

The background of the slide features a blue sky with a sun and clouds. In the foreground, there are black silhouettes of three hikers on a mountain peak. One hiker is standing on the left, holding a flag on a pole. Another hiker is in the middle, leaning forward as if climbing. A third hiker is on the right, also leaning forward. The overall scene is one of achievement and outdoor recreation.

ENABLING CONSERVATION: A TOUR OF VIRGINIA'S CONSERVATION EASEMENT ACT AND OPEN-SPACE LAND ACT

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THE OPEN-SPACE LAND ACT



George C. Freeman, Jr.

- Va. Code Ann. § 10.1-1700 through 10.1-1705
- Enacted by the General Assembly in 1966
- 1966 Acts of Assembly, Chapter 461: “the provision and preservation of permanent open-space land are necessary to help curb urban sprawl, to prevent the spread of urban blight and deterioration, to encourage and assist more economic and desirable urban development, to help provide or preserve necessary park, recreational, historic and scenic areas, and to conserve land and other natural resources”
- In 1966 the General Assembly also created the Virginia Outdoors Foundation and the Virginia Landmarks Commission/Board of Historic Resources
- Pre-dates federal environmental laws such as NEPA, CWA, CAA, ESA, etc. as well as the Uniform Conservation Easement Act

THE OPEN-SPACE LAND ACT



George C. Freeman, Jr.

- Authorizes public bodies to acquire title or interests of not less than five-years' duration in real property for the purpose of preserving open space (Va. Code § 10.1-1701)
- Authorizes public bodies to acquire fee simple title, fee simple title subject to reservation of landowner's rights to farm or timber, or easements in gross not less than five years in duration in any open-space land (Va. Code § 10.1-1703)

THE OPEN-SPACE LAND ACT



George C. Freeman, Jr.

- Authorizes public bodies to designate such property as “open-space land” (Va. Code § 10.1-1701)
- Title or interest in open-space land may be perpetual (Va. Code § 10.1-1701)
- The use of real property for open-space land must conform to the official comprehensive plan of the locality. (Va. Code § 10.1-1701)

WHAT IS OPEN-SPACE LAND?

- “any land which is provided or preserved for (i) park or recreational purposes, (ii) conservation of land or other natural resources, (iii) historic or scenic purposes, (iv) assisting in the shaping of the character, direction, and timing of community development, (v) wetlands as defined in § 28.2-1300, or (vi) agricultural and forestal production.” (Va. Code Ann. § 10.1-1700)



WHAT IS OPEN-SPACE LAND?



- AG’s Opinion RE: definition of open-space land discussed specifically in relation to subsection (iv) of the above definition; the OSLA “does not authorize a county to acquire easements from owners of multi-family rental property, under which the owners agree not to use their property except for multi-family rental purposes” (1981-82 Va. Op. Atty. Gen. 270 (Va.A.G.))

WHICH PUBLIC BODIES?



•"Public body" means any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority formed pursuant to Article 6 (§ 15.2-5152 et seq.) of Chapter 51 of Title 15.2, or the Virginia Recreational Facilities Authority. (Va. Code § 10.1-1700)



•AG's Opinion confirmed that VOF is a public body authorized under the OSLA (1995 Va. Op. Atty. Gen. 39 (Va.A.G.))

•Federal government agencies are not explicitly included, but possibly the reference to “any park authority” could include NPS and *U.S. v. Blackman*, 613 S.E.2d 442, 270 Va. 68 (2005) (discussed later) might support this argument

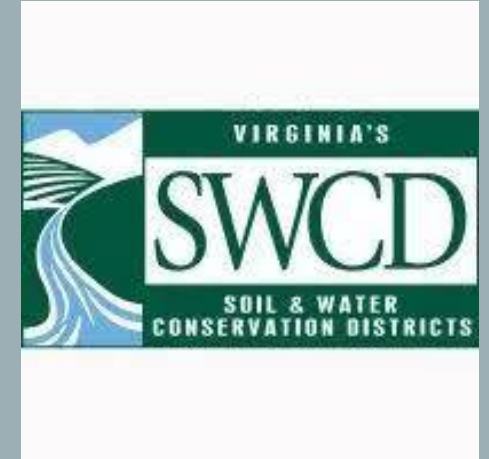


POWERS OF PUBLIC BODIES



•OSLA grants general powers “necessary or convenient to carry out the purposes and provisions of this chapter” and then sets forth several specific powers:

- Financial: borrow funds/make expenditures, advance/accept public funds, apply for and accept grants from federal gov’t and other public and private sources
- Legal: enter into contracts, obtain insurance, enter into joint/cooperative agreements with public bodies of other states or other VA public bodies
- Self-help: “demolish or dispose of any structures or facilities which may be detrimental to or inconsistent with the use of real property as open-space land”



•Local governments are additionally authorized to appropriate funds, issue and sell bonds, set up boards or commissions to hold open-space easements, and levy taxes in support of open-space conservation



TERMINATION OF OPEN-SPACE EASEMENTS

- Open-Space Land Act prohibits termination or extinguishment of open-space easements (with possibly one exception)
- Conservation easement commentators such as Professor Nancy McLaughlin and Robert Levin, Esq. have opined that the Open-Space Land Act:
 - “...arguably precludes condemnation of open-space easements...”
 - “...contains what may be the most progressive and protective compensation provision of all enabling statutes...”



CONVERSION/DIVERSION

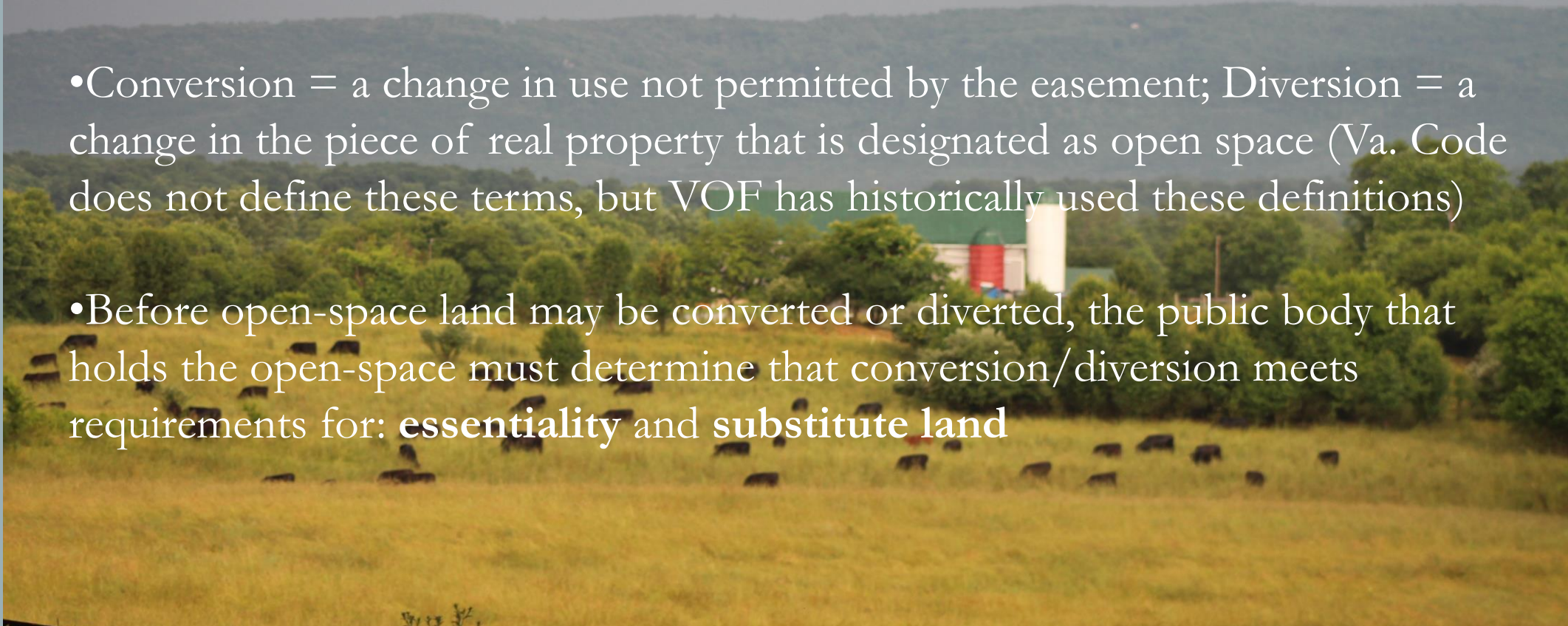
- “Provides greater protection for conservation purposes than would be the case under the [Uniform] Conservation Easement Act or most other state enabling acts” (*A Guided Tour of the Conservation Easement Enabling Statutes*, by Robert H. Levin, Esq., first published 2010 and updated in 2014; available through Land Trust Alliance website)
- OSLA controls the “conversion or diversion of open-space land”
- Provides a flexible safety-valve for accommodating essential needs of the community as they change over time while continuing to preserve open space

