .50 acres of land and two small piers, was, in 1947, jointly deeded to the Board of Supervisors Gloucester County, Virginia, and the Department of Highways of the State of Virginia (currently the Virginia Department of Transportation - VDOT), and the Commonwealth of Virginia. The responsibility "to establish and construct said public highway and public landing" was assigned to the Virginia Department of Transportation (VDOT) (Appendix A). The deed does not indicate ongoing maintenance responsibility however; VDOT has primarily provided maintenance oversight.

The facilities at the landing have experienced significant usage over the years, and are deteriorating due to lack of a regular maintenance program and are in need of improvement and re-design to maximize the safety and use. Watermen stated that boat slips on Aberdeen Creek are few and those at the existing public dock are not adequately sized to accommodate most working boats. With as many as seven boats being docked at a time at the public dock, additional slips are needed. However, the watermen also stated that shoaling on Aberdeen Creek may be the most significant threat to maintaining a working waterfront presence on the creek. The shoaling issue is a theme that has been mentioned every time Aberdeen Creek is discussed with the watermen. See Page 19 for further discussion of the shoaling issue.

Map B- Aerial
Aberbeen Creek Master Plan Area
Gloucester County, Virginia

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Existing Uses

The watermen traditionally use the public landing site for parking, boat docking, unloading daily catch, storing gear, accessing the water, transferring catch to commercial vehicles, and other associated commercial uses. Due to the early hours most watermen visit the landing, and at the request of the watermen using the piers, lighting was provided on site by Virginia Department of Transportation. There are no formal slips (the two piers are "L" shaped with no outside pilings for slips), however, use of the existing infrastructure is maximized. Use of the facilities occurs during spring, summer, and fall crab and oyster seasons. On an average day during the fall crabbing season, a site visit noted seven boats tied to the wharf using a traditional practice of "side-to" or "rafting" together of vessels docking at the public landing piers.

It is commonly understood that a public landing exists at Aberdeen creek. The question of ownership, maintenance, and jurisdiction (concurrent and/or singular) over the public landing is extremely complicated and convoluted. Two public entities remain at the center of historic documents on issues related to ownership, maintenance, and jurisdiction: The Virginia Department of Transportation (VDOT) and Gloucester County. The traditional practice of public landing maintenance at Aberdeen has rested with VDOT. However, there are numerous stories and recounts of the County and other government entities helping to address maintenance of public landings all over Gloucester when collaborative partnerships are needed. There is no reason to believe this historic practice of partnership has not existed at Aberdeen landing in the past.

Formal and informal negotiated agreements of understanding including gentlemen's agreement, Memoranda of Understanding (MOU's), Board of Supervisors' action, County code amendments and other local and state policy actions have compounded and further confused the issue of ownership, maintenance, and jurisdiction. However, it is clear that the land was dedicated as a public landing and has been used as such since the late 1940's.

Further adding to the confusion of ownership, maintenance, and jurisdiction is Sec 21-8 of the Gloucester County Code. This section of code is intended to explain the uses allowed by right and the authority Gloucester County has over public wharves that they **own or control**. The final question of ownership and control will need to be negotiated between VDOT and the County. If ownership and control of the public wharves is obtained by the County, Sec 21-8 can help clarify how public wharves are managed within Gloucester.

Sec.21-8 below explains the uses allowed by right and the authority Gloucester County has over public wharves that they own or control.

Sec. 21-1 of the Gloucester County ordinance characterizes the public landing as a wharf stating "***Wharf*** *shall mean an artificial structure into a body of water from the shore, to be used for the reception of boats and watercraft.*" This definition is important because the Gloucester County Ordinance provides provisions for county management of wharves.

Sec. 21-8 Wharves

(a) Public wharves in Gloucester County are for the use of the general public and shall be open to all vessels both recreational and commercial.

(b)The board of supervisors may, from time to time, designate certain portions of any wharf or pier owned or controlled by the County of Gloucester for commercial use only, for recreational use only, for loading or unloading, for overnight mooring, or for any other purpose deemed appropriate by the board.

(c)Any cargo, vessel, or equipment, of whatsoever kind, placed upon or moored to the wharf or pier shall remain there solely at the risk of the owner, and the wharf shall be available for the use of the general public on equal terms with the owner of such property while such property remains on the wharf.

Public Landing (left) and Gloucester Seafood, Inc. (right) on Aberdeen Creek 2013

Private Property

Existing Infrastructure

The private property on Aberdeen Creek is predominantly developed as single family residential homes with one exception: the former Gloucester Seafood, Inc. site. Many of the residential properties have private docks allowing for water access. Visits to the site revealed private infrastructure at the residential properties along the creek being used to support commercial water-based businesses (i.e. docking of commercial boats). One commercial boat was observed offloading at the public landing and returning to moor at a private dock.

Gloucester Seafood, Inc., a former seafood processing plant, is the only private commercial facility located on the creek. Prior to becoming Gloucester Seafood, Inc. in 1946, the building was occupied by Walker Oyster House restaurant. The property is .94 acres in area, surrounded on three sides by water, and consists of a failing seawall on two sides and a dilapidated building. The property has a concrete base over the majority of the land. The Gloucester County Commissioner of Revenue's office indicates that business license for Gloucester Seafood, Inc., which traditionally processed local crab, imported crabmeat, and canned crabmeat, did not renew their business license after 2010. The property is currently zoned SF-1 (single family residential).

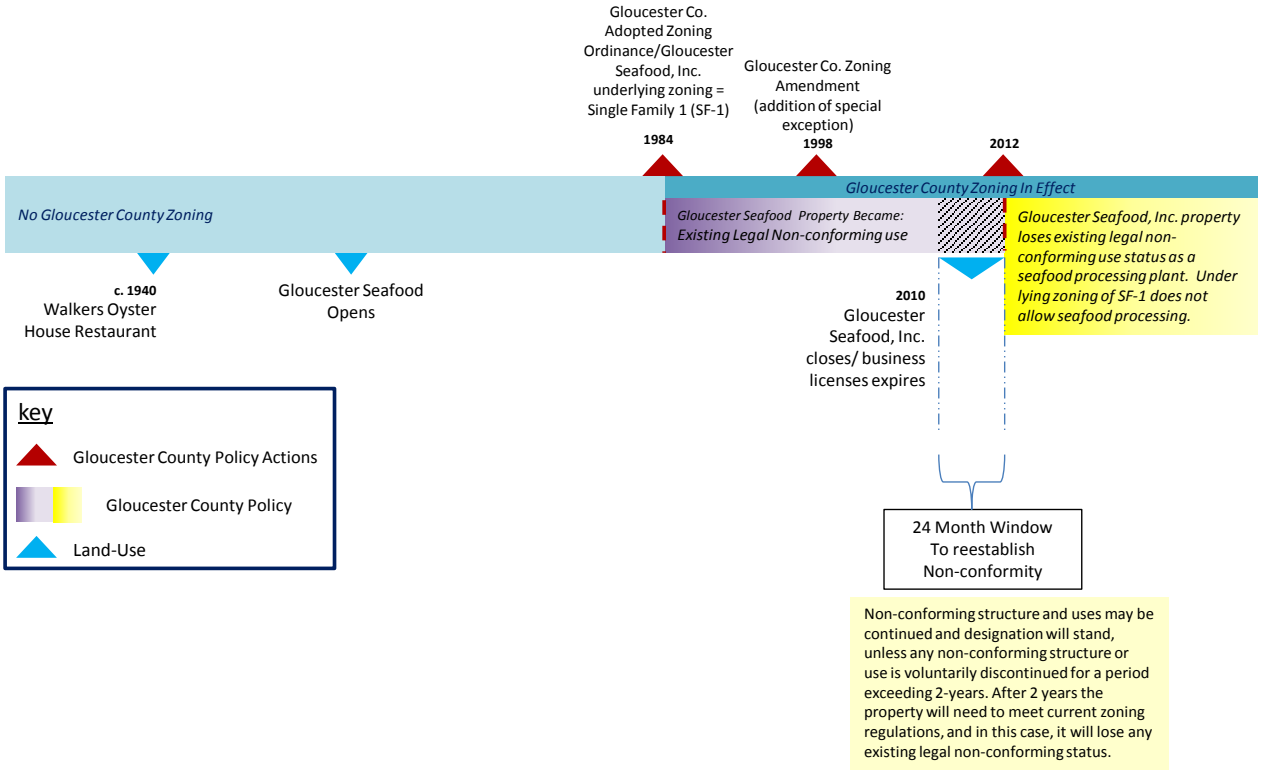
The property is presently leased by local watermen specifically for the value of its access to the water in the upper York River. In July of 2012, by action of the Gloucester County Board of Supervisors, seafood processing is no longer a permitted use in the SF-1 zoning district (Figure 2). Specifically, the Gloucester County Board of Supervisors set the extent of zoning ordinance boundaries to address specific issues related to aquaculture landward of mean low water (MLW). This includes docking of boats and water access for the harvesting of seafood, such as crabs and oysters. This definition of aquaculture, to exclude the harvesting of seafood regulated by other agencies, was a result of the *York River Use Conflict Study and Report*. Input from local watermen, as part of that study, indicated that local regulation of marine resources was an unnecessary duplication of existing state regulations. As a result, when the county revised its ordinance to provide more opportunities for aquaculture and agricultural based businesses, they specifically excluded marine based aquaculture from local regulations.

Discussions with local watermen indicated that the building on the property has several issues that may make it difficult and costly to bring back a seafood processing plant into compliance with local building codes, the state health codes (no septic tank and/or field exist), the Virginia Department of Environmental Quality (underground fuel tanks may be leaking), and the Occupational Safety and Health Administration requirements (commercial building is not safe for workers). However, the watermen who lease the

property stated that the value in the property is its location, which provides water access to the public and private oyster grounds on the York River.

Figure 2 – Timeline

Figure: Approximate timeline of Gloucester Seafood, Inc's land uses and the effects of Gloucester County Policy changes.



Existing Uses

Watermen are using the facilities on the Gloucester Seafood property for mooring boats, parking, and accessing the water, all currently permissible uses. The watermen who lease the property do not use the existing building, and do not see the need to use the structure in the future. Rather, the watermen see more value in the property as a large concrete lot with no building that has water access in an area with limited water access. Further, these watermen also indicated that the shoaling of Aberdeen Creek must be addressed to ensure the future viability of a working waterfront at the Gloucester Seafood property. At this time, the owner of the property is not interested in selling the property, demolishing the

building, or allowing any zoning changes to the property, which leaves the watermen who lease the property with little choice but to use the property for mooring boats, parking, and accessing the water.

Shoaling of Aberdeen Creek

Shoaling is the most significant threat to maintaining a working waterfront presence on Aberdeen Creek. Watermen have expressed navigation issues with larger vessels due to the shoaling of Aberdeen Creek. Without navigable water, boats cannot access the creek. Records indicate that dredging of Aberdeen Creek last occurred in 1974 by the Army Corp of Engineers (ACOE) (Appendix B and Figure 3). Since then, funding to the ACOE has been cut, eliminating the financial resources necessary to fund dredging projects or to cost share with local governments. To help solve this problem, the Middle Peninsula Planning District Commission produced the 2011 *Shallow-Draft Navigation and Sediment Management Plan* (NOAA Grant #NA *FY07 NOS4190178 task* 2.06) and has been awarded a second grant through the Virginia Coastal Zone Management Program (CZM) (NOAA Grant *#NA FY13 13NOS4190135, task 51*) to explore funding mechanisms for the dredging and maintenance specifically for Aberdeen Creek.

The *Shallow-Draft Navigation and Sediment Management Plan* performed an evaluation of a range of costs to provide for the needs of maintaining (dredging) navigation access for Aberdeen Creek. Estimates were made for the project consisting of the initial year for dredging, dredging frequency (also known as dredging cycle and measured in years), and the costs associated with dredging. The focus was on developing and understanding what the costs would be on an average annual basis. The costs were developed based on a long term assessment rather than focusing on the costs of the most recent dredging efforts and should be viewed as averages. The estimated long term cost for maintenance for Aberdeen Creek, would range from $38,000 per year based on a 16 year dredging cycle to $398,000 per year based on a 4 year cycle, with a most probable annual cost of $93,000 per year based on an 8 year cycle.

The second grant is designed to find a method to fund dredging on Aberdeen Creek. The report will include a scientific survey of the Aberdeen Creek channel-including bathymetric contours and channel sediment sampling, will discuss the strategy for funding future dredging using a modified Tax Incremental Financing (TIF) approach, and will map the Aberdeen Creek historic shore change. The report will be made available in November, 2014. Together, the two dredging reports and this report will provide an assessment of both land use and water management concerns. This will provide information for the Gloucester Board of Supervisors and for other agencies involved in coastal resource management and the promotion and protection of working waterfront to consider.

Figure 3
Authorizing Legislation – Army Corps of Engineers
Aberdeen Creek, Va

Condition of Improvement, 30 June 1971

AUTHORITY: The project was approved by the Chief of Engineers under authority of Section 107 of the River and Harbor Act of 1960.
PROJECT: A channel 1.0 mile long, 80 feet wide, and 6 feet deep from that depth in York River to and including a turning basin of the same depth, 450 feet long and 400 feet wide opposite the public landing.
All depths referred to mean low water.
PROGRESS: Project completed.
COST OF CONSTRUCTION: $109,643, excluding $11,300 contributed funds.
APPROXIMATE MEAN RANGE OF TIDE: 2.8 feet.

Chapter 2

Aberdeen Creek – Zoning and Land Use Planning

Zoning plays a significant role in managing land use along Aberdeen Creek. The Gloucester County Zoning Ordinance regulates the uses and structures adjacent to Aberdeen Creek and addressing the potential impact of zoning on working waterfronts is one step in assuring that working waterfronts thrive in the future.

