

# Town of Cape Charles Annexation Agreement 9/6/18 Summary



35  
YEARS

VANDEVENTER BLACK LLP  
ATTORNEYS AT LAW

# PRESENTER



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# Brief History of the Annexation

- 3/13/90 Town of Cape Charles entered into an Agreement with Brown and Root to Petition for Annexation of certain property.
- 3/26/90 Town of Cape Charles filed notice with the Commission on Local Government of its intent to petition the court for the annexation of approximately 3.19 square miles of territory in Northampton County.
- Concurrently the Town served notice on Northampton County which opposed the annexation.

# Area Proposed for Annexation

- The area proposed for annexation was essentially undeveloped and extended generally from the southern boundary of the Town to Old Plantation Creek.
  - Approximately 12% was covered by tidal waters
  - Slightly more than half of the dry land was zoned industrial and the rest was zoned agricultural.
  - The area also contained a right of way belonging to the Eastern Shore Railroad, a dredge spoils area belonging to the Virginia Port Authority, two water wells serving the Town, one small commercial office and one home.

# Brown & Root

- Almost all of the dry land was owned by Brown & Root I, Inc., a subsidiary of a major construction firm from Texas.
- Brown & Root planned to develop the property, together with other property it owned within the Town, as a retirement/resort community named “Accawmacke Plantation.”

# Legal Counsel

- The same lawyer represented both the Town and Brown and Root in the annexation process.

# Accawmacke Plantation

- The plans for the plantation called for the development of 3000 dwelling units over 20 years, together with various retail businesses, a hotel, a marina, a 36-hole golf course and other facilities.
- Brown & Root conditioned its plans on the incorporation of the entire area into the Town, and the extension of the Town utility systems to serve the Plantation.

# Utility Agreements

- In February 1991 the Commission on Local Government issued its Report on the annexation action.
- Among other things the Commission noted: “Brown & Root has entered into an agreement with the Town by which it has committed itself to supporting the proposed annexation and to investing its resources into an expansion and enhancement of municipal facilities.”  
(Comm. Rpt. pg.11)

# The March 1990 Agreement

- Several key provisions of the 1990 Agreement between the Town and Brown and Root are set forth in the following slides.

# The March 1990 Agreement Cont'

- “Brown & Root shall be responsible for the cost of planning the development of its property including the cost of studies by qualified planners, environmental engineers, golf course architects, marina consultants, and other experts retained for the development of Brown & Roots property. Brown & Root agrees to use the results of these studies on coordinated projects with the Town.” (para. 3)

# The March 1990 Agreement Cont'

- “The Town covenants and agrees that it shall not discriminate against any portion or parcel of the Property in the application and enforcement of any laws, ordinances or regulations following annexation and that it shall provide to the Property all Town services furnished to other properties within the Town limits unless such services are reduced or waived in writing by Brown & Root.” (para. 4)

# The March 1990 Agreement Cont'

- “Contingent on available natural resources, the Town agrees to extend water and sewer treatment capabilities to Brown & Root’s properties and to reserve for Brown & Root water and sewer treatment capabilities in sufficient capacities to serve the completed development . . . . **Brown and Root agrees to pay the cost of the physical expansion of the Town’s sewer and water treatment systems i.e. collection, distribution, and treatment, to accommodate the additional treatment demands of the Brown & Root property beyond the limits of the Town’s current permitted capacities.**” (para. 10) (emphasis added)

# The March 1990 Agreement Cont'

- “Brown and Root agrees to construct the necessary physical improvements within its property to accommodate sewer and water services in coordinated fashion with the Town’s proposed improvements to its existing sewer and water treatment facilities. Brown & Root agrees to dedicate the treatment system improvements . . . to the Town. The Town agrees that its water and sewer treatment systems will be operated by qualified and licensed professionals and that the plant(s) will be operated to a standard at least equivalent to that prescribed by the state and federal regulations.” (para. 10)

# The March 1990 Agreement Cont'

- “The provisions of this paragraph shall run with the land and be binding upon the Town or any entity that assumes the responsibility for sewer and/or water treatment services for the Brown & Root property. **In the event the Town conveys or receives compensation for the water and/or sewer treatment systems, following improvements to either of those systems by Brown & Root, Brown & Root shall receive a share of said compensation in direct proportion to the Brown & Root share of funded flow capacity.**” (para. 10) (emphasis added)

