

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

Governor Mark R. Warner by substitution for Governor)
James S. Gilmore, III, Lt. Governor and President of the)
Senate John H. Hager, Acting Attorney General Randolph)
A. Beales, Speaker of the House of Delegates S. Vance)
Wilkins, Jr., Senate Majority Leader Walter A. Stosch,) **RECORD NO. 021003**
House Majority Leader H. Morgan Griffith, Senator Kevin)
G. Miller, Delegate John H. Rust, Jr., Delegate S. Chris)
Jones, State Board of Elections Secretary Cameron P.)
Quinn, all in their official capacities,)

*Defendants and also Appellants except for Gov. Mark R. Warner,
former Lt. Gov. John H. Hager, and former Acting Atty. Gen. Beales.*

v.

Douglas MacArthur West, Albert Simpson, Nanalou)
Sauder, Ruby Tucker, Shirley N. Tyler, Shanta Reid,)
John Mumford, Sam Werbel, Collins Howlett, Ira J.)
Coleman, Maryann Coleman, Carl Waterford, Regina)
Harris, Herman L. Carter, Jr., Grindly Johnson, Rosa Byrd,)
Harold A. Brooks, Elijah Sharp, III, Herbert Coulton,)
Delores L. McQuinn, Richard Railey, Jr., Vincent)
Carpenter, Leslie Byrne, L. Louise Lucas, Yvonne Miller,)
Henry Marsh, Henry Maxwell, Mary Margaret Whipple,)
Bill Barlow, Bob Brink, C. Richard Cranwell, Viola)
Baskerville, Flora Crittenden, Mary T. Christian, L. Karen)
Darner, Jay W. DeBoer, R. Creigh Deeds, Franklin P. Hall,)
Robert D. Hull, Thomas M. Jackson, Jr., Jerrauld C. Jones,)
Kenneth R. Melvin, William P. Robinson, Jr., Marian Van)
Landingham, Mitchell Van Yahres, Clifton A. Woodrum,)

Plaintiffs/Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF SALEM

BRIEF AMICUS CURIAE OF SENATOR D. NICK RERRAS IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF SENATOR D. NICK RERRAS

INTEREST OF THE AMICUS

The Honorable D. Nick Rerras is the duly elected senator representing the Sixth District in the Virginia Senate. Although the Sixth District was not challenged below by plaintiffs, and although there was no plaintiff who resided in that district, the circuit court nevertheless struck down the Sixth District as a supposed violation of the requirements in Article II, § 6 of the Constitution of Virginia relating to compactness and contiguity.

ASSIGNMENTS OF ERROR

Amicus hereby adopts the Assignments of Error set forth in the Opening Brief of Appellants.

QUESTIONS PRESENTED

Amicus hereby adopts the Questions Presented set forth in the Opening Brief of Appellants.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of the Case set forth in the Opening Brief of Appellants.

STATEMENT OF FACTS

Amicus hereby adopts the Statement of Facts set forth in the Opening Brief of Appellants.

ARGUMENT

The circuit court reversed this Court's precedent in Jamerson v. Womack, 244 Va. 506, 423 S.E.2d 180 (1992). Essentially, the circuit court suggested that in Jamerson, this Court adopted and validated the standard of compactness and contiguity used by the General Assembly in 1991. The circuit court then proceeded to state that the 2001 redistricting cycle "introduced a new concept to Virginia, *i.e.* that 'contiguity by water is sufficient.'" West v. Gilmore, CL01-84, 2002 Va. Cir. LEXIS 37, at *16 (City of Salem Mar. 10, 2002). The circuit court then asserted that "neither [Jamerson] nor anything else presented to, or discovered by, the Court indicates that the General Assembly previously had employed such language." Id. Despite this rather bold statement, the circuit court then admitted that in 1991, the General Assembly stated that "[c]ontiguity by water is acceptable to link territory within a district in order to meet the other criteria stated herein and provided that there is reasonable opportunity for travel within the district." Id. at *25 (citation omitted). Had the circuit court made even the most cursory of examinations into how these criteria had been applied in 1991, it would have realized that the connections over water in the 1991 plan were far more numerous and cumbersome than in 2001, and that road travel within the 1991 districts was far more difficult than in the 2001 reapportionment plan. Indeed, if the court had not made this portion of its decision *sua sponte*, even the most minimal of briefing or examination of the evidence would have revealed the absurdity of the circuit court's description of how the criteria were applied in 1991.

The circuit court examined a series of property, bank, and annexation cases in order to determine the meaning of the term “contiguous.” The court also examined the municipal annexation statute for Virginia. Va. Code Ann. § 15.2-3210(D). The circuit court noted that this “statute establishes that for the purpose of annexation contiguity by water is sufficient” but that there is a specific exception that prevents annexation across Hampton Roads. West, 2002 Va. Cir. LEXIS 37, at *23. From its analysis of the 1991 criteria, the case law, and the annexation statute, the circuit court essentially derived three tests for compactness and contiguity that it asserted were used in 1991 and validated in Jamerson:

1. A district must be accessible from one part to the other “by the usual regularly used or scheduled modes of transportation.” Id. at *31.
2. Contiguity by water is sufficient if the two portions of territory are directly across the water from each other and the district lines are drawn to include a highway bridge or a regularly scheduled ferry which joins the territories across the body of water. (Apparently an exception is also made for isolated islands since there is no mention of them in the opinion.)

3. No district can be contiguous across Hampton Roads even if it follows a highway bridge. This is a special exception within the second test.

A brief examination of the 1991 redistricting scheme and the 2001 reapportionment plan will reveal that in 2001, the General Assembly applied the criteria regarding contiguity across water in the same manner as the 1991 General Assembly, with two significant exceptions. First, the General Assembly in 2001 used contiguity by water – without the benefit of a highway bridge – less than the 1991 General Assembly in drawing contiguous state legislative districts; this was done four times in 2001 as compared to twelve times in 1991.¹ Second, the General Assembly in 2001 only crossed bodies of water “by line of sight” (*i.e.*, from opposite bank to opposite bank). In 1991, the General Assembly actually used waterways in an attempt to link territory which was not in the line of sight across the body of water. The 2001 General Assembly did not link any district in this manner.

This brief includes a rather extensive appendix containing maps of the six districts in the 2001 redistricting plan that the circuit court found in violation of the mandate expressed in Article II, § 6 of the Constitution of Virginia requiring contiguous and compact districts. The appendix also contains maps of the

thirteen legislative districts from 1991 that could not be traversed by automobile without leaving the district, including the twelve districts contiguous solely by water. Please examine these maps in conjunction with reading this brief. The maps tell the story far more effectively than words. Below is a description of Senate District 18, which was the subject of this Court's decision in Jamerson, and the other twelve districts in the 1991 plan which were contiguous solely by water.

Senate District 18, approved by this Court in Jamerson, lacks continuous highway transportation across the entire district. District 18 runs from Halifax County in the west to the City of Portsmouth in the east. For approximately six miles through Suffolk and Chesapeake Counties, this district uses a narrow neck of marshland to pass through the Great Dismal Swamp. This segment of the district is bordered by two railroad lines; the only highway connection is on the north side of the northernmost railroad. In order to travel by automobile from the Portsmouth portion of the district to the remainder of the district to the west, one must drive approximately six miles outside the district. "District 18 extends approximately 165 miles from west to east" Jamerson, 244 Va. at 509, 423 S.E.2d at 181. Despite the facts that all parts of the district could not be traversed by automobile and the district extended 165 miles from end to end, this Court

¹ Arguably, the 1991 General Assembly engaged in drawing districts contiguous by water thirteen times, depending upon the classification of the Great Dismal Swamp as either

did not find that this constituted an unreasonable burden of travel on constituents and their elected legislators. Jamerson at 516, 423 S.E.2d at 185-186. Senate District 18 would not have complied with the circuit court's criteria since it could not be traversed by automobile within the district. No district in the 2001 redistricting plan is less compact than Senate District 18 in the 1991 redistricting scheme. Clearly, the General Assembly should be allowed to rely on Senate District 18 as the minimal standard of compactness and contiguity. Please see Appendix, Map A marked "1991 18th Senate District, showing lack of road travel between portions of district."

When drawn by the legislature in 1991, the Hampton portion of Senate District 1 was only contiguous with the rest of the district by water across the Back River. However, this river does have a bridge that crosses from the Hampton portion to the rest of the district through Langley Air Force Base. This connection through Langley Air Force Base is the exact same connection that Senate District 1 and House of Delegates District 91 use in 2001 - which the circuit court maintains is lacking in contiguity. Since the circuit court asserts that it is applying the same standard that was used by the General Assembly in 1991, the 2001 General Assembly should be able to rely on configurations originally drawn by the General Assembly in 1991. Please see Appendix, Map B, entitled "1991 1st Senate District, showing no lack of road connection," and Map N,

shallow water or really wet land.

entitled “2001 1st Senate District, showing no lack of road travel across a body of water.”

As configured in 1991, Senate District 1 is also only contiguous across water at a second location in the southeastern part of the district. Fort Monroe, and the area on the mainland immediately adjacent to it, are connected to the waterfront along Chesapeake Avenue only by crossing the waters of Hampton Roads. In order to drive from the Chesapeake Avenue portion of the district, an individual is required to drive through Senate District 2. The 2001 General Assembly did not draw this configuration. Instead, the legislature consolidated the Chesapeake Avenue section into Senate District 2. Please see Appendix, Map U, marked “1991 1st Senate District, showing lack of road travel across Hampton Roads.”

The 1991 Senate District 2 engaged in a form of contiguity which the 2001 General Assembly did not use. In 1991 the General Assembly created this district which was contiguous only by connecting separated portions of the district on the same side of the James River out of the line of sight and not on opposite banks. To traverse between the upriver portion of this district and the remainder downstream, one would have had to go down the river along the same shoreline in order to reach the remainder of the district in downtown Newport News. Because no rational person would build a bridge which parallels the shore, there

is no ability to transit the two separate parts of the district by automobile. Please see Appendix, Map C marked "1991 2nd State Senate District, showing lack of travel by road through the James River and non-contiguity due to lack of line-of-sight."

The circuit court creates a strawman by asserting that using the 2001 General Assembly's criteria, a district could be created that connects scattered portions of a legislative district along the banks of the James River from the mountains to the sea. West, 2002 Va. Cir. LEXIS 37, at *40. Because the 2001 General Assembly only connected landmasses that were within the line of sight, no such configuration could have been constructed under the General Assembly's 2001 criteria. The 1991 General Assembly, however, did exactly what the court had contemplated in creating Senate District 2. Part of the reason for placing the 2001 Senate District 2 in Newport News and Suffolk County was to eliminate the tortured configuration of the 2d District as it existed following the 1991 redistricting process. Senate District 2 in the 2001 plan is substantially easier to traverse by automobile and is far more compact and contiguous than its 1991 counterpart. Please see Appendix, Map C, entitled "Showing lack of travel by road though the James River non-contiguity due to lack of line of sight," and Map O, entitled "2001 2nd Senate District, showing the relationship of portions of the district on both sides of the James River."

Under the 1991 plan, Senate District 3 linked the Eastern Shore with a portion of Gloucester County, York County, James City County, Williamsburg and Fort Eustis. There is no bridge or ferry route spanning that portion of Chesapeake Bay. Furthermore, there is no road connection between the Fort Eustis portion of Senate District 3 and the territory within James City County. Please see Appendix, Map D, marked "1991 3rd Senate District, showing lack of road connection across Chesapeake Bay and Skiffes Creek."

In the 1991 plan, Senate District 16 connected across the Appomattox River below Petersburg and Colonial Heights and above Hopewell. There is no bridge within the 1991 district which connects the Prince George County portion of the district with the Chesterfield County portion of the district. Please see Appendix, Map E marked "1991 16th State Senate District, showing lack of road travel across body of water."

The General Assembly's 1991 House District 21, located in Virginia Beach, had a portion of the district separated from the remainder of the district by Lynnhaven Bay without a bridge across that body of water. The portion of the district north of Lynnhaven Bay cannot be reached by automobile from any other portion of the 1991 legislative district without driving outside the district's boundaries and around Lynnhaven Bay. Please see Appendix, Map F marked "1991 21st House District, showing lack of road travel across a body of water."

In the 1991 redistricting scheme, House District 64 crossed the James River from Surry County to Fort Eustis on the opposite bank. There is no ability to reach the Fort Eustis portion of the district by automobile without driving outside the district for nearly 20 miles. Please see Appendix, Map G marked “1991 64th House District, showing lack of road travel across James River.”

House District 77 in 1991 had two areas which are inconsistent with the criteria that the circuit court asserted was used at that time. First, the northernmost portion of the 1991 district in Portsmouth was only contiguous by water over Drum Creek and there is no bridge allowing for vehicular travel over Drum Creek within the district. The portion of the district north of Drum Creek could only be reached in an automobile by driving outside of House District 77. Likewise, the Suffolk portion of the district could only be reached from the Portsmouth and Chesapeake portions of the district by driving outside of the district because House District 77 used the exact same connection through the Great Dismal Swamp used by Senate District 18 in 1991. Please see Appendix, Map H marked the “1991 77th House of Delegates District, showing areas not connected by road.”

House District 79 in 1991 also was only contiguous by water. Scotts Creek in Portsmouth does not have a bridge between that portion of the 1991 district on

the south side of Scotts Creek and the portions which are on the north sides of Scotts Creek. The portion on the south side of Scotts Creek could only be reached from the rest of the district in an automobile by driving outside of the district. Please see Appendix, Map I marked "1991 79th House District, showing lack of travel across a body of water."

In 1991, three sections of House District 82 were contiguous solely by water. Lynnhaven Bay divided the House District 82 in 1991 into three portions - a western, a middle, and an eastern portion. There are no bridges across Lynnhaven Bay within House District 82 as configured in 1991. To travel by automobile from any of the three portions to any one of the other portions of the district required driving outside of the district around Lynnhaven Bay and back into the district. Please see Appendix, Map J marked "1991 82nd House District, showing lack of road travel across a body of water."

Four sections of the House District 90 were contiguous solely by water as drawn in 1991. The southern-most portion of the district was only contiguous across Buck Trout Creek. The portion of the district on the north side of Buck Trout Creek could only be reached by automobile by driving outside of the district. The portion on the north side of Buck Trout Creek was only contiguous with the remainder of the district further to the north by the eastern branch of the Elizabeth River, which also had no bridge which crossed the river within House

District 90. Likewise, to reach the portion of the district on the north side of the Elizabeth River by automobile, it was necessary to drive outside of the district. The northern-most portion of the district was only contiguous to the remainder of the district across Lake Whitehurst, a route that also lacked a bridge within House District 90. The portion of the district which was on the south side of Lake Whitehurst through which the residential area on the north side of Lake Whitehurst connected with the southern portion of the district was the Norfolk International Airport. In order to travel from the portion of the district north of Lake Whitehurst to any other portion of the district by automobile would have required driving outside of the district around Lake Whitehurst and the Norfolk International Airport. Norfolk International Airport, unlike Langley Air Force Base, lacks a road which would connect the two portions of the district. Please see Appendix, Map H marked "1991 90th House District, showing lack of road travel across a body of water."

House District 98 in 1991 was contiguous solely by water in two places. First, the district crossed from York County to Gloucester County across the mouth of the York River where it empties into Chesapeake Bay. There is no bridge across the York River within the district. The York County portion of the district is contiguous with the Poquoson portion of the district solely by water over the Poquoson River. There is no bridge across the Poquoson River between the Poquoson and the York County portions of the district. This is the exact

same connection across the Poquoson River used by the General Assembly in the 2001 House District 91, which the court asserted violated the criteria used by the General Assembly in 1991. Had the court not fashioned its contiguity standards *sua sponte*, without briefing or evidence on those standards, it would have discovered that its assumptions were erroneous. Please see Appendix, Map L marked “1991 98th House District, showing lack of road travel across a body of water.”

House District 100 in 1991 included the Eastern Shore, all of Matthews County, and a portion of Gloucestershire County. There is no bridge across this portion of Chesapeake Bay and the nearest bridge across the Bay is nearly two hours away from Matthews County by automobile. Nearly all of that drive would have been outside of House District 100 as configured in 1991. This connection across Chesapeake Bay is the exact same configuration that was used by the General Assembly in 2001 to create Senate District 6. Please see Appendix, Map T marked “1991 100th House District, showing lack of road travel across Chesapeake Bay.”