The majority of the properties along the creek, including the Gloucester Seafood, Inc. property, are zoned SF-1 (single family residential). The zoning is consistent with the use of surrounding properties and the character of the area which includes several subdivision as well as larger agricultural properties. Per the Gloucester County Zoning Ordinance, the SF-1 zoning district is described as (Map C):

> *Sec. 4-7. Single-family detached residential district (SF-1).*
>
> *The intent of the SF-1 district is to preserve existing residential areas and provide for future areas of similar character. To this end, development is limited to low concentration and permitted uses are limited to detached single-family dwellings providing homes for residents plus certain additional uses such as schools, parks, churches and certain public facilities that serve the residents of the district.*

In 2010, Gloucester County staff initiated numerous efforts to address the loss of working waterfront businesses in the County with the adoption of policy recommendations included in the *York River Use Conflict Study*. The recommendations of the study included:

Recommendation 1

Gloucester County Board of Supervisors should develop a Coastal Living Policy

Recommendation 2

Gloucester County Board of Supervisors should map and identify the County's Land, Air and Water Territorial boundaries in the County's Comprehensive Plan and supporting maps

Recommendation 3

Gloucester County Board of Supervisors should take no action at this time to manage or regulate the aquaculture industry within its jurisdiction

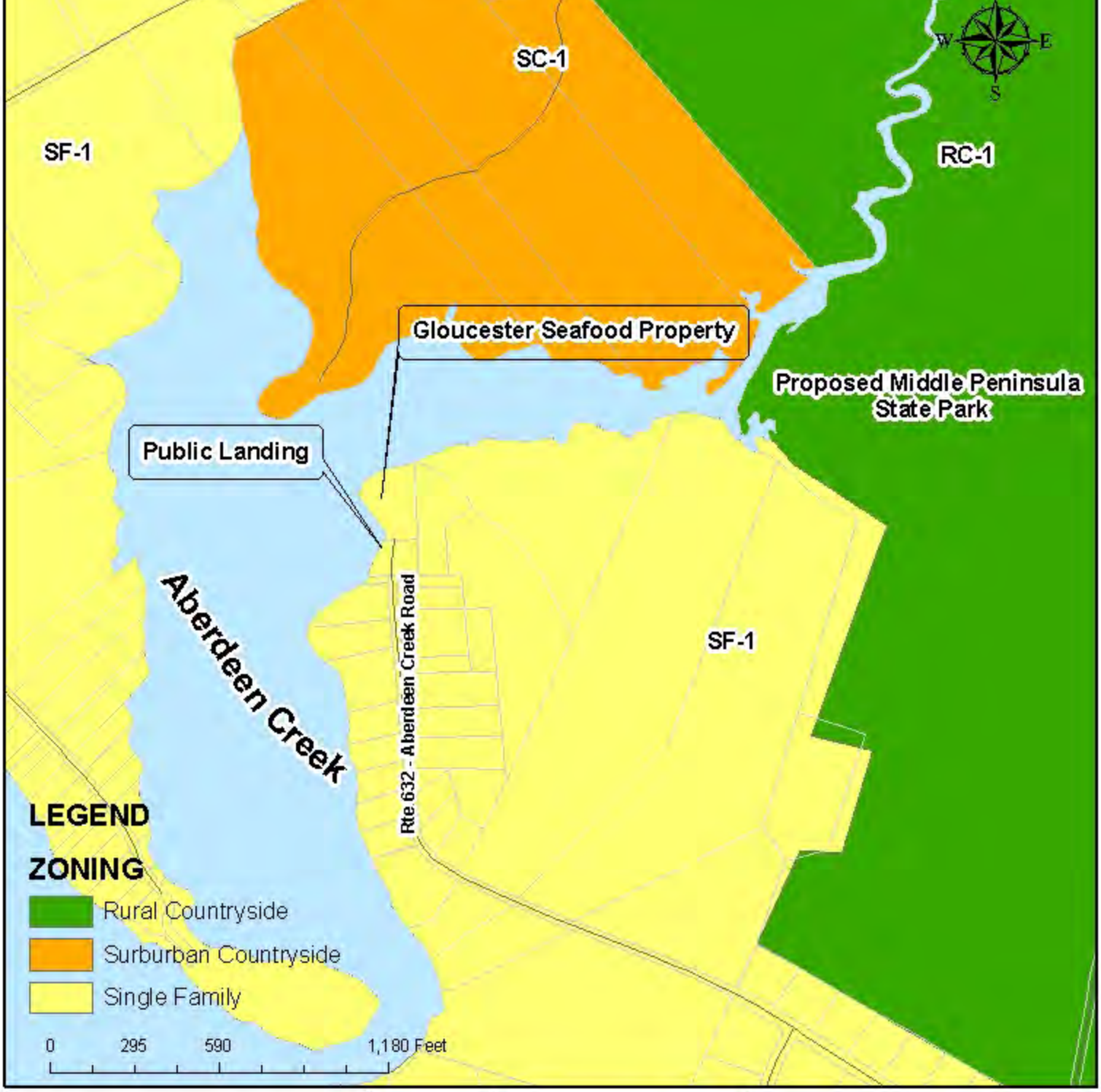
Recommendation 4

Gloucester County Board of Supervisors should develop a policy for the protection of working waterfront infrastructure

Recommendation 5

Gloucester County Board of Supervisors should develop a Waterfront Outdoor Lighting Ordinance

Map C - Zoning
Aberbeen Creek Master Plan Area
Gloucester County, Virginia



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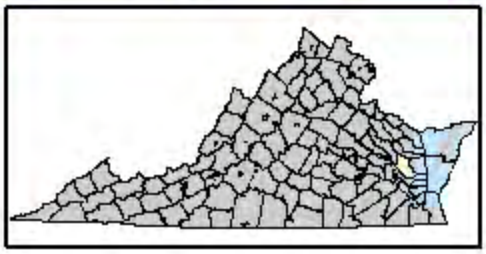
Virginia Coastal Zone MANAGEMENT PROGRAM



Recommendation 6

Gloucester County Board of Supervisors should adopt an ordinance restricting floating homes

Recommendation 7

Gloucester County Board of Supervisors should develop a master plan for public access infrastructure to ensure equal water access for all user groups to the waterways within Gloucester County

A draft of a coastal living policy has been developed by the Gloucester County Planning Staff. To date the policy has not been reviewed or adopted by the Gloucester County Board of Supervisors. The purpose of the coastal living policy is to create a public policy which declares the County's position that working waterfronts are important to the community's culture and economy and advocating that they should be protected and preserved. The policy also provides support for staff to reinforce this policy in land use decisions and recommendations regarding working waterfronts.

Permitted Uses

Continuing its efforts, in July 2012, the Gloucester County Board of Supervisors approved an amendment to the zoning ordinance in an effort to address the working waterfront uses such as aquaculture facilities, seafood processing plants and marinas in residential and agricultural zoning districts. The figure below illustrates the amendment to the zoning code (Also see appendix C). The amendment added definitions of uses associated with working water front businesses and included provisions for the uses in several zoning districts which included Bayside Conservation (C-2) and Suburban Countryside (SC-1), both residential zoning districts. Based on Recommendation #3 of the *York River Use Conflict Study*, the definition of aquaculture excluded aquaculture activities below Mean Low Water (MLW) and regulated by other agencies. The purpose of this was to continue to allow VMRC to regulate marine aquaculture in support of working waterfronts. This was the first step in fully addressing the issue of working waterfronts in Gloucester County without substantially changing the character of the districts in which working waterfronts are located.

Figure 4 – Gloucester County, Va. Zoning Code Amendments

Zoning District	Use	By-right/Special Exception
C-1 Conservation	Seafood Processing Aquaculture facility Aquaculture facility, agricultural	Special Exception Special Exception Special Exception
C- 2 Bayside Conservation (Residential District)	Marina/boatyard Seafood processing plant Aquaculture facility Aquaculture facility, agricultural	Special Exception Special Exception Special Exception Special Exception
RC-1 Rural Countryside (Agricultural District)	Aquaculture facility, agricultural Seafood processing plant	By-right Special Exception
RC-2 Rural Conservation District (Agricultural District)	Aquaculture facility, agricultural Seafood processing plant Marina/boatyard	By-right Special Exception Special Exception
SC-1 Suburban Countryside (Residential District)	Marina/boatyard Seafood processing plant Aquaculture facility, agricultural	Special Exception Special Exception Special Exception
SF-1 Single Family Residential	None (other than below MLW)	
MF-1 - Multifamily	None (other than below MLW)	
B- 1 General Business	Aquaculture facility	By-right
B-2 Village Business	None (other than below MLW)	
B-3 Office Business	None (other than below MLW)	
B-4 Rural Business	Aquaculture facility	By-right
I-1 Industrial	None (other than below MLW)	

SF-1 does allow for aquaculture activities, such as those associated with working waterfronts, below mean low water level. *Aquaculture* is defined as the propagation, rearing, enhancement, and harvest of aquatic organisms in controlled or selected environments, conducted in marine, estuarine, brackish, or fresh water. By extension, many aquaculture activities related to marine aquaculture, such as outdoor storage of equipment and transfer of catch to commercial vehicles, would

also be a permitted use. However, a zoning permit would be required to legally establish the permitted use. Any "improvements" to the site may be subject to other requirements and ordinances discussed above, such as the Site Plan Ordinance, the Chesapeake Bay Preservation Ordinance, Erosion and Control and Stormwater Regulations, requirements of the Health Department for sanitary facilities supporting the commercial use of the site, Uniform Statewide Building Code (USBC) which regulates structures and accessibility of commercial properties, etc. Meeting these requirements can be fairly cost prohibitive for the average waterman.

Permitted Structures

As mentioned earlier, the Gloucester Seafood, Inc. property is zoned SF-1 and is occupied by a former seafood processing facility. County Zoning Ordinance defines seafood processing plants as "the uses and structures associated with the harvesting, preparing and selling of commercial seafood."

Section 5-2 of the Gloucester County Zoning Ordinance provides a list of permitted uses, and bulk requirements for principal and accessory structures, that are permitted in the SF-1 zoning district. (See Appendix D) The SF-1 zoning district does not list many commercial uses, such as the seafood processing plant on the Gloucester Seafood, Inc. property, as a permitted use. The structure is also considered nonconforming since, based on the current requirements including zoning and other ordinances, it would likely not be permitted to be located so close to the water and with limited setbacks.

> *Sec. 10-4. Nonconforming structures and uses of land, structures, or land and structures in combination.*
>
> *Where, at the time of adoption of this ordinance, lawful structures and uses of land, structures, or land and structures in combination exist which would not be permitted by the regulations imposed by this ordinance.*

The Zoning ordinance states that nonconforming structures and uses may be continued and expanded, provided they adhere to the following conditions:

(*1)Any expansion, alteration, or reconstruction of such structures or uses shall, through landscaping, architectural design, nuisance control, or other appropriate means, bring the structures or uses closer to conformity with surrounding uses so*

as to be more harmonious and appropriate in appearance with the existing or intended character of the general vicinity;

(2)Any expansion, alteration or reconstruction of such structures or uses will not result in destruction, loss, or damage of a natural, scenic, or historic feature of major importance;

(3)No nonresidential nonconforming structure or use shall be moved or expanded so that any portion of the structure or use is closer than one hundred (100) feet to any residential lot line, nor closer than one hundred (100) feet from any structure used for human occupancy in any nonresidential district. Where such structures or uses, or any portions thereof, are closer than the distance prescribed at the time of adoption of this ordinance, no expansion or movement may take place in the direction of a residential lot line or structure used for human occupancy, closer than one hundred (100) feet. Minimum distance requirements may be reduced to fifty (50) percent of the requirement if acceptable landscape screening, consisting of a strip of land twenty (20) feet in width planted with an evergreen hedge or dense planting of evergreen shrubs in healthy condition, is provided;

(4)Hours of operation or use of commercial and industrial nonconforming structures or uses shall not be extended beyond existing hours of operation or beyond 10:00 p.m.; whichever is longer, when such structure or use is located within a residential district;

(5)No lighting installed after the effective date of adoption of this ordinance shall create a nuisance to adjacent properties;

(6)Should such nonconforming structures or uses be physically moved from the district in which they were located at the time of adoption or amendment of this ordinance into any other district, they shall conform thereafter to the regulations for the district in which they are located after they are moved.

(7)Any structure, or structure and land in combination, in or on which a nonconforming use is superseded by a permitted use shall thereafter conform to the regulations for the district, and the nonconforming use may not thereafter be resumed;

However, as is the case with the Gloucester Seafood processing plant*:*

(8) If any nonconforming structure or use is voluntarily discontinued for a period exceeding two (2) years after the enactment of this ordinance, any subsequent use shall conform to the requirements of this ordinance; Any nonconforming structure destroyed by fire or other natural hazard shall be allowed to be reconstructed as a nonconforming structure within (2) years.

Issue with the Gloucester Seafood, Inc. property

Records indicate that the business license allowing the use of the structure on the Gloucester Seafood, Inc. property as a seafood processing facility lapsed more than two years ago to date, leaving the nonconforming structure without any vested rights for continuation of the nonconforming use. The re-establishment of its use as a seafood processing plant would not currently be consistent with the SF-1 zoning district or permitted uses in this area. Likewise, many of the uses associated with working waterfront businesses are not permitted by right or with a special exception in the SF-1 zoning district.

Due to the nonconforming status of the Gloucester Seafood, Inc. structure, improvements and expansion of the existing structure are severely limited. Per the zoning ordinance, substantial alterations to or use of the existing Gloucester Seafood, Inc., structure will require bringing the property closer to compliance with the current zoning and other ordinances. It is unlikely that the use of the site and structure as a seafood processing plant would be well accepted by the community, depending upon the impacted and the type of processing conducted at the site. However, based on the plans already adopted by the Board of Supervisors, it is foreseeable that a rezoning of the site to accommodate its use as a working waterfront would be acceptable to the community.

Land Use Policy Considerations

In order to facilitate the process of re-establishing the working waterfront use utilizing the existing facilities at Gloucester Seafood, Inc., the nonconforming use and structure statuses have to be addressed. In order to preserve the facility as a working waterfront for future generations, the solution should be a permanent fix that runs with the land rather than arising each time the use has been discontinued for a two-year duration or when the property changes ownership. Below are some options that have the potential to be used on this site, and can be considered as a general list of options for other localities with situations similar to Gloucester Seafood, Inc. The final recommendations for Aberdeen Creek, including the Gloucester Seafood, Inc. site and the public landing, can be found in Chapter 3.

Rezoning

Rezoning to a commercial use is typically initiated by the property owner and, if approved, could allow for commercial uses permitted under the zoning district. Rezoning could also allow for construction and expansion of the structures as needed within the guidelines of the development regulations. Rezoning also runs with the land resolving the issue of discontinuance of use for an extended period of time.

There are several issues associated with rezoning the Gloucester Seafood, Inc. property to be reestablished as a working waterfront. Currently, no zoning district in the Gloucester County ordinance allows a commercial seafood processing facility or commercial waterfront as a use by right. There are several zoning districts that allow for the use with approval of a special exception.