# The March 1990 Agreement Cont'

- “Brown & Root covenants and agrees that the obligations set forth herein shall run with the land and be binding upon the owners of its property, their successors and assigns.” (para. 15)

# Sewage Plant Capacity

- Projected need of 1.32 Million Gallons Per Day (MGD) at completion of Plantation (Comm. Rpt. n. 63)
  - 0.21 MGD from within existing Town 1.11 MGD from area proposed for annexation
    - Anticipated that the package plant would need to be replaced
  - Beyond 1.0 MGD “tertiary” treatment required

# Water Supply

- The Town's water plant had the capacity to treat 0.325 MGD, but the permitted pumping capacity from the Town's two well was only 0.261 MGD. (Comm. Rpt. Pg. 24)
- The Town's demand was reported to be 0.150 MGD leaving a reserve of 0.111 MGD. (Comm. Rpt. Pg. 24)

# Water Supply Cont'

- Brown & Root drilled 5 added wells with a permitted capacity of 1.1 MGD, contingent on a study to confirm that the wells would not draw water outside the limits of the Plantation and would not result in saltwater intrusion.
  - Brown & Root planned to retain title to the added wells but make water available to the Town.
- “In their submittals to the Virginia Water Control Board, consultants for Brown and Root [F&ME] projected that the . . . Plantation . . . would require 1.1 MGD of groundwater when completed and that two additional wells may be needed to meet future demands.” (Comm. Rpt. Pg. 26 & N. 76)

# Water Supply Cont'

- Brown and Root advised the Commission that it “has agreed to coordinate the construction of residential units on its property with the expansion of the Town’s water treatment plant.” (Comm. Rpt. Pg. 27)

# Commission Findings

- In its February 1991 report the Commission made several recommendations regarding utilities. These recommendations are summarized below in the following slides. (Comm. Rpt. Pgs. 64-65)

# Commission Findings Cont'

- First, the Commission recommended that the “Proposal for Water Wastewater Treatment Plant Improvements” be formally adopted by the parties. (Comm. Rpt. App. D)

# Proposal For Water And Wastewater Treatment Plant Improvements

- Among other things, the Proposal provided:
  - “The ‘capacity of the plant’ shall be based upon SWCB regulations. . . .” (WW Par. 2, W Par. 1)
  - “Should the Town construct additional capacity beyond that provided by Brown & Root, then such additional capacity may be used to extend the unit construction limits otherwise applicable.” (WW Par. 3. W Par 2)
  - “Brown & Root will monitor the Town’s wastewater treatment capacity and coordinate the expansion and development of its project accordingly.” (WW Par. 4, W Par. 4)
  - “The Town authorizes Brown & Root to file the necessary applications for the plant expansion(s) . . . . The Town will agree to immediately proceed with the expansion of the plant when the SWCB and State Health Department permits are obtained or it will authorize Brown & Root to begin the expansion(s) of the plant upon receipt of the necessary permits.” (WW P. 5, W. 3)

# Commission Findings Cont'

- Second, the Commission recommended a change to the 1990 Agreement to provide that Brown & Root would be responsible for “all costs” of sewer plant improvements up to and including “tertiary” treatment.
- Third, the Commission recommended that no industrial waste be allowed without pretreatment by the Plantation or added payment for plant modification.

# Commission Findings Cont'

- Finally, the Commission recommend that the agreement explicitly provide that “any reservation of capacity for the use of the Accawmacke Plantation be derived from capacity created by investments in the municipal system made by Brown & Root.”

# Commission Findings Cont'

- The Commission observed that the March 1990 Agreement was probably NOT binding on the Town because:
  - “various provisions conflicted with well established restrictions on the authority of local governing bodies to bind the hands of their subsequently elected successors”
  - Public hearings were not held in advance of the agreement
- Nevertheless, Brown & Root agreed to be bound by the agreement even if the Town could not be bound.  
(Comm. Rpt. Pgs. 70 -71)

# Improvements

- 6/24/91 as planned improvements are funded by the Town:
  - Waterlines \$1,147,819, Water Plant \$1,077,000, Water Storage Tank \$421,000
  - Total cost with engineering and legal \$3,166,000

# November 1991 Amended Agreement

- As a result of the Commission's Findings the parties entered into an Amended Agreement dated 11/25/91.
- The Amended Agreement generally implemented the Commission's recommendations through additions to paragraph 10 of the March 1990 Agreement.

