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January 10, 2019

HAND DELIVERY

Paul Holt, Director
Community Development/Planning
James City County
101 Mounts Bay Road
Building A
Williamsburg, VA 23185

Re: Landowner Response and Written Request for Department of Conservation and Recreation Involvement with HRSD's Notice of proposed acquisition of land within Agricultural and Forestal District (AFD) 1-02-1-2018 in James City County, Ordinance No, 197A-5 Parcel No. 5820100002

Dear Mr. Holt:

We serve as counsel for Carter's Grove Associates, LLC ("Carter's Grove" or "Landowner") regarding the above-referenced matter.

This letter responds to Hampton Roads Sanitation District's ("HRSD") letter to James City County ("County"), dated December 12, 2018 ("Letter Report"), requesting the County's approval to proceed with the condemnation of seventy-six (76) acres of property within an Agricultural and Forestal District owned by Carter's Grove at 250 Ron Springs Drive, Williamsburg, Virginia 23185, Tax Map ID No. 582-01-00-002 ("76 Acre Parcel").

In 2014, the Landowner purchased Carter's Grove plantation from Colonial Williamsburg and in doing so purchased a 400+ acre historic property on which the Carter's Grove Manor Home ("Manor Home") and other improvements, dependencies, and unique archaeological sites are situated along with the subject parcel consisting of 76.10 acres which is the subject of the Letter Report. The 76 Acre Parcel completely surrounds HRSD's existing Water Treatment Plant and provides an important and well planned physical buffer between the Treatment Plant and the remainder of Carter's Grove plantation. HRSD is seeking to acquire the 76 Acre Parcel to build a new SWIFT (Sustainable Water Initiative for Tomorrow) water treatment facility that will treat waste water and inject it into the Potomac Aquifer.

Deficiencies in the Letter Report

HRSD's Letter Report fails to comply with the requirements of Virginia Code § 15.2-4313 and gives the County no substantive information from which it can properly review the proposed condemnation action and make an informed decision.

Section 15.2-4313 requires that, "at least ninety days prior" to any condemnation action affecting property within an Agricultural and Forestal District ("AFD"), HRSD give "[n]otice to the local governing body . . . in the form of a report" which contains the following information:

1. A detailed description of the proposed action, including a proposed construction schedule;
2. All the reasons for the proposed action;
3. A map indicating the land proposed to be acquired or on which the proposed dwellings, commercial or industrial facilities, or water or sewer facilities to serve nonfarm structures are to be constructed;
4. An evaluation of anticipated short-term and long-term adverse impacts on agricultural and forestal operations within the district and how such impacts are proposed to be minimized;
5. An evaluation of alternatives which would not require action within the district; and
6. Any other relevant information required by the local governing body.

Va. Code Ann. § 15.2-4313(A).

The Letter Report submitted by HRSD is on its face deficient and fails to properly address the statutory factors listed above. Specifically, the Letter Report includes (a) little to no evaluation of the short-term and long-term adverse impacts on agricultural and forestal operations within the district and how such impacts are proposed to be minimized; and (b) no analysis of one of the most important factors – potential alternative sites that would not require action within an AFD.

After reviewing HRSD's Letter Report, the County, in consultation with the local planning commission and the advisory committee, is required by statute to make written findings as to the following:

- (i) the effect the action would have upon the preservation and enhancement of agriculture and forestry and agricultural and forestal resources within the district and the policy of this chapter;
- (ii) the necessity of the proposed action to provide service to the public in the most economical and practical manner; and
- (iii) whether reasonable alternatives to the proposed action are available that would minimize or avoid any adverse impacts on agricultural and forestal resources within the district.

Va. Code Ann. § 15.2-4313(B). Thus, it is essential for HRSD to provide substantive details and support for the conclusions made in the Letter Report to ensure that County has sufficient information to make the written findings detailed above in subsections (i), (ii) and (iii).

Therefore, the Landowner requests that the County require HRSD to resubmit a more detailed report that properly evaluates and provides substantive and detailed information on all six of the statutory factors described in § 15.2-4313(A).

Request for Advice from the Department of Conservation and Recreation

Pursuant to its statutory right, the Landowner hereby requests that the Director of the Department of Conservation and Recreation advise the County on this proposed action in accordance with § 15.2-4313(B). See Va. Code Ann. § 15.2-4313(B) ("If requested to do so by any owner of land that will be directly affected by the proposed action . . . the Director of the Department of Conservation and Recreation, or his designee, may advise the local governing body on the issues listed in clauses (i), (ii) and (iii) of this subsection").