The circuit court found that six districts, three state senate districts and three state house districts, did not comply with the circuit court’s new test for compactness and contiguity. The undeniable fact that there is a double standard implicit in this new test is revealed when applied to the 1991 redistricting

scheme. As discussed above, if this Court had actually applied the circuit court's interpretation of this test in Jamerson, this Court would have had to have found at least 13 districts failed to comply with the compactness and contiguity provision of the Constitution of Virginia, including Senate District 18. As is more easily shown through the maps included in this brief, the districts in the 2001 redistricting plan are no less contiguous by water than the districts in the 1991 redistricting scheme upheld by this court in Jamerson. Indeed, the districts in the 2001 redistricting plan are more contiguous and compact than their predecessors in the 1991 redistricting scheme. Please examine the maps in the appendix as you read the descriptions of the six districts that the circuit court asserts violate the contiguity and compactness provisions of Article II, § 6 of the Constitution of Virginia and compare those maps with the maps just reviewed from the 1991 redistricting scheme.

The circuit court erroneously found that Senate District 1 is separated by water (the Southwest branch of the Back River) "with no ingress or egress by motor vehicle within the district from the Hampton part of the district." West, 2002 Va. Cir. LEXIS 37, at *28. Contrary to the lower court's finding, there is in fact ingress and egress by motor vehicle through Langley Air Force Base. While this military installation currently prohibits civilian traffic from traveling through the base, this is the exact same connection used by the General Assembly in 1991 to connect the northern and western portions of the district

with the Hampton part of the district. If the circuit court is using the same standard used by the General Assembly in 1991, then the 2001 General Assembly should certainly be able to rely upon the same configuration and methods of access to establish contiguity. Please see Appendix, Map N marked “2001 1st Senate District, showing no lack of road connection.”

Similarly, the circuit court asserts erroneously that the “Virginia Beach side of the Chesapeake Bay Bridge Tunnel . . . does not appear to be in the 6th Senate District.” West, 2002 Va. Cir. LEXIS 37, at *31. Please see Appendix, Map Q marked “2001 6th Senate District, showing southern terminus of Chesapeake Bay Bridge Tunnel,” which indicates the Chesapeake Bay Bridge Tunnel is the line between Senate District 6 and Senate District 7. The Chesapeake Bay Bridge Tunnel roadway becomes North Hampton Boulevard. The line continues down North Hampton Boulevard, a road wholly contained within District 6 after it crosses Independence Boulevard.

It is important to note that Senate District 6 is particularly difficult to draw because it includes the Eastern Shore of Virginia. The Eastern Shore contains only slightly more than 51,000 people and is incapable of forming either a state senate or delegate district without additional population from surrounding counties across the Chesapeake Bay. Despite this fact, the circuit court finds that adding Matthews County, which is directly west across Chesapeake Bay from

the Eastern Shore, would offend the principle of contiguity articulated in the Virginia Constitution and under Jamerson. West, 2002 Va. Cir. LEXIS 37, at *34-*35. The court ignored the fact that the 1991 House of Delegates plan, which supposedly utilized the criteria which the court purports to enforce, connected the 100th House of Delegates District in exactly the same manner. Please see Appendix, Map T marked "1991 100th House District, showing lack of road travel across Chesapeake Bay." In fact, the 1991 House District 100 also included a portion of Gloucester County even further to the west. The circuit court also ignored the fact that in 1991, Senate District 3, which corresponds to the 2001 Senate District 6, crossed the Chesapeake Bay at an even wider point. In 1991, in Senate District 3, the Eastern Shore was linked with a portion of Gloucester County, York County, James City County, Williamsburg, and Fort Eustis. There is no bridge or ferry across that portion of Chesapeake Bay. The Fort Eustis portion of the 1991 district is also only contiguous with the James City County portion of the district by water across Skiffes Creek. Please see Appendix, Map D marked "1991 3rd Senate District showing lack of road connection across Chesapeake Bay and Skiffes Creek."

While admitting that there is access by motor vehicle in Senate District 2, the circuit court proceeded to suggest that this is irrelevant because the method of access crosses Hampton Roads and the 4-5 mile trip across the bridge "does not provide reasonable access to all parts of the district." West, 2002 Va. Cir.

LEXIS 37, at *29. This directly contradicts this Court's decision in Jamerson that, with regard to 1991 Senate District 18, neither the 165-mile distance from one end of the district to the other, nor a six-mile trip through the Great Dismal Swamp, prevents an elected official from being fully accessible to residents throughout the district. Jamerson, 244 Va. at 516, 423 S.E.2d at 186.

It would appear to a reasonable person that because this district complies with the litmus test the court applies elsewhere (there is a bridge across the river within the district), a special exception is being made in order to find the 2001 version of this district unconstitutional – hence, the circuit court's reference to the municipal annexation statute which creates a special exception for Hampton Roads. However, the annexation statute regulates municipalities, governmental subunits of the Commonwealth of Virginia that are totally susceptible to the regulation, elimination, or creation by the state in any manner in which it sees fit. State v. Board of County Commissioners of Johnson County, 642 P.2d 456, 457-58 (Wyo. 1982); Board of County Commissioners of the County of Otero v. State Board of Social Services, 528 P.2d 244, 245-46 (1974); Board of County Commissioners of County of Dolores v. Love, 470 P.2d 861, 862 (1970); and Salt Lake County v. Liquor Control Commission, 357 P.2d 488, 489 (1960). Furthermore, the statute containing the annexation criteria is just that, a statute, which is repealed by subsequently enacted legislation such as a redistricting

statute passed by the Virginia General Assembly. See Terry v. Mazur, 234 Va. 442, 456, 362 S.E.2d 904, 912 (1987).

House District 100 wholly contains the Eastern Shore of Virginia and extends across Chesapeake Bay in a direct line of sight to take in territory in Norfolk composed of large numbers of military personnel. Because the Eastern Shore lacks sufficient population to form a House of Delegates District on its own, the Virginia Legislature attempted to complete the district in a manner that would allow Eastern Shore voters to continue to have viable representation. The circuit court suggested that because the residents of the Norfolk area in House District 100 must travel through another district in order to reach the Eastern Shore portion of the district, this violates the Virginia constitutional provision regarding contiguity. The court ignores the fact that in 1991, House District 100 was composed of the Eastern Shore connected across Chesapeake Bay to Matthews County and a portion of Gloucester County. The amount of open water traversed is approximately the same in both cases. In contrast, the distance which an individual from Matthews County would have had to travel by car in the 1991 district in order to reach the Eastern Shore is approximately four times greater than someone in the Norfolk portion of the 2001 district.² The 2001

² The circuit court seems to suggest that there are voters from Hampton who are in District 100. This is simply not true. The only portion of Hampton in House District 100 is an island with no population. Therefore the only population in the district is on the Eastern Shore and in Norfolk.

House District 100 is far more compact and contiguous, providing for far better highway transportation and communication than its 1991 predecessor. Please see Appendix, Map M marked “2001 100th House District, showing lack of road travel across Chesapeake Bay.”

The circuit court found House District 74 to be non-compact because of an arm connecting the Henrico portion of the district to the Charles City County portion of the district. This is the same configuration used by the General Assembly in the 1991 redistricting scheme. The African-American incumbent in this district resides at the far end of the Henrico portion of the arm. The only alternative to this configuration would have been to pair him with one of the African-American or other incumbents in the Richmond area.³ (The district in both 1991 and 2001 is majority-minority and had to gain population in 2001.) Therefore in order to avoid retrogression under the federal Voting Rights Act, as well as to avoid pairing incumbents in this instance, the 1991 configuration was maintained. Furthermore, this district is at least as much as if not more compact than Senate District 18, which was specifically approved in Jamerson. Please see Appendix, Map R marked “2001 74th House District, showing lack of road travel

³ Altering district boundaries so as to pair a minority incumbent will be examined as a possible retrogression. Remarks of John R. Dunne, Assistant Attorney General, Civil Rights Division, before The Council of State Governments, Eastern Regional Conference, concerning “Reapportionment,” July 31, 1990, Manchester, New Hampshire.

across James River.” See also Appendix, Map L marked “1991 98th House District.” Please note the non-highlighted district on Map L containing Charles City County and the arm extending from Charles City County to Henrico County. This arm matches the arm in 2001. The 2001 General Assembly should be allowed to rely on this prior 1991 configuration.

Both plaintiffs’ and defendants’ experts used the same mathematical formulae, the Roeck and Polsby-Popper tests, to compute compactness. The circuit court disdained using these tests because neither method had an “objective cutoff,” identified by the experts, above which a district would be legal. West, 2002 Va. Cir. LEXIS 37, at *13 n.3. Again, the circuit court refused to acknowledge the obvious – the districts in Jamerson provide the template. In Jamerson, the worst two scores on the Polsby-Popper test were Senate Districts 16 and 18 at 0.09 and 0.10 respectively. (In 1991, House District 64 in the House of Delegates plan had an even better score of 0.07.) On the Roeck test, the lowest score was Senate District 18 with a value of 0.12. Both tests use a scale from 0 to 1, zero being the least compact district and 1 being the most compact district. All of the districts in 2001 in both the State Senate and the House of Delegates meet or exceed the low scores of Senate District 18, which was specifically approved in Jamerson. District 74 in the 2001 redistricting plan has a Reock score of 0.16, 4

There has been no indication that this factor is not still examined in a preclearance review.

points better than Senate District 18 in 1991, and a Polsby-Popper score of 0.10, the same as Senate District 18 in 1991. Nor have the compactness scores changed appreciably for District 74 between 1991 and 2001. In 1991, the Reock score was 0.14, 2 points worse than in 2001, and the Polsby-Popper score was 0.12, 2 points better.

As the circuit court noted in its own opinion, neither the plaintiffs' nor the defendants' expert found "that any particular district was unacceptably non-compact according to either of the measures [Roock or Polsby-Popper] applied by the experts." West, 2002 Va. Cir. LEXIS 37, at *13. The circuit court's *sua sponte* standards did not cure this wont of evidence of invalidity because it was legally unsupported and is factually incorrect in its extra-record assumptions.

The circuit court also attacked House District 74 for crossing to the opposite bank of the James River in the vicinity of the City of Hopewell without having a highway bridge across the James River. The court ignored that in 1991, House District 64 crossed the James River from Surry County to Fort Eustis on the opposite bank where the James River is actually wider and lacking a highway bridge connecting the two sides of the river. A motorist attempting to travel from Fort Eustis to the Surry County portion of House District 64 in 1991 would

have had to drive much further than a motorist going from the Hopewell portion of District 74 to the Charles City portion in 2001.

The circuit court then proceeded to attack the contiguity of House District 91. First the circuit court asserts that District 91 lacks contiguity of transportation in the exact same manner as Senate District 1 because of a lack of a bridge over the Back River. Just as in Senate District 1 above, House District 91 is linked by road through Langley Air Force Base. Furthermore, the court suggests that House District 91 lacks contiguity because there is no bridge across the Poquoson River between Poquoson and the York County portions of the district. The circuit court suggests that this is just another example of the General Assembly engaging in its putatively unique 2001 practice of linking districts across bodies of water without bridges. West, 2002 Va. Cir. LEXIS 37, at *39. An examination of House District 91's predecessor district in 1991, House District 98, would reveal the exact same connection across the Poquoson River as well as a further connection across the York River without the benefit of a highway bridge. The 1991 district continued up a narrow neck through Gloucester County of Middlesex and Essex and finally through a narrow neck into Caroline County. House District 91 is far more compact and just as contiguous, if not more so, than its predecessor.

CONCLUSION

The circuit court wrongly asserted that in 2001 the General Assembly operated under less restrictive criteria regarding compactness and contiguity across water than was used by the General Assembly in 1991. Examining the maps from both 1991 and 2001 leaves little doubt about two legal as well as factual errors made by the court. First, there is far less use of water contiguity in the 2001 redistricting plan than in the 1991 redistricting scheme, and unlike in 1991, when water contiguity was used in 2001, it was only by line of sight. Second, under the objective measures used by both plaintiffs' and defendants' experts, the 2001 redistricting plan is more compact than the 1991 redistricting scheme upheld in Jamerson. To find, as the circuit court did, without briefing, argument, or evidence at trial on the issue, that the 2001 General Assembly applied a "new," less stringent criteria that resulted in less contiguous and compact districts than those constructed under what the court purported were more restrictive criteria used in 1991, is simply wrong.

This case is particularly contentious and sensitive as this process impacts the very manner in which the legislature shall be chosen and as such is the subject of intense partisan dispute. In Jamerson, this Court stated that "[l]egislative determinations of fact upon which the constitutionality of a statute

may depend bind the courts unless clearly erroneous, arbitrary, or wholly unwarranted.” Jamerson, 244 Va. at 509, 423 S.E.2d at 182. As is obvious from even a cursory examination of the 1991 reapportionment scheme and the 2001 redistricting plan, the 2001 redistricting plan is far more compact and contiguous, even under the circuit court’s standard, than the 1991 redistricting plan, which was upheld by this Court. There was no principled basis in the record below for overturning the 2001 redistricting plan based on the compactness and contiguity requirement of Article II, § 6 of the Virginia Constitution. This court should end this dispute in a fashion which protects the legitimacy of the 1991 redistricting scheme, the 2001 redistricting plan, and this court’s decision in Jamerson. That can only be done by reversing the decision of the circuit court which invents new criteria which were never previously used by the Virginia Legislature or applied by any court in this Commonwealth – nor suggested to the court by any of the parties in this litigation.

RESPECTFULLY SUBMITTED,

/s/ Jill Holtzman

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:30(c) of the Rules of Supreme Court of Virginia, I hereby certify that Rules 5:26(d) and 5:27 have been complied with, that twenty copies of this *amicus* brief were filed by hand-delivery this ___ day of July, 2002 in the Office of the Clerk of the Supreme Court of Virginia, and that three copies of this *amicus* brief were mailed by first-class mail, postage prepaid, this ___ day of July, 2002, to the following counsel:

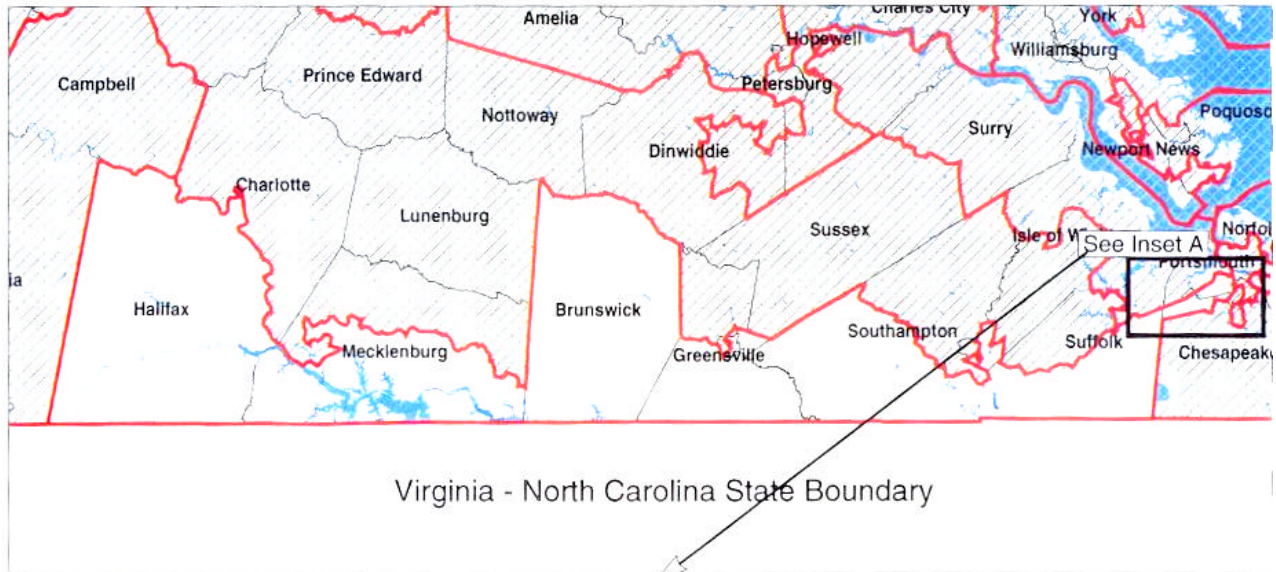
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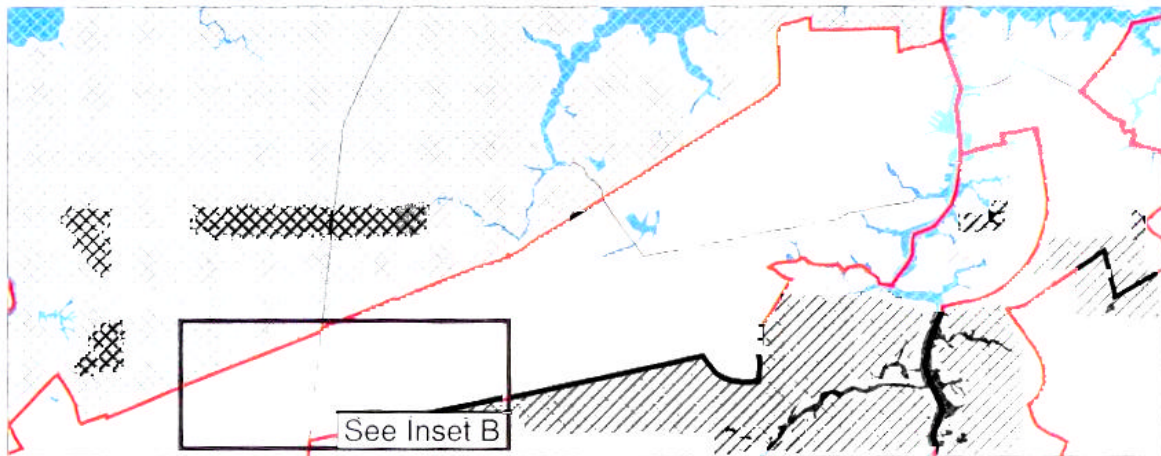
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Kevin P. Oddo, Esq.
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Blacksburg, Virginia 24060