CONVERSION/DIVERSION

- Once land has been designated as “open-space land,” Va. Code § 10.1-1704 prohibits “conversion or diversion from open-space land use” unless certain requirements are met.

- Conversion = a change in use not permitted by the easement; Diversion = a change in the piece of real property that is designated as open space (Va. Code does not define these terms, but VOF has historically used these definitions)

- Before open-space land may be converted or diverted, the public body that holds the open-space must determine that conversion/diversion meets requirements for: **essentiality** and **substitute land**



CONVERSION/DIVERSION: ESSENTIALITY

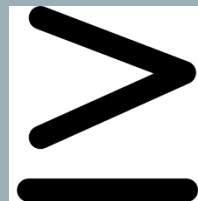
- Before open-space land may be converted or diverted, the public body that holds the open-space must determine that:
 - the conversion/diversion is essential to the orderly development and growth of the locality AND
 - the conversion/diversion is in accordance with the local comprehensive plan



CONVERSION/DIVERSION

- Once the public body has determined that the conversion/diversion is essential, there must be substituted other real property to replace the converted/diverted open space
- The substitute land must be:
 - 1) of at least equal fair market value,
 - 2) of greater value as permanent open-space land than the land converted or diverted and
 - 3) of as nearly as feasible equivalent usefulness and location for use as permanent open space land as is the land converted or diverted.

SUBSTITUTE LAND



CONVERTED/
DIVERTED
OPEN SPACE

CONVERSION/DIVERSION

- The statute was designed to ensure that: 1) any conversion or diversion be essential to the growth of the community and 2) there be no net loss of open-space land.
- The Conservation Easement Act does not include a similar provision.
- Possible exception to Va. Code § 10.1-1704: US Constitution supremacy clause may allow condemnation or extinguishment in some circumstances



OPEN-SPACE LAND ACT: OTHER NOTABLE ASPECTS

- Public bodies are authorized to convey or lease open-space land, subject to contractual restrictions that preserve the land as open space (unless duly converted or diverted pursuant to § 10.1-1704).
- The Act is silent as to who has standing to enforce an open-space easement.
- The Act provides that, “Insofar as the provisions of this chapter are inconsistent with the provisions of any other law, the provisions of this chapter shall be controlling. The powers conferred by this chapter shall be in addition and supplemental to the powers conferred by any other law.” (Va. Code § 10.1-1705)



WOW!

THE CONSERVATION EASEMENT ACT



George C. Freeman, Jr.
(back by popular demand)

- Va. Code Ann. § 10.1-1009 through 10.1-1016
- Enacted by the General Assembly in 1988
- Based on the Uniform Conservation Easement Act (with some significant modifications)
- Primarily for non-profit “holders,” but see Va. Code § 10.1-1016, which allows public bodies to hold conservation easements)

THE CONSERVATION EASEMENT ACT

- “‘Conservation easement’ means a nonpossessory interest of a holder in real property, whether easement appurtenant or in gross, acquired through gift, purchase, devise, or bequest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural or open-space values of real property, assuring its availability for agricultural, forestal, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural or archaeological aspects of real property.” (Va. Code § 10.1-1009)



THE CONSERVATION EASEMENT ACT



- “Holder’ means a charitable corporation, charitable association, or charitable trust which has been declared exempt from taxation pursuant to 26 U.S.C. § 501(c)(3) and the primary purposes or powers of which include: (i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property.” (Va. Code § 10.1-1009)
- VCEA is for private non-profit organizations, but was it **required** in order for non-profit land trusts to hold easements in gross for conservation purposes? *U.S. v. Blackman*, 613 S.E.2d 442, 270 Va. 68 (2005)