# Amendments to Paragraph 10

- (a) The parties agreed to abide by the Proposal for Water and Waste Water Treatment Plant Improvements
- (b) Brown and Root agreed to pay for its share of wastewater plant expansion including “tertiary” treatment
- (c) The parties agreed that no industrial waste would be accepted without pretreatment or plant modification

# Amendments to Paragraph 10 Cont'

(d)“Brown & Root and the Town agree that any reservation of treatment capacity in or from the Town’s water or waste water systems, as provided in the prior Agreement, for the use of Accomack (sic) Plantation shall be derived from the capacity created by investments in the Town’s water and/or waste water systems, made by Brown & Root.” (emphasis added)

# 11/91 Amended Agreement Cont'

- The Amended Agreement also incorporated the terms of paragraph 4 and Schedule A for Road Improvement from a three party Agreement between the Town, Northampton County and Brown & Root dated 11/25/91.

# Paragraph 4 of Three Party Agreement

- “Upon acquisition of all necessary rights-of-way and permits, Brown & Root agrees to commence construction of the new access corridor from Route 184 across the property now owned by V.M. Martin into the Brown & Root property in accordance with the attached schedule of improvements labeled Schedule A. Once construction has commenced, the road shall be completed as expeditiously as practicable. Should Brown & Root not commence construction of the new access corridor as provided above and in accordance with the attached Schedule A or should it fail to complete construction thereof in an expeditious manner, then in such event the Town shall withhold the issuance of any further Certificates of Occupancy in the annexed portion of Accawmacke Plantation.”

# Schedule A

- “Brown & Root shall commence construction of the new connector road referenced in Paragraph 4 of this Agreement (hereinafter New Connector) when:
  1. “If officially approved in writing by . . . [VDOT] . . . When (a) the average annual peak hour volume, entering and leaving the southern tract of Accawmacke Plantation exceeds four hundred (400); and in the same year, (b) when the average annual peak hour volume on Route 642, as measured at the easternmost portion of the southern tract of Accawmacke Plantation exceeds two hundred fifty (250).”

# Schedule A con't

2. “If not officially approved by [VDOT], then the construction of the New Connector shall be commenced according to a schedule mutually acceptable to Brown & Root . . . [and VDOT]. . . .”
3. If Brown & Root and VDOT cannot agree they will submit to binding arbitration.



# Paragraph 8 of Three Party Agreement

- “...the subsequent purchasers of individual lots or other incidents of individual ownership shall not incur the obligations of Brown & Root contained herein. It is the intent of the parties not to impose the obligations of Brown & Root contained herein upon the consumers who purchase lots, condominiums, and/or memberships with Accawmacke Plantation.” (emphasis added)
- “The obligations of Brown & Root, contained herein, except as provided above, shall run with the land and be binding upon the subsequent owners of Accawmacke Plantation, which owners shall assume all of those obligations and relieve the prior owner thereof.”

# The Annexation Order

- On 11/26/91 the Court entered an Annexation Order conditioned on the parties abiding by the following agreements:
  - 11/25/91 Town/Northampton Agreement
  - 11/25/91 Town/Bayshore Agreement
  - The Town to hire a full time professional planner
  - 3/90 Agreement to be amended to conform to all utility recommendations of the Commission incorporated by reference
  - 3/90 Agreement to be amended to required Brown & Root to give a preference to work by local contractors from Northampton and Accomack Counties
  - The Town to extend public services to the annexed area in orderly fashion

# Route 184

- The 11/26/91 Annexation Order also provided that “The Town shall amend its said agreement of March 13, 1990, to provide that Brown & Root, based upon traffic needs generated from within the area proposed for annexation, shall construct or have constructed a new two-lane access road from route 184 into its development to accommodate traffic from Accawmacke Plantation, provided the necessary land and easements are acquired and providing all necessary permits are obtained.” (Par. 5)