1991 18th Senate District

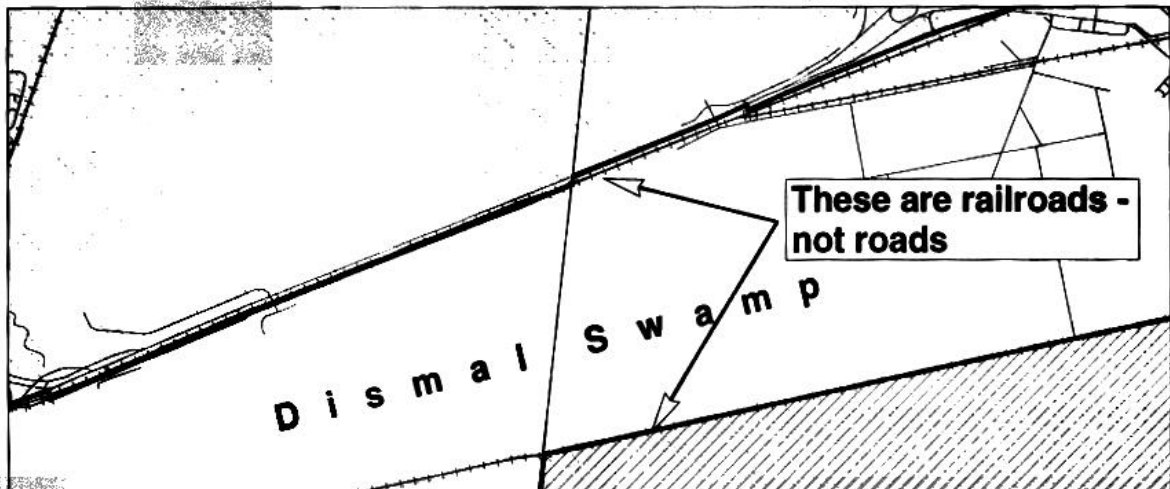
Showing Lack of Road Travel Between Portions of District



Inset A - Showing eastern portion of district

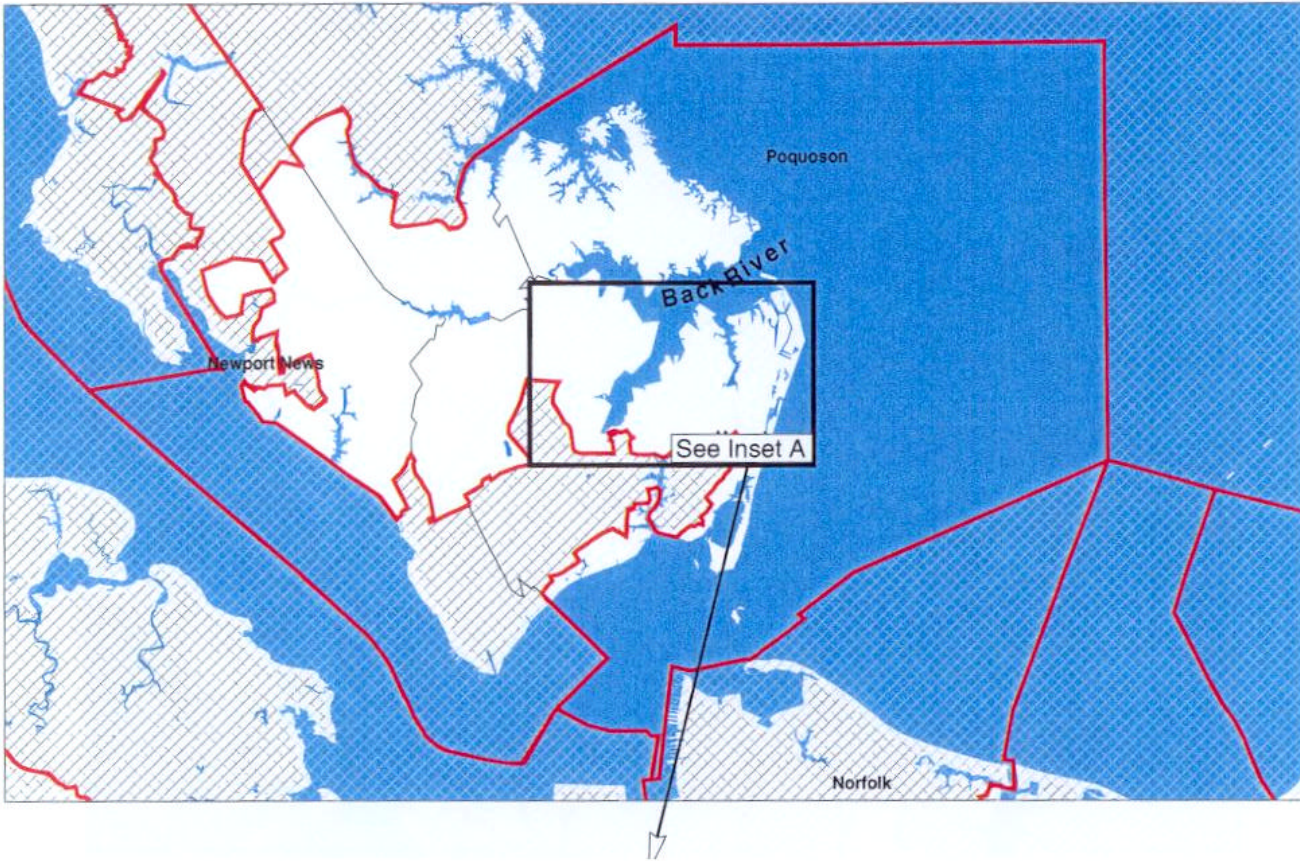


Inset B - Showing lack of road travel across Dismal Swamp area.

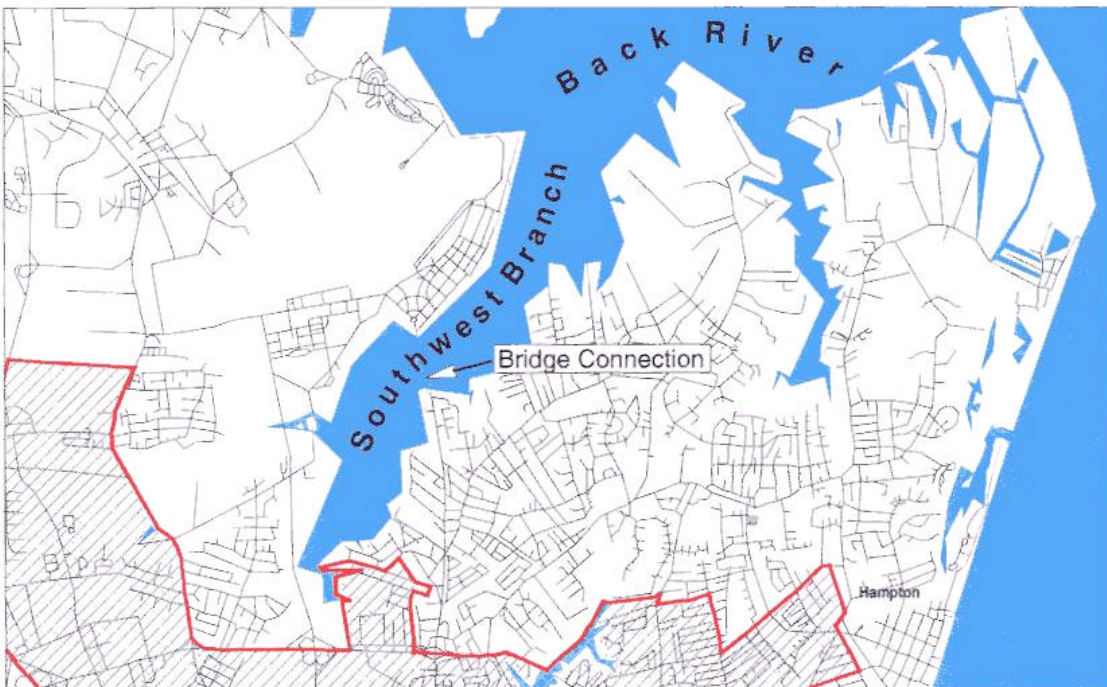


1991 1st Senate District

Showing NO Lack of Road Connection

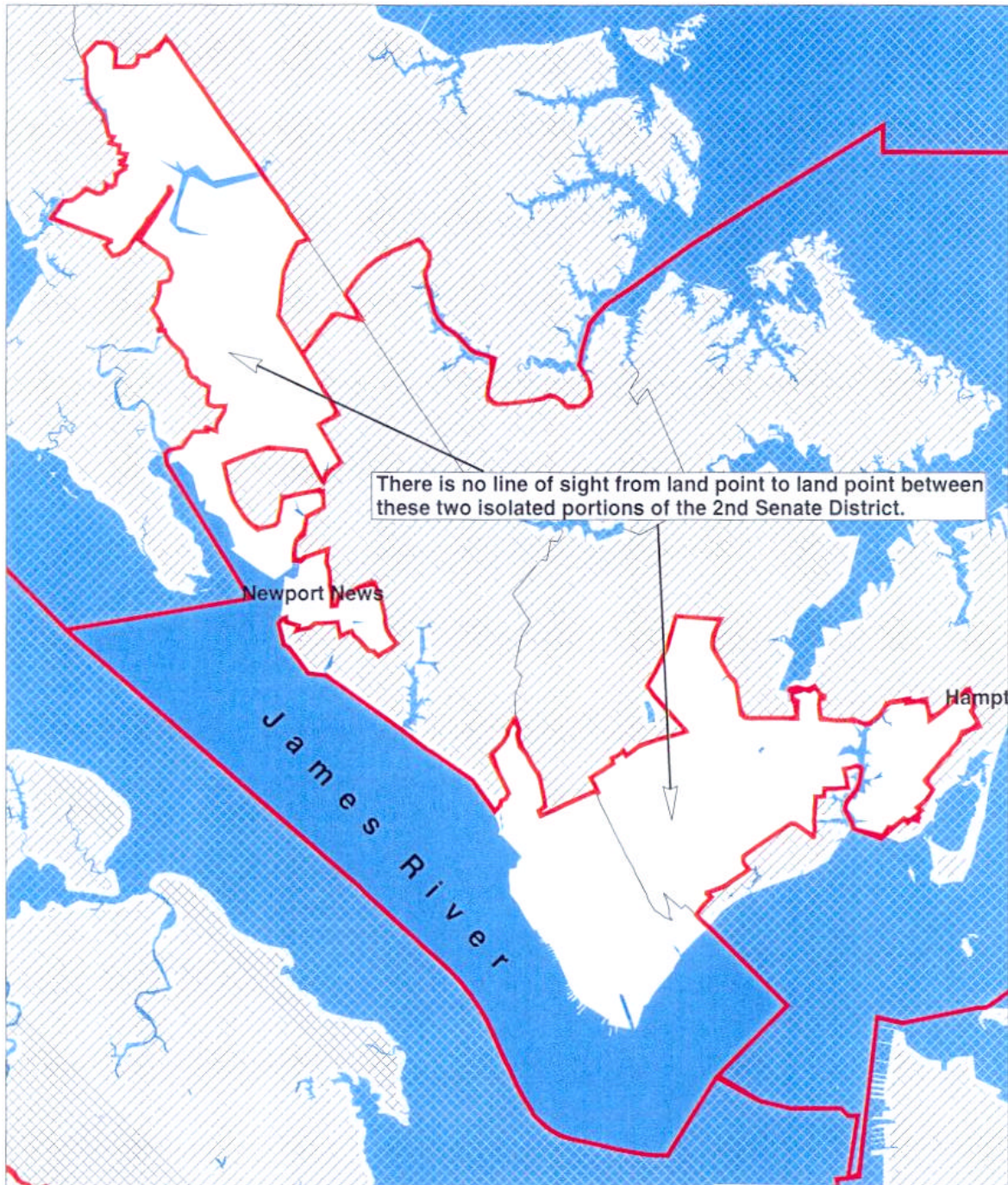


Inset A - Showing bridge across Southwest Branch of Back River



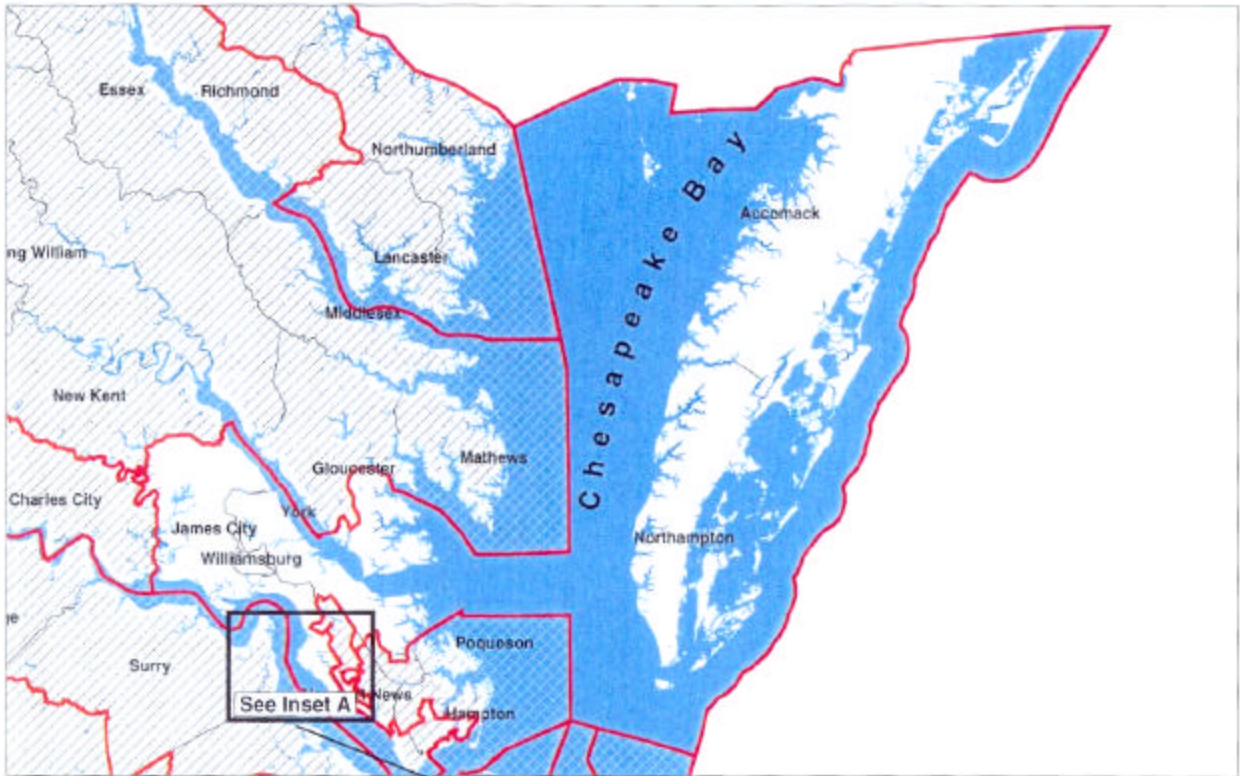
1991 2nd State Senate District

Showing Lack of Travel by Road Through the James River and Non-Contiguity Due to Lack of Line-of-Sight