THE CONSERVATION EASEMENT ACT

- “A conservation easement is perpetual unless the instrument creating it specifies otherwise.” (Va. Code § 10.1-1010)
 - *Contrast with OSLA, which says that open-space easements must have a duration of at least five years.*
- “No conservation easement shall be valid and enforceable unless the limitations or obligations created thereby conform in all respects to the comprehensive plan at the time the easement is granted for the area in which the real property is located.” *Id.*
 - *Similar to OSLA, but more stringent.*
- The Act does not prevent a court from terminating an easement in accordance with principles of law or equity, or limit the power of eminent domain possessed by any public body. *Id.* “Except as otherwise provided in this chapter, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” (Va. Code § 10.1-1014)
 - *Contrast with conversion/diversion under OSLA.*

THE CONSERVATION EASEMENT ACT



- Perpetual conservation easements shall not be made subject to state or local taxation, nor shall the owner of the fee be taxed for the interest of the holder. (Va. Code § 10.1-1011)
- Assessments of the fee interest subject to perpetual easements held pursuant to the Conservation Easement Act *or* the Open-Space Easement Act (§ 10.1-1700-1705) shall reflect the reduction in fair market value of the land resulting from the inability of the owner in using the property for uses terminated by the easement. *Id.*
- AG's Opinions on this topic: 2013 WL 5410703 (Va.A.G.) and 1993 Va. Op. Atty. Gen. 7 (Va.A.G.)

THE CONSERVATION EASEMENT ACT

- Who has standing to enforce a conservation easement?
 - A holder of the easement
 - A person having an express third-party right of enforcement
 - The VA Attorney General
 - The Virginia Outdoors Foundation
 - The Virginia Historic Landmarks Board (i.e., DHR)
 - The local government in which the real property is located
 - Any other governmental agency or person with standing under other statutes or common law (Va. Code § 10.1-1013)
- *Contrast with OSLA, which is silent regarding standing*
- *Historic Alexandria Found. v. City of Alexandria*, 858 S.E.2d 199 (2021) involved the issue of standing and an open-space easement property, but the question of standing focused on whether a party had standing to contest the City's zoning decision rather than enforcement of the open-space easement



THE CONSERVATION EASEMENT ACT

- Va. Code § 10.1-1014 provides that a “conservation easement is valid even though:
 - It is not appurtenant to an interest in real property;
 - It can be or has been assigned to another holder;
 - It is not of a character that has been recognized traditionally at common law;
 - It imposes a negative burden;
 - It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
 - The benefit does not touch or concern real property; or
 - There is no privity of estate or of contract.”
- This statute was copied verbatim from the Model Conservation Easement Act.
- *OSLA does not contain a similar statute.*

THE CONSERVATION EASEMENT ACT

- When a holder, or the successors or assigns thereof, shall cease to exist, any conservation easement shall vest in the Virginia Outdoors Foundation, unless otherwise provided for in the instrument creating the easement. (Va. Code § 10.1-1015)
- VOF already holds over 4,500 easements.
- Va. Code § 10.1-1801(1) provides that if VOF is dissolved by the General Assembly “title to the properties of the Foundation, both real and personal, shall, insofar as consistent with existing contractual obligations and subject to all other legally enforceable claims or demands by or against the Foundation, pass to and become vested in the Commonwealth.”



OSLA AND VCEA

- **Open-Space Land Act**

- For public bodies
- Does not explicitly address standing or taxation
- Does not explicitly protect the validity of easements against traditional common law challenges
- Does not provide a default holder procedure in the event that a public body ceases to exist
- Provides extensive procedure for conversion/diversion of open-space land
- Requires comprehensive plan conformance
- Automatic qualification for use-value assessment
- Immune to merger doctrine



- **Conservation Easement Act**

- For private land trusts
- Explicitly addresses standing and taxation
- Explicitly protects the validity of easements against traditional common law challenges
- Provides a default holder procedure in the event that a holder ceases to exist
- Easements can be condemned or extinguished by a court pursuant to applicable law
- Requires comprehensive plan conformance
- Automatic qualification for use-value assessment

Immune to merger doctrine

PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- Unique provisions of VCEA and OSLA: comprehensive plan conformance requirement and conversion/diversion
- What is the purpose of the comprehensive plan conformance requirement and how should it be applied?
- What role can or should local governments play in planning for land conservation within their jurisdictions?
- Who gets to decide whether an easement conforms to the comprehensive plan?
- What are some recommended best practices to confirm comp. plan conformance?
- How has the comp. plan conformance requirement worked in practice?

PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- How have easement holders drafted deed of easement language to achieve comp. plan conformance or otherwise allow for future land use plans that are essential to community growth and development?
- How has the comp. plan conformance requirement been applied in the context of conversion/diversion requests?
- How has the substitute land requirement of § 10.1-1704 been implemented in conversion/diversion cases?
- Is the substitute land remedy limited to open-space easements?
- Questions from audience...

PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- Gap Valley Farm is in Augusta County at the intersection of 42 and 254. Hwy 42 was part of a growth zone. The county supervisors unanimously supported an easement on this farm – despite it being adjacent to a high school.



PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- Whitescarver – also in Augusta County and also fronting Hwy 42 – which had a growth zone designated as being within $\frac{1}{4}$ mile of the centerline of 42. Public water lines parallel 42 on the opposite side. But the farm fell within a Surface Water Protection Zone and was very close to a public well. The county also unanimously supported this easement.



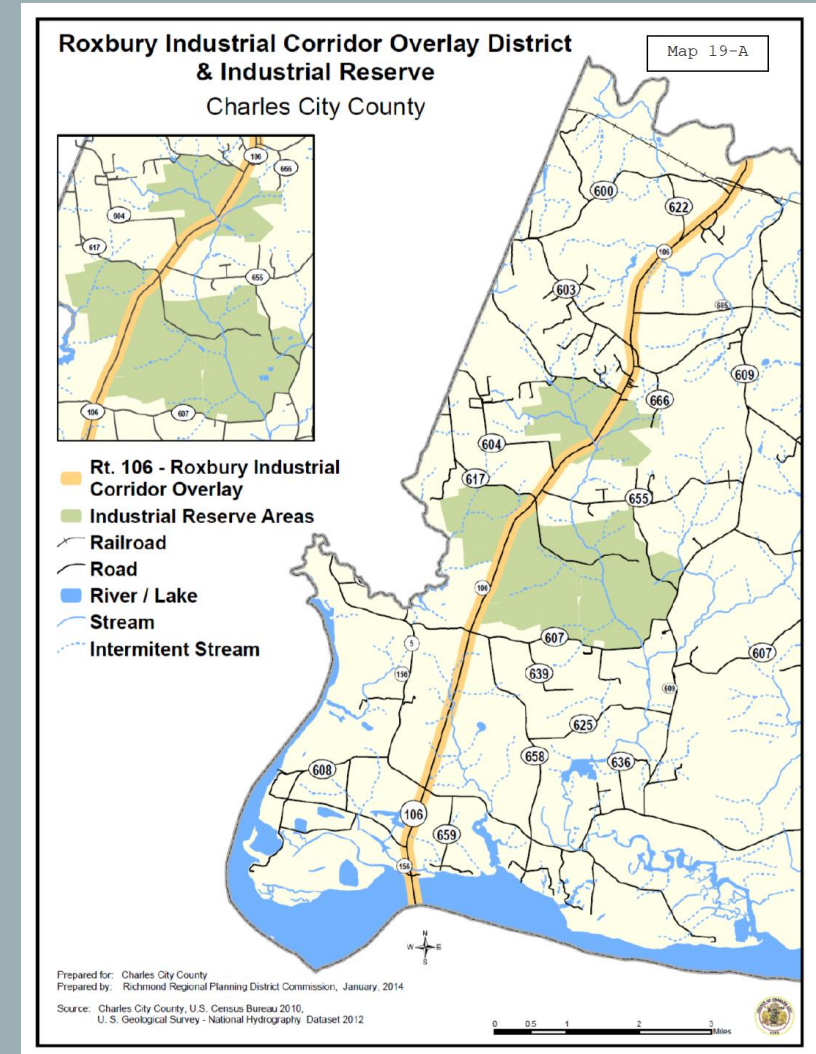
PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- Dufour – in Bath County right on the Alleghany line. Bath County’s comp plan stated that the growth zone was within approximately one-quarter mile of the centerline of 220 – and this farm is on both sides of 220. The family petitioned the county to allow the easement and although it took more than a year, the county approved it.