The concept of creating a zoning district that allows for working waterfront uses is ideal and supported in the adopted *York River Use Conflict Study and Report* as well as in the draft Gloucester County Comprehensive Plan Update. It could be problematic in this case due to the surrounding uses and the concerns of the neighbors; however, if the County is serious about working waterfronts and is true to their adopted plans, rezoning the Gloucester Seafood property and other working waterfronts to a newly created commercial waterfront district should be possible. Working waterfront uses generally consist of aquaculture facilities, maintenance and service facilities for boats, storage facilities for boats and equipment, uploading and offloading of catch, and direct transfer to customers or inland transportation modes. These uses, if permitted under a new zoning district, are ideal for working waterfronts areas and sites. The Gloucester County Planning Commission has made this one of their priorities for the implementation of the Comprehensive Plan once the draft has been approved and adopted by the Board of Supervisors. Input from watermen and commercial waterfront users will be needed to ensure that any regulations associated with the new district fully accommodates the types of uses and needs of working waterfronts.

Special Exception or Conditional Use Permit

Under Virginia Code Ch. 15.2-2286 (A) (3), a governing body is authorized to grant special exceptions "under suitable regulations and safeguards." Special exceptions are also known as *special use permits* or *conditional use permits* (CUPS), though they may not all necessarily serve the same purpose in a particular locality (*See Virginia Code* Ch.15.2-2201 (*definition of special exception*). Appendix E, *The Albemarle County Land Use Handbook, Kamptner/March 2014, Chapter 12*, provides a detailed discussion of the history of Special Exceptions in Virginia.

Gloucester County provides for applications to be reviewed under two processes, *Special Exception* and *Conditional Use Permits* (CUP), depending on use. These processes are a good way for a case by case review of specific properties.

Special Exception

The Special Exception is reviewed and approved by the Board of Zoning Appeals, a judicial board appointed by the circuit court. This process requires site plans

and public hearings. There is no guarantee that a Special Exception will be approved.

While this process may be good in some instances, it is not a good choice for the Gloucester Seafood, Inc. site. Currently, the underlying zoning, SF-1, does not allow for a special exception for seafood processing plant use. Further, the residential zoning districts in Gloucester County that do allow the use with a special exception have criteria for approval that are difficult to meet and which the existing Gloucester Seafood, Inc. site does not satisfy.

> Sec 14-19 of the Zoning Ordinance provides criteria by which the Board of appeals considers Special Exceptions. The Ordinance reads as follows:
>
> *Before issuing any special exception permit, the board of zoning appeals shall review the particular facts and circumstances of each proposed use in terms of the following standards and shall find adequate evidence showing that such use at the proposed location:*
>
> *(1)Is in fact a special exception and appears on the official schedule of district regulations;*
>
> *(2) Will be harmonious with and in accordance with the general objectives of the county's comprehensive plan and the zoning ordinance;*
>
> *(3) Will be designed, constructed, operated, and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such use will not change the essential character of the same area;*
>
> *(4) Will not be hazardous or disturbing to existing or future neighboring uses;*
>
> *(5) Will be served adequately by essential public facilities and services such as highways, streets, police and fire protection, drainage structures, refuse disposal, water and sewer, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services;*

(6)Will not create excessive additional requirements at public cost for public facilities and services and will not be detrimental; to the economic welfare of the county;

(7)Will not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any persons, property, or general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, or odors;

(8)Will have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public thoroughfares; and

(9) Will not result in the destruction, loss, or damage of a natural, scenic, or historic feature of major importance.

Conditional Use Permit

The Conditional Use Permit (CUP) allows a case by case review of a site. Unlike a Special Exception, this process does not go to the Board of Zoning Appeals, but gets further review by the Planning Commission and the BOS. This process requires site plans and public hearings. There is no guarantee that a Conditional Use will be approved.

While the Conditional Use Permit does not have as many nor as specific criteria as a special exception, it is not a good choice for the Gloucester Seafood, Inc. site since, currently, the underlying zoning, SF-1, does not allow for a conditional use permit for seafood processing plant use.

Sec. 14-23. Conditional Use Permits

Purpose: The purpose of this section is to provide for certain uses which, because of their unique characteristics or potential impacts on adjacent land uses, are not generally permitted in certain zoning districts as a matter of right, but which may, under the right set of circumstances and conditions, be acceptable in certain specific locations. These uses are permitted only through the issuance of a conditional use permit by the Board of Supervisors after ensuring that the use can be appropriately accommodated on the specific property, will be in conformance with the Comprehensive Plan, can be constructed and operated in a manner which is compatible with the surrounding land uses and overall character of the community, and that the public interest, safety, and general welfare of the citizens of the County will be protected.

No inherent right exists to receive a conditional use permit; such permits are a special privilege granted by the Board of Supervisors under a specific set of circumstances and conditions, and each application and situation is unique. Consequently, mere compliance with the generally applicable requirements may not be sufficient, and additional measures, occasionally substantial, may be necessary to mitigate the impact of the proposed use. In some situations, no set of conditions would be sufficient to approve an application, even though the same request in another location would be approved.

Working Waterfronts Overlay District

The Working Waterfronts Overlay District concept has been recommended to assist with addressing the issues of working waterfronts on the Perrin River in Gloucester County. Even though there are various ways to approach overlay designation, including seeking new enabling authority that specifically addresses the creation of working waterfront overlay districts or using existing authority granted under § 58.1-3850 for the creation of local technology zones, a Working Waterfronts Overlay District does not currently exist in Gloucester County and would not be appropriate on Aberdeen Creek since the working waterfront use is limited to the Gloucester Seafood, Inc. site and the adjacent pier.

An overlay is better suited for those areas with numerous lots with similar uses and issues. In this case, all the properties, including the Gloucester Seafood, Inc. site, are zoned residential and the Gloucester Seafood, Inc. site is the only known site with a nonconforming use issue. In addition, overlay districts generally have development standards that may not be sympathetic to the character of the area.

Chapter 3

Final Recommendations

It is strongly advised that the recommendations from the previously drafted *York River Use Conflict Study and Report* and the *Perrin River Harbor Master Plan* are used as reference documents for developing public policy for Working Waterfronts. However, every working waterfront area is unique and the Aberdeen Creek working waterfront is no exception. Below are the three preferred recommendations to preserve the Aberdeen Creek area as a viable working waterfront for current and future generations.

1. **Former Gloucester Seafood, Inc. Property**

   There is a two part recommendation for protecting and preserving the working waterfront at this location.

   Part 1

   The most suitable zoning option for the Gloucester Seafood, Inc. property on Aberdeen Creek would be to amend the zoning ordinance to create a commercial waterfront district which allows certain working waterfront uses by right on a careful review of what those uses should be.

   Part 2

   Have the county sponsor a county rezoning of existing working waterfront properties to the commercial districts and issue zoning permits documenting the established by-right use of each site so that they are clearly acknowledged in the County's records. For example, the Gloucester Seafood site may allow for harvesting and unloading while another site may be a boatyard. Both would be zoned commercial waterfront, but the use of each would be one of those listed in the permitted uses under Section 5-2 of the zoning ordinance.

2. **Public Landing/Wharf on Aberdeen Creek**

   A public landing is defined as a wharf in Sec. 21-1 of the Gloucester County Code. The Gloucester County Code gives the Board of Supervisors the power to designate specific uses for public landings or wharves. However, the public landing on Aberdeen Creek has not been designated specifically for either commercial or recreational uses. In order to preserve the working waterfront uses

at this public landing, it is recommended that the Gloucester County Board of Supervisor's:

1) Formally negotiate single ownership status and decouple joint ownership with VDOT and the Commonwealth;

2) Designate, by ordinance, the commercial and recreational use as permitted uses of the landing; and,

3) Further clarify the ancillary uses associated with the permitted uses. For commercial uses associated with working waterfronts, examples of potential ancillary uses are: outdoor gear storage, loading and unloading commercial gear and catch using commercial vehicles, mooring, overnight mooring, etc.

4) As part of the rezoning process described in #1 above, develop a potential public-private partnership with the owners of Gloucester Seafood that may allow a cooperative use of both facilities for certain commercial amenities such as sanitary facilities and storage.

3. **Dredging of Aberdeen Creek**

The shoaling of Aberdeen Creek is the main threat to the long term viability of the working waterfront on the creek. The shoaling came up as a concern in every conversation and meeting with watermen who utilize the creek. It is recommended that Gloucester County and/or the Middle Peninsula Chesapeake Bay Public access authority collaborate and coordinate with other stakeholders to develop and implement a plan to maintain the channel on Aberdeen Creek utilizing the resources in the 2011 *Shallow-Draft Navigation and Sediment Management Plan* and the Tax Incremental Financing (TIF) report when it is available in November 2014.

Appendix

Appendix A

Deed for Public Landing

Alvin A. Leigh et als----------::
::
Vs(New Road; A.D. Aberdeen Creek ::
::
Gloucester County & State Highway ::
Department of Virginia ::
::
Approved by Board of Supervisors ::
March 26th, 1948 ::
::
Approved by Dept. of Highways ::
April 22, 1948 - Length 0.33 miles::

April 26th, 1947

TO THE BOARD OF SUPERVISORS OF GLOUCESTER COUNTY, VIRGINIA, AND DEPARTMENT OF HIGHWAYS OF THE STATE OF VIRGINIA, AND THE COMMONWEALTH OF VIRGINIA.

In Re: Road and highway from end of present Route 632 to Aberdeen Creek and Public Landing on said Creek on the land of Alvin A. Leigh. We the undersigned land owners along and over which the proposed highway beginning at end of present Route 632, to Aberdeen Creek, would run if established, and owners of the land on which said public landing would be, if established, in Abingdon Magisterial District, Gloucester County, Virginia, for and in consideration of the State Highway Commission of Virginia, establishing and constructing said public highway and public landing as proposed will and do hereby grant, give, bargain, sell and convey unto the Commonwealth of Virginia, all our right, title and interest, in and to any land we own adjacent to and over which said proposed road or right of way may or will run, on which said proposed landing may be established, that may be needed for the establishing of said right of way and landing, the said right of way to be a maximum of thirty feet in width and said landing to be not over one hald of an acre of land on said creek, and will sign any and all deeds or other instruments of writing that may be required or necessary to afford or carry the title to the Commonwealth of Virginia, without any consideration therefor other than herein stated.

Witness our hands and seals:

Sidney Banks (SEAL) Mary S. Hewlett (SEAL)

Florence E. Banks (SEAL) Ralph J. Hewlett (SEAL)

April 26th, 1947

To THE BOARD OF SUPERVISORS OF GLOUCESTER COUNTY, VIRGINIA, AND DEPARTMENT OF HIGHWAYS OF THE STATE OF VIRGINIA AND THE COMMONWEALTH OF VIRGINIA.

IN RE: Road and Highway from end of present Route 632 to Aberdeen Creek and Public Landing on said Creek on the land of Alvin A. Leigh.

We the undersigned land owners along and over which the proposed highway beginning at end of present Route 632, to Aberdeen Creek, would run if established, and owners of the land on which said public landing would be, if established, in Abingdon Magisterial District, Gloucester County, Virginia, for and in consideration of the State Highway Commission of Virginia, establishing and constructing said public highway and public landing as proposed will and do hereby grant, give, bargain, sell and convey unto the Commonwealth of Virginia, all our right, title and interest, in and to any land we own adjacent to and over which said proposed road or right of way may or will run, on which said proposed landing may be established, that may be needed for the establishing of said rights of way and landing, the said right of way to be a minimum of thirty feet in width and said landing to be not over one half of an acre of land on said creek, and will sign any and all deeds or other instruments of writing that may be required or necessary to afford or carry the title to the Commonwealth of Virginia, without any consideration therefor other than herein stated.

Witness our hands and seals.

F. H. Trevilian (SEAL)

[illegible] Trevilian (SEAL)

Boyd F. Walker (SEAL)

Alice R. Walker (SEAL)

William F. Leigh (SEAL)

John D. Hart (SEAL)

Violet M. Hart (SEAL)

Howard W. Davis (SEAL)

Lottie V. Davis (SEAL)

Gladys E. Leigh (SEAL)

H. A. Leigh (SEAL)

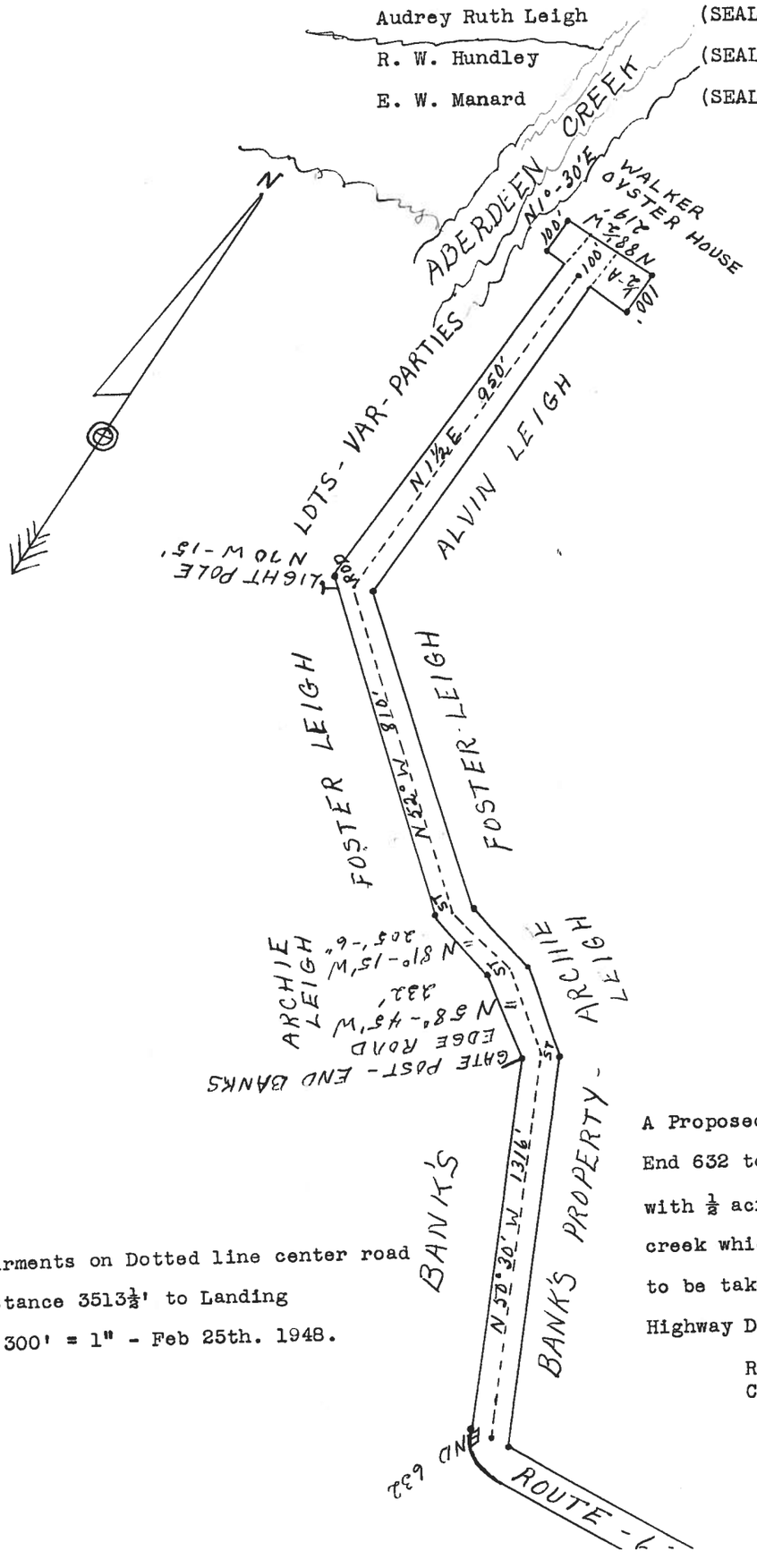
Martha Leigh (SEAL)

Alvin A. Leigh (SEAL)

Audrey Ruth Leigh (SEAL)

R. W. Hundley (SEAL)

E. W. Manard (SEAL)



Measurments on Dotted line center road

Distance 3513½' to Landing

Scale 300' = 1" - Feb 25th. 1948.