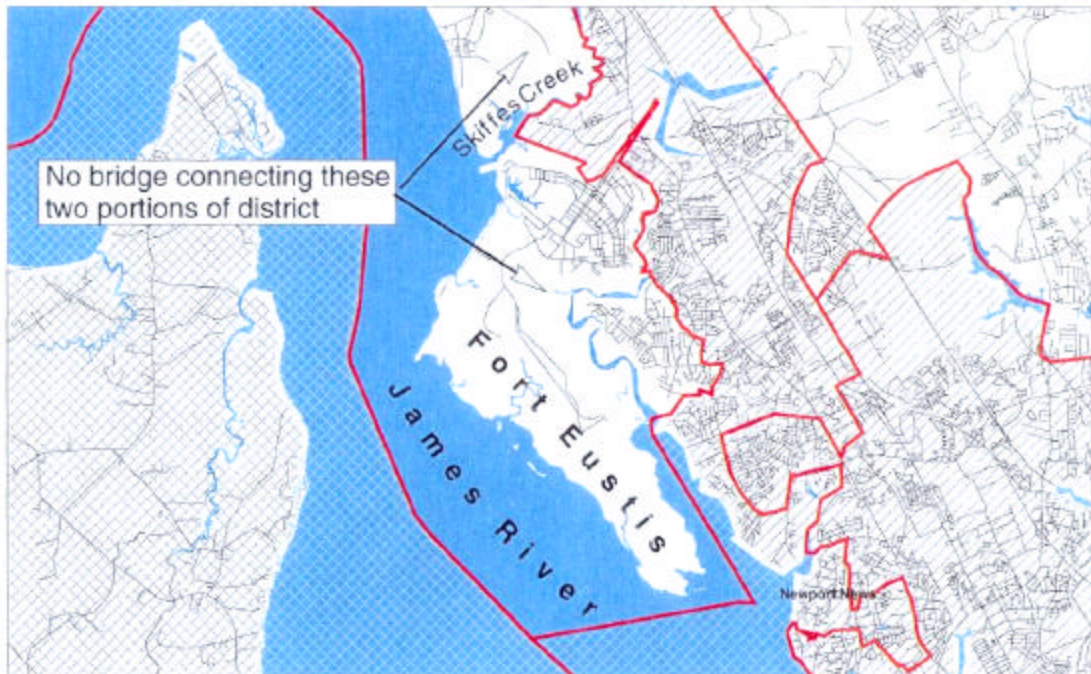


1991 3rd Senate District

Showing Lack of Road Connection Across Chesapeake Bay & Skiffes Creek

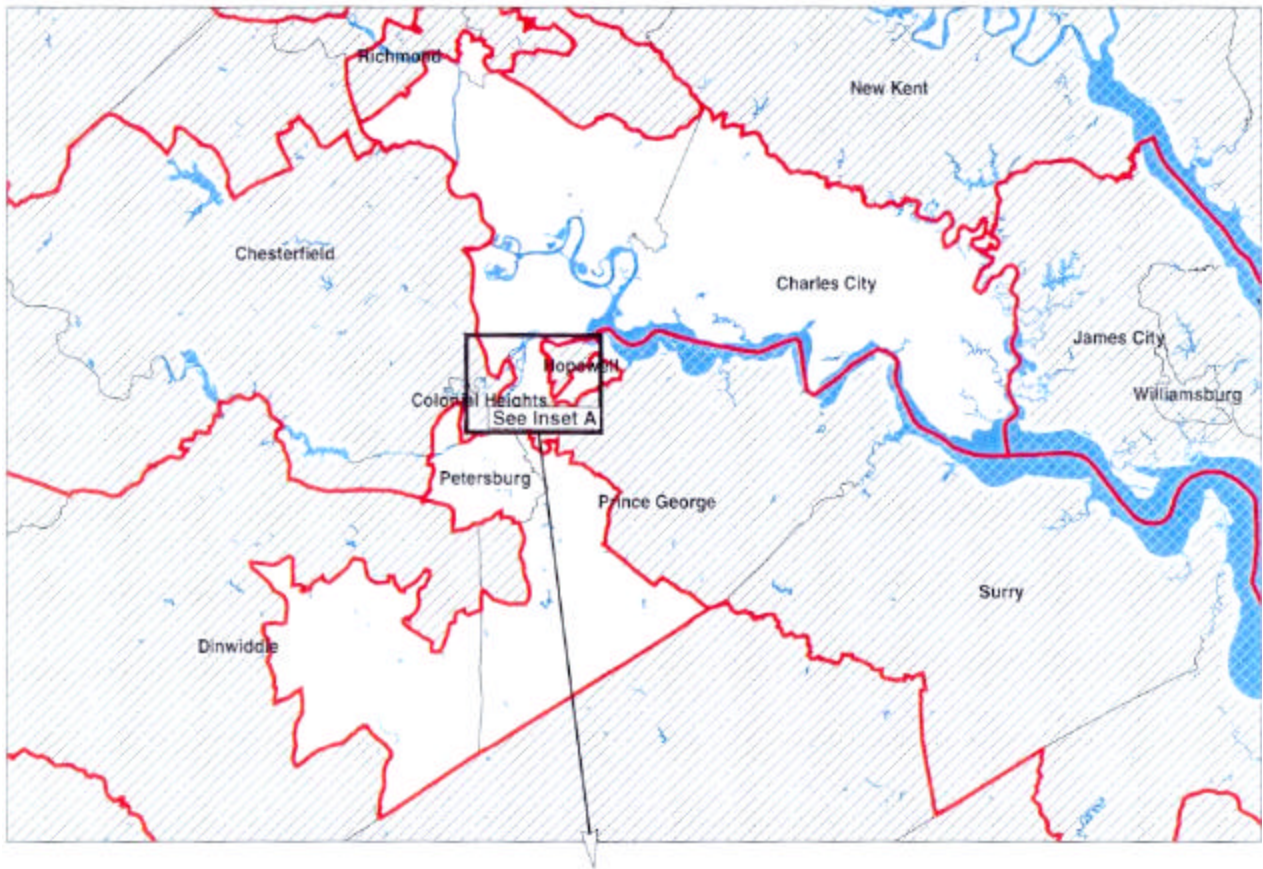


Inset A - Showing lack of road connection across Skiffes Creek

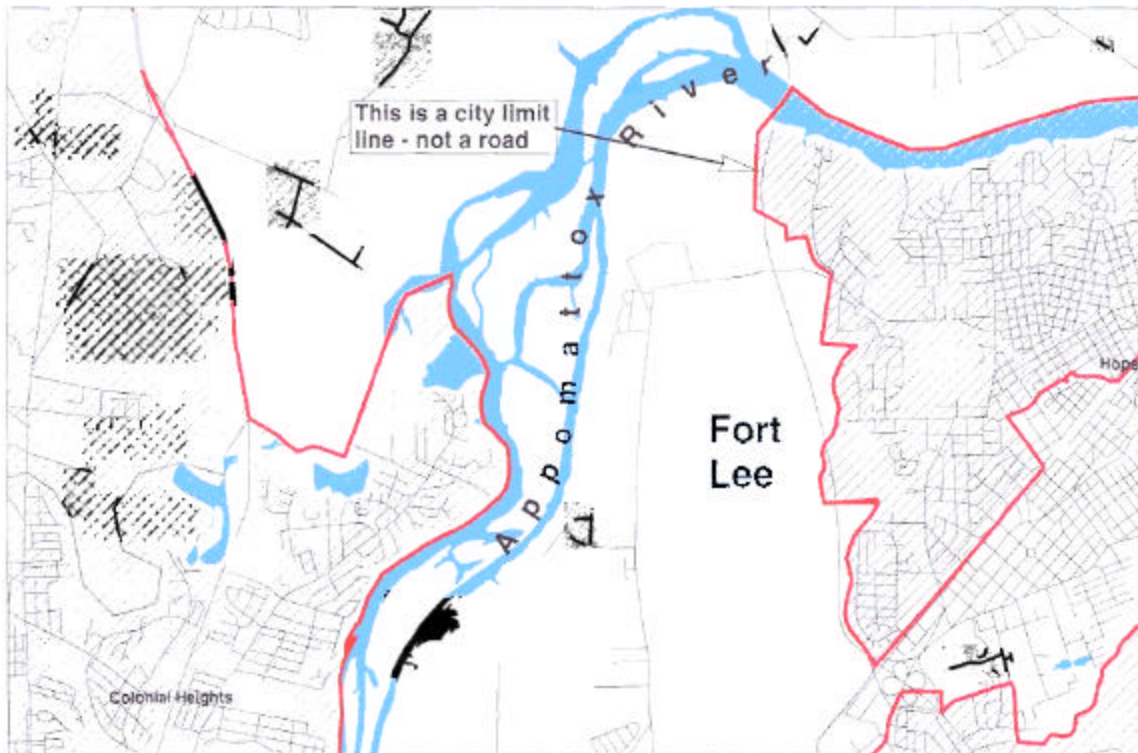


1991 16th Senate District

Showing lack of Road Travel Across Body of Water



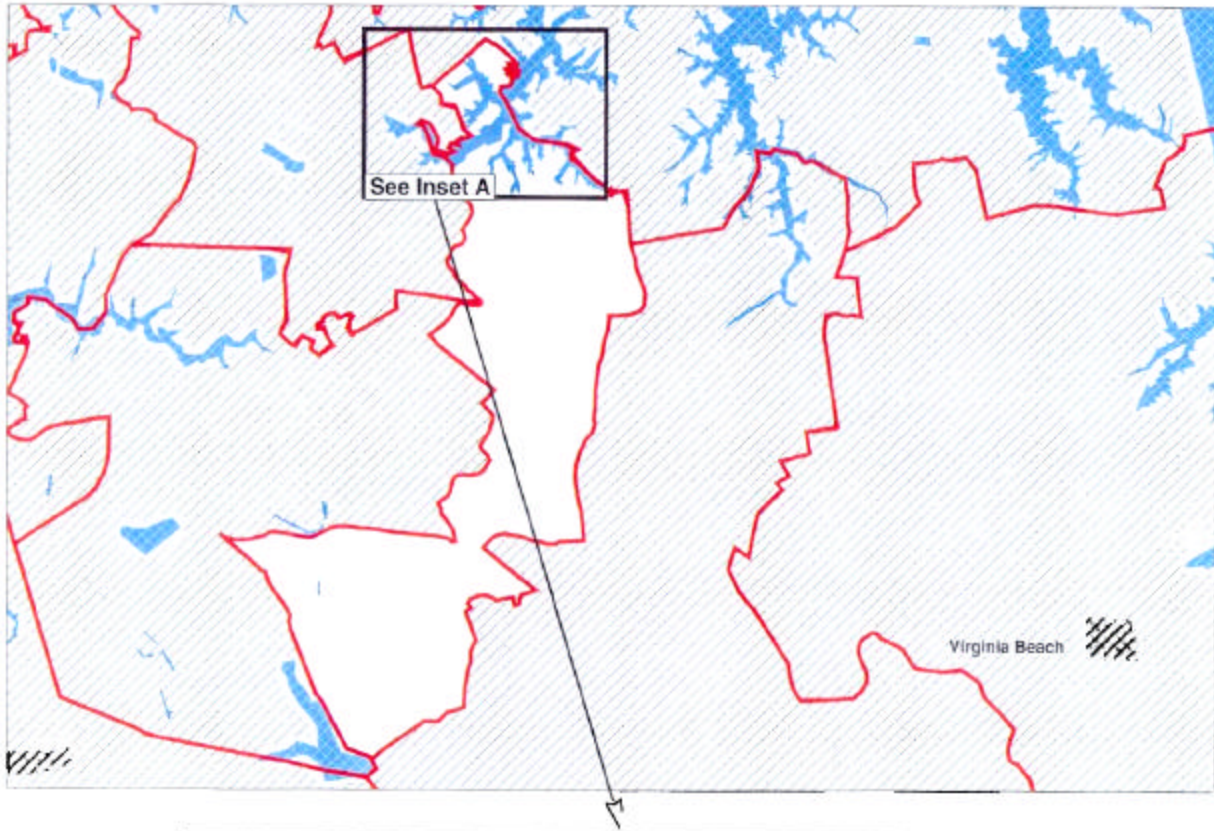
Inset A - Showing lack of road travel across Appomattox River