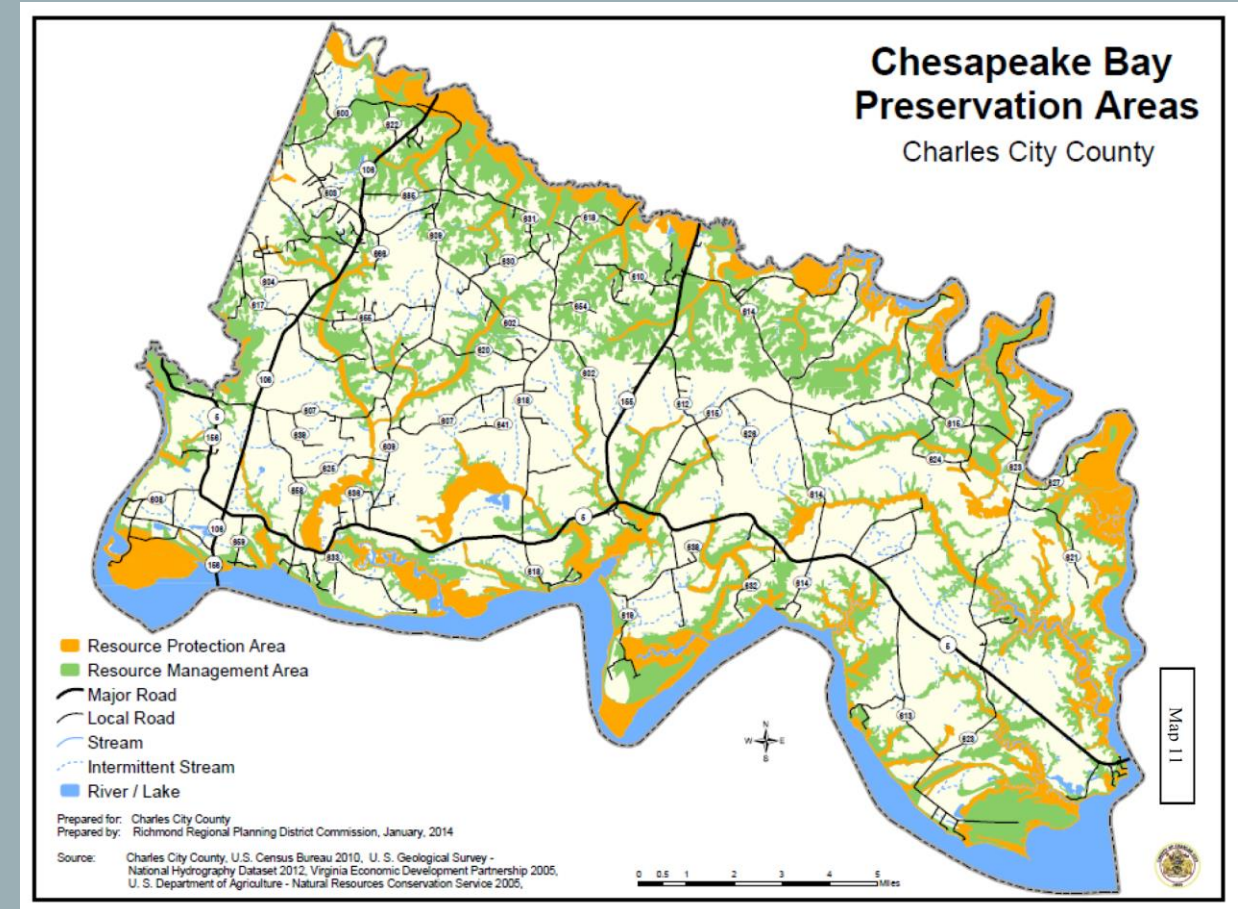
PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- Charles City County initially refused to confirm comp. plan conformance unless landowner provided a survey that proved that her property was not located within Rt. 106 Roxbury Industrial Corridor or an Industrial Reserve Area.