The involvement of the Department of Conservation and Recreation is particularly important in this case as HRSD has provided (a) minimal to no information on the short-term and long-term adverse impacts on the agricultural and forestal operations and how such impacts are proposed to be minimized and (b) no information on "whether reasonable alternatives to the proposed action are available that would minimize or avoid any adverse impacts on agricultural and forestal resources within the district." *Id.*

Carter's Grove is sending a separate formal request for involvement to the Department of Conservation and Recreation and the County.

HRSD's Rush to Condemn

Section 15.2-4313 contemplates that the locality thoroughly consider all proposals to acquire land in an AFD before issuing its approval, including the potential for a public hearing and the circulation of notice in a newspaper within the affected district. See Va. Code Ann. § 15.2-4313(C). Based on the history of communications to date and the brevity of the Letter Report, Carter's Grove is concerned that HRSD is attempting to inappropriately rush the approval process without engaging in a thorough consideration of the factors relevant to land acquisition in an AFD.

Although HRSD was statutorily required to obtain the County's approval *before* taking any condemnation action in connection with an AFD designated property, HRSD issued a condemnation notice to the Landowner on November 13, 2018 without first obtaining the County's approval. (See notice of condemnation letter attached hereto as Exhibit A). It was not until after Carter's Grove raised the review required by Section 15.2-4313 that HRSD indicated that it was going to follow the requirements of the statute.

After the Landowner contested the condemnation notice and brought Section 15.2-4313 to HRSD's attention, HRSD then failed to give notice to the Landowner that it had filed the Letter Report. Although such notice to the Landowner is statutorily required, and although HRSD's Letter Report to the County explicitly states that it provided notice to the Landowner, ***no such notice was ever provided to Carter's Grove***. See Va. Code Ann. § 15.2-4313(A) ("Notice to landowners shall be sent by first-class or registered mail and shall state that further information on the proposed action is on file with the local governing body."). The Landowner did not learn that HRSD had submitted the Letter Report almost a month ago, on December 12, 2018, until recent inquiry was made with the County regarding whether a letter report had been submitted by HRSD.

Originally, HRSD had no intentions of engaging in the review process required by Section 15.2-4313. Now that HRSD has realized it must submit its request to the County for review, Carter's Grove is concerned that HRSD is attempting to rush the required review process. Based upon the Letter Report, HRSD apparently has agreed to complete construction of the proposed facility by 2023 in order to resolve a federal enforcement action taken by the United States Environmental Protection Agency ("EPA") and the Department of Justice ("DOJ"). The fact that a federal enforcement action was brought against HRSD and that HRSD proposed a schedule requiring construction to be completed by 2023 does not affect the review which otherwise must be completed under Section 15.2-4313.

Substantive Response to the Letter Report

Carter's Grove reiterates its request that the County require HRSD to resubmit its Letter Report in order to provide the detail and analysis outlined above. For the issues already addressed in the Letter Report, the Landowner responds as follows:

1. HRSD does not require 76.10 acres to accomplish its public purpose of providing advanced treatment facilities to support alternative disposal of treated waste water. As pointed out in No. 4 of HRSD's Letter Report, it is anticipated that "approximately 7 acres will need to be cleared to support the new facilities". Taking the entire 76 Acre Parcel, which has served as a necessary part of the historic Carter's Grove plantation since Colonial Williamsburg acquired the property from Sealantic in the 1970s, such that HRSD can build a new Water Treatment Plant with a footprint of approximately 7 acres, is a wholly unnecessary taking of lands within the AFD. The 76 Acre Parcel should continue to provide potential outdoor and recreation value, should be conserved as a natural habitat of rare species of plant life, and serve as a continued buffer between the HRSD Treatment Plant and the Manor Home. HRSD's proposed acquisition will effectively eliminate the historic Country Road between the Manor Home and Grove Creek. This means Carter's Grove no longer will have a secondary access to its property to be used as an emergency access and access for large tractor trailers and farm equipment. Condemnation of the 76 Acre Parcel completely alters the current Landowner's use and enjoyment of Grove Creek and the beach along the James River (including one of the only flat portions of the James River beach).