A Proposed 30' Road from End 632 to Aberdeen Creek with ½ acre landing at creek which is requested to be taken over by State Highway Dept.

R. F. Heywood,
Cert. Surveyor

Original deed filed with plat Dec. 16, 1947.

Appendix B

Historical Dredging Notes

DEPARTMENT OF PUBLIC WORKS
P.O. Box 329
Gloucester, Virginia 23061

Birkhofer Building
6515 Main Street

BUILDINGS & GROUNDS
(804) 693-5250

ENGINEERING
(804) 693-5480

MEMORANDUM

To: File

From: Sandra Hogge

Date: February 22, 2010

Subj: Historical Notes on Aberdeen Creek and Mill Creek

Public Works Departmental Files on Dredging are spread among three different file numbers:

34-3726 Mill Creek

35-0743 COE; Dredging

37-0104 Aberdeen Creek

The attached Historical Notes summarize actions taken with regard to dredging (or not) these two Creeks.

Dredging notes (as of 2/22/2010): For "official information" from the Army Corps of Engineers, look at the Norfolk Office web page on dredging (Aberdeen Creek is on the linked page of projects):
http://www.nao.usace.army.mil/Projects/Dredging/homepage.asp

Also see the posting from the Philadelphia office at the link below for good general information:
http://www.nap.usace.army.mil/cenap-pl/ca.htm

Mill Creek: Twice residents tried to get a dredging project for Mill Creek, but twice failed after the assessment by COE.

The 1975 Mill Creek "experience": (Same request as 1998, but from different citizens.) BOS did a resolution 8/5/1975 requesting COE to sponsor a study concerning the dredging of Mill Creek. COE sent letter to County Administrator Fries (July 1976) advising of their intention to submit a "negative" report. COE reconnaissance report dated 8/27/1976 recommended no further COE action be taken due to lack of local support.

The 1998 Mill Creek "experience":

- September 1998 Mr. C.E. Douglas wrote to the BOS requesting that the mouth of Mill Creek be dredged to allow recreational and commercial use.
- September 1998 Wes prepares memo to Bill and includes these facts:
  1. Potential new dredging projects are evaluated by the COE on economic, engineering, and environmental criteria
  2. Aberdeen Creek's status with the COE is "A/N, Active/Not Maintained": it has not been maintained because the BOS has not funded the spoil disposal—it has been a CIP item for about 10 years and the creek has needed dredging since 1980
  3. Feb 1998 COE report, *Shallow Draft Navigation in the Commonwealth of Virginia,* states, "Normally as a matter of local cooperation local sponsors are required to provide placement sites for the placement of material removed from the maintenance dredging of Federal navigation channels."
- October 1998 letter WHW to Douglas:
  1. He can't in good conscience recommend to the BOS that we expend funds on a new project when Aberdeen Creek should be first in line.
  2. He essentially says he will, however, follow BOS direction
- November 4, 1998, BOS minutes: presentation by Lawrence Ives, COE, explaining the process involved in making a formal request under Section 107 of the River and Harbor Act for conducting a feasibility study to determine possibility of dredging Mill Creek. BOS unanimously approved resolution to ask COE to proceed with the feasibility study.
- November 9, 1998, WHW letter to COE: requests feasibility study and acknowledges County's understanding of financial responsibilities.
- January 9, 1999: email Ives to WHW describing a coordination meeting needed during the "project coordination stage"
- June 5, 2001, Memo WHW to BOS conveying the COE Mill Creek Dredging Study which is a negative report (same as in 1976 when this dredging was first solicited by citizens): Noting the $715,000 costs that would be the County's

responsibility, he says, "My recommendation is to accept the report and be done with this matter.

Aberdeen Creek: The Public Works Department's Aberdeen Creek file contains the following excerpts from BOS minute books:

1. Book 13, Page 16, Friday May 23, 1958, Resolution giving assurance to the Secretary of the Army of the United States that the County will, when the entrance channel from the York River into Aberdeen Creek with a turning basing at the head of the channel is approved and authorized by the U.S. Congress, that the County will:
    a. Furnish all necessary lands, rights of ways, and spoil disposal areas for the construction and maintenance of the improvement, when and as required;
    b. Construct and maintain at local expense a public wharf with adequate shore area to utilize the wharf and for parking cars adjacent thereto, and an access road, open to all on equal terms;
    c. Provide documents to hold and save the US harmless
    d. Furnish permits to construct temporary pipe line trestles and to lay dredging pipe lines, anchor lines and anchors, across public and/or privately owned oyster grounds
    e. Furnish permits for ingress to and egress from highways to disposal areas and permits to lay dredge pipe lines across all lands between the dredging operations and the disposal site
    f. Relocate or raise existing telephone and electric power lines crossing Aberdeen Creek, if found necessary, during initial construction or subsequent maintenance.
    g. Establish or designate a competent and properly constituted public body empowered to regulate the use, growth, and free development of the harbor facilities with the understanding that said facilities will be open to all on equal terms.
    h. A copy of this resolution and agreement to be furnished through the District Engineer to the United States for acceptance.
2. Book 13, Page 217, April 24, 1958: Report of George E. Lawson, Boyd F. Walker, and E.P. Roane, the committee appointed to secure local estimates of cost of the erection of dikes, bulkheads, or embankments as may be necessary to prevent the spoil material from returning to the navigable waters of said creek ($4401, Eugene Motley; $4200 Charles W. Wroten and Son Inc.)
3. Book 13, Page 473, Application to VDOT for permit to erect and maintain a wharf on Aberdeen Creek public landing at end of State Route 632
4. Book 14, Page 4, Aberdeen Creek Wharf Project, Agreement between this Board and W.E.Belvin dated February 22, 1962: BOS agrees to pay Mr. Belvin $1500 for the planking and Creosoted materials to be delivered to the Aberdeen Creek job site.
5. BOS Minutes August 28, 1970: Board directs the Executive Secretary to check on the status of the Aberdeen Creek Harbor Committee for the purpose of reactivating the committee.
6. BOS Minutes March __,1972: BOS asks Executive Secretary to notify Aberdeen Creek Harbor Committee members to appear at its April regular meeting.

7. BOS Minutes April 27, 1972: Boyd Walker reported on the Aberdeen Creek, use of dock, and that the creek is filling in where dredged making it difficult for boats to come in at low tide.
8. BOS Minutes March 29, 1973: Fred Carter asked BOS for support in improving the channel at Aberdeen Creek. He said they were in the process of building a subdivision at the end of Aberdeen Creek and wanted access to the creek. He recommended that the channel be re-dredged if needed by the COE. BOS unanimously adopted resolution to request COE to dredge channel to original depth, and that a copy of the resolution be sent to COE, Tom Downing, Harry S. Byrd, and William Scott.
9. BOS March 28, 1974: Elliott Whitehurst, Civil Engineer for the Army COE appeared RE dredging of Aberdeen Creek. He said COE had proposed to pump the spoil to a 30 acre site near Clay Bank used 12 years ago when the creek was originally dredged. The Army received from the Bureau of Sport Fisheries and Wildlife opposition in response to an environmental impact report issued on the project as required by law. They oppose use of the area citing its value as habitat of muskrats and other wildlife. The Virginia Institute of Marine Science and the Gloucester Wetlands Board recommend using the upper portions of the area to avoid the marsh section nearest the shoreline. Unless this problem is resolved, the only alternative is to find another site to dispose of the spoil. BOS then unanimously adopted a resolution to appeal to the Department of the Interior to reevaluate the project and allow COE to proceed with the maintenance dredging of Aberdeen Creek.
10. BOS May 10, 1974: County Administrator advised that the largest landowner signed the release to allow spoil from the dredging of Aberdeen Creek to be deposited on his property. Of the 2 remaining small landowners, one has agreed to sign the lease and one is undecided. Before COE can begin work, BOS must adopt a resolution certifying that $7500 is available to be paid to the COE , and the second item is signing of an agreement giving the Corps authority to go in and work on the land where the spoil is to be located.
11. BOS June 6, 1974: Mr. Gene Whitehurst, Mr. Westcott and Mr. Lawless from the Norfolk COE were present to discuss problems surrounding the dredging operation. The 3 landowners have signed releases, but the possible holdup is obtaining releases from oyster ground holders. The matter of compensation for damages to oyster grounds was discussed, noting that the contractor performing the dredging operation could be held responsible for any damages caused by his negligence. BOS adopted 3 resolutions after COE gave verbal confirmation that it would be possible to repeal them up until 10 a.m. on June 25, 1974.
    a. Approval of Agreement between USA and County (Term #7 = County assumes all costs over $1M)
    b. Approval of Temporary Spoil Disposal Permit to United States of America (cites areas have been platted on a map entitled “Gloucester County, Va., Aberdeen Creek, Survey of August 1973, File No. H-24-14-11 dated 25 April 1974”
    c. Advise COE to Proceed, and further advise that one leaseholder of Oyster Lot #105 had not signed the release and to notify their contractor to take precautions to prevent damage to oyster grounds.
12. BOS October 31, 1974: County Administrator Fries reported that the dredging of Aberdeen Creek is expected to be completed by next Tuesday, November 5, 1974.

13. Letter August 9, 1983, Col. Ronald E. Hudson, Norfolk District Engineer, COE, Real Estate Division, to John J. Jackson: prior to further maintenance dredging, County must enter into a local cooperation agreement with the USA and furnish without cost to the USA spoil disposal areas and to pay for the costs of constructing the necessary levees and spillways. A permanent upland disposal area is needed for the project. District policy for existing projects requires the area to be sufficient for a 50 year period. Either fee simple title or a permanent easement for disposal purposes must be conveyed to the United States. A title insurance policy to the Government to protect its interest in the disposal area is also needed. Preliminary information indicates a 10 to 15 acre upland site should satisfy the projected 50 year need.
14. Letter March 21, 1986, WHW to Jack G. Starr, Chief, Engineering Division, Norfolk District COE: acknowledges his letter of March 4 conveying the report entitled "Analysis and Recommendations for Long-Term Dredted Material Disposal for Aberdeen Creek, Gloucester County, Virginia" and expresses hopes to proceed with options 1& 2 although option 4 (upland disposal) can in no way be funded for the $250,00 estimate because Gloucester is the fastest growing municipality in the state, with burdens on our schools, utilities, public works, and other systems necessitating an almost 30% increase in real estate taxes this year.
15. Public Meeting, November 13, 1986, Discussion of Aberdeen Creek Dredging
16. **First CIP Request Form**, WDJ, 1/20/1987, Project Title: Aberdeen Creek Spoil Disposal
    a. Description: Improve upland spoil disposal area to accept maintenance dredging spoil from Aberdeen Creek
    b. Project Justification: The Corps of Engineers has assessed the recreational and commercial benefits of dredging Aberdeen Creek and assigned a benefit-to-cost ratio of 1.57. There appears to be one affected oyster lease holder opposed to overboard spoil disposal, so onshore disposal appears to be the only option. The Corps has stated that "Active local support of the project and disposal plan will be required" before overboard disposal could be approved.
    c. Cost estimate, Total $103,500
        i. Preliminary and design = $1,500
        ii. Land Acquisition = $2,000(20 ac lease @ $100/year) and each year for 40-50 years
        iii. Site Preparation = $100,000
18. WDJ Note to File 11/22/1988: "I personally don't think we would ever get the OK for overboard disposal, but we surely won't get any consideration for overboard until it is proven that we can't get onshore disposal. We can't prove that we can't get onshore disposal until the Board funds onshore disposal and we go out with $ and see what success we have. That's it. Warning: Note that whereas Aberdeen is a federal project channel & COE will dredge, Sarah's Creek is not & will be a 100% local cost to dredge!"
19. BOS December 6, 1988 Agenda Package: Item VI-J Dredging of Aberdeen Creek; WHW's memo ends with the conclusion that the key to the plan is solution to the spoil disposal problem for the 50 year planning period required
20. WDJ Memo to File, April 1, 1991: He spoke to Richard Kline with COE regarding disposition of Aberdeen Creek project: Condition survey must be updated prior to any recommendations made as to scheduling the dredging of the

creek; condition surveys are scheduled on funded projects; currently Aberdeen Creek is not a funded project and a condition survey has not been scheduled. However, Aberdeen Creek has been changed on the priority sheet and will receive consideration for survey the last 90 days of this fiscal year. Kline made this observation: When this project was last funded, all permitting agencies signed off on the project. The burden was on the County for a spoil site. The County did not provide said site. Accordingly, much of the process would have to be repeated. Another problem is procedural—a solution to the dredge disposal must be in place before funds can be budgeted. Lastly Kline thought the Virginia Port Authority may provide some funding.

