

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

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Mr. Grabb noted that we followed English Common Law regarding the use of subaqueous lands until 1776. He then briefly reviewed important, related milestones in Virginia legislative history, as follows:

- 1779 – A land office was established to issue patents for “waste and un-appropriated” land.
- 1792 – Virginia prohibited granting of any bed of any river/creek in the eastern part of the Commonwealth
- 1819 – The General Assembly extended the boundary of all riparian lands to the low water line (7,000 miles tidal shoreline estimated now in the state, and the public owns less than 200 miles of that shoreline)
- 1873 – Legislature reinstated the prohibition against granting beds and shores if not previously conveyed, but removed the requirement that they be used as a common, See Sect. 28.2-1200. Virginia owns the beds of navigable waters and cannot grant to private ownership. Title of filled bottoms remains with the state. Lawfully filled land authorizes riparian owner’s exclusive private use of that filled area, including filled bottoms. This exclusive right to use state-owned bottoms constitutes a “compensable” property interest.
- Art XI, Section 3 – Special protection was afforded to natural oyster beds defined by the Baylor survey.

Today, the only mechanism whereby a property owner can acquire fee simple interest in a lawfully filled land is by virtue of an Act of Assembly. So the question posed is: What is that worth?

Mr. Grabb referenced Ch. 201 of the Acts of Assembly, 2006, which involved the transfer of submerged land to Jerry Ferguson from oyster ground surrounding an old wharf site at end of long causeway on the Rappahannock River. Mr. Ferguson wanted to purchase 1.2 acres of filled land lying within the original 11.2-acre oyster lease and beneath a manmade island; this Act allowed such conveyance.

In 2005 the Commission adopted a fee structure for upland creation / fill placement, as follows: Private individual at \$1 per square foot; commercial entity at \$3 per square foot.; and industrial user at \$5 per square foot.

Other actions/bills introduced during this timeframe were reviewed:

- HB 1533. Moon Engineering wanted to buy old shipyard land and acquire title to the subaqueous land, but that included both filled and unfilled lands. The governor introduced an amendment for payment of fair market value considerations deemed proper by the MRC. Moon went back to the original plat of 1871 to see original land and fill and subaqueous land, for purpose of getting clear title to sell it.
- 2006 Legislative budget amendment was introduced that prohibited even the governor from selling “unfilled” land.
- Ch 879, Acts of Assembly, 2007 – Says that the Commonwealth shall not convey fee simple title to state-owned bottomlands covered by water.

28.2-1200.1.B

- May convey title if lands were lawfully filled
- Authorized by statute
- Pursuant to court order
- Authorized or permitted by state after 7/1/60
- Filled under apparent color of authority prior to 7/1/60

28.2-1200.1.C

- Shall compensate the Commonwealth in an amount commensurate with property interest conveyed
- Equivalent to 25% of assessed value (exclusive of any buildings and improvements)
- Assessed value is the average of local RE tax assessments for preceding 10 yrs
- If no such assessments are available, value calculated as %, by square footage or acreage, that specific parcel is of a parcel for which assessments are available

28.2-1200.1.D

- If MRC determines unique circumstances, may allow grantee to compensate in an amount less than 25% of assessed value of specified parcel

So, returning to the Moon of Norfolk, LLC case:

- Under the old procedure – state fees collected at commercial rate would be \$325,398; at industrial rate, \$542,330.
- Under new procedure – average assessed value is \$597,410 and 25% is \$149,352.5; ratio of filled to unfilled land is 83%, so compensation due the state is \$123, 962.58.

How this new guidance will be used and how it will be accepted remains to be seen. The Moon example has yet to come to the Marine Resources Commission for consideration.