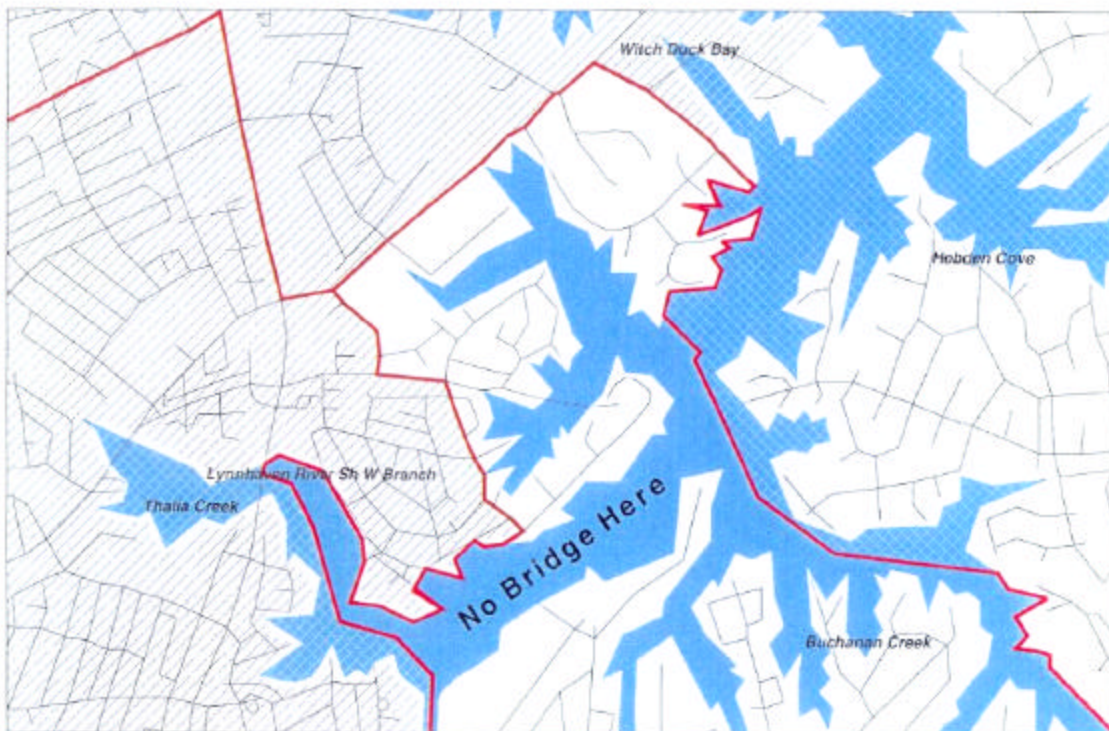
MAP F

1991 21st House District

Showing Lack of Road Travel Across a Body of Water

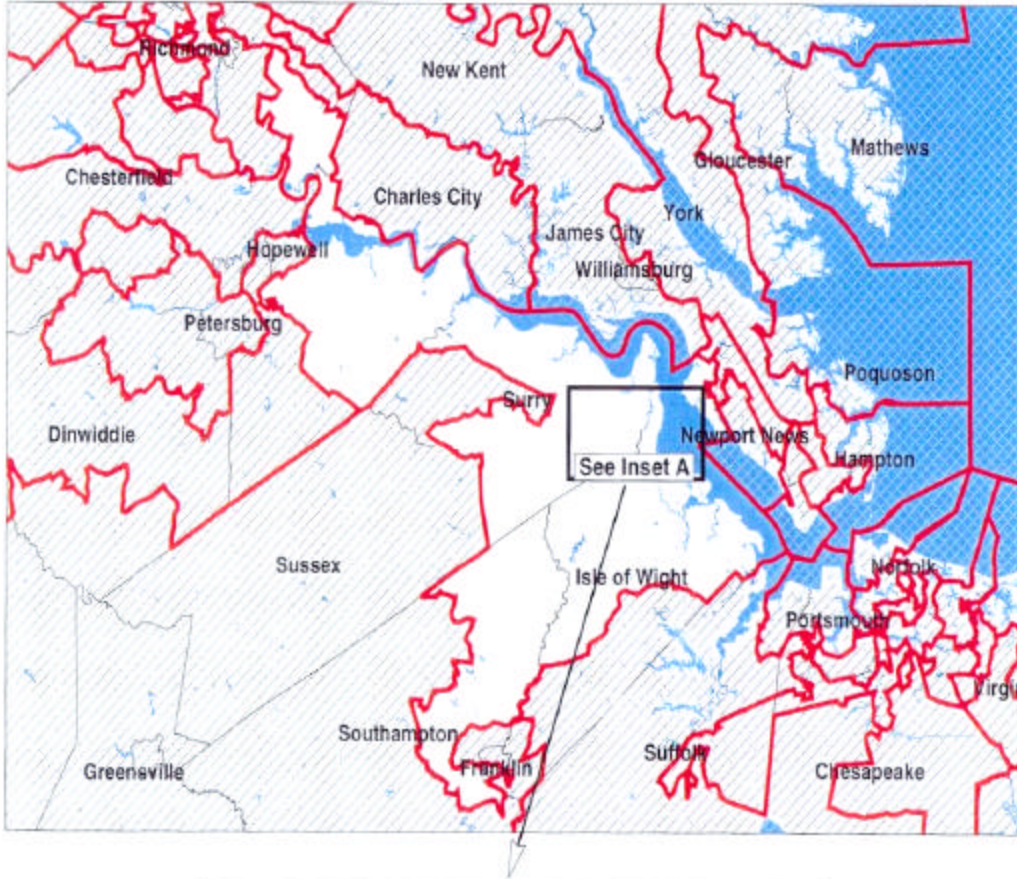


Inset A - Showing lack of road travel across Thurston Branch of Lynnhaven River

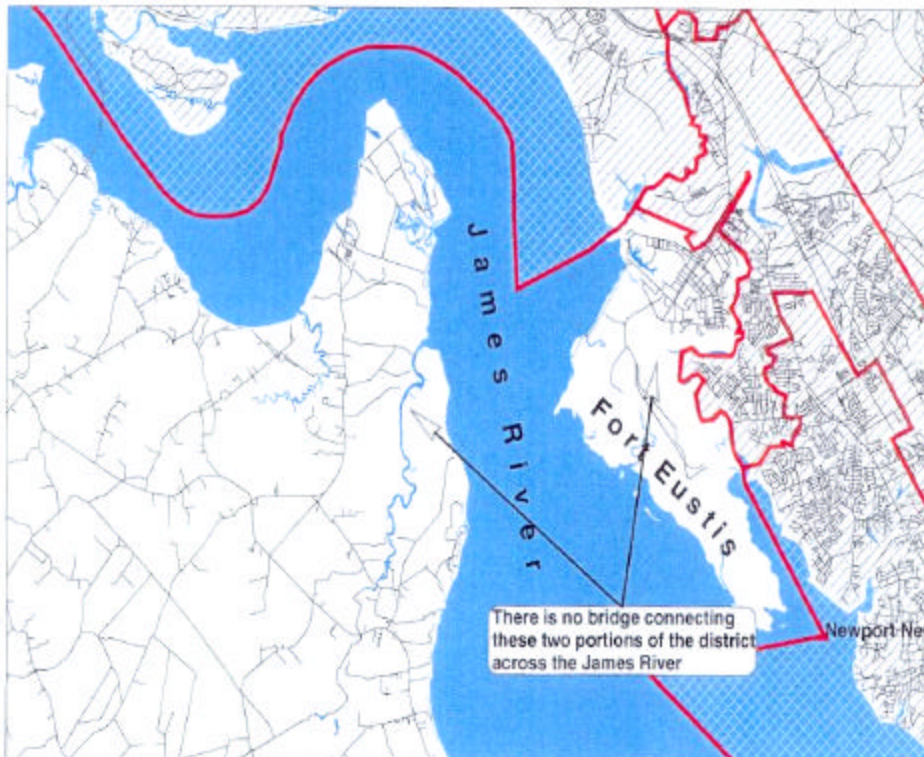


1991 64th House District

Showing Lack of Road Travel Across James River

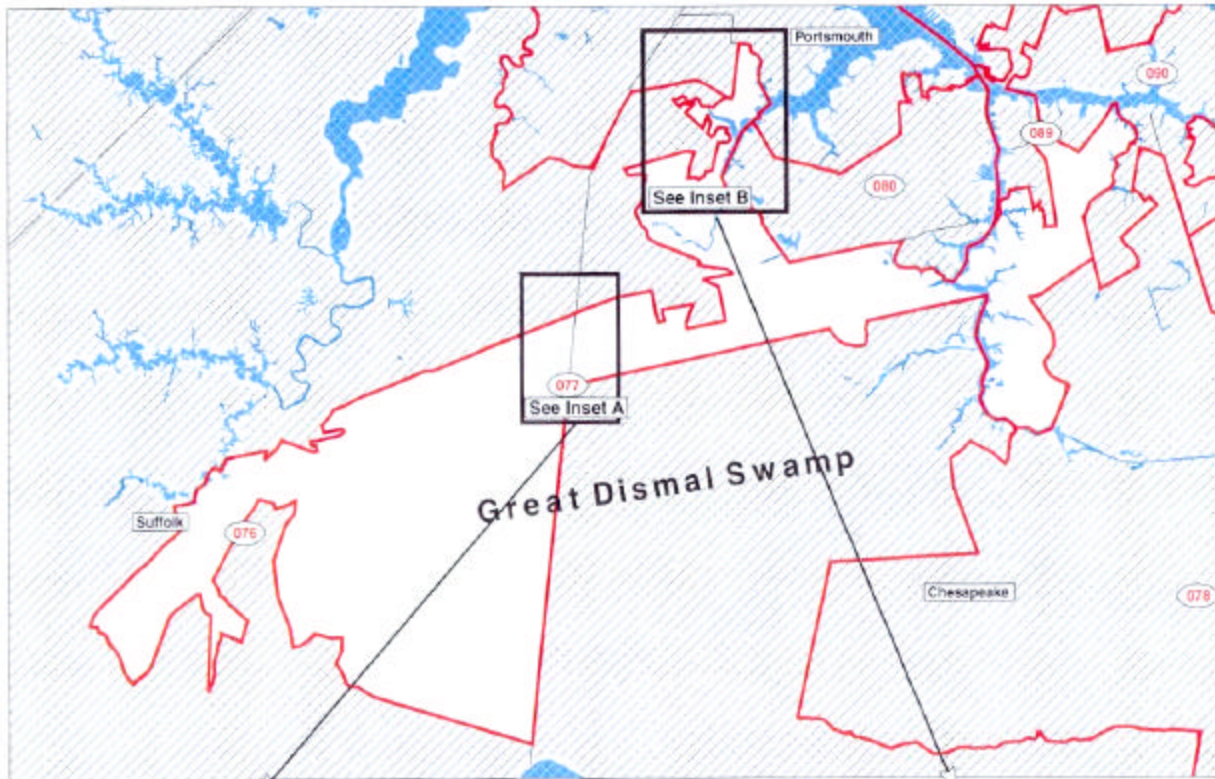


Inset A - Showing lack of bridge across James River



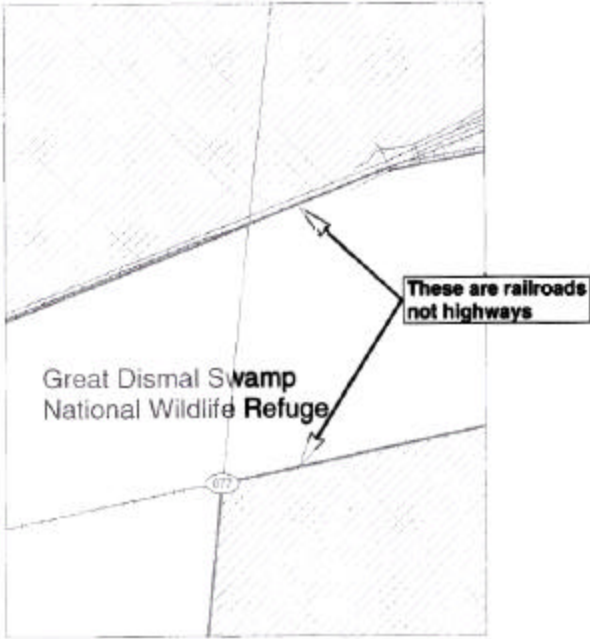
1991 77th House of Delegates District

Showing Areas Not Connected by Road



Inset A - Showing lack of road connection across the Great Dismal Swamp

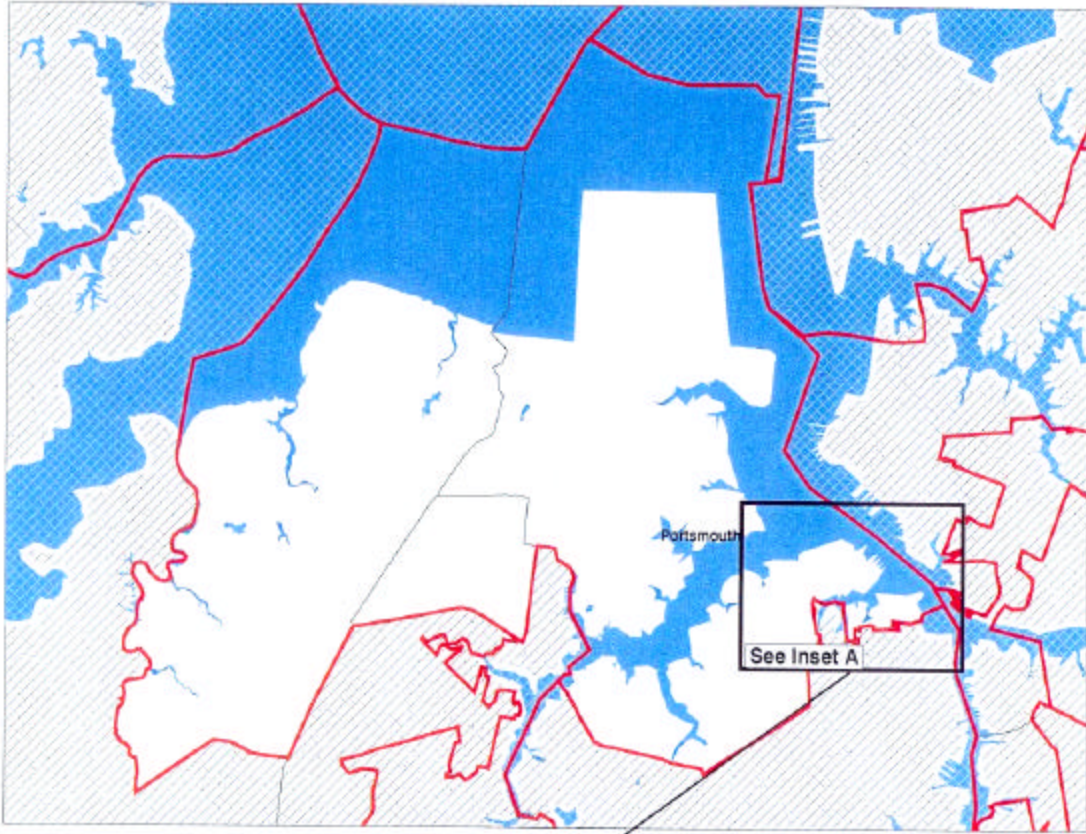
Inset B - Showing lack of bridge across Drum Creek