21. Letter, April 19, 1991 from James N. Thomasson, P.E., Chief, Engineering Division, Army COE to Doug Meredith, notifying him that they have tentatively scheduled a channel condition survey in the summer, and he's optimistic that the survey of Aberdeen Creek will be completed by Sept. 30. This will update the shoaling situation in the entrance channel and allow us to better consider the idea of dredging less than the entire project, as suggested by some users. He suggests contacting Robert Merhige of the Va. Port Authority for financial assistance from the State's port development fund.
22. Letter January 30, 1992 from Ronald G. Vann, P.E., Chief Civil Programs Branch Army COE to Doug Meredith conveying 2 copies of the recent condition survey of the Aberdeen Creek navigation project.
23. Letter 3/2/1999 from J.D. Cook, Captain, US Coast Guard to WHW, notifying him that they are considering removing buoys and beacons for Aberdeen Creek due to diminished channel water depths (2.6 ft. MLLW at approach to Aberdeen Creek). Norfolk District COE advised him that dredging is not planned due to the absence of a dredge material placement site.
24. Letter 6/7/99 WDJ to Capt. Cook, requesting reconsideration of removal of aids to navigation.
25. **Last CIP Request Form** 11/06/2003, CIP Project Title: Aberdeen Creek Spoil Disposal
    a. Description: "Improve upland spoil disposal area to accept maintenance dredging spoil from Aberdeen Creek."
    b. Project Justification: "The Aberdeen Creek channel has shoaled badly. The Corps of Engineers has assessed the dredging benefits and assigned a benefit-to-cost ratio of 1.57. Aberdeen Creek is a federal project channel, and the COE will <u>perhaps</u> dredge it if the County pays for spoil disposal."
    c. Cost estimate, complete @ $193,200
        i. Design, $12,900 (8% of construction)
        ii. Land acquisition $3,200 =20 Acres leased @$100/ac/year x 1.61 (and each year for 40+ years)
        iii. Site preparation, $161,000
        iv. Contingencies, $16,100 (10% of construction)

Appendix C

Gloucester County Zoning Amendment – Aquaculture

AT A MEETING OF THE GLOUCESTER COUNTY BOARD OF SUPERVISORS HELD ON JULY 3, 2012 IN THE COLONIAL COURTHOUSE, 6504 MAIN STREET GLOUCESTER, VIRGINIA: ON A MOTION DULY MADE BY MR. CHRISCOE, AND SECONDED BY MS. THEBERGE, THE FOLLOWING ORDINANCE WAS ADOPTED BY THE FOLLOWING VOTE:

Carter M. Borden, yes;
Ashley C. Chriscoe, yes;
Christopher A. Hutson, yes;
Andrew James, Jr., yes;
John H. Northstein, yes;
Robert J. Orth, yes;
Louise D. Theberge, yes;

AN ORDINANCE TO AMEND APPENDIX B – ZONING OF THE CODE OF GLOUCESTER COUNTY, VIRGINIA, BY AMENDING ARTICLE 2 – DEFINITIONS, SECTION 2-2 – DEFINITIONS; AMENDING ARTICLE 5 – DISTRICT REGULATIONS, SECTION 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED; AND AMENDING ARTICLE 9 – SUPPLEMENTARY DISTRICT REGULATIONS BY ADDING A SECTION 9-23 - SEASONAL SALES AND FARMERS' MARKETS

WHEREAS, the Gloucester County Board of Supervisors requested the Gloucester County Planning Commission consider ideas for an amendment to the Gloucester County Code which would accommodate wayside stands in certain areas of Gloucester County; and

WHEREAS, the Gloucester County Planning Commission and staff spent considerable time examining topics related to the Board's request, reviewing ordinances from other localities, and obtaining the best available technical advice from various expert sources on these topics; and

WHEREAS, the Gloucester County Planning Commission developed and reached consensus on a list of definitions and recommendations which would provide for processes by which to allow wayside stands, farmers' markets, aquaculture facilities, and other agricultural related uses and activities to be located in certain areas of the County; and

WHEREAS, the adoption of an ordinance that supports and encourages agricultural based businesses and activities is consistent with several goals in the Gloucester County's Comprehensive Plan, including: preservation of prime agricultural and forested lands, to encourage economic development that is compatible with the physical and social development of the County, and the preservation of rural character; and

WHEREAS, the Gloucester County Planning Commission reached consensus on a draft ordinance amendment and held a public hearing on June 7, 2012, voting 10-0 to forward the ordinance amendment to the Gloucester County Board of Supervisors with a recommendation of approval; and

WHEREAS, the Gloucester County Board of Supervisors has held a duly advertised public hearing, and is of the opinion that public necessity, convenience, general welfare, and good zoning practice will be furthered by such an amendment.

NOW, THEREFORE BE IT ORDAINED AND ENACTED, by the Board of Supervisors of Gloucester County, Virginia, this 3rd day of July, 2012, that the Gloucester County Code, Appendix B, Article 2 – Definitions, Section 2-2 – Definitions; Article 5 – District Regulations, Section 5-2 – Official Schedule of District Regulations Adopted; and Article 9 - Supplementary District Regulations, be amended as follows:

APPENDIX B – ZONING

Add the following definitions to Appendix B – Zoning – Article 2 – Section 2-2 Definitions:

Aquaculture: The propagation, rearing, enhancement, and harvest of aquatic organisms in controlled or selected environments, conducted in marine, estuarine, brackish, or fresh water.

Aquaculture facility: Any land, structure, or other appurtenance that is used for aquaculture, including any laboratory, hatchery, pond, raceway, pen, cage, incubator, or other equipment used in aquaculture. This ordinance shall not apply to aquaculture facilities that are located below mean low water (MLW) and regulated by other agencies or entities.

Aquaculture facility, agricultural: An aquaculture facility located on a working farm or in an agricultural zoning district. Agricultural aquaculture facilities shall be treated as other agricultural structures and uses.

Aquatic organisms: Finfish, shellfish (mollusks, crustaceans, etc.), aquatic plants, and similar creatures and species.

Community Supported Agriculture (CSA): An arrangement whereby individuals purchase shares in, or subscribe to, a farm operation so that it becomes, in essence, the community's farm; the growers and consumers share the risks and benefits of food production. CSA members or subscribers pay at the onset of the growing season for a share of the anticipated harvest; once harvesting begins, they receive shares of vegetables and fruit, and also sometimes herbs, cut flowers, honey, eggs, dairy products, and meat, fish, or seafood as well.

Farmers' market: A seasonal gathering of vendors in a predetermined, centralized location for the display of hand-made or regionally harvested agricultural, horticultural, silvicultural, and/or seafood products, excluding livestock, produced off-site and brought to the market for sale; the occasional sales of pumpkins, Christmas trees, and other annual products shall also be permitted.

~~*Farmer's market or farm produce stand:* The sale of agricultural or seafood products, excluding livestock, produced off-site and brought to the market for sale.~~

Farm produce stand: Any structure or land used for the sale of agricultural, horticultural, silvicultural, and/or seafood products, excluding livestock, produced off-site and brought to the market for sale. A farm produce stand may be open seasonally or year-round, but is considered to be permanent in nature; the occasional sales of pumpkins, Christmas trees, and other annual products shall also be permitted.

Seasonal sales: The sales of goods and products - such as pumpkins and Christmas trees - that are associated with a particular season or holiday and sold on a temporary and/or annually recurring basis.

~~*Wayside stand, roadside stand, wayside market:* Any structure or land used for the sale of agricultural or horticultural produce, livestock, or merchandise produced by the owner or his family or their farm.~~

Wayside stand, roadside stand, wayside market: Any structure or land used for the sale of agricultural and/or horticultural products, excluding livestock, produced by the owner, or his family, on their farm; or, any structure or land used for the sale of hand-crafted merchandise produced by the owner, or his family, on their farm.

Amend Appendix B – Zoning – Article 5 – Section 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED for Zoning Districts C-2, RC-1, RC-2, and SC-1 to include agritourism activity as follows: [See attached tables]

Amend Appendix B – Zoning – Article 5 – Section 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED for Zoning Districts B-1, B-4, C-1, and C-2 to include aquaculture facilities as follows: [See attached tables]

Amend Appendix B – Zoning – Article 5 – Section 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED for Zoning Districts C-1, C-2, RC-1, RC-2,

and SC-1 to include aquaculture facilities, agricultural as follows: [See attached tables]

Amend Appendix B – Zoning – Article 5 – Section 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED for Zoning Districts B-1, B-2, and B-3 to include farmers' markets as follows: [See attached tables]

Amend Appendix B – Zoning – Article 5 – Section 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED for Zoning Districts B-1, B-2, B-3, and B-4 to include seasonal sales as follows: [See attached tables]

Amend Appendix B – Zoning – Article 5 – Section 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED for Zoning Districts C-2, RC-1, RC-2, and SC-1 to include wayside stands, roadside stands, and wayside markets as follows: [See attached tables]

Amend Appendix B – Zoning – Article 5 – Section 5-2 OFFICIAL SCHEDULE OF DISTRICT REGULATIONS ADOPTED for Special Exception Criteria "S." to read as follows: **"It shall be the responsibility of the applicant to provide all of the appropriate information to the board of zoning appeals for its consideration. This shall include, but not be limited to, noise levels, transportation impacts, distance from residences or businesses, etc. Such information shall be accompanied by a complete ~~plan of the site~~ site sketch drawn to scale."**

Amend Appendix B – Zoning - Article 9 - SUPPLEMENTARY DISTRICT REGULATIONS
Section 9-23. Seasonal Sales and Farmers' Markets is hereby added.

Sec. 9-23. Seasonal Sales and Farmers' Markets.

The following requirements and limitations shall apply to seasonal sales and farmers' markets:

1. An application for a seasonal sales permit must be submitted to the Zoning Administrator for review and approval prior to any seasonal sales or farmers' market activities. A seasonal sales permit will be valid during the season for which the permit was issued, subject to all of the information on the application remaining materially unchanged. If at any time any of the information upon which the seasonal sales permit materially changes, a revised application shall be submitted to the Zoning Administrator for review and approval pursuant to this section. The application for a seasonal sales permit shall contain and be accompanied by the following:

a) A written narrative describing the nature of the proposed activities, proposed duration of such activities, and the proposed daily hours of operation.
b) A legible sketch plan, drawn to scale, depicting the proposed location of the activities – including, but not limited to, merchandise, parking, circulation, pedestrian and vehicular ingress/egress, surface materials, and sanitary facilities, if any.
c) Written and signed authorization from any property owner upon whose property the proposed activities are to take place, confirming that the applicant has the right to use such property for the entire duration listed on the application.
d) Proof of applicable Health Department approvals if the proposed activity requires the same, or a letter from the Health Department stating that none are required.
e) Payment of all appropriate application fees.

2. In addition to the requirements listed in section 9-23(1) above, the following provisions shall apply to farmers' markets:

a) No temporary or seasonal permit shall be issued unless adequate provision is made for off-street parking and safe ingress and egress to the adjacent street; VDOT review and approval may be required.
b) No overnight storage of vehicles shall be permitted, and no permanent structures associated with the site's use as a farmers' market shall be placed or erected on the site.
c) The hours of operation shall be limited to daylight hours.

3. Any signs shall be permitted in accordance with the provisions of Article 12.

A Copy Teste:

Brenda G. Garton

Brenda G. Garton, County Administrator

Official Schedule of District Regulations (Zoning District B-1)

Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
Aquaculture facility										35								Indoor facilities only. The applicant shall secure all appropriate permits required by federal, state, and local agencies. Packing of whole organisms on ice for transport to market shall be permitted.
Farmers' market																		See Article 9, Supplementary District Regulations, Section 9-23
Seasonal Sales																		See Article 9, Supplementary District Regulations, Section 9-23

Official Schedule of District Regulations (Zoning District B-2)

Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
Farmers' market																		See Article 9, Supplementary District Regulations, Section 9-23
Seasonal Sales																		See Article 9, Supplementary District Regulations, Section 9-23

Official Schedule of District Regulations (Zoning District B-3)																		
Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
Farmers' market																		See Article 9, Supplementary District Regulations, Section 9-23
Seasonal Sales																		See Article 9, Supplementary District Regulations, Section 9-23

Official Schedule of District Regulations (Zoning District B-4)

Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
Aquaculture facility										35								Indoor facilities only. The applicant shall secure all appropriate permits required by federal, state, and local agencies. Packing of whole organisms on ice for transport to market shall be permitted.
~~Farmers market or farm produce stand~~							30	2.5	35						20			
Farmers' market																		See Article 9, Supplementary District Regulations, Section 9-23
Farm produce stand							30	2.5	35						20			
Seasonal Sales																		See Article 9, Supplementary District Regulations, Section 9-23

Official Schedule of District Regulations (Zoning District C-1)

Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
	Aquaculture facility	F, I, S, T, U							35	100	100	200	100		20	50	50	Packing of whole organisms on ice for transport to market shall be permitted.
	Aquaculture facility, agricultural	F, I, S, T, U							35	100	100	200	100		20	50	50	Packing of whole organisms on ice for transport to market shall be permitted.