Significantly, the AFD is populated with a coastal plain calcareous ravine forest as evidenced by the dominance of American beech (*Fagus grandifolia*), southern sugar maple (*Acer floridanum*), and calcareous soils weathered by Tertiary shell deposits which contain fossils. The coastal plain calcareous ravine forest contains several unusual plant species including, but not limited to, black cohosh (*Acataea racemosa*) and American bellflower (*Campanula americanum*). The forest contains stands of old growth trees, which can seldom be found elsewhere in Virginia, the only place in the world which harbors this natural community. There will be significant impact to the AFD and effectively to the Commonwealth of Virginia by the potential damage and loss of this rare flora.

2. While HRSD is a political subdivision of the Commonwealth of Virginia with some limited quick take condemnation powers, there is a substantial legal question as to whether it has the power to condemn the 76 Acre Parcel by a Certificate of Take based on its own Charter. See Hampton Roads Sanitation Dist. Comm'n, Va. Acts 1960, c. 66 as

amended, §11(b). Therefore, there are a number of legal issues associated with HRSD's proposed acquisition by condemnation.

3. As addressed in No. 1 above, HRSD seeks to condemn the entire 76 Acre Parcel. **All 76 acres fall within the AFD** – not just 6.10 acres as HRSD suggests.

HRSD seeks to take advantage of a clear scrivener's error in the ordinance addressing the 2018 AFD renewal which inadvertently transposes "76.10 acres" as "6.10 acres." The Landowner previously brought this error to HRSD's and the County's attention, and the County corrected such error. (See File Memo and Corrected Ordinance, attached hereto as Exhibit B.)

A copy of a drawing which shows the AFDs is attached as Exhibit C. Carter's Grove owns the property designated in green on Exhibit C which is located within an AFD.

4. HRSD has been in negotiations with the Landowner to reach an agreement on a limited purchase of property to expand the footprint of the existing Water Treatment Plant by approximately 7 acres, but negotiations have stalled with respect to the issue of just compensation.¹ Carter's Grove had suggested that to the extent an agreement on a limited acquisition could be reached (and efforts have been made between HRSD and engineers retained by Carter's Grove who are also specialists in SWIFT initiatives), there remains a question of just compensation under the Virginia Constitution.

According to representations made by HRSD in its Letter Report, HRSD is under a consent decree with the EPA and DOJ and has a proposed schedule to complete the new facility in 2023. However, given the gravity of the taking of the entire parcel, its potential disturbance of lands within the AFD, and its significant adverse impact to the Manor Home parcel - a national historic treasure that is subject to a complex historic conservation easement and that the Landowner is painstakingly restoring for future generations - the proposed acquisition by HRSD requires, at a minimum, a public hearing in order to fully explore the impacts within the AFD.² As noted above, concurrently with this written response, the Landowner also has written to the Director of the Department of Conservation and Recreation, as permitted under Virginia Code §15.2-4313, to request the Director's review, evaluation and assistance to prevent the permanent taking of the 76 Acre Parcel that should be conserved. Because the Commonwealth of Virginia itself, and not just the locality, is involved in this process HRSD's plea to the County for quick approval of its plan should not be accepted.

¹ Through counsel, Carter's Grove has been in contact with HRSD since the summer of 2017, when HRSD first expressed its intention to acquire this property, and has engaged with HRSD in significant discussions since that time through December 2018.

² In 2014, Carter's Grove purchased the Manor Home parcel and the 76 Acre Parcel with the intention of reestablishing agricultural operations. In addition to an extensive historic restoration of the Manor Home and the formal grounds, Carter's Grove has been reclaiming and fencing fields and pastures and is building a large farm complex to store hay, shelter livestock, and maintain the necessary farming equipment. Reestablishing agricultural operations is a multi-year undertaking, and Carter's Grove continues to take steps to accomplish this goal.

Instead, the proposed taking of Agricultural and Forestal lands for industrial use requires deliberate and thoughtful evaluation.

5. HRSD recites, that it can "avoid impact to the 6.10 acres" [*sic*]. As stated above, the actual parcel size is 76.10 acres per the corrected Ordinance. However, HRSD acknowledges that without a detailed survey showing the specific limits of the AFD within the parcel it cannot advise the County as to whether even a limited acquisition will not disturb the forests within the AFD.

