

LAND PIRACY

PRIVATE APPROPRIATION OF PUBLIC LANDS

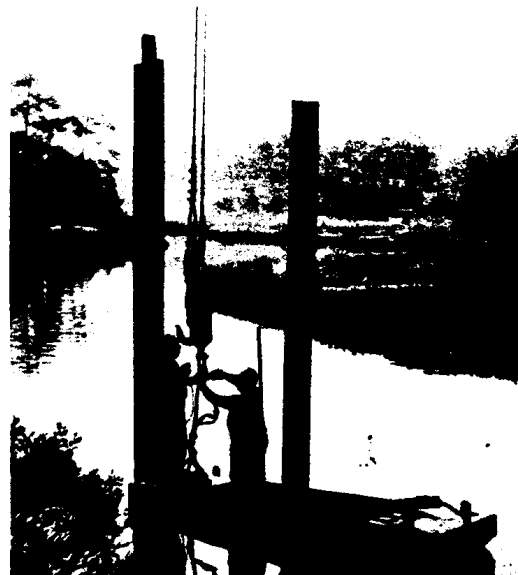
—David Johnson

Some legal questions are left unanswered for years, usually because they are unknown or insignificant to most of us, or because powerful groups with vested interest to protect prefer things to remain as they are. An example of this situation may be found in the Virginia law governing private use of state-owned subaqueous land. A close examination reveals that this body of law fails to protect public interests and creates an undue amount of frustration for the riparian property owner.

Any discussion of the weaknesses of the present use permit system must be prefaced by a brief statement of the manner in which the law determines whether particular subaqueous land belongs to the state or to a private party. Conceptually, this is no problem, for the courts have ruled that "a grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center,"¹ while "the navigable waters and the soil under them, within the territorial limits of the State, are the property of the State, to be controlled by the State, in its discretion, for the benefit of the people of the State."² The problem, of course, is in ascertaining in particular situations whether the body of water in question is "navigable." It has been said that "(t)he question of navigability is one of fact. Its determination must stand on the facts of each case. The test is whether the stream is being used, in its natural and ordinary condition, as a highway of commerce, on which trade or travel are or may be conducted in the customary modes of travel on water."³ Such broad definitions will not offer much assistance to the attorney whose client wants to know if his property line extends to the center of a particular stream. He may offer his opinion, considering the facts as presented to him in the light of cases decided on other facts. However, there is no

way he can answer the question with any certainty.

The law regarding ownership of subaqueous land has been codified,⁴ but, with one exception, the statute is merely declaratory of common law.⁵ Until 1819 the Virginia common law provided that the riparian land owner's property line terminated at high water mark. In that year the General Assembly passed a statute⁶ giving riparian owners the land above low water mark. Thus, in one fell stroke thousands of acres of land were taken from the public without a demand for any compensation from those few citizens who were benefited thereby. While this legislative action may be explained in terms of the prevailing economic and political philosophy of the nineteenth century, it cannot be approved, since a statute of this type is clearly a breach of the government's duty to control the use of subaqueous land "for the benefit of the people of the State."⁷ It may be suggested that this violation of public trust argument has broader ramifications



if viewed in conjunction with the due process clauses of the fifth and fourteenth amendments to the United States Constitution. In short, an act of taking public land without compensation may be unconstitutional. Such an argument has never been raised and probably presents a moot point, since the 1819 statute was upheld in *Miller v. Commonwealth*.⁸ Moreover, even if this decision were to be reversed at some future date, the state could not reacquire land used for over a hundred years by riparian landowners without reimbursing them for their loss.

A more important question to Virginians today is the extent to which and for what purposes private individuals should be allowed to use state-owned bottom land. This determination is now the responsibility of the Virginia Marine Resources Commission (VMRC), an administrative agency which grants use permits if certain broad statutory criteria have been met by the applicant. Before July 1, 1972 some uses of subaqueous land such as "fill by riparian owners opposite their property to the established bulkhead line"⁹ did not require a permit from the VMRC. The practical effect of this exception was that in many instances a riparian owner could acquire, at a minimal investment, land below low water mark by extrapolating the line of the nearest established bulkhead to a point off the shore of his property and building his bulkhead along this imaginary line.