# Other Agreements

- The parties entered into other agreements to implement additional provisions anticipated to be included in the Annexation Order:
  - 11/25/91 Town/Brown & Root Amendment to Agreement of 3/13/90
  - 11/25/91 Town/Northampton/Brown & Root Agreement
    - Required Brown & Root to construct the Route 184 New Connector
    - Required Brown & Root to record restrictive covenants limiting construction to 3000 dwelling units in the Plantation

# Accawmacke Plantation PUD

- On 2/9/97 the Town approved the Accawmacke Plantation Planned Unit Development (PUD) aka the Bay Creek PUD.
- Notably, the PUD is not identical to the Annexation Area.
- As shown in the next slide showing the from the Appendix to the Commission Report, and Exhibit A, Location Map for the PUD, the part of the PUD north of Washington Ave. and east of Fig St. (part of the North Tract of the PUD) is not in the Annexation Area.

# Annexation Area

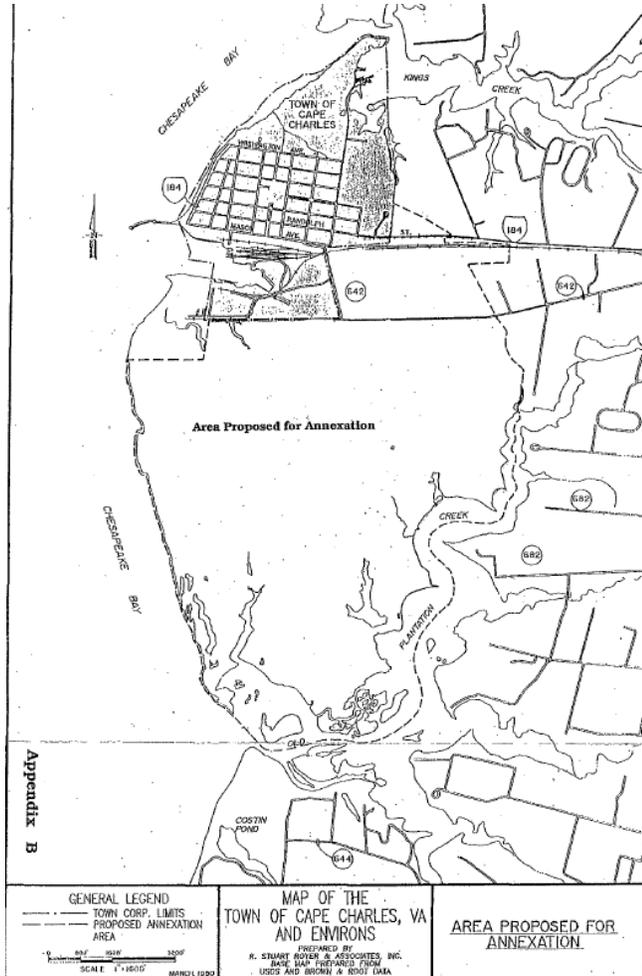
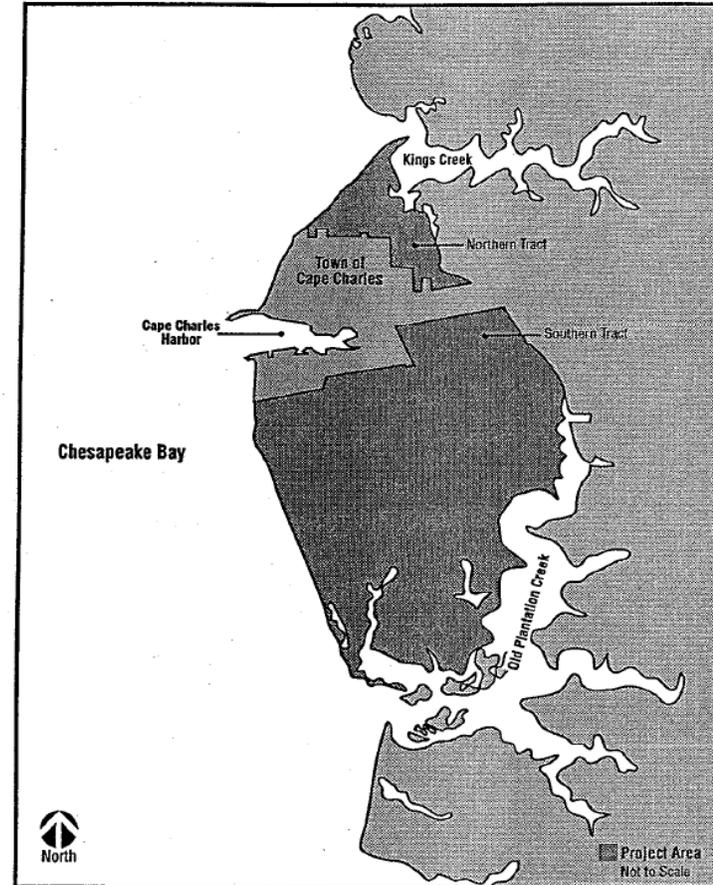