HRSD should not have submitted a Letter Report in which it is unable to identify for the County the extent of the areas affected within the AFD. To simply take the 76 Acre Parcel and avoid its requirements under the statute to properly analyze, assess and report to the locality why it is taking the property *in toto*, does not comply with Section 15.2-4313.

HRSD has not provided the County with any information, attachments, exhibits or analysis of exactly what acreage within the AFD its expansion will impact. Further, while HRSD expects no short-term impact to agricultural operations, its long-term impacts will be more than 7 acres of forestal land.

HRSD also has failed to identify the impact from building injection wells on the 76 Acre Parcel. It takes approximately 1 acre to clear and build injection wells. HRSD has not explained to the County whether injection wells will be placed on the existing Water Treatment Plant or on the expanded footprint of 7 acres, or elsewhere in the AFD. Each injection well site will require a permanent site of at least one-half acre of land, resulting in further loss of forest within the AFD and potentially rare plant life as described above. The long-term impacts are far more than the approximate 7 acres of forestal land. The impact to existing trees and plants can be significant and certainly no analysis has been made by HRSD as to impact on those rare species, as HRSD admits it does not know the limits of the AFD within the 76 Acre Parcel.

HRSD is obligated under the statute to present the County with a true report. Its vague assertion that it is "willing to discuss" the establishment of a permanent conservation easement over the remaining unused portion is not in any way a defined plan.

6. The Landowner disagrees with HRSD's statement that "there are no feasible alternatives that will not require action within this AFD" as there are alternatives. For example, there is an approximately 24 acre parcel located at 200 Ron Springs Drive. Unlike the 76 Acre Parcel, the 24 acre parcel presents few environmental constraints for use by HRSD for its plant expansion.

Regulatory restrictions on the 76 Acre Parcel are primarily due to jurisdictional waters of the United States (wetlands) that border its western and northern boundaries. These resources are subject to a 100 foot RPA buffer in the County which leaves a much smaller percentage of developable land outside the RPA and situated above the 50 foot elevation in the 76 Acre Parcel.

The 24 acre parcel is not part of an AFD and therefore is not subject to the same land use change requirements as the 76 Acre Parcel. Again, it is important to consider that

there is old growth forest in the 76 Acre Parcel, which requires continued protection of this area under an AFD. As stated, the coastal plain calcareous ravine forest is itself a rare habitat type which is found only in several places in Virginia and contains several species which are uncommon for the area including but not limited to black cohosh and American bellflower.

In addition to its clear physical features and topographical advantages, the 24 acre parcel, provides significant and compelling advantages over the current proposed acquisition parcel owned by Carter's Grove, to include without limitation:

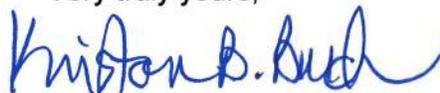
- i. Larger buildable footprint;
- ii. Flatter terrain and anticipated reduced earth moving costs;
- iii. More adjacent space for future expansion;
- iv. More space for construction staging;
- v. Convenient access adjacent to Log Cabin Beach Road;
- vi. Adequate area for the stormwater management features that will be required to account for increased impervious area;
- vii. Additional area for injection wells;
- viii. Potential lower land cost for HRSD;
- ix. Potential for lower construction cost for HRSD; and
- x. No overlap with resource protection areas and buffer zones.

Any concerns by HRSD as to security could be easily accommodated on the 24 acre parcel.

HRSD is incorrect when it states no alternatives exist. It appears that no analysis has been done by HRSD as to whether there are feasible alternatives that will not require action within this AFD.

For the reasons stated above, the Landowner requests that the County require HRSD to resubmit a more detailed report that properly evaluates and provides substantive and detailed information on all six of the statutory factors described in § 15.2-4313(A). In addition, the Landowner requests the involvement of the Department of Conservation and Recreation in the County's review of the Letter Report.

Very truly yours,



Kristan B. Burch

Paul Holt, Director
Community Development/Planning Director
January 10, 2019
Page 8

KBB:wr
Enclosures

cc (w/encls.): Scott Stevens, County Administrator (scott.stevens@jamescitycountyva.gov)
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Jim Icenhour, Chair, Board of Supervisors (james.icenhour@jamescitycountyva.gov)
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F.O. BLECHMAN, 1905-1986
ARTHUR W. WOLTZ, 1905-1993
THOMAS N. DOWNING, 1919-2001
SVEIN J. LASSEN, 1947-2006
HERBERT V. KELLY, 1920-2007
B.M. MILLNER, 1929-2011

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November 13, 2018

**VIA CERTIFIED MAIL RETURN RECEIPT
REQUESTED
AND US MAIL FIRST CLASS**

Carter's Grove Associates, LLC
Attn: Samuel M. Menco
70 West Madison, Suite 4600
Chicago, IL 60602-4215

Dear Mr. Menco:

Re: 250 Ron Springs Drive, Williamsburg, Virginia 23185
Tax Map ID No. 582-01-00-002
Filing of Certificate of Take Pursuant to Va. Code § 25.1-300 et seq.

