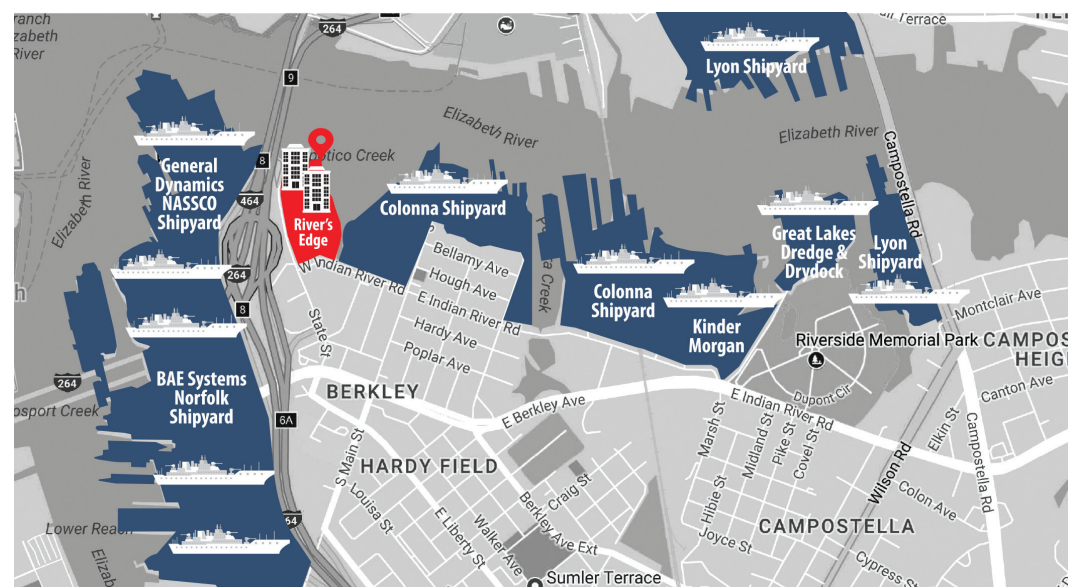


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## THE FIGHT FOR WATERFRONT PROPERTY ON NORFOLK'S ELIZABETH RIVER *By Jim Lang*



MAP DATA @ 2018, GOOGLE IMAGERY @ 2018, CITY OF VIRGINIA BEACH, COMMONWEALTH OF VIRGINIA DIGITAL GLOBE, US GEOLOGICAL SURVEY, USDA FARM SERVICE AGENCY

Industry prefers waterfront property. The discussion in this white paper applies to all types of waterfront industrial facilities. We selected the ship repair industry because it contributes \$3.2 billion to the Hampton Roads economy and because a large new condominium development is planned on 10 acres of waterfront property squeezed between two major civilian shipyards on the Elizabeth River in Norfolk.

Shipyards are the crown jewels of the ship repair industry. Waterfront property is an indispensable necessity for the shipyards in Hampton Roads because large U.S. Navy warships cannot be trailered inland for repairs. A three mile stretch of the Elizabeth River in the Berkley and Campostella sections of Norfolk has served as the home turf to a half-dozen large civilian shipyards. For 150 years, shipyards (and other maritime industries) have spanned the entirety of one bank of this river segment. This could change. The newcomer is the "Rivers Edge at Berkley", a 10 acre residential complex with 280 condominium units, a fitness facil-

ity, swimming pool and a boardwalk along the waterfront that will be open to the general public. This swanky residential community is planned to occupy the waterfront property sandwiched between Colonna's Shipyard (established 1875) and General Dynamics NASSCO Shipyard (formerly Metro Machine and Earl Industries, which were established in the early 1960's).

People living near shipyards say that the work carried on there makes their lives miserable. Grinders on a ship's metal hull sound like very loud lawn mowers. Needle guns force fine chisels to clang against the hull up to 5,000 times per minute, making sounds like a jackhammer. Sandblasting equipment, air powered chipping hammers and air compressors create irritating loud noise. Ship repair work is often a 24/7 operation. The residents at the Rivers Edge at Berkley will at times wonder whether the grinders, needle guns, air hammers and the like are right outside the front door of their homes, especially when shipyard work is done at night and on weekends, or at times when windows are open to let in the breeze. Even with advanced pollu-

tion controls it is not possible to capture all of the gritty dust or fumes generated by these and other shipyard operations, some of which will carry into open windows and will leave deposits on the cars parked outside.

### TOOLS AVAILABLE TO MUNICIPALITIES

As with any large industrial operation, major ship repair work taking place next to tranquil residential living is a recipe for conflict. Ingredients fueling the conflict are on the rise due to the decades-long decline in manufacturing jobs attributable to offshoring, increases in manufacturing productivity and other factors (one example being Ford Motor Company's decision to shut its Norfolk Assembly Plant in 2007). Cities react to manufacturing losses by reducing their inventory of industrial land through rezoning which, if not appropriately managed, forces industrial facilities to live side-by-side with an incompatible neighbor.