MAP I

1991 79th House District

Show Lack of Road Travel Across a Body of Water

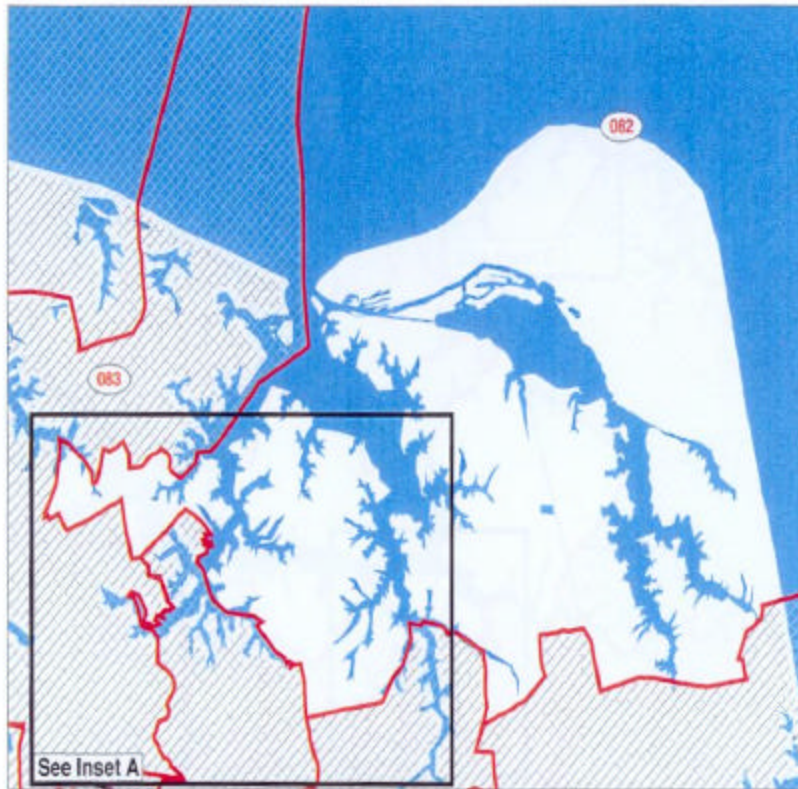


Inset A - Showing lack of road connection across Scotts Creek in 79th District

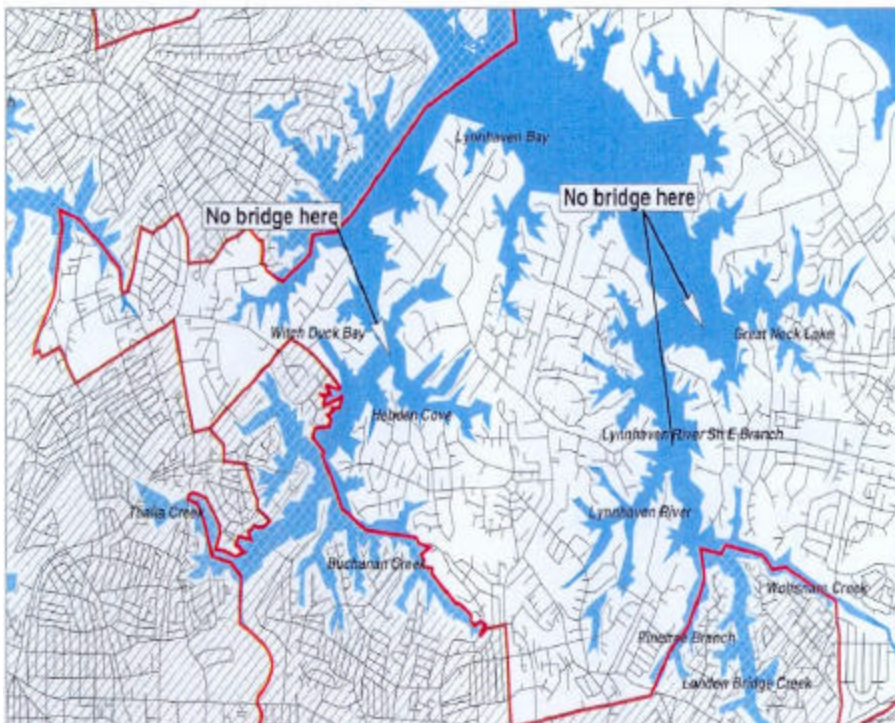


1991 82nd House District

Showing Lack of Road Travel Across a Body of Water

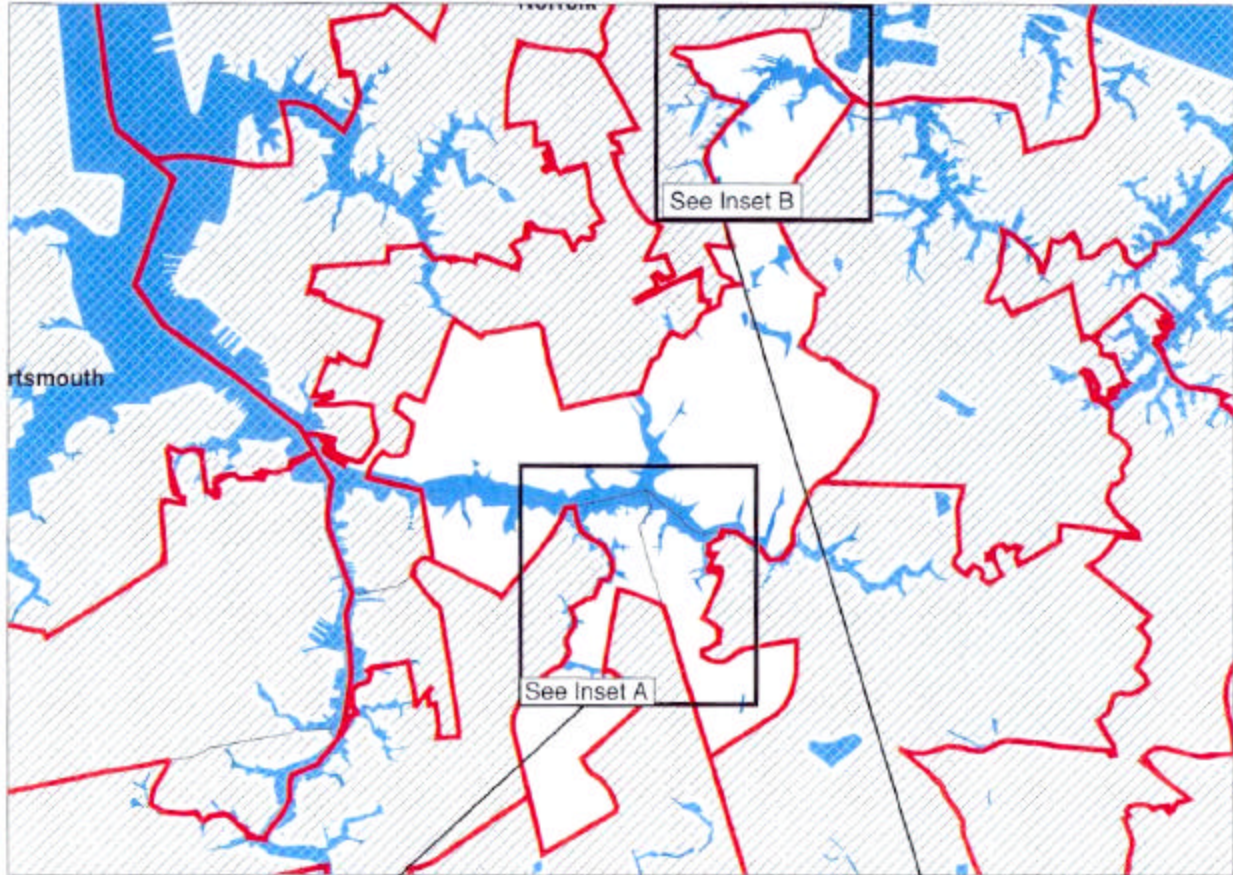


Inset A - Showing lack of road connection across Lynnhaven Bay in two places



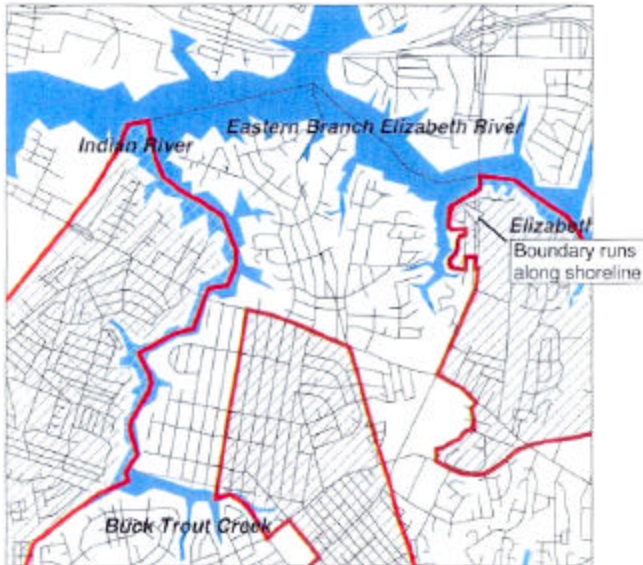
1991 90th House District

Showing Lack of Road Travel Across a Body of Water



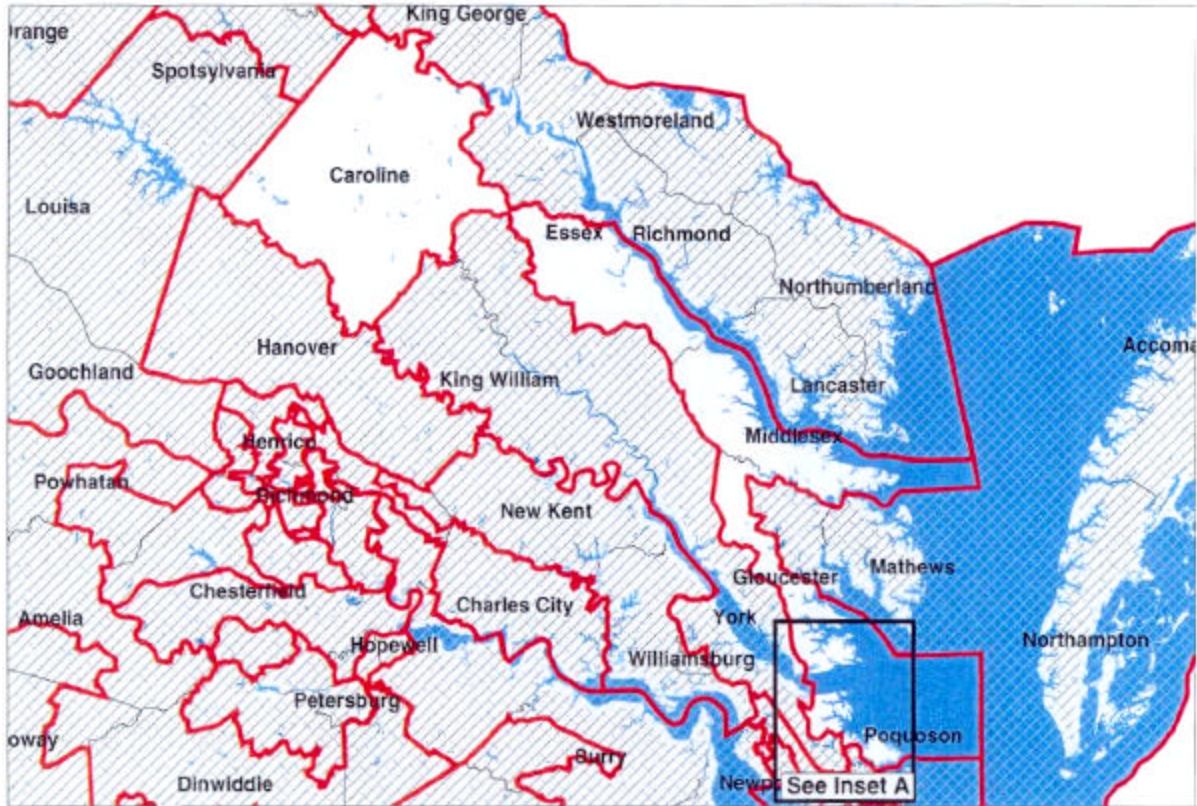
Inset A - Show that there is no bridge within the 90th district across the Elizabeth River.

Inset B - Showing that there is no bridge within the 90th District across Lake Whitehurst

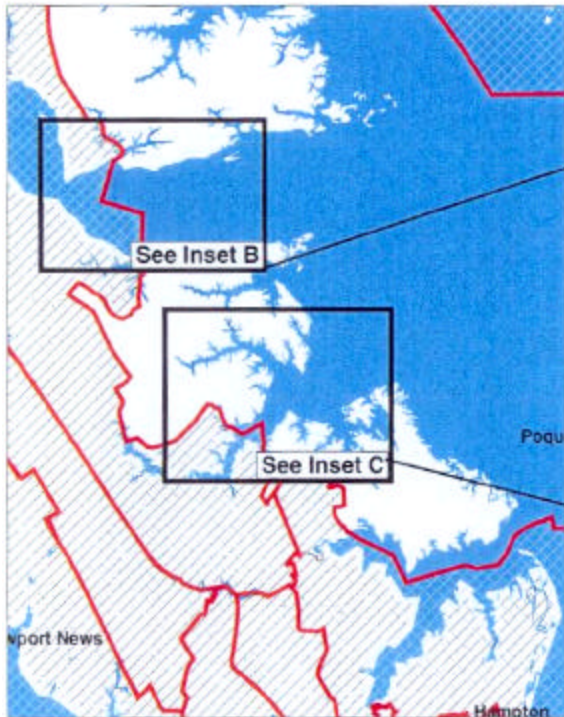


1991 98th House District

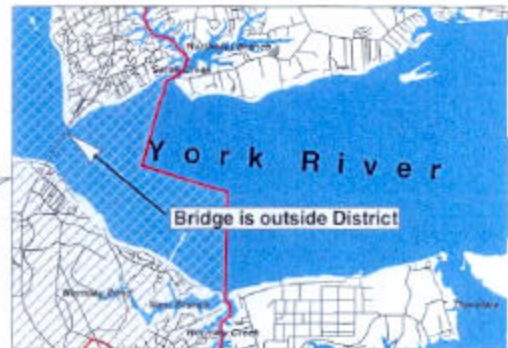
Showing Lack of Road Travel Across a Body of Water



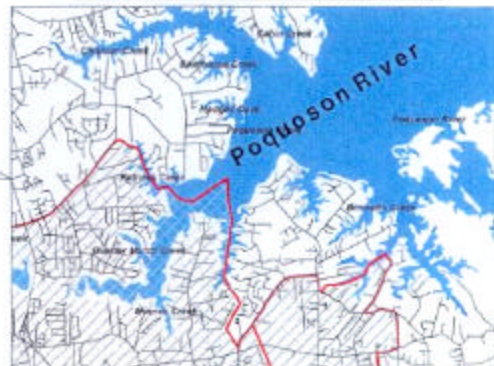
Inset A - Showing lack of road connection over water in two places in District 98