In 1972 the General Assembly abrogated the "established bulkhead line" exception and by statute directed the VMRC to consider the following in its decision making process:

In granting or denying any permit for the use of State-owned bottom lands, the Commission shall be guided in its deliberations by the provisions of Section 1 of Article XI of the Constitution of Virginia, and shall consider, among other things, the effect of the proposed project upon other reasonable and permissible uses of State waters and State-owned bottom lands, its effect upon the marine and fisheries resources of the Commonwealth, its effect upon the wetlands of the Commonwealth, and its effect upon adjacent or nearby properties, its anticipated public and private benefits, and, in addition thereto, the Commission shall give due consideration to standards of water quality as established by the State Water Control Board.¹⁰

Article XI of the Constitution of Virginia states that "it shall be the policy of the Commonwealth to conserve...its public lands...(and) to protect its...lands...for the benefit, enjoyment, and general welfare of the people of the Commonwealth."¹¹ Additionally, the VMRC was given the power "to issue permits for all...reasonable uses of State-owned bottom lands, including...the placement of bulkheads...by owners of riparian lands, in the waters opposite such riparian lands...provided, that such...bulkheads...shall not extend beyond established bulkhead lines."¹² Thus, it is clear that, notwithstanding a requirement to now obtain a permit from the VMRC, it is still possible for a riparian landowner to acquire property below the mean low water mark. The question under existing law is whether this is a "reasonable use" of state-owned bottom land. To answer this the VMRC must look to the decision-making criteria which the General Assembly has directed it to consider.



From an examination of each criterion, it would appear that the erection of a bulkhead below mean low water would seldom be a "reasonable use" of state-owned bottom. Furthermore, a common theme of all the criteria is that the use of state-owned subaqueous land must have some purpose other than merely benefitting private interests. Implicit also is the idea that such use must in some manner benefit the public.

The riparian landowner who does obtain a permit to construct a bulkhead below the mean low water mark is placed in an awkward legal position. His deed will most likely show his property lines ending at the low water mark. Because a VMRC permit is not a grant, and since the doctrine of adverse possession does not operate against the state,¹³ the riparian owner has no way of obtaining a legal title

to the land he has created, unless the General Assembly may be persuaded to give him one. If he has no title, *a fortiori* he should not have to pay real estate taxes. Yet, it would also appear that he would through use acquire vested rights in the land, even though technically he owns only the fill material and the State retains title to the land below mean low water. Practically speaking, however, a VMRC permit is tantamount to a grant in this situation, since it is extremely unlikely that it would ever be revoked and the riparian property owner ordered to restore the state-owned bottom to its original condition. Because vested rights would certainly be acquired after a bulkhead was constructed, there is a strong argument that such a revocation would amount to a taking, and the State would have to compensate the landowner for his loss.

Looking at the situation from the public's stand-point, the state is often inadequately compensated by individuals using state-owned bottom. It is true that the applicant must pay a permit fee of \$25.00 if the cost of the project is less than \$10,000.00 and \$100.00 if it is more than \$10,000.00.¹⁴ Also, the VMRC exacts a royalty of 10c to 30c per cubic yard for removal of subaqueous land,¹⁵ and, therefore, the person who plans to dredge below mean low water to obtain land fill will pay the state a small fee for the dredge material. On the other hand, if the fill material is obtained from some other source, the state gets nothing for what may be perpetual use of its property. Moreover, there are probably many persons who opt for bypassing the time-consuming VMRC administrative process and dredge without a permit. If the VMRC does not establish a viable system of ascertaining when this occurs, private parties will benefit at public expense with impunity.

The legal and environmental problems created by allowing perpetual use of state-owned bottom lands were in the past relatively insignificant, since it was assumed that the demand for land would never be greater than the supply available for development. Today, however, real estate developers are aware that there is an increasing demand for waterfront property; that nearly all natural riparian land has already been exploited or set aside for future development; and that it is thus very profitable to "create" waterfront property by filling wetlands or below mean low water. It is suggested that to protect the environment and to bring certainty to an ambiguous area of the law, the General Assembly should enact legislation which further limits the use of state-owned bottom lands. This could be accomplished by requiring riparian landowners to pay the state rent based on

the value of the bottom used, computed by considering environmental damage, economic loss to the public, and other relevant factors. In addition, the VMRC should be directed to adopt a system whereby individuals who dredge or fill without a permit could be apprehended *before* they complete their illegal and environmentally destructive activities. Such measures would not halt utilization of bottom lands, but would encourage responsible development and result in compensation to the state for use of a valuable public resource. *

FOOTNOTES

1. Ewell v. Lambert, 177 Va. 223, 229, 12 S.E.2d 333,336 (1941.)
2. Taylor v. Commonwealth, 102 Va. 759, 76647 S.E. 875, 879 (1904).
3. United States v. Applachian Elec. Power Co., 312 U.S. 712 (1940).
4. Va. Code Ann. §62.1-1 (Cum. Supp. 1972).
5. Newport News Shipbuilding & Drydock Co. v. Jones, 105 Va. 503, 54 S.E. 314 (1906); Meredith v. Triple Island Gunning Club, Inc. 113 Va. 80, 73 S.E. 721 (1912).
6. Va. Code Ann. §62.1-2 (Cum. Supp. 1972).
7. 102 Va. at 766, 47 S.E. at 879.
8. 159 Va. 924, 166 S.E. 557 (1932).
9. Virginia Acts of Assembly 1970, ch. 621 at 1288.
10. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
11. Va. Const., art. XI, §1.
12. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
13. Shanks v. Lancaster, 46 Va. (5 Gratt.) 110 (1848).
14. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
15. *Id.*