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## RIPARIAN PROPERTY RIGHTS AT WATERFRONT PROPERTIES IN VIRGINIA

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Vast numbers of Virginians enjoy the benefits of living on waterfront property; even more Virginians work or play on the water. Within the Commonwealth of Virginia there are 3,285 square miles of water in the form of bays, lakes, rivers, and streams.<sup>1</sup> These waters create a combined 10,577 miles of shoreline,<sup>2</sup> important because the shoreline is home to a rich bundle of valuable riparian property rights.



### Riparian Area

Riparian rights apply only within a defined footprint called the “riparian area.”<sup>3</sup> The riparian area is unique to each waterfront property, formed by the shore of the waterfront property on one side and by the line of navigation on the other side. Riparian boundary lines extend out from the shoreline to the line of navigation to complete the formation of the riparian area. Just as every waterfront property is unique, so too is the size and shape of the riparian area unique to each particular property. Establishing the riparian area for a waterfront property in Virginia is a complex job requiring review and advice from a riparian property rights attorney and a hydrographic surveyor working under his or her supervision.

<sup>1</sup> How Much of Your State is Wet, USGS: Science for a Changing World, <https://water.usgs.gov/edu/wetstates.html> (site visited March 29, 2018).

<sup>2</sup> Marcia Berman, *How Long is Virginia's Shoreline?*, [http://www.vims.edu/bayinfo/faqs/shoreline\\_miles.php](http://www.vims.edu/bayinfo/faqs/shoreline_miles.php) (April 20, 2010) (site visited Oct. 4, 2018).

<sup>3</sup> *Groner v. Foster*, 94 Va. 650, 652-53, 27 S.E. 493, 494 (1897) (describing the method to set out the boundaries of the riparian area), *cited with approval in*, *Carr v. Kidd*, 261 Va. 81, 86, 540 S.E.2d 884, 887 (2001).

Riparian property rights may or may not include ownership of the bottomland depending on factors such as whether the waterfront property is located on a navigable body of water,<sup>4</sup> whether the bottomland was conveyed into private ownership by the British Crown in the time prior to the American Revolution (under a so-called “King’s Grant”), or whether the bottomland was conveyed into private ownership by the Commonwealth of Virginia<sup>5</sup> (at some point after the American Revolution<sup>6</sup>). The vast majority of waterfront properties in Virginia that adjoin a navigable waterbody do *not* include ownership of the bottomland.<sup>7</sup>

Compared to inland tracts, waterfront properties sell at a premium. For example, the premium to acquire an oceanfront property is 45% over a similar property that doesn’t border the Atlantic; for lakefront properties, 25% more; and for riverfront properties, 24%.<sup>8</sup> Purchasers pay extra for property touching an ocean, lake or river because in part, unlike a comparable property inland, riparian property rights very likely<sup>9</sup> are attached to the waterfront property.

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<sup>4</sup> The riparian property owner — not the Commonwealth — owns the bottomland under of a non-navigable waterbody. *Patterson v. Overbey*, 117 Va. 345 (1915).

<sup>5</sup> Va. Code §28.2-1200.1.

<sup>6</sup> Through operation of the international law of conquest, See, e.g., *Johnson v. M’Intosh*, 21 U.S. 543, 5 L. Ed. 681, 8 Wheat. 543 (1823), during the time period before the American Revolution, the real property within the boundaries of the United States was owned by the sovereigns of Great Britain, France and Spain. At the time of the Revolutionary War, all of the real property within what is now the Commonwealth of Virginia was owned by the British Crown. In the treaty that concluded the American Revolutionary War, the British Crown conveyed its “right to soil” in the United States to the United States. *Id.* A “King’s Grant” is if the British Crown conveyed bottomland into private ownership at any point prior to the American Revolution. The words of the grant must be interpreted, on a case-by-case basis, to determine whether bottomland was intended to convey.

<sup>7</sup> Va. Code §28.2-1200.

<sup>8</sup> Dr. Michael Sklarz and Dr. Norman Miller conducted this study by:

limit[ing] the data to a large sample of 5-digit ZIP Codes that include both waterfront and off-water sales. These waterfront properties were categorized into three types: ocean and bay front, lakefront, and riverfront. These classifications were based upon a proprietary database which Collateral Analytics created to identify and analyze waterfront properties across the entire U.S. using advanced GIS techniques.

Dr. Michael Sklarz and Dr. Norman Miller, *The Impact of Waterfront Location on Residential Home Values*, [http://collateralanalytics.com/index.html?p=1676.html#\\_ftnref1](http://collateralanalytics.com/index.html?p=1676.html#_ftnref1) (March 27, 2018) (site visited Oct. 4, 2018).