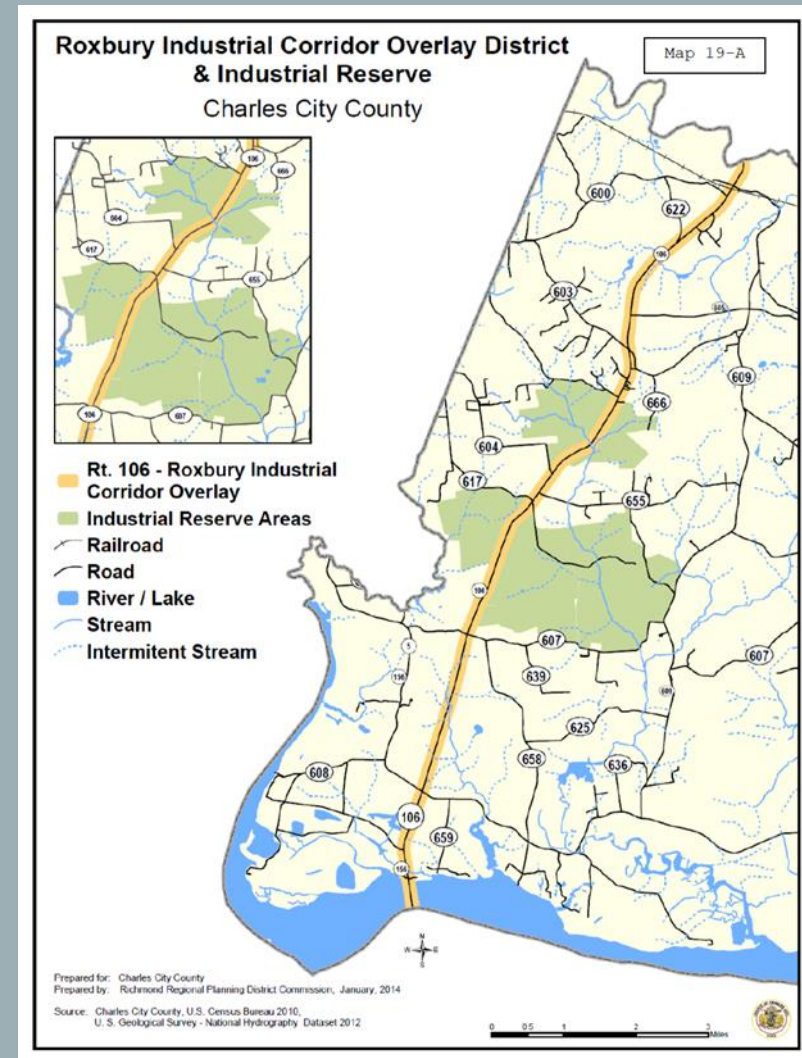
PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- The property appeared to be located partially within an RPA and RMA as shown in comp. plan map. Comp. plan recommended conservation of properties located with RPA and RMA.



PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- The property appeared NOT to be located within the Rt. 106 Roxbury Industrial Corridor or an Industrial Reserve Area, but County required a survey anyway.