As you are aware, this firm represents the Hampton Roads Sanitation District ("HRSD"). Please accept this letter as notice pursuant to Virginia Code § 25.1-306 that HRSD will file a Certificate of Take within thirty (30) to forty-five (45) days in the James City County Circuit Court condemning the above referenced property owned by Carter's Grove Associates, LLC. If you have any questions or concerns, please feel to contact me.

Very truly yours,
JONES, BLECHMAN, WOTLZ & KELLY, P.C.

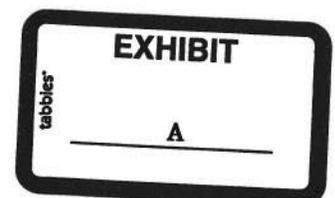
Matthew D. Meadows

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Edward G. Henifin, P.E., General Manager, HRSD (via email)
John Dano, Project Manager, HRSD (via email)

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FILE MEMORANDUM

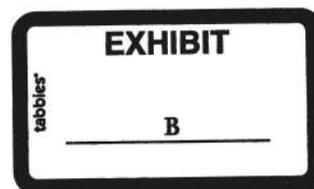
To: File
From: Adam Kinsman, County Attorney
Date: December 18, 2018
Re: Ordinance No. 197A-5

ISSUE:

It has come to my attention that Ordinance No. 197A-5 adopted by the Board of Supervisors on September 11, 2018 (the "Ordinance") contains an error in Ordinance section number two. This section indicates that the Carter's Grove Agricultural and Forestal District (the "AFD") includes two parcels: James City County Real Estate Tax Map Parcel No. 5820100002 ("Parcel No. 1") and James City County Real Estate Tax Map Parcel No. 5910100030 ("Parcel No. 2"). It appears that an error occurred when listing the total acreage of Parcel No. 1, which is listed as being 6.10 acres in size, rather than 76.10 acres.

FACTS:

1. The Staff Report to the Board of Supervisors dated September 11, 2018 (the "Report") states that the AFD was created in 2002 and originally consisted of three parcels totaling approximately 320 acres. In 2006, a 2.26-acre portion was withdrawn from the AFD. In 2015, a 1.56-acre parcel was withdrawn, leaving the AFD with two parcels totaling 316.14 acres.
2. The Report notes that there have been no withdrawals of land from the AFD since 2015.
3. The Report indicates that the entire 76.10-acre Parcel No. 1 was to be included in the AFD.
4. The AFD map presented to the Board of Supervisors on September 11, 2018 (the "Map") shows the entire 76.10-acre Parcel No. 1 as being included in the AFD.
5. The legal newspaper advertisement listed the AFD as including "approximately 316 acres of land."
6. Section number two in the Ordinance lists the total acreage of the AFD as 316.14.



ANALYSIS:

A scrivener's error is an error that tends to occur singularly and is one that is "demonstrably contradicted by all other documents." Westgate at Williamsburg Condo Ass'n, Inc. v. Philip Richardson Co., Inc., 270 Va. 566, 575 (2002). Every document associated with this AFD renewal, including the newspaper advertisement, the Report, the Map, and the total acreage listed in the Ordinance, indicates that the entire 76.10-acre Parcel No. 1 was to be included in the AFD, not just a 6.10-acre portion of it. There is no evidence showing an intent to remove 70 acres from the AFD and not one single reference to a total AFD size of 246.14 rather than the oft-repeated total of 316.14.

CONCLUSION:

It is my opinion that the 6.10-acre notation in the Ordinance constitutes a scrivener's error. A new page one stamped "CORRECTED" should be slip-sheeted and should indicate that Parcel No. 1 is 76.10 acres.