<sup>9</sup> An owner of waterfront property (land that touches a river, bay, creek, or the ocean) normally owns riparian property rights, except where the riparian rights were withheld by a prior owner as documented in the chain of title for the property (a process called “severing” the riparian property rights from the land). *Thurston v. Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965). Because riparian property rights can be severed from the land, and because title insurance companies may draft a riparian rights title exception into the title insurance policy, a person thinking about purchasing waterfront property should check with a riparian property rights attorney before making the purchase.

## Riparian Property Rights Provide Value in a Real Estate Transaction Involving Acquisition of Waterfront Property<sup>10</sup>

Because of their exceedingly high value, riparian property rights are an important element of due diligence in any real estate transaction. In one instance of failed due diligence, a developer in Maryland purchased what it thought were expansion and riparian rights to valuable property for the specific purpose of developing a marina, condominium regime, and a yacht club on the property. However, the riparian property rights were owned by another party; this blocked the developer's plan to build piers and docks with marina slips for the yacht club.<sup>11</sup> As noted above, a prudent buyer should engage a riparian property rights attorney to assist in the transaction.

### Benefits of Riparian Property Rights

Riparian property rights under Virginia law consist of five specific benefits:<sup>12</sup>

1. *The right to enjoy the natural advantages conferred upon the land by its adjacency to the water.* Virginia law allows people or businesses to lease state-owned land submerged under the water (called "bottomland") to grow oysters.<sup>13</sup> A riparian property owner gets "head-of-the-line" privileges for these leases in a process controlled by specific sections of the Virginia Code, and is managed by the Virginia Marine Resources Commission (VMRC).<sup>14</sup>

Additionally, waterfront property owners attach a great deal of value to the scenic view available to them when they look out over the water. It is, however, somewhat challenging at times to obtain legal protection that preserves this vista.

2. *The right of access to the water, including a right-of-way to and from any navigable waters.* The riparian area is designed to protect navigation from the shoreline out to the navigable part of the waterway. (The navigable part of the waterway is defined as beginning at the "line of navigation," the area where most ships and boats travel through).

3. *The right to build a pier out to the navigable part of the water.* The right to build a pier in the Commonwealth is specified in the Virginia Code and is managed by the Virginia Marine Resources Commission (VMRC).<sup>15</sup>

4. *The right for property to expand if the body of water places additional soil along the shoreline.* Contrarily, erosion can cause waterfront property to shrink. The shoreline boundary of a waterfront property is determined by the line of mean low water.<sup>16</sup> It is fluid, changing over time as the shoreline changes. The Virginia Supreme Court noted decades

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<sup>10</sup> The Virginia Supreme Court wrote recently that "The littoral or riparian nature of property is often a substantial, if not the greatest, element of its value." *Lynnhaven Dunes Condominium Association v. City of Virginia Beach*, 284 Va. 661, 673, 733 S.E.2d 911, 917 (2012).

<sup>11</sup> *Conrad/Dommel, LLC v. W. Dev. Co.*, 149 Md. App. 239 (2003).

<sup>12</sup> *Taylor v. Commonwealth of Virginia*, 102 Va. 759, 773, 47 S.E. 875, 880-81 (1904) (listing the five benefits), cited with approval in, *Scott v. Burwell's Bay Improvement Association*, 281 Va. 704, 710, 708 S.E.2d 858, 862 (2011).

<sup>13</sup> Va. Code §§28.2-600 to -650.

<sup>14</sup> Va. Code §§28.2-600 to -602.

<sup>15</sup> Va. Code §§28.2-1205; see especially Va. Code §§28.2-1205(D) (describing a streamlined process).

<sup>16</sup> Va. Code §28.2-1202.

ago that riparian boundaries “are subject to the losses and gains of erosion and accretions.”<sup>17</sup>

5. *The right to make a reasonable use of the water as it flows past or washes upon the land.* During earlier times in Virginia, a riparian owner could use flowing water in a river as an energy source to drive a water wheel that operated a sawmill or a gristmill. Today, water might be withdrawn from a river or stream to irrigate crops or to water cattle. A modern electric power generating plant built next to a river may use river water to cool equipment inside the plant, then return the water (after it has been heated) to the river.<sup>18</sup>

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<sup>17</sup> *Woody v. Abrams*, 160 Va. 683, 693, 169 S.E. 915, 919 (1933).

<sup>18</sup> The withdrawal of surface water may require a Virginia Water Protection permit from the Virginia Department of Environmental Quality.