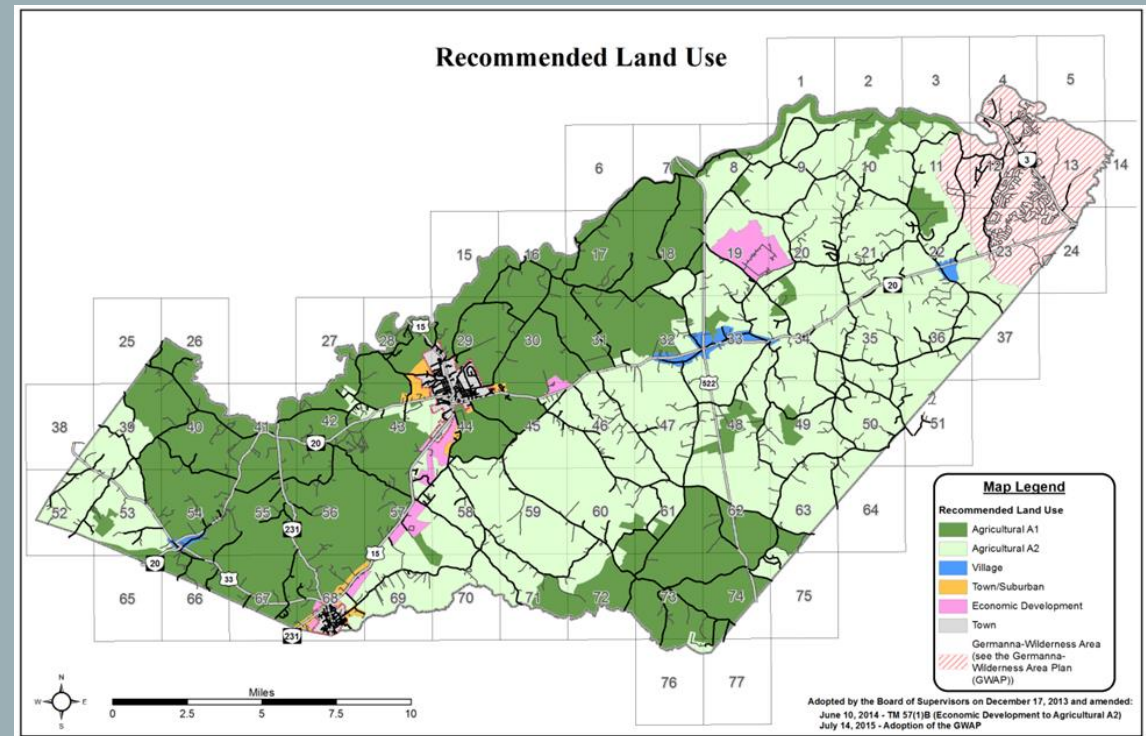
PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- 141-acre working cattle farm in Orange County: located in area planned for “Agricultural 2 (A2)” in comp. plan
- Orange County planner said easement NOT in conformance because property was not in an A-1 future land use area and did not have historic significance

CHART IV-I: LAND USE MAP CATEGORIES		
CATEGORY	PURPOSE	DEFINITION
Agricultural 1 (A1)	Protect the rural, agricultural, historic and conservation areas of the County by preserving open space, limiting population and allowing little or no development other than agricultural and forestal enterprises, farm markets, homesteads and larger estates.	Parcels of specific historic relevance; parcels in conservation or other public/private easements; parcels containing unique physical characteristics and highly dispersed residential land use;
Agricultural 2 (A2)	Protect the characteristics of those areas of the County that feature a mix of agricultural activities, residential neighborhoods and small scale commercial uses.	Pockets of residential development interspersed between large areas of farmland and along primary and secondary highways; Scattered community commercial uses such as auto repair shops, and established rural convenience stores; Public uses include airports, solid waste collection sites (including landfills), and fire and rescue stations.
Village (V)	Retain small village and community living and identity, with local services for convenience.	Concentration of residential development with adjacent areas of commercial services for residents and businesses near primary intersections.
Town-Suburban (T-S)	Allow mixed development in close proximity to town service and employment resources.	Areas adjacent to town boundaries. Moderately intensive residential and commercial development.
Economic Development (ED)	Moderately aggressive development to provide jobs, shopping, higher density residential and expand tax base.	Existing and potential areas identified for an expanded mix of economic activity (industrial, office, and commercial) and higher density residential uses.

PANEL DISCUSSION: LAND USE PLANNING, CONSERVATION, AND PERPETUITY

- Planner appeared to be relying solely on one chart in the comp. plan as basis for denial
- Easement holder scoured comp. plan for recommendations that would support an easement in the A-2 future land use area
- After cogently explaining to Planning Commissioners and the Board of Supervisors why the easement would conform, the County reversed itself





Chesterfield County

Henricus Park Access Road February 14, 2022 Progress Plan

Project Location



North Arrow & Scale



Legend

- Proposed Road
- Proposed Bridge and Shared Use Path
- Proposed Shared Use Path
- Proposed Project by others



Contact Information

88 Ave. #12
Project Manager
Chesterfield County Department of Transportation
3000 Government Center Parkway
Chesterfield, VA 23103
Comments may also be sent to:
ArdE@chesterfield.gov

Henricus Park Access Road
Chesterfield, Virginia



Vertical toolbar with various icons for navigation, editing, and viewing, including a magnifying glass, a red plus sign, a blue square, a red square, a purple icon, a blue icon, a green icon, a yellow icon, a blue shield, and a wrench.