Official Schedule of District Regulations (Zoning District C-2)

Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
	Aquaculture facility	F, I, S, T, U								75								Packing of whole organisms on ice for transport to market shall be permitted.
	Aquaculture facility, agricultural	F, I, S, T, U								75								Packing of whole organisms on ice for transport to market shall be permitted.
	Agritourism activity	S, T, U																
	Wayside stand Roadside stand Wayside market	O, T, U																

Official Schedule of District Regulations (Zoning District RC-1, RC-2)																		
Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
Aquaculture facility, agricultural										75								The applicant shall secure all appropriate permits required by federal, state, and local agencies. Packing of whole organisms on ice for transport to market shall be permitted.
	Agritourism activity	S, T, U																
47 Home occupation Type I, ~~provided that wayside stands and greenhouses with retail and wholesale shall also be permitted~~																		
Wayside stand Roadside stand Wayside market																		

Official Schedule of District Regulations (Zoning District SC-1)																		
Permitted Uses	Special Exceptions	Specific Special Exception Criteria	Minimum Lot Size				Max % of Lot to Be Occupied (Principal and Accessory Buildings)	Max Ht. of Principal Building		Minimum Yard Dimensions (ft)				Accessory Buildings				Misc. Requirements
			Sewer and Water (acres)	Sewer or Water (acres)	On-site S & W (acres)	Width (ft)		Stories	Feet	Front	One Side	Sum Sides	Rear	Stories	Max. Height	Side Lot Lines	Rear Lot Lines	
	Wayside stand Roadside stand Wayside market	O, T, U																
	Agritourism activity	S, T, U																
	Aquaculture facility, agricultural	F, I, S, T, U								75								

Appendix D

Gloucester County Zoning Ordinance

SF-1 Permitted Uses & Structures

Gloucester County Zoning Ordinance

SF-1 Permitted Uses & Structures

	Special Exceptions	Specific Special Exception Criteria	Max. % of Lot to be Occupied (Principal and Accessory Buildings)	Accessory Buildings		
			Stories	Max. Height	Side Lot Lines	Rear Lot Lines
Single family detached dwelling (See definition of building height, single family residential)			2	35 or 50 See Misc. Req.	5, or 15 See Misc. Req.	5 or 30 See Misc. Req.
Churches and other places of worship				20	5	5
Parks and playgrounds						
Home occupations, Type I						
Home gardens						

Uses required for provision and maintenance of public facilities and utilities							
Domestic pets							
Private stables							
Community recreation facilities					20	5	5
Commercial communications facility, Type I							
Commercial communications facility, Type II							
Forestry harvesting							
	Schools, libraries, museums	A, I, H, U					
	Cemeteries	Same as RC-1 district					
	Portable sawmills	A, I, H, S, U					
	Bed and breakfast	F, H, L, T, U					
	Uses required	E, F, I, L, O,					

	for the provision and maintenance of private wastewater utilities	S, T, U, W					
	Home occupations, Type II	U					
	Commercial communications facility, Type III	X—1, 2, 3, 4, 5, 6, 9, 10, 11, 13, 14, 15, 16					
	Commercial communications facility, Type IV	X—1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16					
	Commercial communication facility, Type V	S, U					
	Commercial communication facility, Type VI (data pole)	S, U					
Wind energy facility, small system					120′		

Appendix E

The Albemarle County Land Use Handbook

Kamptner/March 2014

Chapter 12

Chapter 12

Special Use Permits

12-100 Introduction

Under Virginia Code § 15.2-2286(A)(3), a governing body is authorized to grant special exceptions "under suitable regulations and safeguards." Special exceptions are also known as *special use permits* or *conditional use permits* (the term *special use permit* is used in this chapter, except as otherwise noted), though they may not all necessarily serve the same purpose in a particular locality, as discussed in section 12-200. *See Virginia Code § 15.2-2201 (definition of special exception).*

A governing body may delegate the authority to grant special use permits to the BZA. *Virginia Code § 15.2-2309(6).* For example, a BZA could be delegated the authority to consider special use permits for off-site signs. A governing body may also withdraw that authority. *Chesterfield Civic Association v. Board of Zoning Appeals*, 215 Va. 399, 209 S.E.2d 925 (1974) (BZA had no power or authority to consider an application for a special use permit where, after the application was filed but before it was considered by the BZA, the county's zoning regulations were amended to withdraw the authority of the BZA to consider special use permits and to reserve that power in the board of supervisors).

Key Principles to Know About Special Use Permits
• Whether granted by the governing body or the BZA, special use permits are legislative in nature.
• Uses allowed by special use permit are considered to have a potentially greater impact than those allowed as a matter of right.
• Special use permits must be evaluated under reasonable standards, based on zoning principles.
• Impacts from special uses are addressed through conditions.
• Conditions must be reasonably related to the impacts to be addressed, and the extent of the conditions must be roughly proportional to the impacts.
• Decisions granting or denying special use permits are presumed correct and reviewed under the fairly debatable standard.

12-200 The nature of special use permits

Zoning district regulations typically delineate a number of uses that are allowed as a matter of right, and a number of uses that are allowed by special use permit. Uses allowed only by special use permit are those considered to have a potentially greater impact upon neighboring properties or the public than those uses permitted in the district as a matter of right. *Board of Supervisors of Fairfax County v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982). The special use permit procedure, by its very nature, presupposes that a given use may be allowed in one part of a zoning district, but not in another. *Bell v. City Council of City of Charlottesville*, 224 Va. 490, 297 S.E.2d 810 (1982) (rejecting claim that city's zoning ordinance violated the uniformity requirement of Virginia Code § 15.2-2282).

Although by definition special exceptions pertain to *uses* (*Virginia Code § 15.2-2201 (definition of special exception)*, it appears that the meaning of *use* in this context may be broader. In *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), the county's zoning ordinance allowed "deviations" from certain setback regulations with conditions, if approved by the board of supervisors. The deviation was an alternative procedure to obtaining a variance from the BZA. The Virginia Supreme Court classified the deviation as a special exception, "analogous" to a special use permit or a conditional use permit, and analyzed it the same way as it would either of those types of permits. In *Town of Occoquan v. Elm Street Development, Inc.*, 2012 Va. LEXIS 104 (2012) (unpublished), the Virginia Supreme Court characterized a special exception to disturb steep slopes as a density-related permit.

A special use permit is different from a variance. *See chapter 13.* A special use permit cannot alter the provisions of a zoning ordinance. *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation*, 277 Va. 198, 671 S.E.2d 160 (2009), discussed in section 12-660. *See also Board of Supervisors of Washington County v. Booher*, 232 Va.

478, 352 S.E.2d 319 (1987), discussed in the following paragraph; *Sinclair v. New Cingular Wireless*, 283 Va. 567, 727 S.E.2d 40 (2012) (though not deciding whether a county's regulations allowing the disturbance of steep slopes was a special exception, the waiver regulations were analogous to a special exception and were legislative in nature).

A special use permit also cannot be granted by implication. *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987). In *Booher*, the landowner obtained a rezoning of his land in 1975 from A-2 to B-2, and informed the board of supervisors of his intention to establish an automobile graveyard and junkyard. Neither of those uses was allowed by right or by special use permit in the B-2 zoning district. In 1981, the county amended its zoning regulations requiring a conditional use permit for those uses, but only in the M-2 zoning district. The board denied Booher's application to rezone his property to M-2 and ordered him to discontinue the use and remove the vehicles from his property. The Virginia Supreme Court concluded that the Booher's use did not have nonconforming status, adding that "[i]t may be that the Board intended . . . to grant Booher a special exception. But an automobile graveyard was not then and is not now a permitted use in the B-2 zone. Booher did not apply for a special exception in that zone [and] the Board had no power to grant an exception by implication. . ." *Booher*, 232 Va. at 481-482, 352 S.E.2d at 321.

Whether granted by the governing body or the BZA, special use permits are legislative in nature. *Board of Supervisors of Fairfax County v. McDonald's Corporation*, 261 Va. 583, 544 S.E.2d 334 (2001); *Richardson v. City of Suffolk*, 252 Va. 336, 477 S.E.2d 512 (1996); *Ames v. Town of Painter*, 239 Va. 343, 389 S.E.2d 702 (1990) (when granted by a BZA); *Koehne v. Fairfax County Board of Zoning Appeals*, 62 Va. Cir. 80 (2003).

Although zoning regulations may require that an approved special use begin within a certain period of time, Virginia Code § 15.2-2209.1(B) extends the period of validity for special use permits outstanding on January 1, 2011 until July 1, 2017 if the special use permit is related to "new residential or commercial development." This statutory extension pertains only to the date by which the use must be started, and does not apply to any requirement that a special use be terminated or ended by a certain date or within a specified number of years (*see discussion of that issue in section 12-510*).

A locality's special use permit regulations may allow the permit to be revoked if the use is found to be in violation with the permit's conditions, at least on activities directly connected to the permit. *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007); *see Lawless v. Board of Supervisors of Chesterfield County*, 18 Va. Cir. 230 (1989). In *Mirant*, the Virginia Supreme Court held that the city could not revoke a special use permit for purported violations of certain emission control limits in its state-issued stationary source permit to operate because those purported violations were beyond those having a nexus to the purpose of the special use permit.

12-300 Limitations on the uses for which special use permits may be required

A locality's authority to require special use permits has some limitations.

Summary of the Uses for Which a Locality May Not Require a Special Use Permit
• *Production agriculture, silviculture* and *small scale biofuels production* in an agricultural zoning district.
• *Cluster developments* except where a cluster or town center is allowed as an optional form of residential development at a greater density than that permitted by right (see discussion of Virginia Code § 15.2-2288.1, below).
• *Manufactured housing* in an agricultural zoning district.
• *Group homes of 8 or assisted living facilities* for 8 or fewer aged, infirm or disabled persons in a zoning district where single family residential use is a by right use.
• *Family day homes of 5 or fewer persons* in a zoning district where single family residential use is a by right use.
• *Tents* serving as a temporary structure for 3 days of less used for activities such as weddings and estate sales.
• *As a condition of approval of a subdivision plat, site plan or building permit* for a residential development where the dwellings meet the use, height and density requirements allowed by right, with exceptions in Virginia Code § 15.2-2288.1.
• *Temporary family health care structures* established in compliance with Virginia Code § 15.2-2292.1.
• *To address solely aesthetic considerations* outside of a historic district established under Virginia Code § 15.2-2306.

A special use permit may *not* be required for any production agriculture or silviculture activity (*Virginia Code § 15.2-2288*) or qualifying small scale biofuels production (Virginia Code § 15.2-2288.01) in an agricultural zoning district. A special use permit also may not be required for the following uses, provided that statutorily prescribed circumstances exist: (1) cluster developments, *Virginia Code § 15.2-2286.1*; (2) manufactured housing in agricultural zoning districts, *Virginia Code § 15.2-2290(A)*; (3) group homes of 8 or fewer persons or residential facilities for 8 or fewer aged, infirm or disabled persons, which must be allowed by right in zoning districts where single family residential use is allowed by right, *Virginia Code § 15.2-2291*; and (4) family day homes of five or fewer persons, which must be allowed by right in zoning districts where single family residential use is allowed by right, *Virginia Code § 15.2-2292.*

A special use permit also may not be required as a condition of approval of a subdivision plat, site plan or building permit for the development and construction of residential dwellings at the use, height and density permitted by right under a zoning ordinance. *Virginia Code § 15.2-2288.1.* These limitations do not prevent a locality from requiring a special use permit for: (1) a cluster or town center as an optional form of residential development at a density greater than that permitted by right, or otherwise permitted by local ordinance; (2) a use in an area designated for steep slope mountain development; (3) a use as a utility facility to serve a residential development; or (4) nonresidential uses including, but not limited to, home businesses, home occupations, day care centers, bed and breakfast inns, lodging houses, private boarding schools, and shelters established for the purpose of providing human services to the occupants thereof. *Virginia Code § 15.2-2288.1.*

In *Town of Occoquan v. Elm Street Development, Inc.*, 2012 Va. LEXIS 104 (2012) (unpublished), The developer was the contract purchaser of a 3.68 acre parcel zoned R-3, which allowed up to 16 multi-family units per acre. Approximately one-half of the parcel had slopes greater than 20% and the town regulations required a special use permit to disturb or develop on those slopes. Although staff recommended approval of the special use permit with 12 conditions, to which the developer agreed, the town council denied the permit. The developer sued. The town contended that Virginia Code § 15.2-2288.1 did not apply to the town's steep slopes regulations and that the entire parcel was not developable by right because the by right density could be calculated only in compliance with the steep slopes regulations.

The Virginia Supreme Court rejected the town's arguments, concluding that Virginia Code § 15.2-2288.1 "expressly prohibits a locality from requiring a special use permit as a precondition to development that is otherwise permitted under a zoning ordinance," and that the town's steep slopes regulations interfere "with residential development that is otherwise permitted within the zoning district." The Court also rejected the town's argument that the developer had no right to disturb the steep slopes in the absence of a special use permit, concluding that the town "cannot permit this development by right and simultaneously require an SUP as a condition of development on the property. . . By requiring an SUP, the Town has politicized what should be a ministerial decision . . .[T]he steeps slope SUP requirement . . . has no bearing on any density calculation in this instance." To reach that conclusion, the Court characterized the special exception as a density-related permit which was therefore prohibited by the statute. Lastly, the Court rejected the town's argument that the Chesapeake Bay Preservation Act gave it the power to require a special use permit.

The requirement for a special use permit also may not be based solely on aesthetic considerations. *Allstate Development Co. v. City of Chesapeake*, 12 Va. Cir. 389 (1988) (finding that requirement for special use permit for modular houses in a district, but not for stick-built houses, arose solely because the neighbors did not like the appearance of modular houses); *but see Virginia Code § 15.2-2306, allowing localities to require architectural compatibility within districts established under that section.*

Finally, special principles apply to special use permits for religious institutions. See chapter 34 for a discussion of the review of special use permits under the Religious Land Use and Institutionalized Persons Act of 2000.

12-400 Minimal standards must guide the decision-making process

A use allowed by special use permit is permitted "only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public." *Board*

of Supervisors of Fairfax County v. Southland Corp., 224 Va. 514, 521, 297 S.E.2d 718, 721-722 (1982); *Daniel v. Zoning Appeals Board of Greene County*, 30 Va. Cir. 312 (1993). An application for a special use permit must be examined by public officials, and be guided by standards set forth in the zoning ordinance, to determine the impact the proposed use will have if carried out on the property. *Southland Corp., supra.*

Special use permit regulations adopted pursuant to Virginia Code § 15.2-2286(A)(3) "need not include standards concerning issuance of special use permits where local governing bodies are to exercise their legislative judgment or discretion." *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 520, 708 S.E.2d 841, 846 (2011), quoting *Bollinger v. Board of Supervisors of Roanoke County*, 217 Va. 185, 186, 227 S.E.2d 682, 683 (1976). Thus, in *Jennings*, the Virginia Supreme Court upheld the county's granting of "special exception permits" "subject to such conditions as the governing body deems necessary to carry out the intent of this chapter." In *Bollinger*, the Court upheld the county's granting of a conditional use permit for a landfill under a zoning regulation that simply stated: "The location of commercial amusement parks, airports, borrow pits and sanitary fill method garbage and refuse sites shall require a conditional use permit. These permits shall be subject to such conditions as the governing body deems necessary to carry out the intent of this chapter." In affirming the granting of the permit, the *Bollinger* Court was persuaded by the thorough review conducted by the county, even though the standard for granting the special use permit was broad, stating: "it appears the Board acted only after it had the benefit of thorough studies, numerous tests, and after due deliberation on its part. These studies and tests revealed that the land is suitable for landfill purposes. The terms and conditions imposed by the Board indicate that it was well aware of the uses of surrounding land and the characteristics of the property involved."