EXHIBIT A – LOCATION MAP



LOCATION MAP

EXHIBIT A

# S.T.I.P.

- 9/96 Northampton County closes on purchase of 50 acres of land from Brown & Root for a Sustainable Technology Industrial Park (STIP).
- 12/97 County transfers 160 acres (including the 50) to the Industrial Development Authority (IDA).
- Subsequently, the IDA transferred the land back to the County and at the time the STIP was mostly vacant.
- In 1996, a portion of the property adjacent to and near the harbor (Tax Parcels 83A3-14, 17, 19, and 20) was leased from the Town to the IDA for operation of the STIP. At the time, the parcels were vacant except for the old WWTP on Parcel 17. Lease term is 40 years.

## S.T.I.P. Cont'

- In 2007, the lease of Parcels 14, 17, 19, and 20 was assigned from the IDA to South Port Investors, LLC.
- Also in 2007, the Town signed a lease with South Port for Parcels 10 and 12 (the east end of the harbor). Parcel 10 was later consolidated into Parcel 12. Term is 40 years, commencing on South Port's acquisition of the STIP.
- In 2008, South Port purchased the remainder of the STIP (approx. 120 acres) from Northampton County. South Port's plan is to develop a yacht repair facility and related businesses.

## S.T.I.P. Cont'

- A new WWTP was constructed on Parcel 14 and the old WWTP was dismantled on Parcel 17.
- In 2011, the Town and South Port settled a dispute regarding the WWTP construction by reconfiguring the lease covering Parcels 14 and 17.
- In May 2014, South Port began operating the Cape Charles Yacht Center on the leased parcels.
- In June 2016, South Port purchased Parcels 19 and 20 pursuant to purchase options in the lease.
- It is anticipated that South Port will acquire Parcels 12 and 17 in 2018.

# Utility Rate Study

- 8/7/98 The TAF Group prepared a Utility Rate Study for the Town with the following key recommendations:
  - Town to review financial forecast and utility rates on at least an annual basis
  - “The rate recommendations serve as an integral part of an overall economic plan that gives the Town the ability to acquire the necessary infrastructure on an as needed basis, and pay for them out of tap and usage fees.

# New Rates Adopted

- 11/10/98 Council Adopts new utility rates that were recommended by TAF
  - No change in rates for Town
  - Bay Creek and STIP set at same rates
  - Tap fees set the same for all users
- A later study finds that all of these rates were probably set too low.

# Baymark Fee Agreement

- 3/8/99 agreement between Town and Baymark to reconcile which party was responsible for various costs. It was agreed that the Town owed Baymark a total of \$295,357 for costs advanced by Baymark for work by the TAF Group, the law firm of Mays & Valentine and various contractors.

# Negotiations with Baymark

- 6/26/2000 letter from Town to Baymark.
  - “The Town will revise its rate study such that the new rate study will not include the capital improvements which are the responsibility of the successors-in-interest to Kellogg Brown & Root (Baymark Construction Corp.) under the terms of the Annexation Agreement.”
- Town then obtains a new utility rate study.

# New Rate Study Impact

- 4/25/01 letter from Town to Baymark
  - “analysis and presentation clearly compared and contrasted the capital and operating costs of the Town’s systems. This analysis eliminated capital costs for which Baymark . . . is responsible, and basically revealed a snapshot of the utility systems showing that they are not even covering their operating costs.”
  - Attached statement shows certain tap fees used as credits against the \$295,357 owed by the Town to Baymark.