Inset B - Showing lack of bridge connection over York River

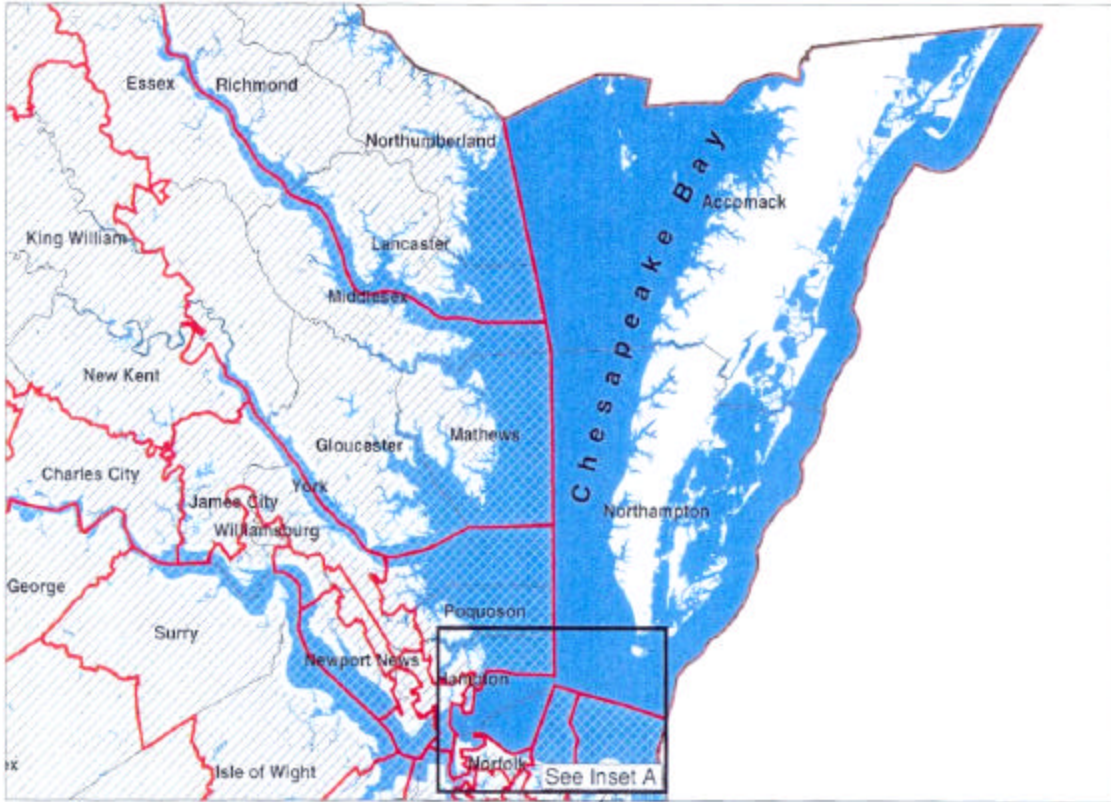


Inset C - Showing lack of bridge connection over Poquoson River

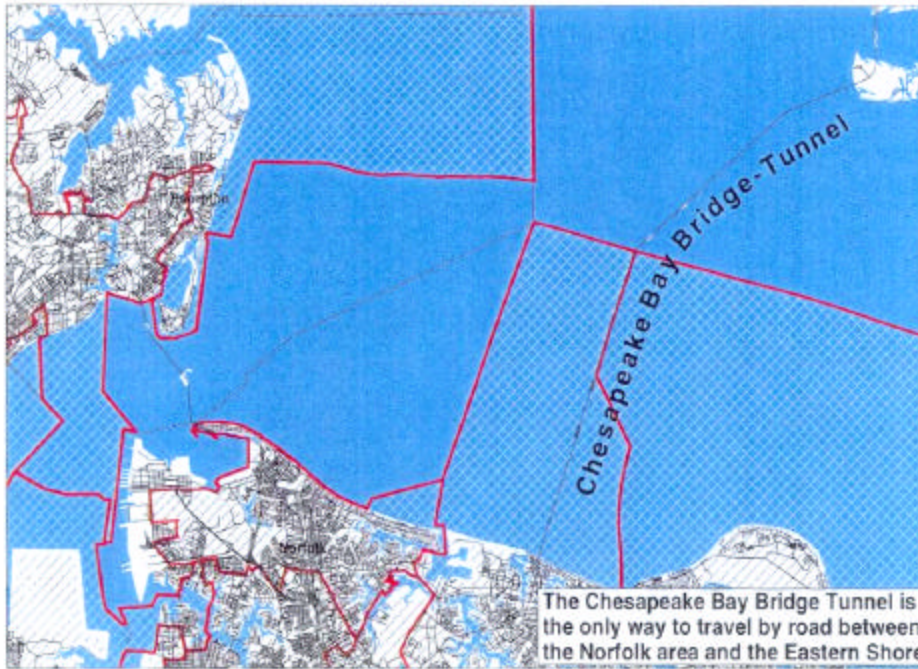


2001 100th House District

Showing Lack of Road Travel Across Chesapeake Bay

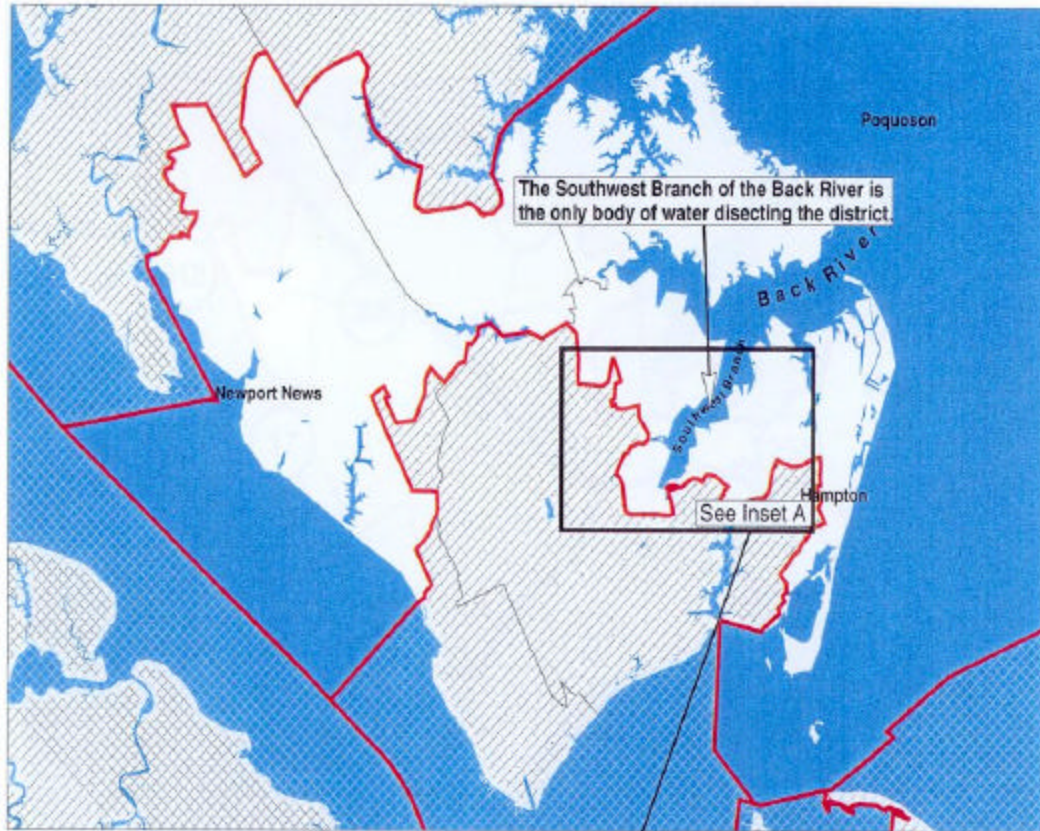


Inset A - Showing lack of bridge connection over Chesapeake Bay

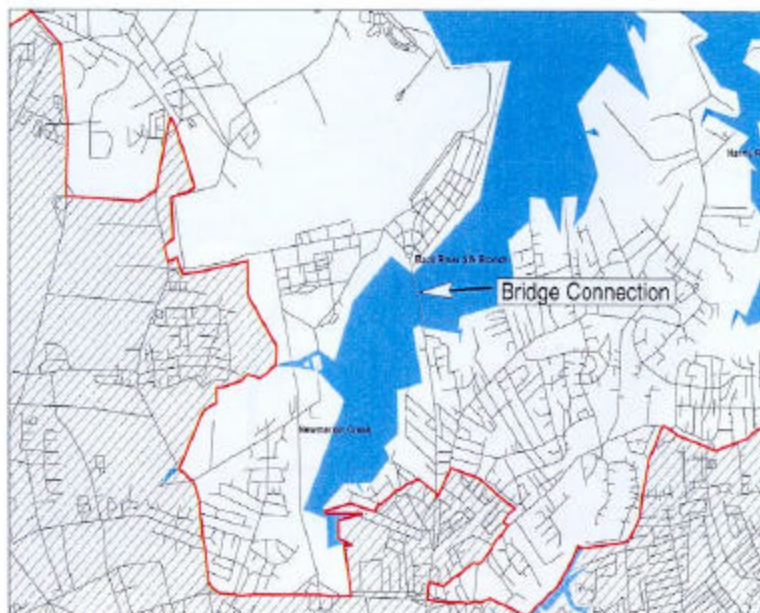


2001 1st Senate District

Showing NO Lack of Road Connection

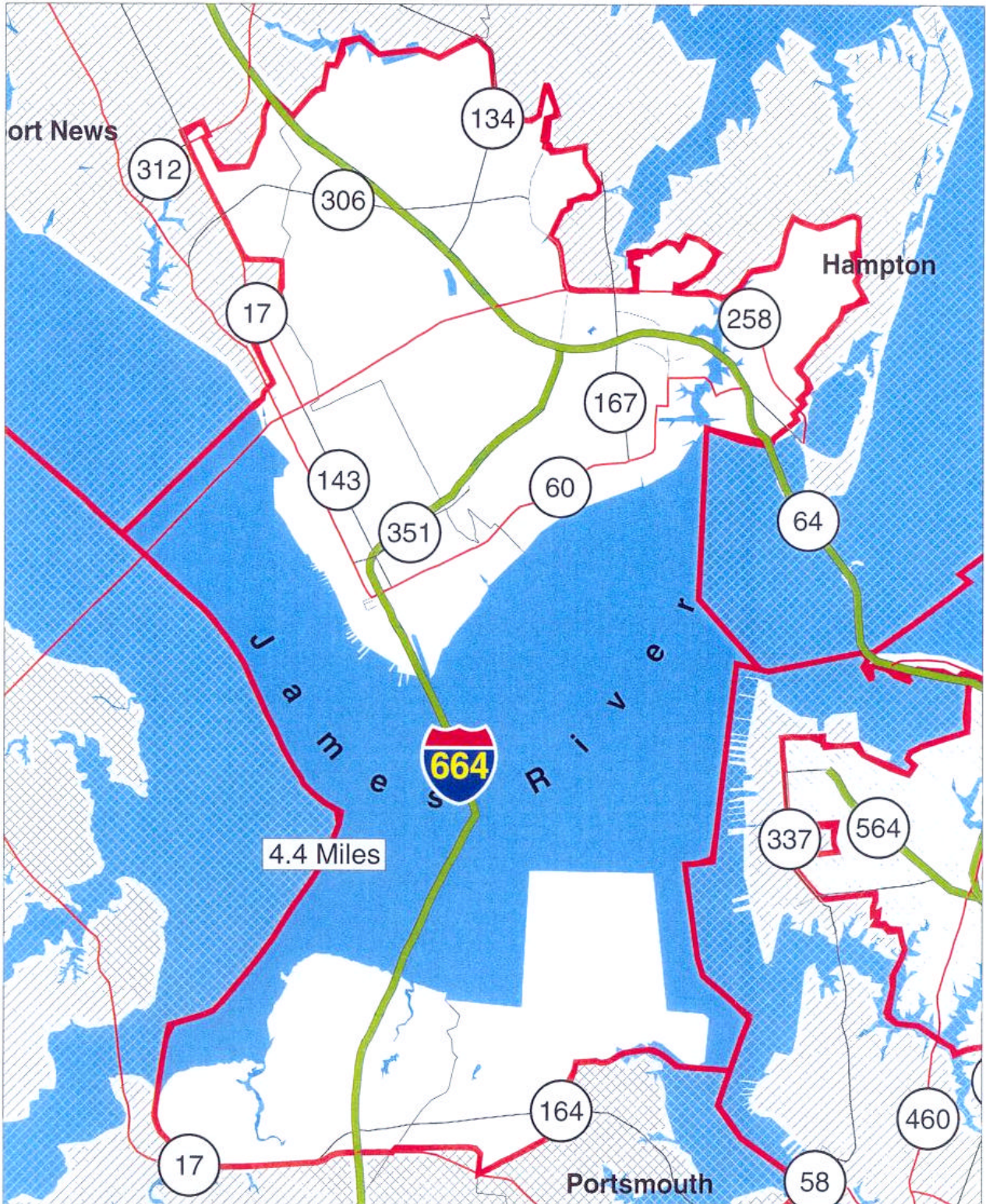


Inset A - Showing Bridge across Southwest Branch of Back River



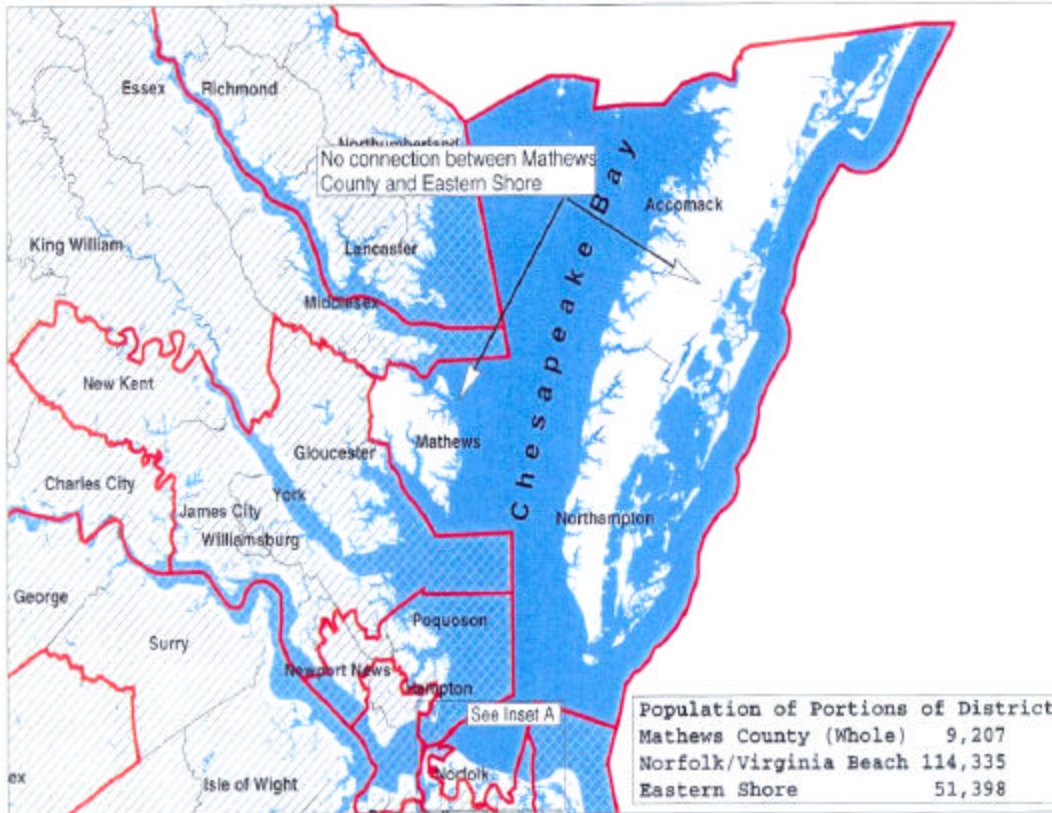
2001 2nd Senate District

Showing Relationship of Portions of the District on Both Sides of the James River