CORRECTED

ADOPTED

SEP 11 2018

ORDINANCE NO. 197A-5

Board of Supervisors
James City County, VA

AGRICULTURAL AND FORESTAL DISTRICT-1-02-1-2018

CARTER'S GROVE 2018 RENEWAL

WHEREAS, James City County has completed a review of the Carter's Grove Agricultural and Forestal District (the "District"); and

WHEREAS, in accordance with Section 15.2-4311 of the Code of Virginia, 1950, as amended (the "Virginia Code"), property owners have been notified, public notices have been filed, public hearings have been advertised, and public hearings have been held on the continuation of the District; and

WHEREAS, the Agricultural and Forestal District (AFD) Advisory Committee at its meeting on June 21, 2018, voted 9-0 to recommend renewal of the District; and

WHEREAS, the Planning Commission following its public hearing on August 1, 2018, concurred with the recommendation of staff and the AFD Advisory Committee and voted 5-0 to recommend renewal of the District with the conditions listed below.

NOW, THEREFORE, BE IT ORDAINED by the Board of Supervisors of James City County, Virginia, that:

1. The Carter's Grove Agricultural and Forestal District (the "District") is hereby continued to October 31, 2022 in accordance with the provisions of the Virginia Agricultural and Forestal District Act, Virginia Code Section 15.2-4300 et. seq. (the "Act").
2. That the District shall include the following parcels, provided, however, that all land within 25 feet of road right-of-ways is excluded from the District:

<u>Owner</u>	<u>Parcel No.</u>	<u>Acres</u>
Carter's Grove Associates	5820100002	76.10
Carter's Grove Associates	5910100030	<u>240.04</u>
	Total:	<u>316.14</u>

3. That pursuant to Sections 15.2-4312 and 15.2-4313 of the Act, the Board of Supervisors requires that no parcel in the District be developed to a more intensive use without prior approval of the Board of Supervisors. Specifically, the following restrictions shall apply:
 - a. The subdivision of land is limited to 25 acres or more, except where the Board of Supervisors authorizes smaller lots to be created for residential use by members of the owner's immediate family, as defined in the James City

County Subdivision Ordinance. Parcels of up to five acres, including necessary access roads, may be subdivided for the siting of Wireless Communications Facilities (WCFs), provided: a) The subdivision does not result in the total acreage of the District to drop below 200 acres; and b) the subdivision does not result in a remnant parcel of less than 25 acres.

- b. No land outside the Primary Service Area and within the District may be rezoned and no application for such rezoning shall be filed earlier than six months prior to the expiration of the District. Land within the District may be withdrawn from the District in accordance with the Board of Supervisors' Policy Governing the Withdrawal of Properties from Agricultural and Forestal Districts, adopted September 28, 2010.
- c. No Special Use Permit (SUP) shall be issued except for agricultural, forestal, or other activities and uses consistent with the Act, which are not in conflict with the policies of this District. The Board of Supervisors, at its discretion, may issue SUPs for WCFs on properties in the District that are in accordance with the County's policies and Ordinances regulating such facilities.

Ruth M. Larson

Ruth M. Larson
Chairman, Board of Supervisors

ATTEST:

Teresa J. Fellows
Teresa J. Fellows
Deputy Clerk to the Board

	VOTES		
	<u>AYE</u>	<u>NAY</u>	<u>ABSTAIN</u>
MCLENNON	✓	—	—
ICENHOUR	✓	—	—
SADLER	✓	—	—
HIPPLE	✓	—	—
LARSON	✓	—	—

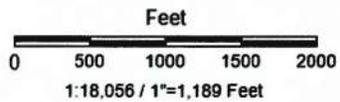
Adopted by the Board of Supervisors of James City County, Virginia, this 11th day of September, 2018.

AFDCtrrsGrvRenw-res

James City County, Virginia

Legend

-  Parcels
- Agricultural & Forestal Districts AFD**
-  Armistead
-  Barnes Swamp
-  Carter's Grove
-  Christenson's Corner
-  Cranston's Pond
-  Croaker
-  Gordon Creek
-  Gospel Spreading Church
-  Hill Pleasant Farm
-  Mill Creek
-  Pates Neck
-  Wrights Island
-  Yarmouth Island



Title:

Date: 4/25/2018

DISCLAIMER: This drawing is neither a legally recorded map nor a survey and is not intended to be used as such. The information displayed is a compilation of records, information, and data obtained from various sources, and James City County is not responsible for its accuracy or how current it may be.