Norfolk created plaNorfolk2030 to guide decision making about physical development and public infrastructure. The 10 acre waterfront site between Colonna's Shipyard

and General Dynamics NASSCO Shipyard is designated as "multifamily" on the Future Land Use Map in plaNorfolk2030. Plans and zoning laws are important, but municipalities have additional tools such as the subdivision process, the building code, the site plan process and the building permit process. If the Rivers Edge at Berkley moves ahead, the city could, for example, require the developer to build the residential units with sound attenuating features, it could mandate that the developer make written disclosure to potential condominium purchasers regarding the nature of the incompatible activities taking place at the adjacent shipyards (much like the City of Virginia Beach requires written disclosure to residential purchasers of jet noise associated with U.S. Navy aircraft operations), and it could also use the site plan process to buffer the condominiums from noise and other shipyard effects.

### TOOLS AVAILABLE TO INDUSTRY

"Encroachment" describes threats to an industrial facility's operations presented by incompatible land uses. The Department of Defense developed a first-rate program to address encroachment which seeks first to prevent encroachment and, where prevention fails, it then seeks to mitigate the effects of encroachment. Airports and railroads have adopted similar programs to address encroachment.

Encroachment programs require the capability to identify incompatible land use concerns. These programs then use a variety of techniques to manage these concerns. One common management strategy is to create space between the facility and the various incompatible land uses by acquiring the property surrounding the industrial facility. This insulates the facility from the incompatible uses through creation of a "compatible use buffer". The 10 acre waterfront site between Colonna's Shipyard and General Dynamics NASSCO Shipyard could have been put into service as a buffer when the parcel was offered for sale between 2009 and 2013 at prices ranging from \$2.6M to \$3.5M. Instead, it was acquired by a purchaser who threatens to develop residential property between and adjacent to established shipyards. Another common management strategy is for industry to collaborate with external entities, such as state and local governments when they make planning and zoning decisions. Industry collaboration with

non-governmental entities can create partnering initiatives that can subsidize acquisition of compatible use buffers and generate positive recognition in the community. If the financial resources to support an effective encroachment program exceed the capacity of an individual facility, the effort may become manageable if an industry group, such as the ship repair industry in Hampton Roads, pools its resources and implements the program as an association.

### OUTLOOK IF ENCROACHMENT PROCEEDS "UNTAMED"

The shipyards operated for decades before the Rivers Edge at Berkley concept took root. However, if these condominiums are built, "business as usual" will not continue at the shipyards. Complacency is a poor strategy as it relegates the shipyards to a defensive posture as complaints flow from condominium residents determined to eliminate all shipyard activity that interrupts the residents' use and enjoyment of their homes. The complaints take many forms: noise, vibration, dust, odor, emissions, air quality, water quality, traffic, night time operation, etc. The complaints will be made to anyone who will listen: local police, city officials, environmental regulatory agencies, etc. Complaints are sometimes made even to the stockholders of the corporate entity that owns the industrial facility, as Norfolk Southern Corporation experienced when protestors crashed the company's annual meeting in May 2017 to demand that the company modify its operations to eliminate coal dust affecting people who live in or near Lamberts Point. There is a "Norfolk Southern: Stop the Coal Dust" page on Facebook with 174 followers. The Sierra Club environmental group, which is known to litigate, has a page on its website devoted to the coal dust issue touting "Norfolk Southern's disregard for public and environmental health". Norfolk Southern has likewise received unflattering television coverage on WTKR and WAVY.

The residents may file a legal action against the facility under the law of nuisance, trespass and/or negligence. In a shipyard case where an encroaching incompatible land use gave rise to allegations of damage to adjacent property, caused by smoke and spray painting, at least one court ruled that "coming to the nuisance" did not bar recovery but only served as a "factor of

importance to be considered."

An environmental group such as Sierra Club might also champion the residents' cause by filing a citizens' environmental lawsuit, which can trigger fines in a maximum amount of \$37,500.00 per violation per day. The residents may also lodge complaints at environmental regulatory agencies, such as the Virginia Department of Environmental Quality or the U.S. Environmental Protection Agency, which expose the shipyards to potential fines in this same amount.

### CONCLUSION

Complacency is costly when it comes to encroachment. The safe strategy is to use buffers to prevent encroachment. Once encroachment takes hold there is an ever-present risk that operations may be curtailed or even shut down. It is risky to expect "business as usual" to continue at the facility simply because it arrived first. The courts are mildly impressed, if at all, with the argument that the encroaching development "came to the nuisance". The investment made to implement a proactive approach to deal with encroachment pays dividends in the long run, especially if an industry group, such as the ship repair industry in Hampton Roads, pools its resources and implements the program as an association.

Jim Lang is a shareholder at Pender & Coward who represents residential and commercial waterfront property owners in water and environmental law issues. Jim helped design the U.S. Navy's encroachment program and he led teams that defeated numerous citizens' environmental lawsuits that threatened operations at waterfront facilities. Clients depend on Pender & Coward attorneys for their litigation and negotiation experience as well as their community contacts. For more information visit [www.pendercoward.com](http://www.pendercoward.com).



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