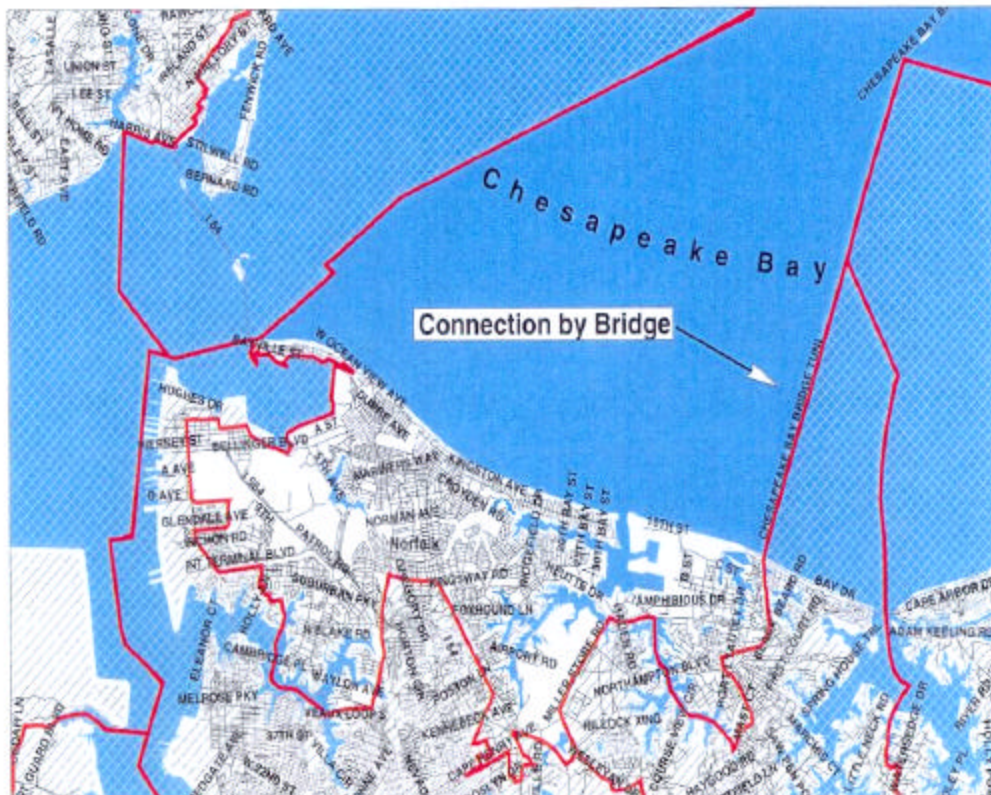


2001 6th Senate District

Showing Lack of Road Travel Across Chesapeake Bay

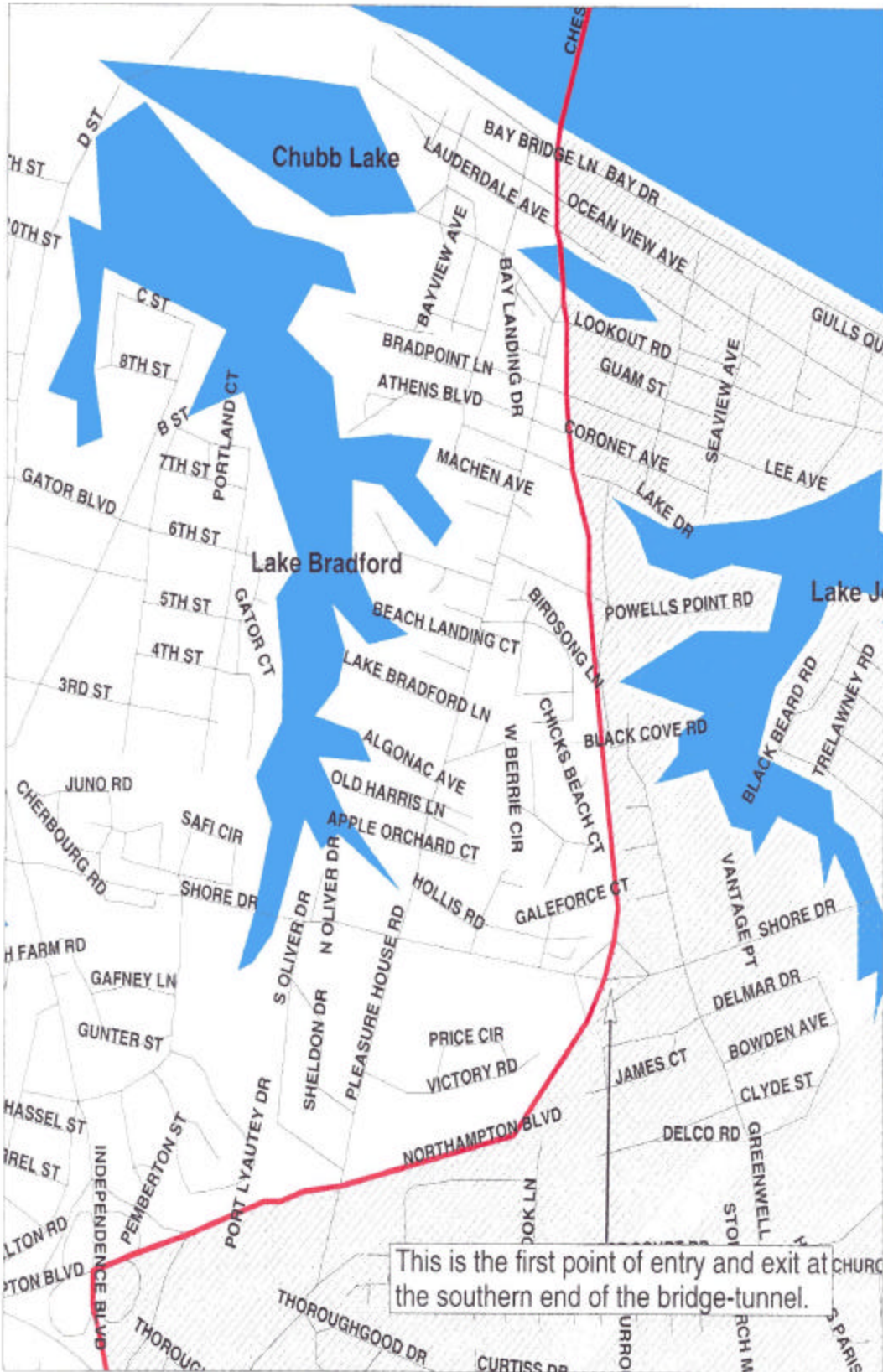


Inset A - Showing Road Connect across Chesapeake Bay Bridge-Tunnel



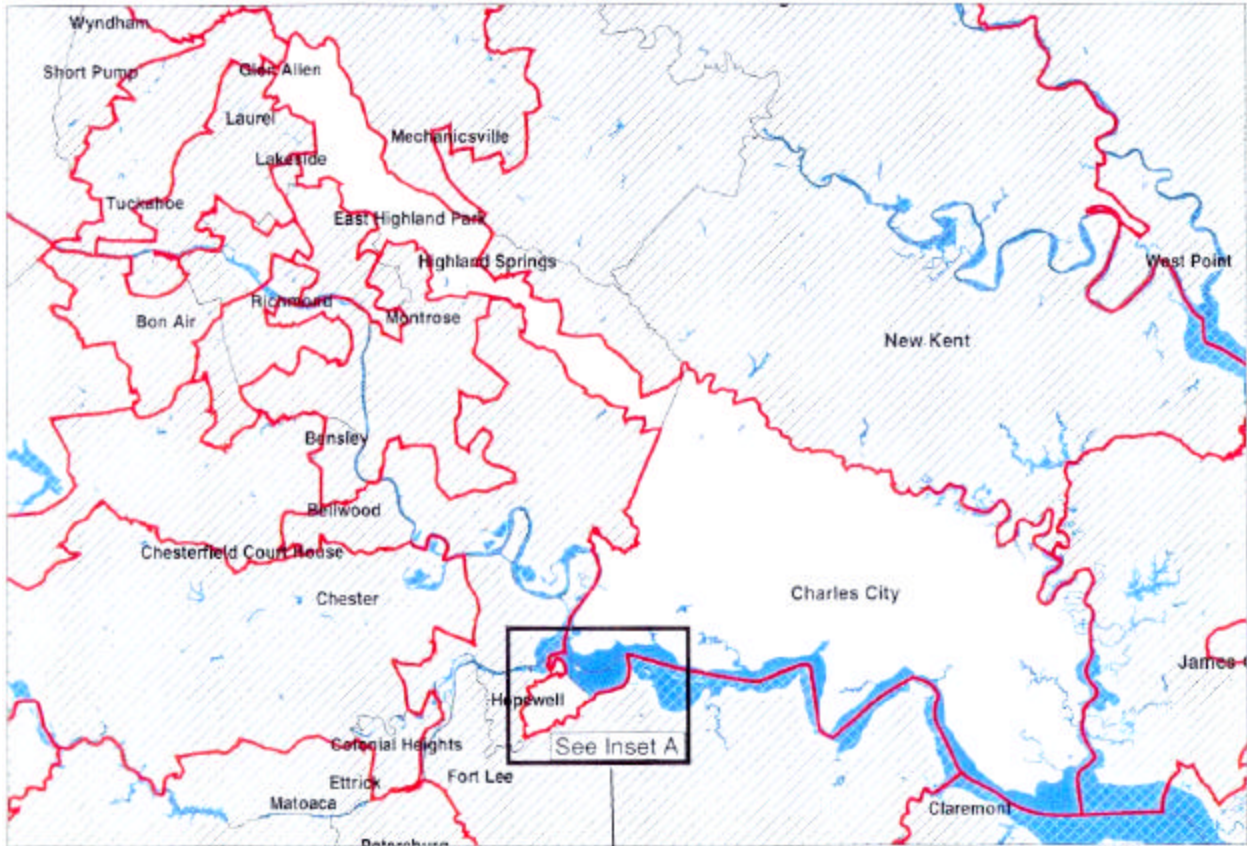
2001 6th Senate District

Showing Southern Terminus of Chesapeake Bay Bridge-Tunnel

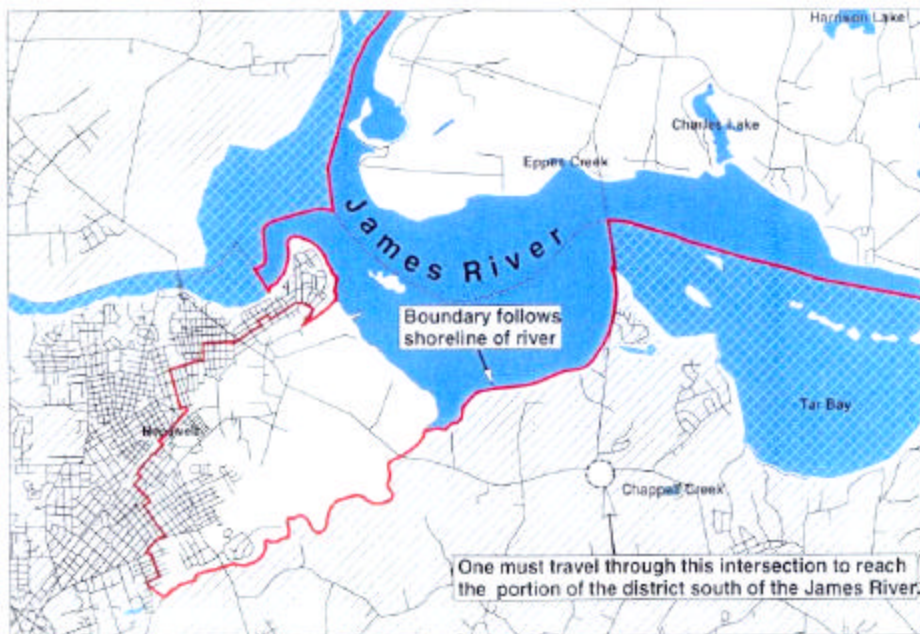


2001 74th House District

Showing Lack of Road Travel Across James River



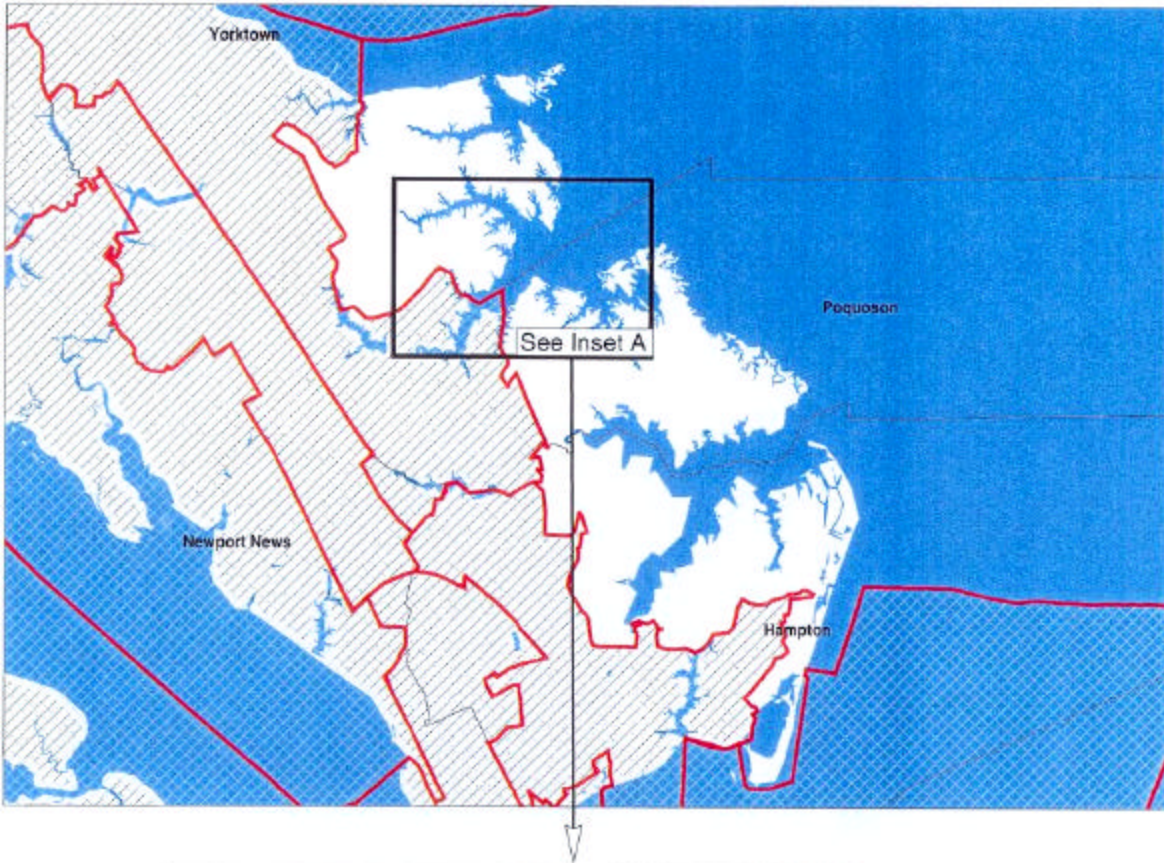
Inset A - Showing Lack of Bridge Connecting Portions of District Across the James River



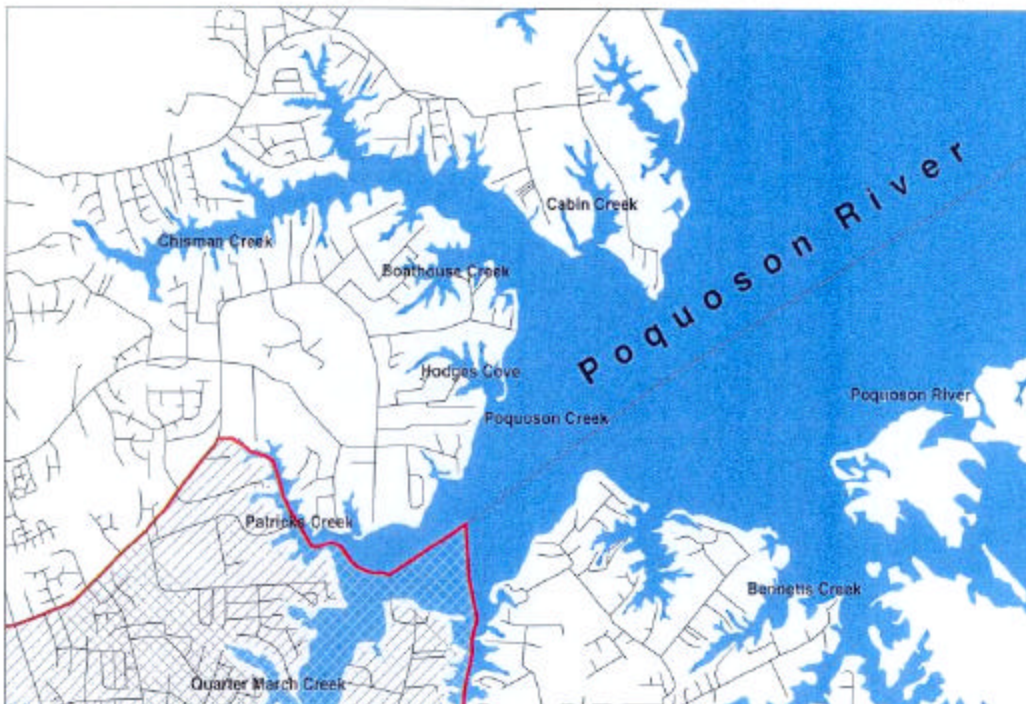
MAP 5

2001 91st House District

Showing Lack of Road Travel Across a Body of Water #



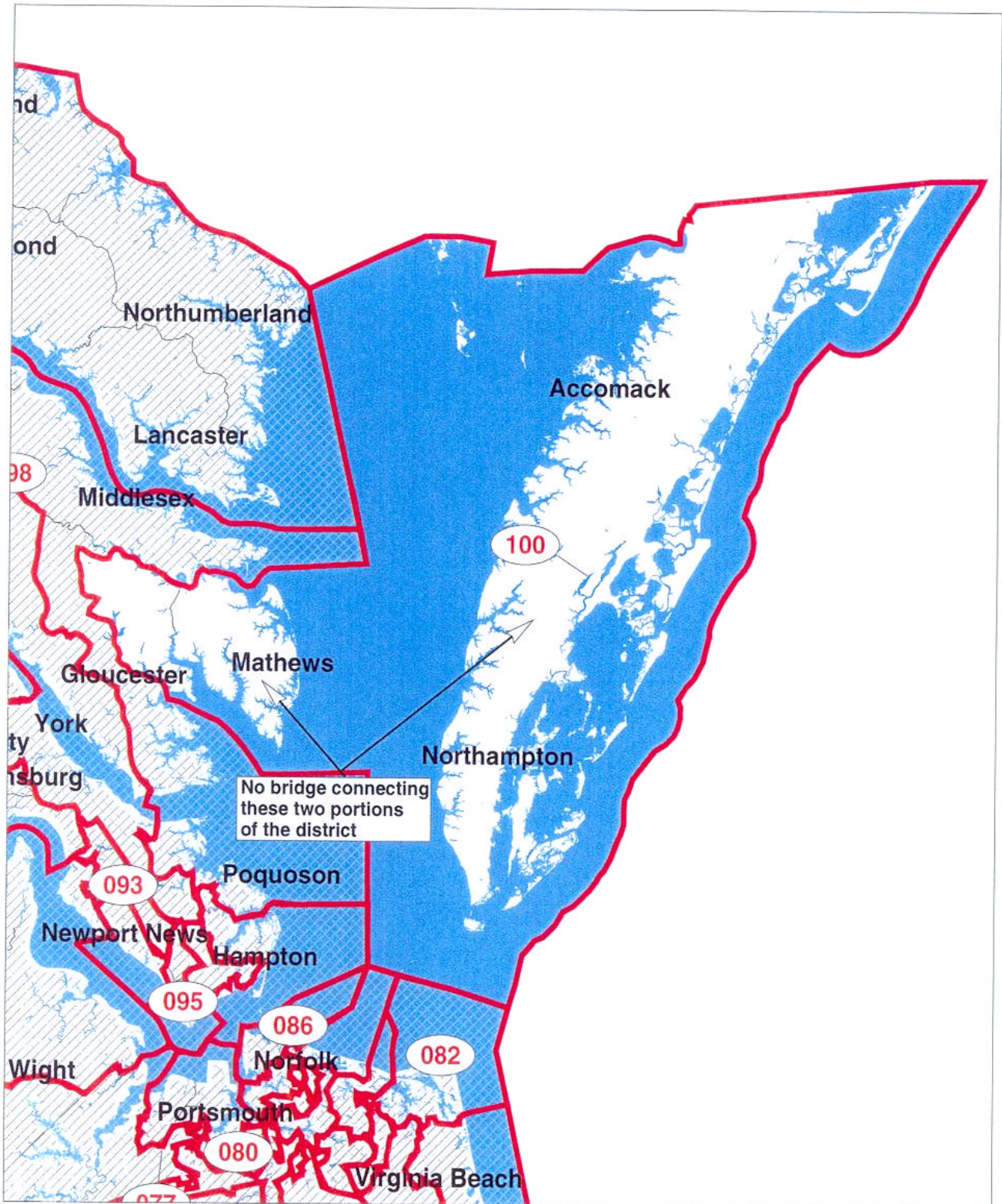
Inset A - Showing lack of bridge connection over Poquoson River



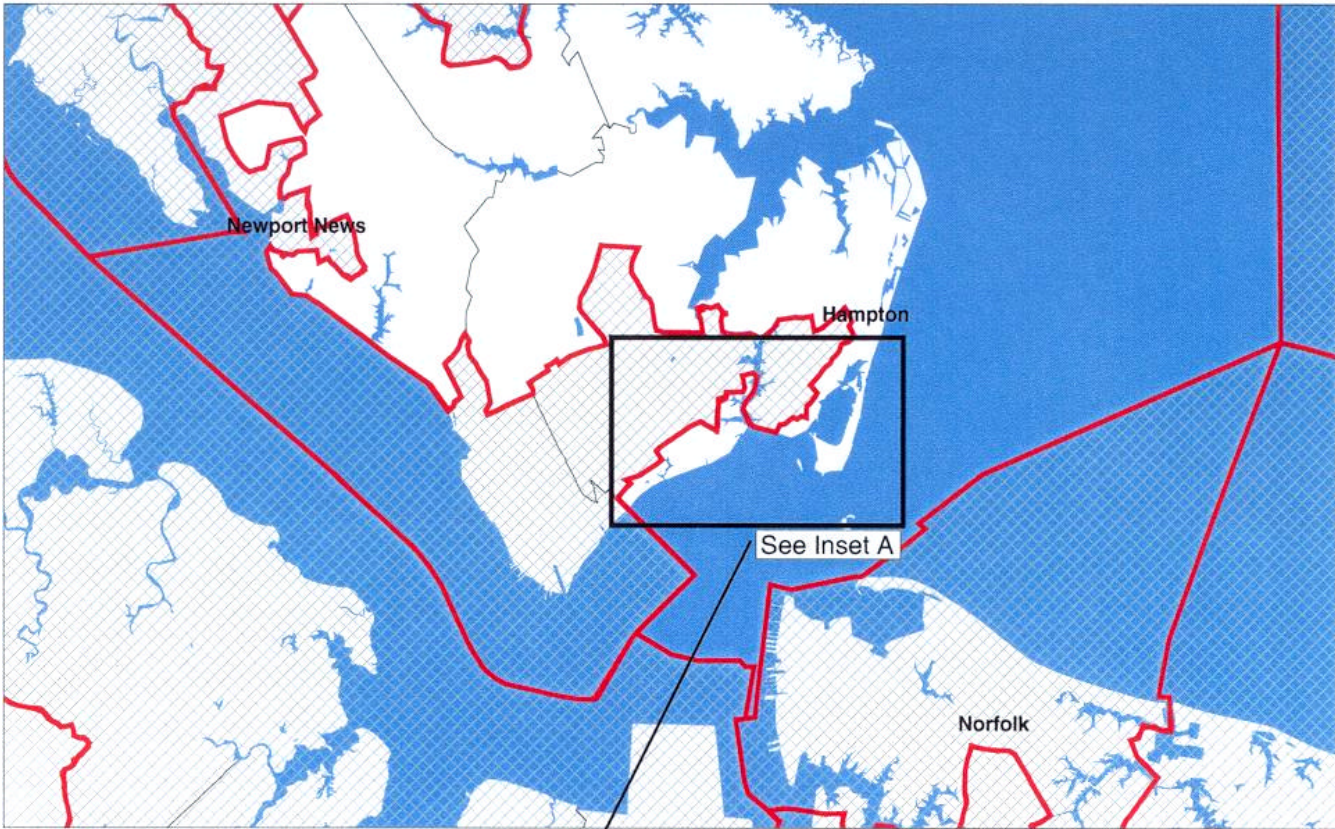
Note - Exactly the same boundary as 1991 District 98

1991 100th House District

Showing Lack of Road Travel across Chesapeake Bay



MAP U
1991 1st Senate District
Showing Lack of Road Travel Across Hampton Roads



Inset A - Showing lack of road travel