In *Cole v. City Council of City of Waynesboro*, 218 Va. 827, 832, 241 S.E.2d 765, 769 (1978), the city's zoning regulations allowed the city council to issue special use permits "whenever public necessity and convenience, general welfare or good zoning practice justifies such special exception or use permits which may be granted by the council adopting an ordinance granting the same after considering the recommendations of the city planning and zoning commission." In holding that a special use permit for a 151-unit apartment complex on a 3/4-acre parcel was invalid, the Virginia Supreme Court said that the above-cited standards in the ordinance were "an open invitation for a special exception to be granted without any consideration being given to certain basic principles of law applicable in the zoning field. It permits a lack of adherence by City Council to a fundamental rule that zoning regulates the use of land." *Cole*, 281 Va. at 833, 241 S.E.2d at 769. The critical distinction between *Jennings/Bollinger* and *Cole* is that the standard in *Cole* was stated in the disjunctive – the city council could consider "public necessity and convenience, general welfare *or* good zoning practice." In other words, the city council was not tied to the zoning statutes or good zoning practice when it considered a special use permit, and this rendered the city's regulations invalid.

At bottom, all that a zoning ordinance must provide is that the governing body's consideration of a special use permit be taken within the framework of the zoning statutes and the principles that apply to zoning. In granting a special use permit, specific findings are not required unless mandated by the zoning ordinance. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013) ("While a zoning ordinance must set forth standards under which applications for special exceptions are to be considered when local governing bodies delegate that legislative power, the ordinance need not do so when the local governing body has reserved the power unto itself"). Typical standards applicable to special use permits include consideration of: (1) the impacts of the special use on the character of the district; (2) the impacts of the special use on the welfare of the landowners and occupants of land in the district, *see Bell v. City Council of City of Charlottesville*, 224 Va. 490, 297 S.E.2d 810 (1982); and (3) consistency with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986) (upholding denial of special use permit to operate crematory based on the negative impact of the proposed use on neighboring properties and inconsistency with comprehensive plan). Other factors that may be considered include: (1) the character of the property; (2) the general welfare of the public; and (3) the economic development of the community. *Bell, supra.* These factors are also akin to those delineated in Virginia Code §§ 15.2-2283 and 15.2-2284.

If specific standards are adopted, deference should be given to the governing body in determining whether the standards were considered when the action was taken. In *Shenandoah Mobile Co. v. Frederick County Board of Supervisors*, 83 Va. Cir. 113 (2011), the applicant challenged the board's denial of a conditional use permit contending that the board failed to give adequate consideration to the standards in the zoning ordinance. The circuit court rejected this

argument, noting that the motion maker "touched on" four of the six standards and that it knew "of no requirement that each individual Board Member express the reasons for voting for or against the motion." *Shenandoah*, 83 Va. Cir. at 116. The court otherwise found substantial evidence in the record to support the board's decision. Another circuit court has held that the governing body is not required to make specific findings with respect to each and every potentially relevant clause in the comprehensive plan, nor each and every clause of the purpose and intent section of the zoning ordinance. *Koehne v. Fairfax County Board of Zoning Appeals*, 62 Va. Cir. 80 (2003) (county's special use permit regulations that the proposed special use be "in harmony with the adopted comprehensive plan" and "in harmony with the general purpose and intent of the applicable zoning district regulations"). Part of that analysis will depend on the language of the zoning ordinance.

As shown in *Bollinger*, the courts will look at the locality's analysis of the facts and how they are applied to the standards, even if the standards are broad as they were in *Bollinger* and *Jennings*. *Compare to Mutter v. Washington County Board of Supervisors*, 29 Va. Cir. 394 (1992), where a circuit court concluded that a special use permit issued without consideration to the locality's comprehensive plan and whose justification was devoid of any meaningful studies or analysis was unreasonable. In *Mutter*, the court concluded that the county's approval of a solid waste convenience station in an environmentally sensitive location with traffic safety issues was unreasonable, arbitrary and capricious. The court noted that the board failed to consider the county's comprehensive plan, conduct any site testing, consult with various environmental and other state agencies, and failed to even consult with the county's landfill manager for his assessment of the suitability of the site.

Lastly, a proposed special use permit need not necessarily be granted merely because an applicant adheres to the applicable zoning regulations; rather, a special use is prohibited unless an applicant obtains a permit. *Amoco Oil Co. v. Zoning Appeals Board of the City of Fairfax*, 30 Va. Cir. 159 (1993) (upholding the denial of special use permit because a number of the applicable special use permit criteria were not met).

12-500 Impacts from special uses are addressed through conditions

If a special use permit is granted, the potential impacts are addressed through reasonable conditions. *Byrum v. Board of Supervisors of Orange County*, 217 Va. 37, 225 S.E.2d 369 (1976). Under Virginia law, the conditions imposed must bear a *reasonable relationship* to the legitimate land use concerns and problems generated by the use of the property. *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580, 318 S.E.2d 407 (1984). A governing body cannot deny a permit indirectly by imposing unreasonable and impossible conditions on its use. *Byrum, supra.*

12-510 Conditions imposed by the governing body are to address impacts and, unlike proffers, they are not voluntary

Unlike proffers that accompany a rezoning considered by the locality's governing body, special use permit conditions are not volunteered by the landowner and need not be developed through negotiation. The locality may state the conditions as it determines to be appropriate as "suitable regulations and safeguards" for special use permits. *Virginia Code § 15.2-2286(A)(3)*. As explained by John H. Foote, Planning and Zoning, *Handbook of Local Government Law*, § 1-9.03, p. 1-51, (2011), the phrase "suitable regulations and safeguards" is "uniformly understood to mean that the locality may unilaterally impose reasonable conditions on the issuance of such permits or exceptions, in contrast to proffers that must come voluntarily from the applicant." *See also Staples v. Prince George County*, 81 Va. Cir. 308, 320-321 (2010) (condition imposing 14-day limit stay rule on campground was upheld because there is a reasonable basis to distinguish campgrounds from sites with permanent dwellings; a "local governing body is permitted to impose involuntary conditions on the grant of a special exception").

Special use permit conditions also may require administrative approvals by others. *Fuentes v. Board of Supervisors of Fairfax County*, 2000 Va. Cir. LEXIS 130 (2000), 2000 WL 1210446 (2000) (conditions in special use permit that required Health Department review and approval of a sewage treatment/disposal system and a groundwater monitoring system were not unlawful delegations of legislative authority; the board was authorized to delegate these administrative functions in a special use permit condition).

In connection with residential special use permits, if a landowner proposes affordable housing, any conditions

imposed must be consistent with the objective of providing affordable housing; when imposing conditions on residential projects that specify the materials and methods of construction or specific design features, the governing body must consider the impact of the conditions upon the affordability of housing. *Virginia Code § 15.2-2286(A)(3).*

Special use permit conditions pertaining to uses involving alcoholic beverages have been the subject of both judicial review and additional legislation. In *County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 200, 559 S.E.2d 627, 628 (2002), the Virginia Supreme Court held that a condition in a special use permit stating "[n]o alcoholic beverages shall be permitted" was not preempted by the Alcoholic Beverages Control Act (see Virginia Code § 4.1-128) because it was a "valid zoning ordinance . . . regulat[ing] the location of an establishment selling . . . alcoholic beverages," as permitted by the Act. Similarly, in *City of Norfolk v. Tiny House*, 222 Va. 414, 281 S.E.2d 836 (1981), the Court held that an ordinance requiring a special use permit for adult uses (such as sellers of alcohol and adult movie theaters) within 1,000 feet of one another did not violate Virginia Code § 4.1-128. The governing bodies of the cities of Norfolk and Richmond also are enabled under Virginia Code § 15.2-2286(A)(3) to impose other conditions on retail alcoholic beverage control licensees. Norfolk may impose conditions providing that the special use permit will automatically expire upon a change in the ownership, possession, management or operation of the property. Richmond may impose conditions requiring automatic review of the permit upon a change of ownership or possession of the property, or a transfer of majority control of the business, and may revoke the permit after notice and a public hearing.

One recurring issue of interest is whether a governing body may impose limitations on the life of a special use permit. A BZA has express authority to impose such a condition. *Virginia Code § 15.2-2309(6).* There is no logical reason why governing bodies should not have the same express authority; however, with one limited exception, they do not have express authority. The governing body of the City of Norfolk is enabled to impose a condition on any special use permit relating to retail alcoholic beverage control licensees which provides that the permit will automatically expire upon the passage of a specific period of time. *Virginia Code § 15.2-2286(A)(3).* No similar express authority exists for other governing bodies, as applied to retail alcoholic beverage control licensees or any other class of permittees, and a number of localities have accordingly concluded that they do not have implied authority to impose such a condition. Some localities conclude otherwise. One possible solution to this uncertainty is for the governing body to get the applicant to agree to such a condition. *See Board of Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985) (subdivider may voluntarily agree to make improvements to existing access roads and will be bound to that agreement, even if the county did not have the authority to otherwise require such improvements as a condition of subdivision approval).

12-520 Conditions must be reasonably and proportionally related to the impacts resulting from the use

When a locality seeks the dedication of land or other property (such as fees) as a condition of a land use approval, such as a condition to a special use permit, it must be certain that these conditions of approval: (1) have a nexus that is related to the impact of the proposed development; and (2) are roughly proportional to the extent of the impact. *Koontz v. St. Johns River Water Management District*, 570 U.S. ___, 133 S. Ct. 2586 (2013); *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994).

If this two-pronged test is not satisfied, the locality has imposed an unconstitutional *exaction*. This principle applies even when the locality denies the permit because the applicant is unwilling to agree to or accept such a condition. *Koontz, supra*. See section 6-440 for an additional discussion of *exactions*.

12-530 Developing condition language

Special use permit conditions typically originate from the locality's staff. Following are some suggestions for writing, reviewing, and revising proposed conditions:

- *State each condition clearly.* Each condition should be a declaratory statement, using clear and concise language as to what must be performed, when it must be performed, when it must be completed, and, if applicable, how it must be performed.

- *Write each condition with the dignity of a zoning regulation*: A condition becomes part of the zoning regulations applicable to the property. Therefore, it should be written with the dignity of a zoning regulation, using terminology found in the zoning ordinance.

- *Select words carefully*: The words in a condition must be carefully selected. Use the word "shall" rather than "should" or "may." If a condition requires that the owner cannot proceed until the county engineer approves a plan, the condition needs to state that "the owner shall obtain approval of the plan from the county engineer before . . .," rather than stating that the owner "shall submit a plan." Never use "etc." in a condition.

- *Consistently use the same word to refer to the same person, place or thing*: A person, place or thing always should be described or identified by the same word.

- *Use complete sentences*: Conditions should be written in complete sentences.

- *Ensure that each condition is comprehensive*: A condition should be written in comprehensive language that addresses the reasonably foreseeable issues that may arise from the condition.

- *Ensure that each condition imposes standards that are enforceable*: Every condition must be reviewed by the zoning administrator's office to ensure that the condition imposes standards that are enforceable. Part of the issue of enforceability pertains to the clarity of the language used, but the other part pertains to whether the language actually imposes a standard that can be enforced.

- *Be careful not to make the condition too specific*: In providing clarity, conditions can become too specific so that they become overly restrictive. Examples of being too specific include referring to the applicant by name (because the special use permit runs with the land), providing a specific measurement for height, distance, or something similar in an absolute when you intend to establish a minimum or a maximum.

- *Ensure that each condition imposes only requirements that address identified impacts*: Conditions may only address impacts resulting from the use. Ensure that the conditions do not modify, waive, substitute or relax otherwise applicable zoning regulations.

- *Use similar language for similar situations*: The locality's staff should propose language that is similar to language previously approved for a similar type of condition.

- *Be certain that the time of performance is clearly stated*: Be certain that the language clearly states when the owner must do the promised or required acts.

- *Ensure that the conditions do not impose, or would not be perceived to impose, an obligation on the locality, VDOT, or any other public entity*: Conditions address impacts from a special use and they should be drafted so as not to impose, or be perceived to impose, an obligation on the locality, VDOT, or any other public entity. This problem often arises in the context of establishing the timing for performance. For example, a condition stating that the "final site plan shall be approved by the site plan agent prior to commencing the use" could be read to mean that the director must approve the site plan. Alternative wording to address this issue would be, for example, "The applicant is required to obtain approval of the final site plan by the site plan agent prior to commencing the use."

- *Consider requiring that conditions be satisfied before the application for a needed approval is submitted*: When a permittee requires additional approvals in the process, such as a site plan, there may be some conditions where it is best to require that a condition be satisfied before the permittee even applies for the site plan rather than some later point in the process, such as prior to issuance of a certificate of occupancy.

- *Ensure that the conditions are well-organized*: Ensure that the conditions are well-organized by having conditions that are related to one another located next to one another.

- *Be certain that referenced documents are properly identified*: References to plats or plans should identify the title, last revision, and the entity preparing the plat or plan. References to ordinances should be identified by section number and include language such as "as the section was in effect on [date of special use permit]." References to letters, memos, staff reports, and similar documents should clearly identify the recipient, the author, and the date.

12-540 Make certain the conditions make sense

Once a condition has been put to writing, the locality's staff must make certain that it is understandable, unambiguous, and enforceable:

- *Review draft conditions with a critical eye*: The locality's planner must ignore his or her insider's understanding of the application and put himself in the position of a reader who knows nothing about the project and: (1) ask whether the proposed conditions are clear, concise, and comprehensive in a way that a future reader will easily understand; (2) drop all assumptions and preconceived notions and be critical; (3) identify the ambiguities and eliminate them; (4) identify all superfluous text and eliminate in; and (5) ask whether each condition would make sense to somebody ten years from now.

- *Have a peer review the conditions*: The planner should ask others not directly involved with the application to review the conditions. It is important to have someone without an insider's knowledge of the application to see if he or she can understand the conditions and identify ambiguities.

- *All appropriate departments review the conditions*: The planner must ensure that all departments and the locality's attorney review and comment on the conditions. Since the zoning administrator will have the task of enforcing the conditions, be certain that the zoning administrator has the opportunity to provide comments as to not only the language, but the subject matter (*e.g.*, a condition that restricts a restaurant use to between the hours of 5:00 a.m. and 1:00 a.m. may require a zoning inspector to be in the field between 1:00 a.m. and 5:00 a.m. if the hours of operation become an enforcement issue).

- *Attach copies of referenced regulations*: Zoning regulations referenced in a condition should be attached so that there is no question about the identified regulation.