# Water Sewer Fee Increases

- 5/11/04 Ordinance amended to increase water and sewer fees per new rate study.
  - In addition to \$875 sewer connection fee a facility fee of \$1,375 added for a total of \$2,250.
  - In addition to the \$875 water connection fee a facility fee of \$875 was added for a total of \$1,750.
  - Total \$4,000.

# Water and Sewer Fee Formula

- 2/8/05 Town adopts water and sewer fee formula for commercial and industrial use to conform to an Equivalent Residential Unit of 125 Gallons Per Day (GPD).

# Rate Factors

- A March 10, 2011 staff report summarized the rate factors including:
  - Accumulation of connection charges in a reserve, coupled with a future payment from the developer, to fund expansion of both water and wastewater capacity.

# Revised Connection Charges

- The Council approved revision of the connection charges in 2011 from about \$20,000 to \$12,350.
- The higher amount had assumed no payment from the developer.
- The lower amount assumed a significant payment in the future, as well as an additional \$6 million grant received under the ARRA.

# Wastewater Rate Increase Summary

- The main driver of the increase in the wastewater rate is the debt service on the new treatment plant.
- A new plant needed to be built to both meet new nutrient discharge regulations and to replace the existing plant that was nearing the end of its service life.

## Rate Increases Cont'

- The total cost of the wastewater plant project was about \$19.2 million.
- The Town was fortunate to obtain two grants (Virginia Water Quality Improvement Fund and American Recovery and Reinvestment Act) to cover almost 73% (\$14 million) of the cost.

## Rate Increases Cont'

- The remaining amount was financed by a twenty year, no-interest loan provided by the Commonwealth of Virginia.
- The debt service associated with this loan comprises most of the wastewater rate increase.

# Rate Increases Cont'

- After the increases there was public commentary that the reason for this increase was because the developer of Bay Creek Resort & Club did not pay the Town for their share of the cost of building the new plant as required by the Annexation Agreement.

# Rate Increases Cont'

- The Annexation Agreement required the developer to pay the cost of expansion to accommodate the additional treatment demands of the annexed property beyond the limits of the Town's "current permitted capacities".
- The "permitted capacity" of the new plant is the same as the old plant, 250,000 gallons per day.

## Rate Increases Cont'

- The Town started planning to replace the old plant in 2006 to meet the new state nutrient removal requirements.
- The old plant was in poor condition and it was impractical to upgrade it with nutrient removal technology.

# Rate Increases Con't

- Additionally, growth projections at that time indicated that the Town would need a higher capacity than 250,000 gallons per day in the fairly near future, and an eventual capacity of about 750,000 gallons per day at full build-out.
- The state recognized this possibility and included a dual waste load allocation (250K and 500K) in their regulation if the new plant was on line by December 31, 2010.

# Rate Increases Cont'

- For these reasons, the Town set out to design and build a plant with a permitted capacity of 500,000 gallons per day.
- Since the Town was planning to build a plant with greater capacity than the current “permitted capacity,” the Town entered into discussions with the developer (Baymark) to pay their share under the Annexation Agreement.

# Rate Increases Cont'

- As these discussions progressed, the economy fell into deep recession and growth came to a virtual halt. As the recession persisted it became clear that the growth projections would need to be revisited after the economy recovered and the real estate market substantially improved. There was no longer a near term need for a plant with a higher “permitted capacity”.

# Rate Increases Cont'

- So, the design process was temporarily halted in late 2008 and in 2009 the Council decided to build the smaller plant (250,000 gallons per day).
- This minimized the risk of building expensive infrastructure that would be underutilized, and avoided a potential permitting dispute.

# Rate Increases Cont'

- Several things happened when the Town decided to retain the current permitted capacity:
  - significantly less money was spent to build the new plant.
  - reduced the increase to the state waste load allocation.
  - a requirement for the developer to pay for expansion was not triggered.

# The Future

- The terms of the Annexation Agreement require the developer to pay at some point in the future; i.e. when the Town needs to expand the permitted capacity of the new plant.
- This is also true for a potential future need to expand the capacity of the water treatment plant.

# QUESTIONS?



## THANK YOU!

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