12-600 The decision on an application for a special use permit

After the challenger's standing is established (*see, e.g.*, *Friends of the Rappahannock v. Caroline County*, 286 Va. 38, 743 S.E.2d 142 (2013)), the first inquiry in a challenge to a decision on a special use permit is whether the decision was made in violation of or in compliance with the applicable zoning regulations. If the decision was made in violation of the zoning regulations (*e.g.*, there was an express prerequisite for eligibility to obtain the permit, such as having a specific pre-existing underlying zoning designation), the action will be found to be arbitrary and capricious and not fairly debatable, thereby rendering the decision void and of no effect. *Newberry Station Homeowners Association v. Board of Supervisors of Fairfax County*, 285 Va. 604, 740 S.E.2d 548 (2013), quoting *Renkey v. County Board of Arlington County*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006).

Once it is shown that the decision was made in compliance with the applicable zoning regulations, the decision to grant or deny a special use permit is valid if the decision is *reasonable*, *i.e.*, whether there is any evidence in the record sufficiently probative to make a fairly debatable issue of the decision to approve or deny a special use permit. *Newberry Station, supra* (upholding approval of a special exception for a transit authority bus maintenance facility even though, among other arguments, the applicant failed to submit a list of hazardous or toxic substances as required by the county's application requirements; the zoning regulations did not require the board to consider hazardous or toxic substances when considering a special exception); *Board of Supervisors of Rockingham County v. Stickley*, 263 Va. 1, 556 S.E.2d 748 (2002) (upholding denial of special use permit), followed in *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003) (upholding denial of special exception). This standard applies even if an applicant has produced evidence that a denial was unreasonable. *Robertson, supra.*

12-610 Evaluating a special use permit decision under the fairly debatable test

The fairly debatable test applies if the decision is challenged in court. *See section 10-500 for a review of the fairly debatable test.* As applied to a denied special use permit, the courts will assume that the request for the special use permit is an appropriate use of the property and that the denial of the application is probative evidence of unreasonableness. *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003); *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990); *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989). At that point, "the dispositive inquiry is whether the [locality] produced sufficient evidence of reasonableness" to make the governing body's denial of the permit fairly debatable. *Robertson*, 266 Va. at 533-534, 587 S.E.2d at 576; *Cowardin, supra; Bratic, supra.*

The fairly debatable test should be relatively easy to satisfy since the determination is not whether the applicant or the locality had more evidence supporting its position, but simply whether the locality's decision was based on *probative evidence.* It is critical, therefore, that the legislative record contain evidence supporting the decision, and that the decision be based on probative evidence rather than opinion, fears, desires, speculation or conjecture.

12-620 Reasonable grounds to deny a special use permit

The decision to deny a special use permit is reasonable if the landowner fails to meet all of the requirements of the zoning ordinance for the granting of a permit. *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990), *discussed below.* Adverse impacts on the character of the neighborhood resulting from a proposed use are a common reason to deny a special use permit. *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989), *discussed below.* Even if the landowner satisfies all of the technical requirements for the issuance of the special use permit, the decision-making body nonetheless retains discretion to approve or deny the permit. *Bratic, supra.* A special use permit also may be denied because the proposed use is inconsistent with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986). The decision-maker also should consider the factors delineated in Virginia Code § 15.2-2284.

In *Board of Supervisors of Rockingham County v. Stickley*, 263 Va. 1, 556 S.E.2d 748 (2002), the board of supervisors denied a special use permit that would have allowed the applicant to raise and release game birds on his farm. The board was concerned about the risk posed by these birds carrying contagious diseases and transmitting them to poultry. In what boiled down to a battle of conflicting expert witnesses, the Virginia Supreme Court held that the board's denial of the special use permit was proper because its evidence demonstrated a "significant risk" to poultry from the release of pen-raised game birds, and that this evidence was amply sufficient to make that issue fairly debatable.

Five Reasonable Grounds to Deny a Special Use Permit
• The landowner fails to meet all of the requirements for the granting of the permit; even if all of the requirements satisfied, the decision-maker retains authority to deny the permit if sound zoning principles justify the decision.
• The proposed use is inconsistent with the comprehensive plan.
• The proposed use would have adverse impacts on the character of the neighborhood.
• The proposed use would have adverse impacts on roads or create a hazardous traffic situation.
• The proposed use would have an adverse impact on the abutting property.

In *Board of Supervisors of Fairfax County v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003), the board of supervisors denied a special exception that would have allowed the applicant to construct three houses within a 200-foot setback on his property. The applicant was required to submit a study addressing *projected* noise levels or projected traffic. The purpose for the study was to identify impacts and how to address them. The applicant's acoustical engineer based his conclusions on a noise study performed in 1997, but the study failed to address projected (future) noise levels. As a result, the applicant's proposed conditions failed to include measures to reduce exterior noise on the property. The county's acoustical engineer analyzed future noise levels and concluded that on some parts of the applicant's property, future noise levels would exceed those provided in the comprehensive plan by 2010. Not

surprisingly, the Virginia Supreme Court found sufficient evidence of reasonableness to make the board's denial of the special use permit fairly debatable.

In *Cowardin*, one of the county's prerequisites to obtaining a special use permits for two boathouses was the issuance of a certificate of occupancy for the structures. Since the certificates had not been issued, the Virginia Supreme Court concluded that the board had established a reasonable basis to justify its denial of the permit.

In *Bratic*, the landowner claimed that he had satisfied all of the technical requirements for the granting of a special use permit to allow a two-family dwelling on his property and, therefore, the county board could not deny his application. The Virginia Supreme Court rejected this argument, stating that a governing body "is not stripped of all discretion in the issuance of a use permit merely upon a showing that the technical requirements of a zoning ordinance have been met." *Bratic*, 237 Va. at 226, 377 S.E.2d at 370 (1989). In reaching that decision, the Court emphasized the legislative nature of special use permits. The Court found that even if the county's technical requirements were satisfied, the board's denial was supported by probative evidence that the area in question in the interior of a neighborhood was predominantly single family, though there was a mix of single family, two-family, triplexes, and even commercial, on the edge. The board's evidence also explained that the area in question was "fragile," meaning that it was subject to change, because of requests for two-family dwellings.

In *Gittins v. Board of Zoning Appeals*, 55 Va. Cir. 495 (2000), a neighbor's testimony that a proposed playground structure was an "eyesore" that detracted from the value of her property, and that a realtor had told her that the existence of the structure would affect the marketability of her home, was sufficient for the circuit court to sustain the BZA's denial of a special use permit. In order to grant the permit, the BZA would have had to find that the structure would have had no detrimental impact on other properties in the immediate vicinity.

In *In re Hurley*, 2001 Va. Cir. LEXIS 64, 2001 WL 543793 (2001), the circuit court held that the BZA properly denied the applicants' special use permit for a home business on the ground that the proposed use would be disruptive to a low density residential neighborhood. The home business was a commercial label-printing business with six employees that produced between 100,000 and 500,000 mailing labels per day on 30 computers. The court held that the BZA properly determined that the home business did not meet the requirements for a special use permit, including the requirement that the use not "constitute sufficient non-residential activity as might modify or disrupt the predominantly residential character of the area."

Adverse impacts on roads resulting from the proposed use also may be a reasonable basis to deny a special use permit. In *Freezeland Orchard Co. v. Warren County*, 61 Va. Cir. 548 (2001), the circuit court upheld the board of supervisors' denial of a special use permit. The circuit court held that the fact that the applicant obtained VDOT approval of its entrances onto a public road did not preclude the board from exercising its legislative judgment in determining that the proposed use of the road would be "hazardous or in conflict with the existing and anticipated traffic in the area," one of its criteria for evaluating special use permits. The court noted that the board received extensive public input at the public hearings. Similarly, in *Heater v. Warren County Board of Supervisors*, 59 Va. Cir. 487 (1995), the circuit court upheld the board of supervisors' denial of a special use permit for a small subdivision in an agricultural zoning district on the ground that the proposed use would be hazardous or in conflict with the existing and anticipated traffic in the area. The fact that the applicant had obtained VDOT approval for the proposed entrances onto a public street because they met the minimum standards for sight distance did not preclude the board from exercising its legislative judgment.

12-630 Unreasonable grounds to deny a special use permit

The denial of a special use permit will be reversed if the locality ignores its standards and then fails to present any evidence to justify its decision. In *Daniel v. Zoning Appeals Board of Greene County*, 30 Va. Cir. 312 (1993), the circuit court reversed the BZA's denial of a special use permit for a mobile home park where the applicant produced evidence that the county's applicable standards were satisfied and the county presented virtually no evidence and failed to demonstrate that the BZA's decision was consistent with the applicable standards. Apparently, the only "evidence" to support the BZA's decision was the opposition of the citizens, but the court said that although the opponents "may be justified in their fears, . . . angry complaints and vague concerns cannot, standing alone, be

enough. The [BZA] must be able to point to some evidence of its own to confront [the applicant's] uncontroverted presentation."

The denial of a special use permit is arbitrary if the decision is not related to any zoning interest, but is instead motivated principally by the heavy opposition of neighbors expressing concerns not related to any zoning interest. *See, e.g., Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (where city council denied permit to allow palmistry and fortune telling solely to placate neighborhood opposition, which was based on religious and moral grounds, rather than zoning grounds, its decision was arbitrary).

12-640 The claim of discrimination based on prior approvals

If it is shown that the standards are being applied in an inconsistent and discriminatory manner, a court may find that the denial of a special use permit does not have a rational basis. *Board of Supervisors of Fairfax County v. McDonald's Corporation*, 261 Va. 583, 544 S.E.2d 334 (2001). However, the Virginia Supreme Court has rarely found a rational basis to be lacking. Because special use permits are evaluated on a case-by-case basis and the facts in each case are unique, the bar for a party challenging a decision to establish that a decision lacks a rational basis is high. *See also the discussion of the equal protection clause in section 6-300.*

In *McDonald's*, the restaurant sought a special use permit to allow a drive-through window; the board had granted special use permits for drive-through windows at other businesses in the area. Nevertheless, the Virginia Supreme Court concluded that there was a rational basis for the board to deny McDonald's permit because: (1) the McDonald's property was much smaller than the other properties; (2) the McDonald's property was a single-use site; the other properties were in shopping centers; (3) the McDonald's property was directly accessed from public roads; the other properties were not; (4) the McDonald's property had a single access; the other properties had multiple access points; (5) the access point on the McDonald's property was much closer to an intersection than the access points on the other properties; and (6) the estimated vehicle trips per day were much higher on the McDonald's property.

In *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990), the board denied special use permits for two boathouses. One of the landowners claimed that the denial of his permit was discriminatory because the board had approved a permit for a boathouse for a neighbor several months earlier. The Virginia Supreme Court rejected this argument, noting that a "claim of discrimination cannot prevail if there is a rational basis for the action alleged to be discriminatory." The Court found a rational basis for the board's decision, stating that the board could properly consider the effect of boathouses on local waters and distinguish the landowner's request from that of his neighbors because the neighbor's boathouse was on a different body of water and that there were no boathouses on the body of water this landowner sought to establish his boathouse.

In *County Board of Arlington County v. Bratic*, 237 Va. 221, 377 S.E.2d 368 (1989), the board denied a special use permit to establish a two-family dwelling. The landowner claimed that the denial of the permit was discriminatory because the governing body had previously granted permits for two-family dwellings in situations "similar" to the landowner's case. The Virginia Supreme Court rejected this argument, first noting that a claim of unlawful discrimination cannot prevail if there is a rational basis for the decision and finding a rational basis in that case in the board's "effort to preserve the single-family character of the interior of the Neighborhood."

12-650 Reasonable grounds to approve a special use permit

A review of the Virginia case law reveals that very few approved special use permits have been challenged. In *Campbell v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 155 (1996), one of the requirements at issue for a special use permit to allow a club to establish a swimming pool and increase its size and boat slips was whether the club's membership was "limited to residents of nearby residential areas." Both the objecting neighbors and the county presented evidence of the makeup of the club's membership, and the court concluded that because there was no established definition of "nearby residential areas," the meaning of the term was fairly debatable and the BZA's approval of the special use permit was upheld.

12-660 Unreasonable grounds to approve a special use permit

Of course, a governing body cannot approve a special use permit if the underlying zoning district regulations do not authorize the proposed use. In *Northampton County Board of Zoning Appeals v. Eastern Shore Development Corporation*, 277 Va. 198, 671 S.E.2d 160 (2009), the board granted a special use permit for a condominium development and, under the zoning ordinance, "Condominium-type ownership (VA Code)" was allowed by special use permit. The zoning administrator disapproved the site plan because the landowner proposed apartment buildings, a prohibited use in the zoning district. The BZA affirmed. The landowner argued that the special use permit for the "condominium" use referred to multiple unit structures such as apartment buildings. The Court analyzed the district regulations and rejected the landowner's argument, finding that the purpose of the zoning district was to limit residential density and that various prohibited classifications, which included apartment buildings, referred to the physical structure of buildings. By contrast, the special use that allowed "Condominium-type ownership (VA Code)" applied to the legal form of land tenure to be adopted. Thus, the Court concluded that the board of supervisors could not have granted a special use permit that would allow apartment buildings, stating: "Although the board of supervisors might have amended the zoning ordinance after following the proper procedure, it was not at liberty to disregard it. Acts of a local governing body that are in conflict with its own ordinances exceed its statutory authority and are void and of no effect. Thus, the County's granting of a special use permit was not effective to alter the provisions of the zoning ordinance." *Northampton*, 277 Va. at 203, 671 S.E.2d at 163. In other words, the county's and the BZA's interpretation of the zoning ordinance was correct – the special use permit granted by the board of supervisors allowed "Condominium-type ownership (VA Code)," not apartment buildings, because the board did not have the authority under its own regulations to grant a special use permit for apartment buildings.

In *Bennett v. Nelson County Board of Supervisors*, 75 Va. Cir. 474 (2004), the board approved a conditional use permit for a vegetative rubbish recycling facility to allow the grinding of stumps by a stump-grinding machine on property in an agricultural zoning district. The staff report noted that the proposed use was contrary to the comprehensive plan and that it was "an industrial use and is not permitted by right or by a conditional/special use permit" in the district. Nonetheless, the board granted the permit. Not surprisingly, the court found that the board's action was invalid, explaining that not only was the use not allowed by permit, but also that the use would create noise, smoke, particulate matter, and the possibility of spontaneous combustion that was incompatible with the surrounding residential and business properties, and that the proposed industrial use in an agricultural district was surround be single-family residential properties, multi-family residential properties, businesses and a resort. The court concluded by stating that "[r]easonable minds cannot differ that this is inappropriate."